IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

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Defendant, the United States, respectfully submits this opposition to plaintiffs' motion to conditionally certify the collective action, equitably toll the two-year Fair Labor Standards Act statute of limitations, approve proposed notice and consent forms, and direct issuance of notice, mostly in electronic form. Dkt. No. 59 (Mot.).[1]

INTRODUCTION

Because plaintiffs will have filed their approximately 32,000 existing consent-to-join forms by December 1, 2020, *see* Dkt. Nos. 58, 61, they bring their motion on behalf of any potential plaintiffs. *See* Mot. vi ¶ 2. And although plaintiffs were well aware of the statute of limitations, they failed to bring their motion until approximately seven weeks before the statute of limitations begins to expire—turning the response and ruling on the motion into a fire drill for the Court and defendant. *Id.* at 16. Plaintiffs seek not only conditional certification for an overly

[1] Although plaintiffs assert that they attach to their motion "Consent to Join Collective Action" forms and seek the Court's approval of those forms, *see* Mot. 2, 26, plaintiffs fail to attach any such forms to their motion. *See generally id.* and Dkt. Nos. 59-1, 59-2. Instead, plaintiffs attach only proposed notice forms that include links to the cases' websites. *See* Dkt. No. 59-2 at 5, 10, 15.

expansive collective that goes beyond the scope of their complaint and to effectuate notice, but to avoid the expiration of their claims, they seek unwarranted tolling of the FLSA's two-year statute of limitations period. Because the statute of limitations cannot be tolled, the effect of any such notice would be limited, if the Court were to determine that notice is appropriate: even if the Court nearly contemporaneously ruled on the motion after receipt of plaintiffs' reply on November 30, 2020,[2] notice could not be facilitated (and plaintiffs would have virtually no time to join) before the two-year limitations period expires entirely, as plaintiffs concede. *Id*. Moreover, the manner of the notice that plaintiffs seek is unworkable, with the language in their proposed notice form both overly expansive and objectionable, making the likelihood of sending such notice immediately extremely low.

For the reasons set forth below, the Court should deny plaintiffs' motion in its entirety. Alternatively, if the Court were to consider notice appropriate for any reason, the Court should delay ordering issuance of any notice until after the Court has both ruled on defendant's pending motion to dismiss[3] and, if necessary, defendant has had the opportunity to re-raise its request for consolidation of the 13 directly related cases.

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[2] Plaintiffs did not consent to defendant's motion to extend time to respond to the motion, stating that they felt any delay would jeopardize their claims. *See* Dkt. Nos. 60, 62. Nor did they agree to defendant's renewed request in light of the Court's November 18, 2020, order. *See* Dkt. No. 62. Consequently, defendant does not expect that plaintiffs will seek an extension to file their reply, considering that doing so would, according to plaintiffs, further any alleged prejudice.

[3] On November 20, 2020, the Court denied defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Rules of the Court of Federal Claims (RCFC), in the related case *Rowe v. United States*, No. 19-67C, Dkt. No. 57. Because defendant brought motions to dismiss pursuant to RCFC 12(b)(6) in each of the related FLSA cases, defendant assumes that the Court will soon issue similar decisions in the other cases denying defendant's motions to dismiss, at least with respect to its RCFC 12(b)(6) arguments.

ARGUMENT

I. Brief Statement Of Facts

At the end of the day on December 21, 2018, the appropriations act that had been funding several Federal government agencies lapsed. The lapse ended on January 25, 2019, when Congress enacted a continuing resolution restoring appropriations to the affected agencies. *See* Pub. L. No. 116-5. Not all agencies were affected by the lapse. *See* Dkt. No. 28 at 6-7.

Because there were no appropriations, the Anti-Deficiency Act generally prohibited Federal officers or employees from performing work or incurring any obligations, including compensating any Federal workers, on pain of criminal penalties. 31 U.S.C. §§ 1341, 1342; *see* U.S. Const., art. I, § 9, cl. 7 (Appropriations Clause); *Office of Pers. Mgmt. (OPM) v. Richmond*, 496 U.S. 414, 424 (1990); *Sutton v. United States*, 256 U.S. 575, 579-80 (1921); *Bradley v. United States*, 98 U.S. 104, 113-114, 117 (1878). The Anti-Deficiency Act excepts, however, some Federal employees to perform work during a lapse in appropriations, provided that the work arises from "emergencies involving the safety of human life or the protection of property," 31 U.S.C. § 1342; those Federal employees are considered "excepted." *See OPM Guidance for Shutdown Furloughs* 1 (Sept. 2015); 31 U.S.C. § 1341(c)(1)(D).

Plaintiffs are Federal employees who were "excepted" and thus worked during the lapse, but whom the United States could not pay on their regularly scheduled paydays due to the Anti-Deficiency Act's strictures. *See generally* Dkt. No. 8-1. Plaintiffs were, however, paid all wages due as soon as practicable after the end of the lapse in appropriations. Plaintiffs bring claims for the purported late payment of their wages, seeking liquidated damages under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. Twelve cases, filed during and after the end of the lapse (between December 28, 2018, and February 15, 2019), seek liquidated damages under

the FLSA using the same theory of relief; one additional case seeks damages under the Back Pay Act and the Border Patrol Agent Pay Reform Act, also for the purported late payment of wages. *See* Dkt. No. 19 (setting forth directly related cases); *see also* Dkt. No. 25. Nine of the 12 FLSA cases bring their cases as collective actions seeking to represent all (or a smaller subset) of the FLSA non-exempt Federal employees who were excepted from the lapse in appropriations and worked during the lapse but were paid for that work on a day other than their regularly scheduled payday. *See, e.g.*, Dkt. No. 19 at 2-3.

In February 2019, in each of these 13 directly related cases, the United States respectfully requested the Court to consolidate all of the cases; the Court ultimately denied the motions to consolidate in November 2019. *See* Dkt. Nos. 19, 20, 23, 24, 25, 34, 36. Also, in May 2019, in each of the 13 directly related cases, the United States respectfully requested the Court to dismiss each case; the motions to dismiss remain pending in most of the cases. *See, e.g.*, Dkt. Nos. 28, 31, 33, 35, 37, 38, 46, 56, 57; *Rowe*, No. 19-67C, Dkt. No. 57.

Plaintiffs in three of the directly related cases—*Tarovisky v. United States*, No. 19-4C; *Avalos v. United States*, No. 19-48C; and *Arnold v. United States*, No. 19-59C—bring their motions to conditionally certify, to toll the statute of limitations, and to issue notice, in conjunction. The motion was first filed in *Tarovisky* on November 9, 2020, *see* Mot.; in *Arnold* on November 10, 2020, *see* No. 19-59C at Dkt. No. 70; and in *Avalos* on November 13, 2020, *see* No. 19-48C, Dkt. No. 49. On November 13, 2020, the Court granted the United States's motion to extend time to respond to the motion in *Arnold*. *See Arnold*, No. 19-59C, Dkt. No. 72. On November 18, 2020, however, the Court denied the United States's motion to extend time to respond to the motion in *Tarovisky*, because plaintiffs had expressed "concern that a delay may jeopardize their claims." Dkt. No. 62. On November 20, 2020, the Court granted the United

States's motion to extend the time to respond to the motion in *Avalos*. *See Avalos*, No. 19-48C, Dkt. No. 52.

II. Conditional Certification Is Unwarranted And Plaintiffs' Proposed Definition Is Objectionable

Plaintiffs seek conditional certification for purposes of effectuating notice. *See* Mot. 12, 16. But because notice is unwarranted in this case or in any of the related cases, there is no need to conditionally certify a collective, and plaintiffs' request is impracticable. Moreover, plaintiffs' proposed definition of the collective that they want the Court to conditionally certify is objectionable and should not be adopted by the Court.

