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.

BRIEF FOR APPELLEES

Julie M. Wilson
Allison C. Giles
NATIONAL TREASURY EMPLOYEES UNION
800 K Street, N.W., Suite 1000
Washington, D.C. 20001
Tel: (202) 572-5500
Fax: (202) 572-5645
julie.wilson@nteu.org
allie.giles@nteu.org

Abigail V. Carter
Leon Dayan
Joshua A. Segal
BREDHOFF & KAISER PLLC
805 15th Street N.W., Suite 1000
Washington, D.C. 20005
Tel: (202) 842-2600
Fax: (202) 842-1888
ldayan@bredhoff.com
acarter@bredhoff.com
jsegal@bredhoff.com

Counsel for Avalos Plaintiffs-Appellees

Jacob Y. Statman
Jason I. Weisbrot
SNIDER & ASSOCIATES, LLC
600 Reisterstown Road
7th Floor
Baltimore, MD 21208
Tel: (410) 653-9060
jstatman@sniderlaw.com
jason@sniderlaw.com

Counsel for Arnold Plaintiffs-Appellees

Clif Alexander
A. Cliff Gordon
ANDERSON ALEXANDER, PLLC
819 N. Upper Broadway
Corpus Christi, Texas 78401
Tel: (361) 452-1279
Fax: (361) 452-1284
clif@a2xlaw.com
cgordon@a2xlaw.com

Counsel for Hernandez Plaintiffs-Appellees

T. Reid Coploff
MCGILLIVARY STEELE ELKIN LLP
1101 Vermont Ave. NW, Suite 1000
Washington, DC 20005
Tel: (202) 833-8855
trc@mselaborlaw.com

Jack K. Whitehead, Jr.
WHITEHEAD LAW FIRM
11909 Bricksome Avenue
Ste. W-3
Baton Rouge, LA 70816
Tel: (225) 303-8600
Fax: (225) 303-0013
jwhitehead@whitehead-law.com

Counsel for Anello Plaintiffs-Appellees

Heidi R. Burakiewicz
D. Robert DePriest
Judith D. Galat
KALIJARVI, CHUZI, NEWMAN & FITCH, P.C.
818 Connecticut Avenue NW, Ste. 1000
Washington, D.C. 20006
Tel: (202) 331-9260
Fax: (877) 219-7127
hburakiewicz@kcnlaw.com
rdepriest@kcnlaw.com
jgalat@kcnlaw.com

Counsel for Richmond Plaintiffs-Appellees

Molly A. Elkin
Sarah M. Block
MCGILLIVARY STEELE ELKIN LLP
1101 Vermont Ave. NW, Suite 1000
Washington, DC 20005
Tel: (202) 833-8855
mae@mselaborlaw.com
smb@mselaborlaw.com

Counsel for Tarovisky Plaintiffs-Appellees

Counsel for Baca Plaintiffs- Appellees

Josh Sanford
SANFORD LAW FIRM, PLLC
10800 Financial Centre Parkway,
Suite 510
Little Rock, AR 72211
Tel: (800) 615-4946
josh@sanfordlawfirm.com

Counsel for Jones Plaintiffs-Appellees

Jules Bernstein
Linda Lipsett
BERNSTEIN & LIPSETT, P.C.
1130 Connecticut Avenue, N.W.,
Suite 950
Washington, D.C. 20036
Tel: (202) 296-1798
Fax: (202) 496-0555
chouse@bernsteinlipsett.com
llipsett@bernsteinlipsett.com

Daniel M. Rosenthal
Brita C. Zacek
JAMES & HOFFMAN, P.C.
1130 Connecticut Avenue, N.W.,
Suite 950
Washington, D.C. 20036
Tel: (202) 496-0500
Fax: (202) 496-0555
dmrosenthal@jamhoff.com
bczacek@jamhoff.com

Counsel for Plaintiff No. 1 Plaintiffs-Appellees

Marshall J. Ray
LAW OFFICES OF MARSHALL J. RAY, LLC
514 Marble Ave NW
Albuquerque, NM 87102
Tel: (505) 312-7598
mray@mraylaw.com

Jason J. Lewis
LAW OFFICE OF JASON J. LEWIS, LLC
1303 Rio Grande Blvd. NW Suite 5
Albuquerque, NM 87104
Tel: (505) 361-2138
jlewis@mraylaw.com

Counsel for Rowe Plaintiffs-Appellees

Laura R. Reznick
BELL LAW GROUP, PLLC
100 Quentin Roosevelt Boulevard,
Suite 208
Garden City, NY 11530
Tel: (516) 280-3008
Fax: (212) 656-1845
lr@belllg.com

Counsel for I. P. et al. Plaintiffs-Appellees

Nicholas M. Wieczorek
CLARK HILL PLLC
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
Tel: (702) 862-8300
Fax: (702) 862-8400
nwieczorek@clarkhill.com

Counsel for D.P. et al. Plaintiffs-Appellees

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.

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STATEMENT OF RELATED CASES

The cases consolidated under this docket number have not been previously before this Court or any other appellate court. We know of no related cases within the meaning of Federal Circuit Rule 47.5(b). We nonetheless note that *Martin v. United States*, No. 21-2255, and its companion case, *Marrs v. United States*, No. 18-1354, present similar legal issues, but arise out of an earlier lapse in federal appropriations.

INTRODUCTION

At midnight on December 21, 2018, appropriations for many federal agencies and departments lapsed. During the next 35 days, thousands of public servants, many of them plaintiffs here, were nonetheless forced to work without knowing whether they would ever be paid, let alone paid the minimum wages and overtime guaranteed by the Fair Labor Standards Act ("FLSA" or "the Act"). 29 U.S.C. §§ 206, 207. Instead, the government made them wait until appropriations resumed to receive what they had earned by working, even as bills piled up, anxieties multiplied, and three paydays came and went. In these consolidated cases, plaintiffs invoke their FLSA right to seek liquidated damages for the government's late payment of minimum wages and overtime, a remedy that Congress designed "to restore damage done by [the employer's] failure to pay *on time*." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 708 (1945) (emphasis added); *see* 29 U.S.C. § 216(b).

The government defends its belated payment of required wages by relying on the Anti-Deficiency Act ("ADA"), framing this appeal as a conflict between the ADA and the FLSA. But that supposed conflict is not real. It disappears once one considers crucial features of each statute that the government largely ignores. As to the ADA, the government ignores generations of precedent holding that the ADA does not abrogate the government's underlying obligations during a lapse in

appropriations. Here, the ADA delayed the government's ability to meet those obligations. The FLSA, in turn, establishes the consequences of that delay: Employees forced to wait for minimum wages and overtime guaranteed by the FLSA may seek liquidated damages that, as the Supreme Court has held, constitute *compensation* for delayed payment, not punishment of their employer.

The government can thus act in a way that furthers the purposes of both statutes and frustrates the purposes of neither by compensating public servants for its own delay in meeting its obligations to them. That is what the Court of Federal Claims held and what this Court should hold as well, as we explain in this brief, submitted on behalf of the plaintiffs in all twelve of the appeals consolidated under this docket number.

STATEMENT OF THE ISSUE

Whether the government's obligation under the Fair Labor Standards Act to pay public servants minimum wages and overtime by payday or face compensatory liquidated damages is abrogated by the Anti-Deficiency Act where the delay is caused by a lapse in appropriations.

STATEMENT OF THE CASE

I. Statutory Background

A. Fair Labor Standards Act

In 1938, Congress passed the FLSA to stamp out "labor conditions detrimental to the maintenance of the minimum standard of living necessary for

health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a); *see also* Pub. L. No. 75-718, 52 Stat. 1060 (1938). To that end, Congress commanded "[e]very employer" to pay a minimum wage that, as of December 2018, was $7.25 per hour. 29 U.S.C. § 206(a). And Congress commanded that "no employer" may require its employees to work more than 40 hours per week unless those additional hours are compensated "at a rate not less than one and one-half times the regular rate at which [the employee] is employed." 29 U.S.C. § 207(a)(1). Congress excluded from those protections, however, certain categories of less vulnerable employees, such as individuals "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

In 1974, Congress extended the FLSA's commands to "the Government of the United States." 29 U.S.C. § 203(x); *see also* Pub. L. No. 93-259, § 6, 88 Stat. 55 (1974). Amendments enacted in that year expanded the term "employer" under the Act to "include[] a public agency," which was, in turn, defined to include the "Government of the United States." 29 U.S.C. § 203(d), (x). Meanwhile, an "employee," in "the case of an individual employed by a public agency," was defined to include "any individual employed by the Government of the United States . . . in any executive agency," among other units of the federal government. 29 U.S.C. § 203(e)(2)(A)(ii).

If "[a]ny employer" violates the FLSA's minimum-wage and overtime provisions, then its wronged employees may sue, seeking "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." 29 U.S.C. § 216(b). If an employer "shows to the satisfaction of the court" that it violated the FLSA's provisions "in good faith" and with "reasonable grounds for believing that [the employer's] act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended," then the court *may*, in its discretion, reduce the otherwise-mandatory liquidated damages award. 29 U.S.C. § 260. The FLSA's statute of limitations—which is two years, unless the violation is "willful"—begins to run when "the cause of action accrued." 29 U.S.C. § 255(a).

B. The Anti-Deficiency Act

The statute now known as the Anti-Deficiency Act ("ADA") was first enacted in 1870. *See* 2 Gov't Accountability Office, *Principles of Fed'l Appropriations Law* 6-35 (3d ed. 2016) ("Red Book"). In its current form, the ADA 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)(A).

