Nos. 2021-2008(L), 2021-2009, 2021-2010, 2021-2011, 2021-2012, 2021-2014, 2021-2015, 2021-2016, 2021-2017, 2021-2018, 2021-2019, 2021-2020 & 2021-2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ELEAZAR AVALOS, JAMES DAVIS,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

2021-2008

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00048, Judge Patricia E. Campbell-Smith.

CORRECTED BRIEF FOR APPELLANT

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Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2009

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00059-PEC, Judge Patricia E. Campbell-Smith

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ROBERTO HERNANDEZ, JOSEPH QUINTANAR, Individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2010

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00063-PEC, Judge Patricia E. Campbell-Smith

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LORI ANELLO, KARL BLACK, GEORGE CLARY, WILLIAM DENELL, JUSTIN GROSSNICKLE, ERIC INKROTE, TIMOTHY MCGREW, MARK MILLER, DAVID NALBORCZYK, MARTIN NEAL, JR., LUKE PALMER, THOMAS RHINEHART, JR., IVAN TODD,

Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2011

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00118-PEC, Judge Patricia E. Campbell-Smith

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BRIAN RICHMOND, ADAM SMITH, THOMAS MOORE, CHRIS BARRETT, WILLIAM ADAMS, KELLY BUTTERBAUGH, DAN ERZAL, BRIAN W. KLINE, KEVIN J. SHEEHAN, JASON KARLHEIM, CHARLES PINNIZZOTTO, JASON DIGNAN, MATHEW BECK, STEPHEN SHRIFT, JAMES BIANCONI, CHRISTOPHER GRAFTON, JESSE CARTER, MICHAEL CRUZ, CARL WARNER, BRIAN OWENS, BRIAN MUELLER, BRYAN BOWER, COREY TRAMMEL, JAMES KIRKLAND, KIMBERLY BUSH, BOBBY MARBURGER, RODNEY ATKINS, LEONEL HERNANDEZ, JOSEPH AUGUSTA, EDWARD WATT,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2012

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00161-PEC, Judge Patricia E. Campbell-Smith

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JUSTIN TAROVISKY, GRAYSON SHARP, SANDRA PARR, JUSTIN BIEGER, JAMES BRATTON, WILLIAM FROST, STEVE GLASER, AARON HARDIN, STUART HILLENBRAND, JOSEPH KARWOSKI, PATRICK RICHOUX, DERRECK ROOT, CARLOS SHANNON, SHANNON SWAGGERTY, GEOFFRY WELLEIN, BECKY WHITE, TAMMY WILSON,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2014

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00004-PEC, Judge Patricia E. Campbell-Smith

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QUENTIN BACA, LEPHAS BAILEY, CHRISTOPHER BALLESTER, KEVIN BEINE, DAVID BELL, RICHARD BLAM, MAXIMILIAN CRAWFORD, MATTHEW CRUMRINE, JOHN DEWEY, JEFFREY DIAMOND,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2015

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00213-PEC, Judge Patricia E. Campbell-Smith

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DAVID JONES, individually and on behalf of all others similarly situated,
Plaintiffs-Appellee,

v.

UNITED STATES,
Defendant-Appellant

2021-2016

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00257-PEC, Judge Patricia E. Campbell-Smith

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TONY ROWE, ALIEU JALLOW, KARLETTA BAHE, JOHNNY DURANT, JESSE A. MCKAY, III, GEORGE DEMARCE, JACQUIE DEMARCE,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2017

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00067-PEC, Judge Patricia E. Campbell-Smith

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D.P, T.S., J.V.,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2018

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00054-PEC, Judge Patricia E. Campbell-Smith

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PLAINTIFF NO. 1, PLAINTIFF NO. 2, PLAINTIFF NO. 3, PLAINTIFF NO. 4,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2019

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00094-PEC, Judge Patricia E. Campbell-Smith

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I. P., A. C., S. W., D. W., P. V., M. R., R. C., K. W., B. G., R. H., individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant

2021-2020

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00095-PEC, Judge Patricia E. Campbell-Smith

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JOSEPH ABRANTES, NEFTALI ACEVEDO, HECTOR ACOSTA, JOSE ACOSTA, DAVID ADAMS, SEAN ADARME, JOSE AGUILAR, DANIEL ALBA, MICHELLE ALBERTSON, KENIE ACEVEDO-CORREA, and all

plaintiffs represented by Alan Lescht and Associates, PC with Jack Jarrett as Lead Counsel,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

2021-2021

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00129-PEC, Judge Patricia E. Campbell-Smith

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STATEMENT OF RELATED CASES

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

STATEMENT OF JURISDICTION

These are appeals in twelve cases arising from the delay in paying wages during the 2018-2019 lapse in appropriations. The Court of Federal Claims had jurisdiction over plaintiffs' complaints under 28 U.S.C. § 1491(a). The court denied the government's motion to dismiss in each case and certified its ruling for interlocutory appeal on February 23, 2021 (in No. 2021-2008), February 26, 2021 (in Nos. 2021-2009, 2021-2010, 2021-2011, 2021-2012, 2021-2014, 2021-2015, 2021-2016, and 2021-2017, and 2021-2021), and March 11, 2021 (in Nos. 2021-2018, 2021-2019, and 2021-2020). *See* No. 21-2008, Appx268-273; No. 21-2008, Appx296-316; No. 21-2008, Appx408-433; No. 21-2008, Appx791-800; No. 21-2021, Appx100-103. This Court granted the government's petitions for review and has jurisdiction over the appeals under 28 U.S.C. § 1292(d). The Court has consolidated the twelve cases asserting claims under the Fair Labor Standards Act and has directed that the case raising claims under the Border Patrol Agent Pay Reform Act be designated as a companion case, with the government filing one brief in the thirteen cases.

STATEMENT OF THE ISSUE

Between December 22, 2018, and January 25, 2019, several government agencies were affected by a lapse in appropriations. Plaintiffs in this case are employees of affected agencies who performed work during that lapse as "excepted employees," *see* 31 U.S.C. § 1341(c)(1)(D)—those whose work relates to "emergencies involving the safety of human life or the protection of property," *id.* § 1342. The

express terms of the Anti-Deficiency Act barred agencies from paying plaintiffs' wages during the appropriations lapse and directed that the wages be paid "at the earliest date possible after the lapse" ended. *Id.* § 1341(c)(2).

The Court of Federal Claims held, however, that in adhering to the directives of the Anti-Deficiency Act, the government incurred liability under the Fair Labor Standards Act (FLSA), or, in one case, the Border Patrol Agent Pay Reform Act (Border Patrol Act) and the Back Pay Act. The court concluded that each statute contains an implicit requirement that wages generally be paid on the employee's regularly scheduled payday. The court further concluded that the government violated that requirement in making payments in accordance with the Anti-Deficiency Act and thus opened itself to an award of liquidated damages under the FLSA and interest payments under the Border Patrol Act and the Back Pay Act.

The question presented is whether the payments in accordance with the Anti-Deficiency Act's commands subjected the government to liability for liquidated damages under the Fair Labor Standards Act or for interest payments under the Border Patrol Agent Pay Reform Act and the Back Pay Act.

STATEMENT OF THE CASE

A. Legal Background

1. Anti-Deficiency Act

The Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.*, provides that, with certain exceptions not relevant here, no officer or employee of the United States may "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). The statute further provides that an officer or employee of the United States "may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." *Id.* § 1342. Violations of either provision may give rise to administrative discipline, and willful violations are punishable as felonies. *Id.* §§ 1349(a), 1350.

Although the statute generally prohibits employees from continuing to work (and agencies from allowing their employees to work) during a lapse in appropriations, that prohibition does not extend to so-called "excepted employees." *See* 31 U.S.C. § 1341(c)(1)(D). Those employees may continue to perform work in certain circumstances, including during "emergencies involving the safety of human life or the protection of property." *Id.* § 1342.

During the 2018-2019 lapse, Congress amended the statute to confirm its understanding that employees may not be paid during a lapse in appropriations. The amendment to the Anti-Deficiency Act provides: "[E]ach excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse." 31 U.S.C. § 1341(c)(2); *see* Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, § 2, 133 Stat.

3, 3-4; Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 103, 133 Stat. 10, 11.

2. Fair Labor Standards Act

With exceptions not relevant here, the Fair Labor Standards Act requires that every worker who works "in any workweek" receive a minimum wage for that workweek, 29 U.S.C. § 206(a), and that certain workers receive additional overtime wages if their workweek exceeds 40 hours, *id.* § 207(a)(1). An employer who violates either of those provisions is liable both for the unpaid wages and for "an additional equal amount as liquidated damages," as well as for reasonable attorney's fees. *Id.* § 216(b).

The FLSA does not specify when wages must be paid. Department of Labor guidance recognizes, however, that minimum and overtime wages should "ordinarily" be paid on the employee's "regular payday for the period in which the particular workweek ends." Wage and Hour Div., Dep't of Labor, Field Operations Handbook § 30b04 (2016), https://go.usa.gov/xFeA4.[1] In some cases, however, the failure to make required wage payments in a timely fashion may constitute a violation of the statute giving rise to damages liability. As the Supreme Court has explained, the statute's liquidated damages provision "constitute[d] a Congressional recognition that

[1] Department of Labor guidance is not directly applicable to federal employees like plaintiffs, for whom the FLSA is implemented by the Office of Personnel Management. *See* 5 U.S.C. § 204(f); 5 C.F.R. pt. 551.

failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living . . . that double payment must be made in the event of delay." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (holding that FLSA claims for overtime compensation cannot be waived in a case involving pay withheld for more than two years); *see also, e.g.*, *Rigopoulos v. Kervan*, 140 F.2d 506 (2d Cir. 1943) (holding an employer liable when it paid accrued overtime wages in monthly installments between three years and six months late); *Calderon v. Witvoet*, 999 F.2d 1101, 1107-08 (7th Cir. 1993) (concluding an employer violated the FLSA when it withheld a portion of each agricultural employee's minimum wage until the employee left the employment, often at the end of the harvest season).

The implicit requirement has never been regarded as absolute, however, and the Supreme Court and the Department of Labor have recognized that it is sometimes infeasible to make wage payments on an employee's regularly scheduled payday because an employer is unable to calculate the payments due by the regularly scheduled payday. In those circumstances, the FLSA "does not require the impossible" but requires instead that payment be made "as soon as convenient or practicable under the circumstances." *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432-33 (1945); *cf.* 29 C.F.R. § 778.106 (similar).

Even when a delayed payment is properly deemed a violation of some implicit prompt payment requirement, it does not automatically follow that an award of liquidated damages is appropriate. Instead, the FLSA provides that a court may

withhold or reduce the amount of liquidated damages "if the employer shows . . . that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260.

3. Border Patrol Agent Pay Reform Act and Back Pay Act

The Border Patrol Agent Pay Reform Act of 2014, Pub. L. No. 113-277, 128 Stat. 2995 (codified primarily at 5 U.S.C. § 5550), establishes a system for calculating the standard and overtime wages owed to border patrol agents. That statute does not, however, contain any provision authorizing monetary relief for violations of its requirements. Accordingly, employees seeking such relief must proceed under some other remedial statute.

One such remedial statute is the Back Pay Act, which provides that an agency employee who "is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the [employee's] pay" is "entitled, on correction of the personnel action, to receive" appropriate back pay. 5 U.S.C. § 5596(b)(1). In addition to any back pay, the employee is entitled to receive interest, computed from "the effective date of the withdrawal or reduction involved," as well as attorney's fees. *Id.* § 5596(b). Neither the Border Patrol Act nor the Back Pay Act contains any provision establishing when border patrol agents' wages must be paid.

B. Factual and Procedural Background

1. Between December 22, 2018, and January 25, 2019, several government agencies were affected by a lapse in appropriations. Pursuant to the Anti-Deficiency Act provisions described above, excepted employees at those agencies continued to perform work during the lapse. All excepted employees received their accrued wages—including any accrued overtime wages—"at the earliest date possible after the lapse" ended. 31 U.S.C. § 1341(c)(2).

Plaintiffs are excepted employees who performed work during the lapse. In twelve of the suits, all of which have been consolidated in this Court, plaintiffs seek liquidated damages under the FLSA in the amount of any minimum and overtime wages that had accrued but were not paid on the plaintiffs' regularly scheduled paydays during the lapse. *See, e.g.*, No. 21-2008, Appx287-288. In *Abrantes v. United States,* plaintiffs allege that the agency's failure to pay them on their regularly scheduled pay dates violated the Border Patrol Act. They primarily seek interest on their wages under the Back Pay Act for the period between their regular paydays and the date that their wages were paid. *See* No. 21-2021, Appx065.

2. In each case, the government moved to dismiss the complaint, explaining, among other things, that its payment of wages in accordance with the Anti-Deficiency Act's instructions does not subject it to liability for liquidated damages under the FLSA or for interest under the Border Patrol Act and the Back Pay Act.

The Court of Federal Claims denied the government's motion in each case, relying on the reasoning it had articulated in *Martin v. United States*, 130 Fed. Cl. 578 (2017), a case that involves similar FLSA claims arising out of the 2013 lapse in appropriations.[2]

Citing its decision in *Martin*, the court stated that the FLSA obliges employers "to pay [required] wages on the employee's next regularly scheduled payday." *See, e.g.*, No. 21-2008, Appx020. The court declared that "the appropriate way to reconcile the [Anti-Deficiency Act and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied." No. 21-2008, Appx022 (quoting *Martin*, 130 Fed. Cl. at 584). The court thus concluded that the Anti-Deficiency Act did not alter any obligation under the FLSA to make payments on the regularly scheduled payday. The court stated that it would consider the impact of the Anti-Deficiency Act only insofar as it would be relevant to determining whether it could properly order payment of liquidated damages for the asserted violations under 29 U.S.C. § 260. The court declared that it "would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate." *Id.* (quoting *Martin*, 130 Fed. Cl. at 584). It would thus "evaluate the existence and operation of the [Anti-Deficiency Act] as part of

[2] Damages proceedings in *Martin* have been protracted. On June 16, the Court of Federal Claims entered partial final judgment as to a subset of the plaintiffs pursuant to Rule 54(b). The government's appeal has been docketed as No. 2021-2255.

determining whether defendant met the statutory requirements to avoid liability for liquidated damages." *Id.* (quoting *Martin*, 130 Fed. Cl. at 584).

On that basis, the court concluded that plaintiffs in each FLSA case had properly pleaded a claim because they had alleged that they had performed work and had not been compensated for that work on their next regularly scheduled payday. *See, e.g.*, No. 21-2008, Appx025-026. The court further determined that, notwithstanding the explicit directives of the Anti-Deficiency Act, plaintiffs had also stated a claim for liquidated damages. Quoting its decision in *Martin,* the court stated that "[i]t would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith" for deferring payment of plaintiffs' wages. *See, e.g.*, No. 21-2008, Appx026. (quoting *Martin v. United States*, 117 Fed. Cl. 611, 627 (2014)).

In *Martin* itself, however, the court had already proceeded to answer that question, concluding on summary judgment that "Defendant has not demonstrated good faith and reasonable grounds for believing its failure to pay did not violate the FLSA." *Martin*, 130 Fed. Cl. at 585. That Executive Branch officials believed that they were required to comply with the unambiguous terms of a criminal statute was not, in the court's view, sufficient to establish subjective good faith. Nor did the court suggest that officials could reasonably have violated the Anti-Deficiency Act on the theory that the violations would be excused by some need to comply with the FLSA. The court in *Martin* nevertheless declared that there was no showing of subjective good faith "[b]ecause the government admittedly took no steps to determine its

obligations under the FLSA during the 2013 shutdown." *Id.* at 586. And, having concluded that no subjective good faith existed, the court stated that it therefore "need not determine whether [the government] had objectively reasonable grounds for its inaction." *Id.*

In the Border Patrol Act case, the court likewise denied the government's motion to dismiss on the basis of its reasoning in *Martin*. The court concluded that the Border Patrol Act, like the FLSA, obliges employers to pay wages "on the employee's next regularly scheduled payday." No. 21-2021, Appx007. The court stated that in its view, the Anti-Deficiency Act's prohibitions "do not abrogate [the government's] obligations" under the Border Patrol Act. *Id.* Accordingly, the court proceeded to "analyze defendant's obligations under the [Border Patrol Act] and the Back Pay Act along with its obligations under the" Anti-Deficiency Act. No. 21-2021, Appx008. On that basis, the court concluded that plaintiffs had properly pleaded a claim under the Border Patrol Act and the Back Pay Act because they had alleged that they had performed work and that the government had committed an unjustified or unwarranted personnel action in not compensating them for that work on their next regularly scheduled payday. No. 21-2021, Appx010-011.

