No. 17-1179

IN THE
Supreme Court of the United States

AMERICAN ECONOMY INSURANCE CO., *et al.*,

Petitioners,

v.

THE STATE OF NEW YORK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Date: March 26, 2018

QUESTIONS PRESENTED

1. Whether an amendment to state law violates the Contracts Clause of the U.S. Constitution, Art. I, § 10, 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, under the circumstances described in Question #1, an amendment to state law violates the Due Process Clause of the U.S. Constitution, Amend. XIV.

3. Whether, under the circumstances described in Question #1, an amendment to state law violates the Takings Clause of the U.S. Constitution, Amend. V.

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INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters nationwide.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in this Court in cases involving claims arising under Article I's Contracts Clause, *see, e.g., Deere & Co. v. New Hampshire*, *cert. denied*, 137 S. Ct. 38 (2016); and the Fifth Amendment's Takings Clause. *See. e.g.*, *Horne v. U.S. Dep't of Agriculture*, 135 S. Ct. 2419 (2015).

WLF is concerned that the decision below authorizes governments to retroactively impose substantial monetary obligations on private entities, on the basis of contracts entered into with the understanding that those entities would *not* incur those financial obligations. Such retroactive legislation is inconsistent with the Framers' intent to protect contractual and property rights from indiscriminate government interference.

Petitioners have demonstrated that review is warranted to resolve the conflict between the decision below and the decisions of other state and federal courts. WLF writes separately to urge that review is

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days before filing this brief, WLF notified counsel for Respondents of its intent to file. All parties have consented to the filing.

also warranted to resolve the conflict between the holding below and this Court's decisions.

STATEMENT OF THE CASE

Before 2013, New York law provided that workers' compensation claims were to be administered and financed by a special state-controlled fund (the "Fund") if the claims arose in connection with a case that was re-opened after having been closed for many years.[2] There are no disputed facts about the operation of the Fund: (1) it was financed through special annual employer assessments, which were passed through from employers to their insurance carriers and then to the Fund; (2) employers were not required to obtain workers' compensation insurance coverage for cases satisfying Section 25-a's prerequisites; and (3) the New York-approved premiums paid by employers for their insurance did not account for payments made to cover Section 25-a claims.[3]

New York's annual assessments ensured that the Fund remained solvent. But some New York employers were unhappy with the ever-increasing costs of administering Section 25-a claims and the resulting increases in their annual assessments. The New York

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[2] Such re-opened claims are known as "Section 25-a claims."

[3] As the court below recognized, New York created the Fund "to protect insurance carriers and employers from uncertain future liability costs they might incur in these 'stale' cases," while simultaneously ensuring that funds would be available to pay all meritorious claims. Pet. App. 2a.

legislature responded in 2013 by adopting a statute that closed the Fund to new cases beginning on January 1, 2014, and directed that Section 25-a claims would thereafter be covered under an employer's workers' compensation insurance policy.

The statutory amendment created no difficulty for insurance carriers with respect to new policies; they could adjust their premiums to account for the cost of covering Section 25-a claims arising under those policies. Indeed, New York's Department of Financial Services (DFS) approved a 4.5% increase in insurance premiums (for all policies issued on or after October 1, 2013) to cover increased costs attributable to insurers' new responsibility for Section 25-a claims. Pet. App. 7a. But insurance carriers face massive losses on policies written before that date because DFS-approved premiums for those policies did not take account of the costs of covering future Section 25-a claims. The New York Compensation Insurance Rating Board has determined that the insurance industry's "unfunded liability" for future Section 25-a claims arising under policies written before October 1, 2013 is between $1.1 and $1.6 billion.[4] Losses to Petitioners alone amount to $62 million; they have booked a $62 million increase in their loss reserves to cover the anticipated costs of covering Section 25-a claims arising under preexisting policies. Pet. 12.

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[4] Correspondingly, New York employers are receiving a massive windfall as a result of the 2013 legislation. The statute relieves them of their prior obligation to pay assessments to the Fund to cover the costs of Section 25-a claims arising under policies written before October 2013—assessments that they otherwise would have been paying for years to come.

