IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JUSTIN TAROVISKY, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 19-4C
	)	(Judge Campbell-Smith)
UNITED STATES,	)	
	)	Collective Action
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Regulations

Other Authorities

QUESTIONS PRESENTED

1. Have Plaintiffs stated a claim under the Fair Labor Standards Act ("FLSA") where they have alleged that the United States failed to pay them minimum wages and overtime compensation on their regularly scheduled pay days for work performed between December 22, 2018 and January 25, 2019 during a partial government shutdown, asserting the same claims that were presented in *Martin v. United States,* 130 Fed. Cl. 578 (2017), where this Court denied the Government's motion to dismiss and granted summary judgment for the Plaintiffs, holding that the United States violated the FLSA when it failed to pay federal employees on their regularly scheduled pay days because of a lapse in appropriations during the 2013 government shutdown?

STATEMENT OF THE CASE

I. FACTUAL ALLEGATIONS

A. The United States Failed to Compensate Members of the Collective Action

The United States government was partially shut down from December 22, 2018 until January 25, 2019, when appropriations were restored in a continuing resolution. *See* Second Amended Complaint ("Complaint") ¶¶ 1, 24; Pub. L. 116-5. During this period, the Plaintiffs were classified as "excepted employees" and required to report to work and perform their duties. *See* Complaint ¶¶ 1, 3, 5-21, 25-27. However, they were not paid on their regularly scheduled pay days. *Id.* ¶¶ 1-3, 5-21, 26, 29-36, 41-43, 47.

Some of the Plaintiffs performed overtime work on December 22, 2018, and did not receive overtime compensation on their regularly scheduled pay day. *Id.* ¶¶ 26, 29, 32, 34-35. The Plaintiffs performed both overtime and non-overtime work between December 23, 2018 and January 25, 2019, but they were not paid the minimum wage or overtime compensation for this work on their regularly scheduled pay days. *Id.* ¶¶ 26-29, 36, 41-47.

The complaint alleges that the Government did not conduct any analysis to determine whether its failure to pay Plaintiffs overtime compensation on their regularly scheduled pay day for overtime work performed on December 22, 2018 and its failure to pay Plaintiffs minimum wages or overtime compensation on their regularly scheduled pay days for work performed between December 23, 2018 and January 25, 2019 complied with the FLSA and it did not rely on any authorities indicating that its failure to pay Plaintiffs on their regularly scheduled pay days complied with the FLSA. *Id.* ¶¶ 37, 48. In fact, the Government disregarded this Court's ruling in *Martin v. United States*, 130 Fed. Cl. 578 (2017), which made clear that the federal government's failure to pay similarly situated plaintiffs on their regularly scheduled pay day due to a lapse in appropriations during a government shutdown violated the FLSA. *Id.* ¶¶ 38, 49. Accordingly, plaintiffs allege that the Defendant willfully violated the FLSA and acted in conscious or reckless disregard of the FLSA's requirements. *Id.* ¶¶ 39, 50.

B. Procedural Background

Plaintiffs Justin Tarovisky and Grayson Sharp filed the Complaint initiating this case on January 2, 2019 as a collective action on behalf of themselves and all other "excepted employees" who did not receive overtime compensation for overtime work performed on December 22, 2018. *See* ECF No. 1. Plaintiffs filed amended complaints on January 9, 2019 and February 19, 2019 to add additional named plaintiffs, update the factual allegations, and assert an additional claim alleging that the Defendant's failure to pay Plaintiffs minimum wages or overtime compensation on their regularly scheduled pay days for work performed between December 23, 2018 and January 25, 2019 violated the FLSA. *See* ECF Nos. 6 and 17. Plaintiffs filed the Second Amended Complaint as a collective action on behalf of themselves and all other "excepted employees" who

were not paid minimum wages or overtime compensation on their regularly scheduled pay days for work performed during the partial government shutdown that began on December 22, 2018.

The Second Amended Complaint contains two counts. Count One alleges that the Government violated the FLSA by failing to pay Plaintiffs overtime compensation on their regularly scheduled pay days for overtime hours worked during the partial government shutdown. *See* Complaint ¶¶ 58-63. Count Two alleges that the Government violated the FLSA by failing to pay Plaintiffs minimum wages on their regularly scheduled pay days for worked performed during the shutdown. *Id.* ¶¶ 64-67. Plaintiffs requested that this Court certify a collective action, enter a declaration that Defendant willfully violated the FLSA and did not act in good faith or have reasonable grounds for believing that it complied with its FLSA obligations, and award payment of unpaid wages and overtime compensation and liquidated damages equal to the amount of minimum wages and overtime compensation that should have been paid on Plaintiffs' regularly scheduled pay days for work performed during the shutdown on and after December 22, 2018. *Id.* at Prayer for Relief.

II. STATUTORY BACKGROUND

A. Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA") requires employers, including the United States,[1] to pay employees not less than the minimum wages provided in 29 U.S.C. § 206 and to pay overtime compensation for hours worked in excess of forty hours per week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. §§ 206 and 207. Employers "are required to pay these wages on the employee's next regularly scheduled payday."

[1] The FLSA was amended in 1974 to cover most federal employees and their employer, the United States government. *See, e.g., El-Sheikh v. United States*, 177 F.3d 1321, 1323 (Fed. Cir. 1999).

Martin v. United States, 130 Fed. Cl. 578, 584 (2017) (citing *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 707, 65 S.Ct. 895, 89 L.Ed. 1296 (1945); *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993) and 29 C.F.R. § 778.106 (2016)).

Employers that violate the FLSA's minimum wage and overtime provisions are liable for the shortfall in timely minimum wage or overtime compensation and an additional amount equal to that shortfall as liquidated damages. 29 U.S.C. § 216(b) ("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 … and in an additional equal amount as liquidated damages.") The 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' and to the free flow of commerce, 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." *Brooklyn Sav. Bank*, 324 U.S. at 707 (1945) (quoting 29 U.S.C. § 202(a)).

Courts may award less than full liquidated damages only if the employer shows that it acted "in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260; *see Abbey v. United States*, 106 Fed. Cl. 254, 265 (2012). There is a "strong presumption under the statute in favor of doubling." *Angelo v. United States*, 57 Fed. Cl. 100, 104 (2003) (quotations omitted). The employer's burden to establish its good faith and the reasonable grounds for its action is "substantial." *Abbey*, 106 Fed. Cl. at 265 (quoting *Adams v. United States*, 350 F.3d 1216, 1226 (Fed. Cir. 2003)). A court may, but is not required to, reduce or eliminate the amount of liquidated damages only when the employer meets

both conditions. Otherwise, the court must award full liquidated damages. *See id*. (quoting 29 C.F.R. § 790.22(b)).