3. On the government's motions, the Court of Federal Claims certified each order for interlocutory appeal under 28 U.S.C. § 1292(d). This Court granted the petitions for review and consolidated the twelve FLSA cases. It also granted the government's motion to designate the FLSA and Border Patrol Act cases as

companion cases and for leave to file a single set of briefs addressing the claims in all cases.

SUMMARY OF ARGUMENT

A. Congress has addressed in the clearest possible terms the payment of federal employees who, as a result of their "excepted" status, perform work during a lapse in appropriations. The Anti-Deficiency Act provides that, with certain exceptions not relevant here, no officer or employee of the United States may "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). The 2019 amendments to the Anti-Deficiency Act further specify the date on which excepted employees are to be paid: "[E]ach excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse." *Id.* § 1341(c)(2).

It is not controverted that the government paid plaintiffs in accordance with the terms mandated by Congress. Plaintiffs assert, however, that when Congress enacted the FLSA, it subjected the treasury to damages claims for compliance with the Anti-Deficiency Act. A court could not properly infer an intent to waive immunity for such claims absent a clear indication that Congress intended that improbable result, and no such indication exists. Even if the FLSA explicitly provided that payments

must be made on a regularly scheduled pay date, that general requirement could not properly be construed to expose the fisc to damage actions when agency officials adhere to the requirements—backed by threat of administrative discipline and possible criminal penalties—of a statute specifically directed to the circumstances of a lapse in appropriations. Indeed, the Court of Federal Claims identified no instance in which Congress has made an agency's compliance with a specific statutory mandate the basis of a damages action under a different statute. But the FLSA does not even explicitly establish a specific date by which payments must be made to ensure compliance with the statute, and the Supreme Court has long recognized that the statute does not compel payments on an employee's usual schedule when doing so would be impossible because of an employer's inability to calculate the payments due by that date. Whatever the scope of any implicit requirement of timely payments, it does not entitle plaintiffs to recover for the delay that resulted from the appropriations lapse.

The impropriety of finding liability in these circumstances is further confirmed by every available tool of statutory interpretation: doing so would require elevating an implicit obligation over an express one, applying a general command over a specific prohibition, and ignoring recently enacted amendments to the Anti-Deficiency Act that confirm Congress's understanding that the government acted appropriately here. And beyond all that, there is simply no evidence to support the remarkable

proposition that Congress intended to put agencies to the choice of violating one statute or the other.

That conclusion is further bolstered by principles of sovereign immunity. As this Court has confirmed, a waiver of sovereign immunity must be "strictly construed, in terms of its scope, in favor of the sovereign." *Athey v. United States*, 908 F.3d 696, 702-03 (Fed. Cir. 2018) (quotation omitted). But in this case, there is no indication that Congress intended for the scope of the sovereign immunity waivers in the relevant pay statutes to include a waiver of immunity for damages claims related to late payment of wages. The absence of any such indication further counsels against plaintiffs' position.

B. Even assuming that the FLSA could properly be read to authorize damages actions against the United States in these circumstances, federal officials, in complying with the Anti-Deficiency Act, plainly did so "in good faith" and with "reasonable grounds" for believing that compliance with the law did not violate the FLSA. 29 U.S.C. § 260. In these circumstances, a court would abuse its discretion in imposing liquidated damages, and the Court of Federal Claims erred in declaring that it could not rule on the damages question as a matter of law. The court's ruling is particularly anomalous in light of its holding in *Martin v. United States*, where it held that the government did not act in subjective good faith because it "took no steps to determine its obligations under the FLSA" during the 2013 shutdown. *Martin v. United States*, 130 Fed. Cl. 578, 586 (2017). The Court of Federal Claims has never suggested

that agency officials could have lawfully chosen to violate the Anti-Deficiency Act or that they could expect that their violations would be excused on the ground that they believed they were complying with implicit requirements of the FLSA. And at an absolute minimum, officials certainly acted in good faith in believing that their actions were compelled by law.

C. For similar reasons, the *Abrantes* plaintiffs' claims brought under the Border Patrol Act and the Back Pay Act should be dismissed. To obtain relief under those statutes, plaintiffs will be required to demonstrate that the deferred payment of plaintiffs' wages violated some substantive provision of the Border Patrol Act. But as with the FLSA, the Border Patrol Act contains no explicit prompt payment requirement, and any judicially implied requirement could not overcome the clear statutory prohibitions contained in the Anti-Deficiency Act. And, also as with the FLSA, that conclusion is further confirmed by every other available tool of statutory interpretation, as well as by principles of sovereign immunity and by plaintiffs' failure to identify any indication that Congress believed in enacting those statutes that it was exposing the public fisc to damages based on officials' compliance with their Anti-Deficiency Act obligations.

ARGUMENT

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

This Court reviews de novo the denial of a motion to dismiss. *See Athey v. United States*, 908 F.3d 696, 705 (Fed. Cir. 2018).

1. The core of plaintiffs' FLSA claims, accepted by the Court of Federal Claims, is that the government's failure to pay their wages on the regularly scheduled pay date violated § 216(b) of the statute and that they are entitled to liquidated damages.

As an initial matter, there can be no serious dispute that government officials complied with the dictates of the Anti-Deficiency Act, and that violations of that statute would have exposed them to civil and criminal sanctions. The Anti-Deficiency Act prohibits officials from "mak[ing] or authoriz[ing] an expenditure," 31 U.S.C. § 1341(a)(1), in the absence of a supporting appropriation. The statute further provides that "each excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse." *Id.* § 1341(c)(2). Plaintiffs do not dispute that they were paid in accordance with that requirement.

Plaintiffs urge, however, that they are entitled to damages because of the FLSA's asserted implicit requirement that employees must be paid on their regularly scheduled pay date (as the government does when the Anti-Deficiency Act does not dictate otherwise). But as the Supreme Court has recognized, the FLSA "does not require the impossible." *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432-33 (1945). Thus, the Court has recognized that when it is infeasible to make payments on an employee's regularly scheduled payday because proper overtime compensation cannot be computed until "weeks or even months" later, delayed payment does not necessarily violate the statute. *Id.* Instead, in that circumstance, employers properly comply with those pay statutes when they make the required payments "as soon as convenient or practicable under the circumstances." *Id.* at 433; *cf.* 29 C.F.R. § 778.106 (similar).

In this case, payment of plaintiffs' wages on their regularly scheduled payday would have been not merely impracticable but plainly illegal. We are unaware of any case finding a violation of the FLSA when a delay is required by another federal statute. And it would be remarkable if Congress, in enacting the FLSA, implicitly exposed the treasury to damages based on officials' compliance with the long-established principles codified in the Anti-Deficiency Act, first enacted more than a century ago. *See, e.g.*, Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 ("[I]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve

the government in any contract for the future payment of money in excess of such appropriations."); Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257-58 (similar).

Those considerations should be dispositive. But other principles of construction all require the same result. First, it is axiomatic that an explicit textual requirement cannot be altered by court-created requirements based on statutory purpose. That canon, generally applied in interpreting a single statute, applies with equal force here in discerning the proper application of two statutes addressing payment of wages. *Cf. Bartels Tr. for Benefit of Cornell Univ. ex rel. Bartels v. United States*, 617 F.3d 1357, 1361 (Fed. Cir. 2010) (stating that arguments derived from atextual sources such as legislative purposes and history cannot "trump[] the statutory text"); *see also Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012) ("[E]ven the most formidable argument concerning [a] statute's purposes could not overcome" a clear requirement found "in the statute's text.").

Second, as the Supreme Court has explained, "the specific governs the general"; that is, where a "general" statutory requirement "is contradicted by a specific prohibition," the "specific provision is construed as an exception to the general one." *RedLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quotation omitted). That rule ensures that "a statute dealing with a narrow, precise, and specific subject"—which reflects Congress's solution to "particularized problems"—"is not submerged" by a different "statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Thus, the Anti-Deficiency Act's

specific provisions addressing the precise question of payments during and after a lapse in appropriations would prevail even if the FLSA explicitly made failure to pay on a regularly scheduled pay date a statutory violation.

Third, even if plaintiffs' position were not so clearly mistaken, principles of sovereign immunity would preclude their assertions. As this Court has repeatedly recognized, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Athey v. United States*, 908 F.3d 696, 702-03 (Fed. Cir. 2018) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)) (citations omitted). Accordingly, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *FAA v. Cooper*, 566 U.S. 284, 290 (2012) (citation omitted) (citing *United States v. Williams*, 514 U.S. 527, 531 (1995), and *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983)). As the Supreme Court stressed in *Cooper,* "[a]mbiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Id.* at 290-91 (citing *United States v. Nordic Vill.*, 503 U.S. 30, 33 (1992)).

A court must therefore consider not only whether Congress has waived immunity in a particular statute but also whether the waiver extends to particular forms of relief. *See Athey,* 908 F.3d at 703. In *Cooper*, the Supreme Court applied those principles in interpreting the civil remedies provision of the Privacy Act, which authorizes "actual damages" in some circumstances but does not define the term.

Applying the particular principles of interpretation applicable to a waiver of immunity, the Court concluded that "the Privacy Act does not unequivocally authorize an award of damages for mental or emotional distress" and, "[a]ccordingly, the Act does not waive the Federal Government's sovereign immunity from liability for such harms." *Cooper*, 566 U.S. at 304. As the Court emphasized, "the scope"—and not merely the existence—"of Congress' waiver [must] be clearly discernable from the statutory text in light of traditional interpretive tools." *Id.* at 291. If not, courts must "take the interpretation most favorable to the Government." *Id.*

These principles leave no doubt that Congress, in amending the FLSA to incorporate a waiver of sovereign immunity, did not implicitly waive immunity for liquidated damages under the FLSA when government officials comply with the specific terms of the Anti-Deficiency Act.[3]

2. The Court of Federal Claims addressed none of these considerations, concluding without analysis that "the appropriate way to reconcile the [Anti-Deficiency Act and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied." No. 21-2008, Appx022 (quoting *Martin v. United States*, 130 Fed. Cl. 578, 584 (2017)). In other words, without significant explanation, the court simply concluded that

[3] Some plaintiffs included in their complaints an additional claim that a portion of the agencies affected by the lapse in appropriations had sufficient appropriated funds to pay at least some employees for some of the days during the lapse. *See, e.g.*, No. 21-2008, Appx785-788. Those claims are not at issue in this appeal.

compliance with the specific commands of the Anti-Deficiency Act constituted a violation of the FLSA, which does not explicitly establish mandatory pay dates or define when a delay should be deemed a violation of the statute. For the reasons discussed, that conclusion is without foundation.

In opposing the government's petitions for interlocutory review, plaintiffs made little attempt to defend the court's reasoning, and instead sought to rely on decisions holding that Congress's failure to appropriate sufficient funds to cover an obligation already incurred by the government generally does not cancel the underlying obligation. *See* No. 21-119, Resp. 2 n.3, 5-7, 13-14; No. 21-121, Resp. 3-4; *see also Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020) (stating that failure to appropriate sufficient funds did not "cancel" the "obligations" that the government has already incurred (quotation omitted)).

This analogy fails in all respects. It is undisputed that the government satisfied its obligation to pay plaintiffs' accrued wages in accordance with the specific requirements of the Anti-Deficiency Act. The question is whether it incurred additional liability by paying the wages as directed by that statute rather than on plaintiffs' regularly scheduled pay date. In *Maine Community Health Options,* by contrast, the Court held that a statutory directive to make particular payments to insurance companies created an enforceable obligation even though Congress later failed to appropriate sufficient funds for the payments. 140 S. Ct. at 1319. Central to the Court's conclusion in that case was that the relevant statute's "express terms" created

an obligation to make the payments by providing that the government "shall pay" insurers "according to a precise statutory formula." *Id.* at 1320-21 (quotation omitted). Here, under plaintiffs' theory, it is the failure to timely appropriate funds that itself gives rise to their claim. And the FLSA contains no "express terms" creating an obligation to pay employees at any particular time or creating an entitlement to damages (much less liquidated damages) when the government defers payment pursuant to another federal statute during a lapse in appropriations.

B. Plaintiffs Would Not Be Entitled to Liquidated Damages Under the FLSA Even Assuming that the Delay in Payment Violated that Statute's Implicit Requirements

This Court reviews de novo the denial of a motion to dismiss. *See Athey v. United States*, 908 F.3d 696, 705 (Fed. Cir. 2018).

Even if it were the case that the timing of the payments here constituted a violation of the FLSA, plaintiffs' claims for liquidated damages should be rejected as a matter of law. The FLSA provides that if an "employer shows to the satisfaction of the court that the act or omission giving rise" to liability "was in good faith" and that the employer "had reasonable grounds for believing that his act or omission was not a violation of the [statute], the court may, in its sound discretion, award no liquidated damages or award any amount thereof." 29 U.S.C. § 260; *see Shea v. United States*, 976 F.3d 1292, 1297 (Fed. Cir. 2020) (The "court must determine that the employer acted in good faith and with reasonable belief as § 260 requires."); *see also id.* at 1300 ("The 'good faith' of the statute requires, we think, only an honest intention to ascertain

what the [FLSA] requires and to act in accordance with it." (alteration in original) (quoting *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir. 1953))).

There could be no clearer case of good faith than that presented here. Government officials did not act negligently, much less in bad faith. They did not make payments during the appropriations lapse because doing so would have violated an express statutory prohibition, and they made payments in accordance with the specific schedule established by Congress. It is implausible to construe their conduct as outside the intended reach of § 260: Congress plainly would not have regarded compliance with the law as anything other than good faith.

The Court of Federal Claims thus had no basis for concluding that it could not reject these claims as a matter of law, and it identified no factual allegation that would support a claim that government officials did not act in good faith. The court's ruling is particularly anomalous in light of its resolution of identical damages claims in its prior decision in *Martin*. The court there concluded that the government had not shown subjective good faith "[b]ecause the government admittedly took no steps to determine its obligations under the FLSA during the 2013 shutdown." *Martin*, 130 Fed. Cl. at 586. But even as it granted summary judgment against the government on the issue of good faith, the court never suggested that government officials were free to violate the Anti-Deficiency Act, or that their violations would be excused on the ground that officials believed the violations were authorized by the implicit requirements of the Fair Labor Standards Act. At a minimum, it was entirely

reasonable for officials to conclude that the FLSA did not rescind their obligation to make payments as directed by the Anti-Deficiency Act.

The court's error is underscored by the fact that its mistaken holding would have no impact on future conduct. Government officials would still be bound by the terms of the Anti-Deficiency Act. Insofar as the trial court's order could be said to have a deterrent effect, it would be an attempt to deter officials from complying with the law, which is not an available option or one that a court should endorse.

C. Plaintiffs' Claims Under the Border Patrol Act and Back Pay Act Should Likewise Be Dismissed

This Court reviews de novo the denial of a motion to dismiss. *See Athey v. United States*, 908 F.3d 696, 705 (Fed. Cir. 2018).

For the same reasons, the *Abrantes* plaintiffs' claims under the Border Patrol Act and Back Pay Act should be dismissed. To obtain relief under the Back Pay Act, plaintiffs will be required to demonstrate, among other prerequisites, that they were "affected by an unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b)(1). Such a showing relies on plaintiffs' contention that the deferral of their wages during the lapse in appropriations violated the Border Patrol Act. *Cf.* 5 C.F.R. § 550.803 (explaining that the "unjustified or unwarranted" nature of a personnel action is determined by reference to the "applicable law").

As with the FLSA, however, the Border Patrol Act contains no provision explicitly requiring that employees' wages be paid on any particular schedule (much

less on a regular pay date). And unlike with respect to the FLSA, plaintiffs have failed to identify any case reading such an implicit requirement into the Border Patrol Act. That alone is sufficient to foreclose plaintiffs' claim.