Petitioners filed suit in state court, alleging that the retroactive impact of the 2013 amendment to Workers' Compensation Law § 25-a violated their constitutional rights. The intermediate appellate court agreed, finding that the amendment retroactively imposed significant obligations on Petitioners in violation of their rights under the Contracts Clause of the U.S. Constitution, Art. I, § 10, and the Takings Clause of the Fifth Amendment. Pet. App. 29a-40a.

The New York Court of Appeals reversed and directed that judgment be entered in favor of Respondents. *Id.* 1a-28a. The court rejected the Contracts Clause claim, concluding that parties to workers' compensation insurance contracts "assume the risk of legislative change" and that "there is no provision of [Petitioners'] 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." *Id.* 18a. The court's Contracts Clause holding did not rely on the legislature's inaccurate claim (in its "Statement in Support" of the 2013 statute) that "the premiums [carriers] have charged already cover this liability [for Section 25-a claims]." Pet. App. 88a. To the contrary, the court explicitly recognized that premiums authorized by DFS did *not* account for such claims. *Id.* 7a.

The court also concluded that Petitioners could not maintain a Takings Clause claim because they could not point to the deprivation of a "vested property interest"; and that "a mere obligation to pay money," when unaccompanied by such a deprivation, cannot constitute a taking. Id. 21a-25a. It held that "the statutory language providing that the Fund would

accept the costs of liability on reopened cases under certain specific circumstances did not provide [Petitioners] with any vested rights in the Fund's continued acceptance of reopened cases." *Id.* 24a.

Finally, the court rejected Petitioners' assertion that the retroactive imposition of substantial monetary obligations violated their rights under the Due Process Clause. *Id.* 25a-27a. It held that the 2013 statute survived the "rational basis scrutiny" routinely applied to retroactive economic legislation, concluding that the statute served two valid purposes: (1) significantly reducing the premiums New York businesses would be required to pay in connection with Section 25-a claims asserted with respect to injuries initially incurred before October 2013; and (2) increasing administrative efficiency—because the legislature might rationally have concluded that Section 25-a claims could be administered more efficiently by insurance carriers than by state employees. *Ibid.* The legislature itself had not cited the efficiency rationale.

SUMMARY OF ARGUMENT

The Petition raises issues of exceptional importance. The court below upheld the authority of New York's legislature to retroactively impose a massive financial obligation on insurance carriers on the basis of contracts entered into with the understanding that those entities would *not* incur those financial obligations. As Petitioners have demonstrated, the court's rejection of their constitutional challenge to the legislature's actions conflicts sharply with the decisions of other state and federal courts. WLF writes separately to urge that

review is also warranted to resolve the conflict between the holding below and the decisions of this Court.

The Contracts Clause expressly bars States from passing "any ... Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10, cl. 1. Although twentieth-century case law cut back on the scope of the clause, the Court has repeatedly confirmed that the Contracts Clause "remains part of the Constitution" and is far from "a dead letter." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978). Whether a State's retroactive adjustment of contractual rights violates the Contracts Clause generally hinges on whether the adjustment is imposed "upon reasonable conditions" and is "of a character appropriate to the public purpose justifying its adoption." *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977).

Perhaps sensing that the 2013 amendment could not survive a "reasonable conditions" analysis, the court below pretermitted that analysis by declaring that the statute did not impair *any* of Petitioners' contractual rights. Pet. App. 18a. According to the court, nothing in the carriers' contracts protected them against changes in the law, and the risk that such changes would lead to massive, unanticipated losses is "a risk inherent in the insurance market." *Ibid.*

That holding was not merely a misreading of the insurance contracts at issue. It also directly conflicts with this Court's decisions clarifying what constitutes an "impair[ment]" of contractual rights. As the Court has explained, "changes in the laws that make a contract legally enforceable may trigger Contracts Clause scrutiny if they impair the obligation of pre-

existing contracts, even if they do not alter any of the contracts' bargained for terms." *General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992). Had an employer sued an insurance carrier before 2013 for the cost of covering a claim that met the State's definition of a Section 25-a claim, the carrier would have been entitled to dismissal of the lawsuit. Payment of such costs were not contemplated under the then-existing Workers' Compensation Law and thus were not costs that carriers had contractually committed to pay. Yet, as a result of the 2013 amendment, New York now requires carriers to pay such claims. Under this Court's decisions, state-law changes that impose substantial new liabilities on a contracting party are a classic example of an "impair[ment]" of contractual rights. The holding of the court below directly conflicts with those decisions and warrants this Court's review.

