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

SUGGESTION OF MOOTNESS

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General
Counsel of Record

ANASTASIA R. SANDSTROM
Senior Counsel

PETER B. GONICK
Deputy Solicitor General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
noah.purcell@atg.wa.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTRODUCTION

The Court granted certiorari in this case to decide whether a Washington law "that applies exclusively to federal contract workers who perform services at a specified federal facility is barred by principles of intergovernmental immunity . . . ." Pet. (I); Pet'r's Br. (I). Washington has now changed its law so that it no longer applies exclusively to federal contract workers at a specified federal facility. App. 1a-8a (Subst. Senate Bill 5890). Rather, it applies to *any* employee, including state employees, who work at a range of facilities. The question presented is thus moot. And because the United States sought only a declaration that the prior law was invalid and to enjoin enforcement of the prior law, this litigation is also moot. J.A. 40 (Complaint's Prayer for Relief).

On March 11, 2022, Washington's Governor signed Substitute Senate Bill 5890, which immediately repealed the portion of Washington's law to which the United States objected. The prior law applied exclusively at the Hanford nuclear site and only to workers employed by federal contractors, which formed the basis for the United States' objection and the premise of the question presented. The revised law applies to *any* worker at *any* facility storing or disposing of high-level radioactive waste or mixed waste (of which there are several in Washington), with exceptions for federal military facilities. This is exactly the kind of statute that this Court has previously upheld as authorized by federal law and it is exactly the kind of statute that the United States and the dissent from denial of rehearing below previously argued is authorized.

This Court therefore should not address whether the prior law discriminated against the federal government and, if so, whether the waiver of inter-governmental immunity under 40 U.S.C. § 3172(a) permitted such laws. That question is now entirely hypothetical, so the Court should vacate the Ninth Circuit opinion and remand to the district court for dismissal or consideration of whether the United States has any residual claims.

Even if the United States claims that the case is not entirely moot and takes the position that Washington's revised law is invalid (contrary to its prior argument that laws like this would be valid), the Court should dismiss this case, vacate the opinions below, and remand for the district court to consider any new arguments and to develop a record regarding the new law. Virtually every argument the United States has made to date about problems with the prior law—e.g., that it did not apply to state employees or to non-federal facilities—is now inapposite. This Court should not evaluate Washington's new law in the first instance.

STATEMENT OF THE CASE

A. Washington Enacted a Law to Facilitate Compensation for Workers at the Hanford Nuclear Cleanup Site Who Suffer Occupational Diseases

The Hanford site is a decommissioned nuclear production site in southeast Washington that produced large quantities of "highly radioactive and chemically hazardous waste." Pet. App. 2a. Thousands of Washingtonians now work at the site for private companies hired by the federal government

to clean up this waste. Pet. App. 4a. The Department of Energy (DOE) describes the cleanup effort as "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 that can severely damage human health. J.A. 85-86, 88-90, 93-97, 172-76. For example, as the federal government recognizes, 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. 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. Releases at Hanford have caused highly dangerous radioactive materials to contaminate workers, drifting outside the direct cleanup areas and polluting clothing and cars. J.A. 198-200.

Despite the acknowledged dangers for Hanford workers, neither federal contractors nor DOE have consistently monitored conditions there to allow medical professionals to know about particular workers' exposures to hazards. J.A. 97-98; CA9.SER.300-01, 311. 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.

In response to this situation, the Washington Legislature enacted House Bill 1723 in 2018. 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)). Given 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 created a rebuttable presumption that certain diseases and conditions of Hanford site workers are occupational diseases under Washington's workers' compensation system. *Id.* This rebuttable presumption was modeled on similar presumptions Washington and other states have applied to other categories of workers, such as firefighters.[1]

Under House Bill 1723, the presumption applied to "Hanford site workers," defined as persons engaged in work for the United States regarding

---

[1] *See, e.g.*, Wash. Rev. Code § 51.32.185 (creating presumption of occupational disease for certain diseases for firefighters); *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).

projects and contracts at the Hanford nuclear site at particular locations, for at least an eight-hour shift. Former Wash. Rev. Code §§ 51.32.187(2)(a), (1)(b) (2021). The "Hanford nuclear site" was defined as:

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

Former Wash. Rev. Code § 51.32.187(1)(a) (2021).

