**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| DONALD MARTIN, JR., | ) | |
| Plaintiffs | ) | No.: 13-834C |
| v. | ) | Judge Patricia E. Campbell-Smith |
| THE UNITED STATES OF AMERICA | ) | Collective Action |
| Defendant. | ) | |

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

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## I. INTRODUCTION

The Government makes one argument over and over in opposition to Plaintiffs' motion for partial summary judgment and in support of the Government's cross motion. According to the Government, the court-constructed "prompt payment" requirement under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, does not "trump" the bar created by the Constitution's Appropriations Clause, Art. I § 9, cl. 7, and the Anti-Deficiency Act, 31 U.S.C. § 1341, against Government agencies making payments in the absence of Congressional appropriations. As a result, it contends, Government agencies did not violate the FLSA when, during the partial Government shutdown of October 2013 (the "2013 Government shutdown"), they did not timely pay the minimum wage and overtime pay to "excepted," "non-exempt" employees who worked between October 1 and October 5, 2013 ("Affected Employees"). Thus, according to the Government, this Court wrongly held that it violated the FLSA by not paying Affected Employees the minimum wage and overtime pay on their regularly scheduled paydays during the 2013 Government shutdown. Relying on the identical argument, the Government contends that it acted in "good faith" in not paying the Affected Employees timely and had a reasonable basis for believing that it was complying with the FLSA, and therefore should not be assessed liquidated damages even if the Court continues to conclude that it violated the FLSA.

The Government is wrong for multiple reasons. First, it improperly seeks reconsideration of this Court's ruling that the Government had violated the FLSA. Second, even if its linchpin argument were correct, the Government did not act in "good faith" or with a "reasonable basis" because it admittedly did not even consider whether it violated the FLSA in not paying Affected Employees on their regularly scheduled paydays. But most important, the Government's central argument is fatally flawed. Judicial precedents issued over the course of almost 150 years

establish that the Anti-Deficiency Act does not diminish the rights of parties dealing with the Government. The Anti-Deficiency Act requires Government agents not to pay moneys that are due until those moneys are appropriated, but if withholding of payments results in the Government violating statutory or contractual obligations, the Government is liable. Thus, the Government's proposed reconciliation of the FLSA and the Anti-Deficiency Act – that federal employees have no right to receipt of the minimum wage or overtime until after Congress appropriates moneys to pay those employees – is at odds with long-established judicial precedent interpreting the Anti-Deficiency Act. The Government's proposal also conflicts with judicial and regulatory authorities addressing disputes arising out of State budget impasses. Consequently, this Court should grant Plaintiffs' motion for partial summary judgment and deny the Government's cross-motion for summary judgment.

## II. ARGUMENT

### A. The Government Does Not Satisfy the Criteria for Reconsideration of the Court's Ruling on Liability, but Even if the Decision Is Reconsidered, the Ruling Was Correct

On July 31, 2014, this Court denied the Government's motion to dismiss the Complaint and, because the facts going to liability were undisputed, also held that the Government had violated the FLSA when it failed to pay Affected Employees the minimum wage and overtime pay for work performed during the week of September 29 through October 5, 2013 (the "Affected Week") on their regularly scheduled paydays for that week. Op. & Order of July 31, 2014 ("MTD Order"), ECF No. 38, at 7. Without ever mentioning the word "reconsider," the Government is asking the Court to reconsider both whether it should have ruled on liability at that stage of the proceedings and the substance of its ruling. The Government, however, does not come close to meeting the standards for "reconsideration" on either of those challenges. For that reason alone, the Government's motion for summary judgment on liability should be denied.

The result should be the same even if the Court does reconsider its ruling. Binding precedent establishes that the Anti-Deficiency Act does not diminish the rights of persons who interact with the Government. The Government's argument that because of the Anti-Deficiency Act Government employees do not have to be paid the minimum wage or overtime pay on their regularly scheduled payday directly conflicts with that precedent.

