No. 21-404

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

PETITIONER,

v.

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,

RESPONDENTS.

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

STATE OF WASHINGTON'S RESPONSE BRIEF

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QUESTION PRESENTED

40 U.S.C. § 3172(a) allows states to regulate workers' compensation on federal land and projects "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State." Text, history, and precedent demonstrate that this provision waives federal immunity from state workers' compensation laws on federal projects.

Washington enacted a workers' compensation law in 2018 tailored to the dangers faced by private employees at the Hanford nuclear site, a uniquely dangerous workplace where private contractors have routinely failed to provide employees with protective equipment or monitor exposures to toxic substances. After unsuccessfully challenging the law in the lower courts, the federal government sought certiorari, which this Court granted, on this question: "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) . . . ."

The federal government has maintained throughout this case that if Washington's law applied to all workers at Hanford and to workplaces other than Hanford, it would comply with § 3172. In 2022, Washington amended the prior statute to expand its protections to all workers at Hanford and at other radioactive waste sites in Washington.

The questions presented are:

1. Whether this case is moot given that the federal government sought only a declaration that Washington's prior law was invalid and Washington has now repealed the portions of that law to which the government objected.

2. If this case is not moot, whether Washington's prior law was authorized by 40 U.S.C. § 3172, which waives federal immunity from state workers' compensation laws on federal land and projects like the Hanford site.

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INTRODUCTION

The Hanford nuclear reservation is a uniquely dangerous worksite, permeated by a "witch's brew" of billions of gallons of radioactive waste. Over 10,000 Washingtonians work at the site, virtually all employed by private companies hired by the federal government. For decades, those companies have failed to protect workers, exposing them to dangerous conditions without providing adequate protective gear or even monitoring their exposures to toxic wastes. Countless workers have fallen ill, yet many were unable to recover workers' compensation because their employers kept no record of what toxins they were exposed to, when they were exposed, or what health impacts those toxins have.

Washington responded to this problem in 2018 by enacting House Bill 1723,[1] creating a presumption for private employees at Hanford that certain illnesses arose from their employment. The bill imposed no direct obligations on the federal government, instead regulating only private businesses operating at Hanford.

The federal government sued, claiming that H.B. 1723 violated the Supremacy Clause, but federal law authorized Washington's approach. Under 40 U.S.C. § 3172(a), States can regulate workers' compensation on federal land and projects "in the same way and to the same extent as if the premises

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[1] Substitute H.B. 1723, 65th Leg., Reg. Sess. (Wash. 2018), https://app.leg.wa.gov/billsummary?BillNumber=1723&Year=2017, will be referenced throughout as H.B. 1723.

were under the exclusive jurisdiction of the State[.]" This language, far broader than other waiver statutes, completely waives federal immunity as to workers' compensation on federal land and projects.

The federal government disagrees, contending that § 3172(a) simply applies normal intergovernmental immunity principles to federal land. U.S. Br. 33. That reading of the statute makes no textual or historical sense, and this Court rejected it in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), holding that although intergovernmental immunity normally precludes direct state regulation of federal activities, § 3172(a) "provides the requisite clear congressional authorization" for States to regulate federal facilities as to workers' compensation. *Id.* at 182. This Court held that the statute "places no express limitation on the type of workers' compensation scheme that is authorized." *Id.* at 183. The federal government concedes that H.B. 1723 is a workers' compensation law. U.S. Br. 42.

The federal government says it is implausible that Congress completely waived federal immunity from State workers' compensation laws, but its argument relies on false premises and ignores § 3172(a)'s text. The government claims that Congress never would have allowed States to adopt regulations that apply only to companies that contract with the federal government, because the political process fails to "provide a sufficient check against abuse" of such companies. U.S. Br. 16. But Congress may reasonably have concluded that such companies—which in Washington include Microsoft,

Boeing, and Amazon—are perfectly capable of protecting themselves. Indeed, the private employers operating at Hanford include large, sophisticated Washington corporations, and the largest business association in Washington lobbied against H.B. 1723. There is thus no reason for the Court to deviate from § 3172(a)'s text based on speculation about Congress's intent. Instead, the Court should conclude, like the court of appeals, 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. 72a.

Although § 3172(a) authorized H.B. 1723, there is no longer any reason for this Court to decide that question. Since the federal government filed this case, it has maintained that if Washington's law applied beyond Hanford and to employers who do not contract with the federal government, it would be valid. Relying on that representation, the Washington Legislature recently enacted Senate Bill 5890,[2] which extends the worker-protective presumptions in H.B. 1723 to all workers in Washington at all facilities that store or dispose of certain types of radiological waste. Thus, Washington law now provides precisely what the federal government has said § 3172(a) authorizes.

Because the government seeks only a declaration that H.B. 1723 is invalid, and because the portions of that law the government challenged have now been replaced, the government's challenge is

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[2] Substitute S.B. 5890, 67th Leg., Reg. Sess. (Wash. 2022), https://app.leg.wa.gov/billsummary?BillNumber=5890&Initiative=false&Year=2021, will be referenced throughout as S.B. 5890.

moot. The Court should therefore do what it routinely does when an intervening change in law renders the question presented hypothetical: dismiss the petition, vacate the lower court opinions, and remand to the district court to consider any remaining claims.

STATEMENT OF THE CASE

A. Washington's Workers' Compensation System Is Tailored to Address the Risks of Specific Industries and Employers

Washington adopted its industrial insurance system in 1911 to provide "sure and certain relief" to workers. 1911 Wash. Sess. Laws 345 (ch. 74, § 1). From the beginning, Washington has treated employers differently based on the specific hazards their workers face. *See* 1911 Wash. Sess. Laws 345-46; *see also* Wash. Rev. Code § 51.16.035(1); Wash. Admin. Code § 296-17-31011. In 1917, this Court upheld Washington's system of distinguishing employers based on the unique work conditions and risks they create. *See Mountain Timber Co. v. Washington*, 243 U.S. 219, 241-46 (1917).

Under Washington's system, the Department of Labor and Industries (L&I) classifies "all occupations or industries in accordance with their degree of hazard and fix[es] therefor basic rates of premium[s.]" Wash. Rev. Code § 51.16.035(1); *accord* Wash. Admin. Code § 296-17-31011. L&I regulations recognize hundreds of categories of occupations and industries, from "excavation work" to "pet grooming," each subject to its own rate. *See generally* Wash. Admin. Code §§ 296-17A-0101 to -7400; -0101-02 (excavation work); -7308-03 (pet grooming). Though the categories

are typically phrased in terms of types of work, rather than by naming specific companies, many of the categories apply to only a single business or handful of businesses because they are the only ones in Washington operating in that industry. For example, Wash. Admin. Code § 296-17A-2103 covers fulfillment standards for distribution of goods for an on-line business; it currently applies only to Amazon.[3] *See also, e.g.*, Wash. Admin. Code § 296-17A-7400 (applying only to state employees at "[m]ental health or acute care hospitals without a fully implemented safe patient handling program").

As in most states, Washington's system differentiates not only between industries, but also within industries. If an employer's workers suffer more injuries than most other employers in the same industry, L&I charges that employer more. Wash. Admin. Code §§ 296-17-850, -855. Thus, an employer in the same industry as another but with a worse safety record may pay a rate several times higher than its competitors.

Because workers can be harmed through chronic occupational exposure as well as workplace injuries, Washington began covering occupational diseases in 1937 to ensure that an employer's workers' compensation responsibilities match the harm experienced by its employees. 1937 Wash. Sess. Laws 1031 (ch. 212). An occupational disease is a disease or condition that arises proximately and naturally out of

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[3] Associated Press, *Washington state to boost workers' comp rates for Amazon* (Dec. 2, 2020), https://apnews.com/article/workers-compensation-washington-017a509e68d9427839c5e49b0096fb3e.

the distinctive conditions of employment. Wash. Rev. Code § 51.08.140; *Dennis v. Dep't of Lab. & Indus.*, 109 Wash. 2d 467, 481-82, 745 P.2d 1295 (1987).