The ADA likewise precludes "[a]n officer or employee of the United States Government" from "employ[ing] personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. Accordingly, during a lapse in appropriations (colloquially, a "shutdown"), most public servants are placed on furlough. Congressional Res. Serv., *Shutdown of the Fed. Gov't: Causes, Processes and Effects* 13-14 (Dec. 10, 2018). But public servants performing work involving the safety of human life or the protection of property are required to continue working, *Shutdown of the Fed. Gov't* 9-10, and are known as "excepted employees," *id.*; 31 U.S.C. § 1341(c)(1)(D).

On January 16, 2019, Congress amended the ADA via the Government Employee Fair Treatment Act ("GEFTA"). GEFTA confirmed that the ADA's prohibition on "expenditure[s] or obligation[s] exceeding an amount available in an appropriation" applies "[e]xcept as specified in this subchapter or any other provision of law." Pub. L. No. 116-1, § 2, 133 Stat. 3, 3 (2019) (codified at 31 U.S.C. § 1341(a)(1)). And it enacted one such exception, providing for certain payments to public servants involuntarily furloughed during a lapse in appropriations and excepted employees forced to work without pay during such a lapse:

> Each employee of the United States Government . . . 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.

Pub. L. No. 116-1, § 2, 133 Stat. 3, 3 (2019) (codified at 31 U.S.C. § 1341(c)(2)). For the purposes of that provision, "the term 'employee' includes an officer." 31 U.S.C. § 1341(c)(1)(C).

II. Factual Background

A. Government shutdown

At midnight on December 21, 2018, time-limited appropriations for many federal agencies and departments lapsed. Thousands of federal employees were forced to work without pay during the ensuing shutdown pursuant to 31 U.S.C. § 1342. Appx274-75, 279. That shutdown lasted until January 25, 2019, when Congress enacted a short-term continuing resolution. Pub. L. No. 116-5, 133 Stat. 10 (2019). At 35 days, that shutdown was the longest lapse in appropriations in the history of the federal government.

The government required plaintiffs in the consolidated lawsuits to work during the shutdown and even to work overtime. *See, e.g.*, Appx279-81. The onset of the shutdown on December 22, 2018, corresponded with the conclusion of

federal employees' pay period that same day. *See id.*[1] Public servants who worked overtime on December 22 thus did not receive overtime pay for work performed that day on their regularly scheduled payday for the pay period that ended December 22. *Id.* And employees forced to work during the shutdown did not receive their ordinary wages—let alone minimum wages or overtime compensation—on their regularly scheduled paydays for work performed between December 23, 2018, and the end of the shutdown on January 25, 2019. *See* Appx274-75, 281, 283.

Under federal law, "[t]he pay period for an employee covers two administrative workweeks." 5 U.S.C. § 5504(a). According to payroll calendars published by the General Service Administration, for example, the government had scheduled paydays on December 28, 2018, January 10, and January 24, 2019, to compensate employees for wages earned during the preceding pay periods.[2] On at least each of those three dates, however, the government failed to pay the minimum wages or overtime for work performed during the shutdown.

[1] The Federal Aviation Administration, however, was funded for an additional 24 hours. Appx773, 775-76.

[2] Gen. Serv. Admin., *2018 Payroll Calendar* and *2019 Payroll Calendar*, https://www.gsa.gov/buying-selling/purchasing-programs/shared-services/payroll-shared-services/payroll-calendars (last visited October 27, 2021).

The government contends that, pursuant to GEFTA, "[a]ll excepted employees received their accrued wages—including any accrued overtime wages—'at the earliest date possible after the lapse' ended." Gov't Br. 7 (quoting 31 U.S.C. § 1341(c)(2)). But the government cites nothing to support that statement. Still worse, it ignores allegations that some public servants waited *months* after the resumption of funding to receive the full wages they were owed under the FLSA. *See* Appx776 (as of April 19, 2019, plaintiffs had not yet received overtime pay earned during shutdown). Eventually, however, public servants forced to work during the lapse in appropriations received their regular wages and overtime for that work. But the government has never compensated workers for the consequences of its delay in paying them.

B. Procedural history

In these putative collective actions, plaintiffs allege, in part, that the government violated the FLSA by failing to pay minimum wages and overtime earned during the shutdown by the government's regular, recurrent paydays. On that basis, they seek liquidated damages under 29 U.S.C. § 216(b). In the Court of Federal Claims, the government moved to dismiss all twelve FLSA actions, asserting that its compliance with the ADA shielded it from liability as an employer under the FLSA.

The Court of Federal Claims disagreed, denying the government's motions largely on the grounds it had described in *Martin v. United States*, 130 Fed. Cl. 578, 583 (2017), *appeal docketed*, No. 21-2255 (Fed. Cir. Aug. 27, 2021), which it incorporated by repeated reference. Appx021-24.

In *Martin*, the court granted partial summary judgment to public servants who, like the plaintiffs here, were forced to work without prompt payment of minimum wages and overtime during a shutdown in 2013. 130 Fed. Cl. at 580, 588. There, the government had asked the court to disregard the FLSA's long-settled prompt-payment requirement on the ground that the FLSA and ADA "impose two conflicting obligations" during a lapse in appropriations. *Id.* at 582-83. Recognizing a long line of 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,'" the Court of Federal Claims concluded that the purported conflict between the FLSA and the ADA was "superficial." *Id.* at 583 (quoting *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012)) (cleaned up). The ADA, the court held, might be relevant only to whether the government was eligible for a discretionary reduction in liquidated damages under 29 U.S.C. § 260. *Id.* at 584.

In the consolidated cases on appeal here, the Court of Federal Claims concluded that its analysis in *Martin* remained pertinent, denying the government's

motions largely on that basis. Appx023, 026. It further concluded that the FLSA's waiver of sovereign immunity encompassed the statutory obligation to pay minimum wages and overtime promptly by payday. Appx025. And it rejected the government's defense, under 29 U.S.C. § 260, that it had violated the FLSA in good faith as premature "at this stage in the litigation," reserving judgment on whether the government "can establish th[at] defense[]" with evidence presented "on summary judgment or at trial." Appx026.

The Court of Federal Claims later granted the government's motion to certify its decisions for interlocutory appeal. This Court granted the government's petition for review and consolidated the twelve cases appearing under this caption.

SUMMARY OF ARGUMENT

These cases seek to vindicate public servants' right to prompt payment of the minimum wages and overtime compensation that Congress guaranteed them under the FLSA. 29 U.S.C. §§ 206, 207. After the government failed to pay its employees at all by their regular, recurrent paydays during the shutdown, the public servants who brought these lawsuits invoked their statutory right to seek liquidated damages, which Congress designed as "reparations to restore damage done by [the employer's] failure to pay *on time*." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 708 (1945) (emphasis added); 29 U.S.C. § 216(b).

Since the FLSA's enactment in 1938, the courts have uniformly held that the Act requires employers either to make prompt payment of minimum wages and overtime by employers' regular, recurrent payday or pay liquidated damages if they wish to avoid litigation over that delay. Congress accepted that long-settled interpretation of the FLSA when it extended the Act to the government in 1974, waiving its sovereign immunity from lawsuits seeking liquidated damages for violation of the FLSA's minimum wage and overtime provisions.

Like the FLSA, the ADA has a long history of judicial interpretation. Since the ADA's inception, courts consistently have held that it does not abrogate the government's underlying obligations, such as its FLSA obligations, which remain enforceable in court; the ADA merely restrains government disbursement officials from paying those obligations when funds have not been appropriated for them.

The two statutes thus do not conflict. The ADA does not relieve the government of its obligations. And once a shutdown ends, the government can act in a way that effectuates the purposes of both the FLSA and the ADA by compensating its employees, pursuant to the FLSA's liquidated damages provision, for the government's own delay in meeting its obligations to them.

The government nonetheless asks this Court to excuse it from complying with the FLSA on the basis of a "conflict" between the FLSA and the ADA. But the purported conflict is entirely "superficial," as the Court of Federal Claims

understood. *Martin*, 130 Fed. Cl. at 583. Indeed, the government creates the appearance of conflict only by misapprehending both halves of the statutory clash that it asserts: It trivializes the long-settled interpretation of the FLSA as a "court-created requirement[] based on statutory purpose," Gov't Br. 17, and it entirely ignores over a century of precedent holding that the ADA does nothing to cancel the government's freestanding obligations, which remain enforceable in court. At nearly every turn, the government fails to acknowledge, let alone distinguish, generations of case law that stand in its way, even as it asks this Court to disregard its "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).

In the alternative, the government reiterates the same argument, which it rearticulates as a plea to this Court's discretion. It would be an "abuse [of] discretion," the government contends, to hold it to account for violating its FLSA obligations during a lapse in appropriations, when it sought to comply with the ADA. Gov't Br. 13. But the statutory provision the government invokes, 29 U.S.C. § 260, permits a discretionary reduction in liquidated damages only if the government shows that it sought reasonably and in good faith to comply with the *FLSA*, not some unrelated law, like the ADA. And any such determination is premature at this early stage in the proceedings, before the government has

presented any evidence to carry its burden of proof on that affirmative defense, as the Court of Federal Claims held. Appx.026.[3]

ARGUMENT

I. The FLSA requires employers to pay their employees on time.

Since the FLSA's enactment, it has been uniformly interpreted to require *timely* payment of minimum wages and overtime by the employer's regular, recurring payday. That interpretation is rooted in the statute's text and structure, as we explain in Part A. The government nonetheless asks this Court to depart from that uniform judicial consensus on the ground that principles of sovereign immunity relieve it of complying with the long-settled rule of payment by payday. As we explain in Part B, however, that argument slights this Court's prior holding that Congress waived sovereign immunity from suit under the FLSA and disregards Supreme Court precedent.