**1. The Government Does Not Meet the Standards for Reconsideration of the Motion to Dismiss Order**

The Government asks the Court to reverse itself on two components of the MTD Order: that the Court could rule against the Government on a motion to dismiss, Defendant's Response ("Gov. Br."), ECF No. 154, at 7-8; and that the Government violated the FLSA when it did not pay Affected Employees the minimum wage and overtime pay on time, *id.* at 8-13. The Government should have brought such a request in a motion for reconsideration under Court of Federal Claim Rule 54(b), which "permits a court, in its discretion, to modify an interlocutory decision upon a motion for reconsideration." Starr Int'l Co. v. United States, 107 Fed. Cl. 374, 376 (2012).

Possibly, the Government chose not to mention that it was seeking reconsideration because of its inability to meet the standards for reconsideration on both of the two components. Motions for reconsideration "must be supported by a showing of extraordinary circumstances which justify relief . . .[t]he three primary grounds that justify reconsideration are (1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." Ogunniyi v. United States, 124 Fed. Cl. 668, 670 (Fed. Cl. 2016); *see also* Sharpe, 112 Fed. Cl. at 468 ("exceptional circumstances" required for reconsideration).

The Government points to no change in the controlling law since 2014 concerning the Court's power in addressing a 12(b)(6) motion to rule a defendant liable when no facts are in dispute. The Government does not identify any new evidence. And it cannot show clear error or manifest injustice in the Court's decision to rule on liability, among other reasons because the Government did not argue during briefing or oral argument that it was improper to consider whether the Government violated the FLSA on the Government's motion to dismiss.

"A motion for reconsideration is not an opportunity to make new arguments that could have been made earlier; an argument made for the first time in a motion for reconsideration comes too late, and is ordinarily deemed waived." Sharpe v. United States, 112 Fed. Cl. 468, 472-473 (Fed. Cl. 2013). In their opposition to the Government's motion to dismiss, Plaintiffs asked the Court to rule in their favor on liability. Pls. Opp. to MTD (ECF No. 26) at 4-5, 17, 30, 37. The Government in reply did not argue that the Court could not rule that the Government was liable on a motion to dismiss, as it does now. Instead, the language in the Government's reply brief implied that the Government agreed that the Court could rule against it at this stage of the case. For example, the penultimate paragraph states, "Alternatively, if the Court finds a violation, no liquidated damages are appropriate." Reply on MTD (ECF No. 27) at 20. The Government has waived the right to raise this issue now.

Even absent a waiver, the Government cannot show "clear error," let alone "manifest injustice," because it has not identified any prejudice from the Court's ruling at the motion to dismiss stage. As noted, it does not point to any evidence of which it was unaware, or any legal argument that it was unable to make, when it filed and argued the motion to dismiss. *See* Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 186 (1st Cir. 1989) (explaining that "manifest

injustice" occurs when the challenged order "was plainly wrong and resulted in substantial prejudice to the aggrieved party").

Second, the Government's request that this Court reconsider its ruling that the Government violated the FLSA is unsupported by any of the narrow grounds for reconsideration. Again, the Government points neither to a change in controlling law nor to new evidence, let alone new evidence that would have altered the Court's conclusion that the Government had violated the FLSA. "[T]he litigation process rests on the assumption that both parties present their case once, to their best advantage; a motion for reconsideration thus should not be based on evidence that was readily available at the time the motion was heard." Ogunniyi, 124 Fed. Cl. at 670 (internal quotations omitted). Nor does the Government address how the Court's MTD Order is clearly erroneous or results in manifest injustice. Indeed, the Government's repeated (albeit erroneous) arguments that the situation here is novel – for example, "No court or administrative body has previously addressed whether the FLSA's requirements would displace contrary requirements imposed by another Federal statute," Gov. Br. (ECF No. 154) at 6 – undercuts any contention that the Order was clearly erroneous or unjust.

For these reasons, the Government's refashioned legal theory about the Anti-Deficiency Act falls far short of the "exceptional circumstances" required for this Court to reconsider its MTD Order. The request for reconsideration improperly couched as a motion for summary judgment should be denied.

**2. The Court Correctly Decided in the MTD Order that the Government Had Violated the FLSA**

Even if the Court reaches the merits of the Government's request for reconsideration, it should reaffirm its ruling that the Government violated the FLSA. The Anti-Deficiency Act does not override the employees' rights and the Government's duties under the FLSA. The rights of

government employees to timely payments during budget impasses have been established in disputes involving State governments, but there is no meaningful distinction between the duties of state and federal governments under the FLSA.

