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

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENTS' SUGGESTION OF MOOTNESS

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In 2018, the State of Washington enacted House Bill 1723, 65th Leg., Reg. Sess. (H.B. 1723), which imposed a novel and highly burdensome workers' compensation regime exclusively on the United States and the employers of federal contract workers at the federally owned Hanford site.[1] The United States challenged the state law, contending that it violates principles of federal intergovernmental immunity. The district court and a Ninth Circuit panel rejected the government's challenge, concluding that 40 U.S.C. 3172(a) authorizes States to discriminate against the United States in the

[1] Like earlier filings in this case, this brief uses the term "federal contract workers" to refer to individuals who are employed by private firms that have entered into contracts or subcontracts to perform services for the federal government.

application of workers' compensation laws to federal land and facilities.

After the Ninth Circuit denied a petition for rehearing en banc over the dissent of four judges, the United States filed a petition for a writ of certiorari. Respondents filed a brief in opposition arguing that H.B. 1723 was valid and that the Court should deny review. This Court granted the petition in January 2022, and the United States filed its opening brief in February 2022.

On March 11, 2022, the Governor of Washington signed into law Substitute Senate Bill 5890, 67th Leg., Reg. Sess. (S.B. 5890), which preserves the novel and burdensome features of H.B. 1723 but alters the category of workers to whom those rules apply. In a suggestion of mootness filed four days later, respondents contend (Mootness Br. 2) that the State's enactment of S.B. 5890 renders the question on which this Court granted certiorari "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."

Respondents' suggestion that the case has become moot is mistaken. H.B. 1723 was in force for nearly four years before the State enacted S.B. 5890. During that time, more than 200 claims were allowed under H.B. 1723, making the United States liable to pay tens of millions of federal taxpayer dollars. The validity of H.B. 1723 is directly relevant to the disposition of those claims, many of which are still on appeal. The question presented is accordingly not moot.

Respondents contend (Mootness Br. 1-2, 16-17) that resolving H.B. 1723's validity will have little practical relevance because S.B. 5890 will subject the United States to liability in every circumstance where H.B.

1723 previously would have done so. It is far from clear that respondents' assertion is correct. S.B. 5890 contains multiple ambiguities that will ultimately be resolved by state courts and that could result in the exclusion of some federal contract workers who were previously covered by H.B. 1723. In any event, respondents' contentions do not sound in Article III mootness, but rather in equitable discretion. At most, such arguments might support a prudential determination that changed circumstances warrant vacatur of the judgment below and a remand for further proceedings, rather than resolution of the question presented on the merits.

Although a disposition along those lines is available, the better course is to resolve the question that the Court granted certiorari to decide. That is the approach this Court has taken in analogous prior circumstances, where new legislation is not compelled by some other source of law, does not provide relief from the harm alleged in the pending case, and does not reflect a change in policy but is instead apparently prompted by a desire to prevent this Court's review. Under those circumstances, the Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review" counsels in favor of maintaining the case on the Court's docket and resolving the parties' dispute on the merits. *City of Erie* v. *Pap's A. M.*, 529 U.S. 277, 288 (2000).

STATEMENT

1. The United States owns a vast parcel of land, known as the Hanford site, in southeastern Washington State. Acquired as part of the Manhattan Project during World War II, the site long supported plutonium production for nuclear weapons. The production facilities were decommissioned at the end of the Cold War,

and the site is now home to a major cleanup operation carried out largely by federal contract workers. A small number of federal employees from the U.S. Department of Energy (DOE), state inspectors, and employees of private firms not affiliated with the cleanup also work on and around the site. See U.S. Opening Br. 3-7.

