No. 17-

IN THE

Supreme Court of the United States

AMERICAN ECONOMY INSURANCE COMPANY, AMERICAN FIRE AND CASUALTY COMPANY, AMERICAN STATES INSURANCE COMPANY, EMPLOYERS INSURANCE COMPANY OF WAUSAU, EXCELSIOR INSURANCE COMPANY, FIRST LIBERTY INSURANCE CORP., GENERAL INSURANCE COMPANY OF AMERICA, LIBERTY INSURANCE CORPORATION, LIBERTY MUTUAL FIRE INSURANCE CO., LIBERTY MUTUAL INSURANCE COMPANY, LM INSURANCE CORPORATION, NETHERLANDS INSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, OHIO SECURITY INSURANCE COMPANY, PEERLESS INDEMNITY INSURANCE COMPANY, PEERLESS INSURANCE COMPANY, WAUSAU BUSINESS INSURANCE COMPANY, WAUSAU GENERAL INSURANCE COMPANY, WAUSAU UNDERWRITERS INSURANCE COMPANY AND WEST AMERICAN INSURANCE COMPANY,

Petitioners,

v.

THE STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, MARIA T. VULLO, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES AND STATE OF NEW YORK WORKERS' COMPENSATION BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an amendment to state law violates the Contracts Clause of the U.S. Constitution by transferring the substantial cost for certain claims under preexisting insurance policies from employers to their insurance carriers, where those insurance policies reflected an agreement that the carriers would not cover those claims, where the carriers were correspondingly paid premiums that did not account for those claims, and where the legislative basis for the new law was obviously false at the time of enactment;

2. Whether an amendment to state law violates the Due Process Clause of the U.S. Constitution by transferring the substantial cost for certain claims under preexisting state-approved insurance policies from employers to their insurance carriers, where those insurance policies reflected an agreement that the carriers would not cover those claims, where the carriers had correspondingly accepted state-approved premiums that did not account for the cost of such claims in reliance on the terms of those insurance policies and longstanding state law, and where the legislative basis for the new law was obviously false at the time of enactment; and

3. Whether an amendment to state law violates the Takings Clause of the U.S. Constitution by transferring the substantial cost for certain claims under preexisting state-approved insurance policies from employers to their insurance carriers, where those insurance policies reflected an agreement that the carriers would not cover those claims, where the carriers had correspondingly accepted state-approved premiums that did not account for the cost of such claims in reliance on the terms of those insurance policies and

longstanding state law, and where the legislative basis for the new law was obviously false at the time of enactment.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners disclose the following. All petitioners are wholly owned indirect subsidiaries of Liberty Mutual Holding Company, Inc. Liberty Mutual Holding Company, Inc. is a mutual company, and no publicly held company owns 10% or more of its stock.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

American Economy Insurance Co. et al. respectfully petition for a writ of certiorari to review the judgment in this case of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals (App. 1a-28a) is reported at 87 N.E.3d 126. The opinion of the New York Supreme Court, Appellate Division (App. 29a-40a), is reported at 139 A.D.3d 138. The opinion of the New York Supreme Court (App. 41a-52a) is unreported.

JURISDICTION

The New York Court of Appeals entered judgment on October 24, 2017. On December 28, 2017, Justice Ginsburg extended the time for filing a petition for a writ of certiorari until February 21, 2018. *See* No. 17A685. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the United States Constitution (the Contracts Clause, U.S. Const. art. I, §10; the Fifth Amendment, U.S. Const. amend. V; and the Fourteenth Amendment, U.S. Const. amend. XIV) and of the New York Workers' Compensation Law (§§10, 25-a, 50, and 151) are reproduced in the appendix to this brief.

INTRODUCTION

Since 1933 the State of New York has operated a special workers' compensation insurance fund for cases that reopen after being closed for a statutorily defined

period, with the goal of protecting employers and their insurance carriers from bearing the costs of unforeseeable changes in the status of beneficiaries' work-related medical conditions. For decades, Section 25-a of the New York Workers' Compensation Law ("WCL") has required employers to support the fund through annual assessments and assigned the fund exclusive financial liability for reopened cases. Correspondingly, the WCL exempted employers from the duty to obtain insurance to cover claims meeting Section 25-a's prerequisites, and insurance carriers' state-approved workers' compensation policies defined the scope of coverage accordingly: They did not cover Section 25-a cases. Likewise, the state-approved premiums that employers paid carriers for workers' compensation insurance did not account for potential liability in Section 25-a cases, nor did the amount of loss reserves carriers maintained under state insurance law and generally accepted actuarial principles.

In 2013 the New York Legislature amended the WCL, closing the fund to cases reopened in 2014 or later. As a result, carriers became liable for future reopened cases, regardless of whether the cases arose under a future workers' compensation insurance policy or a preexisting one. According to the legislative history, this amendment was intended to save New York businesses hundreds of millions of dollars in assessments per year by eliminating what the Legislature perceived to be a double charge for Section 25-a claims: once in the form of assessments paid to the fund, and once in the form of premiums paid to carriers—who, in the State's view, received a "windfall," since they would not incur liability for Section 25-a cases. But that rationale was obviously wrong. It was clear then and it is undisputed now that carriers' premiums were *not* com-

puted to compensate them, and did not compensate them, for Section 25-a liability.

Instead, the real effect of the amendment is to impose on carriers a new liability for cases they had specifically excluded from their preexisting state-approved policies and that they had not been paid to cover. According to the state-designated entity responsible for computing workers' compensation costs, the amendment's closure of the fund to future reopened cases under preexisting policies will inflict on carriers a staggering "unfunded liability" of over $1 billion.

The New York Court of Appeals rejected petitioners' challenges to the amendment under the Contracts, Due Process, and Takings Clauses of the U.S. Constitution. In so holding, the Court of Appeals diverged from this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), where the Court held that a law imposing similarly substantial liability contrary to preexisting contractual terms and long-established expectations violated the Constitution. The Court of Appeals' decision also conflicts with those of the Fifth Circuit and several state high courts, which concluded that similar amendments to state insurance law unconstitutionally saddled carriers with unanticipated liability under policies written long before the challenged legislative act.