***a. The Anti-Deficiency Act does not override the Government's obligations under the FLSA***

The Anti-Deficiency Act does not "cancel [the Government's] obligations." Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181, 2193 (2012) (quoting Dougherty v. United States, 18 Ct. Cl. 496, 503 (1883) and Ferris v. United States, 27 Ct. Cl. 542, 546 (1892)). As such, the Government's argument that the "Appropriations Clause and Anti-Deficiency Act's prohibitions displace the [FLSA's] "prompt payment" requirement during a lapse in appropriations" (Gov. Br. (ECF No. 154) at 8) is inconsistent with both recent and long-established caselaw. Plaintiffs' rights under the FLSA endure despite the Anti-Deficiency Act.

Although the Anti-Deficiency Act prohibits the Government from expending money in the absence of appropriations, it does not affect claimants' right to recover compensation that the Government owes them under a separate statute. "[T]he mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute. . . . The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims." New York Airways, Inc. v. United States, 177 Ct. Cl. 800, 810 (1966).

The type of obligations unaffected by a failure to appropriate funds includes employee compensation. The plaintiffs in Lovett v. United States, 104 Ct. Cl. 557 (1945), were federal employees who served without compensation after the Urgent Deficiency Appropriation Act of

1943[1] prohibited the use of funds for their salaries. 177 Ct. Cl. at 559, 564. The U.S. Court of Claims found that the Act "simply prevented a particular disbursement from a particular fund," *id*. at 583, yet contained no language affecting the compensation due to plaintiffs. It explained that "[i]n a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due." *Id.* at 582. The *Lovett* plaintiffs could recover because "the obligation [to compensate plaintiffs] was never destroyed, and … the obligation continues to this day." *Id*. at 584.

Similarly, in *New York Airways*, the Federal Aviation Act of 1958 authorized the Civil Aeronautics Board to set the compensation for three helicopter companies to transport mail. *Id.* at 803. In the fiscal years that followed, Congress appropriated less than the amounts required by the Board to be paid to the companies, *id*. at 808-809, and the companies brought suit for the payments they were owed. The U.S. Court of Claims rejected the Government's argument that the legal authority of the Board to set compensation rates was circumscribed by the availability of annual appropriations. *Id.* at 810. The court explained that "[t]he intent of Congress to effect a change in the substantive law via provision in an appropriation act must be clearly manifest," and because neither the Federal Aviation Act nor Congressional appropriations contained such manifest language limiting the Board's authority to approve compensation, the Government was liable. *Id*. at 811, 817.

The Government's obligations under a contract likewise survive an absence of appropriation. Salazar, 132 S. Ct. at 2193-94 ("[I]f the Government commits its appropriations

[1] Section 304 of the Urgent Deficiency Appropriation Act of 1943 stated that "[n]o part of any appropriation, allocation, or fund [] which is made available under or pursuant to this Act . . . shall be used . . . to pay any part of the salary, or other compensation for [plaintiffs], unless prior to such date such person has been appointed by the President, with the advice and consent of the Senate . . ." Lovett, 104 Ct. Cl. at 577. Like the Anti-Deficiency Act, it limited the ability of government agencies to disburse funds absent certain conditions.

in a manner that leaves contractual obligations unfulfilled, the contractor is free to pursue appropriate legal remedies arising because the Government broke its contractual promise")[2] (internal quotations omitted); *see also* Ford Motor Co. v. United States, 378 F.3d 1314, 1320 (Fed. Cir. 2004) ("[T]he Anti-Deficiency Act does not bar recovery" of costs arising from performance of a contract); Wetsel-Oviatt Lumber Co. v. United States, 38 Fed. Cl. 563, 570 (Fed. Cl. 1997) ("[N]either the Appropriations Clause of the Constitution, nor the Anti-deficiency Act, shield the government from liability where the government has lawfully entered into a contract with another party"); Ferris v. United States, 27 Ct. Cl. 542 (1892) (explaining that the exhaustion of an appropriation "does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties"); Dougherty v. United States, 18 Ct. Cl. 496, 503 (1883) ("The statutory restraints in this respect [from the exhaustion of an appropriate fund] apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government.").