A. Conditional Certification Is Unwarranted

Section 216(b) of the FLSA permits plaintiffs to bring an action on his or her own behalf as well as on behalf of "other employees similarly situated," provided that each individual gives their "consent in writing to become such a party and such consent is filed in the court in which such action is brought." Although any FLSA complaint with more than one plaintiff is a collective action, "[t]he mechanism by which a collective action is certified is not specified in the FLSA." *Crawley v. United States*, 145 Fed. Cl. 446, 449 (2019) (citing *Hoffman-La Roche v. Sperling*, 493 U.S. 165, 170-72 (1989)). Indeed, it is not clear why an FLSA action that is already a collective, having more than one plaintiff, needs to be certified. Nevertheless, because "[t]he FLSA does not set forth in precise detail the manner in which collective actions should proceed," courts have considered competing options, and most embrace "the two-step approach to deciding whether certification as a collective action is appropriate in a given case." *Gayle v. United States*, 85 Fed. Cl. 72, 77 (2008); *but see Doe No. 1 v. United States*, 148 Fed. Cl. 437, 438-39 (2020) (declining to adopt the "two-step approach" to an FLSA collective action).

The two-step approach "involves a preliminary determination of whether the plaintiffs were subject to a common employment policy or plan, and then, after discovery, an opportunity for the defendant to decertify the collective action on the ground that the plaintiffs are not in fact similarly situated." *Whalen v. United States*, 85 Fed. Cl. 380, 383 (2009). FLSA collective actions are not Rule 23 class actions, and unlike class actions under Rule 23 of the Federal Rule of Civil Procedure, "conditional certification" under the FLSA "does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court." *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013) (citing *Hoffman-La Roche*, 493 U.S. at 171-72; 29 U.S.C. § 216(b)).

Conditional certification is unwarranted in this case because notice is unnecessary. Further, plaintiffs' proposal—set forth in three identical motions in three separate cases—is impracticable.

i. Notice Is Unnecessary

Notice is entirely unnecessary in this case, or in any of the related cases. The Supreme Court in *Hoffman-La Roche v. Sperling*, 493 U.S. 165 (1989), held that issuance of notice in section 216(b) cases is entirely discretionary and case specific: courts "have discretion, in appropriate cases, to implement 29 U.S.C.S. § 216(b), . . . by facilitating notice to potential plaintiffs." 493 U.S. at 169; *see also Briggs v. United States*, 54 Fed. Cl. 205, 205 (2002) ("*Hoffman*[] does not hold that a court is required to order the issuance of such notices as plaintiffs request, nor does it raise such a presumption. *Hoffman* stands merely for the proposition that it is within the *discretion* of the court to authorize notices pursuant to § 216(b).")

(citing *Hoffman-La Roche*, 493 U.S. at 169) (italics in original)). Important purposes behind notice include "serve[ing] the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action," as well as "mak[ing] informed decisions about whether to participate." *Hoffman-La Roche*, 493 U.S. at 170, 172.

The Supreme Court's articulated purposes for issuing notice would not be served in this case, or in any of the related cases. There already exist a "multiplicity of duplicative suits": as demonstrated above and through the various filings in these cases: 12 directly related cases that seek FLSA liquidated damages under the same theory and arising arise out of the same facts. Further, in several of those cases, including in two of the cases that bring the current motion in conjunction, plaintiffs seek to represent *all* Federal employees who may have been affected; the other cases are subsumed within these expansive proposed collectives. Nor is there a need to set a cutoff date for claims, considering that all of plaintiffs' claims arise out of the 2018-2019 lapse in appropriations, which ended on January 25, 2019.

Indeed, one of primary reasons that courts issue notice—to inform plaintiffs about a case—is unnecessary considering the large percentage of alleged potentially eligible plaintiffs who have already chosen to join this case or one of the related cases.

In their motion, plaintiffs repeatedly invoke the procedures used in *Martin*, *see, e.g.*, Mot. 2-3, a case involving the 2013 lapse in appropriations, and another comparison to *Martin* may be useful to demonstrate why notice is unnecessary in this case or in any of the related cases. In *Martin*, plaintiffs asserted that there were approximately 1.3 million potential plaintiffs. *Martin*, No. 13-834C, Dkt. No. 14-3 at 17. The actual number of potential plaintiffs, however, was less than 300,000, or around 22.5 percent of that asserted by plaintiffs' counsel. *Id.* at Dkt. No. 89 at 17 n.3. And of these approximately 300,000 potential plaintiffs who received notice in *Martin*,

less than 26,000 chose to join the action—less than 10 percent of potential plaintiffs. Similarly, in this case plaintiffs assert (without specific citation) that approximately 400,000 excepted Federal employees worked during the lapse in appropriations, and infer that therefore there exist approximately 400,000 eligible plaintiffs. *See* Mot. 1, 6, 25. Assuming a similar ratio to that in *Martin*, the actual number of potential plaintiffs would be closer to 90,000.[4] With most agencies and subcomponents responding to defendant's counsel's inquiries, *see, e.g.*, Dkt. No. 28 at 6-7 (listing most affected agencies), defendant estimates the number of potential plaintiffs in this case, and the related cases, to be less than 160,000.

Using a similar response rate from potential plaintiffs as the rate in *Martin* (under 10 percent), the total number of plaintiffs in this case would be less than 16,000. Among the related cases, however, there are nearly four times that number of existing plaintiffs, underscoring that notice is not needed in this case to advise potential plaintiffs of the pending actions and an opportunity to join. According to representations made by plaintiffs in the 12 related FLSA cases, the total number of plaintiffs who have chosen to join one of the pending actions is more than 61,000—a number that may continue to increase with the Court's orders of November 18, 2020, ordering plaintiffs to file their existing consent to join forms. *See, e.g.*, *Tarovisky*, No. 19-4C, Dkt. Nos. 58 (indicating more than 32,000 consenting to join), 61 (ordering consent forms to be filed); (2) *Avalos*, No. 19-48C, Dkt. No. 47 (indicating more than 16,000 consenting to join);

[4] Moreover, many of these alleged 400,000 Federal employees include individuals ineligible to join this case, such as those who were timely paid from non-appropriated funds or those who are FLSA exempt. *See, e.g.*, United States Commerce, "Plan for Orderly Shutdown Due to Lapse of Congressional Appropriations," Dec. 17, 2018, *available at* https://www.commerce.gov/sites/default/files/2018-12/DOC%20Lapse%20Plan%20-%20OMB%20Approved%20-%20Dec%2017%2C%202018.pdf, at 6 (listing nearly 81 percent of excepted employees as paid from non-appropriated funds), at 10-14 (listing titles of excepted employees as "Director," "Deputy Director," and "Chief," among others).

(3) *D.P. v. United States*, No. 19-54C, Dkt. No. 59 (filing 34 consent forms and emphasizing that "[a]dditional consents will be forthcoming"); (4) *Arnold*, No. 19-59C, Dkt. No. 68-1 (filing 2,595 consent to join forms); (5*) Hernandez v. United States*, No. 19-63C, Dkt. Nos. 1, 4 (filing or seeking to file 35 consent to join forms); (6) *Rowe*, No. 19-67C, Dkt. No. 55 (listing 7 plaintiffs); (7) *Plaintiff No. 1 v. United States*, No. 19-94C, Dkt. No. 114 (listing 514 plaintiffs); (8) *I.P. v. United States*, No. 19-95C, Dkt. No. 71 (listing 10 plaintiffs); (9) *Anello v. United States*, No. 19-118C, Dkt. No. 51 (listing 13 plaintiffs); (10) *Richmond v. United States*, No. 19-161C, Dkt. No. 15 at 2 (informing of 2,515 plaintiffs); (11) *Baca v. United States*, No. 19-213C, Dkt. No. 58 (listing 7,755 plaintiffs); and (12) *Jones v. United States*, No. 19-257C, Dkt. No. 40 (listing one plaintiff). These more than 61,000 plaintiffs chose to join this case or one of the related cases after hearing about the actions "through media coverage and word-of-mouth." *See* Mot. 16.

