No. 17-1179

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**

## BRIEF OF *AMICI CURIAE* PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND NEW YORK INSURANCE ASSOCIATION, INC., IN SUPPORT OF PETITIONERS

ROBERT D. HELFAND*
PULLMAN & COMLEY LLC
90 State House Square
Hartford, CT 06103
(860) 424-4300
rhelfand@pullcom.com

* *Counsel of Record*

*Counsel for Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii
INTEREST OF *AMICI CURIAE* ..... 1
INTRODUCTION AND SUMMARY OF THE ARGUMENT ..... 4
REASONS FOR GRANTING THE WRIT ..... 9
I. Background of the Dispute ..... 9
A. The Fund for Reopened Cases ..... 9
B. Closing the Fund ..... 14
C. Proceedings Below ..... 17
II. The Writ Should be Issued, Because the Decision Below was Erroneous; Because States' Attempts to Shift Their Financial Responsibility to Insurers have Divided Lower Courts; and Because New York's Decision will Encourage Similar Raids on Special Insurance Funds ..... 19
A. The Decision Below Was Erroneous ..... 19
B. The Writ Should Be Granted to Resolve A Division Among the Lower Courts And To Prevent Further Attempts to Appropriate Insurers' Property to Pursue Political Goals ..... 24
CONCLUSION ..... 28

## TABLE OF AUTHORITIES

### CASES

Page(s)

*Berlinski v. Congregation Emanuel of N.Y.,* 289 N.Y.S.2d 503 (App. Div. 1968) ..... 12, 20

*Beshear v. Haydon Bridge Company, Inc.,* 416 S.W.3d 280 (Ky. 2013) ..... 26

*De Mayo v. Rensselaer Polytech Inst.,* 547 N.E.2d 1157 (N.Y. 1989) ..... 7, 11, 12, 17, 18, 19, 20

*Matter of Gantz v. Wallace & Tiernan Lucidol Div.,* 343 N.Y.S.2d 972 (App. Div. 1973) ..... 12

*General Motors Corp. v. Romein,* 503 U.S. 181 (1992) ..... 18, 23

*Industrial Commission of Arizona v. Brewer,* 290 P.3d 439 (Ariz. App. 2012) ..... 5, 26

*Matter of Jansch v. Sagamore Children's Fund,* 756 N.Y.S.2d 326 (App. Div. 2003) ..... 12

*Kansas Building Industry Workers Compensation Fund v. State of Kansas,* 359 P.3d 33 (Kan. 2015) ..... 26

*Matter of Riley v. Aircraft Products Mfg. Corp.,* 353 N.E.2d 801 (N.Y. 1976) ..... 7, 12, 17, 18, 19

*Society Insurance v. Labor & Industry Review Commission,*786 N.W.2d 385 (Wis. 2010) ..... 6, 20, 21, 22, 23, 24, 25

*Matter of Tipton v. Lang's Bakery,*
296 N.Y.S. 228 (App. Div.), *aff'd,*
11 N.E.2d 759 (N.Y. 1937) ..... 10, 12, 13, 18, 19

*U.S. Fidelity & Guaranty Co. v. McKeithen,*
226 F.3d 412 (5th Cir. 2000) .... 5, 21, 22, 25, 26, 27

*Watkins v. Cornwall Press, Inc.,*
63 N.Y.S.2d 23 (App. Div. 1946) ..... 12

*Matter of Wetterau v. Canada Dry,*
3 N.Y.S.3d 432 (App. Div. 2015) ..... 12

*Workers Compensation Fund v. State of Utah,*
125 P.3d 852 (Utah 2005) ..... 26

*Matter of Zechmann v. Canisteo Volunteer Fire Dept.,*
651 N.E.2d 1268 (N.Y. 1995) ..... 11, 19

Constitutional Provisions

Article I, § 10 ..... 6, 7, 17, 19, 20

Amendment V ..... 5, 17, 18, 22

Amendment XIV ..... 6, 7, 17, 18, 22, 23

## Statutes and Regulations

Mo. Ann. Stat. §287.220 ..... 26

12 N.Y. C.R. & Regs. § 318.2 ..... 10

1933 N.Y. Laws, Chapter 384 ..... 9, 10, 11, 13, 17

N.Y. Workers' Comp. Law

§ 10 ..... 9, 10, 11, 13, 19

§ 15 ..... 4, 11, 15

§ 25-a ..... 9, 10, 11, 12, 14, 18, 19, 22

§ 28 ..... 4, 15

§ 50 ..... 9, 10, 13

§ 151 ..... 10

## Other Authorities

Memorandum in Support of 2013-14 New York State Executive Budget, Public Protection and General Government Article VII Legislation, *available at* https://www.budget.ny.gov/pubs/archive/fy1314archive/eBudget1314/fy1314artVIIbills/PPGG_ArticleVII_MS.pdf (visited March 26, 2018) ..... 6, 15, 16, 22

