No. 98-1265

In the Supreme Court of the United States

STEPHEN S. ADAMS, ET AL.,
PETITIONERS

v.

JAMES F. HINCHMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress has unequivocally expressed an intent to waive the sovereign immunity of the United States to liability under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, for back pay covering a six-year period before any claim is filed, even though similarly situated private employers would be subject to liability only for a two-to-three-year period.

2. Whether the manner in which petitioners' administrative claims were handled violated due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 154 F.3d 420. The opinion of the district court (Pet. App. 13a-31a) is reported at 946 F. Supp. 37.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1998. Petitions for rehearing were denied on November 9, 1998. The petition for a writ of certiorari was filed on February 5, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subject to certain occupational and other exemptions, the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, entitles employees to overtime pay

(usually based on hours worked in excess of a 40-hour work week) at the rate of one and one-half times an employee's normal hourly compensation. 29 U.S.C. 207(a), 213(a)(1). Employees may bring suit for unpaid FLSA overtime compensation in "any Federal or State court of competent jurisdiction." 29 U.S.C. 216(b). In the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, Congress added the following statute of limitations to the FLSA:

> Any action commenced * * * to enforce any cause of action for * * * unpaid overtime compensation * * * under the Fair Labor Standards Act * * *
>
> > (a) * * * 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). One of Congress's declared purposes in enacting that provision was to substitute this uniform federal limitations period for "the varying and extended periods of time for which * * * potential retroactive liability" under the FLSA had been imposed upon employers under state law. 29 U.S.C. 251(a).

When the FLSA and the Portal-to-Portal Act were enacted, federal employees were expressly excluded from the FLSA's coverage. See *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1294 & n.10 (D.C. Cir.), cert. denied, 409 U.S. 1012 (1972). Amendments in 1966 brought limited classes of federal employees within the FLSA, which continued to exclude all other federal

employees. *Id.* at 1294-1295. In 1974, the FLSA was amended to cover federal employees generally, subject to the statute's general exemptions (*e.g.*, 29 U.S.C. 213 (1994 & Supp. III 1997)) for executive, administrative, and professional employees, among others. Pub. L. No. 93-259, 88 Stat. 55 (codified in relevant part at 29 U.S.C. 203(e)(2)(A)). Each time federal employees were brought within the FLSA, Congress's purpose was to achieve comparable treatment with private sector employees already covered by the Act. See *AFGE* v. *OPM*, 821 F.2d 761, 769 (D.C. Cir. 1987); *Carter*, 463 F.2d at 1298-1299; H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974). Congress expressed no intention to provide federal employees with greater protections under the FLSA than those provided to other employees. See *Hickman* v. *United States*, 10 Cl. Ct. 550, 552 (1986).[1]

In addition to their judicial remedies, federal employees may invoke the general administrative claims settlement process provided under the Barring Act, 31 U.S.C. 3702 (1994 & Supp. III 1997).[2] The Barring Act applies to a wide range of money claims against the United States, and, when the claims at issue here were filed, authorized the Comptroller General to settle claims "received * * * within 6 years after the claim accrues except * * * as provided in this chapter or

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[1] Apart from the FLSA, Title 5 of the United States Code independently provides for overtime pay for many federal employees. See, *e.g.*, 5 U.S.C. 5542 *et seq.* Many, if not all, of petitioners here received some type of Title 5 overtime pay during the period relevant to this action.

[2] As used in Section 3702, the term "settlement" denotes not a compromise, but an "administrative determination of the amount due." *Illinois Surety Co.* v. *United States*, 240 U.S. 214, 219-222 (1916).

another law." 31 U.S.C. 3702(b)(1)(A).[3] The Barring Act administrative claims settlement process is optional and non-binding on the claimant; a claimant is not required to exhaust the administrative process before seeking judicial enforcement, and filing an administrative claim does not toll the time for bringing suit. See *Hickman* v. *United States*, 10 Cl. Ct. at 553; see also *Irvin Indus. Canada, Ltd.* v. *United States Air Force*, 924 F.2d 1068, 1077 n.88 (D.C. Cir. 1990); *Burich* v. *United States*, 366 F.2d 984, 986-987 (Ct. Cl. 1966) (citing cases), cert. denied, 389 U.S. 885 (1967). Because they are not pursuing claims against the government, *non*-federal employees may not, of course, invoke the Barring Act's administrative process.

