Nos. 2021-2008(L), 2021-2009, 2021-2010, 2021-2011, 2021-2012, 2021-2014, 2021-2015, 2021-2016, 2021-2017, 2021-2018, 2021-2019 & 2021-2020

United States Court of Appeals for the Federal Circuit

ELEAZAR AVALOS, JAMES DAVIS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2008

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00048-PEC, Judge Patricia E. Campbell-Smith.

Amicus Curiae Brief of the
Metropolitan Washington Employment Lawyers Association,
National Employment Lawyers Association,
National Employment Law Project, and
The Impact Fund
in Support of Plaintiffs-Appellees

L. KEVIN ARNOLD, MARTIN LEE, MARK MUNOZ, MATTHEW PERRY, AARON SAVAGE, JENNIFER TAYLOR, RALPH FULVIO, DAVID KIRSH, ROBERT RIGGS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2009

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

ROBERTO HERNANDEZ, JOSEPH QUINTANAR, Individually and on behalf of all others similarly situated,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2010

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00063-PEC, Judge Patricia E. Campbell-Smith.

LORI ANELLO, KARL BLACK, GEORGE CLARY, WILLIAM DENELL, JUSTIN GROSSNICKLE, ERIC INKROTE, TIMOTHY MCGREW, MARK MILLER, DAVID NALBORCZYK, MARTIN NEAL, JR., LUKE PALMER, THOMAS RHINEHART, JR., IVAN TODD,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2011

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00118-PEC, Judge Patricia E. Campbell-Smith.

BRIAN RICHMOND, ADAM SMITH, THOMAS MOORE, CHRIS BARRETT, WILLIAM ADAMS, KELLY BUTTERBAUGH, DAN ERZAL, BRIAN W. KLINE, KEVIN J. SHEEHAN, JASON KARLHEIM, CHARLES PINNIZZOTTO, JASON DIGNAN, MATHEW BECK, STEPHEN SHRIFT, JAMES BIANCONI, CHRISTOPHER GRAFTON, JESSE CARTER, MICHAEL CRUZ, CARL WARNER, BRIAN OWENS, BRIAN MUELLER, BRYAN BOWER, COREY TRAMMEL, JAMES KIRKLAND, KIMBERLY BUSH, BOBBY MARBURGER, RODNEY ATKINS, LEONEL HERNANDEZ, JOSEPH AUGUSTA, EDWARD WATT,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2012

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00161-PEC, Judge Patricia E. Campbell-Smith.

JUSTIN TAROVISKY, GRAYSON SHARP, SANDRA PARR, JUSTIN BIEGER, JAMES BRATTON, WILLIAM FROST, STEVE GLASER, AARON HARDIN, STUART HILLENBRAND, JOSEPH KARWOSKI, PATRICK RICHOUX, DERRECK ROOT, CARLOS SHANNON, SHANNON SWAGGERTY, GEOFFRY WELLEIN, BECKY WHITE, TAMMY WILSON,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2014

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00004-PEC, Judge Patricia E. Campbell-Smith.

QUENTIN BACA, LEPHAS BAILEY, CHRISTOPHER BALLESTER, KEVIN BEINE, DAVID BELL, RICHARD BLAM, MAXIMILIAN CRAWFORD, MATTHEW CRUMRINE, JOHN DEWEY, JEFFREY DIAMOND,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2015

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00213-PEC, Judge Patricia E. Campbell-Smith.

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

v.

UNITED STATES,
Defendant-Appellant

2021-2016

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00257-PEC, Judge Patricia E. Campbell-Smith.

TONY ROWE, ALIEU JALLOW, KARLETTA BAHE, JOHNNY DURANT, JESSE A. MCKAY, III, GEORGE DEMARCE, JACQUIE DEMARCE,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2017

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00067-PEC, Judge Patricia E. Campbell-Smith.

D. P., T. S., J. V.,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2018

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00054-PEC, Judge Patricia E. Campbell-Smith.

PLAINTIFF NO. 1, PLAINTIFF NO. 2, PLAINTIFF NO. 3, PLAINTIFF NO. 4,

Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2019

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00094-PEC, Judge Patricia E. Campbell-Smith.

I. P., A. C., S. W., D. W., P. V., M. R., R. C., K. W., B. G., R. H., individually and on behalf of all others similarly situated,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2020

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00095-PEC, Judge Patricia E. Campbell-Smith.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-2008

Short Case Caption Avalos v. United States, et al.