A. For decades, the courts uniformly have read the FLSA to require employers to pay minimum wages and overtime by the employer's regular payday or face liquidated damages for late payment.

1. From the earliest days of the FLSA, the courts uniformly have held that its minimum-wage and overtime provisions require employers to pay statutorily

[3] Because the government's interlocutory appeal does not contest some plaintiffs' claim that the government failed to pay them despite access to appropriated funds, Gov't Br. 19 n.3, including for overtime performed before the shutdown, those claims will proceed in the Court of Federal Claims, regardless of how this appeal is resolved. *See, e.g.*, Appx776, 780-81, 785-86.

mandated wages *promptly*—that is, on the first regular, recurring payday after the amount due is ascertainable.

The seminal case is *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), decided within a decade of the FLSA's enactment. There, the Supreme Court squarely rejected the notion that an employer could delay payment of minimum wages or overtime but avoid the Act's liquidated-damages provision by tendering payment before the employee filed suit. *Id.* at 708. The Court explained that the FLSA's liquidated-damages provision "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' . . . 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 (emphases added).

The Supreme Court noted that Congress' focus in crafting the FLSA was to protect workers who depend on their regular wages for "subsistence." *Id.* at 707 n.18. Such workers require regular wage payments to meet their own obligations, such as monthly rent, as they come due, and they "are not likely to have sufficient resources" to tide themselves over while waiting for a delayed wage payment. *Id.* at 708. Thus, "the liquidated damage provision is not penal in its nature but constitutes compensation . . . to restore damage done by [the employer's] failure to

pay on time," *id.* at 707-08—a failure "which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages," *id.* at 707.[4]

2. Taking their cue in part from *Brooklyn Savings Bank*, the federal courts have uniformly interpreted the FLSA to require payment of the minimum wage and overtime by the regular payday whenever the amount due is ascertainable by that date. This regular-payday requirement "follows directly from" *Brooklyn Savings Bank*, as Judge Easterbrook explained for the Seventh Circuit. *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir. 1993); *see also Biggs v. Wilson*, 1 F.3d 1537, 1541 (9th Cir. 1993) ("[W]e find it difficult to read *Brooklyn Savings Bank* . . . without concluding that an employer violates the Act if payments are late," as measured against "the employee's regular payday").[5] Indeed, the courts had settled

[4] Precisely because Congress included a liquidated-damages provision to compensate for the consequences of delays in payment, the Court rejected the proposition that interest, on top of liquidated damages, was available to compensate for such delays, as adding interest would amount to "double compensation." 324 U.S. at 715.

[5] Sometimes the formula for overtime calculations requires the use of variables that are not ascertainable as of the next recurring payday, in which case the payment must be made "as soon as convenient or practicable." *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432-33 (1945). Although the government relies on *Harnischfeger*, that case has no application here, because there is no contention that the amounts due were unascertainable as of the plaintiffs' paydays—nor could there be such a contention on a mere motion to dismiss.

on the regular-payday requirement soon after the FLSA was enacted and long before Congress extended it to federal employees in 1974.[6]

In the decades since that extension, the judicial consensus has further solidified.[7]

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[6] *E.g.*, *Roland Elec. Co. v. Black*, 163 F.2d 417, 421 (4th Cir. 1947) ("[I]f [the 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 . . . 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 . . . liquidated damages"); *Birbalas v. Cuneo Printing Indus.*, 140 F.2d 826, 829 (7th Cir. 1944) ("[W]here such overtime payments are not made as they mature, are not then recognized as due, but are wrongfully allowed to accumulate," then liability is "automatic[]"); *Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943) ("Section 7 of the Act plainly contemplates that overtime compensation shall be paid in the course of employment and not accumulated beyond the regular pay day." (citation omitted)); *Seneca Coal & Coke v. Lofton*, 136 F.2d 359, 363 (10th Cir. 1943) (affirming liability when "overtime compensation was not paid when due in the regular course of employment").

[7] *E.g.*, *Calderon*, 999 F.2d at 1107; *Biggs*, 1 F.3d at 1542-43 (holding that minimum wages must be paid by payday and collecting authority consistent with that proposition). In *Rogers v. City of Troy*, the Second Circuit endorsed a minor variation on the same principle, reiterating that the FLSA requires payment of mandatory wages by a regular, recurring payday, but adding that that principle is not offended where employers make a permanent change to their pay schedules for a legitimate business purpose and satisfy additional worker-protective criteria. 148 F.3d 52, 55 (2d Cir. 1998). Failing to pay required wages because of a lapse in appropriations is poles apart from the type of permanent change in an employer's regular, recurring payday implemented for legitimate business reasons that *Rogers* considered. *See id.* at 56 n.3 (comparing circumstances of case to the government shutdown in *Biggs*, 1 F.3d 1537).

That consensus is reflected in this Court's decision in *Cook v. United States*, 855 F.2d 848 (Fed. Cir. 1988), which recognized "the usual rule, *i.e.*, that a claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid." *Id.* at 851 (relaxing that accrual rule where, unlike here, plaintiffs' claims depended on a condition precedent that had not occurred by payday). If an FLSA claim ordinarily accrues on payday, as *Cook* recognized, that is because the violation ordinarily becomes complete when required wages go unpaid on payday. *See Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (articulating the "standard rule" that "a claim accrues 'when a plaintiff has a complete and present cause of action.'" (quoting *Wallace v. Cato*, 549 U.S. 384, 388 (2007)).

3. The Department of Labor, which is charged with enforcing the FLSA in the private sector and for state and local government,[8] has—like the courts—long

[8] The Department of Labor and its Wage and Hour Division possess considerable authority to enforce and interpret the FLSA. *See, e.g.*, 29 U.S.C. §§ 216(c), 259. Although the Office of Personnel Management ("OPM") "is authorized to administer the provisions" of the FLSA with respect to most federal employees, 29 U.S.C. § 204(f), Congress has instructed OPM to exercise that authority "to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy," *Zumerling v. Devine*, 769 F.2d 745, 750 (Fed. Cir. 1985) (cleaned up); *see also AFGE v. OPM*, 821 F.2d 761, 771 (D.C. Cir. 1987) (vacating OPM regulation where, *inter alia*, it was "inconsistent with the Labor Department's" parallel interpretation). Courts are thus "encouraged to consider the DOL's regulations and other interpretations" as statements "of value" in the federal sector. *Adam v. United States*, 26 Cl. Ct. 782, 786 (1992).

interpreted the statute as requiring payment on employers' regular payday.[9] That interpretation, which predates 1974, remains unaltered today, as the government acknowledges. *See, e.g.*, 29 C.F.R. § 778.106 (2021); Gov't Br. 4.

4. The reason for this longstanding and unbroken consensus supporting the regular-payday requirement is no mystery: that requirement flows ineluctably from the FLSA's text and structure—in particular, its liquidated-damages provision and statute of limitations.

The Ninth Circuit aptly explained this point in *Biggs v. Wilson*, *supra*, a case arising from a state-government budget impasse that presented precisely the same FLSA issue as here. As the *Biggs* court observed, the FLSA's provisions requiring employers to "pay" minimum wages (29 U.S.C. § 206) or face liability for "unpaid" wages and presumptive liquidated damages (29 U.S.C. § 216) "necessarily assume that wages are due at some point, and thereafter become unpaid." 1 F.3d at 1539. Indeed, if the FLSA did *not* presuppose that wages have a mandatory due date, the Act would permit required wages to go unpaid indefinitely

[9] *See, e.g.*, 29 C.F.R. § 778.106 (1966) ("The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends."); Dep't of Labor, Op. Letter (Nov. 27, 1973) (employer must "meet the minimum wage requirement in each semi-monthly pay period . . . with respect to all hours worked in workweeks ending within the pay period"); Dep't of Labor, Op. Letter 63 (Nov. 30, 1961) ("[T]he minimum wage due for a particular workweek must be paid on the regular payday for the period in which such workweek ends.").

with no consequences, such that "imposing liability for both unpaid minimum wages and liquidated damages would be meaningless." *Id.* It is therefore *necessary* to recognize such a due date to avoid rendering the FLSA wholly ineffective. *See, e.g.*, *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1473 (2020) ("We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations" of a different statute). And, as *Biggs* explained, "[t]he *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." *Biggs*, 1 F.3d at 1540.

Likewise, as *Biggs* further explained, the FLSA's statute of limitations, 29 U.S.C. § 255(a), must be given effect. That limitations period must "start running from some point, and the most logical point a cause of action for unpaid minimum wages or liquidated damages (which are merely double the amount unpaid) accrues is the day the employee's paycheck is normally issued, but isn't." 1 F.3d at 1540.