Resolving this split would serve important doctrinal and practical purposes, as the Court of Appeals' errors are emblematic of broader confusion regarding the constitutionality of legislative imposition of new liability under preexisting contracts. Although *Eastern Enterprises* resulted in the invalidation of the new law's backward-looking effect, the Court's fractured opinions in that case reinforced rather than resolved that confusion. Indeed, some lower courts—including the Court

of Appeals in this case—have combined dissenting opinions in *Eastern Enterprises* to reach the opposite result reached in that case.

The lack of clear guidance from this Court is especially problematic given the potential financial magnitude of laws imposing new monetary obligations based on preexisting contractual relationships. The amendment imposes extraordinary unanticipated costs on New York carriers, and similar laws could threaten economic upheaval not just in the context of workers' compensation insurance, or insurance generally, but in all commercial areas.

The Court should use this case to correct the Court of Appeals' error and to issue much-needed guidance for future cases.

STATEMENT

A. Workers' Compensation Insurance in New York

New York's Workers' Compensation Law generally requires employers to "secure compensation to [their] employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment." WCL §10(1). The WCL also specifies the ways in which an employer may "secure [such] compensation," including by obtaining insurance from a workers' compensation insurance company. WCL §50.

The issuance of a workers' compensation insurance policy creates an "obvious contractual relationship between [the carrier] and [its] insureds," i.e., employers required to provide benefits to injured employees under the WCL. App. 15a; *see* App. 93a (worker's compensation insurance policy describing itself as "a contract of insurance between … the employer … and …

the insurer"). "In return for the [employer's] payment of the premium," the carrier "agree[s]" to pay benefits to the employer's injured employees. App. 93a-94a; *see* R.53, 55, 253. Specifically, New York workers' compensation policies state that the carrier "will pay promptly when due the benefits required of you [i.e., the employer] by the workers compensation law," and define that term to include "any amendments to that law which are in effect during the policy period." App. 93a-94a.[1]

Premiums for workers' compensation insurance are based on statewide aggregate loss costs, i.e., the medical expenses and lost wages that carriers actually paid under existing policies. App. 7a; R.251, 254-255, 517. The loss-cost level used to set the premium rate for an upcoming policy period is determined "by comparing actuarially projected losses for [that] period to the current loss cost level," R.518-519, with losses for the upcoming period being projected in light of relevant anticipated changes to the WCL, R.254.

The State, through the Department of Financial Services ("DFS"), regulates the workers' compensation insurance business, including through approval of policy terms and rates. App. 7a; R.55, 251-257, 517. Carriers may charge employers only DFS-approved premium rates. R.254, 519.

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[1] It is undisputed that the document in the record entitled "Workers Compensation and Employers Liability Insurance Policy Quick Reference," App. 93a, reflects the operative terms of petitioners' workers' compensation insurance policies. *See* App. 16a; R.254 (testimony that the Quick Reference is a "true and correct copy of Plaintiffs' standard policy" and that it "conforms to the approved New York Policy").

The state Workers' Compensation Board ("WCB") oversees the workers' compensation scheme. Claims may be initiated by the employee, the employee's doctor, or the employer. If the carrier believes it is not responsible for the claim—for example, the carrier may disbelieve that the worker was injured, or that the injury was work-related—the carrier may dispute the claim, in which case the WCB will hold a hearing and resolve the dispute. WCL §25(2), (3).

B. The Pre-Amendment Regime For Reopened Workers' Compensation Cases In New York

1. Whereas some types of insurance provide claims-made coverage, which obligates the carrier to pay only claims made during the policy period, workers' compensation insurance is "occurrence-based, meaning that each policy provides coverage for any claims arising from an accident occurring during that policy year, regardless of when the claim is made." App. 6a-7a; *see also St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 534 n.3 (1978) (explaining difference between claims-based and occurrence-based insurance policies). This occurrence-based structure requires carriers to "pay for medical treatment, procedures, devices, tests and services … for such period as the nature of the injury or the process of recovery may require," even if the loss arises years after the original injury. *Kigin* v. *State of N.Y. Workers' Compensation Bd.*, 970 N.Y.S.2d 111, 116 (App. Div. 2013) (quotation marks omitted), *aff'd*, 24 N.E.3d 1064 (N.Y. 2014); *see also* Weiss & Balter, *N.Y. Workers' Compensation Handbook* § 1.08(1) (Matthew Bender 2016); R.67.

Occurrence-based coverage creates particular risks for both employees and carriers. The employee may find that by the time the loss arises, the carrier has be-

come insolvent. Or the carrier may find that the extent of its covered liabilities is greater than anticipated when the premium was calculated. *See* App. 6a-7a. For example, if a worker is injured in 2007, the premium collected from her employer for its 2007 workers' compensation insurance policy will need to support payment for resulting medical expenses arising not only in 2007 but also in, say, 2010 or 2016. R.253. Because premiums are charged and paid only during the policy period (typically one year), carriers must bear unanticipated liability out of pocket; they have no ability to charge a supplemental premium or otherwise recoup their unanticipated costs. *See* App. 8a. The combination of occurrence-based coverage and the fact that premiums can be collected only during the policy period creates a "long tail of liability" for carriers. R.67; *see* R.351.

2. To mitigate these risks, in 1933 the New York legislature created a special insurance fund for cases that reopened after having grown "stale," i.e., closed for an extended period ("Fund"). *See* App. 2a. Specifically, under Section 25-a of the WCL, the Fund was liable if the reopening occurred at least seven years from "the date of the injury" and at least three years from "the date of the last payment of compensation." WCL §25-a(1); *see* App. 2a-3a.[2]

The Fund's responsibility for any liability in reopened cases meeting Section 25-a's timing require-

[2] A workers' compensation case is closed if "no further proceedings [a]re foreseen," and it reopens when there is "an unanticipated change in the claimant's medical condition," such as "a recurrence of malady, a progress in disease not anticipated, or a pathological development not previously prognosticated." App. 2a-3a (quotation marks omitted).

ments was exclusive and "mandatory, not discretionary." App. 4a. The law stated that "if [an] award [was] made" where Section 25-a's prerequisites were present, "it shall be against the special fund." WCL §25-a(1). "Liability for payment of a compensation award under section 25-a shift[ed] from the insurance carrier to the Special Fund simply by virtue of the passage of the requisite period of time. … Once Section 25-a(1) ha[d] been triggered, the insurance carrier ha[d] no further interest in payment of the claim." *De Mayo* v. *Rensselaer Polytech Inst.*, 547 N.E.2d 1157, 1159 (N.Y. 1989).