B. Proceedings Before Amendment of the Statute

The United States filed a complaint in 2018, asserting that House Bill 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 in the form of declaring the then-existing statute invalid and enjoining its enforcement. J.A. 40. No damages were sought. *Id.* 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). Washington argued that the waiver of intergovernmental immunity in 40 U.S.C. § 3172 authorized Washington's law because it allows states to regulate on federal land "as if the premises were under the exclusive jurisdiction of the State," and on land under the exclusive jurisdiction of the State, Washington can and has enacted workers compensation laws that target particularly dangerous workplaces and employers.

The district court ruled for Washington on cross-motions for summary judgment. Pet. App. 81a. 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." Pet. App. 80a. 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; J.A. 213, 221-22.

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 doing so, it rejected the argument by the United States that § 3172 authorizes only generally applicable laws "rather than 'discrete' state laws that

'single out' the Federal Government and its contractors." *Id.*

The United States unsuccessfully moved for rehearing en banc. Pet. App. 22a-23a. Like the United States, the dissent from the denial of rehearing focused on the law's alleged singling out of the federal government and the "facially discriminatory" rules for presumption of occupational disease. *E.g.*, Pet. App. 38a-40a. Also like the United States, the dissent conceded that a statutory scheme similar to House Bill 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. v. Miller*, 486 U.S. 174 (1988), as allowing any type of workers' compensation scheme subject only to the requirement that the scheme apply equally to federally owned and privately owned facilities).

In its petition and merits brief to this Court, the United States continued its focus on what it described as the explicit singling out of the federal government in Washington's law. Pet. (I) (Question Presented); Pet. 11; Pet'r's Br. 16. And its arguments continued to implicitly concede that if the law applied to federal and non-federal actors, it would not violate inter-governmental 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* Pet'r'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 (citation omitted); Pet'r's Br. 24. The United States then supported its view that the prior law did not properly distinguish among workers by pointing out illustratively that the prior law did not apply to state inspectors or employees of private companies that allegedly performed similar work. Pet. 15-16.

This Court granted the petition on the question presented:

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

Pet. (I).

C. Washington Amends the Law to Cover All Workers at All Radiological Hazardous Waste Sites in Washington

In March 2022, the Washington Legislature significantly amended the statute. App. 1a-8a (Substitute Senate Bill 5890, 67th Leg., Reg. Sess. (Wash. 2022)). The Governor signed the bill into law on March 11, 2022, and it became effective immediately. *Id.* The new law no longer applies its presumptions and other features based on whether a person works for a federal contractor or at the Hanford nuclear site. Instead, the act covers everyone working at radiological hazardous waste facilities, defined as "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."[2] App. 3a-4a (SSB 5890, § 1(1)(b)). Covered workers include anyone, including state inspectors, who have worked at least an eight-hour shift at a radiological hazardous waste facility. *Id*. at § 1(1)(a). The new law also narrowed the

[2] "High level radioactive waste" is "the aqueous waste resulting from the operation of the first cycle solvent extraction system, or equivalent and the concentrated waste from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels, or irradiated fuel from nuclear power reactors." 33 U.S.C. § 1402. "Mixed waste" is "a dangerous, extremely hazardous, or acutely hazardous waste that contains both a nonradioactive hazardous component and, as defined by 10 C.F.R. 20.1003, source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.)" Wash. Admin. Code § 173-303-040.

diseases subject to the work-related presumption, excluding communicable diseases. *Id.* at § 1 (3).

Coverage under the new law differs from the prior law in several crucial respects relevant here. For example, while the Hanford site is still covered under the new law, the new law now applies to all workers at the Hanford site, including state inspectors and private employees not employed by federal contractors (like the prior law, the new law still exempts employees of the federal government, Wash. Rev. Code § 51.12.060). 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. Pet'r's Br. 7 & n.3. *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. 11, 2022) (listing Washington facilities with mixed waste permits).

