No. 21-404

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF WASHINGTON, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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Washington House Bill 1723 (HB 1723) creates an unprecedented workers' compensation regime, including presumptive lifetime benefits eligibility based on a single eight-hour work shift, that applies only to "United States department of energy Hanford site workers." Wash. Rev. Code Ann. § 51.32.187(1)(b) (West 2020). Respondents defend (Br. in Opp. 3) the State's authority to enact workers' compensation laws "tailored to the special hazards and safety records of employers on federal land." But HB 1723 does not classify employees "based on the dangers of their work," and it does not classify employers "based on their * * * safety records." *Id.* at 1-2. It instead imposes massive potential government liability for any individual who worked at a specified federal facility and performed services, "directly or indirectly, *for the United States*." Wash. Rev. Code Ann. § 51.32.187(1)(b) (emphasis added).

The Supremacy Clause prohibits application of such a discriminatory law absent "'clear and unambiguous' authorization" from Congress. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988) (citation omitted). No federal statute confers such authorization here. The only federal law respondents invoke allows States to apply their workers' compensation laws to federal facilities "*in the same way and to the same extent* as if the premises were under the exclusive jurisdiction of the State." 40 U.S.C. 3172(a) (emphasis added). Far from clearly and unambiguously authorizing discrimination against federal contractors, that language "compels the same" treatment of employees at federal and private workplaces. *Goodyear Atomic*, 486 U.S. at 183-184.

Respondents' defense of the Ninth Circuit's decision simply highlights the conflict with *Goodyear Atomic* and the need for this Court's review. Respondents assert (Br. in Opp. 1) that the decision will "impose negligible costs" and "have no impact beyond this case." But as the dissenting judges below correctly warned, the court of appeals' unprecedented approval of "open and explicit" discrimination against the United States is likely to have far-reaching consequences. Pet. App. 39a. The panel's significant holding and "egregious" error warrant this Court's intervention. *Id.* at 38a.

A. The Decision Below Is Profoundly Wrong

Under the intergovernmental-immunity doctrine, a State may not "discriminate against the United States or those with whom it deals," *South Carolina* v. *Baker*, 485 U.S. 505, 523 (1988), unless Congress provides "'clear and unambiguous' authorization for such regulation," *Goodyear Atomic*, 486 U.S. at 180 (citation omitted). Those principles foreclose application of HB 1723, because (1) that law discriminates against the United

States and firms that employ federal contract workers, and (2) Congress did not clearly and unambiguously authorize such discrimination. See Pet. 12-28.

1. Respondents contend (at 1-3, 10-11, 26-27, 29, 33) that HB 1723 draws permissible distinctions based on atypical workplace hazards and employer safety records. But the courts below (which ruled in respondents' favor) did not accept that argument, see Pet. 17, and for good reason: HB 1723 does not define the class of covered employees based on their working conditions or their employers' safety histories. Application of Washington's novel workers' compensation scheme instead turns exclusively on whether a claimant is a "United States department of energy Hanford site worker[]"—*i.e.*, a contract worker who performs services at a specified location, "directly or indirectly, for the United States." Wash. Rev. Code Ann. § 51.32.187(1)(b). The law thus discriminates based on "status as a Government contractor"—precisely what the Supremacy Clause forbids absent clear and unambiguous authorization from Congress. *North Dakota* v. *United States*, 495 U.S. 423, 438 (1990) (plurality opinion).

Respondents' attempt to "rerationalize the statute" lacks merit. *Dawson* v. *Steager*, 139 S. Ct. 698, 706 (2019). In enacting HB 1723, "the State was free to draw" classifications based on the employee's working conditions or the employer's safety record. *Ibid.* Respondents identify (Br. in Opp. 10-11) other state workers' compensation laws that apparently distinguish at least partly along those lines. But "the statute [Washington] enacted does not classify * * * based on" those criteria. *Dawson*, 139 S. Ct. at 706. As noted, it instead expressly distinguishes between federal contract workers and persons employed by the State or by other

private companies. That facial defect dooms respondents' alternative justification. *Ibid.* "[I]t is not too much to ask that, if a State *wants* to draw a distinction based on [occupational safety], it enact a law that actually *does* that." *Ibid.*