Administratively, the WCB would determine whether Section 25-a's prerequisites were met, often at the request of the carrier to which the claim had been submitted. *See* App. 3a-4a; *see Goutremout* v. *Advance Auto Parts*, 20 N.Y.S.3d 724, 724 (App. Div. 2015); *Bates* v. *Finger Lakes Truck Rental*, 839 N.Y.S.2d 234, 236 (App. Div. 2007). But the WCB could "not as a matter of law impose liability on the employer or its insurance carrier" in a case meeting Section 25-a's prerequisites. *Berlinski* v. *Congregation Emanuel of N.Y.*, 289 N.Y.S.2d 503, 506 (App. Div. 1968). Once the objective time criteria were met, assignment to the Fund was mandatory: As the Court of Appeals put it long ago, "[t]he sole criterion" of "the *potential* liability of the fund" was "the passage of time." *Casey* v. *Hinkle Iron Works*, 87 N.E.2d 419, 421 (N.Y. 1949) (emphasis added).

3. The Fund's responsibility for Section 25-a claims was also exclusive as a matter of contract. The state-approved policies stated that the carrier would "pay … the benefits required of [the employer] by the workers compensation law," App. 94a, and—consistent with the fact that the Fund's responsibility was exclusive as a matter of statute—the WCL explicitly "ex-

cept[ed]" Section 25-a cases from employers' obligation to pay benefits to injured workers, WCL §10(1). Therefore, Section 25-a cases were defined out of the scope of coverage provided by state-approved workers' compensation insurance policies.

Accordingly, the premiums charged by carriers and paid by employers "did not include the costs of liability on qualifying reopened cases, as those costs would have been borne by the Fund." App. 18a. Because carriers did not actually pay claims in Section 25-a cases, the entity designated by the State to determine loss-cost levels and corresponding premium rates—the New York Compensation Insurance Rating Board ("NYCIRB")—"did not include in its loss cost calculations any costs carriers would incur on claims that would qualify for assignment to the Fund." App. 7a; *see* R.220. And DFS approved premiums based on those loss cost calculations. App. 7a. Consequently, premiums were not, and could not have been, calibrated to cover claims made in such cases.

Similarly, carriers' loss reserves did not account for Section 25-a claims. Consistent with generally accepted actuarial principles, New York requires carriers to set aside money in an amount "estimated" to provide for all losses or claims that are unpaid and for which the carrier "may be liable." N.Y. Ins. Law §1303; *see* R.255, 518-519. Carriers did not maintain loss reserves to cover loss on Section 25-a claims because, under their policies, they would not be liable for such loss. R.209-212.

4. The Fund was financed through annual assessments on employers. These assessments were set at levels calculated to cover the Fund's expected claim liability and administrative costs in the upcoming year.

WCL §25-a(3); WCL §151(2); 12 N.Y. C. R. & Regs. §318.2(a). Although the WCL directed that the assessments be paid by carriers, it also *required* carriers to pass the assessments on to employers as a surcharge itemized separately from the premiums for workers' compensation insurance. WCL §25-a(3) ("Carriers shall assess such costs on their policyholders"); WCL §151(2)(c) ("All insurance carriers … shall collect such assessments from their policyholders through a surcharge …."); 12 N.Y. C. R. & Regs. §318.2(a). Thus, as a matter of New York law, "[t]he cost of the Fund was … ultimately borne by New York employers, not insurance carriers." App. 2a.

C. The Closure Of The Reopened Case Fund

1. In 2012, the Governor proposed legislation to "close the Reopened Case Fund … to any new claims." App. 87a-88a. On March 29, 2013, the Legislature enacted the legislation as proposed ("Amendment"). *See* WCL §25-a(1-a) (codifying S. 2607-D, L. 2013, ch. 57, part GG); App. 85a-86a. The Amendment inserted into Section 25-a this sentence: "No application by … an insurance carrier for transfer of liability of a claim to the fund for reopened cases shall be accepted by the board on or after the first day of January, two thousand fourteen …." WCL §25-a(1-a). According to the State, the Amendment closed the Fund to all cases that are reopened after 2013, regardless of whether the case arises under a future workers' compensation insurance policy or a preexisting one. App. 8a-9a; C.A. Appellants Br. 19.

By closing the Fund to new cases, the Amendment placed liability for cases meeting Section 25-a's prerequisites on insurance carriers. App. 7a-8a. To account for carriers' new liability for Section 25-a claims, the

State (via DFS) approved a premium rate increase of 4.5%. R.255-256, 353-356, 463, 520-523. That rate increase, however, applies only to workers' compensation policies issued on or after October 1, 2013. *Id.*

For older policies, carriers had no ability to collect supplemental premiums to support their new liability for Section 25-a claims. The Amendment, therefore, imposed on New York carriers what NYCIRB termed an "unfunded liability" of $1.1-1.6 billion. NYCIRB, Analysis of Proposed Bills to Reform the Workers Compensation System 2 (Mar. 14, 2013), *quoted in* App. 8a. As NYCIRB explained (*id.*):

> The unfunded liability results from claims on current and past policies which were closed, may be reopened in the future, and would have been subject to the provisions of Section 25-A. For example, a policy from 2007 could have had a claim that is now closed, and the last payment on which was in 2012. If this claim reopens in, for example, 2016, it could have been deferred to the Reopened Case Fund, but since the bill provides for the Fund's closure, this claim would remain the responsibility of the carrier. However, the premium charged for this policy did not incorporate that possibility, and assumed such costs would be borne by the Fund. Therefore, there is an unfunded liability which will have to be paid by the carriers (i.e. a retrospective cost impact).