The FLSA expressly waives sovereign immunity for claims seeking unpaid minimum wages, unpaid overtime compensation, and liquidated damages against any employer, including the United States, that violates the FLSA's minimum wage and overtime provisions. *See, e.g., El-Sheikh v. United States,* 177 F.3d 1321, 1323-24 (Fed. Cir. 1999) ("Because the Act thus authorizes El-Sheikh to sue his 'employer,' the United States, the Act waives the United States' sovereign immunity from such suits."); *Saraco v. United States,* 61 F.3d 863, 865-66 (Fed. Cir. 1995) (noting that the FLSA "explicitly" waived the federal government's sovereign immunity because "the FLSA conferred the right to recover money from the United States, that is, the FLSA contained the requisite waiver of sovereign immunity[.]")

B. Anti-Deficiency Act

The Anti-Deficiency Act ("ADA") states that "an officer or employee of the United States Government … may not make or authorize 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). While the ADA instructs government officers not to make payments when sufficient funds have not been appropriated, it does not cancel the Government's obligations under the FLSA. *See Martin,* 130 Fed. Cl. at 582-83 (quoting *Salazar v. Ramah Navajo Chapter,* 567 U.S. 182, 197, 132 S.Ct. 2181, 183 L.Ed.2d 186 (2012) and *Ferris v. United States,* 27 Ct. Cl. 542, 546 (1892) (noting 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 [g]overnment" and the lack of appropriations "does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.")).

The ADA was amended on January 16, 2019 in the Government Employee Fair Treatment Act ("GEFTA"), which states that furloughed employees and excepted employees who were required to perform work during the shutdown shall be paid "at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3 (Jan. 16, 2019). Congress enacted similar language in the appropriations act following the 2013 shutdown, which did not preclude the FLSA liquidated damages remedy in *Martin.* *See* Pub. L. No. 113-46 § 115, 127 Stat. 561 (Oct. 17, 2013) (stating that employees affected by the shutdown shall be paid "as soon as practicable after such lapse in appropriations ends.")

SUMMARY OF THE ARGUMENT

It is undisputed that Plaintiffs' claims in this case are nearly identical to those raised in *Martin v. United States,* Case No. 13-843C. *See* Defendant's Motion to Dismiss at 15 (acknowledging that the Plaintiffs in *Martin* are similarly situated to the Plaintiffs in this case). As such, to the extent the Government again advances the same theories that it unsuccessfully advanced in *Martin,* its motion to dismiss should be denied as a result of the reasoning set forth in this Court's prior decisions: *Martin v. United States,* 130 Fed. Cl. 578 (2017); *Martin v. United States,* 117 Fed. Cl. 611, 615 (2014).

The Government essentially makes two new arguments in support of dismissal. First, the Government argues that it did not violate the FLSA because it complied with the ADA. It contends that because it complied with the statutory obligation set forth in the GEFTA amendments to the ADA to pay Plaintiffs "at the earliest date possible . . . , regardless of scheduled pay dates", the case should be dismissed. *See* Defendant's Motion to Dismiss at 10-11 (citing 31 U.S.C. § 1341(c)(2)). The Government is incorrect. There is nothing in the text or legislative history of GEFTA indicating that Congress intended to change the interplay between the ADA and FLSA,

to deprive federal employees of their rights under the FLSA, or to modify or repeal the FLSA provisions at issue in this case. Rather, the legislative history indicates that Congress intended to make sure that federal employees (including those employees who were furloughed and would not otherwise have been entitled to any payment during the shutdown) would be paid as soon as the shutdown ended rather than waiting until their next scheduled pay period to receive their back wages. Moreover, the Government's reliance on *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States,* 48 F.3d 1166 (Fed. Cir. 1995), is misplaced, as it concerned a statute that, unlike the FLSA, did not create a mandatory obligation to make payments in excess of the amounts appropriated by Congress.

Second, the Government argues that it has sovereign immunity. The Federal Circuit, however, has long recognized that sovereign immunity is waived for FLSA claims against the United States and Section 216(b) clearly waives sovereign immunity for any violations of sections 206 or 207 of the FLSA, whether express or implied. Because this case clearly involves violations of Sections 206 and 207 of the FLSA, there is no question that sovereign immunity is waived.

Finally, the Government states in passing that Transportation Security Officers ("TSOs") are precluded from participating in this case. However, the Transportation Security Agency ("TSA") has generally adopted the FLSA and has classified TSOs as FLSA non-exempt employees. The Government has not demonstrated at this stage of the litigation that these employees are prohibited from participating in the case.

ARGUMENT

I. Standard of Review

When considering a motion to dismiss under Rules of the United States Court of Federal Claims ("RCFC") 12(b)(6) for failure to state a claim on which relief can be granted, the court

"must accept as true all the factual allegations in the complaint, and must indulge all reasonable inferences in favor of the non-movant." *Martin v. United States,* 117 Fed. Cl. 611, 615 (2014) (quoting *Sommers Oil Co. v. United States,* 241 F.3d 1375, 1378 (Fed. Cir. 2001)). To survive the motion to dismiss, the factual allegations and reasonable inferences drawn from them must be sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)).

As demonstrated below, Plaintiffs have clearly stated a claim on which relief can be granted based on the facts alleged in the Complaint and the inferences reasonably drawn from them. Accordingly, the Defendant's motion to dismiss should be denied.

II. Plaintiffs Have Alleged Violations Of Sections 206 And 207 Of The FLSA For Which They Are Entitled To Liquidated Damages.

A. This Court Has Previously Held That Plaintiffs Asserting The Same Claims Presented Here Stated A Claim For Liquidated Damages Against The United States Because The Defendant's Failure To Pay Federal Employees Minimum Wages And Overtime Compensation On Their Regularly Scheduled Payday Due To A Lapse In Appropriations Violated The FLSA.

In *Martin v. United States,* 130 Fed. Cl. 578 (2017), this Court granted summary judgment for the Plaintiffs in a case involving the same claims presented here, holding that the United States violated the Fair Labor Standards Act ("FLSA") when it failed to pay federal employees minimum wages and overtime compensation on their regularly scheduled payday because of a lapse in appropriations during a government shutdown and that the affected federal employees were entitled to liquidated damages. *See also Martin,* 117 Fed. Cl. 611 (denying the Government's motion to dismiss on counts one and two, which alleged the same claims presented in this case, concluding that federal employees stated a claim against the United States for liquidated damages when they alleged that the United States failed to pay minimum wages and overtime compensation on their regularly scheduled payday during a government shutdown); *Martin,* 130 Fed. Cl. 578

(granting summary judgment for Plaintiffs and awarding liquidated damages). This Court's reasoning in *Martin* controls the outcome in this case.

