No. 21-404

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF WASHINGTON, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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The Court should resolve the question on which it granted certiorari, and it should reverse the Ninth Circuit's decision upholding Washington House Bill 1723, 65th Leg., Reg. Sess. (2018) (H.B. 1723). Respondents urge the Court not to answer the question presented, but they fail to show that the case is moot, and their contention that the Court should forgo a merits ruling for prudential reasons is unpersuasive.

H.B. 1723 is unconstitutional. The law facially discriminates against the United States and those with whom it deals. Unless such a law is clearly and unambiguously authorized by Congress, it is a paradigmatic violation of the United States' intergovernmental immunity. Respondents principally argue that Congress consented to such discrimination by enacting 40 U.S.C. 3172(a). But that statute's text, history, purpose, and prior construction by this Court all point in the opposite

direction. Those interpretive aids indicate that Congress authorized state officials to apply their workers' compensation laws to federal land and projects in an *evenhanded* manner—*i.e.*, "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State." *Ibid.*

So construed, Section 3172(a) strikes the same balance that Congress has repeatedly struck in enacting limited waivers of federal intergovernmental immunity. By contrast, respondents' theory that Congress authorized facial discrimination against the federal government is counterintuitive and, if accepted, would produce an unprecedented result. At the very least, such a startling surrender of a longstanding constitutional immunity would require far greater clarity than respondents show here. The judgment below should be reversed.

A. The Court Should Resolve The Question Presented

Respondents contend (Br. 3-4, 23-29) that this Court should decline to resolve the validity of H.B. 1723. As explained in more detail in the United States' response to respondents' suggestion of mootness, the Court should decide the question presented.

1. The case is not moot

A "party who alleges that a controversy before [this Court] has become moot has the 'heavy burden' of establishing that [the Court] lack[s] jurisdiction." *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983) (citation omitted). Respondents have not carried that burden here. See U.S. Mootness Br. 11-17.

H.B. 1723 was in effect from June 2018 until March 11, 2022, when the respondent Governor of Washington signed Substitute Senate Bill 5890, 67th Leg., Reg. Sess. (S.B. 5890). Respondents acknowledge (Br. 27)

that claims that were allowed under H.B. 1723 during that nearly four-year period remain pending on appeal. Determining the validity of H.B. 1723 would directly affect the disposition of those claims, because the invalidation of H.B. 1723 could result in "refunds" for the United States. *Ibid.* Because "there is a[] chance of money changing hands," the "suit remains live." *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019); see U.S. Mootness Br. 12-13.[1]

Respondents' principal response (Br. 27) is that "any claim that was allowed under H.B. 1723 would also be allowed under S.B. 5890, so * * * invalidating the prior law will have no impact." But that argument assumes a critical premise: that every claim covered by H.B. 1723 will necessarily be covered by S.B. 5890. In fact, the coverage provisions of those two statutes use substantially different language, and it is unclear whether the Washington courts—the ultimate arbiters of the meaning of state law—will endorse respondents' interpretation. See, *e.g.*, *Animal Sci. Prods., Inc.* v. *Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1874 (2018) (explaining that the "views of the State's attorney general" on the meaning of state law "do not garner controlling weight"); *PT Air Watchers* v. *Department of Ecology*,

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[1] In their reply in support of their suggestion of mootness, respondents assert (at 13) that the government's position "sounds in the doctrine of voluntary cessation." That is mistaken. The voluntary-cessation doctrine addresses the concern that, if a pending challenge to a law is dismissed as moot after the law is amended or repealed, the defendant may then "reenact[] precisely the same provision." *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The United States does not argue that Washington will reenact H.B. 1723. The government's contention instead is that H.B. 1723 retains sufficient practical effect to avoid mootness even if it is not reenacted.

319 P.3d 23, 26 (Wash. 2014) (Washington courts "are not bound by an agency's interpretation of a statute.") (citation omitted).

