IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DONALD MARTIN, Jr.	:	
PATRICIA A. MANBECK	:	
JEFF ROBERTS	:	
JOSE ROJAS	:	No.: 13-834C
RANDALL L. SUMNER	:	Judge Patricia E. Campbell-Smith
Plaintiffs,	:	Collective Action
v.	:	
THE UNITED STATES OF AMERICA	:	
Defendant.	:	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Have Plaintiffs stated a viable claim under the FLSA that they were not timely paid minimum and overtime wages by alleging that the Government failed to pay them for work performed between October 1 and October 5, 2013 on their regularly scheduled paydays?

2. Have Plaintiffs who received $580 or more for the two-week pay period from September 22, 2013 through October 5, 2013 on their regularly scheduled paydays for that period stated viable minimum wage claims under the FLSA when courts and regulators without exception endorse use of no more than a one-week period to evaluate whether minimum wages have been paid?

3. Have Plaintiffs stated a viable claim for liquidated damages under the FLSA by alleging that the Government (a) failed to investigate whether it was in compliance with the FLSA before deciding not to pay them on their regularly scheduled paydays and (b) lacked a reasonable basis for believing that not paying them on their regularly scheduled paydays complied with the FLSA when voluminous case law and its own Department of Labor established that a delay in payment would violate the FLSA?

4. Does the Complaint adequately allege that at least one non-exempt Plaintiff was not timely paid overtime when it alleges that Plaintiffs, like other employees, did not receive overtime payments when they were due and are entitled to damages, and when one named Plaintiff and several opt-in Plaintiffs have submitted declarations stating the number of overtime hours that they worked and when they finally received overtime pay?

5. Have Plaintiffs who are classified as exempt under the FLSA stated viable claims by showing that the United States reduced their normal salaries for reasons that are inconsistent with them being exempt employees during that week?

STATEMENT OF THE CASE

I. FACTUAL ALLEGATIONS

A. The United States' Policies Regarding Payment to Essential Employees During the October 2013 Partial Government Shutdown

The United States government was partially shut down from October 1, 2013 through October 16, 2013 ("the shutdown"). First Amended Complaint ("FAC"), ¶¶ 1, 15. During this period, the United States classified all civilian employees in agencies and positions affected by the shutdown as either essential or non-essential. *Id.*, ¶¶ 16, 17. It decided that about 1.3 million employees ("Members" of the proposed collective action) were "essential" and thus required to report to work and perform their normal duties during the entire shutdown. *Id.*, ¶¶ 17, 18.

Typically, Members are paid biweekly, pursuant to schedules that permit their pay rates to be calculated as a certain amount per hour. *Id.*, ¶¶ 19, 23. The first pay period affected by the shutdown, designated as Pay Period 19, commenced on Sunday, September 22, 2013 and ended Saturday, October 5, 2013. *Id.*, ¶¶ 20, 24. Depending on the agency, Members' scheduled payday for that pay period was October 11, 2013; October 15, 2013; or October 17, 2013. *Id.*, ¶ 20. While Members received a payment on their regularly scheduled payday for this pay period, they were not compensated on that payday for the work performed between October 1, 2013 and October 5, 2013 (the "Five Days"). *Id.*, ¶¶ 20-22. As a result, many Members were paid less than $290 for work performed during the week of September 29 through October 5 on their regularly scheduled payday, and no Members were paid for overtime work performed during the Five Days on that payday. *Id.*, ¶¶ 28-29, 35, 44.

Members were not compensated for work performed during the Five Days, including work that qualified for overtime pay, until the partial shutdown ended. *Id.*, ¶ 21. Plaintiffs make no allegation concerning when Members were paid, but do not dispute Defendant's assertion that

most of them were paid for work performed during the Five Days approximately two weeks after their scheduled paydays for Pay Period 19.

The Government did not conduct any analysis to ascertain whether its failure to pay Members minimum or overtime wages for work performed during the Five Days complied with the FLSA and did not rely on any authorities which state that its failure to pay Members wages for work performed during those Five Days complied with the FLSA. *Id.*, ¶¶ 30, 36, 45. In fact, the government disregarded guidance issued by its own Department of Labor that makes clear that budget problems do not relieve governments of the obligation to pay employees minimum and overtime wages on their scheduled paydays. *Id.*, ¶ 31. Accordingly, plaintiffs allege that the Government willfully violated the FLSA in conscious or reckless disregard of the of FLSA requirements. *Id.*, ¶¶ 32, 37, 46.

B. Procedural Background

Five Plaintiffs filed the Complaint initiating this case on October 24, 2013 as a collective action on behalf of themselves and all other "essential employees" who had performed work during the Five Days but had not been paid for that work on their regularly scheduled paydays. A First Amended Complaint filed January 27, 2014 added 1,017 Members who had signed Consent to Join forms to the action.

The First Amended Complaint contains four counts. Count One claims that the Government violated the FLSA as to all Members by failing to pay them on their regularly scheduled paydays the minimum wage for hours worked during the Five Days, *id.*, ¶¶ 52-55, Count Two claims that the Government violated the FLSA by failing to pay Members classified as non-exempt under the FLSA on their regularly scheduled paydays overtime wages for any overtime hours worked during the Five Days, *id.*, ¶¶ 56-60, and Count III claims that the

Government violated the FLSA by failing to pay Members classified as exempt under the FLSA on their regularly scheduled paydays overtime wages for any overtime hours worked during the Five Days, *id.*, ¶¶ 61-66. Count Four seeks interest under the Back Pay Act if liquidated damages are denied under the FLSA. *Id.*, ¶¶ 67-69.[1]

SUMMARY OF THE ARGUMENT

In its motion papers, the Government advances five theories in support of partial or total dismissal of the FLSA claims.[2] The first four of the theories are extraordinary because the Government cites to virtually no caselaw, and the few decisions that it does cite in fact directly refute its arguments. This does not reflect a lack of research, but the fact that its positions have been roundly rejected by numerous courts, including the Court of Appeals for the Federal Circuit and this Court, as well as the Government's own regulators. As shown below, even when the Government can cite to some supporting authority, its arguments lack merit.

At this stage, Plaintiffs must show only that the facts pled in the Complaint, plus inferences reasonably drawn from those facts, may entitle them to the requested relief. They do not have to prove that they will ultimately be entitled to relief. However, as to several of the issues raised by the Government, Plaintiffs' responses go beyond establishing merely that they may be entitled to relief. Because the facts are indisputable and the law creates a dichotomous

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[1] Plaintiffs do not oppose the Government's motion to dismiss their claims under the Back Pay Act, and the Second Amended Complaint that they will seek leave to file will drop Count IV.

[2] The Government's motion also asked the Court to transfer the case on the basis that it lacked jurisdiction. The Government has now withdrawn that aspect of its motion, and Plaintiffs do not address it in this opposition.

answer, *e.g.* either there is or there is not a violation, the Court's ruling effectively will resolve those issues for this case.

The Government's first theory, that its failure to pay Plaintiffs and other Members for work performed during the Five Days on their regularly scheduled paydays did not violate the FLSA, is an example. If the Government was not required under the FLSA to pay minimum or overtime wages on employees' regular paydays, then the case must be dismissed; if the FLSA required the Government to pay Members on their regularly scheduled paydays, however, then the Government violated the FLSA, because it is indisputable that it did not do so.

Notwithstanding the Government's arguments, the law is clear: the Government violated the FLSA by not paying Plaintiffs and other Members minimum or overtime wages on their regularly scheduled paydays. The Department of Labor has frequently opined that it is a violation of the FLSA not to pay employees minimum or overtime wages on their regular paydays. Court after court has reached the same conclusion. Indeed, even the cases the Government relies on hold that minimum and overtime wages must be paid on workers' paydays. Additionally, the Federal Circuit and the Court of Federal Claims have repeatedly held that FLSA claims accrue for statute of limitations purposes on employees' paydays. It makes no sense to state that a claim accrues on employees' paydays but that there has been no violation of the FLSA until sometime after their paydays.

