SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,   )

           Petitioner,   )

             v.   ) No. 21-404

WASHINGTON, ET AL.,   )

           Respondents.   )

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Pages: 1 through 65

Place: Washington, D.C.

Date: April 18, 2022

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10   Washington, D.C.

11   Monday, April 18, 2022

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14   The above-entitled matter came on for

15   oral argument before the Supreme Court of the

16   United States at 10:00 a.m.

17

18   APPEARANCES:

19   MALCOLM L. STEWART, Deputy Solicitor General,

20   Department of Justice, Washington, D.C.; on behalf

21   of the Petitioner.

22   TERA M. HEINTZ, Deputy Solicitor General, Olympia,

23   Washington; on behalf of the Respondents.

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 1                    P R O C E E D I N G S
 2                                  (10:00 a.m.)
 3            CHIEF JUSTICE ROBERTS:  We will hear
 4   argument first this morning in Case 21-404,
 5   United States versus Washington.
 6            Mr. Stewart.
 7            ORAL ARGUMENT OF MALCOLM L. STEWART
 8              ON BEHALF OF THE PETITIONER
 9            MR. STEWART:  Thank you, Mr. Chief
10   Justice, and may it please the Court:
11            First, this case is not moot.  We
12   acknowledge that Washington's recent enactment
13   of SB 5890 makes it uncertain whether a decision
14   invalidating HB 1723 will ultimately produce any
15   financial benefit to the United States.
16            Under this Court's precedents,
17   however, the case is not moot so long as there
18   is a reasonable possibility that such a benefit
19   will ensue.  Respondents have not carried their
20   heavy burden of negating that possibility.
21            Second, HB 1723 discriminates against
22   the federal government and those with whom it
23   deals.  On its face, it is limited to a specific
24   federal facility, and even within that facility,
25   it applies only to workers engaged in the
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1   performance of federal contractors -- contracts,

2   not to state or purely private workers.

3   Third, HB 3170 -- I'm sorry, 40 U.S.C.

4   3172(a) does not authorize that discriminatory

5   treatment. Properly understood, Section 3172(a)

6   authorizes Washington to apply evenhandedly to

7   federal facilities the same workers'

8   compensation laws that apply in other workplaces

9   in the state. It does not authorize Washington

10   to subject federal contractors at the Hanford

11   facility to uniquely onerous burdens.

12   I welcome the Court's questions.

13   JUSTICE THOMAS: Mr. Stewart, could

14   you give us a -- a more fulsome explanation of

15   the financial interests of the United States in

16   the case considering -- in the context of the

17   mootness argument?

18   MR. STEWART: Well, before SB 5890 was

19   passed, there was no question that the United

20   States had a financial interest in the case.

21   That is, even though the financial burdens would

22   fall in the first instance on the federal

23   contractors, the United States has entered into

24   various arrangements whereby it would absorb

25   those costs. And, most significantly, it's

1   entered into a memorandum of understanding with

2   the state agency whereby it would act as a

3   self-insurer and would pay any increased

4   workers' compensation costs attributable to most

5   of the federal contracts on the site.

6   And so the question for purposes of

7   mootness is whether the enactment of SB 5890 has

8   effectively divested the United States of that

9   financial interest, and the Respondents have

10   identified two possible reasons that that might

11   be so.

12   First, they've said SB 5890 covers all

13   of the workers who were previously covered by HB

14   1723 and some more as well, and, therefore, it

15   says, even if we were able to get the worker's

16   claim under SB 1723 declared invalid or set

17   aside, it wouldn't produce any financial benefit

18   for the United States because the worker could

19   all -- always re-file under SB 5890 and could

20   obtain the same benefits on the same terms.

21   We think it's not a natural

22   construction of the new statutory language to

23   say that the coverage would be coextensive in

24   that way. HB 1723 applied to all DOE Hanford

25   facility workers at specified but broadly

1   defined locations within the Hanford site,

2   without regard to the proximity of their work to

3   the actual storage or treatment of hazardous

4   waste.

5   And, by contrast, the crucial language

6   in SB 5890 is "structures and their lands" where

7   specified categories of waste are stored and

8   disposed of. And the phrase "structures and

9   their lands" is not self-defining, but you would

10   imagine that the lands are areas outside the

11   structure that are in fairly close proximity to

12   the structure itself.

13   We've identified two types of

14   structures. One is a waste treatment facility

15   at the center of the site that is currently

16   under construction, meaning that waste will

17   ultimately be treated there, but that's not

18   happening yet. And that -- workers at that

19   facility would not naturally be said to be

20   working on structures and their lands where

21   wastes are being treated or disposed of.

22   The same thing applies to some of the

23   Hanford office workers, who worked in structures

24   where there are no -- were no hazardous waste.

25   So we think that there's at least an open

1   question whether some of the workers who were

2   covered by HB 1723 would be covered by SB 5890.

3   The second mootness argument that the

4   state has made in its letter of last Monday was

5   that under the effective date provision of SB

6   5890, work -- that law will apply to all future

7   stages in any pending controversy about a

8   particular claimant's entitlement to benefits

9   under the law.

10   And so, for example, if a claimant was

11   denied benefits by DOE and then has an appeal

12   pending to the state industrial board,

13   Washington's view of the law now is that if the

14   claimant is not covered by -- even if the claim

15   was submitted before SB 90 was enacted, if the

16   claimant was covered by HB 1723 but not under

17   the new law, the claimant will not be entitled

18   to benefits because the new law will govern not

19   only new claims but additional stages in the

20   processing of an existing claim.

21   And it's possible that the Washington

22   courts will sustain that reading, but any

23   claimant who was covered by the prior law and

24   not by the new one can be expected to resist it.

25   And so we think that there's at least a

1   reasonable possibility that the -- the courts

2   would ultimately hold any claimant in that

3   position would be entitled to benefits if HB

4   1723 remains operative.

5   And so, to summarize, it was clear

6   before the enactment of SB 5890 that the United

7   States would suffer harm, financial harm, from

8   this law, and the new developments that the

9   state have -- has pointed to don't eliminate

10   that possibility.

11   JUSTICE KAGAN: Do you think, if this

12   was the position you were in when you had to

13   make a decision to file for a petition for

14   certiorari, you would have filed?

15   MR. STEWART: If -- if they had

16   enacted the law between the time of the Ninth

17   Circuit's decision and the time when a petition

18   for certiorari had been due, we might not have

19   filed. We might have filed but asked simply

20   that the Court vacate the judgment below in

21   light of the -- the reduced practical effect of

22   the law even if we didn't think that the --

23   JUSTICE KAGAN: I guess that's what

24   I'm asking. Isn't your real interest here to

25   vacate the judgment below, you know, much more

1   than whatever residual possibility there are --

2   there is that these claims will affect the

3   government?

4   MR. STEWART: Well, we would certainly

5   like to have the judgment below vacated, and we

6   would also like for the Court to provide

7   affirmative clarification as to the scope of

8   3172(a). And, certainly, when -- when a case is

9   not technically moot, but the Court is deciding

10   is this a wise use of our resources to issue a

11   merits ruling, the Court would typically take

12   into account how likely is it that the legal

13   principles involved will bear on the resolution

14   of future cases. That's not a basis for finding

15   the case not to be moot, but if it isn't moot,

16   it's a basis for exercising the Court's

17   discretionary powers.

18   The second thing I would say is we

19   also have an interest and we think the Court has

20   an interest in avoiding the sorts of

21   post-certiorari maneuvers that it's referred to

22   in the past. That is, if a state, before a cert

23   petition was due, had amended the law in the way

24   that it has, it would have effectively been

25   giving up on the possibility of applying HB 1723

1   on into the future with its full coverage.

