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 & 2021-2021

IN THE 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, Judge Patricia E. Campbell-Smith.

REPLY BRIEF FOR APPELLANT

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Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2009

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

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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

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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

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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

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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

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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

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

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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

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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

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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

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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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JOSEPH ABRANTES, NEFTALI ACEVEDO, HECTOR ACOSTA, JOSE ACOSTA, DAVID ADAMS, SEAN ADARME, JOSE AGUILAR, DANIEL ALBA, MICHELLE ALBERTSON, KENIE ACEVEDO-CORREA, and all

plaintiffs represented by Alan Lescht and Associates, PC with Jack Jarrett as Lead Counsel,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

2021-2021

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00129-PEC, Judge Patricia E. Campbell-Smith

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INTRODUCTION AND SUMMARY

Plaintiffs are employees who performed work during the appropriations lapse in December 2018 and January 2019 as so-called excepted employees. They do not dispute that the Anti-Deficiency Act barred payments during the appropriations lapse and that government officials would have been subject to administrative discipline and possible criminal penalties if they had disregarded the statutory command. Plaintiffs also do not dispute that their agencies generally complied with the terms of the Anti-Deficiency Act by paying their accrued wages "at the earliest date possible after the lapse" ended. 31 U.S.C. § 1341(c)(2).[1]

Plaintiffs nevertheless insist that Congress subjected the treasury to damages claims for complying with that statutory command when it extended the Fair Labor Standards Act (FLSA) to federal employees in 1974. But they identify nothing in the text or history of the statute suggesting that Congress believed it was establishing an

[1] Plaintiffs cite an allegation from the complaint filed in one of the thirteen consolidated cases that the plaintiffs in that case had not received overtime pay earned during the lapse in appropriations as of several months later. *See Avalos* Br. 9 (citing Appx776). As the government explained in its opening brief, plaintiffs' complaints should be dismissed to the extent that they claim the government is subject to liquidated damages under the FLSA for complying with the Anti-Deficiency Act. *See* Opening Br. 19 & n.3 (explaining that an additional claim in the same case resting on the allegation that the relevant agency had sufficient appropriations to pay some employees for some of the lapse is "not at issue in this appeal"). To the extent that at least that set of plaintiffs also plausibly alleged that the government failed to comply with the Anti-Deficiency Act and unreasonably delayed overtime payments beyond the time required by that statute, they remain free to pursue claims based on that allegation on remand.

implicit (but absolutely rigid) requirement regarding the timing of payments to federal employees that would be violated when government agencies complied with the express limitations of the Anti-Deficiency Act that long preceded that extension.

Plaintiffs' response briefs largely disregard the fundamental problems with their position. They do not argue that Congress actually intended to make compliance with the Anti-Deficiency Act a basis for damages under the FLSA. They urge, however, that the FLSA had been understood to impose an obligation to pay required wages on an employee's regular payday prior to 1974 and that the Anti-Deficiency Act's prohibitions cannot suspend or repeal that obligation.

These arguments fail in all respects. The FLSA contains no express payment deadlines, and the Supreme Court made clear well before the statute was extended to the federal government in 1974 that the FLSA "does not require the impossible." *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432-33 (1945). Congress would have had no reason to believe that it was enacting a statute that conflicted with the existing explicit restrictions of the Anti-Deficiency Act. Plaintiffs are also quite wrong to frame the question as whether the Anti-Deficiency Act suspended or repealed the FLSA. The question, instead, is whether the extension of the FLSA to the federal government created liability for compliance with the long-established commands of the Anti-Deficiency Act.

Even assuming that the delay in payment violated the FLSA, an award of liquidated damages would be improper. Government officials acted reasonably and in

good faith, *see* 29 U.S.C. § 260, in complying with a statutory directive that they had no discretion to disregard. Plaintiffs urge that government officials could not reasonably believe that their actions comported with the FLSA in view of the ruling of the Court of Federal Claims in *Martin v. United States*, 130 Fed. Cl. 578 (2017), *appeal pending*, No. 21-2255 (Fed. Cir.). But final judgment had not even issued in that non-precedential case at the time of the appropriations lapse, and the government had not yet been able to appeal the decision. It plainly would not control the inquiry under § 260.

