No. 21-404

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
MARK B. STERN
JOHN S. KOPPEL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a state workers' compensation law that applies exclusively to federal contract workers who perform services at a specified federal facility is barred by principles of intergovernmental immunity, or is instead authorized by 40 U.S.C. 3172(a), which permits the application of state workers' compensation laws to federal facilities "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State."

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellant below) is the United States of America. Respondents (defendants-appellees below) are the State of Washington; Jay Robert Inslee, in his official capacity as Governor of the State of Washington; Joel Sacks, in his official capacity as Director of the Washington State Department of Labor and Industries; and the Washington State Department of Labor and Industries.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 1a-20a) is reported at 971 F.3d 856. The order of the court of appeals denying a petition for rehearing en banc and the amended panel opinion (Pet. App. 21a-75a) are reported at 994 F.3d 994. The order of the district court (Pet. App. 76a-82a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2020. A petition for rehearing was denied on April 15, 2021. By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as

that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on September 8, 2021, and the petition was granted on January 10, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides in pertinent part that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * , shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2.

Section 3172(a) of Title 40 provides:

> The state authority charged with enforcing and requiring compliance with the state workers' compensation laws and with the orders, decisions, and awards of the authority may apply the laws to all land and premises in the State which the Federal Government owns or holds by deed or act of cession, and to all projects, buildings, constructions, improvements, and property in the State and belonging to the Government, in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State in which the land, premises, projects, buildings, constructions, improvements, or property are located.

40 U.S.C. 3172(a).

Other pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

In 2018, the State of Washington enacted House Bill 1723, 65th Leg., Reg. Sess. (H.B. 1723), a workers' compensation provision that applies exclusively to federal

contract workers at a federally owned site previously used to produce plutonium for nuclear weapons. Wash. Rev. Code Ann. § 51.32.187 (West Supp. 2022).[1] The United States sued the State and related parties (respondents in this Court), alleging that H.B. 1723's discriminatory treatment of the federal government and of the firms that employ the federal contract workers violates the intergovernmental-immunity principle of the Supremacy Clause. Pet. App. 3a. The district court granted summary judgment to respondents. *Id.* at 76a-82a. A Ninth Circuit panel affirmed. *Id.* at 1a-20a. The panel subsequently amended its opinion, and the court of appeals denied a petition for rehearing en banc over the dissent of four judges. *Id.* at 21a-75a.

A. The Hanford Site

1. In 1939, with the Axis Powers advancing in Europe and the Pacific, scientists approached President Franklin Roosevelt with concerns that an enemy nation would harness new techniques of nuclear fission to develop an atomic bomb. The President responded by ordering an urgent and highly classified effort—ultimately termed the Manhattan Project—to develop such a bomb first. See U.S. Dep't of Energy (DOE), *History of the Plutonium Production Facilities at the Hanford Site Historic District, 1943-1990*, at 1.6-1.8 (June 2002) (*Hanford History*), https://go.usa.gov/xth7k.

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[1] This brief uses the term "federal contract workers" to refer to individuals who are employed by private firms that have entered into contracts or subcontracts to perform services for the federal government. All citations to the Revised Code of Washington Annotated are to the most recent version of the published code in which the cited provisions appear. No dispute exists about the content of the operative provisions in this case.

The Manhattan Project proceeded on parallel tracks. Scientists at a federal facility in Oak Ridge, Tennessee, sought to isolate a large quantity of the highly fissile isotope uranium-235. *Hanford History* 1.9-1.11. In addition, and of central relevance here, other scientists focused on producing an even more fissile isotope of the newly discovered element plutonium. *Ibid.* For that work, the Army acquired a vast tract of land, known as the Hanford site, along a remote stretch of the Columbia River in southeastern Washington. *Id.* at 1.11-1.12.

Measuring some 560 square miles, the Hanford site is roughly half the size of Rhode Island. Pet. App. 7a n.4; see J.A. 141. Work at the site began in March 1943 and "proceeded at a nearly unbelievable pace." *Hanford History* 1.15 (citation omitted). In two years, and amid near-total secrecy, construction crews overseen by the Army Corps of Engineers built more than 500 separate structures, including three nuclear reactors and sophisticated plants for chemically separating plutonium-239. *Id.* at 1.15-1.25. The design and operation of the nuclear facilities were carried out by leading scientists and contract workers from E.I. DuPont de Nemours, which agreed to work "out of patriotic considerations" and "accepted only one dollar as payment for its services." *In re Hanford Nuclear Reservation Litig.*, 521 F.3d 1028, 1040 (9th Cir. 2008), amended, 534 F.3d 986 (9th Cir. 2008), cert. denied, 555 U.S. 1084 (2008).

By early 1945, the Hanford site was successfully producing plutonium. *Hanford History* 1.16. The plutonium from Hanford was transported to Los Alamos, New Mexico, where engineers tested and prepared it for use in a bomb. *Id.* at 1.38-1.39. The resulting device, known as Fat Man, was flown to an American airbase on Tinian Island, loaded into a B-29 bomber, and—on

the order of President Harry Truman—dropped over the Japanese city of Nagasaki on August 9, 1945. *Id.* at 1.39-1.40. Japan surrendered days later, ending World War II. *Id.* at 1.40.[2]

During the Cold War, Hanford expanded its plutonium production. Under the authority of the Atomic Energy Commission (a predecessor agency of DOE), federal contract workers from General Electric and other firms built six more reactors and numerous related facilities. *Hanford History* 1.42-1.65. Ultimately, Hanford accounted for "nearly two-thirds of the" plutonium used "in the United States nuclear program during World War II and the Cold War." Pet. App. 2a. As President John Kennedy observed, Hanford played a critical role in "maintaining the strength of the United States" and "changed the entire history of the world." *Remarks at the Hanford, Washington, Electric Generating Plant* 730, 730 (Sept. 26, 1963), *reprinted in Public Papers of the President: John F. Kennedy* (1964).

2. At the end of the Cold War, the mission at Hanford shifted to cleaning up the extensive waste on the site. *Hanford History* 1.76; see Pet. App. 2a-4a. Since 1989, cleanup efforts have been guided by an agreement among DOE, the U.S. Environmental Protection Agency, and the Washington Department of Ecology, each of which has regulatory authority over certain aspects of the project. *Hanford History* 1.76; see J.A. 187.

The responsible agencies have decommissioned seven of the nine reactors, removed all spent nuclear fuel from the areas along the Columbia River (the "100" Areas on the Hanford site, see App., *infra*, 6a (map)),

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[2] The Manhattan Project site at Oak Ridge yielded a uranium-based bomb, known as Little Boy, which was dropped over Hiroshima on August 6, 1945. *Hanford History* 1.39.

demolished nearly 1000 contaminated facilities, treated more than 27 billion gallons of groundwater, and disposed of nearly 19 million tons of soil and debris. DOE, *Hanford By the Numbers*, https://go.usa.gov/xtsEp (July 6, 2021). A significant amount of remediation work remains, however, particularly in the "tank farms" located in the 200 East and 200 West areas on the site's Central Plateau, where most radioactive and chemically hazardous waste is stored. J.A. 43; see App., *infra*, 6a-7a (maps). Cleanup efforts at the site are "expected to last for at least six more decades." Pet. App. 2a.

Cleanup and similar activities at and around the Hanford site are performed by four distinct categories of workers. First, a "relatively small federal workforce of about 400 DOE employees manages contracts and provides oversight" of the federal project. J.A. 46.

Second, approximately 10,000 federal contract workers perform most of the day-to-day work associated with the DOE cleanup. Pet. App. 4a. About 35%-40% of those contract workers have duties involving hazardous waste. J.A. 183. The other 60%-65% have more typical jobs, ranging from construction work to office responsibilities, and "do not enter hazardous waste sites or radiological areas during the course of their employment." *Ibid.*; see J.A. 46, 187.

Third, state regulators conduct frequent inspections throughout the Hanford site, including in the areas where radioactive and chemically hazardous waste are present. J.A. 46-47, 187-188. Inspectors from Washington's Department of Ecology have performed an average of approximately 50 inspections per year at Hanford over the past five years. J.A. 187. Inspectors from the state Department of Health have averaged about 33 inspections per year over that same period. *Ibid.* Some

state inspectors are on the site "so frequently" that they are "issued security badges to allow them access * * * where cleanup work is occurring." *Ibid.* In 2018, nearly 100 state inspectors had such badges. *Ibid.*

Finally, private employees on and near the Hanford site, although not part of the federal cleanup, "do many of the same types of hazardous jobs" as the federal contract workers. J.A. 186. Specifically, the private company US Ecology, which is located on the Central Plateau adjacent to the 200 East Area and DOE's Environmental Restoration Disposal Facility (ERDF), "operate[s] a landfill and disposes of low-level radioactive waste." *Ibid.*; see App., *infra*, 6a-7a (maps). The private company Perma-Fix Northwest, located adjacent to the Hanford site's 300 Area, likewise "treats some of Hanford's low-level radioactive waste and mixed radioactive and hazardous waste." J.A. 186.[3]

B. Workers' Compensation At Hanford

Throughout the history of the Hanford site's operations, workers there have been covered by workers' compensation programs. Federal employees at the Hanford site have always received workers' compensation coverage under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* FECA was "enacted in 1916 as the first comprehensive injury-compensation statute for federal employees," *United States* v. *Lorenzetti*, 467 U.S. 167, 176 (1984), and it continues to cover all federal employees, 5 U.S.C. 8101(1).

