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

STATE OF WASHINGTON'S REPLY IN SUPPORT OF SUGGESTION OF MOOTNESS

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General
Counsel of Record

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

ANASTASIA R. SANDSTROM
Senior Counsel

PETER B. GONICK
Deputy Solicitor General

TABLE OF CONTENTS

ATTACHMENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The Government asks this Court to review merits briefing, hear argument, and issue an opinion addressing a question presented that is entirely hypothetical and will have no measurable impact. The Court should reject that request. This case is moot, but even if it were technically not, prudential considerations would counsel strongly against this Court needlessly issuing a constitutional ruling.

This Court granted certiorari to decide whether a Washington workers' compensation law "that applie[d] exclusively to federal contract workers who perform services at a specified federal facility is barred by principles of intergovernmental immunity . . . ." Pet. (I); U.S. Br. (I). Washington was the only State with such a law, and Washington has repealed and replaced it with a law that takes a "completely different" approach, as the Government concedes. Opp. Suggestion Mootness 13. The Government agrees that if there are any legal concerns with the new law, they should not be resolved here, because they "raise different issues and require development of a different record." *Id.* at 17. Thus, if the Court were to hear argument and uphold or strike down Washington's prior law, it would have no impact on Washington's revised law or any other state law in the country.

The Government nonetheless argues that the case is not moot because some claims filed under the old law remain pending, and they say it is unclear whether the same claims would be allowed under the new law. But there are fewer than 100 such claims, and only a tortured reading of the new statute would

preclude its application to claims allowed under the old one. Respondents here include the state agency charged with implementing the statute, the Department of Labor and Industries, which proposed the revised statutory language. It is fanciful to think that a state court would reject a state agency's compelling interpretation of a statute that the agency drafted and implements.

Even if the case were not technically moot because of the remote possibility that a Washington court would adopt the Government's strained reading of the statute, prudential considerations counsel against this Court's review. Fewer than 100 claims remain pending under the old statute, and at most a tiny fraction would be affected by the Government's untenable interpretation. Even a generous estimate of its potential savings in this implausible hypothetical would be less than it spends daily on the Hanford project.

Although the Government concedes that it would be "reasonable" for the Court to vacate the decision below and remand on prudential grounds, Opp. Suggestion Mootness 10, 18, it urges the Court not to do so based on "the Court's 'interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review.'" *Id.* at 3 (quoting *City of Erie v. Pap's A. M.*, 529 U.S. 277, 288 (2000)). But Washington is not manipulating the Court's jurisdiction to insulate a favorable decision from review. Whether on mootness or prudential grounds, the State is *asking* this Court to vacate the lower court's favorable decision and dismiss or remand the case. No "favorable decision" would survive. And the

State did not amend its law to manipulate this Court. Throughout this case, the Government has argued that if Washington's law applied more broadly, it would be perfectly legal, but the Government maintained that Washington would never adopt such a broader law because of the costs it would impose on the State and private parties. Washington's legislature has now adopted just such a broader law, refuting the Government's false claim and addressing its stated concern. This Court presumes good faith when a State government goes through the process of enacting a new law, and that presumption is warranted here.

In short, deciding this case would not resolve the constitutionality of any State's law or have any practical impact. The Court should dismiss as moot and vacate the lower court decisions, or vacate and remand on prudential grounds.

ARGUMENT

A. The Case Is Moot

The United States does not dispute that its request for injunctive relief as to Washington's former law, House Bill 1723, is now moot because Washington has substantially revised its statute. And the Government agrees that this Court should not review, in the first instance, the legality of Washington's revised law, Senate Bill 5890. *See* Opp. Suggestion Mootness 17 ("[W]e agree with respondents that '[t]his Court should not evaluate Washington's new law in the first instance.'") (quoting Suggestion Mootness Br. 2). The Government argues, however, that it may still obtain some financial benefit if the Court rules on the validity of H.B. 1723,

because there may be some "relatively low" number of claims that were allowed under H.B. 1723 but would be denied under S.B. 5890. *Id.* at 14.[1] This argument is legally and factually unsupportable.

No one whose claim was allowed under the prior statute, H.B. 1723, is excluded under the new statute. H.B. 1723 defined covered workers as anyone who "engaged in the performance of work, either directly or indirectly, for the United States," who worked at certain specified locations within Hanford: "the two hundred east, two hundred west, three hundred area, environmental restoration disposal facility site, central plateau, or the river corridor locations." Former Wash. Rev. Code § 51.32.187(1)(b) (2018). The revised statute, meanwhile, defines covered workers as anyone working at a "Radiological hazardous waste facility," 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 [certain] military installations." S.S.B. 5890 § 1(1)(b).