A reasonable inference based upon this high rate of joinder is that all of the friends, colleagues, and associates of these more than 61,000 existing plaintiffs have also heard about the pending actions through existing plaintiffs, the media, and word of mouth—which very easily could cover virtually all of the potential plaintiffs that we estimate may exist. And it is also reasonable to infer that these individuals have either affirmatively chosen not to join or have not been diligent in pursuing the relatively easy path to join.[5] In comparison, the percentage of individuals who have already joined this case or one of the related FLSA cases is more than four times the percentage of eligible individuals who chose to join *Martin* despite receiving notice, and nearly two-and-a-half times the joinder rate of FLSA cases generally. *See, e.g.*, *Driscoll v.*

[5] For example, as of November 18, 2020, if one searches "2018 shutdown lawsuit" on Google, the first two results are links to the *Tarovisky* and *Avalos* case websites, and the fifth result is to the *Arnold* case website (and their respective consent-to-join forms).

George Wash. Univ., 55 F.Supp.3d 106, 112 n.2 (D.D.C. 2014) (explaining the reasons for low joinder rates, which average 15.71 percent, in FLSA cases) (quoting Iliza Bershad, "Employing Arbitration: FLSA Collective Actions Post-*Concepcion*," 34 CARDOZO L. REV. 359, 385 (2012); *Brewer v. Bp P.L.C.*, No. 11-401, 2012 U.S. Dist. LEXIS 201098, **37-38 (E.D.La. May 11, 2012) (citing studies showing the median and average joinder rates of FLSA collective actions were approximately 15 percent). Issuing notice therefore will not promote the purpose of informing plaintiffs of potential claims: that has already been very effectively accomplished in this case and the others.

This Court has declined to issue notice when the circumstances do not warrant doing so. For example, this Court's predecessor, the United States Claims Court, declined to order notice in *Adams v. United States*, 21 Cl. Ct. 795, 797 (1990), because "plaintiffs have provided no reason for the court to exercise its discretion. There is no presumption that the court ought to facilitate expansion of the plaintiff group. Further, they have not argued that extra-judicial notice is impossible or that the claims are so small as to discourage additional suits." Similarly, in *Briggs*, the Court determined that certification was inappropriate and that notice would "be a waste of judicial resources and raise unrealistic expectations in putative class members." *Briggs*, 54 Fed. Cl. at 206.

Because the purposes of effectuating notice—promoting efficient resolution of cases with common issues, informing prospective plaintiffs of their potential claims, and avoiding duplicative suits—was obviated well before plaintiffs filed their motion, the Court should exercise its discretion and find notice unnecessary. Moreover, because the "sole consequence" of conditional certification—notice—is unnecessary, the Court should deny conditional certification.

ii. Conditional Certification Is Impracticable

In addition to the reasons why notice and thus conditional certification is inappropriate, the procedural posture of this case and related cases makes conditional certification impracticable.

Plaintiffs argue that they have met their burden to demonstrate conditional certification by demonstrating that the named plaintiffs and potential collective members were victims of a single policy or plan to make Federal employees, designated as excepted during the 2018-2019 lapse in appropriations, work without receiving pay on their regularly scheduled payday. Mot. 14. But plaintiffs' request for conditional certification is inherently confusing considering that three cases bring the identical motion in conjunction. In the cases' respective complaints, the *Arnold* and *Tarovisky* plaintiffs assert that they seek to represent *all* potentially affected Federal employees, while *Avalos* seeks to represent only a subsection of those employees. Yet by bringing the identical motion in each case, as a practical matter, each case separately seeks to certify the same group of individuals. Further, the collective proposed in the motions is more expansive than that proposed in any of the complaints. Adding to this problematic attempt to certify the same collective multiple times is that, by plaintiffs' admission, nine of the related cases seek in their complaints a collective comprising all or a portion of the collective that plaintiffs now seek to conditionally certify. *See, e.g.*, Mot. 2 n.1 (explaining that, of 12 directly related cases, only the plaintiffs in *Anello v. United States*, No. 19-118C; *Richmond v. United States*, No. 19-161C; and *Baca v. United States*, No. 19-213C, do not seek to certify a collective). Consequently, any collective that could be certified—conditionally or otherwise—must exclude individuals who have already consented to join one of the other cases.

Further compounding the issue is that, in its order denying the United States's motion to consolidate, the Court found that "the group of cases proposed for consolidation do not present sufficiently synonymous arguments for the court's consideration such that wholesale consolidation is justified." Dkt. No. 36 at 2. The Court thus has already determined that plaintiffs' claims in some of the cases are distinct, at least to some extent, although it has also indicated that there are "similar issues" amongst the cases. *See, e.g., Arnold*, No. 19-59C, Dkt. No. 61 at 2. Moreover, although the *Tarovisky* and *Avalos* plaintiffs did not oppose consolidation of the FLSA cases, the position of the *Arnold* plaintiffs on consolidation is unknown. *See Arnold*, No. 19-59C, Dkt. No. 18 at 2; *Avalos*, No. 19-48C, Dkt. No. 13 at 3-5; *Tarovisky*, No. 19-4C, Dkt. No. 20 at 2. Nor have the plaintiffs in any of those three cases attempted to amend their complaints to, for example, seek a smaller portion of the expansive collective that they each now attempt to conditionally certify.

Conditional certification is also unwarranted because, according to plaintiffs, there is "the need for very little or no discovery." Mot. 2. The Court explained in *Whalen* that,, after the Court conditionally certifies a case, *i.e.* making a "preliminary determination of whether the plaintiffs were subject to a common employment policy or plan," the parties will have the opportunity for discovery. *Whalen*, 85 Fed. Cl. at 383. But because plaintiffs apparently do not anticipate discovery, then conditional certification is unwarranted. Moreover, because any individuals may easily consent to join this case pursuant to 29 U.S.C. § 216(b), conditional certification is unnecessary.

B. If The Court Were To Determine That Certification Is Necessary, Plaintiffs' Proposed Definition Of A Collective Is Objectionable

Although defendant has demonstrated that conditional certification is unnecessary, if the Court were to determine that conditional certification is appropriate, the Court should reject plaintiffs' proposed definition of a collective. Plaintiffs propose the following collective:

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

Mot. 12.