H.B. 1723 applies to certain geographic areas on the Hanford site where federal contract workers operate ("the two hundred east, two hundred west, three hundred area, environmental restoration disposal facility site, central plateau, [and] the river corridor locations," § (1)(b)), while S.B. 5890 applies to "any structure and its lands" where particular forms of waste are "stored or disposed of," § (1)(b). It is unclear whether all of the geographic areas identified by H.B. 1723—which collectively span hundreds of square miles—constitute "any structure and its lands" where the specified forms of waste are "stored or disposed of," *ibid.*

The key terms in S.B. 5890 are undefined, but if interpreted according to their ordinary meaning, they would likely not cover all of the areas covered by H.B. 1723. For example, there are vast portions of "the river corridor locations" identified by H.B. 1723, § (1)(b), where waste referenced by S.B. 5890 is neither "stored" nor "disposed of," § (1)(b). Respondents' position appears to be that all of those areas should be viewed as the "lands" of "structure[s]" located *elsewhere* on the Hanford site where specified waste is "stored or disposed of." *Ibid.* That expansive reading, however, is textually strained. And additional ambiguities exist, any one of which could result in some workers who were previously covered by H.B. 1723 not being covered by S.B. 5890. See U.S. Mootness Br. 13-14.

Respondents express confidence (Br. 27) that Washington courts will defer to the state administrative agency's interpretation of S.B. 5890. But it does not ap-

pear that the agency has formally adopted any interpretation of the new law, let alone a binding legislative rule of the kind to which Washington courts have granted the deference respondents invoke. *Ibid.* (citing *Marquis* v. *City of Spokane*, 922 P.2d 43, 50 (Wash. 1996)). Washington courts may conclude that they "are not required to give any deference whatsoever to" the agency's litigating position. *Association of Washington Bus.* v. *Department of Revenue*, 120 P.3d 46, 54 (Wash. 2005); cf. *Carranza* v. *Dovex Fruit Co.*, 416 P.3d 1205, 1213 (Wash. 2018) ("While the level of deference owed to regulations is an issue of ongoing debate, administrative policies do not even have the force of regulations, and deference to such policies is inappropriate.").

In short, while state courts may ultimately accept respondents' interpretation of S.B. 5890, that outcome is not certain. And if the new law is interpreted to exclude any workers who were covered by H.B. 1723, the validity of H.B. 1723 will be directly relevant to the disposition of claims that have been allowed under that law and are now pending on appeal. It is thus far from "impossible" that the United States could obtain "effectual relief" from the invalidation of H.B. 1723. *Mission Prod.*, 139 S. Ct. at 1660 (citation omitted). The case accordingly is not moot.

2. The equities favor a decision on the merits

Respondents separately contend (Br. 28-29) that, even if the case is not moot, the Court should avoid the merits as a prudential matter by vacating the decision below and remanding for further proceedings. While that approach is available to the Court, the sounder course here is to decide the question on which the Court granted certiorari. See U.S. Mootness Br. 17-20.

a. As explained above, the validity of H.B. 1723 may remain relevant to a substantial number of claims that were allowed under that law before S.B. 5890 was enacted. Respondents acknowledge (Br. 28) that, if the United States prevails in this case, it could "recoup or avoid somewhere between $17 [million] and $37 million" in workers' compensation payments. Although respondents submit (*ibid.*) that the ultimate figure would be lower, the fact that millions of federal-taxpayer dollars may be at stake weighs in favor of resolving the question presented.

b. Respondents repeatedly assert (Br. 3, 20-21, 26, 29) that the United States has conceded that a law like S.B. 5890 would be valid, and that enactment of that law therefore cures the government's injury. That is incorrect. Consistent with Section 3172(a)'s text and with this Court's precedents, the United States has acknowledged that States can provide unusually generous workers' compensation benefits to individuals who perform unusually dangerous jobs, so long as state law treats the federal government and the firms with which it deals the same as it treats *similarly situated non-federal entities*. See, *e.g.*, U.S. Opening Br. 16-22, 26-30, 32-34; Pet. 13-17; *Dawson* v. *Steager*, 139 S. Ct. 698, 703-706 (2019). But if a similarly situated non-federal entity is *not* subject to the workers' compensation scheme at issue, that scheme cannot be applied to the federal government and its contractors, because a State must treat the government and its contractors as well as it treats the "*favored* class." *Dawson*, 139 S. Ct. at 705; see, *e.g.*, *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 815 n.4 (1989). The government has never suggested that extending H.B. 1723's regime to *any* non-federal entity (*e.g.*, state inspectors) would necessarily remedy

