Nos. 2021-2255 & 2018-1354

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DONALD MARTIN, JR., PATRICIA A. MANBECK, JEFF ROBERTS, JOSE ROJAS, RANDALL SUMNER,
Plaintiffs-Appellees,
v.
UNITED STATES,
Defendant-Appellant.

2021-2255
Appeal from the United States Court of Federal Claims in No. 1:13-cv-834, Judge Patricia E. Campbell-Smith.

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, CHRISTOPHER BIJOU, ALL PLAINTIFFS,
Plaintiffs-Appellants,
v.
UNITED STATES,
Defendant-Appellee.

2018-1354

Appeal from the United States Court of Federal Claims in No. 1:16-cv-1297, Judge Patricia E. Campbell-Smith.

REDACTED CORRECTED OPPOSITION BRIEF FOR APPELLEES IN NO. 2021-2255 AND OPENING BRIEF FOR APPELLANTS IN NO. 2018-1354

HEIDI R. BURAKIEWICZ
ROBERT DEPRIEST
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Marrs Appellants

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-2255

Short Case Caption Martin v. US

Filing Party/Entity Plaintiffs/Appellees in Martin v. US

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: 12/20/2021

Signature: /s/ Heidi R. Burakiewicz

Name: Heidi R. Burakiewicz

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
Donald Martin, Jr.		
Patricia Manbeck		
Jeff Roberts		
Jose Rojas		
Randall Sumner		
(See Attachment)		

☑ 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

Steven A. Skalet Mehri & Skalet 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

Avalos v. United States No.2021-119 (Fed. Cir.)	Anello v. United States No.2021-124 (Fed. Cir.)	Jones v. United States No.2021-128 (Fed. Cir.)
Arnold v. United States No.2021-122 (Fed. Cir.)	Richmond v. United States No.2021-125 (Fed. Cir.	Marrs, et al. v. United States No.2018-1354 (Fed. Cir)
Hernandez v. United States No.2021-123 (Fed. Cir.)	Baca v. United States No.2021-127 (Fed. Cir.)	Tarovisky v. United States No.2021-126 (Fed. Cir.)

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

Attachment to Certificate of Interest

1. Represented Entities

In addition to the five named plaintiffs, a list of plaintiffs who have opted-in to this litigation is available at the Court's request.

5. Related Cases

In addition to the cases listed on the Certificate of Interest, the case titles and numbers of additional cases known to be pending in this court of any other court or agency that will directly affect or directly be affected by this court's decision in the pending appeal are:

- Rowe v. United States
  No. 2021-129 (Fed. Cir.)

- D.P. v. United States
  No. 2021-132 (Fed. Cir.)

- Plaintiff No. 1 v. United States
  No. 2021-2019 (Fed. Cir.)

- I.P v. United States
  No. 2021-2020 (Fed. Cir.)

- Abrantes v. United States
  No. 2021-2021 (Fed. Cir.)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2018-1354

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

Filing Party/Entity Appellants in Marrs, et al. v. United States

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: 12/20/2021

Signature: /s/ Heidi R. Burakiewicz

Name: Heidi R. Burakiewicz

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
See Attachment	See Attachment	See Attachment

☑ 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

Mehri & Skalet, PLLC	Steven A. Skalet Mehri & Skalet, PLLC	Michael Lieder Mehri & Skalet, 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

Martin v. United States No.2021-2255 (Fed. Cir)	Avalos v. United States No.2021-119 (Fed. Cir.)	Anello v. United States No.2021-124 (Fed. Cir.)
Jones v. United States No.2021-128 (Fed. Cir.)	Arnold v. United States No.2021-122 (Fed. Cir.)	Richmond v. United States No.2021-125 (Fed. Cir.)
Hernandez v. United States No.2021-123 (Fed. Cir.)	Baca v. United States No.2021-127 (Fed. Cir.)	Tarovisky v. United States No.2021-126 (Fed. Cir.)

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

Marrs, et al. v. United States, No. 2018-1354
Attachment to Appellant's Certificate of Interest (redacted names)

	Full Name of Party Represented	Name of Real Party in Interest Represented	Parent Corporations and Publicly Held Companies that Own 10% or More of Stock in the Party
1	Nicole Adamson	Nicole Adamson	Not Applicable
3	Bethany Afraid	Bethany Afraid	Not Applicable
4	Joel Albrecht	Joel Albrecht	Not Applicable
5	Jesus Arevalo	Jesus Arevalo	Not Applicable
6	Nathan Arnold	Nathan Arnold	Not Applicable
7	Shawn Ashworth	Shawn Ashworth	Not Applicable
8	Jeremiah Austin	Jeremiah Austin	Not Applicable
9	Michael Avenali	Michael Avenali	Not Applicable
10	Jose Balarezo	Jose Balarezo	Not Applicable
11	Ebony Baldwin	Ebony Baldwin	Not Applicable
12	Charles Bambery	Charles Bambery	Not Applicable
13	David Barraza	David Barraza	Not Applicable
14	Gregory Barrett	Gregory Barrett	Not Applicable
15	Donna Barringer	Donna Barringer	Not Applicable
16	David Bautista	David Bautista	Not Applicable
17	Gary Bayes	Gary Bayes	Not Applicable
18	Darrell Becton	Darrell Becton	Not Applicable
19	Fraun Bellamy	Fraun Bellamy	Not Applicable
20	Darnell Bembo	Darnell Bembo	Not Applicable
21	Jessica Bender	Jessica Bender	Not Applicable
22	Michael Benjamin Jr.	Michael Benjamin Jr.	Not Applicable
23	Bryan Bentley	Bryan Bentley	Not Applicable
24	William Bertrand	William Bertrand	Not Applicable
25	Christopher Bijou	Christopher Bijou	Not Applicable
26	Roverto Bizaro	Roverto Bizaro	Not Applicable
27	Lawrence Black	Lawrence Black	Not Applicable
28	Bryan Blagrave	Bryan Blagrave	Not Applicable
29	Caroline Bloom	Caroline Bloom	Not Applicable
30	John Bodnovits	John Bodnovits	Not Applicable
31	Brad Boulrice	Brad Boulrice	Not Applicable
32	Rafael Bovino	Rafael Bovino	Not Applicable
33	Cynthia Boyd	Cynthia Boyd	Not Applicable
34	Susan Brantley	Susan Brantley	Not Applicable
35	Gregory Braswell	Gregory Braswell	Not Applicable
36	Angel Britt	Angel Britt	Not Applicable
37	Adeasia Broadway	Adeasia Broadway	Not Applicable
38	Leartic Brooks	Leartic Brooks	Not Applicable
39	Jeremy Brown	Jeremy Brown	Not Applicable
40	Scott Brown	Scott Brown	Not Applicable

41	Harold Brown Bull Sr.	Harold Brown Bull Sr.	Not Applicable
42	Wanda Brumfield	Wanda Brumfield	Not Applicable
43	Brian Brummett	Brian Brummett	Not Applicable
44	Bradley Bugger	Bradley Bugger	Not Applicable
45	Joylette Bullock	Joylette Bullock	Not Applicable
46	Marvin Bundy	Marvin Bundy	Not Applicable
47	Jakeia Burgwyn	Jakeia Burgwyn	Not Applicable
48	Rebecca Calhoun	Rebecca Calhoun	Not Applicable
49	Robin Campise	Robin Campise	Not Applicable
50	Janet Cannes	Janet Cannes	Not Applicable
51	Armando Cardenas	Armando Cardenas	Not Applicable
52	Michael Cardew	Michael Cardew	Not Applicable
53	Eric Carll	Eric Carll	Not Applicable
54	Ignacio Carrillo	Ignacio Carrillo	Not Applicable
55	Patricia Carrington	Patricia Carrington	Not Applicable
56	Dustin Cavanaugh	Dustin Cavanaugh	Not Applicable
57	Briant Ceasar	Briant Ceasar	Not Applicable
58	Joe Chaney	Joe Chaney	Not Applicable
59	Katherine Cheese	Katherine Cheese	Not Applicable
60	Mandy Chrestensen	Mandy Chrestensen	Not Applicable
61	Tyrone Civington	Tyrone Civington	Not Applicable
62	James Cobos	James Cobos	Not Applicable
63	Matthew Coffer	Matthew Coffer	Not Applicable
64	Prince Cofie	Prince Cofie	Not Applicable
65	Derek Combs	Derek Combs	Not Applicable
66	Andrew Comer	Andrew Comer	Not Applicable
67	Jodi Conway	Jodi Conway	Not Applicable
68	Daniel Coombe	Daniel Coombe	Not Applicable
69	Wardell Cousins	Wardell Cousins	Not Applicable
70	Sherry Cox	Sherry Cox	Not Applicable
71	Linda Creasia	Linda Creasia	Not Applicable
72	Adam Creveling	Adam Creveling	Not Applicable
73	Joshua Criswell	Joshua Criswell	Not Applicable
74	Chris Croteau	Chris Croteau	Not Applicable
75	Tiwanna Cuffee	Tiwanna Cuffee	Not Applicable
76	Jack Custer	Jack Custer	Not Applicable
77	Cornelius Daniel	Cornelius Daniel	Not Applicable
78	Herman Davis	Herman Davis	Not Applicable
79	Venyette Davis	Venyette Davis	Not Applicable
80	Matthew Dean	Matthew Dean	Not Applicable
81	Claudia DeLaTorre	Claudia DeLaTorre	Not Applicable
82	Jason Delay	Jason Delay	Not Applicable
83	Fernando Diego	Fernando Diego	Not Applicable
84	John Doe 1226	John Doe 1226	Not Applicable

85	John Doe 1227	John Doe 1227	Not Applicable
86	John Doe 1228	John Doe 1228	Not Applicable
87	John Doe 1229	John Doe 1229	Not Applicable
88	John Doe 1230	John Doe 1230	Not Applicable
89	John Doe 1231	John Doe 1231	Not Applicable
90	John Doe 1232	John Doe 1232	Not Applicable
91	John Doe 1233	John Doe 1233	Not Applicable
92	John Doe 1234	John Doe 1234	Not Applicable
93	John Doe 1235	John Doe 1235	Not Applicable
94	John Doe 1236	John Doe 1236	Not Applicable
95	John Doe 1237	John Doe 1237	Not Applicable
96	John Doe 1238	John Doe 1238	Not Applicable
97	John Doe 1239	John Doe 1239	Not Applicable
98	John Doe 1240	John Doe 1240	Not Applicable
99	John Doe 1241	John Doe 1241	Not Applicable
100	John Doe 1242	John Doe 1242	Not Applicable
101	John Doe 1243	John Doe 1243	Not Applicable
102	John Doe 1244	John Doe 1244	Not Applicable
103	John Doe 1245	John Doe 1245	Not Applicable
104	Robert Donahue	Robert Donahue	Not Applicable
105	Dustin Dubroc	Dustin Dubroc	Not Applicable
106	Christopher Ducote	Christopher Ducote	Not Applicable
107	Lonnie Dupre	Lonnie Dupre	Not Applicable
108	Michael Duran	Michael Duran	Not Applicable
109	James Durant	James Durant	Not Applicable
110	Gerardo Durazo	Gerardo Durazo	Not Applicable
111	Joseph Eck	Joseph Eck	Not Applicable
112	Kerry Edwards	Kerry Edwards	Not Applicable
113	Heather Eggink	Heather Eggink	Not Applicable
114	Jace Elliott	Jace Elliott	Not Applicable
115	Thomas Elsarelli	Thomas Elsarelli	Not Applicable
116	Katrina English	Katrina English	Not Applicable
117	Kristofor Erickson	Kristofor Erickson	Not Applicable
118	Douglas Eroh Jr.	Douglas Eroh Jr.	Not Applicable
119	Raul Espinoza	Raul Espinoza	Not Applicable
120	Sharon Evans	Sharon Evans	Not Applicable
121	Lonnie Faircloth	Lonnie Faircloth	Not Applicable
122	Sandra Fales	Sandra Fales	Not Applicable
123	Timothy Finney	Timothy Finney	Not Applicable
124	Agustin Flores	Agustin Flores	Not Applicable
125	Janie Flores-Aliani	Janie Flores-Aliani	Not Applicable
126	Tera Foster	Tera Foster	Not Applicable
127	David Freshour	David Freshour	Not Applicable
128	Gregory Fritzler	Gregory Fritzler	Not Applicable

129	Jason Gaddis	Jason Gaddis	Not Applicable
130	Lawrence Gallina	Lawrence Gallina	Not Applicable
131	Lessie Gant	Lessie Gant	Not Applicable
132	Misael Garcia	Misael Garcia	Not Applicable
133	Brad Gates	Brad Gates	Not Applicable
134	Susan Gill	Susan Gill	Not Applicable
135	Shannon Glaze	Shannon Glaze	Not Applicable
136	Raul Gonzalez	Raul Gonzalez	Not Applicable
137	David Gonzalez-Pena	David Gonzalez-Pena	Not Applicable
138	Adam Good	Adam Good	Not Applicable
139	Christopher Goodwin	Christopher Goodwin	Not Applicable
140	Ronald Green	Ronald Green	Not Applicable
141	Rikki Grenot	Rikki Grenot	Not Applicable
142	Rene Guerra	Rene Guerra	Not Applicable
143	Sean Haltom	Sean Haltom	Not Applicable
144	Shayla Hamlin	Shayla Hamlin	Not Applicable
145	Delshon Harding	Delshon Harding	Not Applicable
146	Willema Hardy	Willema Hardy	Not Applicable
147	Andrea Harris	Andrea Harris	Not Applicable
148	Arthur Harris	Arthur Harris	Not Applicable
149	Melissa Harris-Arnold	Melissa Harris-Arnold	Not Applicable
150	Pamela Harvey	Pamela Harvey	Not Applicable
151	Norman Heffle II	Norman Heffle II	Not Applicable
152	Drew Heintzelman	Drew Heintzelman	Not Applicable
153	Daniel Henderson	Daniel Henderson	Not Applicable
154	Jason Henderson	Jason Henderson	Not Applicable
155	Donald Hendricks	Donald Hendricks	Not Applicable
156	Jacquetta Henry	Jacquetta Henry	Not Applicable
157	Charles Hernandez	Charles Hernandez	Not Applicable
158	Richard Hernandez	Richard Hernandez	Not Applicable
159	William Herndon	William Herndon	Not Applicable
160	Michael Herrera	Michael Herrera	Not Applicable
161	Seth Hicks	Seth Hicks	Not Applicable
162	Diana Hodge	Diana Hodge	Not Applicable
163	Stephanie Hoffa	Stephanie Hoffa	Not Applicable
164	Jonathan Hoffman	Jonathan Hoffman	Not Applicable
165	Samuel Howard	Samuel Howard	Not Applicable
166	Corey Hughes	Corey Hughes	Not Applicable
167	Diana Huston	Diana Huston	Not Applicable
168	Leonora Hutchison	Leonora Hutchison	Not Applicable
169	Beatrice Ibarra-Cruz	Beatrice Ibarra-Cruz	Not Applicable
170	Keith Jackson	Keith Jackson	Not Applicable
171	Matthew Jacobeno	Matthew Jacobeno	Not Applicable
172	Jordana Jakubovic	Jordana Jakubovic	Not Applicable

