Nos. 2021-2255 & 2018-1354

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DONALD MARTIN, JR., PATRICIA A. MANBECK, JEFF ROBERTS, JOSE ROJAS, RANDALL SUMNER,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

2021-2255

Appeal from the United States Court of Federal Claims in No. 1:13-cv-834, Judge Patricia E. Campbell-Smith.

FRANK MARRS, NICOLE ADAMSON, BETHANY AFRAID, JOEL ALBRECHT, JESUS AREVALO, NATHAN ARNOLD, SHAWN ASHWORTH, JEREMIAH AUSTIN, MICHAEL AVENALI, JOSE BALAREZO, EBONY BALDWIN, CHARLES BAMBERY, DAVID BARRAZA, GREGORY BARRETT, DONNA BARRINGER, DAVID BAUTISTA, GARY BAYES, DARRELL BECTON, FRAUN BELLAMY, DARNELL BEMBO, JESSICA BENDER, MICHAEL BENJAMIN, JR., BRYAN BENTLEY, WILLIAM BERTRAND, CHRISTOPHER BIJOU, ALL PLAINTIFFS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

2018-1354

Appeal from the United States Court of Federal Claims in No. 1:16-cv-1297, Judge Patricia E. Campbell-Smith.

CORRECTED NONCONFIDENTIAL PETITION OF APPELLEES IN NO. 2021-2255 AND APPELLANTS IN NO. 2018-1354 FOR REHEARING *EN BANC*

HEIDI R. BURAKIEWICZ
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Washington, DC 20006
(202) 822-5100
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Counsel for *Martin* Appellees

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	2021-2255
Short Case Caption	Martin v. US
Filing Party/Entity	Plaintiffs/Appellees in Martin v. US

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 01/20/2023

Signature: /s/ Heidi R. Burakiewicz

Name: Heidi R. Burakiewicz

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Donald Martin, Jr.		
Patricia Manbeck		
Jeff Roberts		
Jose Rojas		
Randall Sumner		
(See Attachment)		

☑ Additional pages attached

FORM 9. Certificate of Interest **Form 9 (p. 3)**
July 2020

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Steven A. Skalet Mehri & Skalet PLLC		

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☑ Additional pages attached

Avalos v. United States No.2021-119 (Fed. Cir.)	Anello v. United States No.2021-124 (Fed. Cir.)	Jones v. United States No.2021-128 (Fed. Cir.)
Arnold v. United States No.2021-122 (Fed. Cir.)	Richmond v. United States No.2021-125 (Fed. Cir.	Marrs, et al. v. United States No.2018-1354 (Fed. Cir)
Hernandez v. United States No.2021-123 (Fed. Cir.)	Baca v. United States No.2021-127 (Fed. Cir.)	Tarovisky v. United States No.2021-126 (Fed. Cir.)

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

Attachment to Certificate of Interest

1. Represented Entities

In addition to the five named plaintiffs, a list of plaintiffs who have opted-in to this litigation is available at the Court's request.

5. Related Cases

In addition to the cases listed on the Certificate of Interest, the case titles and numbers of additional cases known to be pending in this court of any other court or agency that will directly affect or directly be affected by this court's decision in the pending appeal are:

- Rowe v. United States
  No. 2021-129 (Fed. Cir.)
- D.P. v. United States
  No. 2021-132 (Fed. Cir.)
- Plaintiff No. 1 v. United States
  No. 2021-2019 (Fed. Cir.)
- I.P v. United States
  No. 2021-2020 (Fed. Cir.)
- Abrantes v. United States
  No. 2021-2021 (Fed. Cir.)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2018-1354

Short Case Caption Marrs, et al. v. United States

Filing Party/Entity Appellants in Marrs, et al. v. United States

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 01/20/2023

Signature: /s/ Heidi R. Burakiewicz

Name: Heidi R. Burakiewicz

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
See Attachment	See Attachment	See Attachment

☑ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Mehri & Skalet, PLLC	Steven A. Skalet Mehri & Skalet, PLLC	Michael Lieder Mehri & Skalet, PLLC

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☑ Additional pages attached

Martin v. United States No.2021-2255 (Fed. Cir)	Avalos v. United States No.2021-119 (Fed. Cir.)	Anello v. United States No.2021-124 (Fed. Cir.)
Jones v. United States No.2021-128 (Fed. Cir.)	Arnold v. United States No.2021-122 (Fed. Cir.)	Richmond v. United States No.2021-125 (Fed. Cir.)
Hernandez v. United States No.2021-123 (Fed. Cir.)	Baca v. United States No.2021-127 (Fed. Cir.)	Tarovisky v. United States No.2021-126 (Fed. Cir.)

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

Marrs, et al. v. United States, No. 2018-1354
Attachment to Appellant's Certificate of Interest (redacted names)

	Full Name of Party Represented	Name of Real Party in Interest Represented	Parent Corporations and Publicly Held Companies that Own 10% or More of Stock in the Party
1	Nicole Adamson	Nicole Adamson	Not Applicable
3	Bethany Afraid	Bethany Afraid	Not Applicable
4	Joel Albrecht	Joel Albrecht	Not Applicable
5	Jesus Arevalo	Jesus Arevalo	Not Applicable
6	Nathan Arnold	Nathan Arnold	Not Applicable
7	Shawn Ashworth	Shawn Ashworth	Not Applicable
8	Jeremiah Austin	Jeremiah Austin	Not Applicable
9	Michael Avenali	Michael Avenali	Not Applicable
10	Jose Balarezo	Jose Balarezo	Not Applicable
11	Ebony Baldwin	Ebony Baldwin	Not Applicable
12	Charles Bambery	Charles Bambery	Not Applicable
13	David Barraza	David Barraza	Not Applicable
14	Gregory Barrett	Gregory Barrett	Not Applicable
15	Donna Barringer	Donna Barringer	Not Applicable
16	David Bautista	David Bautista	Not Applicable
17	Gary Bayes	Gary Bayes	Not Applicable
18	Darrell Becton	Darrell Becton	Not Applicable
19	Fraun Bellamy	Fraun Bellamy	Not Applicable
20	Darnell Bembo	Darnell Bembo	Not Applicable
21	Jessica Bender	Jessica Bender	Not Applicable
22	Michael Benjamin Jr.	Michael Benjamin Jr.	Not Applicable
23	Bryan Bentley	Bryan Bentley	Not Applicable
24	William Bertrand	William Bertrand	Not Applicable
25	Christopher Bijou	Christopher Bijou	Not Applicable
26	Roverto Bizaro	Roverto Bizaro	Not Applicable
27	Lawrence Black	Lawrence Black	Not Applicable
28	Bryan Blagrave	Bryan Blagrave	Not Applicable
29	Caroline Bloom	Caroline Bloom	Not Applicable
30	John Bodnovits	John Bodnovits	Not Applicable
31	Brad Boulrice	Brad Boulrice	Not Applicable
32	Rafael Bovino	Rafael Bovino	Not Applicable
33	Cynthia Boyd	Cynthia Boyd	Not Applicable
34	Susan Brantley	Susan Brantley	Not Applicable
35	Gregory Braswell	Gregory Braswell	Not Applicable
36	Angel Britt	Angel Britt	Not Applicable
37	Adeasia Broadway	Adeasia Broadway	Not Applicable
38	Leartic Brooks	Leartic Brooks	Not Applicable
39	Jeremy Brown	Jeremy Brown	Not Applicable
40	Scott Brown	Scott Brown	Not Applicable

