No. 17-1179

IN THE

Supreme Court of the United States

AMERICAN ECONOMY INSURANCE COMPANY, ET AL.,
Petitioners,

v.

NEW YORK, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
DAVID M. LEHN
JOHN B. SPRANGERS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE COURT OF APPEALS ERRONEOUSLY FOUND THE AMENDMENT CONSTITUTIONAL 3

II. THE QUESTIONS PRESENTED ARE TOO IMPORTANT TO LEAVE LOWER COURTS WITHOUT CLEAR GUIDANCE 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Page(s)

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 5, 11

Berlinski v. *Congregation Emanuel of City of New York*, 289 N.Y.S.2d 503 (App. Div. 1968) 7

Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) 9

Casey v. *Hinkle Iron Works*, 87 N.E.2d 419 (N.Y. 1949) 6

De Mayo v. *Rensselaer Polytech Institute*, 547 N.E.2d 1157 (N.Y. 1989) 6, 7

Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998) 1, 11, 12

Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) 8

Ford v. *Georgia*, 498 U.S. 411 (1991) 3

General Motors Corp. v. *Romein*, 503 U.S. 181 (1992) 3, 6, 11

Harleysville Mutual Insurance Co. v. *State*, 736 S.E.2d 651 (S.C. 2012) 11

Indiana ex rel. Anderson v. *Brand*, 303 U.S. 95 (1938) 3

Lingle v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) 9, 10

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 9

Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 3

TABLE OF AUTHORITIES—Continued

Page(s)

NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958) 3

Omnia Commercial Co. v. *United States*, 261 U.S. 502 (1923) 9

Penn Central Transportation Co. v. *New York City*, 438 U.S. 104 (1978).... 10-

Pension Benefit Guaranty Corp. v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 8

Radio Station WOW v. *Johnson*, 326 U.S. 120 (1945) 3

Railroad Retirement Board v. *Alton Railroad Co.*, 295 U.S. 330 (1935) 9

Society Insurance v. *Labor & Industry Review Commission*, 786 N.W.2d 385 (Wis. 2010).... 5, 11

U.S. Fidelity & Guaranty Co. v. *McKeithen*, 226 F.3d 412 (5th Cir. 2000) 12

Williamson v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) 9

Yee v. *City of Escondido*, 503 U.S. 519 (1992).... 10

STATUTORY PROVISIONS

N.Y. Workers' Compensation Law

§10.... 4

§25-a 1, 5, 6, 7, 10

IN THE

Supreme Court of the United States

No. 17-1179

AMERICAN ECONOMY INSURANCE COMPANY, ET AL.,
Petitioners,

v.

NEW YORK, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

Ever since a majority of this Court agreed in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), that legislatively imposing significant backward-looking liability on a limited class violated the Constitution, but disagreed on the rationale, confusion has reigned in the lower courts regarding the circumstances under which a legislature may constitutionally impose new liabilities under preexisting contracts. This case presents an excellent vehicle to provide clarity regarding that issue.

After eight decades, New York closed its Fund for Reopened Cases in 2013 and assigned insurance carriers liability for claims that Section 25-a of the Workers' Compensation Law ("WCL") had long made the Fund's exclusive responsibility. That saddled carriers with a staggering new liability under policies written long ago—even though those State-approved policies ex-

pressly limited carriers' obligations to benefits required under the WCL "in effect during the policy period," and even though the State-approved premiums for those policies indisputably (and understandably) did not compensate carriers for Section 25-a liability. The legislative history shows this amendment was premised on an obvious and indefensible falsehood—that the financing scheme for the Fund was resulting in double charges for insured employers and a "windfall" for carriers.

The New York Court of Appeals incorrectly concluded that this expansion of liability was constitutional. Its decision diverges from the judgment in *Eastern Enterprises* and conflicts with decisions of the Fifth Circuit and several state high courts striking down similar amendments to state insurance laws.

Echoing the Court of Appeals' analysis, the State's opposition is replete with mischaracterizations of the plain text of the policies and the WCL, as well of petitioners' claims. As explained below, these mischaracterizations are essential to the State's defense of the Court of Appeals' decision and the State's effort to deny that this case implicates confusion in the lower courts.

The State's main objection to certiorari is that this case concerns a statutory scheme and history that may not be identical to those at issue in future cases. That is no reason to deny certiorari. This Court's leading cases under the Contracts, Takings, and Due Process Clauses have typically involved unique facts or agreements, but nevertheless have provided—just as this case could provide—crucial guidance regarding fundamental constitutional principles.