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[3] Several other entities operate within the Hanford site. Energy Northwest operates a commercial nuclear power reactor on land leased from DOE. The Laser Interferometer Gravitational-wave Observatory, an academic venture, is also located on land leased from DOE within the site. App., *infra*, 6a-7a (maps).

All other workers at the Hanford site, including federal contract workers, are covered by the state workers' compensation program, the Washington Industrial Insurance Act (WIIA), 1911 Wash. Sess. Laws 345. See Pet. App. 4a. Authority to apply the WIIA on federal land derives from a federal statute first enacted in 1936. That law currently provides (in language not materially different from the original enactment) that the "state authority charged with enforcing and requiring compliance with the state workers' compensation laws" may "apply" those laws to federal land and facilities within the State "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State." 40 U.S.C. 3172(a); see Act of June 25, 1936 (1936 Act), ch. 822, 49 Stat. 1938; Pet. App. 12a & n.6.[4]

The 1936 Act was Congress's response to a "conspicuous gap" that had previously existed "in the workmen's compensation field." S. Rep. No. 2294, 74th Cong., 2d Sess. 1 (1936) (Senate Report). Because States generally have limited authority to apply their laws to federally owned facilities or on federal land, and because FECA applied only to federal *employees*, federal contract workers and others employed on federal projects had no source of workers' compensation coverage. *Ibid.*; see *Murray* v. *Joe Gerrick & Co.*, 291 U.S. 315, 316-320 (1934). The 1936 Act ensured that workers "employed on [such federal] projects" could receive workers' compensation "protection." H.R. Rep. No. 2656, 74th Cong., 2d Sess. 1 (1936) (House Report); see *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180-186 (1988); *id.* at 193-194 (White, J., dissenting).

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[4] That authorization does not affect FECA's coverage of federal employees. 40 U.S.C. 3172(c); see 1936 Act § 2, 49 Stat. 1939.

Workers covered by the WIIA are entitled to benefits if they suffer an injury or illness "in the course of [their] employment." Wash. Rev. Code Ann. § 51.32.010. To obtain benefits for an "'[o]ccupational disease'"—a "disease or infection [that] arises naturally and proximately out of employment," *id.* § 51.08.140—workers must show that their condition was "probably, as opposed to possibly, caused by the[ir] employment," *Dennis* v. *Department of Labor & Indus.*, 745 P.2d 1295, 1301 (Wash. 1987) (en banc). A claim for occupational-disease benefits is generally subject to a two-year statute of limitations. Wash. Rev. Code Ann. § 51.28.055.

Employers covered by the WIIA are required to provide workers' compensation coverage either by paying premiums to a state-administered benefits fund, or by self-insuring and paying benefits directly to their employees. Wash. Rev. Code Ann. § 51.14.010. DOE may serve as the self-insured employer of federal contract workers at Hanford even though they are not federal employees. *Id.* § 51.04.130. DOE assumes that role for most federal contract workers at Hanford. Pet. App. 6a; J.A. 48-49, 52-59. Private firms that employ federal contract workers outside of that arrangement pay for workers' compensation coverage in the first instance and are then reimbursed by DOE, with the exact mechanics depending on particular contracts. Pet. App. 6a; J.A. 48-51.

C. H.B. 1723

For decades, the WIIA applied to federal contract workers at Hanford in the same way that it applied to other workers there and elsewhere in the State. In 2018, however, the Washington legislature enacted H.B.

1723, a retroactive amendment to the WIIA that dramatically changed the applicable workers' compensation regime.

H.B. 1723 applies by its terms to "'United States department of energy Hanford site workers,'" which the law defines to "mean[] any person, including a contractor or subcontractor, who was engaged in the performance of work, either directly or indirectly, for the United States" at specified locations within the Hanford site "for at least one eight-hour shift" at any time. Wash. Rev. Code Ann. § 51.32.187(1)(b). The specified portions of the site are "the two hundred east, two hundred west, three hundred area, [ERDF] site, central plateau, or the river corridor locations." *Ibid.* The Hanford site is further defined to "exclud[e] leased land, state-owned lands, and lands owned by the Bonneville Power Administration." *Id.* § 51.32.187(1)(a).

With respect to the covered workers described above, H.B. 1723 creates "a prima facie presumption that" various enumerated "diseases and conditions" constitute "occupational diseases" that trigger an entitlement to workers' compensation benefits. Wash. Rev. Code Ann. § 51.32.187(2)(a). The listed illnesses are defined broadly and include, *inter alia*, "[r]espiratory disease," numerous cancers, and "[n]eurological disease." *Id.* § 51.32.187(3)(a) and (e); see *id.* § 51.32.187(4). The presumption that such conditions are "occupational disease[s]" triggering benefits eligibility "may be rebutted" only "by clear and convincing evidence" that the illness had a different cause, such as "use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities." *Id.* § 51.32.187(2)(b).

The "presumption established" by H.B. 1723 applies "for the lifetime" of a covered worker, "without regard to the date of last injurious exposure or claim filing." Wash. Rev. Code Ann. § 51.32.187(5)(a) and (c). In addition, a "worker or the survivor of a worker who has died as a result of one of the conditions or diseases listed in" H.B. 1723 "and whose claim was denied" previously "can file a new claim for the same exposure and contended condition or disease." *Id.* § 51.32.187(5)(b).

In sum, H.B. 1723 creates a regime, applicable exclusively to Hanford federal contract workers, that departs from the general WIIA scheme in marked ways. It replaces the two-year statute of limitations with a lifetime entitlement to benefits that extends to any federal contract worker who worked a single eight-hour shift at any time in the site's history—a category conservatively estimated to include at least 100,000 workers—and that can be invoked by survivors after a worker's death. Pet. App. 7a. It replaces the employment-causation requirement with a presumption of benefits eligibility that is rebuttable only by clear-and-convincing evidence—"a threshold not seen elsewhere in occupational disease claims," and one that is "virtually impossible" to meet for claims arising from decades-old conditions given the unavailability of medical records. J.A. 70, 72. And it applies to an "incredibly broad range" of conditions that "commonly occur in the general public," are frequently caused by factors unrelated to employment, and often produce substantial expenses. J.A. 69.

The overall effect of those changes is to make it far easier for Hanford federal contract workers to obtain workers' compensation benefits, and thus to expose their employers—and ultimately the United States—to

massive new costs that similarly situated state and private employers do not incur. The state legislators considering H.B. 1723 anticipated those effects. Sponsors emphasized that the costs of the bill would fall on the federal government, see Pet. 7-8 (citing legislative history), while opponents described the bill as "breathtaking in its scope and inclusivity," J.A. 142.

D. Proceedings Below

1. The United States sued respondents in federal district court, alleging that H.B. 1723 violates the intergovernmental-immunity principle of the Supremacy Clause. Pet. App. 76a. The court agreed with the government that "the Supremacy Clause prohibits states from * * * discriminating against * * * the federal government," except where Congress has provided "clear and unambiguous authorization" to do so. *Id.* at 79a. The court concluded, however, that 40 U.S.C. 3172(a) provides such authorization for H.B. 1723. Pet. App. 79a. In the court's view, Section 3172(a) allows a State to "regulate federal lands within its geographical boundaries with all the tools that could be brought to bear on non-federally owned land," even if the result is discrimination against the federal government or against firms with which it contracts. *Id.* at 80a. The court accordingly granted summary judgment to respondents. *Id.* at 81a.

2. A Ninth Circuit panel affirmed. Pet. App. 1a-20a. The panel explained that "state laws are invalid if they * * * discriminate against the Federal Government or those with whom it deals * * * *unless* Congress provides clear and unambiguous authorization for such regulation." *Id.* at 9a (brackets, citations, and internal quotation marks omitted). The panel observed that H.B. 1723 "applies only to" federal contract workers. *Ibid.*

The panel accordingly stated that "whether HB 1723 violates the doctrine of intergovernmental immunity" depends on whether Section 3172(a) clearly and unambiguously authorizes state "workers' compensation laws that apply uniquely to the workers of those with whom the Federal Government deals." *Id.* at 10a.

The panel held that Section 3172(a) authorizes such a law. Pet. App. 10a-18a. In support of that conclusion, the panel relied principally on the statute's use of the phrase "as if the premises were under the exclusive jurisdiction of the State." 40 U.S.C. 3172(a); see Pet. App. 16a-18a. The panel stated that, when that phrase is read together with "the phrase 'in the same way and to the same extent[,]' * * * it is evident that § 3172 removes federal jurisdiction as a barrier to a state's authority over workers' compensation laws for all who are located in the state." Pet. App. 16a-17a. The panel accordingly understood Section 3172(a) to allow a State "to apply workers' compensation laws to federal land located in the State, without limitation," subject only to "constitutional constraints" *other than* intergovernmental immunity. *Id.* at 18a-19a.

The panel rejected the government's contention that Section 3172(a) does not authorize discrimination against the United States or those with whom it deals. Pet. App. 12a-16a. The panel stated that "[t]he plain text of § 3172 does not purport to limit the workers' compensation laws for which it waives intergovernmental immunity to only those that are 'generally applicable.'" *Id.* at 12a. The panel also noted this Court's statement in *Goodyear Atomic* v. *Miller* that Section 3172(a)'s materially identical predecessor "place[d] *no*

express limitation on the type of workers' compensation scheme that is authorized." *Id.* at 13a (quoting *Goodyear Atomic*, 486 U.S. at 183).