173	Brian James	Brian James	Not Applicable
174	Catherine Jefferson-McCoy	Catherine Jefferson-McCoy	Not Applicable
175	Ivy Jenkins-Cardew	Ivy Jenkins-Cardew	Not Applicable
176	Donald Johnson	Donald Johnson	Not Applicable
177	Duane Johnson	Duane Johnson	Not Applicable
178	LaShowen Johnson	LaShowen Johnson	Not Applicable
179	Renita Johnson	Renita Johnson	Not Applicable
180	Terry johnson	Terry johnson	Not Applicable
181	Felicia Jones	Felicia Jones	Not Applicable
182	Joe Jones	Joe Jones	Not Applicable
183	Monica Jones	Monica Jones	Not Applicable
184	Tracy Jones	Tracy Jones	Not Applicable
185	James Keller	James Keller	Not Applicable
186	Jerry Key	Jerry Key	Not Applicable
187	Karen Kilgore	Karen Kilgore	Not Applicable
188	John Kinniell	John Kinniell	Not Applicable
189	Jeremy Klaus	Jeremy Klaus	Not Applicable
190	Kevin Knowles	Kevin Knowles	Not Applicable
191	Virgilena Komahcheet	Virgilena Komahcheet	Not Applicable
192	Luz Kraft	Luz Kraft	Not Applicable
193	Ricardo Kuybus Jr.	Ricardo Kuybus Jr.	Not Applicable
194	Gregory Labao	Gregory Labao	Not Applicable
195	Francis Lackie	Francis Lackie	Not Applicable
196	Jay LaFargue	Jay LaFargue	Not Applicable
197	Flavio Landeros	Flavio Landeros	Not Applicable
198	Kenneth Lane	Kenneth Lane	Not Applicable
199	Michael Langley	Michael Langley	Not Applicable
200	Johnny Latham	Johnny Latham	Not Applicable
201	Austin Leckie	Austin Leckie	Not Applicable
202	Roosevelt Lewis	Roosevelt Lewis	Not Applicable
203	Robin Lewis Jr.	Robin Lewis Jr.	Not Applicable
204	Victor Logan Jr.	Victor Logan Jr.	Not Applicable
205	Mark Long	Mark Long	Not Applicable
206	Regina Lopez	Regina Lopez	Not Applicable
207	Noel Lorenzo	Noel Lorenzo	Not Applicable
208	Josue Lugo	Josue Lugo	Not Applicable
209	Delbert Mack	Delbert Mack	Not Applicable
210	Justin Maglaya	Justin Maglaya	Not Applicable
211	Gregory Maring	Gregory Maring	Not Applicable
212	Frank Marrs	Frank Marrs	Not Applicable
213	Britney McClain	Britney McClain	Not Applicable
214	Clarence McClure	Clarence McClure	Not Applicable
215	Pamela McEwen	Pamela McEwen	Not Applicable
216	Arron McGee	Arron McGee	Not Applicable

217	Christopher McGee	Christopher McGee	Not Applicable
218	Kurt McGhee	Kurt McGhee	Not Applicable
219	Lydia McGill	Lydia McGill	Not Applicable
220	Ronald McGraw	Ronald McGraw	Not Applicable
221	David McKee	David McKee	Not Applicable
222	Ann McLaughlin	Ann McLaughlin	Not Applicable
223	Donna McRae	Donna McRae	Not Applicable
224	Melissa Mekeel	Melissa Mekeel	Not Applicable
225	Rainier Mendoza	Rainier Mendoza	Not Applicable
226	Loren Mengarelli	Loren Mengarelli	Not Applicable
227	Daren Mensch	Daren Mensch	Not Applicable
228	Brian Miitterling	Brian Miitterling	Not Applicable
229	Nicholas Miles	Nicholas Miles	Not Applicable
230	Grayson Moffett	Grayson Moffett	Not Applicable
231	Brett Molek	Brett Molek	Not Applicable
232	Thomas Moore	Thomas Moore	Not Applicable
233	Peter Morales	Peter Morales	Not Applicable
234	Letitia Morgan	Letitia Morgan	Not Applicable
235	Shawn Morrison	Shawn Morrison	Not Applicable
236	Ronny Morton	Ronny Morton	Not Applicable
237	John Motley	John Motley	Not Applicable
238	Joshua Moyer	Joshua Moyer	Not Applicable
239	Dylan Mroszczyk-McDon	Dylan Mroszczyk-McDon	Not Applicable
240	Michael Mudry	Michael Mudry	Not Applicable
241	Tyrant Murray	Tyrant Murray	Not Applicable
242	Joseph Nalevaiko	Joseph Nalevaiko	Not Applicable
243	Juan Nunez	Juan Nunez	Not Applicable
244	Linda Nutter	Linda Nutter	Not Applicable
245	Matthew Ogden	Matthew Ogden	Not Applicable
246	Dierdra Oretade-Branch	Dierdra Oretade-Branch	Not Applicable
247	Chris Orr	Chris Orr	Not Applicable
248	Reynaldo Osorio	Reynaldo Osorio	Not Applicable
249	Rosemary Oster	Rosemary Oster	Not Applicable
250	Brian Owens	Brian Owens	Not Applicable
251	Rachael Owens	Rachael Owens	Not Applicable
252	Andres Padilla	Andres Padilla	Not Applicable
253	Joshua Parker	Joshua Parker	Not Applicable
254	Jaime Pedroza	Jaime Pedroza	Not Applicable
255	Teri Perkinson	Teri Perkinson	Not Applicable
256	Demetrious Perry	Demetrious Perry	Not Applicable
257	James Peterson	James Peterson	Not Applicable
258	Malcom Pettit	Malcom Pettit	Not Applicable
259	Christopher Pierce	Christopher Pierce	Not Applicable

260	Aaron Pohl	Aaron Pohl	Not Applicable
261	Harry Porter	Harry Porter	Not Applicable
262	Jamie Portzline	Jamie Portzline	Not Applicable
263	Ana Ramos	Ana Ramos	Not Applicable
264	Luis Ramos	Luis Ramos	Not Applicable
265	Lara Raymond	Lara Raymond	Not Applicable
266	Serita Reed	Serita Reed	Not Applicable
267	Steve Reid	Steve Reid	Not Applicable
268	Delwin Reyes	Delwin Reyes	Not Applicable
269	Johnny Reyes	Johnny Reyes	Not Applicable
270	Marty Richter	Marty Richter	Not Applicable
271	Laurie Ridgley	Laurie Ridgley	Not Applicable
272	Lee Riehle	Lee Riehle	Not Applicable
273	Daniel Rivera	Daniel Rivera	Not Applicable
274	Tamara Rn	Tamara Rn	Not Applicable
275	Douglas Roberts	Douglas Roberts	Not Applicable
276	Ellen Roberts	Ellen Roberts	Not Applicable
277	Sherrie roberts	Sherrie roberts	Not Applicable
278	James Robertson	James Robertson	Not Applicable
279	Johnathon Robinson	Johnathon Robinson	Not Applicable
280	Christina Rodriguez	Christina Rodriguez	Not Applicable
281	Kasi Romano	Kasi Romano	Not Applicable
282	Donald Ross	Donald Ross	Not Applicable
283	Sean Ross	Sean Ross	Not Applicable
284	Todd Rowe	Todd Rowe	Not Applicable
285	Victor Rubinacci	Victor Rubinacci	Not Applicable
286	Jorge Salazar	Jorge Salazar	Not Applicable
287	Eleazar Saldana	Eleazar Saldana	Not Applicable
288	Linda Sanders	Linda Sanders	Not Applicable
289	Thomas Sands II	Thomas Sands II	Not Applicable
290	Diana Santiago	Diana Santiago	Not Applicable
291	Roberto Saucedo Jr.	Roberto Saucedo Jr.	Not Applicable
292	Joseph Savone	Joseph Savone	Not Applicable
293	Todd Scheid	Todd Scheid	Not Applicable
294	Jil Scheurer	Jil Scheurer	Not Applicable
295	Amy Schoonover	Amy Schoonover	Not Applicable
296	Karen Scott	Karen Scott	Not Applicable
297	Hector Seccia	Hector Seccia	Not Applicable
298	Delise Shearer	Delise Shearer	Not Applicable
299	Takara Shelton	Takara Shelton	Not Applicable
300	Justen Shomo	Justen Shomo	Not Applicable
301	Arturo Simental	Arturo Simental	Not Applicable
302	Erica Simmons	Erica Simmons	Not Applicable
303	Richard Simon	Richard Simon	Not Applicable

304	Casey Smith	Casey Smith	Not Applicable
305	Darrell Smith	Darrell Smith	Not Applicable
306	Todd Smith	Todd Smith	Not Applicable
307	Robert Solomon	Robert Solomon	Not Applicable
308	Adrienne Stevenson	Adrienne Stevenson	Not Applicable
309	Susan Stipe	Susan Stipe	Not Applicable
310	Jamari Surney	Jamari Surney	Not Applicable
311	Anthony Sutherland	Anthony Sutherland	Not Applicable
312	Robert Swanson Sr.	Robert Swanson Sr.	Not Applicable
313	Dion Tanguma	Dion Tanguma	Not Applicable
314	Justin Tarovisky	Justin Tarovisky	Not Applicable
315	Lila Thompson	Lila Thompson	Not Applicable
316	John Thornton	John Thornton	Not Applicable
317	Douglas Thurston	Douglas Thurston	Not Applicable
318	Choya Todman	Choya Todman	Not Applicable
319	Zamir Toruno-Davila	Zamir Toruno-Davila	Not Applicable
320	Demetrius Tossie	Demetrius Tossie	Not Applicable
321	Steven Toth	Steven Toth	Not Applicable
322	Terri Tryfon	Terri Tryfon	Not Applicable
323	Dennis Tubbs	Dennis Tubbs	Not Applicable
324	Arthur Valdez III	Arthur Valdez III	Not Applicable
325	Agueda Valencia	Agueda Valencia	Not Applicable
326	Gilberto Valencia	Gilberto Valencia	Not Applicable
327	Shanchevia Vance	Shanchevia Vance	Not Applicable
328	Kashonda Vanduyne	Kashonda Vanduyne	Not Applicable
329	Carmen Vasquez	Carmen Vasquez	Not Applicable
330	Charles Viggato	Charles Viggato	Not Applicable
331	Joshua Vogel	Joshua Vogel	Not Applicable
332	Josh Wagner	Josh Wagner	Not Applicable
333	Alan Warsaw	Alan Warsaw	Not Applicable
334	Randall Washington	Randall Washington	Not Applicable
335	Tammy Watkins	Tammy Watkins	Not Applicable
336	Phillip Watson	Phillip Watson	Not Applicable
337	Bernice Watts	Bernice Watts	Not Applicable
338	Mark Wendt	Mark Wendt	Not Applicable
339	Richard Wentz	Richard Wentz	Not Applicable
340	Jason Wilkinson	Jason Wilkinson	Not Applicable
341	Cecil Willey	Cecil Willey	Not Applicable
342	Danny Williams	Danny Williams	Not Applicable
343	Jason Williams	Jason Williams	Not Applicable
344	Michael Williams	Michael Williams	Not Applicable
345	Sean Wilson	Sean Wilson	Not Applicable
346	Teresa Wilson	Teresa Wilson	Not Applicable
347	Andrea Wilson (Davis)	Andrea Wilson (Davis)	Not Applicable

348	Richard Wilson III	Richard Wilson III	Not Applicable
349	Bonnie Wise	Bonnie Wise	Not Applicable
350	Jeffrey Wojcik	Jeffrey Wojcik	Not Applicable
351	Angela Wright	Angela Wright	Not Applicable
352	Rosemary Yniquez	Rosemary Yniquez	Not Applicable
353	Ryan Zito	Ryan Zito	Not Applicable

5. Related Cases

In addition to the cases listed on the Certificate of Interest, the case titles and numbers of additional cases known to be pending in this court of any other court or agency that will directly affect or directly be affected by this court's decision in the pending appeal are:

- Rowe v. United States
  No. 2021-129 (Fed. Cir.)

- D.P. v. United States
  No. 2021-132 (Fed. Cir.)

- Plaintiff No. 1 v. United States
  No. 2021-2019 (Fed. Cir.)

- I.P v. United States
  No. 2021-2020 (Fed. Cir.)

- Abrantes v. United States
  No. 2021-2021 (Fed. Cir.)

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STATEMENT OF RELATED CASES

The cases consolidated under this docket number have not been previously before this Court or any other appellate court. We know of no related cases within the meaning of Federal Circuit Rule 47.5(b). However, thirteen cases before this Court arising out of a later lapse in federal appropriations, for which the first caption is *Avalos v. United States*, No. 21-2008, present similar legal issues.

MARRS APPELLANTS' STATEMENT OF JURISDICTION

The appeal in *Marrs v. United States*, arises from the delay in paying wages during the 2013 lapse in appropriations. The Court of Federal Claims had jurisdiction over plaintiffs' complaints under 28 U.S.C. § 1491(a). The court denied *Marrs*' motion for summary judgment, granted the Government's motion for summary judgment as to liability and entered final judgment on October 27, 2017. No. 18-1354, Appx131-132. *Marrs* Appellants filed a timely notice of appeal on December 22, 2017, No. 18-1354, Appx133, and this Court has jurisdiction over the appeal under 28 U.S.C. § 1295(a)(3). The Court has desginated this case as a companion case to thirteen other pending appeals that involve similar claims arising out of the 2018-19 lapse in appropriations, and has consolidated it with *Martin v. United States*, No. 21-2255, for purposes of briefing, in the nature of cross-appeals.

INTRODUCTION

On October 1, the Government allowed appropriations for many federal agencies to lapse. Over the next sixteen days, the Government forced hundreds of thousands of public servants to work without knowing when they would be paid, and failed to pay them on their regular payday for part of that period. Unquestionably, employees of private employers and of state and local governments who are non-exempt under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq*., have monetary remedies when their employers pay them minimum and overtime wages belatedly. The issue presented here is whether the Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341 *et seq.*, precludes federal employees from being made whole through the same remedy that state and local government employees have in analogous budget impasses.

The Court of Federal Claims, per Judge Campbell-Smith, held in *Martin* that it does not. It concluded that the Government violated the FLSA in not paying non-exempt essential employees minimum and overtime wages on their regularly scheduled paydays. The court also concluded that the essential employees are entitled to liquidated damages, which are the only monetary relief they will receive. Liquidated damages "restore damage done by [the employer's] failure to pay *on time*," *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 708 (1945) (emphasis

added). The parties have agreed on the amount of liquidated damages for the 157 *Martin* Appellees.

In contrast, the Court held that the claims of the 352 *Marrs* Appellants are time-barred. The FLSA's limitations period increases from two to three years if the employer's violation was willful; the Court concluded that the *Marrs* Appellants did not show a willful violation.

