Nos. 2021-2008(L), 2021-2009, 2021-2010, 2021-2011, 2021-2012, 2021-2014, 2021-2015, 2021-2016, 2021-2017, 2021-2018, 2021-2019 & 2021-2020

United States Court of Appeals for the Federal Circuit

ELEAZAR AVALOS, JAMES DAVIS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2008

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00048-PEC, Judge Patricia E. Campbell-Smith.

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Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2009

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00059-PEC, Judge Patricia E. Campbell-Smith.

ROBERTO HERNANDEZ, JOSEPH QUINTANAR, Individually and on behalf of all others similarly situated,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2010

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00063-PEC, Judge Patricia E. Campbell-Smith.

LORI ANELLO, KARL BLACK, GEORGE CLARY, WILLIAM DENELL, JUSTIN GROSSNICKLE, ERIC INKROTE, TIMOTHY MCGREW, MARK MILLER, DAVID NALBORCZYK, MARTIN NEAL, JR., LUKE PALMER, THOMAS RHINEHART, JR., IVAN TODD,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2011

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00118-PEC, Judge Patricia E. Campbell-Smith.

BRIAN RICHMOND, ADAM SMITH, THOMAS MOORE, CHRIS BARRETT, WILLIAM ADAMS, KELLY BUTTERBAUGH, DAN ERZAL, BRIAN W. KLINE, KEVIN J. SHEEHAN, JASON KARLHEIM, CHARLES PINNIZZOTTO, JASON DIGNAN, MATHEW BECK, STEPHEN SHRIFT, JAMES BIANCONI, CHRISTOPHER GRAFTON, JESSE CARTER, MICHAEL CRUZ, CARL WARNER, BRIAN OWENS, BRIAN MUELLER, BRYAN BOWER, COREY TRAMMEL, JAMES KIRKLAND, KIMBERLY BUSH, BOBBY MARBURGER, RODNEY ATKINS, LEONEL HERNANDEZ, JOSEPH AUGUSTA, EDWARD WATT,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2012

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00161-PEC, Judge Patricia E. Campbell-Smith.

JUSTIN TAROVISKY, GRAYSON SHARP, SANDRA PARR, JUSTIN BIEGER, JAMES BRATTON, WILLIAM FROST, STEVE GLASER, AARON HARDIN, STUART HILLENBRAND, JOSEPH KARWOSKI,

PATRICK RICHOUX, DERRECK ROOT, CARLOS SHANNON, SHANNON SWAGGERTY, GEOFFRY WELLEIN, BECKY WHITE, TAMMY WILSON,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2014

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00004-PEC, Judge Patricia E. Campbell-Smith.

QUENTIN BACA, LEPHAS BAILEY, CHRISTOPHER BALLESTER, KEVIN BEINE, DAVID BELL, RICHARD BLAM, MAXIMILIAN CRAWFORD, MATTHEW CRUMRINE, JOHN DEWEY, JEFFREY DIAMOND,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2015

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00213-PEC, Judge Patricia E. Campbell-Smith.

DAVID JONES, individually and on behalf of all others similarly situated,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

2021-2016

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00257-PEC, Judge Patricia E. Campbell-Smith.

TONY ROWE, ALIEU JALLOW, KARLETTA BAHE, JOHNNY DURANT, JESSE A. MCKAY, III, GEORGE DEMARCE, JACQUIE DEMARCE,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2017

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00067-PEC, Judge Patricia E. Campbell-Smith.

D. P., T. S., J. V.,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2018

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00054-PEC, Judge Patricia E. Campbell-Smith.

PLAINTIFF NO. 1, PLAINTIFF NO. 2, PLAINTIFF NO. 3, PLAINTIFF NO. 4,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2019

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00094-PEC, Judge Patricia E. Campbell-Smith.

I. P., A. C., S. W., D. W., P. V., M. R., R. C., K. W., B. G., R. H., individually and on behalf of all others similarly situated,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2020

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00095-PEC, Judge Patricia E. Campbell-Smith.

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STATEMENT OF COUNSEL REQUIRED UNDER FEDERAL CIRCUIT RULE 35(b)

Based on my professional judgment, I believe this appeal requires an answer to a precedent-setting question of exceptional importance: Does the Anti-Deficiency Act's restriction on the ability of government officials to disburse funds absent appropriations abrogate the obligation of the United States under the Fair Labor Standards Act to timely pay its employees for work performed or face compensatory liquidated damages for delay, when the delay in payment is due to the United States' own failure to make appropriations?

/s/ Leon Dayan
Leon Dayan

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Court: *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012); *Ferris v. United States*, 27 Cl. Ct. 542 (1892); and *Dougherty v. United States*, 18 Ct. Cl. 496 (1883).

/s/ Leon Dayan
Leon Dayan

INTRODUCTION

1. The divided panel in this case answered a question of exceptional and recurring importance: Does the Anti-Deficiency Act's restriction on the ability of government officials to disburse funds absent appropriations abrogate the obligation of the United States under the Fair Labor Standards Act to timely pay its employees for work performed or face compensatory liquidated damages for delay, when the delay in payment is due to the United States' own failure to make appropriations?

The panel majority answered that question in the affirmative, reversing the Court of Federal Claims, without even citing, let alone discussing, any Anti-Deficiency Act (ADA) precedents, including Supreme Court precedents featured in the dissenting opinion of Judge Reyna, the decision below, and Appellees' brief.

Most conspicuously, the majority ignored the Supreme Court's decision in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020). That decision holds that the ADA does not abrogate obligations that Congress imposes on the United States in another statute during a lapse in appropriations, because the ADA addresses only the actions of an "officer or employee of the United States," not the obligations of the government itself. *Id.* at 1321-22.

Thus, when the Fair Labor Standards Act (FLSA) is applied consistent with the Supreme Court's interpretation of the ADA, the outcome is straightforward:

While the ADA precludes government agents from issuing paychecks during a lapse in appropriations, the ADA does not abrogate the government's obligation as an FLSA employer to compensate employees for the consequences of late payment via the statute's liquidated damages remedy—a remedy that the Supreme Court has held to be compensatory, not penal. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945). That outcome advances the policies of *both* the FLSA *and* the ADA.

Because it failed to follow *Maine Community Health* and other precedents interpreting the ADA, the panel majority overread that statute, generating a conflict with the FLSA that caused the majority to then twist the FLSA to avoid its own self-generated conflict. In doing so, it split from the Ninth Circuit's decision in *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), which held that California had violated the FLSA when it paid its employees two weeks late on account of a budget impasse.

The majority thus denied compensatory damages to tens of thousands of federal employees who served the public during a lengthy shutdown without knowing when they would receive their next paycheck. Worse still, the majority's reading of the FLSA threatens to spread beyond cases involving failures to pay government workers during lapses in appropriations that the government itself caused. Private employers, too, can be expected to invoke the majority's reasoning to excuse late wage payments on the basis of circumstances of their own making.

We therefore ask that the *en banc* Court grant rehearing to answer a question of extraordinary importance, bring this Circuit's law into conformity with binding precedent, heal an unnecessary rift with a sister circuit, and affirm the decision below.

2. Alternatively, the panel should grant rehearing to correct remand instructions that appear to foreclose certain claims that the government conceded should remain viable regardless of the outcome of this interlocutory appeal.

BACKGROUND

1. These consolidated interlocutory appeals arise out of the lapse in federal appropriations for many agencies that began on December 21, 2018. The ensuing shutdown lasted until January 25, 2019, when Congress restored funding. Pub. L No. 116-5, 133 Stat. 10 (2019). At five weeks, that partial shutdown was the longest in history.

