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No. ________

In The
Supreme Court of the United States

DONALD MARTIN, Jr., *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

JUSTIN TAROVISKY, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act (FLSA) establishes a required minimum wage and a mandatory overtime rate for covered employees. In 1974 Congress extended the FLSA to apply to most federal agencies.

The question presented is:

> Do either the Anti-Deficiency Act or the Government Employee Fair Treatment Act displace, modify or require a special narrower interpretation of the obligations created by the FLSA insofar as those obligations apply to federal employees?

PARTIES

This petition seeks review of two related Federal Circuit decisions. Those appellate opinions each resolved multiple appeals from distinct cases decided by the Court of Federal Claims.

Cases Related to the 2013 Appropriations Lapse

The named plaintiff-petitioners in *Martin v. United States* are Donald Martin, Jr., Patricia A. Manbeck, Jeff Roberts, Jose Rojas, and Randall L. Sumner. A list of the current and former federal employees who opted into this action is set out in ECF No. 144-1, 145-1 in this case in the Court of Federal Claims. A complete list of the current and former federal employees who opted into this action is also being filed with the clerk under seal.

The named plaintiff-petitioners in the court of appeals caption in *Marrs v. United States* are Frank Marrs, Nicole Adamson, Bethany Afraid, Joel Albrecht, Jesus Arevalo, Nathan Arnold, Shawn Ashworth, Jeremiah Austin, Michael Avenali, Jose Balarezo, Ebony Baldwin, Charles Bambery, David Barraza, Gregory Barrett, Donna Barringer, David Bautista, Gary Bayes, Darrell Becton, Fraun Bellamy, Darnell Bembo, Jessica Bender, Michael Benjamin, Jr., Bryan Bentley, William Bertrand, and Christopher Bijou. A list of the current and former federal employees who opted into this action is set out in ECF No. 8-2 in this case in the Court of Appeals for the Federal Circuit. A

PARTIES—Continued

complete list of the current and former federal employees who opted into this action is also being filed with the clerk under seal.

Cases Related to the 2018-19 Appropriations Lapse

The named plaintiff-petitioners in *Anello v. United States* are 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., and Ivan Todd.

The named plaintiff-petitioners in *Arnold v. United States* are L. Kevin Arnold, Martin Lee, Mark Munoz, Matthew Perry, Aaron Savage, Jennifer Taylor, Ralph Fulvio, David Kirsh, and Robert Riggs. A list of the current and former federal employees who opted into this action is set out in ECF No. 71 in *Avalos v. United States* in the Court of Appeals for the Federal Circuit.

The named plaintiff-petitioners in *Avalos v. United States* are Eleazar Avalos and James Davis. A list of the current and former federal employees who opted into this action is set out in ECF No. 71 in *Avalos v. United States* in the Court of Appeals for the Federal Circuit.

The named plaintiff-petitioners in the court of appeals caption in *Baca v. United States* are Quentin

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Baca, Lephas Bailey, Christopher Ballester, Kevin Beine, David Bell, Richard Blam, Maximillian Crawford, Matthew Crumrine, John Dewey, and Jeffrey Diamond. A list of the current and former federal employees who opted into this action is set out in ECF No. 71 in *Avalos v. United States* in the Court of Appeals for the Federal Circuit.

The named plaintiff-petitioners in the court of appeals caption in *D.P. v. United States* are D.P., T.S., and J.V. A list of the current and former federal employees who opted into this action is set out in ECF No. 71 in *Avalos v. United States* in the Court of Appeals for the Federal Circuit. A complete list of the current and former federal employees who opted into this action is also being filed with the clerk under seal.

The named plaintiff-petitioners in *Hernandez v. United States* are Roberto Hernandez and Joseph Quintanar. A list of the current and former federal employees who opted into this action is set out in ECF No. 71 in *Avalos v. United States* in the Court of Appeals for the Federal Circuit.

The named plaintiff-petitioner in *Jones v. United States* is David Jones.

The named plaintiff-petitioners in *I.P. v. United States* are I.P., A.C., S.W., D.W., P.V., M.R., R.C., K.W., B.G., and R.H. A list of the current and former federal employees who opted into this action is set out in ECF No. 71 in *Avalos v. United States* in the Court of

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Appeals for the Federal Circuit. A complete list of the current and former federal employees who opted into this action is also being filed with the clerk under seal.

The named plaintiff-petitioners in the court of appeals caption in *Plaintiff No. 1 v. United States* are Plaintiff No. 1, Plaintiff No. 2, Plaintiff No. 3, and Plaintiff No. 4. A list of the current and former federal employees who opted into this action is set out in ECF No. 71 in *Avalos v. United States* in the Court of Appeals for the Federal Circuit. A complete list of the current and former federal employees who opted into this action is also being filed with the clerk under seal.

The named plaintiff-petitioners in *Richmond v. United States* are 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 August, and Edward Watt. A list of the current and former federal employees who opted into this action is set out in ECF No. 71 in *Avalos v. United States* in the Court of Appeals for the Federal Circuit.

The named plaintiff-petitioners in *Rowe v. United States* are Tony Rowe, Alieu Jallow, Karletta Bahe,

PARTIES—Continued

Johnny Durant, Jesse A. McKay, III, George Demarce, and Jacquie Demarce. A list of the current and former federal employees who opted into this action is set out in ECF No. 71 in *Avalos v. United States* in the Court of Appeals for the Federal Circuit.

The named plaintiff-petitioners in *Tarovisky v. United States* are Justin Tarovisky, Justin Bieger, James Bratton, William Frost, Steve Glaser, Aaron Hardin, Stuart Hillenbrand, Joseph Karwoski, Sandra Parr, Patrick Richoux, Derreck Root, Carlos Shannon, Grayson Sharp, Shannon Swaggerty, Geoffrey Wellein, Becky White, and Tammy Wilson. A list of the current and former federal employees who opted into this action is set out in ECF No. 71 in *Avalos v. United States* in the Court of Appeals for the Federal Circuit. A complete list of the named plaintiff-petitioners is being filed with the clerk under seal.