Plaintiffs' proposed definition of the collective exceeds the scope of the complaints in each case and exceeds the scope of the collective in *Martin* (the collective that plaintiffs state is "closely mirror[ed]" by this proposal, Mot. 23), and is objectionable for two reasons. First, in definition section (a), plaintiffs attempt to include legislative branch Federal employees, by referencing 2 U.S.C. § 1301. Mot. 12. But legislative branch employees are not included in each of plaintiffs' complaints, and the United States objected to their inclusion in *Martin*. *See Tarovisky*, No. 19-4C, Dkt. No. 8-1 ¶ 23 (defining defendant as "an 'employer' and 'public agency' within the meaning of 29 U.S.C. § 203(d), (x)."); *Avalos*, No. 19-48C, Dkt. No. 6 ¶ 3 ("Plaintiffs and all other similarly situated as defined in paragraph 7, *infra*, are 'employee[s]' as defined by 29 U.S.C. § 203(e)."); *Arnold*, No. 19-59C, Dkt. No. 6 at 2 ("Plaintiffs, and all others similarly situated, at all times relevant hereto were each an 'employee' as defined by 29 U.S.C. § 203(e)."); *Martin*, No. 19-834C, Dkt. No. 230 at 19-21. Further, plaintiffs provide no basis to allow for the expansion of the employees that are covered by the FLSA, considering that these

employees are not listed in section 203(e), and therefore, no basis exists to expand the waiver of sovereign immunity provided within the language of the FLSA. *See* 29 U.S.C. § 203(e) (listing "employees" covered under the FLSA); *see also*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (explaining that the cannon *expressio unius est exclusio alterius* has force "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.") (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). The United States therefore objects to the inclusion of individuals covered by 2 U.S.C. § 1301, which does not demonstrate that legislative branch employees are subject to the FLSA.[6]

Second, in definition section (b), plaintiffs seek to include, without limitation, employees "classified as 'non-exempt' under the FLSA." Mot. 12. The definition suggested by plaintiffs requires only that, at some point in time, a plaintiff must be FLSA non-exempt, and does not require that a plaintiff must have been classified as FLSA non-exempt on the date that the lapse in appropriations began. Permitting such an expansive definition as plaintiffs request would allow for plaintiffs to bring untimely misclassification claims, as the *Martin* plaintiffs have attempted to bring nearly seven years after bringing suit. *See Martin*, No. 19-834C, Dkt. Nos. 222 at 22-23; 230 at 28-30. Moreover, the common facts that plaintiffs assert necessitates a collective relate in no manner to misclassification, and misclassified plaintiffs are not similarly situated to those who were simply not paid on their regularly scheduled paydays during the lapse. The United States therefore objects to the definition in (b).

[6] Moreover, inclusion of legislative employees may present separation of powers issues, which plaintiffs have not addressed.

Consequently, and although defendant asserts that certification is unwarranted, to the extent that the Court determines that certification is appropriate, it should utilize the following definition rather than the definition proposed by plaintiffs:

> Federal employees: (a) identified for purposes of the Fair Labor Standards Act ("FLSA") as employees, pursuant to 29 U.S.C. § 203(e); k; (b) classified as "non-exempt" under the FLSA on December 22, 2018; (c) worked for an agency whose appropriations for the payment of wages lapsed; (d) declared "Excepted Employees" for purposes of the Anti-Deficiency Act, 31 U.S.C. §§ 1341-1342, between December 22, 2018, and January 19, 2019; (e) worked for more than four hours of time between December 22, 2018, and January 19, 2019, for purposes other than to assist with the orderly shutdown of their office; and (f) were not paid their wages on their regularly scheduled payday for work performed between December 22, 2018, and January 19, 2019.

III. Equitable Tolling Of The FLSA Statute Of Limitations Is Not Available, And Even If The Court Were To Determine That Tolling Is Available, Tolling Would Be Unwarranted

A. Equitable Tolling Is Unavailable In FLSA Cases Against The Government

Contrary to plaintiffs' assertion, the FLSA's statute of limitations cannot be equitably tolled as against the United States. *See* Mot. 16-17. When enacting the FLSA, Congress provided a two-year statute of limitations within which aggrieved employees may sue their employers, or a three-year limitations period for willful violations. 29 U.S.C. § 255(a). An action is commenced under section 255 on the date of filing, in the case of a named plaintiff, or otherwise on the date upon which an individual files with the court his or her written consent to join. *Id*. at § 256. When originally enacted, the FLSA did not apply to the United States. Congress later extended the provisions of the FLSA to the United States. *Adams v. United States*, 141 Fed. Cl. 428, 431 (2019) (citing 29 U.S.C. § 213(a)).

In *Soriano v. United States*, 352 U.S. 270 (1957), the Supreme Court reiterated that "this Court has long decided that limitation and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." 352 U.S. at 276 (citing *United States v. Sherwood*, 312 U.S. 584, 590-91 (1941)). As to the United States, the FLSA statute of limitations is an element of the waiver of sovereign immunity provided when Congress extended the FLSA to the United States. That waiver of sovereign immunity is jurisdictional, must be strictly construed, and exceptions cannot be implied. The statute of limitations, therefore, cannot be tolled as against the United States.

This Court's predecessor, the United States Claims Court, addressed the availability of equitable tolling in FLSA cases in *Doyle v. United States*, 20 Cl. Ct. 495, 499-500 (1990), *aff'd*, 931 F.2d 1546 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1029 (1992), holding that equitable tolling is unavailable for alleged willful violations of the FLSA because Congress has already provided an extension of the limitations period for those violations. *Id.*; *see* 29 U.S.C. § 255 (willful violations are subject to a three-year statute of limitations). Neither this Court, nor the Court of Appeals for the Federal Circuit, nor the Supreme Court have equitably tolled the two-year statute of limitations in FLSA cases—the relief that plaintiffs seek.[7] *See id.* at 18 (seeking equitable tolling for "the two-year FLSA statute of limitations"). Likewise, this Court has "acknowledged that the issue of whether equitable tolling is generally permitted under the FLSA has not been resolved by either the Supreme Court or the U.S. Court of Appeals for the Federal Circuit." *Jones v. United States*, 88 Fed. Cl. 789, 791 (2009).

[7] Although willful conduct has a three-year statute of limitations, the Court has not determined whether the Government's conduct is willful, as plaintiffs concede, Mot. 18 n.15, and the parties have not substantively briefed the issue.

Plaintiffs point to *United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986), in support of their assertion that the Federal Circuit "has [] indicated that FLSA cases are eligible for equitable tolling." Mot. 17. Plaintiffs are incorrect. The appeals court stated that "[w]hen and if the time comes, the district court will presumably apply the doctrine of equitable tolling consistently with Congress' intent in enacting the particular statutory scheme set forth in FLSA," but the court did not endorse the proposition put forth by plaintiffs in this case. *Cook*, 795 F.2d at 994. Rather, the court, after recognizing the parties' competing contentions regarding the availability of equitable tolling, explained that "[n]othing here said would, of course, preclude the district court from considering those contentions if the question should arise of whether the statute of limitations should be tolled in respect of any future plaintiff or plaintiffs." *Id*. at 994 n.5. And although the Federal Circuit summarily affirmed *Hickman v. United States*, 43 Fed. Cl. 424 (1999), *aff'd* 232 F.3d 906 (Fed. Cir. 2003) (table), to which plaintiffs also point in support, Mot. 17, this Court's decision provided no analysis as to why equitable tolling could apply but was nevertheless inappropriate.

Moreover, although plaintiffs are correct that there is a presumption that equitable tolling applies to statutes of limitation, *see* Mot. 17, that presumption may be rebutted. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008) (holding that the six-year limitations period set forth in 28 U.S.C.§ 2501 is a jurisdictional requirement that cannot be waived and is not susceptible to equitable considerations). "Specific statutory language, for example, can rebut the presumption by demonstrating Congress' intent to the contrary." *Id*. at 137-38. The Supreme Court has set forth various factors that, if present, indicate that Congress intended that equitable tolling should not apply. *United States v. Brockamp*, 519 U.S. 347, 350-52 (1997). As the Federal Circuit has held, not all of these factors need be present, and even the presence of one

factor can be dispositive when determining whether tolling is available. *Kirkendall v. Dep't of Army*, 479 F.3d 830, 837 (Fed. Cir. 2007) (citations omitted). Those factors include whether the statute of limitations is repeated in the statute, whether it is stated in an "unusually emphatic" form, and whether the statute of limitations already includes explicit exceptions. *See Brockamp*, 519 U.S. at 350-52. All three of these factors indicating against equitable tolling are present in this case.