The government required Appellees in these consolidated lawsuits to work during the shutdown, including overtime. *See, e.g.*, Appx279-91. The government did not, however, pay Appellees during the shutdown, *see, e.g.*, Appx274-75, 281, 283, which encompassed three regularly scheduled paydays under federal payroll calendars published by the General Services Administration pursuant to statute, 5 U.S.C. § 5504(a). Maj. Op. 16. Although the government ultimately paid

Appellees for work performed during the five-week shutdown, it has never compensated them for its delay in payment.

Appellees allege, in part, that the government violated the FLSA by failing to pay minimum and overtime wages earned during the shutdown by the government's regular, recurrent paydays. *See* 29 U.S.C. §§ 206, 207. They seek liquidated damages under 29 U.S.C. § 216(b), which are "not penal in … nature but constitute[] compensation …. to restore damage done by [the employer's] failure to pay *on time*." *Brooklyn Sav. Bank*, 324 U.S. at 707-08 (emphasis added).

2. In *Martin v. United States*, an FLSA case against the United States arising from a 2013 government shutdown, the Court of Federal Claims rejected the government's assertion that the FLSA and ADA "impose two conflicting obligations" during a lapse in appropriations and that, on that basis, the FLSA's long-settled payment-by-payday requirement must yield. 130 Fed. Cl. 578, 582-83 (2017).

The provision of the ADA that the government invoked in *Martin* states that "an *officer or employee* of the United States Government" may not make or authorize an expenditure in excess of appropriations, 31 U.S.C. § 1341(a)(1)(A) (emphasis added), but it does not say that any statutory or contractual obligations of the United States itself are abrogated. The Court of Federal Claims explained that the conflict posited by the government was "superficial," 130 Fed. Cl. at 583,

relying on Supreme Court authority establishing "that the ADA's requirements 'apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the government,'" *id.* (quoting *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012) (cleaned up)). The court thus held that the government had violated the FLSA when it failed to timely pay wages during a shutdown.[1]

3. Here, the government responded to Plaintiffs-Appellees' claims with motions to dismiss that invoked the same ADA provision and posited the same "conflict" as it did in *Martin.* The Court of Federal Claims denied those motions, largely on the ground it had described in *Martin*, which it incorporated by reference, Appx021-24, while citing as further support the Supreme Court's intervening decision in *Maine Community Health*, Appx023-24.

4. This Court authorized an interlocutory appeal under 28 U.S.C. § 1292(d)(2), reserved for cases involving "a controlling question of law as to which there is a substantial ground for difference of opinion." Order 8 (Case No. 21-119) (June 3, 2021) (Dkt. No. 58).

In its merits opinion, the majority acknowledged that the Supreme Court has interpreted the FLSA's liquidated damages provision as "'a Congressional

[1] *Martin* gave rise to a companion appeal argued alongside these consolidated cases, which the same panel reversed in a parallel, contemporaneous opinion. *Martin v. United States*, 54 F.4th 1325 (Fed. Cir. 2022).

recognition that failure to pay the statutory minimum *on time* may be so detrimental to maintenance of the minimum standard of living … that double payment must be made in the event of delay,'" notwithstanding the absence of an express pay-by-payday requirement. Maj. Op. 16 (emphasis added) (quoting *Brooklyn Sav.*, 324 U.S. at 707). It acknowledged as well that "[c]ourts have interpreted the FLSA's implicit timely payment obligation to ordinarily require employers to pay wages by the employee's regular payday." *Id.* (citation and internal quotation marks omitted).

Against that backdrop, the majority framed this appeal's "central question" as "how the [ADA's] prohibition on government spending during a partial shutdown coexists with the FLSA's seemingly contradictory timely payment obligation." Maj. Op. 14. But the majority never addressed the line of ADA authority invoked by the lower court to conclude that any conflict between that statute and the FLSA was "superficial."

Instead, the majority's assumptions regarding the ADA led it to conclude that the question could be resolved only by resorting to "canons of construction to avoid a conflict" between the FLSA and the ADA. Maj. Op. 21. Applying those canons, the majority excused the government for its failure to pay by its ordinarily applicable payday during a lapse in appropriations. *Id.* Specifically, the majority held that "the government does not violate" what it called "the FLSA's timely

payment obligation" when the government "complies with the [ADA] by withholding payment during a lapse in appropriations." Maj. Op. 15. To reach that conclusion, the majority was compelled to adopt the position that a post-shutdown wage payment for work performed during a shutdown qualifies as "timely" under the FLSA no matter how long after an employee's regular payday it is made—whether weeks, months, or even longer—so long as it is made on the earliest possible date after appropriations resume. Maj. Op. 20.

Judge Reyna dissented, relying on the line of binding ADA authority cited by the Court of Federal Claims but entirely omitted from the majority's analysis.

ARGUMENT

I. Rehearing *en banc* is warranted because, under longstanding precedent, the ADA does not excuse the government from satisfying its statutory obligations that come due during a lapse in appropriations.

The ADA is not a blank canvas on which the panel was free to introduce its own interpretation. It is a statute that the United States Supreme Court and this Court have addressed and interpreted many times throughout the years, in decisions both recent and longstanding. *See Me. Cmty. Health*, 140 S. Ct. 1308 (2020); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012); *Ferris v. United States*, 27 Ct. Cl. 542 (1892); *Dougherty v. United States*, 18 Ct. Cl. 496 (1883).[2]

[2] Because the Court of Claims issued *Ferris* and *Dougherty* before 1982, they are precedential in this Court. *See, e.g.*, *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc).

The majority nevertheless ignored every ADA precedent cited by the dissent, the court below, and Appellees. *See* Dissent at 12-13; Appx021-24; Appellees' Br. at 31-35. Indeed, the majority cited no ADA precedents at all.

Those precedents hold that the ADA's "restraints … apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government." *Dougherty*, 18 Ct. Cl. at 503, *quoted in Ramah Navajo*, 567 U.S. at 197; *see also Ferris*, 27 Ct. Cl. at 546 (exhaustion of appropriations justified government agent's stop-work order to contractor, but did not discharge government's obligation to pay contractor). Indeed, the current language of the ADA—which was in effect when Congress amended the FLSA in 1974 to extend to federal employees the same rights and remedies as private employees—reflects these longstanding interpretations. Since 1950,[3] the ADA, by its terms, has restricted only the power of "an officer or employee of the United States Government" to disburse funds, 31 U.S.C. § 1341(a)(1)(A), not the rights of third parties to whom the government owes money.

Just over two years ago, in *Maine Community Health*, the Supreme Court interpreted that very ADA language to preclude an argument no different from the one the government asserts here, reaffirming a long line of precedent holding that the statute merely "constrain[s] how *federal employees and officers* may make or

[3] *See* Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765.

authorize payments without appropriations" but does not "cancel [the government's] obligations." 140 S. Ct. at 1321-22 (internal quotation marks omitted) (emphasis added). In light of those decisions, the Court considered whether the government remained bound by an express statutory obligation to make certain payments to health insurers where Congress not only failed to appropriate funds, but also passed a series of riders expressly precluding funding for that obligation. *Id.* at 1315, 1317. Even in that circumstance, the Court *rejected* the government's argument that the ADA implicitly "'qualified' that obligation by making" the government's payments "'contingent on appropriations by Congress.'" *Id.* at 1321 The same is true here: The ADA does not implicitly qualify the government's freestanding obligations under the FLSA. There was accordingly no need for the panel majority to hold that the Anti-Deficiency Act can "coexist[]" with the FLSA's timely-payment obligation, *see supra* at 7, only if that obligation is debilitated.

