Nos. 2021-2255 & 2018-1354

IN THE 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.

COMBINED RESPONSE BRIEF FOR APPELLEE IN NO. 18-1354 AND REPLY BRIEF FOR APPELLANT IN NO. 21-2255

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STATEMENT OF RELATED CASES

No other appeal in or from the present civil action has previously been before this or any other appellate court. The government is not aware of any related cases within the meaning of Federal Circuit Rule 47.5(b).

INTRODUCTION

Plaintiffs are employees who performed work during the appropriations lapse in October 2013 as so-called excepted employees. They do not dispute that the Anti-Deficiency Act barred payments during the appropriations lapse and that government officials would have been subject to administrative discipline and possible criminal penalties if they had disregarded the statutory command. Plaintiffs also do not dispute that their agencies paid their accrued wages promptly after the lapse ended.

Plaintiffs nevertheless insist that Congress subjected the treasury to damages claims for complying with that statutory command when it extended the Fair Labor Standards Act (FLSA) to federal employees in 1974. But they identify nothing in the text or history of the statute suggesting that Congress believed it was establishing an implicit (but absolutely rigid) requirement regarding the timing of payments to federal employees that would be violated when government agencies complied with the express limitations of the Anti-Deficiency Act that long preceded that extension.

Plaintiffs' brief largely disregards the fundamental problems with their position. They do not argue that Congress actually intended to make compliance with the Anti-Deficiency Act a basis for damages under the FLSA. They urge, however, that the FLSA had been understood to impose an obligation to pay required wages on an employee's regular payday prior to 1974 and that the Anti-Deficiency Act's prohibitions cannot suspend or repeal that obligation.

These arguments fail in all respects. The FLSA contains no express payment deadlines, and the Supreme Court made clear well before the statute was extended to the federal government in 1974 that the FLSA "does not require the impossible." *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432-33 (1945). Congress would have had no reason to believe that it was enacting a statute that conflicted with the existing explicit restrictions of the Anti-Deficiency Act. Plaintiffs are also quite wrong to frame the question as whether the Anti-Deficiency Act suspended or repealed the FLSA. The question, instead, is whether the extension of the FLSA to the federal government created liability for compliance with the long-established commands of the Anti-Deficiency Act.

Even assuming that the delay in payment violated the FLSA, an award of liquidated damages would be improper. Government officials acted reasonably and in good faith, *see* 29 U.S.C. § 260, in complying with a statutory directive that they had no discretion to disregard. And it would be wholly inequitable to require the government to pay liquidated damages given its good-faith compliance with that statutory command, particularly given the undisputed fact that the government paid plaintiffs' accrued wages shortly after the restoration of appropriations.

Finally, the *Marrs* plaintiffs' claims additionally fail because they are untimely. Because those plaintiffs filed their claims between two and three years after the alleged improper failure to pay plaintiffs' wages, their claims would be timely only if the asserted violation of the FLSA were "willfull." 29 U.S.C. § 255(a). Conduct

dictated by the express terms of the Anti-Deficiency Act is in no sense deliberate or voluntary, prerequisites for a showing of willfulness.

STATEMENT OF THE CASE FOR *MARRS*

1. The *Marrs* plaintiffs' complaint arises out of the same factual background, and involves identical legal claims, as the *Martin* plaintiffs' complaint. *See* Gov't Opening Br. 2-6. In brief, between October 1 and October 16, 2013, several government agencies were affected by a lapse in appropriations. *See* No. 18-1354, Appx095. Pursuant to the provisions of the Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.*, government agencies were unable to pay employees' wages, and employees were generally prohibited from continuing to work, during that lapse in appropriations. *See id.* §§ 1341(a)(1), 1342. That prohibition on continuing to work did not extend, however, to so-called "excepted employees," who were permitted to continue performing work in certain circumstances, including during "emergencies involving the safety of human life or the protection of property." *Id.* § 1342.

As a result of that exception, some government employees continued to perform work during the 2013 lapse in appropriations. Because of the Anti-Deficiency Act's prohibitions, however, the government did not pay excepted employees for work performed between October 1 and October 5 on those employees' regularly scheduled payday. After appropriations were restored, however, the government "paid all such employees their basic wages" for those days "on or before the employees' next regularly scheduled payday." No. 18-1354, Appx097.