Review is also warranted on the takings and due process claims. Regardless whether one concludes that Petitioners' claims are properly examined under the Fifth Amendment's Takings Clause or the Due Process Clause, this Court's decisions indicate that retroactive imposition of massive financial obligations of the sort imposed here cannot withstand constitutional scrutiny. Review is warranted to resolve the conflict between those decisions and the decision below—which held that the Takings Clause is inapplicable and that the due process claims can be brushed aside under a highly deferential standard of review.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court held that the federal government violated the constitutional rights of a former coal

producer when it imposed a severe retroactive liability on the producer (to pay for healthcare benefits for retired coal workers, benefits that the company had never agreed to pay).

The justices could not agree on the precise constitutional basis for striking down the government's actions. Four justices based the ruling on the Takings Clause. 524 U.S. at 538 (plurality opinion). A fifth justice, Justice Kennedy, concluded that the retroactive liability "violated the proper bounds of settled due process principles." *Id.* at 551 (Kennedy, J., concurring in the judgment and dissenting in part). Importantly, however, all five justices agreed on the salient features of the government's action that caused it to be unconstitutional: (1) the financial imposition was both severe ($50 million) and retroactive; (2) it interfered with the company's reasonable investment-backed expectations; and (3) it was not based on any previous financial commitments by the company. *Id.* at 529, 532, 537 (plurality); *id.* at 549-50 (Kennedy, J.).

The decision below cannot be squared with *Eastern Enterprises*. The court held that Petitioners' Takings Clause claim could not survive what it viewed as a "threshold step" for such claims: a showing that the government has confiscated or destroyed a "vested property interest," not simply imposed a monetary exaction. Pet. App. 22a. But this Court has never adopted a "vested property interest" prerequisite for Takings Clause claims, and the four-justice *Eastern Enterprises* plurality concluded that no such prerequisite exists. 524 U.S. at 528-29 (stating that legislation may be an unconstitutional taking "if it imposes 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.").

The Court of Appeals rejected Petitioners' due process claims without referencing *Eastern Enterprises*. Pet. App. 25a-28a. Moreover, it did so by applying a lax "rational basis scrutiny" to the 2013 statute. *Id.* 26a; *see id.* 27a ("A challenged statute will survive rational basis review so long as it is rationally related to *any conceivable* legitimate State purpose.") (emphasis in original).[5] Nowhere in either its takings or due process analysis did the court attempt to explain how its holding could be reconciled with *Eastern Enterprises*'s holding that a highly analogous financial exaction violated constitutional rights.

Indeed, the court pointed to *no* factual distinctions between this case and *Eastern Enterprises*, in which this Court overturned a retroactive government exaction that it characterized as "quite unusual" and "implicat[ing] fundamental principles of fairness," *Eastern Enterprises*, 524 U.S. at 537 (plurality), and as involving "the most egregious of circumstances." *Id.* at 550 (Kennedy, J.). Review is warranted to resolve the sharp conflict between the

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[5] Moreover, the court conceded that the legislature premised its 2013 statute on a factually incorrect finding, and then identified, as a purpose that the State "conceivabl[y]" could have harbored, a desire to transfer Section 25-a proceedings to entities that could handle cases "more efficiently" than the State. Pet. App. 27a & n.6. But it failed to explain why an efficiency rationale could justify retroactive imposition of a massive financial liability.

decision below and *Eastern Enterprises*.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CONTRACTS CLAUSE DECISIONS

The Contracts Clause bars States from passing "any ... Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10, cl. 1. The court below waved off any serious analysis of Petitioners' Contracts Clause claim, ruling that the challenged 2013 amendment had not impaired any of Petitioners' rights under their contracts with their insureds. That ruling was based on a definition of "impair" that sharply conflicts with this Court's Contracts Clause decisions.

Establishing a Contracts Clause violation requires a litigant to demonstrate a substantial impairment of a contractual relationship. *Spannaus*, 438 U.S. at 244. If a substantial impairment is shown, then the State may seek to justify its actions by demonstrating that they have a "significant and legitimate" public purpose, such as "the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411-12 (1983). If the State can satisfy that requirement, resolution of the constitutional question turns on whether its adjustment of contractual rights is imposed "upon reasonable conditions" and is "of a character appropriate to the public purpose justifying its adoption." *U.S. Trust*, 431 U.S. at 22.