But even assuming that the Border Patrol Act contains an implicit prompt payment requirement similar to the one that courts have read into the FLSA, plaintiffs' Border Patrol Act claim should be dismissed. As is explained in more detail above with respect to the FLSA, such an implicit requirement cannot possibly overcome the specific and unambiguous prohibitions contained in the Anti-Deficiency Act. And that conclusion is further confirmed by the principle that the specific instructions in the Anti-Deficiency Act related to payment of federal employees following a lapse in appropriations must take precedence over the general pay scheme contained in the Border Patrol Act, as well as by principles of sovereign immunity. Finally, and as with the FLSA, plaintiffs have failed to point to any indication in the text, context, legislative history, or any other source that Congress intended to exposure the treasury to this liability, nor have plaintiffs identified any other situation in which Congress has made compliance with a different federal statute the basis for liability under the Border Patrol Act or the Back Pay Act. For all of those reasons, the *Abrantes* plaintiffs' claims should be dismissed.

CONCLUSION

For the foregoing reasons, the orders of the Court of Federal Claims should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,901 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Sean Janda
Sean Janda

STATUTORY ADDENDUM

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29 U.S.C. § 216(b)

§ 216. Penalties

. . .

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

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

29 U.S.C. § 260

§ 260. Liquidated damages

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

31 U.S.C. § 1341

§ 1341. Limitations on expending and obligating amounts

(a) (1) Except as specified in this subchapter or any other provision of law, an officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

(c) (1) In this subsection—

(A) the term "covered lapse in appropriations" means any lapse in appropriations that begins on or after December 22, 2018;

(B) the term "District of Columbia public employer" means—

(i) the District of Columbia Courts;

(ii) the Public Defender Service for the District of Columbia; or

(iii) the District of Columbia government;

(C) the term "employee" includes an officer; and

(D) the term "excepted employee" means an excepted employee or an employee performing emergency work, as such terms are defined by the Office of Personnel Management or the appropriate District of Columbia public employer, as applicable.

(2) Each employee of the United States Government or of a District of Columbia public employer furloughed as a result of a covered lapse in appropriations shall be paid for the period of the lapse in appropriations, and each excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

(3) During a covered lapse in appropriations, each excepted employee who is required to perform work shall be entitled to use leave under chapter 63 of title 5, or any other applicable law governing the use of leave by the excepted employee, for which compensation shall be paid at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates.

31 U.S.C. § 1342

§ 1342. Limitation on voluntary services

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

APPELLANT'S ADDENDUM

ADDENDUM FOR NO. 21-2008

In the United States Court of Federal Claims

No. 19-04C

(E-Filed: December 1, 2020)

JUSTIN TAROVISKY, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Heidi R. Burakiewicz, Washington, DC, for plaintiff. Robert Depriest, Michael Robinson, and Judith Galat, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 17 at 2-3 (second amended complaint, hereinafter referred to as the complaint). On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief can be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 28.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 17; (2) defendant's motion to dismiss, ECF No. 28; (3) plaintiffs'

response to defendant's motion, ECF No. 31; (4) defendant's reply in support of its motion, ECF No. 35; (5) defendant's first supplemental brief in support of its motion, ECF No. 37; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 38; (7) defendant's second supplemental brief in support of its motion, ECF No. 46; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 54; (9) defendant's third supplemental brief in support of its motion, ECF No. 56; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 57. The motion is now fully briefed and ripe for ruling.[1] The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning at 12:01 a.m. on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 17 at 2, 8. The named plaintiffs in this case were, at the time of the shutdown, employees of one of the following fourteen agencies: (1) the Bureau of Prisons; (2) the Federal Emergency Management Agency; (3) the United States Immigration and Customs Enforcement; (4) Voice of America; (5) the National Park Service; (6) the National Weather Service; (7) the United States Secret Service; (8) the United States Customs and Border Protection; (9) the Federal Bureau of Investigation; (10) the Bureau Alcohol, Tobacco, Firearms, and Explosives; (11) the Transportation Security Administration; (12) the Drug Enforcement Administration; (13) the Food Safety Inspection Service; and (14) the Indian Health Service. See id. at 4-8.

In their complaint, plaintiffs allege that they are "excepted employees," a term which refers to "'employees who are funded through annual appropriations who are nonetheless excepted from the furlough because they are performing work that by law,

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[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 28 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 56 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

may continue to be performed during a lapse in appropriations.'" Id. at 2 (quoting the United States Office of Personnel Management Guidance for Government Furloughs, Section B.1 (Sept. 2015)). Plaintiffs also allege that, in addition to being excepted employees required to work during a shutdown, they were also "classified as non-exempt from the overtime requirements of the [FLSA]." Id. at 2-3. As a result of being categorized as non-exempt, excepted employees, plaintiffs were required to work during the shutdown, but were not paid minimum or overtime wages on their regularly scheduled paydays in violation of the FLSA. See id. at 2-3.

According to plaintiffs, defendant's failure to timely pay their minimum and overtime wages was "willful, and in conscious or reckless disregard of the requirements of the FLSA." Id. at 14, 15. In support of this allegation, plaintiffs cite this court's decision in Martin v. United States, 130 Fed. Cl. 578 (2017), and allege that "[u]pon information and belief, [d]efendant conducted no analyses to determine whether its failure to pay [e]xcepted [e]mployees on their regularly scheduled payday complied with the FLSA." Id. at 11. Plaintiffs now "seek payment of wages owed, liquidated damages, and all appropriate relief under the FLSA." Id. at 3.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the

protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[2] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[3] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

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[2] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[3] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 28 at 12-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin, 130 Fed. Cl. 578. In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and

> cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[4] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 28 at 14 (defendant's motion to dismiss); see also ECF No. 31 at 15 (plaintiffs noting that "[i]t is undisputed that [p]laintiffs' claims in this case are nearly identical to those raised in Martin v. United States, Case No. 13-8[34]C"[5]). As

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[4] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

[5] Plaintiffs cite to Martin v. United States as case number 13-843C. The court assumes that plaintiffs' citation contained a typographical error; the correct case number is 13-834C.

plaintiffs outline in their response to defendant's motion, "[a]s in Martin, the [p]laintiffs are federal employees who were designated 'excepted' and required to perform work during the government shutdown." ECF No. 31 at 19. In addition, plaintiffs here, like the plaintiffs in Martin, have alleged that "[u]pon information and belief, [d]efendant conducted no analyses to determine whether its failure to pay [e]xcepted [e]mployees on their regularly scheduled payday complied with the FLSA." ECF No. 17 at 11.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 28. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[6] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130 Fed. Cl. at

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[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 28 at 16. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 46, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 56, ECF No. 57. Maine Community Health does not address the FLSA, and only includes a limited

584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 28 at 18 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. at 19 (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 28 at 19. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 19-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that

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discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

> compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 20-21.

Defendant also asserts that the scope of its waiver of sovereign immunity for FLSA claims does not cover the claims asserted here. See ECF No. 35 at 13-14. It argues, without citation to any authority, that:

> a cause of action under the FLSA cannot per se accrue against the United States when federal agencies fail to pay employees on their regularly scheduled paydays during a lapse in appropriations because a federal statute expressly provides for when and at what rate federal employees will be paid under those circumstances.

Id. at 14.

The court disagrees. The claims brought by plaintiffs in this case are straightforward FLSA minimum wage and overtime claims under the FLSA. See ECF No. 31 at 16, 34-37; see also ECF No. 17 at 14-15. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they and all putative class members: "(a) were classified by [d]efendant as '[e]xcepted [e]mployees," (b) performed FLSA non-exempt work for [d]efendant . . . after 12:01 a.m. on December 22, 2018,[8] and (c) were not paid for such work on their [s]cheduled [p]ayday." ECF No. 17 at 4. Plaintiffs allege specific facts demonstrating how the allegations apply to each named plaintiff. See id. at 4-8.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 28 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

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[8] Defendant argues that "[t]o the extent that plaintiffs claim any FLSA violation for failing to pay FLSA minimum wages or overtime wages to [Transportation Security Officers], or to other FLSA-exempt employees, those claims must be dismissed." ECF No. 28 at 15 n.3. In support of this statement, defendant cites to Jones v. United States, 88 Fed. Cl. 789 (2009). See id. In Jones, the court stated: "The 'precise question at issue' is whether Section 111(d) of the [Aviation and Transportation Security Act] exempts [Transportation Security Administration (TSA)] from compliance with the FLSA when establishing overtime compensation for security screeners. Because we find that the plain language of Section 111(d) is unambiguous, we conclude that TSA need not comply with the FLSA." 88 Fed. Cl. at 792 (emphasis added). This case is not binding precedent, and appears to be limited in application to security screeners. Plaintiffs, on the other hand, argue that the TSA's handbook explicitly contemplates that some employees may be non-exempt from the FLSA. See ECF No. 31 at 37, 39-40 (quoting from the TSA handbook). In the complaint, plaintiffs allege that one named individual is a TSA employee, and assert that she is "classified as FLSA non-exempt," but do not identify her specific job responsibilities. ECF No. 17 at 7. Because the court's decision in Jones does not hold that all TSA employees are necessarily FLSA-exempt, and because plaintiffs have offered evidence to the contrary, the court will not dismiss the claims of all TSA employees at this time. Plaintiffs, however, ultimately bear the burden of proving that any TSA employees asserting claims in this case are, in fact, FLSA non-exempt in order for such employees to recover any damages that may be awarded.

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 35 at 14-15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 14-18. But as the court held in Martin:

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 28, is **DENIED**;

(2) On or before **January 29, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **January 29, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-48C

(E-Filed: December 9, 2020)

ELEAZAR AVALOS, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019); 28 U.S.C. § 1500.

Gregory James O'Duden, Washington, DC, for plaintiff. Julie M. Wilson, Allison C. Giles, Leon Dayan, Abigail Carter, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 6 (amended complaint, hereinafter referred to as the complaint). On May 3, 2019, defendant moved to dismiss the complaint for lack of jurisdiction, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC); and in the alternative, for failure to state a claim on which relief may be granted, pursuant to RCFC 12(b)(6) on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 21.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 6; (2) defendant's motion to dismiss, ECF No. 21; (3) plaintiffs' response to defendant's motion, ECF No. 22; (4) defendant's reply in support of its motion, ECF No. 26; (5) defendant's first supplemental brief in support of its motion, ECF No. 28; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 29; (7) defendant's second supplemental brief in support of its motion, ECF No. 37; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 41; (9) defendant's third supplemental brief in support of its motion, ECF No. 45; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 46. The motion is now fully briefed and ripe for ruling.[1] The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning at 12:01 a.m. on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 6 at 6. The named plaintiffs in this case were, at the time of the shutdown, employed as Customs and Border Protection Officers for the United States Department of Homeland Security, Customs and Board Protection (CBP). See id. at 3. Plaintiffs allege that CBP "classified them as FLSA nonexempt," and that they "were designated excepted employees [under the ADA] for the shutdown that began on December 22[, 2018]." Id. at 3, 6. As a result of being classified as exempt employees, plaintiffs were required to work during the shutdown, but did not receive timely pay for that work. See id. at 6-8 (alleging facts specific to each named plaintiff).

Plaintiffs allege that "[t]he federal government's failure to pay timely [p]laintiffs and other FLSA nonexempt employees who performed overtime work [during the shutdown], or who performed non-overtime work [during the shutdown] violated the

[1] In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 45 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was argued for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case under the authority of Maine Community Health, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

FLSA." Id. 8. And according to plaintiffs, "[t]he federal government was on notice, including from previous litigation, that a failure to pay FLSA nonexempt employees their overtime wages on time, or the required minimum wage on time, regardless of whether the government is shut down, is a per se FLSA violation." Id. at 8-9. In support of this allegation, plaintiffs cite to this court's ruling in Martin v. United States, 130 Fed. Cl. 578 (2017), in which the court found "that the federal government failed to ascertain its FLSA obligations in connection with the payment of FLSA nonexempt employees who were required to work during a government shutdown." Id. at 9. Plaintiffs claim that defendant likewise failed to "obtain such an opinion or analysis about its FLSA obligations" during the shutdown at issue here. Id. As a result, plaintiffs contend, defendant "neither acted in good faith, nor had reasonable grounds for believing that failing to pay FLSA nonexempt employees their overtime wages or the required minimum wage on time during the shutdown was compliant with the FLSA." Id.

Plaintiffs define the putative class to include "FLSA nonexempt employees in bargaining units represented by [the National Treasury Employees Union (NTEU)]" during the shutdown. Id. at 4. The NTEU allegedly represents "[h]undreds of thousands of federal employees, including tens of thousands of employees in bargaining units," who "were forced to work during the partial government shutdown without pay." Id. at 1-2. Notably, however, the NTEU is not a named plaintiff in the amended complaint. See id. at 1.

Plaintiffs now seek "any overtime wages . . . and any minimum wage" earned during the shutdown, "liquidated damages in an amount equal to" those wages, and "reasonable attorneys' fees and costs incurred in this action." Id. at 14-15.

II. Legal Standards

A. Dismissal for Lack of Jurisdiction

Pursuant to the Tucker Act, the court has jurisdiction to consider "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). To invoke the court's jurisdiction, plaintiffs must show that their claims are based upon the Constitution, a statute, or a regulation that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." United States v. Mitchell, 463 U.S. 206, 216-17 (1983) (quoting United States v. Testan, 424 U.S. 392, 400 (1976)).

Plaintiffs bear the burden of establishing this court's subject matter jurisdiction by a preponderance of the evidence. See Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988). In reviewing plaintiffs' allegations in support of

jurisdiction, the court must presume all undisputed facts are true and construe all reasonable inferences in plaintiffs' favor. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-15 (1982); Reynolds, 846 F.2d at 747 (citations omitted). If, however, a motion to dismiss "challenges the truth of the jurisdictional facts alleged in the complaint, the . . . court may consider relevant evidence in order to resolve the factual dispute." Reynolds, 846 F.2d at 747. If the court determines that it lacks subject matter jurisdiction, it must dismiss the complaint. See RCFC 12(h)(3).

B. Dismissal for Failure to State a Claim

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. The Court Has Jurisdiction over Plaintiffs' Claims

At the end of its motion to dismiss, defendant includes a short argument in which it takes the position that the court lacks jurisdiction to hear plaintiffs' claims pursuant to 28 U.S.C. § 1500. See ECF No. 21 at 24-26. Section 1500 states, in its entirety, as follows:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500. Of relevance here, the Court of Appeals for the Federal Circuit has held that the "question of whether another claim is 'pending' for purposes of § 1500 is determined at the time at which the suit in the Court of Federal Claims is filed, not the time at which the Government moves to dismiss the action." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1548 (Fed. Cir. 1994).

According to defendant, "Section 1500 bars plaintiffs from pursuing claims in this case in the Court of Federal Claims because another claim in district court based on the same operative facts was pending on the date they filed their complaint in this Court." ECF No. 21 at 24. Defendant argues that plaintiffs' claims are "based upon the same set of operative facts" as the claims asserted in National Treasury Employees Union v. United States, Case No. 19-cv-50 (D.D.C. 2019), which was filed in the United States District Court for the District of Columbia on January 11, 2019, the same day the present action was filed. Id. at 25. Defendant explains that the NTEU "filed its suit in district court on behalf of itself and its members who were required to report to work as 'excepted employees' during the lapse in appropriations." Id. (citations omitted). Given the symmetry of claims and the fact that the district court case was "filed on the same day as this case," defendant argues, this court must dismiss the present action. Id.

As plaintiffs note in response, however, defendant's analysis elides a critical piece of the statutory text. See ECF No. 22 at 27-29. Section 1500 operates only when the same "plaintiff or his assignee" is involved with the two similar cases. 28 U.S.C. § 1500. As the Supreme Court of the United States has explained: "[Section 1500] is more straightforward than its complex wording suggests. The [Court of Federal Claims] has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." United States v. Tohono O'Odham Nation, 563 U.S. 307, 311 (2011) (emphasis added).

Here, according to plaintiffs, the parties are not the same because "[t]he plaintiffs in Avalos are individual employees and the plaintiff in NTEU v. U[nited] S[tates] is a labor union." ECF No. 22 at 27. In addition, "[n]one of the plaintiffs is an assignee of the other." Id. "Section 1500 is therefore inapplicable." Id. Defendant has offered no evidence to the contrary, but argues in its reply that the court should deem plaintiffs in the two cases to be the same for purpose of applying § 1500:

> The National Treasury Employees Union in NTEU seeks to represent all of its members, while plaintiffs in this case, four individual members of the NTEU, seek to also represent all similarly situated members of the NTEU. According to their website, the NTEU represents federal employees in 33 different agencies, including CBP. In other words, plaintiffs in this case are encompassed by the first-filed district court action. Plaintiffs in both lawsuits are only different in title; they are identical in substance.