2. On October 7, 2016, the *Marrs* plaintiffs, a group of excepted employees who performed work between October 1 and October 5, 2013, filed their complaint. *See* No. 18-1354, Appx022. Like the *Martin* plaintiffs, a similarly situated group of employees, the *Marrs* plaintiffs claim that the government's failure to pay their minimum and overtime wages for those days on their regularly scheduled payday violated an implicit prompt-payment requirement of the FLSA. *See* No. 18-1354, Appx029-030.

Unlike the *Martin* plaintiffs, however, the *Marrs* plaintiffs filed their complaint more than two (but less than three) years after that regular payday. The FLSA provides that a suit commenced more than two and less than three years after a cause of action can proceed only if the suit arises out of a willful violation. 29 U.S.C. § 255(a).

The Court of Federal Claims stayed *Marrs* pending the resolution of the liability question in *Martin*, on the stipulation that the court's decision on liability in *Martin* would apply to *Marrs*. *See* No. 18-1354, Appx041. The court proceeded to grant summary judgment on the issue of liability in the *Martin* plaintiffs' favor, *see* No. 21-2255, Appx035-048, and then dismissed the claims of the *Marrs* plaintiffs as untimely, *see* No. 18-1354, Appx121-131. Although the court believed that the government's deferred payment violated the FLSA, it determined, "guided primarily by" the Supreme Court's decision in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 (1988), that the violation was not "willful." No. 18-1354, Appx128. As the court explained, in

Richland Shoe, the Supreme Court held that a "willful" violation requires showing that an employer at least "acted recklessly" (that is, "more than unreasonably") and identified words such as "voluntary," "deliberate," and "intentional" as "common synonyms" of "willful" to help guide the inquiry. No. 18-1354, Appx125, Appx129. Recognizing that the agencies in this case were acting pursuant "to the imperatives of the" Anti-Deficiency Act, the court concluded that any violation of the FLSA was "involuntary and unintentional," rather than "willful." No. 18-1354, Appx129.

3. Following that grant of summary judgment, the *Marrs* plaintiffs filed a timely notice of appeal. No. 18-1354, Appx133. This Court then stayed that appeal pending resolution of outstanding damages issues in *Martin*. On June 16, 2021, the Court of Federal Claims entered partial final judgment under Rule 54(b) in favor of the first group of *Martin* plaintiffs whose damages the parties had been able to calculate, *see* No. 21-2255, Appx001-011, and the government appealed that final judgment. This Court then granted the parties' motion to treat *Martin* and *Marrs* as companion cases and to consolidate those appeals for purposes of briefing in the nature of cross-appeals.

SUMMARY OF ARGUMENT

A. The government does not violate the FLSA when it defers employees' wage payments during a lapse in appropriations in accordance with the Anti-Deficiency Act's express statutory provisions. In arguing otherwise, plaintiffs seek to transform a general, implicit timeliness principle underlying the FLSA into a rigid, unvarying

command requiring action in violation of another federal statute. That conception of the FLSA's requirements has no basis in case law or common sense.

As the Supreme Court explained decades ago, the FLSA "does not require the impossible." *Walling v. Harnischfeger Corp*, 325 U.S. 427, 432-33 (1945). Thus, although the FLSA may generally require employers to make payments on a usual pay date, that rule is subject to exceptions where such payments are "impossible"—or, in this case, illegal. Plaintiffs' attempt to glean support from various cases where employers substantially delayed wage payments even where making those payments on time was feasible is thus unavailing.

Similarly unpersuasive is plaintiffs' attempt to rely on decisions holding that the failure to appropriate funds to satisfy a clear statutory or contractual obligation does not extinguish that obligation. This case involves the predicate question whether Congress, in extending the FLSA to the federal government, intended to require the government to make payments barred by the Anti-Deficiency Act's prohibitions.

Plaintiffs similarly misunderstand the questions at issue in relying on various inapposite interpretive canons. Plaintiffs invoke the canon that Congress is presumed to be aware of cases interpreting a statute when it amends that statute. But no court had addressed the circumstances presented here when Congress extended the FLSA to the federal government in 1974. The canon against inferring implied repeals similarly has no bearing on the interpretation of the FLSA. The Anti-Deficiency Act long predates the FLSA; the relevant question is whether Congress intended to create

conflicting statutory obligations when it extended the FLSA in 1974, not whether the Anti-Deficiency Act impliedly repealed a preexisting obligation.