Second, the claims of Members who were not paid on time for work performed during the Five Days are not extinguished merely because they may have been paid $580 (80 hours x $7.25 per hour) or more in Pay Period 19, which includes both the week in which the shutdown began and the week prior to the shutdown. Again, the Government does not cite, and Plaintiffs are unaware of, a single decision that supports the notion that pay for a period in excess of one

week is appropriate to assess whether employees have been paid minimum wage. But under the unusual facts of this case, in which there was not a mixture of compensated and uncompensated time within a single day but instead the Government paid nothing at all on the regularly scheduled paydays for five full days, even a week is too long a metric. Instead, the Court should conclude that the Government failed to pay minimum wage for each hour worked on those Five Days. To deny the Government's motion to dismiss based on a two-week pay period, the Court need not resolve the issue whether the FLSA required the Government to pay Members $290 (40 hours x $7.25 per hour) on their regularly scheduled paydays or required the Government to pay Members the minimum wage for each hour worked. The Court should not, however, inadvertently decide the issue in the course of denying the Government's motion.

Third, Plaintiffs have stated viable claims for liquidated damages. The FLSA mandates the payment of liquidated damages unless an employer has violated the FLSA in good faith and with a reasonable basis for believing that it was acting in compliance with the FLSA. Plaintiffs allege that the Government did not perform the requisite investigations and/or analysis to meet either requirement. The overwhelming judicial and administrative authorities establish that employers that pay their employees late are liable for liquidated damages, including state and local governmental entities with budgetary impasses or other problems. These authorities were known or readily available to the Government and the Government cannot avoid liquidated damages. The Government's only response is that the Anti-Deficiency Act, which prohibited the Government from paying Members during the lapse in appropriations, makes its delay in payment reasonable. The equivalent of the Anti-Deficiency Act did not immunize the State of California from liquidated damages when it had a budget impasse, and the federal Government should be no different. The Government is subject to the FLSA just like any other employer.

The Government's lawmakers had a choice about whether to shut down in October. A self-inflicted decision to withhold payments to employees does not relieve it of its obligation to comply with the FLSA.

Fourth, despite Defendant's arguments that Plaintiffs have not sufficiently alleged that any Plaintiff who is classified as non-exempt under the FLSA worked overtime during the Five Days, Plaintiffs allege facts from which it can reasonably be inferred that at least one Plaintiff did so. Of course, in reality there are many more. Plaintiff Jeffrey Roberts submitted a declaration in connection with Plaintiffs' conditional certification motion in which he attests that he worked 12 hours of overtime during the Five Days for which he was not paid on his regularly scheduled payday. But in order to eliminate any issue over this pointless dispute, Plaintiffs will seek leave prior to the scheduled hearing on the Government's motion to file a Second Amended Complaint that makes the allegation express.

Finally, the Government urges that it cannot be liable to Members classified as exempt under the FLSA. Plaintiffs contend that those otherwise exempt Members were non-exempt for the week of September 29 through October 5 because they were not paid their salaries as agreed. According to the Government, Plaintiffs' theory falls because payment on a salary basis is not a requirement for employees to be exempt under OPM's regulations. OPM's regulations are supposed to be consistent with the DOL's regulations, under which payment on a salary basis is required for exempt status and under which Members would be treated as non-exempt and hence entitled to overtime pay for the week of September 29. In the Federal Circuit decision on which the Government relies, the Court ruled that OPM had reasonably deviated from the DOL's regulations to accommodate a federal statute that allowed suspensions of exempt-level employees under circumstances that would make the employees non-exempt under the DOL's

salary basis test. Under the DOL regulations, the failure to pay exempt employees timely causes them to be treated as non-exempt for the week of September 29. Unlike the case on which the Government relies, there is no Act of Congress that has to be reconciled with the DOL regulation here. The exempt Members should be entitled to overtime pay for the week of September 29, just as they would if their payments were delayed and they were employed privately or by state or local governments.

Perhaps realizing that it has no viable legal arguments, the Government chooses to suggest that the FLSA should not apply to the Plaintiffs and other Members because "it was enacted to protect the interests of low wage workers." Def. Mem. at 15 (initial caps omitted). It is offensive for the Government to suggest that the FLSA should not apply, or should not apply equally, to its own workers, many of whom were hurt by its failure to make timely payments. Regardless, Congress extended the FLSA's protections to federal employees in 1974 without suggesting that its protections should be less for them than for other workers. The Government should not attempt to roll back those protections when it violates the FLSA.

ARGUMENT

When deciding a motion to dismiss for failure to state a claim, a court must construe the complaint in the light most favorable to the plaintiffs, accept the truth of factual (as opposed to conclusory) allegations, and draw all reasonable inferences in the plaintiffs' favor. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive the motion to dismiss, the factual allegations plus the reasonable inferences drawn from them must be sufficient "to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

As shown below, Plaintiffs easily meet the plausibility standard based on the factual allegations and the inferences reasonably drawn from them. Accordingly, the Government's motion to dismiss should be denied.

I. PLAINTIFFS STATE VIABLE CLAIMS UNDER THE FLSA BECAUSE THE GOVERNMENT VIOLATED THE STATUTE BY NOT PAYING MINIMUM WAGES OR OVERTIME ON EMPLOYEES' SCHEDULED PAYDAYS

The portion of the Government's motion to dismiss premised on the notion that it did not violate the FLSA by paying Plaintiffs and other essential employees approximately two weeks after their regularly scheduled payday ignores a decision of the Federal Circuit and numerous decisions of this Court. These decisions establish that an FLSA claim accrues for purposes of the statute of limitations when minimum or overtime wages are not paid on an employee's regularly scheduled payday. It would make no sense to hold that a claim accrues on the regularly scheduled payday but that no claim arises for failure to pay FLSA-mandated wages until sometime after that date. Indeed, numerous cases from other jurisdictions hold that a breach occurs at the same time that a claim accrues: on employees' regularly scheduled payday. The Government has pointed to no decisions holding otherwise.

The Government's argument reduces to the observation that most cases involve longer periods of non-payment than here. But the very decisions on which the Government relies affirm that an employer violates the FLSA if it delays payment of minimum wages or overtime until after the employees' regular payday. Employers face an either/or situation: either they make the FLSA mandated payments by the scheduled payday, or they violate the FLSA.

A. FLSA Claims Accrue When Employees Are Not Paid Properly on Their Regularly Scheduled Paydays

The FLSA provides that a claim "may be commenced within two years after the cause of action accrued, and 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." 29 U.S.C. § 255(a). The statute does not define when a claim accrues, but the Department of Labor regulations fill in the gap by adopting the rule that courts had already enunciated: "The courts have held that a cause of action under the Fair Labor Standards Act for unpaid minimum wages or unpaid overtime compensation and for liquidated damages 'accrues' when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends." 29 C.F.R. § 790.21(b).

Twenty five years ago the Federal Circuit recognized that the "usual rule" is that "a claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid." *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988). The Court of Federal Claims, and the predecessor Court of Claims, has repeatedly applied this rule in determining when FLSA claims are time-barred. As Judge Firestone explained in *Moreno v. United States*, 82 Fed. Cl. 387 (2008), the statute of limitations runs from each payday because

> the plaintiffs clearly could have sued any time after the pay periods during which they worked a sixth day per week at FLETC but did not receive overtime for it. The plaintiffs were entitled to FLSA overtime, and, potentially, to associated liquidated damages, once they worked the hours and were not paid, so a cause of action to recover those wages plus liquidated damages under the FLSA was available to the plaintiffs immediately following those pay periods, when it was clear that their paychecks included neither overtime pay nor liquidated damages.