Non-federal employees at the Hanford site, including federal contract workers, receive workers' compensation coverage through the Washington Industrial Insurance Act (WIIA), Wash. Rev. Code Ann. § 51.04.010 *et seq.*[2] Authorization to apply the WIIA on federal land derives from 40 U.S.C. 3172(a), which provides that the "state authority charged with enforcing and requiring compliance with the state workers' compensation laws" may "apply" those laws to federal land and facilities in the State "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State." See U.S. Opening Br. 7-9.[3]

Employees covered by the WIIA are generally entitled to workers' compensation benefits if they suffer an injury or illness "in the course of [their] employment." Wash. Rev. Code Ann. § 51.32.010. To obtain benefits for an "[o]ccupational disease," *id.* § 51.08.140, a worker must show that her condition was "probably, as opposed to possibly, caused by [her] employment," *Dennis* v. *Department of Labor & Indus.*, 745 P.2d 1295, 1301 (Wash.

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[2] All citations to the Revised Code of Washington Annotated are to the most recent version of the published code in which the cited provisions appear.

[3] Federal employees at the Hanford site receive workers' compensation coverage through the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* Section 3172's authorization to apply state workers' compensation law to federal land and facilities does not affect FECA's coverage, see 40 U.S.C. 3172(c), so federal employees are not affected by this case, accord Mootness Br. 10.

1987) (en banc). A claim for occupational-disease benefits is generally subject to a two-year statute of limitations. Wash. Rev. Code Ann. § 51.28.055.

Employers covered by the WIIA are required to provide workers' compensation coverage either by paying premiums to a state-administered benefits fund, or by self-insuring and paying benefits directly to their employees. Wash. Rev. Code Ann. § 51.14.010. DOE may serve as the self-insured employer of federal contract workers at Hanford even though they are not federal employees. *Id.* § 51.04.130. DOE assumes that role for most federal contract workers at Hanford. Pet. App. 6a. Private firms that employ federal contract workers outside of that arrangement pay for workers' compensation coverage in the first instance and are then reimbursed by DOE. *Ibid.*; see U.S. Opening Br. 9.

2. For decades, the WIIA applied to federal contract workers at Hanford in the same way that it applied to other workers there and elsewhere in the State. In 2018, however, the Washington legislature enacted H.B. 1723. That law retroactively amended the WIIA exclusively for "United States department of energy Hanford site workers," defined to "mean[] any person * * * who was engaged in the performance of work, either directly or indirectly, for the United States" at specified locations within the Hanford site "for at least one eight-hour shift." § (1)(b). The specified locations include most of the Hanford site, "excluding leased land, state-owned lands, and lands owned by the Bonneville Power Administration." § (1)(a).

H.B. 1723 dramatically changed the workers' compensation regime applicable to Hanford federal contract workers. It replaced the requirement that workers establish a causal link between their diseases and

their employment with "a prima facie presumption that" covered workers who develop a broad range of medical conditions—including "[r]espiratory disease" and "[n]eurological disease"—have "occupational diseases" entitling them to workers' compensation benefits. § (2)(a); Wash. Rev. Code Ann. § 51.32.187(3)(a) and (e). That presumption "may be rebutted" only "by clear and convincing evidence" that the illness had a different cause. H.B. 1723 § (2)(b). The presumption applies "for the lifetime" of a covered worker, "without regard to the date of last injurious exposure or claim filing." Wash. Rev. Code Ann. § 51.32.187(5)(a) and (c). A "worker or the survivor of a worker who has died as a result of one of the conditions or diseases listed in" H.B. 1723 "and whose claim was denied" previously "can file a new claim for the same exposure and contended condition or disease." *Id.* § 51.32.187(5)(b).

Taken together, H.B. 1723's changes made it far easier for Hanford federal contract workers to obtain workers' compensation benefits. H.B. 1723 consequently exposed the employers of federal contract workers—and ultimately the United States—to massive new costs not incurred by similarly situated state and private employers. See U.S. Opening Br. 10-12.

3. The United States sued respondents in federal district court, alleging that H.B. 1723 imposes burdens on the federal government and its contractors in violation of intergovernmental-immunity principles. Pet. App. 76a; see J.A. 28-41. Among other relief, the United States sought a declaration that H.B. 1723 is unlawful and an injunction barring its enforcement. J.A. 40-41.