ECF No. 26 at 21 (footnote omitted). In support of this position, defendant cites to Allensworth v. United States, 122 Fed. Cl. 45 (2015), and O'Connor v. United States, 308 F.3d 1233 (Fed. Cir. 2002), cases in which the courts concluded that individual members of labor unions were bound by various aspects of settlement agreements negotiated by unions on behalf of their members. Neither of these cases, however, involve the application of § 1500. This authority does not compel the court to find that

the NTEU's lawsuit precludes the individually named plaintiffs in this case from maintaining suit in this court, and defendant's argument fails to make a persuasive connection between § 1500 and the referenced cases.

Additional facts may be discovered, or argument made, in the course of this litigation that affect the analysis, but at this stage the court is unconvinced that § 1500 applies. In particular, the court notes the lack of discussion by the parties of the interplay between § 1500 and this court's exclusive jurisdiction over FLSA claims against the federal government that exceed $10,000. See Abbey v. United States, 745 F.3d 1363, 1368-69 (Fed. Cir. 2014).

Moreover, even assuming an identity of plaintiffs between this case and the district court case, the presently available evidence indicates that plaintiffs filed here first. The case management/electronic case filing (CM/ECF) system docket in this case states that the complaint was "entered on 1/10/2019 at 3:54 PM EST and filed on 1/9/2019." ECF No. 22 at 41. The CM/ECF docket in the district court case states that the complaint was "entered by Shah, Paras on 1/9/2019 at 3:28 PM EST and filed on 1/9/2019." Id. at 46. Plaintiffs' attached to their response, a declaration from Paras Shah, the attorney who filed both cases. See id. at 36-37. The declaration outlines the filing process for each complaint, as follows:

> 1. My name is Paras N. Shah. I am an Assistant Counsel in the Office of General Counsel of the National Treasury Employees Union (NTEU). I have held this position since July 19, 2011. As part of my duties, I have drafted and filed numerous complaints in various federal courts.
>
> 2. As part of my duties, I filed the complaints in Avalos, et al. v. United States, 19-cv-48 (Fed. CL Jan. 9, 2019) and NTEU v. United States, 19-cv-50 (D.D.C. Jan. 9, 2019).
>
> 3. I logged into the U.S. Court of Federal Claims' Case Management/Electronic Case Files (CM/ECF) system on January 9, 2019 in order to file electronically the Avalos complaint in the Court of Federal Claims. I filed the complaint in Avalos at, or within a few minutes prior to, 2:56 p.m. on January 9, 2019.
>
> 4. As part of filing the Avalos complaint, I paid the required filing fee. I received notification from pay.gov promptly after filing the Avalos complaint at 2:56 p.m. on January 9, 2019. A true and correct copy of the pay.gov confirmation that I received (except that the last four digits of the credit card number are redacted) for the filing fee in Avalos is attached as Exhibit A to this Declaration.

5. The ECF notice for Avalos was sent to our office on January 10. That ECF notice states that the complaint was "filed on 1/9/2019" and the complaint itself has "Filed 01/09/19" on it. Avalos, (Dkt. #1). A true and correct copy of the ECF notice for the Avalos complaint is attached as Exhibit B to this Declaration.

6. After I filed the Avalos suit in the Court of Federal Claims, I subsequently logged into the CM/ECF system of the U.S. District Court for the District of Columbia. I filed the NTEU v. U.S. complaint in U.S. District Court at, or within a few minutes prior to, 3:27 p.m. on January 9, 2019. I also paid the required filing fee. I received notification from pay.gov promptly after filing at 3:27 p.m. on January 9, 2019. A true and correct copy of the pay.gov payment confirmation that I received (except that the last four digits of the credit card number, which is redacted) for the filing fee in NTEU v. U.S. is attached as Exhibit C to this Declaration.

Id.

Pursuant to this court's rules, "[i]nitial papers, including the complaint, may be filed in paper or electronic form." RCFC, Appendix E, ¶ 8(a). When a new complaint is electronically filed in this court, as it was in this case, the initial filing is recorded in the court's case CM/ECF system under a place-holder case number, or shell case. Once the filing has been uploaded, the system prompts payment of the filing fee. And after the filing fee has been paid, the system prompts the filer to submit the complaint. The complaint is deemed filed at the time of this submission. This procedure is explained in detail in the "Attorney Guide for Filing Complaints & Petitions in CM/ECF," found on the court's website at www.uscfc.uscourts.gov/electronic-filing.[2]

After the case is filed under a shell case number, the clerk's office assigns the case a permanent case number and creates the formal electronic docket, on which it enters the complaint. This two-step process accounts for the explanation on the docket in this case that was "entered on 1/10/2019 at 3:54 PM EST and filed on 1/9/2019." Id. at 41. Accordingly, in this case, the time stamp indicating that the complaint was "entered on 1/10/2019 at 3:54 PM EST," does not represent the time that the complaint was filed.

The documentation attached to Paras Shah's declaration supports the assertion that the complaint in this case was filed "at, or within a few minutes prior to, 2:56 p.m. on

[2] The version of the filing guide that is presently on the court's website was updated in November 2020, but the court has confirmed that the only substantive revision from the version that was on the website when this case was filed was to the amount of the filing fee.

January 9, 2019." Id. at 36, 39. The email receipt for the filing fee, which bears a tracking number that matches the number stamped on the original complaint, states that it was sent on "Wednesday, January 9, 2019 at 2:56 PM." Id. at 39; see also ECF No. 1 (complaint). The court has also confirmed that its internal records for the shell case created when this case was filed reflect the same filing time. Thus, based both on plaintiffs' evidence and the court's internal records, plaintiffs' complaint in this case was filed on January 9, 2019 at 2:56 p.m., eastern time.

The only evidence of the filing time for the district court case that is before the court indicates that the district court complaint was "entered by Shah, Paras on 1/9/2019 at 3:28 PM EDT and filed on 1/9/2019," and that the filing fee was paid at 3:27 PM on the same date. Id. at 44, 46. The court has no insight into the internal processes of the district court, and will not speculate about what they might be. Further investigation may reveal that the complaint was filed before the time reflected on the district court docket, but the evidence before the court at this time indicates that the district court case was not pending at the time that plaintiffs filed in this court. See Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1548 (Fed. Cir. 1994) (holding that the "question of whether another claim is 'pending' for purposes of § 1500 is determined at the time at which the suit in the Court of Federal Claims is filed, not the time at which the Government moves to dismiss the action"); Parker v. United States, 131 Fed. Cl. 1, 19 n.22 (2017) (noting that the "majority view recognizes as dispositive the sequence of the two complaints' filings" in determining whether § 1500 operates to abrogate this court's jurisdiction). Accordingly, the court would further decline to apply § 1500 based on the order in which it appears the cases were filed.

B. Plaintiffs Have Stated a Claim on which Relief Can Be Granted

1. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

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[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

2. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 21 at 14-15. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 14.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin, 130 Fed. Cl. 578. In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and

> cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 21 at 15 (defendant's motion to dismiss); see also ECF No. 6 at 5, 9-10 (plaintiffs citing Martin in their complaint); ECF No. 22 at 15 (plaintiffs noting that defendant makes the "same argument" here as it did in Martin with regard to the intersection of the FLSA and the ADA). In addition, plaintiffs here, like the plaintiffs in Martin, have alleged that defendant's violations of the FLSA were not in good faith. See ECF No. 6 at 9 (alleging that defendant "neither acted in good faith, nor had reasonable

[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

grounds for believing that failing to pay FLSA nonexempt employees their overtime wages or the required minimum wage on time during the shutdown was compliant with the FLSA").

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 21. With regard to the sufficiency of plaintiffs' allegations, defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 8. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 15.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[6] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130 Fed. Cl. at

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[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 21 at 18. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 37, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 45, ECF No. 46. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that

584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

3. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 21 at 20 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id. at 20-21; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 21 at 21. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 20-23. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 22-23.

"the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

Defendant also asserts that the scope of its waiver of sovereign immunity for FLSA claims does not cover the claims asserted here. See ECF No. 26 at 14. It argues, without citation to any authority, that:

> a cause of action under the FLSA cannot per se accrue against the United States when federal agencies do not pay employees on their regularly scheduled paydays during a lapse in appropriations because a federal statute expressly provides for when and at what rate federal employees will be paid under those circumstances.

Id. at 14.

The court disagrees. The claims brought by plaintiffs in this case are straightforward FLSA minimum wage and overtime claims under the FLSA. See ECF No. 6 at 12-14. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

4. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that CBP "classified them as FLSA nonexempt," and that they "were designated excepted employees [under the ADA] for the shutdown that began on December 22[, 2018]." ECF No. 6 at 3, 6. Plaintiffs also allege that as a result of being classified as exempt employees, plaintiffs were required to work during the shutdown, but did not receive timely pay for that work. See id. at 6-8.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 21 at 13, 14. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 17. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 18.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

5. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 26 at 15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 14-17. But as the court held in Martin:

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 21, is **DENIED**;

(2) On or before **February 8, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 8, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-54C

(E-Filed: December 1, 2020)

D.P., et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Nicholas M. Wieczorek, Las Vegas, NV, for plaintiff.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 4 at 1, 4-5 (amended complaint, hereinafter referred to as the complaint). On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 23.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 4; (2) defendant's motion to dismiss, ECF No. 23; (3) plaintiffs' response to defendant's motion, ECF No. 26; (4) defendant's reply in support of its

motion, ECF No. 34; (5) defendant's first supplemental brief in support of its motion, ECF No. 36; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 39; (7) defendant's second supplemental brief in support of its motion, ECF No. 47; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 51; (9) defendant's third supplemental brief in support of its motion, ECF No. 55; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 56. The motion is now fully briefed and ripe for ruling.[1] The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning at 12:01 a.m. on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 4 at 1, 3. The named plaintiffs in this case were, at the time of the shutdown, employees of "the Federal Air Marshal Service, which is a component of the Transportation Security Administration, which is a component of the Department of Homeland Security."[2] Id. at 2. Plaintiffs further allege that they were "directed to work" during the shutdown without pay, because "they were classified as 'essential employees' or 'excepted employees.'" Id. at 1, 3. Defendant's failure to timely pay plaintiffs, they allege, is a violation of the FLSA. See id. at 3.

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[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 23 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 55 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

[2] Defendant argues, in a footnote, that claims made by FLSA-exempt employees and employees who have asserted the same claims in another court should be dismissed from this action. See ECF No. 23 at 15 n.4. The court does not evaluate these assertions in this opinion because defendant neither identifies any such plaintiffs in this case, nor sufficiently briefs the issue to the court.

Plaintiffs assert that defendant "did not act in good faith and did not have reasonable grounds to violate the FLSA," and "[a]s a result, [d]efendant willfully violated the FLSA." Id. at 5. "Plaintiffs bring this action on behalf of the themselves, all similarly situated Federal Air Marshals, and all other similarly situated Transportation Security Administration employees, and/or other federal employees," id. at 2, and seek "all available relief under [the FLSA], including payment of wages lost and an additional amount as liquidated damages," id. at 5.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

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> appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 23 at 12-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

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[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin v. United States, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 23 at 14 (defendant's motion to dismiss); see also ECF No. 26 at 9-13 (plaintiff's response urging the court to follow its reasoning in the Martin decision). In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 23. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover

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[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

liquidated damages under FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[6] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130 Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign

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[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 23 at 16. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 47, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 55, ECF No. 56. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 23 at 19 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 23 at 19. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 20-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 21.

Defendant also asserts, without citation to any authority, as follows:

> Given that the [ADA] not only prohibits federal agencies from paying excepted employees on their regularly scheduled paydays during a lapse in appropriations, but also specifically addresses when and at what rate wages are to be paid following a lapse in appropriations, the government's waiver of sovereign immunity under the FLSA must be strictly construed against liability for the delayed (but always forthcoming) payment of wages because of a lapse in appropriations.

ECF No. 34 at 12-13.

The court disagrees. The claims brought by plaintiffs in this case are straightforward minimum wage and overtime claims under the FLSA. See ECF No. 26 at 5; ECF No. 4 at 4-5. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were each "classified as FLSA non-exempt" and "as an [e]xcepted [e]mployee and performed work during the partial government shutdown for which [they were] not compensated on the scheduled paydays." ECF No. 4 at 2. Plaintiffs allege specific facts demonstrating how the allegations apply to each plaintiff. See id.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 23 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 34 at 13. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 13-15. But as the court held in Martin:

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 23, is **DENIED**;

(2) On or before **January 29, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **January 29, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-59C

(E-Filed: December 9, 2020)

L. KEVIN ARNOLD, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Jacob Y. Statman, Baltimore, MD, for plaintiff. Michael J. Snider, Keith A. Kauffman, Jason I. Weisbrot, Jefferson Friday, Richard J. Hirn, Mark Schneider, Sarah Suszczyk, Dennie Rose, Sefan P. Sutich, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 6 at 6 (amended complaint, hereinafter referred to as the complaint). On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 25.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 6; (2) defendant's motion to dismiss, ECF No. 25; (3) plaintiffs' response to defendant's motion, ECF No. 30; (4) defendant's reply in support of its motion, ECF No. 34; (5) defendant's first supplemental brief in support of its motion, ECF No. 36; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 39; (7) defendant's second supplemental brief in support of its motion, ECF No. 47; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 48; (9) defendant's third supplemental brief in support of its motion, ECF No. 55; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 59. The motion is now fully briefed and ripe for ruling.[1] The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

On December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 6 at 6. The named plaintiffs in this case were, at the time of the lapse in appropriations, employees of various agencies affected by the shutdown.[2] See id. at 2-5. Plaintiffs further allege that they were classified as FLSA non-exempt, see id., and "designated as 'excepted employees'" who were "required to perform their duties without receiving their appropriate overtime and minimum wage

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[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 25 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 55 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

[2] Defendant argues, in a footnote, that claims made by FLSA-exempt employees and employees who have asserted the same claims in another court should be dismissed from this action. See ECF No. 25 at 15-16 n.3. The court does not evaluate these assertions in this opinion because defendant neither identifies any such plaintiffs in this case, nor sufficiently briefs the issues to the court.

pursuant to [the FLSA]." Id. at 6. Defendant's failure to timely pay plaintiffs, they allege, is a violation of the FLSA. See id. at 7.

Plaintiffs assert that defendant "cannot demonstrate good faith and reasonable grounds for believing its failure to pay minimum wage did not violate the FLSA," because "[d]efendant has knowledge that it has been held liable for similar violations of the FLSA based on its past actions and/or omissions that are identical to the violations, actions and/or omissions alleged herein." Id. at 9, 10. Plaintiffs also state that "[t]he potential class is comprised of [p]laintiffs and all similarly situated employees who are FLSA non-exempt and were designated as excepted service who have performed work for [d]efendant at some time [during the shutdown] without receiving timely payment of minimum wage and/or overtime[] wages for such work." Id. at 5. Plaintiffs seek the payment of minimum and overtime wages due, liquidated damages, and attorneys' fees and costs incurred in this litigation. Id. at 11.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

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[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 25 at 12-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin v. United States, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and

> cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 25 at 14 (defendant's motion to dismiss); see also ECF No. 30 at 5, 6 (plaintiffs claiming that "[d]efendant's motion is nothing more than an attempt to re-litigate its unsuccessful arguments to dismiss identical claims in Martin," and stating that "this case is factually and legally indistinguishable from Martin").

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[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 25. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[6] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130 Fed. Cl. at

[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 25 at 16. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. at 16-17. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 47, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 55, ECF No. 59. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323.

584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 25 at 19 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 25 at 19. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 19-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 21.

Defendant also asserts, without citation to any authority, as follows:

Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

> Given that the [ADA] not only prohibits federal agencies from paying excepted employees on their regularly scheduled paydays during a lapse in appropriations, but also specifically addresses when and at what rate wages are to be paid following a lapse in appropriations, the government's waiver of sovereign immunity under the FLSA must be strictly construed against liability for the delayed (but always forthcoming) payment of wages because of a lapse in appropriations.

ECF No. 34 at 13.

