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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

40 U.S.C. § 3172(a) allows States to regulate workers' compensation on federal land "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State[.]" For decades, courts have interpreted this text to mean that States can regulate workers' compensation on federal land as if the land belonged to the State. On State land, States can apply different laws, rules, and premiums to different employers based on the dangers of their work and their history of employee injuries. Such rules apply to employers on State land even if they contract with the federal government.

Washington State has long tailored its workers' compensation laws to the dangers faced by particular employees, including by adopting statutes specifically to protect firefighters and others facing special hazards. In 2018, Washington enacted a similar statute tailored to the special dangers faced by private employees at the Hanford nuclear site. Hanford is a uniquely dangerous workplace, filled with radioactive and toxic chemicals, and private contractors operating there have routinely failed to provide employees with protective equipment and to monitor their exposures to toxic substances.

The question presented is:

Does 40 U.S.C. § 3172 authorize Washington to apply a workers' compensation law tailored to the unique hazards faced by private employees at the Hanford nuclear reservation in the same way that Washington can address hazards of particular jobsites and employers on State land?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Regulations

Other Authorities

INTRODUCTION

The petition for certiorari in this case seeks nothing more than factbound error correction where there is no error. The decision below creates no conflict with decisions of this Court or other courts, correctly interprets federal law, will have no impact beyond this case, and will impose negligible costs on the United States. The Court should deny certiorari.

The Hanford nuclear reservation is a uniquely dangerous workplace, teeming with radioactive and chemical hazards. Private companies are cleaning up the site, under contracts with the federal government. Those companies have routinely failed to protect their employees from hazards or even track employee exposures to hazardous substances. For that reason, their employees often fall ill and are unable to prove the cause of their illnesses. Washington responded by amending its workers' compensation laws to help workers at Hanford get benefits, just as the State has done for firefighters, police, and healthcare workers.

The district court and court of appeals upheld Washington's law. Under 40 U.S.C. § 3172(a), States can impose workers' compensation rules on federal land "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State[.]" It is undisputed that for areas "under the exclusive jurisdiction of the State," the State can adopt different rules for different employers and workplaces based on the dangers of their work or their safety records, as the State has done here. The court of appeals therefore concluded, after carefully reviewing § 3172's text and this Court's precedent, that § 3172 waived immunity as to Washington's law.

Unhappy with this outcome, the federal government asks this Court to reverse, but its petition meets none of this Court's criteria for granting cert.

The petition asserts no disagreement among lower courts about how to interpret § 3172, and there is none. Rather, for decades federal courts of appeals have uniformly interpreted the waiver broadly.

The petition claims a conflict with *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), but it bases that claim entirely on a single, inapposite sentence ripped out of context. In reality, that decision emphasized that § 3172 "places no express limitation on the type of workers' compensation scheme that is authorized," *id.* at 183, and it did not involve (much less prohibit) a law like this one, which addresses unique hazards at a federal worksite.

Unable to show a conflict, the petition focuses on arguing that the lower court misinterpreted § 3172, but that is both incorrect and no basis for certiorari. As the appeals court held, the federal government's reading of § 3172 ignores key language: States may regulate on federal land "*as if* the premises were under the exclusive jurisdiction of the State[.]" (Emphasis added.) Other waivers of federal immunity use narrower language to specify that States can only impose rules on federal land that apply elsewhere. The lower courts gave effect to this language difference; the petition does not. There is no question that on non-federal land, Washington can adopt special rules or laws for employers based on their unique hazards and safety records, and it can do so

even if those employers contract with the federal government (as many do, like Boeing or Amazon). Section 3172 gives the State the same authority to adopt rules tailored to the special hazards and safety records of employers on federal land, as the State has done here.

Finally, the petition urges the Court to grant review because of the alleged implications of the lower court's opinion, but the decision will have no impact beyond this case. Hanford is a uniquely dangerous worksite and employers there have particularly bad safety records; the petition offers no evidence of a similar location or of any other law like this one. The petition's claims of financial harm are also overblown. Since the law took effect, workers' compensation claims at Hanford have actually *declined*, and there has been no meaningful increase in costs to the federal government. Moreover, unlike in most immunity cases, the federal government has not argued that Washington's law interferes with any federal objective or is otherwise preempted. In short, the only harm alleged here is financial, and even that is minimal.