The district court agreed with the government that "the Supremacy Clause prohibits states from * * * dis-

criminating against * * * the federal government," except where Congress has provided "clear and unambiguous authorization" to do so. Pet. App. 79a. The court concluded, however, that 40 U.S.C. 3172(a) provides such authorization for H.B. 1723. Pet. App. 80a. In the court's view, Section 3172(a) allows a State to "regulate federal lands within its geographical boundaries with all the tools that could be brought to bear on non-federally owned land," even if the result is discrimination against the federal government or against firms with which it contracts. *Ibid.* The district court accordingly granted summary judgment to respondents. *Id.* at 81a.

A Ninth Circuit panel affirmed. Pet. App. 1a-20a. The panel stated that "whether HB 1723 violates the doctrine of intergovernmental immunity" depends on whether Section 3172(a) clearly and unambiguously authorizes state "workers' compensation laws that apply uniquely to the workers of those with whom the Federal Government deals." *Id.* at 10a. Like the district court, the panel understood Section 3172(a) to allow a State "to apply workers' compensation laws to federal land located in the State, without limitation," subject only to "constitutional constraints" *other than* intergovernmental immunity. *Id.* at 18a-19a.

The Ninth Circuit panel subsequently amended one sentence of its opinion in response to a petition for rehearing en banc, see Pet. App. 22a, and the court of appeals denied rehearing over the dissent of four judges, *id.* at 23a. The dissenting judges described the panel's holding as an "egregious" error that construed Section 3172(a) to "mean the exact opposite of what its words say," and that "defied" this Court's "directly controlling" decision in *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988). Pet. App. 38a-40a.

On September 8, 2021, the United States filed a petition for a writ of certiorari. In response, the Attorney General of Washington indicated that the State would defend the law, see Sept. 14, 2021 Press Release, https://go.usa.gov/xzBs9, and the Governor of Washington (a respondent in this Court) "applaud[ed]" the Attorney General's "commitment to defending this state law," Sept. 22, 2021 Press Release, https://go.usa.gov/xzBsp. Respondents thereafter filed a brief in opposition that defended (Br. in Opp. 1-3, 24-32) the Ninth Circuit's reasoning and the legality of H.B. 1723. On January 10, 2022, this Court granted the petition.

4. Eight days later, Washington state legislators introduced a bill—which ultimately became S.B. 5890—to amend the scope of H.B. 1723. See Washington State Legislature, *Bill Information: SB 5890 – 2021-22* (*Bill Information*), https://go.usa.gov/xzkjj. As relevant here, S.B. 5890 leaves in place the workers' compensation regime created by H.B. 1723 (*e.g.*, the prima facie presumption of benefits eligibility for covered medical conditions, the lifetime eligibility period, and the entitlement of survivors to obtain benefits), but amends the provision specifying which workers are covered by that regime. While H.B. 1723 had defined the universe of covered workers based on performing "work, either directly or indirectly, for the United States" at the "'Hanford site,'" § (1)(a) and (b), S.B. 5890 bases coverage on "working at a radiological hazardous waste facility for at least an eight hour shift * * * , including conducting an inspection of the facility," § (1)(a). S.B. 5890 defines a "radiological hazardous waste facility" to "mean[] any structure and its lands where high-level radioactive waste as defined by 33 U.S.C. [] 1402 or mixed waste as defined by [Washington Administrative Code (WAC) §]

173-303-040 is stored or disposed of, except for military installations as defined in" specified federal regulatory provisions. § (1)(a) and (b).[4]

The Washington Senate passed S.B. 5890 on February 12, 2022. *Bill Information*, *supra*. The Washington House of Representatives passed it on March 2, 2022, and the Governor signed it into law on March 11, 2022. *Ibid.* A report accompanying S.B. 5890 in the Washington Senate states that the bill "expands the population" of covered workers "slightly" compared to H.B. 1723. *Senate Bill Report: SSB 5890* at 4 (Feb. 12, 2022), https://go.usa.gov/xzkXx. That report and the Final Bill Report reference the pendency of this case in this Court, and the Washington Attorney General's Office testified in support of the legislation. *Id.* at 3-4; *Final Bill Report: SSB 5890*, https://go.usa.gov/xzkXK.