2   And the state was unwilling to make

3   that sacrifice at the time whether -- when it

4   was unclear whether this Court would grant

5   review. And so we think that there is an

6   interest in terms of the Court's sound

7   management of its docket, again, if the case is

8   not moot, in issuing a decision on the merits so

9   that that sort of maneuver will be discouraged.

10   CHIEF JUSTICE ROBERTS: Mr. Stewart, I

11   have to say I'm not quite sure I understand how

12   3172 works. The question is whether or not, if

13   the state owned the facilities, the workers'

14   compensation law would still work the same way,

15   right? That's where the antidiscrimination

16   principle comes in?

17   MR. STEWART: Yes.

18   CHIEF JUSTICE ROBERTS: Well, how does

19   that work? I mean, is there any doubt that if

20   the state owned these facilities that they would

21   apply the state workers' compensation rules to

22   those -- to the -- the workers?

23   MR. STEWART: Well, the -- the

24   language refers at the outset not to the state

25   legislature but to the state authority charged

 1   with enforcing and requiring compliance with the

 2   state workers' compensation laws, and, here,

 3   that's Washington's Department of Labor &

 4   Industries, which is referred to as L&I.

 5   And then it says it can apply those

 6   laws in the same way and to the same extent to

 7   the federal -- to federal facilities as if the

 8   premises were under the exclusive jurisdiction

 9   of the state. And with respect to HB 1723, the

10   presumptions of workplace causation that it

11   adopts, these are not substantive rules that L&I

12   could apply to any other facilities anywhere

13   else within the State of Washington.

14   CHIEF JUSTICE ROBERTS: I'm sorry,

15   could you break that down? I -- I know that's

16   what it says, but I don't understand -- I don't

17   understand why, if there weren't a federal

18   facility here, but it was a state facility,

19   would those workers be covered by state workers'

20   compensation laws?

21   MR. STEWART: Yes, that's -- that's

22   correct, and the state could have adopted a law

23   that applied the HB 1723 presumptions throughout

24   the state. And if -- if a state had done that,

25   then 3172(a) would have authorized those

 1   presumptions to be adopted at the federal

 2   facility.

 3   But the -- the impetus behind the

 4   enactment of the statute was a decision of this

 5   Court in Murray in 1934 which said because a

 6   particular accident occurred on a federal

 7   enclave and because the Federal Enclave Doctrine

 8   said state laws enacted after the property was

 9   ceded to the federal government can't be applied

10   to -- to the federal facility, the worker's

11   survivor was not able to obtain survivor's

12   benefits under the generally applicable state

13   law.

14   And so what Congress decided to do was

15   to pass a law that said whatever you are doing

16   in the rest of the state you can do on the

17   federal facility. And the way that the Court in

18   Goodyear Atomic described it was to say, on its

19   face, 3172(a) allows the worker -- it dictates

20   the same treatment of workers at the federal

21   facility that they would receive on --

22   JUSTICE KAGAN: I guess, I mean --

23   CHIEF JUSTICE ROBERTS: I'm -- I'm

24   sorry, I was just going to say I didn't quite --

25   I mean, you talked about what the impetus of it

1   is, but if you look at the language, it says, I

2   mean, if this were a state facility, would the

3   workers there be subject to the state workers'

4   compensation laws?

5   MR. STEWART: I think you can do --

6   yes. I think that you can do the comparison in

7   either of two ways. You could ask if Hanford --

8   well, if Hanford were operated by the state,

9   then the state could do it.

10   But, if the question is what would the

11   state authority be able to do on other land

12   within Washington that was subject to the

13   exclusive jurisdiction of the state, the answer

14   to that question would be no, nothing in HB 1723

15   authorizes L&I to apply these presumptions of

16   workplace causation to land anywhere else in

17   Washington.

18   And to the extent that the language is

19   ambiguous, then reading it to --

20   CHIEF JUSTICE ROBERTS: You'll give me

21   at least that?

22   MR. STEWART: I would -- yes, I'll

23   give you that it's ambiguous. I -- I wouldn't

24   acknowledge that their -- the other side's

25   reading is as strong as ours because I think, if

1   you look at Goodyear Atomic, if you look at what

2   precipitated this, if you look at kind of the

3   distinctly disfavored nature of laws that

4   discriminate against the federal government, it

5   would really be a stretch to read this language

6   to say that even though Washington is not doing

7   this anywhere else in the state, it can do it at

8   the Hanford facility because it would be able to

9   do this if no question of intergovernmental

10   immunity were posed.

11   JUSTICE KAGAN: But --

12   JUSTICE ALITO: I had the same problem

13   as the Chief Justice, and I still don't

14   understand the answer. I don't understand what

15   the counterfactual is. This is the closest I

16   could come, but this is probably off the mark,

17   and you'll tell me why.

18   Imagine it's a state facility, it's

19   owned by the state, but there are federal

20   contractors working there. Is that the

21   situation we have to imagine?

22   MR. STEWART: No. I think, when --

23   when they talk about land under the exclusive

24   jurisdiction of the state and -- the Court in

25   Goodyear Atomic said, on its face, the federal

1   law requires the application of the same laws

2   that would apply to purely private facilities

3   within the same state, in that case, Ohio.

4   And so I think the relevant comparator

5   is not what if we were looking at the same tract

6   of land, the Hanford facility, but asking what

7   could the state do if this were under its own

8   exclusive jurisdiction. It's what rules could

9   L&I apply to other tracts of land in Washington

10   that are, in fact, within the exclusive

11   jurisdiction of the state.

12   And that's -- it's consistent with the

13   -- it may not be the only reading of the text,

14   but it's consistent with the impetus for

15   enactment of the law. It's consistent with the

16   nondiscrimination principle. It's consistent

17   with the Court's characterization of the effect

18   of 3172(a) in Goodyear Atomic.

19   JUSTICE KAGAN: But then, I mean --

20   JUSTICE BARRETT: Mister --

21   JUSTICE KAGAN: -- all your stronger

22   arguments, I think, are non-textual arguments.

23   I mean, Goodyear -- Goodyear is a -- is a

24   sentence in a case that was not about

25   discrimination at all, so I think I'm going to

1   put that to one side at least.

2   You have very strong arguments about

3   the impetus of the law and you have very strong

4   arguments about, if this were read as the state

5   wants it to be read, it would stretch quite

6   broadly and -- and -- and -- and maybe just

7   seems like not the kind of thing that Congress

8   would do.

9   But, if you look at the text here, I

10   mean, I'm sort of struggling to read it your

11   way. It -- it -- as the Chief Justice says, it

12   just says, if the state were in charge, could

13   the state do it, and, obviously, the state

14   could.

15   MR. STEWART: Well, again, the -- the

16   law is -- is not directed at the state

17   legislature. It doesn't talk about what the

18   state legislature could enact. It's addressed

19   to the state authority charged with enforcing

20   and requiring compliance.

21   And so L&I's authority is limited to

22   the enforcement of laws that actually exist, and

23   so, if you ask what could L&I do on premises

24   within the exclusive jurisdiction of the state,

25   if the point of reference is other places within

1   the State of Washington outside the Hanford

2   facility, it is -- it -- it could not apply

3   presumptions of this sort because there's no

4   state law that authorizes it to do so.

5   Even if you're talking about the

6   circumstances in which you had a hypothetical

7   Hanford facility that it was on the same tract

8   of land but did not use federal contract

9   workers, used exclusively state and private

10   workers, L&I couldn't in any meaningful sense

11   enforce the presumptions as they are set forth

12   in HB 1723 because HB 1723 by its terms refers

13   to DOE Hanford site workers.

14   Even within that site, it's limited to

15   the federal contract workers on that site.

16   JUSTICE ALITO: To what extent does

17   your argument depend on identifying it as a

18   federal facility?