While this system has generally achieved the State's goals of fairly compensating workers and allocating the cost of workplace illnesses and injuries to the employers who cause them, it has proven inadequate in one key respect. Because Washington's workers' compensation system normally places the burden of proof on the worker to demonstrate that a workplace incident caused their illness, the system does not function properly when certain workers routinely fall ill but for some reason are unable to document what exposures or incidents led to their illness. *See Cyr v. Dep't of Lab. & Indus.*, 47 Wash. 2d 92, 96, 286 P.2d 1038 (1955) (worker generally has burden to show entitlement to benefits); Wash. Rev. Code § 51.52.050(2)(a). Like many other states, Washington has responded to this problem by adopting several presumptions that switch the normal burden of proof, so that if workers in certain categories get sick with certain illnesses tied to their work, the burden is on their employer to prove that the illness is not work related.[4]

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[4] Presumption laws like this are common nationwide. *See, e.g.*, *City of Frederick v. Shankle*, 367 Md. 5, 785 A.2d 749 (2001); *Linnell v. City of St. Louis Park*, 305 N.W.2d 599 (Minn. 1981); *Sperbeck v. Dep't of Indus., Lab. & Human Rels.*, 46 Wis. 2d 282, 174 N.W.2d 546 (1970); Ariz. Rev. Stat. § 23-901.01; Cal. Lab. Code § 3212; Colo. Rev. Stat. § 8-41-209; Fla. Stat. § 112.18; 820 Ill. Comp. Stat. 305/6; Ohio Rev. Code § 742.38; Or. Rev. Stat. § 656.802; 53 Pa. Cons. Stat. § 637; Va. Code § 65.2-402; 4 Arthur Larson et al., *Larson's Workers' Compensation Law* § 52.07[2] (2021).

In 1987, Washington adopted such a presumption for firefighters. 1987 Wash. Sess. Laws 2401, 2402 (ch. 515, § 2); *see also* Wash. Rev. Code § 51.32.185. Specifically, the legislature recognized that firefighters are often exposed to toxic fumes, chemicals, and substances in their work, but usually cannot document exactly what they were exposed to or in what quantities. J.A. 131; CA9.SER.361. For that reason, it was often difficult for firefighters to access workers' compensation benefits when they bore the burden of proving that their illness was caused by their work. The legislature therefore adopted a firefighter occupational disease presumption under which certain respiratory conditions, heart problems, infectious diseases, and cancers are presumed to arise naturally and proximately out of employment as a firefighter. Wash. Rev. Code § 51.08.140; Wash. Rev. Code § 51.32.185(1)(a). This shifts the burden to the employer—virtually always the State or local governments in the case of firefighters—to show that a hazardous exposure at work did not cause the worker's disease.

In 2018, Washington added a similar presumption for police officers and other first responders suffering from post-traumatic stress disorder. 2018 Wash. Sess. Laws 1573 (ch. 264). And in 2021, Washington created presumptions for frontline workers and health care workers related to COVID-19. 2021 Wash. Sess. Laws 1944 (ch. 251); 2021 Wash. Sess. Laws 1955 (ch. 252).

B. The Hanford Nuclear Cleanup Site Poses Special Dangers to Workers

The Hanford nuclear production complex manufactured plutonium for decades. J.A. 178; U.S. Br. 4. The site was home to nine nuclear reactors, J.A. 156, which produced thousands of tons of solid nuclear waste and hundreds of billions of gallons of contaminated liquid waste, J.A. 159. This waste includes a "witch's brew of a wide range of hazardous chemicals and radioactive elements." J.A. 180. Much of the liquid waste was simply dumped on the land at Hanford, and many of the "solid wastes were buried in the ground in pits or trenches." J.A. 160.

Cleanup of the site is being conducted almost entirely by private companies hired by the Department of Energy (DOE). Those companies employ roughly 10,000 workers at the site. U.S. Br. 6; J.A. 46, 178. Cleanup of the site, in DOE's words, is "unprecedented in scale and complexity," exposing workers to many hazardous chemicals and radioactive substances. J.A. 42-43, 89-90, 97-106, 159-67.

Employees at Hanford work amid a unique mix of toxic and radioactive substances present nowhere else. The scale of the waste and dangers is almost unimaginable. *See, e.g.*, J.A. 156-69. The tank farms alone contain 177 underground tanks storing 53 million gallons of radioactive and toxic chemical substances, with around 67 tanks that have leaked into the ground. J.A. 85-86, 161-65. The tank farm waste contains multiple hazardous substances that severely damage human health. J.A. 85-86, 88-90, 93-97, 172-76. For example, even small doses of

ionizing radiation (which permeates Hanford's mixed waste) can cause cancer. J.A. 125-26, 173-76.

Hanford's hazards extend beyond workers who work directly with hazardous materials. Toxic and radioactive substances were dumped at sites throughout the facility, often with no records kept of where. J.A. 160-61. Scientists have found that office workers at Hanford are at increased risk of exposure to dangerous substances, with an increased risk of disease. J.A. 97-98, 198-200; *see also* J.A. 172-76. Releases at Hanford have caused highly dangerous radioactive materials to contaminate workers, drifting outside the direct cleanup areas and polluting clothing and cars. *See, e.g.*, J.A. 198-200.[5]

DOE admitted in a 2014 report that the work conditions are hazardous: "The ongoing emission of tank vapors, which contain a mixture of toxic chemicals, is inconsistent with the provision of a safe and healthful workplace free from recognized hazards."[6] The problem has continued since the 2014 report, with continued emissions of dangerous vapors. J.A. 87-88, 102-03, 199; *see also* J.A. 94-99, 164-69, 192-96, 198-99; Frame *supra* note 5.

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[5] Susannah Frame, *Contamination events force project shut down at Hanford nuclear site*, KING-TV (May 16, 2019, 8:26 PM), https://www.king5.com/article/news/investigations/contamination-events-force-project-shut-down-at-hanford-nuclear-site/281-31e25448-4b84-4a42-a068-ad8be72b1b92.

[6] *See* U.S. Dep't of Energy, Savannah River Nat'l Lab'y, *Hanford Tank Vapor Assessment Report* 15 (Oct. 30, 2014), https://srnl.doe.gov/documents/Hanford_TVAT_Report_2014-10-30-FINAL.pdf.

Despite knowing of these dangers, private contractors operating at Hanford have not protected their employees. Contractors have not consistently supplied their workers with personal protective equipment. J.A. 97-98; CA9.SER.344. And neither the contractors nor DOE have consistently monitored conditions to allow medical professionals to know about particular workers' exposures to hazards. J.A. 195, 166-69, 172-73; CA9.SER.300-01, 311. Multiple federal and expert reports "have documented poor Hanford contractor practices that limit the ability to detect worker exposures." J.A. 167. Because of these failures, workers often have a difficult time identifying specific incidents at work that caused their diseases or conditions. J.A. 141, 168-69, 172-73. And with no documentation of exposures, fairly compensating Hanford workers for injuries and diseases presents challenges not present at most Washington worksites. J.A. 141, 169, 172-73.

Hanford is thus a uniquely dangerous place to work. As summarized by the L&I medical director, the combination of exposure to hazardous substances and the lack of careful monitoring "presents a unique set of medical challenges not found elsewhere in Washington." J.A. 172-73.

C. Through Statutes and Contracts, the Federal Government Has Authorized Washington to Cover Hanford Workers Under Its Workers' Compensation System

Following a rash of worker injuries on the Golden Gate Bridge Project, Congress authorized states to apply their workers' compensation laws on

federal lands and projects. Former 40 U.S.C. § 290[7]; S. Rep. No. 74-2294, 74th Cong., 2d Sess. (1936). The change came after this Court held that a state workers' compensation statute did not apply to a federal facility. *Murray v. Joe Gerrick & Co.*, 291 U.S. 315, 318-19 (1934).

Congress enacted the 1936 law to provide "more adequate protection" to workers on federal projects and property "wherever situated[.]" S. Rep. No. 74-2294, at 1. The law freed state workers' compensation laws "from any restraint by reason of the exclusive federal jurisdiction." *Peak v. Small Bus. Admin.*, 660 F.2d 375, 376 n.1 (8th Cir. 1981); *accord Capetola v. Barclay White Co.*, 139 F.2d 556, 559 (3d Cir. 1943); *Travelers Ins. Co. v. Cardillo*, 141 F.2d 362, 363 (D.C. Cir. 1944).

Washington has long exercised its authority under this law to protect workers at federal facilities. In 1937, employees of federal contractors gained industrial insurance. 1937 Wash. Sess. Laws 525 (ch. 147, § 1). Ever since, private employees working on federal projects in Washington, such as employees of contractors at Hanford, have received industrial insurance benefits. Additionally, while many major employers in Washington, like Boeing, Microsoft, and Amazon, have contracts with the federal government, their employees are covered by state workers' compensation laws regardless of whether they work on federal contracts.

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[7] This statute was once codified at 40 U.S.C. § 290. It was recodified as 40 U.S.C. § 3172(a) in 2002 with minimal changes.

