IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JUSTIN TAROVISKY, ET AL.	:	
	:	Civil Action No. 19-4C
Plaintiffs,	:	
v.	:	Judge Patricia E. Campbell-Smith
	:	
THE UNITED STATES OF AMERICA	:	Collective Action
	:	
Defendant.	:	
	:	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO CONDITIONALLY CERTIFY COLLECTIVE ACTION, EQUITABLY TOLL THE FLSA STATUTE OF LIMITATIONS, APPROVE PROPOSED NOTICE AND CONSENT FORMS, AND DIRECT ISSUANCE OF NOTICE PRIMARILY VIA EMAIL,

Heidi Burakiewicz
Kalijarvi, Chuzi, Newman & Fitch, P.C.
818 Connecticut Avenue NW, Suite 1000
Washington, D.C. 20006
(202) 331-9260 (phone)
(877) 219-7127 (fax)
hburakiewicz@kcnlaw.com

Counsel of Record

Judith Galat
Assistant General Counsel
American Federation of Government Employees
80 F Street, N.W.
Washington, DC 20001
(202) 639-6424 (phone)
(202) 639-6441 (fax)
galatj@afge.org

Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

Rules

Appendix of Pertinent Portions of Statutes, Regulations and Documentary Exhibits

QUESTIONS PRESENTED

1. Have Plaintiffs met the modest standard for conditional certification of a proposed collective action under 29 U.S.C. § 216(b) when public government statements and exhibits show that there are no factual differences among the members of the proposed action that are material to issues of liability, that damages can be established formulaically based on the Defendant's own records, that the only issues in the case are likely to be legal rather than factual, and that the Court's conclusions as to those legal issues are likely to be the same for all collective action members?

2. Should the Court equitably toll the two-year FLSA statute of limitations in order to allow adequate time for prospective plaintiffs to complete Consent forms following distribution of the above-referenced Notice?

3. Do the proposed Notice of Lawsuit Against United States ("Notice") and the proposed Consent to Join Collective Action ("Consent") meet the requirements established pursuant to 29 U.S.C. § 216(b) by accurately informing recipients of their rights under the collective action?

4. Should the United States be ordered pursuant to 29 U.S.C. § 216(b) to send the Notice by email to the work email addresses of the members of the proposed collective action who still work for the Defendant as of the date of the Court's Order and to provide information to Plaintiffs to enable Plaintiffs to send the Notice to collective action members who do not work for Defendant on that date?

INTRODUCTION

The United States of America (also referred to as the "government") required Plaintiffs and approximately 400,000 other employees classified as "excepted" or "essential" to work throughout the partial government shutdown beginning on December 22, 2018 ("Excepted Employees"), but it made no provision to pay them on their regularly scheduled paydays during that shutdown for the work that they performed. Accordingly, Plaintiffs filed this suit on behalf of themselves and other Excepted Employees who performed work beginning on December 22, 2018 and continuing until January 19, 2019, but were not paid on their regularly scheduled payday for that work ("Collective Action Members" or "Members").

As is customary in Fair Labor Standards Act ("FLSA") cases, Plaintiffs in *Tarovisky*, along with Plaintiffs in *Avalos et al. v. United States*, No. 19-48C ("*Avalos*") and *Arnold et al. v. United States*, Docket No. 19-59C ("*Arnold*"), request that the Court conditionally certify the proposed collective action, approve the sending of a proposed notice to members of that action, and approve the use of a proposed consent-to-join form for recipients who choose to participate in the case.

Plaintiffs need to make only a modest showing that other Members are similarly situated for this Court to conditionally certify the proposed collective action. Plaintiffs easily meet this standard. Indisputably, the United States acted uniformly as to all Members by failing, as part of the same set of actions, to pay them on a timely basis for work performed between December 22, 2018 and January 19, 2019. The relatively few issues in this case will be legal, not factual, and can be resolved on motions for summary judgment.

Conditional certification is appropriate for two other reasons. Given the size of each individual Member's claim, it would be economically wasteful to force them to litigate individually. Over 30,000 persons contacted Plaintiffs' counsel and completed forms to join the

lawsuit, potentially hundreds of thousands more should be informed about the case and given the opportunity to litigate their claims collectively.[1] *See* ECF No. 58 (July 15, 2020 Status Report).

Despite the large number of potential opt-ins, the lack of factual issues and the small number of legal issues will make this case straightforward to litigate. Due to legal precedent in this Court, *see Martin v. United States*, 130 Fed. Cl. 578 (2017) ("*Martin*"), and the lack of factual issues, Plaintiffs contemplate an expeditious resolution given the need for very little or no discovery.

The conditional certification process should begin with the Court's approval of the language of the Notice of Lawsuit Against United States ("Notice") and the proposed Consent to Join Collective Action ("Consent"). The proposed Notice and Consent provide Members the appropriate information accurately and in language that recipients are likely to understand and that mirrors the language to which the parties jointly agreed, and the Court approved, in *Martin*. *See* Order on Motion to Certify Class, *Martin*, No. 13-834C (Fed. Cl. Oct. 16, 2014), ECF No. 46 (granting motion to certify collective action and the parties' request in ECF No. 45's stipulation as to conditional certification).[2]

Although the size of the proposed collective action does not make the substantive issues or the language of the Notice and Consent more complex, it does necessitate several administrative

[1] Additionally, more than 16,000 plaintiffs have completed forms to join *Avalos* and another approximately 2,500 plaintiffs have completed forms to join *Arnold*. Based on their status reports filed in July 2020, approximately 8,465 plaintiffs have completed forms to join the nine other related cases. On November 26, 2019, the court denied Defendant's motion to consolidate the 12 related cases. ECF No. 36. Given the current litigation posture of the case, Plaintiffs request that the Court grant conditional certification and approve the issuance of notice and other relief requested in this motion without consolidating the related cases. Indeed, Plaintiffs in *Richmond; Quentin Baca*, and *Anello* indicated that the they did not intend to seek conditional certification or the issuance of notice. Response to Motion, *Richmond et al. v. United States*, No. 19-161C (Fed. Cl. Mar. 15, 2019), ECF No. 15; Response to Motion, *Quentin Baca et al. v. United States*, No. 19-213C (Fed. Cl. Feb. 19, 2019), ECF No. 13; Response to Motion, *Anello et al. v. United States*, No. 19-118C (Fed. Cl. Mar. 12, 019), ECF No. 16. If the Court determines that consolidation is required, Plaintiffs request that the cases be consolidated for the limited purposes at issue in this motion and consider consolidation for additional purposes at the appropriate time.