Marrs, et al. v. United States, No. 2018-1354
Attachment to Appellant's Certificate of Interest (redacted names)
[Note: redaction of names to protect sensitive security information.]

41	Harold Brown Bull Sr.	Harold Brown Bull Sr.	Not Applicable
42	Wanda Brumfield	Wanda Brumfield	Not Applicable
43	Brian Brummett	Brian Brummett	Not Applicable
44	Bradley Bugger	Bradley Bugger	Not Applicable
45	Joylette Bullock	Joylette Bullock	Not Applicable
46	Marvin Bundy	Marvin Bundy	Not Applicable
47	Jakeia Burgwyn	Jakeia Burgwyn	Not Applicable
48	Rebecca Calhoun	Rebecca Calhoun	Not Applicable
49	Robin Campise	Robin Campise	Not Applicable
50	Janet Cannes	Janet Cannes	Not Applicable
51	Armando Cardenas	Armando Cardenas	Not Applicable
52	Michael Cardew	Michael Cardew	Not Applicable
53	Eric Carll	Eric Carll	Not Applicable
54	Ignacio Carrillo	Ignacio Carrillo	Not Applicable
55	Patricia Carrington	Patricia Carrington	Not Applicable
56	Dustin Cavanaugh	Dustin Cavanaugh	Not Applicable
57	Briant Ceasar	Briant Ceasar	Not Applicable
58	Joe Chaney	Joe Chaney	Not Applicable
59	Katherine Cheese	Katherine Cheese	Not Applicable
60	Mandy Chrestensen	Mandy Chrestensen	Not Applicable
61	Tyrone Civington	Tyrone Civington	Not Applicable
62	James Cobos	James Cobos	Not Applicable
63	Matthew Coffer	Matthew Coffer	Not Applicable
64	Prince Cofie	Prince Cofie	Not Applicable
65	Derek Combs	Derek Combs	Not Applicable
66	Andrew Comer	Andrew Comer	Not Applicable
67	Jodi Conway	Jodi Conway	Not Applicable
68	Daniel Coombe	Daniel Coombe	Not Applicable
69	Wardell Cousins	Wardell Cousins	Not Applicable
70	Sherry Cox	Sherry Cox	Not Applicable
71	Linda Creasia	Linda Creasia	Not Applicable
72	Adam Creveling	Adam Creveling	Not Applicable
73	Joshua Criswell	Joshua Criswell	Not Applicable
74	Chris Croteau	Chris Croteau	Not Applicable
75	Tiwanna Cuffee	Tiwanna Cuffee	Not Applicable
76	Jack Custer	Jack Custer	Not Applicable
77	Cornelius Daniel	Cornelius Daniel	Not Applicable
78	Herman Davis	Herman Davis	Not Applicable
79	Venyette Davis	Venyette Davis	Not Applicable
80	Matthew Dean	Matthew Dean	Not Applicable
81	Claudia DeLaTorre	Claudia DeLaTorre	Not Applicable
82	Jason Delay	Jason Delay	Not Applicable
83	Fernando Diego	Fernando Diego	Not Applicable
84	John Doe 1226	John Doe 1226	Not Applicable

Marrs, et al. v. United States, No. 2018-1354
Attachment to Appellant's Certificate of Interest (redacted names)
[Note: redaction of names to protect sensitive security information.]

85	John Doe 1227	John Doe 1227	Not Applicable
86	John Doe 1228	John Doe 1228	Not Applicable
87	John Doe 1229	John Doe 1229	Not Applicable
88	John Doe 1230	John Doe 1230	Not Applicable
89	John Doe 1231	John Doe 1231	Not Applicable
90	John Doe 1232	John Doe 1232	Not Applicable
91	John Doe 1233	John Doe 1233	Not Applicable
92	John Doe 1234	John Doe 1234	Not Applicable
93	John Doe 1235	John Doe 1235	Not Applicable
94	John Doe 1236	John Doe 1236	Not Applicable
95	John Doe 1237	John Doe 1237	Not Applicable
96	John Doe 1238	John Doe 1238	Not Applicable
97	John Doe 1239	John Doe 1239	Not Applicable
98	John Doe 1240	John Doe 1240	Not Applicable
99	John Doe 1241	John Doe 1241	Not Applicable
100	John Doe 1242	John Doe 1242	Not Applicable
101	John Doe 1243	John Doe 1243	Not Applicable
102	John Doe 1244	John Doe 1244	Not Applicable
103	John Doe 1245	John Doe 1245	Not Applicable
104	Robert Donahue	Robert Donahue	Not Applicable
105	Dustin Dubroc	Dustin Dubroc	Not Applicable
106	Christopher Ducote	Christopher Ducote	Not Applicable
107	Lonnie Dupre	Lonnie Dupre	Not Applicable
108	Michael Duran	Michael Duran	Not Applicable
109	James Durant	James Durant	Not Applicable
110	Gerardo Durazo	Gerardo Durazo	Not Applicable
111	Joseph Eck	Joseph Eck	Not Applicable
112	Kerry Edwards	Kerry Edwards	Not Applicable
113	Heather Eggink	Heather Eggink	Not Applicable
114	Jace Elliott	Jace Elliott	Not Applicable
115	Thomas Elsarelli	Thomas Elsarelli	Not Applicable
116	Katrina English	Katrina English	Not Applicable
117	Kristofor Erickson	Kristofor Erickson	Not Applicable
118	Douglas Eroh Jr.	Douglas Eroh Jr.	Not Applicable
119	Raul Espinoza	Raul Espinoza	Not Applicable
120	Sharon Evans	Sharon Evans	Not Applicable
121	Lonnie Faircloth	Lonnie Faircloth	Not Applicable
122	Sandra Fales	Sandra Fales	Not Applicable
123	Timothy Finney	Timothy Finney	Not Applicable
124	Agustin Flores	Agustin Flores	Not Applicable
125	Janie Flores-Aliani	Janie Flores-Aliani	Not Applicable
126	Tera Foster	Tera Foster	Not Applicable
127	David Freshour	David Freshour	Not Applicable
128	Gregory Fritzler	Gregory Fritzler	Not Applicable