The FLSA requires employers, including the United States, to pay employees a minimum wage and to pay overtime compensation for hours worked in excess of forty hours per week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. §§ 206 and 207. As this Court recognized in *Martin*, employers, including the United States, "are required to pay these wages on the employee's next regularly scheduled payday." *Martin*, 130 Fed. Cl. at 584 (citing *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 707, 65 S.Ct. 895, 89 L.Ed. 1296 (1945); *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993) and 29 C.F.R. § 778.106 (2016)). *See also Martin*, 117 Fed. Cl. at 618 (citing *Biggs*, 1 F.3d 1537; *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1579 (11th Cir. 1985), *modified*, 776 F.2d 265; *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944); *Birbalas v. Cuneo Printing Industries*, 140 F.2d 826, 828 (7th Cir. 1944)) ("When applying the Supreme Court's 'on time' mandate, courts have determined almost universally that an FLSA claim accrues, for limitations purposes, when an employer fails to pay workers on their regular paydays, and that a violation of the Act also occurs on that date."); *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988) (noting that the "usual rule" is that "a claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid."); 29 C.F.R. § 790.21(b) ("The courts have held that a cause of action under the Fair Labor Standards Act for unpaid minimum wages or unpaid overtime compensation and for liquidated damages 'accrues' when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends."); 29 C.F.R. § 778.106 (2016) ("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."); *Biggs v. Wilson*, 1 F.3d 1537,

1540 (9th Cir. 1993) (holding that California violated the FLSA by failing to pay state employees on their regularly scheduled pay day because a budget impasse caused there to be "no funds appropriated for the payment of salaries" until two weeks after the regularly scheduled pay day).

In *Martin*, the plaintiffs alleged that during the 2013 government shutdown the United States failed to pay federal employees who were designated "excepted" and required to perform work during the shutdown on their regularly scheduled paydays. 130 Fed. Cl. at 581. While the plaintiffs were subsequently paid their earned wages after the shutdown ended and appropriations were restored, "eventual payment is not what the FLSA requires." *Id.* at 584. Rather, because the United States did not pay the employees on their regularly scheduled payday, this Court concluded that the Government's "failure to timely pay plaintiffs' wages is a violation of the FLSA." *Id.* Accordingly, because the plaintiffs alleged that the United States failed to pay minimum wages and overtime compensation on their regularly scheduled payday, "their claims survived defendant's motion to dismiss." *Id.*

The same is true in this case. The Plaintiffs here allege the same claims that were presented in *Martin*. As in *Martin*, the Plaintiffs are federal employees who were designated "excepted" and required to perform work during the government shutdown. *See* Complaint, at ¶¶ 1-3, 5-21. As in *Martin*, the Plaintiffs allege that the United States violated the FLSA by failing to pay them minimum wages and overtime compensation on their regularly scheduled paydays because of a lapse in appropriations during the government shutdown. *Id.* at ¶¶ 1-3, 24-51. Accordingly, as in *Martin*, the Plaintiffs in this case have alleged a violation of the FLSA for which they are entitled to liquidated damages, and their claims clearly survive a motion to dismiss.

B. Plaintiffs Are Entitled To Liquidated Damages Under The Facts Alleged Because The Government Cannot Show That It Took Appropriate Steps To Ascertain Its Legal Obligations Under The FLSA And To Comply With Them.

1. The FLSA Provides for Liquidated Damages as a Remedy

The FLSA provides for liquidated damages as a remedy for violations of the statute's minimum wage and overtime provisions. 29 U.S.C. § 216(b) states, "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 … and in an additional equal amount as liquidated damages." As this Court noted in *Martin,* "Through the use of the word 'shall,' Congress signaled its intent that a presumption of a liquidated damages award follows a violation of the Act." *Martin,* 117 Fed. Cl. at 626. Indeed, there is a "'strong presumption under the statute in favor of doubling'" and "'[D]ouble damages [are] the norm and single damages the exception.'" *Angelo v. United States*, 57 Fed. Cl. 100, 104 (2003) (quoting *Shea v. Galaxie Lumber,* 152 F.3d 729, 733 (7th Cir. 1998) and *Herman v. RSR Sec. Services,* 172 F.3d 132, 142 (2d Cir. 1999)). As the Supreme Court explained:

> [T]he liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to the maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers' and to the free flow of commerce, 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.

Brooklyn Sav. Bank, 324 U.S. at 707.

2. An Employer's Burden to Overcome the Presumption of Liquidated Damages is Substantial

The presumption can be overcome only through "a limited exception to the liquidated damages requirement" under 29 U.S.C. § 260 if the employer can meet its substantial burden to

demonstrate good faith and "reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]." *Id.* (citing 29 U.S.C. § 260). The employer's burden "is a substantial one, consisting of both a subjective good faith showing and an objective demonstration of reasonable grounds." *Martin*, 130 Fed. Cl. at 585 (citing *Bull v. United States,* 68 Fed. Cl. 212, 229 (2005)). "If … the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages." *Id.* (citing 29 C.F.R. § 790.22(b)). To meet its burden, the Defendant "must show 'an honest intention to ascertain what the [FLSA] requires and to act in accordance with it." *Martin,* 117 Fed. Cl. at 626.

3. Defendant Cannot Meet Its Burden to Overcome the Presumption of Liquidated Damages on a Motion to Dismiss

In *Martin,* this Court noted that the Defendant could not meet its burden on a Rule 12(b)(6) motion to dismiss because it had not offered any evidence to establish what steps, if any, it took to ascertain what the FLSA required or what steps, if any, it took to attempt to comply with those obligations. *Id.* at 627. The Court explained that at this stage of the litigation, "Defendant has not had the opportunity to present evidence of its good faith and the reasonable grounds permitted under the FLSA." *Id.* Accordingly, "it would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith. It may well be that the government can establish these defenses, but its opportunity to do so will come later on summary judgment or at trial." *Id.*

Moreover, this Court rejected the Government's argument that it could meet its burden merely by asserting that it believed it could not make the payments required by the FLSA because the Anti-Deficiency Act prevented it from doing so. *See Martin,* 130 Fed. Cl. at 585-86. In *Martin,* the United States "ask[ed] the court to find that it acted in good faith by honoring the ADA's

express prohibition against making payments in the absence of an appropriation." *Id.* at 585. But this Court explained, "Contrary to the government's suggestion, its burden under the FLSA is not met so easily." *Id.* Instead, the Defendant must show that it took "active steps to ascertain the dictates of the FLSA and then act[ed] to comply with them." *Id.* at 585 (citing *Angelo v. United States,* 57 Fed. Cl. 100, 105 (2003). On summary judgment, this Court concluded, "Because the government admittedly took no steps to determine its obligations under the FLSA during the 2013 shutdown … the court cannot find that it acted in good faith." *Id.* at 586.