The panel further relied on the Ninth Circuit's prior holding in *United States* v. *Lewis County*, 175 F.3d 671, cert. denied, 528 U.S. 1018 (1999), that a state tax applicable to federal and private farmland but not to State-owned farmland was authorized by a federal law (7 U.S.C. 1984) that permitted States to tax federal farmland "in the same manner and to the same extent as other property is taxed." Pet. App. 13a-15a. Finally, the panel suggested that other federal statutes more explicitly codify a nondiscrimination rule, see 4 U.S.C. 111(a); 42 U.S.C. 9620(a)(4), and it inferred that Section 3172(a) would include similar language if Congress had intended to restrict state workers' compensation schemes in that manner, Pet. App. 15a-18a & n.7.

3. In response to a petition for rehearing en banc, the panel amended one sentence of its opinion, see Pet. App. 22a, and the court of appeals denied rehearing over the dissent of four judges, *id.* at 23a.

Judge Collins's dissent—joined by Judges Callahan, Bennett, and Bress—described the panel's holding as an "egregious" error that construed Section 3172(a) to "mean the exact opposite of what its words say" and that "defied" this Court's "directly controlling" decision in *Goodyear Atomic*. Pet. App. 38a-40a. The dissent emphasized that Section 3172(a) authorizes "the application of the 'workers' compensation laws' of a State to employees at federal facilities only '*in the same way and to the same extent*' as if the facilities were not under federal jurisdiction." *Id.* at 39a (citation omitted). The dissent observed that the *Goodyear Atomic* Court had described the same statutory language as "compel[ling]

the *same* workers' compensation award for an employee injured at a federally owned facility as the employee would receive if working for a wholly private facility." *Ibid.* (quoting 486 U.S. at 183-184). In the dissenters' view, that statutory language and the *Goodyear Atomic* Court's construction of it "unambiguously required [the panel] to strike down" H.B. 1723, because H.B. 1723's "whole point" is to treat federal contract workers at Hanford *differently* from other workers. *Id.* at 39a-40a.

The dissenters described the panel's contrary approach as adopting "the astonishing conclusion that Congress" has "by statute affirmatively greenlighted * * * open and explicit discrimination against the Federal Government, thereby giving the States *carte blanche* to impose whatever special workers' compensation rules they want on the United States and its contractors." Pet. App. 39a. The dissenters observed that "no federal court in the more than 200 years since Chief Justice John Marshall's landmark decision in *McCulloch v. Maryland*, 17 U.S. 316 (1819), has ever upheld a state statute that explicitly strikes at the Federal Government in the sort of extraordinary and egregious way that Washington has done here." *Id.* at 38a.

Judge Milan Smith, the author of the panel opinion, filed an opinion concurring in the denial of rehearing en banc. Pet. App. 23a-37a. He construed Section 3172(a) to mean that "a state may enact a workers' compensation scheme for federally-owned property as long as it *could* enact the same scheme 'in the same way and to the same extent' if the property were under the jurisdiction of the state." *Id.* at 25a. Because "'Washington could enforce a version of HB 1723 that did not involve the Federal Government' * * * to a hypothetical state-owned Hanford site," Judge Smith concluded that the

State could apply H.B. 1723 at Hanford, even though no such Washington law *actually* applies to any individuals other than Hanford federal contract workers. *Ibid.* (citations omitted).

SUMMARY OF ARGUMENT

H.B. 1723 violates principles of intergovernmental immunity by subjecting the employers of federal contract workers at the Hanford site, and ultimately the United States, to more onerous workers' compensation obligations than the State imposes on other employers. That state law is therefore invalid unless Congress clearly and unambiguously authorized Washington to enact and enforce it. The court of appeals erred in holding that 40 U.S.C. 3172(a) provides the requisite congressional authorization. Properly understood, Section 3172(a) authorizes States to apply workers' compensation laws *evenhandedly* to federal contract workers and other similarly situated employees, but not to discriminate against the federal government or those with whom it deals.

A. The applicable principles of federal intergovernmental immunity trace their roots to *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which this Court held that Maryland could not tax the Bank of the United States without congressional consent. In its modern form, the doctrine prevents direct taxation or regulation of the federal government and—centrally relevant here—regulation that discriminates against the United States or those with whom it deals. The rationale for that non-discrimination requirement reflects a core structural principle. When a State imposes a neutral measure that equally burdens the federal government and the State's own constituents, electoral safeguards provide a sufficient check against abuse. But when

a State targets the federal government for disfavored treatment, no such check is present. A discriminatory measure therefore is impermissible unless Congress has clearly and unambiguously consented to it.

B. H.B. 1723 does what intergovernmental-immunity principles forbid. That state law imposes potentially massive costs on the United States and those with whom it deals at Hanford, but not on state and other private employers whose workers are otherwise similarly situated. Respondents' contention that H.B. 1723 classifies based on workplace safety cannot be reconciled with the law's plain text. H.B. 1723's applicability to a particular worker turns not on the workplace hazards that individual confronts, or on the specific duties he or she performs, but on whether he or she performs those duties, "directly or indirectly, *for the United States*." Wash. Rev. Code Ann. § 51.32.187(1)(b) (emphasis added).

Respondents alternatively contend that state and private employees at Hanford are not similarly situated to those covered by H.B. 1723, because those covered by H.B. 1723 are categorically exposed to greater risks. That is implausible. H.B. 1723 applies to every federal contract worker who has worked on the Hanford site for a single eight-hour shift. No colorable argument exists that (for example) a federal-contract-worker accountant who spent eight hours in an office away from the most contaminated areas of the site was exposed to greater workplace hazards than a state inspector who routinely accesses those areas, or a private employee who regularly handles radioactive waste at or near the same locations. The inescapable conclusion is that H.B. 1723 constitutes "blatant facial discrimination against the Federal Government." Pet. App. 39a (Collins, J., dissenting from the denial of rehearing en banc).

C. Because H.B. 1723 would otherwise violate principles of intergovernmental immunity, it is permissible only if Congress clearly and unambiguously authorized its discriminatory scheme. But the only statute that respondents suggest could provide such authorization allows States to apply their workers' compensation laws to federal facilities "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State." 40 U.S.C. 3172(a). The ordinary meaning of that language, the original rationale for the statute's enactment, and this Court's reasoning in *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988), all support the same understanding: Section 3172(a) allows evenhanded application of state workers' compensation laws to federal and other similarly situated facilities, but it does not authorize discrimination against the United States or those with whom it deals.

Echoing the Ninth Circuit, respondents contend that Section 3172(a) authorizes a State to apply to a federal facility any workers' compensation law that the State *could apply* to a state or private facility within its jurisdiction. That reading disregards multiple textual features of Section 3172(a). And even if it were correct, it would not permit application of H.B. 1723, because principles of intergovernmental immunity bar discriminatory state laws even at non-federal facilities. Respondents' other arguments, which rely on mistaken inferences from *Goodyear Atomic* and other decisions and statutes, are similarly unavailing. At the very least, respondents fall far short of showing that Congress clearly and unambiguously authorized H.B. 1723's discrimination against the federal government and its contractors. The decision below should be reversed.

ARGUMENT

H.B. 1723 CANNOT BE VALIDLY ENFORCED

Under the Supremacy Clause and principles of intergovernmental immunity, state discrimination against the United States and those with whom it deals is prohibited unless clearly and unambiguously authorized by Congress. H.B. 1723 imposes such discrimination, and 40 U.S.C. 3172(a) does not authorize it. H.B. 1723 is accordingly unlawful and cannot be enforced.[5]

A. Absent Clear And Unambiguous Congressional Authorization, The United States' Intergovernmental Immunity Bars State Discrimination Against The Federal Government And Its Contracting Partners

The doctrine of federal intergovernmental immunity is "almost as old as the Nation." *Dawson* v. *Steager*, 139 S. Ct. 698, 702 (2019). It traces its roots to this Court's decision in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which barred enforcement of a state tax imposed exclusively on the Bank of the United States. *Id.* at 425-437. The Court explained that it "is of the very essence of supremacy to remove all obstacles" to the federal government's "action within its own sphere, and

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[5] The United States strongly believes that workers who suffer injuries or illnesses arising from their employment at Hanford should receive compensation. The government has accordingly made no objection to paying out substantial amounts of workers' compensation benefits to Hanford federal contract workers under the WIIA's pre-H.B. 1723 provisions. In addition, through the Energy Employees Occupational Illness Compensation Program Act of 2000, 42 U.S.C. 7384 *et seq.*, the Department of Labor has provided more than $1.75 billion in benefits to former DOE employees and federal contract workers who have suffered specified illnesses with a connection to their Hanford work. Pet. App. 19a.

so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *Id.* at 427. States thus "have no power, by taxation or otherwise," to "impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 436.

In formulating that rule, the *McCulloch* Court rejected the argument that States should be trusted not to abuse their regulatory powers in ways that impede federal operations. 17 U.S. (4 Wheat.) at 427-436. The Court explained that the "only security against" such "abuse" of power "is found in the structure of the government itself." *Id.* at 428. A State exercising regulatory power typically "acts upon its constituents," and their voting power provides "a sufficient security against erroneous and oppressive" measures. *Ibid.* But "the means employed by the government of the Union have no such security" because the federal government is not represented in state legislatures. *Ibid.* Accordingly, the "legislature of the Union alone * * * can be trusted by the people with the power of controlling measures which concern all." *Id.* at 431.

The intergovernmental-immunity principle recognized in *McCulloch* was initially understood to bar States from imposing *any* tax or regulation, without clear congressional consent, (1) "directly on the Federal Government," or (2) "on those who had contractual relationships with the Federal Government or with its instrumentalities." *United States* v. *County of Fresno*, 429 U.S. 452, 459-460 (1977). The first branch of that doctrine has endured, with the Court consistently "adher[ing] to the rule that States may not" *directly* tax or regulate the United States without Congress's consent.