Thus, contrary to the tenor of the government's submission, the FLSA's regular-payday requirement is no mere suggestion or extra-statutory gloss; it is every bit as much a part of the Act as the minimum-wage and overtime provisions of which it is a part. Indeed, the Supreme Court's *Brooklyn Savings Bank* decision holds that both the right to FLSA-mandated wages and the right to seek liquidated damages to compensate for late payments are so fundamental to the statutory

scheme that they may not be waived. 324 U.S. at 708-09; *see also D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946) (describing "the public policy of minimum wages, *promptly paid*" as "*embodied in* the Wage-Hour Act" (emphases added)).

5. Application of the regular-payday requirement here is straightforward: The government forced excepted employees to work—often to work overtime—for over a month, but failed to pay them properly for that labor on several scheduled paydays. The government's failure to pay minimum wages and overtime by those paydays entitles those employees to seek liquidated damages for the harm wrought by the government's late payment, exactly as they have done here and exactly as the Court of Federal Claims held. Appx025-26.

B. Congress' waiver of sovereign immunity unequivocally encompasses claims for liquidated damages for late payment of required wages.

The government does not—indeed, cannot—dispute that the FLSA requires nearly every employer to pay minimum wages and overtime by payday. Indeed, it cites guidance from its own Department of Labor endorsing that rule. Gov't Br. 4. The government nonetheless insists that it stands on different footing than every other employer covered by the FLSA, invoking "principles of sovereign immunity" to claim that it alone may pay its workers late. Gov't Br. 18. That argument both underplays the FLSA's unequivocal waiver of sovereign immunity and asks this

Court to apply "principles of sovereign immunity" to the FLSA's *substantive* requirements in the face of contrary Supreme Court authority.

1. When Congress amended the FLSA in 1974, it waived sovereign immunity—as this Court has held. *El-Sheikh v. United States*, 177 F.3d 1321, 1323-24 (Fed. Cir. 1999); *Saraco v. United States*, 61 F.3d 863, 865-66 (Fed. Cir. 1995). Congress expressed that waiver by changing the statutory definitions of "employer" and "employee" so that the Act regulated the federal government as an "employer" and protected federal workers as "employees."[10] In so doing, Congress subjected the government, as an employer, not only to the same *substantive* minimum-wage and overtime requirements (codified in § 206 and § 207, respectively) applicable to every other employer, but also to the same liquidated-damages remedy:

> *Any employer* who violates the provisions of *section 206 or 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*.

[10] As amended, the FLSA defines the term "employer" to "include[] a public agency." 29 U.S.C. § 203(d). A "public agency," in turn, includes "the Government of the United States" and "any agency of the United States." 29 U.S.C. § 203(x). Meanwhile, the term "employee" is defined, in the context of any such "public agency," to include "any individual employed by the Government of the United States . . . in any executive agency," among other government units. 29 U.S.C. § 203(e)(2)(A)(ii).

29 U.S.C. § 216(b) (emphases added). The same provision expressly authorizes an action "to recover th[at] liability . . . against any employer (*including a public agency*) in any Federal or State court of competent jurisdiction." *Id.* (emphasis added).

That "explicit[]" waiver, *Saraco*, 61 F.3d at 866, codified in Section 216(b) could hardly be clearer: It authorizes "an employee" (including federal agency employees) to sue "[a]ny employer" (including the Government of the United States) to "recover . . . liability." 29 U.S.C. § 216(b); *see also El-Sheikh*, 177 F.3d at 1333-34. And the scope of that waiver is equally clear: It encompasses lawsuits for violations of "section 206 or 207"—the FLSA's substantive minimum wage and overtime provisions—that seek "liquidated damages." It more than satisfies the requirement that the "waiver of sovereign immunity must be 'unequivocally expressed' in statutory text." *FAA v. Cooper*, 566 U.S. 284, 290 (2012); *see also Saraco*, 61 F.3d at 866.

2. In the face of this clear waiver of sovereign immunity, the government concedes, as it must, that the FLSA contains *some* such waiver, but argues that "there is no indication that Congress intended for the scope of the sovereign immunity waiver[] in the [FLSA] to include a waiver of immunity for damages claims related to *late* payment of wages." Gov't Br. 13 (emphasis added). Put differently, the government insists that it may be subject to the same substantive

statutory provisions as all other employers, but the language of those provisions means something different for it than for every other employer.

In support of that remarkable contention, the government invokes the "sovereign immunity canon," which requires that Congress "unequivocally express[]" the scope of a waiver of sovereign immunity "in statutory text," construing "[a]ny ambiguities in the statutory language . . . in favor of immunity." *Cooper*, 566 U.S. at 290-91. In *Cooper*, for example, the Court concluded that a waiver provision that "expressly authorizes recovery from the Government for 'actual damages'" did not unequivocally authorize damages for emotional distress in light of ambiguity in the term "actual damages." *Id.* at 291-93 (quoting waiver provision).

The government seeks to extend the sovereign-immunity canon so that it would apply, not just to the interpretation of words used to describe the scope of the *remedies* available to a person who sues the government, but even to the interpretation of words used to prescribe the government's *substantive duties* toward that person.

a. The government has already tendered this very argument to the Supreme Court in *Gomez-Perez v. Potter*, which squarely rejected applying the sovereign-immunity canon to words in a statute that describe the government's

substantive duties to others. 553 U.S. 474, 490-91 (2008). The government fails to acknowledge this controlling precedent, let alone distinguish it.

Gomez-Perez considered two provisions of the Age Discrimination in Employment Act ("ADEA") that applied only to the government: a suit-authorizing provision waiving sovereign immunity and a separate, substantive provision specifying the government's duties under the statute. The first provision allowed "'[a]ny person aggrieved'" by a violation of the substantive provision, including a government employee, to bring suit to remedy that violation. 553 U.S. at 491 (alteration in original) (quoting 29 U.S.C. § 633a(c)). The substantive provision established a rule of conduct, imposing on the government a duty to take personnel actions "'free from any discrimination based on age.'" 553 U.S. at 479 (quoting 29 U.S.C. § 633a(a)). The government invoked the sovereign-immunity canon to argue that the *substantive* provision should be read "narrowly" to encompass only classic discrimination, not broadly to extend to retaliation against persons asserting rights under the statute. *Id.* at 490.

The Court rejected the government's argument, holding that the sovereign-immunity canon does not apply to "substantive provision[s] outlawing" primary conduct. *Id.* at 491. Substantive provisions, the Court explained, need not "surmount the same high hurdle" as provisions addressing the scope of remedies available to those who sue the government. *Id.* at 491. And, because the suit-

authorizing provision in the ADEA constituted an "unequivocal[]" waiver of sovereign immunity, the government's bid for sovereign immunity failed. *Id.*; *see also Hunsaker v. United States*, 902 F.3d 963, 968 (9th Cir. 2018) (declining to read substantive provisions via the sovereign-immunity canon where the statute separately waives the government's immunity); *Ford Motor Co. v. United States*, 768 F.3d 580, 586-87 (6th Cir. 2014) (same).

Here, as in *Gomez-Perez*, the government invokes the sovereign-immunity canon to demand a narrow construction of substantive provisions—namely, 29 U.S.C. §§ 206 and 207—in the face of a separate waiver of immunity codified in 29 U.S.C. § 216(b). Under the square holding of *Gomez-Perez,* however, that canon does not apply.

b. In its haste to invoke the sovereign-immunity canon where it does not apply, the government disregards two principles of statutory construction that do apply to any analysis of Congress' amendments to the FLSA in 1974, which subjected the United States to the duties that the Act imposes on employers.[11] The first of those principles is that the meaning of statutory language describing

[11] Even where, unlike here, the sovereign-immunity canon applies, it does not "displace the other traditional tools of statutory construction." *Cooper*, 566 U.S. at 291 (cleaned up). Indeed, even under that canon's requirement that "the sovereign's consent to suit must be clear . . . there is such a thing as utterly clear implication." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 282 (2012). The FLSA's regular payday requirement would more than satisfy that standard, were the sovereign-immunity canon applicable.

generally applicable standards of conduct does not change with the identity of the persons subject to those standards. The second is that where Congress applies an existing statute in new contexts, it has presumably adopted the uniform and well-settled interpretation of that statute.

i. As to the first of those principles, the government's sovereign-immunity argument here is substantially weaker than the argument it made in *Gomez-Perez.* At least in *Gomez-Perez*, the substantive provision in question applied only to the government. Here, in contrast, FLSA sections 206 and 207 and the substantive rules of conduct that they impose apply *both* to the government *and* to private employers.

Accepting the government's argument would thus turn those substantive rules into chameleons whose meaning changes with the identity of the defendant. It is axiomatic, however, that the meaning of a statute cannot change from case to case depending on the identity of the parties. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 378, 380 (2005) ("To give the[] same words a different meaning for each category [of defendant] would be to invent a statute rather than interpret one.").

ii. As to the second principle, Congress' extension of the FLSA's substantive provisions to the government in 1974 confirms that it adopted the long-settled and uniform interpretation of those provisions as of that date, including the prompt-payment requirement. In *Lorillard v. Pons*, for example, the Supreme Court read

Congress' incorporation by reference of FLSA remedies into the Age Discrimination in Employment Act in light of the presumption that Congress "had knowledge of the interpretation given" to those FLSA remedies by the courts and sought "to adopt that interpretation" in the new statute. 434 U.S. 575, 580-81 (1978). That rule applies even where Congress enacts a statute containing language merely analogous to language the Supreme Court has previously interpreted, on the theory that it is "appropriate and realistic to presume that Congress expected" its new statute "to be interpreted in conformity with . . . similarly worded" laws. *Gomez-Perez*, 553 U.S. at 485 (cleaned up). And those principles apply where the background law has been established by "the rulings of the great majority of the lower federal courts," *Manhattan Props. Inc. v. Irving Trust Co.*, 291 U.S. 320, 336 (1934),[12] or "longstanding [agency] interpretation," *FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 437 (1986),[13] no less than the decisions of the Supreme Court.