Petitioners have amply demonstrated that New

York has failed to satisfy the "reasonable conditions" and "appropriate to the public purpose" requirements. Pet. 22-24.[6] The Court of Appeals avoided having to reach the issue by declaring that the 2013 amendment did not impair any of Petitioners' contractual rights. That declaration was not only a gross misreading of the contracts; it also directly conflicts with this Court's understanding of what it means to "impair" a contract within the meaning of the Contracts Clause.

Petitioners' contracts with their insureds during pre-2013 policy periods stated, "We will pay promptly when due the benefits required of you by the workers compensation law." Pet. App. 94a. "Workers Compensation Law" was defined as including "any amendment" to New York's Workers Compensation Law "which are in effect during the policy period." *Id.* 93a. The insurance contracts had one-year policy periods; thus, pre-2013 contracts committed Petitioners to paying "the benefits required of [the insureds]"

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[6] The Court of Appeals posited two appropriate rationales for New York's legislation: reducing insurance costs for New York employers and increasing administrative efficiency. Pet. App. 25a-27a. Neither rationale can survive Contracts Clause scrutiny. While the court may be correct that carriers can administer Section 25-a claims more efficiently than the State, that assessment provides no basis for imposing massive liabilities on carriers. The State could have transferred administrative responsibilities to carriers while still requiring employers to pay the cost of Section 25-a claims. And while the legislation undoubtedly was a boon to favored in-state businesses, such naked wealth transfers from disfavored parties to favored parties have never been deemed a sufficient rationale for impairing contractual rights. Cass Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984).

under New York law (including New York Workers Compensation Law § 25-a) as it existed before 2013, *id.* 57a-66a, not under the law as amended in 2013. The pre-2013 version of § 25-a(1) expressly absolved insurers of liability for re-opened claims meeting the requirements set forth in that provision; it stated that "if an award is made" in connection with such re-opened claims, "it shall be against the special fund provided by this section." *Id.* 57a.

Under New York Workers' Compensation Law as amended in 2013, insurance carriers are now responsible for paying Section 25-a claims based on any injury or death occurring during the policy period, even for policies issued before October 2013. Notwithstanding that the 2013 amendment imposed a massive financial obligation on carriers that they had not previously borne and that their pre-October 2013 contracts did not agree to bear, the Court of Appeals held that Petitioners' "contracts with their insureds have not been impaired by the amendment." Pet. App. 18a. The court reasoned that Petitioners had agreed to pay all Section 25-a claims that were not accepted by the Fund and asserted that Petitioners's Contracts Clause claim "confuses their legal *liability* for reopened cases with their ability to transfer the *costs* of that liability." *Id.* 17a (emphasis in original).

As the Petition explains in more detail, the Court of Appeals' interpretation of the contracts is implausible. The contracts do not merely provide that Petitioners will transfer the costs of Section 25-a claims when the Fund, in its discretion, agrees to accept such claims. Rather, they state unequivocally that Petitioners will pay only those claims for which

the employer is responsible under then-existing Workers' Compensation Law, and the pre-2013 version of § 25-a(1) stated that claims meeting the requirements of that section were the responsibility of the Fund.[7]

Moreover, the decision below is not merely a misreading of the insurance contracts. It also directly conflicts with this Court's decisions regarding what constitutes an "impair[ment]" of contracts. Even if the Court of Appeals were correct that the 2013 amendment merely eliminated Petitioners' contractual rights "to transfer the costs" of its legal liability (as opposed to eliminating their contractual exemption from legal liability), that effect on their contractual rights would nonetheless constitute an "impair[ment]" for Contracts Clause purposes. As this Court has explained, "changes in the laws that make a contract legally enforceable may trigger Contracts Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter any of the contracts' bargained for terms." *Romein*, 503 U.S. at 189. By amending the Workers Compensation Law in a manner that for the first time permits employers to sue carriers to require them to pay the costs of claims meeting the

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[7] To the extent that the Court of Appeals based its interpretation of the contracts on newly adopted principles of state contract law, this Court has never permitted *ad hoc* reinterpretations of state law to trump the Contracts Clause. *See, e.g., Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938). As the Court has repeatedly stated in analogous cases arising under the Takings Clause, although most property rights exist by virtue of state law, "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980).

criteria set forth in Section 25-a, New York has "impaired" Petitioners' contracts, even if the State chooses to characterize Petitioners' pre-existing rights as merely rights "to transfer the costs" of the claims.