Id. at 459; see, *e.g.*, *Mayo* v. *United States*, 319 U.S. 441, 447 (1943) (explaining that, because the United States' freedom from direct state regulation is "inherent in sovereignty," it can never be infringed without consent).

The second branch of the doctrine has evolved over time. Since the late 1930s, the Court has found taxes or regulations that *indirectly* burden the United States—*e.g.*, those imposed on government contractors or lessees—to be permissible so long as they do not "discriminate against the United States or those with whom it deals." *South Carolina* v. *Baker*, 485 U.S. 505, 523 (1988); see, *e.g.*, *North Dakota* v. *United States*, 495 U.S. 423, 435 (1990) (plurality opinion); *id.* at 444 (Scalia, J., concurring in the judgment). State taxes or regulations "imposed on those who deal with the Federal Government" therefore do not violate the United States' intergovernmental immunity if they are "imposed equally on the other similarly situated constituents of the State." *Fresno*, 429 U.S. at 462. That understanding "returns to the original intent of" *McCulloch* by ensuring that the United States and those with whom it deals are not subject to tax or regulatory burdens imposed by States without a "political check against abuse." *Id.* at 462-463.

In applying those principles, the Court has upheld "neutral" state taxes and other measures that treat regulated entities "with an even hand," *i.e.*, without regard to their dealings with the federal government. *Dawson*, 139 S. Ct. at 703; see, *e.g.*, *North Dakota*, 495 U.S. at 438 (plurality opinion). But when a State "single[s] out" the federal government or those with whom it deals "for discriminatory treatment," *Washington* v. *United States*, 460 U.S. 536, 546 (1983), the Court has barred enforcement of the state laws, see, *e.g.*, *Dawson*, 139 S. Ct. at

704-706; *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 817 (1989); *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392, 398 (1983); *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 387 (1960).[6]

As with most other structural safeguards, the federal government may consent to state taxation or regulation that would otherwise violate intergovernmental-immunity principles. Any such waiver, however, must be "clear and unambiguous." *Hancock* v. *Train*, 426 U.S. 167, 179 (1976) (citation omitted); see *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988). Absent such a waiver, "it does not seem too much to require that the State treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself." *Phillips*, 361 U.S. at 385.

B. H.B. 1723 Violates The United States' Intergovernmental Immunity By Discriminating Against The Federal Government And Those With Whom It Deals

H.B. 1723 does what principles of intergovernmental immunity forbid. By creating a dramatically more claimant-friendly workers' compensation regime *only* for Hanford federal contract workers, the law "single[s] out" the federal government and the firms that employ those workers—who are liable for the costs of the benefits—"for discriminatory treatment." *Washington*, 460 U.S. at 546. No neutral principle justifies that "blatant facial discrimination against the Federal Government."

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[6] In some of those decisions, the Court has construed federal statutes that codified the constitutional principles of federal intergovernmental immunity. This Court has viewed the scope of such statutes as "coextensive with" and "determined by reference to the constitutional doctrine." *Davis*, 489 U.S. at 813-814; see *Memphis Bank*, 459 U.S. at 397 (similar).

Pet. App. 39a (Collins, J., dissenting from the denial of rehearing en banc).

1. H.B. 1723 establishes a novel workers' compensation regime exclusively for "'United States department of energy Hanford site workers,'" defined as workers who have performed services, "directly or indirectly, for the United States" at specified locations within Hanford "for at least one eight-hour shift" since 1943. Wash. Rev. Code Ann. § 51.32.187(1)(b). H.B. 1723 excludes those portions of the site owned by the State or leased to private entities. *Id.* § 51.32.187(1)(a). H.B. 1723 thus applies "uniquely to the workers of those with whom the Federal Government deals" at Hanford —and to no one else anywhere in the State. Pet. App. 10a.

The costs of compensating those workers fall on the United States and the firms with which it contracts. See Pet. App. 6a. For most federal contract workers at Hanford, DOE acts as a self-insurer and pays workers' compensation costs directly. *Ibid.*; J.A. 49, 52-59. Some private firms that employ federal contract workers incur workers' compensation costs in the first instance, and are then reimbursed by DOE pursuant to contractual arrangements. Pet. App. 6a; J.A. 49-51. Under either mechanism, responsibility for H.B. 1723's costs ultimately rests with "the United States or those with whom it deals." *Baker*, 485 U.S. at 523.

Those costs are significant. As detailed above, H.B. 1723 departs in dramatic ways from the otherwise-applicable workers' compensation scheme. Most notably, H.B. 1723 both (a) replaces the WIIA's two-year statute of limitations with a lifetime entitlement to benefits (available to survivors after a worker's death), and (b) creates a presumption of benefits eligibility—rebuttable only by clear and convincing evidence—for

any federal contract worker who spent a single eight-hour shift at the Hanford site and later develops one of many commonly occurring illnesses. See pp. 10-12, *supra*.

The statute's overall effect is to expose the federal government and those with whom it deals to potentially massive costs not faced by any "similarly situated constituents of the State." *North Dakota*, 495 U.S. at 438 (plurality opinion); see *Fresno*, 429 U.S. at 462. That is a paradigmatic violation of the United States' intergovernmental immunity.

2. A state law that imposed greater burdens on the federal government and its contractors than on other employers might be valid if it could be shown to rest on "significant differences between" different classes of workers. *Dawson*, 139 S. Ct. at 703 (citation omitted). But H.B. 1723 does not define the class of covered workers by reference to job responsibilities or workplace conditions. Rather, the law applies only to individuals who performed services at the Hanford site, "directly or indirectly, for the United States." Wash. Rev. Code Ann. § 51.32.187(1)(b).

There is no colorable basis for concluding that every individual who spent a single eight-hour shift on the Hanford site was exposed to extraordinary workplace hazards that justify H.B. 1723's dramatically disparate treatment. Most federal contract workers at Hanford have typical jobs, ranging from construction work to office duties, and "do not enter hazardous waste sites or radiological areas during the course of their employment." J.A. 183. A federal-contract-worker accountant who spent one eight-hour shift in a Hanford site office, for example, could not plausibly be thought to face a drastically greater risk of occupational illness than a worker who spends an entire career in a mine, a mill,

an oil refinery, a chemical plant, or a similar facility. Yet H.B. 1723 applies only to the accountant and not to those other workers.

Even within the class of individuals who worked on and around the Hanford site, H.B. 1723's delineation of the workers who are and are not covered lacks any neutral justification. The statute applies to the federal-contract-worker accountant described above, who worked a single eight-hour shift in an office away from the most contaminated parts of the site. Yet it excludes state employees who regularly "conduct inspections throughout the cleanup areas" at Hanford, "including within the tank farms" in the 200 East and West Areas —the parts of the site where contamination is considered the most serious. J.A. 187; see J.A. 46-47, 201-202.

H.B. 1723 likewise excludes employees of the private firm US Ecology—located adjacent to the 200 East and West Areas and the ERDF, see App., *infra*, 6a-7a (maps)—even though those employees work near the most contaminated areas and perform tasks (such as "dispos[ing] of low-level radioactive waste," J.A. 186) that are plainly more hazardous than accounting or similar office duties. H.B. 1723 further excludes employees of the private firm Perma-Fix Northwest—located adjacent to the Hanford site, near the 300 Area where nuclear-fuel fabrication once occurred, see App., *infra*, 6a-7a; J.A. 44, 159—even though they "do many of the same types of hazardous jobs Hanford [federal contract] workers do, including handling and packaging radioactive" waste, J.A. 186.

The inescapable conclusion is that H.B. 1723 discriminates, and was intended to discriminate, against the United States and those with whom it deals. Even the Ninth Circuit panel, which ruled in respondents' favor

on other grounds, acknowledged that H.B. 1723 would "violate the doctrine of intergovernmental immunity" unless Congress had provided "'clear and unambiguous' authorization" for its application to federal facilities. Pet. App. 3a, 9a (citation omitted).

3. Respondents have contended that H.B. 1723 does not discriminate against the United States and those with whom it deals, but is instead "tailored to the special hazards and safety records of employers" at Hanford. Br. in Opp. 3; see, *e.g.*, *id.* at 1-12, 26-27, 29, 33. That argument is unpersuasive.

Most significantly, respondents' account of H.B. 1723 as a measure tailored to workplace safety does not match its text. H.B. 1723 does not classify employees "based on the dangers of their work," and it does not classify employers "based on their * * * safety records." Br. in Opp. 1-2. Rather, it establishes especially favorable workers' compensation rules for individuals who have worked at a particular location (the Hanford site) and have performed services, "directly or indirectly, for the United States." Wash. Rev. Code Ann. § 51.32.187(1)(b). H.B. 1723 thus explicitly discriminates based on "status as a Government contractor"—precisely what the Supremacy Clause forbids. *North Dakota*, 495 U.S. at 438 (plurality opinion).