Because this case meets none of the Court's criteria for certiorari, the Court should deny review.

STATEMENT OF THE CASE

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

The Hanford nuclear production complex was used for decades to manufacture plutonium. CA9.SER.454. It has stopped production, but the

federal government continues to dispose of radioactive waste there, and it contracts with private companies to clean up the site. CA9.ER.109; CA9.SER.454. Cleanup of the site, in the words of the Department of Energy (DOE), is "unprecedented in scale and complexity," exposing workers to many hazardous chemicals and radioactive substances. CA9.ER.106; CA9.SER.245-47, 253-61, 393-400.

Employees at Hanford work amid a unique mix of toxic and radioactive substances present nowhere else in Washington. The scale of the waste and dangers at Hanford is massive: 18 tank farms that contain 177 underground tanks storing 53 million gallons of radioactive and toxic-chemical substances, with around 67 tanks that have leaked some content into the ground. CA9.SER.241-42, 396-98. The tank farm waste contains multiple hazardous substances that severely damage human health. CA9.SER.241, 244-47, 250-53, 334-35, 448-52. For example, as the federal government recognizes, even small doses of ionizing radiation (which permeates Hanford's mixed waste) can cause cancer. CA9.SER.281-82, 449-52.

Hanford's hazards extend beyond workers who work directly with hazardous materials. Scientists have found that office workers at Hanford are at increased risk of exposure to dangerous substances, with an increased risk of disease. CA9.SER.187-89, 253-54; *see* CA9.SER.448-52. 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.*, CA9.SER.187-89.[1]

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." *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, *at* CA9.SER.298. The problem has continued since the 2014 report, with continued emissions of dangerous vapors at the tank farms. CA9.SER.243-44, 256-58; *see also* CA9.SER.180-81, 183-84, 186-87, 251-55, 398-404; Frame *supra* note 1.

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 to protect against harmful exposures. CA9.SER.254, 344. And neither the contractors nor DOE have consistently monitored conditions to allow medical professionals to know about particular workers' exposures to hazards. CA9.SER.183, 300-01, 311, 400-04, 448-49. Because of these failures, workers often have a difficult time identifying specific

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[1] *See also* 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.

incidents at work that caused their diseases or conditions. CA9.SER.356, 402-03, 448-49. And with no documentation of exposures, fairly compensating Hanford workers for injuries and diseases presents challenges not present at most Washington worksites. CA9.SER.356, 403, 448-49.

Hanford is thus a uniquely dangerous place to work. As summarized by the medical director of Washington's Department of Labor and Industries (L&I), 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." CA9.SER.448-49.

B. Washington's Industrial Insurance System Is Tailored to Address the Risks of Specific Industries and Employers, Such as Risks at Hanford

As one of the first States to enact workers' compensation laws, Washington adopted its industrial insurance system in 1911 to provide "sure and certain relief" to its 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. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 241-44, 246 (1917); 1911 Wash. Sess. Laws 345-46; *see also* Wash. Rev. Code § 51.16.035(1); Wash. Admin. Code § 296-17-31011.[2] A core policy of Washington's

[2] The last publication of the Revised Code of Washington was in 2020. The last publication of the Washington Administrative Code was in 2021.

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, 19, 201 P.3d 1011 (2009).

In 1917, this Court upheld L&I's system of distinguishing employers based on the unique work conditions and risks they create. *See Mountain Timber Co.*, 243 U.S. at 243-46.

Under this system, 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 doing that work, many of the categories apply to only a single business or a handful of businesses because there are only a few businesses 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. This classification 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 through workplace injuries, Washington began covering occupational diseases in 1937 to ensure that an employer's workers' compensation responsibilities match the harm its employment causes. 1937 Wash. Sess. Laws 1031 (ch. 212). An occupational disease is a disease or condition that arises proximately and naturally out of 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

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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.

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 workers in a certain category 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 a series of 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]

In 1987, Washington adopted such a presumption for firefighters. 1987 Wash. Sess. Laws 2401 (ch. 515, § 2); *see also* Wash. Rev. Code § 51.32.185. Specifically, the legislature recognized that firefighters are often exposed to a range of toxic fumes, chemicals, and substances in the course of

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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).

their work, but usually cannot document exactly what they were exposed to or in what quantities. CA9.SER.348, 361. For that reason, it was often difficult for firefighters to access workers' compensation benefits under a system in which 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. And it furthers the State's goal of ensuring "sure and certain relief" for workers who have been harmed through their employment. Wash. Rev. Code § 51.04.010.

