No. 22-____

IN THE

Supreme Court of the United States

CODY ADAMS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hazardous Duty Pay statute provides that a federal employee is entitled to a pay differential "for any period in which he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position." 5 U.S.C. § 5545(d). Implementing regulations provide an "agency shall pay" hazardous duty pay differentials to employees who are assigned to perform specific enumerated duties, 5 C.F.R. § 550.904, including "working with or in close proximity to" virulent biologicals, 5 C.F.R. Pt. 550, Subpt. I, App. A. The question presented is:

Under the regulation requiring hazardous duty pay for federal employees who work "with or in close proximity to" virulent biologicals, are federal employees who work in close proximity to individuals infected with virulent biologicals entitled to hazardous duty pay when such exposure is not usually involved in carrying out the performance of their regularly assigned duties?

PARTIES TO THE PROCEEDING BELOW

Petitioners Cody Adams, *et. al* were the Plaintiffs-Appellants in the Court of Appeals.[1]

Respondent United States was the Defendant-Appellee in the Court of Appeals.

[1] A full list of Petitioners is included in the Appendix. *See* Appendix at 74a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Cody Adams, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's *en banc* decision is reported at 59 F.4th 1349. The decision of the United States Court of Federal Claims is reported at 152 Fed. Cl. 350.

STATEMENT OF JURISDICTION

The jurisdiction of the Court of Federal Claims was grounded on 28 U.S.C. § 1491(a)(1). The Federal Circuit had jurisdiction under 28 U.S.C. § 1295(a)(3). The Federal Circuit entered judgment after rehearing *en banc* on February 14, 2023. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 5 U.S.C. § 5545(d), 5 C.F.R. §§ 550.901–550.905, and relevant sections of 5 C.F.R. Part 550, Subpart I, Appendix A, are reprinted verbatim in the Appendix.

STATEMENT OF THE CASE

On March 11, 2020, the World Health Organization declared SARS-CoV-2, otherwise known as COVID-19, a pandemic.[1] Three days later, the President of the United States declared the COVID-19 pandemic a

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[1] *CDC Museum COVID-19 Timeline*, David J. Spencer CDC Museum: In Association with the Smithsonian Institute, https://www.cdc.gov/museum/timeline/covid19.html (last updated Mar. 15, 2023).

national emergency.[2] Two days after that, on March 16, 2020, the Supreme Court postponed oral arguments due to the COVID-19 pandemic, only the fourth such occurrence in history.[3] Most of society quickly shut down to keep people safe. But the 188 Correctional Officers working at the Federal Correctional Institution in Danbury, Connecticut, and other law enforcement officers, including over 12,000 Correctional Workers[4] at the 122 federal prisons nationwide[5], were not protected. They could not work from home. They could not practice social distancing. They could not open the windows or limit close physical contact. Instead, at the height of a raging global pandemic before the protection provided by vaccines, they had to report to work and perform their jobs to keep the inmates and surrounding communities safe. The Correctional Workers had no option but to perform their job duties in person, which required close contact and close physical proximity to individuals known to be infected with COVID-19, in a poorly ventilated and

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[2] *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, The White House (Mar. 13, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak.

[3] Press Release, Supreme Court of the United States (Mar. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20.

[4] *Federal Bureau of Prisons Fact Sheet*, Federal Bureau of Prisons (Jan. 2023), https://www.bop.gov/about/statistics/docs/bop_fact_sheet.pdf?v=1.0.6.

[5] *About Our Facilities*, Federal Bureau of Prisons, https://www.bop.gov/about/facilities/federal_prisons.jsp (last visited May 2, 2023).

crowded prison, when no known cure or treatment for COVID-19 existed.

Because of their necessary workplace exposure to COVID-19, a hazard not usually involved in carrying out the duties of their positions, the Correctional Officers sought compensation in the form of hazardous duty pay, pursuant to 5 U.S.C. § 5545(d). The United States Court of Appeals for the Federal Circuit erroneously denied the officers the compensation they are rightly owed under the statute, effectively deleting a portion of the implementing regulations. The Correctional Officers now petition the United States Supreme Court to hear this important case to determine that the statute and regulations entitle them to extra compensation for working with or in close proximity to this unusual hazard. The Supreme Court should grant the petition because this question can only arise in the Federal Circuit and otherwise Correctional Officers and thousands of other federal law enforcement employees will be without any opportunity for relief from a blatantly wrong interpretation of the hazardous duty pay regulation. Further, the petition should be granted because it raises important questions of federal law and regulatory interpretation.