Marrs, et al. v. United States, No. 2018-1354
Attachment to Appellant's Certificate of Interest (redacted names)

129	Jason Gaddis	Jason Gaddis	Not Applicable
130	Lawrence Gallina	Lawrence Gallina	Not Applicable
131	Lessie Gant	Lessie Gant	Not Applicable
132	Misael Garcia	Misael Garcia	Not Applicable
133	Brad Gates	Brad Gates	Not Applicable
134	Susan Gill	Susan Gill	Not Applicable
135	Shannon Glaze	Shannon Glaze	Not Applicable
136	Raul Gonzalez	Raul Gonzalez	Not Applicable
137	David Gonzalez-Pena	David Gonzalez-Pena	Not Applicable
138	Adam Good	Adam Good	Not Applicable
139	Christopher Goodwin	Christopher Goodwin	Not Applicable
140	Ronald Green	Ronald Green	Not Applicable
141	Rikki Grenot	Rikki Grenot	Not Applicable
142	Rene Guerra	Rene Guerra	Not Applicable
143	Sean Haltom	Sean Haltom	Not Applicable
144	Shayla Hamlin	Shayla Hamlin	Not Applicable
145	Delshon Harding	Delshon Harding	Not Applicable
146	Willema Hardy	Willema Hardy	Not Applicable
147	Andrea Harris	Andrea Harris	Not Applicable
148	Arthur Harris	Arthur Harris	Not Applicable
149	Melissa Harris-Arnold	Melissa Harris-Arnold	Not Applicable
150	Pamela Harvey	Pamela Harvey	Not Applicable
151	Norman Heffle II	Norman Heffle II	Not Applicable
152	Drew Heintzelman	Drew Heintzelman	Not Applicable
153	Daniel Henderson	Daniel Henderson	Not Applicable
154	Jason Henderson	Jason Henderson	Not Applicable
155	Donald Hendricks	Donald Hendricks	Not Applicable
156	Jacquetta Henry	Jacquetta Henry	Not Applicable
157	Charles Hernandez	Charles Hernandez	Not Applicable
158	Richard Hernandez	Richard Hernandez	Not Applicable
159	William Herndon	William Herndon	Not Applicable
160	Michael Herrera	Michael Herrera	Not Applicable
161	Seth Hicks	Seth Hicks	Not Applicable
162	Diana Hodge	Diana Hodge	Not Applicable
163	Stephanie Hoffa	Stephanie Hoffa	Not Applicable
164	Jonathan Hoffman	Jonathan Hoffman	Not Applicable
165	Samuel Howard	Samuel Howard	Not Applicable
166	Corey Hughes	Corey Hughes	Not Applicable
167	Diana Huston	Diana Huston	Not Applicable
168	Leonora Hutchison	Leonora Hutchison	Not Applicable
169	Beatrice Ibarra-Cruz	Beatrice Ibarra-Cruz	Not Applicable
170	Keith Jackson	Keith Jackson	Not Applicable
171	Matthew Jacobeno	Matthew Jacobeno	Not Applicable
172	Jordana Jakubovic	Jordana Jakubovic	Not Applicable

Marrs, et al. v. United States, No. 2018-1354
Attachment to Appellant's Certificate of Interest (redacted names)

173	Brian James	Brian James	Not Applicable
174	Catherine Jefferson-McCoy	Catherine Jefferson-McCoy	Not Applicable
175	Ivy Jenkins-Cardew	Ivy Jenkins-Cardew	Not Applicable
176	Donald Johnson	Donald Johnson	Not Applicable
177	Duane Johnson	Duane Johnson	Not Applicable
178	LaShowen Johnson	LaShowen Johnson	Not Applicable
179	Renita Johnson	Renita Johnson	Not Applicable
180	Terry johnson	Terry johnson	Not Applicable
181	Felicia Jones	Felicia Jones	Not Applicable
182	Joe Jones	Joe Jones	Not Applicable
183	Monica Jones	Monica Jones	Not Applicable
184	Tracy Jones	Tracy Jones	Not Applicable
185	James Keller	James Keller	Not Applicable
186	Jerry Key	Jerry Key	Not Applicable
187	Karen Kilgore	Karen Kilgore	Not Applicable
188	John Kinniell	John Kinniell	Not Applicable
189	Jeremy Klaus	Jeremy Klaus	Not Applicable
190	Kevin Knowles	Kevin Knowles	Not Applicable
191	Virgilena Komahcheet	Virgilena Komahcheet	Not Applicable
192	Luz Kraft	Luz Kraft	Not Applicable
193	Ricardo Kuybus Jr.	Ricardo Kuybus Jr.	Not Applicable
194	Gregory Labao	Gregory Labao	Not Applicable
195	Francis Lackie	Francis Lackie	Not Applicable
196	Jay LaFargue	Jay LaFargue	Not Applicable
197	Flavio Landeros	Flavio Landeros	Not Applicable
198	Kenneth Lane	Kenneth Lane	Not Applicable
199	Michael Langley	Michael Langley	Not Applicable
200	Johnny Latham	Johnny Latham	Not Applicable
201	Austin Leckie	Austin Leckie	Not Applicable
202	Roosevelt Lewis	Roosevelt Lewis	Not Applicable
203	Robin Lewis Jr.	Robin Lewis Jr.	Not Applicable
204	Victor Logan Jr.	Victor Logan Jr.	Not Applicable
205	Mark Long	Mark Long	Not Applicable
206	Regina Lopez	Regina Lopez	Not Applicable
207	Noel Lorenzo	Noel Lorenzo	Not Applicable
208	Josue Lugo	Josue Lugo	Not Applicable
209	Delbert Mack	Delbert Mack	Not Applicable
210	Justin Maglaya	Justin Maglaya	Not Applicable
211	Gregory Maring	Gregory Maring	Not Applicable
212	Frank Marrs	Frank Marrs	Not Applicable
213	Britney McClain	Britney McClain	Not Applicable
214	Clarence McClure	Clarence McClure	Not Applicable
215	Pamela McEwen	Pamela McEwen	Not Applicable
216	Arron McGee	Arron McGee	Not Applicable