Finally, to the extent that there is any ambiguity about the scope of the FLSA's requirements in these circumstances, principles of sovereign immunity require that ambiguity to be construed in the government's favor. *See Athey v. United States*, 908 F.3d 696, 702-03 (Fed. Cir. 2018). And, at a minimum, plaintiffs cannot plausibly urge that the FLSA could possibly be unambiguously read to require the government to violate the Anti-Deficiency Act.

B. Even if this Court were to conclude that the FLSA requires the government to make minimum and overtime wage payments on an employee's regularly scheduled payday when doing so would violate the Anti-Deficiency Act, plaintiffs would not be entitled to liquidated damages because the government's violation of the FLSA would have been both subjectively and objectively reasonable. In contending otherwise, plaintiffs primarily argue that the government's failure to take steps such as seeking a formal legal opinion precludes it from establishing subjective good faith. But such a blanket rule would make no sense in this case, where seeking such an opinion would not have altered the government's conduct; plaintiffs do not plausibly suggest that agency officials would have been advised to violate the Anti-Deficiency Act and expose themselves to potential civil and criminal penalties.

Plaintiffs' other arguments are similarly unavailing. That Congress could have appropriated funds to pay excepted employees only underscores that officials had no

ground for doubting that the Anti-Deficiency Act means exactly what it says. And plaintiffs' assertion that agency officials were not merely mistaken but objectively unreasonable fails for the reasons outlined above.

C. The Court of Federal Claims correctly held that the *Marrs* plaintiffs' claims were untimely. The FLSA provides that any claim filed more than two and less than three years from accrual can proceed only if the underlying violation is "willful," 29 U.S.C. § 255(a), a term that encompasses only "deliberate," "voluntary," or "intentional" violations, *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Conduct that adheres to the express terms of a federal statute is plainly not a voluntary or intentional violation of the FLSA.

ARGUMENT

A. The Government Does Not Violate the FLSA when It Pays Employees in Accordance with the Anti-Deficiency Act

1. Plaintiffs urge at length that the FLSA anticipates that employees should generally make payments on the usual pay date. Pls. Br. 22-28. No one has argued to the contrary, and the government generally makes payments in exactly this way.

That general principle, however, in no way establishes plaintiffs' right to recovery here. As the decisions cited in plaintiffs' brief make clear, the general principle that employers should make payments on scheduled pay dates does not constitute a rigid, unvarying requirement, and that principle provides no basis for

concluding that the extension of the FLSA made compliance with the Anti-Deficiency Act the basis for a liquidated damages claim.

a. Even when a payment is not explicitly barred by another federal statute, the Supreme Court has long recognized that the FLSA "does not require the impossible." *Walling v. Harnischfeger Corp*, 325 U.S. 427, 432-33 (1945) (cited at Pls. Br. 27). Thus, when overtime compensation cannot be computed until after the regular pay date, employers properly comply with the FLSA when they make those payments "as soon as convenient or practicable under the circumstances." *Id.*

Reviewing the cases in this area, the Second Circuit explained that the decisions reflect two general principles, *Rogers v. City of Troy*, 148 F.3d 52, 57 (2d Cir. 1998): first, "that the FLSA requires wages to be paid in a timely fashion," but, second, "that what constitutes timely payment must be determined by objective standards—and not solely by reference to the parties' contractual arrangements." *Id.* The court further noted that cases finding FLSA violations "all involved substantial delays in payment, and—more important—the practices disapproved of resulted in evasions of the minimum wage and overtime provisions of the FLSA." *Id.* at 56. Thus, the court stated, a city would not violate the FLSA if it made changes to its employees' payment schedule for legitimate business reasons, even if that change resulted in the delayed payment of minimum and overtime wages. *Id.* at 57-58.

That analysis accords with the recognition that the FLSA's liquidated damages provision "constitute[d] a Congressional recognition that failure to pay the statutory

minimum on time may be so detrimental to maintenance of the minimum standard of living . . . that double payment must be made in the event of delay." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (pay withheld for more than two years); *see also, e.g.*, *Rigopoulos v. Kervan*, 140 F.2d 506 (2d Cir. 1943) (holding an employer liable when it paid accrued overtime wages between three years and six months late); *Birbalas v. Cuneo Printing Indus.*, 140 F.2d 826 (7th Cir. 1944) (similar).