Respondents' defense of H.B. 1723 reflects the same kind of effort to "rerationalize the statute" that this Court rejected in *Dawson* v. *Steager*. 139 S. Ct. at 706. There, West Virginia contended that a state statute that facially discriminated against retired federal law enforcement officers was permissible because the benefits received by state officers were less generous. *Ibid.* The "problem" with that argument, the Court explained, "is

fundamental. While the State was free to draw whatever classifications it wished, the statute it enacted does not classify persons or groups based on the relative generosity of their pension benefits. Instead, it" classified based on their prior employer's identity. *Ibid.* "Whether the unlawful classification found in the text of a statute might serve as some sort of proxy for a lawful classification hidden behind it is neither here nor there. No more than a beneficent legislative intent, an implicit but lawful distinction cannot save an express and unlawful one." *Ibid.*

The same analysis applies here. Even if there were sound reasons to believe that federal contract workers at the Hanford site face greater job-related dangers than typical employees (but see pp. 24-25, *supra*), the State of Washington cannot permissibly use affiliation with the federal government as a "proxy" for exposure to such hazards. *Dawson*, 139 S. Ct. at 706. Here, as in *Dawson*, "it is not too much to ask that, if a State *wants* to draw a distinction based on [workplace safety], it enact a law that actually *does* that." *Ibid.*

Respondents point (Br. in Opp. 9-10) to other WIIA provisions that adopt certain presumptions for workers in specified occupations, such as firefighters. Even assuming the validity of those provisions (which are not at issue here), they only highlight the defect in H.B. 1723. While those provisions draw distinctions "by reference to job responsibilities," *Dawson*, 139 S. Ct. at 705, H.B. 1723 classifies based on association with the federal government. The closer analogue to H.B. 1723 is not a presumption of workplace connection for firefighters generally, cf. Wash. Rev. Code Ann. § 51.32.185, but a

presumption that applies to *federal* but not *state* firefighters. Respondents identify no basis for viewing such a law as permissible.[7]

Respondents contend that H.B. 1723 is justified because the Hanford site is "uniquely dangerous." Br. in Opp. 1; see, *e.g.*, *id.* at i, 2-3, 6, 12, 18-20, 25, 33. But as explained above, it cannot reasonably be supposed that a federal contract worker who spent a single eight-hour shift at the Hanford site (particularly a shift removed from the most contaminated areas) faces dramatically greater risks than a worker who spends a career in an occupation like mining, milling, or refining. And in any event, the purportedly unique nature of Hanford could not justify H.B. 1723's discrimination among workers *within* the Hanford site itself. See pp. 25-26, *supra*.

Respondents suggest (Br. in Opp. 11, 26) that private employees at US Ecology and Perma-Fix Northwest "do not handle the type of high-level radioactive waste" that federal contract workers at Hanford do. But federal contract workers at Hanford are covered by H.B. 1723 even though most do not handle any radioactive waste at all. J.A. 183-184. Respondents assert (Br. in Opp. 27) that "office workers at the Hanford site * * * are at risk because of their proximity to radioactive waste." But if that is true of an office worker who spends just eight hours on the site, it must also be true

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[7] Washington's actual firefighter-presumption statute is far less sweeping than H.B. 1723. It applies only to firefighters "employed on a full-time, fully compensated basis," and may not be invoked "more than sixty months following the last date of employment." Wash. Rev. Code Ann. § 51.32.185(1)(a) and (b) and (2). It also applies to a narrower range of medical conditions. For example, it applies to cancer claims only where the disease "develops or manifests itself after" the firefighter "has served at least ten years." *Id.* § 51.32.185(3)(a)(i).

of state inspectors and private employees who have spent far more time at and around that location, but are not covered by H.B. 1723.

Respondents briefly suggest (Br. in Opp. 24) that the federal government could avoid the discriminatory effects of H.B. 1723 by changing its "contracting choices," so that private contractors would bear the costs that state law imposes. That suggestion reflects a misunderstanding both of the record and of the applicable principles of intergovernmental immunity. As a practical matter, it is doubtful that the United States could force its contractors to accept all the costs of H.B. 1723. See J.A. 49-50 ("Any increases in workers' compensation costs * * * due to HB 1723 are almost certain to be passed on to DOE" by contractors either as "reimbursable costs" or as requests for "equitable adjustments."). But even if that were possible, it would not eliminate H.B. 1723's constitutional defect, because principles of intergovernmental immunity prohibit discrimination against "the United States *or those with whom it deals*." *Baker*, 485 U.S. at 523 (emphasis added).

Respondents suggest (Br. in Opp. 3, 14-16, 19, 33) that any harm H.B. 1723 may inflict on the United States and its contracting partners is relatively modest, especially when measured against the important policy considerations motivating the law. Those claims echo arguments that States have made since *McCulloch*, and that this Court has rejected for just as long. As Chief Justice Marshall explained, *any* discriminatory treatment of the federal government by a State "is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give." 17 U.S. (4 Wheat.) at 430. In more recent terms, a "State's interest in

adopting [a] discriminatory tax" or regulation, "no matter how substantial, is simply irrelevant." *Dawson*, 139 S. Ct. at 704 (quoting *Davis*, 489 U.S. at 816).

States are not powerless to regulate activities of federal contractors when those activities implicate state policy aims. In pursuing its objectives, however, a State must regulate "with an even hand," subjecting itself and similarly situated parties to the same burdens that it imposes on the United States and those with whom the federal government deals. *Dawson*, 139 S. Ct. at 703. Respondents did not do that here, but instead sought to take "advantage of the Federal Government" by imposing costs on it and firms with which it contracts while sparing the State and similarly situated private employers from comparable burdens. *Washington*, 460 U.S. at 546. H.B. 1723 therefore cannot be validly enforced unless Congress has clearly and unambiguously authorized its discriminatory scheme.

C. Section 3172(a) Does Not Clearly And Unambiguously Authorize The State Of Washington To Enact And Enforce H.B. 1723

The Ninth Circuit concluded that 40 U.S.C. 3172(a) authorizes the enactment and enforcement of H.B. 1723, even though that state law discriminates against the United States and those with whom it deals. Pet. App. 10a-18a. Respondents defend that ruling. Br. in Opp. 24-32. The court of appeals' analysis is mistaken.

By authorizing the application of state workers' compensation laws to federal land and facilities "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State," 40 U.S.C. 3172(a) mandates equal treatment of federal contract workers. The court of appeals' holding that Section 3172(a) authorizes discrimination reads the statute to

mean "the exact opposite of what its words say." Pet. App. 40a (Collins, J., dissenting from the denial of rehearing en banc). At the very least, Section 3172(a) does not contain the "clear and unambiguous" language that would be necessary to achieve the counterintuitive result that the court of appeals' decision produces. *Goodyear Atomic*, 486 U.S. at 180 (citation omitted).

1. Section 3172(a) authorizes States to apply their workers' compensation laws to federal lands and facilities on evenhanded—but not discriminatory—terms

Section 3172(a)'s text, history, and purpose—as well as this Court's analysis of that provision's materially identical predecessor—all point in the same direction: The statute allows States to apply their workers' compensation laws to federal facilities on evenhanded terms, but it does not authorize discrimination against the United States and those with whom it deals.

a. Section 3172 is titled "Extension of state workers' compensation laws to buildings, works, and property of the Federal Government." Subsection (a), titled "Authorization of Extension," provides:

> The state authority charged with enforcing and requiring compliance with the state workers' compensation laws and with the orders, decisions, and awards of the authority may apply the laws to all land and premises in the State which the Federal Government owns or holds by deed or act of cession, and to all projects, buildings, constructions, improvements, and property in the State and belonging to the Government, in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State in which the land, premises, projects,

> buildings, constructions, improvements, or property are located.

40 U.S.C. 3172(a).

The most natural meaning of that statutory language is that States may extend to federal lands and facilities the same workers' compensation provisions that apply to similarly situated non-federal premises. For example, a state workers' compensation provision that applies to construction workers on private or state-owned sites can be applied "in the same way and to the same extent" to construction workers at a federally owned site, 40 U.S.C. 3172(a), notwithstanding the default prohibition on the application of state law to federal property, see *Goodyear Atomic*, 486 U.S. at 180-182. Section 3712(a) thus "compels the same workers' compensation award for an employee injured at a federally owned facility as the employee would receive if working for a wholly private facility." *Id.* at 183-184.

Multiple textual features of Section 3172(a) confirm that interpretation. The titles of both Section 3172 and subsection (a) refer to an "[e]xtension" of state workers' compensation provisions to federal land and facilities, implying that the provisions also apply elsewhere in the State. Cf. *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2177 (2021). Section 3172(a) is addressed to "[t]he state authority charged with enforcing and requiring compliance with the state workers' compensation laws," and it permits that "authority" to "apply the [state workers' compensation] laws" to federal land and facilities—a formulation suggesting that those laws also apply elsewhere in the State. 40 U.S.C. 3172(a). Most critically, Section 3172(a) authorizes application of state workers' compensation laws to federal land and facilities "in the same

way and to the same extent as if the premises were under the exclusive jurisdiction of the State." *Ibid.* By far the most natural understanding of that language is that the state workers' compensation provisions that can be applied to federal land and facilities also apply in other areas of the State, such that they can be applied to the federal land and facilities "in the same way." *Ibid.*

Read in that manner, Section 3172(a) protects federal prerogatives while allowing States to regulate within their borders "with an even hand." *Dawson*, 139 S. Ct. at 703. By authorizing state officials to apply their workers' compensation laws to federal land and facilities if—but only if—they apply those laws "in the same way and to the same extent," 40 U.S.C. 3172(a), to other areas of the State, Congress struck the same familiar balance that intergovernmental-immunity principles have long preserved. To safeguard the federal government from state overreaching, Congress relied on the "political check against abuse" that exists when States apply their laws to federally affiliated entities and similarly situated others alike. *Fresno*, 429 U.S. at 458; cf. *Washington*, 460 U.S. at 546 ("As long as the tax imposed on those who deal with the Federal Government is an integral part of a tax system that applies to the entire State, there is little chance that the State will take advantage of the Federal Government by increasing the tax.") (footnote omitted).

b. The history of Section 3172(a) strongly reinforces that understanding. Congress enacted Section 3172(a)'s predecessor in 1936, as a direct response to this Court's decision in *Murray* v. *Joe Gerrick & Co.*, 291 U.S. 315 (1934). Applying the rule that States generally cannot regulate on federal land without clear congressional consent, the *Murray* Court barred application of the

WIIA to a construction worker killed in a workplace accident at the federally owned Puget Sound Navy Yard. *Id.* at 316-320. The result was to leave non-federal employees who work on federal properties unprotected by any workers' compensation coverage. As non-federal employees, they were not covered by FECA, and under *Murray* they could not be covered by the otherwise-applicable state workers' compensation law.