In any event, the criteria that HB 1723 utilizes are not reasonably tailored to identify "employees who perform particularly hazardous duties." Br. in Opp. 26. To take just one example, the statute applies to a federal-contract-worker accountant who spent a single eight-hour shift on the Hanford site decades ago, while excluding a private employee who handles radioactive waste daily on the most contaminated part of the site. Pet. 16-17; see Pet. App. 88a-89a (maps of Hanford site). Nor can the statute plausibly be read to "draw distinctions based on employers' safety records." Br. in Opp. 26. If a firm with a pristine safety record took over a Hanford federal contract, its employees would be covered by HB 1723; if an employer with a dismal safety record began operating a private facility within the Hanford site, its employees would not be covered. HB 1723 thus classifies based on criteria that reflect "blatant facial discrimination against the Federal Government." Pet. App. 39a (Collins, J., dissenting from denial of rehearing en banc).[1]

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[1] Respondents suggest (Br. in Opp. 24) that the harms to the federal government arise only from its "choices about how to contract." As a practical matter, it is doubtful that the government could force its contractors to accept all the costs of HB 1723. See C.A. E.R. 112-113. But as the petition explains (at 15 n.2), even if that were possible, it would not eliminate the constitutional defect in HB 1723, because the intergovernmental-immunity doctrine prohibits discrimination against "the United States *or those with whom it deals*." *Baker*, 485 U.S. at 523 (emphasis added).

2. The Constitution does not preclude Congress from consenting to state discrimination against the federal government and its contractors. But given the improbability that Congress would take that step, this Court requires "clear and unambiguous" evidence that Congress condoned such discrimination. *Goodyear Atomic*, 486 U.S. at 180 (citation omitted). Respondents do not even mention that standard, let alone try to establish that it is satisfied by the only congressional action they invoke, 40 U.S.C. 3172(a). Those omissions underscore the inconsistency between HB 1723 and this Court's precedent.

a. Like the Ninth Circuit panel, respondents read Section 3172(a) to "permit[] 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." Br. in Opp. 19. That interpretation is flawed for multiple reasons, starting with its poor fit with the statutory text. Section 3172(a) is addressed to the "state authority charged with enforcing and requiring compliance with the state workers' compensation laws." That language is naturally understood to authorize state administrative officials to apply *existing* state workers' compensation laws to federal land or facilities. If Congress had intended to authorize States to adopt *new* laws tailored to federal lands or facilities, Section 3172(a) presumably would have been addressed to the entities that can adopt such laws, such as state legislatures. Pet. 21-22. Respondents do not attempt to reconcile their position with that feature of Section 3172(a)'s text.

Respondents and the Ninth Circuit also fail to account for the critical statutory language permitting application of state workers' compensation 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) (emphasis added). If, as respondents contend (Br. in Opp. 19), Section 3172(a) permits a State to apply to federal facilities any workers' compensation law that it "*could* adopt and apply * * * on land within the State's jurisdiction," the statutory phrase "in the same way and to the same extent" (40 U.S.C. 3172(a)) would do no independent work. Respondents' reading thus violates "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted).

b. Even if Section 3172(a) authorized respondents to apply to federal facilities any law that they "*could* adopt and apply" within their own jurisdiction, Br. in Opp. 19, Section 3172(a) would not authorize application of HB 1723. Even within their own jurisdiction, principles of intergovernmental immunity would bar respondents from applying a law that "discriminate[s] against the United States or those with whom it deals." *Baker*, 485 U.S. at 523; see Pet. 24-25.