the unlawful discrimination or moot the parties' dispute. Cf. *Northeastern Fla. Chapter of the Associated Gen. Contractors* v. *City of Jacksonville*, 508 U.S. 656, 662 (1993) (rejecting the proposition that "a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect").[2]

Contrary to respondents' assertions, significant questions exist about S.B. 5890's validity. It is unclear, for example, how the State can justify applying S.B. 5890 to a federal-contract-worker accountant who spent one eight-hour shift on a part of the Hanford site away from the most contaminated areas, while not applying S.B. 5890 to (i) workers who spend a career in dangerous occupations such as mining, milling, or refining, or (ii) workers at facilities where the waste referenced in S.B. 5890 is treated or generated (as opposed to "stored or disposed of," § (1)(b)). See U.S. Mootness Br. 16-17. Respondents are therefore wrong to contend that S.B. 5890 unequivocally eliminates the legal injury the United States has asserted throughout this case.

And S.B. 5890 notably does not eliminate the United States' injury in fact. Washington did not repeal the substantive provisions of H.B. 1723, and the law as

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[2] The government has relied on the fact that H.B. 1723 "single[s] out" the United States and its contractors for "discriminatory treatment." *Washington* v. *United States*, 460 U.S. 536, 546 (1983). But the government has never suggested that such facial discrimination is the *only* way a state law can violate the United States' intergovernmental immunity. Rather, the government has explained that, while principles of intergovernmental immunity can also bar less blatant forms of disparate treatment, "HB 1723's facial discrimination against the United States and those with whom it deals makes this an especially straightforward case." Cert. Reply Br. 6-7 n.2.

amended leaves federal taxpayers liable for tens of millions of dollars in workers' compensation payments that they otherwise would not have to fund. This case is accordingly not comparable to those in which the Court has declined to resolve the question presented because the plaintiffs had already received "the precise relief that [was] requested in the prayer for relief in their complaint." *New York State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam). The case is instead comparable to those in which the Court has resolved the question presented because it retained continuing legal relevance for petitioners who were still suffering concrete harm. See U.S. Mootness Br. 19 (collecting cases).

c. Resolving the question presented would also further this Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie* v. *Pap's A. M.*, 529 U.S. 277, 288 (2000). Respondents assert (Br. 29) that they are not seeking to insulate the decision below from review because they have urged this Court "to *vacate* the lower courts' decisions" rather than to leave them in place. The same argument was made in *Knox* v. *SEIU*, 567 U.S. 298 (2012), see Reply in Support of Motion to Dismiss as Moot at 1, *Knox*, *supra* (No. 10-1121), but this Court nevertheless observed that "postcertiorari maneuvers designed to insulate a decision from review * * * must be viewed with a critical eye," 567 U.S. at 307. So too here, respondents' willingness to accept vacatur of the court of appeals' judgment does not dispel the natural inference from the timing of S.B. 5890's enactment that respondents have sought to prevent this Court from deciding whether H.B. 1723 is valid. See U.S. Mootness Br. 2, 8-9. In

these circumstances, the "equities of the case," *Lawrence* v. *Chater*, 516 U.S. 163, 168 (1996) (per curiam), favor resolution of the question this Court granted certiorari to decide.

B. H.B. 1723 Cannot Be Validly Applied

The United States' intergovernmental immunity bars application of a state law that discriminates against the federal government or those with whom it deals, unless Congress has clearly and unambiguously authorized such discrimination. See U.S. Opening Br. 19-22. Respondents do not contest any aspect of that articulation of the governing legal rule. They instead briefly dispute whether H.B. 1723 embodies such discrimination (Br. 48-53), and they argue at length (Br. 30-48) that Congress has authorized the State to enact and enforce that law.