Congress addressed that problem by authorizing States to apply their workers' compensation laws to federal land and facilities "in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State." 1936 Act, 49 Stat. 1938. That authorization ensured that "workers employed on federal projects" would not be "deprived of the benefits of [workers' compensation] coverage purely because of an oddity of location." *Goodyear Atomic*, 486 U.S. at 194 (White, J., dissenting) (describing the undisputed background of the statute). In filling that "conspicuous gap," Congress anticipated that the state workers' compensation provisions applicable to workers on federal land and facilities would be the same ones that apply to similarly situated workers on state or privately owned land—the remedy sought by the construction worker's survivors in *Murray*. Senate Report 1; see House Report 1 (similar); p. 8, *supra*.

Early judicial decisions applying the 1936 Act understood it in just that way. The Third Circuit, for example, held that the statute authorized extension of the otherwise-applicable provisions of Pennsylvania workers' compensation law to a worker injured at the federally owned Philadelphia Navy Yard. *Capetola* v. *Barclay White Co.*, 139 F.2d 556, 558-559 (1943), cert. de-

nied, 321 U.S. 799 (1944). Nothing in the statute's history or its roughly eight decades of judicial interpretation before this litigation suggests that it authorizes States to enact and enforce workers' compensation laws that apply solely to federal contract workers.

c. This Court's decision in *Goodyear Atomic* reflects the same understanding. The question there was whether Section 3172(a)'s predecessor authorized the application to a federal nuclear-production facility of an Ohio workers' compensation law that provided supplemental awards for injuries resulting from employers' safety violations. *Goodyear Atomic*, 486 U.S. at 180-183. The United States and the private entity operating the facility contended that the term "workmen's compensation laws" in Section 3172(a)'s predecessor did not encompass Ohio's supplemental-award provision. *Id.* at 183 (quoting 40 U.S.C. 290 (1982)). This Court rejected that argument, holding that the statute "places no express limitation on the type of workers' compensation scheme that is authorized." *Ibid.*

The Court went on to emphasize, however, that while Section 3172(a)'s predecessor encompassed state workers' compensation schemes that turned in part on an employer's fault, the statute imposed a *different* restriction on the types of state laws that could be applied to federal land and facilities. After quoting the statute's authorization to apply state workers' compensation laws to federal facilities "'in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State,'" the Court explained that the statute "compels the same workers' compensation award for an employee injured at a federally owned facility as the employee would receive if working for a wholly private facility." *Goodyear Atomic*, 486 U.S. at

183-184. So construed, the statute guards against state overreaching not by imposing substantive limits on the types of workers' compensation schemes that can be applied to federal facilities, but by triggering the "political check" that constrains state officials in adopting laws that apply to their own constituents. See p. 21, *supra*. The *Goodyear Atomic* Court thus read Section 3172(a)'s predecessor to reflect a compromise: States may "adopt any substantive workers' compensation system they like, *precisely* so long as it is applied in a nondiscriminatory fashion to federal facilities." Pet. App. 47a (Collins, J., dissenting from the denial of rehearing en banc).

d. At a minimum, Section 3172(a) does not provide the "clear and unambiguous" authorization necessary to waive the United States' immunity from discrimination against itself or those with whom it deals. *Goodyear Atomic*, 486 U.S. at 180 (citation omitted). The requirement of clear and unambiguous authorization follows from the well-established principle that "[w]aivers of immunity must be construed strictly in favor of the sovereign." *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992) (citation and internal quotation marks omitted). It also reflects the sensible assumption that Congress and the President will generally be unwilling to acquiesce in state discrimination against the federal government and those with whom it deals. The requirement that authorization of discriminatory state laws must be clear and unambiguous ensures that courts do not lightly infer such a counterintuitive intent. See, *e.g.*, *Hancock*, 426 U.S. at 178-180.

A federal law does not contain the clear and unambiguous statement required for a waiver of governmental immunity if "it is plausible to read the statute" in another way. *FAA* v. *Cooper*, 566 U.S. 284, 299 (2012).

For all the reasons explained above, Section 3172(a) is best read to permit States to apply their workers' compensation laws to federal facilities only if those laws apply equally to non-federal facilities in the State. But even if some doubt existed about the correctness of that reading, it would remain a "plausible" interpretation of the statute. *Ibid.* At the very least, the construction the Ninth Circuit adopted is not one that "the statutory text clearly requires." *Id.* at 299.

2. The court of appeals' interpretation of Section 3172(a) lacks merit

The court of appeals held, and respondents have argued, that Section 3172(a) clearly and unambiguously authorizes States to apply workers' compensation laws that discriminate against the United States and those with whom it deals. The reasons they advance in support of that position lack merit.

a. The crux of the Ninth Circuit's reasoning, amplified by Judge Smith in his opinion concurring in the denial of rehearing en banc and by respondents in this Court, is that Section 3172(a) authorizes a State to apply to a federal facility any workers' compensation scheme that the State *hypothetically could* adopt and apply at a non-federal facility. Pet. App. 16a-18a; *id.* at 25a (Smith, J., concurring in the denial of rehearing en banc); Br. in Opp. 19, 25-29. In support of that reading, the Ninth Circuit and respondents primarily rely on Congress's inclusion of the words "as if the premises were under the exclusive jurisdiction of the State" in 40 U.S.C. 3172(a). See, *e.g.*, Pet. App. 16a-17a. The court and respondents conclude that, so long as the State of Washington could enact and enforce a hypothetical law that applied H.B. 1723's compensation rules solely to

state and/or private facilities, Section 3172(a) authorizes respondents to enforce H.B. 1723. That rationale misreads Section 3172(a) and would not support application of H.B. 1723 in any event.

i. Section 3172(a)'s text makes clear that the proper point of reference is the workers' compensation scheme that *actually* applies outside of federal facilities, not a hypothetical scheme that the State *might* have adopted and applied elsewhere in the State.

Section 3172(a) does not define the powers of state legislatures (or of state governments generally) to enact or adopt *new* workers' compensation laws applicable to federal facilities. Instead, as noted above, Section 3172(a) is addressed to "[t]he state authority charged with enforcing and requiring compliance with the state workers' compensation laws." 40 U.S.C. 3172(a). The only "state workers' compensation laws" that state administrative officials can "enforc[e] and requir[e] compliance with" (*ibid.*) are laws that the State has actually adopted. Likewise, Section 3172(a) authorizes state officials to "apply" those laws to federal facilities "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State." *Ibid.* State officials can apply workers' compensation laws "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State" (*ibid.*) only if those laws actually apply in some way and to some extent to non-federal facilities in the State.

By relying heavily on the phrase "as if the premises were under the exclusive jurisdiction of the State," the Ninth Circuit and respondents effectively read the words "in the same way and to the same extent" out of 40 U.S.C. 3172(a). Neither the court of appeals nor respondents have offered a coherent explanation of how

those words do any independent work under their construction of the statute, or of how their interpretation would differ if the words were deleted. Their position thus violates "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted).

For similar reasons, the court of appeals' and respondents' position conflicts with this Court's understanding of Section 3172(a)'s materially identical predecessor. As explained above, the *Goodyear Atomic* Court read the statute to "compel[] the same workers' compensation award for an employee injured at a federally owned facility as the employee would receive if working for a wholly private facility." 486 U.S. at 183-184. But as respondents and the court of appeals largely acknowledge, see Pet. App. 12a-13a; Br. in Opp. 20-21, their interpretation does not include such a requirement, because the whole point of H.B. 1723 is to create a unique workers' compensation regime applicable *only* to Hanford federal contract workers.

ii. Even if Section 3172(a) used as its benchmark the hypothetical workers' compensation laws that a State *could* adopt for non-federal facilities within the State, H.B. 1723 would still be invalid.

As explained above, H.B. 1723 does not simply establish special workers' compensation rules for the Hanford site. Rather, H.B. 1723 distinguishes between federal contract workers and other Hanford-site employees in a way that discriminates against the United States and the firms with which it contracts. Even at *non-federal* facilities, intergovernmental-immunity principles would bar the State of Washington from adopting a law that "discriminate[s] against the United

States or those with whom it deals." *Baker*, 485 U.S. at 523. A hypothetical Washington law that effected such discrimination on land "under the exclusive jurisdiction of the State," 40 U.S.C. 3172(a), therefore would be forbidden. Cf., *e.g.*, *United States* v. *City of Arcata*, 629 F.3d 986, 988, 991 (9th Cir. 2010) (holding that local laws prohibiting military recruiting of minors anywhere in certain municipalities violated the United States' intergovernmental immunity, in part because those laws "d[id] not affect the federal government incidentally as the consequence of a broad, neutrally applicable rule," but instead "specifically target[ed] and restrict[ed] the conduct of military recruiters").

That understanding its consistent with Section 3172(a)'s origin. Congress adopted the provision in 1936 to address problems of *territorial* jurisdiction. See pp. 33-35, *supra*. Section 3172(a) accordingly provides that States may treat federal facilities as if they were on state or private *land*. The provision does not authorize other deviations from established principles of intergovernmental immunity. H.B. 1723 therefore could not be sustained even if Section 3172(a) authorized States to apply to federal facilities any workers' compensation laws that they *could* apply elsewhere within the State.