The Court of Appeals's contrary conclusion is incorrect as a matter of law, even if one accepts the Court of Appeals's contractual interpretation. If there were, in fact, no impairment, then employers would have been as entitled prior to 2013 as they were after 2013 to sue carriers to demand payment of Section 25-a claims; while carriers could then have filed third-party claims against the Fund seeking indemnification, they would not have had a defense to the employers' lawsuits. But New York has never asserted that employers prior to 2013 were entitled to file such lawsuits, nor are there any reported New York decisions upholding such a right in cases involving claims meeting the criteria established by Section 25-a.

The decision below conflicts with this Court's decisions, which much more broadly define "impair[ment]" of a contract. The Court has concluded that state law can impair a contract even when the statute does not directly alter the terms under which one party must pay another. Thus, for example, *U.S. Trust* held that a New Jersey statute impaired the contractual rights of bondholders when it repealed a bond covenant governing the borrowing authority of the Port Authority of New York and New Jersey, even though the statute did not limit the plaintiffs' rights to demand payments on the bonds. The Court explained that the covenant made it more likely that the Port Authority would have sufficient future resources to repay its bonds and that its repeal "impaired the

obligation of the States' contract" because repeal reduced the bondholders' security. 431 U.S. at 19. Similarly, the Court held that a Pennsylvania statute imposing limits on mining that could cause subsidence damage to buildings located above the mines "operate[d] as a substantial impairment" of contracts that mining companies had entered into with surface owners—whereby the owners had agreed to waive damage claims. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504 (1987). The Court concluded that the statute impaired the contracts even though the statute did not reference them and did not grant any of the property owners a right to sue the mining companies for damages. *Id.* at 476-77 & n.6.

If the Court of Appeals's definition of "impair" is accepted, the Contracts Clause will be rendered a "dead letter." *Spannaus*, 438 U.S. at 241. Review is warranted to resolve the conflict between the decision below and this Court's Contracts Clause decisions.

II. REVIEW IS WARRANTED TO VINDICATE THE FIFTH AND FOURTEENTH AMENDMENTS' LIMITS ON THE GOVERNMENT'S RETROACTIVE IMPOSITION OF LIABILITY

This Court has steadfastly insisted upon certain elementary Fifth and Fourteenth Amendment principles. Ever since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the Court's regulatory takings jurisprudence has rested on the understanding that the Fifth Amendment is violated whenever an exercise of the police power goes "too far." The Court's subsequent case law has sought to explicate the meaning of "too far" by instructing lower

courts how to carefully draw that line.[8] Under *Eastern Enterprises*, a reviewing court must apply a three-factor test to ensure that retroactive liability is reasonably foreseeable and proportionate to the party's conduct. 524 U.S. at 523-24 (plurality). Yet, the Court of Appeals never seriously grappled with Petitioners' takings and due process claims.

While "it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another," *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986), naked wealth transfers—that is, robbing Peter to pay Paul—are strictly prohibited. *See, e.g., R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 349 (1935) (invalidating law that "constitutes a naked appropriation of private property" because it "denies due process by taking the property of one and bestowing it upon another").

Likewise, "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled expectations." *Romein*, 503 U.S. at 191. That is

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[8] Justice Stevens understood the Court's holding in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), to rest on a unified view of property protections afforded by the Takings Clause and Due Process Clauses: "In his opinion for the Court, Mr. Justice Sutherland fused the two express constitutional restrictions on any state interference with private property—that property shall not be taken without due process nor for a public purpose without just compensation—into a single standard." *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring).

why "retroactive aspects of legislation ... must meet the test of due process." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

At bottom, the retroactive application of liability offends the Fifth and Fourteenth Amendments whenever the result is oppressive, patently unfair, and unreasonable. Those core concerns are all implicated in this case. But if the New York legislature may use its police power to impose retroactive liability on a politically disfavored group (workers' compensation insurance carriers) to benefit a politically favored group (their employer insureds), state legislatures everywhere will be able to erode private property rights while evading normal political checks. Given the gravity of the constitutional protections at stake here, the decision below cries out for review.