2. a. Petitioners are 14,122 current and former federal criminal investigators or other federal law enforcement officers who seek back overtime compensation under the FLSA for periods between 1984 and 1995. Pet. App. 1a-2a. In suits filed between February 1990 and December 1995 in the Court of Federal Claims (CFC), petitioners claimed that their employing agencies had incorrectly classified their positions as exempt from the overtime provisions of the FLSA, and they

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[3] See also 4 C.F.R. 31.5(a). During much of the period at issue in this suit, the General Accounting Office (GAO), led by the Comptroller General, exercised authority under 31 U.S.C. 3702 to "settle" a wide variety of money claims against the United States. That authority was recently reassigned to various Executive Branch agencies. The Office of Personnel Management (OPM) is now the designated agency for administrative settlement of federal employees' compensation claims. See 31 U.S.C. 3702(a)(2) (Supp. III 1997). Because GAO was the relevant Section 3702 agency during most of this litigation, for convenience we will continue to refer to GAO as the claims processing agency unless otherwise significant.

sought back payment of amounts due. Simultaneously with filing suit in the CFC, each petitioner lodged an administrative claim for back FLSA overtime pay with the GAO under the Barring Act. *Id.* at 2a.

In October 1992, the CFC issued a consolidated partial summary judgment holding that certain grades of employees were not exempt from the FLSA and had therefore been entitled to overtime pay. *Adams* v. *United States*, 27 Fed. Cl. 5 (1992), modified on other grounds, No. 98-5011, 1998 WL 804552 (Fed. Cir. Sept. 23, 1998). In March 1994, petitioners entered into settlement agreements with the United States that gave those employees back overtime pay and interest for the two-year period before the date that each such employee had filed suit, without prejudice to their right to pursue administrative remedies.[4] Pet. App. 1a-2a. Returning to GAO, petitioners sought a total of six years back FLSA overtime pay—four years beyond what they obtained in the CFC settlement, and four years beyond what the FLSA itself provides, see 29 U.S.C. 255(a)—through the administrative claims settlement process. Pet. App. 2a-4a.

b. When GAO had first confronted the question in 1978, it had concluded that the six-year period set forth in the Barring Act, 31 U.S.C. 3702(b)(1)(A), applied to administrative proceedings to recover back overtime pay under the FLSA. *In re Transportation Sys. Ctr.*, 57 Comp. Gen. 441 (1978). By the time petitioners' administrative claims were pending, however, GAO had begun actively reconsidering that ruling. In *In re*

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[4] That arrangement included employees who were not yet *Adams* plaintiffs in the CFC but would become eligible for inclusion within the settlement agreements upon becoming plaintiffs within one year. See C.A. App. 191-192.

Joseph M. Ford, 73 Comp. Gen. 157 (1994), GAO overruled *Transportation Systems* and determined that the relevant limitations period is the one set forth in the FLSA itself, as amended by the Portal-to-Portal Act. GAO reasoned that "[w]hen a statute creates a right that did not exist at common law and restricts the time to enforce it, expiration of the time limit not only bars the remedy but extinguishes the underlying rights and liabilities of the parties." 73 Comp. Gen. at 160-161 (citing *William Danzer & Co.* v. *Gulf & Ship Island R.R.*, 268 U.S. 633, 635-637 (1925)). Thus, GAO concluded, "a time limitation imposed on a statutorily created judicial cause of action will apply to administrative proceedings to adjudicate the same claims absent a specific provision to the contrary. * * * [L]egislative determinations to limit the extent of a party's exposure to liability or to discourage claims involving stale facts or documentation problems are no less relevant to administrative than to judicial proceedings." 73 Comp. Gen. at 161.[5]

Moreover, GAO explained, when Congress extended FLSA coverage to federal employees, "'no congressional intent was manifested in the amending language or its underlying legislative history that federal employees would be accorded a more liberal limitations

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[5] GAO drew support for that position from a 1974 statute that had reduced the Barring Act's limitation period from ten years to six years. See 73 Comp. Gen. at 161. That 1974 amendment, GAO observed, conformed the Barring Act "to the 6-year limitation period applicable to judicial actions on claims against the United States under 28 U.S.C. 2401 and 2501," and its legislative history "noted that '[t]his will make the time limitation consistent with the Statute of Limitations now applicable to claims filed in administrative agencies and the courts.'" 73 Comp. Gen. at 161 (quoting S. Rep. No. 1314, 93d Cong., 2d Sess. 5-6 (1974)).