A. Statutory and Regulatory Framework

In 1966, Congress ordered the U.S. Civil Service Commission, the predecessor to the Office of Personnel Management (OPM), to provide additional compensation to salaried, General Schedule (GS) employees for duties "involving unusual physical hardship or hazard." 5 U.S.C. § 5545(d). Prior to this, there was no mechanism for compensating employees who performed assignments involving unusual physical hardships or hazards that were not accounted for in their job classification. *See Adair v. United States*, 497 F.3d

1244, 1253 (Fed. Cir. 2007) (citing H.R. Rep. No. 89-31, 1st Sess., at 2 (1965)). The hazardous duty pay (HDP) program was intended to provide "additional remuneration to [an] employee asked to take unusual risks not normally associated with [their] occupation and for which added compensation is not otherwise provided[.]" *Id.* at 1254 (quoting H.R. Rep. No. 89-31 at 4); *see also id.* at 1253–54 (stating that the HDP program was designed to provide compensation "where regularly assigned duties are performed under unusually hazardous conditions").

In enacting the hazardous duty pay statute, John W. Macy, Jr., the then Chairman of the U.S. Civil Service Commission explained that "in most regularly recurring hazardous work situations safety training and precautions have been developed" that render the hazard negligible, but that compensable hazardous duties "go beyond such conditions." *Id.* at 1254. They take into consideration, for example, "such matters as . . . exposure to elements or conditions over which little or no control can be exercised." *Id.*

As part of the hazardous duty pay statute, Congress directed OPM to establish "a schedule or schedules of pay differentials." 5 U.S.C. § 5545(d). Pursuant to Congressional delegation, OPM promulgated regulations implementing the HDP program, and established a schedule of pay differentials, listing different types of hazardous duties which would qualify employees for additional compensation. 5 C.F.R. § 550.903; 5 C.F.R. Pt. 550, Subpt. I, App. A. At issue in this case is the category in Appendix A called "exposure to hazardous agents" which states that employees who "work with or in close proximity to" virulent biologicals, are entitled to HDP. 5 C.F.R. Pt. 550, Subpt. I, App. A (defining "virulent biologicals" as "[m]aterials of micro-organic

nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection").

B. Factual and Procedural History

Plaintiffs are 188 Federal Bureau of Prisons (BOP) employees at the Federal Correctional Institution (FCI) Danbury, in Danbury, Connecticut working as Correctional Officers. From the start of the global pandemic in March 2020, and before any vaccines became available, the Correctional Officers worked while locked inside a federal prison where COVID-19 infected more than 100 employees and 300 inmates.[6]

Because the Correctional Officers were assigned to work with or in close proximity to individuals infected with or contagious with COVID-19, and, thus, were regularly exposed to COVID-19 in performing their job duties, they filed a complaint in the Court of Federal Claims on June 26, 2020, seeking compensation for performing their duties under unusually hazardous conditions. *See* Appendix (Appx) at 55a. Specifically, the Correctional Officers sought hazardous duty pay pursuant to 5 U.S.C. § 5545(d) for working with or in close proximity to "virulent biologicals." *Id*.

Court of Federal Claims Decisions. On February 5, 2021, the Court of Federal Claims granted Defendant United States' motion to dismiss, ruling that neither the HDP statute nor regulations provided for additional pay for exposure to individuals infected with

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[6] During the pandemic, the Bureau of Prisons maintained detailed information as to which inmates and correctional officers became infected with COVID-19, including those at the prison at Danbury. *BOP COVID-19 Statistics*, Federal Bureau of Prisons, https://www.bop.gov/coronavirus/covid19_statistics.html (last visited Apr. 18, 2023).

COVID-19. *Id.* at 53a. The court found that COVID-19 did not constitute an "unusual" hazard under the statute and that Plaintiffs were not entitled to additional pay because they were performing the same job duties as they had been before the pandemic. *Id.* at 60–61a. The Correctional Officers timely appealed. *Id*. at 12a.

Notably, in a functionally identical case seeking HDP for Correctional Officers in a different BOP facility, a different judge on the United States Court of Federal Claims found the plaintiffs had sufficiently alleged that their job duties required them to work in close proximity to COVID-19 through working with infected inmates, and therefore, their claim for HDP for working with virulent biologicals could move forward. *Charles Adams v. United States*, 151 Fed. Cl. 522 (2020).