[2] In *Martin*, the plaintiffs worked with the defendant to craft a limited number of separate notices to agencies in unique circumstances, which Plaintiffs are willing to do again here if necessary.

procedures, all of which were followed in *Martin*. Order on Motion to Certify Class, *Martin*, No. 13-834C (Fed. Cl. Oct. 16, 2014), ECF No. 46. The Court should order the Government to provide the Notice by email to the work email addresses of all Members who remain employed by the United States as of the date of the Court's Order, to provide Plaintiffs appropriate information so that Plaintiffs can contact Members who are no longer employed by the United States, and to provide Plaintiffs with names and emails of persons receiving the notice in case the Plaintiffs need to send a second notice if problems arise with the Government's notification process. Email notice from the Government is the least expensive, quickest, and most effective means of alerting collective action members to the existence of the case and of their rights, and other means of notice should be used only when email notice from the Government to its employees is not available.

STATEMENT OF THE CASE

A. The FLSA Requirements

1. Minimum Wage and Overtime Compensation Must be Paid on the Regularly Scheduled Payday

The FLSA requires that employers, including the United States Government, *Berg v. Newman*, 982 F.2d 500, 504 (Fed. Cir. 1992), compensate their non-exempt employees[3] at least a minimum wage for all hours worked[4] and an overtime rate of one and one-half times their regular rate for all hours worked in excess of specified limits. 29 U.S.C. §§ 206(a)(1), 29 U.S.C. § 207(a)

[3] Employees are covered by the FLSA's minimum wage and overtime provisions unless they are "exempt." 29 U.S.C. § 213(a) (App. A2).

[4] The current federal minimum wage is $7.25 per hour. 29 U.S.C. § 206(a)(1)(C) (App. A1). As this Court has described, the OPM minimum wage regulation also provides that agencies, "'shall pay each of [their] employees wages at rates not less than the minimum wage . . . for all hours of work . . . An employee has been paid in compliance with the minimum wage provisions of this subpart if the employee's hourly regular rate of pay . . . for the workweek is equal to or in excess of the rate specified....'" *Martin v. United States*, 117 Fed. Cl. 611, 616 (2014) (quoting 5 C.F.R. § 551.301(a)–(b)).

(App. A1-2);[5] *see also Martin v. United States*, 130 Fed. Cl. 578, 584 (2017) ("*Martin*"). Employers violate the FLSA if they do not pay the mandated minimum wage and overtime on the employees' scheduled payday. *See id.* at 581 (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) and *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993)).

2. Employees Are Entitled to Liquidated Damages When Not Paid on their Regularly Scheduled Payday During Government Shutdowns

Employers that violate the FLSA's provisions are liable for the shortfall in timely minimum wage or overtime payments and an additional amount equal to that shortfall as liquidated damages. 29 U.S.C. § 216(b) (App. A2); *see also Martin*, 130 Fed. Cl. at 584. 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 v. O'Neil*, 324 U.S. 697, 707 (1945) (emphasis added) (quoting 29 U.S.C. § 202(a) (App. 1)); *see Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583–84 (1942) (explaining that liquidated damages are intended to be compensatory rather than punitive; they compensate employees for the losses they may have suffered as a result of not receiving the proper wages at the time they were due).

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 (App. A2-3); *see also Martin*, 130 Fed. Cl. at 584 (citing 29 U.S.C. § 260); *Abbey v. United States*, 106 Fed. Cl. 254, 265 (2012)

[5] Pursuant to RCFC 5.4(a)(2)(D), (G) and 5.4(b)(1)(C), excerpts from statutes, regulations, and documentary exhibits on which Plaintiffs rely are attached as Appendix A. After the citation to each document included in Appendix A is a reference to the pages in that Appendix at which the relevant excerpt can be found.

(same). 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 has the discretion to reduce the amount of liquidated damages or to refrain from awarding them only when the employer meets both conditions. Otherwise, the court must award liquidated damages. *See id*. (quoting 29 C.F.R. § 790.22(b) (App. A6).[6]

Here, the United States will have a difficult time meeting these conditions, in particular, because of the directly applicable legal precedent related to the fall 2013 budget impasse and resulting partial government shutdown. In 2014, this Court ruled that the government's failure to timely pay minimum and overtime wages violated the FLSA. *Martin v. United States*, 117 Fed. Cl. at 616. Then in 2017, the Court awarded liquidated damages because the government failed to demonstrate good faith and reasonable grounds for believing that it did not violate FLSA, awarding such damages on both the failure to pay at least a minimum wage and overtime wages on the employees regularly scheduled payday. *Martin*, 130 Fed. Cl. at 586-87.

B. Factual Background

1. The United States' Policies Regarding Payment to Excepted Employees During the Partial Government Shutdown Between December 22, 2018 and January 25, 2019

Following a Congressional budget impasse, the United States government began a partial shutdown at 12:01 a.m. on December 22, 2018, lasting until January 25, 2019 ("the shutdown").

[6] The types of hardships suffered by Plaintiffs and other collective action members exemplify why Congress chose to award liquidated damages unless an employer can demonstrate both good faith and reasonable grounds for its actions. *See e.g.*, Zou, Li, *Today, hundreds of thousands of federal workers will miss their first paycheck*, VOX (Jan. 11, 2019) (describing many federal workers trying to figure out how they will cover immediate costs like rent, utilities, and medication), https://www.vox.com/2019/1/9/18172329/partial-government-shutdown-paycheck.

During this period, the United States classified all civilian employees in agencies and positions affected by the shutdown as either excepted or non-excepted. *See* OPM Guidance for Government Furloughs, Sect. B.1. (Sept. 2015) ("OPM Guidance"), *available at* https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf (App. A7-11). The U.S. Office of Personnel Management ("OPM") uses the term "excepted" to refer to "employees who are funded through annual appropriations who are nonetheless excepted from the furlough because they are performing work that, by law, may continue to be performed during a lapse in appropriations." *Id*. It decided that about 400,000 employees were "excepted" and thus required to report to work and perform their normal duties during the entire shutdown. *Id.*, Q&A F.2 at 8 (App. A7-11) ("If an excepted employee refuses to report for work after being ordered to do so, he or she will be considered to be absent without leave (AWOL) and will be subject to any consequences that may follow from being AWOL."); U.S. Dep't of Justice, *Justice Mgmt. Div. Lapse in Appropriations Reference Guide.*, Q&A B.1 at 4 (Sept. 22, 2015) ("DOJ FAQ") (defining excepted employees as employees required to work during the shutdown), *available at* https://www.justice.gov/archives/doj/page/file/779511/download (App. A12-16).