This Court's analysis in *Martin* controls the outcome here. At this stage of the litigation, the facts alleged in the Complaint are accepted as true and the Defendant has offered no evidence to rebut them. In paragraphs 37 and 48 of the Second Amended Complaint, the Plaintiffs allege that the Defendant "conducted no analyses to determine whether its failure to pay Excepted Employees on their regularly scheduled payday complied with the FLSA and can rely on no authorities indicating that its failure to pay Excepted Employees on their regularly scheduled payday complied with the FLSA." Complaint, ¶¶ 37, 48. Thus, the facts alleged in the Complaint clearly do not establish that the Defendant took active steps to ascertain its obligations under the FLSA or took any action to comply with those obligations. As this Court recognized in *Martin,* the Defendant cannot meet its burden under 29 U.S.C. § 260 at this stage of the litigation, because it has not offered any evidence to establish what steps, if any, it took to ascertain its obligations under the FLSA or what steps, if any, it took to attempt to comply with them. Thus, as in *Martin,* "it would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith." *Martin,* 117 Fed. Cl. at 627. To resolve this motion, the Court's analysis can end there.

Moreover, it appears that the Government will be unable to demonstrate good faith and reasonable grounds at any stage of the litigation. The Defendant should have been aware of its obligations under the FLSA, as this Court's decision in *Martin* was issued in 2017, well in advance of the shutdown. As the United States was a party in *Martin*, it is clearly on notice of this Court's ruling. However, the Government does not assert, much less offer any evidence to demonstrate, that it took active steps to ascertain its obligations under the FLSA and acted to comply with them. Instead, it appears to rely on the same argument that this Court rejected in *Martin*. Rather than suggesting that it will demonstrate on summary judgment or at trial that it took appropriate steps to ascertain its FLSA obligations and to comply with them, the Government contends, as it did in *Martin*, that it should not be required to do so because the ADA should excuse it from complying with the FLSA. *See* Defendant's Motion to Dismiss, ECF No. 28, at 16. For the reasons stated in *Martin*, and explained in greater detail below, this argument should be rejected.

III. The Anti-Deficiency Act Does Not Cancel The Government's Obligations Under The Fair Labor Standards Act.

A. The Anti-Deficiency Act Does Not Prevent Plaintiffs From Bringing A Claim In This Court For Damages Based On The Defendant's Failure To Comply With Its Obligation To Pay Minimum Wages And Overtime Compensation On Its Employees' Regularly Scheduled Payday.

As this Court recognized in *Martin*, the Anti-Deficiency Act ("ADA") does not cancel the Defendant's obligations under the FLSA to pay its employees minimum wages and overtime compensation on their regularly scheduled payday or absolve the Defendant from liability for liquidated damages when it fails to do so. *See Martin*, 130 Fed. Cl. at 582-83. The ADA states that "an officer or employee of the United States Government … may not make or authorize 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). While the ADA instructs government

officers not to make payments when sufficient funds have not been appropriated, it does not defeat the government's obligations or prevent injured parties from seeking a remedy in this Court. Rather, "the Supreme Court has held 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 [g]overnment." *Martin,* 130 Fed. Cl. at 583 (quoting *Salazar v. Ramah Navajo Chapter,* 567 U.S. 182, 197, 132 S.Ct. 2181, 183 L.Ed.2d 186 (2012)). This is because "[a]n appropriation per se merely imposes limitations upon the Government's own agents; … but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." *Martin,* 130 Fed. Cl. at 583 (quoting *Ferris v. United States,* 27 Ct. Cl. 542, 546 (1892). As the Court of Claims explained:

> It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute. … The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims.

New York Airways, Inc. v. United States, 369 F.2d 743, 748 (Ct. Cl. 1966). *See also Martin,* 130 Fed. Cl. at 583 (quoting *Lovett v. United States,* 104 Ct. Cl. 557, 582, 66 F. Supp. 142 (1945) ("[i]n a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due.")).

Accordingly, where, as here, the United States failed to comply with its obligation to make payments when due because of a lapse in appropriations, the injured party may seek a remedy in this Court. *See, e.g., New York Airways*, 369 F.2d at 752 ("[T]he failure of Congress or an agency to appropriate or make available sufficient funds does not repudiate the obligation; it merely bars the accounting agents of the Government from disbursing funds and forces the carrier to a recovery in the Court of Claims."); *Collins v. United States,* 15 Ct. Cl. 22, 35 (1879) (noting that the

Government's liability to pay "the compensation to which public officers are legally entitled … exists independently of the appropriation, and may be enforced by proceedings in this court."); *Common Ground Healthcare Coop. v. United States,* 142 Fed. Cl. 38, 52 (2019) ("Because plaintiff's claim arises from a statute mandating the payment of money damages in the event of its violation, the Judgment Fund is available to pay a judgment entered by the court on that claim.").

B. Because The Defendant's Obligations Under The FLSA Are Mandatory, The Government Cannot Rely On *Highland Falls*, Which Addressed A Statute That Did Not Create A Mandatory Obligation To Make Payments In Excess Of Appropriations.

1. Unlike the Statute at Issue in *Highland* Falls, the FLSA Creates a Mandatory Obligation

The Government's reliance on *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States,* 48 F.3d 1166 (Fed. Cir. 1995) is unavailing. The Federal Circuit did not hold that the Anti-Deficiency Act allowed the Government to disregard its obligations because of a lapse in appropriations or that a party injured by the Government's failure to comply with its obligations could not bring a claim for damages in this Court. Rather, the court concluded that the statute at issue, the Impact Aid Act, did not create a mandatory obligation for the Government to make payments in excess of an appropriation because the statute contemplated that the amounts initially allocated by the Secretary of the Department of Education for entitlements under the statute could be reduced to correspond to the amounts appropriated by Congress if the appropriations were not sufficient to fully fund the entitlements. Accordingly, a school district could not bring a claim for damages when its funding allocation was reduced to correspond to an appropriation. *Id.* at 1167 ("The court dismissed the complaint after concluding that Highland Falls's entitlement to funds under the Act was not mandatory and that appellants therefore did not have a monetary claim against the government. We affirm.").