Instead of examining the ADA precedents, the majority peremptorily declared that affirming the Court of Federal Claims' decision would be "absurd," because, according to the majority, it would "forc[e] *the government* to choose between a violation of the Anti-Deficiency Act or the FLSA." Maj. Op. 18 (emphasis added). But it is a mistake to view the government itself as subject to the

ADA, because the Supreme Court has repeatedly held that statute to be directed only to individual government *agents*:

> As we have explained, "'[a]n appropriation per se merely imposes limitations upon the Government's own agents,'" but "'its insufficiency does not pay the Government's debts, nor cancel its obligations.'" *Ramah*, 567 U. S., at 197 (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)).

Me. Cmty. Health, 140 S. Ct. at 1321-22.

This is precisely why the Supreme Court's decision in *Maine Community Health* was not "absurd." While the ADA prevented the government's agents from disbursing payments to health insurers when they came due, the insurers' statutory right to payment was unaffected and could be vindicated through a lawsuit and a recovery from the United States via the Judgment Fund. 140 S. Ct. at 1321-22 & 1318 n.3. Nor was it "absurd" for this Court's predecessor to hold that the ADA did not affect a party's contractual right to payment, even in the absence of adequate appropriations. *Dougherty*, 18 Ct. Cl. at 503.

Here, too, there would be nothing absurd about allowing Appellees to obtain relief for the delay in paying them. Appellees here did not, after all, seek an injunction to force government payroll agents to make timely wage payments during the shutdown.[4] They instead sought a post-shutdown FLSA monetary

[4] While an injunctive remedy of that nature would indeed conflict with the ADA, the FLSA does not allow employees, public or private, to pursue injunctions as a means of securing timely wage payments. *See* 29 U.S.C. § 216(a) (authorizing only

remedy for the delayed payments from the government itself—a remedy that the Supreme Court has held is *compensatory*, not penal, *see supra* at 5, and that would in no way contravene the ADA.

The remedy Appellees seek would thus advance the policies of both the FLSA and the ADA, satisfying this Court's "duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). Instead, the majority interpreted the FLSA based on a putative conflict with the ADA that is inconsistent with binding precedents that the majority failed to address. That departure from precedent warrants *en banc* review.

II. Rehearing *en banc* is warranted because the majority's decision opens a needless circuit split and weakens the protections of the FLSA.

The majority's misunderstanding of the relationship between the FLSA and the ADA is all the worse for what it has wrought: To avoid a non-existent conflict between those statutes, the majority artificially weakened the FLSA, splitting from the Ninth Circuit via an interpretation that risks spreading far beyond the circumstances here.

A. In *Biggs*, the Ninth Circuit held that California was subject to liquidated damages under the FLSA for delayed payment of wages caused by a state budget

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a damages remedy for violations of timely-payment requirement embedded in §§ 206 & 207).

impasse. 1 F.3d 1537. There, California "law prohibited the release of paychecks until a budget was approved by the Legislature and signed by the Governor," *id.* at 1538, just as here the ADA impeded the government's disbursement agents from paying employees on time. Recognizing that the FLSA contained no *express* payment-by-payday requirement, the Ninth Circuit reasoned that such an obligation necessarily flows from the statute's text and structure. "Unless there is a due date after which minimum wages become unpaid, imposing liability for both unpaid minimum wages and liquidated damages would be meaningless." *Id.* at 1539-40. That conclusion, the Ninth Circuit continued, follows both judicial and Department of Labor interpretations. *Id.* at 1542-43 (collecting authorities); *see also* Appellees' Br. 16-19 (same). It thus held that California could be liable for payments delayed by two weeks where state law precluded payment absent a budget. *Id.* at 1538.

Biggs drew further support from the Supreme Court's opinion in *Brooklyn Savings*, which "rejected the employer's argument … that the right to liquidated damages arises only if the employee is compelled to sue for minimum wages due." 1 F.3d at 1541. The Ninth Circuit found it "difficult to read" that decision "without concluding that an employer violates the Act if payments are late." *Biggs*, 1 F.3d at 1541; *accord, e.g.*, *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir. 1993). By contrast, the majority here shrugged off *Brooklyn Savings*, focusing exclusively on

its conclusion that liquidated damages cannot be waived, Maj. Op. 21, and ignoring entirely its separate holding that "liability [for liquidated damages] is not conditioned on default at the time suit is begun," *Brooklyn Sav.*, 324 U.S. at 711.

The majority nonetheless failed to acknowledge that it was splitting from *Biggs*. At best, the majority purported to distinguish *Biggs* on the ground that the ADA contains a provision supplying a time by which the government is obligated to make payments delayed by the lapse in appropriations—namely, the "earliest date possible after the lapse" ends, 31 U.S.C. § 1341(c)(2). Maj. Op. 20. But *Biggs* itself considered circumstances that would have satisfied that standard; California made payroll the very day its new budget was signed into law, and that payment was held to be late. *Biggs*, 1 F.3d at 1538.

In any event, the provision of the ADA invoked by the majority was enacted only in 2019, *after* Appellees here had already seen at least two paydays come and go during the shutdown. *See* Appellees' Br. 6-8. And the majority's reasoning could not rationally have turned on the existence of that amendment, because the majority reached the same outcome in the companion *Martin* case, which involved a 2013 shutdown that had ended years before the 2019 amendment. *Martin*, 54 F.4th at 1327.

Moreover, the 2019 amendment does not, as the majority opinion implies, supply anything resembling a substitute *regular* payday of the kind approved in

Rogers v. City of Troy, 148 F.3d 52, 55 (2d Cir. 1998). That is because the duration of a shutdown is notoriously unpredictable, and the 2019 amendment merely guarantees payment on the earliest date appropriations resume, a date that, in an era of widening political conflict, can fall five weeks after the first missed FLSA regular payday—which happened here—or far longer.

B. Worse, by reading the FLSA to avoid a non-existent conflict with the ADA, the majority announced an interpretation that threatens to metastasize far beyond this case. That is because a 1974 amendment to the FLSA made the government a statutory "employer" just like any other, subject to the same rules of conduct that bind state and local governments and private parties. *See* 29 U.S.C. §§ 203(d)-(e), 206, 207, 216(b). "To give the[] same words a different meaning for each category [of defendant] would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378, 380 (2005).

Here, the majority concluded that the FLSA merely "requires employers to pay their employees as soon as practicable under the circumstances." Maj. Op. 19. Because, according to the majority, the government would have "violate[d] the Anti-Deficiency Act" by paying minimum wages and overtime during a lapse in appropriations, compliance with the FLSA's ordinarily applicable payment-by-payday rule was excused as "not practicable." Maj. Op. 19. For support, the majority relied on *Walling v. Harnischfeger Corp.*, which authorized an employer

to pay *overtime* "as soon as convenient or practicable" only where the formula for determining overtime pursuant to a collective-bargaining agreement was mathematically impossible to calculate by the employer's regular payday. 325 U.S. 427, 432-33 (1945).

That narrow exception does not apply here, for the government does not claim that it was incapable of calculating employee wages by their paydays. And to divorce the words "as soon as convenient or practicable" from their original context and make the exception applicable here is to expand the exception beyond recognition. Indeed, neither the government nor the majority has pointed to any authority endorsing such an expansion of that exception. Still less have they identified any authority permitting delayed payment of minimum wages—rather than overtime—on grounds of impracticability. That is because extending that exception to easy-to-calculate minimum wages would undermine a statute designed "to aid the … lowest paid of the nation's working populations" by guaranteeing "a minimum *subsistence* wage." *Brooklyn Sav. Bank,* 324 U.S. at 707 n.18 (emphasis added). "Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." *Id.* at 707-08.

