No. 19-59C
(Judge Campbell-Smith)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

L. KEVIN ARNOLD, *et al.*,

Plaintiffs,

v.

UNITED STATES,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF ITS
MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY

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DEFENDANT'S REPLY IN SUPPORT OF ITS
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Defendant, the United States, respectfully submits its reply, in support of its motion for leave to file as supplemental authority, the recent decision by the United States Supreme Court in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (Apr. 27, 2020). *See* Dkt. No. 46.

As explained in the Government's motion to extend time to file this reply, *see, e.g.*, Dkt. No. 49, this reply addresses the arguments raised by the various plaintiffs in 12 of the 13 directly related cases. Plaintiffs in all 13 cases have responded to the Government's motion.[1]

Indeed, all plaintiffs concur with the United States that *Maine Community* is relevant to the issues in this case, and thus the related cases, and no plaintiffs object to the Government's motion to file supplemental authority. *See Tarovisky*, No. 19-4C, Dkt No. 47; *Avalos*, No. 19-48C, Dkt. No. 38; *D.P.*, No. 19-54C, Dkt. No. 44; *Arnold*, No. 19-59C, Dkt. No. 48; *Hernandez*, No. 19-63C, Dkt. No. 44; *Rowe*, No. 19-67C, Dkt. No. 45; *I.P.*, No. 19-95C, Dkt. No. 58; *Anello*, No. 19-118C, Dkt. No. 44; *Abrantes*, No. 19-129C, Dkt. No. 44; *Richmond*, No. 19-161C, Dkt.

[1] Because the Court struck our motion and plaintiffs' response in *Plaintiff No. 1*, we do not address that response in this reply. *Plaintiff No. 1*, No. 19-94C, Dkt. Nos. 98, 99.

No. 44; *Baca*, No. 19-213C, Dkt. No. 51; and *Jones*, No. 19-257C, Dkt. No. 32. Plaintiffs instead object to the Government's analysis regarding the applicability of *Maine Community* to these cases. As such, defendant respectfully requests that the Court grant defendant's motion, and we explain below why plaintiffs' interpretations of *Maine Community* are incorrect.

BACKGROUND

In *Maine Community*, the Supreme Court evaluates whether the statute implementing the now-expired Risk Corridors program created a Government obligation to pay insurers the full amount of losses. *Maine Community*, 140 S. Ct. at 1319. The Court considered whether this obligation continued even when Congress did not appropriate funds for such losses beyond the amounts collected from profitable insurance plans. *Id.* at 1319-1322.

Plaintiffs almost uniformly agree that the decision in *Maine Community* is relevant, and only dispute the interpretation of the case in the context of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et. seq.*[2] Broadly speaking, plaintiffs' responses in each case raise two main arguments, and several plaintiffs also raise a third. First, plaintiffs assert that *Maine Community* confirms that a legal duty imposed by a statute, such as the FLSA, can mature into a legal liability even without appropriated funds. *See, e.g.*, *Avalos*, No. 19-48C, Dkt. No. 38; *Jones*, No. 19-275C, Dkt. No. 32. Second, plaintiffs argue that the Government Employee Fair Treatment Act (GEFTA) of 2019, Pub. L. No. 116-1, 133 Stat. 3 § 24, which amended the Anti-Deficiency Act in January 2019 and requires the Government to pay employees at their standard rates of pay as soon as possible after the lapse of appropriations ended, does not eclipse the Government's

[2] The plaintiff in *Jones* "consents to the use of *Maine Community* as supplemental authority but opposes Defendant's interpretation of the case." *Jones*, No. 19-257C, Dkt No. 32 at 1-2 ("to the extent that *Maine Community* is relevant, it wholly rejects Defendant's arguments while supporting Plaintiff's position here.").