The Impact Aid Act authorized the Secretary of the Department of Education to allocate funds to school districts for certain purposes. Section 237 provided for the Secretary to determine funding allocations to school districts that were burdened by federal ownership of property, and Sections 238 and 239 authorized the Secretary to determine funding allocations for districts with students residing on federal property and districts that incurred a sudden increase in attendance. However, the amounts allocated by the Secretary did not create mandatory obligations. Rather, "[t]he statute recognizes that Congress may choose to appropriate less money for entitlements under the Act than is required to fund those entitlements fully." *Id.* at 1168. In Section 240, the statute created a formula for reducing the amounts initially allocated by the Secretary to correspond to the amount of the appropriation. *Id.*

While the reduction formula provided for full funding of Section 237 allocations before funding was allocated to entitlements under the other sections, the court concluded that the Secretary did not err by reducing Section 237 allocations during fiscal years 1989 through 1993 based on the amount earmarked for Section 237 entitlements rather than transferring funds that were earmarked for the other sections, reasoning that the Section 240 formula contemplates a lump-sum appropriation. *Id.* at 1172. Moreover, because the statute did not create a mandatory obligation to fully fund the Section 237 entitlements in the absence of a sufficient appropriation, a Section 237 district had no claim for damages based on the reduction in its funding allocation. *Id.* at 1167.

2. The Anti-Deficiency Act Does Not Allow the Government To Disregard A Mandatory Obligation, Such As The Minimum Wage and Overtime Payments Under The FLSA

By contrast, this Court has repeatedly recognized that where a statute creates a mandatory obligation, the Anti-Deficiency Act does not allow the Government to disregard the obligation due

to insufficient appropriations and a party impacted by the Government's failure to comply can bring a claim for damages in this Court. *See, e.g., Collins v. United States,* 15 Ct. Cl. 22, 35 (1879) (noting that a government officer could bring a claim for the compensation to which he was entitled because the law fixing his compensation created a mandatory obligation on the government); *Common Ground Healthcare Coop. v. United States,* 142 Fed. Cl. 38, 52 (2019) (concluding that lack of appropriations did not allow the Government to avoid its obligation to make cost-sharing reduction payments that were required under the Affordable Care Act because the statutory obligation was mandatory); *Martin,* 130 Fed. Cl. 578 (holding that the ADA did not preclude recovery of liquidated damages under the FLSA where the United States failed to pay federal employees on their regularly scheduled payday during a government shutdown).

Sections 206 and 207 of the FLSA create mandatory obligations. They require employers, including the United States, to pay their employees minimum wages and overtime compensation. As this Court noted in *Martin,* "[T]he FLSA states, in part, that the government 'shall pay to each of [its] employees' a minimum wage. The FLSA also requires that the government pay overtime wages to its employees for time worked in excess of forty hours per week 'at a rate not less than one and one-half the regular rate at which he is employed.'" 130 Fed. Cl. at 584 (citing 29 U.S.C. § 206(a) and 29 U.S.C. § 207(a)(1)). Unlike the funding allocations under the Impact Aid Act, the Government's obligation under the FLSA to pay its employees minimum wages and overtime compensation is not subject to the availability of appropriations and the Government is not permitted to reduce its statutory obligations to correspond with amounts appropriated by Congress. *See, e.g., Martin,* 130 Fed. Cl. at 582-84. Accordingly, because the obligations created in Sections 206 and 207 of the FLSA are mandatory, the Defendant cannot rely on *Highland Falls*.

C. The Recent Amendments To The ADA Did Not Cancel The Defendant's Obligations Under the FLSA.

1. The GEFTA Amendments Directed Payments Following the Restoration of Appropriations, But Did Not Modify Or Repeal FLSA Remedies

The Government Employee Fair Treatment Act of 2019 ("GEFTA"), which amended the ADA to require federal employees to be paid as soon as practicable after the shutdown rather than waiting until the employees' next scheduled pay date, does not change the analysis. *See* Pub. L. No. 116-1, 133 Stat. 3. Just as the ADA does not cancel the Government's obligations under the FLSA during a lapse in appropriations, the recent amendments to the ADA do not do so. Like the ADA itself, the GEFTA amendments provide instructions to the Government's agents, but do not "pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." *See Martin,* 130 Fed. Cl. at 583 (quoting *Ferris,* 27 Ct. Cl. at 546).

The GEFTA amendments should not be read to abrogate this Court's decision in *Martin* and the precedent on which it is based in the absence of a clear expression that Congress intended to depart from established judicial interpretation of the ADA when it enacted the GEFTA amendments. *See, e.g. Ryan v. Gonzales,* 568 U.S. 57, 66, 133 S. Ct. 696, 184 L.Ed.2d 528 (2013) (quoting *Merck & Co., Inc. v. Reynolds,* 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."); *Lindahl v. Office of Personnel Management,* 470 U.S. 768, 782 n.15 (1985) (Because Congress is presumed to be aware of administrative or judicial interpretations of the statute, "the fact that Congress amended § 8347 … without explicitly repealing the established *Scroogins* doctrine itself gives rise to a presumption that Congress intended to embody *Scroogins* in the amended version of § 8347.")

There is nothing in the text or legislative history of GEFTA indicating that Congress intended to depart from the established judicial interpretation of the ADA or suggesting that

Congress intended to change the interplay between the ADA and the FLSA when it enacted the GEFTA amendments. The FLSA is not mentioned in the text or legislative history of GEFTA and there is nothing in the text or legislative history indicating that Congress intended to deprive federal employees of their FLSA rights when it enacted GEFTA. Nor is there any indication that Congress intended to modify or repeal Sections 206, 207, or 216 of the FLSA when it enacted the GEFTA amendments. Rather, the legislative history indicates that Congress intended to make sure that federal employees (including those employees who were furloughed and were not entitled to wages pursuant to the FLSA) would be paid as soon as the shutdown ended rather than waiting until their next scheduled pay period to receive their back wages. The language stating that employees will be paid "at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates" was intended to ensure that "we will make sure that we will not wait on their pay period, but they will get it immediately." 105 Cong. Rec., H501 (daily ed. Jan. 11, 2019) (Statement of Rep. Jackson Lee).

2. GEFTA Does Not Modify Or Repeal FLSA Remedies By Implication Because The GEFTA Amendments Can Be Harmonized With The FLSA In The Manner Described In *Martin*.

It is well established that repeals by implication are not favored. *See Morton v. Mancari,* 417 U.S. 535, 549-50 (1974) (citing *Posadas v. National City Bank,* 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936); *Wood v. United States,* 10 L. Ed. 987 (1842); and *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n,* 393 U.S. 186, 193, 89 S. Ct. 354, 358, 21 L. Ed. 2d 334 (1968)). Accordingly, where Congress did not express any intention to modify or repeal FLSA remedies when in enacted GEFTA, it should not be presumed to have done so by implication unless there is no way to reconcile GEFTA with the FLSA. *Id.* at

550 ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.").