I. THE COURT OF APPEALS ERRONEOUSLY FOUND THE AMENDMENT CONSTITUTIONAL

A. The State defends the Court of Appeals' conclusion that the Amendment did not violate the Contracts Clause by urging this Court to defer to that court's interpretation of petitioners' policies. This Court "accord[s] respectful consideration and great weight to the views of the state's highest court but, in order that the constitutional mandate 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. This involves an appraisal of the statutes of the State and the decisions of its courts." *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938).[1] Moreover, this Court does not let state-court rulings that, like the decision below, unaccountably depart from existing state law "thwart review in this Court" of "federal constitutional rights." *Ford* v. *Georgia*, 498 U.S. 411, 423 (1991) (quoting *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958)); *see also Radio Station WOW* v. *Johnson*, 326 U.S. 120, 129 (1945) (Supreme Court will "consider the correctness of the non-federal ground" if it is "an obvious subterfuge to evade consideration of a federal issue").[2]

---

[1] The State says (at 14) this Court "will not disturb a state court's contract interpretation unless it is 'manifestly wrong.'" This Court's recent jurisprudence has not used that formulation. *See, e.g.*, *General Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992). Nonetheless the Court of Appeals' analysis of the policies and state law was manifestly wrong.

[2] *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), *see* Opp. 15, did not involve a Contracts Clause claim, or the contention that the state

The Court of Appeals held that the Amendment did not impair petitioners' policies. The State argues (at 13-14) that this conclusion was correct because the policies "contained no provision that entitled petitioners to transfer their contractual liabilities to the Fund or that conditioned petitioners' obligations to their insureds on the Fund's acceptance of such transfers" or that "limited petitioners' liability based on the Fund's operation." *Accord* Pet. App. 18a. The absence of such terms is irrelevant, however, because that is not how the Amendment impaired petitioners' contracts. Petitioners' contention has always been that the Amendment impaired their agreement to cover only benefits that employers were required to pay, which did not include Section 25-a claims.

To counter *that* claim, the State relies on various misrepresentations of petitioners' policies and the law. It declares (at 3) that carriers are "contractually and statutorily obligated to cover any change in benefits." Similarly, it asserts (at 14), quoting the Court of Appeals, that given the phrase "'all benefits required of their insureds,'" the policies were "broad enough to 'obligate [petitioners] to cover the costs of liability on any reopened case that otherwise would have qualified for transfer to the Fund.'" The policies did not say that. They explicitly covered only the "benefits required" by the WCL "in effect during the policy period," Pet. App. 93a-94a, and at that time the WCL excluded Section 25-a cases from employers' responsibility to pay benefits, WCL §10(1) ("except as otherwise provided in section twenty-five-a").

---

court's reading of state law was manifestly wrong or would thwart review of a federal constitutional claim.

Notably, the State does not deny that the State-approved 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." Pet. App. 18a; *see* Pet. 10-12. Indeed, state law barred that, specifying that Fund assessments "shall not constitute an element of loss for the purpose of establishing rates for workers' compensation insurance." WCL §25-a(3). Nor does the State dispute NYCIRB's determination that the Amendment imposes an "unfunded liability" of $1.1-1.6 billion on New York carriers. Pet. App. 8a.[3]

The State notes (at 14) that the policies did not explicitly "mention claims in reopened cases." That is irrelevant. The just-recited language defined the liability assumed by carriers and put Section 25-a claims outside those boundaries. By expanding the boundaries to include Section 25-a cases, the Amendment substantially impaired petitioners' contracts. *See Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 240 (1978) (law "substantially altered [contractual] relationships by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake"); *Society Ins.* v. *Labor & Indus. Rev. Comm'n*, 786 N.W.2d 385, 404 (Wis. 2010) (increasing the "extent of an insurer's liability" constitutes substantial impairment).

---

[3] The State incorrectly asserts (at 5) that the recent increase in the Fund's expenses "was borne by employers in the form of higher insurance premiums." As it acknowledges on the same page, the "Fund was funded by assessments" separate from premiums.

The State's invocation of *General Motors* is misplaced. There, this Court held that a state workers' compensation statute enacted after formation of the automakers' employment contracts was not an implied term of those contracts, and therefore a later legislative amendment did not impair the contracts. 503 U.S. at 187-189. By contrast, the Amendment here impairs an *express* contractual limitation on liability—to benefits employers were required to pay under the WCL "in effect during the policy period." Pet. App. 93a.