obligation to pay FLSA minimum wages and overtime wages on plaintiffs' regularly scheduled paydays during the lapse. *See, e.g.*, *Arnold*, No. 19-59C, Dkt No. 48 (the obligation to pay Federal employees as soon as possible cannot eclipse the Government's obligation to pay liquidated damages); *I.P.*, No. 19-95C, Dkt. No. 58 (the Government can pay its employees at the earliest possible date even when paying liquidated damages due to the resulting FLSA violation).[3] Third, certain plaintiffs assert that *Maine Community* confirms that the Court possesses Tucker Act jurisdiction because the language "shall pay" contained within the FLSA necessarily satisfies the fair interpretation test. *See, e.g.*, *Tarovisky*, No. 19-4C, Dkt No. 47 at 8 ("[t]he FLSA contains the same 'shall pay' language that *Maine Community* identifies as demonstrating that Congress intended to create both a right and remedy under the Tucker Act"); *Rowe*, No. 19-67C, Dkt. No. 45; *I.P.*, No. 19-95C, Dkt. No. 58. Moreover, plaintiffs argue, the Court has jurisdiction over any claims for statutorily created monetary liabilities unless explicitly displaced by another statute containing its own judicial remedies. *See, e.g.*, *Hernandez*, No. 19-63C, Dkt. No. 44; *Abrantes*, No. 19-129C, Dkt. No. 44; *Richmond*, No. 19-161C, Dkt. No. 44.

ARGUMENT

As an initial matter, defendant does not dispute that, if the Government incurs an obligation, it must be paid. The Government admitted this in its motions to dismiss and, indeed, has explained in numerous filings that it has paid all employees for work performed during the 2018-2019 lapse in appropriations. *See, e.g.*, *Tarovisky*, No. 19-4C, Dkt. No. 28 at 13; *Avalos*, No. 19-48C, Dkt. 21 at 17. *Maine Community*, however, does not support plaintiffs' arguments that the Anti-Deficiency Act—particularly as amended by GEFTA—does not affect whether the

[3] Plaintiffs in *Abrantes* raise arguments that *Maine Community* confirms that the incurrence of damages under the Border Control Pay Reform Act and the Back Pay Act cannot be repealed or eliminated by GEFTA.

Government should be liable for FLSA liquidated damages during a lapse in appropriations, or that *Maine Community* confirms that the Court possesses Tucker Act jurisdiction to hear plaintiffs' claims.

I. GEFTA Defined The Government's Payment Obligations During The Lapse

Because the Anti-Deficiency Act as amended by GEFTA, not the FLSA, defines the Government's obligations to pay plaintiffs during a lapse in appropriations, plaintiffs incorrectly argue that the Government's interpretation of *Maine Community* runs contrary to the Government's obligation to fairly compensate its employees.

Plaintiffs argue that the FLSA contains mandatory language similar to the statute discussed in *Maine Community*, *i.e*. Section 1342 of the Risk Corridor statute, that imposes a legal duty for the Government to ensure that wages are paid in accordance with the FLSA, and which will mature to a legal liability regardless of appropriations statutes. *See Maine Cmty.*, 140 S. Ct. at 1320; *see also, e.g., Avalos*, No. 19-48C, Dkt. No. 38; *Jones*, No. 19-275C, Dkt. No. 32. In particular, plaintiffs focus on the fact that both the FLSA and Section 1342 include a mandatory instruction that the Government "shall pay" according to a statutory formula. *See, e.g., Tarovisky*, No. 19-4C, Dkt No. 47; *I.P.*, No. 19-95C, Dkt. No. 58; *Jones*, No. 19-257C, Dkt. No. 32; *see also* 29 U.S.C. § 206(a) ("every employer *shall pay* to each of his employees") (emphasis added). As several plaintiffs assert, "*Maine Community* reflects a principle as old as the Nation itself: the Government should honor its obligation." *See Anello,* No. 19-118C, Dkt No. 44 at 4; *Baca*, No. 19-213C, Dkt No. 51 at 4; *Hernandez,* No. 19-63C, Dkt. No. 44 at 1.

As explained above, the Government does not dispute that, if an obligation is incurred, it must be paid. Plaintiffs' argument goes a step too far by asserting that *Maine Community* supports a finding that the FLSA legally obliges the Government to pay a plaintiff on his or her

regularly scheduled payday during a lapse in appropriations. *See, e.g.*, *Richmond*, No. 19-161C, Dkt. No. 44. And the plaintiffs in *D.P.*, *Baca*, and *Anello* go yet a step beyond that to insist that the FLSA imposes a prompt payment requirement even without an explicit timeline for the payment of wages. *D.P.*, No. 19-54C, Dkt No. 48 at 5; *Anello*, No. 19-118C, Dkt No. 44 at 4; *Baca*, No. 19-213C, Dkt No. 51 at 4.