Although Members continued to work during the shutdown, they were not timely compensated for the work performed between December 22, 2018 and January 19, 2019, the last day of the last full pay period during the shutdown, as required by the FLSA. Typically, Excepted Employees are paid biweekly, pursuant to schedules that permit their pay rates to be calculated as a certain amount per hour. *See e.g.*, Nat'l Fin. Ctr., Office of the Chief Fin. Officer, USDA, Form No. NFC-1217, *Pay Period Calendars 2018 and 2019* ("Pay Period Calendars" with each calendar listing biweekly pay periods 1 to 26), *available at* https://www.nfc.usda.gov/Publications/Forms/pay_period_calendar.php (App. A. 17-19). The first pay period affected by

the shutdown commenced on Sunday, December 9, 2018 and ended Saturday, December 22, 2018. *Id*. While Members received a partial payment on their regularly scheduled payday for this pay period,[7] they were not compensated on their scheduled payday, at a minimum, for the overtime work performed on December 22, 2018. *See* Off. of Pers. Mgmt. Guidance, *Special Instructions for Agencies Affected by a Possible Lapse in Appropriations Starting on December 22, 2018*, p. 1 (Dec. 2018) ("OPM's Special Instructions") (App. A20-24) ("Assuming the lapse is in effect during the time that timekeeping is being finalized, the paychecks may not include pay for any work performed on Saturday, December 22."), *available at* https://www.whitehouse.gov/wp-content/uploads/2018/ 12/Special-Instructions-for-a-Possible-December-22-Lapse.pdf.

The next pay period affected by the shutdown commenced on Sunday, December 23, 2018 and ended on Saturday, January 5, 2019. Members received no payment on their regularly scheduled payday for work performed during this second pay period.[8] *Id.* ("No pay may be provided for excepted work during the December 23-January 5 pay period until the lapse in appropriations has ended."); *see also* Timm, Jane C., *Government employees could go without pay for nearly a month, at least*, NBC NEWS (Jan. 7, 2019) (Acting White House Chief of Staff John Michael Mulvaney declaring that without an agreement by January 8th, "payroll will not go out as originally planned on Friday night [January 11, 2019]."), https://www.nbcnews.com/politics/donald-trump/government-employees-could-go-without-pay-nearly-month-n955741.

The final pay period affected by the shutdown commenced on Sunday, January 6, 2019 and ended on Saturday, January 19, 2019. Members again received no payment on their regularly scheduled payday for work performed during the third pay period. Heckman, Jory *State*

[7] Depending on the agency, an employee's scheduled payday was between December 28 and December 31.

[8] Depending on the agency, an employee's scheduled payday for the second pay period was between January 11 and January 14.

Department will pay employees for next 15 days amid 'strict budget constraints', FED. NEWS NETWORK (Jan. 18, 2019) ("furloughed and exempt agency employees will not receive back pay for dates between Dec. 22, 2018 and Jan. 19, 2019 until Congress and President Donald Trump reach an agreement to end the lapse in agency funding."), https://federalnewsnetwork.com/government-shutdown/2019/01/state-department-will-pay-employees-for-next-15-days-amid-strict-budget-constraints/; *see also* Kelley, Riley *Government shutdown: Working without pay*, AP NEWS (Jan. 19, 2019) ("Employees deemed essential by the U.S. government continue to go to work each day without pay[.]"), https://apnews.com/0bc58e03db384715996d223265a3e8a7.

2. The United States Uniformly Failed to Pay its Excepted Employees Minimum Wages on the Scheduled Payday

The United States was obligated to pay Members, who are non-exempt under the FLSA, on their scheduled paydays at least minimum wage for each hour worked. Just as various agencies and officials had warned, as discussed in the section above (*see e.g.*, OPM's Special Instructions, p. 1 (App. A20-24)), Members were not paid at all on their scheduled paydays, let alone paid a minimum wage, for any of the time worked between December 23, 2018 and January 19, 2019. This Court applies a workweek standard for measuring minimum wage, meaning the government committed an FLSA violation if any Member was paid less than $290 in any given week ($7.25 multiplied by 40 hours) on their regularly scheduled payday. *Martin*, 117 Fed. Cl. at 624.

The United States fell short of paying Members the minimum wage on their scheduled payday, and these amounts are relatively easy to determine, especially considering that the government has consolidated the majority of its agencies' payroll services into five shared centers. *See* Off. of Pers. Mgmt., *Migration Planning Guidance: Service Delivery*, OPM HR Line of Business, http://www.opm.gov/services-for-agencies/hr-line-of-business/migration-planning-guidance/service-delivery/ (last visited Nov. 6, 2020) (identifying the five payroll providers that

deliver biweekly payroll services to the majority of federal employees). Even though non-exempt Members eventually received payment, they are entitled to liquidated damages for the failure to pay at least the minimum wage on a timely basis.[9]

3. The United States Uniformly Failed to Pay its Excepted Employees Overtime Compensation on the Scheduled Payday

During the shutdown, many Excepted Employees, who are non-exempt under the FLSA, worked in excess of the applicable thresholds for overtime pay. Despite working, the United States did not pay those Members overtime compensation on their scheduled paydays for the overtime performed. *See* OPM's Special Instructions, p. 1 (App. A20-24). Specifically, the government failed to pay Members for overtime worked on December 22, 2018, which coincided with the first day of the shutdown. The government also failed to pay Members on their regularly-scheduled payday for overtime work performed between December 23, 2018 and January 5, 2019, just as it failed to pay them minimum wage for work on those days. *See* OPM's Special Instructions, p. 1 (App. A2-24) (stating Excepted Employees will not receive overtime payments until new appropriation or continuing resolution passed). Finally, the government failed to pay members for overtime worked and minimum wages on their regularly-scheduled pay day for the pay period ending on January 19, 2019. *See* Kelley, Riley *Government shutdown: Working without pay*, AP NEWS (Jan. 19, 2019). Even though non-exempt Members eventually received payment, they are entitled to liquidated damages for the failure to pay overtime on a timely basis.

[9] While payment varied widely by Agency, Agencies began making payments to furloughed employees on January 31, 2019, six days after the shutdown ended. *See* Yoder, Eric, *Here's what federal employees should know about their shutdown back pay*, WASH. POST (Jan. 29, 2019), https://www.washingtonpost.com/politics/heres-what-furloughed-employees-should-know-about-their-back-pay/2019/01/29/69a3c70e-23e1-11e9-90cd-dedb0c92dc17_story.html.