Respondents correctly observe that Washington workers' compensation laws apply to many companies that "contract with the federal government." Br. in Opp. 29. But as explained above (pp. 2-4, *supra*), Section 3172(a) and this Court's precedent distinguish between state workers' compensation laws that encompass federal contractors within a broader, neutrally defined class of employers, and state laws that burden federal contractors *because of* their status as such. HB 1723 unambiguously falls into the latter category.[2]

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[2] A state law could discriminate in violation of the intergovernmental-immunity doctrine without expressly distinguishing

Respondents' position also runs directly counter to this Court's explanation in *Goodyear Atomic* that Section 3172(a) "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." 486 U.S. at 183-184; see Pet. 19-20, 28-29. Respondents appear to recognize (Br. in Opp. 20-21) that HB 1723 cannot be squared with that understanding of Section 3172(a). They accordingly contend (*ibid.*) that this passage in the Court's opinion is not controlling, while emphasizing the opinion's prior statement that Section 3172(a)'s predecessor "place[d] no express limitation on the type of workers' compensation scheme that is authorized." *Goodyear Atomic*, 486 U.S. at 183. But the Court's point there was simply that the term "workmen's compensation laws" in Section 3172(a)'s predecessor encompassed state laws that provide enhanced benefits when workplace injuries result from employer safety violations. See *ibid.*

More generally, Section 3172(a) leaves Washington free to enact an atypically generous workers' compensation scheme and to apply that scheme to federal contract workers, *so long as* the State provides the same benefits to other employees. The *Goodyear Atomic*

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between federal entities and others, as by imposing special burdens on functions that as a practical matter are performed only by the federal government or its contractors. See, *e.g.*, *United States* v. *County of Fresno*, 429 U.S. 452, 457 (1977) (explaining that the state law invalidated in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), did not explicitly single out the Bank of the United States but instead applied to "any Bank . . . established without authority from the State"). But HB 1723's facial discrimination against the United States and those with whom it deals makes this an especially straightforward case.

Court thus construed Section 3172(a) to impose a nondiscrimination requirement *rather than* any substantive "limitation on the type of workers' compensation scheme that" States may apply to federal facilities. 486 U.S. at 183; see *id.* at 183-184; Pet. App. 46a-47a. Respondents invoke one half of the Court's reasoning while rejecting the other, but both aspects were integral to the Court's analysis.[3]

Respondents suggest (Br. in Opp. 22-23, 27-28) that the history and early judicial interpretations of Section 3172(a)'s predecessor support their understanding of the statute. That is mistaken. The early appellate cases involved application of *existing*, nondiscriminatory state workers' compensation laws to federal land or facilities within the State—*e.g.*, application of Pennsylvania workers' compensation law to the Philadelphia Navy Yard. *Capetola* v. *Barclay White Co.*, 139 F.2d 556, 558-559 (3d Cir. 1943), cert. denied, 321 U.S. 799 (1944). Those decisions are consistent with Congress's purpose to ensure that "workers employed on federal projects" are not "deprived of the benefits of [workers' compensation] coverage purely because of an oddity of location." *Goodyear Atomic*, 486 U.S. at 194 (White, J., dissenting). But none of the decisions cited by respondents approved application of a state workers' compensation law that *discriminated* against the federal government or the firms with which it had contracted. Indeed, apart

[3] As the petition explains (at 14), a requirement of equal treatment is itself a powerful check against States' imposition of exorbitant workers' compensation liability on federal contractors. Section 3172(a), as construed in *Goodyear Atomic*, reflects Congress's decision to rely on that check rather than on a truncated conception of "workers' compensation laws." Under respondents' reading, by contrast, Section 3172(a) would impose no such check at all.

from the lower-court decisions in this case, respondents identify no judicial decision approving such discrimination.

Finally, respondents rely (Br. in Opp. 29-32) on other federal statutes that purportedly require nondiscrimination in clearer terms. But those statutes use different formulations fitting their respective contexts, none of which involves a territorial-jurisdiction gap of the kind that prompted enactment of Section 3172(a). Pet. 20-21. In any event, Congress need not enact a clear statutory ban (or any statutory ban at all) in order to preclude States from discriminating against the United States and its contractors. Background principles of intergovernmental immunity prohibit such discrimination without the need for affirmative congressional action. That default prohibition controls unless Congress unambiguously *authorizes* States to discriminate. Pet. 21; see Pet. App. 55a-56a (Collins, J., dissenting from denial of rehearing en banc). Section 3172(a) does not provide such authorization.

