No. 21-404

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* WORKERS' INJURY LAW & ADVOCACY GROUP (WILG) IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Workers' Injury Law & Advocacy Group [WILG] is a national non-profit membership organization dedicated to protecting and advocating the rights of millions of injured workers and their families who, each year, suffer the consequences of workplace injuries and illnesses. WILG advocates for both reasonable benefits and increased safety in the American workplace.

The group acts principally to assist attorneys and non-profit groups in advocating the rights of injured workers through education, communication, research, and information gathering. WILG is a network of like-minded advocates for workers' rights, information and knowledge, a sense of commitment and kinship, and networking to help each other and our clients.

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[1] This brief is filed pursuant to Supreme Court Rules 33.1, 34, and 37. Written consent to file this brief has been given by all parties; by Elizabeth B. Prelogar, Solicitor General of the United States; and by Anastasia R. Sandstrom, Senior Counsel, Office of the Attorney General of the State of Washington. No counsel for a party has authored this brief in whole or in part. No person or entity has made a monetary contribution to this brief's preparation or submission. Counsel of Record, Mr. Burke and Mr. Gillelan, are co-chairmen of the Amicus Committee of Workers' Injury Law & Advocacy Group. Counsel of Record have received assistance in writing the brief from attorney Valerie McOmie, Camas, Washington, Amicus Co-Coordinator for the Washington State Justice Association Foundation, and Brad McClellan, attorney, Austin, Texas, and former Chief of the Workers' Compensation Section of the Office of the Attorney General of Texas.

Workplace safety is one of the pillars of the advocacy efforts of the *amicus curiae.* Frequently, WILG provides in-person and online access to safety experts to assist the organization in supporting legislation in Congress and the various states to educate and facilitate the creation of better working conditions for the nation's workers.

WILG, founded in 1995, has grown into an organization of more than 1,000 members from every state in the nation. Members include sole practitioners, attorneys from multi-lawyer firms, and paralegals. WILG, with headquarters in New Port Richey, Florida, represents an important, national voice for workers. WILG's members are committed to improving the quality of legal representation of those employees who are injured on the job or who are victims of occupational disease, through superior legal education and through judicial and legislative activism.

SUMMARY OF ARGUMENT

A. As a matter of sound public policy and because of the creation of the Grand or Industrial Bargain in employer-employee relations in the early years of the 20th century, the State of Washington has great latitude to enact legislation to regulate workplace safety and to control state workers' compensation benefits payable by certain employers whose workplaces are extraordinarily dangerous.

B. The federal government has recognized the extraordinary hazards of exposure to radioactive materials by providing for payment of benefits for workers

who developed occupational diseases from the exposure, or their survivors. Scarcity of recordkeeping is an additional criterion to assess the risk for workers.

C. The creation of a presumption of workers' compensation compensability for certain classes of workers is a well-grounded exercise of the responsibility and authority of the states to recognize that certain workers are exposed to extraordinary risks and are entitled to relief from a burden of proof that is often difficult to meet. Such presumptions generally need not be perfectly tailored to be permissible. A state legislature must be given breathing space to fashion legislation to carry out its mandate to protect the health and safety of its citizens.

D. The enactment of the presumption statute for federal contract workers at Hanford is authorized by an act of Congress and is a reasonable exercise of sovereign legislative authority based upon unique risks.

ARGUMENT

I. AS A MATTER OF SOUND PUBLIC POLICY AND BECAUSE OF THE CREATION OF THE GRAND OR INDUSTRIAL BARGAIN IN EMPLOYER-EMPLOYEE RELATIONS IN THE EARLY YEARS OF THE 20TH CENTURY, THE STATE OF WASHINGTON HAS GREAT LATITUDE TO ENACT LEGISLATION TO REGULATE WORKPLACE SAFETY AND TO CONTROL STATE WORKERS' COMPENSATION BENEFITS PAYABLE BY CERTAIN EMPLOYERS WHOSE WORKPLACE IS EXTRAORDINARILY DANGEROUS.

The State of Washington has great latitude to legislate benefits for injured workers on the basis of extraordinary risk to workers whose employers are part of the state workers' compensation system.