The Government claims that S.B. 5890 may narrow application of the presumption because "[i]t is far from clear that every portion of the sprawling, 560-square-mile Hanford site where federal contract

---

[1] Although Washington normally applies the law in effect at the date of injury, this rule does not apply when the statute shows an intent to apply the law retroactively. *Ashenbrenner v. Dep't of Lab. & Indus.*, 62 Wash. 2d 22, 380 P.2d 730, 732 (1963). S.B. 5890 has such an intent. S.S.B. 5890 § 1(5)(b), (c). Therefore, even if H.B. 1723 were invalidated, the same claims could be made under S.B. 5890.

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.'" Opp. Suggestion Mootness 13. This argument reflects a profound misunderstanding of the relevant statutes and the extent of the contamination at Hanford.

To begin with, the prior law did not actually apply to "every portion of the sprawling, 560-square-mile Hanford site where federal contract workers have been stationed." *Id.* Rather, it applied to workers at "the two hundred east, two hundred west, three hundred area, environmental restoration disposal facility site, central plateau, or the river corridor locations" within Hanford. Former Wash. Rev. Code § 51.32.187(1)(b) (2018); *see also* U.S. Br. App. 7a (map showing areas of Hanford site covered by H.B. 1723). Working at any of these areas would obviously qualify as working at a "Radiological hazardous waste facility" under S.B. 5890 because they all are home to a multitude of structures and lands where radioactive waste has been stored or disposed. For example, the "river corridor" portion of Hanford contains "more than 1,000 structures which must be removed" and "more than 760 solid and liquid waste sites."[2] This includes nine mothballed nuclear reactors, all of which "remain highly radioactive," "dozens of support and auxiliary buildings" for each reactor, and "[l]arge sites with buried wastes . . . found at each reactor area, along with sites where contaminated liquids were deposited onto the ground

[2] https://www.hanford.gov/page.cfm/RiverCorridor.

or leaked from temporary storage."[3] Similarly, the "three hundred area" was home to "six small scale nuclear reactors," was used to process "hundreds of thousands of tons of raw uranium," and today "presents unique challenges to workers involved in decommissioning, deactivating, decontaminating, and demolishing the *hundreds* of facilities in the complex."[4] The area is also dotted with burial grounds for highly contaminated solid and liquid wastes, but records of exactly what was dumped and where are "spotty."[5] The remaining specified areas, the "two hundred east," "two hundred west," and "Environmental Restoration Disposal Facility" site, are all contained within the "central plateau," which is home to "[h]undreds of solid waste sites."[6] This area includes "177 underground storage tanks spread out into eighteen groups of tanks called tank farms," "a massive landfill that . . . accepts materials that come from building demolition projects and solid waste burial ground excavations at Hanford," and "hundreds of other facilities and structures," many of which "were critical to the processing of plutonium."[7] The notion that any of these areas covered under the prior law would be excluded from coverage under S.B. 5890 is fanciful at best.

The example the Government offers to support its argument only proves how deeply flawed its claim

---

[3] *Id.*

[4] https://www.hanford.gov/page.cfm/300Area (emphasis added).

[5] *Id.*

[6] https://www.hanford.gov/page.cfm/200Area.

[7] *Id.*

is. The Government contends that "the large waste-treatment-and-immobilization facility currently being constructed at the center of the site—fall[s] outside the most natural understanding of a 'structure and its lands' where the specified forms of waste are 'stored or disposed of.'" Opp. Suggestion Mootness 13-14. But this facility is directly adjacent to the Hanford tank farms,[8] 177 underground storage tanks that contain "56 million gallons of radioactive and chemical waste."[9] As if that weren't enough, the new facility will include an "Integrated Disposal Facility" to store and dispose of much of the waste it processes.[10] Again, the notion that workers on this project are not working on "any structure and its lands where" radioactive waste is "stored or disposed of" is absurd. S.S.B. 5890 § 1(1)(b).