Plaintiffs assert, without substantial elaboration, that *Walling* has "no application here because the amounts due were ascertainable as of the employees' paydays." Pls. Br. 28. But the relevance of that decision is not its factual similarity to the circumstances here; the relevance is the Supreme Court's recognition that the FLSA does not establish a rigid rule that payments must be paid on the regularly scheduled date even when doing so is impossible for practical—or, in this case, legal—reasons.

b. Plaintiffs' attempt to glean support from this Court's decision in *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988) (cited at Pls. Br. 25), fails in all respects. The question in that case was when an overtime claim accrued for purposes of applying the statute of limitations. As described in more detail in the Court's earlier decision in *United States v. Cook*, 795 F.2d 987, 989, 994 (Fed. Cir. 1986), the FLSA required that after 1978, federal firefighters be paid overtime for hours worked in excess of the average number of hours worked by firefighters, with that average to be determined by a study conducted by the Secretary of Labor. The Secretary's initial

study overstated the number of average hours; that error was corrected in a revised study. The district court determined that the firefighters' cause of action did not accrue until the publication of the recomputed study, which, this Court observed, reflected a conclusion that "nonpayment of legal overtime before the stated date did not accrue a claim without more." *Cook*, 855 F.2d at 851. The Court next observed—in the only sentence quoted by plaintiffs—that "[t]his is contrary to 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. Cook* did not address the question presented here—when the deferral of payment violates the FLSA—and it did not suggest that a payday rule would apply regardless of the explicit command of another federal statute. *Cook* confirmed, moreover, that even for purposes of determining an accrual date, the "usual rule" is not the invariable rule. *Id.*

Plaintiffs' quotation of general language in *Calderon v. Witvoet*, 999 F.2d 1101 (7th Cir. 1993) (quoted at Pls. Br. 24), without regard to the facts of the case likewise does not advance their argument. That case involved an employer's treatment of migrant farmworkers. Rather than pay their full wages each pay period, the employer withheld part of the nominal wages which would be paid only as a "bonus" when the worker left the defendant's employ. *Id.* at 1107 (quotation omitted). The court's holding that this deliberate, systematic delay, which raised the type of concerns noted in *Brooklyn Savings Bank*, violated the FLSA is entirely consistent with the government's position here.

Plaintiffs also seek (at Pls. Br. 25-26) to rely on the Ninth Circuit's decision in *Biggs v. Wilson,* 1 F.3d 1537 (9th Cir. 1993), which found that a delay in payment to state workers during a California budget impasse violated the FLSA. But *Biggs* did not concern the crucial circumstances presented here, where plaintiffs urge that the enactment of the FLSA penalized adherence to the explicit requirements of another federal statute. As discussed, there is no basis on which to conclude that in extending the FLSA to the government, Congress made compliance with the previous federal statute a violation of the newly applicable provisions. Variations in state appropriations processes did not similarly form part of the essential background of the 1974 extension of the FLSA. And for the same reason, plaintiffs' attempted reliance on the Department of Labor's guidance to state governments in circumstances like those presented in *Biggs* (at Pls. Br. 27-28) similarly fails.

Plaintiffs observe that inasmuch as the FLSA clearly requires that wages be paid, there must be some temporal point at which that requirement will be violated. *See* Pls. Br. 25-26. That observation, which is not in dispute, begs the question presented here—whether payment following a lapse in appropriations in accordance with the terms of the Anti-Deficiency Act contravenes the FLSA's implied payment requirement.

c. Plaintiffs also observe that the failure to appropriate funds to satisfy a clear statutory obligation does not, of itself, extinguish that obligation. Pls. Br. 33-35. In seeking to rely on that observation here, however, plaintiffs first assume their

conclusion that the FLSA requires payments during appropriations lapses, even though such payments were explicitly barred long before the FLSA was made applicable to the federal government. This case thus bears no resemblance to decisions on which plaintiffs seek to rely, where it was clear that the government had incurred, by statute or by contract, the underlying obligation. *See, e.g.*, *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320-21 (2020) (explaining that the relevant statute's "express terms" had created an obligation to make payments by providing that the government "shall pay" insurers "according to a precise statutory formula" (quotation omitted)); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 193-94 (2012) (explaining that the government had made a "contractual promise to pay each tribal contractor the full amount of funds to which the contractor was entitled" (alteration and quotation omitted)); *United States v. Langston*, 118 U.S. 389, 393 (1886) (explaining that the relevant statute created an obligation to pay the claimant by "fixing his annual salary" at a specific amount). And, of course, it is undisputed that the government has long since paid the wages required by the FLSA, satisfying any substantive obligation; the only remaining question is whether plaintiffs are additionally entitled to liquidated damages on top of their wages.