C. Procedural Background

Two Plaintiffs filed the Complaint initiating this case on December 31, 2018. Since then, information about the lawsuit has spread through word-of-mouth and media coverage, but without any formal individual notice. The shutdown continued, and on January 9, 2019, the original Plaintiffs amended the Complaint alleging the additional violations described above. As of this filing, more than 30,000 persons have contacted Plaintiffs' counsel and completed forms to join the lawsuit through an online electronic sign-up form.[10] *See* ECF No. 58 (July 15, 2020 Status Report). With its related motion for certification, the Plaintiffs filed a Second Amended Complaint including an additional 15 named plaintiffs affected by the government shutdown as a sample of the employees who contacted Plaintiffs' counsel from various agencies. *See* ECF No. 17 (Amended Complaint).

ARGUMENT

I. PLAINTIFFS EASILY HAVE MADE THE "MODEST FACTUAL SHOWING" THAT PROPOSED MEMBERS ARE SIMILARLY SITUATED TO THE PLAINTIFFS

A. The Court Should Conditionally Certify a Proposed Collective Action Upon a Modest Showing that Other Individuals Are Similarly Situated

The FLSA authorizes Plaintiffs to bring suit on behalf of similarly situated individuals. 29 U.S.C. § 216(b) (App. A2) ("An action to recover the liability . . . may be maintained against any employer . . . by any one or more employees for and on behalf of himself or themselves and other employees similarly situated."). It also gives those similarly situated individuals the right to opt-in to this case. *Id.* ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such

[10] Plaintiffs are working with A.B. Data, a well-respected Claims Administration company and have prepared a website and electronic sign-up process that can accommodate hundreds of thousands of Members. More information can be found about A.B. Data at https://abdataclassaction.com (last visited Nov. 6, 2020).

action is brought."). As stated above, the government consented to this Court's certification of a similar collective action in *Martin*. *See* Order on Motion to Certify Class, *Martin*, No. 13-834C (Fed. Cl. Oct. 16, 2014), ECF No. 46.

As the Supreme Court has noted, this ability to bring collective actions provides several important benefits:

> A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989) (internal citations omitted);[11] *see Whalen v. United States*, 85 Fed. Cl. 380, 387 (2009) (quoting *Hoffman-LaRoche*, 493 U.S. at 170); *Gayle v. United States*, 85 Fed. Cl. 72, 80 (2008) (same).[12]

The Court of Federal Claims engages in a two-step process to determine whether FLSA cases should proceed as collective actions. *See Whalen*, 85 Fed. Cl. at 383, 386 (applying two-step process to certify collective action); *Gayle*, 85 Fed. Cl. at 77, 80 (same). During the "conditional certification" or "notice" stage, the plaintiffs need only make a "modest factual showing" that potential class members are similarly situated, and the inquiry is "not particularly searching." *Whalen*, 85 Fed. Cl. at 384 ("[T]he court's task in conditionally certifying a collective action is limited, involving only a modest factual showing of a common policy or plan.") (quotations omitted); *see Gayle*, 85 Fed. Cl. at 77 (authorizing conditional certification in light of lenient evidentiary standard).

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[11] *Hoffman-LaRoche* involved claims brought pursuant to the Age Discrimination in employment Act of 1967. That statute incorporates the FLSA enforcement provisions set forth in 29 U.S.C. § 216(b) (App. A2).

[12] The ability of individuals to pursue wage and hour violations collectively is a classic example of making it possible to have "an effective assertion of many claims which otherwise would not be enforced, for economic or practical reasons." *Greenfield v. Villager Indus.*, 483 F.2d 824, 831 (3d Cir. 1973).

This burden may be met through pleadings demonstrating that plaintiffs and potential collective action members were "together the victims of a single decision, policy, or plan."[13] *Whalen*, 85 Fed. Cl. at 384. Any "distinctions . . . in job titles, functions, or pay will not stand in the way of conditional certification when an overarching nexus is present." *Whalen*, 85 Fed. Cl. at 386 (quotations omitted). The Court should not consider how it may resolve the disputed issues during this phase. *Id.*

Upon conditional certification, the Court should authorize the sending of a notice to the similarly situated individuals informing them of the pendency of the action and providing them with the opportunity to opt in. *See id.* at 384–85 (citing *Castillo, Inc. v. P&R Enters., Inc.*, 517 F. Supp. 2d 440, 449–50 (D.D.C. 2007)). The case then proceeds as a "representative action" throughout discovery. *See id.* at 385. During the second phase, after the conclusion of discovery, defendants may move to decertify the conditional class if the record establishes that the plaintiffs are not actually similarly situated. *Id.* at 383; *Gayle*, 85 Fed. Cl. at 78.

Plaintiffs propose the following class definition:

> Federal employees (a) identified for purposes of the Fair Labor Standards Act ("FLSA") as employees, pursuant to 2 U.S.C. § 1301 or 29 U.S.C. § 203(e); (b) classified as "non-exempt" under the FLSA; (c) declared "Excepted Employees" during the 2018-2019 partial government shutdown; (d) worked at some time between December 22, 2018 and January 19, 2019, other than to assist with the orderly shutdown of their office; and (e) not paid on their regularly scheduled payday for work between December 22, 2018 and January 19, 2019.

[13] An FLSA collective action is not subject to the class certification standards of Rule 23 such as the numerosity, commonality, and typicality requirements. *Gayle*, 85 Fed. Cl. at 77 (citations omitted) ("Collective actions are distinct from class action lawsuits and thus are not subject to the requirements governing class actions set forth in Fed. R. Civ. P. 23 . . . or its counterpart in this court . . . .").

B. Plaintiffs Have Made the Modest Factual Showing for Conditional Certification

Plaintiffs have met the lenient burden of making a modest factual showing that they are similarly situated to all Proposed Members. These employees, including Plaintiffs, are similar as to all relevant facts, including:

- The United States designated each of them an Excepted Employee for purposes of the shutdown;
- As Excepted Employees, each was required to work throughout the shutdown, OPM Guidance, Sec. B.1 at p. 1 (App. A7-11); DOJ FAQ, Q&A B.1 at p. 4 (App. A12-A16);
- Each is typically paid on a two-week pay period schedule, Pay Period Calendars (App. A17-19);
- For many of them, the first pay period affected by the shutdown was December 9, 2018 through December 22, 2018, when Excepted Employees were not paid on their regularly scheduled paydays for overtime worked on December 22, 2018, OPM's Special Instructions, at p. 1 (App. A20-24);
- For each of them, the second pay period affected by the shutdown was December 23, 2018 through January 5, 2019, when Excepted Employees were not paid on their regularly scheduled paydays for work performed during that period, *id.*;
- For each of them, the third pay period affected by the shutdown was January 6, 2019 through January 19, 2019, when Excepted Employees were not paid on their regularly scheduled paydays for work performed during that period, *id.*;

- The United States did not make any effort to pay any Members on their scheduled paydays minimum wage for work performed during the shutdown, *id.*;
- Upon information and belief, the United States did not rely on any advice of counsel or any guidance from regulators when it decided not to pay any of the Members on their scheduled paydays minimum wage for work performed during the shutdown, and instead acted in direct disregard of an earlier ruling made by this Court, *see Martin*;
- The United States did not make any effort to pay any of the Members on their scheduled paydays for overtime worked between December 22, 2018 and January 19, 2019, OPM's Special Instructions, at p. 1 (App. A20-24); and
- Upon information and belief, the United States did not rely on any advice of counsel or any guidance from regulators when it decided not to pay any of the Members on their scheduled paydays for overtime worked during the shutdown, and instead acted in direct disregard of the rulings of this Court, *see Martin*.