Id. at 404 n.37 (2008). *See, e.g., Corrigan v. United States*, 68 Fed. Cl. 589, 592-93 (Fed. Cl.) (holding plaintiff's claims to be time-barred because there were more than three years between his last payday and the day of filing, and "[a] claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid"), *aff'd*, 223 F. App'x 968 (Fed. Cir. 2007); *Adams v. United States*, No. 00-447 C, 2003 U.S. Claims LEXIS 238, at *4 (Aug. 11, 2003) ("Since these are continuing claims, a separate cause-of-action accrues each payday."); *Beebe v.*

United States, 640 F.2d 1283, 1293 (Ct. Cl. 1981) (holding that not all of plaintiffs' claims were time-barred because "a separate cause of action accrued each payday when the [Government] excluded the overtime compensation [plaintiffs] claim in this suit").

In its memorandum, the Government carefully states, "This circuit has never held that a delay in payment of minimum or overtime wages is a violation of the FLSA." Def. Mem. at 18 (emphasis in original). This assertion ignores entirely this Court's line of authority that FLSA claims accrue upon a delay in payment of minimum or overtime wages beyond the employees' regularly scheduled payday.

The only way that this line of authority would not be dispositive is if the statute of limitations begins to accrue ***before*** the violation has occurred. But as the Ninth Circuit has explained, that makes no sense:

> [Defendants] nevertheless argue that the statute of limitations, prejudgment interest, and liquidated damages provisions do not need to begin on the same day at which a violation occurs. We do not see how. If employees had a right to recover only at the point of nonpayment (as opposed to late payment), but the period of limitations began running as of the employee's payday, the statute would start running before an employee had a right to recover. That cannot be correct.

Biggs v. Wilson, 1 F.3d 1537, 1540-41 (9th Cir. 1993) ("*Biggs II*").

But this Court need not resort only to the Ninth Circuit. The rule in ***this*** Circuit as well is that the accrual date for statute of limitations purposes and the claim origin date are the same. *See Cook*, 855 F.2d at 851 (holding that FLSA claims "did not start the limitations period running" when "they could not have been sued on").

Thus, the Federal Circuit and this Court, by adopting the rule that the statute of limitations starts to run on FLSA claims when moneys are not paid on the regular payday, have effectively decided that an employer violates the FLSA by failing to pay minimum and overtime wages to its employees on their regularly scheduled payday.

B. Other Judicial and Administrative Authorities Affirm that the Government Violated the FLSA by Failing to Pay Minimum and Overtime Wages on Employees' Regularly Scheduled Paydays

If the Court looks beyond this Circuit to the decisions that the Government cites, it should start with the *Biggs II* decision. *Biggs* involves remarkably similar facts to those in this case (defendant calls them "reasonably similar," Def. Mem. at 21) on the issue of whether a violation occurred, although, as discussed in subsection III, the facts are critically different as they relate to whether liquidated damages are appropriate.

In *Biggs*, the State of California paid employees 14-15 days late (the identical time frame as in this case) because of a budget impasse (as in this case). The plaintiff represented a class of highway maintenance employees who sued the Governor and several other high-ranking officials, but not the State itself, claiming that they had violated the FLSA by failing to pay minimum wages on their paydays. 1 F.3d at 1538-39.

The district court granted summary judgment to the plaintiffs, ruling that the State had not issued paychecks promptly under the totality of the circumstances. *Id.* at 1538; *Biggs v. Wilson*, 828 F. Supp. 774, 777 (E.D. Cal. 1991) ("*Biggs I*"). The Ninth Circuit agreed with the result but added a bright line test, holding that "the FLSA is violated unless the minimum wage is paid on the employee's regular payday." *Id.* at 1541.

The Government discusses only the district court's ruling and then falsely states, "No cases have held that payment of wages a certain number of days following the end of the pay period is a violation of the FLSA." Def. Mem. at 22. In fact, the Ninth Circuit made clear in *Biggs* that paying minimum or overtime wages even one day after the regular payday is a violation of the FLSA. It recently resoundingly reaffirmed its holding:

> Although there is no provision in the FLSA that explicitly requires an employer to pay its employees in a timely fashion, this Circuit has read one into the Act. *Biggs v. Wilson*, 1 F.3d 1537, 1541 (9th Cir. 1993). In *Biggs*, we held that

> payment must be made on payday, and that a late payment immediately becomes a violation equivalent to non-payment. *Id.* at 1540. "After [payday], the minimum wage is 'unpaid.'" *Id.* at 1544. The district court misread *Biggs.* For purposes of the FLSA, there is no distinction between late payment violations and minimum wage violations: late payment is a minimum wage violation. *See id.*

Rother v. Lupenko, 515 F. App'x 672, 675 (9th Cir. 2013).

Equally important, the bright line rule established in *Biggs* has been adopted repeatedly by other courts, including in decisions stretching back to the 1940's. *See generally Arroyave v. Rossi*, 296 F. App'x 835, 836 (11th Cir. 2008) (citing decisions of the Third, Fifth, Seventh, Ninth and Tenth Circuits holding that an employer violates the FLSA, and is liable for liquidated damages, if it does not pay wages on employees' payday or when due in the regular course of employment).

The Department of Labor has adopted the same bright line rule. Its regulation states, "The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends," unless "the correct amount of overtime compensation cannot be determined until some time after the regular pay period," in which case an employer must "pay[] the excess overtime compensation as soon after the regular pay period as is practicable." 29 C.F.R. § 778.106. DOL Fact Sheet #70, entitled "Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues" (App. A1) reiterates that, "In general, an employer must pay covered non-exempt employees the full minimum wage and any statutory overtime due on the regularly scheduled pay day for the workweek in question," and then adds, "Failure to do so constitutes a violation of the FLSA." The Government is left to argue that the Office of Personnel Management ("OPM"), not the Department of Labor, administers the FLSA for federal employees. (Def. Mem. at 16.) But Congress intended OPM's administration of the FLSA for federal employees to be consistent with the DOL's administration of the statute for everyone else. *See Riggs v. United States*, 21

Cl. Ct. 664, 668 (1990). Given the Congressional direction of regulatory consistency and the uniformity of judicial construction, there is no reason to think that if OPM had looked at the issue of when the United States is obligated to pay minimum and overtime wages, it would have reached any contrary conclusion.

C. The Fact that the Delay in Payment Was Roughly Two Weeks Does Not Change the Conclusion that the Government Violated the FLSA

The Government cites ***no*** case holding that the FLSA was not violated because the delay in payment was too short to give rise to liability. Instead, it argues that in most reported cases finding FLSA violations for delays in payment the delay was much longer than in this case. Def. Mem. at 18-20. That proves nothing other than, perhaps, employers that delay payment by many months are more likely than employers that delay payment for shorter periods to obstinately attempt to argue their positions to the point of receiving reported, adverse decisions rather than settling and avoiding the costs of pointless litigation. But even though the delay in payment may have been longer in the decisions cited by the Government, those decisions repeatedly endorse the principle that payment must be made on the regularly scheduled payday. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707-08 & n.20 (1945) (holding that employees are entitled to liquidated damages when employer did not pay overtime wages at the same time as regular wages because Congress made liquidated damages available for "failure to pay the statutory minimum on time" in recognition of "the necessity of prompt payment to workers of wages"); *Calderon v. Witvoet*, 999 F.2d 1101 (7th Cir. 1993) (affirming that an employer's "retaining any part of the minimum wage past the end of the pay period violates the FLSA"); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 491 (2d Cir. 1960) ("overtime compensation shall be paid in the course of employment and not accumulated beyond the regular pay day") (quoting *Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943).