In the case at bar, the State of Washington through its legislature enacted a workers' compensation provision that applies exclusively to workers who are employed by private firms that enter into contracts or subcontracts to perform services for the federal government at the Hanford site in the State of Washington, a federally owned site previously used to produce plutonium for nuclear weapons.[2] The filings by the State of Washington provide detailed information about the unique risk faced by federal contract workers and the legislature's response to

[2] It is not the intent of this brief to duplicate the detailed history of the Hanford site and the cleanup underway that is contained in the briefs filed by the parties. House Bill 1723, 65th Leg. Reg. Sess., was passed by the Washington legislature in 2018. Wash. Rev. Code Ann. § 51.32.187 (West Supp. 2022).

that risk by enacting the presumption of compensability.

There is long precedent for the right of the states in this area. For more than a century, this Court has recognized that states can develop a statutory scheme to provide benefits to injured workers without interference from the federal government.

After the State of New York passed one of the first workers' compensation statutes, this Court considered the constitutionality of legislative replacement of a common law tort for work-related injuries with an exclusive remedy, no-fault system with scheduled benefits for injured workers. The "Grand Bargain" or "Industrial Bargain" was upheld by the Court in *New York Central Railroad v. White,* 243 U.S. 188 (1917).

The 105-year-old decision concisely explained the Grand Bargain:

> It is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall,-that is, upon the injured employee or his dependents.

243 U.S. at 203

The landmark case held that the use of workers' compensation laws to replace traditional tort remedies must provide "significant" benefits. Consideration for the Grand Bargain was a "reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise . . . " *New York Central Railroad* and subsequent pronouncements have given the states great latitude to develop a reasonable schedule of defined benefits as their part of living up to the Grand Bargain.

Such legislative response is the business of the states. Eighty-nine years after the *New York Central Railroad* opinion, in *Howard Delivery Serv. v. Zurich Am. Ins. Co.,* 547 U.S. 651, 662-663 (2006), the Court noted the purpose of a state adopting a statutory workers' compensation scheme:

> The invention of workers compensation as it has existed in this country since about 1910 involves a classic social trade-off or, to use a Latin term, a quid pro quo. . . . What is given to the injured employee is the right to receive certain limited benefits regardless of fault, that is, even in cases in which the employee is partially or entirely at fault, or when there is no fault on anyone's part. What is taken away is the employee's right to recover full tort damages, including damages for pain and suffering, in cases in which there is fault on the employer's part. P. Lencsis, WORKERS COMPENSATION: A REFERENCE AND GUIDE 9 (1998).

This "classic trade-off" allows the states to provide for limited benefits regardless of fault. It is uncontro-

verted that contractors and subcontractors hiring workers at the Hanford site are subject to the workers' compensation laws of the State of Washington. Thus, the State of Washington has authority to legislate benefits for such workers and the conditions under which those benefits are available.

Recently, this Court spoke of the power of the states in this area. In the concurring opinion in *National Federation of Independent Business, et al v. OSHA,* 142 S.Ct. 661, 211 L.Ed.2d 448 (2022), Justice Gorsuch wrote:

> There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the "general power of governing," including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government.

142 S.Ct. at 667 (Gorsuch, J., concurring) (citing *National Federation of Independent Business v. Sebelius*, 567 U. S. 519, 536 (2012).

In *National Federation of Independent Business v. Sebelius,* 567 U.S. 519 (2012), Chief Justice Roberts looked to the writings of the Founding Fathers regarding the division of power between the federal and state governments:

> "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) . . . Because the police power is controlled by 50 different States instead of one national sovereign, the

> facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222, (2011).

Id. at 536.

James Madison, in THE FEDERALIST No. 45, was concerned about an over-reaching federal government except in cases of war and national security. The future President of the United States said:

> The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which

> might favor their ascendancy over the governments of the particular States.

The FEDERALIST PAPERS, No. 45, James Madison, January 26, 1788.

II. THE FEDERAL GOVERNMENT HAS RECOGNIZED THE EXTRAORDINARY HAZARDS OF EXPOSURE TO RADIOACTIVE MATERIALS BY PROVIDING FOR PAYMENT OF BENEFITS FOR WORKERS WHO DEVELOPED OCCUPATIONAL DISEASES FROM THE EXPOSURE, OR THEIR SURVIVORS. SCARCITY OF RECORDKEEPING IS AN ADDITIONAL CRITERION TO ASSESS THE RISK FOR WORKERS.

The nuclear weapons program of the United States began as early as 1939 when Enrico Fermi and Albert Einstein brought the threat of a Nazi super weapon to President Franklin D. Roosevelt's attention. As World War II progressed, the urgency to develop an atomic bomb intensified and eventually produced the bombs that were dropped over Hiroshima and Nagasaki.