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 front-line workers and health care workers related to COVID-19. 2021 Wash. Sess. Laws 1944 (ch. 251); 2021 Wash. Sess. Laws 1955 (ch. 252).

Most relevant here, in 2018 Washington enacted House Bill 1723, creating a similar presumption for "Hanford site workers." In light of the many dangers discussed above of working at the Hanford site, 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) (Substitute H.B. 1723, 65th Leg., Reg. Sess. (Wash. 2018); 2018 Wash. Sess. Laws 226 (ch. 9, § 1)).

The presumption does not apply to all employers in the greater Hanford reservation, but rather focuses on the most dangerous areas and the employers with the worst safety records. For example, the United States points out that the presumption law does not apply to parts of the reservation where certain companies operate, Pet. 4, but it omits that these facilities (US Ecology and Perma-Fix Northwest) do not handle the type of high-level radioactive waste present at the part of Hanford covered by the law, so they do not expose workers to the same risks. *See* CA9.SER.183-84, 187 ("Workers at the Hanford site thus have much higher potential for harmful exposures than workers at Perma-Fix Northwest and US Ecology."), 225-26, 262, 347-48, 456. Similarly, the United States points out that the law does not apply to State employees who occasionally enter the Hanford site 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.

Finally, while the special-hazard presumption law shifts the burden of proof, it does not provide greater benefits to Hanford workers than to workers incurring occupational diseases at other places of employment. Wash. Rev. Code §§ 51.32.050, .060-.095; Wash. Rev. Code § 51.36.010.

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

Faced with the unique hazards and issues of exposure documentation at Hanford, the Washington Legislature turned to a 1936 federal law to respond.

Following a rash of worker injuries on the Golden Gate Bridge Project in San Francisco, Congress authorized States to apply their workers' compensation laws to contractors working on projects on federal lands. Former 40 U.S.C. § 290[5]; CA9.SER.366. 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. 2294, at 1, 74th Cong., 2d Sess. (1936). It "fill[ed] a conspicuous

[5] This statute was once codified at 40 U.S.C. § 290. It was recodified as 40 U.S.C. § 3172 in 2002 with minimal changes. The last publication of § 3172 and all other federal codes in this brief was 2018.

gap" by allowing States to adopt workers' compensation laws applicable to federal property. S. Rep. No. 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) (Wash. Rev. Code § 51.12.060). 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.

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. CA9.SER.368-69, 373; Wash. Rev. Code § 51.04.130. L&I and DOE entered into the current memorandum of understanding (MOU) in June 2018—*after* the

challenged special-hazard presumption law became effective. CA9.SER.375; 2018 Wash. Sess. Laws 226 (ch. 9, § 1). In the MOU, DOE agrees to follow Washington law without reservation. CA9.SER.373.

D. Workers' Compensation Claim Numbers and Costs at Hanford Have Been Modest Under Washington's Law

The total cost of cleaning up the Hanford nuclear site is staggering. The federal government estimates that the cleanup will cost between $323 billion and $677 billion, with annual costs of between $3 billion and $15 billion for at least the next half century.[6]

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 (citing United States Dep't of Labor, *Total Benefits Paid by Facility, Cumulative EEOICPA Compensation and Medical*

[6] 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).

Paid—Hanford (June 30, 2020), https://www.dol.gov/owcp/energy/regs/compliance/charts/hanford.htm). Payments that workers receive under State workers' compensation laws are deducted from any recovery under EEOICPA. *See* 20 C.F.R. § 30.625-.627.

Given the total cleanup cost at Hanford and the amount the federal government spends on 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. CA9.ER.133. DOE paid roughly $115 million in State workers' compensation benefits during that time, averaging roughly $11 million annually. CA9.ER.133. DOE provided no estimate at the district court about how H.B. 1723 had affected 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. Wash. Dep't of Lab. & Indus., *Hanford–Department of Energy (DOE) Data* (Nov. 2021), https://lni.wa.gov/insurance/_docs/Hanford-DOE%20Data.pdf. The petition expresses particular concern about a possible flood of retroactive claims, but the record reflects that in the first year after the legislature adopted H.B. 1723, DOE received less than 100 claims invoking the statutory presumption. CA9.SER.370; CA9.ER.134. The pace of claims invoking the presumption has only declined since then, with a total of 259 claims filed in over three years. *Hanford–DOE Data.*

The United States says that H.B. 1723's legislative history reflects that Washington would have "no further financial obligation under this bill." Pet. 7-8. But this refers to an earlier version of H.B. 1723. In the final version of the bill, 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. CA9.SER.355-56.