Rather, *Maine Community* expressly explains that statutory language determines the scope and nature of the liability. *Maine Cmty.*, 140 S. Ct. at 1320. With respect to these cases that arose as a result of the 2018-2019 lapse in appropriations, the Court must consider not only the FLSA's statutory requirements, but must look also—and first—to GEFTA, which incorporates specific timing requirements to pay Federal employees "at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, 133 Stat 3 § 24; *see also* 31 U.S.C. § 1341(c)(2). Thus, the statutory obligations established by the FLSA do not alone determine liability on the part of the Government because the FLSA is not the only statute imposing a mandatory payment, nor is it the most specific. The Government explained instead, in both its motions for leave to file supplemental authority and in its earlier motions to dismiss, that, when interpreting statutes, the principle that the "specific governs the general" must apply to determining which statute prevails. *See e.g. Hernandez*, No. 19-63C, Dkt. No. 42 at 3; *Rowe*, No. 19-67C, Dkt. No. 24 at 13. The FLSA does not provide for the timing for payment of wages during a lapse of appropriations whereas GEFTA clearly imposes both a time and a rate for payment of wages during such a lapse. GEFTA, therefore, controls.

Plaintiffs also uniformly argue that *Maine Community* confirms that a statute that imposes a legal duty to pay certain monies cannot be repealed by subsequent appropriation

riders, and reject the Government's assertion that GEFTA's time limits eclipse the statutory requirements to pay FLSA liquidated damages. *See, e.g.*, *Arnold*, No. 19-59C, Dkt. No. 48; *I.P.*, No. 19-95C, Dkt. No. 58. In *Maine Community*, the Supreme Court found that Congress did not repeal an obligation to pay losses for eligible plans that were unprofitable under the Risk Corridors program by virtue of limiting the amount of appropriations that were distributed through it. Rather, the Court found that "repeals by implication are disfavored," particularly through appropriation riders without "words that expressly or by clear implication modified or repealed the previous law." *Maine Cmty.*, 140 S. Ct. 1323-1324. Plaintiffs incorrectly analogize the circumstances in *Maine Community* to these cases, by claiming that GEFTA's amendment to the Anti-Deficiency Act does not repeal the incurrence of mandatory liquidated damages because GEFTA contains no express language to expressly modify the FLSA's terms. *See, e.g.*, *Tarovisky*, No. 19-4C, Dkt. No. 47 at 5; *Richmond*, No. 19-161C, Dkt. No. 44 at 7.

The circumstances in *Maine Community* are distinct from these cases, however. First, GEFTA does not cancel the Government's obligation to pay Federal employees FLSA wages owed for work performed. GEFTA instead dictates the time when and the rate at which the Government must pay those wages during a lapse in appropriations. 31 U.S.C. § 1341(c)(2). Conversely, the FLSA contains no prescribed time for payment of wages. 29 U.S.C. § 206(a).

Second, several plaintiffs also argue that a universally acknowledged implicit prompt payment requirement exists in the FLSA, notwithstanding the lack of any explicit timeline. *See, e.g.*, *Richmond*, No. 19-161C, Dkt. No. 44 at 11; *Jones*, No. 19-275C, Dkt. No. 32 at 5-6. But any implicit FLSA prompt payment requirement that exists is an extra-statutory requirement created within a context outside of a lapse of appropriations. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945); *see also Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993). As explained

in our motions to dismiss, *see, e.g.*, *Hernandez*, No. 19-63C, Dkt. No. 25 at 12-13, the United States has not waived its sovereign immunity with regard to requirements not expressly contained within the FLSA, and in any event, GEFTA provides the statutory requirement for when and at what rate wages should be paid during a lapse in appropriations. Indeed, *Maine Community* expressly explains that statutory language determines the scope and nature of the liability. *Maine Cmty.*, 140 S. Ct. at 1320.

Further, although plaintiffs worked during the lapse, the Government's inability to pay them on their regularly scheduled paydays was not an FLSA violation because the FLSA does not impose a time for such payment during a lapse: GEFTA does. *Hernandez*, No. 19-63C, Dkt. No. 44 at 4 ("the FLSA's statutory text does not mandate payment on any particular date"). *Maine Community* provides, rather, that the Appropriations Clause and the Anti-Deficiency Act "constrain how Federal employees and officers make or authorize payments without appropriations." *Maine Cmty.*, 140 S. Ct. at 1308, 1321. Plaintiffs' reading of the FLSA, as imposing an obligation on the Government that is not contained within the statute's language, is inapposite to GEFTA's express language, and is not supported by *Maine Community*'s holding.