DIRECTLY RELATED CASES

Anello v. United States, United States Court of Federal Claims, No. 19-118C, date interlocutory appeal granted February 26, 2021

Arnold v. United States, United States Court of Federal Claims, No. 19-59C, date interlocutory appeal granted February 26, 2021

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Avalos v. United States, United States Court of Federal Claims, No. 19-48C, date interlocutory appeal granted February 23, 2021

Baca v. United States, United States Court of Federal Claims, No. 19-213C, date interlocutory appeal granted February 26, 2021

D.P. v. United States, United States Court of Federal Claims, No. 19-54C, date interlocutory appeal granted March 11, 2021

Hernandez v. United States, United States Court of Federal Claims, No. 19-63C, date interlocutory appeal granted February 26, 2021

Jones v. United States, United States Court of Federal Claims, No. 19-257C, date interlocutory appeal granted February 26, 2021

Marrs v. United States, United States Court of Federal Claims, No. 16-1297C, judgment entered October 27, 2017

Martin v. United States, United States Court of Federal Claims, No. 13-834C, judgment entered June 16, 2021

I.P. v. United States, United States Court of Federal Claims, No. 19-95C, date interlocutory appeal granted March 11, 2021

Plaintiff No. 1 v. United States, United States Court of Federal Claims, No. 19-94C, date interlocutory appeal granted March 11, 2021

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Richmond v. United States, United States Court of Federal Claims, No. 19-161C, date interlocutory appeal granted February 26, 2021

Rowe v. United States, United States Court of Federal Claims, No. 19-67C, date interlocutory appeal granted February 26, 2021

Tarovisky v. United States, United States Court of Federal Claims, No. 19-04C, date interlocutory appeal granted February 26, 2021

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Petitioners Donald Martin, *et al.*, and Justin Tarovisky, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgments and opinions of the United States Court of Appeals entered on November 30, 2022.[1]

OPINIONS BELOW

The petition seeks review of two related Federal Circuit decisions involving claims by federal employees who were required to work during appropriation lapses that resulted in partial government shutdowns, in 2013 and in 2018-19. Each of those decisions resolved appeals from several cases filed in the Court of Federal Claims.

The November 30, 2022 court of appeals opinion resolving the cases arising out of the 2013 appropriation lapse, *Martin v. United States*, reported at 54 F.4th 1325, is set out at pp. 1a-16a of the Appendix. The March 10, 2023, order denying rehearing en banc in *Martin* is set out at pp. 47a-49a of the Appendix.

The November 30, 2022 court of appeals opinion resolving the cases arising out of the 2018-19 appropriation lapse, *Avalos v. United States*, reported at 54 F.4th

[1] The petition seeks review of two Federal Circuit decisions which involve closely related questions. *See* Supreme Court Rule 10.4. *Avalos v. United States* resolved appeals in twelve Court of Federal Claims cases which were consolidated for briefing and argument by the court of appeals. *Martin v. United States*, resolving two other appeals from the Court of Federal Claims, relied largely on the court of appeals' opinion in *Avalos*.

1343, is set out at pp. 17a-46a of the Appendix. The March 10, 2023, order denying rehearing en banc in *Avalos* is set out at pp. 50a-58a of the Appendix.

The opinions of the Court of Federal Claims are as follows:

Anello v. United States, December 4, 2020, 151 Fed. Cl. 372 (2020), App. 59a-76a

Arnold v. United States, December 9, 2020, 151 Fed. Cl. 504 (2020), App. 77a-94a

Avalos v. United States, December 9, 2020, 151 Fed. Cl. 380 (2020), App. 95a-122a

Baca v. United States, December 4, 2020, 151 Fed. Cl. 478 (2020), App. 123a-146a

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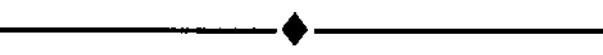

JURISDICTION

The decisions of the court of appeals were entered on November 30, 2022. Timely petitions for rehearing en banc were denied on March 10, 2023. On May 31, 2023, the Chief Justice granted an application extending the time for filing petitions in these cases until August 7, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Federal Claims had jurisdiction pursuant to 28 U.S.C. § 1491(a)(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are set out in the Appendix.

INTRODUCTION

These cases concern the critical distinction between federal statutes that establish legal obligations binding on the United States, and periodic

congressional appropriations, which in some instances do not include sufficient (or any) appropriations to meet the government's legal obligations. For 137 years this Court has held that the absence of such an appropriation does not alter the government's obligations. In the instant cases, a sharply divided Federal Circuit has adopted essentially the opposite rule. Under the decisions below, the absence of such an appropriation will ordinarily have the effect of eliminating the legal obligations which that appropriation would have funded. This extraordinary new legal standard, adopted without even a pretense of consistency with the decisions of this Court, has ramifications far beyond the tens of thousands of injured federal workers to whom the Federal Circuit denied relief.

This Court most recently reiterated its longstanding rule in *Maine Community Health Options v. United States*, 140 S.Ct. 1308 (2020). There the Court rejected the government's contention that all federal laws should be interpreted to contain an implicit exception for instances in which Congress has failed to appropriate funds needed to meet the obligations of that law. Instead, the Court held—as it had repeatedly held in the past—that the absence of a congressional appropriation does not alter the government's legal obligations, unless the terms of the applicable appropriations statute expressly and specifically modify the otherwise applicable legal obligation. *Maine Community Health* explained that this rule was an instance of the usual presumption against implied repeals.

In these cases, the Federal Circuit did not purport to hold that the relevant appropriations limitation (the date on which various appropriations expired) contained language modifying the statute that created the obligations the plaintiffs sought to enforce (the Fair Labor Standards Act). Nor did the United States advance any such argument.

Instead, the divided court of appeals adopted a radical new legal standard for analyzing this important recurring situation. The Federal Circuit held that the 1870 Anti-Deficiency Act (ADA) ordinarily means that federal laws do not create obligations for which there is no congressional appropriation, reasoning that post-ADA statutes should if possible be construed not to impose obligations for which there is no appropriation. In the Federal Circuit's view, the presumption against implied repeals thus limits the scope and legal significance of any post-1870 obligation-creating statute (such as the 1938 FLSA). Post-1870 statutes, the Federal Circuit held, do not create substantive obligations, and thus cannot be violated, when there is no appropriation sufficient to satisfy any obligation, absent "explicit" language necessarily repealing or limiting the ADA. App. 31a. This Federal Circuit standard is thus essentially the opposite of the legal standard reiterated by this Court in *Maine Community Health*. Under the decisions below, the presumption against implied repeals will usually mean that the absence of an appropriation operates to narrow or rescind, rather than to leave unaltered, the substantive obligations of federal statutes. The decisions

of the Federal Circuit is plainly inconsistent with this Court's precedents, and with decisions in the seven circuits which correctly adhere to those precedents.

The Federal Circuit did not assert that its decisions were supported by, or consistent with, the decisions of this Court regarding absent or insufficient appropriations. The majority opinion did not even mention *Maine Community Health* or any of the other decisions of this Court since 1886 regarding absent or insufficient appropriations. That silence is especially striking because the Federal Circuit was reversing a series of decisions by the Court of Federal Claims that *had* expressly relied on this Court's decisions. The opinion of the dissenting judge in the Federal Circuit also relied on this Court's decisions. One may reasonably conclude that the Federal Circuit failed to even discuss this Court's controlling precedents because the majority below simply could not explain how its decisions could be reconciled with this Court's decisions.