19   Suppose -- excuse me -- there is one

20   facility in a state where the -- the risk is

21   much higher than anyplace else in the state,

22   and, therefore, there's a justification for

23   flipping the causation requirement. And it just

24   so happens that the only workers working on that

25   site are federal workers, so the site is not

1   identified as a federal facility by name. It's

2   identified based on the characteristics of the

3   site that are thought to justify the change in

4   the causation rule.

5   Would there be a problem there?

6   MR. STEWART: I think there would be a

7   potential problem, but it's a much harder case.

8   And one of the things we would like to know in

9   that circumstance is, did the state single out

10   that facility because it was a federal facility,

11   or did it single it out because it truly

12   believed that the risks there were higher than

13   anywhere else?

14   And so, for --

15   JUSTICE ALITO: Yeah, okay, so it's --

16   it comes down to a question of legislative

17   intent?

18   MR. STEWART: I think, again, in those

19   circumstances. For -- to -- to take another

20   hypothetical, if a state imposed a -- a special

21   tax, a higher corporate income tax on profits

22   that private firms earned -- earn by producing

23   and supplying military equipment.

24   Now a law like that might not refer

25   specifically to the federal government, but it

1   would have an evident likelihood of

2   discriminating against federal contractors

3   because military equipment is most likely to be

4   bought by the federal government.

5   Now, if a state legislature tweaked

6   the definition of military equipment to ensure

7   that it swept in a little bit of stuff that was

8   typically bought by civilians, that shouldn't be

9   good enough to save it. But we acknowledge that

10   the law with respect to those types of statutes

11   is underdeveloped. They pose much harder

12   problems.

13   I think the reason that we have

14   pursued this case so vigorously is that it

15   seemed to us the easy case. It seemed to us a

16   case in which there were two forms of explicit

17   discrimination against the federal government.

18   JUSTICE BARRETT: On --

19   JUSTICE KAVANAUGH: What --

20   JUSTICE BARRETT: I'm sorry. Well,

21   this problem that Justice Alito is hypothesizing

22   and your answer goes to the potential problems

23   that you reserved in your breach -- brief with

24   respect to the new law, right?

25   MR. STEWART: Yes.

1   JUSTICE BARRETT: As if you're

2   treating -- and it's not a question of

3   legislative intent, right? It's a question of

4   looking at the facial classification and saying

5   are the desk workers at this site subject to any

6   greater risk than, say, firefighters or miners?

7   And it's -- it's a question of identifying the

8   relevant categories of risk?

9   MR. STEWART: That -- that would be

10   important, but it might also turn on legislative

11   intent. For example, in -- in the equal

12   protection area, even where it is necessary that

13   a plaintiff show intentional discrimination, I

14   was subject to adverse treatment because of my

15   race or sex, a plaintiff can sometimes make that

16   showing by establishing that the state adopted a

17   facial -- facially neutral criterion but adopted

18   it because it correlated with race or sex.

19   And that, I think, is rarely

20   successful, but it is commonly understood to be

21   an available method of proof even in equal

22   protection cases where the plaintiff has to show

23   intentional discrimination.

24   So I think at least part of the

25   inquiry with respect to SB 5890 would be did the

1   state single out this particular category of

2   workers because it understood that the large

3   majority of them would be federal contract

4   workers, or did it enact the law because it was

5   concerned with the dangers imposed by these

6   occupations without regard to the identity of

7   the -- the entity that would ultimately bear the

8   financial loss.

9   JUSTICE SOTOMAYOR: Counsel, you have

10   a presumption in your favor, the presumption

11   that a waiver has to clearly and unambiguously

12   waive governmental immunity. As my colleagues

13   have pointed out, the language here is a waiver

14   of immunity, but there is some ambiguity as to

15   what the extent of that waiver is.

16   And so, given that your -- that your

17   opposing counsel points to a number of statutes

18   that very clearly say you can't discriminate

19   against the federal facility or federal

20   employees, they have very express language about

21   being treated equally, which this statute

22   doesn't, why doesn't that show us, if it's an

23   ambiguity as to the scope, that the scope is as

24   broad as the language supports?

25   MR. STEWART: Well, first, I think the

 1   general rule -- and this is not just with

 2   respect to intergovernmental immunity. It

 3   applies to immunities from suit generally under

 4   decisions like FAA versus Cooper. The general

 5   rule is even when Congress has clearly

 6   manifested its intention to waive immunity to

 7   some degree, disputes about the scope of that

 8   waiver are themselves subject to the clear

 9   statement requirement.

10   The second thing is we do think that

11   Congress manifested an intent to import a

12   principle of nondiscrimination into the statute.

13   That is, it defined what the state agency can do

14   on federal facilities with respect to what -- by

15   reference to what the state agency could do on

16   premises within the exclusive jurisdiction of

17   the state. And so we think it's natural to say

18   that was importing the nondiscrimination

19   requirement that has always been central to the

20   Court's intergovernmental immunity decisions.

21   The third thing I would say is we went

22   for 80 years after this statute was enacted

23   before any state appears to have read it to

24   authorize the sort of targeting of federal

25   facilities that Washington has done here. And

1   so, if the law were truly ambiguous or if the

2   better reading of the law were as the state

3   represents, we would have expected states to

4   explore their options before that time.

5   The fourth --

6   CHIEF JUSTICE ROBERTS: Well, but, I

7   mean, maybe it has to do with the fact that

8   there aren't very many places like Hanford,

9   right, where you have a situation where

10   basically anybody there is certainly subject to

11   great concern, unlike other places.

12   I mean, is -- are there analogous

13   places in the rest of the country where a state

14   might be concerned about the workers'

15   compensation regime --

16   MR. STEWART: I mean --

17   CHIEF JUSTICE ROBERTS: -- because

18   it's a particularly hazardous environment that

19   -- that people have been working in?

20   MR. STEWART: -- I don't know of

21   specific analogues to Hanford. Now Congress has

22   enacted a statute of its own, the EEOICPA, which

23   is not Hanford-specific, but it's specific to

24   workers in the atomic weapons sector. It -- it

25   encompasses people like some of the Hanford

 1   workers. It also encompasses people engaged in

 2   uranium milling or mining. So there certainly

 3   are other workplaces within the country that --

 4   where workers are subject to some of the same

 5   dangers.

 6   But the -- the whole point of the

 7   antidiscrimination principle is that in

 8   circumstances where it's apparent that the

 9   federal government is going to be fitting the

10   bill, states may often feel a temptation to kind

11   of benefit some class of their own residents to

12   an exorbitant degree with the understanding that

13   they won't be -- the state itself won't be

14   required to absorb the costs.

15   The last thing I would say about

16   Goodyear Atomic -- and I agree with you, Justice

17   Kagan, that the point at issue in that case was

18   not whether a discriminatory state law would

19   pass constitutional review. Nevertheless, the

20   fact that this was this Court's instinctive

21   reaction to what the language meant should tell

22   you that it's at least a plausible reading.

23   And I'd also point out that Congress

24   re-codified the provision with some minor

25   changes in the interval within -- between

 1   Goodyear Atomic and the present, suggesting that

 2   Congress was satisfied to read the statute as

 3   imposing a non-discrimination requirement.

 4   JUSTICE KAGAN: What -- what do you

 5   think this statute would have to look like for

 6   it to mean what the State of Washington says

 7   this one means?

 8   MR. STEWART: I mean, I think it would

 9   have to say something like the state legislature

10   and/or the state authority can impose on

11   facility -- federal facilities or facilities

12   within the exclusive jurisdiction of the

13   government whatever workers' compensation laws

14   they choose, and to make doubly sure, it might

15   say without regard to principles of

16   intergovernmental immunity.

17   And I think that's another textual

18   point, that under the state's view of the law,

19   it's really not clear what work the -- the

20   language about "in the same way and to the

21   extent" as if the premises were within the

22   exclusive jurisdiction --

23   JUSTICE KAGAN: I mean --

24   MR. STEWART: -- of the state to do

25   it.