The Government relies on the Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341 *et seq.*, to defend its belated payment of minimum and overtime wages on all issues: liability, liquidated damages, and statute of limitations. It wrongly contends that the ADA and the FLSA conflict. The Government utterly ignores generations of precedent holding that although the ADA delays the Government's ability to meet its obligations during a lapse in appropriations, the statute does not abrogate those obligations. The FLSA establishes that an employer that forces its employees to wait for minimum and overtime wages beyond their regular payday is liable and subject to liquidated damages as compensation for delayed payment. Both statutes' purposes can be satisfied without frustrating the purposes of either simply by paying employees liquidated damages once funds are available.

In this case, the Government stipulated that it did not even consider whether it would violate the FLSA by compelling employees to work without provision for paying them minimum and overtime wages. This failure was especially egregious

for two reasons. First, the Government's FLSA experts had long maintained that state governments that delayed paying employees minimum or overtime wages because of a budget impasse violated the FLSA. Second, shortly before the shutdown began, Congress passed an act to pay members of the military and the civilians who support them during the shutdown but did not consider similar legislation for other civilian employees. Because of the failure to even consider its obligations under the FLSA, the Government's FLSA violation was not in good faith, the Government lacked reasonable grounds for believing that its actions complied with the FLSA, and the Government willfully violated the FLSA. The same facts that support the imposition of liquidated damages also support the existence of the willfulness necessary to increase the limitations period to three years. The Court of Federal Claims correctly held that the Government was liable to the *Martin* Appellees for liquidated damages but incorrectly dismissed the claims of the *Marrs* Appellants based on the statute of limitations.

STATEMENT OF THE ISSUES

1. Whether the ADA abrogates the Government's obligation under the FLSA to promptly pay public servants minimum and overtime wages during a lapse in appropriations or be subject to compensatory liquidated damages.

2. Whether the Government qualifies for reduction or elimination of liquidated damages when (a) it did not consider whether requiring employees to

work during the partial shutdown without any provision to pay them minimum or overtime wages complied with its obligations under the FLSA, (b) its FLSA experts maintain that state governments that act likewise violate the FLSA and are subject to liquidated damages, and (c) Congress passed a law shortly before the shutdown providing for pay for military employees and the civilians who support them but no agency considered whether requiring other civilian excepted employees to work during the shutdown without paying them on their regularly scheduled payday would violate the FLSA.

3. Whether the Government willfully violated the FLSA, thereby increasing the applicable limitations period from two years to three, when (a) it did not consider whether requiring employees to work during the partial shutdown without any provision to pay them minimum or overtime wages complied with its obligations under the FLSA, (b) its FLSA experts maintain that state governments that act likewise violate the FLSA and are subject to liquidated damages, and (c) Congress passed a law shortly before the shutdown providing for pay for military employees and the civilians who support them but no agency considered whether requiring other civilian excepted employees to work during the shutdown without paying them on their regularly scheduled payday would violate the FLSA.

STATEMENT OF THE CASE

I. Statutory Background

A. Fair Labor Standards Act

In 1938, Congress passed the FLSA to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). To that end, Congress commanded "[e]very employer" to pay a minimum wage that, as of October 2013, was $7.25 per hour, 29 U.S.C. § 206(a), and to pay employees who work more than 40 hours in a week "at a rate not less than one and one-half times the regular rate at which [the employee] is employed." 29 U.S.C. § 207(a)(1). Congress exempted from those protections categories of employees that it considered less vulnerable to financial hardships, such as individuals "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

In 1974, Congress amended the FLSA to expand the term "employer" to "include[] a public agency," which was, in turn, defined to include the "Government of the United States." 29 U.S.C. § 203(d), (x). Meanwhile, an "employee" was defined to include "any individual employed by the Government of the United States," with certain exceptions not relevant to this appeal. 29 U.S.C. § 203(e)(2)(A)(ii).

If "[a]ny employer" violates the FLSA's minimum-wage and overtime provisions, then its wronged employees may sue, seeking "the amount of their unpaid minimum wages, or their unpaid overtime compensation" and "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). But if an employer shows that it violated the FLSA's provisions "in good faith" and with "reasonable grounds for believing that [the employer's] act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended," the court may, in its discretion, reduce the otherwise-mandatory liquidated damages award. 29 U.S.C. § 260. The FLSA's statute of limitations is two years unless the violation is "willful," in which case it is three years. 29 U.S.C. § 255(a).

B. The Anti-Deficiency Act

The statute now known as the Anti-Deficiency Act ("ADA") was first enacted in 1870. *See* 2 Gov't Accountability Office, *Principles of Fed'l Appropriations Law* 6-35 (3d ed. 2016). Currently, the ADA prohibits "an officer or employee of the United States Government" from "mak[ing] or authoriz[ing] 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).

The ADA likewise precludes "[a]n officer or employee of the United States Government" from "employ[ing] 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. Accordingly, during a lapse in appropriations, the Government requires public servants performing work involving the safety of human life or the protection of property, known as "excepted employees," to continue working while other Government employees are placed on furlough. Congressional Res. Serv., *Shutdown of the Fed. Gov't: Causes, Processes and Effects* 9-10, 13-14 (Dec. 10, 2018); 31 U.S.C. § 1341(c)(1)(D).

II. Factual Background

A. The Government Did Not Timely Pay Excepted Employees During the 2013 Shutdown

Because of a lapse in appropriations, the Government ceased many operations from October 1 through October 16, 2013 (the "2013 Shutdown"). Government employees, including the *Martin* Appellees and the *Marrs* Appellants, who provided services involving "the safety of human life or the protection of property" were "excepted" from furlough and required to work during the 2013 Shutdown. No. 18-1354, Appx095. The Executive Branch explained the shutdown was caused by a dispute over the funding or operation of the Affordable Care Act, even though it would mean, among other things, that "hundreds of thousands of civilian workers -- many still on the job, many forced to stay home --

aren't being paid, even if they have families to support …."[1] *See also* 159 Cong. Rec. S7029-02, (daily ed. Sept. 30, 2013) (statement of Sen. Scott Brown) (addressing political dispute precipitating lapse in appropriations). Most of the public servants forced to work without pay did not have job duties associated with the ACA.

Typically, the Government pays employees biweekly. The first pay period affected by the 2013 Shutdown commenced Sunday, September 22, 2013, and ended Saturday, October 5, 2013.[2] The Government paid excepted public servants for work performed during the first nine days of the pay period (September 22-30), but did not pay them on their regularly scheduled payday for work performed between Tuesday, October 1 and Saturday, October 5. No. 18-1354, Appx097. It did not pay them timely because the ADA prohibited payment of wages for work performed by excepted employees until funds had been appropriated. No. 18-1354, Appx094. Because the Government did not pay employees for work performed October 1-5, 2013, on their regularly scheduled paydays, some public servants did not receive the minimum wage for work performed during the week of

[1] Remarks on the Federal Government Shutdown and the Patient Protection and Affordable Care Act, 2013 Daily Comp. Pres. Doc. 2 (Oct. 1, 2013), available at https://www.govinfo.gov/content/pkg/DCPD-201300683/pdf/DCPD-201300683.pdf (last visited December 6, 2021).
[2] Nat'l Finance Ctr., Pay Period Calendar 2013, at https://www.nfc.usda.gov/ppcalendar/ppcal2013.htm#pp7 (last visited Dec. 6, 2021).

September 29-October 5, 2013, on their regularly scheduled paydays. No. 18-1354, Appx097. In addition, employees who worked overtime during October 1-5, 2013, did not receive overtime wages for that work on their regularly scheduled paydays. No. 18-1354, Appx026.

The 2013 Shutdown ended before the end of the next pay period. The Government retroactively paid employees their wages for regular and overtime work performed between October 1 and October 5, 2013, but did not pay them any liquidated damages, attorney fees, or expenses. No. 18-1354, Appx097.

B. Before and Since 2013, the Government has Maintained that a State Government that Fails to Timely Pay Minimum and Overtime Wages to Employees Required to Work During a Shutdown Violates the FLSA and is Liable for Liquidated Damages

The Government cannot identify any federal agency that considered whether requiring excepted employees to work during the shutdown without paying them minimum or overtime wages on their regularly scheduled paydays for that work would violate the FLSA. No. 18-1354, Appx096. It did not seek a formal legal opinion regarding how to meet its obligations to excepted employees under the FLSA. No. 18-1354, Appx096. The lack of consideration of the FLSA is striking

because at least since issuing an Opinion Letter dated July 20, 1998, the Wage and Hour Division (WHD) of the Department of Labor has maintained:[3]

a. State governments violate the FLSA if they fail to pay minimum or overtime wages on employees' regularly scheduled payday;

b. The prompt payment requirement applies to state governments during a budget impasse even if state law bars expending non-appropriated funds;

c. Employees may recover liquidated damages as a result of a state or local government's failure to timely pay them minimum or overtime wages.

No. 18-1354, Appx096,98; No. 21-2255, Appx174-175. In stating this opinion, the WHD agreed with two federal court decisions – *Biggs v. Wilson*, 1 F.3d 1537

[3] The Department of Labor and its Wage and Hour Division enforce and interpret the FLSA for all employees other than those of the Government. *See, e.g.*, 29 U.S.C. §§ 216(c), 259. The Office of Personnel Management ("OPM") "is authorized to administer the provisions" of the FLSA with respect to most federal employees. 29 U.S.C. § 204(f). However, Congress has instructed OPM to exercise that authority "to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." *Zumerling v. Devine*, 769 F.2d 745, 750 (Fed. Cir. 1985) (cleaned up); *see also Am. Fed'n of Gov't Emps. v. OPM*, 821 F.2d 761, 771 (D.C. Cir. 1987) (vacating OPM regulation that was "inconsistent with the Labor Department's" parallel interpretation). The DOL's regulations and other interpretations" are thus statements "of value" in the federal sector. *Adam v. United States*, 26 Cl. Ct. 782, 786 (1992).

(1993) and *Caldman v. State of California*, 852 F. Supp. 898, 902 (E.D. Cal. 1994) – which enunciated these principles in cases dealing with California's failure to pay employees minimum and overtime wages during a shutdown caused by a budget impasse.

Similarly, in 2007 and 2009, employees of the United States Department of Labor engaged in a series of communications with officials of the Commonwealth of Pennsylvania who maintained that a provision of the State Constitution would bar payments to employees for work performed until budget impasses were resolved. The Administrator of the WHD wrote "that an employer is required to pay covered employees the full minimum wages and overtime due on the regularly scheduled pay day for the workweek in question, and failure to do so constitutes a violation of the FLSA." No. 21-2255, Appx138.

Steven Mandel, the Department of Labor's Associate Solicitor for Fair Labor Standards, gave a fuller explanation in a letter dated August 26, 2009. He stated that "[i]t is the Department's position that Pennsylvania must make timely payments of minimum wages and overtime pay in accordance with the Fair Labor Standards Act to any covered employees who work during a budget impasse." Citing the Supreme Court's decision in *Brooklyn Savings Bank v. Oneil*, 324 U.S. 697, 709 n.20 (1945), and the July 1998 Opinion Letter, Mandel explained "the

FLSA requires prompt payment of the wages due under the Act at the time of the employees' normal payday." He concluded:

> Accordingly, Pennsylvania is obligated under the FLSA (see 29 U.S.C. 203(d) and (x)) to timely pay on a continuing basis any employees the requisite minimum wage and overtime compensation for work performed. The prompt payment requirement applies whether or not there is a provision in state law that limits expending non-appropriated funds; any such provision provides no defense to this requirement.

No. 18-1354, Appx097; No. 21-2255, Appx197-198.

In November 2009, several months after the Pennsylvania budget impasse of 2009 had ended, the WHD issued a publicly available fact sheet, No. 18-1354, Appx098, that states:

> 1. If an employer is having trouble meeting payroll do they need to pay non- exempt employees on the regular payday?
>
> In general, an employer must pay covered non-exempt employees the full minimum wage and any statutory overtime due on the regularly scheduled pay day for the workweek in question. Failure to do so constitutes a violation of the FLSA.
>
> …
>
> 10. Does it matter if the State or local government employee is considered an essential or critical employee for the purposes of a required furlough?
>
> The application of the FLSA is not affected by the classification of an employee as essential or critical for the purposes of a required furlough.
>
> 11. What remedies are available to correct violations of the FLSA when employees are not paid on a timely basis?

> a. The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages or for interest on the back wages ….
>
> …
>
> c. An employee may file suit to recover back wages and an equal amount in liquidated damages, plus attorney's fees and court costs.

No. 21-2255, Appx212-215. The WHD has not substantively modified its responses to questions 1, 10, and 11 since then. *Id*.

C. The Government Paid Military Employees and the Civilians Who Support Them During the 2013 Shutdown but Did Not Even Consider Whether Requiring Other Civilian Employees to Work Without Paying Them on Their Regularly Scheduled Payday Would Violate the FLSA

At least one opportunity existed to avoid the type of FLSA violation long recognized by the WHD. On September 28, 2013, two days before appropriations would end, the Pay Our Military Act ("POMA") was introduced in the House of Representatives. POMA appropriated money until regular appropriation acts were adopted to pay members of the Armed Forces, civilian personnel of the Department of Defense and the Coast Guard, and even employees of contractors who supported members of the Armed Forces. Within two days, both houses of Congress passed and the President signed it. Actions Overview: H.R.3210 — 113th Congress (2013-2014), at https://www.congress.gov/bill/113th-congress/house-bill/3210/actions; P.L. 113-39.16.

Congress did not pass legislation to provide relief to civilian employees outside the Department of Defense and Coast Guard. The Government stipulated that no agency considered whether requiring other civilian excepted employees to work during the shutdown without paying them on their regularly scheduled payday would violate the FLSA. No. 18-1354, Appx027.

III. Procedural History

Five excepted employees filed the Complaint initiating *Martin v. United States*, on October 24, 2013, as a collective action on behalf of themselves and all other "excepted employees" who had performed work between October 1 and October 5, 2013, but not been paid on their regularly scheduled paydays. No. 21-2255, Appx093-109. Plaintiffs claimed that the late payment of their wages violated the FLSA, entitling them to statutory liquidated damages. No. 21-2255, Appx093-094.

The Government moved to dismiss. No. 21-2255, Appx294-330. In an opinion and order issued on July 31, 2014, the Court ruled that the Government violated the FLSA by not paying excepted, non-exempt employees minimum and overtime wages for all hours worked during September 29-October 5, 2013 on the employees' regularly scheduled payday, except to the extent that the Government was unable to compute the correct amount of overtime wages by that payday. No.

21-2255, Appx018-029. The Court, however, left open whether the Government was liable for liquidated damages. No. 21-2255, Appx023-024, 032-034.

Subsequently, the parties stipulated to and the Court approved certification of a collective action. No. 21-2255, Appx071-077. Over 24,000 persons opted in to the action. No. 21-2255, Appx337. The Court ordered that the claims of plaintiffs attemping to opt in more than two years after October 2013, not be included in the same docket as the *Martin* claims and they filed a separate complaint on October 7, 2016. No. 21-2255, Appx331.