First, the limitations period is repeated in section 255(a). *See* 29 U.S.C. § 255(a) (action "may be commenced within two years after the cause of action accrued," and "every such action shall be . . . commenced within two years after the cause of action accrued"). Second, the limitations period is stated in an unusually emphatic form. *Id*. ("every such action *shall be forever barred* unless commenced within two years after the cause of action accrued.") (italics added). Third, the FLSA sets forth an explicit exception to the general two-year rule: "every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that* a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." *Id*. (italics added). Because section 255 "sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling,'" tolling would be inconsistent with the intent of Congress that tolling not be permitted. *Brockamp*, 519 U.S. at 351-52; *see also Brice v. Sec'y of the Dep't of Health and Human Svcs*., 240 F.3d 1367, 1373 (Fed. Cir. 2001) ("When an Act includes specific exceptions to a limitations period, we are not inclined to create other exceptions not specified by Congress."); *Doyle v. United States*, 20 Cl. Ct. 495, 499-500 (1990) (holding that equitable tolling does not apply to FLSA statute of limitations, in part, because of the exception for a willful violation). To support their argument regarding congressional intent, plaintiffs point

solely to non-binding cases that do not persuasively demonstrate that the analysis of *Brockamp* and *Doyle* is inapplicable. *See* Mot. 17-18. The FLSA's statute of limitations may not be equitably tolled for claims against the Government.

B. Equitable Tolling Is Unwarranted, Even If It Were Available

i. Equitable Tolling For Potential Plaintiffs Is Unripe

Even if equitably tolling the FLSA statute of limitations would not be a violation of the United States's sovereign immunity, plaintiffs' motion for equitable tolling should be rejected because it is not ripe. As plaintiffs explain, their motion for equitable tolling of the statute of limitations is on behalf of putative, or potential, plaintiffs, rather than the "more than 32,000" who have already submitted to plaintiffs their consent to join forms. *See, e.g.*, Mot. 18 ("Plaintiffs seek to equitably toll the two-year FLSA statute of limitations for potential opt-in plaintiffs"); 19 (citing cases for the proposition that equitable tolling is appropriate to avoid prejudice to potential plaintiffs); 20 (relying upon *Viriri v. White Plains Hosp. Med. Ctr.*, 320 F.R.D. 344, 355 (S.D.N.Y. 2017), to assert that equitable tolling in appropriate for potential opt-in plaintiffs' claims); *see also* Dkt. No. 58. Plaintiffs are inappropriately requesting the Court to provide an impermissible advisory opinion.

Because potential plaintiffs are not currently parties to this lawsuit, there is no "case or controversy" regarding these individuals, and any "claim" involving them is not ripe for adjudication. The Federal Circuit addressed the issue of tolling the statute of limitations for putative plaintiffs in *Cook*, 795 F.2d at 994. A group of firefighters had sued for FLSA liquidated damages, and the district court ordered that the Government identify similarly situated firefighters and also tolled the statute of limitations. *Id.* On appeal, the Federal Circuit upheld the district court's order directing the Government to identify similarly situated firefighters, but

held that tolling the statute of limitations was improper. *Id*. The court explained that because the tolling order could not apply to employees who had not yet filed claims, it was not ripe: "a federal court is without power to give advisory opinions, because such opinions cannot affect the rights of the litigants in the case before it. Nor do courts 'sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before [them].'" *Id*. (quoting *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (other citations omitted)).

Similarly, other courts have held that tolling the statute of limitations for potential plaintiffs is no more than issuance of an advisory opinion. *See, e.g., Calloway v. AT&T Corp.*, 419 F.Supp.3d 1031, 1037-38 (N.D. Ill. 2019) ("Not surprisingly, some courts have held that any decision on equitable tolling as it applies to putative plaintiffs would amount to an advisory opinion. The Court agrees: it is not possible to decide whether equitable tolling applies to plaintiffs not yet in the case." (citing, among others, *Cook*, 795 F.2d at 994 (other citations omitted))); *Sanchez v. Santander Bank, N.A.*, No. 17-5775, 2019 U.S. Dist. LEXIS 198094, **22-23 (D.N.J. Nov. 15, 2019) (citing cases and holding that "[t]he potential opt-in Plaintiffs are not before the Court. Consequently, any decision as to them would constitute an impermissible advisory opinion."); *Atkinson v. TeleTech Holdings, Inc.*, No. 3:14-cv-253, 2015 U.S. Dist. LEXIS 23630, **26-27 (S.D. Oh. Feb. 26, 2015) (citing cases and holding that "the Court finds that Plaintiffs' motion, seeking to equitably toll the FLSA claims of the potential opt-in plaintiffs, is premature, and the Court lacks jurisdiction to grant the requested equitable relief at this time.").

Plaintiffs seek the precise relief that the Federal Circuit found inappropriate and that warranted reversal in *Cook*, and that other courts have similarly found inappropriate. The Court should deny as unripe plaintiffs' request for equitable tolling for prospective plaintiffs.

ii. Plaintiffs Do Not Meet The Requirements For Equitable Tolling

Further, even if the Court were to find both that the United States waived its sovereign immunity and that the potential plaintiffs' claims are ripe, equitable tolling is still available in only limited circumstances that plaintiffs fail to show are present in this case.

As explained above, this Court has never equitably tolled the two-year statute of limitations under the FLSA, and no binding precedent establishes that the FLSA statute of limitations can be tolled at all. With respect to equitable tolling generally, however, this Court has consistently followed the holding of the Supreme Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), which addresses equitable tolling in a discrimination lawsuit against the Department of Veterans Affairs. Mr. Irwin filed an untimely complaint because his attorney failed to notify him of the agency's final decision; the Supreme Court held that his claim of excusable neglect by his attorney did not warrant equitable tolling of the statute of limitations. 498 U.S. at 90. Rather, the Court held that "Federal courts have typically extended equitable relief only sparingly in suits against private litigants, allowing tolling where the claimant has actively pursued his judicial remedies by filing a defective pleading or where he has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.*

The Court of Claims articulated the test for equitable tolling: "[p]laintiff must either show that defendant has concealed its actions with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date." *Japanese War Notes Claimants Ass'n v. United States*, 178 Ct. Cl. 630, 634, 373 F.2d 356, 359 (1967).[8] "Ignorance of rights which should be known is not enough." *Id.* Recently, in a

[8] In addition to the Supreme Court and the U.S. Court of Appeals for the Federal Circuit, this Court is also bound by precedent of the Court of Claims. *Coltec Indus. v. United States*, 454 F.3d 1340, 1353 (Fed. Cir. 2006).

National Vaccine case, the Federal Circuit held that equitable tolling can be appropriate only if a plaintiff establishes both that "(1) she pursued her rights diligently, and (2) an extraordinary circumstance prevented her from timely filing the claim." *K.G. v. Sec'y of Health & Human Servs.*, 951 F.3d 1374, 1379 (Fed. Cir. 2020) (citing *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 755 (2016)).

Plaintiffs cannot meet any of these requirements and demonstrate that equitable tolling would be appropriate. First, they do not allege any defective pleading; indeed, plaintiffs seek relief for actions not yet taken rather than for purposes of, for example, curing existing, defective consent to join forms.[9] Second, plaintiffs do not allege that the Government induced or tricked potential plaintiffs into missing the filing deadline, and that situation unequivocally did not occur. Moreover, the filing deadline has not yet passed.