ARGUMENT

This Court should vacate the decision below and remand with instructions for the district court to dismiss or consider whether the United States has any residual claims. The statutory provisions that formed the primary basis for the lawsuit no longer exist, and the Court cannot provide any relief by answering the now obsolete question presented.

I. The Court Routinely Dismisses Cases When Intervening Changes in Law Make the Question on Which Certiorari Was Granted Moot

This Court's jurisdiction is limited to actual "cases" or "controversies." U.S. Const. art. III, § 2. An "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). "Throughout the litigation, the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and *likely to be redressed by a favorable judicial decision*." *United States v. Juv. Male*, 564 U.S. 932, 936 (2011) (per curiam) (emphasis added) (cleaned up). Therefore, if circumstances change while an appeal is pending that prevent the Court from providing effective relief, the case becomes moot and must be dismissed. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990). To decide the case on the merits despite the changed circumstances would be to issue an "advisory opinion[] on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam).

Ordinarily, the Court dismisses outright a case that has become moot on appeal, vacating the judgment below and remanding with directions to dismiss. *Lewis*, 494 U.S. at 482. But "where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework . . . [the Court's] practice is to vacate the judgment and remand for further proceedings in

which the parties may, if necessary, amend their pleadings or develop the record more fully." *Id.*

An intervening change in the law that makes answering the question presented meaningless in providing any relief routinely renders litigation moot. For example, in *United States Department of Treasury v. Galioto*, 477 U.S. 556 (1986), the plaintiff challenged a federal law prohibiting all persons who had been previously involuntarily committed to a mental institution from purchasing firearms, while permitting some felons to do so. *Id.* at 557. After oral argument, Congress amended the law relating to firearms restrictions, allowing such persons—and other persons subject to firearms restrictions—to petition administratively for an exception. *Id.* at 559. Thus, it could "no longer be contended that such persons have been 'singled out.' Also, no 'irrebuttable presumption' now exists since a hearing is afforded to anyone subject to firearms disabilities. Accordingly, the equal protection and 'irrebuttable presumption' issues discussed by the District Court are now moot." *Id.* at 559-60 (citations omitted). The Court thus vacated the judgment below and remanded for consideration of the remaining issues in the case.

Similarly, this Court recently dismissed as moot a challenge to a New York City rule regarding the transport of firearms because the state amended its statutes and the City changed its rule. *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020). Specifically, plaintiffs challenged a rule preventing their transport of firearms to a second home or shooting range outside the city. *Id.* at 1526. After the Court granted certiorari, New York State amended its statutes and New York City amended its

rule so that petitioners could transport firearms to a second home or shooting range outside the city. *Id.* Accordingly, the Court dismissed the case as moot, despite plaintiffs' claim that the new law and rule continued to infringe on their rights, but in slightly different ways. *Id.* (addressing arguments that under the new law and rules, plaintiffs would not be able to stop for gas, food, or restroom breaks while in transit, and that plaintiffs might seek damages). Rather than attempt to resolve plaintiffs' continuing objections to the new law, the Court recognized that the question on which it had granted certiorari was moot and remanded to the district court to allow the parties "if necessary [to] amend their pleadings or develop the record more fully." *Id.* at 1526-27.

There are countless other examples of the Court dismissing a case as moot due to intervening changes in the law. *E.g.*, *United States v. Microsoft Corp.*, 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 briefed and argued mooted the case); *U.S. Dep't of Justice v. Provenzano*, 469 U.S. 14, 15-16 (1984) (per curiam) (dismissing as moot because new law enacted after certiorari was granted meant that Freedom of Information Act requests must be "judged under the law presently in effect"); *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 213-14 (1984) (repeal of residency durational requirement after certiorari granted mooted equal protection challenge based on

that requirement); *Diffenderfer v. Cent. Baptist Church of Miami*, 404 U.S. 412, 414 (1972) (per curiam) (dismissing as moot case challenging church parking lot as exempt from taxation because under intervening law parking lot not automatically exempt; remanding to allow amendment of pleadings if necessary).