## INTEREST OF *AMICI CURIAE*[1]

*Amicus* Property Casualty Insurers Association of America ("PCI") is a national property and casualty trade organization that promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI advocates its members' public policy positions in all 50 states and on Capitol Hill. It files *amicus* briefs in courts across the country, in cases that raise issues that affect property casualty insurers and their customers. PCI is composed of nearly 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. PCI members write $220 billion in annual premiums, 37 percent of the nation's property casualty insurance. Member companies write 44 percent of the U.S. automobile insurance market, 30 percent of the homeowners market, 35 percent of the commercial property and liability market, and 37 percent of the private workers' compensation market. In New York, PCI members write 32.6 percent of the property casualty market, including 39.8 percent of the personal lines insurance market, 28.1 percent of the commercial insurance market, and 22.2 percent of the workers' compensation market.

---

[1] Counsel for *amici curiae* affirms that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the *Amici* made a monetary contribution to the preparation or submission of this brief. The parties' counsel of record received timely notice of the intent to file this brief. All Petitioners and Respondents have consented in writing to its filing.

*Amicus* American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association, representing approximately 325 major property and casualty insurance companies based in New York and most other states. AIA members collectively underwrite $137 billion in direct property and casualty premiums nationwide, including $10 billion in New York. They range in size from small companies to the largest insurers with global operations. These companies underwrite virtually all lines of property and casualty insurance, including nearly $1.5 billion in New York workers' compensation insurance premiums. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums nationwide. AIA also files *amicus curiae* briefs in significant cases before federal and state courts, including this Court, on issues of importance to the insurance industry and marketplace.

*Amicus* National Association of Mutual Insurance Companies ("NAMIC") is the largest property and casualty insurance trade association in the United States, with more than 1,400 member companies representing 39 percent of the total U.S. market. NAMIC supports a diverse spectrum of regional and local mutual insurance companies, as well as many of the largest insurers in the world. NAMIC member companies in the United States and Canada serve more than 170 million policyholders and write more than $230 billion in annual

premiums. NAMIC members account for 54 percent of homeowners, 43 percent of automobile, and 32 percent of the business insurance markets in the United States.

*Amicus* New York Insurance Association, Inc. ("NYIA"), is a state trade association that has represented the property and casualty insurance industry in New York for more than 130 years. NYIA's membership includes both national and regional carriers, domestics and non-domestics, collectively writing more than $12 billion in New York premium annually. The association represents stock, mutual, and cooperative insurers writing in virtually every county of New York State. NYIA's mission is to promote an insurance market that is viable and strong, in order better to serve the insuring public; to promote the economic, legislative, and public standing of its members and the insurance industry; to provide a forum for discussion of policy issues of common concern to its members and the insurance industry; and to serve the public interest through activities promoting the safety and security of persons and property.

If the decision of the Court of Appeals is not reversed, it will have significant implications for the business operations and exposure of many members of the *Amici*. *Amici* believe their litigation experience and policy expertise will aid this Court in its consideration of this case.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

In the first half of the Twentieth Century, New York modified its workers' compensation laws by creating two special entities that funded payments to accident victims in specific, limited circumstances. The Special Disability Fund (the "SDF") was the nation's first "second injury fund" ("SIF"); it helped compensate employees when their workplace injuries produced long-term health problems by exacerbating pre-existing conditions. The Fund for Reopened Cases (the "Fund"), which was funded by assessments on employers, provided payment for certain "stale" claims—claims for new problems that arose after a case appeared to be closed. Following New York's lead, virtually every state created one or more such government entities, with dedicated assets for compensating particular categories of injured workers.

For the most part, states have refrained from diverting the resources of these entities for political objectives, such as paying for other government operations. Thus, while the SDF was closed to most claims in 2007, it remained open to new claims based on older injuries, until the statute of limitations for such claims had expired. N.Y. Workers' Comp. Law, §§15(8)(h)(2)(a), 28. Workers' compensation policies cover expenses which relate to accidents that occur during the policy term, even if the expenses arise later. App. 6a-7a. If the SDF had stopped accepting

claims based on past accidents, therefore, responsibility for them would have been forced on insurers whose policies had not accounted for the risk of expenses previously covered by the fund. The state prevented that outcome, even though it might have freed up some of the fund's remaining assets.