E. The District Court and Ninth Circuit Ruled That Congress Waived Immunity

After the United States sued Washington, the district court ruled for Washington on cross-motions for summary judgment. CA9.ER.6. It held that "[t]he plain language" of § 3172 "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 "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 its special-hazard presumption. CA9.ER.22, 32.

The Court of Appeals unanimously affirmed, in an opinion by Judge Milan Smith. The court began by examining the statute's language, Pet. App. 10a, 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. 12a. In interpreting the statutory language, the panel cited *Goodyear Atomic*, which addressed the waiver statute and held that it "place[d] no express limitation" on permissible workers' compensation laws. *Goodyear Atomic*, 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. 17a (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's language to the language of 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 contains no such limitation. Pet. App. 15a (contrasting § 3172 with the waiver in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 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. 19a.

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)). Judge Smith also critiqued the few judges dissenting from denial of rehearing for their "extensive use of hyperbole" and for "speak[ing] of this rather straight-forward statutory construction case in apocalyptic terms." Pet. App. 23a.

REASONS TO DENY REVIEW

This case meets none of the Court's criteria for granting certiorari. The petition makes no effort to show a conflict with any lower court decision, and it misreads this Court's decision in *Goodyear Atomic* to allege a conflict. That case emphasized that § 3172 places "no express limitation" on permissible workers' compensation laws, 486 U.S. at 183, and it simply did not address a law like this one, which deals with unique hazards at a federal worksite. Contrary to the petition's argument, *Goodyear Atomic* does not limit § 3172's waiver of immunity to state laws that treat all employers alike. In reality, virtually all workers' compensation laws distinguish between employers in a variety of ways, and as the Ninth Circuit correctly

held, § 3172 permits a State to adopt and apply a workers' compensation rule on federal land if the State *could* adopt and apply the law on land within the State's jurisdiction.

The petition also shows no important federal question warranting review. The federal government has not even alleged that the special-hazard presumption law has interfered with Hanford cleanup operations or impaired any federal function. At most, the United States alleges a modest financial impact on one unique project. With no proof that there are far-reaching effects from the lower court's decision, this Court should deny review.

A. The Decision Below Creates No Conflict with Decisions of this Court or Lower Courts

The United States alleges no circuit split warranting review. Instead, it points to this Court's decision in *Goodyear Atomic*, arguing that the lower court's decision conflicts with this Court's "binding construction of the relevant statutory language" in that case. Pet. 12. That is incorrect.

Goodyear Atomic involved an Ohio workers' compensation law under which an injured employee received an extra award if their employer caused their injury by violating state safety regulations. *Goodyear Atomic*, 486 U.S. at 176-77. The federal government argued that Ohio's special award law was not a "typical [no fault] workers' compensation act," and thus could not apply to federal land under the waiver statute. *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." *Goodyear Atomic*, 486 U.S. at 176-77. In the context of Ohio's law, which applied to all facilities, 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.* at 183-84.

Based entirely and misguidedly on this sentence, the petition argues that *Goodyear Atomic* forbids State laws, like this one, that address hazards unique to federal facilities. Pet. 19, 24, 26, 28. But the decision does no such thing, as the lower court here correctly explained. Pet. App. 10a-13a.

The *Goodyear Atomic* 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: "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 H.B. 1723 does[,]" and it "did not purport to impose the limitation on the statute that the United States seeks to impose here[.]" Pet. App. 13a. The petition's interpretation would mean that no matter how uniquely dangerous a federal facility might be, a State

could only enforce its workers' compensation laws that apply elsewhere. Pet. 18. But *Goodyear Atomic* has no such holding. Pet. App. 11a-12a; *see also* Pet. App. 12a ("The 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.'").