The Government does not even mention this long line of cases in the context of its argument that it did not violate the rights of Affected Employees under the FLSA. Instead, it cites two of the decisions while arguing that it had reasonable grounds for believing that it was complying with the FLSA in not paying the employees until after appropriations had been made. Gov. Br. at 21 (citing Salazar and quoting Ferris). Regardless of its attempt to virtually ignore these decisions, the Government's argument that nothing in the FLSA demonstrates that the statute's "prompt payment" requirement should trump the Anti-Deficiency Act (Gov. Br. (ECF No. 154) at 5) turns the decisions on their heads. Salazar, New York Airlines, and Lovett

[2] Salazar also may be viewed as a case arising under a statute. The contract at issue in Salazar was entered pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450 *et seq*., which "mandates that the Secretary shall pay the full amount of 'contract support costs' incurred by tribes in performing their contracts." 132 S. Ct. at 2186.

establish that a claimant's right to receive compensation statutorily or contractually owed to him by the Government can be terminated by a lack of appropriations only by specific, "clearly manifest," Congressional language. New York Airways, 177 Ct. Cl. at 810; *see also* Parsons's Case, 15 Ct. Cl. 246, 247 (Ct. Cl. 1879) ("[t]his court has held repeatedly that the absence of an appropriation constitutes no bar to the recovery of a judgment in cases where the liability of the government has been established"). The FLSA contains no language stating that the mandate to pay federal employees a minimum wage or overtime is circumscribed by the availability of appropriations. Nor does it state that the liquidated damages provision is somehow affected by the appropriations process. Congress did not pass any legislation in 2013 subordinating the FLSA to the Anti-Deficiency Act. Accordingly, the Government has no legal basis from which to argue that the Anti-Deficiency Act "trumped" the rights of Government employees to timely payment of minimum wage and overtime pay.

***b. Other than its reliance on the Anti-Deficiency Act, the Government no longer argues that employees need not receive minimum wage or overtime pay on their regularly scheduled paydays***

In contesting liability in 2014, the Government principally argued that employers, including state governments, should not be liable, and should not have to pay liquidated damages, when payment of the minimum wage or overtime pay is, in the words of a subheading, "merely delayed." Gov. Br. on MTD (ECF No. 23) at 17; *see id.* at 17-22 (setting out Government's argument). That argument has been abandoned. The Government does not challenge Plaintiffs' showing that state governments that do not meet their FLSA obligations by employees' regularly scheduled paydays violate the FLSA, even if the reason is the legislature's failure to appropriate money. Pl. Br. (ECF No. 153-1) at 27-32. The only vestige of the Government' former argument is its repeated disparagement of the FLSA requirement that

employees receive minimum wage and overtime pay on their regularly scheduled paydays as "court-constructed." Gov. Br. (ECF No. 154) at 5, 8, 10, 11, 12, 23.

The fact that courts have had to fill in a gap in the language of the FLSA to make it effective does not make the resultant principle any less authoritative. Courts frequently must, and do, interpret statutes by addressing issues for which Congress did not make provision. *See, e.g.*, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 447 (U.S. 2003) ("[C]ongressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text"); Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) ("In the absence of any express statutory guidance from Congress, it remains for this Court to determine what harmless-error standard applies on collateral review of petitioner's Doyle claim. We have filled the gaps of the habeas corpus statute with respect to other matters, and find it necessary to do so here.") (citations omitted); Zatuchni v. Sec'y of HHS, 516 F.3d 1312, 1328 (Fed. Cir. 2008) ("Because nothing in the Vaccine Act addresses the issue of survivorship, the issue is properly addressed as a matter of federal common law. '[T]he inevitable incompleteness presented by all legislation means that' it is the 'responsibility of the federal courts . . . 'to declare . . . rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress.'"). If rules declared by the courts to fill in statutory gaps were deemed as less authoritative than the Congressional language, statutes would become less dependable and private parties less able to plan their affairs with confidence.