Third, plaintiffs do not specifically argue that their claims are "inherently unknowable." They concede that "more than 30,000" individuals have learned about the case "through media coverage and word-of-mouth" and have completed consent to join forms "through an online electronic sign-up form."[10] Mot. 10, 16. Indeed, considering the large number of individuals

[9] To the extent that any of plaintiffs' existing consent to join forms are found to be defective, defendant has already explained in *Arnold* and in *Avalos* that it conditionally consents to plaintiffs curing those defects. *See, e.g.*, *Avalos*, No. 19-48C, Dkt. No. 51 at 5 n.1; *Arnold*, No. 19-59C, Dkt. No. 73 at 6-7.

[10] This "online electronic sign-up form" was in use, at the latest, by January 14, 2019. *See* Dkt. Nos. 9-1 at 11 n.10; 9-3 ¶ 14. Likewise, media attention about the lapse in appropriations and accompanying legal challenges—including this case—was widely available during the lapse. *See, e.g.*, Dkt. No. 9-1 at 6-9; Ogrysko, Nicole, Federal News Network, "Federal judge denies restraining order on shutdown's impacts on excepted employees," https://federalnewsnetwork.com/government-shutdown/2019/01/a-feds-guide-to-pending-government-shutdown-lawsuits/ (Jan. 15, 2019). Further, in the other two cases that have joined plaintiffs' current motion, an additional approximately 18,500 individuals have chosen to join—2,595 in *Arnold*, and over 16,000 in *Avalos*—each of whom have apparently also learned about their respective cases through word of mouth and media coverage.

who have chosen to join each of the three cases, as well as the other related cases, plaintiffs could not colorably argue that their claims were "inherently unknowable."

Moreover, to accept the proposition that a claim is inherently unknowable until and unless a plaintiff receives Court ordered notice of his or her potential claim would allow equitable tolling in virtually every case, hollowing the statute of limitations simply because a plaintiff was purportedly unaware of a claim. In *Christofferson v. United States*, 64 Fed. Cl. 316 (2005), for example, plaintiffs sought to equitably toll the statute of limitations by asserting that their claims were inherently unknowable. 64 Fed. Cl. at 326. The Court rejected the argument, finding plaintiffs clearly on notice that the government would not pay them overtime and thus making them aware of the underlying facts regarding their claims. *Id*. at 327. Recognizing the slippery slope of allowing equitable tolling due to purported ignorance, the Court explained that

> Plaintiffs, in effect, argue that the government had a duty to give them notice of potential claims. We must agree with the court in *Udvari* [*v. United States*, 28 Fed. Cl. 137 (1993),] that no such duty exists. If successful, this argument would mean that the limitations period would run indefinitely; equitable tolling, an exception, would swallow the rule.

Id. at 327-28.

Plaintiffs thus cannot demonstrate that their claims were "inherently unknowable," and make no attempt to do so in any event.

Finally, prospective plaintiffs cannot demonstrate that they "pursued [their] rights diligently" such that "extraordinary circumstances" warrant equitable tolling. Plaintiffs seek equitable tolling for the sole purpose of issuing notice to prospective plaintiffs and allowing prospective plaintiffs to submit completed consent to join forms after the expiration of the statute of limitations. *See, e.g.*, Mot. iv ¶ 2, 26. They allege that "the 30-day stay of proceeding and the 267-day halt in proceedings to rule on Defendant's consolidation motion, as well as the potential

period of time the Court will take to rule on Plaintiffs' motion for conditional collective action certification," were "extraordinary circumstances" that warrant equitable tolling. *Id*. at 21. However, proceedings were never "halted" during the pendency of United States's motion for consolidation—during that time the parties fully briefed the Government's motion to dismiss, and the Court did not have before it a pending motion for conditional certification or motion to serve notice. *See, e.g.*, Dkt. Nos. 24, 27, 28, 31, 35. Plaintiffs cannot blame the Court for their failure to diligently pursue their claims.

Nor did any "extraordinary circumstance" require plaintiffs to wait until approximately seven weeks (by their calculation) before their claims begin to expire to filing their current motion. Mot. 16, 18 n.15 (filing on Nov. 9, 2020, and explaining that the statute of limitations would begin to run in "December 2020 or January 2021, depending on the pay period"). Although plaintiffs first moved for conditional certification on January 14, 2019, in the midst of the lapse in appropriations and while counsel for the United States was furloughed, the Court struck the motion two days later. Dkt. Nos. 9, 11. Following resumption of appropriations, the parties filed a joint status report on February 13, 2019, in which plaintiffs proposed filing their motion for conditional certification eight days later, and proposed to move for leave to file existing consent to join forms because "[t]he statute of limitations on each individual employee's claim is still running until the consent forms are filed with the court." Dkt. No. 13 at 3. Yet despite plaintiffs' statement regarding the statute of limitations deadline, they never requested the Court to allow them to file their existing consent to join forms; instead, the Court ordered them to do so.[11] *See* Dkt. No. 61. Nor did plaintiffs renew their motion for conditional

[11] Of the 13 related cases, the only plaintiffs who affirmatively sought to file, and then filed, their consent to join forms are the *Arnold* plaintiffs, who filed their forms on October 30, 2020. *Arnold*, No. 19-59C, Dkt. Nos. 68, 69.

certification until their current motion; plaintiffs in the related cases never attempted to file a motion at all.

Plaintiffs now attempt to justify their delay in filing the motion by asserting that, because the Court did not issue a scheduling order, "it remained uncertain as to whether Plaintiffs could refile their motion for conditional collective action certification." Mot. 21. But if plaintiffs were uncertain whether they could move for conditional certification, it was their duty to pursue whatever right they believe they had to file such a motion. And even assuming that the triggering date for re-urging conditional certification was the date that the Court denied the United States's motion for consolidation, as plaintiffs implicitly allege, *id*. at 20-21, the Court ruled on consolidation nearly a year ago. Dkt. No. 36 (order dated November 26, 2019). Furthermore, although plaintiffs assert that remote work due to the pandemic has caused hardship for plaintiffs' counsel, Mot. 21, that remote work did not begin until approximately four months after the Court denied consolidation. Had plaintiffs filed this motion in November 2019 or February 2020, for example, and the Court granted the motion, we would not now, at this late date, be confronting plaintiffs' current issues regarding the statute of limitations.

As demonstrated above, plaintiffs were well aware of the statute of limitations when filing their case. *See, e.g.*, Dkt. Nos. 9, 13. Moreover, plaintiffs' counsel briefed similar issues with respect to equitable tolling in the *Martin* case, which plaintiffs repeatedly reference in their motion. *See, e.g.*, *Martin*, No. 13-834C, Dkt. Nos. 87, 99. They are thus well aware that the Court found unpersuasive plaintiffs' equitable tolling arguments in *Martin* with respect to the claims of prospective plaintiffs, albeit on other grounds than those raised in this case. *Martin v. United States*, No. 13-834C, 2015 U.S. Claims LEXIS 1310, **9-17 (Ct. Fed. Cl. Oct. 15, 2015).

Further, the *Arnold* plaintiffs raised the pending statute of limitations with respect to the 2018-2019 lapse in appropriations in their motion for a status conference filed in August 2020, at which time they requested that the Court hold a hearing in all related cases to discuss certification of a collective, notice, and statute of limitations issues. *See Arnold*, No. 19-59C, Dkt. No. 60. When the Court denied the motion on August 13, 2020, the Court explained that plaintiffs could file their existing consent to join forms in an unopposed motion for leave.[12] *Id.* at Dkt. No. 61. The Court further explained that the plaintiffs should file a motion for class certification if they found it warranted; moreover, "[i]f plaintiffs would like to seek expedited class certification, they may file a separate motion seeking such relief, accompanied by a brief explaining their position." *Id.* The *Arnold* plaintiffs filed no motion for expedited consideration, nor any motion at all regarding conditional certification, for nearly three months after the Court issued its decision. Nor did any of the plaintiffs in any of the directly related cases file a motion for conditional certification prior to plaintiffs' motion in this case, and certainly not a motion seeking expedited consideration.