II. Washington's New Law Makes This Case Moot

The same rationale applied countless times by this Court after intervening legislation applies here. The United States filed its complaint seeking declaratory and injunctive relief regarding the prior law, Washington Substitute House Bill 1723, which is no longer effective. *See* J.A. 28, 40. Thus, the Court can no longer provide effective relief because enjoining enforcement of House Bill 1723 would not prevent enforcement of the new law. And the United States sought only declaratory and injunctive relief, alleging no claim for damages under the former law. J.A. 40. *See New York State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526-27 (dismissing as moot and rejecting plaintiffs' argument that they might seek damages because a claim for damages was not included in the complaint); 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper *Fed. Prac. & Proc.* § 3533.3 (3d ed. Supp. 2021) (claim for money damages typically forestalls mootness, but claim for declaratory and injunctive relief often does not).

More fundamentally, the gravamen of the United States' challenge to the former law, and the entire premise of its question presented, is that Washington cannot single out the federal

government in a workers' compensation law. *See* Pet'r's Br. (I); J.A. 28-40. The United States repeatedly acknowledged that workers' compensation laws can distinguish among types of work or types of facilities, so long as the law does not single out the federal government and applies more broadly. *E.g.*, Pet'r'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.") *See also* Pet. Reply at 3 ("'the State was free to draw' classifications based on the employee's working conditions or the employer's safety record." (quoting *Dawson v. Steager*, 139 S. Ct. 698, 706 (2019)). Similarly, the dissent from denial of rehearing acknowledged that "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." Pet. App. 47a n.2. *See generally Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755-56 (1995) (explaining that where a state law allegedly violates the constitution because of "differential treatment of two similar classes," the State can "cure the problem either by similarly burdening, or by similarly unburdening, both groups," and citing as an example the intergovernmental immunity case *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989)).

The newly amended law, which no longer differentiates federal contractors from other employers and instead distinguishes among types of facilities, has thus mooted the basis for the complaint of the United States. Answering the question presented will be a purely "advisory

opinion[] on abstract propositions of law" relating to a now defunct statute. *Hall*, 396 U.S. at 48. And for purposes of evaluating the new statute, no relief can be granted to the United States because even if the Court were to agree that a state may not apply a workers' compensation law exclusively to federal contractors, the new statute does no such thing.

Even if the United States may object to the new state law, that does not affect the mootness issue because such an objection would raise different issues and require development of a different record. The United States could no longer argue that a law applying exclusively to federal contractors was invalid; instead, the United States would have to show that a workers' compensation scheme addressing particularly dangerous worksites, applied to federal and non-federal employers alike, was invalid.

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.

The United States may contend that enjoining enforcement of House Bill 1723 could still have some impact on pending claims filed under the old version of the law, but that would be incorrect. While some workers' compensation claims filed under House Bill 1723 are still working their way through State administrative and court proceedings, any claim that has been approved under House Bill 1723 would also be approved under the revised law, so striking down House Bill 1723 would have no ultimate

impact on those claims. Specifically, Senate Bill 5890 expands the rebuttable presumption created by House Bill 1723 beyond federal contract workers at Hanford to cover not only all workers at Hanford, but also all workers at other radiological hazardous waste facilities in Washington. App. 3a-4a (SSB 5890 § 1). Thus, no worker whose pending claim has received the benefit of House Bill 1723's rebuttable presumption would lose that benefit under the revised law, and there would be no benefit to the United States of invalidating House Bill 1723.[3]

CONCLUSION

The Court should vacate the Ninth Circuit opinion and remand to the district court for dismissal or consideration of whether the United States has any residual claims.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General
Counsel of Record

ANASTASIA R. SANDSTROM
Senior Counsel

PETER B. GONICK
Deputy Solicitor General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200

March 15, 2022

[3] The only way in which Senate Bill 5890 narrows application of the rebuttable presumption as compared to House Bill 1723 is by removing communicable diseases from the list of presumptively work-related illnesses, SSB 5890 § 1(3)(a), (e), but the State is unaware of any such claims.