Indeed, the majority's interpretation of the FLSA is particularly pernicious because, as Judge Reyna explained in dissent, "the government … brought on the

shutdown" that it invokes to excuse its failure to honor the FLSA. Dissent 14. Relieving the government of its statutory obligation on the basis of a supposed impossibility of its own making departs from longstanding judicial reluctance to permit a wrongdoer to profit from its misconduct. And because private employers are treated identically to the government, *see supra* at 15, the majority's reasoning threatens to open a loophole for private employers to avoid responsibility for timely payments due to circumstances of their own making.

III. Alternatively, the panel should grant rehearing to clarify its overbroad remand instructions, which overlooked the government's concession that some of Appellees' claims remain viable and which otherwise misapprehended the record.

On remand, the majority instructs "the court to enter *judgment* consistent with this opinion." Maj. Op. 22 (emphasis added). That instruction is overbroad for two reasons.

First, the majority concludes that judgment is appropriate because it assumes "the government paid Plaintiffs-Appellees immediately after the one-month shutdown ended." Maj. Op. 20. But that assumption is inconsistent with allegations in the record—which Appellees highlighted—that "some public servants waited *months* after the resumption of funding to receive the full wages they were owed under the FLSA." Appellees' Br. 9 (citing Appx776). Those claims should be permitted to proceed, even on the majority's reasoning that the FLSA requires

paying public employees "at the earliest date possible after a lapse in appropriations ends." Maj. Op. 21.

Second, as Appellees pointed out, this "interlocutory appeal does not contest some Plaintiffs' claims that the government failed to pay them despite access to appropriated funds, including for overtime performed before the shutdown." Br. 14 n.3 (*citing, e.g.*, Appx776, 780-81, 785-86). Indeed, the government conceded that "[t]hose claims are not at issue in this appeal." Gov't Br. 19 n.3. The majority's apparent remand instruction "to enter judgment," rather than that proceedings consistent with its opinion continue, is therefore in urgent need of clarification via panel rehearing.

CONCLUSION

For the reasons stated above, the Court should rehear this case *en banc* or, in the alternative, grant panel rehearing.

Dated: January 17, 2023

Respectfully Submitted,

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ADDENDUM

Opinion

***Avalos v. United States*, 21-2008, Nov. 30, 2022 (Dkt. No. 98)**

United States Court of Appeals for the Federal Circuit

ELEAZAR AVALOS, JAMES DAVIS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2008

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00048-PEC, Judge Patricia E. Campbell-Smith.

L. KEVIN ARNOLD, MARTIN LEE, MARK MUNOZ, MATTHEW PERRY, AARON SAVAGE, JENNIFER TAYLOR, RALPH FULVIO, DAVID KIRSH, ROBERT RIGGS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2009

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00059-PEC, Judge Patricia E. Campbell-Smith.

ROBERTO HERNANDEZ, JOSEPH QUINTANAR, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2010

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00063-PEC, Judge Patricia E. Campbell-Smith.

LORI ANELLO, KARL BLACK, GEORGE CLARY, WILLIAM DENELL, JUSTIN GROSSNICKLE, ERIC INKROTE, TIMOTHY MCGREW, MARK MILLER, DAVID NALBORCZYK, MARTIN NEAL, JR., LUKE PALMER, THOMAS RHINEHART, JR., IVAN TODD,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2011

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00118-PEC, Judge Patricia E. Campbell-Smith.

BRIAN RICHMOND, ADAM SMITH, THOMAS MOORE, CHRIS BARRETT, WILLIAM ADAMS, KELLY BUTTERBAUGH, DAN ERZAL, BRIAN W. KLINE, KEVIN J. SHEEHAN, JASON KARLHEIM, CHARLES PINNIZZOTTO, JASON DIGNAN, MATHEW BECK, STEPHEN SHRIFT, JAMES BIANCONI, CHRISTOPHER GRAFTON, JESSE CARTER, MICHAEL CRUZ, CARL WARNER, BRIAN OWENS, BRIAN MUELLER, BRYAN BOWER, COREY TRAMMEL, JAMES KIRKLAND, KIMBERLY BUSH, BOBBY MARBURGER, RODNEY ATKINS, LEONEL HERNANDEZ, JOSEPH AUGUSTA, EDWARD WATT,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2012

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00161-PEC, Judge Patricia E. Campbell-Smith.

JUSTIN TAROVISKY, GRAYSON SHARP, SANDRA PARR, JUSTIN BIEGER, JAMES BRATTON, WILLIAM FROST, STEVE GLASER, AARON HARDIN, STUART HILLENBRAND, JOSEPH KARWOSKI, PATRICK RICHOUX, DERRECK ROOT, CARLOS SHANNON, SHANNON SWAGGERTY, GEOFFRY WELLEIN, BECKY WHITE, TAMMY WILSON,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2014

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00004-PEC, Judge Patricia E. Campbell-Smith.

QUENTIN BACA, LEPHAS BAILEY, CHRISTOPHER BALLESTER, KEVIN BEINE, DAVID BELL, RICHARD BLAM, MAXIMILIAN CRAWFORD, MATTHEW CRUMRINE, JOHN DEWEY, JEFFREY DIAMOND,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2015

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00213-PEC, Judge Patricia E. Campbell-Smith.

DAVID JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

2021-2016

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00257-PEC, Judge Patricia E. Campbell-Smith.

TONY ROWE, ALIEU JALLOW, KARLETTA BAHE, JOHNNY DURANT, JESSE A. MCKAY, III, GEORGE DEMARCE, JACQUIE DEMARCE,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2017

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00067-PEC, Judge Patricia E. Campbell-Smith.

D. P., T. S., J. V.,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2018

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00054-PEC, Judge Patricia E. Campbell-Smith.

PLAINTIFF NO. 1, PLAINTIFF NO. 2, PLAINTIFF NO. 3, PLAINTIFF NO. 4,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2019

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00094-PEC, Judge Patricia E. Campbell-Smith.

I. P., A. C., S. W., D. W., P. V., M. R., R. C., K. W., B. G., R. H., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs- Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2020

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00095-PEC, Judge Patricia E. Campbell-Smith.

Decided: November 30, 2022

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Before REYNA, LINN, and HUGHES, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HUGHES.

Dissenting opinion filed by *Circuit Judge* REYNA.

HUGHES, *Circuit Judge*.

This interlocutory appeal addresses whether the government violates the Fair Labor Standards Act by not paying federal employees who work during a government shutdown until after the lapse in appropriations has been resolved. The Court of Federal Claims determined that the employees had established a prima facie case of an FLSA violation even though the Anti-Deficiency Act legally barred the government from making payments during the shutdown. Because we determine that the government did not violate the FLSA's timely payment obligation as a matter of law, we reverse.

I

From December 22, 2018 to January 25, 2019, the federal government partially shut down because of a lapse in appropriations. Plaintiffs-Appellees continued to work despite the shutdown because of their status as "excepted employees"—employees who work on "emergencies involving the safety of human life or the protection of property" and whom the government can "require[] to perform work during a covered lapse in appropriations." 31 U.S.C. §§ 1341(c)(2), 1342. During this shutdown period, the government was barred from paying wages to excepted employees by the Anti-Deficiency Act, which prohibits the government from "authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C.

§ 1341(a)(1)(A). The parties do not dispute that the government paid Plaintiffs-Appellees their accrued wages after the partial shutdown ended.

Plaintiffs-Appellees sued the government in the United States Court of Federal Claims, alleging that the government violated the Fair Labor Standards Act (FLSA) "by failing to timely pay their earned overtime and regular wages during the partial government shutdown." Appx12. Plaintiffs-Appellees sought liquidated damages under the FLSA, asserting that the government failed to make timely payments when it missed three scheduled pay dates during the partial shutdown: December 28, 2018; January 10, 2019; and January 24, 2019. Plaintiffs-Appellees' Br. 8; *see* 29 U.S.C. § 260. Under the FLSA, any employer who does not timely pay minimum or overtime wages is liable for liquidated damages equal to the amount of the untimely paid wages. *See* 29 U.S.C. § 216(b). But the Court of Federal Claims has the discretion to award no liquidated damages "if the employer shows . . . that the act or omission giving rise to [the FLSA] action was in good faith" and was based on "reasonable grounds for believing that [the] act was not a violation of the" Act. *Id.* § 260.