In this case, it is clear that the FLSA and ADA are not irreconcilable, as they can be harmonized in the manner described by this Court in *Martin*. *See Martin*, 130 Fed. Cl. at 583-84. This is as true after the GEFTA amendments as it was before them. Prior to the GEFTA amendments, the ADA instructed government officials not to make payments in the absence of an appropriation. While this instruction applied to the official, it did not cancel the government's obligations under the FLSA to pay its employees on their regularly scheduled pay day or eliminate the remedies provided by the FLSA if the government failed to do so. *See id.* at 583. The GEFTA amendments merely instruct government officials to pay back wages and to do so promptly when appropriations are restored rather than waiting until the employees' next scheduled pay day. This does not change the analysis in *Martin*. If the ADA provisions instructing government officials not to make payments during a lapse in appropriations can be reconciled with FLSA provisions that provide a remedy to affected employees, as they were in *Martin*, the amended ADA provision instructing government officials to pay back wages promptly when appropriations are restored does not change the analysis. There is nothing inconsistent, much less irreconcilable, about an instruction to pay back wages promptly after funds are appropriated and the availability of liquidated damages under the FLSA for the untimely payment of wages.

3. The GEFTA Amendments Are Similar to the Language in the Appropriation Passed Following the 2013 Shutdown

GEFTA is similar to the language in the appropriation passed after the 2013 shutdown, which did not affect the result in *Martin.* After the 2013 shutdown, Congress passed an appropriation stating that federal employees affected by the shutdown shall be paid "as soon as practicable after such lapse in appropriations ends." *See* Pub. L. No. 113-46 § 115, 127 Stat. 561

(Oct. 17, 2013). GEFTA similarly states that federal employees shall be paid "at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, 133 Stat. 3. Just as the 2013 appropriation had no impact on the result in *Martin*, GEFTA does not change the analysis regarding the interplay of the ADA and FLSA here.

4. The Government Cannot Rely on GEFTA To Demonstrate Good Faith or Reasonable Grounds For Believing That It Complied With The FLSA Because GEFTA Was Not Enacted Until After The FLSA Violations Had Already Occurred

The Government cannot rely on the GEFTA amendments to demonstrate good faith or reasonable grounds for believing that it complied with the FLSA when it failed to pay employees on their regularly scheduled pay days because GEFTA was not enacted until after the FLSA violations had already occurred. GEFTA was enacted on January 16, 2019, after the Government had already failed to pay employees the compensation required by the FLSA on their regularly scheduled paydays for overtime work performed on December 22, 2018 and for work performed during the pay period that began on December 23, 2018 and ended on January 5, 2019. *See* Complaint ¶¶ 26-36, 41-43. Accordingly, the Defendant cannot claim that it believed it was complying with its FLSA obligations because of the GEFTA amendments when it failed to pay employees on their regularly scheduled payday because the GEFTA amendments had not yet been enacted.

Moreover, the GEFTA amendments should not be applied retroactively to impair vested rights. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 270-71 (1994) ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless congress had made clear its intent."). As the Supreme Court explained:

> [T]he first rule of construction is that legislation must be considered as addressed to the future, not the past. The rule is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. … A retrospective operation will not be given to a statute which interferes with antecedent rights … unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature.'

Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199, 34 S. Ct. 101, 58 L. Ed. 179 (1913) (citations omitted). Accordingly, because the Plaintiffs' right to liquidated damages under the FLSA accrued when they were not paid on their regularly scheduled pay day, the subsequent GEFTA amendments should not be read to retroactively eliminate them, as Congress did not clearly express any intention to retroactively eliminate the Plaintiffs' FLSA remedies when it enacted the GEFTA amendments.

IV. Sovereign Immunity Has Been Waived For The Claims Asserted In This Case.

A. The Federal Circuit Has Recognized that Sovereign Immunity is Waived for FLSA Claims Against the United States

The Federal Circuit has recognized that sovereign immunity is waived for FLSA claims against the United States.[2] *See, e.g., El-Sheikh v. United States*, 177 F.3d 1321, 1323 (Fed. Cir. 1999); *Saraco v. United States*, 61 F.3d 863, 865-66 (Fed. Cir. 1995). When the FLSA was amended in 1974 to include federal employees, 29 U.S.C. § 216(b) became applicable to most federal employees and to their employer, the United States government. *See El-Sheikh*, 177 F.3d at 1323. That section provides, "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 … and in an additional equal

[2] The Tucker Act gives this Court jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress … or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

amount as liquidated damages" and that "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." *Id.*

As this Circuit and others have recognized, this provision contains an express waiver of sovereign immunity for claims seeking unpaid minimum wages, unpaid overtime compensation, and liquidated damages against any employer who violates the FLSA's minimum wage and overtime provisions, including the United States. *See, e.g., El-Sheikh,* 177 F.3d at 1324 ("Because the Act thus authorizes El-Sheikh to sue his 'employer,' the United States, the Act waives the United States' sovereign immunity from such suits."); *Saraco v. United States,* 61 F.3d 863, 865-66 (Fed. Cir. 1995) (noting that the FLSA "explicitly" waived the federal government's sovereign immunity because "the FLSA conferred the right to recover money from the United States, that is, the FLSA contained the requisite waiver of sovereign immunity[.]"; *Cosme Nieves v. Deshler,* 786 F.2d 445, 450 (1st Cir. 1986) ("In the FLSA the United States has clearly waived the sovereign immunity of federal agencies … to suit by their employees."). As this Court explained:

> In this case, **the plaintiffs correctly argue that the FLSA contains an express waiver of sovereign immunity**. In *El-Sheikh v. United States,* 117 F.3d 1321, 1323 (Fed. Cir. 1999), the Federal Circuit explained that the 1974 amendments to the FLSA expanded the definition of "employee" under the Act to include "any individual employed by the government of the United States … in any executive agency," 29 U.S.C. § 203(e)(2)(A), and that **this provision, when read together with the private right of action found in 29 U.S.C. § 216(b), provides an explicit waiver of sovereign immunity authorizing federal employees to sue their employer, the United States**. *El-Sheikh,* 177 F.3d at 1323-24. Thus, in contrast to FCRA, **there is no question that sovereign immunity has been waived under the FLSA**.

King v. United States, 112 Fed. Cl. 396, 399 (2013) (emphases added).