Prospective plaintiffs' inactions thus do not demonstrate the diligent pursuit of their claims. *See, e.g, Calloway*, 419 F.Supp.3d at 1037-38 (declining to equitably toll the statute of limitations and explaining that, "on the diligence requirement, the relevant question will be whether the later-filing plaintiffs were diligent in pursuing their claims. All of this depends on arguments not yet presented by plaintiffs who have not yet opted-in."). As this Court has explained after declining to equitably toll the period of time during which a motion to dismiss and a motion for conditional certification were pending, "our staying of class certification would

[12] Plaintiffs in *Richmond* filed an identical motion, without separately seeking defendant's consent, and which the Court likewise denied. *Richmond*, No. 19-161C, Dkt. Nos. 56, 57.

not prevent putative plaintiffs from asserting a potentially colorable claim for relief, nor would it affect their ability to commence their own litigation." *Jones*, 88 Fed. Cl. at 791; *see also Crawley*, 145 Fed. Cl. at 452 (explaining that equitable tolling should be applied "sparingly" and declining to toll the statute of limitations for the time that the motion for conditional certification was pending because plaintiffs failed to show that they met any of the circumstances to do so (citing *Martin*, 2015 U.S. Claims LEXIS 1310)).

Plaintiffs rely upon numerous, nonbinding cases to assert that "delays outside of the plaintiff's control, such as a stay of the proceedings or the length of time motions are pending, [are] extraordinary circumstances warranting equitable tolling of the statute of limitations." Mot. 18. For example, plaintiffs cite to the delays in issuing notice and ruling on the collective action certification that the court found sufficient to toll the statute of limitations in *Yahraes v. Restaurant Associates Events Corp*, No. 10-cv-935 SLT, 2011 WL 844963, *3 (E.D.N.Y. Mar. 8, 2011). Mot. 19. They also cite to the court's decision in *Viriri v. White Plains Hospital Medical Center*, 320 F.R.D. 344, 355 (S.D.N.Y. 2017), in which the court extended the statute of limitations due to the court's delay in ruling on the plaintiffs' motion for conditional certification. Mot. 20. But pending before both of those district courts were motions for conditional certification—far unlike the circumstances in this case, when plaintiffs have made no attempt to move for conditional certification until seven weeks before the statute of limitations begins to expire. And as demonstrated above, this Court has declined to find tolling in such situations. *See, e.g.*, *Crawley*, 145 Fed. Cl. at 452.

Plaintiffs have failed to demonstrate that equitable tolling, even if available in FLSA cases, is appropriate in this case for potential plaintiffs; the expiration of the statute of limitations will not affect those individuals who have already filed appropriate consent to join forms, or

those who will file such forms in accordance with the Court's order. *See* Dkt. No. 61. The claims of prospective plaintiffs do not meet any of the factors necessary for tolling and, considering the large number of individuals who have already filed consent to join forms in one of these cases, those prospective plaintiffs should have been well aware of their claims. Further, no "extraordinary circumstances" warrant equitable tolling. The Court should deny plaintiffs' request for equitable tolling.

IV. Plaintiffs' Proposed Method Of Notice Is Unworkable

As demonstrated above, notice is entirely unnecessary in this case, and the related cases, and the Court should decline to order notice. If the Court were to order notice, however, plaintiffs' suggested method is inherently unworkable and places an undue burden on the United States.

Plaintiffs request that the Court require notice to be issued to "potential opt-in plaintiffs who are not aware of this litigation and have not yet completed opt-in forms to join this or another related case." Mot. 22. Yet plaintiffs' attempt to carve out individuals who have already joined one of the cases is an inherent impossibility at this time: even assuming that all plaintiffs file their consent to join forms on December 1, 2020, as the Court has ordered, the United States could not adequately use that information to determine which individuals have already joined a case and thus should not receive notice. Simply put, the consent forms lack necessary information for the United States to do what plaintiffs request. For example, the United States objected in *Arnold* to the filed consent to join forms for numerous reasons, including that plaintiffs failed to include any method of identity verification, such as a date of birth or social security number. *Arnold*, No. 19-59C, Dkt. No. 68. Likewise, the consent to join forms filed on November 20, 2020, in *D.P.* lack any information that would permit the United States to verify

that individual's identity and to determine at which employing agency the individual worked, let alone where or in what position. *D.P.*, No. 19-54C, Dkt. No. 59. And even in cases in which some identifying information is provided at the outset on plaintiffs, duplicate plaintiffs arise. *See Martin*, No. 13-834C, Dkt. No. 235 (stipulating dismissal of 1,050 duplicative claims).[13]

One of the inherent difficulties with plaintiffs filing consent to join forms that were not created in consultation with the United States or approved by the Court is that those forms lack information that is necessary for (1) the United States to determine whether the individual has joined only one case and (2) for an agency to verify employment. The consent to join forms in each case contain different information, in a different format. And even the information provided, if sufficient, may not be entirely accurate, considering that individuals unintentionally identify the wrong employing agency or transpose digits in a social security number. Further, plaintiffs' proposal places the burden solely on the United States to both ascertain which individuals have joined which case and then to remove otherwise eligible Federal employees from receiving notice. Plaintiffs, however, bear the burden at the outset to ensure that no individual attempts to bring multiple claims seeking the same relief, and requiring agencies to parse through their lists of employees who meet the definition of a collective that the Court might determine is a waste of agency resources. At a minimum, obtaining the necessary information from all existing plaintiffs in all of the cases would likely take months.[14] And even with the use of a claims administrator, there is simply no way to ensure that existing plaintiffs

[13] Counsel for defendant has already determined, for example, after conducting a short spot check of the plaintiffs' summary chart in *Arnold*, that there are apparent duplicates within the case, as well as joiners who also filed a union grievance directly with the agency.

[14] In *Martin*, for example, the United States has requested such information for years, without success. *See generally Martin*, No. 13-834, Dkt. No. 230.

will not receive notice, including plaintiffs in other cases. Providing notice to existing plaintiffs will result in increased duplication of claims that, prior to the United States potentially calculating any damages, plaintiffs will have to ameliorate.

The necessity, and difficulty, of carving out existing plaintiffs from receiving notice also reveals another inherent flaw in plaintiffs' already unworkable plan. Plaintiffs propose that notices are sent to potential plaintiffs "depending on his or her bargaining unit," as allocated in a determined manner between the *Avalos*, *Arnold*, and *Tarovisky* counsels. Mot. 22. Although surely not their intent, plaintiffs effectively request that the Court cede its impartiality by (1) steering potential plaintiffs in each case to one plaintiffs' counsel over another, based upon an employee's bargaining unit, and (2) endorsing the three cases bringing plaintiffs' current motion, despite other related cases known to the Court that seek to represent the exact same plaintiffs.