This Court should direct dismissal of the claims under the Border Patrol Act and the Back Pay Act asserted by the *Abrantes* plaintiffs for reasons that parallel the analysis of the FLSA claims. The *Abrantes* plaintiffs urge that the Border Patrol Act, which provides that agents "shall receive pay" at particular levels, is a money-mandating statute and that violations of that requirement can be asserted under the Tucker Act. That assertion is accurate, but it has no bearing on the inquiry here. The *Abrantes* plaintiffs have received the pay that is mandated by the Border Patrol Act. The statute does not, however, create an additional requirement that the mandated wages be paid on an employee's regular payday in these circumstances.

ARGUMENT

A. The Government Does Not Violate the FLSA when It Pays Employees in Accordance with the Anti-Deficiency Act

1. Plaintiffs urge at length that the FLSA anticipates that employees should generally make payments on the usual pay date. *Avalos* Br. 14-22. No one has argued to the contrary, and the government generally makes payments in exactly this way.

That general principle, however, in no way establishes plaintiffs' right to recovery here. As the decisions cited in plaintiffs' brief make clear, the general principle that employers should make payments on scheduled pay dates does not constitute a rigid, unvarying requirement, and that principle provides no basis for concluding that the extension of the FLSA made compliance with the Anti-Deficiency Act the basis for a liquidated damages claim.

a. Even when a payment is not explicitly barred by another federal statute, the Supreme Court has long recognized that the FLSA "does not require the impossible." *Walling v. Harnischfeger Corp*, 325 U.S. 427, 432-33 (1945) (cited at *Avalos* Br. 16 n.5). Thus, when overtime compensation cannot be computed until after the regular pay date, employers properly comply with the FLSA when they make those payments "as soon as convenient or practicable under the circumstances." *Id.*

Reviewing the cases in this area, the Second Circuit explained that the decisions reflect two general principles, *Rogers v. City of Troy*, 148 F.3d 52, 57 (2d Cir. 1998) (cited at *Avalos* Br. 17 n.7): first, "that the FLSA requires wages to be paid in a timely

fashion," but, second, "that what constitutes timely payment must be determined by objective standards—and not solely by reference to the parties' contractual arrangements." *Id.* The court further noted that cases finding FLSA violations "all involved substantial delays in payment, and—more important—the practices disapproved of resulted in evasions of the minimum wage and overtime provisions of the FLSA." *Id.* at 56. Thus, the court stated, a city would not violate the FLSA if it made changes to its employees' payment schedule for legitimate business reasons, even if that change resulted in the delayed payment of minimum and overtime wages. *Id.* at 57.

That analysis accords with the recognition that the FLSA's liquidated damages provision "constitute[d] a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living . . . that double payment must be made in the event of delay." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (pay withheld for more than two years); *see also, e.g.*, *Rigopoulos v. Kervan*, 140 F.2d 506 (2d Cir. 1943) (holding an employer liable when it paid accrued overtime wages between three years and six months late); *Birbalas v. Cuneo Printing Indus.*, 140 F.2d 826 (7th Cir. 1944) (similar).

Plaintiffs assert, without elaboration, that *Walling* has "no application here" (*Avalos* Br. 16 n.5) and that *Rogers* is "poles apart" (*Avalos* Br. 17 n.7) from this case. That is true insofar as the payment schedule in this case was indisputably dictated by Congress and that the government complied with an unambiguous statutory

command—but that distinction undermines, rather than advances, plaintiffs' argument. The relevance of the decisions, in any event, is not their factual similarity to the circumstances here, but their recognition that the FLSA does not establish a rigid rule that payments must be paid on the regularly scheduled date even when doing so is impossible for practical—or, in this case—legal reasons.

b. Plaintiffs' attempt to glean support from this Court's decision in *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988) (cited at *Avalos* Br. 18), fails in all respects. The question in that case was when an overtime claim accrued for purposes of applying the statute of limitations. As described in more detail in the Court's earlier decision in *United States v. Cook*, 795 F.2d 987, 994 (Fed. Cir. 1986), the FLSA required that after 1978, federal firefighters be paid overtime for hours worked in excess of the average number of hours worked by firefighters, with that average to be determined by a study conducted by the Secretary of Labor. The Secretary's initial study overstated the number of average hours; that error was corrected in a revised study. The district court determined that the firefighters' cause of action did not accrue until the publication of the recomputed study, which, this Court observed, reflected a conclusion that "nonpayment of legal overtime before the stated date did not accrue a claim without more." *Cook*, 855 F.2d at 851. The Court next observed—in the only sentence quoted by plaintiffs—that "[t]his is contrary to 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. Cook* did not address the question presented here—when the deferral of

payment violates the FLSA—and it did not suggest that a payday rule would apply regardless of the explicit command of another federal statute. *Cook* concluded, moreover, that even for purposes of determining an accrual date, the "usual rule" is not the invariable rule. *Id.*

