

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF GOVERNMENT )  
EMPLOYEES, AFL-CIO, )  
80 F Street N.W., )  
Washington, D.C. 20001, )  
202-639-6426, )

Plaintiff, )

v. )

UNITED STATES, )

and )

JOHN BERRY, AS DIRECTOR OF THE )  
U.S. OFFICE OF PERSONNEL MANAGEMENT, )  
AND THE U.S. OFFICE OF )  
PERSONNEL MANAGEMENT, )  
1900 E Street N.W., )  
Washington, D.C. 20415, )

and )

JACOB J. LEW, AS DIRECTOR OF )  
THE OFFICE OF MANAGEMENT AND )  
BUDGET, AND THE U.S. OFFICE OF )  
MANAGEMENT AND BUDGET, )  
725 17<sup>th</sup> Street N.W., )  
Washington, D.C. 20503, )

Defendants. )

Civil Action No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. This is an action brought by the American Federation of Government Employees (“AFGE”) on its own behalf and as a representative of its affiliated councils, locals and members. AFGE seeks declaratory and injunctive relief addressing defendants’

violations of the Appropriations Clause of the U.S. Constitution and the Thirteenth Amendment to the U.S. Constitution by requiring federal civilian employees to work without pay during a period of lapsed federal funding appropriations.

2. More specifically, this action arises from a failure of the United States Congress and the President of the United States to pass legislation appropriating funds for the continued operation of federal Executive Branch agencies and departments, i.e., a lapse of appropriated funds, leading to what is colloquially referred to as a “government shutdown,” and the requirement issued and enforced by defendants that certain federal civilian employees who are ordinarily paid from appropriated funds must work without pay during this government shutdown or face discipline; notwithstanding the Government’s inability to pay them for their work during the period of lapsed appropriations.
3. Without current funding legislation, extensive functions of federal Executive Branch agencies will cease to operate. For example, at least the following functions will cease to operate: environmental impact assessments, small business loan programs, new home loan guarantee programs, processing of paper tax returns, and National parks and Smithsonian museums. *See, e.g.,* Ed O’Keefe and Michael E. Ruane, *Government shutdown: Potential furloughs for 800k federal workers, disruption of D.C. services*, *Washington Post*, April 6, 2011, available at [http://www.washingtonpost.com/politics/government-shutdown-potential-furloughs-for-800000-federal-workers-disruption-of-dc-services/2011/04/06/AFRItOqC\\_story.html](http://www.washingtonpost.com/politics/government-shutdown-potential-furloughs-for-800000-federal-workers-disruption-of-dc-services/2011/04/06/AFRItOqC_story.html) (last visited April 7, 2011). As many as 800,000 federal employees may ultimately be furloughed as a result of the lapse in funding, while others are being required to work

without pay or a lawful promise of future payment. *Id.*

### **JURISDICTION**

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.
5. This Court has the power to issue a declaratory judgment pursuant to 28 U.S.C. § 2201.

### **VENUE**

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

### **PARTIES**

7. Plaintiff AFGE is a national labor organization and unincorporated association having its headquarters at: 80 F Street N.W., Washington, D.C. 20001. AFGE has as one of its chief purposes the representation of approximately 600,000 federal civilian employees in agencies and departments across the federal government. AFGE, on its own and through its affiliated councils and locals, represents its members and the interests of its members and bargaining units by, *inter alia*, negotiating collective bargaining agreements, arbitrating grievances under negotiated grievance procedures, filing unfair labor practice charges, lobbying Congress for favorable working conditions, pay and benefits, litigating employees' collective and individual rights before administrative agencies and in court, and generally acting as federal civilian employees' exclusive representative for the purpose of collective bargaining with the federal government.
8. Defendant United States is the United States Federal Government ("the Government").
9. Defendant John Berry is the Director of the United States Office of Personnel

Management (“OPM”), and is sued solely in his official capacity.