Moreover, the crux of *Goodyear Atomic* is that States have expansive authority to apply workers' compensation laws to federal land under the broad waiver Congress adopted. The Court emphasized that "workers' compensation laws provide[] a wide variety of compensation schemes that do not fit neatly within appellant's view of the 'typical' scheme." *Goodyear Atomic*, 486 U.S. at 184. The waiver statute "places no express limitation on the type of workers' compensation scheme that is authorized." *Id.* at 183. The court of appeals appropriately applied this holding, saying "[w]e cannot properly construe § 3172 in a way that would conflict with that understanding[.]" Pet. App. 13a.

In short, the petition's alleged conflict relies on ripping a single sentence out of context as supposedly controlling on a topic the opinion never addressed. There is no conflict with *Goodyear Atomic*.

Nor is there a conflict with any other decision of the Court. The United States cites several cases about the nature of intergovernmental immunity. Pet. 13-15, 18, 29-30 (citing *Dawson v. Steager*, 139 S. Ct. 698, 702 (2019); *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality opinion);

South Carolina v. Baker, 485 U.S. 505, 523 (1988); *Washington v. United States*, 460 U.S. 536, 546 (1983); *United States v. County of Fresno*, 429 U.S. 452, 458 (1977); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)); *Travis v. Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998). But these cases recognize Congressional authority over intergovernmental immunity, and none of them precludes Congress from adopting a waiver statute like this one. The non-discrimination discussion in cases like *North Dakota* relates to laws where a waiver was not present. *North Dakota*, 495 U.S. at 437-38.

Indeed, this Court's decisions recognize that the intergovernmental immunity doctrine is not absolute. The Court has "more recently adopted a functional approach to claims of governmental immunity" to accommodate the "full range of each sovereign's legislative authority[.]" *North Dakota*, 495 U.S. at 435, 436-39. In fact, the "limits on the immunity doctrine are, for present purposes, as significant as the rule itself." *United States v. New Mexico*, 455 U.S. 720, 734 (1982).

The lower court's decision is also consistent with decisions of other federal appellate courts, which for decades have interpreted § 3172 more broadly than the petition does. The petition claims that § 3172 only allows application of State laws on federal land that apply identically on State land, but federal courts of appeals have understood § 3172's effect very differently. They have routinely held that § 3172 makes it as though any federal land in the state *is not federal land at all*. For example, in 1943, just a few years after the waiver was enacted, the Third Circuit held that "[t]he situation created by [§ 3172] was no

different, so far as the operation of Pennsylvania's compensation law is concerned, than it would have been had Pennsylvania never ceded jurisdiction of the Navy Yard site to the federal government." *Capetola*, 139 F.2d at 559. A year later, the D.C. Circuit held that "[t]he effect of the Act is, therefore, to restore the status quo ante," i.e., to "revest State jurisdiction" over federal land. *Travelers Ins. Co.*, 141 F.2d at 363. More recently, the Eighth and Fifth Circuits held that the effect of § 3172 is that "state workmen's compensation laws, as applied to private employers working on federal land, are freed from *any* restraint by reason of the exclusive federal jurisdiction." *Peak*, 660 F.2d at 376 n.1 (emphasis added) (citing *Roelofs v. United States*, 501 F.2d 87, 90-91 (5th Cir. 1974)). This understanding of § 3172 is entirely consistent with the lower court's holding here 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. 17a.

Other cases confirm that when Congress broadly waives immunity, States may adopt laws that treat the federal government differently than other actors. For example, in *United States v. Lewis County, Wash.*, 175 F.3d 671 (9th Cir. 1999), the court upheld a State tax that "undeniably" treated farmland held by the federal government differently than similar farmland held by the State, finding this permissible because intergovernmental immunity had been waived. *Id.* at 675-76. The petition seeks to distinguish *Lewis County* because in that case the State law also applied to private parties, which

provided a "political check against excessive taxation." Pet. 26 (quoting *Lewis County, Wash.*, 175 F.3d at 676). But the law here involves similar political checks because it applies to very large employers based in Washington, who are fully able to participate in the political process and did lobby against the bill. CA9.SER.356. The only reason these costs are passed on to the federal government is because of the government's choices about how to contract. If the federal government structured its contracts differently to require private employers to pay workers' compensation claims, it could reduce its costs and encourage contractors to take greater safety precautions. Poor federal contracting choices do not make State laws unconstitutional.