The American nuclear program has employed nearly 700,000 workers at over 380 Department of Energy sites across the country. Major sites from coast-to-coast spanned thousands of miles and involved enormous, rapid construction projects. "Atomic Cities" were literally created overnight as thousands of workers, from uranium miners and transporters to bomb testers and their families flocked to new job opportunities and a chance to defend our nation.

The incredible success of the U.S. nuclear weapons program stands as a testament to American ingenuity and patriotism. However, it was not without sacrifice. Of the 700,000 employees, contractors, or sub-con-

tractors of the Department of Energy, many became sick as a result of the hazardous work environment associated with nuclear weapon production. Their sacrifice was appropriately described by President Bill Clinton in an Executive Order in 2000:

> Thousands of these courageous Americans . . . paid a high price for their service, developing disabling or fatal illnesses as a result of exposure to beryllium, ionizing radiation, and other hazards unique to nuclear weapons production and testing. Too often, these workers were poorly protected or not properly made aware of the dangers when working with radiation and chemicals specific to nuclear weapon production. As a result, many developed work-related illnesses; sometimes even well after their employment.[3]

In an attempt to remedy the sacrifice of nuclear weapons workers, President Clinton signed into law the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA).[4]

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[3] Executive Order 13179, President Bill Clinton, *Providing Compensation to America's Nuclear Weapons Workers. See* www.nuclearworkers.org/history-of-the energy-employees-occupational-illness-compensation program." Retrieved February 5, 2022.

[4] 42 U.S.C. §§ 7384 et seq and amendments. The Act was passed by Congress October 30, 2000, and became effective July 31, 2001. The U.S. Department of Labor manages claims filed under the Act. Among hundreds of covered sites are major sites: Savannah River Site (SRS): Aiken, South Carolina; Portsmouth Gaseous Diffusion Plant: Portsmouth, Ohio; Iowa Army Ammunition Plant (IAAP): Burlington, Iowa; Oak Ridge Gaseous Diffusion Plant: Oak Ridge, Tennessee; Hanford Site: Richland, Washington;

The EEOICPA provides compensation as well as related medical expenses to workers who contracted certain diseases as a direct result of exposure to beryllium, silica, or radiation while working for the U.S. Department of Energy and its predecessor agencies, its contractors, or subcontractors in the nuclear weapons industry.[5]

In addition to the extraordinary risk of exposure to radioactive materials, there is an increased risk for federal contract workers at Hanford based upon the scarcity of documentation and recordkeeping for preserving the safety of the workers.[6]

Congress has made it a national priority for employers to report work-related injuries and illnesses and other factors that may result in harm to an employee. The Occupational Safety & Health Administration (OSHA) focuses on recordkeeping with clear and concise requirements for recording injuries and illnesses.[7] It is so important for the safety of American workers, OSHA's website publicly displays an employer's workplace violation history. These record-

Paducah Gaseous Diffusion Plant: Paducah, Kentucky; and Los Alamos National Laboratory: Los Alamos, New Mexico.

[5] For a description of the program, *see* www.benefits.gov, *The Energy Employees Occupational Illness Compensation Program Act (EEOICPA),* and www.cdc.gov, the official website of the Centers for Disease Control and Prevention.

[6] The scarcity of reporting by employers of federal contract workers at Hanford is documented in briefs of the State of Washington.

[7] The authorization for OSHA to require and enforce record keeping is found at 29 CFR 1904.

keeping methods ensure accountability and are integral to safety planning.[8]

A short statement by OSHA on its website summarizes the importance of good recordkeeping, "This information helps employers, workers and OSHA evaluate the safety of a workplace, understand industry hazards, and implement worker protections to reduce and eliminate hazards, preventing future workplace injuries and illnesses."[9]

The importance of recordkeeping is crucial to maintaining high safety and health standards for several reasons:

1. No business is free of risk. There is always the possibility that an employee will be injured on the job.
2. Maintaining records of all work-related injuries and illnesses can illuminate ongoing issues within the safety structure of a corporation or industry. Locating these weak points can prevent more extensive injuries in the future.
3. Accurate records allow for more informed decision making. This in turn leads to better safety plans and more effective implementation of those plans.

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[8] After the enactment of federal law to create OSHA, the U.S. Supreme Court found the statutory scheme did not violate the constitutional right to be tried by a jury and was a proper subject for Congress to legislate under the Commerce Clause of the federal Constitution. *Atlas Roofing Co., Inc., v. Occupational Safety and Health Review Commission,* 430 U.S. 442 (1977).