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 1              JUSTICE KAGAN:   -- when you said
 2     especially, you know, to be double sure, it has
 3     to refer to a waiver of immunity, I mean, do you
 4     think that the statute basically, given the
 5     breadth of this -- of -- of what the State of
 6     Washington is saying here, that there has to be
 7     an express waiver of immunity?
 8              MR. STEWART:   Well, I think, with
 9     regard to antidiscrimination in particular, that
10     is, it's relatively commonplace for the United
11     States to engage in the sort of waiver that we
12     think it engaged in here, namely, a -- an
13     authorization for the state to apply -- apply
14     certain of its own laws evenhandedly to federal
15     facilities, it requires some express
16     congressional authorization, but it's not
17     especially unusual.
18              We don't know of any analogue to a
19     hypothetical version of 3172(a) that would tell
20     the state:  You can impose discriminatory
21     workers' compensation laws on federal
22     facilities.
23              CHIEF JUSTICE ROBERTS:  Thank you,
24     counsel.
25              Justice Thomas, anything?
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1   Justice Breyer?

2   Justice Alito?

3   Justice Sotomayor, anything?

4   Justice --

5   JUSTICE BARRETT: I do have one.

6   Mr. Stewart, I just want to make sure

7   that I understand the textual hook because it's

8   been pointed out the statute's not a model of

9   clarity, but I guess, for one, I do see a

10   textual hook for your argument, and I want to be

11   sure that I'm correctly understanding it.

12   You say that 3172 is aimed at the

13   executive essentially, not at the legislature.

14   And you get that from this language that says

15   state authority charged with enforcing and

16   requiring appliance -- compliance with, in the

17   beginning, and then awards of the authority may

18   apply the laws of all land -- to all land and

19   premises in the state which the federal

20   government controls.

21   So yours isn't completely unmoored

22   from the statute and rooted in purposes, right?

23   MR. STEWART: Yes. I mean, I think --

24   I think what -- what it is saying is the state

25   authority here, L&I, can apply whatever

1   substantive body -- can apply to the federal

2   facility whatever substantive body of worker

3   compensation rules it could apply in the other

4   parts of Washington that are within the

5   exclusive jurisdiction of the state.

6   JUSTICE BARRETT: So the limitation --

7   so your position is that if there's an otherwise

8   existing extant body of generally applicable

9   law, the Washington agency charged with

10   enforcing that law can apply that extant body of

11   law to federal facilities and that that's what

12   3172 authorizes by that language that I just

13   quoted?

14   MR. STEWART: Yes. And the only

15   clarification I would make is, when we say

16   "extant," certainly, Washington could update its

17   state laws even after 3172(a) was enacted.

18   It's not like the Federal Enclave

19   Doctrine, where you look at a certain point in

20   time and you ask --

21   JUSTICE BARRETT: Right.

22   MR. STEWART: -- what state laws were

23   in effect there. But so long as it does that on

24   an even-handed basis, the Washington

25   administrative agency can apply to the federal

1   facility the same laws it is authorized to apply

2   in the rest of the state.

3   JUSTICE BARRETT: Thank you.

4   CHIEF JUSTICE ROBERTS: Thank you,

5   counsel.

6   MR. STEWART: Thank you, Mr. Chief

7   Justice.

8   CHIEF JUSTICE ROBERTS: Ms. Heintz.

9   ORAL ARGUMENT OF TERA M. HEINTZ

10   ON BEHALF OF THE RESPONDENTS

11   MS. HEINTZ: Mr. Chief Justice, and

12   may it please the Court:

13   To protect workers on federal projects

14   like the Hanford cleanup, Congress passed a

15   waiver statute that allows states to regulate

16   federal contractors using all the same tools we

17   can use as to any private actor.

18   That waiver allowed Washington's

19   former law that is challenged here. But,

20   ultimately, this Court need not decide this

21   issue because this case is moot.

22   The federal government is asking you

23   to issue a constitutional ruling invalidating a

24   state law that no longer exists and that has no

25   ongoing effect.

 1   This Court should decline and should

 2   instead vacate the decisions below and remand

 3   for further proceedings.

 4   The government concedes that there is

 5   no prospective relief that this Court can grant

 6   as to Washington's former law because the state

 7   has already eliminated the provisions that are

 8   challenged here.

 9   The only reason the government argues

10   that there is still a live controversy is

11   because it assumes that invalidating

12   Washington's former law could still impact the

13   small number of pending claims that were

14   initially filed under the old law.

15   That is incorrect. Washington's

16   presumption statute applies retroactively, so

17   the revised law will govern any pending claims

18   for benefits initially filed under the former

19   law, even those cases on appeal.

20   The government speculates that there

21   may be individuals whose pending claims were

22   filed under the old law and that would not be

23   covered under Washington's revised statute. But

24   even if that were true, those claims would now

25   be rejected under Washington's revised statute.

1   Thus, if this Court were to reach the

2   merits and either uphold or invalidate

3   Washington's former law, it will have absolutely

4   no effect on any workers' right to benefits or

5   the government's finances. This case is moot.

6   I welcome the Court's questions.

7   JUSTICE THOMAS: Counsel, wouldn't

8   your case be much stronger if what you just said

9   had been found to be the case by the Supreme

10   Court of Washington?

11   MS. HEINTZ: Your Honor, what I did

12   say has been found at least in principle by the

13   Washington State Supreme Court.

14   JUSTICE THOMAS: No, I mean in the

15   context of the statutes that we're talking

16   about.

17   MS. HEINTZ: Certainly. If the

18   Supreme Court had issued a ruling directly on

19   point in this case, it would be stronger. But

20   what we're asking this Court to acknowledge is

21   settled principles of Washington and federal law

22   that when a statute is retroactive -- and the

23   statute here is expressly retroactive -- when it

24   is retroactive, then courts have an obligation

25   to the legislature or Congress to honor that

 1   retroactive intent and to apply that law to all

 2   pending cases, even if it ultimately changes the

 3   outcome.

 4   JUSTICE THOMAS: But do -- do you

 5   think a -- a -- a -- someone who has benefitted

 6   from the old law and who would like their

 7   benefits updated for changed circumstances would

 8   agree with you, or would they rather simply

 9   pursue their case under the law -- under the old

10   law, which was the basis for their benefits in

11   the first -- in the first instance?

12   MS. HEINTZ: Your Honor, I have two

13   points.

14   First, a -- a worker that had

15   previously had a claim under the old law would

16   not have a vested right to fight a retroactive

17   application of the new law until there has been

18   a final judgment.

19   Once there's a final judgment, then

20   there's a due process right that is vested and

21   there can be an argument by the worker. But, as

22   to all pending claims, there is no such vested

23   right, and so there is no argument by the worker

24   that the law cannot retroactively apply to those

25   claims.

 1   As to the closed claims -- and there's

 2   about 160 of those claims -- approximately,

 3   sorry, 140 of those claims -- those claims have

 4   been adjudicated now to final judgment. The

 5   federal government had every opportunity to

 6   challenge the constitutionality of the old law

 7   in those cases. It chose not to do so, and

 8   those claims are now final.

 9   So there is no ability by the federal

10   government to relitigate the constitutionality

11   of the old law in those cases. There is a small

12   exception under Washington law that allows a

13   worker to reopen only the amount of the benefits

14   or the need for additional medical services, but

15   that does not allow relitigation of the

16   determination that they suffered an occupational

17   injury.

18   Res judicata would still bar

19   relitigation and the federal government

20   challenging the underlying statute so that if

21   this Court issues a constitutional ruling, it

22   will have no impact either on the pending claims

23   or on the claims that are already closed, which

24   is a closed universe of only 200 claims total,

25   66 which are pending and approximately 140 that

1   are closed.