This Court granted review in *Maine Community Health* because the Federal Circuit decision in that case raised serious doubts about the vitality of the legal obligations established by one provision of a single federal substantive statute. The Federal Circuit standard in this case is infinitely more far-reaching. It is not merely about the interpretation of the appropriations statutes in these cases; indeed, the Federal Circuit decisions do not even discuss the terms of the particular appropriations measures. Rather, the decisions below establish a new general rule that would apply in any instance in which Congress has not enacted sufficient

(or any) appropriations to meet the government's normal legal obligations. As the petitioners noted in *Maine Community Health*, the legal standard applied to such claims by the Federal Circuit is exceptionally important, because most claims against the United States can be brought only in the Court of Federal Claims and are thus controlled by Federal Circuit precedent.

Review by this Court is particularly important because the decisions below, imposing a special limitation on (or interpretation of) the FLSA when the plaintiffs are employees of the federal government, creates a double standard. It applies a different rule to the federal government than that imposed by the FLSA on state governments. The claims in the instant cases arose because the federal government, as a result of political deadlocks, failed for a period of time to enact appropriations needed to run most government agencies. The petitioners in these cases, federal employees at numerous government agencies, were required to work without pay for varying periods of time. That same problem has repeatedly arisen when *state* governments, because of similar failures to enact appropriations, require their employees to work without receiving the timely wages required by the FLSA. The Ninth Circuit, and the Supreme Courts of Pennsylvania and California, have held that such unpaid labor violates the FLSA, and the United States Department of Labor has expressly endorsed the Ninth Circuit decision. State governments are liable if they fail to pay timely FLSA-required wages because of a political

dispute about appropriations, but under the decisions below the federal government cannot be sued when it does the same thing. Such a do-as-we-say-not-as-we-do interpretation of the FLSA makes a mockery of federalism.

If the Court does not grant review of the instant cases, it will be essentially impossible at any point in the future for this Court (or even the Federal Circuit) to correct the Federal Circuit's limitation on the FLSA. The specific issue in these cases is whether federal employees can obtain redress when, as a result of a budget impasse, they had to work for a period of time without timely receiving the wages required by the FLSA. The FLSA authorizes an award of liquidated damages for such a violation of the statute, but that relief can be denied if an employer had a reasonable good faith belief that its actions were lawful. The erroneous Federal Circuit decisions below, unless now overturned by this Court, provide a basis for just such a belief, and—if not corrected by the Court in this very case—are likely to operate as a permanent and unreviewable bar to similar claims in the future.

The modest sums sought by the individual petitioners in this case, to be sure, are quite small compared to the billions of dollars sought, and won, by the petitioners in *Maine Community Health*. But neither that decision, nor the standards applied by this Court in determining whether to grant review, distinguish between claims of corporate plaintiffs, however great, and the injuries suffered by workers of limited means who, living paycheck-to-paycheck, are unable to pay

the rent, to avoid late charges on their credit card and other bills, or to afford groceries or medical care, because their employer did not pay them on time. The practices at issue in this litigation injured a large number of federal employees; approximately one hundred thousand current or now-retired federal workers joined or opted into one of the fourteen cases which gave rise to the appeals at issue here.

STATEMENT OF THE CASE

Legal Background

Fair Labor Standards Act

(1) The legal obligations of the government at issue in this case arise under the FLSA. Workers covered by the FLSA (with certain exceptions not relevant here) must be paid a federal minimum wage of $7.25 per hour. 29 U.S.C. § 206(a)(1)(C). Employees who work more than 40 hours in a week (with certain exceptions not relevant here) must be paid for those additional hours at an overtime rate of one and one-half times their regular rate. 29 U.S.C. § 207(a)(1). An FLSA claim must ordinarily be brought within two years of the date on which it accrued; the limitations period is extended to three years in the case of a willful violation. 29 U.S.C. § 255. Although the FLSA did not apply to federal workers when it was originally enacted, Congress amended the law in 1974 to apply to most federal employees.

If an employer violates the minimum wage or overtime requirement, it must usually pay—in addition to the unlawfully withheld amounts—"an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The liquidated damages provision is designed to provide compensation for "damages too obscure and difficult of proof." *Brooklyn Savings Bank v. O'Neil*, 324 U.S 697, 707 (1945). Although an award of liquidated damages is usually mandatory, the court may deny any award, or award an amount less than that usually required, "if the employer shows to the satisfaction of the court that the action or omission giving rise to [the claim] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260.

(2) The date by which FLSA-required minimum wages or overtime must be paid is a key element of an FLSA claim. A violation of the FLSA occurs, and a claim for liquidated damages arises, if the required wages or overtime are not paid "on time." *Brooklyn Savings Bank*, 324 U.S. at 707; *see id.* at 707 n.20 ("prompt payment"), 714 ("promptly").

Nine circuits hold that a worker's regular payday is the date after which a violation occurs if the worker has not been paid FLSA-mandated minimum wages or overtime.[2] Even the Federal Circuit recognizes that

[2] *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192, 198 (2d Cir. 2013) ("the next regular payday"); *Stone v. Troy Constr., LLC*, 935 F.3d 141, 154 (3d Cir. 2019) ("each regular payday"); *Roland Elec. Co. v. Black*, 163 F.2d 417, 421 (4th Cir. 1947) ("regular payment date"); *Halferty v. Pulse Drug Co., Inc.*, 821 F.2d 261, 271 (5th Cir. 1987) ("each regular payday");

(outside the context of a lapse in appropriations) the FLSA requires that mandated payments be made on a worker's regular payday.[3] The highest courts of California[4] and Pennsylvania[5] also interpret the FLSA to require that the mandated payments be made on a worker's regular payday. The date on which that violation is deemed to occur is also the date on which a worker's claim accrues for purposes of the statute of limitations. The Department of Labor has long maintained that an FLSA violation occurs, and an FLSA claim accrues, if a worker is not paid FLSA-mandated wages or overtime on his or her regular payday.[6] The

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Hughes v. Region VII Area Agency on Aging, 542 F.3d 169, 187 (6th Cir. 2008) ("each regular payday"); *Biggs v. Wilson*, 1 F.3d 1537, 1538 (9th Cir. 1993) ("the employee's regular payday"); *Benavides v. Miami Atlantic Airfreight, Inc.*, 322 Fed. Appx. 746, 747 (11th Cir. 2009) ("the regular payment date"); *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir.1988); *Howard v. City of Springfield*, 274 F.3d 1141 (7th Cir. 2001) ("the regular pay day").