Any effort by the United States in future proceedings to argue that portions of Hanford that were covered under H.B. 1723 should be excluded from coverage under S.B. 5890 would also run headlong into the Government's own repeated descriptions of Hanford as a single, highly contaminated site. *See, e.g.*, J.A. 43 (Declaration of Department of Energy manager describing Hanford as single site owned and operated by the United States where contractors "are engaged in a massive cleanup operation unprecedented in scale and complexity to remediate the site . . . ."); J.A. 29 (DOE is "responsible for the remediation of the

---

[8] *See* https://www.hanford.gov/page.cfm/IDF.

[9] *Id.*

[10] *Id.*

environmental legacy of the United States' production of nuclear weapons, including that of its chief plutonium production facility—the Hanford Nuclear Reservation . . . ."); Pet. 3-4 ("the Hanford site 'generated significant amounts of highly radioactive and chemically hazardous waste.'"); U.S. Br. 4-5 (stating site was 560 square miles, that the "site . . . successfully produce[d] plutonium" and that later the "mission at Hanford shifted to cleaning up the extensive waste on the site"); CA.9.ECF.8 at 6 (contractors and subcontractors perform "federal cleanup activities on the Hanford nuclear site.").

Even if the Government were not so wrong on the facts, the legal flaws in its argument would undermine it entirely. While the United States is correct that state courts rather than executive agencies provide the definitive meaning of statutes, Opp. Suggestion Mootness 15, in Washington "[a] court must give great weight to the statute's interpretation by the agency which is charged with its administration, absent a compelling indication that such interpretation conflicts with the legislative intent." *Marquis v. City of Spokane*, 130 Wash. 2d 97, 922 P.2d 43, 50 (1996). Here, the state agency charged with implementing the statute, the Department of Labor and Industries, is a respondent and proposed the revised statutory language. L&I represents to this Court that it proposed and interprets S.B. 5890 to extend its protection to all workers at Hanford who were covered under H.B. 1723. This interpretation of the statute is entirely consistent with other evidence of legislative intent, such as legislative history making clear that the goal of S.B. 5890 was to expand the statute's coverage and cover any workers at

Hanford who might previously have been excluded.[11] It is profoundly unlikely that a state court would reject a state agency's compelling interpretation of a statute the agency drafted and implements.

In sum, the statute's plain meaning, the facts about the Hanford site, and Washington courts' deference to agency interpretation all undermine the Government's argument that some claims under the old law would not be covered by the new law. Accordingly, invalidating H.B. 1723 would provide no effective relief to the Government, and the case should be dismissed as moot. The cases cited by the United States regarding the uncertainty of recovery address uncertainty of recovery on the merits of a claim; they do not speak to alleged uncertainty about whether a change in the law would make review and invalidation of the former law pointless. *See* Opp. Suggestion Mootness 15; *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (holding case not moot where damages sought although ultimate recovery was uncertain); *Decker v. Northwest Env't Defense Center*, 568 U.S. 597, 609-10 (2013) (holding case not moot where prior rules regarding unlawful discharges of stormwater could still result in fines or liability).

The Court should dismiss the case as moot, vacate the ruling below, and remand for consideration of any residual claims the United States may have.

---

[11] *See Senate Bill Report: SSB 5890* at 4 (Feb. 12, 2022), https://go.usa.gov/xzkXx.

B. Even if the Case Is Not Moot, the Speculative Possibility of an Insignificant Impact from Invalidating the Prior Law Does Not Merit this Court's Review

Even when an intervening change in law does not render a case completely moot, the Court may vacate the lower court decision and remand for further proceedings to "conserve[] the scarce resources of this Court that might otherwise be expended on plenary consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). The Court has used this practice in light of "a wide range of developments, including [the Court's] own decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General and state attorneys general." *Id.* (citations omitted) (citing numerous cases).

Contrary to the United States' suggestion, uncertainty about the impact of a changed circumstance—even if there were any here—does not argue against such an outcome, but rather for it. *See Lawrence*, 516 U.S. at 172-73. In *Lawrence*, the Court discussed factors affecting the Court's practice of issuing a grant, vacate, and remand (GVR) when the government changes its interpretation of a statute or regulation and rejected the view that a GVR should only be granted when the outcome of the changed interpretation was certain: "It is precisely because of uncertainty that we GVR." *Id.* at 172.

In any event, the United States agrees that even under its expansive view of the potential impact of invalidating H.B. 1723, a reasonable approach to

the changed circumstances here would be vacating and remanding. Opp. Suggestion Mootness 18. In truth, because the practical impact, if any, of the Court's review would be far less than what the Government supposes, and because its other concerns are inapt, the Court should vacate and remand.