Although the duty to provide industrial insurance coverage normally falls on employers, rather than on an entity that hires those employers to carry out a contract, for decades DOE has agreed to pay for some contractors' obligations at Hanford under an agreement between L&I and DOE. J.A. 143-45; CA9.SER.373; Wash. Rev. Code § 51.04.130. L&I and DOE entered into the current memorandum of understanding (MOU) in June 2018—*after* the law challenged here became effective. CA9.SER.373-75; 2018 Wash. Sess. Laws 226 (ch. 9, § 1). In the MOU, DOE agrees to follow Washington law without reservation. CA9.SER.373.

D. In 2018, Washington Adopted a Presumption to Protect Hanford Workers

In 2018, Washington enacted H.B. 1723 for "Hanford site workers." In light of the many dangers discussed above of working at Hanford, the difficulty workers have had in proving which exposures to which chemicals made them sick, and the consistently poor safety record of employers operating at Hanford, the legislature responded, just as it has for firefighters, police officers, and frontline health workers, by creating a rebuttable presumption that certain diseases and conditions of Hanford site workers are occupational diseases. Wash. Rev. Code § 51.32.187(2)(a); H.B. 1723; 2018 Wash. Sess. Laws 226 (ch. 9, § 1). The presumption is not absolute, but is rebuttable with evidence including "use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities." Wash. Rev. Code § 51.32.187(2)(b). This law furthered the State's goal of ensuring "sure and certain relief" for

workers harmed through their employment. Wash. Rev. Code § 51.04.010.

H.B. 1723 was tailored to protect as many Hanford workers as possible while complying with federal law. Because federal law preempts application of state workers' compensation laws to federal employees, 5 U.S.C. § 8102(a), Washington has never attempted to apply those laws, including H.B. 1723, to federal employees. Wash. Rev. Code § 51.12.060. But with the exception of roughly 400 federal employees, virtually all workers at Hanford—over 10,000—are employees of private companies hired by the federal government. U.S. Br. 6; J.A. 46. These are the same types of private employees who have long received the protection of Washington's workers' compensation laws on federal land, and these were the employees covered by H.B. 1723. Former Wash. Rev. Code § 51.32.187(1) (2018).

H.B. 1723's presumption did not apply to the entire Hanford site, but rather covered only workers in the most contaminated areas and areas where cleanup efforts posed the greatest dangers: "the two hundred east, two hundred west, three hundred area, environmental restoration disposal facility site, central plateau, or the river corridor locations." Former Wash. Rev. Code § 51.32.187(1)(b) (2018); *see also* U.S. Br. App. 7a (map showing areas of Hanford covered by H.B. 1723). These areas are all profoundly contaminated with radioactive and hazardous waste and all home to massive cleanup efforts. *See generally*

J.A. 158-59.[8] H.B. 1723 did not apply to parts of the Hanford reservation where certain private companies operate, but these facilities (US Ecology and Perma-Fix Northwest) do not handle the type of high-level radioactive waste present at the parts of Hanford covered by the law, so they do not expose workers to the same risks. *See* J.A. 131, 180-81, 194-96, 198 ("Workers at the Hanford site thus have much higher potential for harmful exposures than workers at Perma-Fix Northwest and US Ecology."). H.B. 1723 similarly did not apply to the small number of state employees who occasionally enter Hanford to conduct brief inspections, but there is no evidence that any such worker has ever been sickened by an exposure at Hanford or that their employers have failed to provide them with protective gear or take other safety measures, as the covered employers have failed to do. *See, e.g.*, J.A. 166-68.

While H.B. 1723 shifted the burden of proof, it did not provide greater benefits to Hanford workers than to workers at other places of employment. Wash. Rev. Code §§ 51.32.050, .060-.095; Wash. Rev. Code § 51.36.010.

The cost of H.B. 1723 is a tiny fraction of the total expenses incurred by the United States in cleaning up Hanford. The federal government estimates that the cleanup will cost between $323 billion and $677 billion, with annual costs of between

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[8] *See also* https://www.hanford.gov/page.cfm/River Corridor; https://www.hanford.gov/page.cfm/200Area; https://www.hanford.gov/page.cfm/300Area.

$3 billion and $15 billion for at least the next half century.[9]

Since the early 2000's, the federal government has operated a compensation program for federal employees and some contractors who become ill after working at certain nuclear sites, including Hanford. *See* Energy Employees Occupational Illness Compensation Program Act (EEOICPA), 42 U.S.C. §§ 7384 to 7385s-6. Under that program, "the Federal Government has paid out more than $1.75 billion to Hanford workers as of June 2020," roughly $100 million annually. Pet. App. 19a & n.9. Payments that workers receive under state workers' compensation laws are deducted from any recovery under EEOICPA. *See* 20 C.F.R. § 30.625-.627.

Unlike the total cleanup cost at Hanford and the cost of federal compensation programs, the cost of state workers' compensation at Hanford has been and remains modest. In the decade before enactment of H.B. 1723, private contractor employees at Hanford submitted an average of 300-350 State workers' compensation claims annually. J.A. 67. DOE paid roughly $115 million in state workers' compensation benefits during that time, averaging roughly $11 million annually. J.A. 67. DOE provided no estimate at the district court about how H.B. 1723 had affected

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[9] Letter from Doug S. Shoop, Manager, Dep't of Energy (Richland WA), to David R. Einan, Manager, EPA (Richland WA) & Alexandra K. Smith, Nuclear Waste Program Manager, Dep't of Ecology (Richland WA) (Jan. 31, 2019), https://www.hanford.gov/files.cfm/2019_Hanford_Lifecycle_Report_w-Transmittal_Letter.pdf (contains attachment: *2019 Hanford Lifecycle Scope, Schedule and Cost Report*, at pages ES-2 to ES-3).

its costs. But since H.B. 1723's enactment, the number of workers' compensation claims filed by employees at Hanford has actually *declined*, and the total cost of claims has barely budged.[10] The United States notes that the presumption law applied retroactively, but the record reflects that in the first year after the legislature adopted H.B. 1723, DOE received fewer than 100 claims invoking the statutory presumption. J.A. 68, 146. The pace of claims invoking the presumption has only declined since then, with a total of just 259 claims filed in over three years. *Hanford–DOE Data*.

The United States says that H.B. 1723's legislative history reflects that Washington legislators "emphasized that the costs of the bill would fall on the federal government." U.S. Br. 12 (citing Pet. 7-8). But this refers to an earlier version of H.B. 1723. In the final version, the Washington legislature changed the bill to give the State Fund—the central fund applicable to all employers who are not self-insured—responsibility for claims that were not covered by the MOU with DOE. J.A. 140. H.B. 1723 passed with overwhelming bipartisan support,[11] despite several large business associations, including the Association of Washington Business,

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[10] Wash. State Dep't of Lab. & Indus., *Hanford–Department of Energy (DOE) Data* (Nov. 2021) (*Hanford–DOE Data)*, https://lni.wa.gov/insurance/_docs/Hanford-DOE%20Data.pdf.

[11] *See supra* note 1.

"Washington's oldest and largest statewide business association,"[12] testifying against the bill.[13]

E. The District Court and Ninth Circuit Upheld Washington's Law

The United States filed a complaint in 2018, asserting that H.B. 1723 impermissibly "singles out and discriminates against the Federal Government and its contractors, purports to directly regulate the Federal Government, and imposes significant burdens on the Federal Government and its contractors without imposing them on other employers in the State, all in violation of the Supremacy Clause ...." J.A. 28-29. The complaint sought declaratory and injunctive relief declaring the then-existing statute invalid and enjoining its enforcement. J.A. 40. No damages were sought. J.A. 40. The complaint acknowledged that federal law waives intergovernmental immunity so that "States may enforce their workers' compensation laws against private employers working on federal land 'in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State.'" J.A. 33-34 (quoting 40 U.S.C. § 3172(a)). Washington argued that the waiver of intergovernmental immunity in 40 U.S.C. § 3172(a) authorized Washington's law.

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[12] *About AWB*, https://www.awb.org/about-us/who-we-are/.

[13] H.B. Rep. on H.B. 1723, at 5, 65th Leg., Reg. Sess. (Wash. 2018).