Marrs, et al. v. United States, No. 2018-1354
Attachment to Appellant's Certificate of Interest (redacted names)

217	Christopher McGee	Christopher McGee	Not Applicable
218	Kurt McGhee	Kurt McGhee	Not Applicable
219	Lydia McGill	Lydia McGill	Not Applicable
220	Ronald McGraw	Ronald McGraw	Not Applicable
221	David McKee	David McKee	Not Applicable
222	Ann McLaughlin	Ann McLaughlin	Not Applicable
223	Donna McRae	Donna McRae	Not Applicable
224	Melissa Mekeel	Melissa Mekeel	Not Applicable
225	Rainier Mendoza	Rainier Mendoza	Not Applicable
226	Loren Mengarelli	Loren Mengarelli	Not Applicable
227	Daren Mensch	Daren Mensch	Not Applicable
228	Brian Miitterling	Brian Miitterling	Not Applicable
229	Nicholas Miles	Nicholas Miles	Not Applicable
230	Grayson Moffett	Grayson Moffett	Not Applicable
231	Brett Molek	Brett Molek	Not Applicable
232	Thomas Moore	Thomas Moore	Not Applicable
233	Peter Morales	Peter Morales	Not Applicable
234	Letitia Morgan	Letitia Morgan	Not Applicable
235	Shawn Morrison	Shawn Morrison	Not Applicable
236	Ronny Morton	Ronny Morton	Not Applicable
237	John Motley	John Motley	Not Applicable
238	Joshua Moyer	Joshua Moyer	Not Applicable
239	Dylan Mroszczyk-McDon	Dylan Mroszczyk-McDon	Not Applicable
240	Michael Mudry	Michael Mudry	Not Applicable
241	Tyrant Murray	Tyrant Murray	Not Applicable
242	Joseph Nalevaiko	Joseph Nalevaiko	Not Applicable
243	Juan Nunez	Juan Nunez	Not Applicable
244	Linda Nutter	Linda Nutter	Not Applicable
245	Matthew Ogden	Matthew Ogden	Not Applicable
246	Dierdra Oretade-Branch	Dierdra Oretade-Branch	Not Applicable
247	Chris Orr	Chris Orr	Not Applicable
248	Reynaldo Osorio	Reynaldo Osorio	Not Applicable
249	Rosemary Oster	Rosemary Oster	Not Applicable
250	Brian Owens	Brian Owens	Not Applicable
251	Rachael Owens	Rachael Owens	Not Applicable
252	Andres Padilla	Andres Padilla	Not Applicable
253	Joshua Parker	Joshua Parker	Not Applicable
254	Jaime Pedroza	Jaime Pedroza	Not Applicable
255	Teri Perkinson	Teri Perkinson	Not Applicable
256	Demetrious Perry	Demetrious Perry	Not Applicable
257	James Peterson	James Peterson	Not Applicable
258	Malcom Pettit	Malcom Pettit	Not Applicable
259	Christopher Pierce	Christopher Pierce	Not Applicable

Marrs, et al. v. United States, No. 2018-1354
Attachment to Appellant's Certificate of Interest (redacted names)

260	Aaron Pohl	Aaron Pohl	Not Applicable
261	Harry Porter	Harry Porter	Not Applicable
262	Jamie Portzline	Jamie Portzline	Not Applicable
263	Ana Ramos	Ana Ramos	Not Applicable
264	Luis Ramos	Luis Ramos	Not Applicable
265	Lara Raymond	Lara Raymond	Not Applicable
266	Serita Reed	Serita Reed	Not Applicable
267	Steve Reid	Steve Reid	Not Applicable
268	Delwin Reyes	Delwin Reyes	Not Applicable
269	Johnny Reyes	Johnny Reyes	Not Applicable
270	Marty Richter	Marty Richter	Not Applicable
271	Laurie Ridgley	Laurie Ridgley	Not Applicable
272	Lee Riehle	Lee Riehle	Not Applicable
273	Daniel Rivera	Daniel Rivera	Not Applicable
274	Tamara Rn	Tamara Rn	Not Applicable
275	Douglas Roberts	Douglas Roberts	Not Applicable
276	Ellen Roberts	Ellen Roberts	Not Applicable
277	Sherrie roberts	Sherrie roberts	Not Applicable
278	James Robertson	James Robertson	Not Applicable
279	Johnathon Robinson	Johnathon Robinson	Not Applicable
280	Christina Rodriguez	Christina Rodriguez	Not Applicable
281	Kasi Romano	Kasi Romano	Not Applicable
282	Donald Ross	Donald Ross	Not Applicable
283	Sean Ross	Sean Ross	Not Applicable
284	Todd Rowe	Todd Rowe	Not Applicable
285	Victor Rubinacci	Victor Rubinacci	Not Applicable
286	Jorge Salazar	Jorge Salazar	Not Applicable
287	Eleazar Saldana	Eleazar Saldana	Not Applicable
288	Linda Sanders	Linda Sanders	Not Applicable
289	Thomas Sands II	Thomas Sands II	Not Applicable
290	Diana Santiago	Diana Santiago	Not Applicable
291	Roberto Saucedo Jr.	Roberto Saucedo Jr.	Not Applicable
292	Joseph Savone	Joseph Savone	Not Applicable
293	Todd Scheid	Todd Scheid	Not Applicable
294	Jil Scheurer	Jil Scheurer	Not Applicable
295	Amy Schoonover	Amy Schoonover	Not Applicable
296	Karen Scott	Karen Scott	Not Applicable
297	Hector Seccia	Hector Seccia	Not Applicable
298	Delise Shearer	Delise Shearer	Not Applicable
299	Takara Shelton	Takara Shelton	Not Applicable
300	Justen Shomo	Justen Shomo	Not Applicable
301	Arturo Simental	Arturo Simental	Not Applicable
302	Erica Simmons	Erica Simmons	Not Applicable
303	Richard Simon	Richard Simon	Not Applicable

Marrs, et al. v. United States, No. 2018-1354
Attachment to Appellant's Certificate of Interest (redacted names)