2   JUSTICE THOMAS: Thank you.

3   CHIEF JUSTICE ROBERTS: Well, I mean,

4   your argument depends upon a prediction about

5   what the Washington State Supreme Court is going

6   to do.

7   MS. HEINTZ: Yes, Your Honor, to some

8   extent, but this is settled law. We're not

9   asking you to accept our opinion on the issue.

10   The Supreme -- State Supreme Court has been very

11   clear in Estate of Hemberton, and it follows

12   settled federal law on this issue that when

13   legislation is enacted and it is intended and

14   explicitly retroactive, the courts have an

15   obligation to the legislature to apply that law

16   retroactively.

17   CHIEF JUSTICE ROBERTS: Well, but we

18   have pretty rigorous standards when,

19   particularly after a grant of certiorari, the

20   respondent undertakes certain efforts to moot

21   out the case. It has to be -- I forget what our

22   language is -- you know, beyond any doubt or

23   something like that.

24   And I think, as you just candidly

25   acknowledged, there are a number of cases where

1   the issue would still be alive, and however

2   confident you are about your prediction of your

3   state supreme court, you know, sometimes

4   predictions don't pan out. Courts do unusual

5   things.

6   MS. HEINTZ: Understood.

7   CHIEF JUSTICE ROBERTS: So isn't that

8   -- isn't that enough of a continuation of the

9   impact of the controversy given the rigorous

10   nature of our standards?

11   I mean, I -- I don't -- I don't want

12   to suggest that the legislature is engaging in

13   some kind of a gambit, but maybe it was a

14   sincere effort to make our workload better, but

15   it -- it -- it is not totally -- the case is not

16   totally out of, you know, any significance at

17   all, I don't think.

18   MS. HEINTZ: Your Honor, I would have

19   two responses.

20   First, I would just point out that

21   Washington's legislature is just a part-time

22   legislature. They only meet for a couple of

23   months each year. And so, since the last time

24   the legislature met and the legislation --

25   legislative session that started earlier this

1   year, there have been a number of significant

2   events that have crystallized and narrowed the

3   federal government's complaints -- claims. And

4   so the state legislature was responding in good

5   faith to those developments and -- and trying to

6   ensure the continuity of benefits.

7   But, as to your other question, Your

8   Honor -- my apologies, your other question was

9   about the state --

10   CHIEF JUSTICE ROBERTS: Don't expect

11   me to remember it.

12   (Laughter.)

13   MS. HEINTZ: When the state

14   legislature acts here or about the retroactive

15   application.

16   CHIEF JUSTICE ROBERTS: Right.

17   MS. HEINTZ: This is a much more

18   attenuated case than this Court considered in

19   the New York State Rifle Association.

20   Here, there is no claim of a live

21   controversy in the case-in-chief. The federal

22   government only sought an invalidation and a

23   declaratory judgment. They asserted no damages

24   here. They're not claiming they can assert

25   damages. So they're talking about potential

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1    collateral consequences in other cases that are
2    based on a number -- a series of speculative
3    events that might occur in the future.
4              If a office worker tries to reopen
5    their case, if the Washington courts determine
6    that there is no -- that the statute -- the new
7    statute and the old statute are not coextensive,
8    if that office worker's claim falls within the
9    gap of the coverage, if Washington courts do not
10   apply res judicata to preclude relitigation of
11   their claims, then maybe there might be some
12   ongoing application.
13             But that is not the type of live case
14   or controversy and present controversy that this
15   Court has ever held as sufficient for Article
16   III purposes.
17             JUSTICE BARRETT:  Counsel, if you say
18   it's so clear, I mean, I thought the government
19   made what I thought was a decent point in its
20   letter response.  You didn't identify this
21   retroactivity argument until your fourth
22   submission regarding mootness.  And if it was
23   that clear, why did you wait so long to make it?
24             MS. HEINTZ:  Yes, Your Honor.  And the
25   state sincerely regrets that and wishes that we
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1   had raised that issue sooner.

2   To be clear, the state understood

3   immediately that this statute was retroactive.

4   What took a little longer to understand and

5   which we learned in the course of implementing

6   the law was that the state courts would apply

7   this retroactive legislation to all pending

8   claims on appeal, even if it means changing the

9   outcome of the litigation.

10   And that was an oversight, but there

11   is no uncertainty in the state of that law.

12   That is settled Washington law. It follows

13   settled federal law. There is no real ambiguity

14   about the application of that law.

15   JUSTICE KAGAN: Well, one of the

16   arguments you make in your briefing is that even

17   if we find that this does not raise to our very

18   high bar of mootness that we should vacate this

19   case. And I want to know whether you found any

20   precedent for us to do something like that at

21   this stage.

22   MS. HEINTZ: Well, Your Honor, there

23   is certainly precedent that the Court has broad

24   jurisdiction to -- to decide the issues that

25   sort of merit this Court's consideration. And I

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1      think particularly where, as here, it would

2      require invalidating the laws of a sovereign

3      state, there are factors that would suggest that

4      this Court, even if it doesn't find it moot,

5      certainly finds that the stakes have been

6      substantially decreased, and it does not warrant

7      invalidating a state statute.

8                JUSTICE GORSUCH:  I -- I --

9                MS. HEINTZ:  Part --

10               JUSTICE GORSUCH:  -- I understand the

11     argument that we might dismiss the case if -- if

12     it's not moot but -- but for some reason no

13     longer of great significance.  And I -- I think

14     that was your response to Justice Kagan.

15               But you're asking us to vacate a

16     judgment, and if it isn't moot and it isn't

17     wrong, on what authority could we do so?

18               MS. HEINTZ:  Because that is what the

19     Court has done in the past when there's been a

20     change of the legislative scheme.  That is the

21     reason that the case has been mooted out.  So --

22               JUSTICE GORSUCH:  Well, moot --

23     mootness, yes.

24               MS. HEINTZ:  Yeah.  Oh --

25               JUSTICE GORSUCH:  But I think Justice
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 1   Kagan's question -- and this is -- this is why

 2   I'm -- I'm popping up -- is I think Justice

 3   Kagan's question, if I understand it correctly,

 4   is suppose it isn't moot. Suppose we have a

 5   live controversy, small though it may be, some

 6   still live, all right, and suppose we think the

 7   judgment below is correct.

 8   How can we vacate it?

 9   MS. HEINTZ: The Court would have -- I

10   don't know the -- the grounds on which this

11   Court would vacate it.

12   JUSTICE GORSUCH: Neither do I.

13   That's why I'm asking you.

14   (Laughter.)

15   MS. HEINTZ: Understood. Understood,

16   Your Honor.

17   JUSTICE GORSUCH: Okay. All right.

18   If you don't know the answer to that question,

19   good. That makes me feel better because I don't

20   either. All right.

21   MS. HEINTZ: Thank --

22   JUSTICE BREYER: Can I ask you, what

23   they say -- and, look, there are -- we assume

24   this new law sweeps back and avoids this

25   problem, okay? But they say there are 66

 1   people, maybe there are a few more, a few less,

 2   there's 66 people who worked at Hanford. They

 3   sued under the own -- old law. They got

 4   compensated under the Washington statute and

 5   those are on appeal.

 6   And you say do not worry because, as

 7   to those 66 cases, this new law will come along,

 8   and since it says it's retroactive, it will

 9   apply to them too, and they'll follow that and

10   the thing will be wiped out.

11   All right. But they say: Read the

12   new law and read the old law. The old law

13   applies where there is -- what is it? It's --

14   it's -- it's geographically defined the area

15   where it applies, it's Hanford's decision,

16   geographic areas which collectively span

17   hundreds of miles. The new law applies to

18   workers who work at any structure and its lands.