To cover this unfunded liability, carriers writing New York workers' compensation policies need to increase their loss reserves. R.211-212. In light of petitioners' market share, they have already booked a $62 million increase in their loss reserves attributable to

the elimination of the Fund for cases reopened under preexisting policies. R.213-216, 220-221, 512.

2. The Governor's memorandum supporting the proposed Amendment explained the rationale behind it:

> Closing the Fund would save New York businesses hundreds of millions of dollars in assessments per year. … The original intent of the Fund was to provide carriers relief in a small number of cases where liability unexpectedly arises after a case has been closed for many years. However, carriers do not need this relief because the premiums they have charged already cover this liability. This reform prevents a windfall for such carriers.

Mem. in Support of 2013-14 New York State Executive Budget, Public Protection and General Government Article VII Legislation 29 (the "Governor's memorandum"), *quoted in* App. 6a.

The Governor's reasoning—the only legislative history for the Amendment—was demonstrably false. As detailed above, the premiums charged by carriers before the Amendment did not account for any liability for Section 25-a claims. Indeed, the Court of Appeals observed that premiums collected "for pre-2013 policy years … did not include the costs of liability" for claims that "would have been borne by the Fund" and therefore the premiums "in those previous policy years are ... now insufficient to cover the costs of [carriers' post-Amendment] liability." App. 18a. That followed from the fact that, before the Amendment, New York law assigned liability exclusively to the Fund where Section 25-a's prerequisites were present and workers' compensation insurance policies explicitly defined the scope of coverage not to include Section 25-a claims. And that

is confirmed by DFS's post-Amendment approval of a premium rate increase specifically to cover carriers' new liability for Section 25-a claims (solely under new policies).

D. Proceedings Below

Petitioners, insurance carriers authorized to provide workers' compensation insurance to New York employers, filed suit in New York court to declare the Amendment unconstitutional as applied to claims arising under policies issued before 2014, and to permanently enjoin the State from enforcing the Amendment with respect to such claims. Petitioners argued that the Amendment violated the Contracts, Due Process, and Takings Clauses of the U.S. Constitution.

After the trial court granted the State's motion to dismiss and denied petitioners' cross-motion for summary judgment, the Appellate Division unanimously reversed, holding the Amendment unconstitutional as applied to policies issued before October 1, 2013 (when the DFS-approved rate increase took effect), and granting summary judgment to petitioners. App. 39a-40a.

Drawing on this Court's precedents, the Appellate Division first determined that, by "impos[ing]" an "unfunded liability" that carriers "cannot make up," the Amendment "'attaches new legal consequences to [a relationship] completed before its enactment.'" App. 34a (quoting *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 532 (1998) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994))). That retroactive effect, the court then held, violated the Contracts Clause: it reflected a significant impairment of preexisting contracts, yet was not "reasonable and necessary to serve a significant and

legitimate public purpose" because "the legislation's stated purpose of preventing a windfall to insurance carriers was based upon the erroneous premise that premiums already cover this new liability." App. 38a. The court also held that the Amendment "constitute[d] a regulatory taking in violation of the Takings Clause" because it imposed "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* The court did not address the Due Process Clause.

The New York Court of Appeals reversed and dismissed the case. First, the court rejected the Contracts Clause claim on the ground that the Amendment "does not impair" the "contractual relationship" between carriers and their employer-insureds. App. 15a. The court declared that "there is no provision of plaintiffs' contracts with their insureds relieving them of the obligation to pay an injured worker's benefits in the event that the Fund did not accept a reopened case." App. 18a. In the court's view, the Amendment merely eliminated a way for carriers to off-load onto the Fund "the costs of … liability" they otherwise bore, remarking that the policies as written "require[d] plaintiffs to pay all necessary benefits on reopened cases." App. 17a-18a. Moreover, although the court acknowledged that the policies explicitly defined the scope of coverage by reference to the WCL "in effect during the policy period," it nonetheless concluded that those contracts unqualifiedly "assume[d] the risk of legislative change," including a post-policy-period amendment. *Id.*

Next, the court denied the Takings Clause claim because, it said, petitioners had not "identif[ied] any vested property interest impaired by the legislative amendment." App. 23a. The court reasoned: "As a

general matter, the government does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights." *Id.* (quotation marks omitted). In reaching that conclusion, the court explained that it was departing from the *Eastern Enterprise* plurality's takings analysis, and instead siding with Justice Kennedy's partial dissent and Justice Breyer's dissent for four Justices. App. 22a n.5.

Finally, the court held that the Amendment did not violate the Due Process Clause. The court found that the Amendment's application to claims arising under preexisting policies was "justified by a rational legislative purpose," namely, as the Governor's memorandum had said, "sav[ing] New York businesses hundreds of millions of dollars in assessments per year." App. 26a. But the court did not rely on the Governor's explanation of those savings—eliminating the supposed double charge on employers to cover claims paid by the Fund—because the court recognized that there was no such double charge to eliminate. Rather, the court accepted two other explanations of those same savings that were invented by the State for purposes of litigation: the complete elimination of the assessments charged to employers, and the gains in administrative efficiency by having carriers administer Section 25-a claims. App. 26a-27a.

REASONS FOR GRANTING THE WRIT

Concern about laws that impose new obligations or liabilities based on past actions "finds expression in several provisions of our Constitution." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994). Among those provisions are the Contracts, Due Process, and Takings Clauses.

The New York Court of Appeals' decision that the Amendment violated none of those provisions splits sharply with *U.S. Fidelity & Guaranty Co.* v. *McKeithen*, where the Fifth Circuit held that a similar law changing the formula for carriers' payments to a workers' compensation fund under preexisting contracts effected a taking. 226 F.3d 412, 420 (5th Cir. 2000). It also departs from other state high courts that have held unconstitutional similar laws modifying preexisting insurance contracts. *See Harleysville Mut. Ins. Co.* v. *State*, 736 S.E.2d 651, 658-659 (S.C. 2012) (Contracts Clause); *Society Ins.* v. *Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 402-405 (Wis. 2010) (Contracts and Due Process Clauses). On the other hand, the decision below accords with some lower-court decisions upholding similar amendments. *See, e.g.*, *Allstate Ins. Co.* v. *Kim*, 829 A.2d 611, 622-625 (Md. 2003) (no violation of Contracts or Takings Clause); *K-Mart Corp.* v. *State Indus. Ins. Sys.*, 693 P.2d 562, 569 (Nev. 1985) (no violation of Contracts or Due Process Clause).