[3] *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988) ("a claim .... under the FLSA accrues at the end of each pay period when it is not paid").

[4] *White v. Davis*, 30 Cal.4th 528, 545, 68 P.3d 74 (2003) ("the employees' regular payday").

[5] *Council 13, Am. Fed'n of State, County & Mun. Employees v. Rendell*, 604 Pa. 352, 380 (Pa. 2009) ("when the wages are regularly due to be paid").

[6] 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."); W.H. Admin. Op. (Jan. 27, 1969) ("The Act requires that employees must be paid on the regular payday"); 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");

regular payday rule was well established in 1974 when Congress amended the FLSA to apply it to federal agencies.

(3) State governments occasionally experience internal disagreements which result in the failure to adopt a budget, or appropriations legislation, that is necessary to authorize payment of salaries to government employees. When that occurs, the states require some or all of the affected employees to continue to work, which in some instances means that those employees will not be paid on their regular paydays. The lower courts have consistently held that a state would violate the FLSA if, because of such a budget dispute, it failed to pay FLSA-required minimum wages or overtime on a worker's regular payday. The Ninth Circuit has interpreted the FLSA in that manner, as have the Supreme Courts of California and Pennsylvania. *Biggs v. Wilson*, 1 F.3d 1537, 1543 (9th Cir. 1993), *cert. denied*, 501 U.S. 1081 (1994) ("The FLSA does not require California to pass a budget on time; it only requires California to do what all employers must do—pay its employees the minimum wage on payday.");

In the Matter of U.S. Dep't of Labor v. Micro-Chart, Inc., (U.S. Dep't of Labor Admin. Review Bd.), 1998 WL 787288, at *3 (Nov. 4, 1998) ("wages must be paid on the employees' regular payday"); 29 C.F.R. §§ 790.21(b) ("courts have held that a cause of action under the Fair Labor Standards Act for unpaid minimum wages or unpaid overtime and for liquidated damages 'accrues' when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends"), 778.106 ("The general rule is that overtime compensation earned in particular workweek must be paid on the regular pay day for the period in which such workweek ends.").

White v. Davis, 30 Cal.4th 528, 579 (2003) ("[T]he state is obligated to comply with the minimum requirements of the FLSA during a budget impasse, notwithstanding the lack of available appropriation."); *Council 13, Am. Fed'n of State, County & Mun. Employees v. Rendell*, 604 Pa. at 383 ("[The state must] pay all FLSA nonexempt [from the FLSA] Commonwealth employees in the event that the Pennsylvania General Assembly failed to pass a budget by July 1, 2008").

The Department of Labor has repeatedly agreed that the FLSA regular payday rule applies if a state fails to make FLSA-required payments on workers' regular paydays because of a budget dispute. A 1998 opinion letter set out the Department's express agreement with the Ninth Circuit decision in *Biggs*. 1998 WL 1147716, at *1 (DOL WAGE-HOUR). In response to queries from Pennsylvania officials, the Department explained that the state was required to timely pay workers entitled to FLSA-mandated minimum wages or overtime "whether or not there is a provision in state law that limits expending non-appropriated funds.... "[7] In *Martin* the government stipulated that the Wage and Hour Division has interpreted the FLSA in this manner since at least 1998.[8]

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[7] Letter of Steven Mandel, Department of Labor Associate Solicitor for Fair Labor Standards. *Martin* Appx. 274-75, 451.

[8] *Martin* Doc. 151, p. 4 ¶ 6 ("regularly scheduled payday").

Anti-Deficiency Act and the Government Employee Fair Treatment Act

Section 1341(a) of Title 31, commonly referred to as the Anti-Deficiency Act (ADA), provides that, except as otherwise provided by law, "an officer or employee of the United States Government ... may not ... make or authorize 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).

Section 1342 of Title 31, provides that

> [a]n officer or employee of the United States Government ... may not accept voluntary services for [the] government or employ 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. This provision was originally enacted in 1884 to prevent federal employees from incurring federal financial obligations by, without authorization, hiring or arranging for services from third parties who then insisted on compensation from the government. *See* 43 U.S. Op. Atty. Gen. 293, 301 (1981).

Since at least 1950, the budget authority of one or more federal agencies has lapsed because Congress failed for a time to enact further appropriations after existing appropriations expired. In 1981 the Attorney General, relying on section 1342, concluded that an agency whose appropriations had lapsed could require employees to continue working (although unpaid) to the extent that their continued employment was

necessary to address emergencies involving the safety of human life or the protection of property. 43 U.S. Op. Atty. Gen. 293-307. Those employees are referred to as "excepted employees."

Since that time, after an appropriation lapse has ended, the government has paid those excepted employees for emergency work done under section 1342, and also paid employees who did not work, but were furloughed during the period of partial shutdown. That practice was made permanent in 2019, with the enactment of the Government Employee Fair Treatment Act. 133 Stat. 3, Pub. L. No. 116-1 (GEFTA). That law, codified in section 1341(c), provides that this compensation will be paid "at the earliest day possible after the lapse in appropriation ends." 31 U.S.C. § 1341(c)(2). GEFTA applies to appropriation lapses that begin on or after December 22, 2018.

Proceedings Below

Court of Federal Claims

Cases Arising Out of the 2013 Appropriations Lapse

Martin v. United States concerns an appropriations lapse and partial shutdown that occurred in October 2013. Appropriations for most federal agencies lapsed on October 1, and were not enacted until October 16. Federal employees who were required to work during this period were not paid on their regular payday for a portion of that period, but were instead paid two weeks after those FLSA-mandated wages were due. Martin and several other federal employees

brought this action seeking the liquidated damages provided for by the FLSA. In later phases of the litigation, thousands of other federal employees opted into the lawsuit and asserted individual claims.

In 2014 the Court of Federal Claims denied the government's motion to dismiss. App. 248a. The court held that the FLSA requires that mandated payments be made on a worker's regular payday, citing decisions in several courts of appeals as well as Department of Labor regulations. App. 261a-262a. The court did not decide whether the government could avoid liability for liquidated damages by showing that it had acted with a reasonable, good faith belief that the FLSA did not require payment on the regular payday.