period than employees in the private sector.'" 73 Comp. Gen. at 160 (quoting *Hickman* v. *United States*, 10 Cl. Ct. at 552). Application of the Barring Act to extend the limitations period for administrative back pay claims against the government, GAO concluded, would thwart congressional intent by "creat[ing] disparate treatment * * * between federal employees and private sector employees," who have no administrative alternative to filing a court suit for back pay. 73 Comp. Gen. at 161. Following its "usual practice," GAO announced that it would apply its policy "to all FLSA claims that have not been settled prior to the date of today's decision." *Ibid.*

c. Petitioners and others quickly persuaded Congress to grant relief from the effect of the *Ford* decision on many already-pending FLSA administrative claims. In Section 640 of the Treasury, Postal Service and General Government Appropriations Act of 1995, enacted September 30, 1994, Congress provided:

> In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et seq.*) for claims filed before June 30, 1994.

Pub. L. No. 103-329, 108 Stat. 2432.

Invoking Section 640, petitioners contacted GAO seeking resolution of their claims. GAO acknowledged that Section 640 modified the effect of *Ford*, but it reminded petitioners that, in accordance with GAO regulations, their claims had to be processed first through each claimant's employing agency. Pet. App.

5a-6a; see 4 C.F.R. 31.4.[6] Petitioners brought their claims to the attention of the employing agencies, which denied them on the ground that Section 640 by its terms authorized only the Comptroller General to apply a six-year statute of limitations. Pet. App. 5a-6a.

In 1995, petitioners appealed those agency determinations to GAO. By then, however, Congress was considering repeal of Section 640. GAO announced in a separate pending FLSA administrative case (in which petitioners had been granted leave to intervene) that it did "not intend to issue a decision" concerning application of Section 640 "until the [1996 Treasury Appropriations bill] is enacted (because of the possible retroactive repeal of §640)." Pet. App. 6a (discussing proceedings underlying *In re Marvin B. Atkinson*, No. B-256938.2, 1996 WL 31212 (Comp. Gen. Jan. 29, 1996)); see also C.A. App. 95, 96. GAO transmitted a similar message to Congress. C.A. App. 227, 228. Petitioners filed this lawsuit on October 27, 1995, seeking mandamus, injunctive and declaratory relief requiring GAO to apply a six-year statute of limitations to their claims notwithstanding *Ford*. Pet. App. 8a.

On November 19, 1995, Congress added the following amendment to Section 640:

> This section [*i.e.*, Section 640] shall not apply to any claim where the employee has received any com-

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[6] The relevant regulation provided that "[a] claimant should file his or her claim with the administrative department or agency out of whose activities the claim arose," which "shall initially adjudicate the claim"; and, if unsatisfied, the claimant "may appeal that determination to" GAO. 4 C.F.R. 31.4; see also 4 C.F.R. 31.7 ("Claims are settled on the basis of the facts as established by the Government agency concerned and by evidence submitted by the claimant. * * * The burden is on claimants to establish the liability of the United States, and the claimant's right to payment.").

> pensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.

Treasury, Postal Service, and General Government Appropriations Act of 1996, Pub. L. No. 104-52, 109 Stat. 468-469. That amendment substantially reduces the number of claimants who could rely on Section 640 to support pending claims that would otherwise be foreclosed by the *Ford* decision. In discussing the purpose of the amendment, its sponsor explained that GAO's 1978 decision to apply a six-year limitations period had been "incorrect [because] the law states that everyone would only be entitled to 2 years" back pay for FLSA violations. 141 Cong. Rec. H12,376 (daily ed. Nov. 15, 1995) (remarks of Rep. Lightfoot). He added that, although in *Ford* GAO had "corrected its mistake," the 1994 legislation—which required GAO to allow up to six years back pay for claims that had already been filed by June 30, 1994—would cost the government as much as $460 million, "nearly the entire Secret Service budget." *Ibid.* "The conferees were faced with a choice—either pay hundreds of millions for work done many years ago and fire four or five thousand employees[,] or give the Federal workers the same rights as their private sector counterparts." *Ibid.* Therefore, "we included language providing for the same treatment for public and private workers * * * not just because [to do otherwise] costs a lot of money, but because it is fair." *Ibid.*

GAO applied amended Section 640 in the pending case in which petitioners had intervened. *In re Marvin*

B. Atkinson, No. B-256938.2, 1996 WL 31212 (Comp. Gen. Jan. 29, 1996). GAO then advised petitioners in March 1996 that it would similarly adjudicate their FLSA claims in accordance with amended Section 640. See Pet. App. 16a.