Filing Party/Entity Metropolitan Washington Employment Lawyers Ass'n, et al.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 01/31/2023

Signature: /s/Omar Vincent Melehy

Name: Omar Vincent Melehy

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Metropolitan Washington Employment Lawyers Association		
National Employment Lawyers Association		
National Employment Law Project		
The Impact Fund		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Omar Vincent Melehy Melehy & Associates LLC	Mark Hanna Murphy Anderson PLLC	Alan. R. Kabat Bernabei & Kabat, PLLC

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☐ Additional pages attached

2021-2009, 2021-2010	2021-2011, 2021-2012	2021-2014, 2021-2015
2021-2016, 2021-2017	2021-2018, 2021-2019	2021-2020, 2021-2255
2018-1354		

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF INTEREST

Amici, all of which are organizations dedicated to defending and advancing workers' rights, respectfully submit this *amicus* brief to aid the Court in deciding whether to grant Appellees' petition for rehearing *en banc*. *Amici* share an interest in the disposition of this case in light of the serious consequences it will have for federal employees seeking to enforce their rights under the Fair Labor Standards Act.

STATEMENT PURSUANT TO FED. R. APP. P. 29(c)

Pursuant to Fed. R. App. P. 29(c), *amici* state that:

(A) *Amici* alone authored the entire brief, and no attorney for a party authored any part of the brief; and

(B) Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting the brief, exclusive of the dues counsel on appellees' side have paid for their membership in *amici* MWELA and NELA; and

(C) No person other than the *amici curiae*, their members and cooperating attorneys, and their counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUE

Whether the Fair Labor Standards Act's requirement that the federal government pay compensatory liquidated damages when it fails to meet its statutory obligation to pay employees on their regularly scheduled payday is abrogated where the government-employer's failure to do so was due to a lack of congressional appropriations?

SUMMARY OF FACTS RELEVANT TO *AMICI* BRIEF

These consolidated interlocutory appeals arise out of the lapse in federal appropriations for many agencies that began on December 21, 2018 and ended on January 25, 2019, when Congress restored funding. Pub. L. No. 116-5, 133 Stat. 10 (2019). At five weeks, that partial shutdown was the longest in history.

The government required plaintiffs to work during the shutdown, including overtime. *See, e.g.*, Appx279-91. The government did not pay the plaintiffs during the shutdown, *see, e.g.*, Appx274-75, Appx281, Appx283, which encompassed three biweekly paydays. Maj. Op. at 16. Although the government ultimately paid plaintiffs for work performed during the shutdown, it has never compensated them for its delay in payment.

Plaintiffs-Appellees allege, in part, that the government violated the FLSA by failing to pay minimum wages and overtime earned during the shutdown by the government's recurrent paydays. *See* 29 U.S.C. §§ 206, 207. They seek liquidated

damages under 29 U.S.C. § 216(b). The government responded with motions to dismiss that invoked the same Anti-Deficiency Act's ("ADA") provision and posited the same "conflict" with the FLSA. *See* 31 U.S.C. § 1341, 1342. The Court of Federal Claims denied those motions. Appx021-24.

On appeal, the majority held that "the government does not violate the FLSA[']s timely payment obligation] when it complies with the [ADA] by withholding payment during a lapse in appropriations." Maj. Op. at 15. Judge Reyna dissented, relying on binding ADA authority cited by the Court of Federal Claims. Based on such authority, Judge Reyna concluded that the absence of appropriated funds and the ADA's concomitant spending restrictions do not void the government's resulting liability for its failure to comply with FLSA's mandate to promptly pay essential workers the wages they are due. Dis. Op. at 10-11.

INTRODUCTION

This Court should grant *en banc* review to correct the panel majority's serious legal errors and properly realign the Court's holding with applicable Circuit and Supreme Court precedent. The majority's opinion confuses the ADA's prohibition on contemporaneous payment of unappropriated funds with a nullification of the affected workers' right to compensatory damages for violation of the FLSA's prompt-payment requirement. This result cannot stand in light of longstanding caselaw to the contrary.

The panel majority erred in carving out an extra-textual exception to the FLSA to relieve the government of liability when it fails to timely pay its employees—due to lack of appropriated funds. The question is not whether the government was obligated to continue to issue paychecks to essential employees while appropriations were cut off pursuant to the ADA. Rather, the question is simply whether the FLSA requires the government to pay liquidated damages, in addition to overdue regular wages, when appropriations resumed. In view of both statutes and relevant caselaw, the answer is a resounding yes.

The panel majority's holding squarely conflicts with Federal Circuit precedent establishing that lack of appropriations and the ADA's prohibitions on spending cannot serve as a shield against the U.S. government's outstanding statutory obligations. *See, e.g.*, *N.Y. Airways, Inc. v. United States*, 177 Ct. Cl. 800,

810, 369 F.2d 743 (1966) ("the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute").