The government moved to dismiss Plaintiffs-Appellees' complaint under Court of Federal Claims Rule 12(b)(6) for failing to state a claim. The government argued that it "cannot be held liable for violating its obligations under the FLSA" because the Anti-Deficiency Act prohibited the government from paying Plaintiffs-Appellees during the partial shutdown. Appx21. The Court of Federal Claims denied the government's motion to dismiss, reasoning that Plaintiffs-Appellees "had 'alleged that [the government] had failed to pay wages' on [Plaintiffs-Appellees'] 'next regularly scheduled payday'" and therefore stated a claim for relief under the FLSA. *Avalos v. United States*, 151 Fed. Cl. 380, 388 (2020) (quoting *Martin v. United States*, 130 Fed. Cl. 578, 584 (2017)). The trial court relied on its decision in *Martin*, in which it determined that "the appropriate way

to reconcile [the Anti-Deficiency Act and the FLSA] is not to cancel the defendant's obligation to pay its employees" under the FLSA, but to "require that [the] defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate" per 29 U.S.C. § 260. *Martin*, 130 Fed. Cl. at 584. The trial court then granted the government's motion to stay proceedings and certify an interlocutory appeal to address the question of "whether [the] defendant is liable for liquidated damages under the FLSA when [the] defendant complies with the Anti-Deficiency Act's command to defer payment of Federal employees' wages during a lapse in appropriations." Appx297 (cleaned up). The government appeals. We have jurisdiction under 28 U.S.C. § 1292(d)(2).

II

We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error. *Adams v. United States*, 350 F.3d 1216, 1221 (Fed. Cir. 2003).

A

Congress passed an early version of the Anti-Deficiency Act in 1870, making it unlawful "for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations." Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. In 1884, Congress developed this prohibition further, mandating that "no Department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law except in cases of sudden emergency involving the loss of human life or the destruction of property." Act of May 1, 1884, ch. 37, 23 Stat. 15, 17.

These provisions took on more life over the subsequent years: In 1905, Congress required appropriations to be

apportioned monthly "to prevent undue expenditures in one portion of the year that may require deficiency or additional appropriations to complete the service of the fiscal year." Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257–58. And in 1906, Congress mandated that "all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment" and subjected any person who violated the provision to removal from office and a potential fine, imprisonment, or both. Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 49.

Congress continued to amend the Anti-Deficiency Act over the next 100 years. In its current form, the Act prohibits "an officer or employee" of the United States government from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1). The Act further prohibits officers and employees from "accept[ing] voluntary services . . . or employ[ing] personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." *Id.* § 1342. The Anti-Deficiency Act clarifies that "each excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work . . . at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse." *Id.* § 1341(c)(2).

An officer or employee that violates these prohibitions receives "appropriate administrative discipline," which could include "suspension from duty without pay or removal from office." *Id.* § 1349. Further, if the violation is knowing and willful, the offending officer or employee is subject to a criminal fine "not more than $5,000," imprisonment "for not more than 2 years," or both. *Id.* § 1350.

B

Congress passed the FLSA in 1938 after finding "that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" causes certain undesirable outcomes. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 2, 52 Stat. 1060, 1060. Relevant to this appeal, the 1938 version of the FLSA required "[e]very employer [to] pay to each of his employees who is engaged in commerce or in the production of goods for commerce" a minimum wage. *Id.* § 6, 52 Stat. 1062. It also required employers to pay employees one-and-a-half times the employees' regular rate "for a workweek longer than forty hours." *Id.* § 7, 52 Stat. 1063. The current version of the FLSA contains substantially identical requirements. *See* 29 U.S.C. §§ 206, 207.

Initially, the FLSA excluded the United States from its definition of "employer," Pub. L. No. 75-718, § 2, 52 Stat. 1060, and excluded individuals "employed in a bona fide executive, administrative, professional, or local retailing capacity" from the minimum wage and overtime requirements, *id.* § 13, 52 Stat. 1067. But in 1974, Congress amended the FLSA's definition of "employer" to remove the language excluding the United States, and it amended the FLSA's definition of "employee" to expressly include "an individual employed by a public agency" of "the Government of the United States," subject to certain conditions. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58–60.

III

The central question in this appeal is how the Anti-Deficiency Act's prohibition on government spending during a partial shutdown coexists with the FLSA's seemingly contradictory timely payment obligation. The government argues that the FLSA's timely payment obligation "does not require the impossible" and considers what is "convenient

or practicable under the circumstances." Defendant-Appellant's Br. 16 (quoting *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432–33 (1945)). The government therefore asserts that it did not violate the FLSA's timely payment obligation because it paid excepted employees as soon as possible and practicable under the circumstances—when the Anti-Deficiency Act legally allowed the government to make those payments. *Id.* at 15.

Plaintiffs-Appellees argue that the FLSA's timely payment obligation is more rigid, requiring "employers to pay statutorily mandated wages *promptly*—that is, on the first regular, recurring payday after the amount due is ascertainable." Plaintiffs-Appellees' Br. 14–15. Plaintiffs-Appellees argue that the government should pay employees both wages and liquidated damages when a partial shutdown ends in recognition of "the government's own delay in meeting its obligations" under the FLSA. *Id.* at 12.

We hold that the FLSA's timely payment obligation considers the circumstances of payment and that, as a matter of law, the government does not violate this obligation when it complies with the Anti-Deficiency Act by withholding payment during a lapse in appropriations.

We begin with the text of the FLSA. *United States v. Gonzales*, 520 U.S. 1, 4 (1997). The FLSA does not address whether the government violates the law by not paying employees on their regularly scheduled pay date during a partial shutdown. In fact, the FLSA does not specify at all when an employer must pay wages to its employees. It merely requires that "[e]very employer *shall pay* to each of his employees who in any workweek is engaged in commerce" a minimum wage, with no explicit mention of *when* the employer must make this payment. *See* 29 U.S.C. § 206 (emphasis added).

But an employer must still pay its employees in a timely manner. The Supreme Court has explained that the FLSA's liquidated-damages provision, 29 U.S.C. § 216(b),

"constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living . . . that double payment must be made in the event of delay . . . ." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

Courts have interpreted the FLSA's implicit timely payment obligation to ordinarily require employers to pay wages by "the employee's regular payday." *Biggs v. Wilson*, 1 F.3d 1537, 1541 (9th Cir. 1993); *see also, e.g.*, *Roland Elec. Co. v. Black*, 163 F.2d 417, 421 (4th Cir. 1947) ("[I]f [an employer] fails to pay overtime compensation promptly and when due on any regular payment date, the statutory action for the unpaid minimum and liquidated damages given under Section 16(b) immediately arises in favor of the aggrieved employee."); *Atl. Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944) ("[I]f an employer on any regular payment date fails to pay the full amount of the minimum wages and overtime compensation due an employee, there immediately arises an obligation upon the employer to pay the employee . . . liquidated damages.").

But there are exceptions to this general rule. The Supreme Court has recognized that—at least for the overtime provision, 29 U.S.C. § 207(a)—failing to pay on a regular pay date is not a per se violation of the FLSA. *Walling*, 325 U.S. at 432–33. For example, the employer in *Walling* did not violate the FLSA when it did not pay overtime wages on its employees' regular pay date because "the correct overtime compensation [could not] be determined until some time after the regular pay period." *Id.* at 432. The Supreme Court clarified that the FLSA "does not require the impossible" but requires payment only "as soon as convenient or practicable under the circumstances." *Id.* at 432–33.