Finally, a district court has already rejected the other-cases-involved-longer-delays argument:

> It is true that most of the cases cited above involved a longer delay in payment than the five to six weeks involved in this case. However, this Court may not accept this relatively brief delay as permissible because such would lead to uncertainty concerning at what time an employer becomes obligated to compensate an employee for past work performed. Thus, this Court adopts the Department of Labor's interpretation of the FLSA requiring that overtime compensation be paid promptly on the regular pay day for the work period that included these overtime hours unless the exceptions found within the regulation are present.

Brooks v. Village of Ridgefield Park, 978 F. Supp. 613, 618 (D.N.J. 1997), *aff'd in relevant part*, 185 F.3d 130 (3d Cir. 1999). While reversing in part, the Third Circuit affirmed this portion of the district court's decision. 185 F.3d at 135-36.

The Government offers no more guidance as to when a violation for delay in payment occurs if not at the regularly scheduled payday than did the employer in *Biggs* or *Brooks*. Instead, it would leave the employer, the employees and the courts in a state of total uncertainty as to when a violation occurs. That is obviously unworkable.

D. Government Employees Are Protected by the FLSA

The Government's offensive suggestion that federal government workers deserve lesser protections than other workers is wrong legally and factually. Legally, Congress extended the protections of the FLSA to federal workers in 1974. It did so principally by redefining an "employee" to include:

> any individual employed by the Government of the United States—
>
> (i) as a civilian in the military departments …,
>
> (ii) in any executive agency …,
>
> (iii) in any unit of the judicial branch of the Government which has positions in the competitive service, …

29 U.S.C. § 203(e)(2)(A). Congress did not exclude federal employees from the minimum wage protections in section 206 or the overtime protections in section 207. In short, even if all federal workers were highly compensated, they would be protected.

But they are not all highly compensated. The opt-in Plaintiffs include many GS-04 and 05 employees, who have annual salaries ranging from about $28,000 to about $41,000. OPM, Salary Table 2013-RUS, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2013/general-schedule/rus.pdf (last visited April 11, 2014) (App. A5). Members suffered significant damages from the delay in payment and the uncertainty about when they would be paid.[3]

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[3] While it normally is improper to refer to materials outside the complaint in responding to a motion to dismiss, the suggestion that Government employees are too well compensated to deserve the FLSA protections merits a response. Accordingly, Plaintiffs reproduce below footnote 4 from their memorandum in support of their motion for conditional certification and related relief (Docket No. 14). The references in the footnote are to declarations submitted with that motion:

> The types of hardships suffered by Plaintiffs and other collective action members exemplify why Congress chose to award liquidated damages unless an employer can demonstrate both good faith and reasonable grounds for its actions. *See, e.g.,* Copeland Decl., ¶¶ 7-12 (explaining that she and her husband both worked for government and hence were not paid for work on the Scheduled Payday, that she was turned away from a doctor's appointment because she could not afford copay, they needed donations to pay for children's medications, and they had to defer mortgage, vehicle loans, utility bills, and vehicle insurance payments); Melvin Decl., ¶¶ 7-12 (explaining that on Scheduled Payday he not receive wages and per diem to cover his substantial out-of-pocket expenses on government travel, and as a result he had to defer mortgage payments, incurred late fees, discontinued tutoring for son, and cut back on household expenses); Rowell Decl., ¶¶ 9-12 (explaining that he is sole source of income for family of five and that family had little savings due to expenses related to a kidney transplant, and as a result of government's failure to timely pay wages, he incurred late fees because he was unable to make credit card payments and could not afford to buy food that wasn't absolutely necessary); Jones Decl., ¶¶ 7-10 (explaining that he is sole source of income for family of four and could not afford to make home and car payments during shutdown); Ballard Decl., ¶¶ 7-12 (explaining that she was forced to report to work against doctor's orders following surgery, that she incurred late fees

For all these reasons, the Government violated the FLSA when it failed to pay essential employees minimum and overtime wages on their regularly scheduled paydays for work performed during the Five Days. The Government's motion to dismiss should therefore be denied.

II. PLAINTIFFS STATE VIABLE CLAIMS ON BEHALF OF EMPLOYEES WHO EARNED AT LEAST $580 IN THE PAY PERIOD BECAUSE THE GOVERNMENT IS USING THE WRONG UNIT OF TIME TO ASSESS ITS LIABILITY

Without citing to any authority, the Government asserts that whether employees were paid minimum wage should be calculated by multiplying the minimum wage rate of $7.25 per hour times the 80 hours in the two-week pay period. As a result, it says, any employee who was paid $580 or more during Pay Period 19 does not have a minimum wage claim. Def. Mem. at 23. The Government is wrong.

A. Plaintiffs Do Not Have to Prove That They Earned Less Than $7.25 Per Hour Multiplied by the Number of Hours Worked in the Entire Two-Week Pay Period 19 Because the Workweek is the Longest Period of Time to Evaluate the Minimum Wage Payment

The FLSA requires covered employers to pay the minimum wage "to each of his employees who ***in any workweek*** is engaged in commerce …." 29 U.S.C. § 206(a) (emphasis

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because she was unable to make rent, mortgage, and car payments in a timely manner and was forced to obtain a $1,000 loan); Torrain Decl., ¶ 7 (explaining that she incurred late fees because she was unable to make rent and car payments in timely manner); Chamberlain Decl., ¶ 9 (explaining that he incurred late fees because he was unable to pay his creditors on time); Jennings Decl., ¶ 7-8 (explaining that he was unable to pay his bills in a timely manner and that he intends to retire two years earlier than initially planned due to government's failure to pay him on time). They were not alone: "Hardship withdrawals from the Thrift Savings Plan set a record [in October 2013], as thousands of participants tapped their retirement accounts during the 16-day partial government shutdown, according to figures released" by the TSP. Sean Reilly, "TSP hardship withdrawals hit record high" (Nov. 18, 2013), *available at http://www.federaltimes.com/article/20131118/BENEFITS03/311180007/TSP-hardship-withdrawals-hit-record-high* (App. A14).

added). While it has not issued a regulation concerning the appropriate pay period for minimum wage calculations, the Department of Labor has prescribed that "[t]he workweek is to be taken as the standard in determining the applicability of the Act." 29 C.F.R. § 776.4(a). Following that general principle, it has consistently interpreted section 206(a) to be "applicable on a work week basis and requires payment of the prescribed minimum wages to each employee who 'in any work week' is employed in a covered enterprise." Wage Hour Opinion Letter No. 125 (August 14, 1962), *quoted in Sandoz v. Cingular Wireless, LLC*, Civ. Act. No. 07-1308, 2013 U.S. Dist. LEXIS 47018, at *22-23 (W.D. La. Mar. 27, 2013).

Less than two years after the FLSA was adopted in 1938, the General Counsel of the Wage and Hour Division of the Department of Labor stated that "for enforcement purposes, the Wage and Hour Division is at present adopting the workweek as the standard period of time over which wages may be averaged to determine whether the employer has paid the equivalent of [the minimum wage]." Wage & Hour Release No. R-609 (Feb. 5, 1940), *reprinted in* 1942 Wage Hour Manual (BNA) 185, *quoted in Dove v. Coupe*, 759 F.2d 167, 171 (D.C. Cir. 1985).[4] About twenty years later, the Wage and Hour Administrator stated that "while the Act does not require that the employee's compensation must be paid weekly, it does require the employer to pay minimum wages due for the particular work week on the regular pay day for the period in which such work week ends." Opinion Letter No. 63 (November 30, 1961), *quoted in Sandoz*, 2013 U.S. Dist. LEXIS 47018, at *23.