Here, Congress did not merely incorporate a specific portion of the FLSA into a subsequent enactment, as in *Lorillard*. Instead, it incorporated the *entirety* of the existing FLSA against the government by defining the government as an

[12] *Accord, e.g.*, *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018); *Texas Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536-37 (2015).

[13] *Accord, e.g.*, *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974).

employer little different from any private employer.[14] *See IRS v. Murphy*, 892 F.3d 29, 40-41 (1st Cir. 2018) (holding that Congress' waiver of sovereign immunity for violation of a specifically enumerated statute incorporated the lower courts' uniform interpretation of that statute at the time the waiver was enacted).

By the time Congress took the momentous step of extending the FLSA to federal employees in 1974, the Act's "requirement of prompt payment" had long been "clearly established by the authorities." *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 491 (2d Cir. 1960). Nearly three decades before, in 1945, the Supreme Court had interpreted the FLSA's liquidated damages provision to require "reparations to restore damage done by [the employer's] failure to pay *on time*." *Brooklyn Sav. Bank*, 324 U.S. at 708 (emphasis added). And both the federal appellate courts and the Department of Labor had concluded that the FLSA requires payment by the employer's regular, recurring payday. *See supra* pp. 16-19. Because the FLSA's minimum-wage and overtime provisions had a long-established meaning by the time Congress amended the Act to waive sovereign immunity for violations of those provisions, Congress plainly intended to adopt that settled meaning as to the government.

[14] We say "little different" because Congress was attentive to the concern that that wholesale application of the FLSA might "confuse the administration" of pay provisions under Title 5 of the U.S. Code and thus empowered OPM to administer the Act for federal employees for the purpose of minimizing any potential confusion. *Zumerling*, 769 F.2d at 750.

* * *

In sum, all available authority confirms that employers, including the government, must pay minimum wages and overtime by the employer's regular payday or compensate its employees for that delay. The FLSA's unequivocal waiver of sovereign immunity encompasses that obligation "to pay on time," *Brooklyn Savings Bank*, 324 U.S. at 708, which the courts had settled long before Congress extended that substantive obligation to the government in 1974.

II. The ADA does not cancel public servants' right to timely payment of minimum wages and overtime under the FLSA.

In the face of the FLSA's settled meaning, the government looks to an entirely distinct statutory scheme, the ADA, in an effort to shield itself from liability for failure to pay minimum wages and overtime by its regular, recurrent payday during a lapse in appropriations. Because the ADA never so much as mentions the FLSA, that argument is premised on the government's assumption that the FLSA conflicts with the ADA, making it "impossible" for the government to meet its obligations under both statutes in the wake of a government shutdown. Gov't Br. 16.

The Court of Federal Claims correctly rejected that asserted conflict as "superficial." *Martin*, 130 Fed. Cl. at 583, *incorporated by reference by* Appx022-23. Indeed, the government's argument that the ADA trumps public servants' FLSA rights ignores over a century of precedent holding that, while the ADA

restrains government payroll officials from disbursing funds in the absence of appropriations, the statute neither prohibits Congress from creating binding statutory obligations nor abrogates the government's obligations to pay what it has promised. *Infra* Part II(A). The government's argument also disregards entirely the "strong presumption" against implied repeals. *Epic Sys.*, 138 S. Ct. at 1624 (cleaned up); *see also infra* Part II(B). We address each of those flaws in turn.

A. The ADA, including its recent amendments, does not suspend the government's statutory obligations during a lapse in appropriations.

1. In the government's view, it should be absolved of all FLSA responsibility for untimely wage payments caused by the shutdown that led to this lawsuit, because the ADA prohibited the government's payroll officials from making any wage payments during that shutdown. *See* 31 U.S.C. § 1341(a)(1)(A). But it does not follow that the inability of payroll officials to pay wages on time cancels the government's statutory obligation to compensate public servants for its delay in making the required payments.

To the contrary, as the Supreme Court emphasized only last year, "[i]ncurring an obligation . . . is different from paying one." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1319 (2020). Indeed, generations of federal appropriations precedents recognize that the government's failure to appropriate funds to satisfy its debts does not cancel its financial obligations,

which remain judicially enforceable. Thus, more than a century ago, in *United States v. Langston*, the Supreme Court held that "a statute fixing the annual salary of a public officer at a named sum . . . should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer." 118 U.S. 389, 394 (1886). And the cases decided in subsequent decades are to the same effect.[15]

The ADA incorporates this distinction between incurring an obligation and paying one: Since Congress enacted the earliest versions of that statute, courts have interpreted its provisions as "restraints . . . [that] apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government." *Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1883), *cited in, e.g.*, *Ramah*, 567 U.S. at 197.[16] The ADA thus does not "address[] whether

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[15] *See, e.g.*, *Maine Cmty. Health*, 140 S. Ct. at 1331 (failure to appropriate sufficient funds to satisfy a statutory obligation did not "discharge[]" that obligation); *Ramah*, 567 U.S. at 191 ("Although the agency itself cannot disburse funds beyond those appropriated to it, the Government's valid obligations will remain enforceable in the courts." (internal quotation marks omitted)); *In re Aiken Cty.*, 725 F.3d 255, 260 (D.C. Cir. 2013) (Kavanaugh, J.) ("As the Supreme Court has explained, courts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated."); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) (an appropriation's "insufficiency does not pay the Government's debts, nor cancel its obligations").

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

Congress itself can create or incur an obligation directly by statute," but merely "constrain[s] how federal employees and officers may make or authorize payments without appropriations." *Maine Cmty.*, 140 S. Ct. at 1321.[17]

Where, as here, the ADA impedes the government's disbursement officials from satisfying the government's obligations, the wronged party "is free to pursue appropriate legal remedies arising because the Government broke its . . . promise." *Ramah*, 567 U.S. at 198 (cleaned up). Such a remedy is supplied by the liquidated damages authorized by 29 U.S.C. § 216(b). And those damages will be paid out of the Judgment Fund, a standing appropriation that exists for the express purpose of paying otherwise-unsatisfied legal obligations established by a judgment of the Court of Federal Claims. *See* 28 U.S.C. § 2517; 31 U.S.C. § 1304(a)(3)(A). The ADA thus does nothing to prevent wronged parties from recovering what they are owed.

The present language of the ADA amply supports these longstanding interpretations. By its terms, the statute restricts only the power of "an officer or employee of the United States Government" to disburse funds, 31 U.S.C.

[17] *Accord, e.g.*, *Ramah*, 567 U.S. at 197; *Navajo Nation v. Dep't of Interior*, 852 F.3d 1124, 1129 (D.C. Cir. 2017) (Kavanaugh, J.) ("[A]lthough the [ADA] prohibits a government agency from incurring obligations in excess of appropriations, if the agency nevertheless obligates itself to spend in excess of appropriations, it does not cancel the agency's obligations nor defeat the rights of other parties.").

§ 1341(a)(1)(A), not the rights of third parties to whom the government owes money. And in the event of conflict between the ADA and some other statutory commitment, the Supreme Court explained in *Maine Community Health*, the "Act's prohibitions give way 'as specified' or 'authorized' by 'any other provision of law.'" 140 S. Ct. at 1322 (quoting 31 U.S.C. § 1341(a)(1)).

The government insists that any analogy to *Maine Community Health* "fails in all respects" because that case considered a mandatory statutory obligation that the government failed to satisfy for want of appropriations. Gov't Br. 20-21. But that is just as true here. By requiring public servants to work—and work overtime—the government triggered equally mandatory provisions in the FLSA that, like the statute in *Maine Community Health*, commanded that the government "shall pay" certain wages. 29 U.S.C. §§ 206, 207. *See also supra* pp. 4, 19-21.

More to the point, *Maine Community Health* expressly interpreted the ADA as precluding precisely the argument 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 authorize payments without appropriations," without "cancel[ing] [the government's] obligations." *Maine Cmty.*, 140 S. Ct. at

1321-22 (internal quotation marks omitted). The government fails to mention that conclusion or the precedent it reaffirmed, let alone distinguish it.[18]

Because the ADA neither addresses statutory obligations created by Congress nor cancels the rights of third parties, like the public servants here, it does not affect public servants' right to hold the government to the promises Congress codified in the FLSA.

2. The GEFTA amendments do not change this analysis. According to the government, those amendments—which Congress enacted in the final days of the shutdown that led to this litigation—bless its belated payment of minimum wages and overtime by establishing the date by which wages are due following a lapse in appropriations. Gov't Br. 11. For support, the government points to language providing 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." 31 U.S.C. § 1341(c)(2).

[18] The government has wisely abandoned its argument, asserted below, that *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), supports its position. That case considered an actual conflict between two non-ADA statutes, adding that deferring to the later-enacted appropriations measure avoided tension with the provisions of the ADA. *Id.* at 1170. Here, by contrast, the government relies on a supposed conflict between the FLSA and the ADA itself, notwithstanding the ADA's limited scope. *See also Maine Cmty.*, 140 S. Ct. at 1326 n.9 (explaining that *Highland-Falls* is inapplicable absent incompatibility with a freestanding statute).