Plaintiffs' quotation of general language in *Calderon v. Witvoet*, 999 F.2d 1101 (7th Cir. 1993), without regard to the facts of the case likewise does not advance their argument. That case involved an employer's treatment of migrant farmworkers. Rather than pay their full wages each pay period, the employer withheld part of the nominal wages which would be paid only as a "bonus" when the worker left the defendant's employ. *Id.* at 1107 (quotation omitted). The court's holding that this deliberate, systematic delay, which raised the type of concerns noted in *Brooklyn Savings Bank*, violated the FLSA is entirely consistent with the government's position here.

Plaintiffs also seek to rely on the Ninth Circuit's decision in *Biggs v. Wilson,* 1 F.3d 1537 (9th Cir. 1993), which found that a delay in payment to state workers during a California budget impasse violated the FLSA. As the Second Circuit observed in *Rogers,* the Ninth Circuit's decision was "[t]he only case that arguably does not fall within th[e] paradigm" described above. 148 F.3d at 56 n.3. But even assuming that *Biggs* was correctly decided, it did not concern the crucial circumstances presented here, where plaintiffs urge that the enactment of the FLSA penalized adherence to the explicit requirements of another federal statute. As discussed, there

is no basis on which to conclude that in extending the FLSA to the government, Congress made compliance with the previous statute a violation of the newly applicable provisions. Variations in state appropriations processes did not similarly form part of the essential background of the 1974 extension of the FLSA.

Plaintiffs observe that inasmuch as the FLSA clearly requires that wages be paid, there must be some temporal point at which that requirement will be violated. *See Avalos* Br. 19-22. That observation, which is not in dispute, begs the question presented here—whether payment following a lapse in appropriations in accordance with the terms of the Anti-Deficiency Act contravenes the FLSA's payment requirement.

c. Plaintiffs also observe—as did the government in its opening brief—that the failure to appropriate funds to satisfy a clear statutory obligation does not, of itself, extinguish that obligation. *Avalos* Br. 31-34; Gov't Opening Br. 20-21. In seeking to rely on that observation here, however, plaintiffs first assume their conclusion that the FLSA requires payments during appropriations lapses that were explicitly barred long before the FLSA was made applicable to the federal government. This case bears no resemblance to decisions on which plaintiffs seek to rely, where it was clear that the government had incurred, by statute or by contract, the underlying obligation. *See, e.g.*, *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320-21 (2020) (explaining that the relevant statute's "express terms" had created an obligation to make payments by providing that the government "shall pay" insurers "according to a precise

statutory formula" (quotation omitted)); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 193-94 (2012) (explaining that the government had made a "contractual promise to pay each tribal contractor the full amount of funds to which the contractor was entitled" (alteration and quotation omitted)); *United States v. Langston*, 118 U.S. 389, 393 (1886) (explaining that the relevant statute created an obligation to pay the claimant by "fixing his annual salary" at a specific amount). And, of course, it is generally undisputed that the government has long since paid the wages required by the FLSA, and did so on the schedule required by the Anti-Deficiency Act.

2. Plaintiffs' discussion of a variety of interpretive canons rests on incorrect premises and misunderstands the questions at issue.

a. Plaintiffs invoke the principle that Congress is presumed to be aware of the settled interpretation of a statute when it amends or extends that statute. *Avalos* Br. 27-29. But the cases interpreting the FLSA in 1974 when Congress extended its provisions to the federal government would have given Congress no reason to conclude that the FLSA imposed an unvarying pay-date requirement or that extending the FLSA would subject the treasury to liquidated damages claims for compliance with the Anti-Deficiency Act. To the contrary, as is explained above, by 1974, the Supreme Court had already held that the FLSA does not impose a rigid requirement or "require the impossible." *Walling*, 325 U.S. at 432-33.