Nevertheless, the temptation to use these entities to solve budget problems or reward favored constituencies can be very strong. To resolve an anticipated budget shortfall in 2009, Arizona moved assets from a special workers' compensation fund (one which functioned, in part, as an SIF) to the general fund of the state. When challenged, that action was allowed as a matter of Arizona law. *Industrial Commission of Arizona v. Brewer*, 290 P.3d 439, 440, 445 (Ariz. App. 2012). Kansas, Kentucky, and Utah have tested similar actions.

Federal law has put limits on *how* these entities may be exploited; in particular, it prevents states from using the property of private businesses to substitute for fund assets. Louisiana tried to supplement the resources of its SIF by requiring new contributions from (among others) insurers that had already left the state's market. The Court of Appeals for the Fifth Circuit held that the Constitution's Takings Clause prohibits "a transfer of [insurers'] assets to … third parties for public use." *U.S. Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412, 417-18 (5th Cir. 2000). Wisconsin eliminated a statute of limitations on certain workers' compensation claims, and thereby "shifted the

burden of payment" for older claims "from [a] Fund to the insurer." The statute was invalidated under both the Contracts and Due Process Clauses. *Society Insurance v. Labor & Industry Review Commission*, 786 N.W.2d 385, 394, 405 (Wis. 2010).

In 2013, New York decided to test these limits. It closed the Fund for Reopened Cases, but without the timing mechanism it had used in connection with the SDF. If a worker whose claim had become "stale" now incurred new expenses for an accident that occurred before 2014, the Fund would not accept the claim—even though insurance policies from that period had assumed the Fund would pay those expenses.

The change was deliberate: The Governor's memorandum in support of the measure asserted that the law would free *employers* from future financial burdens, by forcing *insurers* to "cover this liability." It justified the change by contending that insurers had already charged premiums for the claims in question, and so that closing the Fund would "prevent[] a windfall." App. 6a.

These contentions were egregiously wrong, because the state controls the process by which the costs of workers' compensation policies are calculated: Through that process, New York had actually *prohibited* insurers from charging premiums for the losses they are now being forced to indemnify. The measure chiefly seeks to benefit employers—at insurers' expense—by making insurers pay costs

that could otherwise be charged to employers in future assessments. But if the current assets of the Fund turn out to exceed the cost of claims that are already pending, then off-loading older claims to insurers will also have delivered a "windfall" for the *state*.

New York's Court of Appeals upheld the state's action, but only by ignoring 80 years of consistent statutory interpretation and basic Constitutional principles. The Court concluded that the Fund's retroactive closing did not impair insurance contracts, in violation of the Contracts Clause, on the ground that "liability" for claims covered by the Fund had already "rested with the carriers" under prior law. App. 18a. Yet the Court had held previously that the *purpose* of the law which created the Fund was precisely "to save employers and insurance carriers from liability … for stale claims." *Matter of Riley v. Aircraft Products Mfg. Corp.,* 353 N.E.2d 801, 803 (N.Y. 1976). It had explained that "[l]iability for payment of [such claims] … shift[ed] from the insurance carrier … simply by virtue of the passage of the requisite period of time." *De Mayo v. Rensselaer Polytech Inst.*, 547 N.E.2d 1157, 1159 (N.Y. 1989).

The Court also erred in connection with the Due Process Clause. It accepted Respondents' assertion that claims based on older accidents will cause "hundreds of millions of dollars" in future assessments on employers. It held that "saving" employers from such assessments is a "legitimate

legislative purpose." But it failed to inquire whether that purpose was being "furthered by rational means." Consequently, it held expressly that New York's having knowingly kept insurers from charging premiums to cover the claims at issue *could not* establish that the state's subsequent use of insurers' property to pay those claims (and bail out employers) was a violation of due process. App. 26a-27a.

This Court should grant a writ of certiorari in the instant case, because New York's actions violate the Constitutional rights of the Petitioners—along with hundreds of other insurers that are members of the *Amici*. Review is appropriate to resolve the stark division between New York's decision and those of other courts, such as the Fifth Circuit, which have rejected similar government efforts to transfer obligations to insurers. And review is urgently needed. New York's SDF was one of 21 SIFs to be closed within the last 25 years; many similar funds are likely to be closed or modified in the years to come. If it is not corrected by this Court, the erroneous decision in this case is likely to encourage many more unlawful appropriations of private assets, either to satisfy unrelated commitments, or to score points with favored constituencies.