That language merely directs the government to mitigate some of the harm that the shutdown inflicted by requiring government payroll officials to disburse wages to all federal officers and employees "at the earliest date possible after the lapse in appropriations ends," even if that date arrives before the next scheduled payday and without regard to the ADA's general prohibitions. *Id.* But GEFTA says nothing about the rights of FLSA-covered employees whom Congress chose to make eligible for additional liquidated damages as compensation for delays in the payment of minimum wages and overtime.

Had Congress sought to displace FLSA remedies for delayed payments, it would have both said so expressly and drafted a far narrower statute. GEFTA, however, extends far more broadly than those federal employees who are guaranteed minimum wages and overtime by the FLSA. It provides for payments to officers, as well as employees. 31 U.S.C. § 1341(c)(1)(C). And it encompasses payments to *all* employees, including executive, administrative, and professional employees whom Congress declined to protect through minimum-wage and overtime requirements, let alone through presumptive liquidated damages for late payment. 29 U.S.C. § 213(a)(1).

GEFTA's inclusion of well-paid officers, as well as executive, administrative, and professional employees, also indicates that it compensates for a harm distinct from those covered by the FLSA. GEFTA ensures that government

officials and employees ultimately receive the salary to which they are legally entitled. FLSA remedies, by contrast, focus on the minimum wages necessary for subsistence and overtime, providing for liquidated damages to compensate for the consequences of delay in payment of those wages. *See supra* pp. 4-5, 15-16.

Buttressing the conclusion that GEFTA is not aimed at displacing FLSA rights or remedies is that GEFTA provides for payment not only to those employees who are forced to work without pay during a shutdown, but also to *furloughed* employees—who perform no work during a shutdown and have no FLSA right to compensation for that period of involuntary idleness. The very same subsection on which the government relies provides, in language that the government never quotes, that "[e]ach employee . . . furloughed as a result of a covered lapse in appropriations shall be paid for the period of the lapse in appropriations . . . at the employee's standard rate of pay." 31 U.S.C. § 1341(c)(2).

As the inclusion of those furloughed employees suggests, GEFTA cannot be read as creating a "payday" for work performed for many of the employees it covers. Still less can it be read as establishing a recurring periodic payday that might satisfy the FLSA's regular-payday requirement, as the government suggests. To the contrary, the statute does not supplant the government's schedule of biweekly regular paydays set out in 5 U.S.C. § 5504(a), but merely directs a one-time, post-shutdown payment of delayed wages.

The structure of the statutory scheme further confirms that the ADA's amendments do not alter public servants' rights under the FLSA. When Congress enacted GEFTA, it codified that provision as a mere subsection of the ADA. It did *not* amend the FLSA's prompt payment requirement, its lengthy list of exclusions, or its liquidated damages provision, all of which are codified in an entirely distinct title of the U.S. Code. And it did *not* amend the separate statutory requirement that the government pay its employees on a biweekly basis, which likewise is codified in a separate title. 5 U.S.C. § 5504(a). "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). Applying that presumption here indicates that, in enacting GEFTA, Congress sought to alter neither the FLSA's prompt payment requirement nor public servants' ordinarily applicable paydays, none of which GEFTA references.

By instead codifying GEFTA as amendments to the ADA, Congress confirmed that it sought only to alter a statute that has "long enjoyed [a] separate sphere[] of influence" from statutes like the FLSA. *Epic Sys.*, 138 S Ct. at 1619 (referring to the Arbitration Act and National Labor Relations Act).[19] And the

[19] The Supreme Court often looks to the placement of a provision within the statute books when evaluating whether statutory language creates a jurisdictional restriction or a criminal prohibition. *See, e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 439 (2011) (explaining that a provision's placement among the procedural provisions of a broader statutory scheme was probative of its

ADA's sphere of influence, as we have explained, has long been limited to restricting government disbursement officials from making payments without appropriations, not compromising freestanding statutory entitlements or creating substantive obligations or corresponding rights, such as those codified in the FLSA. GEFTA is of a piece with the remainder of the ADA. Where the ADA specifies the duties of government disbursement officials during a lapse in appropriations, GEFTA speaks to those same duties in the period immediately following a resumption in appropriations. GEFTA therefore is a directive to the Executive Branch's disbursement officials, not a labor standards statute, like the FLSA, that endows a class of people vulnerable to exploitation with substantive rights and establishes remedies for the violation of those rights.

Indeed, Congress made clear that it understood GEFTA as a mere exception to the ADA's general rule, codified in 31 U.S.C. § 1341(a)(1), that government disbursement officials "may not make or authorize an expenditure or obligation exceeding" available appropriations. When enacting GEFTA, Congress amended

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meaning); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("Kansas' objective to create a civil proceeding is evidenced by its placement of the Act within the Kansas probate code, instead of the criminal code."). Just as the legislature must speak clearly to create a jurisdictional requirement or a crime, *see Henderson*, 562 U.S. at 436; *Moskal v. United States*, 498 U.S. 103, 108 (1990) (rule of lenity), Congress must express a "clear and manifest" intent to repeal a freestanding statute, *Epic Sys.*, 138 S. Ct. at 1624 (internal quotation marks omitted). GEFTA's location within the U.S. Code is thus probative of its meaning, further confirming that it does not repeal the FLSA.

that general rule to clarify that it applied "[e]xcept as specified in this subchapter." Pub. L. No. 116-1, § 2, 133 Stat. 3, 3 (codified at 31 U.S.C. § 1341(a)(1)). GEFTA's only other provision added subsection (c) to the ADA, providing for certain payments to employees and officers on which the government relies here. *Id.* Those payments are for obligations incurred during a lapse in appropriations, notwithstanding the generally applicable rule that "a time-limited appropriation is available to incur an obligation only during the period for which [the appropriation] is made." Red Book 5-4; *see also* 31 U.S.C. § 1502(a). GEFTA thus authorizes payments "exceeding an amount available in an appropriation" that would violate the prohibition against such payments if the ADA did not exclude "[e]xcept[ions] . . . specified in this subchapter" from that prohibition. 31 U.S.C. § 1341(a)(1).[20]

As a matter of basic logic, exceptions, like the one at issue here, "cannot be broader in scope than the restriction to which they are exceptions." *Whitewater W. Indus., Ltd. v. Alleshouse*, 981 F.3d 1045, 1057 (Fed. Cir. 2020). It follows that GEFTA shares the narrow scope of the ADA, of which it is a part: It affects only

[20] *See also, e.g.*, *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 438 (1827) ("[T]he exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made.") (Marshall, C.J.).

government disbursement officers' ability to make payments, without cancelling third parties' right to payment.

It is thus particularly appropriate to apply to these cases "the usual rule that Congress . . . 'does not, one might say, hide elephants in mouseholes.'" *Id.* at 1626-27 (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). Applying that rule, it is "more than a little doubtful that Congress" would have hidden in a mere exception to the ADA—a statute that has for over a century been held not to compromise third parties' freestanding rights to payment—a provision that, according to the government, does exactly that. *Id.*at 1627.

Finally, concluding that GEFTA suspends the FLSA's prompt payment rule during government shutdowns would disserve the purpose of those amendments. That purpose is manifest in the amendatory act's very title—the "Government Employee *Fair Treatment* Act of 2019," Pub. L. No. 116-1, § 2, 133 Stat. 3, 3 (emphasis added)—which is probative of the amendment's meaning, *see, e.g.*, *Almandarez-Torres v. United States*, 523 U.S. 224, 234 (1998). It would hardly be "fair treatment" if GEFTA silently withdrew from federal workers eligibility for liquidated damages for late payment of wages that private-sector employees enjoy and that Congress expressly extended to public servants in 1974.

The legislative debate preceding passage of GEFTA confirms that Congress intended no such silent withdrawal of the FLSA right to liquidated damages. To

the contrary, Congress enacted those amendments "to ease the[] anxiety" of federal workers by guaranteeing that they would ultimately be paid, notwithstanding the lapse in appropriations. 165 Cong. Rec. S133 (daily ed. Jan. 10, 2019) (statement of Sen. McConnell); *see also* 165 Cong. Rec. H498-02 (daily ed. Jan. 11, 2019) (statement of Rep. Cummings) (purpose of 2019 ADA Amendments was to relieve workers' "stress" and "uncertainty"). Congress nonetheless recognized that the promise of delayed payment was not full compensation. Without prompt payment of their wages, "[f]ederal employees will still struggle to find ways to put food on the table and make ends meet." Cong. Rec. H498-02 (daily ed. Jan. 11, 2019) (statement of Rep. Gianforte); *see also id.* (statement of Rep. Pelosi) (recognizing that the impact of delayed payment "is catastrophic in the lives of these Americans when they can't pay their mortgage, their rent, their utilities, bills, their car payments, children's tuition on time . . . [i]t affects their credit rating"). Given these harms, "[s]ending these workers their paycheck late is wrong." *Id.* (statement of Rep. Pelosi).

That "wrong" has a statutory remedy, at least for employees covered by the FLSA, but forced to work without prompt payment: the FLSA's liquidated damages provision, which permits "double payment" of minimum wages and overtime "in the event of delay in order to ensure restoration of the worker to that minimum standard of well-being" guaranteed by the FLSA. *Brooklyn Sav. Bank*,

324 U.S. at 707. It cannot be that when Congress pursued "fair treatment" by ensuring that excepted employees would eventually be paid, albeit paid late, it also sought to foreclose those workers' statutory remedy for damages arising from such a late payment.