Both of those contentions are badly mistaken. H.B. 1723 facially discriminates against the United States and the firms with which it contracts. And 40 U.S.C. 3172(a) does not authorize such discrimination, let alone clearly and unambiguously so.

1. H.B. 1723 discriminates against the United States and those with whom it deals

H.B. 1723's novel and costly workers' compensation scheme applies only to "United States department of energy Hanford site workers." § (1)(b). It is difficult to imagine more "blatant facial discrimination against the Federal Government." Pet. App. 39a (Collins, J., dissenting from the denial of rehearing en banc).

Respondents assert (Br. 23) that H.B. 1723 was "tailored to the medical, safety, and employer-history concerns presented at Hanford." But H.B. 1723 does not reflect any such tailoring. It "does not classify persons

or groups based on" any of the workplace-safety concerns respondents now invoke. *Dawson*, 139 S. Ct. at 706. It instead classifies based on whether a worker performed services, "directly or indirectly, for the United States." § (1)(b). That defect is fatal; "it is not too much to ask that, if a State *wants* to draw a distinction based on [workplace safety], it enact a law that actually *does* that." *Dawson*, 139 S. Ct. at 706.

Respondents suggest (Br. 50) that H.B. 1723's application exclusively to federal contract workers at Hanford is permissible because Hanford is a uniquely dangerous workplace. But H.B. 1723 cannot be justified on that rationale. See U.S. Opening Br. 24-26. To take one particularly clear example, H.B. 1723 applies to a federal contract worker who spent a single eight-hour shift on a part of the Hanford site away from the most contaminated areas, but it does not apply to state inspectors and non-federal-contract-worker private employees who work routinely on the most contaminated areas of the site. See *ibid.* No statute tailored to workplace-safety concerns would operate in that way.

Respondents suggest (Br. 14, 50) that H.B. 1723 permissibly excludes non-federal-contract-worker private employees at Hanford because those employees "do not handle the type of high-level waste pervasive at Hanford." But federal-contract-worker accountants covered by H.B. 1723 do not handle *any* type of waste. See U.S. Opening Br. 28-29. Respondents similarly claim (Br. 14, 49) that H.B. 1723 permissibly excludes state inspectors because there is no evidence that state inspectors were sickened by exposures at Hanford or that their employers failed to provide safety equipment. But there is likewise no evidence that federal-contract-worker accountants who spent only eight hours at the

Hanford site were sickened by exposures, and H.B. 1723 applies to all employers of federal contract workers—including employers with pristine safety records.[3]

Respondents observe (Br. 11) that various "major employers in Washington * * * have contracts with the federal government," and that "their employees are covered by state workers' compensation laws regardless of whether they work on federal contracts." But that only highlights the defect in H.B. 1723. The employers of federal contract workers at Hanford are not subject to H.B. 1723 "regardless of whether they work on federal contracts," *ibid.*; they are subject to H.B. 1723 *because of* their "status as * * * Government contractor[s]," *North Dakota* v. *United States*, 495 U.S. 423, 438 (1990) (plurality opinion). Absent clear and unambiguous congressional authorization, such discrimination is at the core of what the United States' intergovernmental immunity forbids. See *ibid.*

Finally, respondents suggest (Br. 3) that the concerns underlying the intergovernmental-immunity doctrine do not apply here because the firms that employ federal contract workers at Hanford "are perfectly capable of protecting themselves." But the incentives for private firms to "protect[] themselves" (*ibid.*) by opposing the enactment of laws like H.B. 1723 are diminished if any increased costs the laws impose can be passed on to the federal government. See U.S. Opening Br. 23, 29. In any

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[3] Although not directly pertinent to the question presented, the United States contests many of respondents' assertions about the safety conditions at Hanford. See, *e.g.*, C.A. E.R. 80-83 (documenting the government's extensive factual disputes); D. Ct. Doc. 209, at 10-11, *Hanford Challenge* v. *Moniz*, No. 15-cv-5086 (E.D. Wash. Nov. 15, 2016) (finding that plaintiffs who made similar allegations about safety at Hanford had failed to show any imminent harm).