The Government also argues that the decisions addressing California budget impasses, Biggs v. Wilson, 1 F.3d 1537 (9th Cir. 1993), and Caldman v. State of California, 852 F. Supp. 898 (E.D. Cal. 1994), and presumably the Department of Labor's interpretation that state governments violate the FLSA if they do not timely pay the minimum wage and overtime pay

during budget impasses, are distinguishable because the FLSA preempts state laws analogs to the Anti-Deficiency Act, whereas the FLSA does not preempt the Anti-Deficiency Act. Gov. Br. at 8-11, 16-19. But as shown above, the Anti-Deficiency Act does not alter employees' rights under the FLSA at all. The state analogs similarly do not alter employees' rights under the FLSA because of federal preemption. Thus, while the Government is correct that preemption is not an issue when two federal statutes are involved, the FLSA has the same vitality for both federal and state employees during a budget impasse. *See* 29 U.S.C. § 203(e) (subjecting both federal and state governments to the FLSA by defining "employee" to include "any individual employed by the Government of the United States," with certain qualifications, and "any individual employed by a State," with certain exceptions). Of course, Congress, unlike state legislatures, had the power to legislate that the Government does not violate the FLSA by not paying federal employees who are required to work during a partial shutdown until after the shutdown is concluded. But Congress did not pass such an amendment to the FLSA.

Because the Government now agrees that state governments violate the FLSA when they do not pay minimum wage and overtime pay on a timely basis, and because the protections of the FLSA extend equally to federal and non-federal employees during budget impasses unless Congress directs otherwise, the Government violated the FLSA when it did not pay federal employees on their regularly scheduled paydays the minimum wage and overtime pay that they had earned during the 2013 Government shutdown. The Government's motion for reconsideration should be denied, even if the Court considers its merits instead of rejecting it for its procedural shortcomings.

### B. The Government Is Liable for Liquidated Damages

The Government admits that liquidated damages are payable to Affected Employees if it violated the FLSA, except that the Court has the discretion not to award or reduce the liquidated

damages if the Government "shows to the satisfaction of the court" ***both*** that it acted "in good faith" and with "reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]." Gov. Br. (ECF No. 154) at 13 (quoting 29 U.S.C. § 260). The Government also admits that it has the burden to establish that that it acted in good faith and that it had reasonable grounds for believing that it was not violating the FLSA. *Id.* at 13-14. Indeed, this Court already has held that the Government has that burden. MTD Order (ECF No. 38) at 21.

**1. The Government Did Not Act in Good Faith Because It Did Not Attempt to Ascertain What the FLSA Required and Did Not Attempt to Comply with the FLSA's Requirements**

To establish good faith, the Government must show that it engaged in "active steps to ascertain the dictates of the FLSA and then act to comply with them." Pls. Br. (ECF No. 153-1) at 24 (quoting Angelo v. United States, 57 Fed. Cl. 100, 105 (2003)). The Government quotes a slightly different formulation with the same meaning. Gov. Br. (ECF No. 154) at 14 ("'[G]ood faith,' as used in section 260, means 'an honest intention to ascertain what the FLSA requires and to act in accordance with it.'") (quoting Astor v. United States, 79 Fed. Cl. 303, 320 (2007)). This Court already has quoted the same standard as in *Astor*. MTD Order (ECF No. 38) at 21 (quoting Bull v. United States, 68 Fed. Cl. 212, 229 (2005)).

In their opening brief, Plaintiffs contended that the Government could not possibly meet its burden because it had stipulated that (a) the agencies that advise the Government on the implementation of labor law and policy did not prior to or during the 2013 Government shutdown consider whether requiring Affected Employees to work during the Affected Week without paying them minimum or overtime wages on their regularly scheduled paydays for that work would violate the FLSA; (b) it is unaware of any other agency that considered the issue prior to or during the 2013 Government shutdown; and (c) it did not seek a formal legal opinion regarding how to meet its obligations under both the Anti-Deficiency Act and FLSA as to

Affected Employees who were required to work during the shutdown. Pl. Br. (ECF No. 153-1) at 25 (citing Facts 14, 15).

The Government cannot dispute that it did not consider its duties under the FLSA prior to and during the 2013 Government shutdown because it has so stipulated. Instead, it argues that its failure to consider its FLSA obligations should be excused because consideration would have been futile. Gov. Br. (ECF No. 154) at 14 ("[N]o course of compliance was available to Federal agencies; it was impossible for Federal agency officials to comply with both the FLSA and Anti-Deficiency Act during the shutdown"); *id.* at 15 ("Any attempt to ascertain a compliance course of action would have been futile if complying with the FLSA required paying excepted employees on their regular pay day in the absence of an appropriation for that purpose").