The government subsequently moved for summary judgment, arguing that the "requirement of prompt payment ... does not operate in the present circumstances, when the FLSA and the ADA are apparently in conflict." App. 233a-234a. In its 2017 opinion, the court rejected that contention, holding that "[t]he Anti-Deficiency Act does not operate to cancel defendant's obligations under the Fair Labor Standards Act." App. 231a (capitalization removed). It pointed out that this Court had held that the requirements of the ADA "apply to the official, but they do not affect the rights in ... court of the citizen honestly contracting with the [g]overnment." App. 232a (quoting *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012)). The Court of Federal Claims also held that the government had

failed to show that it had acted in good faith and with reasonable grounds for its actions. App. 238a-242a.[9]

Cases Arising Out of the 2018-19 Appropriations Lapse

Appropriations for most federal agencies lapsed on December 22, 2018, and were not renewed until January 25, 2019. Federal employees who were required to work during the appropriations lapse generally received their FLSA-mandated wages and overtime as much as four weeks, and in some instances six weeks or more, after their regular payday. Twelve cases were filed in the Court of Federal Claims asserting FLSA claims arising out of the 2018-19 appropriations lapse. Tens of thousands of federal workers opted to join in one of the cases and assert their individual claims.

The government moved to dismiss all these cases, advancing essentially the same arguments that it had raised in *Martin* regarding the ADA. Applying its

[9] The claims in *Marrs* also arose from the 2013 appropriations lapse; the Court of Federal Claims dealt with them separately because the government argued that those claims had not been raised in a timely manner. The FLSA usually requires that claims be brought within two years after a claim accrued. For a variety of reasons, a significant number of federal workers who were required in 2013 to work without timely pay did not seek to opt into the litigation within that the two-year period. Under the FLSA, the usual two-year limitations period is extended to three years if an employer's violation is willful. 29 U.S.C. § 255(a). The *Marrs* plaintiffs argued that the government's violation of the FLSA was willful. The Court of Federal Claims rejected that contention, and therefore held that the *Marrs* claims were time-barred. App. 221a.

earlier decision in *Martin*, the Court of Federal Claims, in separate decisions in each of these cases, rejected the government's argument that "the government payment obligations are abrogated by a lack of appropriations." App. 378a-380a. The Court of Federal Claims cited this Court's then-recent decision in *Maine Community Health* in denying the government's motions. App. 377a, n.7.

Federal Circuit

All of these cases were appealed to the Federal Circuit. The court of appeals consolidated the cases regarding the 2018-19 appropriations lapse and decided them *sub nom. Avalos v. United States*. App. 17a. The court decided *Martin* and *Marrs* together, *sub nom. Martin v. United States*. App. 1a. The court resolved the common substantive issues in *Avalos*, and then applied that decision in the *Martin* appeal.

Cases Arising Out of the 2018-19 Appropriations Lapse

A divided court of appeals overturned the decisions of the Court of Federal Claims, advancing a general standard regarding the impact of insufficient appropriations, and of the ADA, on the government's legal obligations. The majority held that, in the absence of a sufficient appropriation, a federal statute should not be construed to impose an obligation on the government, unless that statute explicitly mandates payment regardless of the availability of an appropriation. The

court ruled that if a plaintiff asserts that a substantive statute imposes an obligation on the federal government, but there is no appropriation to satisfy that obligation, the relied-upon statute must be "interpret[ed] ... in light of an even more established and more specific federal statute: the [1870] Anti-Deficiency Act." App. 37a. The court of appeals reasoned that "[i]f Congress ... intend[s] to upend or modify the Anti-Deficiency Act's longstanding prohibition on making expenditures for which Congress has not apportioned funds, it would [do] so explicitly." App. 34a; *see* App. 29a ("explicit"), 31a ("explicitly"). In the absence of textual language that "clearly expressed" an intent to upend or modify the Anti-Deficiency Act, the relied-upon statute should be construed not to impose an obligation for which there is no appropriation. App. 34a.

The Federal Circuit based this rule on what it characterized as "the hierarchy of federal interests" at stake. App. 36a. The ADA would normally take precedence over a substantive obligation-creating law because the 1870 ADA would be the earlier-adopted statute, and because its directive regarding the expenditure of federal funds would be the more specific provision. App. 37a. This general rule of construction, the majority explained, was warranted by the principle that "disfavor[s] repeals by implication." App. 33a. Absent an express textual provision, a substantive statute does not repeal by implication the ADA or impose an obligation for which there is no appropriation. App. 33a.

The Federal Circuit acknowledged that "[c]ourts have interpreted the FLSA's implicit timely payment

obligation to ordinarily require employers to pay wages by 'the employee's regular payday.'" App. 30a (quoting *Biggs v. Wilson*, 1 F.3d 1537, 1541 (9th Cir. 1993)). But the majority held that was not sufficient to satisfy its requirement of an "explicit" textual mandate. "[T]he FLSA does not explicitly discuss when an employer must make these payments; it merely implies that payments must be timely under the circumstances." App. 33a; *see* App. 29a ("no explicit mention of when the employer must make this payment"), 31a ("the FLSA does not explicitly address" whether nonpayment during an appropriations lapse would violate the law). And the requirement that FLSA-mandated payments be made on a worker's regular payday, the court held, is two steps removed from the requisite explicit textual command; that requirement, however well-established it might be, was found in only "judicial opinions that [in turn] interpret an implicit obligation." App. 34a. The majority opinion never discussed this Court's decisions in *Maine Community Health*, *Salazar*, or any other case concerning whether the lack of appropriations affects substantive federal rights.

Judge Reyna dissented, pointing out that under the majority opinion "the FLSA is rendered nugatory." App. 42a. He objected that this Court's decisions in *Maine Community Health* and *Salazar* made clear that neither the absence of appropriations nor the ADA limit the obligations of the government. App. 44a. "[T]he insufficiency of an appropriation 'does not pay the Government's debts, nor cancel its obligations.'" App. 44a (quoting *Maine Community Health*, 140 S.Ct.

at 1321-22 (quoting *Salazar*, 567 U.S. at 197)). Judge Reyna objected that the majority's conclusion was inconsistent with decisions in the geographical circuits holding that the FLSA is violated if state or private employers fail to pay FLSA-required minimum and overtime wages on workers' regular paydays. App. 45a.

Cases Arising Out of the 2013 Appropriations Lapse

In its decision regarding the 2013 appropriations lapse, the Federal Circuit held, "[f]or the same reasons in *Avalos*, we conclude that the government did not violate the FLSA's timely payment obligation as a matter of law." App. 6a. The court of appeals remanded *Martin* and *Marrs* for entry of judgment consistent with those opinions. Judge Reyna again dissented. App. 7a.