## REASONS FOR GRANTING THE WRIT

### I. Background of the Dispute

#### A. The Fund for Reopened Cases

New York's Workers' Compensation Law ("WCL") imposes no-fault liability on employers for workers who are injured in the course of employment. Section 10 expresses this liability as a requirement that employers "secure compensation" for such workers. WCL §10. Under Section 50, employers may satisfy this requirement in only three ways: by purchasing workers' compensation insurance from an authorized insurer; by purchasing a policy from the State Insurance Fund; or by self-insuring. WCL §50. Thus, workers' compensation insurance policies cover the obligation to "secure compensation" that is imposed by Section 10.

In 1933, the WCL was amended to address "stale" claims—claims made at least seven years after the underlying accident, and at least three years after the last previous payment ("Reopened Claims"). 1933 N.Y. Laws, ch. 384 (the "1933 Amendments"). A new provision, Section 25-a, authorized awards in cases where the Workers' Compensation Board determined, as a matter of fact, that a claim satisfied the criteria for a Reopened Claim. The law also created a new Fund for Reopened Cases, and it stated that any such award "shall be against" that Fund. WCL §25-a. The Fund was financed by surcharges and assessments

collected from insured businesses and other employers. WCL §§25-a(3), 151(2); 12 N.Y. C. R. & Regs. §318.2(a).

The same 1933 Amendments that added Section 25-a to the WCL (and thereby created the Fund) also amended Section 10—the section that creates employers' compensation obligations. As amended, Section 10 still provided that "[e]very employer ... shall ... secure compensation to his [sic] employees ... for ... injury," in the ways that are specified in Section 50. But the 1933 Amendments modified this language, by adding: "except as otherwise provided in section twenty-five-a ... ." L. 1933, c. 384, §1. Section 10 now reads:

> Every employer ... shall in accordance with this chapter, *except as otherwise provided in section twenty-five-a hereof*, secure compensation to his employees ... .

WCL §10 (emphasis added).

By creating the Fund, the state guaranteed the payment of awards for Reopened Claims, "where the employer had gone out of business ... or the insurance carrier had become insolvent." *Matter of Tipton v. Lang's Bakery,* 296 N.Y.S. 228, 231 (App. Div.), *aff'd*, 11 N.E.2d 759 (N.Y. 1937). The 1933 Amendments could have pursued that goal by making the Fund nothing more than a backstop to employers and insurers in those limited circumstances. Instead, the amendments mandated that *every* award for a Reopened Claim "shall be

against" the Fund. At the same time, the amendments added language to Section 10 to make it clear that providing for the payment of Reopened Claims was an "except[ion]" to the general obligations Section 10 imposes on employers—*i.e.,* the obligation to "secure compensation" through workers' compensation insurance policies.

In short, the 1933 Amendments intentionally relieved both employers and their insurers from liability for Reopened Claims.[2] The courts of New York—including the Court of Appeals—consistently read the 1933 Amendments in precisely that way:

> Liability for payment of a compensation award under section 25–a shifts 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) has been triggered, the insurance carrier has no further interest in payment of the claim.

*De Mayo v. Rensselaer Polytech Inst.*, 547 N.E.2d 1157, 1159 (N.Y. 1989). *Accord Matter of Zechmann v. Canisteo Volunteer Fire Dept.,* 651 N.E.2d 1268, 1271 (N.Y. 1995) ("The primary purpose of section 25-a(1) is to transfer liability ... from employers and

---

[2] By way of contrast, awards for claims compensable by the Special Disability Fund had to be made "against the employer or [its] insurance carrier," which could then seek reimbursement from the fund. WCL §15(8)(f). The WCL contains no language making *those* claims an "except[ion]" to employers' obligations under Section 10.

carriers to the Special Fund"); *Matter of Riley v. Aircraft Products Mfg. Corp.,* 353 N.E.2d 801, 803 (N.Y. 1976) ("The purpose of section 25-a is to save employers and insurance carriers from liability ... for stale claims"); *Wetterau v. Canada Dry,* 3 N.Y.S.3d 432, 434 (App. Div. 2015) (same); *Matter of Jansch v. Sagamore Children's Fund,* 756 N.Y.S.2d 326, 328 (App. Div. 2003) ("The purpose of ... § 25-a 'is to impose on the Special Fund the liability for truly "stale" claims'"), *quoting Matter of Gantz v. Wallace & Tiernan Lucidol Div.,* 343 N.Y.S.2d 972, 975 (App. Div. 1973); *Berlinski v. Congregation Emanuel of N.Y.*, 289 N.Y.S.2d 503, 506 (App. Div. 1968) ("the obvious intent of the Legislature [was] to transfer liability for stale claims to the Special Fund. … [T]he [Workers' Compensation B]oard may not as a matter of law impose liability [for a Reopened Claim] on the employer or its insurance carrier"); *Watkins v. Cornwall Press, Inc.,* 63 N.Y.S.2d 23, 25 (App. Div. 1946) ("The purpose of ... the Special Fund ... [is] to ... cushion the burden to the employer and carrier by relieving them from a continuing liability").