The Supreme Court cautioned that courts should avoid "even the appearance of judicial endorsement of the merits" of a case when sending notice, and explained that "Court intervention in the notice process for case management purposes is distinguishable in form and function from the solicitation of claims. In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality." *Hoffman-La Roche*, 493 U.S. at 174. Cannon 2 of the Code of Conduct for U.S. Judges (effective March 12, 2019), is titled "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities." Cannon 2(A) requires that judges "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Ordering notice to issue in the

manner that plaintiffs seek would necessarily result in at least an appearance of partiality by the Court in two ways.[15]

First, the collectives set forth in plaintiffs' complaints in *Arnold*, *Avalos*, and *Tarovisky* overlap, and by conjoining their current motions, plaintiffs' counsel apparently each seek to represent all potential plaintiffs who meet the collective that they now propose. Mot. 12. To address this overlap, plaintiffs propose that the Court direct notice to potential employees based upon bargaining unit, by approving different notices that list different counsel and different fee arrangements. *See id.* at 22; Dkt. No. 59-2 (proposed notices). Plaintiffs thus ask the Court to steer prospective plaintiffs—who meet the collective definition in multiple cases—to counsel in only one of the cases and to enlist defendant to do the work. Depending upon which notice a potential plaintiff receives, and if he were to choose to join an action, his potential recovery would be affected, based upon his choice of counsel. Paragraph 5 in the *Avalos* notice states that "Neither [National Treasury Employees Union (NTEU)] nor Bredhoff & Kaiser will ask any employee that they represent to pay any attorneys' fees, either up front or out of his or her recovery." Dkt. No. 59-2 at 4. Yet paragraph 5 in the *Arnold* and *Tarovisky* notices explain that "You also will be subject to a contingency fee agreement with plaintiffs' lawyers. . . . If there is a recovery, plaintiffs' lawyers are entitled to reimbursement of all costs reasonably incurred in the litigation and to fees equal to 25% of the recovery." *Id.* at 9, 14. By informing plaintiffs of only one counsel and of one case, however, the Court will implicitly endorse that case and that counsel when other cases are pending that a potential plaintiff could choose to join. And

[15] Defendant in no way intends to suggest that the Court is anything other than impartial in this case or in the related cases, and indeed recognizes the steps that the Court has taken to ensure that no appearance of impropriety exists. *See, e.g.*, *Arnold*, Case. No. 19-59C, Oct. 29, 2020 Remark. Defendant raises these points, however, to underscore some of the potential problems that stem from plaintiffs' requests and that make their motion infeasible.

receiving notice that refers to only one case may similarly affect a potential plaintiff's ultimate choice of counsel. For example, an individual who is in an NTEU bargaining unit but who does not belong to the union might wish to be represented by counsel unaffiliated with the union, even if he has to pay a portion of his recovery in contingency fees. If the Court were to approve notice, that notice must be comprehensive and provide prospective plaintiffs with all of their available options for counsel in all of the cases seeking similar relief, otherwise potential plaintiffs will not receive all information pertinent to choosing whether to join one of the actions, and if choosing to join, which action.

Second, due to the various motions filed by the parties, the Court is well aware of the multiple related cases that seek identical or virtually identical relief. Although there are no motions to conditionally certify pending in the other related cases, permitting notice for only the *Arnold*, *Avalos*, and *Tarovisky* cases would have the same effect of endorsing these cases to individuals who are prospective plaintiffs in the other cases as well. At the very least, before considering whether to approve notice the Court should permit the United States to re-urge consolidation and to permit the parties in all cases to address the possible effect of providing notice only in *Arnold*, *Avalos*, and *Tarovisky*—and the effect of the overlapping requested collectives—before proceeding in the manner that plaintiffs request in their motion.

Plaintiffs' notice proposal is unworkable for other reasons as well. Plaintiffs assert, for example, that the United States's five payroll providers can simply "send notice by email" to the Government emails of potential plaintiffs. Mot. 24. This method of notice, however, would place an unwarranted burden on the United States and reflects a misunderstanding of the information that may reside with an agency as distinguished from the information that is available to a payroll provider. Bargaining unit codes are set forth in Box 37 of the Standard

Form 50 "SF-50," which is a document that is part of an employee's electronic Official Personnel File (eOPF). This code "identifies a bargaining unit to which you belong, whether or not you[] are actually a member of a labor organization." *See* SF-50 "Notification of Personnel Action" at 2, *available at* https://www.opm.gov/forms/pdfimage/sf50.pdf. But payroll providers do not have access to employees' eOPFs. Instead, depending upon the data given to the provider by the agency (which may not include bargaining unit information), the payroll provider may be unable to determine which employee belongs to which, if any, bargaining unit. And if, for example, an employee is *not* a member of a union but her position is in a bargaining unit, her payroll records would be of no assistance: no union dues would be taken from her paycheck and the payroll provider would have no knowledge that the employee's position is within a bargaining unit. To proceed in the manner suggested by plaintiffs, agencies would need to provide payroll centers with a list of individuals to whom the notices would need to be sent—a much more involved process than simply checking a box and sending an email, as plaintiffs erroneously suggest is possible. Moreover, payroll providers are not regularly equipped to send email to some discreet subset of an agency's employees. Plaintiffs' presumption that payroll providers should be enlisted to reach out to the particular potential clients that plaintiffs' counsel would like to represent grossly taints and undermines the required neutrality of the process.

The United States also objects to plaintiffs' proposed delivery method of notices. Plaintiffs assert that notice should be issued in a manner similar to that in *Martin*, and seek that defendant (1) issue electronic notice through the payroll providers or, for former employees, notice by U.S. Mail, (2) copy plaintiffs' counsel on those notices, (3) provide all of the information on prospective plaintiffs directly to plaintiffs' counsel, so that they can, apparently in their discretion, (4) "disseminate a second notice if similar problems take place as did in

Martin." Mot. 24. But this is not the procedure that occurred in *Martin*, despite plaintiffs' contentions, and it is unworkable. As explained above, sending electronic notice through defendant's payroll providers is not feasible and would be inappropriate; in *Martin*, defendant effectuated notice directly through the agencies, with a bounce back rate of less than 0.2 percent of the total notices sent. *Martin*, No. 13-834C, Dkt. No. 89 at 10. Further, despite plaintiffs' attempts to require that notice be resent in *Martin*, the Court found notice to have been well-effectuated and denied plaintiffs' request. *Id.* at Dkt. No. 125 at 3. The Court certainly never suggested that plaintiffs could simply reissue notice at plaintiffs' discretion. Nor did the United States provide to plaintiffs in *Martin* the email addresses and work addresses of prospective plaintiffs, which is inappropriate and unnecessary if the United States is issuing notice. *See* Mot. 24.

Finally, defendant objects to the notice forms as presented by plaintiffs, for the reasons articulated above. In particular, defendant objects to: (1) the proposed explanation in paragraph one of the notices as to why the notice was sent because it does not reflect the proposed collective and may not reflect any collective ultimately established by the Court; and (2) listing only one case and the counsel for that case. Further, plaintiffs do not attach to their motion a consent to join form, and as explained above, the United States anticipates that it may have objections to any such form that plaintiffs might propose. For example, the United States has objected to the consent to join forms filed in *Arnold*, No. 19-59C, Dkt. No. 73, and expects that some of the same objections will arise with respect to the consent to join forms that will be filed in *Avalos* and *Tarovisky*—including lack of verifiable signatures, insufficient identifying information, and language that does not reflect the collective definition, if one is determined by the Court.

If the Court were to determine that notice is necessary, the United States respectfully requests that the Court not approve a notice or require that it be sent until the Court has ruled on the United States's motions to dismiss in each of the cases and has permitted defendant the opportunity to re-urge consolidation, which the Court has indicated would be allowed. *See* Dkt. No. 36 at 2; *see also, e.g. Rowe*, No. 19-67C, Dkt. No. 57 at 11. After the Court has ruled on the motions to dismiss and consolidation in each of the related cases, the United States also respectfully requests that the Court permit the United States to submit with the plaintiffs (either separately, if consolidation is again denied, or through lead counsel, if consolidation is permitted) time to confer regarding the consent and notice forms, and the method of issuing notice, before presenting that proposal to the Court.

CONCLUSION

For these reasons, the Court should deny plaintiffs' motion to conditionally certify the case as a collective action, to equitably toll the FLSA statute of limitations, to approve the proposed notice and consent forms, and to issue notice.

Respectfully submitted,

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