

App. No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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ELEAZER AVALOS, et. al,  
L. KEVIN ARNOLD, et. al,  
ROBERTO HERNANDEZ, et. al,  
LORI ANELLO, et. al,  
BRIAN RICHMOND, et. al,  
JUSTIN TAROVISKY, et. al,  
QUENTIN BACA, et. al,  
DAVID JONES, et. al,  
TONY ROWE, et. al,  
D.P., et. al,  
Plaintiff No. 1, et. al,  
I.P., et. al,  
*Petitioners,*

v.

UNITED STATES,  
*Respondent.*

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**APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION  
FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FEDERAL CIRCUIT**

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May 26, 2023

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## **APPLICATION**

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Federal Circuit:

Pursuant to Supreme Court Rule 13.5, Petitioners respectfully request that the Court extend the time to file a petition for a writ of certiorari in this matter for sixty days through Monday, August 7, 2023. On March 10, 2023, the U.S. Court of Appeals for the Federal Circuit issued an order denying Petitioners' petition for rehearing en banc (see App. C, *infra*). Absent an extension of time, the petition would be due on June 8, 2023. Petitioners are filing this application at least ten days before that date. See S. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **BACKGROUND**

In a 2-1 decision, the Federal Circuit Court of Appeals reversed two decisions of the Court of Federal Claims and dismissed the claims of over 95,000 non-exempt Federal Government employees under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* Petitioners in these 12 cases were required to work during the partial government shutdown in 2018-2019, while Petitioners in the other two cases were required to work during the partial government shutdown

in 2013. The Government did not pay any of the Petitioners until after the shutdowns ended.

The Federal Circuit's decision will deny relief not only to Petitioners but also to the hundreds of thousands of current and future federal employees who similarly will be required to work during future shutdowns. The holding also calls into question the right of workers throughout the United States to relief under the FLSA when any employer finds it impracticable to pay its workers minimum or overtime wages on their regular paydays – a right that previously was unquestionable under 75 years of decisions.

On October 1, 2013, the Government allowed appropriations for many federal agencies to lapse. Over the next 16 days, the Government forced hundreds of thousands of public servants to work without paying them minimum or overtime wages on their regular payday. And for 35 days starting on December 22, 2018, the Government forced similar numbers of non-exempt employees to work during a budget impasse without paying them minimum or overtime wages on their regular paydays.

Numerous judicial decisions, including from this Court, and the guidance of the U.S. Department of Labor establish that private employers violate the FLSA and are liable for liquidated damages when they fail to pay non-exempt workers minimum and overtime wages on their regular paydays. Judicial decisions and

Labor Department guidance apply the same rule to state and local governments, even when the non-payment results from a budget impasse and the State's Constitution forbids State officers from making payments until money is appropriated.

The Court of Federal Claims followed this established law in granting partial summary judgment to the *Martin* Petitioners, who assert claims arising out of the 2013 shutdown. *Martin v. United States*, 130 Fed. Cl. 578 (2017). The Court later followed *Martin* in denying the Government's motions to dismiss in the "Avalos" cases arising out of the 2018-19 shutdown. *See, e.g., Avalos v. United States*, 151 Fed. Cl. 380 (2020).

A divided Federal Circuit panel reversed both rulings. App. A (*Martin* decision); App. B (*Avalos* decision). The majority interpreted the FLSA as requiring employers to pay their employees, not on their regular paydays, but "as soon as practicable under the circumstances." App. B at 19. And, according to the majority, "[p]aying federal government wages during a lapse in appropriations is not practicable because government would violate the Anti-Deficiency Act [(“ADA”), 31 U.S.C. § 1341] and could incur civil and criminal liability by making those expenditures." *Id.* The majority reversed in *Martin* "[f]or the same reasons in *Avalos*." App. A at 5.

The full Federal Circuit denied petitions for rehearing *en banc* in *Martin* and *Avalos* without a published explanation on March 10, 2023. App. C.

### **REASONS FOR GRANTING AN EXTENSION OF TIME**

Petitioners request that the time to file a petition for a writ of certiorari be extended for sixty days for three reasons:

1. This case presents an important question affecting, at minimum, the rights of hundreds of thousands of federal employees under the FLSA and, potentially, the FLSA rights of state and local government and private employees. Petitioners need additional time to prepare a petition for a writ of certiorari addressing such an important question.

2. Petitioners have reached out to an experienced Supreme Court practitioner for assistance in preparing the petition and he requires additional time to familiarize himself with the record and to perform the necessary legal research, so that the petition may be properly framed and argued in this Court.

3. The *Martin* and *Avalos* Petitioners have not yet decided whether to file a joint certiorari petition or separate certiorari petitions. Even if they file separately, they will coordinate to present the issues as clearly as possible. Coordination among up to 13 sets of lawyers will require more time than if the issues were presented in only a single case.



## CONCLUSION

For these reasons, Petitioners respectfully request that the time to file a petition for a writ of certiorari in this matter be extended by sixty days to and including Monday, August 7, 2023.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

A copy of this application was served by U.S. mail to the Solicitor General of the United States at the address below in accordance with Supreme Court Rule 22.2 and 29.4:

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