The opinion in *Matter of Tipton, supra*, which was affirmed by the Court of Appeals, declared unambiguously that an employer's insured obligation to employees ends when the time limits of Section 25-a have expired:

> [B]y the terms of [Section 25-a] the rights of the parties hereto became fixed three years after the last payment of compensation, and seven years after the accident ... . Thereupon

> the employer had fulfilled all of the terms of the Workmen's Compensation Law and met all the obligations imposed thereby. The employer then stood relieved of all liability to make further payments in this case; and the Workmen's Compensation Law no longer applied to it.

296 N.Y.S. at 230-31.

One consequence of this aspect of the 1933 Amendments was that workers' compensation insurers were precluded from charging premiums for covering the costs of Reopened Claims. The New York Compensation Insurance Rating Board ("CIRB") is a non-profit association appointed by the Superintendent of one of the Respondents, the Department of Financial Services ("DFS"), to collect workers' compensation data. R. 251-52. The CIRB uses that data to calculate annual loss costs—the total value of covered indemnity and medical expenses. These calculations must be approved by the DFS. R. 254-55. Insurers' rates (which the DFS must also approve) are calculated, in part, by multiplying the CIRB's approved loss costs by carrier-specific "loss cost multipliers." *Id.;* R. 517.

Before the Fund was closed in 2014, the CIRB's loss costs did not include any benefits the Fund paid on Reopened Claims. R. 258. That is, the CIRB did not treat payments for Reopened Claims as part of the cost of "securing compensation" for injured workers under WCL §§10 and 50. *Id.* As a

result, the approved rates insurers charged could not take account of any potential losses associated with Reopened Claims. *Id.* Insurers also may not recoup those losses in subsequent years. *See* App. 7a-9a.

The omission of Fund payments from loss costs is significant in at least two ways. If insurers had been liable for Reopened Claims under prior law—even contingently—then the omission would be an error, and DFS would not have approved it. Respondent's approval confirms that no such "liability" existed.

For insurers, underwriting and rating both depend on accurate definitions of the risks a policy assumes. Generally, underwriters would not knowingly accept a risk that is excluded from the rate. Thus, the rates establish the reliance on prior law that goes to the essence of the Constitutional questions at issue in this case.

### B. Closing the Fund

In March 2013, the WCL was amended to provide that no Reopened Claim could be accepted by the Fund after January 1, 2014. WCL §25-a(1-a). That amendment was noteworthy (among other reasons) for its failure to distinguish among the affected claims.

One of New York's *other* workers' compensation entities, the Special Disability Fund, had been closed in 2007. Like other SIFs, the SDF was created to encourage employers to hire workers

with pre-existing conditions. If the worker suffered a new injury, and if that malady was exacerbated by the worker's prior condition, the employer could obtain reimbursement from the SDF for benefits that were payable after 260 weeks. WCL §15(8)(d).

Closing the SDF effectively increased the financial obligations of employers and insurers, but, because the fund was closed in phases, it did *not* impose new obligations under insurance policies that had been issued before the fund was closed. The SDF was closed to most claims as of July 1, 2007; it remained open to claims based on accidents which had occurred before that date for another three years. WCL §15(8)(h)(2)(a). By that time, all such claims would be time-barred. WCL §28. Thus, the closing affected only those insurance policies which were written *after* insurers had received notice of the closing and appropriately adjusted their rates.

New York's Legislature omitted this timing safeguard from the 2013 legislation that closed the Fund. Consequently, injured workers now have to look to employers and their insurers to satisfy *all* Reopened Claims—including claims that arise out of accidents which occurred before 2014, when insurers could not charge premiums to cover such claims.

The history of the legislation clearly identifies those insurers as its target. The Governor's memorandum in support of the closing assumed—incorrectly—that insurers' premiums in prior years had accounted for Reopened Claims. On that basis,

it asserted that insurers received a "windfall" whenever such claims were paid by the Fund, out of assets contributed by employers. The memorandum promised to save employers "hundreds of millions of dollars"—at insurers' expense:

> Closing the Fund would save New York businesses hundreds of millions of dollars … . 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. … [C]arriers 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, *quoted in* App. 6a.