A. The Judgment Below Is Inconsistent with *Eastern Enterprises* Because the Court Failed to Apply The Important Factors Set Forth by This Court

Certiorari is warranted because the Court of Appeals's decision conflicts with *Eastern Enterprises*, which makes clear that the Fifth Amendment is violated where, as here, a law imposes "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." 524 U.S. at 528-29 (plurality). *Eastern Enterprises* requires a reviewing court to apply a three-factor test to ensure that retroactive liability is reasonably foreseeable and proportionate to the party's conduct. *Id*. at 523-24. Yet the Court of Appeals never

undertook that constitutionally mandated inquiry.

In *Eastern Enterprises*, the Court held that the Fifth Amendment did not allow the Coal Industry Retiree Health Benefit Act of 1992 to be retroactively applied to require a former coal-mining company to pay health benefits to over 1,000 former employees of that industry. Although no single opinion commanded a majority of the Court, Justice O'Connor (writing for four justices) distilled from this Court's Fifth Amendment precedent three factors of "particular significance" to the Takings Clause inquiry: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." 524 U.S. at 523-24.

Concurring in the judgment, Justice Kennedy embraced similar reasoning, though he would have framed the inquiry in terms of the Due Process Clause. He emphasized that such laws are constitutional only if the parties on whom liability is retroactively imposed are actually responsible for the costs they are being asked to bear. *Id.* at 539 (Kennedy, J.).

The decision below conflicts with *Eastern Enterprises* because the Court of Appeals made *no* attempt to evaluate the crucial Fifth Amendment factors that informed this Court's judgment. As Petitioners have demonstrated, evaluation of each of those factors here weighs strongly in their favor. Pet. 28-29. Nonetheless, dispensing with *Eastern Enterprises* in a lone footnote, the appeals court simply ignored the Court's plurality and embraced instead the "no-takings" view of Justice Kennedy and the four

dissenting Justices.[9] But the appeals court's holding overlooks that a majority of the justices (the plurality plus Justice Kennedy) concluded that the financial exaction at issue in *Eastern Enterprises*—an exaction largely indistinguishable from the one imposed on Petitioners—violated Fifth Amendment norms.

In sweeping aside *Eastern Enterprises*, the appeals court also declared that Petitioners' takings claim failed as a "threshold" matter for lack of "any vested property interest impaired by the legislative amendment." Pet. App. 22a-23a. But Petitioners have shown they are deprived of the $62 million they have already set aside in loss-reserve funds to cover the 2013 amendment's retroactively imposed, unfunded liability. *See* Pet. 12-13. That undisputed amount is no less significant than the "$50 to $100 million" deemed "substantial" in *Eastern Enterprises*. 524 U.S. at 529.

Of course, "[c]ontract rights are a form of property." *U.S. Trust*, 431 U.S. at 19 n.16. Moreover, because an explicit premise of the Takings Clause's Just Compensation provision is that all property can be converted into money, it makes little sense to treat

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[9] By drawing upon the views of dissenting justices to cobble together a "precedent," the decision below also contravenes *Marks v. United States*, 430 U.S. 188 (1977). *Marks* mandates that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding ... may be viewed as that position taken by those members *who concurred in the judgment* on the narrowest grounds. *Id* at 193 (emphasis added). Because dissenting justices by definition have not "concurred" in the Court's judgment, their views constitute no part of the Court's holding.

money differently from any other form of property under the Fifth Amendment.

In any event, courts have also recognized that a regulated entity's expenditures necessitated by new legislative or regulatory burdens qualify as "property interests" under the Due Process Clause, even if no expended funds are transferred directly to the government. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (holding that a state-court order granting prejudgment attachment of property implicates due process rights, even though the attachment was for the benefit of third parties). Whether the substantial exaction imposed on Petitioners is viewed through a takings or due process lens, *Eastern Enterprises* requires a finding that retroactive exactions of the sort imposed on Petitioners do not comply with constitutional norms. Review is warranted of the Court of Appeals's contrary holding.