ARGUMENT

Respondents contend that the Washington legislature's recent enactment of S.B. 5890 moots this case and that the Court should accordingly vacate the judgment below and remand the case to the lower courts. But respondents fail to carry their burden to show that the Court could not possibly afford any effectual relief. S.B. 5890 contains multiple ambiguities that will ultimately be resolved by state courts, and there are a variety of circumstances in which determining H.B. 1723's legality would continue to have concrete significance with respect to at least some individuals' existing claims. At most, respondents demonstrate that the question on which this Court granted certiorari, which concerns the

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[4] S.B. 5890 also excludes "communicable diseases" from the "[r]espiratory disease[s]" and "[n]eurological disease[s]" that are covered by H.B. 1723's workers' compensation regime. S.B. 5890 § (3)(a) and (e).

validity of H.B. 1723, is likely to have less practical significance than it did when the Court decided to review this case. But that argument does not implicate the jurisdictional issue of mootness; it speaks instead to whether the Court should, as a prudential matter, exercise its equitable discretion to vacate the decision below and remand for any appropriate further proceedings.

Although such a disposition would be reasonable, the better approach is to decide the question presented. This Court has exercised its discretion to issue merits decisions in similar prior circumstances, including in cases like this one where intervening legislation does not redress the harm alleged and appears designed to prevent this Court's review. If the Court decides not to resolve the question presented, it should vacate the judgment below and remand for any appropriate further proceedings, rather than ordering dismissal.

A. Respondents Have Not Met Their Burden To Show That This Case Has Become Moot

When a party to a case pending before this Court "suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result." *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993). This Court has said that the burden of showing mootness at this stage of a case is "demanding." *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019); see, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983) ("[T]he party who alleges that a controversy before [this Court] has become moot has the 'heavy burden' of establishing that [the Court] lack[s] jurisdiction.") (citation omitted). This Court will find a pending merits case moot "only if 'it is impossible

for a court to grant any effectual relief whatever.'" *Mission Prod.*, 139 S. Ct. at 1660 (quoting *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013)). Any remaining "claims, if at all plausible, ensure a live controversy." *Ibid.*; see, *e.g.*, *Knox* v. *SEIU*, 567 U.S. 298, 307-308 (2012) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.") (brackets and citation omitted).

For multiple reasons, respondents have not carried their burden to establish mootness here.

1. H.B. 1723 took effect on June 7, 2018, see J.A. 35, and all of its provisions remained in force through the enactment into law of S.B. 5890 on March 11, 2022, see Mootness Br. 9. DOE informs this Office that, during that nearly four-year period, more than 200 workers' compensation claims were allowed under H.B. 1723. The government has challenged nearly all of those allowed claims, and those disputes are "working their way through State administrative and court proceedings." *Id.* at 16. Under Washington law, providers of workers' compensation insurance are required to pay out awards while they are being challenged on appeal, on the express condition that beneficiaries must repay any awards that are ultimately reversed. See Wash. Rev. Code Ann. §§ 51.32.210, 51.32.240, 51.52.050. DOE informs this Office that the federal government has paid nearly $17 million on claims allowed under H.B. 1723 since the law took effect in 2018 and that nearly $20 million is allocated to additional reserve liability for future payments on those allowed claims.

If, as the United States has contended throughout this case, H.B. 1723 is invalid under principles of federal intergovernmental immunity, DOE would not be liable

for claims that were allowed under that law. The government would thus have the option to recoup payments that have been made while challenges to H.B. 1723 were pending, and it would not have to make the future payments for which it is currently liable under claims allowed pursuant to H.B. 1723. Relieving the government of those financial obligations would constitute "effectual relief" sufficient to defeat a mootness claim under a straightforward application of this Court's precedents. *Mission Prod.*, 139 S. Ct. at 1660 (citation omitted); see *ibid.* ("[N]othing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents.").