The district court ruled for Washington on cross-motions for summary judgment. CA9.ER.6. It held that "[t]he plain language" of § 3172(a) "allow[s] the state to regulate federal lands within its geographical boundaries with all the tools that could be brought to bear on non-federally owned land." CA9.ER.7. The federal government had conceded in its briefing that § 3172(a) "authorizes the State to regulate on federal land as it permissibly may do so under state law." EWDC.ECF.33, at 3. And at oral argument, the United States stipulated that if the federal government was not involved and the Hanford site was on state land, Washington could adopt and apply H.B. 1723. J.A. 213, 222.

The court of appeals unanimously affirmed, in an opinion by Judge Milan Smith. The court began by examining the statute's language, Pet. App. 65a-66a, concluding 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.'" Pet. App. 68a. In interpreting the statutory language, the panel cited *Goodyear*, which addressed the waiver statute and held that it "place[d] no express limitation" on permissible workers' compensation laws. *Goodyear Atomic Corp.*, 486 U.S. at 183. The Court also cited many court of appeals opinions reading the same waiver broadly to mean 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. 72a (citing *Peak*, 660 F.2d at 376 n.1; *Capetola*, 139 F.2d at 559; *Travelers Ins. Co.*, 141 F.2d at 363).

The court also compared § 3172(a)'s language to other waivers of intergovernmental immunity and found it materially broader. While other waivers specify that states cannot apply a more stringent rule on federal land than applies on state land, § 3172(a) contains no such limitation. Pet. App. 70a-71a (contrasting § 3172(a) with the waiver in the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9620(a)(4)).

The court emphasized that the United States conceded in oral argument and at the district court that "Washington could enforce a version of H.B. 1723 that did not involve the Federal Government and where the Hanford site were a state project." Pet. App. 73a. Because it "could" apply the presumption to a project under the State's exclusive jurisdiction, it could apply this presumption in the same way and to the same extent on federal land. Pet. App. 73a, 80a-81a.

The court also emphasized that while some of the federal government's arguments hinted at preemption concerns, the government had not actually made a preemption argument, so "the United States has waived that argument[.]" Pet. App. 74a.

The United States unsuccessfully moved for rehearing en banc. Pet. App. 22a-23a. Judge Smith concurred in the denial of rehearing en banc, noting 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." Pet. App. 25a (quoting 40 U.S.C. § 3172(a)).

Like the United States, the dissent from the denial of rehearing focused on the law's alleged singling out of the federal government. *E.g.*, Pet. App. 38a-40a. Also like the United States, the dissent conceded that a law similar to H.B. 1723 that applied more broadly to include non-federal actors would be permissible. Pet. App. 47a n.2 ("States may apply different standards to different types of facilities or different types of work, so long as in drawing these distinctions they do not discriminate against the Federal Government."); *see also* Pet. App. 46a-48a (dissent from denial of rehearing generally describing *Goodyear Atomic Corp.*, 486 U.S. 174, as allowing any type of workers' compensation scheme subject only to the requirement that the scheme apply equally to federally owned and other facilities).

F. The Federal Government Sought Certiorari on a Specific Question While Detailing Ways Washington Could Amend its Law to Resolve the Question Presented

The federal government sought certiorari on a very narrow and specific question: "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) ...." Pet. I (Question Presented); U.S. Br. I. The government repeatedly characterized the alleged problem with Washington's law as singling out of the federal government. Pet. 11; U.S. Br. 16. And its arguments implicitly conceded that if

the law applied to federal and non-federal actors, it would not violate intergovernmental immunity. For example, the United States described the Supremacy Clause as allowing application of a state law or regulation to federal contractors "if it is 'imposed on some basis unrelated to the object's status as a Government contractor or supplier'—that is, if it is 'imposed equally on other similarly situated constituents of the State.'" Pet. 13 (quoting *North Dakota v. United States*, 495 U.S. 423, 437-38 (1990) (plurality opinion)); *see also* U.S. Br. 16 ("Section 3172(a) authorizes States to apply workers' compensation laws *evenhandedly* to federal contract workers and other similarly situated employees ...."). Similarly, the United States acknowledged that states may distinguish among workers in their workers' compensation programs if significant differences between the classes of workers justify the differential treatment. Pet. 15; U.S. Br. 24.

G. Washington Amended its Law to Cover Workers at All Radiological Hazardous Waste Sites in Washington

After the Court granted certiorari, the Washington legislature, relying on the federal government's representations about what sort of law would address its concerns, repealed and replaced large portions of H.B. 1723. The legislature enacted Substitute Senate Bill 5890, eliminating all references to the "Hanford nuclear site" and "United States department of energy Hanford site workers." The presumption now applies instead to all workers in Washington "working at a radiological hazardous

waste facility for at least [one] eight hour shift . . . including conducting an inspection of the facility." S.B. 5890, at 2 (appended to Suggestion of Mootness at 3a). "'Radiological hazardous waste facility' means any structure and its lands where high-level radioactive waste as defined by 33 U.S.C. Sec. 1402 or mixed waste as defined by [Wash. Admin. Code §] 173-303-040 is stored or disposed of, except for military installations as defined in 31 C.F.R. Part 802.227 and listed in Appendix A to 31 C.F.R. Part 802." S.B. 5890 (Suggestion of Mootness at 3a-4a).

Because high level radioactive waste is stored and disposed of at all parts of Hanford covered under H.B. 1723, those same areas remain covered under S.B. 5890. *See* Reply in Support of Suggestion of Mootness 4-9. But in addition to covering private employees of federal contractors, the new law now covers state inspectors at the Hanford site and any other workers who perform an 8-hour shift there, excepting federal employees. *See* S.B. 5890; Wash. Rev. Code § 51.12.060 (exempting federal employees from Washington's workers' compensation laws). The new law also applies to a range of non-federal facilities within the State, including facilities the United States previously argued were comparable to Hanford but not covered under the prior law, such as Perma-Fix Northwest and Energy Northwest. U.S. Br. 7.[14]

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[14] *See, e.g.*, Department of Ecology, State of Washington, *Other mixed waste facilities we oversee*, https://ecology.wa.gov/Waste-Toxics/Nuclear-waste/Radioactive-waste-disposal (last visited Mar. 21, 2022) (listing Washington facilities with mixed waste permits).

Washington filed a Suggestion of Mootness, explaining how this new law rendered the current proceedings moot.

SUMMARY OF THE ARGUMENT

Washington's adoption of S.B. 5890 resolves this case. The basis for the federal government's complaint and petition for certiorari was that Washington's presumption law applied only at Hanford and only to employees of federal contractors. The new law eliminates these objections. It covers any worker at any radiological hazardous waste site, with the exception of federal military installations. The new law thus affords the federal government all the relief it sought, so the Court should dismiss the case as moot, vacate the opinion below, and remand for further proceedings if necessary.

In any event, the court of appeals correctly upheld the former statute, so if the Court does reach the merits, it should affirm. This Court has long held that states may treat employers based on the workplace safety risks they create for their employees. *Mountain Timber Co.*, 243 U.S. at 243-46. And Congress has waived intergovernmental immunity for state workers' compensation laws on federal land and projects. 40 U.S.C. § 3172(a). This waiver authorizes Washington to protect workers at Hanford just as it could protect workers elsewhere. Washington properly exercised its authority by adopting a law tailored to the medical, safety, and employer-history concerns presented at Hanford. Former Wash. Rev. Code § 51.32.187(1) (2018).

ARGUMENT

Although the Supremacy Clause generally prevents states from directly regulating the federal government or applying different rules to federal contractors than apply to others, the United States properly concedes that the doctrine does not apply if Congress waives intergovernmental immunity, as it has done for workers' compensation. *Goodyear Atomic Corp.*, 486 U.S. at 185-86; U.S. Br. 16, 22. The key question presented here is thus the scope of the waiver Congress adopted in 40 U.S.C. § 3172(a). The statutory text, comparisons to other statutory waivers, and this Court's precedent all indicate that § 3172(a) is best read as a complete waiver of intergovernmental immunity, authorizing application of Washington's former law at Hanford.

Ultimately, however, there is no need for this Court to resolve the precise scope of the waiver in § 3172(a), because Washington has now repealed and replaced the portions of Washington law to which the federal government objected. This renders this case moot.

A. The State Has Repealed and Replaced the Challenged Law, so the Court Should Vacate and Remand Based on Mootness or Prudential Considerations

The statutory provisions that formed the basis for the federal government's lawsuit no longer exist, and the Court can no longer provide any relief by

invalidating the former law. The case is thus moot, and the Court would be providing a purely advisory opinion if it answered the now hypothetical question presented. Even if the case were not technically moot, prudential considerations would strongly counsel against issuing a constitutional ruling that would have no effect on any existing law. The Court should vacate the decision below and remand for the district court to consider whether the government has any residual claims.