2. Plaintiffs' discussion of a variety of interpretive canons rests on incorrect premises and misunderstands the questions at issue.

a. Plaintiffs invoke the principle that Congress is presumed to be aware of the settled interpretation of a statute when it amends or extends that statute. Pls. Br. 28-

30. But the cases interpreting the FLSA in 1974, when Congress extended its provisions to the federal government, would have given Congress no reason to conclude that the FLSA imposed an unvarying pay date requirement or that extending the FLSA would subject the treasury to liquidated damages claims for compliance with the Anti-Deficiency Act. To the contrary, as is explained above, by 1974, the Supreme Court had already held that the FLSA does not impose a rigid requirement or "require the impossible." *Walling*, 325 U.S. at 432-33.

b. Plaintiffs similarly highlight their misunderstanding of the two statutes when they urge that the Anti-Deficiency Act should not be read to impliedly repeal obligations that they assert were imposed by the FLSA. Pls. Br. 37-41. The argument again assumes the premise that the FLSA required payment even when payment was impossible. And in any event, the Anti-Deficiency Act predates the FLSA's enactment and extension to the federal government by many decades and so asking whether it "repealed" that statute is nonsensical. The question, instead, is whether Congress, when it extended the FLSA, believed that it was imposing a duty on the government that would apply notwithstanding the contrary prohibitions of the Anti-Deficiency Act and would make compliance with those prohibitions the basis for a damages action. The answer is plainly no. Indeed, as plaintiffs note, the canon against implied repeals arises in part "out of 'respect for Congress as a drafter' that is unlikely to create 'irreconcilable conflicts' in its legislation." Pls. Br. 38 (alterations omitted)

(quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018)). Thus, insofar as the canon is relevant here, it reinforces the error of plaintiffs' position.

Plaintiffs similarly misunderstand the point at issue when they urge that the 2019 amendments to the Anti-Deficiency Act are not relevant to this case. *See* Pls. Br. 36-37. The amendments provide that each employee shall be paid "at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations." 31 U.S.C. § 1341(c)(2). Although enacted after the lapse in appropriations at issue in this case, those amendments underscore that Congress has at all times understood that salaries cannot be paid during appropriations lapses.

c. Plaintiffs also argue that the canon that the specific governs the general is inapplicable because the Anti-Deficiency Act does not bar Congress from creating underlying substantive obligations. *See* Pls. Br. 41. The question, however, is whether Congress intended that agency officials comply with the command of the Anti-Deficiency Act during an appropriations lapse or with the general prompt payment requirement of the FLSA. Plaintiffs do not dispute that agency officials were obliged to act in accordance with the Anti-Deficiency Act. And there is no reason to conclude that Congress believed that adhering to the long-established mandates of the Anti-Deficiency Act—which apply only in the specific circumstances of a lapse in appropriations—would violate the more generally applicable requirements of the FLSA, much less that doing so would subject the treasury to damages claims.

d. Finally, plaintiffs err in urging that interpretive canons of sovereign immunity are irrelevant in determining whether Congress subjected the government to damages for complying with the Anti-Deficiency Act.

As an initial matter, plaintiffs are wrong to suggest that the government's failure to rely on those canons below should "be a factor in analyzing the validity of" the argument. Pls. Br. 42-43. The government explained in the Court of Federal Claims that plaintiffs' interpretation is at odds with a variety of interpretive principles. That the government did not address principles of sovereign immunity does not reflect on the "validity" of that foundational doctrine. In any event, in construing a statute, "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). As this Court has explained, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Pfizer, Inc. v. Lee*, 811 F.3d 466, 471 (Fed. Cir. 2016) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992)).

Plaintiffs do not plausibly explain how the FLSA's waiver of immunity can properly be construed to encompass conduct specifically mandated by another federal statute, much less how it can be extended to authorize liquidated damages in those circumstances. Plaintiffs mistakenly characterize the application of sovereign immunity principles as "asking the Court effectively to insert a new" provision "into

the FLSA" and as positing a "narrow implied exception" to the FLSA's liquidated damages provision. Pls. Br. 43-44. The question, however, is whether the statute can properly be read to authorize such damages. The timely-payment requirement does not appear in the FLSA's text; the Supreme Court and other courts have repeatedly recognized it is not an inflexible requirement that applies without regard to relevant circumstances; and the relevant circumstance in this case is the explicit command of another federal statute. Principles of sovereign immunity underscore that the FLSA cannot be construed to permit an award of liquidated damages in these circumstances.