The State presents a fundamentally different—and wrong—conception of the pre-Amendment workers' compensation system. It says (at 1, 4) that "carriers could apply to transfer their liabilities from workers'-compensation policies to the Fund," and similarly, that "[r]ather than pay claims in reopened cases themselves, carriers could apply to transfer the case to the Fund." The suggestion that carriers had liability for Section 25-a cases until they elected to transfer the case to the Fund is false.

Before the Amendment, the WCL declared, and courts recognized, that the Fund had "mandatory," exclusive liability for claims in cases meeting Section 25-a's prerequisites. Pet. App. 4a. Section 25-a provided that the Fund "shall" be liable for valid claims in cases meeting Section 25-a's requirements. WCL §25-a(1). The Court of Appeals explained in 1989, as it had in 1949: "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." *De Mayo* v. *Rensselaer Polytech Inst.*, 547 N.E.2d 1157, 1159 (N.Y. 1989); *accord Casey* v. *Hinkle Iron Works*, 87 N.E.2d 419, 421 (N.Y. 1949). Thus, once sufficient time had passed, the Workers' Compensation Board could "not *as a matter of*

law impose liability on the employer or its insurance carrier"; it was statutorily required to impose it on the Fund. *Berlinski* v. *Congregation Emanuel of City of New York*, 289 N.Y.S.2d 503, 506 (App. Div. 1968) (emphasis added), *cited approvingly in De Mayo*, 547 N.E.2d at 1159.

The State stresses (at 4) that "[t]ransfer to the Fund was not automatic," referring to the process of determining whether Section 25-a's three objective "criteria for transfer" were present for a given case: the case was "closed," at least seven years had passed since injury, and at least three years had passed since last payment. WCL §25-a(1). But the possibility that a carrier might incorrectly claim a case met those prerequisites is irrelevant here. Petitioners' argument does not concern whether any particular cases met the prerequisites; it concerns who is responsible in cases that *meet* the prerequisites. Before the Amendment, New York law placed that responsibility on the Fund and ultimately employers; the Amendment changed that and placed it on carriers.

The State asserts (at 5) that before the Amendment, "carriers were … permitted to recoup the cost of [the] assessments [for the Fund] by charging their insureds a surcharge on premium" and that employers "ended up paying" for the Fund. But it was not happenstance or grace that led employers to pay; it was their statutory obligation. The WCL *required* carriers to recoup assessments from employers. Pet. 11.

Finally, the State does not deny that the Amendment will not survive review under the Contracts Clause if this Court determines that the Amendment has substantially impaired petitioners' policies; the State does not even argue that it serves a "significant

and legitimate public purpose." *Energy Reserves Grp., Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983).

In sum, the Court of Appeals' conclusion that the Amendment did not violate the Contracts Clause (like the State's defense of that conclusion) rests on mischaracterizations of the law and of petitioners' policies. Petitioners do not ask this Court to grant the petition to correct such errors. But it is necessary—and wholly appropriate—for this Court to do so to properly resolve the important constitutional questions presented. Because this Court did not have occasion to address the Contracts Clause directly in *Eastern Enterprises* since the law at issue was federal, it is particularly important that the Court use this case to provide guidance regarding the force of that clause regarding similar impositions of backward-looking liability.

B. The State also maintains (at 17-18) that the Amendment does not violate the Due Process Clause. Yet it does not deny that the legislature's actual rationale for the Amendment—the elimination of a perceived double charge on employers and windfall for carriers for Section 25-a cases, *see* Pet. App. 6a—was totally illegitimate.

The State instead cites (at 17) the Court of Appeals' two made-up rationales: efficiency gains would be realized by having carriers administer Section 25-a cases, and the Amendment would save employers hundreds of millions of dollars because they would no longer have to pay Fund assessments.

Those rationales cannot justify the Amendment's retroactivity even under the rational-basis standard. *See Pension Ben. Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (retroactivity must be supported

by rational basis). Reducing *administrative* costs to employers cannot justify eliminating *all liability* for employers; the administrative-cost-savings rationale applies only to claims arising under *future* policies. *See* Pet. 26. And the State does not deny that without the double charge claimed by the legislature, the elimination-of-assessments rationale is just a naked transfer of wealth from carriers to their employer-insureds. This Court's longstanding precedent indicates that naked wealth transfers are not merely "unwise" or "improvident," *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); they are "against all reason and justice," *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 388 (1798); *accord Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935), and thus fail even rational-basis review.