When circumstances change while an appeal is pending that prevent the Court from providing effective relief, the case becomes moot. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990). To nevertheless decide the case would be to issue an "advisory opinion[] on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). This Court therefore routinely dismisses cases as moot or remands for consideration of any remaining claims where an intervening change in the law makes answering the question presented meaningless. *See, e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. City of New York,* 140 S. Ct. 1525 (2020) (dismissing because city rule restricting transport of firearms was rescinded and state statute enacted prohibiting such rules); *United States v. Microsoft*, 138 S. Ct. 1186, 1188 (2018) (per curiam) (dismissing because legislation enacted after oral argument had terminated the parties' dispute "over the issue with respect to which certiorari was granted"); *Bowen v. Kizer*, 485 U.S. 386, 387 (1988) (per curiam) (dismissing because legislation enacted after case was argued mooted the case); *U.S. Dep't of Justice v. Provenzano*, 469 U.S. 14, 15-16 (1984) (per curiam)

(dismissing as moot based on intervening change in law); *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 213-14 (1984) (same); *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam) (same).

Here, enactment of S.B. 5890 renders this case moot. The federal government sought only declaratory and injunctive relief—no damages—invalidating H.B. 1723. The central premise of its argument and the question presented to this Court was that Washington could not adopt a workers' compensation law that applied only to federal contract employees at a federal facility. *See* U.S. Br. I; J.A. 28-40. But the government repeatedly acknowledged that the State could apply workers' compensation laws to federal facilities that also apply elsewhere. *E.g.*, U.S. Br. 32-33 ("States may extend to federal lands and facilities the same workers' compensation provisions that apply to similarly situated non-federal premises."). The State has now repealed and replaced the portion of the former law that limited its coverage to Hanford and to employees of federal contractors. The new law instead applies to anyone who works at a "[r]adiological hazardous waste facility," defined as "any structure and its lands where" certain radioactive wastes are stored or disposed. S.B. 5890 § 1(1)(b). The federal government agrees that S.B. 5890 uses a "completely different" coverage formula than the prior law, and that any legal challenge to the new law would raise different issues and require development of a different record, so this Court should not opine on S.B. 5890. Opp. Sugg. Mootness at 13, 17.

Thus, the key feature of the law the United States sought to invalidate no longer exists, and ruling on the merits of the prior statute would have no impact on Washington's law or any other law going forward. It would be a purely "advisory opinion[] on abstract propositions of law." *Hall*, 396 U.S. at 48.

The government erroneously contends, however, that this case is not technically moot because invalidating H.B. 1723 could entitle it to refunds from a small group of Washingtonians whose claims for benefits under the old law were approved but are still on appeal. Opp. Sugg. Mootness at 11-12. There are fewer than 70 such claims, and in any event, any claim that was allowed under H.B. 1723 would also be allowed under S.B. 5890, so even as to this small number, invalidating the prior law will have no impact. Reply Supporting Mootness 4-9.

The government claims that some "relatively low" number of claims allowed under H.B. 1723 might be denied under S.B. 5890, Opp. Sugg. Mootness at 14, but as the State has detailed at length in its Reply in Support of Suggestion of Mootness, that is legally and factually incorrect. The plain language of S.B. 5890's coverage definition extends to all parts of Hanford covered by H.B. 1723, and L&I, the state agency that drafted S.B. 5890 and will implement it, interprets the statute to cover all workers at Hanford who were covered under H.B. 1723. In Washington "[a] court must give great weight to the statute's interpretation by the agency which is charged with its administration, absent a compelling indication that such interpretation conflicts with the legislative intent." *Marquis v. City of Spokane*, 130 Wash. 2d 97, 922 P.2d 43, 50 (1996).

This Court should thus follow its regular practice when a change in law moots a case and "vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully." *Lewis*, 494 U.S. at 482 (citations omitted).

Even if S.B. 5890 somehow failed to render this case completely moot, the Court should still vacate the lower court decision and remand for further proceedings to "conserve[] the scarce resources of this Court." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). The federal government agrees that "vacating and remanding would be a reasonable approach here," but it urges the Court to decide the case anyway. Opp. Sugg. Mootness at 18. Its reasons are unpersuasive.

The government first claims that the Court should hear argument and issue a constitutional ruling because of the "concrete significance" of the impacts of such a ruling. *Id.* But the outermost limit of the practical impact the government can claim is its potential ability to recoup or avoid somewhere between $17 and $37 million worth of payments to sick workers. *Id.* at 11. Given that the government expects to spend at least $8 million *every day* for the next 50 years cleaning up the Hanford site, *supra* n.6, this claim provides no justification for the Court to spend its time resolving this case. And the government's estimate of how much it might save is wildly overstated because it assumes that none of the claims allowed under H.B. 1723 would be allowed under S.B. 5890, when in fact all of them would be.

The United States also contends that review is warranted here despite its limited practical impact because the State allegedly brought about the intervening change in law to insulate a favorable decision from the Court's review while continuing to subject the United States to the same harm. Opp. Suggestion Mootness 19. This argument is doubly wrong. First, the State is not insulating anything from review because the State is asking this Court to *vacate* the lower courts' decisions on mootness or prudential grounds; no "favorable decision" would survive. Second, S.B. 5890 does not subject the United States to the same harm it alleged from H.B. 1723. The "harm" alleged in this case, from the United States' initial complaint through its petition and briefing to this Court, was "a state workers' compensation law that applies *exclusively* to federal contract workers." J.A. 38; U.S. Br. I (emphasis added). The United States has repeatedly conceded that Washington could instead adopt a law that turned on working at a particular type of facility, whether on federal land or not, *see, e.g.*, Pet. 13, 16, 18, which is exactly what Washington has now done. Thus, while the United States may object to the new law, the harm it alleges is not the same. As the United States concedes elsewhere, any challenge to the new law would "raise different issues and require development of a different record." Opp. Suggestion Mootness 17.

In short, this case is moot, but even if it were not, the miniscule stakes alleged by the government here would not warrant this Court's issuance of a constitutional ruling. The Court should vacate the lower court rulings and remand to the district court.

B. 40 U.S.C. § 3172(a) Completely Waives Intergovernmental Immunity, Allowing States to Regulate Workers' Compensation on Federal Lands and Projects As if They Were Under Exclusive State Jurisdiction

There is no dispute between the parties that § 3172(a) waives intergovernmental immunity as to state workers' compensation laws. The central question for this Court is whether § 3172(a) effects a complete or a partial waiver of such immunity. The federal government offers an ever-changing array of theories about how Congress supposedly intended to limit § 3172(a)'s waiver. But all signs here—the sweeping scope of the statutory text, the contrast of its language with partial waivers enacted around the same time, and this Court's prior interpretations of the unambiguous statutory language—point to the same conclusion: Congress completely waived immunity as to state workers' compensation laws for federal land and projects. Thus, if this Court does not dismiss this case as moot, it should uphold H.B. 1723 as falling within Congress's broad waiver of intergovernmental immunity in § 3172(a).

1. The text of Section 3172(a) supports the State's reading

The plain text of 40 U.S.C. § 3172(a) effects a total waiver of intergovernmental immunity as to state workers' compensation laws on federal land and projects. The government disputes this plain reading only by relying on words not found in the text and taking statutory language out of context.

The waiver's language is sweeping:

> The state authority charged with enforcing and requiring compliance with the state workers' compensation laws . . . 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). Thus, the waiver gives states authority to regulate federal projects "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State[.]" The plain meaning of this language, as the lower court held, is that it "removes federal jurisdiction as a barrier to a state's authority over workers' compensation laws[.]" Pet. App. 72a.

Several features support this reading. First, the waiver is written based on what the State could do under its "exclusive jurisdiction." That is an expansive term clearly designed to waive intergovernmental immunity, because "exclusive jurisdiction" means more than just ownership; it means full regulatory authority. This interpretation is supported by precedent and contemporary dictionaries. *Webster's Dictionary* from 1934, for example, defines "jurisdiction," as relevant here, as: "authority of a sovereign

power to govern or legislate; power or right to exercise authority; control." Jurisdiction, *Webster's New International Dictionary of the English Language* (1936). The term "exclusive" was similarly defined as "excluding or having the power to exclude," while "exclude" means "to refuse participation, enjoyment, consideration or inclusion." *Id.* (exclusive, exclude). Case law from the same time period applied the same understanding: exclusive jurisdiction meant complete authority to regulate, not just ownership. *See, e.g.*, *Murray*, 291 U.S. 319 (after effective date of the state's cession of land, the "jurisdiction of the federal government was exclusive" and "laws subsequently enacted by the state were ineffective in the navy yard"; *North Dakota*, 495 U.S. at 435 (plurality opinion) (citing cases recognizing that states have no jurisdiction to tax or regulate liquor sales on military bases under "exclusive federal jurisdiction") (case omitted); *Atkinson v. State Tax Comm'n of Oregon*, 303 U.S. 20, 23-25 (1938) (distinguishing federal ownership of land from "exclusive jurisdiction" over that land).