Yet here, the panel majority found that when there are no funds appropriated to pay its essential workers on their payday, the government is effectively immunized by the ADA from FLSA liability, including the liquidated damages necessary to compensate its employees for the harms suffered during such an extended period of unpaid labor. As Judge Reyna's dissent detailed, the ADA poses no obstacle to the court's ability to give effect to the FLSA—the ADA's restrictions on government officials have no bearing on the FLSA's compensatory remedies offered when government employees go five weeks without a paycheck and suffer serious harms as a result.

In summary, *en banc* review is both necessary to realign the Court's holding with applicable precedent and to forestall an otherwise potentially wide-ranging and deleterious impact on employees well beyond the scope of this case. The Court should not open the door to a gradual weakening of the FLSA's prompt-payment provision based on flawed legal reasoning that squarely conflicts with existing caselaw.

ARGUMENT

I. THE ADA DOES NOT EXEMPT THE GOVERNMENT FROM COMPENSATORY LIQUIDATED DAMAGES LIABILITY UNDER THE FLSA WHEN IT FAILS TO TIMELY PAY ITS ESSENTIAL EMPLOYEES DUE TO A LAPSE IN APPROPRIATIONS

The panel majority could reach its conclusion that the ADA somehow nullifies the FLSA only by ignoring clear precedent and by finding a contradiction between the two statutes where there is none. While the ADA might prohibit the government from meeting some of its obligations during the lapse in appropriations, the ADA does not abrogate its resulting liability from failing to meet those obligations, including those mandated by the FLSA.

As the majority opinion correctly recognized, "'where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" Maj. Op. at 19 (quoting *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1018 (1984)). *See also* Dis. Op. at 14. Yet the panel majority's opinion proved too much in asserting that "[t]he central question in this appeal is how the [ADA's] prohibition on government spending during a partial shutdown coexists with the FLSA's seemingly contradictory timely payment obligation. . . ." Maj. Op. at 14. This reasoning confuses the ADA's prohibition on contemporaneous payment of unappropriated funds with a nullification of the affected employee's right to

compensatory liquidated damages under the FLSA's prompt-payment requirement.

Longstanding caselaw in this Circuit demonstrates that any purported contradiction between the ADA and FLSA at issue is illusory. In *N.Y. Airways*, the Court of Claims held that "the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." 177 Ct. Cl. at 810. Thus, "[t]he failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims." *Id.* Additionally, the ADA's requirements cannot defeat the obligations of the government. *See Me. Cmty. Health Options v. United States,* 140 S. Ct. 1308,1321-22 (2020); *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1322 (Fed. Cir. 2018), *rev'd on other grounds*, *Me. Cmty. Health Options*.

Finally, the panel majority's ruling is contrary to Supreme Court precedent, which, prohibits courts from reading exceptions into the FLSA—a remedial statute—that are not plainly stated in its text. *See, e.g.*, *Tenn. Coal Co. v. Muscoda*, 321 U.S. 590, 597 (1944); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). As the majority recognized, the FLSA contains a prompt payment provision which requires any employer, including the United States, to pay its employees by their regular payday. Maj. Op. at 15-16. And if an employer fails to do so, it is liable for

liquidated damages. *Id.* at 16. The FLSA does not contain any exception or any defense to liability if an employer lacks appropriated funds. Yet the panel majority effectively crafted such an exception in finding that "the government does not violate the FLSA when it pays employees for work performed during a government shutdown at the earliest date possible after a lapse in appropriations ends." Maj. Op. at 21. This conclusion is confounding precisely because the FLSA imposes liability on the federal government in the same way as it does for any other FLSA employer—namely, such liability accrues when an employer fails to pay employees on their regular payday. Dis. Op. at 13.

In summary, this Court may easily give effect to both the FLSA and ADA without stripping federal employees of the protections and compensatory remedies afforded by the FLSA merely because the government failed to avert a shutdown. While the ADA precludes government officials from paying essential personnel during the lapse in appropriations, *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012), the government is nonetheless liable under the FLSA's liquidated damages provision to compensate those employees for the harms flowing from such non-payment when appropriations resume. This is consistent with the cross-purposes of the two statutes, as the ADA is designed to penalize the government and the FLSA is designed to protect workers.