Plaintiffs in *Anello*, *Baca*, and *D.P.* then go yet a step further and argue that the Government's interpretation of the FLSA cannot stand because it would contravene an *express* prompt payment requirement inherent within the FLSA. *D.P.*, No. 19-54C, Dkt No. 48 at 5; *Anello*, No. 19-118C, Dkt. No. 44 at 13; *Baca*, No. 19-213C, Dkt. No. 51 at 13. Plaintiffs cite to 29 C.F.R. § 778.106, which provides a general rule for the payment of overtime compensation in the non-Government context. Congress extended the FLSA in 1974 to Federal employees, however, it authorized the Office of Personal Management (OPM) to administer the FLSA in a manner consistent with, but not identical to, the Department of Labor's (DOL) administration of

the Act in the private sector. 29 U.S.C. § 204(f); *see Riggs v. United States*, 21 Cl. Ct. 664, 668 (1960); *see also* 5 C.F.R. § 551.101(c) ("OPM's administration of the Act must comply with the terms of the Act but the law does not require OPM's regulations to mirror [DOL's] FLSA regulations."). Thereafter, OPM promulgated a separate and distinct set of implementing regulations under Title 5, *see* 5 C.F.R. § 551.101-710; Title 29 regulations thus do not control administration of the FLSA as to the Government.

Moreover, even if 29 C.F.R. § 778.106 were applicable, plaintiffs' argument is facially incorrect because that regulation establishes no requirement for payment on the part of the Federal Government for two reasons. First, the regulation recognizes that "there is no requirement in the Act that overtime compensation be paid weekly," but that it is instead a "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 a workweek ends." 29 C.F.R. § 778.106. In other words, the regulation recognizes that the FLSA prescribes when an employer must pay overtime compensation. Thus, any argument that GEFTA repeals the FLSA lacks merit because the FLSA contains no timing requirement for the payment of wages.

Second, 29 C.F.R. § 778.106 falls under Section B of the DOL's Wage and Hour Division's "Statements of General Policy or Interpretation Not Directly Related to Regulations." Unlike a regulation that implements a statutory requirement, this section only clarifies the practices and policies to guide the administration and enforcement of the FLSA in the non-Federal Government context. 29 C.F.R. § 778.1(a). These generalized statements do not further any argument that the FLSA sets forth a specific time for payment of wages, which, during a lapse in appropriations, would be superseded by GEFTA in any event.

Plaintiffs in *Abrantes* raise their claims under the Border Patrol Pay Reform Act (BPAPRA), Pub. L. No. 113-277, 128 Stat. 2995 (2014), and Back Pay Act (BPA), 5 U.S.C. § 5596. *Abrantes*, No. Dkt. No. 45 at 6-7. The *Abrantes* plaintiffs allege that, in the same manner that GEFTA does not cancel the Government's obligations to pay liquidated damages under the FLSA, GEFTA does not repeal similar obligations under the BPAPRA and the BPA. According to plaintiffs, "[i]n passing GEFTA, Congress could have expressly stated that the Government was not liable for the damages it already owed employees for the current shutdown as well as future shutdowns – but Congress did not so limit its liability." *Abrantes*, No. 19-129C, Dkt. 45 at 6. The Government explained in its motion to dismiss, however, that BPAPRA contains neither a timeliness requirement nor a damages provision, and thus GEFTA provides the timing and rate requirements for payment of wages during a lapse in appropriations. *See Abrantes*, No. 19-129C, Dkt. No. 23 at 14. Further, the *Abrantes* plaintiffs were paid full wages following the end of the lapse of appropriations and are not entitled to back pay. *See, e.g., id.*

Indeed, GEFTA establishes when and at what rates the Government shall pay Federal employees who worked during a lapse in appropriations: "at employees' standard rate of pay at the earliest date possible after the lapse in appropriation ends, regardless of the scheduled pay dates, and subject to the enactment of appropriation Acts ending the lapse." 31 U.S.C. § 1341(c)(2). By comparison, the FLSA requires that the Government "shall pay" the employees their provided overtime and minimum wages. 29 U.S.C. § 206(a). The FLSA determines the required wage amounts while GEFTA establishes when, relative to a lapse in appropriations, these amounts must be paid. The FLSA also provides for liquidated damages if wages are not paid in the amounts prescribed, 29 C.F.R. §216(b), but the Government has paid all of the wages

as prescribed and paid them at the time it was statutorily directed to do so. 31 U.S.C. § 1341(c)(2).