The Ninth Circuit found it "[c]ritical[]" that the United States had "conceded during oral argument that Washington could enforce a version of HB 1723 that did not involve the Federal Government." Pet. App. 73a; see *id*. at 25a (Smith, J., concurring in the denial of rehearing en banc). But the evident import of that government concession was simply that, if Washington were cleaning up radioactive waste at a state facility *without* using federal workers, so that no question of intergovernmental immunity was implicated, there would

be no constitutional barrier to the State's elimination or relaxation of usual causation requirements in determining eligibility for workers' compensation benefits. That concession does not imply that disparate treatment of federal and non-federal workers at a hypothetical state facility would likewise be permissible.

The Ninth Circuit and respondents construe Section 3172(a) as "affirmatively greenlight[ing] * * * open and explicit discrimination against the Federal Government, thereby giving the States *carte blanche* to impose whatever special workers' compensation rules they want on the United States and its contractors." Pet. App. 39a (Collins, J., dissenting from the denial of rehearing en banc). Nothing in the Constitution would preclude Congress from consenting to the enactment and enforcement of state workers' compensation laws that single out federal contract workers for differential treatment. But given the evident potential for abuse that such authorization would create, and the consequent unlikelihood that Congress would confer such authority, courts should construe Section 3172(a) to allow discriminatory state laws only if the statutory text compels that reading in "clear and unambiguous" terms. *Goodyear Atomic*, 486 U.S. at 180 (citation omitted). Neither the Ninth Circuit nor respondents have offered any basis for concluding that their interpretation of Section 3172(a) satisfies that demanding standard.

b. The court of appeals offered several other rationales for its reading of Section 3172(a), and respondents have echoed them in this Court. None is persuasive.

i. The Ninth Circuit and respondents rely on this Court's statement in *Goodyear Atomic* that Section 3172(a)'s predecessor "place[d] no express limitation on

the type of workers' compensation scheme that is authorized." 486 U.S. at 183; see Pet. App. 10a-13a; Br. in Opp. 2, 18-21. As explained above, however, the Court made that statement in rejecting an argument that the statutory term "'workmen's compensation laws'" encompassed only "typical" workers' compensation schemes, not those that authorize enhanced awards for injuries arising from employers' safety violations. 486 U.S. at 183; see pp. 35-36, *supra*. Because the United States has not disputed in this litigation that H.B. 1723 qualifies as a workers' compensation law within the meaning of Section 3172(a), that aspect of *Goodyear Atomic* has no bearing on the question presented.

ii. The court of appeals and respondents also rely on the Ninth Circuit's decision in *United States* v. *Lewis County*, 175 F.3d 671, cert. denied, 528 U.S. 1018 (1999). Pet. App. 13a-15a; Br. in Opp. 23-24. The question in *Lewis County* was whether a state property tax that applied to federal and private farmland, but not to farmland owned by the State or a local government, was permissible under a federal law that authorized States to tax federal farmland "in the same manner and to the same extent as other property is taxed." 7 U.S.C. 1984. The court held that the state tax did not impermissibly discriminate against the United States because (1) it was imposed on all farmland except state and local farmland, and (2) requiring state and local governments to "engage in a circular process of taxing themselves" would serve no useful purpose. 175 F.3d at 676. The court also noted that the State's imposition of the tax "on privately-owned farmland in general" provided "a political check against excessive taxation." *Ibid.*

Assuming arguendo that *Lewis County* was correctly decided, it does not support the decision below.

Unlike the state tax at issue in *Lewis County*, H.B. 1723 does not apply to "privately-owned [land]" or to private employees "in general." 175 F.3d at 676. It applies only to federal contract workers at a federal facility, and it ultimately burdens the federal government, which "does not have a direct voice in the state legislatures." *Washington*, 460 U.S. at 545. H.B. 1723 therefore is not subject to the "political check" against discriminatory or excessive regulation that was present in *Lewis County*. 175 F.3d at 676. Nor is there any pointless-circularity justification (or any other valid rationale) for exempting state employees from H.B. 1723.

iii. The Ninth Circuit and respondents identify various other federal statutes that they contend prohibit discrimination against the federal government more clearly than Section 3172(a) does. Pet. App. 15a-16a & n.7; Br. in Opp. 31-32. That line of argument is misconceived. As an initial matter, the statutes cited by respondents and the court of appeals use different formulations fitting their respective contexts, none of which involves a territorial-jurisdiction gap of the kind that prompted Congress to enact Section 3172(a). And it is not apparent that the language used in any of those statutes prohibits discrimination against federal actors any more clearly than does Section 3172(a).

Even if Section 3172(a) were viewed as less explicit on this point than those statutes, however, that would be immaterial. Congress need not enact a clear statutory ban (or any statutory ban at all) to preclude States from discriminating against the United States and those with whom it deals. The default rule of intergovernmental immunity bars such discrimination unless Congress clearly and unambiguously *authorizes* it. See *Goodyear Atomic*, 486 U.S. at 180. The contention that

Section 3172(a) contains an insufficiently clear *prohibition* on state discrimination thus "flips the governing canon of construction on its head." Pet. App. 55a (Collins, J., dissenting from the denial of rehearing en banc). Because Section 3172(a) does not clearly and unambiguously authorize H.B. 1723's facially discriminatory scheme, that state law is impermissible and cannot be enforced.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
MARK B. STERN
JOHN S. KOPPEL
Attorneys

FEBRUARY 2022

APPENDIX A

1. 40 U.S.C. 3172 provides:

Extension of state workers' compensation laws to buildings, works, and property of the Federal Government

(a) AUTHORIZATION OF EXTENSION.—The state authority charged with enforcing and requiring compliance with the state workers' compensation laws and with the orders, decisions, and awards of the authority may apply the laws to all land and premises in the State which the Federal Government owns or holds by deed or act of cession, and to all projects, buildings, constructions, improvements, and property in the State and belonging to the Government, in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State in which the land, premises, projects, buildings, constructions, improvements, or property are located.

(b) LIMITATION ON RELINQUISHING JURISDICTION.—The Government under this section does not relinquish its jurisdiction for any other purpose.

(c) NONAPPLICATION.—This section does not modify or amend subchapter I of chapter 81 of title 5.

2. Wash. Rev. Code Ann. § 51.32.187 (West Supp. 2022) provides:

Hanford site workers—Prima facie presumption of certain occupational diseases—Rebuttal—Definitions.

(1) The definitions in this section apply throughout this section.

(a) "Hanford nuclear site" and "Hanford site" and "site" means the approximately five hundred sixty square miles in southeastern Washington state, excluding leased land, state-owned lands, and lands owned by the Bonneville Power Administration, which is owned by the United States and which is commonly known as the Hanford reservation.

(b) "United States department of energy Hanford site workers" and "Hanford site worker" means any person, including a contractor or subcontractor, who was engaged in the performance of work, either directly or indirectly, for the United States, regarding projects and contracts at the Hanford nuclear site and who worked on the site at the two hundred east, two hundred west, three hundred area, environmental restoration disposal facility site, central plateau, or the river corridor locations for at least one eight-hour shift while covered under this title.

(2)(a) For United States department of energy Hanford site workers, as defined in this section, who are covered under this title, there exists a prima facie presumption that the diseases and conditions listed in subsection (3) of this section are occupational diseases under RCW 51.08.140.

(b) This presumption of occupational disease may be rebutted by clear and convincing evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

(3) The prima facie presumption applies to the following:

(a) Respiratory disease;

(b) Any heart problems, experienced within seventy-two hours of exposure to fumes, toxic substances, or chemicals at the site;

(c) Cancer, subject to subsection (4) of this section;

(d) Beryllium sensitization, and acute and chronic beryllium disease; and

(e) Neurological disease.

(4)(a) The presumption established for cancer only applies to any active or former United States department of energy Hanford site worker who has cancer that develops or manifests itself and who either was given a qualifying medical examination upon becoming a United States department of energy Hanford site worker that showed no evidence of cancer or was not given a qualifying medical examination because a qualifying medical examination was not required.

(b) The presumption applies to the following cancers:

(i) Leukemia;

(ii) Primary or secondary lung cancer, including bronchi and trachea, sarcoma of the lung, other than in situ lung cancer that is discovered during or after a postmortem examination, but not including mesothelioma or pleura cancer;

(iii) Primary or secondary bone cancer, including the bone form of solitary plasmacytoma, myelodysplastic syndrome, myelofibrosis with myeloid metaplasia, essential thrombocytosis or essential thrombocythemia,

primary polycythemia vera (also called polycythemia rubra vera, P. vera, primary polycythemia, proliferative polycythemia, spent-phase polycythemia, or primary erythremia);

(iv) Primary or secondary renal (kidney) cancer;

(v) Lymphomas, other than Hodgkin's disease;

(vi) Waldenstrom's macroglobulinemia and mycosis fungoides; and

(vii) Primary cancer of the: (A) Thyroid; (B) male or female breast; (C) esophagus; (D) stomach; (E) pharynx, including all three areas, oropharynx, nasopharynx, and hypopharynx and the larynx. The oropharynx includes base of tongue, soft palate and tonsils (the hypopharynx includes the pyriform sinus); (F) small intestine; (G) pancreas; (H) bile ducts, including ampulla of vater; (I) gall bladder; (J) salivary gland; (K) urinary bladder; (L) brain (malignancies only and not including intracranial endocrine glands and other parts of the central nervous system or borderline astrocytomas); (M) colon, including rectum and appendix; (N) ovary, including fallopian tubes if both organs are involved; and (O) liver, except if cirrhosis or hepatitis B is indicated.