304	Casey Smith	Casey Smith	Not Applicable
305	Darrell Smith	Darrell Smith	Not Applicable
306	Todd Smith	Todd Smith	Not Applicable
307	Robert Solomon	Robert Solomon	Not Applicable
308	Adrienne Stevenson	Adrienne Stevenson	Not Applicable
309	Susan Stipe	Susan Stipe	Not Applicable
310	Jamari Surney	Jamari Surney	Not Applicable
311	Anthony Sutherland	Anthony Sutherland	Not Applicable
312	Robert Swanson Sr.	Robert Swanson Sr.	Not Applicable
313	Dion Tanguma	Dion Tanguma	Not Applicable
314	Justin Tarovisky	Justin Tarovisky	Not Applicable
315	Lila Thompson	Lila Thompson	Not Applicable
316	John Thornton	John Thornton	Not Applicable
317	Douglas Thurston	Douglas Thurston	Not Applicable
318	Choya Todman	Choya Todman	Not Applicable
319	Zamir Toruno-Davila	Zamir Toruno-Davila	Not Applicable
320	Demetrius Tossie	Demetrius Tossie	Not Applicable
321	Steven Toth	Steven Toth	Not Applicable
322	Terri Tryfon	Terri Tryfon	Not Applicable
323	Dennis Tubbs	Dennis Tubbs	Not Applicable
324	Arthur Valdez III	Arthur Valdez III	Not Applicable
325	Agueda Valencia	Agueda Valencia	Not Applicable
326	Gilberto Valencia	Gilberto Valencia	Not Applicable
327	Shanchevia Vance	Shanchevia Vance	Not Applicable
328	Kashonda Vanduyne	Kashonda Vanduyne	Not Applicable
329	Carmen Vasquez	Carmen Vasquez	Not Applicable
330	Charles Viggato	Charles Viggato	Not Applicable
331	Joshua Vogel	Joshua Vogel	Not Applicable
332	Josh Wagner	Josh Wagner	Not Applicable
333	Alan Warsaw	Alan Warsaw	Not Applicable
334	Randall Washington	Randall Washington	Not Applicable
335	Tammy Watkins	Tammy Watkins	Not Applicable
336	Phillip Watson	Phillip Watson	Not Applicable
337	Bernice Watts	Bernice Watts	Not Applicable
338	Mark Wendt	Mark Wendt	Not Applicable
339	Richard Wentz	Richard Wentz	Not Applicable
340	Jason Wilkinson	Jason Wilkinson	Not Applicable
341	Cecil Willey	Cecil Willey	Not Applicable
342	Danny Williams	Danny Williams	Not Applicable
343	Jason Williams	Jason Williams	Not Applicable
344	Michael Williams	Michael Williams	Not Applicable
345	Sean Wilson	Sean Wilson	Not Applicable
346	Teresa Wilson	Teresa Wilson	Not Applicable
347	Andrea Wilson (Davis)	Andrea Wilson (Davis)	Not Applicable

348	Richard Wilson III	Richard Wilson III	Not Applicable
349	Bonnie Wise	Bonnie Wise	Not Applicable
350	Jeffrey Wojcik	Jeffrey Wojcik	Not Applicable
351	Angela Wright	Angela Wright	Not Applicable
352	Rosemary Yniquez	Rosemary Yniquez	Not Applicable
353	Ryan Zito	Ryan Zito	Not Applicable

5. Related Cases

In addition to the cases listed on the Certificate of Interest, the case titles and numbers of additional cases known to be pending in this court of any other court or agency that will directly affect or directly be affected by this court's decision in the pending appeal are:

- Rowe v. United States
  No. 2021-129 (Fed. Cir.)
- D.P. v. United States
  No. 2021-132 (Fed. Cir.)
- Plaintiff No. 1 v. United States
  No. 2021-2019 (Fed. Cir.)
- I.P v. United States
  No. 2021-2020 (Fed. Cir.)
- Abrantes v. United States
  No. 2021-2021 (Fed. Cir.)

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CONFIDENTIAL MATERIAL OMITTED

The material omitted on pages 2 and 3 of the attachment to the *Marrs et al. v. United States*, No. 2018-1354 Certificate of Interest includes sensitive security information regarding the identities of Federal Air Marshals. In the Nonconfidential version of this filing, these names appear as "John Doe" in the attachment to the Certificate of Interest.

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the decisions of the Supreme Court of the United States or the precedent(s) of this court identified in the petition for rehearing en banc filed in the 13 consolidated cases arising out of the 2018-19 government shutdown ("*Avalos* Petition").

Based on my professional judgment, I believe this appeal requires an answer to the precedent-setting questions of exceptional importance identified in the *Avalos* Petition and that the answer given by the panel majority was incorrect for reasons set out in the *Avalos* Petition and for two additional reasons set out below.

ARGUMENT

Petitioners in these two cases (together "*Martin*") adopt all the arguments in the petition for rehearing *en banc* filed this day in the thirteen cases headed by *Avalos v. United States*, No. 2021-2008, 2022 U.S. App. LEXIS 32991 (Fed. Cir. Nov. 30, 2022) ("*Avalos*"). Those arguments apply equally here. The *en banc* court should rehear the cases for two additional reasons because the panel majority: (1) wrongly relied in *Martin* on an amendment to the Anti-Deficiency Act (the "ADA Amendment") adopted over five years after the events giving rise to Martin Petitioners' claims and (2) wrongly ignored the Department of Labor's interpretation of the FLSA. In *Martin*, Petitioners claim that the Government violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*., during the 2013 partial Government shutdown. The *Avalos* petitioners claim that the Government violated the FLSA during the 2018-19 partial Government shutdown. In a 2-1 decision with a strong dissent from Judge Reyna, the panel majority laid out its legal analysis in *Avalos* and simply held in *Martin* that "[t]his holding applies equally to the *Martin* appeal, which involves substantially identical circumstances to *Avalos*." *Martin v. United States*, Nos. 2021-2255, 2018-1354, 2022 U.S. App. LEXIS 32996, at *5 (Fed. Cir. Nov. 30, 2022). The circumstances in *Martin*, however, were not identical to those in *Avalos* and give rise to two additional reasons for rehearing.

I. The Panel Majority Wrongly Relied in *Martin* on an Amendment to the Anti-Deficiency Act Adopted During the 2018-19 Shutdown, Five Years *After* the 2013 Shutdown.