With little or no dissent, courts have reached the same interpretation of the FLSA as has the Department of Labor. *See, e.g., Sandoz*, 2013 U.S. Dist. LEXIS 47018, at *27 (adopting "the workweek as the measuring rod for compliance" with the minimum wage provisions of the

[4] A caveat is discussed in Part II.B below.

FLSA); *Morgan v. SpeakEasy, LLC*, 625 F. Supp. 2d 632, 651 (N.D. Ill. 2007) (holding that minimum wage must be calculated on a workweek basis, even though the pay period is two weeks); *Rogers v. Savings First Mortgage, LLC*, 362 F. Supp. 2d 624, 629-31 (D. Md. 2005) (holding that, where employer establishes a bi-monthly pay period, wages paid on payday must be allocated to the workweeks within that pay period to determine compliance with minimum wage provisions, as the FLSA takes as its standard a single workweek).

Without having to decide the issue, Judge Bruggink also recognized that courts require that minimum wage be paid each workweek. In *Christofferson v. United States*, 77 Fed. Cl. 361 (2007), he wrote, "so long as total pay at the end of the week divided by the number of hours worked is no less than the minimum wage rate, [29 U.S.C.] section 206 has not been violated." *Id.* at 364 n.2.

In sum, there is no basis for arguing that any employee who was paid at least $580 for Pay Period 19 does not have a minimum wage claim. Plaintiffs were not paid equal amounts for each week. It is undisputed that they were paid their normal salaries for the week of September 22-28, but paid only to the extent that they worked on September 29 or 30 during the week of September 29 through October 5. If the Government failed to pay employees the minimum wages during the second week of the pay period, it is liable. The Court therefore should deny the motion to dismiss the minimum wage claims of persons who were paid $580 or more during Pay Period 19.

B. Under the Facts of this Case, the Government Should Be Liable for Not Paying Minimum Wage for Each Hour Worked During the Five Days

Although generally minimum wage compliance should be evaluated for each workweek, under the facts of this case the United States may be liable for each hour for which essential employees worked for which it did not pay any, let alone minimum, wages during the week of

September 29 through October 5. Although the issue whether the Government's liability should be based on whether it paid minimum wages for all hours worked during the week of September 29, or for each hour worked during the week, need not be addressed to deny the Government's motion to dismiss, Plaintiffs address the issue now to avoid a decision becoming law of the case on the issue.

In the Wage & Hour Release from 1940 quoted above, the General Counsel, aware that the FLSA defined the minimum wage as an hourly rate, added that "the courts might hold to be a violation of the law [a case] where the employer does not pay anything for hours properly considered to be hours worked, such as periods of waiting time." Wage & Hour Release No. R-609, *quoted in Dove*, 759 F.2d at 171-72. There are strong arguments based on the statutory language and the purposes of the FLSA to adopt the hourly rather than the weekly approach. *See Norceide v. Cambridge Health Alliance*, 814 F. Supp. 2d 17, 23-26 (D. Mass. 2011) (adopting hourly approach based on statutory language making hourly rate rather than workweek compensation the standard for minimum wage, statutory use of "workweek" as the standard for overtime requirements but not for minimum wage requirements, and purpose of protecting workers rather than employers). Nonetheless, with only a few exceptions the courts have rejected the hourly approach in favor of the one considering all compensation paid for all work during a workweek, and Plaintiffs do not ask the Court to adopt a rule that rejects the general approach.

This case, however, is unusual in two respects. First, in most or all cases in which the hourly approach was rejected, employees who worked less than 40 hours per week complained that, as part of their employer's regular compensation schedule, they were not paid for a specific time in the day, such as a meal break when they were on call, unlike the majority of the day for

which they were paid. *See, e.g., Carman v. Mortgage Homes Corp.*, Civ. Act. No. 4:11-CV-1824, 2014 U.S. Dist. LEXIS 26222, at *4-5, 16 n.4 (S.D. Tex. Feb. 28, 2014) (hours worked off-the-clock before or after shifts or during lunch); *Roop v. Wrecker & Storage of Brevard Inc.*, Case No: 6:12-cv-1387-Orl-31TBS, 2013 U.S. Dist. LEXIS 157042, at *11-12 (M.D. Fla. Nov. 1, 2013) (certain time each day was supposedly uncompensated); *Balasanyan v. Nordstrom, Inc.*, 913 F. Supp. 2d 1001, 1003, 1009-10 (S.D. Cal. 2012) (one and a half hours of supposedly uncompensated time per shift). As an example, if an employee who regularly is paid $30 an hour for supposedly working 35 hours per week actually has so many job duties that she has to work through lunch every day and hence really works 40 hours per week, her effective pay rate is $26.25 per hour for 40 hours of work, week after week. By contrast, federal employees were paid for any work done on September 29 and 30, but nothing at all for work performed during the Five Days. If a federal employee was paid $26.25 per hour for eight hours of work on September 30, 2013, it is fiction to regard her effective pay rate as $5.25 per hour for the entire week. The uncompensated work was not because of her job duties or a dispute about how long those duties should take to complete, it was because of a government budget dispute that had nothing to do with those duties.

Second, what happened to federal employees was especially damaging to their finances. In the example above, the employee who works through lunch knows in advance her work hours and her total compensation. She can plan in terms of house payments, car payments and the other expenses of life. Federal employees similarly plan their lives around having a given level of income, regardless whether that income level is $20 per hour or $50 per hour. Those expectations were dashed in October 2013. During the October partial shutdown, essential employees were required to come to work, even if they were on medical or vacation leave, but

were not paid and did not even know how long they would have to wait until they were paid. They were forced to scramble to try to find means to meet their financial obligations. They should be compensated under the FLSA, even if their pay for work performed on September 29 and September 30 exceeded $290.[5]

III. PLAINTIFFS HAVE STATED VIABLE CLAIMS FOR LIQUIDATED DAMAGES BECAUSE THE GOVERNMENT HAS NOT SHOWN, AND CANNOT SHOW, THAT IT ACTED IN GOOD FAITH AND WITH A REASONABLE BASIS FOR BELIEVING THAT IT WAS IN COMPLIANCE WITH THE FLSA

The United States next argues that Plaintiffs' claims for liquidated damages must be dismissed because the Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.,* prevents it from being liable for liquidated damages for failure to timely pay minimum and overtime wages. The argument fails for two reasons. First, the Government cannot possibly establish on a motion to dismiss that it acted in good faith and had a reasonable basis for believing that it was acting in conformity with the FLSA. Second, under the facts of this case, it will be impossible for the Government ***ever*** to prove that it acted in good faith and had a reasonable basis for believing that it was acting in conformity with the FLSA. Just like a private party, it cannot create a budget problem, delay payment to its employees while requiring them to continue to work, and then show good faith or a reasonable basis when its own regulators know that such actions violate the FLSA. Even though the Court cannot grant partial judgment on the pleadings or partial summary judgment for Plaintiffs at this stage of the proceedings, the analysis is clear that the Government will become liable for liquidated damages.

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[5] Of course, the Court can, and probably should, instead simply deny the Government's motion to dismiss, and wait until a motion for summary judgment to decide whether to use a weekly or an hourly approach to determining whether employees were paid minimum wage.

A. The Complaint Alleges, and the Government Has Not Refuted, that the Government Did Not Act in Good Faith and Lacked a Reasonable Basis for Believing that Its Actions Complied with the FLSA

Employers that violate the FLSA's provisions are liable for the shortfall in timely minimum wage or overtime payments and an additional amount equal to that shortfall as liquidated damages. 29 U.S.C. § 216(b). The liquidated damages provision "constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being." *Brooklyn Sav. Bank*, 324 U.S. at 707 (1945) (emphasis added) (quoting 29 U.S.C. § 202(a)); *see Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583–84 (1942) (explaining that liquidated damages are intended to compensate employees for the losses they may have suffered as a result of not receiving the proper wages at the time they were due).