The Government is wrong for four reasons. First, the Government's futility rationale conflicts with the standard that it admits that it must meet, namely, that it have had an "honest intention to ascertain what the FLSA requires and to act in accordance with it." In its brief, the Government never states that it considered the FLSA, but only that, if it had, any attempt to comply with the FLSA would have been futile. The Government could not have had an "honest intention to ascertain what the FLSA requires" when it did not even "consider whether requiring Affected Employees to work during the Affected Week without paying them minimum or overtime wages on their regularly scheduled paydays for that work would violate the FLSA." For the same reason, it could not have had an "honest intention … to act in accordance with [the FLSA requirements]." Lack of consideration of the FLSA is inconsistent with good faith.

Second, the Government tacitly seeks to transform the admitted standard from "good faith" to the "absence of bad faith." Instead of a requirement of an honest intention to ascertain duties and comply with them, the Government asks the Court to hold that the lack of intent to

violate the FLSA is sufficient to avoid liquidated damages. But that is not the FLSA's standard, as explained by an Arizona district court:

> In this case, the Trust has submitted no evidence of any efforts to ascertain the requirements of the FLSA. Gary Herberger testified that he never considered whether Nellis might be eligible for overtime and never did anything to determine her eligibility because Nellis never raised the issue. Such explanations do not excuse the Trust from its affirmative duty to ascertain what the FLSA requires of it as an employer. This is true even absent a showing of bad faith. Having failed to produce evidence of an honest intention to comply with the FLSA, the Trust fails to establish a triable issue of fact as to liquidated damages. The court therefore lacks discretion pursuant to [29 U.S.C.] § 260 and must award liquidated damages under [29 U.S.C.] § 216.

Nellis v. G.R. Herberger Revocable Trust, 360 F. Supp. 2d 1033, 1045-1046 (D. Ariz. 2005) (explaining that "[t]he Trust's lack of subjective bad faith in dealing with Nellis is not sufficient to meet the statutory requirement of good faith efforts to comply with the FLSA so as to avoid liability for liquidated or double damages"); Ayala v. Tito Contrs., Inc., 82 F. Supp. 3d 279, 285 (D.D.C. 2015) (holding employer liable for liquidated damages when "Defendants made no attempt whatsoever to ascertain whether their payroll practices satisfied [the FLSA's overtime] requirements" and explaining that "[a] good-faith defense 'requires 'an affirmative showing of a genuine attempt to ascertain what the law requires, not simply . . . a demonstration of the absence of bad faith'"").

Third, the Government focuses only on the period after October 1 in arguing that it acted in good faith. The possibility of a partial Government shutdown was known weeks before it began. *See, e.g.*, Kelley Holland, *How to prepare for a federal government shutdown*, CNBC (Sep. 23, 2013), http://www.cnbc.com/2013/09/23/ (last visited June 17, 2016); NASA, Operations and Furloughs Under a Government Shutdown (Sep. 27, 2013), http://www.nasa.gov/sites/default/files/files/ShutdownFAQs-09-27-2013-Update.pdf (last visited June 17, 2016); John Tozzi, *Government Shutdown Preparations Are a Lot of Work*,

BLOOMBERG BUSINESSWEEK (Sep. 27, 2013), http://www.bloomberg.com/news/articles/2013-09-27/government-shutdown-preparations-are-a-lot-of-work. If the Government had considered its duties under the FLSA before October 1, 2013, Congress could have considered funding appropriations for excepted, non-exempt employees, just as it passed last minute legislation to pay military employees and the civilian and private employees who supported them. *See* Pl. Br. (ECF No. 153-1) at 7 (Fact 16). If Congress had provided the requested funding, the Government would not have violated the FLSA. Alternatively, Congress could have refused to provide the requested funding and passed legislation making clear that the Government would not violate the FLSA if it paid employees promptly after the shutdown ended. Because the Government did not consider the FLSA and act in conformity with its obligations, what Congress might have done remains unknown.