These common facts establish that the Members were "the victims of a single decision, policy, or plan" to make them work without paying them on their regularly scheduled payday. *Whalen*, 85 Fed. Cl. at 384; *Gayle*, 85 Fed. Cl. at 77. Because the Members are similarly situated factually, they also are similarly situated as to the critical legal questions. Though previously settled by this Court in *Martin*, these questions are likely to be the principal focus of the litigation:

- Is an employer such as the United States liable under the FLSA for not paying employees minimum wage or overtime pay on their regularly scheduled paydays?
- Even if employers normally are liable under the FLSA for not paying employees minimum wage or overtime pay on their regularly scheduled paydays, did the Anti-

Deficiency Act, 31 U.S.C. § 1341 *et seq.*, supersede or impliedly amend the FLSA so as to insulate the United States from liability?

- Did the United States act in good faith and with reasonable grounds for believing that it was acting in conformity with the FLSA in not timely paying Members notwithstanding the contrary decision in *Martin*?

The showing of all of these similarities, including that Members were all victims of a single set of actions by the United States, easily meets the standard for conditional certification.

C. The Large Number of Inquiries Also Supports Conditional Certification

In addition, conditional certification is warranted by the fact that more than 30,000 persons contacted Plaintiffs' counsel and completed forms to join the lawsuit. This is significant for two reasons. First, if the Court were to decide that the original Plaintiffs and Members are not similarly situated, the logical implication is that joinder of plaintiffs is improper under RCFC 20(a)(1). The Court would be faced with thousands of individual suits at greatly inflated costs to the parties and the Court. *Hoffman-LaRoche*, 493 U.S. at 170 (collective actions benefit the judicial system "by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity"). For example, individual Plaintiffs who did not work any overtime are entitled to $1,160 on the minimum wage claim. The costs to litigate over claims of this size are prohibitive. *See Hughes v. Kore of Ind. Enter., Inc*, 731 F.3d 672, 675 (7th Cir. 2013) (Posner, J.) (explaining that small value case is appropriate for class certification because of the "difficulty of finding a lawyer willing to handle an individual suit in which the stakes are $100 or an improbable maximum of $1000," even though if "successful the plaintiff's lawyer would be entitled to a fee paid by the defendant" because a reasonable attorneys' fee to obtain a $100 judgment probably would not be "enough to interest a competent lawyer").

Second, the fact that thousands of potential Members already have indicated that they wish to join the case shows that there is significant interest among Members in the case. Those who already have contacted the firm received information about the case through media coverage and word-of-mouth, but the ability to join should not be limited to the government employees who happen to learn about the case. The Court instead should conditionally certify the action and direct the sending of notice to all Members.

II. The Court Should Order Equitable Tolling of the Statute of Limitations

Equitable tolling of the statute of limitations is necessary in this matter to avoid substantial prejudice to the potential opt-in plaintiffs who are not aware of this litigation and have not yet completed opt-in forms to join this or another related case. Plaintiffs here have actively pursued their claims in the context of complex proceedings involving multiple related lawsuits that have required significant judicial resources and necessarily slowed the processing of this case. Moreover, there is no meaningful alternative to equitable tolling. Even an expedited ruling in favor of Plaintiffs on the motion for conditional certification would not fully address the undue prejudice to the potential opt-in plaintiffs because it is unlikely that the parties are will agree on the notice language, send out the notice to potential opt-in plaintiffs, and provide adequate time for these potential opt-in plaintiffs to consent to join this lawsuit before the two-year FLSA statute of limitations begins to expire in December 2020. As set forth below, the circumstances in this case are extraordinary and warrant equitable tolling of the statute of limitations.

A. Equitable Tolling of the Statute of Limitations Is Available in FLSA Actions

The U.S. Court of Federal Claims has consistently recognized its authority to equitably toll the FLSA statute of limitations in actions against the federal government. *See Moreno v. United States*, 88 Fed. Cl. 266, 282 (2009) (tolling statute of limitations in FLSA action); *see also Crawley*

v. United States, 145 Fed. Cl. 446, 452 (2019) (recognizing that the FLSA statute of limitation can be equitably tolled); *Abbey v. United States*, 106 Fed. Cl. 254, 287 (2012) (recognizing that the Court may equitably toll the FLSA statute of limitations); *Lange v. United States*, 79 Fed. Cl. 628, 632 (2007) (concluding that equitable tolling is available in appropriate FLSA cases); *Christofferson v. United States*, 64 Fed. Cl. 316, 326 (2005) ("the weight of authority favors equitable tolling of FLSA claims"); *Ewer v. United States*, 63 Fed. Cl. 396, 402 (2005) ("the FLSA limitations period is not a statute of repose; thus, principles of equitable tolling apply"); *Hickman v. United States*, 43 Fed. Cl. 424, 427 (1999) ("[t]he principles of equitable tolling apply to the [FLSA] limitations"), *aff'd* 232 F.3d 906 (Fed. Cir. 2000); *Udvari v. United States*, 28 Fed. Cl. 137, 139 (1993) (assuming equitable tolling of FLSA is permissible).