The idea that the federal government would retain some degree of immunity from state regulation on land under the state's "exclusive jurisdiction" is irreconcilable with the plain meaning and judicial construction of that term. The federal intention to entirely waive jurisdiction as to workers' compensation is confirmed by § 3172(b), which specifies that: "The Government under this section does not relinquish its jurisdiction *for any other purpose*." (Emphasis added.) That phrasing only makes sense if the government *has* relinquished its jurisdiction for some purpose, namely as to workers' compensation.

The relinquishment of federal "jurisdiction" and grant of "exclusive jurisdiction of the State" is particularly telling because, from its origins, intergovernmental immunity has been characterized as an incident of jurisdiction. The parties in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), for example, characterized their respective claims about state taxation of a federal bank on state land as a matter of competing assertions of jurisdiction. *Id.* at 342 (noting Maryland's argument that "the jurisdiction of the state extends over all its territory" and the government's competing argument that Congress's actions created a strong ground "to infer a cessation of state jurisdiction"). The *McCulloch* Court also framed intergovernmental immunity as an incident of sovereignty and jurisdiction. *Id.* at 429 ("It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident.").[15]

Another feature reflecting the breadth of § 3172(a)'s waiver is that it waives immunity over federal land and projects "*as if* the premises were

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[15] *See also, e.g.*, *Collector v. Day*, 78 U.S. 113, 123 (1870), *overruled in part by Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (invalidating federal tax on state judicial officer as violating intergovernmental immunity, reasoning: "'If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State . . . .'" (quoting *Weston v. City of Charleston*, 27 U.S. (2 Peters) 449, 466 (1829))).

under the exclusive jurisdiction of the State" (emphasis added). "As if" presupposes a hypothetical situation: it means "as it would be if // it was *as if* he had lost his last friend."[16] The statutory language is thus explicitly framed in the hypothetical: states may apply their workers compensation laws to federal premises "as it would be if" those premises were under the states' exclusive jurisdiction. It is hard to imagine a clearer attempt to give states full regulatory authority over workers' compensation on federal land. Indeed, as detailed below, the state is unaware of any other federal waiver statute that grants states authority "as if" the federal premises were under exclusive state jurisdiction. *See infra* p. 41-43.

The straightforward meaning of this statutory language effectuates a complete waiver of intergovernmental immunity as to workers' compensation on federal lands or projects. As the court of appeals explained, § 3172(a) "permits the States to apply workers' compensations laws to federal land located in the state, without limitation." Pet. App. 73a-74a.

The federal government critiques this plain reading, but its arguments focus more on the imagined consequences of a complete waiver of immunity than on the statute's plain language.

To begin, the government argues that the plain reading adopted by the court of appeals ignores the statutory phrase "in the same way and to the same

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[16] As if, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/as%20if (last visited Mar. 22, 2022).

extent," but that is incorrect. U.S. Br. 38-39. The statute says that the State may regulate "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). This language makes clear that the State's power is identical—no more and no less—to what it would be on premises under the State's exclusive jurisdiction. The government suggests that this language must mean something else. It claims that the phrase means that 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." U.S. Br. 32. But "in the same way and to the same extent" does not reference how states treat other workers; it references how states could regulate under their "exclusive jurisdiction." This is markedly different from other waiver statutes, which explicitly reference how states actually regulate others. *See, e.g.*, 49 U.S.C. § 5126(a) (providing that "person[s] under contract with" the federal government to transport hazardous materials are subject to state regulation "in the same way and to the same extent that any person" is regulated); *infra* p. 41-43.

The federal government also insists repeatedly that § 3172(a) prohibits regulations on federal land that differ from those on state or private land, U.S. Br. 16, 32-33, but that is not what the statute says. When Congress wants to prohibit stricter state regulation on federal land, it knows exactly how to say so, and it has in many other waiver statutes detailed below. *See infra* p. 41-43. It did not do so here. As the court of appeals correctly held: "[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.'" Pet. App. 68a.

The government also argues that the statute's header supports its interpretation, but "the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 529 (1947). And the header language does not support the government's interpretation in any event. The header states: "Extension of state workers' compensation laws to buildings, works, and property of the Federal Government." U.S. Br. 32. The government argues that the use of the word "extension" implies that the "provisions also apply elsewhere in the State." U.S. Br. 32. But in stating that § 3172(a) results in an "extension" of such laws, the header merely states the obvious: before enactment of § 3172(a), state workers' compensation laws did not apply to "buildings, works, and property of the Federal Government[,]" and after enactment of the statute, they do. 40 U.S.C. § 3172(a). This language cannot support the weight the government puts on it.

Unhappy with § 3172(a)'s broad text, the federal government tries to limit its meaning by claiming that the statute's legislative history indicates that it was directed solely to "address problems of territorial jurisdiction" and simply applied to federal land the same intergovernmental immunity rules that applied elsewhere. U.S. Br. 40. But this reading makes no sense. According to the government, before the "late 1930s," intergovernmental immunity was "understood to bar States from

imposing *any* tax or regulation" on federal contractors even outside federal land. U.S. Br. 20-21 (citing *United States v. County of Fresno*, 429 U.S. 452, 459-460 (1977)). According to the cases cited, this rule began to change in 1937 to allow application of nondiscriminatory state taxes to federal contractors. *County of Fresno*, 429 U.S. at 459-460.[17] But Congress first enacted the materially identical predecessor to § 3172(a) *in 1936*, before this rule had changed. Thus, on the government's own telling, in 1936 states could not regulate federal contractors *at all*, even on a nondiscriminatory basis, outside federal land. If the government were correct that Congress's intent was to allow states to regulate on federal land just as they could on state land, the waiver would have done nothing at all, because it would simply have extended the complete immunity of federal contractors on non-federal land onto federal land. That is nonsensical. The much more plausible reading of the history is that Congress intended to completely waive federal immunity from state workers' compensation laws on federal land and projects.

Another problem with the government's version of the legislative history is that it understates the breadth of § 3172(a)'s language. The actual language of the waiver applies not just to "all land and premises in the State which the Federal Government owns or holds by deed or act of cession," but also to "all

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[17] *See also South Carolina v. Baker*, 485 U.S. 505, 506 (1988) (before late 1930s, courts viewed "any tax on income a party received under a contract with the government [as] a tax on the contract and thus a tax 'on' the government because it burdened the government's power to enter into the contract").

projects, buildings, constructions, improvements, and property in the State and belonging to the Government." § 3172 (emphasis added). This is consistent with Congress's goal of protecting laborers "on projects, buildings, constructions, improvements, and property *wherever situated* belonging to the United States of America." C.A.9.SER 365-66 (Senate Report, Rep. No. 74-2294, 74th Cong., 2d Sess. (1936)) (emphasis added). The text of the waiver thus extends to federal projects outside of federal enclaves. Thus, whenever immunity applies to government contractors as a result of work on federal lands or federal projects, § 3172 will apply.

In a last ditch effort to critique the court of appeals' reasoning, the government demands that this Court accept any "plausible" interpretation of the statute that avoids a complete waiver of immunity. U.S. Br. 36-37. But as this Court held in *Goodyear* in rejecting what the government claimed was a "plausible" reading, any interpretation of § 3172(a) must still be "squared with the statute's language and history." *Goodyear Atomic Corp.*, 486 U.S. at 183. As in *Goodyear*, the government's interpretation here cannot be squared with § 3172(a)'s language or history.

The federal government's reading of § 3172(a) is not plausible or even internally consistent. The government claims that the statute "authoriz[es] 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." U.S. Br. 33. There are at least three problems with this interpretation.