The court ruled in February 2017, on the parties' cross-motions for summary judgment. No. 21-2255, Appx035-048. As it had done on the motion to dismiss, the court rejected the Government's argument that the FLSA and ADA "impose two conflicting obligations" during a lapse in appropriations. No. 21-2255, Appx040. Recognizing a long line of authority establishing "that the ADA's requirements 'apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the government,'" the Court of Federal Claims concluded that the purported conflict between the FLSA and the ADA was "superficial." No. 21-2255, Appx041 (quoting *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 187 (2012)) (cleaned up). The ADA, the court held, might affect the Government's eligibility for a discretionary reduction in liquidated damages under 29 U.S.C. § 260, No. 21-2255, Appx041-042, but concluded that the Government

did not qualify for a reduction under the facts of this case. No. 21-2255, Appx043-045.

Since then, the parties have attempted to determine the amount of liquidated damages owed to each opt-in. But after the court certified for interlocutory appeal its denial of motions to dismiss in 13 consolidated cases arising out of the 2018-19 partial shutdown, it entered final judgment on the claims of the 157 *Martin* Appellees pursuant to RCFC 54(b) to allow the appeal of issues arising in *Martin* to be heard in conjunction with the interlocutory appeals in those 13 cases. No. 21-2255, Appx001-011.

The court reached the opposite result in *Marrs*, in which 352 excepted employees filed a Complaint on October 7, 2016 alleging the same violation as in *Martin*. No. 18-1354, Appx007-039. Because they filed their claims more than two, but less than three years after the government failed to pay the *Marrs* Appellants on their regularly scheduled payday, they alleged that the Government willfully violated the FLSA, extending the statute of limitations to three years. No. 18-1354, Appx023.

The Court accepted the parties' stipulation that "the Court's ruling in *Martin* on the issue of defendant's liability for liquidated damages under the [FLSA] … [shall] apply to this case[,]" and that the "only issue to be resolved in this case is whether the FLSA's two or three year statute of limitations applies to plaintiffs."

No. 18-1354, Appx040-041. The parties filed cross-motions for summary judgment, No. 18-1354, Appx042-072, 073-102, and on October 27, 2017, the court denied Plaintiffs' Motion and granted Defendant's Motion for Summary Judgment, No. 18-1354, Appx103-113. Despite the court's analysis in *Martin* that the purported conflict between the FLSA and the ADA was "superficial," No. 21-2255, Appx041, the court in *Marrs* concluded that the Government's actions did not go beyond "merely negligent" conduct. No. 18-1354, Appx129-130. *Marrs* Plaintiffs appealed, and on April 19, 2018, this court granted the motion to stay the proceedings in this appeal pending a final judgment in *Martin*.

SUMMARY OF ARGUMENT

This case seeks to vindicate public servants' right to prompt payment of the minimum wages and overtime compensation that Congress guaranteed them under the FLSA. 29 U.S.C. §§ 206, 207. Plaintiffs seek liquidated damages "to restore damage done by [the employer's] failure to pay *on time*." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 708 (1945) (emphasis added); 29 U.S.C. § 216(b).

Since the FLSA's enactment in 1938, courts overwhelmingly have held that employers that fail to make prompt payment of minimum wages and overtime by employers' regular paydays must pay liquidated damages. Congress accepted that long-settled interpretation of the FLSA when it extended the Act to the Government in 1974, waiving its sovereign immunity from lawsuits seeking

liquidated damages for violation of the FLSA's minimum wage and overtime provisions.

Like the FLSA, the ADA has a long history of judicial interpretation. Courts consistently have held that it does not abrogate the Government's underlying obligations, such as its FLSA obligations, which remain enforceable in court; the ADA merely restrains Government disbursement officials from paying those obligations until funds are appropriated for them.

Any conflict between the two statutes thus is, as the Court below stated, "superficial." If it fails to appropriate moneys, the ADA does not relieve the Government of its obligations. It then becomes obligated to pay liquidated damages pursuant to the FLSA's liquidated damages provision as a result of the Government's own delay in meeting its obligations to its employees.

In asking this Court to reverse the decision in *Martin*, the Government conjures the appearance of conflict by misapprehending both halves of its imaginary statutory clash. It trivializes the long-settled interpretation of the FLSA as a "court-created requirement[] based on statutory purpose," Gov't Br. 14, and it entirely ignores over a century of precedent holding that the ADA does nothing to cancel the Government's freestanding obligations, which remain enforceable in court. The Government fails to acknowledge, let alone distinguish, generations of case law that stand in its way, even as it asks this Court to disregard its "duty to

interpret Congress' statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

The Government also ignores the record in this case. That record establishes that the Government's FLSA experts have for more than twenty years taken the position that a state government violates the FLSA and is subject to liquidated damages if it is unable because of a budget impasse to pay employees whom it requires to work. And it ignores that Congress passed POMA to pay military and civilian employees of the Department of Defense while ignoring the Government's other civilian employees and no agency considered whether requiring other civilian excepted employees to work during the shutdown without paying them on their rescheduled payday would violate the FLSA. The Government neither acted in good faith nor with reasonable grounds for believing it was complying with the FLSA.

The standard for showing that an employer's violation of the FLSA was willful, which extends the limitations period from two years to three years, is very similar to the standard for defeating an employer's attempt to show good faith and reasonable grounds for believing that it was complying with the FLSA. Proof of willfulness requires a showing that an employer violated the FLSA intentionally or with reckless disregard of its obligations under the FLSA, not merely negligently or unreasonably. *See McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 135 n.13

(1988). The Court of Federal Claims concluded that the Government's violation was not reckless in light of the ADA's restrictions. No. 18-1354, Appx128-131. But as the lower court recognized, it is well-established that an employer violates the FLSA recklessly when it fails to make "adequate inquiry" about its obligations under the statute. *Id.* Hallmarks of "adequate inquiry" include seeking legal advice and trying to implement that advice. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 125-30 (1985) (holding employer did not recklessly disregard ADEA's requirements where it sought legal advice and consulted with the union to try to bring its retirement policy into compliance with the ADEA while also adhering to an existing collective bargaining agreement); *Abbey v. United States*, 106 Fed. Cl. 254 (2012) (finding no evidence of reckless disregard where the FAA violated the FLSA despite an extensive review process led by legal counsel who had considerable experience in federal personnel matters).

Here the Government failed to obtain advice from its own legal experts who had opined about similar situations involving state governments or take any other steps to try to comply with its obligations under the FLSA, including trying to obtain the same protection for most of its civilian employees that Congress extended to its civilian employees and the civilian employees of contractors who supported the military. The facts that the Government had experts on hand, that those experts had considered this very issue, and that POMA pointed to at least one

action that could have been taken, took the failure to inquire beyond mere negligence or unreasonableness to recklessness.

ARGUMENT

I. The FLSA Requires Employers to Pay Their Employees on Time

Since its enactment, federal courts and the Department of Labor have uniformly interpreted the FLSA to require *timely* payment of minimum wages and overtime by the employer's regular paydays. That interpretation is rooted in the statute's text and structure. The Government nonetheless asks this Court to depart from that judicial consensus based on principles of sovereign immunity, an issue it never even raised below. That belated argument slights this Court's prior holding that Congress waived sovereign immunity from suit under the FLSA and disregards Supreme Court precedent.

A. For Decades, Courts Uniformly Have Read the FLSA to Require Employers to Pay Minimum Wages and Overtime by the Employer's Regular Payday or Face Liquidated Damages for Late Payment

From the earliest days of the FLSA, courts uniformly have held that its minimum-wage and overtime provisions require employers to pay statutorily mandated wages *promptly*—that is, on the first regular payday after the amount due is ascertainable.

Seven years after the FLSA's enactment, the Supreme Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), rejected the notion that an employer

could avoid the Act's liquidated-damages provision by tendering payment of delayed minimum or overtime wages before the employee filed suit. *Id.* at 708. The Court explained that the FLSA's liquidated-damages provision "constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' … that double payment must be made *in the event of delay* in order to insure restoration of the worker to that minimum standard of well-being." *Id.* at 707 (emphases added).

The Supreme Court noted that Congress focused in crafting the FLSA on protecting workers who depend on their regular wages for "subsistence." *Id.* at 707 n.18. Such workers require regular wage payments to meet their obligations, such as monthly rent, as they come due, and they "are not likely to have sufficient resources" to tide themselves over while waiting for a delayed wage payment. *Id.* at 708. Thus, "the liquidated damage provision is not penal in its nature but constitutes compensation … to restore damage done by [the employer's] failure to pay on time," *id.* at 707-08—a failure "which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages," *id.* at 707.

Taking their cue partly from *Brooklyn Savings Bank*, federal courts have uniformly interpreted the FLSA to require payment of minimum and overtime wages by the regular payday whenever the amount due is ascertainable by that

date. This regular-payday requirement "follows directly from" *Brooklyn Savings Bank*. *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir. 1993); *see also Biggs v. Wilson*, 1 F.3d 1537, 1541 (9th Cir. 1993) ("[W]e find it difficult to read *Brooklyn Savings Bank* without concluding that an employer violates the Act if payments are late," as measured against "the employee's regular payday"). Indeed, courts had settled on the regular-payday requirement around the time of *Brooklyn Savings Bank*, long before Congress extended the FLSA to federal employees in 1974.[4] Since that extension, the judicial consensus has further solidified.[5]

[4] *E.g.*, *Roland Elec. Co. v. Black*, 163 F.2d 417, 421 (4th Cir. 1947) ("[I]f [the employer] fails to pay overtime compensation promptly and when due on any regular payment date, the statutory action for unpaid minimum and liquidated damages … immediately arises in favor of the aggrieved employee."); *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944) ("[I]f an employer on any regular payment date fails to pay the full amount of the minimum wages and overtime compensation due an employee, there immediately arises an obligation to pay … liquidated damages"); *Birbalas v. Cuneo Printing Indus.*, 140 F.2d 826, 829 (7th Cir. 1944) ("[W]here such overtime payments are not made as they mature … but are wrongfully allowed to accumulate," then liability is "automatic[]"); *Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943) ("Section 7 of the Act plainly contemplates that overtime compensation shall be paid in the course of employment and not accumulated beyond the regular pay day."); *Seneca Coal & Coke v. Lofton*, 136 F.2d 359, 363 (10th Cir. 1943) (affirming liability when "overtime compensation was not paid when due in the regular course of employment").

[5] *E.g.*, *Calderon*, 999 F.2d at 1107; *Biggs*, 1 F.3d at 1542-43 (holding that minimum wages must be paid by payday and collecting authority consistent with that proposition).

This Court's decision in *Cook v. United States*, 855 F.2d 848 (Fed. Cir. 1988), reflects this consensus by recognizing "the usual rule, *i.e.*, that a claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid." *Id.* at 851 (relaxing that rule where, unlike here, plaintiffs' claims depended on a condition precedent that had not occurred by payday). An FLSA claim ordinarily accrues on each payday, as *Cook* recognized, because the violation ordinarily becomes complete on the date when required wages go unpaid.

The Department of Labor, which as noted above is charged with enforcing the FLSA as to private employers and state and local governments, has likewise long interpreted the statute as requiring payment on employees' regular payday.[6] That interpretation, which predates 1974, remains unaltered today. *See, e.g.*, 29 C.F.R. § 778.106 (2021).

This longstanding and unbroken consensus supporting the regular-payday requirement flows ineluctably from the FLSA's text and structure—in particular, its liquidated damages and statute-of-limitations provisions. The Ninth Circuit

[6] *See, e.g.*, 29 C.F.R. § 778.106 (1966) ("The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends."); Dep't of Labor, Op. Letter 63 (Nov. 30, 1961) ("[W]hile the Act does not require that the employee's compensation must be paid weekly, it does require the employer to pay minimum wages due for a particular work week on the regular payday for the period such workweek ends."); 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").

explained this point in *Biggs v. Wilson*, *supra*, which as stated above arose from a state-government budget impasse that presented the same FLSA issue as here. As *Biggs* observed, the FLSA's provisions requiring employers to "pay" minimum wages (29 U.S.C. § 206) or face liability for "unpaid" wages and presumptive liquidated damages (29 U.S.C. § 216) "necessarily assume that wages are due at some point, and thereafter become unpaid." 1 F.3d at 1539. If required wages did not have a mandatory due date, they could go unpaid indefinitely without consequences and "imposing liability for both unpaid minimum wages and liquidated damages would be meaningless." *Id.*; *see, e.g.*, *Cty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1473 (2020) ("We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations" of a different statute). And, as *Biggs* explained, "[t]he *only* logical point that wages become 'unpaid' is when they are not paid at the time work has been done, the minimum wage is due, and wages are ordinarily paid—on payday." *Biggs*, 1 F.3d at 1540 (emphasis added).

Likewise, as *Biggs* further explained, the FLSA's statute of limitations, 29 U.S.C. § 255(a), must be given effect. That limitations period must "start running from some point, and the most logical point a cause of action for unpaid minimum wages or liquidated damages (which equal the amount unpaid) accrues is the day the employees' paycheck is normally issued, but isn't." *Id.* at 1540.

Thus, contrary to the tenor of the Government's submission, the FLSA's regular-payday requirement is no mere suggestion or extra-statutory gloss; it is essential to the minimum-wage and overtime provisions of which it is a part. Indeed, *Brooklyn Savings Bank* holds that the right to seek liquidated damages to compensate for late payments is so fundamental to the statutory scheme that it may not be waived. 324 U.S. at 708-09; *see also D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946) (describing "the public policy of minimum wages, *promptly paid*" as "*embodied in* the Wage-Hour Act" (emphases added)).

The Government, however, analogizes its situation during a budget impasse to a narrow exception to the regular payday requirement that exists when a formula for overtime calculations requires the use of variables that are not ascertainable as of the next recurring payday, in which case the payment must be made "as soon as convenient or practicable." *See Walling v. Harnischfeger Corp*., 325 U.S. 427, 432-11 (1945). The Department of Labor has memorialized the *Walling* holding into a regulation:

> *When the correct amount of overtime compensation cannot be determined* until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. … [I]n no event may payment be delayed beyond the next payday *after such computation can be made*.

29 C.F.R. § 778.106 (emphases added). As the regulation makes clear, this exception applies only when the amount of overtime compensation cannot be determined.

Walling has no application here because the amounts due were ascertainable as of the employees' paydays. Only three agencies at which fewer than 40 opt-ins worked – less than 0.2% of the 24,000 opt-ins – stated that they had insufficient human resources employees during the 2013 Shutdown to pay overtime to excepted employees had funding been available. No. 21-2255, Appx229-236. Moreover, the Government's attempt to equate a prohibition on spending during a budget impasse to the impossibility exception would mean that *Biggs* was wrongly decided and that the DOL erroneously has maintained over the past two decades that state and local governments are potentially liable for failure to pay minimum and overtime wages during impasses. Not surprisingly, the Government cites no authority for its position.