The Second Circuit has also suggested that, while contractual pay dates can be relevant and probative to this inquiry, "what constitutes timely payment must be determined by objective standards—and not solely by

reference to the parties' contractual arrangements." *Rogers v. City of Troy*, 148 F.3d 52, 57 & n.4 (2d Cir. 1998). Agency interpretation of the statute arrives at the same conclusion: The Department of Labor advises employers that "compensation due [to] an employee must *ordinarily* be made at the regular payday for the workweek." U.S. Dep't of Labor, Wage and Hour Div., Field Operations Handbook § 30b04 (2016) (emphasis added).[1]

Because the FLSA does not explicitly address whether paying excepted employees immediately after a lapse in appropriations ends is timely, we turn to canons of statutory construction to aid our interpretation. *See Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). "When confronted with two Acts of Congress allegedly touching on the same topic, [courts are] not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (citation omitted). Plaintiffs-Appellees suggest that we can give effect to both the Anti-Deficiency Act and the FLSA because they "do not conflict." Plaintiffs-Appellees' Br. 12. According to Plaintiffs-Appellees, "once a shutdown ends, the

[1] As the government notes, "Department of Labor guidance is not directly applicable to federal employees like [the] plaintiffs, for whom the FLSA is implemented by the Office of Personnel Management." Defendant-Appellant's Br. 4 n.1 (citing 5 U.S.C. 204(f); 5 C.F.R. pt. 551). But, in general, Congress has advised the Office of Personnel Management to "administer the provisions of law in such a manner as to assure consistency with the meaning, scope, and application [of] rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." H.R. Rep. No. 93-913, at 28 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811, 2837.

government can act in a way that effectuates the purposes of both the FLSA and the [Anti-Deficiency Act] by compensating its employees, pursuant to the FLSA's liquidated damages provision, for the government's own delay in meeting its obligations to them." Plaintiffs-Appellees' Br. 12. But this interpretation *would* have us create a conflict between the two statutes by holding that the Anti-Deficiency Act forbids, but the FLSA simultaneously requires, payment during a lapse in appropriations. If we were to adopt Plaintiffs-Appellees' proposed interpretation, we would be forcing the government to choose between a violation of the Anti-Deficiency Act or the FLSA. This is an absurd result that we should avoid, if possible. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

"[I]n approaching a claimed conflict, we come armed with the 'strong[] presum[ption]' . . . that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." *Epic*, 138 S. Ct. at 1624 (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)). We disfavor repeals by implication, "particularly . . . when, as here, we are urged to find that a specific statute . . . has been superseded by a more general one." *Sw. Marine of S.F., Inc. v. United States*, 896 F.2d 532, 533 (Fed. Cir. 1990). Normally, "a specific statute controls over a general one." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

The Anti-Deficiency Act is more specific than the FLSA. The Anti-Deficiency Act explicitly forbids the government from making expenditures during a lapse in appropriations and further specifies when the government must pay excepted employees for work performed during a partial shutdown, 31 U.S.C. § 1341(a)(1), (c)(2), whereas the FLSA discusses the much broader topic of general payment requirements for all employers, 29 U.S.C. §§ 206, 207. And the FLSA does not explicitly discuss when an employer must make these payments; it merely implies that payment must be timely under the circumstances. *See*

Brooklyn Sav. Bank, 324 U.S. at 707; *Walling*, 325 U.S. at 433.

Further, some form of the Anti-Deficiency Act had existed for nearly 70 years before Congress passed the FLSA, and for over 100 years by the time Congress extended the FLSA's protections to federal government employees. *See supra* Section II. If Congress intended to upend or modify the Anti-Deficiency Act's long-standing prohibition on making expenditures for which Congress has not apportioned funds, it would have done so explicitly. "A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Epic*, 138 S. Ct. at 1624 (cleaned up). Plaintiffs-Appellees have not shown a clearly expressed intention; instead, they rely on judicial opinions that interpret an implicit obligation in the context of distinct fact patterns. *See* Plaintiffs-Appellees' Br. 16–17 (collecting and discussing cases). Plaintiffs-Appellees have not otherwise shown why a later-enacted, more general statute should supersede a long-standing, specific one.

"[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotation marks omitted). We conclude that Congress did not intend for the FLSA to overturn, conflict with, or supersede the Anti-Deficiency Act's prohibition on making expenditures during a lapse in appropriations. Rather, Congress intended for the two statutes to coexist in the following manner: The FLSA requires employers to pay their employees as soon as practicable under the circumstances. *Walling*, 325 U.S. at 433. Paying federal government wages during a lapse in appropriations is not practicable because the government would violate the Anti-Deficiency Act and could incur civil and criminal liability by making those expenditures. Therefore, the

federal government timely pays wages, per the FLSA, when it pays its employees at the earliest date possible after the lapse in appropriations ends.

Our holding does not create a "moving target" as to "when the employee actually gets paid." *Biggs*, 1 F.3d at 1540. Indeed, the Anti-Deficiency Act expressly addresses when payment should be made following a lapse in appropriations: "the earliest date possible after the lapse in appropriations ends." 31 U.S.C. § 1341(c)(2). This effectuates the implicit timely payment requirement of the FLSA and relieves "employees, employers, and courts alike [from] guess[ing] when 'late payment' becomes 'nonpayment' in order to determine whether the statute of limitations has begun to run, the amount of unpaid wages and liquidated damages to be awarded, and how much prejudgment interest has been accrued." *Biggs*, 1 F.3d at 1540.

Finally, we note that the cases on which Plaintiffs-Appellees rely are distinguishable. Many of these cases "involved substantial delays in payment, and—more important[ly]—the practices disapproved of resulted in evasions of the minimum wage and overtime provisions of the FLSA." *Rogers*, 148 F.3d at 56 (discussing *Brooklyn Sav. Bank*, 324 U.S. 697, which involved a two-year delay; *Calderon v. Witvoet*, 999 F.2d 1101 (7th Cir. 1993), which involved a five-year delay; and *United States v. Klinghoffer Brothers Realty Corp.*, 285 F.2d 487 (2d Cir. 1960), which involved a one-year delay); *see* Plaintiffs-Appellees' Br. 16–17, 29 (discussing the same cases). Here, the government paid Plaintiffs-Appellees immediately after the one-month shutdown ended.

Brooklyn Savings Bank v. O'Neil is particularly distinguishable, even beyond the substantial delays and attempts to evade the FLSA's requirements that are present in that case. The employees in *Brooklyn Savings* accepted overdue minimum and overtime wages from their employers and signed contracts releasing their employers from

liability for FLSA claims. 324 U.S. at 699–702. The Supreme Court held that employees cannot waive their right to minimum wages, overtime wages, or liquidated damages under the FLSA. *Id.* at 706–07. The Court found support in the "Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living . . . that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being." *Id.* at 707.

The Court in *Brooklyn Savings* analyzed whether "a statutory right conferred on a private party, but affecting the public interest, may . . . be waived or released if such waiver or release contravenes the statutory policy." *Id.* at 704. That issue is not relevant here; this appeal does not involve contractual waiver or other similar circumstances. In fact, the hierarchy of competing legal interests in this appeal is entirely different than that in *Brooklyn Savings*. There, the Court interpreted private contracts in light of a superior federal statute: the FLSA. In contrast, this appeal turns on how we interpret the FLSA in light of an even more established and more specific federal statute: the Anti-Deficiency Act. Our interpretation relies on well-established canons of construction to avoid a conflict between these two statutes. And we find no indication that Congress intended to create such a conflict—much less the "clearly expressed congressional intent[]" that caselaw requires, *Epic*, 138 S. Ct. at 1624.