Timely petitions for rehearing en banc were filed in *Avalos* and *Martin*. The Federal Circuit denied those petitions on March 10, 2023.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT DECISIONS CONFLICT WITH 137 YEARS OF DECISIONS BY THIS COURT

The decisions of the Federal Circuit stand in stark and indefensible conflict with 137 years of decisions by this Court, which have repeatedly held that the absence or insufficiency of an appropriation does not

alter the government's obligations. Since the 1886 decision in *United States v. Langston*, 118 U.S. 389 (1886), this Court has repeatedly held that the legal obligations of the United States are not altered by the failure of Congress to appropriate funds to meet those obligations, unless the appropriation legislation itself contains express language repealing those obligations. The divided Federal Circuit decision below establishes essentially the opposite rule: the absence of such an appropriation triggers application of the ADA, which in turn overrides any post-1870 statute that does not "explicitly" repeal pro tanto the Anti-Deficiency Act itself. The Federal Circuit's disregard of this Court's precedents is of critical practical importance, because most claims against the United States must be brought in the Federal Circuit, where this new and palpably incorrect legal standard will now be applied.

First, the Federal Circuit insists that it would be "absurd" to interpret a federal law to impose an obligation on the United States when there is no appropriation to satisfy that obligation. App. 32a. But for more than a century this Court has held, to the contrary, that the United States can be indeed subject to a legal obligation even when Congress does not appropriate funds to pay that obligation.

In *United States v. Langston*, the plaintiff sought compensation for his service at the rate of $7,500 a year, the salary fixed by law prior to his appointment. During several of the plaintiff's years of service, however, Congress had appropriated only $5,000 per annum in compensation. This Court held that those

insufficient appropriations had not altered the amount of compensation to which Langston was entitled.

> Repeals by implication are not favored.... [I]t is not probable that congress ... should, at a [date after fixing the salary], make a permanent reduction of his salary, without indicating its purpose to do so, either by express words of repeal.... [A]ccording to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law.

118 U.S. at 393-94.

Salazar v. Ramah Navajo Chapter, 567 U.S. 182 (2012), held that the government violated the Indian Self-Determination and Education Assistance Act when it failed to make payments required under that Act, even though Congress had failed to appropriate sufficient funds to meet those obligations. "The [insufficiency of an] appropriation 'merely impose[s] limitations upon the Government's own agents; ... its insufficiency [does] not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.'" 567 U.S. at 191 n.3 (quoting *Ferris v United States*. 27 Ct. Cl. 542, 546 (1892)). "Although [an] agency itself cannot disburse funds beyond those

appropriated to it, the Government's 'valid obligations will remain enforceable in the courts.'" 567 U.S. at 191 (quoting Government Accounting Office, Principles of Federal Appropriations Law, p.[p.] 6-17 (2d ed. 1992) (GAO Redbook)).

Most recently, *Maine Community Health* held that obligations created by a provision of the Affordable Care Act remained in effect and enforceable even though Congress had chosen not to appropriate any funds to satisfy those obligations. The Court noted that "the GAO warns [that] although a 'failure to appropriate' funds 'will prevent administrative agencies from making payment,' that failure 'is unlikely to prevent recovery by way of a lawsuit.' [GAO Redbook], 2-63 (citing, e.g., *Langston*)." 140 S.Ct. at 1320. During the oral argument in *Maine Community Health*, Justice Sotomayor correctly observed that "the appropriations bill limits how I can pay you, but it doesn't rescind and it doesn't tell me not—that you won't be paid.... " Oral Argument, *Maine Community Health Options v. United States*, p. 56.

Second, the decision of the Federal Circuit inverts this Court's longstanding insistence that limitations on appropriations do not repeal by implication the legal obligations of the federal government. Under the decisions below, the controlling question is not whether a failure to appropriate funds repeals by implication substantive legal obligations, but whether those legal obligations repeal by implication the ADA.

Langston insisted that the statutory salary in that case would not be reduced by a later appropriation law absent "express words of repeal." 118 U.S. at 394. In *Belknap v. United States*, 150 U.S. 588 (1893), the Court explained that *Langston* was based on the principle that "[r]epeals by implication are not favored, and [in that case] it was held that the mere failure to appropriate the full salary was not, in and of itself alone, sufficient to repeal the prior act [establishing the plaintiff's salary].... " 150 U.S. at 594. *TVA v. Hill*, 437 U.S. 153 (1978), emphasized that the doctrine that repeals by implication are disfavored "applies with even greater force when the claimed repeal rests solely on an Appropriations Act." 437 U.S. at 190. This rule that appropriation limitations do not by implication repeal the government's substantive obligations was central to this Court's decision in *Maine Community Health*.

> Because Congress did not expressly repeal [the substantive obligations at issue], the Government seeks to show that Congress impliedly did so. But "repeals by implication are not favored," *Morton v. Mancari*, 417 U.S. 535, 549 (1974), ... and are a "rarity," *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001).... This Court's aversion to implied repeals is "especially" strong "in the appropriations context." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440 (1992).

Maine Community Health, 140 S.Ct. at 1323 (footnotes omitted).

But the Federal Circuit decisions establish the opposite rule. The absence or insufficiency of an appropriation, the court below held, triggers application of the ADA. The 1870 ADA presumptively controls, and a later-enacted substantive federal statute (such as, here, the 1938 FLSA) cannot by implication repeal the ADA. App. 33a. That is why, under the decisions below, in the absence of the "explicit" language required to repeal a pre-existing law, a substantive federal statute must be construed not to create an obligation for which there is no appropriation.[10]

Third, the decision of the Federal Circuit rests on an interpretation and application of the ADA which this Court has repeatedly rejected. The court below asserted that applying the usual rule that the FLSA requires payment of minimum wages and overtime on an employee's regular payday would "force the government to ... violat[e] the Anti-Deficiency Act.... " App. 46a. This Court rejected that same argument in *Salazar*.

> [T]he Government suggests that today's holding could cause the Secretary to violate the Anti-Deficiency Act.... but a predecessor version of that Act was in place when *Ferris* [*v.*

[10] The degree to which the court of appeals departed from this Court's precedents is illustrated by the lower court's reliance on GEFTA, which provides that federal employees (whether furloughed or required to work during an appropriations lapse) should be paid once a lapse in appropriations ends. App. 378a-380a; 31 U.S.C. § 1341(c). The Federal Circuit did not hold, and the government did not argue, that GEFTA had repealed the FLSA regular payday requirement. GEFTA is expressly inapplicable to the 2013 appropriations lapse at issue in *Martin* and *Marrs*.

> *United States*, 27 Ct. Cl. 542 (1892)] and *Dougherty* [*v. United States*, 18 Ct. Cl. 496 (1883)] were decided, ... and the Government did not prevail there.

567 U.S. at 198. But here, the Federal Circuit insisted that, in order to avoid a conflict with the ADA, federal statutes should be construed, if at all "possible," to incorporate a tacit proviso that the obligations created do not exist unless sufficient funds were appropriated. App. 32a. But this Court in *Maine Community Health* rejected a similar contention that federal laws should generally be interpreted to contain such an ADA-based limitation. 140 S.Ct. at 1321-22 (quoting Brief for United States, 20, 24-25).