II. THE COURT MUST FULLY ENFORCE THE FLSA AND ITS LIQUIDATED DAMAGES PROVISION

The majority incorrectly held that the federal government "does not violate the FLSA when it pays employees for work performed during a government shutdown at the earliest date possible after a lapse in appropriations ends." Maj. Op. at 21. This glosses over the serious harms such employees faced when they were forced to go without pay for several weeks, and thus fails to properly consider the remedial purpose of the FLSA in aiming to rectify those harms. Moreover, to properly countenance such a purpose, the Court should look to a recent decision of the National Labor Relations Board ("NLRB") for guidance on "make-whole" remedies in the workplace context.

For the duration of the government shutdown, "excepted" employees, although required to work without pay, were still undoubtedly required to make payments of their own. The mere fact of a government shutdown did not relieve employees of their monthly bills and expenses, credit card payments and interest expenses, insurance payments, rent or mortgage payments, to say nothing of their need to pay for food and the like.

This is precisely where the FLSA steps in. It aims to protect workers from and compensate them for the destabilizing financial consequences that may result when an employer neglects to pay its employees on time. Indeed, the Supreme Court has stated that the FLSA's liquidated damages provision "is not penal in its

nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

Moreover, this Court should look to other federal workplace statutes that likewise contain compensatory remedies for guidance. Recently, the NLRB issued a decision that emphasized an analogous remedial imperative in the National Labor Relations Act, under which the NLRB may order "make-whole relief" to compensate employees who have suffered adverse consequences from an employer's unfair labor practice. *Thryv, Inc.*, 372 NLRB No. 22 (N.R.L.B December 13, 2022). Similar to the purpose of the FLSA's liquidated damages provision, the NLRB in *Thryv, Inc.* explained that "make-whole relief" is more fully realized when it compensates affected employees for "all direct or foreseeable pecuniary harms" that result from an unfair labor practice. *Id.* at slip op. 1.

The NLRB explained that "[f]ollowing an unlawful discharge, for example, an employee may be faced with interest and late fees on credit cards, or penalties if she must make early withdrawals from her retirement account in order to cover her living expenses. She might even lose her car or her home, if she is unable to make loan or mortgage payments. As a result of an unfair labor practice, discriminatees could also face increased transportation or childcare costs." *Id.* at slip op. 15 (quoting *Voorhees Care & Rehab. Ctr.*, 371 NLRB No. 22, slip op. at 4 n. 14

(N.L.R.B August 25, 2021)). Thus, as part of the NLRB's statutory obligation to ensure that employees are more fully restored to the situation they would have inhabited but for a respondent's unfair labor practice, "make-whole relief" must account and compensate for these otherwise unredressed harms.

Similarly, the FLSA's liquidated damages provision fulfills an analogous purpose in compensating employees for the foreseeable yet often unquantifiable harms that follow when an employer fails to pay its employees on their regularly scheduled payday. These consequences can be severe, even for federal government employees, many of whom do not earn particularly high incomes. For example, as of Fiscal Year 2017, the median salary of Executive Branch employees was $79,386 and the 25th percentile was $56,143. *See* U.S. OFFICE OF PERSONNEL MGMT., *Salary Information for the Executive Branch, Fiscal Year 2017* (Feb. 2018).[1] For employees in these manifold positions, to work without pay for over a month while their expenses accrue and savings dwindle is no easy task and likely brings considerable difficulty to them and their families.

The government, out of all FLSA employers, should set an example for others to follow. This Court should not permit the federal government to be the one FLSA employer that can skirt its obligations and avoid paying liquidated damages

[1] https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/salary-information-for-the-executive-branch.pdf.

when it fails to promptly pay the wages that are owed to essential non-exempt workers. Those damages are not a windfall to the workers nor are they a penalty to the government. Rather, liquidated damages are essential when there is a delay in payment to compensate the employees for the downstream harms they suffered from working without pay for up to five weeks while the government otherwise languished in dysfunction.

Yet here, the panel majority found that when there are no funds appropriated to pay the essential workers on their payday, the government is effectively immunized by the ADA from any FLSA liability whatsoever, including the liquidated damages necessary to compensate its employees for the various harm suffered during such an extended period of unpaid labor. In so doing, the majority determined that losses suffered from the late payment must be borne by the persons who are least able to bear them—the essential workers—while the majority immunized the party who caused the losses and the one with the financial wherewithal to pay appropriate and badly-needed compensation.

Given the problematic decision of the panel majority and the potentially deleterious impact of the decision on both federal workers and employees generally, *en banc* review is warranted.

CONCLUSION

Amici respectfully request that this Court should rehear this case *en banc* or, in the alternative, grant panel rehearing.

Dated: January 31, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Federal Circuit Rule 35(g)(3) because it contains 2,569 words, according to the count of Microsoft Word.

/s/ Omar Vincent Melehy
Omar Vincent Melehy