IN THE UNITED STATES COURT OF FEDERAL CLAIMS

L. KEVIN ARNOLD, *et. al.,*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 19-59 PEC
	)	(Judge Campbell-Smith)
UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S SUPPLEMENTAL BRIEF
REGARDING ITS SUPPLEMENTAL AUTHORITY

Pursuant to the Court's June 9, 2020 order, Dkt. No. 49, defendant, the United States, respectfully submits this supplemental brief explaining the relevance of the recent decision by the United States Supreme Court in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), to this case.

First, *Maine Community* discusses the interplay between insufficient appropriations and the Anti-Deficiency Act, which is a dispositive issue in this case. The Court's reasoning in *Maine Community*, especially in light of this interplay, supports the Government's position that it is not liable for liquidated damages under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, for failure to pay excepted employees on their regularly scheduled paydays during the 2018-2019 lapse in appropriations. "Neither the Appropriations Clause nor the Anti-Deficiency Act address the issue of whether the Government incurs an obligation; rather, both provisions constrain how Federal employees and officers may make or authorize payments in the absence of appropriations." *Maine Cmty.*, 140 S. Ct. at 1311. The FLSA imposes a legal obligation on the Government to pay employees for work performed, but the Anti-Deficiency Act, as amended by the Government Employee Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3

§ 24, controls how and at what rate federal agencies may make or authorize payments without appropriations "at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse." 31 U.S.C. § 1341(c)(2).

Second, defendant recognizes that the United States Court of Appeals for the Federal Circuit has held that this Court may exercise its Tucker Act jurisdiction to hear FLSA claims. *Abbey v. United States*, 745 F.3d 1363 (Fed. Cir. 2014). The Supreme Court's holding in *Maine Community* confirms, however, that Tucker Act jurisdiction is not implicated or available, indeed is displaced, when the applicable statue that creates the liability contains its own provision for judicial review, as the FLSA does.

I. The FLSA Mandates Payment Of Wages, But GEFTA Dictates The Timing

Although the FLSA sets forth the rates that employees must be paid for minimum and overtime wages, in the extraordinary circumstances of a lapse in Federal appropriations, GEFTA dictates the timing of those payments.

In *Maine Community*, the Supreme Court holds that the now-expired Risk Corridors program, § 1342, created a Government obligation to pay insurers the full amount of losses as calculated by the statutory formula, notwithstanding the fact that Congress did not appropriate funds beyond the amounts collected from profitable insurance plans. *Maine Cmty.*, 140 S. Ct. at 1319. Specifically, *Maine Community* holds that § 1342 obligated the Government to pay participating insurers the full amount calculated by the statutory formula because "Congress can create an obligation directly through statutory language." *Id.* at 1320. The Court explained that an "'obligation' is a 'definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty . . . that could mature into a

legal liability by virtue of actions on the part of the other party beyond the control of the United States.'" *Id.* at 1319 (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 70 (2005)). The Court explains that "Section 1342 imposed a legal duty of the United States that could mature into a legal liability through the insurers' actions—namely, their participating in the healthcare exchanges." *Id*. at 1320. That conclusion "flows from § 1342's express terms and context." *Id.* In particular, § 1342 thrice used the mandatory language "shall": the HHS Secretary (1) "shall establish and administer" the program; (2) "shall provide" for payments according to the statutory formula; and (3) "shall pay" insurers for losses exceeding the statutory threshold. *Id*. at 1320-21.

Plaintiffs argue that, similarly to the statute discussed in *Maine Community*, *i.e*. Section 1342 of the Risk Corridor statute, the FLSA contains mandatory language that imposes a legal duty on the Government to ensure that wages are paid in accordance with the FLSA, and that matures into a legal liability regardless of appropriations statutes. 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, in accordance with its statutory obligations, it has paid all employees the wages due 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. But as the Court explains in *Maine Community*, particularly in the Government context, "[i]ncurring an obligation, of course, is different from paying one." *Id.* at 1319. That is because "[n]either the Appropriations Clause nor the Anti-Deficiency Act addresses whether Congress itself can create or incur an obligation directly by statute. Rather, both provisions constrain how federal employees and officers may make or authorize payments without appropriations." *Id.* at 1321. The Court reiterated that an appropriation imposes

limitations upon the Government's agents, but that the lack of an appropriation does not cancel the Government's obligations. *Id*.