Courts may award less than full liquidated damages only if the employer shows that it acted "in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260; *see Abbey v. United States*, 106 Fed. Cl. 254, 265 (2012), *rev'd on other grounds*, 2014 U.S. App. LEXIS 5303 (Fed. Cir. Mar. 21, 2014). There is a "strong presumption under the statute in favor of doubling." *Angelo v. United States*, 57 Fed. Cl. 100, 104 (2003) (quotations omitted). The employer's burden to establish its good faith and the reasonable grounds for its action is "substantial." *Abbey*, 106 Fed. Cl. at 265 (quoting *Adams v. United States*, 350 F.3d 1216, 1226 (Fed. Cir. 2003)). A court has the discretion to reduce the amount of liquidated damages or to refrain from awarding them only when the employer meets both conditions. Otherwise, the court must award liquidated damages. *See id*. (quoting 29 C.F.R. § 709.22(b)).

"Good faith" is subjective. The defendant must establish "'an honest intention to ascertain what the [FLSA] requires and to act in accordance with it.'" *Moreno*, 82 Fed. Cl. at 277 (quoting *Beebe*, 226 Ct. Cl. at 328). Plaintiffs have alleged that it did not have such an intent (First Amended Complaint (Doc. No. 13), ¶¶ 30-32, 54, 59, 65), and that allegation must be accepted as true for purposes of the motion to dismiss. On a motion to dismiss, for which the Government cannot introduce its own evidence, it cannot refute those allegations. It has not attempted to show any effort "to ascertain what the [FLSA] requires and to act in accordance with it."

The inquiry into whether the government had reasonable grounds is objective. "Proof that the law is uncertain, ambiguous or complex may provide reasonable grounds for an employer's belief that he is in conformity with the Act, even though his belief is erroneous." *Beebe*, 226 Ct. Cl. at 328. Again, the Government has not attempted to do so here, and Plaintiffs have alleged that the Government did not have such reasonable grounds (First Amended Complaint (Doc. No. 13), ¶¶ 30-32, 54, 59, 65). Finally, as shown in Section II.C.2 below, the Government could not have had reasonable grounds for believing that it was acting in conformity with the Act because the law unambiguously establishes that the United States was not acting in conformity with the FLSA when it failed to pay Plaintiffs and other essential employees.

B. The Government Cannot Show that It Acted in Good Faith and with a Reasonable Basis for Believing that It Was Complying with the FLSA

The motion to dismiss the claim for liquidated damages fails for reasons more fundamental than the fact that Plaintiffs pled elements that may give rise to liability. Under the facts as pled, the Government cannot escape liability for liquidated damages because there was no reasonable basis for believing that it was complying with the FLSA when it intentionally failed to pay employees on their regularly scheduled paydays.

1. Employers, Including State and Local Governments, Regularly Are Held Liable for Liquidated Damages for Failure to Pay Employees on Their Regularly Scheduled Paydays

It is well-established that an employer is liable for liquidated damages for failing to pay employees on their regularly scheduled paydays unless it can prove both good faith and a reasonable basis for believing that it was in compliance with the FLSA. *See, e.g., Solis v. A-1 Mortg. Corp.*, 934 F. Supp. 2d 778, 784-85, 814-15 (W.D. Pa. 2013) (awarding liquidated damages in case in which employer withheld pay checks because liquidated damages are ordinarily awarded and employer failed to show good faith or reasonable basis for withholding); *Mathis v. About Your Smile, P.C.*, Civ. Act. No. 02-CV-597, 2002 U.S. Dist. LEXIS 15572 (E.D. Pa. 2002), at *5, 11-12 (holding that employer violated the rule that "an employer must pay its employees at least minimum wage on payday" by withholding paycheck for 16 days and setting a hearing for the determination of compensatory and liquidated damages"); *Pascoe v. Mentor Graphics Corp.*, 199 F. Supp. 2d 1034, 1061 (D. Ore. 2001) (holding that employer violated rule that "wages are considered unpaid, and a minimum wage not received under the FLSA, if wages are not paid on the employee's regular payday" by withholding paycheck for about two and a half months, entitling plaintiff to liquidated damages); *Brooks*, 978 F. Supp. at 619-21 (while acknowledging "strict standard for establishing good faith and reasonableness on the part of the employer," refusing to grant summary judgment against municipal employer because factual issues remain as to whether its withholding of overtime payments pursuant to terms of collective bargaining agreement was done in good faith and with a reasonable basis).

The Department of Labor summarizes:

> What remedies are available to correct violations of the FLSA when employees are not paid on a timely basis?
>
> . . .

> c. An employee may file suit to recover back wages, and an equal amount in liquidated damages, plus attorney's fees and court costs.

DOL Fact Sheet #70 (App. A1), at Q&A 11.

2. Governments Do Not Have a Reasonable Basis for Delaying Payments to Employees Based on Budget Impasses or Other Budget Problems

In 1990, California paid its employees two weeks late because, as in this case, "there was no … budget, and thus no funds appropriated for the payment of salaries, on payday." *Biggs II*, 1 F.3d at 1538. On cross-motions for summary judgment, the district court ruled that the delays in payments made the defendants liable for violating the FLSA, but held for three reasons that they were not liable for liquidated damages. First, the plaintiffs had sued only the Governor and various other officials and not the State, and the FLSA "imposes liability for liquidated damages upon the employer who violates sections 206 [minimum wage] or 207 [overtime]; it imposes no liability upon the officers of the employer." *Biggs I*, 828 F. Supp. at 779. Second, defendants produced evidence of the state's "efforts to comply with FLSA … reflect[ing] an honest intention to ascertain the requirements of the FLSA and to act accordingly." *Id.* Third, "the State had reasonable grounds for believing that its conduct complied with the Act because neither statutes, the applicable regulations nor the cases directly address the issue of prompt payment in the face of a state budget impasse. This case appears to be one of first impression." *Id.* The plaintiffs did not appeal the denial of liquidated damages, so the issue was not before the Ninth Circuit. *Biggs II*, 1 F.3d at 1538 & n.3.

The facts in *Biggs* are readily distinguishable from this case. First, Plaintiffs have sued their employer, the United States. Second, the Government has not presented any evidence of a good faith effort to ascertain and comply with the FLSA's requirements. For that reason alone, its motion to dismiss should be denied. But it is the third distinction, as explicated in *Caldman v. California*, 852 F. Supp. 898 (E.D. Cal. 1994), that results in the conclusion that the Government

cannot possibly prove that it had a reasonable basis for withholding payments to Plaintiffs and other Members in this case.

Two years after the events giving rise to *Biggs*, California had another budget impasse in 1992, again resulting in employees being paid late because no money had been appropriated. This time, liquidated damages were imposed because the holding of the district court in *Biggs* in 1991 that the State of California violated the FLSA by not paying its employees promptly "eliminates the possibility that the State's actions in 1992, though in fact in violation of the FLSA, were taken under an objectively reasonable belief that the State did not have to pay plaintiffs promptly." *Caldman*, 852 F. Supp. at 902. "An employer's failure to heed administrative rulemaking or precedent with respect to the FLSA deprives the employer of the good faith defense" and the reasonable basis defense. *Id.* at 901 (citing *Joiner v. City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987) (in view of Department of Labor regulation, the City of Macon could not reasonably believe that its mass transit system employees were excluded from FLSA requirements) and *Richard v. Marriott Corp.*, 549 F.2d 303, 306 (4th Cir. 1977) (holding that widely circulated 1974 opinion letter of the Wage and Hour Administrator, which apparently was not addressed specifically to defendant, put defendant on notice of proper procedure for crediting tips against the minimum wage, depriving defendant of ability to assert good faith defense to liquidated damages).