To be sure, the scope of the relief that the government might obtain now that H.B. 1723 applies only to a closed universe of previously allowed claims is narrower than the amount of money that was potentially at stake before the State enacted S.B. 5890 (when H.B. 1723 had both prospective and retroactive application). But this Court has repeatedly held that parties' "interest in the retrospective relief they have requested * * * saves their * * * claim from mootness." *Collins* v. *Yellen*, 141 S. Ct. 1761, 1780 (2021); see, *e.g.*, *Decker* v. *Northwest Envt'l Def. Ctr.*, 568 U.S. 597, 609-610 (2013) (holding that "a live controversy continues to exist regarding whether petitioners may be held liable * * * under the earlier version of" a subsequently amended rule); *Davenport* v. *Washington Educ. Ass'n*, 551 U.S. 177, 182 n.1 (2007) (similarly holding that a case was not moot where the petitioner sought monetary relief "for respondent's alleged violation of the prior version of" a subsequently amended Washington law); see also 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.6, at 299-300 (2008) (explaining that "obvious reasons for denying mootness" exist "when the former provisions"

of a subsequently amended law "control the consequences of past transactions").

2. Respondents' principal response (Mootness Br. 16-17) to the foregoing line of argument is that "any claim that has been approved under" H.B. 1723 "would also be approved under" S.B. 5890, because S.B. 5890 (like H.B. 1723) applies to all "federal contract workers at Hanford." Accordingly, respondents assert (*id.* at 17), "no worker whose pending claim has received the benefit of [H.B.] 1723" would "lose that benefit under the revised law, and there would be no benefit to the United States of invalidating [H.B.] 1723."

Respondents simply assume without analysis of S.B. 5890's text that the new law covers every worker that H.B. 1723 previously covered. The coverage provisions in those two statutes, however, include completely different language. H.B. 1723 applied to "any person * * * engaged in the performance of work, either directly or indirectly, for the United States" within the "'Hanford site.'" § (1)(a) and (b). S.B. 5890, by contrast, applies to workers at any "radiological hazardous waste facility," a term that it defines to "mean[] any structure and its lands" (except for certain military installations) where specified forms of dangerous waste are "stored or disposed of." § (1)(a) and (b). It is far from clear that every portion of the sprawling, 560-square-mile Hanford site where federal contract workers have been stationed falls within the ordinary meaning of "any structure and its lands where" the specified forms of dangerous waste are "stored or disposed of." § (1)(b).

For example, some construction projects on the Hanford site where federal contract workers have performed services—including the large waste-treatment-and-immobilization facility currently being constructed

at the center of the site—fall outside the most natural understanding of a "structure and its lands" where the specified forms of waste are "stored or disposed of." S.B. 5890 § (1)(b). Likewise, some current and former office and administrative buildings on the Hanford site do not appear to fit within S.B. 5890's geographic coverage because they are separated from any structure that stores or disposes of dangerous waste. Cf. J.A. 46, 183 (describing the wide range of workers at Hanford).

It accordingly appears that at least some workers who were previously covered by H.B. 1723 may not be covered by S.B. 5890. If any such workers have had claims allowed under H.B. 1723, the proper disposition of those claims would continue to depend on whether H.B. 1723 is valid. Although the number of claims in that category may be relatively low, a party's continuing "concrete interest, however small, in the outcome of the litigation" ensures that a "case is not moot." *Knox*, 567 U.S. at 307-308 (citation omitted); see, *e.g.*, *Chafin*, 568 U.S. at 177 (explaining that "even the availability of a 'partial remedy' is 'sufficient to prevent a case from being moot'") (brackets and citation omitted); *Ellis* v. *Brotherhood of Ry. Clerks*, 466 U.S. 435, 442 (1984) (holding that case was not moot even though the "amount at issue is undeniably minute").

Respondents might have different views on various steps in that analysis. They might interpret undefined phrases such as "any structure and its lands" or "stored or disposed of," S.B. 5890 § (1)(b), more broadly than those terms' ordinary meaning would suggest. Or they might contend that S.B. 5890 displaces H.B. 1723 as the governing standard for all claims—even those previously allowed under H.B. 1723 but not covered by S.B.

5890—despite S.B. 5890's lack of any language mandating that result.