B. The Lower Courts' Persistent Confusion on How to Apply *Eastern Enterprises* Underscores the Need for Review

The petition also presents an ideal opportunity to resolve the broader doctrinal uncertainty and division afflicting the lower courts over *Eastern Enterprises*. Just as the Court of Appeals misapplied *Eastern Enterprises*'s Fifth Amendment holding, many lower federal courts have expressed confusion regarding how to apply *Eastern Enterprises*'s directive that "legislation might be unconstitutional if it imposes 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." 524 U.S. at 528-29 (plurality).

In particular, the Second, Sixth, Eleventh, and D.C. Circuits have all concluded that neither Justice O'Connor's plurality opinion nor Justice Kennedy's concurrence is binding because neither may be viewed as "narrower" than the other. *See Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) (assuming that "neither opinion constitutes the narrower ground, thus leaving us without binding authority"), *cert. denied*, 558 U.S. 932 (2009); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) ("Because the substantive due process reasoning presented in Justice Kennedy's concurrence is not a logical subset of the plurality's takings analysis, no 'common denominator' can be said to exist among the Court's opinions."), *cert. denied*, 540 U.S. 1103 (2004); *Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) ("*Eastern Enterprises* has no precedential effect on this case because no single rationale was agreed upon by the Court."); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998) (concluding that "Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's takings analysis").[10]

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[10] These circuits effectively cabin *Eastern Enterprises* to its *sui generis* facts. *See, e.g., Alcan Aluminum*, 315 F.3d at 189 ("The only binding aspect of such a splintered decision is its specific result, and so the authority of *Eastern Enterprises* is confined to its holding that the Coal Act is unconstitutional as applied to Eastern

These holdings sharply conflict with decisions in other circuits. The Third and Fourth Circuits, for example, have both recognized that *Eastern Enterprises* "mandates judgment" for those plaintiffs who "stand in substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999); *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 237 (4th Cir. 2002) (holding the same and quoting *Unity Real Estate*).

And the Fifth Circuit has explicitly relied on *Eastern Enterprises* to sustain a Takings Clause challenge to a retroactive state law. In *U.S. Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 416-20 (5th Cir. 2000), the court applied *Eastern Enterprises*'s three factors to Louisiana's workers' compensation statute, which retroactively altered a funding formula for computing insurance carriers' contributions to the State's workers' compensation fund. 226 F.3d at 414-20. The appeals court held that the statute violated the Takings Clause as applied to pre-enactment insurance contracts of carriers who had either withdrawn from the state market or had substantially reduced their underwriting in the State. *Id.* at 420.

Still other federal appeals courts of appeals have mistakenly concluded, as the Court of Appeals did here (Pet. App. 22a n.5), that they are bound to follow only the five justices in *Eastern Enterprises* who disagreed with the plurality's Takings Clause analysis (*i.e.*,

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Enterprises."); *Bituminous Contractors*, 156 F.3d at 1255 (same).

Justice Kennedy and the four dissenting Justices). *Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (upholding state statute temporarily reducing retirement benefits against a Takings Clause challenge because "a majority of justices found that the Takings Clause did not apply under the facts of *Eastern Enterprises*"); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed Cir. 2001) (en banc) (holding that because "five justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings," "we are obligated to follow the views of that majority").

Yet this Court continues to cite *Eastern Enterprises* as binding precedent. *See, e.g., Horne*, 569 U.S. at 528 (citing *Eastern Enterprises* for the proposition that, in a Fifth Amendment challenge to agency action, "it would make little sense to require the [complaining] party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding"); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) (Kennedy, J., concurring in the judgment) (citing *Eastern Enterprises* for the proposition that "a regulation might be so arbitrary or irrational as to violate due process").

The lower courts' confusion regarding the proper application of *Eastern Enterprises*—combined with the indisputably improper reliance by the New York Court of Appeals and other courts on the *Eastern Enterprises* dissenters—warrants this Court's plenary review. Until this Court clarifies the proper constitutional framework for addressing the government's imposition of substantial retroactive liability, lower courts will be

tempted to conclude that *no* standard applies. The petition is an ideal vehicle for the Court not only to clarify the precedential value of *Eastern Enterprises* also to ensure that the important property-rights protections set forth in that decision are not rendered a dead letter. Matters of this constitutional import cannot be left to the doctrinal incoherence of the lower courts.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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Dated: March 26, 2018