19   So, when I read that, I think maybe

20   there are several federal workers who are busy

21   on a river at Hanford cleaning out muskrat nets

22   -- nests, okay, and they are nowhere near a

23   structure where particular forms of waste are

24   disposed of, expect -- except by the muskrats,

25   which have nothing to do with this, okay?

1   So they say: Well, how do we know

2   they're going to be wiped out? And you say:

3   Well, because there's clear Washington law on

4   that subject.

5   I would be willing to bet that there

6   isn't clear law on the geographical scope of

7   muskrat nets -- nests in the State of

8   Washington. So, when I read that, I thought: I

9   don't know. And, therefore, I couldn't.

10   Now that's my problem with your

11   argument, and if it's a real problem, well, then

12   I can't really say it's moot.

13   MS. HEINTZ: I understand, Your Honor,

14   and there are actually two separate mootness

15   arguments here. The much more straightforward

16   argument is that because this law applies

17   retroactively, whether or not the worker who has

18   a pending claim, whether they can continue to

19   assert that claim under the new law will be

20   determined solely by application of that new

21   law.

22   It requires no reference to the old

23   law at all. You just have to look at the

24   geographic scope of the new law. If they have a

25   claim --

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1              JUSTICE BREYER:  These claims they
2   already got.  They were paid.  And the
3   government wants its money back.
4              MS. HEINTZ:  Yes, Your Honor, but the
5   retroactive application means that it says, oh,
6   the new law didn't -- the old law doesn't exist.
7   And so, if they have a claim under the new law,
8   they can proceed.  If they don't, they -- they
9   can't.
10             JUSTICE BREYER:  Oh, I get it.  Okay.
11             MS. HEINTZ:  Yeah.
12             JUSTICE BREYER:  So your point is
13  Washington law is absolutely clear.  This is a
14  situation, it said, retroactive in the new law.
15  So even if you won in 14 courts in -- because
16  they're stacked up there in Washington, and
17  you're now at Court Number 13 and, yeah, you
18  won, you won, you won, bad luck, the
19  government's going to come in and we will say in
20  -- the government will say only the new law
21  applies; it doesn't matter whether you're
22  working on muskrat nests or any -- either you
23  were or you weren't.  And if you were, then bad
24  luck.  And if you weren't -- okay.
25             MS. HEINTZ:  Exactly.
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1   JUSTICE BREYER: And the authority for

2   that under Washington law is?

3   MS. HEINTZ: Estate of Hemberton,

4   which follows the Pluit case.

5   JUSTICE BREYER: Okay. Look at --

6   MS. HEINTZ: And that is settled law,

7   and it's settled in multiple different cases.

8   JUSTICE BREYER: Got it.

9   MS. HEINTZ: So these are two separate

10   mootness arguments.

11   JUSTICE ALITO: I -- I appreciate your

12   concern that we not exceed our Article III

13   jurisdiction and decide something that's not a

14   live case or controversy. But, other than that

15   abstract concern, why do you care? If this old

16   law is void, dead, has no effect, why are you

17   fighting so hard to prevent us from considering

18   its status?

19   MS. HEINTZ: Your Honor, I mean, the

20   state has an interest in ensuring that this

21   Court address live cases or controversies. And

22   -- and we do still believe that the way -- the

23   old law fell within the scope of the waiver.

24   It's just no longer a live case or controversy.

25   But, as acknowledged, the waiver

1   language is very broad. It uses the term

2   "exclusive jurisdiction of the state." That

3   language does not really permit distinguishing

4   between different types of intergovernmental

5   immunity, as -- as would be suggested by the

6   government.

7   JUSTICE ALITO: Well, do you think it

8   allows -- it allows a state to single out a

9   federal facility by name?

10   MS. HEINTZ: Your Honor, it could do

11   that -- if the state could do that with respect

12   to a private actor, which we think the state

13   could, then it is permitted by -- under this

14   waiver provision.

15   And I would just note that at the time

16   that this waiver statute was initially passed in

17   1936, states had already adopted workers'

18   compensation schemes that chose -- that treated

19   different employers differently based on their

20   circumstances.

21   JUSTICE ALITO: Well, the state could

22   single out a private facility, and that -- the

23   only -- what would be the defense against that?

24   A rational basis economic -- equal protection

25   review. That's it. So, basically, you think

1   that this means nothing.

2   MS. HEINTZ: I think that this waiver

3   permits differential treatment of the federal

4   government because it permits everything that

5   the state could do with respect to a private

6   actor.

7   JUSTICE KAGAN: And it could do that

8   --

9   CHIEF JUSTICE ROBERTS: Why --

10   JUSTICE KAGAN: -- with respect to

11   federal employees, yes, not just employees of

12   contractors?

13   MS. HEINTZ: No, Your Honor. The

14   federal employees are governed by a separate

15   federal statute, the Federal Employee

16   Compensation Act, which has a preemption

17   provision. So this statute, even from the time

18   it was first passed, only ever applied to

19   federal contractors, which are private

20   employers. And so Congress understood that at

21   the time --

22   JUSTICE KAGAN: Well, but if you look

23   at the language of this statute and if you take

24   it to be as broad as you say the language is,

25   why wouldn't -- why would preemption principles

1   apply?

2   MS. HEINTZ: Your Honor, because

3   preemption -- I have two responses, but, first,

4   preemption applies even under the state's

5   exclusive jurisdiction. So what you're looking

6   at is what the state could do with respect to a

7   private actor on state land.

8   Even in those situations, the state

9   cannot conflict with federal law. It is still

10   bound to ensure that it doesn't interfere or

11   conflict with federal law. It would similarly

12   -- those preemption principles would apply under

13   this.

14   And so, as this Court recognized in

15   North Dakota v. United States, preemption and

16   intergovernmental immunity are two separate

17   obstacles or barriers to state limit --

18   regulation of federal contractors.

19   JUSTICE BARRETT: I don't understand

20   where it is that the state has exclusive state

21   jurisdiction. Maybe I'm just being dense about

22   this, but it seems to me like the Supremacy

23   Clause stretches everywhere.

24   So you just said in response to

25   Justice Kagan that preemption wouldn't apply if

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 1       it was the state's exclusive jurisdiction.
 2       Wouldn't that presuppose that Congress had
 3       already waived some sort of immunity or already
 4       said we just cede our authority over this
 5       particular piece of territory to the state?
 6                MS. HEINTZ:  Your Honor, preemption
 7       principles would apply.  So this does not waive
 8       preemption.  This waives only intergovernmental
 9       immunity and territorial jurisdiction, and those
10       are incidents of federal jurisdiction.
11                But even in the state's exclusive
12       jurisdiction, when it's regulating a private
13       actor on state land, it is still bound to comply
14       with other federal statutes.  So --
15                JUSTICE BARRETT:  But the state
16       doesn't have exclusive jurisdiction, right,
17       except insofar as Congress may allow it to?
18                MS. HEINTZ:  Right, Your Honor, and so
19       the "exclusive jurisdiction of the state," that
20       term is reference to a virtual control that
21       generally occurs with state regulation of
22       private actors on state land.
23                There is still, like, constitutional
24       limitations and limitations of federal statutes
25       that apply in those situations, but territorial
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1   limitations and limitations of intergovernmental

2   immunity would not apply.

3   JUSTICE BREYER: Well, how could --

4   JUSTICE BARRETT: But you're saying

5   that this would be so -- that -- that -- that

6   the federal government was so deferential to the

7   states here that if we read the waiver as you

8   propose, Congress is essentially saying to the

9   states you can impose whatever rules of workers'

10   compensation liability you want.

11   So, here, you could say it was strict

12   -- strict liability because this was a really

13   hazardous site, and so, if there's any kind of

14   injury suffered by a federal contractor on this

15   site, you know, there might be an award of a

16   million dollars, that would be fine.