The panel majority focuses on the ADA Amendment to resolve what it calls "[t]he central question in this appeal," namely, "how the Anti-Deficiency Act's [("ADA"), 31 U.S.C. § 1341 *et seq.*] prohibition on government spending during a partial shutdown coexists with the FLSA's seemingly contradictory timely payment obligation." *Avalos* at *11. The ADA Amendment provides that "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." *Id.* at *10 (quoting 31 U.S.C. § 1341(c)(2)); *see also, e.g., id.* at *21 (concluding that "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."). According to the majority, Congress "expressly addresses" in the ADA Amendment when payment is due under the FLSA "following a lapse in appropriations: 'the earliest date possible after the lapse in appropriations ends.'" *Id.* at *18-19 (quoting 31 U.S.C. § 1341(c)(2)). The panel majority erred in its use of the ADA Amendment in *Avalos*, but even if its analysis in *Avalos* were correct, the ADA Amendment cannot have affected the Government's obligations pursuant to the FLSA in *Martin.* The shutdown giving

rise to *Martin* occurred in 2013, while the ADA Amendment ***was adopted on January 16, 2019***.[1]

Courts presume that statutes apply only prospectively, *see, e.g., Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265-80 (1994); *Rivers v. Roadway Express,* 511 U.S. 298, 311 (1994), absent "clear evidence" of contrary congressional intent. *Landgraf*, 511 U.S. at 286. In this case, no evidence suggests that Congress intended the ADA Amendment to apply retroactively. To the contrary, the presumption of prospective-only application is especially strong here. The Court of Federal Claims had awarded liquidated damages in *Martin* two years before Congress adopted the ADA Amendment in 2019 in the midst of the 2018-19 shutdown. Here, neither the text nor the legislative history of the ADA Amendment indicates an intent to overrule *Martin.* If the Congressional silence gives rise to any inference, it should be that Congress agreed with the *Martin* decision.

The prospective-only presumption leads in a second way to the conclusion that the panel majority was wrong in *Martin*. In 2013, the Government must have violated the FLSA by not paying minimum and overtime wages on excepted employees' regularly scheduled paydays. If the law instead allowed the Government

[1] The panel majority's focus on the ADA Amendment also undermines its argument that the FLSA was the later-adopted statute and that the FLSA's silence about the ADA suggests that Congress must have meant the ADA to control when "Congress has not appropriated funds." *Avalos* at *16. The ADA Amendment is the later adopted relevant statute.

in 2013 to pay minimum and overtime wages at the earliest date possible after a lapse in appropriations ends," *Avalos* at *21, then there would have been no need in 2019 to pass a law that, according to the panel majority, "expressly addressed" when payment was due – "at the earliest date possible after a lapse in appropriations ends." Courts strive to avoid constructions that render statutes meaningless surplusage. *E.g., Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1951 (2022).

Without the prop of the ADA Amendment, the panel majority's remaining arguments that "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" fall apart. But even if the majority were correct in *Avalos*, it erred in applying that ruling in *Martin*. The Court should rehear and ultimately alter the majority's decision in *Martin*.

II. The Panel Majority Wrongly Ignored the Department of Labor's Interpretation of the FLSA to State and Local Governments Experiencing Shutdowns Even Though the Same Interpretation Should Apply to the Federal Government.

The United States Department of Labor ("DOL"), the federal agency charged with enforcing the FLSA with respect to all persons and entities other than the federal government and its employees, has consistently interpreted the statute as requiring state and local governments experiencing budget impasses to pay minimum and overtime wages on employees' regularly scheduled paydays even though state laws prohibit those payments until moneys have been appropriated.

This history was part of the stipulated record in *Martin.* Congress subjected state and local governments to the FLSA in the same law that subjected the federal government to the FLSA. The majority was required to accord the DOL's interpretation deference. Instead, the majority ignored it.

Congress amended the FLSA in 1974 to "remove the language excluding the United States" from its scope. *Avalos* at *11; *see* Pub. L. 93–259, §§ 6(a), 13(e), Apr. 8, 1974, 88 Stat. 58, 64 (the "FLSA Amendment"). Through the same amendment, Congress extended the FLSA to state and local governments. Although the descriptions of the federal employees and the state and local employees brought under the Act's protections differ, 29 U.S.C. § 203(d), (e), neither the FLSA Amendment nor any subsequent legislation differentiates the protections afforded to covered federal public servants in any way from those extended to covered state and local employees.

California required employees to work during budget impasses in 1990 and 1992 even though it could not pay them under the state Constitution and statutes until the impasses ended. *See Biggs v. Wilson,* 1 F.3d 1537, 1538 (9th Cir. 1993); *Caldman v. California*, 852 F. Supp. 898, 902 (E.D. Cal. 1994). Employees sued under the FLSA because they received the required pay only after the impasses ended, which was after their paydays. In *Biggs*, the Ninth Circuit ruled that California had violated the FLSA during the 1990 impasse, holding that "the FLSA

is violated unless the minimum wage is paid on the employee's regular payday." 1 F.3d at 1541. The next year, the district court in *Caldman* imposed liquidated damages on California for a different group of employees injured in the 1992 impasse. The *Caldman* court rejected the State's argument that its need to comply with the State Constitution precluded liquidated damages. Instead, the court adopted the reasoning of the *Biggs* district court, which was unpersuaded by California's contentions that the FLSA was improperly interfering with the "state's own internal operations, including matters of budgeting and personnel administration." 852 F. Supp. at 902 (citing *Biggs v. Wilson*, 828 F. Supp. 774, 778 (E.D. Cal. 1991)).

Since 1998, four years after the ruling in *Caldman*, the DOL has followed the reasoning of *Biggs* and *Caldman*. It has manifested this reasoning through: an opinion letter issued in 1998, No. 21-2255, Appx251-52; a series of communications with representatives of the State of Pennsylvania in 2007 and 2009 as that State, like California before it, experienced budget impasses and was prevented by State law from paying the wages of employees until the impasses were resolved, No. 21-2255, Appx.191, 215, 274-75; and finally a publicly available document issued in late 2009 entitled, "Fact Sheet 70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues," No. 21-2255, Appx.289-92. The Government stipulated in *Martin* that the DOL's interpretation of the FLSA includes:

a. The failure to pay employees of State government required minimum wage and overtime premiums when due – *i.e.*, on the regularly scheduled payday for the work performed – constitutes a violation of the FLSA;

b. The prompt payment requirement applies to State governments during a budget impasse, whether or not there is a provision of state law that limits expending non-appropriated funds; any such provision provides no defense to this requirement; and

c. Employees may recover liquidated damages pursuant to 29 U.S.C. §§ 216(b) and 260 as a result of a state or local government's failure to pay them minimum wages and overtime wages for work performed during a pay period on their regularly scheduled payday for that period.