event, the United States' intergovernmental immunity exists to protect the United States, which "does not have a direct voice in the state legislatures." *Washington* v. *United States*, 460 U.S. 536, 545 (1983). This case vividly illustrates the need for that protection. Washington imposed heightened financial burdens solely on the employers of Hanford federal contract workers, knowing those burdens would fall on federal taxpayers nationwide. That is a paradigmatic example of a State impermissibly exploiting the absence of a "'political check'" on its legislature to "take advantage of the Federal Government." *Id.* at 545-546 (citation omitted).[4]

2. Section 3172(a) does not clearly and unambiguously authorize application of discriminatory state laws

Section 3172(a) does not clearly and unambiguously authorize application of a discriminatory state workers' compensation law like H.B. 1723. Section 3172(a)'s text, history, purpose, and construction by this Court—along with practical considerations and common sense—indicate that Congress authorized only *evenhanded* application of state workers' compensation laws.

a. Respondents' analysis (Br. 30-40) of the text of Section 3172(a) fails to account for the opening words of that provision: "The state authority charged with enforcing and requiring compliance with the state workers' compensation laws * * * may apply the laws to all [federal] land and premises in the State * * * ." 40

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[4] Respondents contend (Br. 48-53) that H.B. 1723 reflects rational legislative decisions. But the rational-basis standard that applies in most "equal protection cases" is "inappropriate" in the intergovernmental-immunity analysis. *Davis*, 489 U.S. at 816. "Instead, the relevant inquiry is whether the inconsistent * * * treatment is directly related to, and justified by, 'significant differences between the two classes.'" *Ibid.* (citation omitted).

U.S.C. 3172(a). Section 3172(a) thus authorizes the *application* by state *administrative officials* of workers' compensation laws that *actually exist* and apply elsewhere in the State. That aspect of the statutory text undermines respondents' assertion (Br. 31, 35, 37, 39-40) that Section 3172(a) empowers state *legislatures* to enact any laws that they *hypothetically* "could" adopt for non-federal property. The government has identified that flaw in respondents' position three times in this Court. U.S. Opening Br. 32, 38; Pet. 22-23; Cert. Reply Br. 5. The Ninth Circuit dissenters noted it too. Pet. App. 54a. Yet respondents have not "attempt[ed] to reconcile their position with that feature of Section 3172(a)'s text." Cert. Reply Br. 5.

For substantially the same reason, respondents' position likewise conflicts with Section 3172(a)'s authorization to apply 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). H.B. 1723 applies only to Hanford federal contract workers, and respondents appear to accept that it does not apply "in the same way and to the same extent" to anyone else in the State. *Ibid.* The typical way of describing that arrangement would be to say that H.B. 1723 applies to Hanford federal contract workers "in a *different* way," and "impose[s] liability to a *different* extent," than any state law applicable to "premises 'under the exclusive jurisdiction of the State.'" Pet. App. 44a (Collins, J., dissenting from the denial of rehearing en banc). As a matter of ordinary language, respondents thus read Section 3172(a) "to mean the exact opposite of what its words say." *Id.* at 40a.

Respondents' principal answer (Br. 35) is that Section 3172(a)'s "'in the same way and to the same extent'" language "makes clear that the State's power is identical —no more and no less—to what it would be on premises under the State's exclusive jurisdiction." The State's power on those premises, respondents contend, is "without limitation." Br. 34 (citation omitted). But that understanding does not actually give any substantive content to the statutory term "in the same way and to the same extent." See U.S. Opening Br. 38-39. And as explained above (see pp. 12-13, *supra*), that argument conflates the power of "the State" writ large with the power of the state administrative officials at whom Section 3172(a) is directed. Whatever power state *legislatures* may possess to enact new workers' compensation statutes governing non-federal lands, the power of state administrative officials to "enforc[e] and requir[e] compliance with" such provisions is limited to existing (not hypothetical) laws. 40 U.S.C. 3172(a). Because no actual Washington law authorized those administrative officials to apply H.B. 1723's substantive presumptions to individuals who worked on lands "under the exclusive jurisdiction of the State," *ibid.*, Section 3172(a) did not authorize the officials to apply those presumptions to federal contract workers who performed services at the Hanford site.