APPENDIX

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 5890

67th Legislature
2022 Regular Session

Passed by the Senate
February 12, 2022
Yeas 32 Nays 17

_____

President of the Senate

Passed by the House
March 2, 2022
Yeas 68 Nays 27

_____

Speaker of the House of Representatives

Approved

_____

Governor of the State of Washington

CERTIFICATE

I, Sarah Bannister, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5890** as passed by the Senate and the House of Representatives on the dates hereon set forth.

_____

Secretary

FILED

Secretary of State
State of Washington

SUBSTITUTE SENATE BILL 5890

Passed Legislature – 2022 Regular Session

State of Washington 67th Legislature 2022 Regular Session

By Senate Labor, Commerce & Tribal Affairs (originally sponsored by Senators Keiser, Conway, Dhingra, Hasegawa, Kuderer, Lovick, Nobles, Saldaña, Stanford, Wellman, and C. Wilson)

READ FIRST TIME 02/03/22.

AN ACT Relating to clarifying eligibility for the presumption for workers' compensation for all personnel working at a radiological hazardous waste facility; amending RCW 51.32.187; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 51.32.187 and 2019 c 108 s 1 are each amended to read as follows:

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

(a) ((~~"Hanford nuclear site" and "Hanford site" and "site" means the approximately five hundred sixty~~

~~square miles in southeastern Washington state, excluding leased land, state-owned lands, and lands owned by the Bonneville Power Administration, which is owned by the United States and which is commonly known as the Hanford reservation.~~

~~(b) "United States department of energy Hanford site workers" and "Hanford site worker" means any person, including a contractor or subcontractor, who was engaged in the performance of work, either directly or indirectly, for the United States, regarding projects and contracts at the Hanford nuclear site and who worked on the site at the two hundred east, two hundred west, three hundred area, environmental restoration disposal facility site, central plateau, or~~

p. 1

~~the river corridor locations for at least one eight-hour shift while covered under this title.~~

~~(2)(a) For United States department of energy Hanford site workers, as defined in this section, who are covered under this title, there exists a prima facie presumption that the diseases and conditions listed in subsection (3) of this section are occupational diseases under RCW 51.08.140~~)) "Exposed worker(s)" means a worker working at a radiological hazardous waste facility for at least an eight hour shift covered under this title, including conducting an inspection of the facility.

(b) "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 WAC 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.

(2)(a) For exposed workers who are covered under this title, there exists a prima facie presumption that the diseases and conditions listed in subsection (3) of this section are occupational diseases under RCW 51.08.140.

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

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

(a) Respiratory disease, except communicable diseases;

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

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

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

(e) Neurological disease, except communicable diseases.

(4)(a) The presumption established for cancer only applies to any active or former ((~~United States department of energy Hanford site~~)) exposed worker who has cancer that develops or manifests itself and who either was given a qualifying medical

examination upon becoming ((~~a United States department of energy Hanford site~~)) such a worker that showed no evidence of cancer or was not given a qualifying

medical examination because a qualifying medical examination was not required.

(b) The presumption applies to the following cancers:

(i) Leukemia;

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

(iii) Primary or secondary bone cancer, including the bone form of solitary plasmacytoma, myelodysplastic syndrome, myelofibrosis with myeloid metaplasia, essential thrombocytosis or essential thrombocythemia, primary polycythemia vera (also called polycythemia rubra vera, P. vera, primary polycythemia, proliferative polycythemia, spent-phase polycythemia, or primary erythremia);

(iv) Primary or secondary renal (kidney) cancer

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

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

(vii) Primary cancer of the: (A) Thyroid; (B) male or female breast; (C) esophagus; (D) stomach; (E) pharynx, including all three areas, oropharynx,

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

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

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

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

(6)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final

decision allows the claim of benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorneys' fees and witness fees, be paid to the worker or his or her beneficiary by the opposing party.

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

NEW SECTION. **Sec. 2.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

- - - END - - -