No. 21-2255, Appx.191.[2]

Thus, the panel majority can be correct only if the DOL is wrong in its interpretation of the FLSA or if the FLSA means something different when applied to the federal government than to a state government. In evaluating the correctness of the DOL's position, the panel majority first should have decided whether *Skidmore* deference applied. *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (holding

[2] While the DOL is not responsible for administering the FLSA with respect to the federal government, its interpretation should have the same weight as if it did. In the same 1974 amendment that extended the FLSA to both the federal government and state and local governments, Congress directed the Office of Personnel Management, which administers the FLSA with respect to federal employees, 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, *quoted in Avalos* at *15 n.1.

that agency interpretations not adopted through the rulemaking process are subject to deference to the extent they have the "power to persuade" based on factors such as "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."). As this Court has explained, "we believe the Supreme Court intends for us to defer to an agency interpretation of the statute that it administers if the agency has conducted a careful analysis of the statutory issue, if the agency's position has been consistent and reflects agency-wide policy, and if the agency's position constitutes a reasonable conclusion as to the proper construction of the statute, even if we might not have adopted that construction without the benefit of the agency's analysis." *Cathedral Candle Co. v. Int'l Trade Comm'n*, 400 F.3d 1352, 1366 (Fed. Cir. 2005). The majority never considered whether it should defer to the DOL's interpretation of the FLSA.

The DOL's interpretation was entitled to deference in this case. The agency has been consistent in its interpretation, the interpretation is consistent with the rulings in *Biggs* and *Caldman*, the agency has engaged in a thorough analysis as shown in the documents, and the interpretation is reasonable.

Thus, the panel majority's interpretation of the FLSA is incorrect unless state governments violate the FLSA by not paying minimum and overtime wages during budget impasses while the federal government did not violate the FLSA in 2013

under similar circumstances. But a conclusion that the FLSA in 2013 had a different meaning as to the federal government than as to state and local governments would violate basic rules of statutory construction. As stated above, the language of the FLSA, including the FLSA Amendment, does not differentiate between federal and state employees in protections afforded. The laws of States such as California and Pennsylvania prohibited expenditures, including payments to employees, until money had been appropriated, just as does federal law. The governments' own internal conflicts, not some type of circumstance outside their control, created the inability to pay employees, regardless of whether the government was federal or state.[3] Courts reject interpretations that give statutory language one meaning for one entity or situation and a different meaning for another entity or situation. *See Bank of Am., N.A. v. Caulkett*, 575 U.S. 790, 796 (2015) (refusing to give "the term 'secured claim' … a different definition depending on the value of the collateral" because "[w]e are generally reluctant to give the 'same words a different meaning'

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[3] While appropriations laws are irrelevant to whether the Government's statutory obligations are satisfied, events in 2013 highlight the self-created nature of the budget impasse applicable to *Martin*. During the three days before the shutdown, Congress considered and passed and the President signed the Pay Our Military Act ("POMA"), H.R. 3210. H.R. 3210, Pay Our Military Act, available at https://www.congress.gov/bill/113th-congress/house-bill/3210. POMA appropriated funds to pay members of the military, nearly all civilian Defense Department employees, and even employees of civilian contractors who supported the military. *Id*. The Government failed, however, to provide funds to pay the *Martin* Petitioners.

when construing statutes") (quoting *Pasquantino v. United States*, 544 U.S. 349, 358 (2005)); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708-09 (2014) ("no conceivable definition of the term [person] includes natural persons and nonprofit corporations, but not for-profit corporations,"; "[t]o give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one") (quoting *Clark v. Martinez*, 543 U.S. 371, 378 (2005)).

The superiority of federal laws cannot justify violating this rule of statutory construction. Federal superiority can explain why the FLSA overrides state prohibitions on payments to employees forced to work during shutdowns but not how the same statutory words can require payment on regular paydays by states but not the federal government during a lapse in appropriations.

CONCLUSION

In order to correct the significant errors discussed above and for the reasons stated in the *Avalos* Petition, the Court should grant rehearing *en banc.*

Dated: January 20, 2023 Respectfully Submitted,

/s/ Heidi R. Burakiewicz

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ADDENDUM

United States Court of Appeals for the Federal Circuit

DONALD MARTIN, JR., PATRICIA A. MANBECK, JEFF ROBERTS, JOSE ROJAS, RANDALL SUMNER,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2255

Appeal from the United States Court of Federal Claims in No. 1:13-cv-00834-PEC, Judge Patricia E. Campbell-Smith.

FRANK MARRS, NICOLE ADAMSON, BETHANY AFRAID, JOEL ALBRECHT, JESUS AREVALO, NATHAN ARNOLD, SHAWN ASHWORTH, JEREMIAH AUSTIN, MICHAEL AVENALI, JOSE BALAREZO, EBONY BALDWIN, CHARLES BAMBERY, DAVID BARRAZA, GREGORY BARRETT, DONNA BARRINGER, DAVID BAUTISTA, GARY BAYES, DARRELL BECTON, FRAUN BELLAMY, DARNELL BEMBO, JESSICA BENDER, MICHAEL BENJAMIN, JR., BRYAN BENTLEY, WILLIAM BERTRAND, CHRISTOPHER BIJOU, ALL PLAINTIFFS,

Plaintiffs-Appellants

v.

UNITED STATES,
Defendant -Appellee

2018-1354

Appeal from the United States Court of Federal Claims in No. 1:16-cv-01297-PEC, Judge Patricia E. Campbell-Smith.

Decided: November 30, 2022

HEIDI R. BURAKIEWICZ, Kalijarvi, Chuzi, Newman & Fitch, PC, Washington, DC, argued for all plaintffs-appellants, plaintiffs-appellees. Patricia A. Manbeck, Donald Martin, Jr., Jeff Roberts, Jose Rojas, Randall Sumner also represented by DONALD ROBERT DEPRIEST; MICHAEL LIEDER, Mehri & Skalet, PLLC, Washington, DC.

MARK B. STERN, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellant, defendant-appellee. Also represented by BRIAN M. BOYNTON, SEAN JANDA, MICHAEL SHIH.

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*.

The *Martin* appeal asks 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 it does, even though the Anti-Deficiency Act legally bars the government from making payments during the shutdown. Because we hold today in *Avalos v. United States*, No. 21-2008 (Fed. Cir. Nov. 30, 2022) that the government does not violate the FLSA's timely payment obligation as a matter of law under these circumstances, we reverse.

The *Marrs* appeal involves an additional issue about whether the government willfully violated the FLSA, thereby extending the FLSA's statute-of-limitations period to three years. Because we conclude that the government did not violate the FLSA, we need not reach the trial court's statute-of-limitations determination in *Marrs*.

I

The facts and procedural history of this appeal largely mirror those laid out in our opinion issued today in *Avalos*. In *Avalos*, federal employees who worked during the 2018–2019 partial government shutdown alleged that the government violated the Fair Labor Standards Act (FLSA) by delaying payments until after the lapse in appropriations ended. This appeal concerns a similar shutdown that occurred from October 1, 2013 to October 16, 2013.