In short, the lower court's opinion is entirely consistent with *Goodyear Atomic* and the decisions of other federal courts. It is the petition that seeks a change in how courts have interpreted § 3172.

B. The Decision Below Properly Interprets Federal Law

The petition's primary argument for granting certiorari is that the court of appeals "erred in construing" § 3172 "to authorize the application of HB 1723," Pet. 12; this claim is not only inaccurate, but also a paradigmatic request for factbound error correction. Nothing about the lower court's reading of the interplay between § 3172 and Washington's law warrants this Court's review.

Under 40 U.S.C. § 3172(a), a State "may apply the [workers' compensation] laws to all land and premises" owned by the Federal Government "in the same way and to the same extent as if the premises

were under the exclusive jurisdiction of a State[.]" The court of appeals carefully analyzed the meaning of this text, Pet. App. 10a-18a, and agreed with other courts of appeals that this language "removes federal jurisdiction as a barrier to a state's authority over workers' compensation laws[.]" Pet. App. 17a; *supra* at 22-23. In other words, § 3172 "authorizes the States to apply workers' compensations laws to federal land located in the state without limitation" and thus allows Washington's application of H.B. 1723 to address Hanford's unique dangers. Pet. App. 14a-15a.

To avoid the plain meaning of the language Congress used in § 3172, the petition offers several arguments to narrow its scope. But all involve ignoring language in § 3172, adding language to it, or otherwise contorting the statute's text.

First, the petition contends that "[t]he most natural way" to read § 3172 is that "if a state workers' compensation law applies equally to all private employees, that law could be applied to federal contract workers at the federal facility." Pet. 18. But as the court of appeals explained, "[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. 12a. On land under the State's exclusive jurisdiction, States routinely apply different rules to different employers and worksites. *See supra* at 6-10. And § 3172 gives States authority to regulate on federal land "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State."

In fact, the petition almost immediately refutes its own argument, conceding 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 workers' compensation laws or regulations that applied only to employers handling high-level radioactive waste. *Cf.* Wash. Admin. Code § 296-17A-2103 (risk category for "fulfillment" center applied only to Amazon). Such laws or regulations would apply only to federal contractors at Hanford, yet the United States concedes they would be allowed under § 3172. Pet. 18. The petition thus contradicts its own claim that § 3172 forbids laws that apply "uniquely" to federal contractors. Pet. 19. By the same token, the federal government cannot possibly dispute that States can draw distinctions based on employers' safety records (as this has long been a pervasive feature of workers' compensation laws), even if it means that federal contractors with poor safety records pay a higher rate than others in their industry. *See supra* at 8; *Mountain Timber Co.*, 243 U.S. at 243-46.

Given the petition's legal concessions, its only real argument is the factbound quibble that, in application, H.B. 1723's provisions don't track hazardous duties or employers. That is incorrect. The petition fixates on the legislature's decision not to cover employees at US Ecology and Perma-Fix Northwest, Pet. 16, but these companies do not handle the type of high-level radioactive waste present at Hanford. CA9.SER.183-84, 187 ("Workers at the

Hanford site thus have much higher potential for harmful exposures than workers at Perma-Fix Northwest and US Ecology."), 225-26, 262, 281-82, 347-48, 449-52, 456. The petition questions the legislature's decision to cover office workers at the Hanford site, but there is strong evidence that such workers are at risk because of their proximity to radioactive waste. *See, e.g.*, CA9.SER.187-89, 253-54, 448-52; Frame *supra* note 2. And the petition critiques H.B. 1723 for not applying to State inspectors who occasionally visit Hanford, but it offers no evidence that any such inspector has ever fallen ill or faced difficulties in accessing protective equipment or documenting exposures like those faced by private employees at Hanford. States possess broad authority on land within their exclusive jurisdiction to make these types of distinctions, *see, e.g.*, *Mountain Timber Co.*, 243 U.S. at 243-46 (holding State may address specific workplace hazards in workers' compensation laws), and § 3172 extends that same authority to federal lands.