Because the premiums insurers had already charged *did not* cover liability for claims based on older accidents, closing the Fund to those claims forces insurers to subsidize other participants in the system. Assuming that the cost of such claims, combined with the cost of pending claims, exceeds the current assets of the Fund, forcing insurers to pay those claims will save employers from future assessments. And if current assets exceed the value of claims that are *already* pending, then insurers will also be subsidizing a "windfall" for the state.

### C. Proceedings Below

By this action, Petitioners seek a declaration that the 2013 amendment to the WCL was unconstitutional, insofar as it applied retroactively—*i.e.*, in its effect on Reopened Claims based on accidents that occurred before the law was amended. On appeal from an appellate decision in Petitioners' favor, New York's Court of Appeals held that the amendment did not violate any of the Contracts, Takings or Due Process Clauses of the United States Constitution.

In connection with the Contracts Clause, the Court held that closing the Fund retroactively did not impair insurers' contracts with employers. App. 15a. It based that conclusion on a finding that "liability" for Reopened Claims had "ultimately rested with carriers," even before 2014. App. 18a. Thus,

> [t]he amendment merely altered the allocation of costs of that liability by removing an avenue for carriers to transfer reopened cases to the Fund… .

*Id.*

These statements were manifestly at odds with the decisions cited above, which held that "sav[ing]" employers and insurers "from liability" had been the very "purpose" of the 1933 Amendments, *Matter of Riley*, 353 N.E.2d at 803; that "[o]nce section 25–a(1) ha[d] been triggered, the

insurance carrier ha[d] no further interest in payment of the claim," *De Mayo*, 547 N.E.2d at 1159; and, indeed, that "the Workmen's Compensation Law no longer applied" to claims after the requisite passage of time. *Matter of Tipton*, 296 N.Y.S. at 231. Yet the Court below failed so much as to acknowledge—much less explain—this departure from eight decades of its own jurisprudence. *See* App. 18a-19a.

The same reasoning underlies the Court's decision under the Takings Clause: It found that Section 25-a had not "clearly grant[ed]" insurers a vested property interest in avoiding liability for Reopened Claims (App. 24a)—even though it had previously held that Section 25-a was enacted precisely "to save" insurers from that liability. *Matter of Riley*, *supra*.

Finally, the Court rejected Petitioners' challenge under the Due Process Clause. The Court found that the state's actions pursued "a legitimate legislative purpose": saving employers from paying future assessments. App. 26a. But the Court failed to inquire whether that purpose—however "legitimate"—was being "furthered by rational means." *See General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Consequently, it held expressly that closing the fund retroactively could not offend due process, even if the state had prevented insurers from charging premiums that covered the claims in question. App. 27a.

## II. The Writ Should be Issued, Because the Decision Below was Erroneous; Because States' Unfair Attempts to Shift Financial Responsibility to Insurers have Divided Lower Courts; and Because New York's Decision will Encourage Similar Raids on Special Funds

### A. The Decision Below Was Erroneous

As noted, the Court of Appeals's decision under the Contracts Clause rested on the assumption that insurers accepted "liability" for Reopened Claims when they wrote workers' compensation policies before 2014. App. 18a. That premise is refuted by literally dozens of prior decisions, including decisions that were written or affirmed by the Court of Appeals itself. *E.g.*, *De Mayo*, 547 N.E.2d at 1159; *Matter of Zechmann*, 85 N.E.2d at 752; *Matter of Riley*, 353 N.E.2d at 803; *Matter of Tipton*, 296 N.Y.S. at 230-31. It also ignores the language of the WCL, which expressly makes responsibility for Reopened Claims an "except[ion]" to the obligations that are covered by workers' compensation policies. WCL §§ 10, 25-a. Yet the decision in this case neither acknowledged nor attempted to distinguish either the statutory language or any of these prior rulings.

Instead, the Court below reasoned that "there is no provision of plaintiffs' [insurance] contracts … relieving them of the obligation to pay … benefits in the event that the Fund did not accept a reopened case." App. 18a. That reasoning is flawed. It refers

to the fact that, under prior law, the Workers' Compensation Board could determine that a given claim did not, as a matter of *fact*, meet the criteria of a Reopened Claim. *See* App. 3a-4a. Contrary to the Court's suggestion, however, that did not mean that either the Board or the Fund had discretion to deny any claim that *did* so qualify. For those claims, "[l]iability … shift[ed] … to the Special Fund simply by virtue of the passage of the requisite period of time," *De Mayo*, 547 N.E.2d at1159, and the Board "[could] not as a matter of law impose liability … on the employer or its insurance carrier." *Berlinski*, 289 N.Y.S.2d at 506. Thus, the Court was actually faulting insurers' policies for failing to anticipate that applicable laws would be changed retroactively.