B. Sovereign Immunity is Waived Regardless of Whether the Violation of the FLSA Was Express or Implied

The Defendant argues that because a waiver of sovereign immunity must be express rather than implied, the underlying statutory violation for which immunity is waived must itself be an express violation of the statute in order to fall within the scope of the Tucker Act's waiver of sovereign immunity. Defendant is mistaken. It is the waiver itself that must be express, not the claim for which immunity is waived. As the Federal Circuit explained, "Although the waiver of sovereign immunity must be unequivocal, the money-mandating source of substantive law may be express or implied." *New York & Presbyterian Hosp. v. United States*, 881 F.3d 877, 881 (Fed. Cir. 2018). The Supreme Court made this clear in *United States v. Mitchell*, 463 U.S. 206, 217 n. 16 (1983), noting that to fall within the scope of the Tucker Act waiver of sovereign immunity, "the substantive source of law may grant the claimant a right to recover damages either 'expressly or by implication.'"

To fall within the scope of the Tucker Act's waiver of sovereign immunity, the Plaintiff must simply bring a claim under a statute that creates a right to money damages. "[A] statute creates a right capable of grounding a claim within the waiver of sovereign immunity if … it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472, 123 S. Ct. 1126, 155 L.Ed.2d 40 (2003). To fall within the waiver of sovereign immunity, the Plaintiff must bring a claim under a statute that is "reasonably amenable to the reading that it mandates a right of recovery in damages." *Id.* at 473. As the Supreme Court explained:

> [T]here is simply no question that **the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a claim falls within this category, the existence of a waiver of sovereign immunity is clear.** The question in this case is thus analytically distinct: whether the statutes or regulations at issue can be

> interpreted as requiring compensation. Because the Tucker Act supplies a waiver of immunity for claims of this nature, **the separate statutes and regulations need not** provide a second waiver of sovereign immunity, nor need they **be construed in the manner appropriate to waivers of sovereign immunity.**

United States v. Mitchell, 463 U.S. 206, 218-19 (1983) (emphases added).

C. There is More Than a Fair Inference that the FLSA Creates a Right to Money Damages

Plaintiffs must simply demonstrate that there is at least "a fair inference" that the FLSA creates a right to money damages. *White Mountain Apache Tribe,* 537 U.S. at 473. The "fair interpretation" standard "demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity." *Id.* at 472. "It is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *Id.* at 473.

The FLSA clearly satisfies the "fair interpretation" standard, as it expressly provides a right to money damages for violations of Section 206 or 207, the statute's minimum wage and overtime provisions. 29 U.S.C. § 216(b) provides, "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." Thus, FLSA claims asserting violations of sections 206 and 207 clearly fall within the scope of the Tucker Act's waiver of sovereign immunity.

As explained above, the Plaintiffs in this case have alleged violations of sections 206 and 207 of the FLSA because they allege that the Defendant failed to pay minimum wages and overtime compensation on their regularly scheduled paydays, which this Court has recognized is a violation of the FLSA's minimum wage and overtime requirements. *See Martin,* 130 Fed. Cl. at

584 (citing *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 707, 65 S.Ct. 895, 89 L.Ed. 1296 (1945); *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993) and 29 C.F.R. § 778.106 (2016)) (holding that "defendant's failure to timely pay plaintiffs' wages" on their regularly scheduled pay day due to a lapse in appropriations during a government shutdown "is a violation of the FLSA."). Thus, the Plaintiffs in this case have clearly alleged a claim under a statute that creates a right to money damages, bringing their claims within the scope of the Tucker Act's waiver of sovereign immunity.

D. Section 216(b) Clearly Waives Sovereign Immunity for Violations of Sections 206 or 207 of the FLSA

While the Government notes that "ambiguities in the scope of a waiver" will be construed in favor of the sovereign, Section 216(b) is not ambiguous. It clearly waives sovereign immunity for any violation of sections 206 or 207 of the FLSA by any employer to whom the FLSA applies. As explained above, the United States is an "employer" to whom the FLSA and Section 216(b) applies, and the failure to pay the minimum wages and overtime compensation required by Sections 206 and 207 on the employee's regularly scheduled payday is a violation of those sections. *See, e.g., Martin,* 130 Fed. Cl. at 584. Accordingly, the waiver of sovereign immunity unambiguously applies to claims by federal employees against their employer, the United States, seeking liquidated damages for the failure to pay minimum wages and overtime compensation on their regularly scheduled payday. Because the scope of the waiver is clear, the principle that ambiguity is construed in favor of the sovereign does not apply in this case. *See Griffin v. United States*, 85 Fed. Cl. 179, 187-88 (2008), *aff'd*, 590 F.3d 1291 (Fed. Cir. 2009) (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 128 S. Ct. 2007, 2019 (2008) (noting that there is no basis to depart from the ordinary meaning where " 'there is no ambiguity left for us to construe.' "). Thus, because the Plaintiffs have alleged that the United States violated Section 206 and 207 of the FLSA

by failing to pay them minimum wages and overtime compensation on their regularly scheduled pay days, *see Martin*, 130 Fed. Cl. at 584, sovereign immunity has clearly been waived.

V. Transportation Security Officers Classified As FLSA Non-Exempt Under TSA's Own Policies Should Not Be Excluded From This Case Because Their Claims Do Not Conflict With TSA Policies Implemented Under The Aviation and Transportation Security Act.

Defendant asserts that plaintiffs who are employed by the Transportation Security Administration ("TSA") as Transportation Security Officers ("TSOs") are "FLSA-exempt employees" who may not participate in this case. *See* Defendant's Motion to Dismiss, ECF No. 28, at 10 n.3. However, Defendant's reliance on *Jones v. United States*, 88 Fed. Cl. 789 (2009) is misplaced, as the decision does not preclude TSOs who are classified as FLSA non-exempt employees under the TSA's own policies from asserting FLSA claims that do not conflict with the policies the agency has implemented under the Aviation and Transportation Security Act ("ATSA").

As explained below, *Jones* did not hold that TSOs are excluded from FLSA coverage because they fall within an FLSA exemption. Rather, the court concluded that the ATSA authorized TSA to promulgate policies that supersede conflicting provisions of the FLSA. In this case, however, TSA appears to have adopted the FLSA for TSOs who are classified as FLSA non-exempt under TSA Management Directive No. 1100.55-8 and the accompanying handbook. *See* Transportation Security Administration, TSA Management Directive No. 1100.55-8 (2009), http://afgelocal1040.org/files/MD/1100.55-8.pdf ("MD 1100.55-8"); Transportation Security Administration, TSA MD 1100.55-8 Handbook (2017), http://afgelocal1040.org/files/MD/1100.55-8%20HB.pdf ("Handbook 1100.55-8"). To the extent that the agency has exercised its discretion under the ATSA to implement policies that are consistent with the Plaintiffs' FLSA claims, *Jones* does not require dismissal.