B. The strong presumption against implied repeal confirms that the ADA does not cancel the government's FLSA obligations during a lapse in appropriations.

In arguing that the ADA trumps its FLSA obligations during a lapse in appropriations, the government "faces a stout uphill climb." *Epic Sys.*, 138 S. Ct. at 1624. That is because "[a] party seeking to suggest . . . that one [statute] displaces the other[] bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be clear and manifest." *Id.* (internal quotation marks and citations omitted). This rule applies to any amendment that could upset the settled construction of a statute, whether that statute has been authoritatively construed by the Supreme Court, *TC Heartland LLC v. Kraft Foods Grp. Brand LLC*, 137 S. Ct. 1514, 1520 (2017), or consistently interpreted by an administrative agency, *United States v. Madigan*, 300 U.S. 500, 567, 569 (1937). *See also JEM Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 146 (2001) (Scalia, J., concurring).

This presumption against repeals arises not only out of "[r]espect for Congress as [a] drafter" that is unlikely to create "irreconcilable conflicts" in its

legislation, but also out of "respect for the separation of powers." *Epic Sys.*, 138 S. Ct. at 1624. Congress' role is "to write the laws and to repeal them," while "[i]t is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Id.* at 1619, 1624.

The government asks this Court to disregard that "duty" to harmonize congressional commands of equal dignity. Instead, it insists that the ADA trumps the FLSA's prompt-payment requirement during lapses in appropriations. But it points to no statutory language providing that the ADA should take priority over the FLSA during such lapses. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (rejecting partial implied repeal where "[n]owhere in [the statute] or in its legislative history is there discussion of the interaction between" the two pertinent provisions). To the contrary, the ADA provides that its provisions give way to "any other provision of law," 31 U.S.C. § 1341(a)(1), as the Supreme Court has explained, *Maine Cmty.*, 140 S. Ct. at 1322, and as we have pointed out, *supra* p. 34.

Absent an express repeal, the government thus must prove an implied repeal, in the face of the "strong presumption that repeals by implication are disfavored." *Epic Sys.*, 138 S. Ct. at 1624 (cleaned up). And the courts' ordinary "aversion to implied repeals is especially strong in the appropriations context." *Maine Cmty.*, 140 S. Ct. at 1323 (internal quotation marks and citations omitted). Such an

implication will overcome that presumption against repeal, only "where provisions in two statutes are in irreconcilable conflict or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (internal quotation marks omitted).

The government cannot carry that heavy burden. The FLSA and ADA do not conflict; the ADA neither restrains Congress from creating statutory obligations nor cancels the rights of third parties arising from those obligations. *See supra* Part II(A). That interpretation, which flows from over a century of precedent construing the ADA, harmonizes the two statutes, giving effect to each. The statutes' "separate spheres of influence" is reason enough to conclude that they do not conflict. *Epic Sys. Corp.*, 138 S. Ct. at 1619; *see also POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014) (no conflict between two statutes where "each has its own scope and purpose").[21]

Nor does the ADA cover "the whole subject" of the FLSA. At most, the ADA's recent amendment overlaps in part with the FLSA, insofar as both statutes provide for certain payments to federal employees forced to work during a lapse in appropriations. But that overlap is incomplete, because "[t]he two statutes impose

[21] Indeed, if a mere lapse in appropriations were enough to repeal the government's statutory obligations, then it would all but vitiate the Supreme Court's longstanding rule requiring the government to establish "something more than the mere omission to appropriate a sufficient fund" to find an implied repeal. *Maine Cmty.*, 140 S. Ct. at 1323 (citation omitted).

'different requirements and protections.'" *POM Wonderful*, 573 U.S. at 115 (discussing interaction of the Lanham Act and FDCA) (quoting *JEM Ag Supply*, 534 U.S. at 144). The FLSA requires statutory wages only for employees who work and excludes executive, administrative, and professional employees, among others. 29 U.S.C. § 213(a)(1); 5 C.F.R. §§ 551.205-551.207. The ADA, meanwhile, mandates payments for *all* federal employees and officers, regardless of whether they were furloughed during a lapse in appropriations and regardless of whether they serve in an executive, administrative, or professional capacity. 31 U.S.C. § 1341(c)(1)(C), (c)(2). Above all, the FLSA permits an employee to seek liquidated damages where the employer fails to pay minimum wages and overtime on time. 29 U.S.C. § 216(b); *Brooklyn Sav. Bank*, 324 U.S. at 707-08. The ADA, by contrast, contains no such provision.

That sort of incomplete overlap does not imply that the ADA trumps the FLSA during lapses in appropriations. Indeed, the Supreme "Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *JEM Ag Supply*, 534 U.S. at 144.[22] That is particularly true where,

[22] *Accord, e.g.*, *POM Wonderful*, 573 U.S. at 115 ("Although both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety."); *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) ("[W]here the statutes do in fact overlap we are not at liberty to infer any positive preference for one over the other." (internal quotation marks and citations omitted)); *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 461 (1975); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731

as here, those two statutes incorporate distinct remedial regimes. *See, e.g.*, *Johnson*, 421 U.S. at 461.

The absence of any conflict between the FLSA and the ADA obviates the government's appeal to the principle that the "the specific governs the general." Gov't Br. 17 (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)). At the outset, the ADA is hardly more specific than the FLSA; the ADA payment provisions apply to a far greater swath of employees and are silent on the availability of liquidated damages. *See supra* pp. 36-37. But even if the government were right that the ADA is somehow more specific, "this greater specificity would matter only if [both acts] cannot be implemented in full at the same time" and thus does not apply where two acts "are complementary and have separate scopes." *POM Wonderful*, 573 U.S. at 118 (citing *RadLAX Gateway*, 566 U.S. at 643-47); *accord, e.g.*, Scalia & Garner, *Reading Law* 183. That rule thus has no application here in light of the FLSA's and ADA's "complementary and separate scopes."

(7th Cir. 2004) (Easterbrook, J.) ("Whether overlapping and not entirely congruent remedial systems can coexist is a question with a long history at the Supreme Court, and an established answer: yes.").

III. The government cannot establish that it sought, reasonably and in good faith, to comply with the FLSA by complying with the ADA.

Finally, the government argues that, even if it violated the FLSA by failing to pay its employees on time, it cannot be held liable for liquidated damages. For support, the government invokes 29 U.S.C. § 260, which permits trial courts to award a discretionary reduction in liquidated damages if the employer shows that it acted in good faith and with reasonable grounds for believing it was not violating the FLSA. Under that provision, the government contends that its compliance with the provisions of the ADA would make any award of liquidated damages an abuse of discretion. That argument is incorrect as a matter of law and premature as a matter of procedure.

A. The government cannot establish reasonable, good-faith efforts to comply with the FLSA by claiming its compliance with a separate statute.

The FLSA permits an employer to seek a discretionary reduction in liquidated damages only where it establishes its reasonable, good-faith efforts to comply with the *FLSA*, not some other provision of the U.S. Code. The plain language of the Act conditions any discretionary reduction in liquidated damages on the "the employer show[ing] to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that [it] had reasonable

grounds for believing that [its] act or omission was not *a violation of the Fair Labor Standards Act*." 29 U.S.C. § 260 (emphasis added).

The government seeks to satisfy that standard by claiming it acted in compliance with the ADA. Crediting that claim would permit reduced liquidated damages whenever an employer has reasonable ground for believing that it acted in compliance with any provision of federal law, not the FLSA specifically. But "courts aren't free to rewrite clear statutes under the banner of [their] own policy concerns." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019).

Even if compliance with the ADA might somehow establish reasonable, good-faith efforts to comply with the FLSA, the factual predicates for the government's argument would remain baseless. At the outset of the government shutdown that led to this appeal, the only judicial decision to consider whether the ADA excused the government from complying with the FLSA squarely rejected that argument, relying on the longstanding rule that the ADA does not cancel the government's obligations. *Martin*, 130 Fed. Cl. at 583. Having already litigated—and lost—the arguments it reasserts here, the government cannot claim any confusion as to its legal obligations under the FLSA. Instead, it must establish that it considered *Martin* and nevertheless rejected in good faith and on a reasonable basis that decision—and the longstanding precedents on which it relied—when it disregarded the FLSA in 2018 and 2019. *See Wright v. Carrigg*, 275 F.2d 448, 449

(4th Cir. 1960) (employer failed to demonstrate good faith belief that employees were not covered by Act where courts had already previously held that they were).

Nor can the government rely on the GEFTA amendments to establish its good-faith compliance with the FLSA. Those amendments were not enacted until January 16, 2019—22 days after the shutdown began on December 22 and after the government had already failed to pay required wages on two paydays. *See supra* pp. 6, 8. The government could not have relied, in good faith or otherwise, on a provision that had not even been enacted.

B. Even if the government's argument were viable, it would remain procedurally improper.

The government cannot establish its good-faith efforts to comply with the FLSA on a motion to dismiss. Under 29 U.S.C. § 260, the employer bears the burden of "show[ing]" that it satisfies that standard. *Bull v. United States*, 479 F.3d 1365, 1379 (Fed. Cir. 2007). By definition, a "showing" is "[t]he act . . . of establishing *through evidence* and argument." *Showing*, Black's Law Dictionary (11th ed. 2019) (emphasis added). Here, however, the government has offered *no* evidence to support its claim to reduced liquidated damages; it has not even answered the complaints. Instead, it inverts the applicable burden of proof, faulting the Court of Federal Claims for "identif[ying] no factual allegation that would support a claim that government officials did not act in good faith," Gov't Br. 22, as though plaintiffs were obligated to allege facts to rebut a showing that the

government has never made. *See, e.g.*, *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1986 n.9 (2017) (plaintiff need not "anticipate and negate in her pleading" an affirmative defense).