3. Meanwhile, petitioners' lawsuits were pending in the district court, and, in supplemental complaints filed on December 13, 1995 and January 29, 1996, petitioners added challenges to amended Section 640 and *Atkinson*. Petitioners demanded relief based on asserted property interests in their unpaid overtime compensation and in their pending administrative claims. They contended that due process had been violated by the alleged retroactive shortening of their limitations period; by GAO's requirement that they bring their claims initially before their employing agencies; by the refusal of those agencies to determine their claims in accordance with the original Section 640; and by GAO's failure to pass on their appeals before the amendment to Section 640. See Pet. App. 8a. Petitioners also sought relief under the Administrative Procedure Act (APA), 5 U.S.C. 706(1), and further claimed a denial of equal protection on the ground that GAO had processed the claims of an unrelated group of federal employees under Section 640's six-year statute of limitations before the 1995 amendment was enacted. See Pet. App. 28a-30a.

a. The district court granted the government's motion for summary judgment. Pet. App. 13a-31a. The court held that petitioners' pending administrative claims did not constitute separate "property" rights entitling them to demand application of the pre-*Ford* interpretation of the law, because a cause of action is "inchoate, and affords no definite or enforceable property right until reduced to a final judgment." *Id.* at 19a (quoting *Austin* v. *City of Bisbee*, 855 F.2d 1429,

1435 (9th Cir. 1988)). The court also held that petitioners had no enforceable property interest in their "earned but unpaid FLSA overtime compensation." *Id.* at 19a-22a. "[T]he FLSA," it explained, "is a creature of statute and can only confer benefits contained within the statute," *id.* at 20a, and "there was nothing in the legislative record [of the FLSA] indicating congressional intent to impart a more liberal limitations period to federal employees than to employees in the private sector." *Id.* at 21a. Indeed, "[u]ntil the passage of Section 640 in the 1995 Act, GAO had no authority to permit a 6 year limitation period for FLSA claims," and its past practice of doing so was simply "wrong." *Ibid.*

The court added, however, that those petitioners who had filed their administrative claims before June 30, 1994 had derived "property interests in their unpaid overtime compensation" from the enactment of Section 640. Pet. App. 22a. The court concluded, however, that those petitioners are not entitled to relief, because such interests could be extinguished consistently with due process by economic legislation having "'a legitimate legislative purpose furthered by rational means.'" *Id.* at 22a-23a (quoting *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992)). The court found that the amendment to Section 640 met that standard. *Id.* at 23a-26a.

For similar reasons, the court held that petitioners had identified no unconstitutional "taking" that could justify the injunctive relief they sought. Pet. App. 26a-28a. Applying the analysis of *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986), the district court found, among other things, that the denial of petitioners' administrative claims had caused no undue interference with any legitimate expectations. Pet. App. 26a-27a. The court further held that, in

amending Section 640 in 1995, Congress had reasonably determined that it would be "unfair for the public to bear the burden of a mistake made by GAO." *Id.* at 27a-28a. Finally, the court rejected petitioners' equal protection and APA claims. *Id.* at 28a-30a.

b. With one exception, the court of appeals affirmed the district court's holdings "substantially for the reasons stated in the court's thorough and well-reasoned opinion." Pet. App. 8a-9a. The exception concerned the district court's disposition of petitioners' claim that the amendment to Section 640 gave rise to a compensable "taking" of rights conferred under the original Section 640. The court of appeals held that it lacked jurisdiction to consider that claim. It explained that "[t]he usual remedy for unconstitutional takings is a suit for money damage (*i.e.*, the 'just compensation' that the Constitution assures)" either in the CFC under the Tucker Act, 28 U.S.C. 1491 (1994 & Supp. III 1997), or, if the amount in controversy is less than $10,000, in the district court under the Little Tucker Act, 28 U.S.C. 1346(a)(2). Pet. App. 11a (citations and footnote omitted). The court found that, if petitioners' counsel were correct in representing that petitioners' individual FLSA back pay claims each exceeded $10,000, the district court would have lacked jurisdiction to consider whether the administrative denial of those claims amounted to a compensable "taking." *Id.* at 11a-12a. In any event, the court added, even if some of those claims were under $10,000, exclusive appellate jurisdiction would lie in the Federal Circuit. *Id.* at 12a. The court thus remanded the "takings issue" to the district court

for further proceedings on the jurisdictional question. *Ibid.*[7]

ARGUMENT

Petitioners appear to acknowledge that the court of appeals' decision has little precedential value beyond the precise dispute presented in this case, which, for that matter, the decision did not even entirely resolve on the merits. See Pet. 16-17 ("the conclusory nature of the opinions below do[es] not provide much insight into the courts' reasoning"). Moreover, as discussed below, there is no merit to petitioners' contention that the result in this case is somehow inconsistent with any decision of this Court or of another court of appeals. Thus, at bottom, this certiorari petition amounts to a request for error correction. But that is not ordinarily a basis for this Court's review, and, in any event, there is no error to correct. Further review is therefore not warranted.