The court disagrees. The claims brought by plaintiffs in this case are straightforward minimum wage and overtime claims under the FLSA. See ECF No. 6 at 8-10; ECF No. 30 at 8. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that they were classified as FLSA non-exempt, ECF No. 6 at 2-5, and "designated as 'excepted' employees" who were "required to perform their duties without receiving their appropriate overtime and minimum wage pursuant to [the FLSA]." Id. at 6. Plaintiffs allege specific facts demonstrating how the allegations apply to each plaintiff. See id. at 2-5.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 25 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 34 at 15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 15-18. But as the court held in Martin:

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 25, is **DENIED**;

(2) On or before **February 8, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 8, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-63C

(E-Filed: December 1, 2020)

ROBERTO HERNANDEZ, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

William Clifton Alexander, Corpus Christi, TX, for plaintiff.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 1 at 1-2 (complaint). On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 25.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 25; (3) plaintiffs' response to defendant's motion, ECF No. 28; (4) defendant's reply in support of its

motion, ECF No. 32; (5) defendant's first supplemental brief in support of its motion, ECF No. 34; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 35; (7) defendant's second supplemental brief in support of its motion, ECF No. 43; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 47; (9) defendant's third supplemental brief in support of its motion, ECF No. 51; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 52. The motion is now fully briefed and ripe for ruling.[1] The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning at 12:01 a.m. on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 1 at 1. The named plaintiffs in this case were, at the time of the shutdown, employees of the United States Immigration and Customs Enforcement, within the Department of Homeland Security. See id. at 3.

In their complaint, plaintiffs allege that they are "excepted employees," a term which refers 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. at 1-2 (quoting the United States Office of Personnel Management Guidance for Government Furloughs, Section B.1, https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf (Sept. 2015)). Plaintiffs also allege that, in addition to being excepted employees required to work during a shutdown, they were also "classified as [ ] FLSA non-exempt employee[s]." Id. at 3. As a result of being categorized as non-exempt, excepted employees, plaintiffs were required to work during

[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 25 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 51 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

the shutdown, but were not paid minimum or overtime wages on their regularly scheduled paydays in violation of the FLSA. See id. at 4-5.

According to plaintiffs, defendant "conducted no analyses to determine whether its failure to pay [e]xcepted [e]mployees on their regularly scheduled payday complied with the FLSA." Id. at 5. In support of this allegation, plaintiffs cite this court's decision in Martin v. United States, 130 Fed. Cl. 578 (2017), a case in which this court "has found that the federal government's failure to timely pay similarly-situated plaintiffs violates the FLSA and that the government is liable for liquidated damages for committing such violations." Id. at 5. Plaintiffs now seek payment of "unpaid back wages due to [p]laintiffs, . . . civil penalties, and . . . liquidated damages equal in amount to the unpaid compensation found due to [p]lainitffs." Id. at 10.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[2] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[3] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

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[2] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[3] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 25 at 12-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin, 130 Fed. Cl. 578. In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and

> cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[4] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 25 at 13 (defendant's motion to dismiss); see also ECF No. 1 at 5 (plaintiffs citing Martin in their complaint); ECF No. 28 at 14-15 (plaintiffs reviewing and favorably comparing the arguments made in Martin). In addition, plaintiffs here, like the plaintiffs in Martin, have alleged that "[u]pon information and belief, [d]efendant conducted no analyses to determine whether its failure to pay [e]xcepted [e]mployees on their regularly scheduled payday complied with the FLSA." ECF No. 1 at 5.

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[4] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 25. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 13.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[5] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[6] Martin, 130 Fed. Cl. at

[5] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 25 at 16. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 43, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[6] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 51, ECF No. 52. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323.

584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 25 at 18 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. at 19 (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 25 at 19. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 19-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 20-21.

Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

Defendant also asserts that the scope of its waiver of sovereign immunity for FLSA claims does not cover the claims asserted here. See ECF No. 32 at 14. It argues, without citation to any authority, that:

> a cause of action under the FLSA cannot per se accrue against the United States when federal agencies do not pay employees on their regularly scheduled paydays during a lapse in appropriations because a federal statute expressly provides for when and at what rate federal employees will be paid under those circumstances.

Id.

The court disagrees. The claims brought by plaintiffs in this case are straightforward FLSA minimum wage and overtime claims under the FLSA. See ECF No. 28 at 6, 12-14; see also ECF No. 1 at 7-10. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they and all putative class members were classified as excepted employees who "perform[ed] work for [d]efendant without pay" on their regularly scheduled pay days.[7] ECF No. 1 at

[7] Defendant argues that "[t]o the extent that plaintiffs (1) claim any FLSA violation for failing to pay FLSA minimum wages or overtime wages to FLSA-exempt employees, or (2)

4-6. Plaintiffs allege specific facts demonstrating how the allegations apply to the named plaintiffs. See id.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 25 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 32 at 14-15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 14-18. But as the court held in Martin:

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welcome FLSA-exempt employees . . . to join their collective, those claims must be dismissed." ECF No. 25 at 15 n.3. In support of this statement, defendant cites to Jones v. United States, 88 Fed. Cl. 789 (2009). See id. In Jones, the court stated: "The 'precise question at issue' is whether Section 111(d) of the [Aviation and Transportation Security Act] exempts [Transportation Security Administration (TSA)] from compliance with the FLSA when establishing overtime compensation for security screeners. Because we find that the plain language of Section 111(d) is unambiguous, we conclude that TSA need not comply with the FLSA." 88 Fed. Cl. at 792 (emphasis added). This case is not binding precedent, and appears to be limited in application to security screeners. Plaintiffs note that defendant "does not appear to seek relief on these arguments at this time" and therefore plaintiffs choose to "not further respond to them except to state that granting any relief on these arguments would constitute an improper advisory opinion." ECF No. 28 at 7 n.1. (citing Gen. Mills, Inc. v. United States, 123 Fed. Cl. 576, 594 (2015)). In the complaint, plaintiffs do not allege that any putative class member is a TSA employee. See ECF No. 1 at 3. Because the court's decision in Jones does not hold that all TSA employees are necessarily FLSA-exempt, and because neither plaintiffs nor defendant has alleged that any putative class member is a TSA employee, the court will not address this argument at this time.

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 25, is **DENIED**;

(2) On or before **January 29, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **January 29, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-67C

(E-Filed: November 20, 2020)

TONY ROWE, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Marshall J. Ray, Albuquerque, NM, for plaintiff.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 1 at 1-2 (complaint). On May 3, 2020, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 24.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 24; (3) plaintiffs' response to defendant's motion, ECF No. 27; (4) defendant's reply in support of its

motion, ECF No. 31; (5) defendant's first supplemental brief in support of its motion, ECF No. 33; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 35; (7) defendant's second supplemental brief in support of its motion, ECF No. 43; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 46; (9) defendant's third supplemental brief in support of its motion, ECF No. 53; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 54. The motion is now fully briefed and ripe for ruling.[1] For the following reasons, defendant's motion is **DENIED**.

I. Background

In their complaint, plaintiffs define the putative class bringing this collective action as follows:

> Plaintiffs and those similarly situated are all bargaining unit employees or were bargaining unit employees of the Federal Indian Service Employees Union ("FISE"), working for the Bureau of Indian Affairs, Bureau of Indian Education, or the Office of the Secretary/Office of the Special Trustee for American Indians at all relevant times during the partial government shutdown and lapse of appropriations that began on December 22, 2018 and that is ongoing as of the date of the filing of this Complaint.

ECF No. 1 at 1-2. Plaintiffs further allege that they "are 'excepted' or 'essential' employees for purposes of the ongoing shutdown and furlough," and that they "have been required to work without timely pay and/or without overtime pay because of the lapse in appropriations since December 22, 2018." Id. at 2. Plaintiffs seek "all unpaid wages and overtime, liquidated damages, and interest." Id.

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[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 24 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 53 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. Id.; see also Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Beginning at 12:01 a.m. on December 22, 2018, the federal government "partially shut down and appropriations . . . lapsed to fund various agencies," including the Bureau of Indian Affairs, the Bureau of Indian Education, and the Office of the Secretary/Office of the Special Trustee for American Indians. Id. at 5. Pursuant to the ADA, "[a]n officer or employee of the United States Government . . . may not accept voluntary services for [the] government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." Id. at 6 (quoting 31 U.S.C. § 1342). While some employees were furloughed during the shutdown, plaintiffs were deemed "essential" or "excepted" employees under the ADA, and were required to continue work. Id. As of January 15, 2019, the date of the complaint, plaintiffs had been "required to work throughout the furlough and [had] not been paid their regular wages and/or earned overtime in a timely fashion." Id. Specifically, plaintiffs "have received a pay stub reflecting 0.00 for the pay period ending January 5, 2019, even though they have worked their regular hours in addition to overtime." Id. at 11. According to plaintiffs, defendant's failure to pay regular wages and earned overtime is a per se violation of the FLSA. Id. at 13.

Plaintiffs also allege that "there is evidence the denial of pay is willful and not the result of mere negligence or oversight." Id. at 9. In support of this statement, plaintiffs point to a public statement by President Donald J. Trump in which he proclaimed that he was "proud to shutdown the government." Id. at 9 (quoting a transcript published by www.marketwatch.com). In addition, plaintiffs note that this court decided a FLSA case in plaintiffs' favor "under nearly identical circumstances," referring to Martin v. United States, 130 Fed. Cl. 578 (2017).[2] Id. at 10. As such, plaintiffs contend that defendant "has been on notice of its obligations as articulated in Martin v. United States but has not taken any steps to fulfill those obligations." Id. Plaintiffs allege that defendant is, as a result, liable for a penalty of liquidated damages under the FLSA. See id. at 14.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is

[2] Plaintiffs' complaint cites to Martin v. United States, 130 Fed. Cl. 538 (2017), but the court assumes that this citation includes a typographical error and that plaintiffs mean to reference Martin v. United States, 130 Fed. Cl. 578 (2017).

plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C.

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[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

§ 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 24 at 12-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibitions do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] Act would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin, 130 Fed. Cl. 578. In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown]

because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the

court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 24 at 14 (defendant's motion to dismiss). As plaintiffs outline in their response, "[l]ike in Martin v. United States, [p]laintiffs have pleaded (and will be able to prove) that they were non-exempt employees who were required to work during the shutdown (i.e., lapse in appropriations), and that they were not paid timely for actual wages or overtime." ECF No. 27 at 7. In addition, plaintiffs here, like the plaintiffs in Martin, "have pleaded that the [d]efendant has continued to fail to take steps to determine its obligations under the FLSA," as it relates to the propriety of an award of liquidated damages. Id.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 24. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[6] As it did in Martin, "the

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[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin, 130 Fed. Cl. at 586-87. This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 24 at 16. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]."

court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130 Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 24 at 18 (quoting Lane v. Pena, 518 U.S. 187, 196 (1996)). And that waiver "will be strictly construed, in terms of its scope, in favor of the sovereign." Id. (citations omitted). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See ECF No. 24 at 18; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 24 at 19. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims

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See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant it one of its supplemental filings, see ECF No. 43, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 53, ECF No. 54. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Community Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 19-20. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 20-21.

Defendant also asserts, without citation to any authority, that:

> when the United States does not pay employees on their regularly scheduled paydays during a lapse in appropriations, a[ ] FLSA cause of action against the United States (1) does not accrue because the United States has not waived sovereign immunity for money damages resulting from the delayed payment of wages during a funding gap, and (2) cannot accrue because the [ADA] controls when and at what rate of pay the government must pay employees following a funding gap.

ECF No. 31 at 13.

The court disagrees. The claims brought by plaintiffs in this case are "straightforward minimum wage and overtime claims" under the FLSA. ECF No. 27 at 9; see also ECF No. 1 at 13-16. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were each "covered employees under [FLSA] and [were] deemed 'excepted' or 'essential' pursuant to the [ADA]. As a result, they [were] required to work throughout the furlough and [were] not paid their regular wages and/or earned overtime in a timely fashion." ECF No. 1 at 6. Plaintiffs allege specific facts demonstrating how the allegations apply to each plaintiff. See id. at 7-10.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 24 at 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 31 at 15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 15-18. But as the court held in Martin:

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional

factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 24, is **DENIED**;

(2) On or before **January 22, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **January 22, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-94C

(E-Filed: March 4, 2021)[1]

PLAINTIFF NO. 1, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Jules Bernstein, Washington, DC, for plaintiff. Linda Lipsett, Daniel M. Rosenthal, and Alice Hwang, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Ethan P. Davis,[2] Acting Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, Vijaya S. Surampudi, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by

[1] This opinion was issued under seal on December 11, 2020. See ECF No. 122. Pursuant to ¶ 4 of the ordering language, the parties were invited to inform the court as to whether any redactions were required before the court made this opinion publicly available. No redactions were proposed by the parties. See ECF No. 142 (notice). Thus, the sealed and public versions of this opinion are identical, except for the publication date and this footnote.

[2] Joseph H. Hunt was listed as Assistant Attorney General on defendant's motion to dismiss, see ECF No. 112, but was replaced with Ethan P. Davis on defendant's reply.

failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 109 at 23-24 (fourth amended complaint, hereinafter referred to as the complaint). On June 4, 2020, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 112.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 109; (2) defendant's motion to dismiss, ECF No. 112; (3) plaintiffs' response to defendant's motion, ECF No. 115; and (4) defendant's reply in support of its motion, ECF No. 116. The motion is now fully briefed and ripe for ruling. The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

On December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 112 at 12. The named plaintiffs and putative class members in this case were, at the time of the shutdown, "employed by federal agencies including but not limited to, the Federal Bureau of Investigations ('FBI'), the United States Secret Service ('USSS'), the Bureau of Alcohol, Tobacco, Firearms and Explosives ('ATF'), the Drug Enforcement Administration ('DEA') and the Federal Air Marshal Service ('FAM')."[3] ECF No. 109 at 24. Plaintiffs further allege that they were "essential and excepted employees of Defendant who are non-exempt under the [FLSA], and who worked for [d]efendant without being paid on their regular pay days, and at all, during the 2018-2019 Government shutdown, in violation of [the] FLSA." Id.

Plaintiffs assert that, at the time of the shutdown, defendant was "on express notice of this [c]ourt's decision in Martin v. United States, 117 Fed. Cl. 578 (2017), . . . in which this [c]ourt held that [d]efendant's failure to pay approximately 24,000 of its excepted employees 'on time,' in connection with a prior governmental shutdown in 2013 violated the FLSA." Id. at 25. As a result of the holding in Martin, plaintiffs allege that defendant "had express notice that its violations alleged herein were patently

[3] Defendant argues, in a footnote, that claims made by FLSA-exempt employees and employees who have asserted the same claims in another court should be dismissed from this action. See ECF No. 112 at 16-17 n.3. The court does not evaluate these assertions in this opinion because defendant neither identifies any such plaintiffs in this case, nor sufficiently briefs the issues to the court.

unlawful, and it engaged in these violations nonetheless, . . . in reckless disregard" of applicable law. Id.

Plaintiffs seek, for themselves and those similarly-situated, declaratory judgment, and an award of "liquidated damages under [the] FLSA in an amount equal to the minimum wages, or straight time wages, whichever is greater, and overtime compensation they did not receive, but were entitled [to] . . . on their regularly scheduled pay days." Id. at 28-29. Plaintiffs also see an award of reasonable attorneys' fees and costs. See id. at 29.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[4] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[5] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

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[4] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[5] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 112 at 14-15. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 14.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin v. United States, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and

> cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[6] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs in this case." ECF No. 112 at 15 (defendant's motion to dismiss); see also ECF No. 115 at 6 (stating that "[t]he [g]overnment admits that the [p]laintiffs in this case are similarly situated to those in Martin").

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during

[6] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

that time due to the lapse in appropriations. See ECF No. 112. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] in light of the provisions in of the [ADA]." Id. at 8. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs in this case could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 15.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[7] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[8] Martin, 130 Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

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[7] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 112 at 18. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case.

[8] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 112 at 21-23; ECF No. 115 at 9, 17-18. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 112 at 21 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 112 at 23. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 23-24. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 24.

Defendant also asserts, without citation to any authority, as follows:

> Given that the [ADA] not only prohibits federal agencies from paying excepted employees on their regularly scheduled paydays during a lapse in appropriations, and that it specifically addresses when and at what rate wages are to be paid following a lapse in appropriations, the government's waiver of sovereign immunity under the FLSA must be strictly construed against liability for the delayed (but always forthcoming) payment of wages because of a lapse in appropriations.

ECF No. 116 at 15.