Respondents' reading of Section 3172(a)'s "in the same way and to the same extent" language is also irreconcilable with this Court's understanding of that language in *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988). There, the Court explained that the language "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 183-184; see *id.* at 185 (looking to "private facilities within the State" when discussing the meaning of the statutory "'to the same extent'" requirement). H.B. 1723 does not fit within that construction, because it entitles Hanford federal contract workers to workers' compensation awards that are unavailable to similarly situated employees "working for a wholly private facility." *Id.* at 184. Respondents suggest (Br. 45-46) that the *Goodyear Atomic* Court meant something less than what it said. But the Court's description of Section 3172(a)'s predecessor was both correct and directly intertwined with its holding in the case. See U.S. Opening Br. 35-36. At the very least, the Court's understanding was sufficiently "plausible," *FAA* v. *Cooper*, 566 U.S. 284, 299 (2012), to defeat the argument that Section 3172(a) clearly and unambiguously supports respondents' position.

b. The history of Section 3172(a) further undermines respondents' claim that Congress consented to discrimination against the United States and its contractors. As respondents acknowledge (Br. 10-11), Congress enacted Section 3172(a)'s materially identical predecessor in 1936, in response to this Court's decision in *Murray* v. *Joe Gerrick & Co.*, 291 U.S. 315 (1934). The question there was whether Washington's workers' compensation law applied to a navy yard that the United States had acquired from the State in 1891. *Id.* at 316-319. The Court explained that, under the federal-enclave doctrine, only state laws in force at the time of the cession continue to apply at the property, unless Congress provides otherwise. *Id.* at 318. Because Washington's workers' compensation law had not been enacted until 1911, it did not apply to the navy yard. *Ibid.*

Congress addressed that problem by enacting the key statutory language in this case, authorizing state officials to apply state workers' compensation laws to, *inter alia*, federal "lands" and "projects * * * in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State." Act of June 25, 1936 (1936 Act), ch. 822, 49 Stat. 1938. The intent and effect of that language has been clear from the beginning. By removing the prior territorial barrier to applying state workers' compensation laws to federal land or projects, Congress ensured that workers on such land or projects could receive the same workers' compensation coverage that they would have received if the State had "never ceded jurisdiction * * * to the federal government." *Capetola* v. *Barclay White Co.*, 139 F.2d 556, 559 (3d Cir. 1943), cert. denied, 321 U.S. 799 (1944); see *Goodyear Atomic*, 486 U.S. at 182-183 & n.4; *id.* at 193-194 (White, J., dissenting).

Respondents contend (Br. 34) that the 1936 Act "effectuate[d] a complete waiver of intergovernmental immunity as to workers' compensation on federal lands or projects," such that States became free to discriminate against the federal government and its contractors. But for more than 80 years before this case, the statute was never understood in that way. The statute instead operated in a straightforward manner that reflected its original purpose to address territorial-jurisdiction barriers. Thus, a worker injured at the Philadelphia Navy Yard received coverage under Pennsylvania's generally applicable workers' compensation law. *Capetola*, 139 F.2d at 559. A worker injured at a federally owned (and contractor-operated) nuclear plant in Ohio received coverage under Ohio's generally applicable workers' compensation law. *Goodyear Atomic*, 486 U.S. at 180-181,

186. And workers injured at federal facilities in Washington received coverage under the State's generally applicable workers' compensation law—the remedy sought in *Murray*. See U.S. Opening Br. 34.