Finally, the Government implicitly limits the employer of the Affected Employees to the executive department agencies, not Congress. *See, e.g.*, Gov. Br. (ECF No. 154) at 14 ("In this case, no course of compliance was available to Federal agencies; it was impossible for Federal agency officials to comply with both the FLSA and Anti-Deficiency Act during the shutdown."). The FLSA, however, includes Congress as part of the "Government of the United States" for purposes of the statute. Included in the definition of "employees" are "any individual employed by the Government of the United States" in executive agencies, certain judicial branches, and the Library of Congress, among other listed entities. 29 U.S.C. § 203(e)(2)(A). Although direct employees of Congress are not covered, the inclusion of certain judicial branch employees and Library of Congress employees indicates that Congress did not intend to define "Government of the United States" narrowly as the executive branch agencies. Thus, to the extent that Congress contributed to the violations of the employer's duties under the FLSA by not appropriating funds

to pay Affected Employees the minimum wage and for overtime worked, it is part of the Government, and the Government can be liable. Similarly, in every one of the cases discussed above leading up to and including Salazar, Congress's failure to appropriate moneys timely, or failure to appropriate sufficient funds, contributed to the Government's failure to adhere to its statutory or contractual obligations. The agencies' failure to have the money to meet its obligations did not relieve the Government from liability.

**2. The Government Did Not Have Reasonable Grounds for Believing that Requiring Affected Employees to Work Without Timely Payment of Minimum Wage and Overtime Adhered to its Duties Under the FLSA**

As the Government states, "[p]roof 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." Gov. Br. (ECF No. 154) at 19 (quoting Havrilla v. United States, 125 Fed. Cl. 454, 467 (2016)). It argues that the law here is "uncertain" because "the issue of whether the FLSA's prompt payment requirements would displace the Anti-Deficiency Act's prohibition against payments in the absence of appropriations is an issue of first impression," which "has never before been addressed by a court or administrative body." *Id.* at 20, 21.

But just as the Government's failure to even consider the impact of the FLSA in October 2013 undercuts its argument to have acted in "good faith," so too the lack of consideration undercuts the Government's ability to argue that the uncertainty, ambiguity or complexity of the law gave it reasonable grounds for believing that it acted in conformity with the FLSA during the 2013 Government shutdown. The Third Circuit explained in reversing a district court holding against an award of liquidated damages:

> While we have considered the closeness of factual or legal questions in a case arising under the Act [the FLSA] to be relevant to a liquidated damages decision, *see [Brock v.] Claridge Hotel and Casino*, 846 F.2d [180,] 187 [(3d Cir. 1988)], we hold here that in order to assist an employer's case against liquidated damages,

> "***legal uncertainty . . . must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice***". *Laffey [v. Northwest Airlines, Inc.*], 567 F.2d [429,] 466 [(D.C. Cir. 1976)]. Legal uncertainty must have actually led the employer who violated the Act to believe that it was in compliance at the time of the violation. Here there is no record evidence that [the employer] undertook its illegal pay practices reasonably believing them to be legal because of some pervasive legal uncertainty concerning the exemption status of its employees. ***The legality of its pay practices was never an issue for [the employer] until Labor began its Wage and Hour Investigation.***

Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 910 (3d Cir. 1991) (emphasis added); *see* Yourman v. Dinkins, 865 F. Supp. 154, 163 (S.D.N.Y. 1994) ("[D]uring the relevant time period [the defendants] did not even consider that their military leave, disciplinary sanctions, and court attendance policies might run afoul of the requirements for FLSA exemption. They, therefore, cannot credibly claim to have considered authorities concerning the actual deduction-possible deduction issue in relation to those policies. Consequently, the uncertain state of the law with regard to the actual deduction-partial deduction issue cannot contribute to the defendants' good faith defense."); Harris v. District of Columbia, 749 F. Supp. 301, 303 (D.D.C. 1990) ("Faced with changing legal obligations, the District did little more than throw up its hands and summarily deny even plaintiffs' requests to investigate their eligibility for overtime compensation under FLSA. The District cannot employ a claim of legal uncertainty to hide its own failure to put forth more than a nominal effort to comply with FLSA.").