The Federal Circuit has similarly indicated that FLSA cases are eligible for equitable tolling. *See United States v. Cook*, 795 F.2d 987, 994 (Fed. Cir. 1986) ("[w]hen and if the time comes, the district court will presumably apply the doctrine of equitable tolling consistently with Congress' intent in enacting the particular statutory scheme set forth in FLSA."). The Federal Circuit also affirmed *Hickman v. United States*, 43 Fed. Cl. 424 (1999), which unequivocally concluded that the FLSA statute of limitations is subject to equitable tolling. *Hickman v. United States*, 232 F.3d 906 (Fed. Cir. 2000) (affirming without published opinion). While the Supreme Court has not directly addressed equitable tolling with respect to the FLSA, it has made clear that a presumption of equitable tolling applies to actions against the United States. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990) (suggesting that equitable tolling is properly applied to cases involving faultless plaintiffs). Although this presumption may be rebutted with statutory language evincing congressional intent to the contrary, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), this Court found no such evidence in the statutory language

of the FLSA, *see Moreno*, 88 Fed. Cl. at 282; *Christofferson*, 64 Fed. Cl. at 325-26; *Hickman*, 43 Fed. Cl. at 427.[14]

B. Plaintiffs Are Entitled to Equitable Tolling of the Statute of Limitations

Plaintiffs seek to equitably toll the two-year FLSA statute of limitations[15] for potential opt-in plaintiffs due to the extraordinary circumstances in this proceeding. A court may equitably toll the statute of limitations where the plaintiffs: (1) have diligently pursued their rights, and (2) extraordinary circumstances prevent them from timely filing the claims. *See K. G. v. Sec'y of Health & Human Servs.*, 951 F.3d 1374, 1379 (Fed. Cir. 2020); *Sneed v. Shinseki*, 737 F.3d 719, 725 (Fed. Cir. 2013); *Viriri v. White Plains Hosp. Med. Ctr.*, 320 F.R.D. 344, 355 (S.D.N.Y. 2017) (applying this standard in the FLSA context).

Courts have routinely found that delays outside of the plaintiff's control, such as a stay of the proceedings or the length of time motions are pending, to be extraordinary circumstances warranting equitable tolling of the statute of limitations. *See, e.g., McGlone v. Contract Callers, Inc.*, 867 F.Supp.2d 438, 445 (S.D.N.Y. 2012) ("[w]hile plaintiffs wishing to pursue their rights cannot sit on them indefinitely, those whose putative class representatives and their counsel are

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[14] Furthermore, other circuits confronted with this issue have concluded that equitable tolling is permissible in FLSA actions. *See, e.g., Sandoz v. Cingular Wireless, L.L.C.*, 700 F. App'x 317, 321 (5th Cir. 2017) (assuming availability of equitable tolling under FLSA); *Rodriguez v. Cnty. of Nassau*, 547 F. App'x. 79, 81 (2d. Cir. 2013) (same); *Chao v. Va. DOT*, 291 F.3d 276, 283–84 (4th Cir. 2002) (same); *Archer v. Sullivan Cnty.*, Nos. 95-5214/95-5215, 1997 U.S. App. LEXIS 33052, at *10–14 (6th Cir. Nov. 14, 1997) (applying five factor test to determine whether equitable tolling of FLSA claim warranted); *Partlow v. Jewish Orphans' Home, Inc.*, 645 F.2d 757, 760–61 (9th Cir. 1981), abrogated on other grounds by Hoffman-La *Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), (equitably tolling FLSA statute of limitations); *see also Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1039 (9th Cir. 2013) (tolling FTCA claim based in part on availability of equitable tolling under FLSA); *Hodgson v. Humphries*, 454 F.2d 1279, 1283–84 (10th Cir. 1972) (holding that statute of limitations is an affirmative defense under the FLSA rather than a jurisdictional limitation). Therefore, these legal precedents, as outlined above, support the application of the equitable tolling doctrine to the FLSA statute of limitations in an action against the federal government.

[15] The FLSA statute of limitations is two years or three years, depending on whether the employer's violation was willful. 29 U.S.C. § 255. While Plaintiffs contend that the United States willfully violated the FLSA, they recognize that the Court may disagree. If the two-year statute of limitations were to apply (it would run in December 2020 or January 2021 depending on the pay period), potential opt-in plaintiffs nonetheless may be time-barred from joining this action.

diligently and timely pursuing the claims should also not be penalized due to the court's heavy dockets and understandable delays in rulings."); *Israel Antonio–Morales v. Bimbo's Best Produce, Inc.*, 2009 WL 1591172, at *1 (E.D.La. Apr. 20, 2009) (collecting cases for the proposition that "[c]ourts routinely grant equitable tolling in the FLSA collective action context to avoid prejudice to actual or potential opt-in plaintiffs that can arise from the unique procedural posture of collective actions"); *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 200 (S.D.N.Y.2006) (granting equitable tolling of the statute of limitation while the collective action certification was pending to avoid prejudice to the potential opt-in plaintiffs); *Owens v. Bethlehem*, 630 F.Supp. 309, 312 (S.D.W.Va. 1986) (tolling where ruling on class certification was pending for five months "[t]hrough no fault of the Plaintiffs or the Defendant"); *see also Crawley*, 145 Fed. Cl. at 452 (acknowledging that "courts outside of this circuit have held that equitable tolling may be appropriate during the time it takes the court to consider a motion for conditional certification").

For instance, in *Yahraes v. Rest. Assocs. Events Corp*, the court determined that plaintiffs were entitled to equitable tolling of the FLSA statute of limitations due to extraordinary nature of the proceedings, which caused a delay in the issuance of notice to potential opt-in plaintiffs. No. 10-CV-935 SLT, 2011 WL 844963, at *3 (E.D.N.Y. Mar. 8, 2011). The court had previously issued a stay in the proceedings, and then took months to rule on plaintiffs' motion for collective action certification. *Id.* at *1-*2. The court determined that "[t]he delay caused by the time required for a court to rule on a motion, such as one for certification of a collective action in a FLSA case, may be deemed an 'extraordinary circumstance[ ]' justifying application of the equitable tolling doctrine." *Id*. at *2. The court ultimately concluded these delays warranted the FLSA statute of limitations to be tolled for 92 days to account for the 37-day period during which

the case was stayed and the 55-day period it took the court to rule on the plaintiffs' motion for certification of the collective action. *Id*. at *3.

Similarly, in *Viriri*, the plaintiffs requested the court equitably toll the FLSA statute of limitations for the time taken to rule on their motion for conditional certification. 320 F.R.D. at 354–55. The court acknowledged that there was "a substantial gap between the time the [m]otion was fully submitted and the date of this decision, after which notice will be mailed out and potential opt-in plaintiffs will be made aware of their right to participate in this [a]ction." *Id.* at 355. As a result, the court tolled the potential opt-in plaintiffs' claims during the period it took the court to consider the plaintiffs' motion for conditional collective action certification and to avoid undue prejudice to the potential opt-in plaintiffs. *Id.*

Here, Plaintiffs' case has been delayed due to the complexity of these proceedings and the substantial judicial resources necessary to address this and multiple related cases. On January 14, 2019, Plaintiffs initially filed their motion to conditionally certify the collection action. ECF No. 9. On January 16, 2019, the Court struck Plaintiff's motion for conditional collective action certification. ECF No. 11. The Court also stayed proceedings due to the federal government shutdown and instructed the parties to confer and file a joint status report, which was to include a proposed agreed-upon filing deadline for plaintiffs to refile their motion for conditional collective action certification. ECF No. 11. The parties were unable to agree upon a proposed schedule for plaintiffs to refile their motion to certify. *See* ECF No. 13. On February 15, 2019, the Court lifted the stay on proceedings but did not issue a schedule for plaintiffs to refile their motion for conditional collective action certification. ECF No. 16. On March 4, 2019, the Court determined that it would not issue a schedule in this matter until it ruled on Defendant's Motion to Consolidate Cases. ECF No. 23. On November 26, 2019, the Court denied Defendant's Motion to Consolidate

Cases but did not issue a scheduling order in this matter. ECF No. 36. Moreover, Defendant filed a motion to dismiss, which has been pending since May 3, 2019. ECF No. 28. The Court has not yet issued a scheduling order for this matter, and as such, it remained uncertain as to whether Plaintiffs could refile their motion for conditional collective action certification.