Before this case, no State appears to have suggested Section 3172(a) or its statutory predecessors gave "States *carte blanche* to impose whatever special workers' compensation rules they want on the United States and its contractors." Pet. App. 39a (Collins, J., dissenting from the denial of rehearing en banc). Nor would such an authorization serve any discernible federal purpose. Allowing state officials to apply their workers' compensation laws "with an even hand" to federal and non-federal facilities alike reflects a familiar balance that Congress struck in other statutes enacted during the same era. *Dawson*, 139 S. Ct. at 703 (discussing 4 U.S.C. 111, which was enacted in 1939). By contrast, respondents' position that Congress has "affirmatively greenlighted * * * open and explicit discrimination against the Federal Government" would represent an "astonishing" step with no apparent precedent. Pet. App. 39a (Collins, J., dissenting from the denial of rehearing en banc).

Respondents assert (Br. 37) that, under the government's interpretation of the current statutory language, Congress's enactment of Section 3172(a)'s predecessor in 1936 "would have done nothing at all." That is mistaken. The federal intergovernmental-immunity doctrine has two distinct branches: one prevents direct state regulation of the United States, and one prevents state discrimination against the United States and its contractors. See U.S. Opening Br. 21-22. To the extent that application of some state "workmen's compensa-

tion laws," 1936 Act, 49 Stat. 1938, to federal contractors at federal enclaves or other federal facilities could be understood as direct regulation of the United States, the 1936 Act waived the government's immunity from that form of regulation, see *Goodyear Atomic*, 486 U.S. at 181-182. But Congress's waiver of that particular form of immunity does not imply that Congress also took the novel and highly counterintuitive step of consenting to *discrimination* against the United States and its contractors. Intergovernmental immunity, in other words, is not an all-or-nothing proposition. Just as Congress can waive the United States' sovereign immunity from one form of damages but not another, see *Cooper*, 566 U.S. at 299, it can consent to application of some state workers' compensation laws but not others.[5]

At a minimum, Section 3172(a) does not consent to the application of discriminatory state workers' compensation laws with the clarity that this Court's precedents require. See *Goodyear Atomic*, 486 U.S. at 180; *Hancock* v. *Train*, 426 U.S. 167, 179 (1976). Particularly given the anomalous nature of such a waiver, it must be stated "unequivocal[ly]" and "may not be inferred." *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 619 (1992); accord *FBI* v. *Fazaga*, 142 S. Ct. 1051, 1060-1061 (2022) (explaining that a constitutional or common-law "privilege should not be held to have been abrogated or limited unless Congress has at least used clear statutory language"). Respondents barely mention that demanding standard, let alone demonstrate that Section 3172(a) meets it.

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[5] Congress's determination that the authorization in Section 3172(a) would not apply to federal employees, see 40 U.S.C. 3172(c), further undercuts respondents' assertion (Br. 30) that Congress "completely waived immunity" in this area.

c. Respondents' remaining arguments (Br. 41-48) lack merit.

i. Respondents repeatedly pivot (Br. 34-35, 39, 41-43) from Section 3172(a) to other statutes that they claim (Br. 41) more clearly limit particular waivers of federal intergovernmental immunity. That argument fails at the threshold. Federal intergovernmental immunity is inherent in the constitutional structure, and it forecloses state discrimination against the United States and its contractors except to the extent that Congress has *waived* that immunity through "clear and unambiguous" language. *Goodyear Atomic*, 486 U.S. at 180 (citation omitted); see U.S. Opening Br. 19-22. Respondents' contention that other statutes *preserved* immunity with greater clarity is accordingly irrelevant.

In any event, respondents' argument is unpersuasive even on its own terms. The statutes respondents identify (Br. 41-43) use formulations drawn from their respective contexts. For example, 4 U.S.C. 111 is an income-tax statute that prohibits discrimination based on the source of compensation, while the environmental-regulation statutes cited by respondents reference the stringency of requirements or standards applied to others. None of those statutes addresses the territorial-jurisdiction problem that prompted Section 3172(a), so it is unsurprising that none uses the same formulation. At most, those statutes suggest that Congress could have included in Section 3172(a) an antidiscrimination rule even more explicit than the one imposed by that provision's "in the same way and to the same extent" language. See pp. 14-15, *supra*. But as just noted, Congress does not need to clearly state such a rule. And even outside the area of governmental immunity, this