b. Plaintiffs similarly highlight their misunderstanding of the two statutes when they urge that the Anti-Deficiency Act should not be read to impliedly repeal

obligations that they assert were imposed by the FLSA. *Avalos* Br. 43-47. The argument again assumes the premise that the FLSA required payment even when payment was impossible. And in any event, the Anti-Deficiency Act predates the FLSA's enactment and extension to the federal government by many decades and so asking whether it "repealed" that statute is nonsensical. The question, instead, is whether Congress, when it extended the FLSA, believed that it was imposing a duty on the government that would apply notwithstanding the contrary prohibitions of the Anti-Deficiency Act and would make compliance with those prohibitions the basis for a damages action. The answer is plainly no. Indeed, as plaintiffs note, the canon against implied repeals arises in part "out of 'respect for Congress as a drafter' that is unlikely to create 'irreconcilable conflicts' in its legislation." *Avalos* Br. 43-44 (alterations omitted) (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018)). Thus, insofar as the canon is relevant here, it again demonstrates the error of plaintiffs' position.

Plaintiffs similarly misunderstand the point at issue when they urge that the 2019 amendments to the Anti-Deficiency Act did not amend obligations under the FLSA. *See Avalos* Br. 36-43. The amendments provide that each employee shall be paid "at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations." 31 U.S.C. § 1341(c)(2). The amendments simply underscore that Congress has at all times understood that salaries cannot be paid during appropriations lapses, and the new

legislation established a specific requirement that employees be paid as soon as possible after a lapse ends. Plaintiffs note that the legislative history of the amendments indicates that many members of Congress voiced concern regarding the impact of the appropriations lapse. *Avalos* Br. 41-43. Congress addressed that concern by requiring payment as soon as possible following end of the appropriations lapse. Nothing in the text or history of the amendments suggests that failure to make payments prior to that time violated the FLSA or might provide employees with a damages remedy.

Plaintiffs also note that the 2019 amendments provided that the Anti-Deficiency Act's prohibitions apply "[e]xcept as specified in this subchapter or any other provision of law," 31 U.S.C. § 1341(a)(1). *Avalos* Br. 34. But that language—which was not added to the Anti-Deficiency Act until 2019—cannot be understood as implicitly directing officials to pay employees on their regular paydays in accordance with plaintiffs' understanding of the FLSA; to the contrary, the language was enacted together with the directive to make payments after—not during—the appropriations lapse. Insofar as the provision is relevant, it underscores that Congress has never perceived the FLSA to establish a provision of law that would limit the scope of the Anti-Deficiency Act.

c. Plaintiffs also argue that the canon that the specific governs the general is inapplicable because the Anti-Deficiency Act does not bar Congress from creating underlying substantive obligations. *See Avalos* Br. 47. The question, however, is

whether Congress intended that agency officials comply with the command of the Anti-Deficiency Act during an appropriations lapse or with the general prompt payment requirement of the FLSA. Plaintiffs do not dispute that agency officials were obliged to act in accordance with the Anti-Deficiency Act. And there is no reason to conclude that Congress believed that adhering to the long-established mandates of the Anti-Deficiency Act—which apply only in the specific circumstances of a lapse in appropriations—would violate the more generally applicable requirements of the FLSA, much less that doing so would subject the treasury to damages claims.

d. Plaintiffs also mistakenly invoke the principle that the meaning of statutory language cannot change from case to case depending on the identity of the parties. *See Avalos* Br. 27 (citing *Clark v. Martinez*, 543 U.S. 371, 378, 380 (2005)). That payments should generally be made promptly is not at issue, and plaintiffs do not seriously dispute that, whatever the scope of the implicit requirement, it is not rigid and uniform without regard to the circumstances of a particular case. In any event, the canon on which plaintiffs rely is also inapposite because it indicates that courts should not "give the[] same words a different meaning." *Clark*, 543 U.S. at 378. But plaintiffs do not rely on the statutory text, and nothing in the government's position requires that the "same words" be given different meanings.

e. Finally, plaintiffs err in urging that interpretive canons of sovereign immunity are irrelevant in determining whether Congress subjected the government to damages for complying with the Anti-Deficiency Act.