Second, the petition argues that the legislative history of § 3172 suggests that it forbids State laws that address hazards unique to federal land. Pet. 20-21. But nothing in the snippets it cites address that question. In reality, Congress's manifest purpose was to free state workers' compensation laws "from any restraint by reason of the exclusive federal jurisdiction." *Peak*, 660 F.2d at 376 n.1. Just a few years after the law was enacted, several federal appellate courts interpreted its intent as treating

federal land as though it were simply State property. *See Capetola*, 139 F.2d at 559; *Travelers Ins. Co.*, 141 F.2d at 363. Congress has never contradicted that understanding.

Third, the petition claims that in evaluating a State's authority to regulate on land within its exclusive jurisdiction, § 3172 only allows a comparison with "laws that the State has actually adopted," not laws that it could adopt. Pet. 22-23. Thus, the petition claims, whether Washington could adopt a special-hazard presumption law on State land is irrelevant; all that matters is whether the State actually has such a law. Pet. 11, 15, 23. As the court of appeals pointed out, this reading ignores the statute's use of the words "as if." Pet. App. 16a. "As if" means: "as it would be if // It was *as if* he had lost his last friend." https://www.merriam-webster.com/dictionary/as%20if. When § 3172(a) says that States can regulate federal land "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State," the proper comparison is the State's full authority to regulate premises under its exclusive jurisdiction, not what laws it had previously enacted. If "the premises"—here, Hanford—were under the State's exclusive jurisdiction, the State could apply presumptions and distinctions based on work hazards and employer safety records, just as the State has done on its own land in other contexts, as the federal government has repeatedly conceded. CA9.ER.21-22, 32. That is precisely what § 3172 allows and what H.B. 1723 does.

Finally, the petition incorrectly contends that even if the appropriate comparison is to laws the State could enact on its own land, H.B. 1723 is not such a law. Pet. 24-25. The petition's argument seems to be that on State land, the State could not adopt a different rule for an employer that contracts with the federal government than it could for other employers. But that is simply incorrect; a federal contract is not a magic wand allowing employers to escape workers' compensation laws. For example, many Washington employers—from Boeing, to Microsoft, to Amazon—contract with the federal government. If one of these companies had a particularly dangerous worksite or poor safety record on land "under the exclusive jurisdiction of the State," 40 U.S.C. § 3172(a), the State would unquestionably have the power to adopt a law or regulation 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[.]" Nothing in § 3172 would require that the law apply to other employers.

The flaws in the petition's textual argument are confirmed by comparing § 3172's language to other federal waiver statutes. While many waiver statutes expressly preclude States from applying stricter rules on federal land than apply elsewhere, Congress chose not to include such limitations in § 3172. When Congress uses different language in statutes addressing related topics, courts presume a difference in meaning. *See, e.g.*, *Sosa v. Alvarez-Machain*,

542 U.S. 692, 711 n.9 (2004) ("Congress knew how to specify 'act or omission' when it wanted to"); *Fares v. Barr*, 942 F.3d 1172, 1175 (9th Cir. 2019).

Specifically, many federal statutes waiving intergovernmental immunity give States authority to regulate federal land "in the same manner and to the same extent" that they regulate others, but they omit § 3172(a)'s language "as if the premises were under the exclusive jurisdiction of the State[.]" 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). Similarly, the Clean Air Act, 42 U.S.C. §§ 7401 to 7515, 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). Both statutes require that federal facilities be treated the same as any other facility. But § 3172 is different—it does not require the State to treat facilities identically, but rather gives the State regulatory authority "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of a State[.]" 40 U.S.C. § 3172(a). The comparator is thus not how the State regulates other facilities, but how the State could regulate the federal facility "if the premises were under the exclusive jurisdiction of [the] State[.]" 40 U.S.C. § 3172(a).

Ironically, the petition cites two similar statutes as reasons why it is vital for this Court to

grant review, saying that the court of appeals' interpretation here could have broad application. Pet. 31-32. But the statutes the petition cites use materially narrower language than § 3172, thus reinforcing the lower court's rationale and weakening the petition's. Specifically, 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." Both statutes thus require a comparison of how others are actually regulated; they do not give States authority to regulate "as if the premises were under the exclusive jurisdiction of the State[.]" 40 U.S.C. § 3172(a).

Similarly, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 to 9675, provides that the authority it grants States to pass 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 forbids States from imposing more stringent laws on federal land than on other land for CERCLA clean up. But Congress did not use such language for workers' compensation coverage.

