No. 23-343

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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

1. Four years ago in *Maine Community Health Options v. United States*, 140 S.Ct. 1308 (2020), the government urged the Court to impose a narrow interpretation on the Affordable Care Act in light of the Anti-Deficiency Act (ADA). It argued that the section at issue should be construed to contain no right to reimbursement because—in the absence of the necessary congressional appropriation—judicial recognition of any such right would conflict with the ADA.[1] This Court declined to skew the interpretation of that section based on the ADA. 140 S.Ct. at 1321-23. Instead, the Court analyzed the section without regard to the ADA (*id*.) and then applied the usual rule that the absence of an appropriation does not alter the government's legal obligations. 140 S.Ct. at 1323-27.

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[1] See Brief for the Respondent, *Maine Community Health Options v. United States*, 25 ("[b]ut Section 1342 cannot fairly be read as overriding the Anti-Deficiency Act...."), 27 ("[s]tatutes ... that ... expressly confer an 'entitle[ment] [ ]' ... [are] properly understood as qualified by the Anti-Deficiency Act.") (quoting *Highland Falls-Ford Montgomery Cent. Sch. Dis. v. United States*, 48 F.3d 1166, 1168, 1171 (Fed. Cir. 1995)), 28 ("[p]etitioners thus have offered no valid basis for disregarding the Anti-Deficiency Act ... in construing Section 1342"), 39 ("[s]ection 1342's instruction was qualified from its inception by the ... Anti-Deficiency Act's provision ... by forbidding the expenditure of funds Congress has not appropriated."); Brief in Opposition, *Maine Community Health Options v. United States*, 26 ("statutory instructions to an agency to make payments cannot be read in isolation, but must be read in light of the overarching command of the Anti-Deficiency Act ... "), 27-28 ("HHS was obligated by the Anti-Deficiency Act to construe Section 18062 to require only the payment of funds validly appropriated for that purpose").

In the Federal Circuit, however, the government's proposal for a special ADA-based method of interpretation was quite successful. The court of appeals below held that, where an appropriation does not exist to fund a statutory claim, the statute itself is subject to a bevy of narrowing interpretative principles, all fashioned for the purpose of avoiding what the court of appeals regarded as a conflict with the ADA. Pet. App. 28-37. Those limiting principles are not restricted to the particular statute in this case, the Fair Labor Standards Act (FLSA). Rather they are generally applicable rules that would require that virtually any statute be construed not to create a right to compensation if the needed appropriation is lacking.

The Federal Circuit decision creates, in the form of ADA-based rules of interpretation, the very consequence rejected by this Court in decisions from *United States v. Langston*, 118 U.S. 389 (1886), to *Maine Community Health*. Under the decision below, the absence of an appropriation vitiates the asserted right, not (as was urged in *Langston* and *Maine Community Health*) by repealing it, but instead by requiring that the statute at issue be construed not to create any right for which there would not be an appropriation. These ADA-based interpretative rules will inevitably prompt any claimant who can do so to file suit in one of the geographical circuits that instead apply *Langston* and *Maine Community Health*, rather than sue in the Court of Federal Claims, which alone interprets obligation-creating statutes in this crabbed manner.

2. The Federal Circuit set out four distinct grounds for holding that the FLSA does not entitle a federal worker to compensation at the federal minimum and overtime wage rates until Congress has appropriated the funds needed to pay those wages.

First, the Federal Circuit held that the ADA presumptively controls because it was enacted in 1870, long before the FLSA was first applied to federal workers. The FLSA, as the "later statute," was presumed not to "suspend [the] operations" of "preexisting law," the ADA. Pet. App. 33a. The court of appeals held that a later-enacted obligation-creating statute will be interpreted not to create an obligation for which there is no appropriation absent a "clearly expressed congressional intent[]" to "overturn ... or supersede[] the Anti-Deficiency Act's prohibition on making expenditures during a lapse in appropriations." Pet. App 34a. The FLSA contains no such language unequivocally expressing that intent. But neither did the statute at issue in *Langston* (enacted in 1884, 14 years after the ADA) or the statute in *Maine Community Health* (enacted in 2010, 140 years after the ADA).[2] The United States does not contend that any other circuit applies to obligation-creating statutes this ADA-based rule of statutory construction.

Second, the Federal Circuit held that an obligation-creating statute must not be construed to require the United States to make an expenditure that would

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[2] The United States unsuccessfully made a similar argument in *Maine Community Health*. Brief for the Respondent, 25.

(in that circuit's view) violate the ADA. "If we were to adopt Plaintiffs-Appellees' proposed interpretation, we would be forcing the government to choose between a violation of the Anti-Deficiency Act or the FLSA. This is an absurd result that we should avoid, if possible." Pet. App. 34a. The brief in opposition would rephrase this doctrine slightly, to hold that an obligation-creating statute should not be construed in a manner that would require a federal employee (rather than the government itself) to violate the ADA. Br. Opp. 15 n.*. Under that slightly narrower articulation, this presumptive limitation would apply in any case in which the mandated payment would be made by a federal employee. "[P]etitioners do not explain why that distinction makes a difference in this case." *Id.* That distinction also would also not have made any difference in either *Langston* or *Maine Community Health*; in both cases a government employee would have had to make the disputed payment, and thus would have (in the view of the Federal Circuit) violated the ADA.[3] The government does not contend that any other circuit applies to obligation-creating statutes this ADA-based rule of statutory construction.