Consequently, *Maine Community*'s holding does not support plaintiffs' arguments that the Government incurred liability under the FLSA during the lapse in appropriations, but rather supports the Government's argument that the Anti-Deficiency Act, as amended by GEFTA, governs payment to Federal employees during a lapse in appropriations.

II. Plaintiffs Have Not Sufficiently Demonstrated Tucker Act Jurisdiction

The Government has not previously explained that the Court does not possess Tucker Act jurisdiction over FLSA cases because the law of this circuit is to the contrary, as set forth by the United States Court of Appeals for the Federal Circuit in *Abbey v. United States*, 745 F.3d 1363 (Fed. Cir. 2014). Several plaintiffs, however, have expressly argued that the Court possesses Tucker Act jurisdiction based upon plaintiffs' misunderstanding of the Supreme Court's brief reiteration in *Maine Community* of the Supreme Court's holding in *United States v. Bormes*, 133 S. Ct. 12 (2012). *See Maine Cmty.*, 140 S. Ct. at 1327-28; *see, e.g.*, *Tarovisky*, No. 19-4C, Dkt No. 47; *Hernandez*, No. 19-63C, Dkt. No. 44; *Rowe*, No. 19-67C, Dkt. No. 45.

Although not an FLSA case, in *Bormes* the Supreme Court reviewed the history and purpose of the Tucker Act and the Little Tucker Act and concluded that the Tucker Act's jurisdictional grant and accompanying immunity waiver were enacted to supply the missing ingredient for an action against the United States for the breach of certain monetary obligations not otherwise judicially enforceable. *Bormes*, 133 S. Ct. at 18. The Court explained the Tucker Act's gap-filling role:

> The Tucker Act is displaced . . . when a law assertedly imposing monetary liability on the United States contains its own judicial remedies. In that event, the specific remedial scheme establishes the exclusive framework for the liability Congress created under

> the statute. Because a precisely drawn, detailed statute pre-empts more general remedies, FCRA's [Fair Credit Reporting Act] self-executing remedial scheme supersedes the gap-filling role of the Tucker Act.

Id. (internal quotation marks and citations omitted).

The FLSA contains its own judicial remedies, providing that suit may be brought "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). And there is no question that the FLSA contains its own waiver of sovereign immunity. *Id*. at §§ 203(e)(2)(A), 216(b); *see El-Sheikh v. United States*, 177 F.3d 1321, 1323 (Fed. Cir. 1999) ("the waiver is found in the 1974 amendments to the Fair Labor Standards Act"). *Bormes* explains that "the Tucker Act cannot be superimposed on an existing remedial scheme," *Bormes*, 133 S. Ct. at 18, and "any attempt to append a Tucker Act remedy to the [statute's] existing remedial scheme interferes with its intended scope of liability." *Id*. at 20.

Because the FLSA allows, "[w]ithout resort to the Tucker Act, . . . claimants to pursue in court the monetary relief contemplated by the statute," *Bormes*, 133 S. Ct. at 19, the Tucker Act is displaced and cannot supply jurisdiction for FLSA suits. The Federal Circuit, however, disagrees and has ruled that the Tucker Act continues to supply this Court with jurisdiction to entertain FLSA suits against the Federal Government. *Abbey*, 745 F.3d at 1369. We recognize that *Abbey* is the law of the Federal Circuit and that it is binding upon this Court.

CONCLUSION

For these reasons, we respectfully request the Court to grant our motion for leave to file supplemental authority.

Respectfully submitted,

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Dated: June 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of June, 2020, a copy of the foregoing "DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY" was filed electronically. This filing was served electronically to all parties by virtue of the court's electronic filing system.

/s/ Erin K. Murdock-Park
ERIN K. MURDOCK-PARK