B. Congress Made the Timely Payment Requirement Applicable to the Government When it Amended the FLSA in 1974

When Congress extended the FLSA to the Government in 1974, it adopted the uniform and well-settled interpretation of its provisions, including the prompt-payment requirement. In *Lorillard v. Pons*, for example, the Supreme Court presumed that when it incorporated by reference FLSA remedies into the Age Discrimination in Employment Act, Congress "had knowledge of the interpretation

given" to those FLSA remedies by the courts and sought "to adopt that interpretation" in the new statute. 434 U.S. 575, 580-81 (1978). Even when Congress enacts a statute containing language merely analogous to language the Supreme Court has previously interpreted, the Court presumes that Congress expected its new statute "to be interpreted in conformity with … similarly worded" laws. *Gomez-Perez v. Potter*, 553 U.S. 474, 485 (2008) (cleaned up). And those principles apply even when the background law has been established, not by the Supreme Court, but by "the rulings of the great majority of the lower federal courts," *Manhattan Props. Inc. v. Irving Trust Co*., 291 U.S. 320, 336 (1934), or "longstanding [agency] interpretation," *FDIC v. Phila. Gear Corp*., 476 U.S. 426, 437 (1986).

Here, Congress did not merely incorporate a specific portion of the FLSA into a subsequent enactment, as in *Lorillard*. Instead, it extended the entirety of the FLSA to the Government by defining the Government as an employer little different from any other employer. *See IRS v. Murphy*, 892 F.3d 29, 40-41 (1st Cir. 2018) (holding that Congress' waiver of sovereign immunity for violation of a specifically enumerated statute incorporated the lower courts' uniform interpretation of that statute at the time the waiver was enacted).

As described above, the FLSA's "requirement of prompt payment" had long been "clearly established by the authorities" before Congress extended the FLSA

to Government employees in 1974. *United States v. Klinghoffer Bros. Realty Corp*., 285 F.2d 487, 491 (2d Cir. 1960). Because the FLSA's minimum-wage, overtime, and liquidated damages provisions "had an established meaning" by 1974, Congress intended to adopt that settled meaning as to the Government. And because Congress intended to incorporate the FLSA's provisions against the Government, application of the regular-payday requirement to this case is straightforward: the Government violated the FLSA by failing to pay Plaintiffs' minimum and overtime wages on their scheduled paydays. This violation entitles those employees to seek liquidated damages for the harm wrought by the late payment, as the Court of Federal Claims held. No. 21-2255, Appx042-047.

C. Congress' Waiver of Sovereign Immunity Encompasses Claims for Liquidated Damages for Late Payment of Required Wages

When Congress amended the FLSA in 1974, it waived sovereign immunity—as this Court has held. *El-Sheikh v. United States*, 177 F.3d 1321, 1323-24 (Fed. Cir. 1999); *Saraco v. United States*, 61 F.3d 863, 865-66 (Fed. Cir. 1995). In so doing, Congress subjected the Government, as an employer, not only to the same *substantive* minimum-wage and overtime requirements (codified in § 206 and § 207, respectively) applicable to every other employer, but also to the same liquidated-damages remedy:

> *Any employer* who violates the provisions of section 206 or 207 of this title shall be liable to the *employee or employees* affected in the amount

> of their unpaid minimum wages, or their unpaid overtime compensation … and *in an additional equal amount as liquidated damages*.

29 U.S.C. § 216(b) (emphases added). The same provision expressly authorizes an action "to recover th[at] liability … against any employer *[including a public agency]* in any Federal or State court of competent jurisdiction." *Id.* (emphasis added).

That "explicit[]" waiver, *Saraco*, 61 F.3d at 866, could hardly be clearer: it authorizes "an employee" (including federal employees) to sue "[a]ny employer" (including the Government) to "recover the liability" set out in section 216(b). *See El-Sheikh*, 177 F.3d at 1333-34. And the scope of that waiver is equally clear: it encompasses lawsuits for violations of "section 206 or 207"—the FLSA's minimum wage and overtime provisions—that seek "liquidated damages." It easily satisfies the requirement that the "waiver of sovereign immunity must be 'unequivocally expressed' in statutory text." *FAA v. Cooper*, 556 U.S. 284, 290 (2012); *see also Saraco*, 61 F.3d at 866.

D. The ADA Does Not Create a Narrow Exception to the FLSA's Allowance of Liquidated Damages Against the Sovereign When the Government Fails to Timely Pay Minimum or Overtime Wages Because of Its Failure to Appropriate Funds

The Government concedes, as it must, that it has generally waived sovereign liability against claims under the FLSA and that the FLSA provides for liability and liquidated damages for employers that fail to pay minimum and overtime

wages on regularly scheduled paydays except when it is not feasible to calculate overtime wages by that date. But the Government makes three arguments against liability when it fails to make timely payments because Congress failed to appropriate funds. Each argument is fatally flawed.

1. The FLSA's Requirement of Timely Payment of Minimum and Overtime Wages Does Not Alter the ADA

First, the Government argues that the FLSA and ADA conflict when the Government fails to make timely payment because of non-appropriation of funds. In that instance, it states, the FLSA must yield because "an explicit textual requirement," which it finds in the ADA, "cannot be altered by court-created requirements based on statutory purpose," which is how it characterizes the FLSA's timely payment requirement. Gov't Br. 14.

While acknowledging that the principle that court-created requirements must yield to statutory text is "generally applied in interpreting a single statute," the Government asserts that it "applies with equal force here in discerning the proper application of two statutes." *Id.* It cites two decisions in supposed support of that proposition but each deals with supposed conflicts between the text and purpose or legislative history of a single statute. *See Kloeckner v. Solis,* 568 U.S. 41, 55 n.4 (2012); *Henry E. & Nancy Horton Bartels Trust ex rel. Cornell Univ. v. United States,* 617 F.3d 1357, 1361 (Fed. Cir. 2010). It cites no decision applying this principle across multiple statutes and, because of the presumption against implied

repeal of a statute discussed below, the principle does not apply straightforwardedly, if at all.

But even if the principle could apply across two statutes, the Government's argument fails for two reasons. First, the decision below does not "alter[]" the ADA's requirements. The Government's argument that the ADA trumps public servants' FLSA rights ignores over a century of precedent holding that, while the ADA restrains Government payroll officials from disbursing funds in the absence of appropriations, the statute neither relieves the Government from binding statutory obligations nor abrogates the Government's obligations to pay what it has promised. Second, the Government's argument disregards entirely the presumption against implied repeals.

a. The ADA Does Not Suspend the Government's Statutory Obligations During a Lapse in Appropriations

In the Government's view, it should be absolved of all FLSA responsibility for untimely wage payments caused by the 2013 Shutdown because the ADA prohibited payroll officials from making any wage payments during that shutdown. But it does not follow that the inability of payroll officials to pay wages on time cancels the Government's statutory obligation to compensate public servants for its delay in making the required payments.

To the contrary, as the Supreme Court emphasized only last year, "[i]ncurring an obligation … is different from paying one." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1319 (2020). Indeed, generations of precedents recognize that the Government's failure to appropriate funds to satisfy its debts does not cancel its financial obligations, which remain judicially enforceable. More than a century ago, in *United States v. Langston*, the Supreme Court held that "a statute fixing the annual salary of a public officer at a named sum … should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer." 118 U.S. 389, 394 (1886). And the cases decided in subsequent decades are to the same effect.[7]

[7] *See, e.g.*, *Maine Cmty. Health*, 140 S. Ct. at 1331 (failing to appropriate sufficient funds to satisfy a statutory obligation did not "discharge[]" that obligation); *Ramah*, 567 U.S. at 191 ("Although the agency itself cannot disburse funds beyond those appropriated to it, the Government's valid obligations will remain enforceable in the courts." (internal quotation marks omitted)); *In re Aiken Cty.*, 725 F.3d 255, 260 (D.C. Cir. 2013) (Kavanaugh, J.) ("As 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."); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) (stating that an appropriation's "insufficiency does not pay the Government's debts, nor cancel its obligations").

On the flip side, the ADA does not diminish the rights of persons dealing with the Government. *Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1883),[8] *cited in, e.g.*, *Ramah*, 567 U.S. at 197 (explaining that the ADA imposes "restraints … [that] apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government"). The ADA thus does not "address[] whether Congress itself can create or incur an obligation directly by statute," but merely "constrain[s] how federal employees and officers may make or authorize payments without appropriations." *Maine Cmty.*, 140 S. Ct. at 1321.[9] The party wronged by officials' inability to satisfy the Government's obligations "is free to pursue appropriate legal remedies arising because the Government broke its … promise." *Ramah*, 567 U.S. at 198 (cleaned up). The liquidated damages authorized by 29 U.S.C. § 216(b) are such a remedy.

The Government does not mention even one of these decisions, or any other decision interpreting the ADA, in its opening brief. This silence actually trumpets

[8] Because the Court of Claims issued *Dougherty* long before 1982, it is precedential in this Court. *See, e.g.*, *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc).

[9] *Accord, e.g.*, *Ramah*, 567 U.S. at 197; *Navajo Nation v. Dep't of Interior*, 852 F.3d 1124, 1129 (D.C. Cir. 2017) (Kavanaugh, J.) ("[A]lthough the [ADA] prohibits a government agency from incurring obligations in excess of appropriations, if the agency nevertheless obligates itself to spend in excess of appropriations, it does not cancel the agency's obligations nor defeat the rights of other parties.").

that it is asking the Court to depart from over a century of precedent. *See Nat'l Immigrant Justice Ctr. v. United States DOJ,* 953 F.3d 503, 510-11 (7th Cir. 2020) (concluding that party's "complete silence" about implications of its position for confidentiality of advice given to policymakers "speaks volumes"); *United States v. Suarez-Reyes,* 910 F.3d 604, 606 (1st Cir. 2018) ("We have noted before that, in some circumstances, 'silence speaks volumes.' So it is here: there appears to be no satisfactory answer to the mootness argument.").

The Government instead relies on the language of the ADA but that language in fact supports these longstanding interpretations. By its terms, the statute restricts only the power of "an officer or employee of the United States Government" to disburse funds, 31 U.S.C. § 1341(a)(1)(A), not the rights of third parties to whom the Government owes money.

In January 2019, more than five years after the events giving rise to this litigation, Congress amended the ADA to specify that "each excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." 31 U.S.C. § 1341(c)(2); see also Pub. L. 116-1, § 2, 133 Stat. 3, 3. The Government mentions this amendment in its Statement of Facts and in its Summary of Argument but not in its Argument. Regardless of the reason for the

Government's inconsistency in argument, the amendment cannot be relevant to this case: it was adopted after the 2013 Shutdown. But even if it were adopted during or before the shutdown, the amendment's impact, if any, is at most to accelerate excepted employees' pay by a few days if "possible." It says nothing about what, if any, remedy is available to public servants.

Because the ADA neither alters statutory obligations created by Congress nor cancels the rights of third parties like the public servants here, it does not affect public servants' right to hold the Government to the promises Congress codified in the FLSA.

b. The Strong Presumption Against Implied Repeal Confirms that the ADA Does Not Cancel the Government's FLSA Obligations During a Lapse in Appropriations

In arguing that the ADA trumps its FLSA obligations during a lapse in appropriations, the Government "faces a stout uphill climb" because "[a] party seeking to suggest … that one [statute] displaces the other[] bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be clear and manifest." *Epic Sys.*, 138 S. Ct. at 1624. (internal quotation marks and citations omitted). This rule applies to any amendment that could upset the settled construction of a statute, whether that statute has been authoritatively construed by the Supreme Court, *TC Heartland LLC v. Kraft Foods Grp. Brand LLC*, 137 S. Ct. 1514, 1520 (2017), or consistently

interpreted by an administrative agency, *United States v. Madigan*, 300 U.S. 500, 567, 569 (1937).

The presumption against repeals arises not only out of "[r]espect for Congress as [a] drafter" that is unlikely to create "irreconcilable conflicts" in its legislation, but also out of "respect for the separation of powers." *Epic Sys.*, 138 S. Ct. at 1624. Congress' role is "to write the laws and to repeal them," while "[i]t is this Court's duty to interpret Congress' statutes as a harmonious whole rather than at war with one another." *Id.* at 1619, 1624.

The Government asks this Court to disregard that "duty" to harmonize congressional statutes. Instead, it insists that the ADA trumps the FLSA's prompt-payment requirement during lapses in Government appropriations. But it points to no statutory language providing that the ADA should take priority over the FLSA during lapses in appropriations. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (rejecting partial implied repeal where "[n]owhere in [the statute] or in its legislative history is there discussion of the interaction between" the two pertinent provisions).

Absent an express repeal, the Government must prove an implied repeal, in the face of the "strong presumption that repeals by implication are disfavored." *Epic Sys.*, 138 S. Ct. at 1624 (cleaned up). And the courts' ordinary "aversion to implied repeals is especially strong in the appropriations context." *Maine Cmty.*,

140 S. Ct. at 1323. Such an implication will overcome the presumption against repeal, only "where provisions in two statutes are in irreconcilable conflict or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (internal quotation marks omitted).

The Government cannot overcome that "strong presumption." The FLSA and ADA only "superficial[ly]" conflict; the ADA neither restrains Congress from creating statutory obligations nor cancels the rights of third parties arising from those obligations. That well-established interpretation harmonizes the two statutes, giving effect to each. The statutes' "separate spheres of influence" is reason enough to conclude that they do not conflict. *Epic Sys. Corp.*, 138 S. Ct. at 1619; *see also POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014) (no conflict between two statutes where "each has its own scope and purpose").[10]

Nor does the ADA cover "the whole subject" of the FLSA. "The two statutes impose 'different requirements and protections.'" *POM Wonderful*, 573 U.S. at 115 (discussing interaction of the Lanham Act and FDCA) (quoting *JEM Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001)). The

[10] Indeed, if a mere lapse in appropriations were enough to repeal the Government's statutory obligations, then it would vitiate the Supreme Court's longstanding rule requiring the Government to establish "something more than the mere omission to appropriate a sufficient fund" to find an implied repeal. *Maine Cmty.*, 140 S. Ct. at 1323 (internal quotation marks omitted).

FLSA provides minimum wage and overtime protections for certain types of workers across the economy, while the ADA proscribes Governmental officers from paying funds that have not been appropriated. The two statutes overlap only as to some types of employees (not executive, administrative, and professional employees, among others, 29 U.S.C. § 213(a)(1); 5 C.F.R. §§ 551.205-551.207), who work for the federal government (which is a small segment of all private and public employees subject to the FLSA), and who are "excepted" and therefore required to work rather than be furloughed in the unusual circumstance of a budget impasse or other failure to appropriate funds. That sort of incomplete overlap does not imply that the ADA trumps the FLSA during lapses in appropriations. Indeed, the Supreme "Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *JEM Ag Supply*, 534 U.S. at 144.[11] That is particularly true where, as here, those two statutes incorporate distinct remedial regimes. *See, e.g.*, *Johnson*, 421 U.S. at 461.

[11] *Accord, e.g.*, *POM Wonderful*, 573 U.S. at 115 ("Although both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety."); *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) ("[W]here the statutes do in fact overlap we are not at liberty to infer any positive preference for one over the other." (internal quotation marks omitted)); *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 461 (1975); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004) (Easterbrook, J.) ("Whether overlapping and not entirely congruent remedial systems can coexist is a question with a long history at the Supreme Court, and an established answer: yes.").