Plaintiffs also mistakenly invoke the principle that the meaning of statutory language cannot change from case to case depending on the identity of the parties. *See* Pls. Br. 43-44 (citing *Clark v. Martinez*, 543 U.S. 371, 379, 382 (2005)). That payments should generally be made promptly is not at issue, and plaintiffs do not seriously dispute that, whatever the scope of the implicit requirement, it is not rigid and uniform without regard to the circumstances of a particular case. In any event, the canon on which plaintiffs rely is also inapposite because it indicates that courts should not "give the[] same words a different meaning." *Clark*, 543 U.S. at 378. But plaintiffs do not rely on the statutory text, and nothing in the government's position requires that the "same words" be given different meanings.

B. Plaintiffs Are Not, in Any Event, Entitled to Liquidated Damages

1. Plaintiffs initially contend that they are entitled to liquidated damages because the government's acting in accordance with the Anti-Deficiency Act's explicit prohibitions does not demonstrate the subjective good faith required to substantiate a defense under 29 U.S.C. § 260. That is incorrect.

As an initial matter, plaintiffs' argument that the government is precluded from establishing subjective good faith because it did not take "active steps to ascertain" the FLSA's requirements, such as by "seek[ing] a formal legal opinion regarding how to meet its obligations," Pls. Br. 47-48 (quotation omitted), is unavailing. Regardless of the FLSA's requirements, the Anti-Deficiency Act unambiguously precluded employing agencies from making the wage payments that plaintiffs sought. Plaintiffs do not suggest that the Anti-Deficiency Act could have been construed to permit agency officials to make payments to excepted employees during the appropriations lapse or that they could have received legal advice to that effect.

In contrast to other cases involving a determination under 29 U.S.C. § 260, government officials in cases involving an appropriations lapse have no discretion in the timing of payments. The circumstances of the present cases thus bear no resemblance to those in *Beebe v. United States*, 640 F.2d 1283, 1295 (Ct. Cl. 1981), where the Court remanded for a determination under § 260 in the first instance. Plaintiffs also mistakenly rely on that decision for the proposition that, as a matter of

law, subjective good faith does not exist unless the government takes active steps to ascertain its obligations, even where the government's conduct is specifically dictated by statute. The Court in *Beebe* simply concluded on the facts of that case that "[a]fter a careful examination of the documents that have been submitted with the motions for summary judgment and the facts which have been admitted, we find that this issue involves questions of fact which cannot be resolved on summary judgment and that it must be remanded to the trial division for determination." *Id.* at 1295.

Plaintiffs similarly err in urging (at Pls. Br. 48-49) that agency officials did not act in subjective good faith because the government could have "act[ed] in at least two ways"—either by enacting legislation or by paying plaintiffs "liquidated damages after funds had been appropriated." Those assertions only underscore that agency officials believed in good faith that they were obliged to comply with the unambiguous requirements of the Anti-Deficiency Act. Congress could have enacted legislation creating an exception to the Anti-Deficiency Act. But it did not, and officials were bound by the terms of the statute that existed, not by a hypothetical provision. Following the appropriations lapse, agencies made payments without delay. That they did not provide additional compensation as "liquidated damages" has no bearing on their good faith during the appropriations lapse, quite apart from the fact that there is no general authority for agencies to make such payments and there would in any event have been no basis for concluding that such payments were warranted.

2. As already discussed, government agencies did not violate the FLSA. Plaintiffs compound their error by insisting that the agencies' understanding of their obligations was not, at a minimum, reasonable.

In arguing that the government improperly focuses on its compliance with the Anti-Deficiency Act rather than the FLSA (at Pls. Br. 50), plaintiffs again misperceive the relevance of the Anti-Deficiency Act to the obligations at issue. It is undisputed that to qualify for the FLSA's good-faith defense, the government must show it had reasonable grounds for believing its deferral of plaintiffs' wages was not a violation of the FLSA. *See* 29 U.S.C. § 260. But the point is that, in light of the Anti-Deficiency Act's clear statutory prohibition on making wage payments during a lapse in appropriations, the government had (at the absolute least) reasonable grounds for believing that Congress did not intend for the FLSA to impose a rigid ordinary-payday requirement in the circumstances presented in this case—and that, as a result, the government's actions complied with the FLSA.