C. None of the State's arguments regarding petitioners' takings claim has merit.

First, quoting *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 511 (1923), the State contends (at 16) that a government takes a "contractual interest" only if it "'appropriated' the contract—i.e., acquired 'the obligation or the right to enforce' it." That is wrong. In that 95-year-old case, the Court held that the government's destruction of the contract's value—by requisitioning steel that was to be supplied under the contract—was not a taking because the Takings Clause had "always been understood as referring only to a direct appropriation." 261 U.S. at 510-511 (quotation marks omitted). That is not how the Clause is understood today. A "direct government appropriation" may still be the "paradigmatic taking," but more recent precedent recognizes other forms. *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). The total-loss rule articulated in *Lucas* v. *South Carolina Coastal Coun-*

cil, 505 U.S. 1003, 1019 (1992), and the multi-factor test articulated in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978)—and invoked here, Pet. 28—"aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property." *Lingle*, 544 U.S. at 538-539. The State cannot disregard this precedent.[4]

Second, the State asserts (at 16) that petitioners waived their takings argument. That depends on another mischaracterization. As the State acknowledges (at 8, 16), petitioners' takings theory below was that the Amendment diminished the contracts' value by abrogating an express contractual limitation on liability, which unforeseeably imposed substantial new liability. N.Y. Ct. App. Resps.' Br. 52-55. That is the same theory petitioners have presented here. Pet. 28-30. Regardless, "[h]aving raised a taking claim in the state courts, … petitioners could … formulate[] any argument they liked in support of that claim here." *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

Third, the State maintains (at 17) that petitioners' claim fails "because the Fund's closure … merely preserved petitioners' pre-existing contractual liability." As explained above, that is plainly incorrect.

---

[4] Nonetheless, the Amendment *is* a direct appropriation of petitioners' contractual right not to pay benefits in cases meeting Section 25-a's prerequisites.

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

The State opposes certiorari because this case involves "unique circumstances." Opp. 9-10. Yet, the same can be said of many leading cases under the Contracts, Takings, and Due Process Clauses. In *Eastern Enterprises*, for example, this Court addressed an as-applied challenge to the Coal Act based on the regulated entity's participation in the industry and prior benefit plans. 524 U.S. at 534-537 (plurality op.); *see also General Motors*, 503 U.S. 181 (addressing constitutionality of Michigan statute as applied to employment contracts of certain automakers); *Allied Structural Steel*, 438 U.S. 234 (addressing constitutionality of Minnesota statute as applied to pension plan of 30-employee company). Those cases deserved this Court's attention because they implicated important questions regarding constitutional principles that would be applied in future cases. The same is true here.

The State also errs in denying that the cases discussed in Part II.A of the petition reflect division over a common constitutional question. First, the State argues (at 11) that unlike the Court of Appeals here, the courts in *Harleysville Mutual Insurance Co.* v. *State*, 736 S.E.2d 651 (S.C. 2012), and *Society Insurance* v. *Labor & Industry Review Commission*, 786 N.W.2d 385 (Wis. 2010), held that the contracts at issue had been impaired. But the State does not dispute that those cases addressed the constitutionality of an expansion of liability under existing insurance contracts. Thus, the State has merely shown that those courts reached different *results*. That is the essence of a split warranting certiorari.

Nor is the State's attempt to distinguish *U.S. Fidelity & Guaranty Co.* v. *McKeithen*, 226 F.3d 412 (5th Cir. 2000), meritorious. The State notes (at 11) that the Fifth Circuit "invalidated a statute that retroactively imposed *new* financial obligations," but that is exactly what petitioners claim the Amendment did. The Court of Appeals reached a different conclusion, as explained, only by disregarding the policies' terms, the WCL's text, and its own precedent.

Finally, the State's attempt (at 12) to minimize the confusion engendered by *Eastern Enterprises* is unavailing. The import of that case is not limited to the question whether legislation "impos[ing] an obligation to pay money without appropriating a 'specific property interest'" effects a taking. Opp. 12. It also involves the broader question whether "legislation … impos[ing] severe retroactive liability on a limited class of parties that could not have anticipated the liability" was unconstitutional. 524 U.S. at 528-529. Because a majority of this Court agreed that such legislation was invalid but did not agree on a rationale, it left lower courts confused as to when analogous laws are valid. Indeed, the Court's fractured reasoning has led courts—including the Court of Appeals here—to combine *Eastern Enterprises*' dissenting opinions to reach the opposite result reached in that case. Given the Amendment's staggering cost to carriers, and the fact that the Amendment upset reasonable expectations grounded in a nearly century-old statutory scheme, this case is an ideal vehicle to clarify *Eastern Enterprises*.

CONCLUSION

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

Respectfully submitted.

SETH P. WAXMAN
Counsel of Record
DAVID M. LEHN
JOHN B. SPRANGERS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

MAY 2018