For these reasons, the Government's first basis for contending that it should not be liable for liquidated damages when its officers are not permitted to pay its non-exempt employees whom it requires to work is without merit.

2. Because the FLSA and ADA Do Not Conflict, the Principle that "the Specific Governs the General" Does Not Apply

The merely "superficial" conflict between the FLSA and the ADA obviates the Government's next argument, which is an appeal to the principle that "the specific governs the general." Gov't Br. 14 (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)). At the outset, the ADA is not more specific than the FLSA; the ADA payment provisions apply far beyond the employment context, and even in the employment context apply to a wider range of employees (exempt as well as non-exempt). But even if the Government were right that the ADA is more specific, "this greater specificity would matter only if [both acts] cannot be implemented in full at the same time" and does not apply where two acts "are complementary and have separate scopes." *POM Wonderful*, 573 U.S. at 118 (citing *RadLAX Gateway*, 566 U.S. at 118); *accord, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012). The principle that the specific governs the general has no application here because of the FLSA's and ADA's "complementary and separate scopes."

3. The Government's Belated Sovereign Immunity Argument Fails Because Congress' Waiver of Sovereign Immunity in

1974 Encompasses Claims for Liquidated Damages for Excepted Employees Required to Work During Shutdowns

Finally, the Government argues that "in amending the FLSA to incorporate a waiver of sovereign immunity, [Congress] did not implicitly waive immunity for liquidated damages under the FLSA when government officials comply with the specific terms of the Anti-Deficiency Act." Gov't Br. 16. In essence, it asks the Court to read into either 29 U.S.C. § 203, 206, 207, or 216(b) the phrase, "except that employees of the United States Government whom it requires to work pursuant to 31 U.S.C. § 1342 despite the lack of funds to pay them for that work may not sue it for liquidated damages if the Government fails to pay them minimum wages or overtime wages on their regularly scheduled paydays."

The Government did not raise this argument below.[12] "'[S]overeign immunity is a jurisdictional issue that may be raised for the first time on appeal.' But a 'belated assertion of sovereign immunity' is a factor that may be 'relevant to the issue of waiver.'" *Knudsen v. IRS*, 581 F.3d 696, 707 (8th Cir. 2009) (internal citations omitted). It also should be a factor in analyzing the validity of an argument that the Government did not deem worth asserting for eight years.

[12] The Government conceded waiver of sovereign immunity below and argued against the imposition of interest under the Back Pay Act on withheld moneys: "[i]n enacting the FLSA, Congress opted to compensate Federal employees who had been improperly denied overtime pay for the loss of the use of wrongly withheld overtime pay through the provision of liquidated damages." No. 21-2255, Appx325.

Aside from its belated assertion, the Government's sovereign immunity defense should be rejected for four reasons. First, the Government is asking the Court effectively to insert a new provison into the FLSA. *See Kloeckner*, 568 U.S. at 55 (rejecting Government's argument that "requires our reading new words into the statute"). The fact that the new provison would benefit only it – none of the other employers subject to the FLSA – makes its reading all the more suspect.

Second, the meaning of statutory language describing generally applicable standards of conduct should not change with the identity of the persons subject to those standards. *See, e.g.*, *Clark v. United States*, 543 U.S. 371, 379, 382 (2005) ("to give these same words a different meaning for each category [of defendant] would be to invent a statute rather than interpret one"). Accepting the Government's argument would turn the FLSA into a chameleon whose meaning changes depending on whether the defendant is the Government or any other party.

This principle is especially apt here because of the Ninth Circuit's decision in *Biggs* and the Department of Labor's interpretation of the applicability of the FLSA to state (or local) governments barred by their state constitutions or laws from paying their employees who are required to work during a budget impasse on their regularly scheduled paydays. Repeated guidance from the Department of Labor makes clear that the Government believes that state governments violate the FLSA if they fail to timely pay minimum or overtime wages to their non-exempt

employees who are required to work during the impasse and that the late payments subject state governments to liquidated damages. The language of the FLSA does not even hint that the federal government and state governments should be treated differently in these circumstances and that federal employees are left without the remedy available to their state counterparts.

Third, not only would the Government's argument benefit only it, it also would create a narrow implied exception to 29 U.S.C. 216(b)'s provision for liquidated damages. The FLSA contains an express exception to the otherwise automatic imposition of liquidated damages in 29 U.S.C. § 260, discussed below. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co*., 446 U.S. 608, 616-617 (1980). The Government has not pointed to any such intent.

Fourth, the Government does not cite any decision concluding that a statute that generally waives sovereign immunity creates a narrow, implied exception to that waiver. Here, the Government does not challenge that it waived sovereign immunity for purposes of liability and imposition of liquidated damages under the FLSA. It asserts only that it did not waive immunity with respect to claims arising out of its failure to pay minimum and overtime wages timely during budget impasses.

Against these rules of construction, the Government invokes the principles that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign" and "[a]ny ambiguities in the statutory language are to be construed in favor of immunity." Gov't Br. 16 (quoting, respectively, *Athey v. United States*, 908 F.3d 696, 702-03 (Fed. Cir. 2018) and *FAA v. Cooper*, 566 U.S. 284, 290 (2012)). But it points to no ambiguities in the language of 29 U.S.C. § 203(d), (x), which waived sovereign immunity, or in the remainder of the FLSA that lead to uncertainties about how to construe the waiver of sovereign immunity. It is one thing to construe ambiguous language strictly in favor of immunity; it is another thing, as the Government seeks here, to insert a detailed phrase into a statute that is not ambiguous. "[C]ourts aren't free to rewrite clear statutes under the banner of [their] own policy concerns." *Azar v. Allina Health Servs*., 139 S. Ct. 1804, 1815 (2019).

Without any statutory language or rules of construction to which to turn, the Government resorts to the Supreme Court's interpretation of the Privacy Act of 1974 in *Cooper, supra.* Gov't Br. 15-16. But *Cooper* is irrelevant because the Privacy Act applies only to the Government. 566 U.S. at 287. As a result, the Supreme Court could employ rules of construction applicable to waivers of sovereign immunity, *id.* at 290-91, and interpret the phrase "actual damages" narrowly as excluding mental or emotional distress damages against the

Government without worrying about the phrase "actual damages" as including mental and emotional damages in cases against other defendants. *Id.* at 304.

In sum, all available authority confirms that employers, including the Government, must pay minimum wages and overtime by the employer's regular payday. The FLSA's unequivocal waiver of sovereign immunity encompasses that long-established obligation "to pay on time." *Brooklyn Savings Bank*, 324 U.S. at 708. And that same waiver of sovereign immunity makes the Government, like all other employers, liable for compensatory liquidated damages if it fails to pay the required wages by the regular payday, even if the reason for the failure to pay is a lack of appropriated funds.

II. The Government's Compliance with the ADA Did Not Show that It Acted in Good Faith or with Reasonable Grounds for Believing It Was Complying with the FLSA

Alternatively, the Government argues that, even if it violated the FLSA, it cannot be held liable for liquidated damages under 29 U.S.C. § 260, which permits trial courts to reduce or eliminate liquidated damages if the employer shows that it acted in good faith and with reasonable grounds for believing it was not violating the FLSA. The Government makes the same argument it made to the Court of Federal Claims, namely, that it knew it could not pay minimum or overtime wages because of the ADA and hence acted in good faith and with the requisite grounds for believing it was not violating the FLSA. Gov't Br. 17-19.

The court below rejected that argument, as this Court should as well. The Government must satisfy both prongs of the section 260 standard for reduction or elimination to even be considered. *See Shea v. United States*, 976 F.3d 1292, 1297 (Fed. Cir. 2020) (stating that court may "deny liquidated damages if the employer shows that its classification decision, though erroneous, was in good faith *and* was made with "reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]") (emphasis added); *Thompson v. Sawyer*, 678 F.2d 257, 282 (D.C. Cir. 1982) ("§ 260 imposes a two-pronged burden on employers, to show both that they acted in good faith and that they had reasonable grounds for believing their actions did not violate the FLSA"). The statute creates a "strong presumption … in favor of doubling." *Shea v. Galaxie Lumber*, 152 F.3d 729, 733 (7th Cir. 1998)). The Government's references to the ADA, without more, do not come close to overcoming that "strong presumption" under the facts of this case. And even if the Government had satisfied both of the section 260 prongs, reduction or elimination of liquidated damages would have been inappropriate in this case.

A. The Government Did Not Show that It Acted in Good Faith

"Good faith" is subjective. An employer must establish "'an honest intention to ascertain what the [FLSA] requires and to act in accordance with it.'" *Beebe v. United States*, 640 F.2d 1283, 1295 (Ct. Cl. 1981). An employer shows that honest intention by taking "'active steps to ascertain the dictates of the FLSA

and then act[ing] to comply with them.'" *Shea v. United States*, 976 F.3d at 1300 (quoting *Barfield v. New York City Health & Hosps. Corp*., 537 F.3d 132, 150 (2d Cir. 2008)).

In this case, as the Court below concluded, the Government admits that it neither "took active steps to ascertain the dictates of the FLSA" nor that it "act[ed] to comply with them." It did not consider whether requiring excepted employees to work October 1-5, 2013 without paying them minimum or overtime wages on their regularly scheduled paydays for that work would violate the FLSA and it did not seek a formal legal opinion regarding how to meet its obligations to excepted employees under the FLSA. No. 21-2255, Appx044; No. 18-1354, Appx096. As the Court of Federal Claims summarized, "Because the government admittedly took no steps to determine its obligations under the FLSA during the 2013 shutdown, no disputed and material facts exist, and the court cannot find that it acted in good faith." No. 21-2255, Appx044.

The Government effectively wants to omit the requirement to ascertain the dictates of the FLSA and focus only on its excuse, the ADA, for not attempting to comply with the FLSA. But, even if the need to ascertain the dictates of the FLSA were not part of the test of "good faith," the ADA did not preclude the Government from acting in at least two ways. First, Congress – which, after all, is also part of the Government – could have passed a measure akin to POMA to protect the pay

of civilian excepted employees who did not work for the Department of Defense, and the Executive Branch could have sought such legislation. Second, the Government could have paid excepted employees liquidated damages after funds had been appropriated and saved itself the time and expenses associated with litigation.

Reinforcing the conclusion that the Government cannot satisfy the "good faith" prong of 29 U.S.C. § 260 is the fact that its Department of Labor followed *Biggs* in taking the position that state governments are exposed to liquidated damages if they fail to pay minimum and overtime wages during budget impasses. State law can bar state officials from paying employees before funds are appropriated, just as the ADA bars federal officials. If a state law ban on payments does not warrant elimination of liquidated damages for state governments, the ADA's ban does not warrant elimination of liquidated damages for the federal Government. No. 21-2255, Appx046-047.

B. The Government Did Not Show that It Had Reasonable Grounds for Believing It Was Complying with the FLSA[13]

The Government states that its officials acted with "objective good faith," by which it means having "reasonable grounds for believing that [their] act or omission was not a violation of the [statute]," "in recognizing that they were bound

[13] The Court below did not reach this issue, having concluded that the Government did not satisfy the good faith requirement.

by the plain terms and uniform understanding of the Anti-Deficiency Act." Gov't Br. at 17, 18. This argument distorts 29 U.S.C. § 260 in two crucial ways.

First, the Government substitutes "[statute]" for the "Fair Labor Standards Act of 1938" in its discussion of section 260. This facilitates trying to slip through that its argument impliedly replaces the reference to the FLSA in section 260 with a reference to the ADA. 29 U.S.C. § 260, however, does not refer to the ADA or even to federal law in general; instead, it bases an employer's potential relief from liquidated damages on a reasonable belief that its actions did not violate the FLSA. The Government does not, and cannot, say anything indicating that it had a reasonable ground for believing that its failure to pay excepted employees minimum and overtime wages on their regularly scheduled paydays complied with the FLSA.

Second, the Government tries to substitute its officials for it, the employer, as an entity. Nobody doubts that Government officials had to comply with the ADA. But officials' reasonable beliefs about their duties are not relevant to an award of liquidated damages. In the first case arising from a shutdown in California, the plaintiffs sued only the governor and various other officials, not the state. The court declined to award liquidated damages because the FLSA "imposes liability for liquidated damages upon the employer who violates sections 206 [minimum wage] or 207 [overtime]; it imposes no liability upon the officers of the

employer." *Biggs v. Wilson*, 828 F. Supp. 774, 779 (E.D. Cal. 1991), *aff'd* 1 F.3d 1537 (9th Cir. 1993).

The question, therefore, is whether the Government as an entity had a reasonable basis for believing that it was not violating the FLSA. As discussed above, the Government's experts on the FLSA, the Department of Labor, maintain that state governments violate the statute when they require employees to work during budget impasses without receiving minimum or overtime wages even though state officials might be constrained by state law from making those wage payments. The Government does not attempt to distinguish its obligations from those of state governments and otherwise offers no reason why it reasonably believed that it would be in compliance with the FLSA in the analogous situation.

The language of 29 U.S.C § 260 is clear. Liquidated damages may be reduced or eliminated only if it was reasonable for the Government – not its officials – to reasonably believe that it would not violate the FLSA – not the ADA – in not paying minimum or overtime wages during the 2013 Shutdown. Again, "courts aren't free to rewrite clear statutes under the banner of [their] own policy concerns." *Azar*, 139 S. Ct. at 1815.

C. Elimination or Reduction of Liquidated Damages Would Have Been Inequitable Under the Facts of this Case

29 U.S.C. § 260 does not require a court to reduce or eliminate liquidated damages even if an employer meets both requirements for potential reduction,

which the Government has not done as shown in the prior two subsections. Instead, a court may make no adjustment to the normal liquidated damages, reduce them, or eliminate them. 29 U.S.C. § 260. Typically this discretion is exercised by the trial court, and if this Court decides that the Government has satisfied both of the §216(b) prongs, it should remand the case to the trial court to determine whether any elimination or reduction is appropriate.

On remand, the Court of Federal Claims should consider the "strong presumption … in favor of doubling" mentioned above. *Shea v. Galaxie Lumber*, 152 F.3d at 733 (7th Cir. 1998). Congress adopted the liquidated-damages provision because failure to receive pay on time may harm employees' "minimum standard of living 'necessary for health, efficiency, and general well-being of workers.'" *Brooklyn Sav. Bank*, 324 U.S. at 707. The Court below earlier had noted "that at least some government employees . . . were working at the GS-04 or GS-05 levels, and had annual salaries starting around $28,000 in 2013." No. 21-2255, Appx 024, n.11 (citations omitted). Public servants, like other employees, require regular wage payments to meet their obligations and "are not likely to have sufficient resources" to tide themselves over while waiting for a delayed wage payment. *Brooklyn Sav. Bank*, 324 U.S. at 708. Liquidated damages address "damages too obscure and difficult of proof for estimate." *Id*. at 707; *accord Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942).