The protections of the Contracts Clause do not turn on whether insurance policies anticipate such changes. In Wisconsin, certain workers' compensation claims are subject to a 12-year statute of limitations; at the end of 12 years, they become payable from the state's "Work Injury Supplemental Benefit Fund." The repeal of that statute of limitations was challenged in *Society Insurance v. Labor & Industry Review Commission*, 786 N.W.2d 385 (Wis. 2010). In that case, Wisconsin's Supreme Court did not find that the underlying policies contained a provision that relieved them of liability after 12 years. Nevertheless, it correctly held that

> [t]he legislation … modified a basic term of an insurance contract—the extent of an insurer's liability for traumatic injury

> claims—which was bargained for and reasonably relied upon by the parties.

786 N.W.2d at 404.

The Court of Appeals also suggested in a second way that businesses should regard government oversight as an unavoidable initiator of arbitrary and lawless actions, rather than a resource for stability and predictability. It asserted that the risk of insurance premiums' being insufficient to cover all losses is "inherent in … a highly-regulated market such as workers' compensation insurance … ." App. 18a.

But the insufficiency at issue here did not arise from any limitation on the capacities of the state's actuaries. In this case, Respondent DFS knowingly and affirmatively prevented insurers from including a specific category of loss in their premium calculations. App. 7a-8a. The Legislature then deliberately imposed financial responsibility on the insurers for that very category. When Louisiana imposed charges on insurers that had already left the market, to cover obligations of its SIF, the Court of Appeals for the Fifth Circuit observed:

> extensive regulation … [did not make] it objectively reasonable to expect that Louisiana would decide to shift the cost of funding the SIF … to insurers … who could not recoup the costs of this forced underwriting …

> [T]he mantra that insurance is a regulated industry will not cover all sins of retroactivity. …

*U.S. Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412, 418 (5th Cir. 2000).[3]

In connection with Petitioners' claims under the Takings and Due Process Clauses, the Court of Appeals found that insurers had no "vested property interest" or "vested right" to avoid liability for Reopened Claims. App. 24a, 25a. That finding was erroneous, in part, because it ignored the case law and statutory language which expressly excepted insurers from that liability. It also suffered from a logical flaw. In *Society Insurance*, the Court held that the repealed statute of limitations had given the plaintiff insurer "a right to fixed exposure to liability, which vested" when each claim became time-barred. 786 N.W.2d at 400. In the same way, Section 25-a of the WCL clearly gave New York insurers a right to

---

[3] In another part of its opinion, the Court below contended that it was "inconsistent" for Petitioners to assert that their pre-2014 policies did not make them liable for Reopened Claims, while also asserting that the closing of the Fund imposed such liability. App. 17a. The Court's reasoning is unclear, but it appears to misapprehend insurers' contentions about the 2013 legislation as an argument about the proper construction of policy language. If so, the Court's conclusion is unfounded. The express purpose of the 2013 statute was to make "carriers" pay the cost of Reopened Claims, while supposedly saving money for the "businesses" they insured. *See* App. 6a. The fact that the state will seek to enforce the statute in this manner has never been in dispute.

fixed exposure, which vested seven years after each injury, and three years after the last payment for the injury.

In connection with the Due Process Clause, the Court of Appeals found that closing the Fund retroactively would save employers from future assessments—because the State "assert[ed]" that the Fund's current assets might be insufficient to cover Reopened Claims arising from pre-2014 accidents. The Court found that this assertion "constitute[d] a sufficient showing" that retroactive application of the legislation was justified by a "rational legislative purpose." App. 26a.

The Court also acknowledged, however, that even a legitimate legislative purpose runs afoul of the Due Process Clause, if it is not "furthered by rational means." *Id.*, *quoting General Motors Corp.*, *supra*. Yet it went on to rule that the retroactive closing of the Fund—which could make insurers responsible for "hundreds of millions of dollars" in Reopened Claims—would comport with due process, *even if* the state had knowingly and affirmatively prevented the insurers from charging premiums to cover that expense, and even though the insurers may not recoup their losses now. App. 8a-9a, 27a.

In *Society Insurance,* the state similarly claimed that shifting liability for 12-year-old claims away from a special fund, and onto insurers, was necessary to keep the fund solvent. But the Court found that this claim "weigh[ed] in … favor" of the

plaintiff insurer, "because it demonstrate[d] the significant financial burden being shifted to insurers." 786 N.W.2d at 402. Importantly, that case involved not "hundreds of millions of dollars," but a single claim, valued at less than $12,000. The Court observed, however, that "in order to impact the solvency of the Fund, time-barred … claims must necessarily involve … significant benefits"—and, therefore, imposed an unconstitutional burden. *Id.*

What the Court below accepted as a "rational purpose" was, in reality, a straightforward transfer of the financial burden for claims based on accidents that had already occurred—from employers (whose assessments support the Fund, and whose employees suffered the accidents) to their insurers (who were prevented from charging premiums to cover those claims). The Court's opinion also ignored the possibility that the transfer might benefit the state, if current Fund assets turn out to exceed the amount of pending claims.