Most fundamentally, the decision below rests on an inexplicable misreading of the actual text of the ADA. In nine different passages in *Avalos*,[11] and three passages in *Martin*,[12] the Federal Circuit asserts that the ADA limits what "the government" can do. Most strikingly, the Federal Circuit insists that the Act authorizes prosecution of the government itself. "Paying federal government wages during a lapse in appropriations is not practicable because the government would violate the Anti-Deficiency Act and could incur civil and criminal liability by making those expenditures." App. 35a.

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[11] App. 22a ("the Anti-Deficiency Act legally barred the government from making payments during the shutdown"), 23a, 24a. 25a, 28a, 29a, 32a, 33a, 34a, 35a.

[12] App. 2a, 3a, 5a.

That baffling reference to the imposition of criminal liability on the United States occurs because the Federal Circuit improperly substituted "the government" for the actual words of the ADA, which instead apply only to "an officer or employee of the United States Government," not to the government itself. 31 U.S.C. § 1341(a)(1)(A). This Court has repeatedly pointed out that the ADA applies only to individual government officials. "[T]he Anti-Deficiency Act's requirements 'apply to the official, but they do not affect the rights in ... court of the citizen honestly contracting with the Government.'" *Salazar*, 567 U.S. at 197 (quoting *Dougherty v. United States*, 18 Ct. Cl. at 503); *see Maine Community Health*, 140 S.Ct. at 1321. As the Chief Justice correctly observed at the oral argument in *Maine Community Health*, "I've never understood the Antideficiency Act to apply to the actions of agencies. I understood it to apply to individuals who go and obligate the government when they really had no authority to do that." Oral Argument at 48.

It is not possible to fault the Federal Circuit's analysis of *Langston*, *Salazar*, or *Maine Community Health*, because the majority opinion does not contain any such analysis at all; the opinion never even mentions this Court's controlling precedents. The failure of the court of appeals to even attempt to deal with this Court's precedents is difficult to understand. *Salazar* is relied on in both *Martin* decisions in the Court of Federal Claims. *Maine Community Health* is invoked in all 12 of the lower court opinions regarding the claims related to the 2018-19 partial shutdown. Judge

Reyna's dissenting opinions expressly relied on *Salazar* and *Maine Community Health*. App. 12a-14a, 42a-44a. *Langston*, *Salazar*, and *Maine Community Health* were repeatedly cited and quoted in the section of the plaintiffs' appellate briefs dealing with the Anti-Deficiency Act.[13] The plaintiffs' brief in *Martin* pointed out that "[t]he Government does not mention even one of these [Supreme Court] decisions ... in its opening brief. This silence actually trumpets that it is asking the Court to depart from over a century of precedent."[14] The same can be said of the majority opinion below.

II. THE FEDERAL CIRCUIT DECISIONS CONFLICT WITH DECISIONS IN SEVEN CIRCUITS

Seven circuits, correctly applying this Court's precedents, hold that limitations in an appropriation do not affect the pre-existing obligations of the United States, absent a clear intent to repeal or modify those obligations. In those circuits the government cannot (as it can now in the Federal Circuit), invoke the Anti-Deficiency Act to bootstrap an appropriation provision into a presumption of repeal or modification of government obligations.

In *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), the Nuclear Regulatory Commission sought to justify its failure to act on a pending licensing request

[13] Brief for Appellees, *Avalos v. United States*, 31-45; Opposition Brief for Appellees in *Martin* and *Marrs*, 33-40.

[14] Opposition Brief for Appellees in *Martin* and *Marrs*, 35.

by pointing out that in the previous three years Congress had appropriated nothing, or very little, for processing that licensing request. The District of Columbia Circuit rejected the government's argument that the congressional appropriations for the Commission had repealed by implication the Commission's obligation to process that application.

> The Commission argues that those appropriations levels demonstrate a congressional desire for the Commission to shut down the licensing process. But ... [a]s 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. See *TVA v. Hill*, ... ; *United States v. Langston*,....

725 F.3d at 260 (capitalization omitted) (opinion by Kavanaugh, J.). In *Navajo Nation v. United States Department of the Interior*, 852 F.3d 1124 (D.C. Cir. 2017), that court of appeals recognized that the Anti-Deficiency Act does not limit the rights of individuals dealing with the government. "[W]hile 'the Anti-Deficiency Act's requirements "apply to the official, ... they do not affect the rights in this court of the citizen honestly contracting with the Government."' " 852 F.3d at 1129 (quoting and citing *Salazar*) (opinion joined by Kavanaugh, J.); *see Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984) ("when appropriations measures arguably conflict with the underlying authorizing legislation, their effect must be construed narrowly") (opinion by Bork, J.).

The First,[15] Second,[16] Sixth,[17] Eighth,[18] Ninth[19] and Tenth[20] Circuits apply the same standard, holding that the absence of or limitation in an appropriation does not by implication repeal or modify the government's substantive obligations. In all of those circuits the presumption against a repeal by implication means that the absence of or limitation in an appropriation does *not* rescind or modify the government's obligations. That is essentially the opposite of the Federal Circuit standard in the decisions below—that the absence of an appropriation presumptively *does* limit or rescind the government's obligations, because an obligation-creating statute cannot repeal by implication the Anti-Deficiency Act.

[15] *Granite State Chapter v. Federal Labor Relations Authority*, 173 F.3d 25, 27 (1st Cir. 1999).

[16] *Auburn Housing Authority v. Martinez*, 217 F.3d 138, 144 (2d Cir. 2002).

[17] *United States v. Trevino*. 7 F.4th 414, 427 (6th Cir. 2021).

[18] *West River Elec. Ass'n, Inc. v. Black Hills Power and Light Co.*, 918 F.2d 713, 719 (8th Cir. 1990).

[19] *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 575 (9th Cir. 2000).

[20] *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192 (10th Cir. 1999).

III. THE PROBLEMS CREATED BY THE FEDERAL CIRCUIT DECISIONS ARE EXCEPTIONALLY SERIOUS

The legal standard established and applied by the majority opinions, as Judge Reyna pointed out in his dissenting opinions, are fundamentally inconsistent with this Court's decisions in *Salazar* and *Maine Community Health*. That error is of particular importance because claims against the government under many federal statutes (including the FLSA) can only be brought in (or reviewed by) the Federal Circuit. Such a sea change in federal law, adopted by the slimmest of margins by a single panel, should not occur without review by this Court.