The Washington courts' eventual resolution of those interpretive questions will help to define the practical consequences of the Washington legislature's enactment of S.B. 5890. For present purposes, however, potential arguments like those are beside the point. The "views of the State's attorney general" or other executive-branch officials on such issues "do not garner controlling weight"; the state courts determine the meaning of state law. *Animal Sci. Prods., Inc.* v. *Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1874 (2018). And overcoming respondents' mootness claim does not require a showing that a decision holding H.B. 1723 invalid *will necessarily* benefit the government financially; it is enough that a court "might order some remedy." *Decker*, 568 U.S. at 610; see, *e.g.*, *Mission Prod.*, 139 S. Ct. at 1660 ("Ultimate recovery * * * may be uncertain or even unlikely * * * . But that is of no moment. If there is any chance of money changing hands, [the petitioner's] suit remains live.").

3. Respondents assert that, going forward, S.B. 5890 will "cure the problem" that the United States identified in H.B. 1723 because the new law will apply to state inspectors and employees of non-federal-contractor private firms at and around the Hanford site. Mootness Br. 15 (citation omitted); see *id.* at 1-2, 10, 16. But even if S.B. 5890 were valid, that would not moot the dispute over H.B. 1723's validity in the circumstances where the prior law continues to govern, as described above.

In any event, S.B. 5890 will not necessarily cure the impermissible discrimination against the federal government previously imposed by H.B. 1723. Even as-

suming that S.B. 5890 covers state inspectors and employees of non-federal-contractor private firms at and around the Hanford site, that would at best address the "blatant facial discrimination against the Federal Government" that H.B. 1723 imposed. Pet. App. 39a (Collins, J., dissenting from the denial of rehearing en banc). The intergovernmental-immunity doctrine, however, does not protect only against *facial* discrimination. The state law invalidated in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), for example, did not facially discriminate against the Bank of the United States, but instead applied to "any Bank . . . established without authority from the State." *United States* v. *County of Fresno*, 429 U.S. 452, 457 (1977).

Instead, S.B. 5890's legality would turn on whether the classifications in that law rest on "'significant differences between'" different classes of workers—that is, whether the state law regulates federal contract workers and other similarly situated employees "with an even hand." *Dawson* v. *Steager*, 139 S. Ct. 698, 703 (2019) (citation omitted). Contrary to respondents' suggestions (Mootness Br. 2, 7, 15), identifying that standard does not concede the validity of S.B. 5890. Depending on how state courts ultimately construe the new law, it may have many of the same defects as H.B. 1723.

It remains unclear, for example, how the State of Washington can justify subjecting the employer of a federal-contract-worker accountant who worked a single eight-hour shift on a part of the Hanford site away from the most contaminated areas to dramatically greater costs than the employer of workers who spend a career in dangerous occupations such as mining, milling, refining, or chemical-plant work. Cf. U.S. Opening

Br. 24-25, 28. It is also unclear why employers of workers at facilities where the specified forms of dangerous waste are "stored or disposed of," S.B. 5890 § (1)(b), should be subject to drastically greater burdens than, for example, employers of workers at facilities where that same kind of waste is treated or generated. And it is no answer that S.B. 5890 may treat a few other entities as *poorly* as it treats the United States; under the intergovernmental-immunity doctrine, a State must treat the federal government as well as it treats the "*favored* class" (*i.e.*, similarly situated employers not subject to the burdensome workers' compensation law). *Dawson*, 139 S. Ct. at 705.

To be sure, we agree with respondents that "[t]his Court should not evaluate Washington's new law in the first instance." Mootness Br. 2. If the United States ultimately pursues an intergovernmental-immunity challenge to S.B. 5890, that suit will "raise different issues and require development of a different record" than does the current challenge to H.B. 1723. *Id.* at 16. Maintaining this case on its docket for the purpose of determining *S.B. 5890's* validity therefore would be inconsistent with this Court's usual role as "a court of review, not of first view." *Decker*, 568 U.S. at 610 (citation omitted). But respondents cannot rely on their claims about S.B. 5890 as a basis to argue that the parties' existing dispute about the validity of *H.B. 1723*—the dispute this Court granted certiorari to resolve—has become moot.