10. Defendant OPM is an Executive Branch agency of the federal government. OPM is located at 1900 E Street N.W., Washington, D.C. 20415-1300. OPM’s statutory mission is set forth in 5 U.S.C. § 1103(a)(7). OPM is responsible for setting policies and issuing directives governing personnel management by the federal government.
11. Defendant Jacob J. Lew is the director of the United States Office of Management and Budget (“OMB”), and is sued solely in his official capacity.
12. Defendant OMB is an agency of the Executive Office of the President of the United States. OMB is located at 725 17<sup>th</sup> Street N.W., Washington, D.C. 20503. OMB’s statutory mission is set forth in 31 U.S.C. § 503, *et seq.* OMB is responsible for, *inter alia*, setting policies and issuing directives regarding federal expenditures, federal budget development and execution, and overseeing federal agencies’ financial management.

### FACTS

13. The Appropriations Clause of the United States Constitution mandates, *inter alia*, that “[n]o Money shall be drawn from the treasury, but in Consequence of Appropriations made by Law.” U.S. Const. Art. I, § 9, cl. 7.
14. Section 3101 of Title 5 of the United States Code states that “[e]ach Executive agency, military department, and the District of Columbia may employ such number of employees of the various classes recognized by Chapter 51 of this title as Congress may appropriate for from year to year.”
15. Chapter 51 provides, *inter alia*, for the basic pay of General Schedule employees and for the pay and scheduled rate of pay for prevailing rate employees. Both classes of

- employees are represented by AFGE and will be affected by the present lapse in funding.
16. Section 1341 of Title 31 of the United States Code provides, *inter alia*, that “[a]n officer or employee of the United States Government or of the District of Columbia may not - - (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation [or] (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law”.
  17. On a continuing basis, Congress enacts appropriations laws annually that authorize Executive Branch departments and agencies to expend money in accordance with the terms set forth in the pertinent appropriations law.
  18. These annual appropriations laws fund the pay and benefits of most federal civilian employees, including many employees represented by AFGE.
  19. It is a basic obligation of federal employment that federal employees report to work unless their absence is approved or excused. An employee’s unapproved or unexcused absence from work is cause for administrative discipline against the employee.
  20. In the absence of a lawful appropriation, the Government, including defendants, has no authority to pay or obligate itself to pay the salaries of federal civilian employees who are paid from appropriated funds.
  21. The annual appropriations laws for fiscal year 2010 expired by their terms on September 30, 2010.
  22. Congress and the President extended appropriated funding for fiscal year 2011 past September 30, 2010, through a series of continuing appropriations acts. *See* P.L. 111-242, P.L. 111-290, and P.L. 111-317.

23. The most recent continuing appropriations were enacted by the Additional Continuing Appropriations Amendments 2011 on March 18, 2011. P.L. 112-6. The Additional Continuing Appropriations Amendments extended appropriated funding for the federal government until April 8, 2011.
24. As of 2:00 p.m. on April 8, 2011, Congress has not passed and the President has not signed any law extending appropriated funding past April 8, 2011. Consequently, as of 12:01 a.m. on April 9, 2011, appropriations for the operations of most federal agencies and departments, including appropriations for the pay of most federal civilian employees, will lapse.
25. A lapse in appropriations and consequent government shutdown is imminent.
26. Section 124 of OMB Circular No. A-11 (2010) (“Circular A-11”) provides, “policy guidance and instructions for actions to be taken by Executive Branch agencies when Congress fails to enact either regular appropriations, a continuing resolution, or needed supplementals, resulting in an interruption of fund availability.” Circular A-11, § 124.1(b).
27. Section 124 of Circular A-11 also provides that “[a]gency heads must develop and maintain plans for an orderly shutdown in the event of the absence of appropriations[.]” and that these shutdown plans must be submitted to OMB “when they are either first prepared or revised.” Circular A-11, § 124.2. These plans must include, *inter alia*, the total number of employees to be retained under the plan to protect life and property. *Id.*
28. AFGE attempted to obtain copies of specific agency contingency plans and related records from OMB. However, OMB has not provided AFGE with the requested records and AFGE initiated an action in the United States District Court for the District of

Columbia under the Freedom of Information Act in an effort to obtain the requested records. *See AFGE v. Lew, et al.*, Case number 11-642 (RJL) (filed March 30, 2011).