First, this reading adds words to § 3172(a) and ignores words in the statute. Section 3172(a) says that states may apply workers' compensation laws to federal land and projects "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). Unlike many other waiver statutes, *supra* p. 41-43, this language conspicuously does not say state laws can apply "in the same way and to the same extent as" they apply elsewhere. Nothing in this text requires the state law actually to "apply in other areas of the State," U.S. Br. 32-33, and the Court should not add such terms to the statute. *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) (court does not add to statute). Here, unlike in other waiver statutes, the "same way and same extent" language refers not to how the State regulates elsewhere, but to what the State could do if the federal land or project "were under the exclusive jurisdiction of the State." By insisting that § 3172(a) only allows laws that actually apply elsewhere, the government also ignores the phrase "as if," which presupposes a hypothetical comparison as detailed above. *Supra* p. 33-34. And by claiming that the federal government retains federal jurisdiction to assert immunity, the United States reads the word "exclusive" entirely out of the statute. Because the government's interpretation adds to and omits key words in § 3172(a)'s text, the Court should reject it. *See 62 Cases of Jam*, 340 U.S. at 596.

Second, the government elsewhere has conceded that § 3172(a) allows state workers'

compensation laws even if they apply only on federal land. For example, the government has conceded that "if a State has a special workers' compensation provision for employees who perform particularly hazardous duties, that provision could be applied to federal contract workers who perform those duties at the federal facility." Pet. 18 (citation omitted). So, for example, Washington could adopt a workers' compensation law or regulations that applied only to workers directly involved in the dangerous task of emptying tanks containing high-level radioactive waste. Such a law would apply only to federal contractors at Hanford, yet the United States concedes it would be allowed under § 3172(a). Pet. 18.

Finally, the government's reading would lead to bizarre results Congress could not have intended. For example, under the government's theory, if a state enacted special workers' compensation protections for workers engaged in shipbuilding, applying that law to private employees on federal land (such as a Navy base) would be perfectly fine if there was some other shipbuilding facility in the state on non-federal land. But if that private facility closed, so that the law no longer applied to anyone outside federal land, the state law would suddenly violate § 3172(a). That makes no sense.

In sum, the government's reading of § 3172(a) ignores the statute's text. The court of appeals' faithful reading of that text should be affirmed.

2. Comparing Section 3172 to other waivers of immunity supports the State's reading

The flaws in the government's textual arguments are put into sharper relief by comparing § 3172's broad waiver language to the far narrower language Congress has used when it intends to grant only a partial waiver of intergovernmental immunity. Congress has used many approaches to indicate when it intended to grant only partial immunity, but it used none here.

For example, shortly after Congress enacted the precursor statute to § 3172 in 1936, Congress passed a partial waiver of intergovernmental immunity as to state taxation of federal officers. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 (1989). That waiver provided:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States ... by a duly constituted taxing authority having jurisdiction, if the taxation *does not discriminate* against the officer or employee because of the source of the pay or compensation.

Id. (citing 4 U.S.C. § 111) (emphasis added). This unquestionably partial waiver of intergovernmental immunity, unlike § 3172, used precise and narrow language and explicitly forbade differential treatment of federal officers or employees. *Id.* One of the primary cases on which the government relies, *Dawson v. Steager*, 139 S. Ct. 698 (2019), analyzed this partial statutory waiver. This analysis is inapposite here.

Other partial waivers of immunity are similarly explicit. For example, in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 to 9675, Congress provided that on federal land state laws "shall not apply to the extent a State law would apply any standard or requirement to [federal] facilities which is more stringent than the standards and requirements applicable to facilities which are not" federal. 42 U.S.C. § 9620(a)(4). This waiver explicitly forbids states from imposing more stringent laws on federal land than on other land.

Even where federal statutes waive intergovernmental immunity by giving states authority to regulate federal land "in the same manner and to the same extent" that states regulate others, the waiver statutes omit the key feature of § 3172(a)'s language: "as if the premises were under the exclusive jurisdiction of the State." The court of appeals identified numerous such statutes. Pet. App. 70a-71a. For example, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 to 6992k, allows states to enforce their hazardous waste management plans on federal agencies only if a state regulates the agency "in the same manner, and to the same extent, as any person is subject to such requirements." 42 U.S.C. § 6961(a). The Clean Air Act, 42 U.S.C. §§ 7401 to 7515, likewise, provides that a federal facility "shall be subject to, and comply with, all Federal, State, interstate, and local requirements . . . respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity." 42 U.S.C. § 7418(a). Similarly, 49 U.S.C. § 5126(a) provides that "person[s]

under contract with" the federal government to transport hazardous materials are subject to state regulation "in the same way and to the same extent that any person" is regulated, and 16 U.S.C. § 835c-1(b) authorizes state taxation of lands acquired by the United States as part of the Columbia Basin Project "in the same manner and to the same extent as privately owned lands of like character."

All of these waivers require states to regulate federal land or contractors "in the same way and to the same extent" that some other person or land is actually regulated. But § 3172 is different: it allows states to apply their laws "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 federal government downplays the stark contrast of § 3172's broad language with these more limited waivers, arguing that the court below flipped the presumption on its head by requiring an express retention of intergovernmental immunity rather than an express waiver. But this is sleight of hand. The court below analyzed the very broad language of § 3172 and properly concluded that the limitations argued by the government were not reflected in the statutory text. The court cited these other statutes simply to demonstrate that when Congress wanted to limit its waiver of intergovernmental immunity in ways that the government claimed it had done in § 3172, it knew very well how to do that. The court of appeals properly gave effect to the complete waiver here.

3. Precedent supports the State's reading

Decisions of this Court also support the State's interpretation that § 3172 entirely waives intergovernmental immunity for state workers' compensation laws on federal land and projects.

This Court confirmed the broad scope of the waiver in *Goodyear Atomic Corp.*, 486 U.S. at 186. That case involved a worker who was injured while working for a federal contractor on federal land, and who received an extra compensation award under an Ohio statute providing such awards to injured employees if their employer caused the injury by violating state safety regulations. *Id.* at 176-77. The federal government first argued that the Ohio law amounted to a direct regulation of the federal facility, which would be prohibited under normal principles of intergovernmental immunity. *Id.* at 182. This Court decided that it need not resolve whether the law was equivalent to a direct regulation because even if it were, the predecessor to § 3172 "provides the requisite clear congressional authorization for the application of the provision." *Id.*

This initial holding, on its own, refutes the government's contention that § 3172 simply applies normal rules of intergovernmental immunity to federal land. U.S. Br. 33. If that were all § 3172 did, then it would still prohibit direct regulation of the federal government on federal land. U.S. Br. 16 ("the doctrine prevents direct taxation or regulation of the federal government"); 20 (same). But this Court held that it didn't need to decide whether Ohio's law was equivalent to direct regulation, because even if it

was, § 3172 "provides the requisite clear congressional authorization for the application of" state law. *Goodyear Atomic Corp.*, 486 U.S. at 182.

That is not the only key holding of *Goodyear*. The federal government's second argument in the case was that § 3172 waived intergovernmental immunity only for "typical [no fault] workers' compensation" laws, and that Ohio's special workers' compensation law thus could not be applied to federal lands. *Id.* at 183. This Court disagreed, holding that whether Ohio's law was "typical" made no difference because § 3172 "place[d] no express limitation on the type of workers' compensation scheme that is authorized." *Id.* at 183-84. This runs directly counter to the government's contention that § 3172 allows application only of workers' compensation laws that apply to "similarly situated non-federal premises." U.S. Br. 32.

The government cites passages from *Goodyear* out of context to distort its core holding. In the context of Ohio's law, which applied to all facilities in Ohio, the Court noted that the waiver "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.* The United States argues that this passage establishes a "restriction on the types of state laws that could be applied to federal land and facilities." Br. 35; *see also* Br. 39. But it does no such thing. The *Goodyear* Court had no reason to decide whether the waiver statute forbids state workers' compensation laws tailored to special hazards at a federal worksite, because no such law was before the Court. *See, e.g.*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (explaining

that only "[t]he question actually before the Court [was] investigated with care, and considered in its full extent"). As the court of appeals explained in rejecting this argument: "the Court considered there a state workers' compensation law that did not concern a particular employer, or a particular site located in the state, like HB 1723 does" and it "did not purport to impose the limitation on the statute that the United States seeks to impose here." Pet. App. 68a.