These examples highlight that when Congress wants to waive intergovernmental immunity but

prohibit more stringent regulation on federal land, it knows how to do so. Congress chose not to impose such limitations in § 3172, and the court of appeals properly gave effect to that legislative decision.

In sum, the court of appeals gave effect to all the text in § 3172 and correctly held that it allows application of H.B. 1723 at Hanford. Nothing in that accurate, case-specific determination warrants this Court's review.

C. The Decision Below Will Have No Impact Beyond this Case and Will Not Interfere with Federal Prerogatives

In contending that this case is sufficiently important to warrant this Court's time, the petition offers two deeply flawed arguments. Neither justifies this Court's review.

First, the petition claims that the decision below strikes an "astonishing" and "unprecedented" blow to intergovernmental immunity, Pet. 29, characterizing "this rather straight-forward statutory construction case in apocalyptic terms." Pet. App. 23a. But intergovernmental immunity cases are decided on their own statutes and facts, and the narrow decision here will have no impact beyond deciding that § 3172 allows application of H.B. 1723 at Hanford.

Section 3172, of course, waives immunity only as to workers' compensation laws, and as detailed above, waivers of intergovernmental immunity on other topics use more limited language. The decision below thus will have no impact on intergovernmental immunity more generally.

Even within the narrow realm of workers' compensation laws, it is undisputed that Hanford is a unique project—in DOE's own words, "unprecedented," CA9.ER.106—with unique hazards to workers. There is no reason to assume that upholding Washington's authority to provide specific rules for a uniquely hazardous worksite will generate a wave of similar laws. The petition cites no similar law anywhere. If other States enact similar laws, and if lower courts reach divergent results about how § 3172 applies to those laws, this Court could of course address this question then.

Moreover, the federal government has made no argument that Washington's law frustrates federal objectives or impairs federal functions. Although the federal government often argues preemption in intergovernmental immunity cases, as in *Goodyear Atomic*, 486 U.S. at 177-78, and *North Dakota*, 495 U.S. at 430, it has made no such argument here. Pet. App. 19a. Presumably, this is because the government concluded that it could not show that H.B. 1723 would interfere with federal objectives. On the contrary, by incentivizing 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 for the operation of nuclear power plants as both sought to ensure the health and safety of the public); CA9.ER.140 (representing that DOE's "top priority in conducting its cleanup operations at Hanford is ensuring the health and safety of its federal and contractor workforce").

The petition's second argument for review is the unsupported claim that H.B. 1723 will "drastically increase[]" Hanford's costs. Pet. 15, 7; *see also* Pet. 12, 30-31. But even this alleged financial harm is illusory.

There is currently no evidence that H.B. 1723 will measurably impact the federal government's workers' compensation costs. The United States conceded in the lower courts that the costs were indeterminate. CA9.ER.134 (admitting that "[c]laim costs are particularly difficult to calculate"); CA9.ER.133 ("Estimating costs associated with HB 1723 claims is extremely difficult . . . ."). And since adoption of H.B. 1723, the number of workers' compensation claims filed annually at Hanford has actually *declined*, and the federal government's payouts in state workers compensation claims have barely changed. *Hanford–DOE Data*, figs. 2 & 3.[7] While the petition expresses grave concern about untold thousands of past workers potentially filing claims, Pet. 30, the State received fewer than 100 claims invoking the presumption in the year after the legislature adopted H.B. 1723, CA9.SER.370, CA9.ER.134, and the pace of claims invoking the presumption has only declined since then, with a total of 259 claims filed in over three years. *Hanford–DOE Data.*

Even if H.B. 1723 marginally increases the federal government's workers' compensation costs, any increase would be negligible in context. The federal government will spend between $3 billion and $15 billion annually for at least the next fifty years

[7] *See supra* page 15.

cleaning up Hanford. Pet. 12; *Lifecycle Report* at page P-1 *supra* note 6. And even before H.B. 1723, the federal government was spending over $110 million annually on state and federal workers' compensation for Hanford workers. *Supra* at 14-15. Thus, even accepting the petition's unsupported claim that the decision below "is likely to cost the United States tens of millions of dollars annually," Pet. 12, that would be far less than what the federal government already spends on workers' compensation at Hanford, and less than one percent of annual Hanford cleanup costs. A possible one percent increase in the cost of a single project does not create an "important federal question." Rule 10(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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