The government's statutory obligation to supply evidence of its good faith recognizes the inherently subjective nature of that inquiry. As this Court's predecessor explained in a precedential opinion, "[t]he 'good faith' referred to in section 260 means an honest intention to ascertain what the Fair Labor Standards Act requires and to act in accordance with it. Whether an honest intention existed, necessitates a subjective inquiry. Obviously, such a subjective inquiry involves the presentation of testimony." *Beebe v. United States*, 640 F.2d 1283, 1295 (Ct. Cl. 1981) (internal quotation marks and citations omitted).[23]

Whether the government can satisfy that subjective standard thus awaits the presentation of testimonial evidence and cannot be determined as a matter of law. *Beebe*, for example, held that the issue "cannot be resolved on summary judgment," instead remanding for the trial court to evaluate it in the first instance. *Id.* That conclusion applies with even greater force on a motion to dismiss, where the employer has not attempted to carry its burden of proving good faith with any

[23] By contrast, an employer's "reasonable grounds" for believing that it acted in compliance with the FLSA "involves an objective standard." *Id.*

evidence and the wronged employees have had no opportunity, via discovery, to rebut whatever evidence the employer ultimately offers.

The discretionary character of relief under 29 U.S.C. § 260 offers yet another reason to permit the trial court to evaluate the government's evidence of good faith in the first instance. Even if the government ultimately shows that it sought, reasonably and in good faith, to comply with the FLSA, then it is not automatically entitled to reduced damages, but is merely eligible to request that the trial court exercise discretion in its favor: "[T]he 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." 29 U.S.C. § 260 (emphasis added). Even that discretion "must be exercised consistently with the strong presumption under the statute in favor of doubling" the employer's damages. *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 733 (7th Cir. 1998). "Doubling is the norm, not the exception." *Id.*

In asking this Court to exercise that discretion in the first instance, the government addresses the wrong tribunal. "[T]he lower court has broad statutory discretion" to reduce liquidated damages, *Bull v. United States*, 479 F.3d 1365, 1380 (Fed. Cir. 2007), not this Court. Accordingly, "[t]his discretionary ruling . . . is clearly for the district court, subject to review in this court only for abuse of

discretion." *Local 246 Utility Workers of Am. v. S. Cal. Edison Co.*, 83 F.3d 292, 298 (9th Cir. 1996).

Even if the government ultimately carries its burden of proving that it sought to comply, reasonably and in good faith, with the FLSA, it is jarring for the government to suggest that the Court of Federal Claims must, as a matter of law, exercise its discretion to reduce to nothing public servants' compensation for the harm they suffered by delayed payment of wages. After all, the shutdown was no act of God, but the product of policymakers' decisions in the executive and legislative branches of government to pursue policy objectives at the expense of paying public servants for the work they performed. Those public servants suffered real financial injuries when their paychecks did not arrive when expected—late fees, interest charges, damaged credit ratings. Liquidated damages would compensate for those injuries, even when they are "too obscure and difficult of proof for estimat[ion]," out of "recognition that failure to pay the statutory minimum on time" works real harms. *Brooklyn Sav.*, 324 U.S. at 707. Holding the government to its obligation to pay those damages would force it to internalize the costs of its conduct rather than foisting those costs on blameless public servants.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed and the case remanded for further proceedings.

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Respectfully Submitted,

Counsel for Avalos Plaintiffs-Appellees

/s/ Julie M. Wilson
Julie M. Wilson
Allison C. Giles
NATIONAL TREASURY EMPLOYEES UNION
800 K Street, N.W., Suite 1000
Washington, DC 20001
Tel: (202) 572-5500
Fax: (202) 572-5645
julie.wilson@nteu.org
allie.giles@nteu.org

Abigail V. Carter
Leon Dayan
Joshua Segal
BREDHOFF & KAISER PLLC
805 15th Street N.W., Suite 1000
Washington, D.C. 20005
Tel: (202) 842-2600
Fax: (202) 842-1888
ldayan@bredhoff.com
acarter@bredhoff.com
jsegal@bredhoff.com

Counsel for Arnold Plaintiffs-Appellees

/s/ Jacob Y. Statman (with consent)
Jacob Y. Statman

Jason I. Weisbrot
SNIDER & ASSOCIATES, LLC
600 Reisterstown Road, 7th Floor
Baltimore, MD 21208
Tel: (410) 653-9060
jstatman@sniderlaw.com
jason@sniderlaw.com
Counsel for Hernandez Plaintiffs-Appellees

/s/ Clif Alexander (with consent)
Clif Alexander (Texas Bar No. 24064805)
A. Cliff Gordon (Texas Bar No. 00793838)
ANDERSON ALEXANDER, PLLC
819 N. Upper Broadway
Corpus Christi, TX 78401
Tel: (361) 452-1279
Fax: (361) 452-1284
clif@a2xlaw.com
cgordon@a2xlaw.com

Counsel for Anello Plaintiffs-Appellees

/s/ T. Reid Coploff (with consent)
T. Reid Coploff
Gregory K. McGillivary
MCGILLIVARY STEELE ELKIN LLP
1101 Vermont Ave. NW, Suite 1000
Washington, DC 20005
Tel: (202) 833-8855
gkm@mselaborlaw.com
trc@mselaborlaw.com

Counsel for Richmond Plaintiffs-Appellees

/s/ Jack K. Whitehead, Jr. (with consent)
Jack K. Whitehead, Jr.
WHITEHEAD LAW FIRM
11909 Bricksome Ave., Ste. W-3
Baton Rouge, LA 70816

Tel: (225) 303-8600
Fax: (225) 303-0013
jwhitehead@whitehead-law.com
teamwhitehead@whitehead-law.com

Counsel for Jones Plaintiffs-Appellees

/s/ Josh Sanford (with consent)
Josh Sanford
SANFORD LAW FIRM, PLLC
10800 Financial Centre Parkway, Suite 510
Little Rock, AR 72211
Tel: (800) 615-4946
josh@sanfordlawfirm.com

Counsel for Tarovisky Plaintiffs-Appellees

/s/ Heidi R. Burakiewicz (with consent)
Heidi R. Burakiewicz
D. Robert DePriest
KALIJARVI, CHUZI, NEWMAN &
FITCH, P.C.
818 Connecticut Avenue NW, Suite 1000
Washington, DC 20006
Tel: (202) 331-9260
Fax: (877) 219-7127
hburakiewicz@kcnlaw.com
rdepriest@kcnlaw.com
Counsel for Baca Plaintiffs- Appellees

/s/ Molly A. Elkin (with consent)
Molly A. Elkin
Sarah M. Block
Gregory K. McGillivary
MCGILLIVARY STEELE ELKIN LLP
1101 Vermont Ave. NW, Suite 1000
Washington, DC 20005
Tel: (202) 833-8855
gkm@mselaborlaw.com
mae@mselaborlaw.com

smb@mselaborlaw.com

Counsel for Rowe Plaintiffs-Appellees

/s/ *Marshall J. Ray* (with consent)
Marshall J. Ray
LAW OFFICES OF MARSHALL J. RAY, LLC
514 Marble Ave NW
Albuquerque, NM 87102
Tel: (505) 312-7598
mray@mraylaw.com

Jason J. Lewis
LAW OFFICE OF JASON J. LEWIS, LLC
1303 Rio Grande Blvd. NW Suite 5
Albuquerque, NM 87104
Tel: (505) 361-2138
jlewis@mraylaw.com

Counsel for D.P. et al. Plaintiffs-Appellees

/s/ *Nicholas M. Wieczorek* (with consent)
Nicholas M. Wieczorek
CLARK HILL PLLC
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, NV 89169
Tel: (702) 862-8300
Fax: (702) 862-8400
nwieczorek@clarkhill.com

Counsel for* Plaintiff No. 1 *Plaintiffs-Appellees

/s/ *Jules Bernstein* (with consent)
Jules Bernstein
Linda Lipsett
BERNSTEIN & LIPSETT, P.C.
1130 Connecticut Avenue, N.W., Suite 950
Washington, DC 20036

Tel: (202) 296-1798
Fax: (202) 496-0555
chouse@bernsteinlipsett.com
llipsett@bernsteinlipsett.com

Daniel M. Rosenthal
Brita C. Zacek
JAMES & HOFFMAN, P.C.
1130 Connecticut Avenue, N.W., Suite 950
Washington, DC 20036
Tel: (202) 496-0500
Fax: (202) 496-0555
dmrosenthal@jamhoff.com
bczacek@jamhoff.com

Counsel for I. P. et al. Plaintiffs-Appellees

/s/ Laura R. Reznick (with consent)
Laura Reznick
BELL LAW GROUP, PLLC
100 Quentin Roosevelt Boulevard, Suite 208
Garden City, NY 11530
Tel: (516) 280-3008
Fax: (212) 656-1845
lr@belllg.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Federal Circuit Rule 32(b)(1) because it contains 12,762 words, according to the count of Microsoft Word.

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