1. Much of the analysis in the proceedings below concerned whether the enactment of Section 640 in 1994 conferred an enforceable property interest on the group of plaintiffs—the vast majority of petitioners here (Pet. App. 2a)—who filed claims before June 30, 1994, but who fall within the scope of the 1995 amendment to Section 640.[8] Although the court of appeals remanded

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[7] The United States argued in a petition for rehearing that the remand was unnecessary because petitioners had consistently disavowed any claim for money relief in this action and were seeking exclusively equitable relief on all claims, including the "takings" claim. Petitioners confirmed the same point in their own petition for rehearing. Appellants' Pet. for Reh'g and Suggestion for Reh'g En Banc 11-14. Both petitions were denied. Pet. App. 32a, 33a.

[8] The court of appeals declined, on jurisdictional grounds, to address whether the Takings Clause entitles those petitioners to

for further proceedings on that issue, petitioners have filed this petition alleging independent claims of entitlement, distinct from any claim under Section 640, to the same back pay remedy. Those claims lack merit.

a. The statutory provisions subjecting the United States to back pay liability under the FLSA constitute a waiver of sovereign immunity. See *Hickman* v.

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just compensation in light of the amendment to Section 640 in 1995. Pet. App. 10a-12a. If those petitioners prevail on their just compensation claim on remand, they will obtain the moneys to which they claim entitlement under the alternative theories of recovery presented in this petition. As to them, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroosook R.R.*, 389 U.S. 327, 328 (1967); accord *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari). If a live dispute involving those petitioners persists after remand, they will retain their right to present to this Court any claim they present here so long as they have preserved it. See, *e.g.*, *Urie* v. *Thompson*, 337 U.S. 163, 172-173 (1949); Robert L. Stern & Eugene Gressman, *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993).

The court of appeals did not explain why, in its view, the claims it decided on the merits fell within its jurisdiction whereas the claims it remanded fell within the exclusive jurisdiction of the Federal Circuit. There is no obvious basis for such a distinction, since petitioners' various claims seek similar forms of relief against the government: mandamus and injunctive and declaratory relief concerning the government's disposition of their administrative claims for federal money. See Pet. App. 8a; see generally Gov't Supp. C.A. Br. 1-14; *Van Drasek* v. *Lehman*, 762 F.2d 1065, 1071 n.11 (D.C. Cir. 1985) ("[j]urisdiction under the Tucker Act cannot be avoided by * * * disguising" what is "essentially a monetary claim in injunctive or declaratory terms") (internal quotation marks omitted). Thus, if certiorari were granted, this Court could confront threshold jurisdictional questions similar to those addressed by the D.C. Circuit but not raised in the petition. See also note 10, *infra*.

United States, 10 Cl. Ct. 550, 552-553 (1986); see generally *Hubbard* v. *Administrator*, 982 F.2d 531 (D.C. Cir. 1992) (en banc). It is axiomatic that such waivers must "be strictly construed, in terms of [their] scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox*, 119 S. Ct. 687, 691 (1999); accord *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992); see also Gov't C.A. Br. 29-30.

Petitioners' burden here is formidable. They acknowledge that their position would expose the United States to considerably greater back-pay liability under the FLSA than similarly situated private employers would face. See Pet. 20-24 & nn.11-12. That is so because private-sector employees (as well as the employees of state and local governments) *must* bring any FLSA claim for back wages in federal court subject to the limitations period of the Portal-to-Portal Act, see 29 U.S.C. 216(b) and (c), whereas, under petitioners' position, federal employees could escape that limitations period by initiating administrative proceedings. Petitioners must therefore identify some provision in which Congress "unequivocally expressed" (*Blue Fox*, 119 S. Ct. at 691) an intent to place the United States in that inferior position and to deprive it of the statutory protections to which all other employers are entitled.