Maine Community thus emphasizes that the issue of whether the Government is obligated under the FLSA to pay employees for work performed differs from the timing of that payment for work performed during a lapse in appropriations. Plaintiffs' argument goes a step too far by asserting that *Maine Community* supports a finding by this Court that the FLSA legally obliges the Government to pay a plaintiff at a certain *time* during a lapse in appropriations, *i.e.* on his or her regularly scheduled payday. *Maine Community* does not support plaintiffs' arguments that the Anti-Deficiency Act—as amended by GEFTA—does not affect the Government's liability for FLSA liquidated damages during a lapse in appropriations. Rather, *Maine Community* expressly explains that statutory language determines the scope and nature of the liability. *Maine Cmty.*, 140 S. Ct. at 1320. This is important for two reasons.

First, the FLSA's "regular payday" requirement is a rule created by courts. Although the FLSA states that an employer "shall be liable" for violating the Act, it contains no express requirement as to the timing of payment. 29 U.S.C. § 216(b); *see also* 29 U.S.C. 203 *et. seq*. Because any "regular payday" requirement is not based on the express language of the statute, by the reasoning of *Maine Community*, the FLSA does not obligate the Government to make payment on a particular date, such as a regularly scheduled payday. Thus, because the statute contains no timing requirement, the Government does not violate the Act or become liable for damages if wages are not paid on a regularly scheduled payday during a lapse in appropriations—a conclusion consistent with and supported by *Maine Community*.

Second, 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 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. 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 (GEFTA) of 2019, Pub. L. No. 116-1, 133 Stat. 3 § 24; *see also* 31 U.S.C. § 1341(c)(2). The FLSA provides no timing requirement for payment of wages during a lapse of appropriations, whereas GEFTA imposes both a time and a rate for payment of wages during such a lapse. GEFTA, therefore, controls.

Nor does *Maine Community* confirm, as plaintiffs argue, that a statute, which imposes a legal duty to pay certain monies, cannot be "repealed" by subsequent appropriation riders, thus foreclosing the argument that GEFTA's time limits eclipse the FLSA's statutory requirements to pay liquidated damages. In *Maine Community*, the Court holds that Congress did not impliedly repeal § 1342's mandatory obligation through its subsequent appropriations riders; instead, Congress "'merely appropriated a less amount' than that required to satisfy the Government's obligation, without 'expressly or by clear implication modifying'" that obligation. *Id.* at 16-18 (quoting *United States v. Langston*, 118 U.S. 389, 394 (1886)).

GEFTA does not cancel the Government's obligation to pay Federal employees FLSA wages owed for work performed, nor does GEFTA "repeal" the FLSA's non-existent timing

language. 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), whereas the FLSA contains no prescribed time for payment of wages. 29 U.S.C. § 206(a). Significantly, *Maine Community* clarifies the distinction between the Government incurring an obligation and the scope and nature of an obligation—both of which are at issue in this case. The question raised in *Maine Community* is whether statutory language obliged the Government to make payment to insurers: as the Court explains, the word "shall" in § 1342 "imposed a legal duty on the United States that could mature into a legal liability through the insurers' actions—namely, their participating in the healthcare exchanges." *Maine Cmty.*, 140 S. Ct. at 1320.

This case, however, is not about whether the FLSA imposes a "legal duty" on the Government to pay employees for work performed: the FLSA does, and the Government has paid the FLSA wages due. The Government has previously recognized that duty, repeatedly acknowledging that "[t]he federal government has waived sovereign immunity for claims and damages that fall *expressly* within the text of the FLSA." Dkt. No. 34 (Def. Reply) at 3. The question instead is whether, during a lapse in appropriations, the FLSA imposes a "legal duty" on the Government to pay employees *on their regularly scheduled payday* or incur liability for liquidated damages. As *Maine Community* reiterates, statutory language determines the scope and nature of liability, 140 S. Ct. at 1320, and the FLSA's statutory language mandates no particular date for payment. Conversely, the Anti-Deficiency Act, as amended by GEFTA, specifically requires payment to Federal employees "at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse." § 1341(c)(2).