B. This Court's Review Is Warranted

1. The Ninth Circuit judges who dissented from the denial of rehearing en banc viewed the panel's ruling as conflicting with this Court's decision in *Goodyear Atomic*. Pet. App. 39a-40a, 44a-45a. Respondents and the panel below, by contrast, have affirmatively relied on that decision. See Br. in Opp. 21; Pet. App. 13a. That sharp divergence of views regarding this Court's leading precedent on the meaning of Section 3172(a)—each embraced by multiple judges of a circuit that contains a disproportionate number of significant federal facilities, Pet. 31—counsels strongly in favor of this Court's intervention.

2. HB 1723's financial implications are dramatic. The statute allows retroactive claims by Hanford workers (and survivors of deceased Hanford workers) dating back to 1943. And because HB 1723 creates lifelong benefits eligibility for workers at a site where cleanup activities are expected to continue for at least six more decades, its effects likely will be felt well into the 22nd century. Pet. 30-31.

Respondents do not dispute those features of HB 1723. Nor do they disavow their own projection that Hanford workers and their survivors will file roughly 4000 retroactive claims, each of which could exceed a million dollars in liability. Pet. 31. Workers' compensation payouts by DOE have already started to increase. See Br. in Opp. 15 (citing data showing payouts in 2018, 2019, and 2020 each exceeding prior years). And that is just the beginning of the financial impact, because many claims are still being processed or litigated, and many awards are paid out gradually for years or decades.

Respondents seek to downplay (Br. in Opp. 34) the overall number of workers' compensation claims that have been filed during the past three years. But at Hanford as elsewhere, work has been disrupted by the pandemic for much of that time. Claims statistics from that period accordingly have little predictive value. Respondents assert that "tens of millions of dollars annually" for decades to come is a "negligible" price for federal taxpayers. *Id.* at 34-35 (citation omitted). That may be the State's perspective, but it is not a compelling reason to deny review.[4]

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[4] Respondents observe (Br. in Opp. 14-15) that the Department of Labor through the Energy Employees Occupational Illness Compensation Program Act of 2000, 42 U.S.C. 7384 *et seq.*, has paid more

3. The Ninth Circuit's decision to "greenlight[] * * * open and explicit discrimination against the Federal Government" implicates core constitutional concerns. Pet. App. 39a (Collins, J., dissenting from denial of rehearing en banc). Respondents suggest (Br. in Opp. 33) that the harm is limited because the government did not separately bring a preemption claim asserting that "H.B. 1723 would interfere with federal objectives." But one Supremacy Clause violation is harmful enough. And contrary to respondents' suggestion, a state law violating the intergovernmental-immunity doctrine *does* "interfere with the exercise" of federal powers, even without separate proof of an "[in]ability to perform * * * governmental functions." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 810, 814 (1989).

Respondents also insist (Br. in Opp. 1) that the decision below "will have no impact beyond this case." But the intergovernmental-immunity doctrine exists in part "because the United States," unlike other subjects of state regulation, "does not have a direct voice in the state legislatures." *Washington* v. *United States*, 460 U.S. 536, 545 (1983). The absence of such a "'political check'" provides a powerful temptation for States to "take advantage of the Federal Government." *Id.* at 545-546. The sponsors of HB 1723 indicated that they were doing just that, Pet. 7, and it took the State barely a year to extend HB 1723's reach, Pet. 30.

If those efforts succeed, nothing would stop other States in the Ninth Circuit from following suit. As with

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than $1.75 billion to federal employees and contract workers suffering from illness after working at Hanford. Although it is not directly pertinent to the question presented here, that program underscores the federal government's commitment to assisting those who become ill in connection with Hanford nuclear-site work.

other structural constitutional protections, "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture." *Stern* v. *Marshall*, 564 U.S. 462, 503 (2011) (citation omitted). This Court should intervene to restore a sound interpretation of Section 3172(a) and a proper balance of authority between the federal government and the States.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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