[9] www.osha.gov/recordkeeping

4. Employees that are fully informed of the risks and hazards found in their workplace will be more likely to follow cautious work practices and report workplace hazards that may be overlooked by management.[10]

The State of Washington likewise recognized the importance of recordkeeping with enactment of the Washington Industrial Safety & Health Act (WISHA). RCW 49.17.050 informs the director of labor and industries' rule-making authority, and specifically addresses the importance of promulgating rules and regulations that ensure adequate recordkeeping. That statute provides in pertinent part that the director shall:

(1) Provide for the preparation, adoption, amendment, or repeal of rules and regulations of safety and health standards governing the conditions of employment of general and special application in all workplaces; . . .

(5) Provide for appropriate reporting procedures by employers with respect to such information relating to conditions of employment which will assist in achieving the objectives of this chapter;

RCW 49.17.220 provides for specific actions to be taken by employers regarding recordkeeping:

(1) Each employer shall make, keep, and preserve, and make available to the director such records regarding his or her activities relating to this chapter as the director may prescribe by regulation as necessary or

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[10] www.safetycounselling.com/tag/osha-recordkeeping/

appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this section such regulations may include provisions requiring employers to conduct periodic inspections. The director shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this chapter, including the provisions of applicable safety and health standards.

(2) The director shall prescribe regulations requiring employers to maintain accurate records, and to make periodic reports of work-related deaths, and of injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(3) The director shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provisions for each employee or former

> employee to have access to such records as will indicate his or her own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by any applicable safety and health standard promulgated under this chapter and shall inform any employee who is being thus exposed of the corrective action being taken.

In the foregoing statute, the legislature of the State of Washington recognized public policy regarding the necessity for documentation of recordkeeping, and the legitimacy of the State in addressing through special rules the safety issues that result from inadequate recordkeeping.

The importance of the lack of adequate recordkeeping on the part of employers of federal contract workers at Hanford cannot be overstated. The extraordinary risk of exposure to radioactive materials is uncontroverted. The additional risk associated with the scarcity of recordkeeping is another reason that the legislature of the State of Washington should be given deference by the courts.

III. THE CREATION OF A PRESUMPTION OF WORKERS' COMPENSATION COMPENSABILITY FOR CERTAIN CLASSES OF WORKERS IS A WELL-GROUNDED EXERCISE OF THE RESPONSIBILITY AND AUTHORITY OF THE STATES TO RECOGNIZE THAT CERTAIN WORKERS ARE EXPOSED TO EXTRAORDINARY RISKS AND ARE ENTITLED TO RELIEF FROM A BURDEN OF PROOF THAT IS OFTEN DIFFICULT TO MEET. SUCH PRESUMPTIONS GENERALLY NEED NOT BE PERFECTLY TAILORED TO BE PERMISSIBLE. A STATE LEGISLATURE MUST BE GIVEN BREATHING SPACE TO FASHION LEGISLATION TO CARRY OUT ITS MANDATE TO PROTECT THE HEALTH AND SAFETY OF ITS CITIZENS.

The State of Washington was one of the first states to enact a workers' compensation statutory system. From the beginning, employers were treated differently based upon specific hazards their workers faced. As with the presumption statute at issue in this case regarding employers at the Hanford site, the Washington legislature has traditionally considered the risk of an employer.

Washington adopted a presumption of compensability for firefighters in 1987.[11] Such presumption, commonly called a "firefighter presumption," is based upon unique risks of men and women who work as firefighters.

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[11] Wash. Rev. Code § 51.32.185. More than 20 states have enacted similar presumption statutes for workers in hazardous occupations, especially firefighters. *See* 4 Arthur Larson et al., LARSON'S WORKERS' COMPENSATION LAW § 52.07(2) (2021).

A decade earlier, in 1977, in Oklahoma, the legislature created a statutory presumption that certain occupational diseases or injuries suffered by firefighters were compensable under the workers' compensation laws.

11 O.S. § 49-110(A) provides in pertinent part:

> Any member of the fire department of any municipality who is disabled as a result of heart disease, injury to the respiratory system, infectious disease, or the existence of any cancer which heart disease, injury to the respiratory system, infectious disease, or cancer was not revealed by the physical examination passed by the member upon entry into the department, shall be presumed to have incurred the heart disease, injury to the respiratory system, infectious disease, or cancer while performing the firefighter's duties as a member of such department unless the contrary is shown by competent evidence.