(5)(a) The presumption established in this section extends to an applicable United States department of energy Hanford site worker following termination of service for the lifetime of that individual.

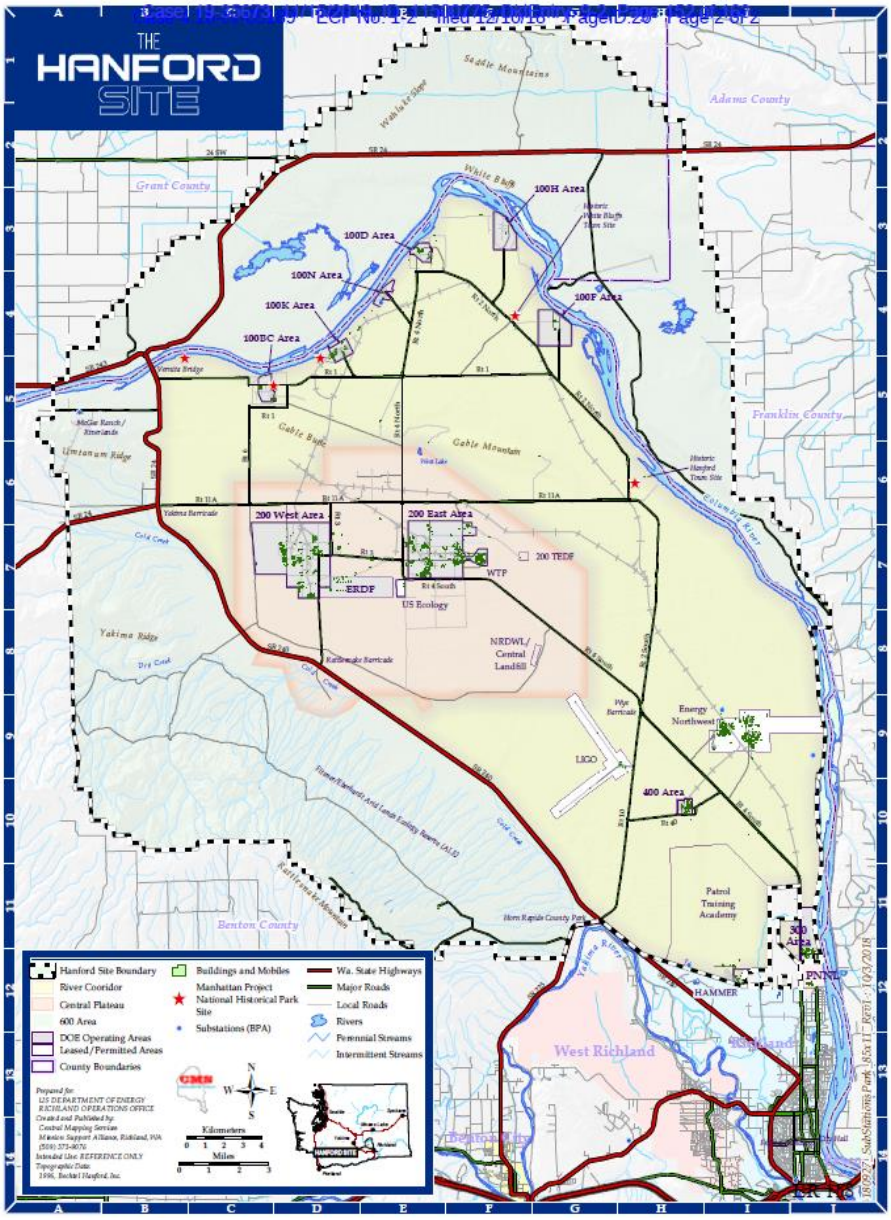
(b) A worker or the survivor of a worker who has died as a result of one of the conditions or diseases listed in subsection (3) of this section, and whose claim was denied by order of the department, the board of industrial insurance appeals, or a court, can file a new claim for the same exposure and contended condition or disease.

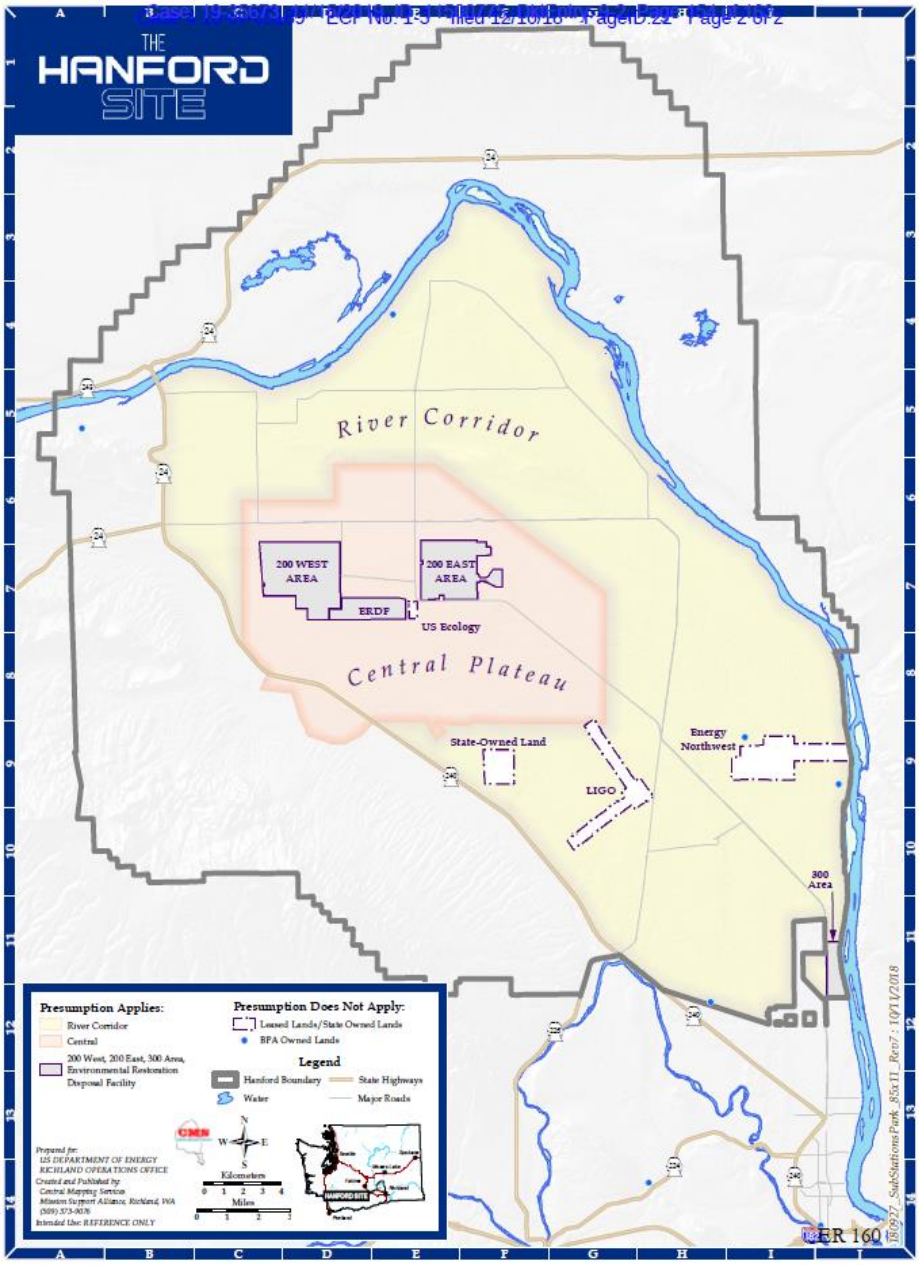
(c) This section applies to decisions made after June 7, 2018, without regard to the date of last injurious exposure or claim filing.

(6)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim of benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorneys' fees and witness fees, be paid to the worker or his or her beneficiary by the opposing party.

(b) When a determination involving the presumption established in this section is appealed to any court and the final decision allows the claim for benefits, the court shall order that all reasonable costs of appeal, including attorneys' fees and witness fees, be paid to the worker or his or her beneficiary by the opposing party.

APPENDIX B


THE HANFORD SITE
Saddle Mountains
Adams County
Grant County
White Bluffs
100H Area
100D Area
100N Area
100K Area
100BC Area
100F Area
Franklin County
Gable Butte
Gable Mountain
Umtanum Ridge
200 West Area
200 East Area
200 TEDF
WTF
ERDF
US Ecology
NRDWL/ Central Landfill
Yakima Ridge
Energy Northwest
LIGO
400 Area
Patrol Training Academy
300 Area
PNNL
HAMMER
West Richland
Richland
Benton County
Hanford Site Boundary
River Coorider
Central Plateau
600 Area
DOE Operating Areas
Leased/Permitted Areas
County Boundaries
Buildings and Mobiles
Manhattan Project National Historical Park Site
Substations (BPA)
Wa. State Highways
Major Roads
Local Roads
Rivers
Perennial Streams
Intermittent Streams
Kilometers
Miles


THE HANFORD SITE
River Corridor
200 WEST AREA
200 EAST AREA
ERDF
US Ecology
Central Plateau
State-Owned Land
LIGO
Energy Northwest
300 Area
Presumption Applies:
River Corridor
Central
200 West, 200 East, 300 Area, Environmental Restoration Disposal Facility
Presumption Does Not Apply:
Leased Lands/State Owned Lands
BPA Owned Lands
Legend
Hanford Boundary
State Highways
Water
Major Roads
Kilometers
Miles
ER 160