Nor do other decisions of this Court compel a different result. The United States cites several cases about intergovernmental immunity, but most did not involve a waiver of intergovernmental immunity at all, or involved waivers that explicitly barred differential treatment of the federal government or federal officers. Br. 19-22 (citing *North Dakota*, 495 U.S. at 435 (plurality opinion) (no waiver statute); *South Carolina v. Baker*, 485 U.S. 505, 523 (1988) (no waiver statute); *Washington v. United States*, 460 U.S. 536, 546 (1983) (no waiver statute); *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392, 398 (1983) (partial tax waiver barring discriminatory treatment); *United States v. County of Fresno*, 429 U.S. 452, 459-60 (1977) (no waiver statute); *Hancock* v. *Train*, 426 U.S. 167, 179 (1976) (Clean Air Act partial waiver); *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 387 (1960) (no waiver statute); *Mayo v. United States*, 319 U.S. 441, 447 (1943) (no waiver statute); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)) (no waiver statute). These cases are inapposite.

4. The government's concerns about the purported consequences of the lower court's ruling are overblown

This Court should also reject the government's speculation about the consequences of a complete waiver of intergovernmental immunity as a pretense for ignoring the plain language of § 3172. The statutory text is controlling. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (when text of statute is unambiguous, judicial inquiry is complete").

In any case, the government's prognostications about such consequences are overblown. The waiver does not grant states carte blanche on several levels.

First, the waiver is narrowly limited to state workers' compensation laws and only to compensate workers injured on federal lands and projects.

Second, if a state workers' compensation law conflicted with a federal statute or interfered with a federal objective, the federal government could argue preemption, as it often does in intergovernmental-immunity cases, such as *Goodyear Atomic Corp.*, 486 U.S. at 177-78, and *North Dakota*, 495 U.S. at 440. The government has made no such argument here, *see* Pet. App. 75a, presumably because the government concluded that it could not show that H.B. 1723 would

interfere with federal objectives. On the contrary, by motivating contractors to create a safer work environment, H.B. 1723 furthers federal safety objectives. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984) (holding state law authorizing punitive damages was not preempted by the federal remedial scheme governing nuclear power plants as both sought to protect the public); J.A. 29 ("DOE's top priority in conducting its cleanup operations at Hanford is ensuring the health and safety of its federal and contractor workforce").

Finally, as this Court has recognized, Congress always has the authority to limit states' ability to regulate. Thus, arguing that state rules will increase costs in a way that "make it difficult or impossible" for the federal government to obtain a service it needs "ignores the power of Congress to protect the performance of the functions of the national government." *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 104 (1940).

C. Washington's Prior Law Complied with 40 U.S.C. § 3172

This Court has made clear that, as to land within their exclusive jurisdiction, states can tailor workers' compensation laws in any rational way based on the dangers posed by particular jobs, worksites, or employers. Because § 3172 waives immunity and allows state regulation "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State," the only remaining question is whether H.B. 1723 satisfied this standard. It clearly did.

A core policy of Washington's Industrial Insurance Act "is to allocate the cost of workplace injuries to the industry that produces them, thereby motivating employers to make workplaces safer." *Harry v. Buse Timber & Sales, Inc.*, 166 Wash. 2d 1, 201 P.3d 1011, 1018 (2009). This Court upheld that policy in *Mountain Timber Co.*, 243 U.S. at 243-46, making clear that Washington may tailor its workers' compensation laws to address specific hazards. Washington thus has authority to regulate employers and workplaces differently as long as there is a rational basis for such treatment.

Following this established law, Washington has adopted varying workers' compensation rates, regulations, and laws to address specific risks to worker safety. As one element of this targeted approach, Washington has adopted presumption laws to address the unique risks faced by firefighters, police officers, and health care workers. The United States concedes that these laws are acceptable under the State's exclusive jurisdiction. Br. 27.

So too is H.B. 1723. While the United States challenges various choices made by the legislature, each had a reasoned basis. For example, Washington included office workers at Hanford within the presumption based on the extensive contamination at the site and scientific reports showing that office workers suffered toxic exposures. J.A. 199-200. Washington did not include state inspectors because

there was no evidence that they had suffered any adverse health consequences or that their employers had failed to provide them with adequate protective gear, unlike federal contractors. *See, e.g.*, J.A. 166-68. The law did not cover nearby private companies because they do not handle the type of high-level waste pervasive at Hanford. J.A. 194-96. The United States argues that a worker who has spent only one shift at Hanford does not face the risk of "a worker who spends a career in an occupation like mining, milling, or refining." U.S. Br. 28. But it provided no evidence to rebut the expert testimony from the State's top workplace safety official that Hanford "presents a unique set of very hazardous conditions to Washington workers characterized by the presence of quantities and types of hazardous substances found nowhere else in Washington." J.A. 130. And in any event, the problem H.B. 1723 addressed was not merely Hanford's unique dangers, but also the unique difficulty Hanford workers have had in recovering workers' compensation. *See infra* p. 10.

The decisions challenged by the federal government are legislative choices entitled to deference, and the United States has never argued that the decisions lack a rational basis. Pet. App. 74a-75a. Even if evidence suggested that conditions warranted extension of the law to additional areas or employers, "reform may take one step at a time, addressing itself to the phase of the problem which

seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955).

The government argues that "[e]ven if there were sound reasons to believe that federal contract workers at the Hanford site face greater job-related dangers than typical employees, the State of Washington cannot permissibly use affiliation with the federal government as a 'proxy' for exposure to such hazards." Br. 27 (citing *Dawson*, 139 S. Ct. at 706). But this argument assumed that intergovernmental immunity applies. It does not; it was waived. Washington may therefore regulate in the best way it sees fit to address the hazardous conditions within the bounds of Due Process and Equal Protection. Pet. App. 74a-75a. And given that virtually all Hanford workers are employed by private companies who have contracted with the federal government, it was perfectly reasonable to use that status as a "proxy" for those the State wanted to protect.

Similarly flawed is the government's argument that H.B. 1723 was invalid even under the State's reading of § 3172. U.S. Br. 39-40. The government claims that under the State's interpretation, § 3172 would only allow the State to regulate on federal land in the same way that intergovernmental immunity allows the State to regulate elsewhere. There are two problems with this argument. First, § 3172 didn't just import intergovernmental immunity rules to federal land, it completely waived immunity. As noted above, the government's contrary theory

would mean that when Congress first waived immunity in 1936, it actually wasn't waiving immunity at all, because States could not regulate federal contractors even outside of federal land. *Infra* p. 36-37. And second, § 3172 waives immunity not only on federal land, but also on federal "projects," as detailed above, so the waiver would apply to federal projects outside federal land. *Infra* p. 36-37. Thus, § 3172 fully waived immunity as to workers' compensation on federal land and projects, and the government has conceded at every stage of this case that absent immunity, H.B. 1723 would be valid. *See, e.g.*, Pet. App. 73a.

Even absent a waiver, outside of federal land a federal contract is not a magic wand allowing employers to escape workers' compensation laws. As discussed above, many Washington employers—from Boeing to Amazon—contract with the federal government. If one of these companies had a particularly dangerous worksite on land "under the exclusive jurisdiction of the State," 40 U.S.C. § 3172(a), the State could unquestionably adopt a law specifying that certain injuries or illnesses at the site were presumptively work-related. *See Mountain Timber Co.*, 243 U.S. 219. Under § 3172, if the company then leased space on federal property and moved the worksite there, the State could still "apply the law[] . . . in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State[.]"

In short, "§ 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. 72a. With that barrier removed, H.B. 1723 was a valid exercise of the State's authority.

D. Though the Court Should Not Evaluate Washington's Revised Law in the First Instance, the New Law Clearly Complies with 40 U.S.C. § 3172

The State and the federal government agree that "'[t]his Court should not evaluate Washington's new law in the first instance.'" Opp. Suggestion Mootness 17 (quoting Suggestion of Mootness 2). As the federal government concedes, if it decides to challenge Washington's revised law, such a challenge would raise different issues and require different evidence than was presented here. *Id.*

If the Court nonetheless decides to opine about S.B. 5890, the law is clearly valid under any interpretation of § 3172. S.B. 5890 applies to companies on both federal and non-federal land, *supra* n. 14, and it applies without regard to whether an employer contracts with the federal government. This Court has held that even when intergovernmental immunity applies, it allows state regulation "imposed on some basis unrelated to the object's status as a Government contractor or supplier." *North Dakota*, 495 U.S. at 437-38 (plurality

opinion). And even on the reading of § 3172 advanced by the federal government, the State may "extend to federal lands and facilities the same workers' compensation provisions that apply to similarly situated non-federal premises." U.S. Br. 32-33. There is thus no basis to question the legality of S.B. 5890.

CONCLUSION

The Court should vacate the Ninth Circuit opinion and remand to the district court on mootness or prudential grounds; if the Court declines to do so, then it should affirm.

RESPECTFULLY SUBMITTED.

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