In this case, the Government was solely responsible for creating the situation in which public servants were not paid. It created the budget impasse and continued it to the point that excepted employees had to continue working not knowing when the impasse would end and they would be paid. The Government is unlike a private employer that runs into cashflow difficulties because of a downturn in the economy. Moreover, liquidated damages are Plaintiffs' only remedy (other than an award of attorneys' fees and costs to their counsel); they have no regular damages because eventually they were paid for the work they performed. *See supra* Part, II.A. The Government should pay them liquidated damages for their injuries "too obscure and difficult of proof for estimate."

III. Plaintiffs Showed that the Government Willfully Violated the FLSA

This Court reviews de novo the Court of Federal Claims' grant of summary judgment on the issue of liability. *See Shell Oil Co. v. United States,* 7 F.4th 1165, 1171 (Fed Cir. 2021).

The same facts that establish the Government did not act in good faith further establish that the Government's violation was willful. Because the Government failed to make any inquiry and "disregarded the very 'possibility' that it was violating" the FLSA, it acted willfully.

A. The Limitations Period Is Three Years When an Employer Disregards the Possibility that It Is Violating its Obligations Under the FLSA

The FLSA's statute of limitations is two years, except that a claim "arising out of a willful violation may be commenced within three years after [it] accrued." 29 U.S.C. § 255(a). The Government committed a willful violation when it "knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful." 5 C.F.R. § 551.104.

Government employees satisfy the "reckless disregard" standard by proving that the Government "show[ed] 'evident indifference' to the FLSA's requirements." *Moreno v. United States*, 88 Fed. Cl. 266, 277 (2009) (quoting *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1296 (3rd Cir. 1991)). As the Court of Federal Claims explained:

> "Reckless disregard" is further defined as the "failure to make adequate inquiry into whether conduct is in compliance with the Act." 5 C.F.R. § 551.104; *see also Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-09 (9th Cir. 2003) ("For § 255's extension to obtain an employer need not knowingly have violated the FLSA; rather, the three-year term can apply where an employer disregarded the very possibility that it was violating the statute, although we will not presume that conduct was willful in the absence of evidence.") (citing *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 141 (2nd Cir. 1999)).

Bull v. United States, 68 Fed. Cl. 212, 272-73 (2005), *aff'd*, 479 F.3d 1365, 1379 (Fed. Cir. 2007); *accord Santiago v. United States*, 107 Fed. Cl. 154, 160 (2012) (quoting same passage from *Alvarez*). The Court below correctly adopted the

"adequate inquiry" standard, No. 18-1354, Appx129-130, as have numerous other decisions of the Court of Federal Claims, *see, e.g., Gibson v. United States,* No. 19-529C, 2019 U.S. Claims LEXIS 1339 at *10 n.3 (Oct. 7, 2019); *Abou-El-Seoud v. United States*, 136 Fed. Cl. 537, 554 (2018), and the governing federal regulation, 5 C.F.R. § 551.104.

The phrase, "adequate inquiry," implies that the Government must make at least some inquiry. *See Bland v. California Dep't of Corrections,* 20 F.3d 1469, 1477 (9th Cir. 1994) (affirming grant of habeas relief because trial court "made absolutely no inquiry into the defendant's request for substitution" of counsel, and an adequate inquiry was required); *United States v. Stork,* No. 86-5067, 1988 U.S. App. LEXIS 518, at *4 (9th Cir. Jan. 15, 1988) (reversing conviction because trial court was required to make an adequate inquiry before ruling on a motion for new counsel, and the court made no inquiry at all).

The Court below suggested that the *Marrs* Appellants sought to incorrectly apply the "reckless disregard" and "adequate inquiry" standards by deviating from the interpretation of "willful" set out in *McLaughlin v. Richland Shoe Co*., 486 U.S. 128 (1988). No. 18-1354, Appx129-130. The Court was wrong: *Richland Shoe* supports *Marrs* Appellants' argument that the Government willfully violated the FLSA when it failed even to consider, let alone consult with its lawyers, about its obligations under the statute.

Richland Shoe expressly adopted the standard for willfulness set out in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-130 (1985). *Richland Shoe*, 486 U.S. at 135. *Richland Shoe* otherwise gave little guidance about the meaning of "willful" except that proof of willfulness required proof of "more than negligence, or, perhaps, … a completely good-faith but incorrect assumption that a pay plan complied with the FLSA," and that generally an employer did not willfully violate the FLSA if it "sought legal advice concerning its pay practices." *Id.* at 134-35.

In *Thurston*, which interpreted the word "willful" under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, the Court held that TWA did not act in 'reckless disregard' of the requirements of the ADEA." 469 U.S. at 130. The airline "sought legal advice and consulted with the [u]nion" in trying "to bring its retirement policy into compliance with the ADEA" while also observing the terms of an existing collective-bargaining agreement. *Id*. The plan it ultimately adopted violated the ADEA in one respect, but "[i]t is reasonable to believe that the parties involved, in focusing on the larger overall problem, simply overlooked the challenged aspect of the new plan." *Id.* Similarly, in *Abbey v. United States*, 106 Fed. Cl. 254 (2012), which the Court of Federal Claims also cited in ruling against the *Marrs* Appellants, No. 18-1354, Appx130, the agency in question adopted a plan based on an "extensive review process" led by the legal

counsel for the agency who had "considerable experience in FAA personnel matters." *Abbey*, 106 Fed. Cl. at 283. In short, *Richland Shoe*, *Thurston*, and *Abbey* all point to an employer having to rigorously analyze, generally through legal counsel, the implications of a new situation on its obligations under the FLSA for its FLSA violation not to be willful. In none of the cases did the defendant fail to make any inquiry about its obligations under the FLSA.

B. The Government Did Not Inquire at all into Whether Not Paying Minimum and Overtime Wages on Employees' Regularly Scheduled Paydays Violated the FLSA

The same stipulated facts that establish the Government failed to act in good faith further establish that the Government acted with reckless disregard of its obligations under the FLSA. The Government "made no inquiry into how to comply with the FLSA, instead relying entirely on of the primacy of the ADA. "By its own admission, the government did not consider—either prior to or during the government shutdown—whether requiring essential, non-exempt employees to work during the government shutdown without timely payment of wages would constitute a violation of the FLSA." No. 21-2255, Appx044. The Government also "admits that it did not seek a legal opinion regarding how to meet the obligations of both the ADA and FLSA during the government shutdown." *Id.*

The Government easily could have made a rigorous inquiry. It employed experts on the interpretation and application of the FLSA in the Department of

Justice, in the Department of Labor (which administered the statute as to all employers except the Government), and in the Office of Personnel Management (which administered the statute as to the Government). No. 18-1354, Appx095-101. The DOL had analyzed the very issues presented by the 2013 Shutdown on several prior occasions. *See supra* Part II.B. And attorneys in the Department of Justice who had represented the Government in *Ramah*, decided the year before the shutdown, were fully familiar with the Court's reaffirmation of the principle that the ADA does not "cancel [the Government's] obligations" or reduce the rights of "citizen[s] honestly contracting with the Government." 567 U.S. at 197. Thus, the Government easily could have analyzed its obligations under the FLSA. And the Government – which is more than just the agencies – was hardly helpless to protect its employees, just as it protected civilian employees working for the Department of Defense. *See supra* Part II.C.

CONCLUSION

For the foregoing reasons, the decision in *Martin* below should be affirmed, the decision in *Marrs* should be reversed, and the cases should be remanded for further proceedings.

Dated: December 20, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. Circ. R. 32(b)(1) because it contains 13,718 words, according to the count of Microsoft Word.

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STATUTORY ADDENDUM

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29 U.S.C. § 260

§260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. § 255(a)

§255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act

(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

(b) if the cause of action accrued prior to May 14, 1947—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c) of this section, every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to May 14, 1947, the action shall not be barred by paragraph (b) of this section if it is commenced within one hundred and twenty days after May 14, 1947 unless at the time commenced it is barred by an applicable State statute of limitations;

(d) with respect to any cause of action brought under section 216(b) of this title against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.

29 U.S.C. § §216(b)

§216. Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any

one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

5 C.F.R. § 551.104

§ 551.104 Definitions

In this part—

Act or *FLSA* means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 *et seq.*).

…

Statute of limitations means the time frame within which an FLSA pay claim must be filed, starting from the date the right accrued. All FLSA pay claims filed on or after June 30, 1994, are subject to a 2-year statute of limitations, except in cases of willful violation where the statute of limitations is 3 years.

…

Willful violation means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.

APPELLANT'S ADDENDUM

In the United States Court of Federal Claims

No. 16-1297C

(E-Filed: October 27, 2017)

FRANK MARRS, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Civilian Pay; Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (2012); Statute of Limitations, 29 U.S.C. § 255(a); Willful Violation Not Found.

Heidi R. Burakiewicz, Washington, DC, for plaintiffs. Steven A. Skalet and Michael Lieder, Washington, DC, of counsel.

Joseph E. Ashman, Senior Trial Counsel, with whom were Chad A. Readler, Acting Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, and Erin Murdock-Park, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant.

OPINION

CAMPBELL-SMITH, Judge.

This matter is before the court on plaintiffs' motion for partial summary judgment, ECF No. 19, and defendant's cross-motion for partial summary judgment, ECF No. 20, filed pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC). Plaintiffs filed a reply brief, ECF No. 21. Defendant informed the court that the government did not intend to file a reply brief. See Jt. Status R., ECF No. 14, at 1. This matter is thus fully briefed and ripe for decision. For the reasons set forth below, the court denies plaintiffs' motion and grants defendant's motion.

I. Background

This is the companion case to Martin v. United States, Case No. 13-834C (Martin). These two cases were consolidated on November 2, 2016 for the determination of certain common issues of law. ECF No. 9. Consolidation of these cases ended on March 17, 2017. ECF No. 13. Familiarity with the three opinions issued in Martin, Case No. 13-834C, is presumed. See Martin v. United States, 117 Fed. Cl. 611 (2014) (Martin I) (denying in part and granting in part defendant's motion to dismiss); Martin v. United States, No. 13-834C, 2015 WL 12791601 (Fed. Cl. Oct. 15, 2015) (Martin II) (denying plaintiffs' request to apply equitable tolling to the relevant statute of limitations to permit as many as 18,300 additional plaintiffs to join that suit); Martin v. United States, 130 Fed. Cl. 578 (2017) (Martin III) (granting plaintiffs' motion for summary judgment as to liability). Only the facts pertinent to the parties' cross-motions are discussed here.

Plaintiffs in these companion cases are current or former government employees who allege that they were not timely compensated for work performed during a shutdown of the federal government in October 2013, in violation of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 et seq. (2012). This court has found that the failure to pay these workers in a timely fashion was indeed a violation of the FLSA, and that liquidated damages provide the remedy for such a violation. See generally Martin III. This case presents one additional issue, whether the government's violation of the FLSA was willful under 29 U.S.C. § 255(a). A willful violation of the statute would extend the statute of limitations in section 255(a) from two years to three years. See id. This particular question was not litigated in Martin, but is of crucial relevance here.

Whether the statute of limitations for plaintiffs' claims is three years, not two years, is the "single legal issue . . . dispositive of this case." Jt. Status R., ECF No. 12, at 1. As plaintiffs note, the complaint in this case "was filed more than two but less than three years after Plaintiffs' claims accrued." ECF No. 19-1, at 6-7. Thus, although the parties have styled their motions as motions for partial summary judgment, a ruling in the government's favor would entirely dispose of this case. Accordingly, the viability of plaintiffs' claims turns on the court's interpretation of "willful violation," 29 U.S.C. § 255(a), as that term is applied in this particular circumstance of the government's violation of the FLSA.

II. Legal Standard for Finding a Willful Violation of the FLSA

The statutory text states in relevant part:

> Any action . . . to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.],

> (a) . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued[.]

29 U.S.C. § 255 (emphasis added). Some courts have interpreted the term "willful," and the test for willfulness, so broadly as to encompass all employers acting in violation of the FLSA who knew that the FLSA was "in the picture." See, e.g., Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971) ("Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?"). This interpretive approach, referred to here as the Jiffy June test, was rejected by the United States Supreme Court as overly broad.

In the place of the Jiffy June test, the Supreme Court announced a more restrictive definition of willfulness to establish a three year statute of limitations for FLSA violations: "The standard of willfulness [is] that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988) (Richland Shoe) (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)). Under the Richland Shoe standard, even an unreasonable action in contravention of the FLSA is not enough to establish willfulness:

> If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful . . . . If an employer acts unreasonably, but not recklessly, in determining its legal obligation, . . . it should not be . . . considered [willful] under Thurston or the identical standard we approve today.

Id. at 135 n.13; see, e.g., Bull v. United States, 479 F.3d 1365, 1379 (Fed. Cir. 2007) (same).

The Richland Shoe Court specifically rejected another proposed standard for willfulness, which it described as an "intermediate standard." 486 U.S. at 131. Under the intermediate standard, a finding of willfulness would be proper "'if the employer, recognizing it might be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute.'" Id. at 134. While the court reserves further discussion of the willfulness standard, a standard hotly debated by the parties, for the analysis section of this opinion, the court does observe that the burden is on plaintiffs to establish willfulness. See Bull, 479 F.3d at 1379; Adams v. United States, 350 F.3d 1216, 1229 (Fed. Cir. 2003) ("Unlike good faith, the employee bears the burden of proving the willfulness of the employer's FLSA violations.") (citation omitted).

III. Standard of Review on Summary Judgment

"[S]ummary judgment is a salutary method of disposition designed to secure the just, speedy and inexpensive determination of every action." Sweats Fashions, Inc. v. Pannill Knitting Co., 833 F.2d 1560, 1562 (Fed. Cir. 1987) (internal quotations and citations omitted). The party moving for summary judgment will prevail "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). A genuine dispute of material fact is one that could "affect the outcome" of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[A]ll evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party." Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted). "With respect to cross-motions for summary judgment, each motion is evaluated on its own merits and reasonable inferences are resolved against the party whose motion is being considered." Marriott Int'l Resorts, L.P. v. United States, 586 F.3d 962, 968-69 (Fed. Cir. 2009) (citation omitted).

A summary judgment motion is properly granted against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and for which that party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A nonmovant will not defeat a motion for summary judgment "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson, 477 U.S. at 249 (citation omitted). "A nonmoving party's failure of proof concerning the existence of an element essential to its case on which the nonmoving party will bear the burden of proof at trial necessarily renders all other facts immaterial and entitles the moving party to summary judgment as a matter of law." Dairyland, 16 F.3d at 1202 (citing Celotex, 477 U.S. at 323).

IV. Analysis

Defendant in its cross-motion and plaintiffs in their reply brief cite to Richland Shoe as support for their positions on the "willful violation" issue. ECF No. 20, at 13; ECF No. 21, at 3-4. Not only is Richland Shoe binding precedent, it provides the best tool for understanding the concept of willfulness, as that concept is employed in section 255(a).[1] In that case, the Supreme Court noted, first, that the statute of limitations for the FLSA is two-tiered. Richland Shoe, 486 U.S. at 132. Plaintiffs are allowed two years to lodge claims for "nonwillful" violations, and three years to file claims for "willful"

[1] To the extent that plaintiffs' reply brief could be read to urge the court to conduct a de novo construction of section 255(a), see ECF No. 21, at 8, this court is bound by Richland Shoe and cannot stray from the statutory interpretation of section 255(a) presented therein. E.g., Crowley v. United States, 398 F.3d 1329, 1335 (Fed. Cir. 2005).

violations. Id. at 133. There must, therefore, be a "significant distinction" separating willful violations from violations that are not willful. Id. at 132.