Plaintiffs identify no indication in the text or history of the FLSA extension to the federal government that would support their position, and they do not argue that Congress actually intended to create the unique anomaly their argument proposes. Instead, relying primarily on *Gomez-Perez v. Potter*, 553 U.S. 474, 490-91 (2008), plaintiffs urge that these interpretive canons have no application insofar as they are asking the Court to construe the FLSA to create a substantive obligation that is violated by compliance with the Anti-Deficiency Act. *Avalos* Br. 24-26. Whether Congress intended to create an obligation that would make compliance with the Anti-Deficiency Act the basis for a damages suit is a question that involves intertwined substantive and remedial issues, as is often the case in determining whether Congress has made the government's actions or failures to act the basis of a damages suit. And in determining the scope of those obligations, the Court "should also have in mind that the Act waives the immunity of the United States and that . . . we should not take it upon ourselves to extend the waiver beyond that which Congress intended." *Smith v. United States*, 507 U.S. 197, 203 (1993) (alteration in original) (quoting *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979)). That is clearly the case here, where plaintiffs argue that Congress made compliance with the Anti-Deficiency Act a basis for damages.

Equally clearly, *Gomez-Perez* sheds no light on the inquiry here. The relevant statute in that case had two distinct provisions: one provision that "unequivocally waive[d] sovereign immunity" and a separate "substantive provision outlawing

'discrimination.'" *Gomez-Perez*, 553 U.S. at 491. In those circumstances, the Court concluded that the separate, substantive provision did not need to "surmount the same high hurdle" of construction as the remedial provision. *Id.* Here, the Court is asked to determine the scope of (and relationship between) the FLSA's remedial provision, 29 U.S.C. § 216—which is silent on the question of the timing of payment dates—and the Anti-Deficiency Act, which specifically establishes that the payments must be made after the appropriations lapse has ended.

B. Plaintiffs Are Not, in Any Event, Entitled to Liquidated Damages

Plaintiffs have not demonstrated any violation of the FLSA. But even assuming to the contrary for purposes of argument, they cannot plausibly argue that the government did not act "in good faith" or that it lacked "reasonable grounds for believing" that its conduct was not in violation of the FLSA. 29 U.S.C. § 260. Plaintiffs cite no case or principle that remotely suggests that government officials who adhere to express statutory commands do not act "in good faith" or that it would be unreasonable for those officials to believe that Congress had not made compliance with one federal statute a violation of another statute.

Plaintiffs urge, however, that government officials could not reasonably believe that their actions comported with the FLSA in light of the ruling of the Court of Federal Claims in *Martin v. United States*, 130 Fed. Cl. 578 (2017), *appeal pending*, No. 21-2255 (Fed. Cir.). *Avalos* Br. 49-50. But *Martin* is a nonprecedential decision from a

single trial court, in a case that had not even progressed to final judgment at the time of the relevant lapse in appropriations. That ruling—which the government has only recently been able to appeal—could not be the basis of a liquidated damages award.

Plaintiffs are equally wide of the mark in urging that the issue of damages should be resolved on remand if this Court were to conclude that the government's conduct violated the FLSA. The issue of entitlement to liquidated damages based on the government's deferral of wages during the lapse in appropriations presents no relevant factual issues to resolve: the government deferred plaintiffs' wages during that lapse because the Anti-Deficiency Act prohibited making wage payments during that period. Any award of liquidated damages in this circumstance would necessarily constitute an abuse of discretion.

The Court of Federal Claims' resolution of the damages question in *Martin* illustrates the error of plaintiffs' arguments. The court there held that an employer acts in good faith only if it takes "active steps to ascertain the dictates of the FLSA." 130 Fed. Cl. at 585 (quotation omitted). In the court's view, the agencies in that case acted in bad faith because they had "rel[ied] entirely" on "the primacy of the" Anti-Deficiency Act when deferring plaintiffs' wages—rather than making an "inquiry into how to comply with the FLSA" or "seek[ing] a legal opinion regarding how to meet the obligations of both" statutes." *Id.* at 585-86. The court did not suggest that there was any way that agencies could have satisfied the requirements of the FLSA as

posited by the court while also complying with the Anti-Deficiency Act. Nor did the court indicate what type of relevant legal advice agencies could have received.