These divergent results reflect the lack of conclusive guidance from this Court regarding the constitutionality of laws expanding liability under preexisting contractual arrangements. Such confusion among lower courts persists despite this Court's decision in *Eastern Enterprises*, 524 U.S. 498. Although the Court there struck down the Coal Industry Retiree Health Benefit Act's requirement that a former coal-mine operator make future premium payments to a health benefits fund on behalf of former employees, "[t]he splintered nature of the Court makes it difficult to distill a guiding principle." *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 658 (3d Cir. 1999); *see Eastern Enters.*, 524 U.S. at 537 (plurality op.) (law effected taking without just compensation); *id* at 550 (Kennedy, J., concur-

ring in the judgment and dissenting in part) (law did not effect taking but did deprive employers of property without due process); *id.* at 554 (Breyer, J., dissenting) (law neither effected taking nor violated due process). Further, although the Contracts Clause is implicated by laws of this nature, *see, e.g.*, *General Motors Corp.* v. *Romein*, 503 U.S. 181 (1992) (considering challenges under both Contracts and Due Process Clauses), the Court in *Eastern Enterprises* did not have occasion to address that clause directly because the law at issue was federal.

The New York Court of Appeals is not alone in using the combination of two dissenting opinions in *Eastern Enterprises* to uphold a law—while losing sight of both the overarching constitutional concern about the imposition of new liability under preexisting contractual relationships, and the essential point that, consistent with that overarching concern, the Court in *Eastern Enterprises* held the law at issue unconstitutional. If this Court does not clarify the application of these constitutional provisions in this context, the abiding concern they express will continue to be flouted—and lower courts may even continue to use *Eastern Enterprises* to do so.

Given the staggering size of the liability here and in other potential situations where a State may impose a new liability under a past contract—and given the disruption that unforeseeable backwards-looking liability could cause in the insurance industry and other industries—this Court should step in to correct the decision below and provide guidance for similar cases arising in the future.

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE AMENDMENT WAS CONSTITUTIONALLY PERMISSIBLE

A. The Amendment Violates The Contracts Clause

The Amendment's imposition on carriers of liability for Section 25-a claims made under preexisting workers' compensation policies violates the Contracts Clause. In applying the Clause, "[t]he threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Reserves Grp., Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (quotation marks omitted). If so, "the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem" or "eliminat[ing] … unforeseen windfall profits." *Id.* at 411-412 (citation omitted). The final "inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Id.* at 412 (quotation marks omitted). This standard reflects a heightened level of judicial scrutiny, *see Pension Ben. Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) ("we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses"), but the precise "level of scrutiny to which the legislation will be subjected" varies with the "severity of the impairment," *Energy Reserves*, 459 U.S. at 411.

1. Contrary to the Court of Appeals' determination, the Amendment impairs the preexisting contractual relationships between carriers and employers. By the terms of the policies, carriers did not assume liabil-

ity for Section 25-a claims—in fact, they expressly defined such claims to be outside the scope of coverage. App. 93a-94a; WCL §10(1). And the consideration employers paid their carriers for coverage—the premiums—correspondingly reflected the fact that "the costs of liability" for Section 25-a claims would not have been borne by the carrier. App. 18a.

By saddling carriers with liability for Section 25-a claims anyway, the Amendment destroys a basic element of the preexisting bargain and erases the phrase "in effect during the policy period" from the preexisting policies. *See, e.g.*, *Railroad Ret. Bd.* v. *Alton R.R. Co.*, 295 U.S. 330, 349 (1935) (statute requiring employers to pay future pension for past service "never contemplated by either party when the earlier relation existed" "[p]lainly … alters contractual rights"); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 240, 245-246 (1978) ("The Act substantially altered [preexisting contractual] relationships by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake.").

The court below disregarded these essential features of the policies and the WCL.[3] The court insisted

[3] Although the interpretation of the insurance policies and of the New York WCL may be matters of state law, for purposes of a Contracts Clause analysis this Court does not defer to the New York Court of Appeals' conclusions but rather must analyze these questions "independently of the conclusion of that court." *Appleby* v. *City of New York*, 271 U.S. 364, 379-380 (1926). "[I]n order that the constitutional mandate [of the Contracts Clause] may not become a dead letter, [the Court is] bound to decide for [itself] whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation." *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938); *accord General Motors*, 503 U.S. at 187.

that "there is no provision of plaintiffs' contracts with their insureds relieving them of the obligation to pay an injured worker's benefits in the event that the Fund did not accept a reopened case." App. 18a. But there was: Again, carriers' liability was only what they agreed to assume in their policies, and the policies were clear that carriers did not agree to assume liability for Section 25-a claims. Nothing in the policies conditioned that limitation on whether the Fund actually fulfilled its obligations under Section 25-a. Moreover, carriers could not have voluntarily or involuntarily acquired liability for Section 25-a cases before the Amendment because, as a matter of law, "potential liability" for Section 25-a claims vested exclusively in the Fund merely upon "the passage of time." *Casey* v. *Hinkle Iron Works*, 87 N.E.2d 419, 421 (N.Y. 1949); *accord De Mayo* v. *Rensselaer Polytech Inst.*, 547 N.E.2d 1157, 1159 (N.Y. 1989) ("Liability for payment of a compensation award under section 25-a shift[ed] from the insurance carrier to the Special Fund simply by virtue of the passage of the requisite period of time."); *Berlinski* v. *Congregation Emanuel of N.Y.*, 289 N.Y.S.2d 503, 506 (App. Div. 1968) (WCB could "not as a matter of law impose liability on the employer or its insurance carrier" for cases meeting Section 25-a's prerequisites).

