Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
Solicitor General Division
PO Box 40100 • Olympia WA 98504-0100 • (360) 753-6200

April 11, 2022

The Honorable Scott Harris
Clerk of Court
Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543

Re: *United States v. Washington*
U.S. Supreme Court Docket No. 21-404

Dear Mr. Harris:

In the weeks since Washington's Governor signed Senate Bill 5890, repealing and replacing large parts of the law challenged in this case, the State has worked expeditiously to inform the Court of this new development and to determine precisely how the amended law will impact pending cases filed under the prior law. The State immediately submitted a Suggestion of Mootness informing the Court of the new law. The federal government responded, arguing that the State's prior law could still impact claims that were filed under the old law and are not yet final. The State replied that anyone who received benefits under the old law would also be entitled to benefits under the new law, so invalidating the old law would have no impact.

As the State has begun to implement the new law in practice and has prepared for argument in this case, the State has concluded that the case is moot for a simpler reason than previously articulated.[1] In brief, because of the clear retroactive intent of SB 5890, Washington case law requires that the amended law apply to pending claims that were filed under the old law and are not yet final. Thus, Washington's prior law will have no effect going forward on any worker's right to benefits or on the federal government's finances. The State files this letter to inform the Court of its ultimate position on mootness and to avoid needless uncertainty.

The normal rule in workers' compensation cases in Washington is that "the rights of claimants under the Workmen's Compensation Act are controlled by the law in force at the time of the person's injury, rather than by a law which becomes

[1] The State notified the federal government of this rationale and its intent to file this pleading on April 8, 2022.

effective subsequently." *Ashenbrenner v. Dep't of Lab. & Indus.*, 62 Wash. 2d 22, 25, 380 P.2d 730 (1963). This normal rule, however, does not apply here for two reasons.

First, in the Washington workers' compensation context, this normal rule does not control if the subsequent change in law clearly indicates an intent that it be applied retroactively. *See id.* at 26-27; *Harris v. Dep't of Labor & Indus.*, 120 Wash. 2d 461, 473, 843 P.2d 1056 (1993) ("The court in *Ashenbrenner* held only that it would presume the law in effect on the date of an injury controls the rights of a worker absent clear legislative intent to the contrary. That opinion suggests the legislature can change this rule retrospectively if it clearly expresses an intent to do so."). And here, section (5)(c) of SB 5890 specifies that: "This section applies to decisions made after June 7, 2018,[2] without regard to the date of last injurious exposure or claim filing." Thus, the new law clearly indicates an intent to apply retroactively, so the law as amended by SB 5890 governs any decision made after June 7, 2018, that is not yet final (i.e., any decision filed under the prior law that is still pending in administrative proceedings or Washington courts).

Second, because the legislature intended SB 5890 to apply retroactively, broader principles of Washington law would also require Washington courts to apply SB 5890, rather than HB 1723, to any cases still pending on appeal in the courts. Specifically, "[w]hen a legislature makes clear that an act is intended to apply retroactively, 'an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.'" *In re Estate of Hambleton*, 181 Wash. 2d 802, 823, 335 P.3d 398 (2014) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995)).

These two principles together demonstrate that this case is moot. Washington's prior law, HB 1723, will not govern claims that are still pending on appeal. And invalidating HB 1723 would have no impact on pending claims, because if a claim cannot prevail under SB 5890, benefits will be denied as a matter of state law regardless of whether HB 1723 was valid. Thus, while the State continues to believe that everyone covered under HB 1723 is also covered under SB 5890, ultimately that is not controlling for mootness purposes, because if there is a person (as the government hypothesizes) who received benefits under HB 1723 but is not eligible under SB 5890, and whose claim is still pending, their claim would now be denied as a matter of state law.

The State represents to this Court that if, in any pending case that was filed while the prior law (HB 1723) was in effect, the federal government asserts that the

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[2] June 7, 2018, was the effective date of Washington's prior law that was challenged in this case, House Bill 1723. Laws of 2018, ch. 9, § 1 (Substitute H.B. 1723, 1723-S.SL.pdf (wa.gov)).

claimant is not entitled to coverage under SB 5890, Washington will agree that SB 5890 rather than HB 1723 should be applied to resolve whether the claimant is covered. *See* Decl. Patrick (enclosed).

The State respectfully renews its request that the Court dismiss this case as moot, vacate the judgment of the court of appeals, and remand to the district court for dismissal or consideration of whether the United States has any residual claims.

I would appreciate if you could circulate this letter to the Members of the Court.

Sincerely,

s/ Noah G. Purcell

Noah G. Purcell
Solicitor General
360-753-6200

wro
enclosure: Declaration of Knowrasa Patrick
cc: Counsel of Record

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *PETITIONER*, v. STATE OF WASHINGTON ET AL., *RESPONDENTS*.	DECLARATION OF KNOWRASA PATRICK

I, Knowrasa Patrick, declare under the penalty of perjury of the laws of the United States that the following is true:

1. I am over 18 and competent to testify. I have been the Program Manager of the Self-Insured Program of the Washington State Department of Labor and Industries since June 1, 2021. In the course of my employment, I am familiar with claims filed under Wash. Rev. Code § 51.32.187.

2. Substitute Senate Bill 5890 took effect on March 11, 2022, and altered the definition of covered workers in Wash. Rev. Code § 51.32.187.

3. There are 48 appeals pending before the Washington State Board of Industrial Insurance Appeals in which the presumption under § 51.32.187 is at issue. And there are 18 pending before the superior court. There are a total of 66 current cases.

4. In all of these 66 appeals, if the Department of Energy contends that the worker would not be covered under the revised statute, such that the presumption in § 51.32.187 would not apply, L&I will agree that Substitute Senate Bill 5890, rather than the former law, should be applied to resolve the issue and that the Board or superior court must address this issue either on the record if it is suitably developed or through a remand either to the Board or to the Department of Labor & Industries to develop the record.

DATED this 11th day of April 2022.

s/ Knowrasa Patrick

KNOWRASA PATRICK
Program Manager
Self-Insured Program
Washington State Dep't of Labor & Indus.