### B. The Writ Should Be Granted to Resolve A Division Among the Lower Courts and To Prevent Further Attempts to Appropriate Insurers' Property to Pursue Political Goals

This was not the first case challenging a state's attempt to transfer the financial burden of workers' compensation claims to insurers—even if the insurers had never agreed to cover them. Yet, in the course of its opinion, the Court of Appeals made

a series of rulings about threshold Constitutional questions that are diametrically opposed by the cases which considered similar legislation.

The Court of Appeals's opinion conflicts with that of the Wisconsin Supreme Court on the question of whether imposing liability for a new category of loss impairs an insurance contract, absent a "provision … relieving [insurers] of the obligation to pay … benefits." *Compare* App. 18a *with Society Insurance*, 786 N.W.2d at 404. It conflicts with the Fifth Circuit on whether insurers assume the risk that such new liabilities will be imposed, by agreeing to participate in a highly regulated industry. *Compare* App. 18a-19a *with U.S. Fidelity*, 226 F.3d at 418. It conflicts with *Society Insurance* on whether the imposition of new liabilities affects a "vested right." *Compare* App. 24a, 25a *with* 786 N.W.2d at 400. And it conflicts with that case's analysis of the significance of similar facts to a Due Process determination. *Compare* App. 27a *with* 786 N.W.2d at 402.

It is important that this Court resolve these questions, because they, along with the circumstances in which they have arisen, can determine the liability of an important industry for at least hundreds of millions of dollars. *See* App. 6a. Furthermore, these questions are likely to arise again. Indeed, the decision in the Court below might serve to hasten that event.

A number of state governments have already yielded to the temptation to raid assets of special workers' compensation funds to pay for other government operations. *See, e.g.*, *Kansas Building Industry Workers Compensation Fund v. State of Kansas*, 359 P.3d 33 (Kan. 2015); *Beshear v. Haydon Bridge Company, Inc.*, 416 S.W.3d 280 (Ky. 2013); *Industrial Commission of Arizona v. Brewer*, *supra*; *Workers Compensation Fund v. State of Utah*, 125 P.3d 852 (Utah 2005). That temptation is increasing—not only because many states continue to face budget shortfalls, but also because the type of special workers' compensation fund that is at issue in this case is a dying breed.

Between 1992 and 2010, for example, 20 states and the District of Columbia all closed their SIFs entirely.[4] Missouri decided to keep its fund, but to limit the types of claims it would pay after January 2014. Mo. Ann. Stat. §§287.220(2) and (3).

Left standing, New York's approach to closing its Fund for Reopened Cases would provide instructions to other states on how to use the 28 remaining SIFs to "transfer … [insurers'] assets to …

---

[4] The following jurisdictions have closed their SIFs to new claims: Alabama (1992); Arkansas (2007) Colorado (1993); Connecticut (1995); District of Columbia (1998); Florida (1997); Georgia (2004); Kansas (1993); Kentucky (1996); Louisiana (2010); Maine (1992); Minnesota (1995); Nebraska (1997); New Mexico (1996); New York (2007); Rhode Island (1998); South Carolina (2007); South Dakota (1999); Utah (1994); Vermont (1999); and West Virginia (2003).

third parties for public use," *U.S. Fidelity*, 226 F.3d at 417—and even reap a potential windfall, depending on how the fund is wound down. It is of urgent moment to the insurance industry that this Court establish firmly the Constitutional limits on such appropriations of private assets to meet government commitments.

## CONCLUSION

This case presents issues of national importance for the industry *Amici* represent. The Court below violated insurers' Constitutional rights. In doing so, it created a stark division among the lower courts on important issues, and it increased the likelihood these issues will continue to be litigated.

*Amici* respectfully submit that a writ of certiorari should be granted.

Dated: March 26, 2018

Respectfully submitted,

ROBERT D. HELFAND
PULLMAN & COMLEY, LLC
90 State House Square
Hartford, Connecticut 06103
(860) 424-4300
rhelfand@pullcom.com

*Counsel for* amici curiae *Property Casualty Insurers Association of America, American Insurance Association, National Association Of Mutual Insurance Companies and New York Insurance Association, Inc.*