The court disagrees. The claims brought by plaintiffs in this case are "straightforward" minimum wage and overtime claims under the FLSA. ECF No. 115 at 12; see also ECF No. 109 at 27. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were "essential and excepted employees of Defendant who are non-exempt under the [FLSA], and who worked for Defendant without being paid on their regular pay days, and at all, during the 2018-2019 Government shutdown, in violation of the FLSA." ECF No. 109 at 24.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid for the work performed during the lapse at the earliest possible date after the lapse in appropriations ended." ECF No. 112 at 13, 14. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 16. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 17.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 116 at 17. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 17-20. But as the court held in Martin:

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.[9]

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 112, is **DENIED**;

(2) On or before **February 12, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

[9] The court acknowledges that the parties have a significant disagreement with regard to interpreting and applying the regulation that governs the calculation of liquidated damages under the FLSA. See ECF No. 112 at 26-30 (arguing that under the applicable regulations plaintiffs are not entitled to liquidated damages for straight time pay); ECF No. 115 at 22-27 (arguing, in response, that plaintiffs "are entitled to liquidated damages in an amount equal to their straight time [ ] pay for all non-overtime hours worked"). Because the court does not reach the issue of whether plaintiffs are entitled to liquidated damages at this stage in the litigation, it is premature to decide how such damages, if they are ultimately awarded, should be calculated. As such, the court reserves its ruling on this question and the parties may re-urge their arguments at the appropriate time.

(3) On or before **February 12, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court as to their positions on the consolidation of this case with any other matters before the court; and

(4) On or before **February 12, 2021**, the parties are directed to **CONFER** and **FILE** a **notice** informing the court as to whether any redactions are required before the court makes this order publicly available, and if so, attaching an agreed-upon proposed redacted version of this opinion and order.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-95C

(E-Filed: December 1, 2020)

I.P., et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Laura R. Reznick, Garden City, NY, for plaintiff.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 1 at 1-2 (complaint). On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief can be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 25.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 25; (3) plaintiffs' response to defendant's motion, ECF No. 37; (4) defendant's reply in support of its

motion, ECF No. 44; (5) defendant's first supplemental brief in support of its motion, ECF No. 46; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 49; (7) defendant's second supplemental brief in support of its motion, ECF No. 57; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 65; (9) defendant's third supplemental brief in support of its motion, ECF No. 67; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 70. The motion is now fully briefed and ripe for ruling.[1] The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 1 at 5. The named plaintiffs in this case were, at the time of the shutdown, employees of the Transportation Security Administration, within the Department of Homeland Security. See id. at 3-4.

In their complaint, plaintiffs allege that they are "essential employees" or "excepted employees," terms which refer to employees who "were required to report to work and perform their normal duties, but were not compensated for their work performed." Id. at 1-2, 5. Plaintiffs also allege that, in addition to being excepted employees required to work during a shutdown, they were also "classified as FLSA non-exempt Federal Air Marshal[s]." Id. at 3-4. As a result of being categorized as non-exempt, excepted employees, plaintiffs were required to work during the shutdown, but were not paid minimum or overtime wages on their regularly scheduled paydays in violation of the FLSA. See id. at 5-7.

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[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 25 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 67 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

According to plaintiffs, defendant's failure to timely pay their minimum and overtime wages was "willful, and in conscious or reckless disregard of the requirements of the FLSA." Id. at 6, 7. In support of this allegation, plaintiffs allege that "[d]efendant conducted no analyses to determine whether its failure to pay non-exempt [plaintiffs] the minimum wage for work performed during the [shutdown] complied with the FLSA and relied on no authorities indicating that its failure to pay [plaintiffs] the minimum wage for work performed during the [shutdown] complied with the FLSA," id. at 6, and that "[d]efendant conducted no analyses to determine whether its failure to pay non-exempt [plaintiffs] overtime pay for work performed during the [shutdown] complied with the FLSA and relied on no authorities indicating that it could fail to pay overtime to non-exempt [plaintiffs] on the [s]cheduled [p]ayday," id. at 7. Plaintiffs now seek payment of wages owed, liquidated damages, pre- and post-judgment interest, and reasonable attorneys' fees. See id. at 10-11.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[2] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[3] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

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[2] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[3] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 25 at 12-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin v. United States, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and

> cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[4] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 25 at 14 (defendant's motion to dismiss); see also ECF No. 37 at 6 (plaintiffs stating that "this case is factually and legally indistinguishable from Martin"). As plaintiffs outline in their response to defendant's motion, "by [d]efendant's own admission, the allegations in this case are virtually identical to those that were adequately pled in Martin." ECF No. 37 at 9. In addition, plaintiffs here, like the plaintiffs in Martin, have alleged that "[d]efendant conducted no analyses to determine

[4] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

whether its failure to pay" plaintiffs both regular and overtime pay during the shutdown "complied with the FLSA." ECF No. 1 at 6, 7.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 25. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[5] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[6] Martin, 130 Fed. Cl. at

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[5] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 25 at 16. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 57, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[6] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 67, ECF No. 70. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding

584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 25 at 19 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 25 at 19. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 19-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 20-21.

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sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

Defendant also asserts that the scope of its waiver of sovereign immunity for FLSA claims does not cover the claims asserted here. See ECF No. 44 at 14. It argues, without citation to any authority, that:

> when the United States does not pay employees on their regularly scheduled paydays during a lapse in appropriations, a[ ] FLSA cause of action against the United States (1) does not accrue because the United States has not waived sovereign immunity for money damages resulting from the delayed payment of wages during a funding gap, and (2) cannot accrue because the [ADA] controls when and at what rate of pay the government must pay employees following a funding gap.

Id. at 13.

The court disagrees. The claims brought by plaintiffs in this case are straightforward FLSA minimum wage and overtime claims under the FLSA. See ECF No. 37 at 6-7, 9; see also ECF No. 1 at 8-10. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they and all putative class members were "[e]ssential [e]mployees" who were "classified as FLSA non-exempt Federal Air Marshal[s]" and "performed work for [d]efendant" but

were "not compensated on the [s]cheduled [p]ayday."[7] ECF No. 1 at 3-5. Plaintiffs allege specific facts demonstrating how the allegations apply to each named plaintiff. See id. at 3-4.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 25 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 44 at 15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 15-18. But as the court held in Martin:

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[7] Defendant argues that "[t]o the extent that plaintiffs (1) claim any FLSA violation for failing to pay FLSA minimum wages or overtime wages to FLSA-exempt employees, or (2) welcome FLSA-exempt employees to join their collective, those claims must be dismissed." ECF No. 25 at 15 n.3. In support of this statement, defendant cites to Jones v. United States, 88 Fed. Cl. 789 (2009). See id. In Jones, the court stated: "The 'precise question at issue' is whether Section 111(d) of the [Aviation and Transportation Security Act] exempts [Transportation Security Administration (TSA)] from compliance with the FLSA when establishing overtime compensation for security screeners. Because we find that the plain language of Section 111(d) is unambiguous, we conclude that TSA need not comply with the FLSA." 88 Fed. Cl. at 792 (emphasis added). This case is not binding precedent, and appears to be limited in application to security screeners. In the complaint, plaintiffs allege that the named individuals are TSA employees, but assert that they are "classified as FLSA non-exempt Federal Air Marshal[s]." ECF No. 1 at 3-4. Because the court's decision in Jones does not hold that all TSA employees are necessarily FLSA-exempt, and because plaintiffs have alleged to the contrary, the court will not dismiss the claims of TSA employees at this time. Plaintiffs, however, ultimately bear the burden of proving that any TSA employees asserting claims in this case are, in fact, FLSA non-exempt in order for such employees to recover any damages that may be awarded.

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 25, is **DENIED**;

(2) On or before **January 29, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **January 29, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-118C

(E-Filed: December 4, 2020)

LORI ANELLO, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Theodore Reid Coploff, Washington, DC, for plaintiff. Sarah M. Block, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 1 at 1-2 (complaint). On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 26.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 26; (3) plaintiffs' response to defendant's motion, ECF No. 27; (4) defendant's reply in support of its

motion, ECF No. 31; (5) defendant's first supplemental brief in support of its motion, ECF No. 33; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 34; (7) defendant's second supplemental brief in support of its motion, ECF No. 43; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 47; (9) defendant's third supplemental brief in support of its motion, ECF No. 52; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 53. The motion is now fully briefed and ripe for ruling.[1] The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

On December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 1 at 2. The named plaintiffs in this case were, at the time of the shutdown, fire fighters employed either by the United States Department of Commerce at the National Institute of Standards and Technology or the United States Department of Homeland Security at Training Center Petaluma.[2] See id. at 1-2. Plaintiffs further allege that they were "designated 'excepted' employees [and] were directed to continue working without pay by defendant." Id. at 7. Defendant's failure to timely pay plaintiffs, they allege, is a violation of the FLSA. See id. at 10-12.

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[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 26 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 52 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

[2] Defendant argues, in a footnote, that claims made by FLSA-exempt employees and employees who have asserted the same claims in another court should be dismissed from this action. See ECF No. 26 at 15 n.4. The court does not evaluate these assertions in this opinion because defendant neither identifies any such plaintiffs in this case, nor sufficiently briefs the issues to the court.

Plaintiffs assert that defendant "has violated and continues to violate the provisions of the FLSA . . . in an intentional, willful, unreasonable, and bad faith manner." Id. at 10. "Plaintiffs bring this action as a collective action on behalf of themselves and all other similarly situated employees who have worked and/or are working in 'excepted' status without pay," id. at 3, and seek "monetary liquidated damages equal to any minimum wage and overtime compensation earned since December 22, 2018, as well as interest thereon," in addition to attorneys' fees and costs, id. at 13.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's

[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

> standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 26 at

[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

13-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin v. United States, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 26 at 14 (defendant's motion to dismiss); see also ECF No. 27 at 11 n.3 (noting that the Martin plaintiffs' claims were "almost identical to those here").

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 26. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated

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[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

damages under FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[6] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130 Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign

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[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 26 at 17. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 43, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 52, ECF No. 53. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 26 at 19 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 26 at 19-20. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 20-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 21.

Defendant also asserts, without citation to any authority, as follows:

> Given that the [ADA] not only prohibits federal agencies from paying excepted employees on their regularly scheduled paydays during a lapse in appropriations, but also specifically addresses when and at what rate wages are to be paid following a lapse in appropriations, the government's waiver of sovereign immunity under the FLSA must be strictly construed against liability for the delayed (but always forthcoming) payment of wages because of a lapse in appropriations.

ECF No. 31 at 13.

The court disagrees. The claims brought by plaintiffs in this case are straightforward minimum wage and overtime claims under the FLSA. See ECF No. 1 at 10-12; ECF No. 27 at 6-7. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were each "designated 'excepted' employees [and] were directed to continue working without pay by defendant." ECF No. 1 at 7. Plaintiffs allege specific facts demonstrating how the allegations apply to each plaintiff. See id. at 7-9.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 26 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 31 at 14. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 14-17. But as the court held in Martin:

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 26, is **DENIED**;

(2) On or before **February 5, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 5, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-161C

(E-Filed: December 2, 2020)

BRIAN RICHMOND, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Jack K. Whitehead, Jr., Baton Rouge, LA, for plaintiff.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 1 at 2-3 (complaint). On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief can be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 23.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 23; (3) plaintiffs' response to defendant's motion, ECF No. 26; (4) defendant's reply in support of its

motion, ECF No. 30; (5) defendant's first supplemental brief in support of its motion, ECF No. 32; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 35; (7) defendant's second supplemental brief in support of its motion, ECF No. 43; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 47; (9) defendant's third supplemental brief in support of its motion, ECF No. 51; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 53. The motion is now fully briefed and ripe for ruling.[1] The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 1 at 2-3. The named plaintiffs in this case were, at the time of the shutdown, employees of the Bureau of Prisons, within the United States Department of Justice. See id.

In their complaint, plaintiffs allege that they are "'[e]xcepted' employees," performing "emergency work involving the safety of human life or the protection of property," and as such "were forced to continue to perform their duties designated as essential, without the receipt of their normally scheduled wages," during the shutdown. Id. at 3 & n.1. Plaintiffs also allege that, in addition to being excepted employees required to work during a shutdown, they were also "classified as FLSA non-exempt." Id. at 4-5. Despite being required to work during the shutdown, plaintiffs allege that they were not paid "in accordance with the minimum wage and overtime provisions of the [FLSA]." Id. at 3.

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[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 23 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 51 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

According to plaintiffs, defendant "cannot show it acted in good faith during its violation of the FLSA and therefore, in addition to monetary damages, the [p]laintiffs are . . . entitled to liquidated damages." Id. at 9. In support of this allegation, plaintiffs cite this court's decision in Martin v. United States, 130 Fed. Cl. 578 (2017), a case in which the court "found that the federal government's failure to timely pay similarly-situated plaintiffs violates the FLSA and that the government is liable for liquidated damages for committing such violations." Id. at 8. Plaintiffs now seek the payment of "all regular, minimum, and overtime wages," earned by plaintiffs, "liquidated damages equal to" any overtime or minimum wages earned, as well as attorneys' fees and costs. Id. at 11.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[2] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[3] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

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[2] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[3] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 23 at 12-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin v. United States, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and

> cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[4] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 23 at 13 (defendant's motion to dismiss); see also ECF No. 26 at 7 ("The [p]laintiffs here have pled precisely the same type of claim presented in Martin, i.e., that they were non-exempt employees who worked for the federal government during the shutdown and were not paid on their regular pay dates."). In addition, plaintiffs here, like the plaintiffs in Martin, have alleged that "[d]efendant conducted no analysis to determine whether its failure to pay" plaintiffs "on their

[4] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

regularly scheduled payday" during the shutdown "complied with the FLSA." ECF No. 1 at 8.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 23. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 13-14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[5] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[6] Martin, 130 Fed. Cl. at

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[5] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 23 at 16. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. at 16-17. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 43, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[6] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 51, ECF No. 53. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding

584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 23 at 19 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 25 at 19. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 19-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 20-21.

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sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

Defendant also asserts that the scope of its waiver of sovereign immunity for FLSA claims does not cover the claims asserted here. See ECF No. 30 at 13. It argues, without citation to any authority, that:

> when the United States does not pay employees on their regularly scheduled paydays during a lapse in appropriations, a[] FLSA cause of action against the United States (1) does not accrue because the United States has not waived sovereign immunity for money damages resulting from the delayed payment of wages during a funding gap, and (2) cannot accrue because the [ADA] controls when and at what rate of pay the government must pay employees following a funding gap.

Id.

The court disagrees. The claims brought by plaintiffs in this case are "garden variety" minimum wage and overtime claims under the FLSA. See ECF No. 26 at 16-17; see also ECF No. 1 at 7-10. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they and all putative class members were excepted employees "were forced to continue to perform their duties designated as essential, without the receipt of their normally

scheduled wages."[7] ECF No. 1 at 3. Plaintiffs allege specific facts demonstrating how the allegations apply to each named plaintiff. See id. at 4-5.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 23 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 30 at 14-15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 14-18. But as the court held in Martin:

> [I]t 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. Moreover, even if the court

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[7] Defendant argues that "[t]o the extent that plaintiffs (1) claim any FLSA violation for failing to pay FLSA minimum wages or overtime wages to FLSA-exempt employees, or (2) welcome FLSA-exempt employees to join their collective, those claims must be dismissed." ECF No. 23 at 15 n.3. In support of this statement, defendant cites to Jones v. United States, 88 Fed. Cl. 789 (2009). See id. In Jones, the court stated: "The 'precise question at issue' is whether Section 111(d) of the [Aviation and Transportation Security Act] exempts [Transportation Security Administration (TSA)] from compliance with the FLSA when establishing overtime compensation for security screeners. Because we find that the plain language of Section 111(d) is unambiguous, we conclude that TSA need not comply with the FLSA." 88 Fed. Cl. at 792 (emphasis added). This case is not binding precedent, and appears to be limited in application to security screeners. Moreover, plaintiffs do not allege that any putative class member is a TSA employee. See ECF No. 1 at 10. Because the court's decision in Jones does not hold that all TSA employees are necessarily FLSA-exempt, and because neither plaintiffs nor defendant has alleged that any putative class member is a TSA employee, the court will not address this argument at this time.

were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 23, is **DENIED**;

(2) On or before **February 1, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 1, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-213C

(E-Filed: December 4, 2020)

QUENTIN BACA, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019); 28 U.S.C. § 1500.