17   MS. HEINTZ: It would depend on if the

18   state could do that with a private regulator.

19   JUSTICE BARRETT: Let's say it could.

20   MS. HEINTZ: Yes. So, in that

21   circumstance, this doctrine would not provide a

22   limitation. If there was a conflict with some

23   other federal statute -- and there are often

24   federal statutes at play when you're talking

25   about significant federal functions or federal

1   enclaves. There's all kinds of statutes that

2   would be at play.

3   If there was a conflict with one of

4   those federal statutes, then that would still be

5   a limitation. But intergovernmental immunity

6   would not be that limitation. And Congress was

7   just making the determination that states could

8   use the full authority that they have over any

9   private or -- or state actor or employee and

10   apply the same rules that they would apply in

11   those circumstances --

12   JUSTICE BREYER: Yeah, but there is a

13   different --

14   MS. HEINTZ: -- to the private --

15   JUSTICE BREYER: -- I mean, that is

16   exactly the question that is bothering me. I

17   mean, one day in the legislature a group of

18   federal employees from Hanford show up and they

19   say: You know, it's tough being a federal

20   employee. People in the state make much more

21   money. We have more dangerous jobs. And the

22   state laws generally are pretty fair to their

23   workers, but try working for the federal

24   government. This is supposed to strike a chord

25   of agreement.

1   So they say: Now you can't do much

2   for us because you're a state legislature, but

3   I'll tell you one thing you can do. What you

4   could do for you is you give us, if we're hurt,

5   and define hurt very broadly, please, so that if

6   we're even hurt a little bit, we get millions.

7   Now we've got to watch that number

8   because -- but -- but, really, it's high. And

9   you know the wonderful thing? If you make

10   private employers pay this in the State of

11   Washington, they are voters, so you have to

12   worry about them.

13   And if the government pays for it in

14   the state, well, that's a problem, you're going

15   to have to raise taxes. But do you know who's

16   paying for this one? The feds. The feds will

17   pay, the taxpayers in the other states. So

18   let's go and really hit the ceiling and we'll

19   really pay a lot of money and we won't have to

20   pay for it.

21   Okay. I know projects like that. I

22   won't say which they are, but there we are.

23   Now, to me, did I think Congress

24   intended that? Hmm. It's going to take quite a

25   lot of doing before I think they wanted that

1   result. Now that's -- that's where I am. So

2   what do you think?

3   MS. HEINTZ: Understood, Your Honor.

4   Congress has the ultimate political check here.

5   They can always amend this statute, but they

6   used very broad language. They used the term

7   "exclusive jurisdiction of the state."

8   They knew it was very broad language.

9   That exact term was used in Merrick v. Garland

10   -- Garrick, so the case that they were

11   responding to used exactly that same type of

12   language. They understood that they were

13   granting a broad authority.

14   If they don't like the policy later,

15   they can amend the statute. But that is not a

16   basis to ignore the plain terms of this

17   language, which allows a state to treat the

18   premises as if it were under the exclusive

19   jurisdiction of the state.

20   JUSTICE KAGAN: Ms. Heintz, I think

21   the question was really a question of, like, you

22   know, maybe you're right about the text, but why

23   would Congress have done that? I mean, we can't

24   really believe that that's what Congress meant

25   to do.

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1              And if you take all the other statutes
2       which you gave us and you said, look, the text
3       is different, and you're right, the text is
4       different.
5              But, at the same time, we know that
6       Congress has a kind of modus operandi with
7       respect to this, and it basically always says
8       whatever you do elsewhere you can do for
9       facilities like Hanford.
10             It doesn't say, you know, whatever you
11      could dream of doing elsewhere but actually
12      wouldn't you could do to federal facilities.
13      And I think that that's what Justice Breyer is
14      asking.  Like, what sensible Congress would have
15      written the statute the way you say it ought to
16      be read?
17             MS. HEINTZ:  Well, there number -- are
18      a number of points, Your Honor.  They were
19      regulating primarily private employers, and so
20      they could have reasonably assumed that those
21      private employers who act as federal contractors
22      did have some say in the legislative process,
23      which is evident here too.  The -- the federal
24      contractors did participate in the state
25      legislative process.
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 1   And, second, Congress could very well

 2   conclude that the type of workers' compensation

 3   schemes that had already been enacted by the

 4   states, which allows distinguishing between

 5   different employers based on the specific risks

 6   of that employer, based on their specific safety

 7   profiles, based on all of the distinctive

 8   features of that employer, that that should

 9   apply with as much force to these private

10   entities that were governed by this waiver.

11   And -- and that's a very reasonable

12   decision. Maybe Congress did not anticipate

13   that it would be taken this far, but we're not

14   really doing anything differently than what was

15   permitted before in that Hanford is a unique

16   site. It is the most toxic workplace in

17   America.

18   There -- you know, the employees there

19   are around 56 million gallons of toxic and

20   radiological hazard waste and they have unique

21   exposures. And -- and another thing is that

22   they can't always prove what they were exposed

23   to, and that's one of the other unique dangers

24   here.

25   And so Congress could very well have

1   concluded that the federal contractors, these

2   private employees -- employers could take care

3   of themselves and that there was every reason to

4   allow states to regulate these private employers

5   based on their specific circumstances.

6   JUSTICE BARRETT: Ms. Heintz, what do

7   you have to say to the government's language or

8   focus on the language that makes it seem like

9   this is aimed not at the legislature -- and by

10   "it," I mean 3172 -- is aimed not at state

11   legislatures but at the state bodies who enforce

12   otherwise generally applicable laws?

13   MS. HEINTZ: So the argument seems

14   primarily directed towards the word "apply."

15   And I think that argument --

16   JUSTICE BARRETT: Well, I think

17   enforcing and requiring compliance was too,

18   right?

19   MS. HEINTZ: Yes. But that language

20   presupposes there's a statute that's already

21   been enacted. And the federal government

22   doesn't argue that this language freezes the

23   laws in place as of 1936, which would be the

24   consequence, I think, of not permitting states

25   to enact new laws.

1   JUSTICE BARRETT: I guess I don't

2   understand why that position would freeze the

3   law. I agree with you, and the government, Mr.

4   Stewart, said that that's not their position,

5   and I don't see how it could be.

6   But, if the statute is aimed at the

7   state authority charged with enforcing and

8   requiring compliance with, that description

9   seems to fit, you know, the executive agency.

10   MS. HEINTZ: Because, at the time that

11   this law was enacted, there was a broad

12   prohibition on any form of regulation of the

13   federal government or those with which it dealt.

14   And so, if Congress intended at that

15   time for this language to prohibit state

16   legislators from doing anything, then they --

17   then this would have very little meaning. It

18   would only have applied to the laws that were

19   existing at the time. It could --

20   JUSTICE BARRETT: So "apply," then

21   address what you were getting ready to say about

22   the word "apply."

23   MS. HEINTZ: That the word "apply"

24   really does presuppose that there's been an

25   enactment -- and -- of a law. And so what you

1   really need to do is see what kind of law can --

2   can the states enact and then apply.

3   And, really, there's no -- the word --

4   term "exclusive jurisdiction" does not allow for

5   a distinction between different types of

6   intergovernmental immunity.

7   This Court in Goodyear has already

8   held that this is a waiver of intergovernmental

9   immunity. It's a clear and unambiguous waiver

10   at least as with respect to direct regulation.

11   And this language really doesn't allow

12   you to distinguish between these different

13   types. If the state can directly regulate under

14   its exclusive jurisdiction, it can also, you

15   know, remove all other incidents of federal

16   jurisdiction, including all of intergovernmental

17   immunity.

18   JUSTICE GORSUCH: I just want to make

19   sure I understand your mootness argument. Sorry

20   to circle back.