The court below asserted that petitioners' contention that the policies did not obligate carriers to cover Section 25-a cases before the Amendment is "inconsistent" with petitioners' contention that the Amendment imposed liability on them for such claims under preexisting policies. App. 17a. That point plainly misunderstands petitioners' argument and the import of the Contracts Clause: the new law alters preexisting contracts by imposing a liability based on preexisting contractual relationships that was outside—indeed,

contrary to—the agreed-upon terms of those relationships.

2. This contractual impairment is substantial. The scope of coverage is a basic term of an insurance policy: it defines the principal obligations of both carrier (what claims are paid on the insured's behalf) and insured (the amount of premium paid to the carrier), as well as the carrier's financial planning through loss reserves. The Amendment does not tweak the outer edge of the policy's coverage scope; it blows a hole in it, inserting a large new class of claims and nullifying language explicitly limiting the scope of coverage to the employer's obligations under the WCL "in effect during the policy period." *See Allied Structural Steel*, 438 U.S. at 246-247 (retroactive pension vesting was "severe" impairment since vesting schedule was "a basic term of the pension contract" and impairment affected "an area where the element of reliance was vital—the funding of a pension plan … determined by a painstaking assessment of the insurer's likely liability").

3. This substantial impairment of petitioners' contracts is not "appropriate" to achieve a "significant and legitimate public purpose." The only contemporaneously articulated rationale for the law—that it would "save New York businesses hundreds of millions of dollars in assessments per year" and eliminate a "windfall" being captured by carriers, Mem. in Support of 2013-14 New York State Executive Budget, Public Protection and General Government Article VII Legislation (the "Governor's memorandum"), at 29, *quoted in* App. 6a—was obviously false.

That rationale assumed that both the assessments that employers paid to the Fund and the premiums that they paid to their carriers covered Section 25-a. But as

the State surely knew, given its approval of the policy terms and premiums before the Amendment, the pre-Amendment premiums did *not* include Section 25-a liability. *See supra* p.10. Thus, NYCIRB determined that, because "the premium charged for [a New York workers' compensation] policy did not incorporate [the] possibility" that carriers would be liable for Section 25-a claims, the Amendment would impose an "unfunded liability" of $1.1-1.6 billion on New York carriers. NYCIRB, Analysis of Proposed Bills to Reform the Workers Compensation System 2 (Mar. 14, 2013), *quoted in* App. 8a. Indeed, the State confirmed that the pre-Amendment premiums did not cover Section 25-a cases by approving an increase in premium rates under *future* policies specifically to account for carriers' new liability for Section 25-a claims as a result of the Amendment. R.255-256, 353-356, 463, 520-523. A rationale that "could not reasonably be conceived to be true by the governmental decisionmaker" cannot even survive rational basis scrutiny, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), much less the heightened scrutiny required under the Contracts Clause.[4]

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[4] In rejecting the due process claim, the Court of Appeals invoked the Amendment's potential for cost savings *divorced* from the supposed double charge identified in the legislative history. *See* App. 26a. For purposes of the Contracts Clause, that theory cannot suffice because heightened scrutiny requires that a proffered justification "be genuine, not hypothesized or invented post hoc in response to litigation." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996). In any event, as discussed *infra* pp.25-27, this hypothesized cost-savings rationale fails to justify the law because it reduces the Amendment to a naked wealth transfer, which is illegitimate. *Energy Reserves*, 459 U.S. at 411-412 ("The [Contracts Clause] requirement of a legitimate public purpose guarantees

The Court of Appeals also considered the Amendment's retroactive imposition of liability to be nothing more than the materialization of the "risk … that the premium charged in any one policy year will be insufficient to cover the costs of a carrier's liability—… a risk inherent in the insurance market, especially in a highly regulated market such as workers' compensation insurance." App. 18a. That too is wrong. Although insurance carriers assume the risk that there will be more valid claims than expected or that the magnitude of covered loss will be greater than expected, New York carriers did *not* assume the risk that a new law enacted after the close of the policy period would make them liable for an additional category of claims that they had agreed to exclude from the scope of coverage. On the contrary, the policies expressly stated that the carriers assumed only the liabilities imposed on employers under the law in effect at the time.

General regulatory supervision of the industry does not nullify the specific liability limitation embodied in the policies. *See U.S. Fid. & Guar. Co.*, 226 F.3d at 418 ("the mantra that insurance is a regulated industry will not cover all sins of retroactivity"); *Garris* v. *Hanover Ins. Co.*, 630 F.2d 1001, 1007 (4th Cir. 1980) (the "regulated nature of the insurance industry" precludes constitutional protection from retroactive legislation only if the business is "already regulated *in the particular* to which he now objects" (emphasis added)). The Court of Appeals' view leaves carriers without ability to contractually protect themselves from even specified risks.

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that the State is exercising its police power, rather than providing a benefit to special interests.").

B. The Amendment Violates Due Process

The Amendment's imposition of liability for Section 25-a claims arising under preexisting workers' compensation policies—contrary to the terms of those policies, the premiums paid under those policies, and decades of stable state law allocating exclusive responsibility for such claims to the Fund—also violates the Due Process Clause. To survive review under this clause, an economic regulation must be rationally related to a legitimate government purpose. *Concrete Pipe & Prod. of Cal., Inc.* v. *Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 641 (1993). And when a law imposes new obligations based on past conduct, that effect itself must be rationally related to a legitimate government purpose. *Landgraf*, 511 U.S. at 266 ("a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application" (quotation marks omitted)); *Pension Ben. Guar. Corp.*, 467 U.S. at 730 ("The retroactive aspects of legislation … must meet the test of due process[.]").

Again, the Amendment's actual justification for imposing this new liability for claims under preexisting policies fails even rational-basis review because its factual foundation—that closing the Fund would save businesses hundreds of millions of dollars per year in assessments by eliminating a double expense incurred by employers—"could not reasonably be conceived to be true by the governmental decisionmaker." *Clover Leaf Creamery*, 449 U.S. at 464. Tellingly, the Court of Appeals did not rely on this rationale in upholding the Amendment.

Instead, the court considered the Amendment justified purely by the possibility of achieving those sav-

ings *alone*, divorced from the debunked notion that the continued operation of the Fund was resulting in double charges to employers (and thus a windfall for carriers). App. 26a. Even under the rational-basis standard, that hypothesized rationale fails.