Molly Ann Elkin, Washington, DC, for plaintiff. Gregory K. McGillivary, Sarah M. Block, John W. Stewart, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 1 at 3 (complaint, filed on February 6, 2019); ECF No. 32 at 338-39 (third amended complaint, filed on April 19, 2019). On May 3, 2019, defendant moved to dismiss the complaint for lack of jurisdiction, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC); and in the alternative, for failure to state a claim on which relief may be granted, pursuant to RCFC 12(b)(6) on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 33.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) plaintiffs' third amended complaint (hereinafter referred to as the complaint, unless otherwise stated), ECF No. 32; (3) defendant's motion to dismiss, ECF No. 33; (4) plaintiffs' response to defendant's motion, ECF No. 34; (5) defendant's reply in support of its motion, ECF No. 38; (6) defendant's first supplemental brief in support of its motion, ECF No. 40; (7) plaintiffs' response to defendant's first supplemental brief, ECF No. 41; (8) defendant's second supplemental brief in support of its motion, ECF No. 50; (9) plaintiffs' response to defendant's second supplemental brief, ECF No. 54; (10) defendant's third supplemental brief in support of its motion, ECF No. 59; and (11) plaintiffs' response to defendant's third supplemental brief, ECF No. 60. The motion is now fully briefed and ripe for ruling.[1] The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning at midnight on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 32 at 339. The named plaintiffs in this case were, at the time of the shutdown, employees of the United States working as air traffic controllers for the Federal Aviation Administration (FAA). See id. at 338. Although the lapse in appropriations began on December 22, 2018, the FAA did not exhaust its appropriated funds until 12:01 a.m. on December 24, 2020. See id. at 342.

In their complaint, plaintiffs allege that they were categorized as excepted employees, and "compelled to continue to work through the shutdown." Id. at 339. Plaintiffs did not receive timely minimum or overtime wages for work performed during the shutdown. See id. at 344-45. Plaintiffs also allege that some air traffic controllers did not receive timely minimum or overtime wages for work performed between December 19 and December 23, 2018, even though the FAA had not yet exhausted its appropriated

[1] In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 59 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was argued for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case under the authority of Maine Community Health, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

funds. See id. at 345-48. In addition, plaintiffs claim that defendant's "violations of the FLSA as alleged herein have been done in an intentional, willful, and bad faith manner." Id. at 349, 353, 354; see also id. at 350, 351. Plaintiffs now seek "backpay as well as monetary liquidated damages equal to any unpaid or untimely paid minimum wage and overtime compensation earned since December 19, 2018, as well as interest thereon," and attorneys' fees and costs. See id. at 355.

II. Legal Standards

A. Dismissal for Lack of Jurisdiction

Pursuant to the Tucker Act, the court has jurisdiction to consider "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). To invoke the court's jurisdiction, plaintiffs must show that their claims are based upon the Constitution, a statute, or a regulation that "'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" United States v. Mitchell, 463 U.S. 206, 217 (1983) (quoting United States v. Testan, 424 U.S. 392, 400 (1976)).

Plaintiffs bear the burden of establishing this court's subject matter jurisdiction by a preponderance of the evidence. See Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988). In reviewing plaintiffs' allegations in support of jurisdiction, the court must presume all undisputed facts are true and construe all reasonable inferences in plaintiffs' favor. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-15 (1982); Reynolds, 846 F.2d at 747 (citations omitted). If, however, a motion to dismiss "challenges the truth of the jurisdictional facts alleged in the complaint, the . . . court may consider relevant evidence in order to resolve the factual dispute." Reynolds, 846 F.2d at 747. If the court determines that it lacks subject matter jurisdiction, it must dismiss the complaint. See RCFC 12(h)(3).

B. Dismissal for Failure to State a Claim

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is

plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. The Court Has Jurisdiction over Plaintiffs' Claims

At the end of its motion to dismiss, defendant includes a short argument in which it takes the position that the court lacks jurisdiction to hear plaintiffs' claims pursuant to 28 U.S.C. § 1500. See ECF No. 33 at 24-25. Section 1500 states, in its entirety, as follows:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500. Of relevance here, the United States Court of Appeals for the Federal Circuit has held that the "question of whether another claim is 'pending' for purposes of § 1500 is determined at the time at which the suit in the Court of Federal Claims is filed, not the time at which the Government moves to dismiss the action." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1548 (Fed. Cir. 1994).

According to defendant, "Section 1500 bars plaintiffs from pursuing claims in the Court of Federal Claims because another claim in district court based on the same operative facts was pending on the date they filed their complaint in the Court of Federal Claims." ECF No. 33 at 24. Defendant argues that plaintiffs' claims are "based upon the same operative facts" as the claims asserted in National Air Traffic Controllers Association, AFL-CIO v. United States, Case No. 19-62 (D.D.C. 2019), which was filed in the United States District Court for the District of Columbia on January 11, 2019. Id. Defendant explains the operative facts of National Air Traffic Controllers, as follows: "NATCA filed its suit on behalf of 'similarly situated employees at the FAA working in 'excepted' status in accordance with the minimum wage and overtime provisions of the' FLSA, who asserted untimely payment of wages for their work performed during the lapse in appropriations." Id. Given the symmetry of claims and the fact that the district court case was filed first, defendant argues, this court must dismiss the present action. See id. at 25.

As plaintiffs note in response, however, defendant's analysis elides a critical piece of the statutory text. See ECF No. 34 at 11-14. Section 1500 operates only when the same "plaintiff or his assignee" is involved with the two similar cases. 28 U.S.C. § 1500.

As the Supreme Court of the United States has explained: "[Section 1500] is more straightforward than its complex wording suggests. The [Court of Federal Claims] has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." United States v. Tohono O'Odham Nation, 563 U.S. 307, 311 (2011) (emphasis added).

Here, according to plaintiffs, none of the named plaintiffs in the district court case when it was filed on January 11, 2019, were named plaintiffs in this case when it was filed on February 6, 2019. See ECF No. 34 at 12 (stating that "at the time the original [c]omplaint was filed on February 6, 2019, none of the individual plaintiffs in the instant case were plaintiffs in the then-pending district court case"). Defendant has offered no evidence to the contrary, but argues in its reply that the court should deem plaintiffs in this case to be "encompassed by the first-filed district court action," because the plaintiffs in the district court case "sought to represent all air traffic controllers." ECF No. 38 at 21-22. This position, however, is discordant with requirements for maintaining a claim under the FLSA. The FLSA requires individuals to consent in writing to become a party to a case. See 29 U.S.C. § 216(b) (stating that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought"). As such, the theoretically overlapping classes of plaintiffs between the two cases is not enough to establish an identity of plaintiffs for purposes of § 1500.

Defendant also insists that plaintiffs' reading of § 1500 "is based on a very narrow reading of § 1500's statutory text, which contradicts the Federal Circuit's determination that § 1500 is not to be interpreted narrowly," and criticizes plaintiffs for urging the court to adopt a "literal" reading of the statute. ECF No. 38 at 19, 20. The court disagrees with defendant. As an initial matter, defendant's reliance on Trusted Integration, Inc. v. United States, 659 F.3d. 1159, 1164 (Fed. Cir. 2011), in arguing against a narrow construction of Section 1500 is misleading. See id. at 20. While the Federal Circuit did indeed counsel against a narrow view of the statute, that admonition was clearly made in reference to determining whether two cases involved the same set of operative facts. See Trusted Integration, 659 F.3d at 1164. The court did not address the identity of plaintiffs in Trusted Integration, because Trusted Integration, Inc. was clearly the named plaintiff in both cases at issue. See id. at 1162. And, even assuming that the proper construction of all parts of the statute is broad, defendant asks the court to read the term "plaintiff or his assignee" so broadly that it would lose all meaning. 28 U.S.C. § 1500. The court declines to do so.

Moreover, applying the statutory text as written cannot fairly be viewed as overly-restrictive. In the words of the Supreme Court, under § 1500, this court "has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." Tohono, 563 U.S. at 311 (emphasis added). Because defendant has not demonstrated any overlap of plaintiffs between this

case and National Air Traffic Controllers Association, Case No. 19-62 (D.D.C. 2019), § 1500 does not abrogate this court's jurisdiction. As plaintiffs state: "[p]ut simply, 28 U.S.C. § 1500 is not implicated here because the two cases at issue were brought by different plaintiffs; whether this case involves the same operative facts as the then-pending district court case is entirely irrelevant." ECF No. 34 at 12.

B. Plaintiffs Have Stated a Claim on which Relief Can Be Granted

1. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[2] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

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2 The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[3] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

2. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 33 at 14-16. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 14-15.

[3] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[4] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 33 at 15 (defendant's motion to dismiss); see also ECF No. 32 at 341 (plaintiffs citing Martin in their complaint); ECF No. 34 at 16 (plaintiffs noting that defendant makes the "exact same argument" here as it did in Martin with regard to the intersection of the FLSA and the ADA). In addition, plaintiffs here, like the plaintiffs in Martin, have alleged that defendant's violations of the FLSA were willful. See ECF No. 32 at 349, 350, 351, 353, 354.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 33. With regard to the sufficiency of plaintiffs' allegations, defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 8. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 15.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[5] As it did in Martin, "the

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[4] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

[5] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 33 at 18. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In

court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[6] Martin, 130 Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

3. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 33 at 20-21 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. at 21 (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 50, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[6] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 59, ECF No. 60. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 33 at 21. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 20-23. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 22-23.

Defendant also asserts that the scope of its waiver of sovereign immunity for FLSA claims does not cover the claims asserted here. See ECF No. 38 at 14. It argues, without citation to any authority, that:

> a cause of action under the FLSA cannot per se accrue against the United States when federal agencies do not pay employees on their regularly scheduled paydays during a lapse in appropriations because a federal statute expressly provides for when and at what rate federal employees will be paid under those circumstances.

Id. at 14-15.

The court disagrees. The claims brought by plaintiffs in this case are straightforward FLSA minimum wage and overtime claims under the FLSA. See ECF No. 32 at 348-55. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

4. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were categorized as excepted employees, and "compelled to continue to work through the shutdown." ECF No. 32 at 339. Plaintiffs also allege that they did not receive timely minimum or overtime wages for work performed during the shutdown. Id. at 344-48.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs, air traffic controllers, [were] employees of the [FAA], an agency that was affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 33 at 13, 14. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 17. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 18.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

5. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 38 at 15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 15-18. But as the court held in Martin:

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 33, is **DENIED**;

(2) On or before **February 5, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 5, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-257C

(E-Filed: December 1, 2020)

DAVID JONES, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Joshua Sanford, Little Rock, AR, for plaintiff.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through the United States Department of Agriculture, Food Safety and Inspection Service (FSIS), violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 1 at 1-3, 5 (complaint). On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 15.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 15; (3) plaintiffs'

response to defendant's motion, ECF No. 16; (4) defendant's reply in support of its motion, ECF No. 20; (5) defendant's first supplemental brief in support of its motion, ECF No. 22; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 23; (7) defendant's second supplemental brief in support of its motion, ECF No. 31;[1] (8) defendant's third supplemental brief in support of its motion, ECF No. 39; and (9) plaintiffs' response to defendant's third supplemental brief, ECF No. 41. The motion is now fully briefed and ripe for ruling.[2] The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

In their complaint, plaintiffs define the putative class bringing this collective action as "employees who are or were Food Safety and Inspection Service food inspectors for [d]efendant, who, during the applicable time period, work/worked for [d]efendant and are/were denied their rights under applicable federal wage and hour laws." ECF No. 1 at 2. Plaintiffs further allege that they are "excepted employees" and that they "like 2,400 other FSIS food inspectors, [were] retained for the shutdown," which began on December 22, 2018. Id. at 5-6. Plaintiffs seek "declaratory judgment, monetary damages, liquidated damages, prejudgment interest, and costs, including reasonable attorney's fees." Id. at 3.

Beginning at 12:01 a.m. on December 22, 2018, "a partial government shutdown began," affecting the FSIS, among other agencies. Id. at 5. The ADA "authorizes the executive branch to require employees to work, without pay, during a lapse in appropriated funds, if their work relates to 'the safety [of] human life or the protection of

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[1] Plaintiffs did not file a response to defendant's second supplemental brief.

[2] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 15 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 39 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. Id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

property.'" Id. at 5 (quoting 31 U.S.C. § 1342). While some employees were furloughed during the shutdown, plaintiffs were deemed "excepted" employees under the ADA, and were required to continue work. Id. at 5-6. As of February 15, 2019, the date of the complaint, plaintiffs had been required to work throughout the shutdown and defendant "ha[d] not paid its [FSIS] food inspectors minimum or overtime wages as required by the FLSA." Id. at 2. Specifically, plaintiffs have not received "a lawful minimum wage for all hours worked up to forty (40) in one week or one and one-half (1.5) times their regular rate for all hours in excess of forty (40) in a week." Id. at 6. According to plaintiffs, defendant's failure to pay regular wages and earned overtime is a per se violation of the FLSA. Id. at 7.

Plaintiffs also allege that defendant "neither acted in good faith, nor had reasonable grounds for believing that failing to pay FLSA nonexempt employees their overtime wages on time was compliant with the FLSA." Id. In support of this statement, plaintiffs note that this court decided a FLSA case in plaintiffs' favor in a similar case, referring to Martin v. United States, 130 Fed. Cl. 578 (2017). See id. at 7-8. As such, plaintiffs contend that defendant "was on notice . . . that a failure to pay FLSA nonexempt employees their overtime wages on time" constituted "bad faith." Id. at 7, 11. Plaintiffs allege that defendant is, as a result, liable for a penalty of liquidated damages under the FLSA. See id. at 8.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the

United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds

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[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 15 at 13-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] Act would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin, 130 Fed. Cl. 578. In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund

> for the expenditure . . . .” 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant’s motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that “the issue is more complex than simply a choice between whether the FLSA or the ADA controls.” Id. at 583. In the court’s view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant’s obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs’ claims survived a motion to dismiss because they had “alleged that defendant had failed to pay wages” on plaintiffs’ “next regularly scheduled payday.” Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were “situated similarly to plaintiffs here.” ECF No. 15 at 14 (defendant’s motion to dismiss). Plaintiffs plead in their complaint that, like the plaintiffs in Martin, “[a]s a result of the shutdown, [d]efendant did not pay [plaintiffs] a lawful minimum wage for all hours worked.” ECF No. 1 at 6. And, as plaintiffs note in their response, “prior case law has already

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[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court’s reasoning in Martin with regard to the structure of the proper analysis in this case.

established that the [ADA] does not alleviate [d]efendant from its obligation to timely pay its employees under the FLSA." ECF No. 16 at 1. In addition, plaintiffs here, like the plaintiffs in Martin, have "alleged that [d]efendant was on notice, both through previous case law and the [defendant's] own previous liability, that its failure to pay [plaintiffs] violated the FLSA," as it relates to the propriety of an award of liquidated damages. Id. at 17-18.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 15. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[6] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130 Fed. Cl. at

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[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 15 at 17. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 31, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 39, ECF No. 41. Maine Community Health does not address the FLSA, and only includes a limited

584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 15 at 19 (quoting Lane v. Pena, 518 U.S. 187, 196 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 15 at 19-20. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

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discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

Id. at 21.

> Defendant also asserts, without citation to any authority, that:
>
> > Given that the Anti-Deficiency Act not only prohibits federal agencies from paying excepted employees on their regularly scheduled paydays during a lapse in appropriations, but also specifically addresses when and at what rate wages are to be paid following a lapse in appropriations, the government's waiver of sovereign immunity under the FLSA must be strictly construed against liability for the delayed (but always forthcoming) payment of wages because of a lapse in appropriations.

ECF No. 20 at 13.