Even absent the pandemic, which has caused a considerable strain on Plaintiffs' counsel as they have had to adapt to remote work and illnesses, the circumstances surrounding this case, as outlined above, are extraordinary and warrant equitable tolling of the statute of limitations. Even if Plaintiffs could have filed their motion for conditional collective action certification immediately after the Court ruled on the motion for consolidation, the 30-day stay of proceeding and the 267-day halt in proceedings to rule on Defendant's consolidation motion, as well as the potential period of time the Court will take to rule on Plaintiffs' motion for conditional collective action certification, would still warrant equitable tolling of the statute of limitations. *See Viriri*, 320 F.R.D. at 355 (granting equitable tolling for period the court took to consider plaintiffs' motion for collective action certification to avoid prejudice to potential opt-in plaintiffs); *Israel Antonio-Morales*, 2009 WL 1591172, at *2 ("[p]otential opt-in plaintiffs will be substantially prejudiced by the entrance of the requested stay, unless this Court tolls the statute of limitations for potential opt-in plaintiffs for the period of the stay.").

Based on the foregoing, Plaintiffs respectfully request that the Court equitably toll the statute of limitations for potential opt-in plaintiffs for at least the period of time the case was stayed from January 16, 2019 to February 15, 2019, the period of time when the motion to consolidate was pending from March 4, 2019 to November 26, 2019, and for the time it takes the Court to consider Plaintiffs' motion for conditional collective action certification.

III. THE COURT SHOULD ADOPT THE JOINT NOTICE PROPOSAL FROM THE *TAROVISKY, ARNOLD,* AND *AVALOS* PLAINTIFFS

The plaintiff groups representing the vast majority of plaintiffs who have already submitted consent forms to join this and related litigation are the plaintiffs in *Tarovisky* (more than 30,000 plaintiffs), *Avalos*, No. 19-48C (more than 16,000 plaintiffs), and *Arnold*, No. 19-59C (approximately 2,500 plaintiffs) (collectively "Plaintiffs Group") and jointly request conditional certification and the issuance of notice. The Plaintiffs Group, who are each affiliated with unions representing federal employees affected by the 2018-2019 government shutdown, jointly request that to protect the interests of potential opt-in plaintiffs who are not aware of this litigation and have not yet completed opt-in forms to join this or another related case be sent one of the following notices depending on his or her bargaining unit:

- *Avalos et al. v. United States*: Notice to be sent to employees in bargaining units for which the National Treasury Employees Union ("NTEU") is the exclusive representative (Attach. A, Notice Version 1);

- *Arnold et al. v. United States*: Notice to be sent to employees in bargaining units for which the National Federation of Federal Employees ("NFFE"); the International Association of Machinists and Aerospace Workers ("IAMAW"), the National Association of Government Employees ("NAGE"), the National Weather Service Employees Organization ("NWSEO"), the Professional Aviation Safety Specialists, AFL-CIO ("PASS"), or the Laborers' International Union of North America ("LiUNA") are the exclusive representative (Attach. B, Notice Version 2); and

- *Tarovisky et. al v. United States*: Notice to be sent to all other affected employees not receiving notice in one of the above listed notices including employees in bargaining units for which American Federation of Government Employees ("AFGE") is the exclusive representative (Attach. C, Notice Version 3).

To date, no other plaintiffs have moved to request conditional certification or the issuance of Notice. Indeed, plaintiffs in *Richmond; Quentin Baca*, and *Anello* indicated that they did not intend to seek conditional certification or the issuance of notice. *See* Response to Motion,

Richmond et al. v. United States, No. 19-161C (Fed. Cl. Mar. 15, 2019), ECF No. 15; Response to Motion, *Quentin Baca et al. v. United States*, No. 19-213C (Fed. Cl. Feb. 19, 2019), ECF No. 13; Response to Motion, *Anello et al. v. United States*, No. 19-118C (Fed. Cl. Mar. 12, 019), ECF No. 16. Accordingly, there is no other pending or alternative proposal to notify remaining potential opt-in plaintiffs of their rights in this litigation.

IV. THE COURT SHOULD APPROVE THE LANGUAGE OF THE PROPOSED NOTICE AND CONSENT FORMS

Section 216(b)'s affirmative permission for employees to proceed on behalf of similarly situated employees necessarily grants trial courts the authority and imposes on them the responsibility to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to the commands of the Federal Rules of Civil Procedure. As part of this duty, the Supreme Court has directed that trial courts should "facilitate[] notice to potential plaintiffs" early in the litigation. *Hoffman-LaRoche*, 493 U.S. at 169. Notice is appropriate upon the grant of conditional certification. *See Whalen*, 85 Fed. Cl. at 384–85 ("If the court finds that plaintiffs have made a 'modest factual showing' of common circumstance, then it may conditionally certify the collective action and send notice to potential collective action plaintiffs.") (citation omitted); *Gayle*, 85 Fed. Cl. at 77 (explaining that if a collective action is conditionally certified, "notice may be sent to potential collective action plaintiffs").

As the Supreme Court has explained, a Court-authorized notice to similarly situated employees must be "timely, accurate, and informative." *Hoffmann-La Roche*, 493 U.S. at 172. Plaintiffs' proposed Notice and Consent forms meet this standard. In addition to closely mirroring the language of the court approved Notice and Consent forms in *Martin*, to which the parties jointly agreed and presented to the court, s*ee* Order on Motion to Certify Class, *Martin*, No. 13-834C, (Fed. Cl. Oct. 16, 2014), ECF No. 46, they accurately inform Members of the claims in the case,

their rights if they join the case, the deadline for joinder, the identity of counsel, the important terms of the retainer agreement, and the fact that the Court has not ruled on the merits, among other topics. They do so in an evenhanded manner while avoiding legalese. The Court should approve both documents.