The appellate courts in Oklahoma have upheld the constitutionality of the firefighter presumption. In *Johnson v. City of Woodward,* 2001 OK 85, 38 P.3d 218 (2000), the Supreme Court of Oklahoma held:

> ¶ 18 The legislature determined any member of a fire department disabled as a result of heart disease not revealed by the physical examination passed upon entry into the department is entitled to a presumption such heart disease was incurred while performing duties as a member of the fire

> department, *unless the contrary is shown by competent evidence*. Although § 49-110(A) may be inartfully drawn, it also is clear from the plain language of this statute that the legislature intended to weave this presumption into the Workers' Compensation system because it specifically provided the workers' compensation carrier should provide the medical benefits to disabled firefighters. (Emphasis added)

Even though the Supreme Court of Oklahoma believed the firefighter presumption statute was "inartfully drawn," the Court found the legislature's intent was to create the presumption based upon the hazards of being a firefighter in the line of duty.

In the most recent attack upon the constitutionality of the Oklahoma firefighter presumption, in the case of *City of Edmond v. Vernon,* 2009 OK CIV APP 36, 210 P.3d 860 (2008), [12] the Oklahoma Court of Civil Appeals again upheld the constitutionality of the statute, opining:

> ¶ 17 By adopting the presumption, the Legislature recognized the importance of firefighters in our society and the unique danger of their occupation. While other first responders are also faced with danger, the firefighter must enter burning buildings and is most directly exposed to smoke and other hazardous materials, no matter how sophisticated his or her equipment. The Legislature reasonably concluded that such

[12] The Supreme Court of Oklahoma denied certiorari in the case on March 30, 2009, and the opinion was released for publication.

> exposure might have a direct effect on a firefighter's health, and it applied the presumption to diseases whose causes are not always known with medical certainty. (Emphasis added)

Although the Oklahoma statute creating the firefighter presumption may have been "inartfully drawn," the appellate courts looked at the statute and gave deference to the legislature by holding: "The Legislature reasonably concluded that such exposure might have a direct effect on a firefighter's health . . . "

States, in assessing the risks encountered by firefighters, have the right to provide for an evidentiary advantage for them. That advantage is based upon extraordinary risk in the workplace. Such presumptions are part of the workers' compensation laws in many states.[13]

A leading authority on the topic of firefighter presumptions is The Honorable David B. Torrey, a workers' compensation judge for nearly three decades

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[13] *See Presumptive Coverage for Firefighters and Other First Responders*, National Council on Compensation Insurance (NCCI), November, 2018, www.ncci.com/Articles/Documents/Insights-Research-Brief-Presumptive-Coverage.pdf; 6 "Non-cancer occupational health risks in firefighters," Institute of Occupational Medicine, https://academic.oup.com/occmed/article-pdf/62/7/485/4392951/kqs116.pdf, *2012; Firefighter Fatalities in the United States—2017*, National Fire Protection Association, https://www.nfpa.org/-/media/Files/News-and-Research/Fire-statistics-and-reports/Emergency-responders/osFFF.pdf (June 2018).

for the Commonwealth of Pennsylvania, Department of Labor and Industry.[14] Judge Torrey wrote:

> A key question on this topic is whether a state's firefighter cancer presumption law is merely procedural or is, instead, evidentiary in nature. This dichotomy has, notably, been treated by the Larson treatise for many years. Conclusions on this issue can only be achieved by a study of the cases–no state statute, to the writer's knowledge, actually announces whether the cancer presumption is substantive or procedural.
>
> The predominant holding, as it turns out, is that the formidable firefighter cancer presumption does indeed rise to the level of evidence. Legislatures have enacted cancer presumption statutes in their compensation laws to make it easier for a cancer-afflicted firefighter to succeed with his or her case. "The presumption," one thoughtful court has stated, was "enacted to relieve claimants from the nearly impossible burden of proving firefighting actually caused their disease . . . " [*Wanstrom v. North Dakota Workers' Compensation Bureau,* 621 N.W. 2d 864 (North Dakota 2001)]
>
> The presumption is thought appropriate as legislatures have been persuaded that an

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[14] Judge Torrey is an adjunct professor at the University of Pittsburgh School of Law and a former president of the National Association of Workers' Compensation Judiciary.

> increased risk of cancer accompanies the occupation of firefighter.[15]

Consistently, state legislatures and appellate courts recognize that the increased risk of the work of a firefighter is a rational basis for the enactment of special treatment by way of a presumption.