29. On April 5, 2011, OPM issued guidance stating that “Federal agencies do not have the authority to pay their employees during a shutdown, regardless of whether the employees are working as “excepted” [i.e., essential] or furloughed as “non-excepted”. *See The Potential Impact of a Lapse in Appropriations on Federal Employees*, available at <http://www.opm.gov/furlough2011/> (last visited April 8, 2011).
30. Pursuant to instructions and guidance from OPM and OMB, federal Executive Branch agencies have designated and are continuing to designate thousands of civilian employees as “essential” or “excepted”, terms which this complaint uses interchangeably to refer to appropriated fund employees required to work without pay during a period of lapsed appropriations. Employees designated as essential are therefore required to work, without pay, during a period of lapsed appropriations or face administrative discipline for failing to report to work.
31. Members of AFGE employed in multiple federal Executive Branch agencies, including the United States Department of Agriculture, the United States Coast Guard, the United States Department of Housing and Urban Development, the United States Social Security Administration, and the United States Department of Labor, have been and continue to be designated as “essential” or “excepted” and are required to work without pay during the present period of lapsed appropriations or face administrative discipline, up to and including removal from federal employment.
32. Removal from employment is one of the most, if not the most, severe administrative sanctions that the Government may take against an employee.

33. Upon information and belief, none of the employees being required to work without pay during the period of lapsed appropriations under the threat of discipline are being required to work without pay as a punishment for a crime of which they have been duly convicted.
34. Federal Executive Branch agencies, including defendants, have purported to designate employees as essential and to require them to work without pay during the period of lapsed appropriations pursuant to section 1342 of Title 31 of the United States Code (“Section 1342”). Defendants also purport to rely on Section 1342 for the assertion that essential employees who work without pay during a government shutdown will be paid once new funding legislation is enacted.
35. Section 1342 states in relevant part that, “[a]n officer or employee of the United States Government or of the District of Columbia Government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.”
36. Section 1342 does not provide any time frame for how long volunteer or personal services may be accepted by the Government for emergencies involving the safety of human life or the protection of property in the absence of appropriated funds.
37. Section 1342 does not contain any monetary amount nor does it contain any monetary limit for the cost of personal services that may be accepted by the Government for emergencies involving the safety of human life or the protection of property in the absence of appropriated funds
38. Section 1342 claims to be an exception to section 1341 of Title 31 of the U.S. Code.



**COUNT I**

39. AFGE realleges and incorporates by reference herein paragraphs 1-38 of the complaint.
40. Section 1342 is not an appropriations law nor does it provide federal Executive Branch agencies with the power to bind future Congressional appropriations.
41. Section 1342 nevertheless purports to allow federal officers or employees to obligate the Government to pay money from the United States treasury in the absence of existing appropriations made by law for that purpose.
42. Because section 1342 is not an appropriation made by law, it is not a valid exception to section 1341 of Title 31 of the United States Code and violates the Appropriations Clause of the United States Constitution.

**COUNT II**

43. AFGE realleges and incorporates by reference herein paragraphs 1-42 of the complaint.
44. Section 1 of the Thirteenth Amendment to the United States Constitution states that “[n]either slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”
45. Defendants are using legal process and governmental coercion in the form of administrative discipline to coerce federal civilian appropriated fund employees, including members of AFGE, who have not been duly convicted of any pertinent crime to work without pay or a lawful promise of future payment during the period of lapsed appropriations.
46. Defendants’ actions violate the Thirteenth Amendment’s prohibition on involuntary servitude.

**RELIEF REQUESTED**

WHEREFORE, AFGE respectfully asks that the Court:

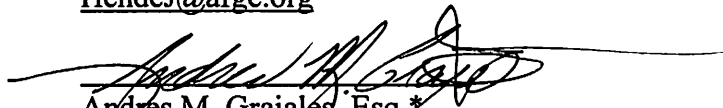
47. Declare that Section 1342 violates the Appropriations Clause of the United States Constitution.
48. Declare that defendants' requirement that federal civilian appropriated fund employees who are deemed essential work without pay during the period of lapsed appropriations or be subject to administrative discipline is unlawful.
49. Enjoin defendants from requiring federal civilian appropriated fund employees who are deemed essential to work without pay during the period of lapsed appropriations or be subject to administrative discipline.
50. Order such other relief as the Court may deem just and proper.

Respectfully submitted,

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