Accordingly, at this stage of the litigation, the Government has not met its burden to prove that TSOs are exempt from the coverage of the FLSA. The Government has not demonstrated that TSA did not exercise its discretion to adopt the FLSA for TSOs who are classified as FLSA non-exempt under TSA Management Directive No. 1100.55-8 nor has the Government demonstrated that TSOs fall within any statutory exemption to the FLSA.[3] While the Government will have an opportunity to present such evidence at summary judgment or trial, it has not demonstrated at this stage that TSOs are exempt from FLSA coverage.

A. The Government's Reliance on *Jones* is Misplaced Because There Is No Conflict Between the FLSA Claims Asserted in this Case and the Compensation Scheme Adopted by TSA

In *Jones*, TSA adopted an overtime compensation policy that conflicted with the overtime calculations in the FLSA:

> In accordance with TSA's overtime compensation scheme, TSA pays Plaintiffs one-and-a-half times (150%) their straight time rate for each overtime hour worked, regardless of whether Plaintiffs had worked regular hours or premium shifts. This is allegedly inconsistent with the overtime calculation set forth in the FLSA, which requires that premium rates be creditable toward overtime compensation. *See* 29 U.S.C. Section 207(h).

88 Fed. Cl. at 791. The court held that because Section 111(d) of the ATSA gave the agency discretion to establish levels of compensation for security screeners "notwithstanding any other provision of law", TSA could establish levels of overtime compensation without regard to the FLSA rates and the agency's policy would supersede conflicting provisions of the FLSA. *Id.* at 792. The court explained, "Because the statute does not clearly express that Congress intended to attribute anything other than its plain meaning to 'notwithstanding,' Section 111(d) must be

[3] Defendant has offered no evidence regarding their job duties, responsibilities, the scope of their authority, the judgment and discretion they exercise, or other factors that may be relevant in determining their exemption status.

interpreted as precluding application of any other ***conflicting*** provisions of law." *Id.* at 792 (emphasis added).

Accordingly, the *Jones* plaintiffs' claims were dismissed not because they were found to be exempt from FLSA coverage but because TSA had exercised its discretion to promulgate an overtime compensation policy that superseded conflicting provisions of the FLSA. This holding does not preclude the claims of TSA plaintiffs in this case because there is no conflict between the FLSA claims asserted here and the compensation scheme adopted by TSA.

B. TSA Has Generally Adopted the FLSA

TSA has generally adopted the FLSA with some modifications. *See* MD 1100.55-8 and Handbook 1100.55-8. The Handbook to Management Directive No. 1100.55-8 includes the following definition of the FLSA:

> Fair Labor Standards Act (FLSA): The FLSA establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting FT and PT workers in the private sector and in Federal, State, and local governments.

Handbook 1100.55-8, at Section A.17.

The policy states that TSA employees may be classified as "FLSA Exempt" or "Non-Exempt." *Id.* at Section B.2. It provides that minimum wage and overtime provisions apply to TSA employees determined to be FLSA non-exempt:

> Non-Exempt Employee: An employee in an identified position covered by minimum wage and overtime provisions. An employee's position is considered non-exempt if it does not meet the exemption criteria defined in Section B3 of this handbook.

Id. at Section A.32.

The Handbook also sets the rate at which overtime will be paid to nonexempt employees:

> Computation of OT [overtime] Pay for a Non-Exempt Employee: A non-exempt employee's OT rate of pay is equal to one and one-half times an employee's hourly regular rate of pay for all OT hours worked.

Id., Section C.3(b).

Thus, TSA has adopted a compensation policy that is consistent with the FLSA minimum wage and overtime provisions that form the basis of the claims in this case. Accordingly, unlike the situation in *Jones*, the ATSA does not prevent the Plaintiffs in this case from seeking relief from actions which violate both the FLSA and the TSA's own compensation policy.

C. It Is Well Established that Government Agencies Must Follow Adopted Policies Even If They Would Otherwise Have Unfettered Discretion

It is well-established that government agencies must follow policies that they have adopted. The Supreme Court held in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), and its progeny, that when a government agency voluntarily adopts a policy, the agency is bound to that policy even if it otherwise would have had unfettered discretion. In *Accardi*, the Supreme Court granted a writ of *habeas corpus* when the Attorney General disregarded applicable procedures for the Board of Immigration Appeals' suspension of deportation orders. Although the Attorney General had final power to deport, the Supreme Court held that while internal procedures were in effect, "the Attorney General denies himself the right to sidestep the Board or dictate its decision." *Id.* at 267.

Applying these principles, the Supreme Court in *Service v. Dulles*, 354 U.S. 363, 373 (1957), vacated a Foreign Service officer's national security discharge for its failure to follow internal regulations. In reviewing the regulation, the Supreme Court explained that "the fact that the Department itself proceeded in this very case under those Regulations down to the point of petitioner's discharge," and the fact that the regulation was intended "to protect the personal liberties of employees," necessitated the agency to follow its own regulation. *Id.* at 373. While acknowledging that the agency was not obligated to adopt "rigorous substantive and procedural

safeguards," the Supreme Court nonetheless held that "having done so he could not, so long as the Regulations remain unchanged, proceed without regard to them." *Id.* at 388.

Similarly, in *Vitarelli v. Seaton,* 359 U.S. 535 (1959), the Supreme Court held in matters such as dismissal of a government employee on loyalty or security grounds that "scrupulous observance of departmental procedural safeguards is clearly of particular importance." *Id.* at 540; s*ee also Yellin v. U.S.,* 374 U.S. 109, 114 (1963) (an executive agency is to be "held to observance of its rules"); *Morton v. Ruiz,* 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."); and *Doe v. U.S. Department of Justice,* 753 F.2d 1092, 1098 (D.C. Cir. 1985) ("Courts, of course, have long required agencies to abide by internal, procedural regulations... even when those regulations provide more protection than the Constitution or relevant civil service laws.").

Accordingly, TSA employees who are classified as FLSA non-exempt under the TSA's own policies and do not fall within any FLSA exemption are not exempt from FLSA coverage and should not be precluded from participating in this case.

CONCLUSION

For the reasons set forth above, the Government's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that Plaintiffs' Opposition to Defendant's Motion to Dismiss was filed electronically and served electronically on June 21, 2019, pursuant to the court's electronic filing system on Defendant's counsel of record:

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