The court disagrees. The claims brought by plaintiffs in this case are straightforward minimum wage and overtime claims under the FLSA.[8] See ECF No. 1 at 8-10. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they

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[8] Plaintiffs assert in their response to defendant's motion to dismiss, that "there are circumstances [here] that create issues regarding when [p]laintiffs should have been paid that extend beyond the [ADA] and its GEFTA amendment." ECF No. 16 at 15. Plaintiffs note that "meat and poultry establishments" are required to reimburse the FSIS for inspection services that take place on federal holidays and for services extending beyond the standard eight-hour work day or forty hour work week. Id. These allegations are not included in plaintiffs' complaint, therefore the court does not address them here.

are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were each covered employees under the FLSA and were "designated [ ] 'excepted' employee[s] and . . . retained for the shutdown." ECF No. 1 at 6. As a result, they were required to work throughout the shutdown but "[d]efendant did not pay [plaintiffs] a lawful minimum wage for all hours worked." Id. Plaintiffs allege specific facts demonstrating how the allegations apply. See id. at 6-10.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of an agency affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 15 at 12-13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 20 at 15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 15-18. But as the court held in Martin:

> [I]t 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. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 15, is **DENIED**;

(2) On or before **January 29, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **January 29, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

ADDENDUM FOR NO. 21-2021

In the United States Court of Federal Claims

No. 19-129C

(E-Filed: December 11, 2020)

JOSEPH ABRANTES, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Border Patrol Agent Pay Reform Act, 5 U.S.C. § 5550; Back Pay Act, 5 U.S.C. § 5596; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Gary E. Mason, Washington, DC, for plaintiff. Danielle L. Perry, Alan Lescht, Jack Jarrett, Neil Landeen, Gregory F. Coleman, Lisa A. White, Mark E. Silvey, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government violated the Border Patrol Agent Pay Reform Act (BPAPRA), 5 U.S.C. § 5550, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 1 at 35-37 (complaint).[1] Plaintiffs assert claims against defendant pursuant to the BPAPRA and the

[1] In the second and third counts of plaintiffs' complaint, they allege violations of the Fifth and Thirteenth Amendments to the United States Constitution. See ECF No. 1 at 42-43. Plaintiffs have voluntarily dismissed those two counts, see ECF No. 31 (order granting motion for voluntary dismissal), and now proceed only on the first count of the complaint, alleging a violation of the Border Patrol Agents Pay Reform Act (BPAPRA), 5 U.S.C. § 5550, see ECF No. 1 at 40-41.

Back Pay Act, 5 U.S.C. § 5596. See id. at 40-41. On May 17, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees.[2] See ECF No. 23.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 23; (3) plaintiffs' response to defendant's motion, ECF No. 24; (4) defendant's reply in support of its motion, ECF No. 30; (5) defendant's first supplemental brief in support of its motion, ECF No. 33; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 34; (7) defendant's second supplemental brief in support of its motion, ECF No. 43; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 46; (9) defendant's third supplemental brief in support of its motion, ECF No. 52; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 53. The motion is now fully briefed and ripe for ruling. The court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

At 12:01 a.m. on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 1 at 35. The named plaintiffs in this case were, at the time of the shutdown, employees of the "Customs and Border Protection, a subdivision of the Department of Homeland Security." Id. at 34. "Plaintiffs were required to report to work and perform their normal duties, but they were not timely compensated for certain work performed . . . after midnight on Saturday, December 22, 2018." Id. at 35. Plaintiffs further allege that, pursuant to the BPAPRA, "[d]efendant is obligated to pay [p]laintiffs their assigned border patrol rate of pay and to pay [p]lainitffs overtime pay for work performed in excess of applicable thresholds." Id. at 36.

"Plaintiffs bring the current suit on behalf of themselves and other employees similarly situated for declaratory judgment, back wages, interest on their back wages, and other associated relief for Defendant's willful and unlawful violations of federal law." Id. at 34.

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[2] Defendant also moved to dismiss the second and third counts of the complaint for lack of jurisdiction, but because plaintiffs voluntarily dismissed those claims, see ECF No. 31, defendant subsequently abandoned that portion of its motion. See ECF No. 30 at 7 n.2 (defendant's reply in support of its motion to dismiss).

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of three statutes, the ADA, the BPAPRA, and the Back Pay Act. The ADA states that "an officer or employee" of the federal 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). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C.

[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

§ 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the Back Pay Act and the BPAPRA. The Back Pay Act provides as follows:

> An employee of an agency who . . . is found by appropriate authority under applicable law . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
>
> (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period.

5 U.S.C. § 5596(b)(1). The employee is also entitled to recover interest on their back pay, compounded daily. See 5 U.S.C. §§ 5596(b)(2)(A)-(B).

Here, plaintiffs allege that the unjustified or unwarranted personnel action was defendant's failure to pay their wages under the BPAPRA. See ECF No. 1 at 40-41. The BPAPRA governs compensation for border patrol agents. See 5 U.S.C. § 5550. The statute outlines three "levels" of pay, and requires that each border patrol agent either elect or be assigned a level annually. See 5 U.S.C. § 5550(b)(1). The statute further provides that each "border patrol agent shall receive pay" that corresponds with his or her assigned level. 5 U.S.C. §§ 5550(b)(2)(B), (b)(3)(B); see also 5 U.S.C. § 5550(b)(4)(A). And each "border patrol agent shall receive compensatory time off or pay at the overtime hourly rate of pay for hours of work in excess of" the regular number of hours set for each level. 5 U.S.C. § 5550(b)(2)(D), (b)(3)(D), (b)(4)(B).

The text of the BPAPRA does not specify a date on which wages must be paid, but "[t]his court has long adhered to the view that a suit for compensation due and payable periodically is, by its very nature, a 'continuing claim' which involves multiple causes of action, each arising at the time the Government fails to make the payment alleged to be due." Burich v. United States, 366 F.2d 984, 986 (Ct. Cl. 1966); see also Jones v. United States, 113 Fed. Cl. 39, 41 (2013) (stating that "plaintiffs' claims for Sunday premium pay accrued each time payment was due"); Bishop v. United States, 77 Fed. Cl. 470, 481

(2007) (holding that plaintiff's claim for overtime pay under the Back Pay Act "began to accrue . . . when he allegedly worked uncompensated overtime"); Corrigan v. United States, 70 Fed. Cl. 665, 671 (2006) (holding that a claim for back pay accrues "each time . . . compensation [mandated by a statute] was excluded from [an employee's] paycheck"); Friedman v. United States, 310 F.2d 381, 385 (Ct. Cl. 1962) (stating that "where the payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought").

B. The Court's Reasoning in Martin Is Instructive Here

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees. See ECF No. 23 at 19-21. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the Back Pay Act and the BPAPRA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, Congress plainly precluded payments on the schedule plaintiffs assert is required by the BPAPRA and the [Back Pay Act]. Federal officials who comply with that criminal prohibition do not violate the BPAPRA or the [Back Pay Act], and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 19-20.

The parties have not presented, nor has the court found, any case in which a court has previously ruled on intersection of the ADA, the Back Pay Act, and the BPAPRA. This court, however, has ruled on the intersection between the ADA and a different federal pay statute—the Fair Labor Standards Act, 29 U.S.C. § 201-219 (FLSA)—in the context of a lapse in appropriations. See Martin v. United States, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. . . . As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584. The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time. See ECF No. 23. Defendant characterizes the issues now before the court as:

> whether plaintiffs' back pay claims are moot because they have now been fully paid their wages for their work performed during the lapse in appropriations, and whether plaintiffs have stated a claim under the [BPAPRA] or the Back Pay Act for back pay, interest, attorney fees, and costs, because the federal government did not pay plaintiffs on their regularly

> scheduled paydays during the lapse and notwithstanding the provisions of the [ADA].

Id. at 11. In arguing its position, defendant acknowledges the court's decision in Martin, but both notes that it "respectfully disagree[s] with that holding," and argues that the holding "cannot be extended to apply to non-FLSA statutes." Id. at 20. Notwithstanding defendant's disagreement, the court believes that the framework it set out in Martin is appropriate and instructive here.[4]

This case does not involve FLSA claims; in fact, plaintiffs are expressly excluded from the FLSA. See 29 U.S.C. § 213(a)(18) (stating that the FLSA does not apply to "any employee who is a border patrol agent, as defined in section 5550(a) of Title 5"). But defendant's obligations under the BPAPRA and the Back Pay Act, are analytically similar to its obligations under the FLSA. Like the BPAPRA and the Back Pay Act, the FLSA sets out defendant's obligations to pay regular and overtime wages to its employees, and provides a means for recovering damages in the event the pay provisions are violated. See 29 U.S.C. §§ 206, 207, 216. And although like the BPAPRA the text of the FLSA does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). As such, in the court's view, the central holding in Martin—that defendant's obligations under the ADA do not abrogate its obligations under the FLSA—logically applies with the same force here. See Martin, 130 Fed. Cl. at 584.

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[4] Defendant also argues that its obligations under the BPAPRA and the Back Pay Act are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 23 at 26. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address BPAPRA or Back Pay Act claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 43, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

Accordingly, as it did with regard to the FLSA claims in Martin, the court will analyze defendant's obligations under the BPAPRA and the Back Pay Act along with its obligations under the ADA.[5] See Martin, 130 Fed. Cl. at 584 (stating that "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages").

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 23 at 28 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192). Defendant concedes that "the BPAPRA is money-mandating for border patrol agents' pay," giving this court jurisdiction over claims made under the statute, but argues that the claims made by plaintiffs in this case for the delayed payment of wages fall outside the scope of the waiver of sovereign immunity. See id.; see also Adde v. United States, 81 Fed. Cl. 415, 417 (2008) (holding that this court can hear claims made under the Back Pay Act only when a "plaintiff [also alleges] another source of law which requires a non-discretionary, virtually automatic payment which has not occurred").

Defendant argues that the Back Pay Act and the BPAPRA "do not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 23 at 29. As a result, defendant contends, the scope of the waiver of sovereign immunity does not extend to the category of claims alleging a violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 29-30. According to defendant, the GEFTA

[5] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 52, ECF No. 53. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the BPAPRA and the Back Pay Act even when funding is not available.

confirms its long-standing belief that the government's payment obligations under the pay statutes are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to damages.

Id. at 30.

> Defendant also asserts, without citation to any authority, as follows:
>
> Given that the [ADA] not only prohibits federal agencies from paying excepted employees on their regularly scheduled paydays during a lapse in appropriations, and that it addresses specifically when and at what rate wages are to be paid following a lapse in appropriations, the government's waiver of sovereign immunity under the BPAPRA and the [Back Pay Act] must be strictly construed against liability for the delayed (but always forthcoming) payment of wages because of a lapse in appropriations.

ECF No. 30 at 16.

The court disagrees. The claims brought by plaintiffs in this case are straightforward claims under the BPAPRA and the Back Pay Act. See ECF No. 1 at 40-41; ECF No. 24 at 9-10. And although the statutory text does not specify when such claims arise, the long history of this court's decisions establishes that pay claims arise each time defendant fails to pay wages owed. See, e.g., Jones, 113 Fed. Cl. at 41; Bishop v. United States, 77 Fed. Cl. at 481; Burich, 366 F.2d at 986. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary pay claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other such case.

D. Plaintiffs State a Claim for Back Pay

To state a claim for relief pursuant to the Back Pay Act, plaintiffs "must show that (1) this Court is the 'appropriate authority' to determine whether (2) he was subject to an 'unjustified or unwarranted personnel action' that (3) 'resulted in the withdrawal or reduction of all or part of [his] pay, allowances, or differentials.'" Dustin v. United States, 113 Fed. Cl. 366, 370 (2013) (quoting 5 U.S.C. § 5596(b)(1), and citing Collier v. United States, 379 F.3d 1330, 1332-33 (Fed. Cir. 2004)).

"Whether this Court is the 'appropriate authority' to make an award under the Back Pay Act depends on whether the personnel action at issue is one over which the Civil Service Reform Act has deprived this Court of jurisdiction." Id. (citing United States v. Fausto, 484 U.S. 439, 454 (1988); Salinas v. United States, 323 F.3d 1047, 1049 (Fed. Cir. 2003); Sacco v. United States, 63 Fed. Cl. 424, 428-29 (2004)). A claim for late payment of wages due pursuant to the BPAPRA is not among the personnel actions within the purview of the Civil Service Reform Act. See 5 U.S.C. § 7512. Defendant does not dispute that this court is an appropriate authority for purposes of this case within the meaning of the Back Pay Act. See ECF No. 23; ECF No. 30.

Here, plaintiffs allege that the unjustified or unwarranted personnel action that resulted in a withdrawal or reduction in pay was defendant's failure to timely pay their wages as required by the BPAPRA. See ECF No. 1 at 40-41. In their complaint, plaintiffs allege that they "were required to report to work and perform their normal duties, but they were not timely compensated for certain work performed . . . after midnight on Saturday, December 22, 2018" in violation of the BPAPRA. Id. at 35, 36.

According to defendant, these allegations do not amount to an unjustified or unwarranted personnel action for two reasons. See ECF No. 23 at 31. "First, the lapse in appropriations was not a personnel action." Id. at 32. This argument misconstrues plaintiffs' allegations. Plaintiffs allege that the relevant personnel action was defendant's failure to pay their statutorily mandated wages, not Congress's failure to appropriate funds to the agency. See ECF No. 1 at 40-41.

And second, defendant argues that its failure to pay plaintiffs' wages was not unjustified or unwarranted because of the limitations imposed by the ADA. See ECF No. 23 at 32-33. Defendant acknowledges that courts have held "that an unjustified or unwarranted personnel action can encompass withholding of pay . . . or outright failure to pay." Id. at 31 (citing Romero v. United States, 38 F.3d 1204, 1210 (Fed. Cir. 1994), and Adde v. United States, 98 Fed. Cl. 517, 522 (2011)). In this case, however, it contends that "[p]laintiffs cannot demonstrate that, in the extraordinary circumstances of a lapse in appropriations, the government's actions were 'unjustified and unwarranted.'" Id. at 33.

Whether defendant's failure to pay plaintiffs during the shutdown was unjustified or unwarranted under the particular circumstances of this case, however, is a novel question seeming to involve mixed issues of fact and law. Defendant, in effect, asks the court to hold that the provisions of the ADA create a per se rule that a failure to pay employees during a government shutdown cannot be unjustified or unwarranted. The court is not prepared, based on the argument before it, to reach such a conclusion prior to allowing for any factual development that could inform its analysis.[6] Accordingly, the court will not make a determination at this stage of the litigation as to whether defendant's actions were unjustified or unwarranted, but finds that plaintiffs have met the relatively low bar of alleging facts that could plausibly support such a finding. See Iqbal, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

Finally, defendant argues that plaintiffs "cannot demonstrate that they meet the third element required to establish a [Back Pay Act] violation, that the 'unjustified or unwarranted personnel action . . . resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee.'" ECF No. 23 at 33 (quoting Collier, 379 F.3d at 1333). According to defendant, "[b]ecause plaintiffs' pay was delayed, and not permanently reduced or withdrawn, plaintiffs have failed to state a cognizable [Back Pay Act] claim." Id. at 34. In making this argument, defendant cites to a number of cases, none of which hold that delayed payment is insufficient to support recovery under the Back Pay Act. See id. at 33-35. In fact, this court has affirmatively held—in a case cited by defendant elsewhere in its brief—that delayed payment of wages owed can constitute a violation of the Back Pay Act. See Adde, 98 Fed. Cl. at 522 (rejecting defendant's argument that plaintiff had not shown an unjustified or unwarranted personnel action under the Back Pay Act because plaintiff "was merely the victim of delayed payment"); see also ECF No. 23 at 31-32.

The court finds that, presuming the facts as alleged in the complaint to be true and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the Back Pay Act and the BPAPRA.[7] See Cary, 552 F.3d at 1376 (citing Gould,

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[6] For example, the court could envision a situation in which an agency has not exhausted its previously appropriated funding at the time of a government shutdown, but fails to pay employees deemed excepted under the ADA because new funds had not been appropriated. Under such circumstances, the hypothetical employees may be able to show that the agency's decision was not warranted or justified. Accordingly, the court will proceed with caution before adopting a per se rule against recovery under the Back Pay Act for wages earned but not timely paid during a government shutdown.

[7] According to defendant, the fact that it paid plaintiffs' wages after the shutdown ended moots their claims. See ECF No. 23 at 22-24. Defendant's argument appears to be premised on its position that plaintiffs' claim for pay did not accrue during the shutdown, by operation of the ADA. See id. As the court has previously explained, however, it disagrees. Defendant does not

935 F.2d at 1274). The court will determine whether plaintiff ultimately proves the elements of its claims at the appropriate procedural opportunity.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 23, is **DENIED**;

(2) On or before **February 12, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 12, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

claim to have paid any interest allowed under the statute. See 5 U.S.C. § 5596(b)(2)(A) (stating that awards for back pay "shall be payable with interest"). Thus, to the extent such liability can be established and remains outstanding, plaintiffs' claims remain viable.