B. Although The Practical Importance Of This Case Is Now More Limited Than It Was At The Petition Stage, The Court Should Still Resolve The Question Presented

Even when changed circumstances do not render a case moot, they may suggest that deciding the question

on which this Court previously granted certiorari is no longer a sound use of the Court's resources. Where changed circumstances have that effect, the Court may vacate the judgment below and remand the case for further proceedings in the lower courts. The propriety of that course depends "on the equities of the case." *Lawrence* v. *Chater*, 516 U.S. 163, 168 (1996) (per curiam); see, *e.g.*, *Biden* v. *Sierra Club*, 142 S. Ct. 56 (2021); *Kiyemba* v. *Obama*, 559 U.S. 131 (2010) (per curiam). While vacating and remanding would be a reasonable approach here, the sounder course is to resolve the question concerning the validity of H.B. 1723 that the Court granted certiorari to decide.

1. So long as a case in which the Court has granted certiorari is not formally moot, the Court generally resolves the question presented and leaves it to the parties and the lower courts "at later stages of the litigation to decide" the legal effects of intervening developments. *Chafin*, 568 U.S. at 177; see, *e.g.*, *Zivotofsky* v. *Clinton*, 566 U.S. 189, 194 (2012) ("In general, the Judiciary has a responsibility to decide cases properly before it."). A merits decision is particularly appropriate where intervening developments do not provide "the precise relief that petitioners 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). Here, the Washington legislature's enactment of S.B. 5890 leaves the United States subject to a continuing obligation to pay tens of millions of dollars in additional workers' compensation costs out of federal taxpayer funds as a result of a single State's law.

As explained above, the prospect that resolving the validity of H.B. 1723 will have concrete significance to

the parties is not largely hypothetical or even particularly unlikely. See pp. 11-15, *supra*. This case thus fits comfortably within the category of cases in which this Court has decided the question presented notwithstanding an intervening legal development. See, *e.g.*, *North Carolina* v. *Covington*, 138 S. Ct. 2548, 2553 (2018) (per curiam) (resolving plaintiffs' challenge to earlier district lines after those lines were redrawn); *Davenport*, 551 U.S. at 182 n.1 (resolving challenge to Washington state law even after it was amended); *Northeastern Fla. Chapter of the Associated Gen. Contractors* v. *City of Jacksonville*, 508 U.S. 656, 662 (1993) (similar for amended city ordinance).

2. Resolving the question presented is particularly warranted here because respondents appear to have brought about the intervening legal development for the purpose of preventing this Court's review while continuing to subject the United States to the same harm. This Court has an "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). The Court has accordingly stated that "postcertiorari maneuvers designed to insulate a decision from review * * * must be viewed with a critical eye." *Knox*, 567 U.S. at 307.

As noted above, respondents filed a brief in opposition that defended the Ninth Circuit's decision upholding H.B. 1723 on the merits. Respondents have not disavowed the view that H.B. 1723 is valid, and they presumably will continue to defend H.B. 1723 in any appeals from benefits awards made under that law. Yet only eight days after this Court granted certiorari, the respondent State—with supporting testimony from the

State Attorney General's Office and ultimately the signature of the respondent Governor—initiated the legislative process that culminated in the enactment of S.B. 5890. That legislation did not reflect a change in policy by newly elected leadership, cf. *Biden* v. *Sierra Club*, 142 S. Ct. 56 (new Administration's determination not to use funds for border-wall construction), nor was it compelled by some other source of law, cf. *New York State Rifle*, 140 S. Ct. at 1526 (noting that New York State had prohibited the municipal law previously maintained by respondent New York City).

Respondents' actions here are instead an unusually transparent effort to prevent this Court's review. The "equities of the case," *Lawrence*, 516 U.S. at 168, weigh against allowing that effort to succeed. At a minimum, however, the Court should vacate the judgment below and remand for any appropriate further proceedings, rather than dismissing the case outright.

CONCLUSION

Respondents' suggestion of mootness should be denied, and the Court should resolve the case on the merits. In the alternative, the Court should exercise its equitable discretion to vacate the judgment of the court of appeals and remand the case for further proceedings.

Respectfully submitted.

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