Court has "routinely construed statutes to have a particular meaning even [if] Congress could have expressed itself more clearly." *Torres* v. *Lynch*, 578 U.S. 452, 472 (2016).[6]

Indeed, the statutes cited by respondents significantly undercut their position. Those statutes demonstrate Congress's consistent commitment, across a variety of areas, to permitting *evenhanded* regulation of federal facilities and contractors, while barring *discrimination* against the United States and those with whom it deals. Conspicuously absent from respondents' litany of statutes is any law that clearly and unambiguously authorizes discrimination against the federal government or its contracting partners. As the Ninth Circuit dissenters observed and respondents have not refuted, "no federal court in the more than 200 years since Chief Justice John Marshall's landmark decision in *McCulloch v. Maryland* has ever upheld a state statute that explicitly strikes at the Federal Government in the sort of extraordinary and egregious way that Washington has done here." Pet. App. 38a (citation omitted).

ii. Respondents also assert (Br. 44) that "[d]ecisions of this Court" buttress their position. But the only decision they invoke to support that proposition (Br. 44-46) is *Goodyear Atomic*. And the only part of *Goodyear Atomic* that they suggest supports them is the Court's statement that Section 3172(a)'s predecessor "place[d] no express limitation on the type of workers' compensation scheme that is authorized." 486 U.S. at 183.

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[6] Respondents appear to have abandoned their prior reliance on the statute construed in *United States* v. *Lewis County*, 175 F.3d 671 (9th Cir.), cert. denied, 528 U.S. 1018 (1999), which was a centerpiece of the decision below, Pet. App. 13a-15a; see U.S. Opening Br. 42-43.

That statement, however, referred only to the meaning of the term "'workmen's compensation laws'" in Section 3172(a)'s statutory predecessor. *Goodyear Atomic*, 486 U.S. at 183. And it was immediately followed by the Court's statement that the statute "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 183-184. The clear import of *Goodyear Atomic* is that States can apply to federal facilities a relatively broad range of "workers' compensation laws," 40 U.S.C. 3172(a), but must do so in a nondiscriminatory way. That understanding supports the United States' position in this case, not respondents'. See U.S. Opening Br. 35-36, 41-42.

iii. Respondents also suggest (Br. 14-15, 47-48) that H.B. 1723 does not inflict significant practical harm on the United States. That suggestion ignores this Court's long-settled holding in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)—a decision respondents characterize (Br. 46) as "inapposite"—that discriminatory treatment of the federal government by a State is necessarily "an abuse, because it is the usurpation of a power which the people of a single State cannot give." 17 U.S. (4 Wheat.) at 430; see *United States* v. *County of Fresno*, 429 U.S. 452, 457-464 (1977). In any event, under respondents' view (Br. 30) that Section 3172(a) "completely waived [the United States'] immunity as to state workers' compensation laws for federal lands and projects," all 50 States could impose heightened workers' compensation obligations on federal contractors as such, without invoking any purported safety-related rationale. Acceptance of that interpretation would allow

serious state abuses, whatever the scope of the practical harm done by H.B. 1723 itself.

Respondents also suggest (Br. 47-48) that, if H.B. 1723 actually caused significant practical harm, the United States might have asserted a preemption challenge. But the central question in this case is whether a federal statute unambiguously authorizes H.B. 1723. If Section 3172(a) actually conferred such authorization, there would be no evident ground for arguing that H.B. 1723 is preempted. Cf. *Goodyear Atomic*, 486 U.S. at 186 n.9 (summarily rejecting preemption argument after concluding that Section 3172(a)'s predecessor authorized application of the state workers' compensation law in question). And if Congress has not conferred such authorization, any preemption argument would be superfluous. Under bedrock principles of intergovernmental immunity, the proper disposition of this case turns on whether Congress has unambiguously consented to the discriminatory regime that H.B. 1723 imposes, not on whether any federal statute prohibits it. See p. 19, *supra*. Congress has not provided such unambiguous consent in Section 3172(a).

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

APRIL 2022