21   But your first point as I take it is

22   that in this case, the government only sought a

23   declaratory judgment and injunction, and there's

24   nothing to declare and there's nothing to enjoin

25   because the statute's gone, point one.

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 1                    MS. HEINTZ:  Yes.

 2                    JUSTICE GORSUCH:  Point two, with

 3      respect to the ongoing other cases, you're

 4      confident you're representing to the Court that

 5      Washington state courts will retroactively apply

 6      the new law and not the old law?

 7                    MS. HEINTZ:  Yes, Your Honor.

 8                    JUSTICE GORSUCH:  Okay.  And, number

 9      three, if you're wrong about that, the

10      government can raise its arguments there?

11                    MS. HEINTZ:  Yes, Your Honor.

12                    JUSTICE GORSUCH:  And number four,

13      that with the closed cases, they're just closed

14      and the government lost its chance to make those

15      arguments because they're final judgments?

16                    MS. HEINTZ:  Yes, Your Honor.

17                    JUSTICE GORSUCH:  All right.  I got

18      it.  Thank you.

19                    MS. HEINTZ:  Thank you.

20                    JUSTICE KAGAN:  Do you think there's

21      any way of certifying this issue to the

22      Washington Supreme Court about what they will

23      do?

24                    MS. HEINTZ:  I understand that that

25      has happened before in the past.  It -- it --
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          1   it's been a long time, but I -- I believe there

          2   is a -- a procedure available to do that, yes.

          3   I don't think it's necessary. The

          4   state law is very clear on this point. The

          5   federal government is not really challenging

          6   that law. They're not challenging the actual

          7   language of the statute, which applies

          8   retroactively.

          9   They're raising sort of an inchoate

         10   uncertainty, but that isn't sufficient, I think,

         11   in a -- to present a live case or controversy,

         12   particularly when that alleged uncertainty deals

         13   with a collateral case, not this case-in-chief.

         14   Here, there is no ongoing violation.

         15   There are no damages. And so, in this case,

         16   there is no reasonable likelihood of an ongoing

         17   effect.

         18   JUSTICE ALITO: But what if your

         19   prediction turns out to be wrong?

         20   MS. HEINTZ: Then the federal

         21   government can raise that issue in the cases,

         22   the 66 live cases.

         23   JUSTICE ALITO: Yeah. And then what?

         24   MS. HEINTZ: And then -- and then the

         25   arguments will be made. But, in that context,

1   the state will also be arguing, as would the

2   federal government, this does apply

3   retroactively.

4   JUSTICE ALITO: Well, no, play it all

5   out. So they raise it, and the state court says

6   no, the prediction was wrong. Then what?

7   MS. HEINTZ: Then it would -- at least

8   at that point, you will know there's a live case

9   or controversy.

10   JUSTICE ALITO: Yeah. And then what?

11   They have to file a new cert petition?

12   MS. HEINTZ: If the state courts

13   decide similarly, given the history in this

14   case. It could happen. But I think there is no

15   reasonable likelihood of that happening, that

16   these -- these -- again, multiple levels of

17   speculation that are built in, because even in

18   the context where there's no retroactive

19   application, we still have our argument that the

20   statutes are coextensive.

21   And even if the courts reject that,

22   that particular worker's claim needs to fall in

23   the gap of that coverage. We're talking a

24   closed universe of a very small number of

25   claims. So there are multiple layers in which

1   this gets resolved based on state law grounds

2   that never have to reach the invalidity of the

3   underlying statute.

4   And so, given all of that layer of

5   speculation, it really isn't sufficient to

6   establish a live case or controversy in this

7   case.

8   CHIEF JUSTICE ROBERTS: Thank you,

9   counsel.

10   Justice Thomas?

11   Justice Breyer, anything further?

12   Justice Alito, Anything?

13   Justice Gorsuch? Nothing?

14   Thank you, counsel.

15   MS. HEINTZ: Thank you.

16   CHIEF JUSTICE ROBERTS: Rebuttal,

17   Mr. Stewart?

18   REBUTTAL ARGUMENT OF MALCOLM L. STEWART

19   ON BEHALF OF THE PETITIONER

20   MR. STEWART: Thank you, Mr. Chief

21   Justice.

22   First, Respondents have said -- have

23   characterized our challenge as focusing on the

24   potential collateral consequences of HB 1723.

25   But, when we sought declaratory and injunctive

       1   relief at the outset against enforcement and

       2   application of HB 1723, that is a law that is

       3   applied and enforced in the context of

       4   individual benefits determinations.

       5   And so the very thing we were asking

       6   for was an order saying don't apply and enforce

       7   these unique standards in determining individual

       8   claimants' entitlement to benefits. And our

       9   position is there is still a sufficient

      10   possibility that this will wind up happening,

      11   that the case is not moot.

      12   The second thing is that, Justice

      13   Kagan, you referred to the possibility of

      14   certification. And, certainly, there is a

      15   process by which this Court can certify state

      16   law questions to the -- the state supreme court.

      17   It's often done when the Court feels that it

      18   needs to know what state law dictates before it

      19   can resolve the federal question.

      20   I've never known of it being done to

      21   inform the Court's determination whether a case

      22   is moot, and I think that's partly because cases

      23   like Mission Products really set the -- the

      24   applicable framework. Mission Products says the

      25   very existence of substantial uncertainty is a

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 1      basis for finding the Court not to be moot.  It
 2      is often the case that when the Court grants
 3      cert on -- on a precise question, the ultimate
 4      practical consequences of its ruling are not
 5      clear because those depend on subsequent
 6      determinations as to other questions.  That
 7      doesn't make the case moot.
 8              The third thing, Justice Gorsuch, you
 9      asked about what would the authority be to
10      vacate.  We -- we think that the Court has
11      recognized a -- a broad authority to vacate
12      based on the principles of equity.  Often, when
13      the Court has vacated judgments below, it's done
14      so in summary orders, and, therefore, the -- the
15      legal principles have not been fleshed out as
16      much as they could be.
17              But we would also say, if there is
18      doubt about the Court's authority to vacate, the
19      Court certainly shouldn't leave the judgment
20      intact.  It would really create dismal
21      incentives to tell a state that if you can
22      reduce the practical significance of the
23      question presented enough for the Court to DIG
24      but not enough for the court case to be moot,
25      you can preserve your favorable judgment.
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         1   The fourth thing, just as a point of

         2   clarification, Justice Kagan, you asked about

         3   federal employees. Section 3172(c) says that

         4   the authorization doesn't disturb Section 8101

         5   of Title 5, and that's the Federal Employees'

         6   Compensation Act. It's apparent on the face of

         7   3172 that this doesn't affect federal employees.

         8   It affects only federal contract workers.

         9   But the reason that the Court has

        10   always framed the antidiscrimination principle

        11   as no discrimination against the federal

        12   government or those with whom it deals is that

        13   it's often predictable that when there is

        14   discrimination against federal contractors, the

        15   costs of that discrimination will ultimately be

        16   borne by the United States.

        17   And the last thing, in response to

        18   Justice Breyer's question, our complaint here is

        19   not that Washington is treated -- treating the

        20   workers too generously. If Washington wanted to

        21   spend its own funds to benefit a class of

        22   Washington residents that it believed had not

        23   been treated as well as they should have by the

        24   federal government, its authority to spend state

        25   treasury funds wouldn't be impacted by

1   principles of intergovernmental immunity.

2   The problem here is that Washington

3   has decided that the United States should be

4   doing more for this class of Washington

5   residents, but it's not within the power of a

6   single state to determine how much the federal

7   government should be doing to solve a national

8   problem.

9   Thank you, Mr. Chief Justice.

10   CHIEF JUSTICE ROBERTS: Thank you,

11   counsel. The case is submitted.

12   (Whereupon, at 11:03 a.m., the case

13   was submitted.)

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