The Amendment's effect on carriers under preexisting policies cannot be justified as an effort to improve benefits for injured workers; their benefits are not affected at all by the Amendment. Nor can it be justified by efficiency gains. The Court of Appeals observed that "claims on reopened cases can be administered more efficiently by insurance carriers" than by the Fund. App. 27a. But those efficiency gains could only relate to Section 25-a claims arising under future policies, for which employers would pay premiums to (more-efficient) carriers rather than assessments to the (less-efficient) Fund. *See id.* n.6. In contrast, because of the Amendment, employers have *no costs* with respect to future Section 25-a claims arising under preexisting policies—they now owe neither assessments to the Fund nor premiums to their carriers for such cases. Marginal, unquantified administrative savings under future policies cannot reasonably justify massive new liability for carriers resulting from the total elimination of costs to employers under preexisting polices.

In other words, the cost-savings rationale hypothesized by the Court of Appeals amounts to nothing more than a naked transfer of wealth from one group (workers' compensation insurance carriers) to another (their employer-insureds). Although this Court has not conclusively addressed the question, its precedent strongly indicates that a naked wealth transfer is not a legitimate purpose for legislation. For example, in *Alton Railroad Co.*, the Court struck down on due process grounds a law requiring employers to pay pension ben-

efits to former employees who had separated before the law was enacted, declaring it "arbitrary in the last degree." 295 U.S. at 349. Turning to another provision of that law—which declared that a former employee's prestatute service would count under certain circumstances for purposes of computing the future pension annuity due, contrary to the employer's and employee's original understanding of their relationship—the Court said: "The provision … constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the act denies due process of law by taking the property of one and bestowing it upon another." *Id.* at 349-350; *see also, e.g.*, *Energy Reserves*, 459 U.S. at 411-412.

As a leading commentator has explained, "[t]he minimum requirement that government decisions be something other than a raw exercise of political power has been embodied in constitutional doctrine under the due process clause[.]" Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1692 (1984). Accordingly, the Due Process Clause (along with the Contracts Clause, Takings Clause, Equal Protection Clause, and others) reflects a general "prohibition of naked preferences." *Id.* at 1689; *see also, e.g.*, *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) ("a law that takes property from A. and gives it to B[.] … is against all reason and justice").

Naked wealth transfers are particularly troubling in cases like this, where the transfer is so large. *See, e.g., Pension Ben. Guar. Corp.*, 467 U.S. at 731 ("we have noted that retrospective civil legislation may offend due process if it is particularly harsh and oppressive"); *N.Y. Cent. R.R. Co.* v. *White*, 243 U.S. 188, 205 (1917) ("This, of course, is not to say that any scale of

compensation, however … onerous, … would be supportable."); *Eastern Enters.*, 524 U.S. at 550 (Kennedy, J., concurring in the judgment and dissenting in part) (statute invalid under Due Process Clause in light of its "egregious" effect).

C. The Amendment Works An Unconstitutional Taking

With respect to preexisting policies, the Amendment also takes property in violation of the Takings Clause. "[R]egulation of private property" constitutes a taking if it "goes too far." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537-538 (2005). Assessing whether that standard is met ordinarily depends on evaluation of three factors: "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Id.* at 538-539 (quotation marks omitted).

Here, all three factors reflect a taking. The Amendment has a significant economic impact: Petitioners expect to incur about $62 million in new liabilities under the Amendment (with the new liability to all New York workers' compensation carriers expected to be $1.1-1.6 billion). *See Eastern Enters.*, 524 U.S. at 529 (plurality) (economic impact "on the order of $50 to $100 million" favored conclusion that taking had occurred). The Amendment interferes with carriers' distinct investment-backed expectations: Carriers calibrated the premiums they charged employers and the loss reserves they maintained to cover future liabilities based on the express terms of their state-approved policies, state approval of premium rates, and decades of a stable statutory framework assigning liability for Section 25-a cases exclusively to the Fund. The Amend-

ment upends those expectations, rendering the premiums charged and loss reserves maintained vastly and irremediably inadequate. Certainly, "there was no pattern of conduct on the state's part that could have given the plaintiffs sufficient notice" of the Fund's closure. *U.S. Fid. & Guar. Co.*, 226 F.3d at 419. And the character of the action is troubling: The Amendment was adopted based on an obviously false premise that employers were being double charged for Section 25-a cases. Applied to cases under preexisting policies, the Amendment does not actually eliminate a double charge or a windfall; it simply forces carriers to pick up employers' tab for future Section 25-a cases arising under preexisting policies. *See id.*

Adopting the takings analysis from the dissenting opinions in *Eastern Enterprises* rather than the plurality, the Court of Appeals thought petitioners' takings claim failed at the "threshold" because (the court said) they "cannot identify any vested property interest impaired by the legislative amendment." App. 22a-23a. The court pointed out that the WCL "did not provide plaintiffs with any vested right in the Fund's continued acceptance of reopened cases," App. 24a, but that was not petitioners' contention. Much as the plurality in *Eastern Enterprises* found, the Amendment impairs petitioners' property by requiring them to pay money for claims that were beyond their clear contractual obligations and the longstanding legal obligations of their insureds. 524 U.S. at 529 (plurality op.) ("the company is clearly deprived of the amounts it must pay the Combined Fund"). It is not the case that, as the dissenting Justices maintained in *Eastern Enterprises*, a takings claim arises only if the challenged law "operate[s] upon or alter[s] an identified property interest," 524 U.S. at 540 (Kennedy, J., concurring in the judg-

ment and dissenting in part); *accord id.* at 554 (Breyer, J., dissenting), but even if that were so, that standard would be satisfied here: petitioners will have to look to their loss reserves, a distinct fund of money that they have increased by $62 million, to pay Section 25-a liability under preexisting policies resulting from the Amendment. *See U.S. Fid. & Guar. Co.*, 226 F.3d at 420.