In view of these cases, the Government cannot possibly establish good faith or a reasonable basis for a belief that its actions conformed with the FLSA. Its regulators undoubtedly were aware of, and certainly had access to if asked, the *Biggs* and *Caldman* decisions. Moreover, as discussed above, the Department of Labor had issued guidance as to the proper treatment of employees under the FLSA "when private and public employers require

employees to take furloughs and to take other reductions in pay and / or hours worked." DOL Fact Sheet #70 (App. A1), at 1. That guidance made clear that public employers still had to pay employees minimum wage on a timely basis for work performed, and that employees could sue, including for liquidated damages, when they "are not paid on a timely basis." *Id.*, Q&A 11.

The only argument that the Government advances for why its actions were reasonable is that the Anti-Deficiency Act prevented it from paying essential employees until after the budget impasse ended. But that just puts the United States in the same position as the State of California during the 1990 and 1992 budget impasses, arguably unable to pay its employees in a timely manner until the impasse was broken. That circumstance did not meet the "reasonable basis" standard in *Caldman*, and should not here, for several reasons.

First, it would put the United States in a favored position relative to private employers. Suppose a private partnership has an agreement that no employee may be paid unless both partners agree on the budget for the year. The partners disagree about the budget. As a result, the employees are not paid. A defense that liquidated damages should not be assessed because they had a reasonable basis for not making a timely payment – that their partnership agreement prevented payment – would be laughable. But that is the very argument that the Government is making here. It also would put the United States in a favored position relative to state and local governments, which will be liable for liquidated damages for failure to pay employees because of a budget impasse, as shown by the result in *Caldman*. Nothing in 29 U.S.C. § 260, or the remainder of the FLSA, suggests that Congress intended the United States to have a favored status as to liquidated damages.

Second, Plaintiffs are not suing the agencies or departments in which they work; they are suing their employer, the United States of America. It may be true that the departments had no

choice in October 2013 not to pay Members until the budget impasse was resolved, but the United States as a whole had a choice, including as to whether to create the impasse in the first place. Legislative gridlock does not trump the FLSA.

Third, the United States could have made arrangements to pay the Members. On the eve of impasse, Congress passed on September 30, 2013, and the President signed, an Act that assured paychecks during the partial shutdown for troops and for civilian Defense Department workers and employees of contractors whom the Secretary of Defense determined to be "providing support to members of the Armed Forces." Pay Our Military Act, 113 P.L. 39; 127 Stat. 532 (Sep. 30, 2013). Nothing prevented Congress from adopting similar legislation for other Members. Indeed, the court in *Caldman* held that California was liable for liquidated damages to the plaintiffs in part because the State had adopted legislation under which other, more favored employees, were paid timely. 852 F. Supp. at 901-02.

Finally, if there is any doubt that the United States should be liable for liquidated damages because it cannot possibly satisfy the "good faith" and "reasonable basis" tests, that doubt should be resolved in favor of liability. The principle that the FLSA should be "construed liberally to apply to the furthest reaches consistent with congressional direction," *Mitchell v. Lublin*, 358 U.S. 207, 211 (1959), has been applied in a wide variety of contexts in favor of employees. *See, e.g., id.* at 211-12 (holding that employees are "engaged in commerce" and hence protected by FLSA); *Prickett v. Dekalb County*, 349 F.3d 1294, 1296 (11th Cir. 2003) (holding that employees opted in to entire action so that they did not have to file new consents to join when complaint was amended to add a new claim); *Biggs*, 1 F.3d at 1539 (holding that State violated implied requirement that employees be paid minimum and overtime wages on their regularly scheduled paydays); *Pickett v. Beard*, Case No. 1:13-CV-0084 AWI BAM, 2014 U.S.

Dist. LEXIS 15066, at *20 (E.D. Cal. Feb. 5, 2014) (holding that attorneys' fees are available to prevailing plaintiff who seeks only declaratory relief). The same principle requires an award of liquidated damages under the circumstances of this case.

IV. PLAINTIFFS HAVE STATED VIABLE CLAIMS FOR NON-EXEMPT EMPLOYEES FOR OVERTIME PAY BECAUSE THEY HAVE ADEQUATELY ALLEGED THAT AT LEAST ONE PLAINTIFF DID NOT RECEIVE OVERTIME PAY IN A TIMELY MANNER

Notwithstanding the Government's arguments, the Amended Complaint contains adequate allegations from which it may be inferred that at least one plaintiff worked overtime during the Five Days for which he or she was not timely paid. Paragraph 2 states that "Plaintiffs seek liquidated damages under the FLSA ***for themselves*** and all other FLSA non-exempt Essential Employees in the amount of any overtime payments to which they were entitled on the Scheduled Payday." (Emphasis added). Similarly, paragraph 38 alleges that as a result of the Government's failure to pay overtime on the Scheduled Payday, "the non-exempt Essential Employees, ***including the non-exempt Plaintiffs***, have suffered monetary damages and are entitled to liquidated damages." (Emphasis added).

Even if these allegations are not sufficient, Jeff Roberts, one of the five original Plaintiffs, has alleged in a declaration submitted in support of Plaintiffs' conditional certification motion that he worked and recorded 12 hours of work during the Five Days in addition to his scheduled workdays (he was scheduled to, and did, work four ten hour days that week, including three days between October 1 and October 5) for which the Government failed to pay overtime on his Scheduled Payday of October 11, 2013. (Doc. No. 14-16, at ¶¶ 6, 7.) Many other non-exempt employees who opted into the action in the First Amended Complaint also submitted declarations stating the number of hours of overtime that they worked during the Five Days for which they were not timely compensated. Based on these declarations, the sole possible effect of

the Government's motion to dismiss based on Plaintiffs' supposed failure to allege that they had not been paid for overtime worked during the Five Days is a delay in the proceedings while Plaintiffs prepare and seek leave to file an Amended Complaint.

To forestall any justification for delay, however, Plaintiffs will file a motion before the hearing on May 9, 2014, seeking leave to file a Second Amended Complaint in which the Government's failure to pay Mr. Roberts timely for work performed during the Five Days will be stated expressly. The Second Amended Complaint also will add over 500 new opt-in Plaintiffs to the action.

V. PLAINTIFFS STATE VIABLE CLAIMS FOR EXEMPT EMPLOYEES FOR OVERTIME PAY

The Government argues that the claims of exempt employees should be dismissed for two reasons. First, it argues that the First Amended Complaint does not adequately allege that the only Plaintiff classified as exempt worked any overtime during the Five Days. But the Government knows that an opt-in Plaintiff classified as exempt worked overtime but was not timely paid overtime wages on his regular payday for Pay Period 19. David Anderson Decl., Doc. No. 14-5, at ¶¶ 6-7. Thus, again, the sole possible effect of this argument is to delay proceedings while an amended complaint is filed. As mentioned above, Plaintiffs intend to file an amended complaint prior to the May 9 hearing in order to avoid this possibility.

The Government's second argument that the claims of exempt Plaintiffs should be dismissed relies on its misinterpretation of the Federal Circuit's decision in *Billings v. United States*, 323 F.3d 1328 (Fed. Cir. 2003). Its argument is flawed for several reasons.

A. *Billings* Rests on a Congressional Statute for Which There Is No Analog in this Case

The Government ignores a critical distinction between the issue in *Billings* and in this case. In *Billings*, OPM had to accommodate a Congressional statute that required deviation from the DOL regulations, while in this case there is no such statute.