IV

Because the government does not violate the FLSA when it pays excepted employees for work performed during a government shutdown at the earliest date possible after a lapse in appropriations ends, we reverse the Court of Federal Claims' decision denying the government's motion to dismiss for failure to state a claim, and we remand

for the court to enter judgment consistent with this opinion.

REVERSED AND REMANDED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

ELEAZAR AVALOS, JAMES DAVIS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2008

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00048-PEC, Judge Patricia E. Campbell-Smith.

L. KEVIN ARNOLD, MARTIN LEE, MARK MUNOZ, MATTHEW PERRY, AARON SAVAGE, JENNIFER TAYLOR, RALPH FULVIO, DAVID KIRSH, ROBERT RIGGS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2009

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00059-PEC, Judge Patricia E. Campbell-Smith.

ROBERTO HERNANDEZ, JOSEPH QUINTANAR, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2010

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00063-PEC, Judge Patricia E. Campbell-Smith.

LORI ANELLO, KARL BLACK, GEORGE CLARY, WILLIAM DENELL, JUSTIN GROSSNICKLE, ERIC INKROTE, TIMOTHY MCGREW, MARK MILLER, DAVID NALBORCZYK, MARTIN NEAL, JR., LUKE PALMER, THOMAS RHINEHART, JR., IVAN TODD,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2011

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00118-PEC, Judge Patricia E. Campbell-Smith.

BRIAN RICHMOND, ADAM SMITH, THOMAS MOORE, CHRIS BARRETT, WILLIAM ADAMS, KELLY BUTTERBAUGH, DAN ERZAL, BRIAN W. KLINE, KEVIN J. SHEEHAN, JASON KARLHEIM, CHARLES PINNIZZOTTO, JASON DIGNAN, MATHEW BECK, STEPHEN SHRIFT, JAMES BIANCONI, CHRISTOPHER GRAFTON, JESSE CARTER, MICHAEL CRUZ, CARL WARNER, BRIAN OWENS, BRIAN MUELLER, BRYAN BOWER, COREY TRAMMEL, JAMES KIRKLAND, KIMBERLY BUSH, BOBBY MARBURGER, RODNEY ATKINS, LEONEL HERNANDEZ, JOSEPH AUGUSTA, EDWARD WATT,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2012

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00161-PEC, Judge Patricia E. Campbell-Smith.

JUSTIN TAROVISKY, GRAYSON SHARP, SANDRA PARR, JUSTIN BIEGER, JAMES BRATTON, WILLIAM FROST, STEVE GLASER, AARON HARDIN, STUART HILLENBRAND, JOSEPH KARWOSKI, PATRICK RICHOUX, DERRECK ROOT, CARLOS SHANNON, SHANNON SWAGGERTY, GEOFFRY WELLEIN, BECKY WHITE, TAMMY WILSON,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2014

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00004-PEC, Judge Patricia E. Campbell-Smith.

QUENTIN BACA, LEPHAS BAILEY, CHRISTOPHER BALLESTER, KEVIN BEINE, DAVID BELL, RICHARD BLAM, MAXIMILIAN CRAWFORD, MATTHEW CRUMRINE, JOHN DEWEY, JEFFREY DIAMOND,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2015

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00213-PEC, Judge Patricia E. Campbell-Smith.

DAVID JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

2021-2016

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00257-PEC, Judge Patricia E. Campbell-Smith.

TONY ROWE, ALIEU JALLOW, KARLETTA BAHE, JOHNNY DURANT, JESSE A. MCKAY, III, GEORGE DEMARCE, JACQUIE DEMARCE,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2017

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00067-PEC, Judge Patricia E. Campbell-Smith.

D. P., T. S., J. V.,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2018

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00054-PEC, Judge Patricia E. Campbell-Smith.

PLAINTIFF NO. 1, PLAINTIFF NO. 2, PLAINTIFF NO. 3, PLAINTIFF NO. 4,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2019

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00094-PEC, Judge Patricia E. Campbell-Smith.

I. P., A. C., S. W., D. W., P. V., M. R., R. C., K. W., B. G., R. H., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2020

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00095-PEC, Judge Patricia E. Campbell-Smith.

REYNA, *Circuit Judge*, dissenting.

This appeal involves two statutes. The Fair Labor Standards Act ("FLSA") requires employers, including the U.S. government, to pay workers earned wages on a regularly scheduled pay period basis. Employers that fail to pay their workers on a timely scheduled basis are subject to certain penalties, including liquidated damages. The other statute, the Anti-Deficiency Act ("ADA"), applies to government officials. It prohibits government officials from making expenditures, where the expenditure is not funded by duly passed appropriations. In other words, the government lacks authority to spend money it does not have.

The majority interprets the relevant provisions of the ADA and FLSA to mean that the ADA renders null the liquated damages provision of the FLSA. I disagree. I believe that each statute stands alone and that the relevant provisions of the two statutes are not inconsistent with each other.

From December 22, 2018, to January 25, 2019, the federal government partially shutdown due to lack of appropriations (funding). *Avalos v. United States*, 151 Fed. Cl. 380, 382 (2020); J.A. 274. To keep key parts of the government functioning, the government created two categories of federal employee: "excepted" and "non-excepted." Non-excepted employees were instructed to not show-up for work and received no compensation for the period of time they did not report for work. This appeal does not involve non-excepted employees.

The "excepted" employees were required to report for work during the shutdown, to continue working and to perform normal duties. Despite working and earning wages during the shutdown, the excepted employees were not paid for their work until the first payday after the shutdown ended. *Avalos*, 151 Fed. Cl. at 382–83. This means

that excepted employees received no pay on their regularly scheduled paydays during the shutdown.

At the time of the shutdown, Plaintiffs-Appellees were employed as Customs and Border Protection Officers for the U.S. Department of Homeland Security. These officers ("CBP Officers") were designated as excepted employees and were required to report for work. *Id.* at 382. They received no pay during the shutdown but were paid on the first regularly scheduled payday that came after January 25, 2019, the day the shutdown ended. *Id.*; J.A. 280–83.

On January 29, 2019, the CBP Officers filed their amended complaint in the United States Court of Federal Claims ("Court of Claims") seeking liquidated damages for the time they worked without pay during the shutdown. J.A. 288. The CBP Officers alleged that, under the FLSA, the government was liable for liquidated damages because during the shutdown it failed to pay wages on their regularly scheduled payday(s).

The government moved to dismiss the suit for failure to state a claim. The government did not dispute that the CBP Officers were not timely paid during the shutdown. The government asserted that the government shutdown was caused by a lack of general appropriation and, therefore, it was prohibited from paying the CBP Officers. According to the government, it cannot, as a matter of law, be held liable for liquidated damages that are based on wages not paid during the shutdown because the ADA prohibited it from paying the wages for which there was no funding during a shutdown. The Court of Claims denied the government's motion based largely on its decision in *Martin,* which involved issues identical to the issues in this case. *Avalos*, 151 Fed. Cl. at 387–91 (discussing *Martin v. United States*, 130 Fed. Cl. 578 (2017)). The government appeals the judgment of the Court of Claims.

According to the majority, the "central question in this appeal is how the Anti-Deficiency Act's prohibition on

government spending during a partial shutdown coexists with the FLSA's seemingly contradictory timely payment obligation." Maj. Op. 14. The majority reverses and remands to the Court of Claims, holding that the government cannot, as a matter of law, be held liable for liquidated damages under the FLSA where the failure to pay employee wages was due to a government shutdown. I disagree with my colleagues on several fronts.