Third, the Federal Circuit held that an obligation-creating statute must be interpreted not to create an obligation for which there is no appropriation if the obligation-creating statute is less specific than the ADA. "Normally, 'a specific statute controls over a general one.'" Pet. App. 33a (quoting *Bulova Watch Co. v.*

[3] The government made a similar argument in *Maine Community Health*. Brief for the Respondent, 16.

United States, 365 U.S. 753, 758 (1961)). The court of appeals reasoned that the ADA is the "more specific" statute because the ADA "explicitly forbids" making expenditures in the absence of an appropriation, "whereas the FLSA discusses the much broader topic of general payment requirements for all employers...." Pet. App. 33a. The same could be said about *Maine Community Health*; the Affordable Care Act addresses "the much broader topic" of health insurance. The government does not contend that any other circuit applies to obligation-creating statutes this ADA-based rule of statutory construction.

Fourth, the Federal Circuit invoked this Court's decision in *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432-33 (1945), that the FLSA "does not require the impossible." Pet. App. 31a. But that holding in *Walling* does not create some special loophole in the FLSA; federal statutes are routinely described as not requiring the impossible, and are construed to avoid such a consequence. E.g., *Case v. Los Angeles Lumber Product Co.*, 308 U.S. 106, 117 (1939) (Bankruptcy Act); *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 355 (1937) (Internal Revenue Code). The Affordable Care Act also does not "require the impossible"; if one of the insurance companies in *Maine Community Health* had failed to provide HHS with the information needed to calculate the reimbursement to which it was entitled, the government would have been excused on grounds of impossibility from having to provide any reimbursement. The key element of this aspect of the decision below is its holding that the absence of an appropriation, in conjunction with the ADA, constitutes a form of

impossibility. If that is correct, it would be equally true with regard to any obligation-creating statute that does not require the impossible. The problem with characterizing the situation in this case as one of impossibility, as the dissent noted, is that the government pleading impossibility is the very entity solely responsible for causing the problem in the first place. Pet. App. 46a. The United States does not contend that any other circuit applies to obligation-creating statutes this ADA-based rule of statutory construction or this standard of impossibility.

3. The government argues that the Federal Circuit's decision is "unlikely to have effects beyond the very narrow circumstances present here" because it "rests on the interaction between the Anti-Deficiency Act and the FLSA." Br. Opp. 17-18. But the "interaction" in this case between the ADA and the FLSA is governed by the general interpretive principles established by the court of appeals, principles that would also govern the interaction between the ADA and any other obligation-creating statute. The presumption that a statute does not, absent special language, create obligations for which there is no appropriation, applies to all laws enacted after the adoption of the ADA in 1870, not just to the FLSA. If the Federal Circuit is correct, the ADA "controls" any statute which is less specific than the prohibition in the ADA, a standard that would encompass most laws that are not recipient specific. Any statute that "does not require the impossible" would give way to the impossibility that the Federal Circuit perceives is created by the ADA.

The brief in opposition comments that the Federal Circuit's impossibility analysis "resolves this case." Br. Opp. 12. But the Federal Circuit's decision did not stop there. As the government itself concedes, the opinion below also spells out and applies "other principles of statutory construction" based on the ADA. *Id*. The absence of an express regular payday requirement in the FLSA did not by itself resolve this case; it merely opened the door to reading the ADA into the statute. The same would be true of any obligation-creating statute that did not require the impossible.

Seven circuits hold that the failure of Congress to enact a needed appropriation does not repeal an obligation otherwise imposed on the government by statute. The Federal Circuit, on the other hand, holds that the failure of Congress to enact such an appropriation triggers application of the ADA, which in turn requires that the statute be reinterpreted to omit that obligation. The United States insists these lines of cases are consistent, on the theory that the Federal Circuit reinterpretation leaves no right to repeal. But there is no practical difference between the rule rejected in seven circuits—that the lack of an appropriation repeals a statutory right—and the rule adopted in the Federal Circuit—that the absence of that appropriation mandates reinterpretation of the statute to remove that right.

Notwithstanding doctrinal niceties, the practical conflict between those standards will be obvious to litigants. Claims that would survive in most circuits under *Langston* and its progeny will foreseeably be

rejected in the Federal Circuit. When a claim could be brought in a geographical circuit, litigants will pursue their claims there, rather than risk application by the Federal Circuit of its ADA-based rules of interpretation. The United States does not actually suggest that a prudent litigant now would pursue litigation such as this in the Federal Circuit if it were possible to file elsewhere. Similarly, as the petition explains, unionized federal employees may be able to escape the Federal Circuit's ADA-based interpretive rules by pursuing their claims through a grievance procedure, rather than in the Court of Federal Claims. Non-unionized employees have no such option. Pet. 34-35.

