U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

April 13, 2022

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: United States v. State of Washington, et al., No. 21-404

Dear Mr. Harris:

On April 11, 2022, respondents filed a letter raising an argument that this case is moot for a reason that they had not "previously articulated." Letter 1. Respondents now assert that Substitute Senate Bill 5890, 67th Leg., Reg. Sess. (2022) (S.B. 5890), which the Washington legislature enacted after this Court granted certiorari, applies retroactively to all state workers' compensation claims pending on appeal, such that the validity of House Bill 1723, 65th Leg., Reg. Sess. (2018) (H.B. 1723) will no longer be relevant to the disposition of those claims. Letter 1-2. Respondents contend that their new position on the retroactive application of S.B. 5890 moots the question presented in this case. *Ibid.* The thrust of respondents' new argument is that, *even if* some workers who were covered by H.B. 1723 are not covered by S.B. 5890, a decision by this Court holding H.B. 1723 invalid could have no practical impact on any such individual's worker's compensation award. For two reasons, respondents fail to carry the "heavy burden" of demonstrating that this pending merits case is moot. *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983) (citation omitted).

First, although respondents "represent[] to this Court" that they will treat S.B. 5890 as fully retroactive, Letter 2, the Washington courts are the ultimate arbiters of state law, U.S. Reply Br. 2-3, and it is uncertain whether those courts will accept the construction that respondents advance in their letter. As respondents acknowledge, Washington courts require a clear indication of legislative intent to apply a statute retroactively. Letter 2 (citing cases). The fact that respondents did not identify their present retroactivity argument until their fourth submission regarding mootness suggests that S.B. 5890 may not meet that high standard of clarity. The import of respondents' new position, moreover, is that workers who were previously covered by H.B. 1723 but are not covered by S.B. 5890 will be divested of their previously granted awards. Such workers would likely dispute respondents' argument, and Washington courts might accept the workers' position. At a minimum, sufficient doubt exists to preclude a finding that this Court lacks Article III jurisdiction to resolve the question on which it granted certiorari.

Second, the unstated premise of respondents' letter is that a decision by this Court holding H.B. 1723 invalid could have no practical effect on awards previously made under that provision that have already become final. Washington law, however, provides a variety of mechanisms for

reopening otherwise-final workers' compensation awards at the worker's request. See, *e.g.*, Wash. Rev. Code § 51.32.160 (West 2010). For example, workers may reopen claims and receive additional awards of benefits in response to changes in their medical conditions. If this Court holds that H.B. 1723 is constitutionally invalid, and if a worker subsequently asks that an award made under that provision be reopened and increased in light of changed circumstances, the United States would have a compelling argument that requiring increased payments under an unconstitutional state law is impermissible. That prospect belies respondents' assumption that a decision by this Court holding HB 1723 invalid could have no practical impact on any workers who have already received final awards under that law.

The government will be prepared to further address these issues at oral argument if the Court deems it appropriate. I would appreciate it if you would distribute this letter to the Members of the Court.

Sincerely,

Elizabeth B. Prelogar
Solicitor General

cc: See Attached Service List

21-0404
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