The Supreme Court then specifically clarified its earlier decision in Thurston which could have been misread to accept the "unreasonableness" of agency action as sufficient proof of willfulness. See Richland Shoe, 486 U.S. at 135 n.13 (citing Thurston, 469 U.S. at 126). The Supreme Court explained that, on the spectrum of agency behavior ranging from unreasonable to reckless, anything short of recklessness in an agency's determination of its legal obligations under the FLSA is not a "willful violation" under section 255(a). See id. ("If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under petitioner's [intermediate standard], it should not be so considered under Thurston or the identical standard we approve today.").

Although decisions have issued from this court reflecting different takes on the Richland Shoe test for willfulness, none of the formulations cited by the parties has binding effect in this case. Hewing closely to the Supreme Court's articulation, the court requires -- as the test for plaintiffs to prevail here on the "willful violation" issue -- that plaintiffs show that the government agencies violating the FLSA during the October 2013 shutdown acted recklessly, i.e., more than unreasonably, when determining their liabilities under the FLSA. See Abbey v. United States, 106 Fed. Cl. 254, 283 (2012) (finding that a "negligent and unreasonable" determination of obligations under the FLSA by a federal agency did not "rise[] to the level of willfulness as defined by the Supreme Court in [Richland Shoe]").

As a threshold matter, the court notes that in Martin III the principal legal issue decided by the undersigned was whether the government's "act or omission giving rise to [the plaintiffs' FLSA claim for liquidated damages] was in good faith." 29 U.S.C. § 260. The court did not find the government's acts and omissions during the October 2013 shutdown regarding its FLSA obligations to be in good faith. Martin III, 130 Fed. Cl. at 586. That determination, however, was not informed by the applicable legal test for resolving the willfulness issue currently pending before the court, even though the factual underpinnings for the two legal issues do overlap.[2] The court now turns to the undisputed evidence in the record.

[2] Plaintiffs err when they contend that the two legal questions are the same. See ECF No. 19-1, at 22-23 ("The Court's ruling [on the issue of good faith in Martin III] also controls the issue of whether the Government violated the FLSA willfully within the meaning of 29 U.S.C. § 255(a).").

A. Undisputed Evidence Regarding the FLSA Violations

Plaintiffs rely on the joint stipulations of fact acknowledged and filed by the parties in Martin. See ECF No. 19, at 1 (citing Case No. 13-834C, ECF No. 151). The government relies on the same stipulations of fact. See ECF No. 20, at 7-8. Plaintiffs assert that a willful violation of the FLSA occurred because

> the Government admittedly did not prior to or during the 2013 Government shutdown (a) consider whether requiring employees to work without paying them minimum or overtime wages on their regularly scheduled paydays for that work would violate the FLSA, or (b) seek a formal legal opinion regarding how to meet its obligations under both the Anti-Deficiency Act[3] and FLSA.

ECF No. 19-1, at 5.

The first relevant joint stipulation of fact not in dispute cited by plaintiffs is as follows:

> Based upon the information received from relevant personnel and review of the relevant documents, the agencies that advise the Federal Government on the implementation of labor law and policy did not prior to or during the 2013 Government shutdown consider whether requiring employees designated as "non-exempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., and as "excepted" for purposes of the shutdown to work during the shutdown without paying them minimum or overtime wages on their regularly scheduled paydays for work performed during the first week of the shutdown would violate the FLSA. Based upon the information described above, defendant is not aware of any other agency that considered the issue prior to or during the 2013 Government shutdown.

Case No. 13-834C, ECF No. 151 ¶ 3. The second relevant joint stipulation of fact not in dispute cited by plaintiffs is as follows:

> The Government did not seek a formal legal opinion regarding how to meet its obligations under both the Anti-[D]eficiency Act and FLSA as to employees designated as "non-exempt" under the FLSA and as "excepted" for purposes of the shutdown who were required to work during the shutdown.

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[3] The Anti-Deficiency Act ("ADA") prohibits the government from spending money when specific appropriations authorizing those expenditures are not in place. See 31 U.S.C. § 1341(a)(1)(A) (2012).

Id. ¶ 4. Based on these two undisputed facts, plaintiffs assert that they have established a willful violation of the FLSA. See ECF No. 19-1, at 24-25.

The government argues, however, that these facts do not rise to the level of a willful FLSA violation. ECF No. 20, at 14-17. A third joint stipulation of fact not in dispute is cited by the government in support of its position in this suit:

> The Government understood that during a lapse in appropriations the Anti-Deficiency Act, 31 U.S.C. § 1341(a), prohibited payment of wages for work performed during the 2013 Government shutdown until funds had been appropriated.

Case No. 13-834C, ECF No. 151 ¶ 2. The court agrees with the parties that there are no material disputes of fact in this case, because all of the relevant facts are undisputed. The court next summarizes the caselaw discussed in the parties' briefs.

B. Guidance from Caselaw Interpreting Richland Shoe

The parties cite a number of decisions that were issued by this court and which involve an examination of willfulness in the context of FLSA violations, but which do not involve a federal government shutdown. The court therefore finds the parties' interpretations of the holdings of those cases to be of limited assistance. The court also finds decisions of the United States Court of Appeals for the Federal Circuit to be similarly unhelpful here in refining the willfulness inquiry.

The discussion of willfulness in Bull, for example, is brief and is anchored in factual circumstances that are not analogous to the government shutdown that underlies this case:

> In finding that Customs had in fact acted willfully, the court below relied upon extensive testimony to establish that Customs knew the plaintiffs were working off duty without compensation, as well as an internal memo predicting that such work "could open Customs management to compensation issues because the [officers] are using their off duty time to meet Customs requirements." The court also found that the [agency official's] memorandum (directing that previously off-duty work was to be performed during working hours) was "an admission by defendant that it knew it had been engaging in activity in possible violation of the FLSA." This evidence is plainly sufficient to support a finding of willfulness.

Bull, 479 F.3d at 1379 (internal citations omitted). Given that the standard of review in Bull was the "clear error" standard, id. (citing Adams, 350 F.3d at 1229), and given that its discussion of willfulness does not provide any clarification of the term "willful

violation," and given the difference in the factual backgrounds of this case and Bull, the holding in Bull does not aid the court in its resolution of the dispositive issue in this case.

Also of no assistance to the court here is the Federal Circuit's decision in Cook v. United States, 855 F.2d 848 (Fed. Cir. 1988), cited correctly by plaintiffs as a case distinguishable on its facts. Cook announces a per se rule that a federal agency which follows the advice of the United States Department of Labor as to the FLSA cannot have committed a willful FLSA violation. See id. at 850 (stating that when "a federal agency . . . has in good faith accepted and followed the advice of the Secretary of Labor . . . [,] any mistake in responding to the demands of the FLSA is not willful"). But, no advice of the Secretary of Labor regarding FLSA obligations during the federal shutdown is part of the factual record of this case.[4]

C. Willfulness Not Found on These Facts

The court is faced, then, with an issue of first impression, guided primarily by Richland Shoe.[5] If the government understood that it could not obey the ADA and timely pay its excepted employees, was that a willful violation of the FLSA under section 255(a)? The court concludes that it was not for the reasons set forth below.

The court finds that the FLSA violation for these plaintiffs, which may have been caused by an unreasonable interpretation of the FLSA by federal agencies, see Martin III, 130 Fed. Cl. at 586, does not rise to the level of a willful violation. Although the government's pay actions during the shutdown did not evince good faith under the FLSA, see id., none of the undisputed evidence before the court, notwithstanding all favorable inferences accorded to plaintiffs, establishes that the federal government exhibited reckless disregard for the FLSA when it complied with the ADA and violated the FLSA.

1. Richland Shoe

As the court examines the facts underlying this suit to determine whether the federal government exhibited a reckless disregard for FLSA requirements during the

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[4] Nor are the pay practices of the Department of Labor for its own employees during the shutdown part of the record in this case.

[5] Plaintiffs rely on Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 197 (2012), and the Supreme Court's discussion therein of the government's contract obligations notwithstanding the ADA, as support for their position on the willfulness of the government's FLSA violation here. ECF No. 19-1, at 25-26; ECF 21, at 15 n.1. The court does not interpret the holding in Salazar as containing guidance for drawing a distinction between nonwillful and willful FLSA violations, which is the issue before the court.

2013 shutdown, the Supreme Court's decision in Richland Shoe offers a few guideposts, in addition to the conceptual framework for willfulness described earlier in this opinion.[6] First, although not adopted with any precision, common synonyms of "willful" -- "voluntary," "deliberate" and "intentional" -- were cited approvingly by the Court. Richland Shoe, 486 U.S. at 133. During the shutdown, bowing to the imperatives of the ADA, agencies did not pay excepted employees and did not inquire into their FLSA obligations. In the court's view, the agencies' compliance with the ADA and nonpayment of owed wages was more in the nature of involuntary and unintentional violations of the FLSA, rather than willful conduct. See id.

Similarly, the Richland Shoe Court distinguished "merely negligent" conduct from willful violations of the FLSA. Id. As this court has found, there was no good faith inquiry into FLSA obligations by federal agencies before or during the 2013 shutdown. Martin III, 130 Fed. Cl. at 586. The court does not, however, view the agencies' focus on the ADA and not on the FLSA as going beyond "merely negligent" conduct and rising to the level of reckless disregard of the FLSA and its pay requirements.

Finally, the Richland Shoe Court clearly disfavored a test for willfulness that turned on the employer's request for legal advice before, or during, its violation of the FLSA. 486 U.S. at 134-35. Although plaintiffs rely to a great extent on the agencies' failure to seek legal advice as to their FLSA obligations before or during the 2013 shutdown, ECF No. 19-1, at 25-26, that circumstance alone does not, according to Richland Shoe, determine willfulness. 486 U.S. at 134-35. Plaintiffs' burden to show willfulness is not met simply by pointing out that the agencies did not obtain legal opinions regarding their FLSA obligations before violating the FLSA during the 2013 shutdown.

2. Adequate Inquiry in These Circumstances

The parties agree that 5 C.F.R. § 551.104 (2013) is the regulation that applies to the FLSA violations at issue in this suit. Section 551.104 provides two relevant definitions. First, a willful FLSA violation "means a violation in circumstances where the agency knew that its conduct was prohibited by the [FLSA] or showed reckless disregard of the requirements of the [FLSA]. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful." Id. Second, reckless disregard of the requirements of the FLSA "means failure to make adequate inquiry into whether conduct is in compliance with the [FLSA]." Id.

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[6] Plaintiffs do not argue that the federal government "knew" of its FLSA violations during the 2013 shutdown. Thus, only the "reckless disregard" prong of the willfulness inquiry is at issue in the parties' cross-motions for summary judgment.

As this court has explained, when Richland Shoe and section 551.104 are read together, an agency's failure to make adequate inquiry into its FLSA obligations "must be more than a merely negligent or unreasonable failure" for that failure to constitute a willful violation of the FLSA. See Abbey, 106 Fed. Cl. at 282 (citations omitted). Indeed, the adequacy of an agency's inquiry into its FLSA obligations is measured not in terms of mere negligence or unreasonableness, but in the sense of reckless disregard of the FLSA that meets the definition of willfulness established by Richland Shoe. See Angelo v. United States, 57 Fed. Cl. 100, 109 (2003) (noting that section 551.104 is secondary to Richland Shoe for purposes of the willfulness inquiry (citing Bankers Trust N.Y. Corp. v. United States, 225 F.3d 1368, 1375 (Fed. Cir. 2000))). In other words, the court must reject any attempt by plaintiffs to circumvent Richland Shoe by relying on an "adequate inquiry" test that cleaves more to the Jiffy June test, described supra, or the intermediate test, described supra, both of which were rejected in Richland Shoe. Instead, plaintiffs remain bound by Richland Shoe and cannot rely on section 551.104 to alter the Supreme Court's precedential test for willfulness.

Here, the undisputed facts show that the federal government, as a whole, understood that it could not pay excepted employees during the 2013 shutdown due to the constraints of the ADA. Case No. 13-834C, ECF No. 151 ¶ 2. The court must take these circumstances into account. See 5 C.F.R. § 551.104. Complying with the ADA and not paying excepted employees during the shutdown does not, in the court's view, mean that these federal agencies showed a reckless disregard of the FLSA. Instead, the agencies' conduct, in the context of the 2013 government shutdown governed by both the ADA and the FLSA, did not exceed a level of merely negligent or unreasonable conduct vis-à-vis the FLSA.

Although there is no case directly on point, this court has found, on at least one occasion, that a federal agency did not recklessly disregard the FLSA when it attempted to comply with a particular federal statute and, as a result, neglected its obligations under the FLSA. In Abbey, the Federal Aviation Administration (FAA) was directed to comply with a personnel management overhaul set forth in a new statute. 106 Fed. Cl. at 259. Facing a short transition deadline, the FAA decided to maintain certain pay practices which violated FLSA requirements because the agency did not understand the full implications of the statute requiring the personnel management overhaul. Id. at 281-83. Thus, although the background facts in Abbey and this case are dissimilar, the decision in Abbey shows that federal agencies may blunder in their interpretation of a federal statute that implicates their responsibilities under the FLSA, without committing a willful violation of the FLSA.[7] As was the case in Abbey, the FLSA violation affecting these plaintiffs during the 2013 government shutdown was nonwillful, not willful.

[7] This court has also reasoned that where there was some doubt about whether the FLSA or a displacing statute applied instead, no willful violation of the relevant pay

V. Conclusion

Having considered the undisputed facts and all of the parties' arguments, the court concludes that plaintiffs have failed to meet their burden to show a willful violation of the FLSA. Plaintiffs' motion for partial summary judgment, ECF No. 19, is **DENIED**, and defendant's motion for partial summary judgment, ECF No. 20, is **GRANTED**. Because the two-year statute of limitations in 29 U.S.C. § 255(a) applies to plaintiffs' claims, and because this suit was filed more than two years after plaintiffs' claims accrued, plaintiffs' claims are barred by the statute of limitations and must be dismissed for lack of subject matter jurisdiction. The clerk's office is directed to **ENTER** judgment for defendant, **DISMISSING** this case without prejudice. No costs.

IT IS SO ORDERED.

s/ Patricia Campbell-Smith
PATRICIA CAMPBELL-SMITH
Judge

statute could be found. Blair v. United States, 15 Cl. Ct. 763, 767 n.6 (1988) (citing generally Cook, 855 F.2 at 848).

In the United States Court of Federal Claims

No. 16-1297 C

FRANK MARRS, ET AL.

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion, filed October 27, 2017, granting defendant's motion for partial summary judgment and denying plaintiffs' motion for partial summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant, and plaintiffs' complaint is dismissed without prejudice. No costs.

Lisa L. Reyes
Clerk of Court

October 27, 2017 By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.