4. The Ninth Circuit and the highest courts of California and Pennsylvania construe the FLSA to require that government workers be paid during a budget lapse, even if the state legislature has not appropriated funds to do so. Pet. 12-13. The Department of Labor has endorsed these decisions, and insists that those wages must be paid even if there is "a provision in state law that limits expending non-appropriated funds." Pet. 13. Those decisions, and the Department of Labor's position, are clearly inconsistent with the decision below.

The brief in opposition argues that the Ninth Circuit decision in *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), is wrong. "*Biggs* did not discuss—or even cite—*Walling*...." Br. Opp. 16. But the conflict between the Federal Circuit and the Ninth Circuit does not disappear merely because one of them may be incorrect. The government points out that the two state supreme

court decisions holding that FLSA wages must be paid during a budget lapse "follow[] *Biggs*'s reasoning...." Br. Opp. 16. But even if, for that reason, those state court decisions too were unsound, the conflict would remain.

To buttress its criticism of *Biggs*, the government states that "the Second Circuit has explained that *Biggs* is an outlier." Br. Opp. 16 (citing *Rogers v. City of Troy*, 148 F.3d 52, 56 n.3 (2d Cir. 1998)). But *Rogers* did not state that *Biggs*'s application of the FLSA to a budget impasse was an outlier; until the instant case, *all* lower courts had agreed that the FLSA requires that wages be paid during such an impasse. Rather, *Rogers* commented only that the facts of *Biggs* were unusual because the delay in payment in that case did not result from an intent to evade the FLSA. The Second Circuit in *Rogers* disclaimed any disagreement with the result in *Biggs*. "*Biggs* in no way contradicts the result we reach today." *Rogers*, 148 F.3d at 56 n.3.

The government argues that "much of *Biggs*' logic has been superseded by the 2019 Amendments", which may preclude an open-ended post-lapse delay in the payment of wages of federal employees. Br. Opp. 17. Those amendments could address the statement in *Biggs* that permitting payments on a date other than the regular payday could "create a 'moving target'" about when the workers must be paid. See *Biggs*, 1 F.3d at 1540. But that comment cannot fairly be described as "much of *Biggs*' logic." This is just a single sentence in a 2500-word opinion; the issue is only mentioned in one of the twenty paragraphs in the Ninth Circuit analysis. And this argument is not raised at all

in the state supreme court decisions in *White v. Davis*, 30 Cal. 4th 528, 579 (2003), and *Council 13, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Rendell*, 604 Pa. 352, 376-79 (2009).

Even if the FLSA ordinarily would require payment of FLSA minimum and overtime wages during a budget impasse, the United States insists that the FLSA must be interpreted differently when the federal government is the employer at issue. The meaning of the FLSA is necessarily different with regard to federal workers, the United States contends, because the interpretation of the FLSA as applied to a federal budget lapse turns on "the interaction of the FLSA and the Anti-Deficiency Act...." Br. Opp. 17. The government's argument highlights the nature of the Federal Circuit decision below: the court of appeals requires that federal laws be given a special interpretation to conform to the ADA, even if that results in an interpretation that would not apply to any other defendant covered by the statute at issue.

5. The United States asserts that the decisions of this Court cited by petitioners "state that Congress's failure to appropriate sufficient funds to cover an obligation *already incurred* by the government generally does not cancel the underlying obligation." Br. Opp. 14 (emphasis added). If that were all that the cited cases held, they might be distinguishable from the instant case; here the appropriations to pay the petitioners' wages lapsed before petitioners did the work in question. But this Court's decisions are not so limited. In *United States v. Langston*, the appropriations for the

plaintiff's position was reduced by Congress in July 1882; the plaintiff sued for wages that had not yet accrued at that point, but that were owed for work done from that time until July 1885. 118 U.S. at 390-91.

6. The United States asserts that it is undisputed that petitioners "were paid in accordance with" 31 U.S.C. § 1341(c)(2). Br. Opp. 11. That is not correct. This provision, enacted in 2019, is expressly limited to events occurring on or after December 22, 2018. 31 U.S.C. § 1341(c)(a)(A). The statute does not apply to the petitioners asserting claims arising out of the 2013 budget lapse. Although section 1341(c)(2) entitles federal employees to be paid for work during a budget lapse, it does not contain an appropriation for such payment. Whether section 1341(c)(2) by itself will actually confer any rights on federal employees in future lapses will turn on whether this Court overturns the Federal Circuit decision in this case.

7. The government argues that this entire controversy "does not raise issues of broad importance" because the petitioners did ultimately receive the wages they were due, and thus, "unlike in many FLSA cases, the only question remaining is whether petitioners are additionally owed liquidated damages." Br. Opp. 17. But the availability of liquidated damages was the very question properly deemed important enough to warrant review in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 699-702 (1945).

The typical claim of the federal employees in this case who were forced to work without pay during the 2018-19 budget lapse is well over $1,000. To highly paid individuals, who ordinarily are not covered by the

FLSA anyway, that might not be a sum of great importance. But for the many thousands of petitioners who live from paycheck to paycheck, that would be enough to buy a month of groceries for a family of four.

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.

Respectfully submitted,

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