In the court of appeals, the government sought to distinguish *Maine Community Health*, arguing that the text of the obligation-creating statute in that case expressly required the government to make the payments at issue, regardless of the absence of an appropriation. That contention illustrates the litigation that the Federal Circuit decisions below portend. In any future case, the government will argue that *Avalos* rather than *Maine Community Health* applies, contending that whichever statute is at issue lacks the special explicit language required by *Avalos*. The *Avalos* "explicit" language requirement will be applied to determine which obligation-creating federal laws are and are not altered by the lack of appropriations.

The unpredictable task of applying this new requirement will create precisely the uncertainty which

this Court has sought to avoid. If those who do business with the government cannot be certain that they will receive the compensation that the law appears to promise, they are likely to be wary of relying on federal law, or to increase what they charge in order to cover the risk that *Avalos* will be applied to defeat their future claims. It is equally important that Congress understand the ramifications of appropriations legislation. The GAO Redbook assures Congress that the absence or insufficiency of appropriations will not affect the rights of others. *Maine Community Health*, 140 S. Ct. at 1320. But in the wake of *Avalos*, absent action by this Court, the Redbook will have to be rewritten. Every time Congress enacts or fails to enact appropriations legislation, it will have to survey all the obligation-creating laws that might be affected, and will need to predict which of those statutes will and will not be deemed "explicit" under *Avalos*, an entirely impracticable task.

The disparate application of the FLSA created by the decision below is an affront to federalism. Other federal courts have insisted that the FLSA requires payment to state workers during a budget impasse, and the supreme courts of California and Pennsylvania have accepted that interpretation of the FLSA. The Department of Labor has endorsed this construction, and in an appropriate case would presumably take action against a state that did not comply with it. But a divided Federal Circuit now holds that agencies of the federal government itself—including the Department of Labor—can do exactly what the FLSA

bars state governments from doing. Such a topsy-turvy construction of a major federal statute should not be permitted without careful reconsideration by this Court.

The circuit conflict creates several problems. First, there are certain claims against the United States which (unlike FLSA claims) can be brought either in the Court of Federal Claims (with review in the Federal Circuit) or in a district court (with review in one of the geographical courts of appeals). This Court's decision in *Salazar* resolved a conflict—with regard to substantially identical claims—between the Federal Circuit (reviewing a decision of the Court of Federal Claims) and a decision of the Tenth Circuit (reviewing a decision of a district court). With regard to this type of claim, future plaintiffs will be able to obtain a more favorable decision by filing in a district court rather than in the Court of Federal Claims. Second, certain claims, although filed in a district court, are reviewed in the Federal Circuit. *E.g.*, 28 U.S.C. § 1295(a)(2). Thus, a district court in the District of Columbia, or in six other circuits, would need to apply different standards depending on whether its decision would be subject to review in the Federal Circuit or in a geographical court of appeals.

The Federal Service Labor Management Relations Act creates a different forum-shopping incentive. If a federal employee covered by a collective bargaining agreement files an internal grievance (such as a grievance alleging a violation of the FLSA), the complaint

will ordinarily be resolved by binding arbitration.[21] An arbitrator's decision resolving such an FLSA complaint is subject to only limited review by the Federal Labor Relations Authority, and is largely immune from judicial review.[22] That is precisely what has happened with regard to the FLSA issues in this case. The Fraternal Order of Police United States Park Police Labor Committee successfully arbitrated on behalf of its members FLSA claims for liquidated damages regarding the 2018-19 appropriation lapse. The arbitrator sustained the very legal claims rejected by the Federal Circuit in the instant cases. *See United States Dept. of Interior United States Park Police*, 73 F.L.R.A. 276 (2022). If this Court does not overturn the Federal Circuit decision, federal union members will have an incentive to pursue through arbitration claims that could not be won in the Court of Federal Claims, in the hope that the arbitrator (or FLRA) will adhere to the precedent followed by the regional courts of appeals, rather than by the Federal Circuit.

The serious harm caused by the FLSA violations in these cases, and the large number of injured federal workers, underscore the need for action by this Court. As the Court of Federal Claims judge correctly observed, "[p]ayday is important to the everyday worker. Missing a paycheck can have devastating consequences." App. 46a.

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[21] 5 U.S.C. § 7120.

[22] 5 U.S.C. § 7123.

> [A]t least some government employees, who may be plaintiffs herein, were working at the GS–04 or GS–05 levels, and had annual salaries starting around $28,000 in 2013.... Such salaries leave families a narrow margin, particularly when–as plaintiffs in this action have described–child care expenses continue and unexpected health-related expenses arise.... Moreover, there is evidence that the government anticipated the hardships its employees might face. The OPM web site provides sample letters for employees' use in negotiating for late payment with creditors, mortgage companies, and landlords.

App. 271a. The record below demonstrated that the lack of timely payment made it difficult or impossible for many lower paid federal workers to pay their credit card bills, mortgage, or rent, caused them to incur late fees, and forced them to forgo medical care, or to buy fewer groceries. Federal employees who were required to work faced greater burdens than did furloughed federal employees, because the workers had to pay commuting and child-care expenses, and could not seek temporary non-federal employment or obtain state unemployment compensation.[23] In a related federal case, the district judge commented during the 2018-19 appropriation lapse,

> [i]t's hard not to empathize with the plaintiffs' positions. They are not the ones at fault here.... I don't have any doubt whatever that there's a real hardship being felt by innocent

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[23] *Martin v. United States*, ECF Nos.14-7 to 14-18.

> federal employees across the country right now. Several plaintiffs have filed declarations to that effect. And the government rightly acknowledges as much....

National Treasury Employees Union v. United States, CV No. 19-50 (D.D.C.), transcript of Jan. 16, 2019, 49-50. A total of approximately one hundred thousand current or retired federal employees joined or opted into one of the fourteen cases addressed by the Federal Circuit decisions below.

If the Court does not at this juncture review the decisions of the Federal Circuit, in the future it will probably be impossible as a practical matter for this Court or any other court to correct the Federal Circuit's erroneous limitation on the FLSA. In appropriation-lapse FLSA cases, the only relief at issue is liquidated damages; the government will have paid the mandated minimum wage and overtime, however tardily, before a court could address the merits. But section 260 of the FLSA provides that liquidated damages can be denied if an employer shows that it acted in good faith and "had reasonable grounds for believing that [the] act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. The Federal Circuit decisions below create precisely the reasonable ground that in future cases will satisfy section 260, and thus as a practical matter will probably bar future appropriation-lapse claims for liquidated damages. Review by this Court of the Federal Circuit decisions in the cases at issue in this petition is thus the last chance to correct the error in those decisions. For the many tens of thousands of federal

employees who have been or will be required to work during appropriation lapses, it is now or never.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgments and opinions of the Court of Appeals for the Federal Circuit.

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