The State of Washington, through its duly elected legislature, evaluated the risk of certain employees at the Hanford site and exercised its authority to provide a presumption of compensability under circumstances contained in the provisions of HB 1723. Similarly, the Washington legislature also created rebuttable presumptions of compensability as a response to the outbreak of coronavirus.[16]

The states are entitled to deference in fulfilling their responsibility regarding the health and safety of their citizens. The latitude of the states to protect

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[15] David B. Torrey, *Firefighter Cancer Presumption Statutes in Workers' Compensation and Related Laws: An Introduction*, www.nawcj.org/wp-content/uploads/2019/06/NAWCJ-FIREFIGHTER-PRESUMPTIONS.

[16] The State of Washington created a statutory compensability presumption for health care workers who contract an infectious or contagious disease during a public health emergency. RCW 51.32.390 was a legislative response to the outbreak of coronavirus. Pursuant to RCW 51.32.181, for "frontline employees," there exists a prima facie presumption that any infectious or contagious diseases that are transmitted through respiratory droplets or aerosols, or through contact with contaminated surfaces and are the subject of a public health emergency are occupational diseases. RCW 51.32.185 creates a compensability presumption for law enforcement officers who develop heart problems within 72 hours of exposure to certain substances and for contraction of infectious disease.

their workers allows for an imperfect statute and risk-to-presumption ratio. In Oklahoma, where there was an "inartfully drawn" statute, the courts gave deference to the reasonable conclusions of the Oklahoma legislature. Unquestionably, legislators elected by the citizens of the State of Washington are better situated than the courts to evaluate risk and craft reasonable statutes to address that risk.

IV. THE ENACTMENT OF THE PRESUMPTION STATUTE FOR FEDERAL CONTRACT WORKERS AT HANFORD IS AUTHORIZED BY AN ACT OF CONGRESS AND IS A REASONABLE EXERCISE OF SOVEREIGN LEGISLATIVE AUTHORITY BASED UPON UNIQUE RISKS.

By enactment of 40 U.S.C. § 3172, Congress consented to be treated in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State of Washington. As with other statutory presumptions in Washington and other states, RCW 51.32.187 constitutes a reasonable exercise of legislative authority based upon risks uniquely faced by the category of persons protected by the statutory presumption.

The Washington legislature should be permitted to adopt a presumption that applies to the vast majority of Hanford site workers and is based on a particular danger uniquely faced by federal contract workers. Thus, such circumstances provide sufficient support to target that category of workers.

The U.S. Department of Energy has made it a top priority that the cleanup operation at Hanford should ensure the health and safety of the federal and contractor workforce and the citizens of

Washington. The State of Washington has the same goal. The passage of the Washington statute serves as an incentive to employers to provide safer working conditions.

The state statute has not resulted in any discriminatory burden on the federal government and the taxpayers to pay claims made for workers exposed to the hazards of Hanford.

The federal government has spent billions of dollars over three decades to begin the cleanup of the Hanford site. A reporter, after an extensive tour of the site, wrote:

> Even as scientists continue to puzzle over Hanford's tank waste, and as contractors flip the lights on in shiny new buildings, concerns about massive cost overruns, contractor lapses, and missed deadlines weigh heavily on the project. Hanford, born and built feverishly in the heat of World War II, now seems to be in a slow, meandering slog toward an unseen finish line.[17]

The eventual cleanup cost of the Hanford site is unknown, but the U.S. Department of Energy estimates that number could approach $700 billion over the next 60 years.[18]

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[17] Maria Galucci, *A Glass Nightmare: Cleaning Up the Cold War's Legacy at Hanford*, April 2, 2020, spectrum.ieee.org/Hanford-nuclear-site, the official Website of the Institute of Electrical and Electronics Engineers (IEEE), the world's largest technical professional organization with 400,000 members in 160 countries.

[18] *See 2019 Hanford Lifecycle Scope, Schedule and Cost Report*, pages ES-2 to ES-3, www.handford.gov/files.cfm/2019.

On the other hand, there is no evidence that the enactment of the Washington presumption statute will adversely affect the federal government's workers' compensation costs. Since the effective date of HB 1723, the number of workers' compensation claims filed annually at Hanford has declined. The pace of claims using the presumption as the basis for compensability has also declined, with a total of 259 claims filed in the first three years.[19]

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[19] Wash. Dep't of Lab. & Indus., *Hanford-Department of Energy (DOE) Data,* November, 2021.

CONCLUSION

The *amicus curiae,* Workers' Injury Law & Advocacy Group, requests the Court to sustain the opinion of the Ninth Circuit that the State of Washington had legal authority to create a compensability presumption under the state's workers' compensation laws for workers exposed to hazardous working conditions at the Hanford site.

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