The *Billings* plaintiffs claimed that the Government had misclassified them as exempt under the executive exemption. *Id.* at 1330. They argued that they would not have been exempt under the DOL regulations because those regulations required not only that exempt employees have the job duties of an executive, but also that they be paid on a "salary basis." *Id.* at 1330. The *Billings* plaintiffs were not paid on a salary basis, they contended, because they could be suspended from work and their pay docked for a variety of reasons that were not permitted under the DOL regulations. *Id.* at 1330-31. Congress directed that OPM would "administer the provisions of the [FLSA] in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." *Id.* at 1333 (quoting House Report); *see Riggs v. United States*, 21 Cl. Ct. 664, 668 (1990) (relying on House report). The plaintiffs concluded that because OPM's regulations in *Billings* would produce a different result as to whether the plaintiffs were exempt than would the DOL's regulations, the OPM's regulations were invalid.

The Court of Appeals accepted that the DOL and OPM regulations would produce different results for the *Billings* plaintiffs: non-exempt under the DOL regulations because of failure to adhere to the "salary basis" test, but exempt under the OPM regulations. *Id.* at 1334. The Court also accepted that Congress expected OPM regulations to be consistent in application

with the DOL's. *Id.* Nonetheless, it rejected plaintiffs' argument that the inconsistency in result rendered the OPM regulations invalid.

The Court ruled against the *Billings* plaintiffs because ***Congress*** had adopted a law providing that federal employees, including employees whose duties were primarily executive, professional or administrative, were subject to suspensions and associated docking of pay. 5 U.S.C. § 7503(a) ("Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct)."). OPM had to reconcile the Congressional authorization of suspensions of persons with exempt-level duties with the Congressional intent that it administer the FLSA consistently with the DOL regulations. The Federal Circuit concluded that OPM's resolution reasonably reconciled these competing purposes. 323 F.3d at 1334.

This case is similar to *Billings* in that, federal employees classified as exempt would be treated as non-exempt for the week of September 29 through October 5 and entitled to overtime pay if DOL regulations are followed. To pay an employee on a salary basis, an employer must pay the employee his or her full salary at the scheduled time, unless the employee performs no work during the week or under other circumstances not applicable here. 29 C.F.R. § 541.602(a). In particular, "An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer . . . ." *Id.* For any week in which a public employer fails to pay a normally exempt employee on a salary basis, the employee is treated as a non-exempt employee, and is entitled to receipt of minimum wage and overtime at one and one-half times his or her normal rate. Although the regulations do not

expressly address how to treat an essential employee forced to work during a budget impasse, they do expressly address the closely related situation of a furloughed public employee: "Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced." 29 C.F.R. § 541.710(b). Similarly, the Government's deliberate failure to pay exempt employees on a timely basis makes them non-exempt for any week of delayed payment. Thus, this situation is like *Billings* in that the plaintiffs would be entitled to relief under the FLSA if the DOL regulations were followed.

But unlike the situation in *Billings*, here there is no countervailing Congressional dictate that OPM must reconcile with the DOL regulations. Congress has not provided that the pay of federal employees may be postponed beyond their paydays. Instead, OPM recognizes that every effort must be made to pay federal employees timely. Its regulations provide that, even when an employee must be evacuated from his or her normal workplace, the employee "shall be paid on the employee's regular pay days when feasible," and even provides for payment in advance if required to help the employee defray expenses. 5 C.F.R. § 550.403(a), (b). This distinction from *Billings* is critical. Without any competing Congressional considerations, federal exempt employees should be treated the same as private and state and local government employees.

B. OPM Did Not Adopt the Salary Basis Test as a Matter of Practicality, Not Principle

Unable to dispute the critical distinction discussed above between *Billings* and this case, the Government falls back on the Federal Circuit's approval in *Billings* of OPM's non-inclusion of a "salary basis" test in the definition of an exempt employee. But OPM did not exclude the DOL's test because of some belief that it is flawed. Rather, as Judge Bruggink explained in the

lower court decision that resulted in *Billings*, OPM does not include the "salary basis" test because the great majority of federal employees – those performing non-exempt duties as well as those performing exempt duties – are salaried, making the test of little if any utility in distinguishing exempt from non-exempt employees:

> Under the civil-service system covering the great majority of federal employees, pay is calculated from an *annual* rate of basic pay irrespective of the whether an employee is "labor" or "management." … [T]he salary-basis test would not meaningfully distinguish between, on the one extreme, unskilled federal employees, and on the other extreme, upper federal management. It is not surprising, therefore, that OPM focuses on the work actually being done by the exempt employee, rather than on the peculiarities of the federal government's pay mechanism.

Adams v. United States, 40 Fed. Cl. 303, 307 (1998), *aff'd sub nom. Billings v. United States*, 323 F.3d 1328 (Fed. Cir. 2003).

Further evidence that OPM does not reject the "salary basis" test as a matter of principle comes from the fact that the minority of federal employees "in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation," 5 U.S.C. § 5342(a)(2), are paid on an hourly, not a salaried basis, under the Federal Wage System administered by OPM. *See* 5 U.S.C. §§ 5341-44 (providing statutory basis for Federal Wage System); *Jaynes v. United States*, 75 Fed. Cl. 218, 221 (2007) (explaining that positions "covered by the Federal Wage System … are paid on an hourly basis in accordance with a local prevailing-rate pay schedule"). Thus, exempt federal employees are paid on a salary basis, and hourly federal employees are non-exempt. The "salary basis" test was dropped only because most non-exempt federal employees also are paid on a salary basis, making it of limited utility.

Because the "salary basis" test is not incompatible with federal employment, and because there is no statute directing that delays in payment of federal employees should have a different

impact on exempt federal employees than it does on other exempt employees, the Court should adopt the DOL's approach to this issue.

C. The OPM Does Not Intend to Deprive Federal Employees of Overtime Pay that Is Available Under the DOL Regulations

It is appropriate to treat Plaintiffs otherwise classified as exempt as non-exempt during the week of September 29 through October 5 for one final reason. Except when, as in *Billings*, Congress had mandated otherwise, OPM does not intend its regulations to restrict federal employees' rights to overtime. Its regulations state, "An employee entitled to overtime pay under this subpart and overtime pay under any authority outside of title 5, United States Code, shall be paid under whichever authority provides the greater overtime pay entitlement in the workweek." 5 C.F.R. § 551.513.[6] The reference to "this subpart" is to the OPM's regulations implementing the FLSA in the federal sector. *Alexander v. United States*, 32 F.3d 1571, 1577 (Fed. Cir. 1994).

This regulation does not strictly apply here because, as discussed in subsection V.A above, exempt employees are not entitled to FLSA overtime pay under the OPM's regulations. Nonetheless, the broad reference to "any authority outside of title 5" reveals that OPM does not intend its regulations to be a straightjacket preventing federal employees from overtime pay to which they would otherwise be entitled. Under the spirit of this regulation the Court should look to the DOL regulations under which federal employees would receive overtime pay for the week of September 29 through October 5. No Act of Congress or regulation of the OPM indicates an intent to allow the United States to delay paying its exempt employees minimum or overtime wages with impunity.

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[6] This provision was not considered in *Billings*, because it was raised for the first time on appeal. 323 F.3d at 1335.

CONCLUSION

The judicial and regulatory authorities are overwhelming. The Government violated the FLSA when it did not pay Plaintiffs and other Members minimum or overtime wages for work performed during the Five Days on their regularly scheduled paydays and are liable for liquidated damages. For the reasons set forth above, the Government's motion to dismiss the FLSA claims in the operative complaint should be denied.

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Respectfully submitted,

/s/ Heidi R. Burakiewicz

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