In contrast to other cases involving a determination under 29 U.S.C. § 260, government officials in cases involving an appropriations lapse have no discretion in the timing of payments. The circumstances of these cases thus bear no resemblance to those in *Beebe v. United States*, 640 F.2d 1283, 1295 (Ct. Cl. 1981), where the Court remanded for a determination under § 260 in the first instance. That case also did not suggest that remands are generally required even where the government's conduct was dictated by statute. Instead, the Court in *Beebe* concluded that "[a]fter a careful examination of the documents that have been submitted with the motions for summary judgment and the facts which have been admitted, we find that this issue involves questions of fact which cannot be resolved on summary judgment and that it must be remanded to the trial division for determination." *Id.* at 1295.

C. Plaintiffs' Claims Under the Border Patrol Act and Back Pay Act Should Likewise Be Dismissed

For similar reasons, the *Abrantes* plaintiffs' claims should be dismissed. To prevail on their claims under the Border Patrol Act and Back Pay Act, the *Abrantes* plaintiffs would need to show that deferral of their wages in accordance with the Anti-Deficiency Act constituted an "unjustified or unwarranted personnel action," 5 U.S.C. § 5596(b)(1), a standard that will require a demonstration that the deferral violated the terms of the Border Patrol Act, *cf.* 5 C.F.R. § 550.803.

Like the FLSA, the Border Patrol Act contains no provision requiring that employees' wages be paid on any particular date, and for all of the reasons given above, it is implausible to think that Congress intended to impose such an implicit obligation that would penalize compliance with the existing provisions of the Anti-Deficiency Act.

The *Abrantes* plaintiffs advance many of the same arguments urged by the *Avalos* plaintiffs, including that claim-accrual rules support reading an implicit regular-payday requirement into the statute (at *Abrantes* Br. 15-19); that the Anti-Deficiency Act did not alter the government's substantive obligations (at *Abrantes* Br. 19-21), and that the 2019 amendments to the Anti-Deficiency Act cannot bear on that analysis (at *Abrantes* Br. 21-22). These arguments fail for the reasons discussed with regard to the FLSA.

The *Abrantes* plaintiffs briefly make several additional arguments specific to the Border Patrol Act. They argue that the Border Patrol Act qualifies as a money-mandating statute for purposes of the Tucker Act's waiver of sovereign immunity (at *Abrantes* Br. 11-13), that the failure to pay wages on time qualifies as an unjustified or unwarranted personnel action (at *Abrantes* Br. 14), and that precedent establishes that a reduction in pay can be unjustified or unwarranted even where the government does not intend for the reduction to occur (at *Abrantes* Br. 14-15).

None of those arguments provides support for plaintiffs' claim. First, the government does not dispute that the Border Patrol Act, which provides that agents

"shall receive pay" at particular levels, is a money-mandating statute or that the Tucker Act waives the government's immunity for money damages for a violation of that mandate. In this case, however, it is undisputed that all of the *Abrantes* plaintiffs have received the pay that is mandated by the Border Patrol Act. The relevant question is whether the Border Patrol Act contains an additional, implicit requirement that the mandated wages be paid on an employees' regular payday in these circumstances. That the Border Patrol Act is money-mandating with respect to the amount of pay does not suggest that it also contains an implicit mandatory timing requirement that would support a damages claim.

Second, plaintiffs contend, relying on *Adde v. United States*, 98 Fed. Cl. 517, 522 (2011), that the failure to provide required pay on a regularly scheduled pay date is an unjustified or unwarranted personnel action. *Abrantes* Br. 14. In *Adde* a government employee was entitled to (and was not paid) foreign post allowances over a period of three years; the government paid those allowances only long after she brought suit. *See Adde*, 98 Fed. Cl. at 520. That case did not assume the existence of a categorical rule that any delays in payments are unjustified or unwarranted personnel actions. More specifically, the Court of Federal Claims there had no occasion to consider whether a delay resulting from application of the Anti-Deficiency Act would constitute an unjustified or unwarranted personnel action. And the court did not hold that the Border Patrol Act contains a regular-payday requirement that would be violated by a payment delay during an appropriations lapse.

Third, plaintiffs advance another undisputed but inapposite proposition: that an erroneous reduction in pay can qualify as an unjustified or unwarranted personnel action even if the government's error is unintended or inadvertent. *Abrantes* Br. 14-15. The delay here was not inadvertent. It was dictated by Congress.

CONCLUSION

The orders of the Court of Federal Claims should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4758 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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