The legal uncertainty arising out of the intersection of the Anti-Deficiency Act and the FLSA did not "pervade and markedly influence" the Government's belief that it was acting appropriately. As it admits, the legality of requiring employees to work without paying them FLSA-mandated amounts "was never an issue" for the Government until Plaintiffs filed this lawsuit. Thus, the Government cannot defeat Plaintiffs' right to liquidated damages based on a contention that it had "reasonable grounds" to believe that it was in compliance with the FLSA.

But even if the Government had considered the relevant law in 2013, the Government could not meet the "reasonable grounds" test because the law was not "uncertain, ambiguous or complex." As the Government has stipulated, since at least 1998, the Wage and Hour Division (WHD) of the Department of Labor, which administers the wage and hour provisions of the FLSA with respect to private employment, State governments and political subdivisions of a State, has interpreted the FLSA as follows:

a. The failure to pay employees of State government required minimum wage and overtime premiums when due – i.e., on the regularly scheduled payday for the work performed – constitutes a violation of the FLSA;

b. The prompt payment requirement applies to State governments during a budget impasse, whether or not there is a provision of state law that limits expending non-appropriated funds; any such provision provides no defense to this requirement.

c. Employees may recover liquidated damages pursuant to 29 U.S.C. §§ 216(b) and 260 as a result of a state or local government's failure to pay them minimum wages and overtime wages for work performed during a pay period on their regularly scheduled payday for that period.

Pl. Br. (ECF No. 153-1) at 8-9 (Facts 18-19). This interpretation is consistent with the rulings in Biggs and Caldman.

Thus, the only possible "uncertainty" as of October 2013 to which the Government can point was whether the same interpretation of the rights of state employees would apply to federal employees as well. The consistent rulings of lower courts that the Anti-Deficiency Act did not relieve the Government of its obligations or deprive parties dealing with the Government of their

statutory or contractual rights, which had been followed by the Supreme Court in Salazar in 2012, only one year prior to the 2013 Government shutdown, should have eliminated any doubt, if the Government had bothered to consider the issue. The Government did not have reasonable grounds for believing in October 2013 that it was acting in compliance with the FLSA.

**3. Affected Employees Should Not Be Deprived of Liquidated Damages**

Even if the Court concludes that the Government satisfies both requirements for reduction or elimination of liquidated damages, the Court has the discretion not to reduce or eliminate them, as the Government admits. Gov. Br. (ECF No. 154) at 22. This case provides the paradigmatic circumstances under which that discretion should be exercised. If the Court concludes that the Government violated the FLSA but withholds liquidated damages, Affected Employees will have no remedy for the violation. As Justice Marshall stated more than two centuries ago, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

**C. The Analysis of Whether the Government Violated the FLSA and Whether It Is Liable for Liquidated Damages Is Identical with Respect to Overtime Pay as with Respect to the Minimum Wage**

In its MTD Order, the Court left open the possibility that the Government could show that it did not violate the FLSA with respect to the overtime pay of some Affected Employees by demonstrating that it could not determine the amount of overtime compensation they were due until after the regularly scheduled paydays for the Affected Week. MTD Order (ECF No. 38) at 18. Through written discovery, Plaintiffs established that, if that situation existed for any Affected Employees, it was a very small percentage of them. Pl. Br. (ECF No. 153-1) at 39-40. The Government has not advanced any argument that Affected Employees were not paid timely

because of inability to determine the amount of overtime compensation they were due until after the regularly scheduled paydays for the Affected Week. Instead, it relies on the same argument that it does with respect to minimum wage payments, namely, "the agencies could not arrange for the payment of the wages in the absence of an appropriation for that purpose." Gov. Br. (ECF No. 154) at 25. There is now no basis in this case to analyze overtime pay claims differently than minimum wage claims.

## III. CONCLUSION

The Government violated the FLSA in failing to pay Affected Employees the minimum wage and overtime pay on their regularly scheduled paydays for the Affected Week. It cannot justify any reduction or elimination in liquidated damages arising out of its violation. Plaintiffs' motion for partial summary judgment should be granted, and the Government's cross-motion should be denied.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that I served Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment and Opposition to Defendant's Cross-Motion for Summary Judgment on June 17, 2016 through the Court of Federal Claims' ECF system on Defendant's Counsel:

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