Petitioners can make no such showing. The Barring Act, upon which they rely here, does not contain a waiver of sovereign immunity for FLSA claims, much less an "unequivocal expression" of such a waiver (*Nordic Village*, 503 U.S. at 37). The Act nowhere mentions the FLSA, nor does it confer an affirmative entitlement on any class of claimants to a particular statute of limitations. Instead, the Act confers generic "[a]uthority" on a particular federal decisionmaker—

the Comptroller General during much of the period at issue—to "settle claims" against the government in a broad variety of circumstances. 31 U.S.C. 3702 (1994 & Supp. III 1997); see note 3, *supra*. The Barring Act does create an administrative procedure that claimants may invoke as an alternative to filing suit in court—a procedure that the Act itself makes unavailable if the claim is not filed within six years after it accrues, except "as provided in * * * another law." 31 U.S.C. 3702(b)(1)(A). But the Act does not itself create rights to collect money from the public fisc, nor does it enlarge the rights or remedies that claimants may derive from the statutory scheme underlying their claim.

Here that underlying statutory scheme is the FLSA, and "[t]he limitations of the Portal-to-Portal Act are an integral part of the overtime compensation prescribed by the FLSA." *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1298 (D.C. Cir.), cert. denied, 409 U.S. 1012 (1972); see also note 11, *infra*. In the Portal-to-Portal Act, Congress imposed a two-to-three-year statute of limitations (together with other restrictions) for all FLSA actions specifically to protect the economic interests of all "employers," who, Congress found, might otherwise face "wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a), 255(a). Congress found that, unless limited, the FLSA would threaten "the Public Treasury" through its impact on *private* employers—*i.e.*, by reducing tax revenues and increasing the cost to the government of purchasing goods and services. 29 U.S.C. 251(a)(8) and (9). But that indirect effect on the Treasury could be dwarfed by the consequences of petitioners' position, which would routinely expose "the Public Treasury" to direct liability for back-pay claims against federal employers

reaching back three times as far as ordinary claims that could be brought against private employers.

Moreover, when Congress amended the FLSA in 1974 to cover federal employees generally, it gave no indication that it wished to treat those employees differently from private-sector employees in this respect or that it intended to expose the public fisc to degrees of liability to which private employers are immune. To the contrary, the legislative record reveals an emphasis on ensuring that the FLSA claims of federal employees would be administered "in such a manner as to assure consistency with" the application of the Act "in other sectors of the economy." H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974). As one court observed in reviewing a pre-1974 amendment extending the FLSA to restricted categories of federal employees (see pp. 2-3, *supra*), Congress "intended to provide for equality of treatment" as between federal employees and their private-sector counterparts, a statutory objective that extends to "the limitations of the Portal-to-Portal Act." *Carter*, 463 F.2d at 1298-1299; see also *AFGE* v. *OPM*, 821 F.2d 761, 769 (D.C. Cir. 1987).[9]

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[9] When the Portal-to-Portal Act was enacted, federal employees were still excluded from the scope of the FLSA, and thus the only applicable enforcement mechanism for any covered class of employees for the collection of back wages was a suit in any "court of competent jurisdiction." 29 U.S.C. 216(b). It is thus no surprise that some provisions of the Portal-to-Portal Act refer to "court[s]." 29 U.S.C. 256; cf. Pet. 18. Congress's failure to amend the Act when it included federal employees within the coverage of the FLSA does not, as petitioners suggest (Pet. 21, 24), constitute an "unequivocal expression" of intent to grant those employees, at public expense, vastly broader back pay rights than any other employee covered by the Act. Quite to the contrary, as discussed in the text, Congress intended for federal and non-federal employees to receive "equality of treatment."

Any doubt about petitioners' failure to show an "unequivocal" waiver of sovereign immunity would be resolved by Section 640 as amended. That provision is significant here not because Congress has the power to "preclud[e] judicial review by implication," Pet. 27 (emphasis omitted), but because any inquiry into whether Congress has unequivocally expressed an intent to waive sovereign immunity must make sense of all relevant provisions of federal law. See, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156 (1981). As amended, Section 640 provides that some FLSA claims filed with the GAO before June 30, 1994 are subject to a six-year statute of limitations. The imposition of that six-year limitations period would serve little purpose if, as petitioners contend, all claimants would be entitled to a six-year limitations period in any event. See also Pet. App. 24a-25a.