II. THE QUESTIONS PRESENTED ARE TOO IMPORTANT TO LEAVE LOWER COURTS WITHOUT CLEAR GUIDANCE

This case presents an opportune vehicle to provide much-needed clarity regarding the circumstances under which a new law may expand the scope of liability contrary to the terms of a preexisting contractual relationship. The decision below aggravates division among lower courts regarding the constitutionality of such legislation when applied to contracts providing insurance or similar future benefits—types of contracts that depend upon stable and predictable rules regarding the scope of future liability. And as illustrated by this case, the potential financial effect of such laws is massive.

A. Constitutional Review Of Laws Expanding Liability Under Preexisting Insurance Policies Has Divided The Lower Courts

In the absence of clear guidance from this Court, lower courts confronting laws similar to the Amendment have reached different results under different constitutional frameworks. Some courts have held that laws expanding contractual liability under preexisting insurance contracts violate the Constitution. For example, in *U.S. Fidelity & Guaranty Co.*, the Fifth Circuit struck down a Louisiana statute that retroactively

modified the State's method of assessing insurance carriers' contributions to a state workers' compensation fund. 226 F.3d at 420. Under the statute, carriers that had long since exited or decreased their share of the Louisiana market were required to make contributions to the fund based on the volume of workers' compensation claims they continued to pay on previously written policies, even though they no longer had the ability to recoup the costs of contributions through adjustments to premiums. *Id.* at 414-417. Whereas the New York Court of Appeals in this case combined two dissenting opinions from *Eastern Enterprises* to conclude that the Amendment did not affect a cognizable property interest, App. 22a n.5, the Fifth Circuit adhered to the reasoning of the *Eastern Enterprises* plurality and held the new assessment formula effected a taking of carriers' property, 226 F.3d at 420; *cf. also West Va. CWP Fund* v. *Stacy*, 671 F.3d 378, 386-387 (4th Cir. 2011) (treating combination of dissenting opinions in *Eastern Enterprises* as "more authoritative than the plurality's conclusion"); *Swisher Int'l, Inc.* v. *Schafer*, 550 F.3d 1046, 1056-1057 (11th Cir. 2008) (same).

The Supreme Court of South Carolina struck down a similar statute—which expanded the definition of "occurrence," and thus liability, under preexisting commercial general-liability insurance policies—but did so under the Contracts Clause. *Harleysville Mut. Ins. Co.* v. *State*, 736 S.E.2d 651, 658-659 (S.C. 2012). That court found—contrary to the New York Court of Appeals here—that negating an express "policy period" limitation on coverage qualified as substantial impairment of the obligation of contract. *Id.* at 658.

And the Wisconsin Supreme Court invoked both the Contracts Clause and the Due Process Clause to invalidate a law making carriers liable for additional

medical expense benefits under preexisting insurance policies after the limitations period had expired. *Society Ins.* v. *Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 402-405 (Wis. 2010). There again, the court differed from the New York Court of Appeals in finding that "the extent of an insurer's liability" was a "basic term of an insurance contract," and that a law modifying that term substantially impaired the contract. *Id.* at 404.

Like the New York Court of Appeals in this case, however, other courts have upheld legislation expanding the scope of liability under preexisting insurance arrangements. The Maryland Court of Appeals upheld against challenges under the Contracts and Due Process Clauses the application of a statute abolishing restrictions on parent-child tort liability found in the common law and insurance policies to future claims under preexisting policies, despite the fact that the carriers "had no contractual obligation" to cover such liability when the policies were written. *Allstate Ins. Co.* v. *Kim*, 829 A.2d 611, 622-625 (Md. 2003). The Supreme Court of Nevada held that a statute retroactively increasing death and permanent disability benefits to offset the effects of inflation did not violate the Due Process or Contracts Clauses. *K-Mart Corp.* v. *State Indus. Ins. Sys.*, 693 P.2d 562, 569 (Nev. 1985). And a federal district court in Rhode Island rejected challenges under the Contracts, Due Process, and Takings Clauses to a law imposing a cost-of-living adjustment on liabilities under preexisting workers' compensation insurance policies. *Liberty Mut. Ins. Co.* v. *Whitehouse*, 868 F. Supp. 425, 428, 437 (D.R.I. 1994).

The New York Court of Appeals' errors in analyzing the relevant constitutional protections in this case are thus representative of the broader confusion in cas-

es addressing the constitutionality of legislation imposing new liabilities based on preexisting insurance contracts. The decision below increases the uncertainty that carriers and insureds—not to mention legislators and judges—are likely to experience regarding the stability of insurance bargains struck. This Court should take the opportunity to resolve this confusion.

B. The Issues Presented In This Case Are Important To The Insurance Industry And Other Highly Regulated Industries

This case also warrants the Court's review because of the massive and disruptive economic consequences threatened by the Amendment and similar legislation in the future.

The Amendment unsettles decades of insurance contracts and regulatory approvals in New York, and imposes extraordinary unanticipated costs on New York workers' compensation insurance carriers. NYCIRB, Analysis of Proposed Bills to Reform the Workers Compensation System 2 (Mar. 14, 2013), *quoted in* App. 8a. Moreover, workers' compensation insurance coverage is already financially perilous for carriers, *see* Brandenburg et al., Nat'l Ass'n of Ins. Comm'rs, *The Impact of Investment Income on Workers' Compensation Underwriting Results* 8 (Sept. 2017) (noting the "volatility" of workers' compensation underwriting in comparison to other commercial lines); the Amendment's retroactive liability is so significant that it might harm the financial health of workers' compensation carriers and dampen their willingness to continue to offer such insurance in the future.

That is just the tip of the potential iceberg: It merely reflects the cost of imposing liability for one

kind of claim (a claim in a case reopened after having been closed for the specified duration) under one kind of insurance policy (workers' compensation) in one industry (insurance) in one State (New York). Legislatures' "responsivity to political pressures poses a risk that [they] may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals" more generally. *Landgraf*, 511 U.S. at 267. The State of New York could easily conceive other laws to impose new liability under preexisting contracts in other kinds of circumstances, for other kinds of insurance, and in other industries. And other States around the country could do the same, emboldened by New York's example. The consequences could be staggering and destructive. *See id.* at 271 ("predictability and stability are of prime importance" in matters "affecting contractual or property rights.").

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted.

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FEBRUARY 2018