V. THE UNITED STATES SHOULD SEND THE NOTICE ELECTRONICALLY TO ALL MEMBERS WHO STILL ARE EMPLOYED BY IT AND PROVIDE CONTACT INFORMATION TO PLAINTIFFS

An accurate and informative notice does no good to the extent that members of a proposed collective action are unaware of it. For that reason, a court presiding over an FLSA collective action has "a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Hoffman-La Roche*, 493 U.S. at 170–71. The goal that the notification process be accomplished efficiently and properly is, of course, consistent with the general mandate that the Federal Rules of Civil Procedure be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Given deficiencies in the government's provision of notice in *Martin*, plaintiffs propose a two-step notice process by which the government sends notice by email to its current employees and provides the same contact information to plaintiffs' counsel to disseminate a second notice if similar problems take place as did in *Martin*. *See* Motion for Miscellaneous Relief, *Martin*, No. 13-834C, (Fed. Cl. June 24, 2015), ECF No. 87 (outlining problems resulting in numerous collective action members not receiving the court approved notice). The most speedy and inexpensive means of providing notice in this case is to require the United States through its payroll administrators to send notice by email, with proof of service to Plaintiffs' counsel, to the work addresses of all Members who are still employed by the Government as of the date of the Court's Order. Moreover, this Court approved this procedure in *Martin*. Order on Motion to Certify Class,

Martin, No. 13-834C (Fed. Cl. Oct. 16, 2014), ECF No. 46. Numerous courts in other jurisdictions have similarly used email to provide notice in FLSA and other cases. *See e.g.*, *Margulies v. Tri-Cnty. Metro. Transp. Dist. of Or.*, 3:13-cv-00475-PK, 2013 U.S. Dist. LEXIS 146484, at *60 (D. Or. Oct. 10, 2013) (finding "that email is an efficient and nonintrusive method of communication"); *Alequin v. Darden Rests., Inc.*, No. 12-61742-CIV, 2013 U.S. Dist. LEXIS 108341, at *6 (S.D. Fla. July 31, 2013) ("[C]ourts in this Circuit commonly approve email notice to potential opt-in class members in FLSA cases."); *Ritz v. Mike Rory Corp.*, 12 CV 367 (JBW)(RML), 2013 U.S. Dist. LEXIS 61634, at *15 (E.D.N.Y. Apr. 30, 2013) (permitting email notice); *Rehberg v. Flowers Foods, Inc.*, No. 3:12cv596, 2013 U.S. Dist. LEXIS 40337, at *6 (W.D.N.C. Mar. 22, 2013) (same); *Jones v. JGC Dallas LLC*, Civil Action No. 3:11-CV-2743-O, 2012 U.S. Dist. LEXIS 185042, at *18–19 n.9 (N.D. Tex. Nov. 29, 2012) (listing FLSA cases permitting email notice).

The subject line and text of the email, "Notice of Your Rights in a Collective Action Lawsuit Arising Out of the 2018-2019 Government Shutdown," are evenhanded while providing critical information to interested employees immediately. The cost to the United States will be minimal, and communication will be essentially instantaneous, furthering the policy objectives set out in Rule 1 of the Federal Rules of Civil Procedure.

The alternative approach of using United States mail to provide Members with notice would be at odds with the goals of efficient and inexpensive litigation. Approximately 400,000 Members were affected by the United States' actions and omissions. The cost of processing, printing and mailing notices to all of them almost certainly would exceed hundreds of thousands of dollars. Many of the mailed notices undoubtedly would be discarded unread as junk mail.

The provision of notice by email instead of United States mail to the extent possible also is in the government's interest. It will be liable to Plaintiffs for the fees and expenses of the case pursuant to the FLSA's fee shifting provisions if Plaintiffs prevail. Whether Plaintiffs' counsel uses a claims administration company or incurs costs and fees for the time of its own paralegals for whom the firm can recover an hourly rate, the government would be faced with paying a large and unnecessary amount of expenses.

For Members no longer employed by the United States,[16] the government should be required to provide Plaintiffs with information sufficient to allow them to seek additional information and give email notice to all persons for whom that information is provided and mailed notice to the others.

Plaintiffs will receive undeliverable notices for some of the intended recipients. Plaintiffs have suggested a process by which they will identify the Members for whom they receive undeliverable notices to the government. The government then will be obligated to perform the necessary searches, and provide updated information to Plaintiffs, who will re-send notice to those Members.

CONCLUSION

For the reasons set out above, the Court should: (1) conditionally certify the proposed collective action; (2) equitably toll the FLSA statute of limitations to allow adequate time for prospective plaintiffs to complete Consent forms following distribution of Notice; (3) approve the language of the proposed Notice and Consent; and (4) order the United States to send the Notice to the work email addresses of each Potential Member still employed by the

[16] *Employees* may have resigned from their jobs to seek other employment as a result of the shutdown. *See* Healy, Jack, et al., *As Government Shutdown Goes On, Workers' Finances Fray: 'Nobody Signed Up for This'*, N.Y. TIMES (Jan. 8, 2019), available at https://www.nytimes.com/2019/01/08/us/paychecks-government-shutdown.html. Other employees have resigned for other reasons or retired.

Government, to mail the Notice to each Potential Member not still employed by the Government, to provide Plaintiffs appropriate information if Plaintiffs need to contact Members who are no longer employed by the United States, and to provide Plaintiffs with names and emails of persons receiving the notice in case the Plaintiffs need to send a second notice if problems arise with the Government's notification process.

November 9, 2020

Respectfully submitted,

s/ Heidi R. Burakiewicz
HEIDI R. BURAKIEWICZ
Kalijarvi, Chuzi, Newman & Fitch, P.C.
818 Connecticut Avenue NW, Suite 1000
Washington, D.C. 20006
(202) 331-9260 (phone)
(877) 219-7127 (fax)
hburakiewicz@kcnlaw.com

Counsel of Record for the Plaintiffs

Robert DePriest
Alexander F. Booker
Kalijarvi, Chuzi, Newman & Fitch, P.C.
818 Connecticut Avenue NW, Suite 1000
Washington, D.C. 20006
(202) 331-9260 (phone)
(877) 219-7127 (fax)

rdepriest@kcnlaw.com
abooker@kcnlaw.com

Of Counsel for the Plaintiffs

Judith Galat
Assistant General Counsel
American Federation of Government Employees
80 F Street, N.W.
Washington, DC 20001
(202) 639-6424 (phone)
(202) 639-6441 (fax)
galatj@afge.org

Of Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Federal Claims by using the CM/ECF system. I also certify that the foregoing document is being served on Defendant's counsel of record and that service will be accomplished by the CM/ECF system.

Respectfully,

s/ Heidi R. Burakiewicz
Heidi R. Burakiewicz

November 9, 2020