Further, the Government has not waived sovereign immunity for any court created implicit FLSA prompt payment requirement, and in particular, it has not waived sovereign immunity for the payment of wages during a lapse in appropriations. *See, e.g.*, *Hernandez*, No. 19-63C, Dkt. No. 25 at 12-13; *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). The United States has not waived its sovereign immunity with regard to requirements not expressly contained within the FLSA or in any of its interpreting regulations, and in any event, GEFTA provides the statutory requirement for when and at what rate wages should be paid during a lapse in appropriations. As *Maine Community* explains, *statutory language* determines the scope and nature of the liability. *Maine Cmty.*, 140 S. Ct. at 1320. Put simply, any implicit requirement for payment on any particular date not contained within the language of the FLSA is inapposite to GEFTA's language expressly providing for when payment shall be made, and consistent with *Maine Community*, the Government should not be liable for liquidated damages in this context.

In sum, the Court's reasoning in *Maine Community* establishes that, notwithstanding the FLSA's "shall pay" language, the scope and nature of when the Government must pay wages that become due and owing during a lapse in appropriations is governed by the Anti-Deficiency Act, as amended by GEFTA.

II. Even If The FLSA Creates A Government Obligation To Pay Employees On Their Regular Payday, *Maine Community* Makes Clear That Such An Obligation Is Not Triggered During A Lapse In Appropriations

Even if this Court were to determine that the FLSA's express statutory language sufficiently creates an obligation on the part of the Government to pay employees on some regularly scheduled payday, *Maine Community* refines the scope and nature of any obligation to pay during a lapse in appropriations.

As the Court explains in *Maine Community*, "[n]either the Appropriations Clause nor the Anti-Deficiency Act addresses whether Congress itself can create or incur an obligation directly by statute. *Maine Cmty.*, 140 S. Ct. at 1311. Rather, both provisions constrain how federal employees and officers may make or authorize payments *without appropriations*." *Id.* at 1321 (emphasis added). The Court reiterated that "an appropriation *per se* merely imposes limitations upon the Government's own agents, but its insufficiency does not pay the Government's debts, nor cancel its obligations." *Id.* (internal quotation omitted). Thus, the Court explicitly recognizes the difference between incurring an obligation and paying one. *Id*.

To the extent that the FLSA contains a "regular payday" requirement at all, *Maine Community*'s reasoning, when applied to this case, clarifies that no obligation arose to pay employees on their regularly scheduled payday during the lapse in appropriations. When Congress amended the Anti-Deficiency Act through GEFTA, it provided that excepted employees "shall be paid . . . at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse." 31 U.S.C. § 1341(c)(2). In other words, as amended, the Anti-Deficiency Act itself clearly and specifically imposes the legal duty on the United States of how and when to pay excepted employees who worked during the lapse in appropriations. *See id.* at § 1341(c)(1)(A) (defining "covered lapse in appropriations" as "any lapse in appropriations that begins on or after December 22, 2018").

Conversely, as explained above, the FLSA is silent regarding when wages must be paid, or regarding payment during a Federal lapse in appropriations. Consistent with the well-known principle that "the specific governs the general" when interpreting statutes, the Anti-Deficiency Act's specific language, regarding payment of Federal employees for work performed during a

lapse in appropriations, eclipses any general obligation that may be read into the FLSA to pay employees at a particular time. *See, e.g.*, Def. Reply at 5-6. *Maine Community*'s directive that the "express terms and context" of a statute form the basis of the Government's liability further informs that the timing of the Government's payment obligations during the lapse in appropriations arise not from the FLSA but from the Anti-Deficiency Act's language that Federal employees must be paid "at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." § 1341(c)(2).

III. The FLSA Displaces Tucker Act Jurisdiction

The Government recognizes that precedent from the Federal Circuit is binding on this Court, and that *Abbey v. United States*, 745 F.3d 1363 (Fed. Cir. 2014), held that this Court has Tucker Act jurisdiction over FLSA cases. However, *Maine Community*'s brief discussion of the Supreme Court's holding in *United States v. Bormes*, 133 S. Ct. 12 (2012), demonstrates that the FLSA displaces the Tucker Act's "gap filling" role when the substantive statue has not provided for judicial review. *See Maine Cmty.*, 140 S. Ct. at 1327-28.

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.

For these reasons, we respectfully request this court consider the decision and the foregoing interpretation in *Maine Community*.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of June, 2020, a copy of the foregoing "DEFENDANT'S SUPPLEMENTAL BRIEF REGARDING ITS 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
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