Even more important, petitioners' position would render the 1995 amendment a nullity. By carving out exceptions to Section 640, that amendment is obviously intended to ensure that some limitations period *shorter* than six years will apply whenever Section 640 does not. Petitioners' position, however, would entitle claimants to a six-year limitations period whether or not Section 640 applies, and it would drain the 1995 amendment of any significance. That consequence confirms that petitioner's position is wrong, for statutory schemes must be interpreted, if possible, to give each provision operative effect. See, *e.g.*, *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997).[10]

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[10] The regime that petitioners would extend to all FLSA claims against the United States would be highly unusual. If an FLSA administrative claim is denied and the claimant then files a court suit, the court does not "review" the administrative determination

b. There is no merit to petitioners' contention that the decision below conflicts with *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59 (1953). In that case, the United States charged that a private employer had knowingly employed child labor from 1942 to 1945 in violation of the Walsh-Healey Act (see 41 U.S.C. 35 *et seq.*); it had commenced administrative proceedings in 1947 and had then filed a court suit in 1950. This Court held that the suit was barred by the statute of limitations imposed by the Portal-to-Portal Act, which applies to suits filed under the Walsh-Healey Act (and the Bacon-Davis Act, 40 U.S.C. 276a *et seq.*) as well as

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—which has no effect on the claimant's rights—but considers the claim de novo. *Burich* v. *United States*, 366 F.2d 984, 986-987 (Ct. Cl. 1966) (citing cases), cert. denied, 389 U.S. 885 (1967); *Schulthess* v. *United States*, 3 Cl. Ct. 126 (1983); *Hilton* v. *United States*, 227 Ct. Cl. 734 (1981); see also p. 4, *supra*. Petitioners' position, however, would entitle a claimant to relief in administrative proceedings long after the limitations period for any court action had passed. For that reason, any unsuccessful administrative claimant seeking relief in court after the expiration of that period could not file an ordinary FLSA suit under 29 U.S.C. 216(b). He or she might instead file a suit like this, seeking "mandamus and injunctive and declaratory relief" concerning the disposition of the underlying administrative claim for money. Pet. App. 8a. But there is little precedent concerning whether, and in what forum, the Administrative Procedure Act or some other provision of federal law authorizes federal-court actions of this kind. See Supp. Gov't C.A. Br. 12-14. (Although OPM is an "agency" for purposes of the APA, GAO—the administrative entity in which the administrative actions were initiated—is not. See *Chen* v. *GAO*, 821 F.2d 732, 737 n.6 (D.C. Cir. 1987); 5 U.S.C. 701(b)(1).) As noted above (see note 8, *supra*), uncertainty about that issue, which the court of appeals only cursorily addressed (see Pet. App. 10a-12a), could pose threshold jurisdictional concerns that this Court might need to resolve before reaching the merits of any issue presented in the petition.

the FLSA. Although the Court's decision focused on the applicability of the Portal-to-Portal Act to the suit, the United States had alternatively contended that even if the Act applied, the "action," for purposes of the Act, had "commenced when the administrative proceedings were initiated." 345 U.S. at 66. The proceedings whose timeliness was disputed were not the administrative proceedings themselves but the subsequent court suit, and the government's argument was thus that the administrative proceedings had tolled the statute of limitations for the court suit. The Court rejected that claim, stating that Congress, when it enacted the Portal-to-Portal Act, "was addressing itself to lawsuits in the conventional sense." *Ibid.*

The question presented here, however, is not whether administrative proceedings brought by the United States as plaintiff can toll the limitations period for any subsequent tort suit. The question is whether petitioners have identified some provision of federal law that "unequivocally expresse[s]" a congressional intent to expose the United States as employer to much greater FLSA liability than similarly situated private employers would face. Indeed, *Unexcelled Chemical* did not address the provision on which petitioners rely as a waiver of sovereign immunity: the limitations provision of the Barring Act, which applies only to claims *against* the United States, and which, as discussed, does not in fact waive sovereign immunity. See 31 U.S.C. 3702(b)(1). If anything, this Court's decision in *Unexcelled Chemical* cuts more against petitioners' position than for it. In rejecting the efforts of the United States *as plaintiff* to circumvent the limitations period of the Portal-to-Portal Act, the Court noted the surpassing breadth of Congress's desire to protect employers against the "harsh results" of the FLSA as

previously enforced. 345 U.S. at 61. It would be anomalous to construe that decision as a basis for subjecting the United States *as employer* to precisely the "harsh results" that Congress designed the Portal-to-Portal Act to avoid.