In its summary-judgment ruling in *Martin*, the Court of Federal Claims determined that Plaintiffs-Appellees had stated a claim for an FLSA violation by alleging that the government had not compensated government employees during the shutdown. *Martin v. United States*, 130 Fed. Cl. 578, 583 (2017). Even though the Anti-Deficiency Act prohibited the government from paying these employees during the shutdown, the Court of Federal Claims reasoned that "the appropriate way to reconcile the two statutes is not to cancel [the government's] obligation to pay its

employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that [the government] demonstrate[s] a good faith belief, based on reasonable grounds, that its actions were appropriate." *Id.* at 584. If the government were to demonstrate a good faith belief based on reasonable grounds, the trial court could exercise its discretion under 29 U.S.C. § 260 to award no liquidated damages. *Id.* But after hearing argument on this issue, the Court of Federal Claims determined that the government had not demonstrated a good faith belief based on reasonable grounds and concluded that the *Martin* "plaintiffs are entitled to liquidated damages in an amount equal to the minimum and overtime wages that defendant failed to timely pay." *Id.* at 587–88 (citing 29 U.S.C. § 216(b)).

Because the court's liability determination in *Martin* applied to *Marrs*, the parties in *Marrs* stipulated that the only remaining issue to resolve was "whether the FLSA's two or three year statute of limitations applies to [the *Marrs*] plaintiffs." *Marrs v. United States*, No. 16-1297C (Fed. Cl. Mar. 17, 2017), ECF No. 13, at 1. The court ruled that the FLSA's two-year statute of limitations applied because the plaintiffs could not meet their burden to show willfulness and extend the statute of limitations period to three years. *Marrs v. United States*, 135 Fed. Cl. 155, 162 (2017). Because the *Marrs* plaintiffs filed suit more than two years after their claims accrued, the court concluded that the *Marrs* plaintiffs' claims are barred by the statute of limitations and thus dismissed the case for lack of subject matter jurisdiction. *Id.*

The government appeals the court's decision in *Martin*, and the *Marrs* plaintiffs appeal the court's decision in *Marrs*. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

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).

III

The government appeals the Court of Federal Claims' decision in *Martin v. United States*, 130 Fed. Cl. 578 (2017), finding the government liable for liquidated damages under the FLSA. Our opinion today in *Avalos v. United States*, No. 21-2008 (Fed. Cir. Nov. 30, 2022), resolves the same question raised in the *Martin* appeal: how the Anti-Deficiency Act's prohibition on government spending during a partial shutdown coexists with the FLSA's seemingly contradictory timely payment obligation. We hold in *Avalos* 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." *Avalos*, No. 21-2008, slip op. 15.

This holding applies equally to the *Martin* appeal, which involves substantially identical circumstances to *Avalos*. Indeed, the trial court relied on its decision in *Martin* to form the basis for its decision in *Avalos*. *See id.* at 11 ("The trial court relied on its decision in *Martin v. United States*, 130 Fed. Cl. 578 (2017), 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."). For the same reasons in *Avalos*, we conclude that the government did not violate the FLSA's timely payment obligation as a matter of law.

Because the trial court's finding of a potential FLSA violation in *Marrs* depended on its decision in *Martin*, we need not reach the trial court's subsequent willfulness determination in *Marrs*.

IV

We accordingly reverse the trial court's decision in *Martin* that held the government liable for liquidated damages. We also vacate the Court of Federal Claims' decision in *Marrs* to the extent that it relied on *Martin*. We remand both cases to the Court of Federal Claims to enter judgment consistent with this opinion.

REVERSED-IN-PART, VACATED-IN-PART, AND REMANDED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

____

DONALD MARTIN, JR., PATRICIA A. MANBECK, JEFF ROBERTS, JOSE ROJAS, RANDALL SUMNER,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

____

2021-2255

____

Appeal from the United States Court of Federal Claims in No. 1:13-cv-00834-PEC, Judge Patricia E. Campbell-Smith.

FRANK MARRS, NICOLE ADAMSON, BETHANY AFRAID, JOEL ALBRECHT, JESUS AREVALO, NATHAN ARNOLD, SHAWN ASHWORTH, JEREMIAH AUSTIN, MICHAEL AVENALI, JOSE BALAREZO, EBONY BALDWIN, CHARLES BAMBERY, DAVID BARRAZA, GREGORY BARRETT, DONNA BARRINGER, DAVID BAUTISTA, GARY BAYES, DARRELL BECTON, FRAUN BELLAMY, DARNELL BEMBO, JESSICA BENDER, MICHAEL BENJAMIN, JR., BRYAN BENTLEY, WILLIAM BERTRAND, CHRISTOPHER BIJOU, ALL PLAINTIFFS,

Plaintiffs-Appellants

v.

UNITED STATES,
Defendant -Appellee

2018-1354

Appeal from the United States Court of Federal Claims in No. 1:16-cv-01297-PEC, Judge Patricia E. Campbell-Smith.

REYNA, *Circuit Judge*, dissenting.

The majority decides this appeal on the basis of its interpretation of the Fair Labor Standards Act ("FLSA") and the Anti-Deficiency Act ("ADA").[1] The majority reaches a conclusion in this appeal that is contrary to the plain meaning of the statutory texts, and that is unsupported and inconsistent with the congressional purpose of the statutes. This is the same conclusion it reached in the companion case *Avalos*. In *Avalos*,[2] I lay out in greater detail the reasons for why I would uphold the judgment of the Court of Federal Claims and find that the Plaintiffs-Appellees sufficiently plead an allegation that the government violated the FLSA when it failed to timely pay excepted federal workers their earned wages during the relevant government shutdown. For purposes of economy, I adopt and

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[1] *Martin v. United States*, 130 Fed. Cl. 578 (2017); *Marrs v. United States*, 135 Fed. Cl. 155 (2017).

[2] *Avalos v. U.S.*, Nos. 2021-2008 through 2021-2012 and 2021-2014 through 2021-2020.

submit in this appeal my full dissent in *Avalos*, as set out below:

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.

STATUTORY ADDENDUM

29 U.S.C. § 203

§ 203(d). Employer

"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.

§ 203(e)(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 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 advisor to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee of 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.

29 U.S.C. § 216(b)

§ 216. Penalties

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

Any employer who violates the provisions of section 206 or 207 of this title shall by liable to the employee 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.

29 U.S.C. § 260

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

13 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.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2) because it contains 2,726 words, according to the count of Microsoft Word.

/s/ Heidi R. Burakiewicz
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