The United States first contends that 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." Opp. Suggestion of Mootness 18 (quoting *Chafin v. Chafin*, 568 U.S. 165, 177 (2013)). But the cases the United States cites for this proposition say no such thing. *Chafin* did not address an intervening development at all, but held that a party's request for vacatur of expense orders was not moot merely because it was disputed whether the party had waived that relief by not appealing the cost orders. *Chafin*, 568 U.S. at 177. The second case cited by the United States strays even further afield, addressing whether the political question doctrine precludes *district court* review of an issue; the case says nothing about prudential concerns governing this Court's discretionary review. *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012).

The United States next relies on the alleged "concrete significance" of resolving the validity of H.B. 1723. Opp. Suggestion Mootness 18-19. But as discussed above, that significance is zero because all claims pending under H.B. 1723 are covered under S.B. 5890, so even if the Court were to invalidate H.B. 1723, the same claims would remain. But even adopting the United States' view, the concrete significance is minimal.

The Government asserts that it has paid $17 million in claims allowed under H.B. 1723, with an additional reserve of $20 million set aside for future payments on those claims. Opp. Suggestion Mootness 11. But even if that entire amount were somehow recoverable, it would represent roughly one one-hundredth of one percent (0.01%) of the lowest estimate—$323 billion—of what the federal government expects to spend cleaning up Hanford in the decades ahead. Letter from Doug S. Shoop, Manager, Dep't of Energy (Richland, WA), to David R. Einan, Manager, EPA (Richland, WA) & Alexandra K. Smith, Nuclear Waste Program Manager, Dep't of Ecology (Richland, WA) (Jan. 31, 2019), https://www.hanford.gov/files.cfm/2019_Hanford_Lifecycle_Report_w-Transmittal_Letter.pdf. (contains attachment: *2019 Hanford Lifecycle Scope, Schedule and Cost Report*, at pages ES-2 to ES-3) (contains attachment: *2019 Hanford Lifecycle Scope, Schedule and Cost Report*, at pages ES-2 to ES-3).

But the concrete significance is much smaller still. Although the United States asserts that it has challenged nearly all of the over 200 allowed claims under H.B. 1723, Opp. Suggestion Mootness 11, Washington Department of Labor & Industries records reflect that only 66 of those allowed claims are currently on appeal. App. 1a (Johnson Decl.). Unappealed claims are final under Washington law, precluding relitigation of issues. *Marley v. Dep't of Lab. & Indus.*, 125 Wash. 2d 533, 886 P.2d 189, 192 (1994).

Therefore, the universe of claims that could theoretically be impacted by this Court's review of H.B. 1723 would be whatever portion of those 66

claims that would not be allowed under S.B. 5890. As discussed above, the law and facts strongly suggest that this number is zero, and even the Government agrees it may be "relatively low." Opp. Suggestion Mootness 14. The concrete significance of this Court's review is thus slim to none.

The Government next contends that review is warranted here despite its limited practical impact because the State allegedly brought about the intervening legal development for the purpose of insulating a favorable decision from the Court's review while continuing to subject the United States to the same harm. Opp. Suggestion Mootness 19. This argument is doubly wrong: the State is not insulating anything from review, and S.B. 5890 does not subject the Government to the same harm it alleged from H.B. 1723. Indeed, the cases cited by the Government to support its view show the opposite of what it claims.

The first objection, that the State allegedly passed S.B. 5890 to "insulate a favorable decision from review," Opp. Suggestion Mootness 19 (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000)), makes little sense. The State is asking this Court to *vacate* the lower courts' decisions on mootness or prudential grounds; no "favorable decision" would survive.

The Government's objection here sounds in the doctrine of voluntary cessation, but that doctrine is generally inapplicable to changes in law for two reasons. First, a change in the law prevents a party from renewing its allegedly unlawful policy after the Court's dismissal, which is the primary concern of the voluntary cessation doctrine. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167,

189-90 (2000) (describing basis of voluntary cessation doctrine as preventing recurrence of challenged conduct); *Knox v. Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (same). Second, when a state government goes through the process of enacting a new law, the presumption is that the new law has been enacted in good faith and is intended to be permanent. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (holding that in the absence of evidence to the contrary, courts presume that government agents have properly discharged their official duties) (citing cases); *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chi.*, 326 F.3d 924, 930 (7th Cir. 2003) ("[A]ll the circuits to address the issue" have agreed that a change in law "moots a plaintiff's injunction request" because governmental entities are presumed to make such changes without any intent to revert to the prior law).