There is also no "conflict[]" (Pet. 16) between the decision below and the concluding footnote of *Glenn Electric Co.* v. *Donovan*, 755 F.2d 1028 (3d Cir. 1985). In that case, the government had brought administrative proceedings as plaintiff against a private employer under, among other statutes, the United States Housing Act of 1937, 42 U.S.C. 1437 *et seq.* (U.S. Housing Act). Although that statute is not among the three to which the Portal-to-Portal Act applies, the employer nonetheless argued that the Act's limitations provision barred the proceedings. The Third Circuit rejected that argument on the ground that the Portal-to-Portal Act is simply inapplicable to proceedings under the U.S. Housing Act. See 755 F.2d at 1031-1034. In a footnote, the court alternatively remarked that, even if the Portal-to-Portal Act *were* applicable to proceedings under the U.S. Housing Act, its limitations period would still be inapplicable on the facts of *Glenn Electric* "[i]nasmuch as the [government's] enforcement action has been entirely administrative." *Id.* at 1034 n.7 (citing *Unexcelled Chemical*).

Whether or not that footnote could plausibly be said to have precedential value, it is entirely consistent with the decision below. Again, the question in this case is whether Congress has "unequivocally expressed" an intention to waive sovereign immunity as to FLSA claims against the United States *as employer* in circumstances where similarly situated private-sector employers would be immune from such claims. Like *Unexcelled Chemical*, *Glenn Electric* did not address

that issue, nor did it address the provision of the Barring Act upon which petitioners erroneously rely in claiming that sovereign immunity has indeed been waived.[11]

2. Finally, petitioners present a diffuse set of arguments (Pet. 27-29) that the manner in which their administrative claims were handled violated due process. Those arguments are factbound and, in any event, without merit.

Petitioners contend that GAO displayed a "lack of genuine investigation into, or interest in, the statutory interpretation questions actually at issue." Pet. 28. But that "due process" argument is wholly derivative of petitioners' own mistaken position on the statutory issue presented here. Although petitioners allege that GAO acted in bad faith in reversing its position on that issue, that allegation is difficult to square with, among other things, the unanimous conclusion of the four federal judges who have reviewed this case that GAO's prior position was "wrong" and that its present one is correct. Pet. App. 21a; accord *id.* at 8a-10a; see also *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401

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[11] Petitioners contend that the decision below is in "tension" with several court of appeals decisions, all of which involved private employers, holding that the limitations provision of the Portal-to-Portal Act may be waived if not properly pleaded as a defense (or that defendants may be estopped from relying on that provision if they fraudulently induce a plaintiff to delay filing suit). See Pet. 23 (citing, *inter alia*, *Hodgson* v. *Humphries*, 454 F.2d 1279 (10th Cir. 1972)). The question here, however, is not whether the government has waived sovereign immunity in the course of this litigation (indeed, sovereign immunity cannot be so waived), but whether Congress has affirmatively and unequivocally waived that immunity to the extent that petitioners claim. The litigation-waiver and estoppel cases that petitioners cite have no bearing on that issue.

U.S. 402, 420 (1971) ("there must be a strong showing of bad faith or improper behavior" before a court will permit "inquiry into the mental processes of administrative decisionmakers"); *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975) (similar).[12]

Finally, there is no merit to petitioners' claim (Pet. 28) that GAO acted unconstitutionally in failing to process their claims before the 1995 enactment of the amendment to Section 640. Petitioners cite no authority for the proposition that the delay was unlawful, and, in any event, the district court correctly determined that petitioners "did not have a sufficiently developed factual record for their claims and, given the sheer number of [claimants] in this case, would not have had one by the time amended Section 640 was enacted." Pet. App. 29a; see also *id.* at 10a.[13]

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[12] It is well settled that "[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993) (quoting *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978)); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-864 (1984). There is thus no merit to petitioners' reliance on past statutory interpretations "by the GAO and other agencies" (Pet. 12-15); the cited administrative decisions either concerned statutes other than the FLSA and the Portal-to-Portal Act or were overruled in *Ford* when GAO correctly determined that its previous position had been erroneous. See also *Hickman*, 10 Cl. Ct. at 552 (1986 decision accepting, without discussion, GAO's previous position, which had not yet been overruled).

[13] Petitioners are mistaken in alleging that petitioners' employing agencies had engaged in a "systematic denial of statutorily-mandated wages to thousands of government employees." Pet. 28. As the CFC explained in *Adams*, many of the original classifications given petitioners' jobs by their employing agencies were fully

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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justified, and the others were overturned only after detailed analysis under OPM criteria. See 27 Fed. Cl. at 12-29. Indeed, petitioners did not claim a "willful violation" of the FLSA in their CFC suit, even though such a finding would have entitled them to three years' back overtime pay. See 29 U.S.C. 255(a).