Plaintiffs' argument (at Pls. Br. 50-51) that the Anti-Deficiency Act only binds government officials, and not the United States itself, again highlights the fundamental error of their position. Absent a change in the law, all executive branch officials were bound to comply with the terms of the Anti-Deficiency Act. The United States acts through its officers and employees, and plaintiffs identify no officer or employee who could lawfully have made payments.

3. Finally, plaintiffs are wrong to argue that, if the government demonstrates good faith and a reasonable basis for its actions in complying with the Anti-Deficiency Act, this Court should remand to the trial court for it to determine whether to award liquidated damages. Congress has specified the circumstances in which liquidated damages may be available. It has not authorized remedies beyond those specified. And extending the statutory remedy beyond the terms established by Congress would be irreconcilable with the most basic principles of sovereign immunity.

Plaintiffs observe that liquidated damages are their "only remedy (other than an award of attorneys' fees and costs to their counsel)" because "they have no regular damages." Pls. Br. 53. But that fact undermines, rather than supports, plaintiffs' claim: the reason they have no regular damages is because the government paid the plaintiffs all of their accrued wages following the restoration of appropriations. Officials acted in subjective and objective good faith, and no basis exists for an award of liquidated damages.

C. The Court of Federal Claims Correctly Dismissed the *Marrs* Plaintiffs' Claims As Untimely

For the reasons discussed above and in the government's opening brief, the *Marrs* plaintiffs' claims would fail on the merits. The Court of Federal Claims correctly held that their claims should be rejected in any event as untimely.

The FLSA's statute of limitations provides that an "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(a). The *Marrs* plaintiffs filed their complaint on October 7, 2016, *see* No. 18-1354, Appx022, which is more than two (but less than three) years after the payday for which the government failed to make regular wage payments during the lapse in appropriations. It is uncontroverted that their claims are barred unless they can demonstrate that the asserted violation of the FLSA was "willful."

The Supreme Court has explained that Congress's adoption of "a two-tiered statute of limitations[] makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 (1988). To demonstrate a willful violation, plaintiffs must demonstrate "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* at 133. In "common usage," the Court further explained, a "willful" standard is "synonymous with such words as voluntary, deliberate, and intentional." *Id.* (quotation omitted).

Even if this Court were to construe the FLSA to require regular-payday payments even where those payments are prohibited by the Anti-Deficiency Act, the conduct of government officials was in no sense willful. Officials were prohibited by federal law from making the payments in question. Compliance with the specific terms of a statute with criminal and civil penalties is anything but a deliberate, reckless act.

The *Marrs* plaintiffs take the bad faith argument of the *Martin* plaintiffs to its extreme conclusion, arguing that unless an employer has "rigorously analyze[d], generally through legal counsel, the implications of a new situation on its obligations under the FLSA," any violation is willful. Pls. Br. 57. And because the government did not "rigorously analyze" that question or "seek a legal opinion" regarding it, Pls. Br. 57-58 (quotation omitted), plaintiffs argue that any FLSA violation must be willful. But that asserted rigorous-analysis requirement has no basis in the plain text of the FLSA and is unsupported by the Supreme Court's analysis in *Richland Shoe*, where the Court explicitly rejected a proposed standard that would have made "the issue in most cases turn on whether the employer sought legal advice concerning its pay practices," explaining that such a standard would "fail[] to give effect to the plain language of the statute of limitations." 486 U.S. at 134-35.

Nevertheless, plaintiffs mistakenly seek support for that position in an Office of Personnel Management regulatory definition of "reckless disregard" as the "failure to make adequate inquiry into whether conduct is in compliance." 5 C.F.R. § 551.104. The regulation does not suggest that additional inquiry is required when conduct is dictated by the specific terms of a statute. And the regulation makes clear that "[a]ll of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful." *Id.* (definition of "willful violation"). In sum, government officials did not violate the FLSA; they acted in both subjective and objective good faith; and they did not engage in willful disregard of their obligations.

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims in No. 21-2255 should be reversed and the decision of the Court of Federal Claims in No. 18-1354 should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 28.1(e)(2)(A) because it contains 5,823 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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