In fact, intervening changes in law occurring after the Court has granted certiorari routinely result in dismissal. *See* Suggestion of Mootness 13-14 (citing cases). Tellingly, the cases cited by the Government to support its argument that the Court views post-certiorari maneuvers as suspect involved private parties who could resume the allegedly unlawful activities after dismissal. Opp. Suggestion Mootness 19 (citing *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000); *Knox v. Service Emps. Int'l Union, Local 1000*, 567 U.S. at 307). In *City of Erie,* the Court declined to dismiss as moot a challenge to a city ordinance prohibiting nude dancing when the establishment in question notified the Court post-certiorari that its business had closed. 529 U.S. at 287. The Court reasoned that the business "could again decide to

operate a nude dancing establishment in Erie." *Id.* Likewise, in *Knox*, the Court declined to dismiss as moot a case challenging a union's use of nonmember payments after the union offered a refund post-certiorari, noting that the union could well collect similar fees in the future. 567 U.S. at 307.

By contrast, here the State has enacted a new statute and there is no indication that it will resume its previously challenged conduct. Instead, the State has responded to the alleged problems in its former statute to do just what the United States argued in this litigation the State can do: "extend to federal lands and facilities the same workers' compensation provisions that apply to similarly situated non-federal premises." U.S. Br. at 32-33.

This highlights the problems with the Government's second objection: the new law does not subject the Government to the "same harm" it alleged previously. Opp. Suggestion Mootness 19. The "harm" alleged in *this* case, from the United States' initial complaint through its petition and briefing to this Court, was "a state workers' compensation law that applies *exclusively* to federal contract workers." J.A. 38; U.S. Br. (I) (emphasis added). The Government repeatedly conceded previously that Washington could instead adopt a law that turned on working at a particular type of facility, whether on federal land or not, *see, e.g.*, Pet. 13, 16, 18, which is exactly what Washington has now done. Thus, while the Government may well object to the new law, as it recognizes elsewhere, that challenge will involve "different issues and require development of a different record." Opp. Suggestion Mootness 17

(internal quotations omitted). This is not the same alleged harm.

This case is therefore more like cases the Court has dismissed after intervening changes in law where a party claims continuing harm from the new statute, *e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020); *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414-15 (1972), and less like the cases relied on by the United States, where the intervening law did not address the challenged conduct or merely reduced the frequency or amount of allegedly unlawful conduct. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (challenge to state redistricting based on alleged racial gerrymandering unaffected by redrawing district lines, some of which retained original districts); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 182 n.1 (2007) (new law merely caused allegedly unconstitutional requirement "to be applicable less frequently"); *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (new statute continued to disadvantage plaintiffs' efforts to obtain city contracts in favor of minority business enterprises, but merely "to a lesser degree"); Opp. Suggestion Mootness 19 (arguing that this case falls "comfortably" within the category of cited cases).

In short, it is a colossal understatement to say only that it would be "reasonable" to vacate and remand here on prudential grounds. In truth, it would be entirely unreasonable to issue a constitutional ruling in a case that will not affect any existing law and will have no practical impact. Even if the Court

concludes this case is not moot, it should vacate and remand.

CONCLUSION

The Court should 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. In the alternative, the Court should exercise its equitable discretion to vacate the judgment of the court of appeals and remand for further proceedings.

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 23, 2022

No. 21-404

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

PETITIONER,

v.

STATE OF WASHINGTON ET AL.,

RESPONDENTS.

DECLARATION OF JAMES S. JOHNSON

I, James S. Johnson 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 an assistant attorney general in the Washington State Attorney General's Office Labor & Industries Division since June 8, 1994. I supervise litigation of appeals that relate to self-insured employers. In the course of my employment, I am familiar with the number of appeals filed under Wash. Rev. Code § 51.32.187.

2. I have reviewed the records of the Washington State Attorney General's Office and reviewed the numbers of "Hanford Presumption" claims pending in litigation. There are now 48 appeals pending before the Board of Industrial Insurance Appeals. And there are 18 pending before the superior court. There are a total of 66 current cases.

DATED this 22nd day of March 2022.

James S. Johnson

JAMES S. JOHNSON
Assistant Attorney General