First, the majority errs that as a matter of law, there is no FLSA violation in this case. The law is well-settled on the question of whether federal employees are entitled to liquidated damages under the FLSA when they are not paid on their regular payday. The FLSA makes clear that failure to pay wages on regularly scheduled paydays constitutes a FLSA violation.

The majority is also incorrect that liquidated damages cannot attach because the government was prohibited by the ADA, and presumably not of its own choosing, from paying the CBP Officers.

My sense is that the FLSA and ADA are distinct statutes with distinct purposes whose operations in this case neither intersect nor are otherwise inconsistent. Stated differently, the ADA in this instance does not trump the FLSA and render its liquidated damages provision null.

The FLSA provides in relevant part:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . not less than $7.25 an hour.

29 U.S.C. § 206(a)(1)(C). The FLSA is administered to federal employees by the Office of Personnel Management ("OPM"). OPM has promulgated a regulation providing that employees must be paid "wages at rates not less than

the minimum wage . . . for all hours of work." 5 CFR § 551.301(a)(1). The FLSA provides that employers who violate these provisions "shall be liable to the employee . . . affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

Again, the undisputed facts are that the government required the CBP Officers to report to work during the shutdown; and that the CBP Officers were not paid wages on their regularly scheduled paydays. These circumstances clearly apply to § 216(b) of the FLSA, and on this basis, I would find that the government's failure to pay the CBP Officers during the shutdown was a violation of the FLSA.

The majority appears to agree with the foregoing conclusion, but my colleagues take steps to avoid saying so. Namely, they engage in an unorthodox statutory interpretation that first examines whether the statutes are contradictory and whether the statutes can coexist. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (The statutory interpretation "inquiry begins with the statutory text, and ends there as well if the text is unambiguous."); *see also Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321–22 (2020) (explaining that the ADA did not "qualify" the government's obligation to pay an amount created by the "plain terms" of a statute). In so doing, the majority concludes that the government is shielded from liquidated damages if the failure to pay is due to a shutdown. In other words, the statutes can be said to coexist because the FLSA is rendered nugatory.

There is no principled basis for the majority view. Indeed, the opposite is true. The FLSA is remedial in nature, and it acts as a shield to protect workers. Not so with the ADA. The ADA is meant to punish government officials for certain actions. The ADA neither references the FLSA nor

the liquidated damages provision of § 216(b). Nothing in the statues, or applicable caselaw, supports an argument that the ADA applies to federal workers.

The Supreme Court has recognized that the FLSA was enacted "to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945) (citing H. Rep. No. 2738, 75th Cong., 3d Sess., pp. 1, 13, 21, and 28). The FLSA recognizes that employees do not have equal bargaining power and serves to protect them. *Id.*

Similarly, the Supreme Court has explained that the FLSA liquidated damages provision is not meant as punishment for the employer, but rather, focuses on compensating the employee. *Id.* at 707 ("[T]he liquidated damages provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.").

According to the Supreme Court, the ADA's requirements "apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012) (citation omitted).

Here, the CBP Officers were honestly "contracting" with the government. There is no legal support for the belief that government workers forfeit their FLSA protection at a time of shutdowns. As the Supreme Court has noted, the insufficiency of an appropriation "does not pay the Government's debts, nor cancel its obligations." *Me. Cmty.*, 140 S. Ct. at 1321–22 (quoting *Ramah*, 567 U.S. at 197). This court has recognized, "the Supreme Court has rejected the notion that the Anti-Deficiency Act's requirements somehow defeat the obligations of the government." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1322

(Fed. Cir. 2018) *rev'd on other grounds*, *Me. Cmty.*, 140 S. Ct. 1308.

The majority fails to point to legal authority for the proposition that the ADA cancels the government's obligation to protect the very federal employees that the FLSA was intended by Congress to protect. I see no congressional requirement or Supreme Court precedent that negates liquidated damages under the FLSA or the ADA. Rather, the liquated damages provision of the FLSA "constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay." *Brooklyn Sav.*, 324 U.S. at 707 (emphasis added) (citation omitted). And as this court has explained, the "usual rule" is "that a claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid." *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988).

Other regional circuits have concluded that a FLSA claim accrues when an employer fails to pay employees on their regular payday, and that the FLSA violation occurs on that date. *See Atl. Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944) ("[I]f an employer on any regular payment date fails to pay the full amount . . . due an employee, there immediately arises an obligation upon the employer to pay the employee . . . liquidated damages."); *Birbalas v. Cuneo Printing Indus.*, 140 F.2d 826, 828 (7th Cir. 1944) ("[O]vertime compensation shall be paid in the course of employment and not accumulated beyond the regular pay day . . . . [T]he failure to pay it, when due, [is] a violation of [the FLSA]."); *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993) ("The only logical point that wages become 'unpaid' is when they are not paid at the time work has been done, the minimum wage is due, and wages are ordinarily paid—on payday."); *Olsen v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570,

1579 (11th Cir. 1985), *modified*, 776 F.2d 265 (11th Cir. 1985) ("The employee must *actually receive* the minimum wage each pay period.").

The majority asserts a number of other conclusions: that the ADA trumps the FLSA because it was passed first and is more specific than the FLSA; that requiring liquidated damages in this situation would lead to an "absurd result"; and that the government would be forced to "choose between a violation of the Anti-Deficiency Act or the FLSA." Maj. Op. 18–19. But we need not reach these questions because there is no justiciable conflict between the two laws. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work . . . . Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*."). I do agree with the majority that "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Maj. Op. 19 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984)).

Payday is important to the everyday worker. Missing a paycheck can have devasting consequences. That is what this case is about. Congress sought a remedy for such consequences by extending the potential for liquidated damages. Here, the employer should not be absolved of adherence to the FLSA, more so where the employer is the government that brought on the shutdown.

The Court of Claims correctly analyzed the statute and binding Supreme Court precedent. I would affirm the Court of Claims' decision and allow the case to continue.

Statutes

29 U.S.C. § 203

As used in this chapter-

. . .

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)

(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the [1] Government Publishing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)

(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

> (B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

. . .

(g) "Employ" includes to suffer or permit to work.

. . .

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

. . . .

29 U.S.C. § 206

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than—

> (A) $5.85 an hour, beginning on the 60th day after May 25, 2007;
>
> (B) $6.55 an hour, beginning 12 months after that 60th day; and
>
> (C) $7.25 an hour, beginning 24 months after that 60th day;

. . . .

29 U.S.C. § 207

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

. . . .

29 U.S.C. § 216

. . .

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

. . . .

31 U.S.C. § 1341

(a)

(1) Except as specified in this subchapter or any other provision of law, an officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

(c)

(1) In this subsection—

(A) the term "covered lapse in appropriations" means any lapse in appropriations that begins on or after December 22, 2018;

(B) the term "District of Columbia public employer" means—

(i) the District of Columbia Courts;

(ii) the Public Defender Service for the District of Columbia; or

(iii) the District of Columbia government;

(C) the term "employee" includes an officer; and

(D) the term "excepted employee" means an excepted employee or an employee performing emergency work, as such terms are defined by the Office of Personnel Management or the appropriate District of Columbia public employer, as applicable.

(2) Each employee of the United States Government or of a District of Columbia public employer furloughed as a result of a covered lapse in appropriations shall be paid for the period of the lapse in appropriations, and each excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

(3) During a covered lapse in appropriations, each excepted employee who is required to perform work shall be entitled to use leave under chapter 63 of title 5, or any other applicable law governing the use of leave by the excepted employee, for which compensation shall be paid at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates.

31 U.S.C. § 1342

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Rehearing En Banc and Panel Rehearing complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,829 words according to the word count function of Microsoft Word.

/s/ Julie M. Wilson
Julie M. Wilson
NATIONAL TREASURY EMPLOYEES UNION