Federal Circuit Decision. A panel of three judges on the United States Court of Appeals for the Federal Circuit heard arguments on appeal on October 6, 2021. Before the panel released a decision, a member of the Federal Circuit made a *sua sponte* request for a poll on whether to hear the case *en banc*. Appx. at 47a. A majority of judges on the Federal Circuit voted for *en banc* consideration and, on June 27, 2022, the Court ordered the case be heard *en banc* under 28 U.S.C. § 46. *Id.* After briefing and oral argument before the *en banc* Federal Circuit, the Court issued its opinion and final judgment, affirming the ruling of the Court of Federal Claims, on February 14, 2023. *Id.* at 1a.

The full Court split 10-2. The *en banc* majority held that OPM "simply has not addressed contagious-disease transmission (e.g., human-to-human, or through human-contaminated intermediary objects or surfaces)" outside of two settings that are not applicable in this case. *Id.* at 5a. The Court determined that the regulatory

phrase "work with or in close proximity" only related to "assignments that involve directly or indirectly working with the virulent biological *itself* rather than ambient exposure to a virulent biological in the workplace due to transmission by infected humans." *Id.* at 21a (emphasis in original). According to the Court, because OPM did not include any "risk of exposure" language in the virulent biological category, job duties that are not directly related to working *with* a hazard are not covered. *Id.* at 24a. The rule that the majority adopted guts the statute and implementing regulations for it only allows payment of HDP to federal workers who work directly *with* a hazard such as in a test tube or petri dish. The rule ignores both the "in close proximity" language of the regulation, and as importantly, the plain language of the statute that requires HDP be paid for duties "involving unusual physical hardship or hazard." 5 U.S.C. § 5545(d). Moreover, because an absolute defense to the payment of HDP is that exposure to the hazard was taken into account in the classification of the employee's position description, *see id.*, *no employee* would be entitled to HDP for working with virulent biologicals because exposure to such hazards would have been taken into account when classifying the positions of scientists and laboratory employees—the only workers who would work *with* virulent biologicals in laboratory settings.

The dissent opined that "COVID-19 exposure falls within the scope of the regulations" because the "work with or in close proximity to" phrase "unambiguously encompasses COVID-19 exposure." Appx. at 39a. The dissenting opinion explained that the majority's interpretation of "work with or in close proximity to" renders the phrase "in close proximity to" superfluous. *Id.* at 40a. Because of the phrase "in close proximity to," the dissent would interpret the regulations to

include hazardous duty pay for what the majority describes as "ambient" exposure to COVID-19, or workplace exposure to COVID-19 through the performance of one's job duties. *Id.* at 45a. Thus, according to the dissent, because the regulatory language encompasses COVID-19 exposure, the Plaintiffs' assigned duties required them to "work with or in close proximity" to a hazard which entitles them to HDP. *Id*.

The dissent took issue with the majority's statutory and regulatory interpretations, which they found "erroneous and overly narrow." *Id*. at 31a. The majority's "shortcut" of focusing on its narrow interpretation of the regulations, rather than the broader command of the governing statute, was "mistaken." *Id*. at 31a n.2. As the dissent further noted, the majority's narrow interpretation of the implementing regulations "raises serious questions as to the regulations' validity," because "[n]othing in the statutes suggests that enhanced pay may be limited to employees who work 'directly or indirectly' with a virus or microorganism in a laboratory." *Id*. at 41a n.8.

REASONS TO GRANT THE PETITION

I. The Federal Circuit's Interpretation is Wrong.

The Supreme Court should grant this petition because the Federal Circuit's ruling is manifestly incorrect. First, the Federal Circuit's interpretation read out an entire clause of the regulation, and in effect, voids an entire category of hazardous duty pay. Second, the Federal Circuit ignores the plain language of the statute and regulations, and, as a consequence of its faulty interpretation, creates an inconsistency between the coverage of the statute and the coverage of the regulations. And third, the Federal Circuit's

interpretation is wrong because it conflicts with OPM's contemporaneously issued guidance and practice regarding hazardous duty pay for COVID-19 exposure.

A. The Federal Circuit's Decision Voids a Provision of the Regulation.

The Federal Circuit's interpretation of the hazardous duty pay regulations, specifically the Court's interpretation of the phrase "work with or in close proximity to" reads out an entire clause of the regulation. "Work with or in close proximity to" is a phrase found in the HDP Schedule that establishes which duties entitle an employee to extra compensation. *See* 5 C.F.R. Pt. 550, Subpt. I, App. A. The Federal Circuit interprets the regulations to only cover "assignments that involve directly or indirectly working with a virulent biological *itself* rather than ambient exposure to a virulent biological in the workplace due to transmission by infected humans." Appx. at 21a (emphasis in original); *see also id.* at 21a (stating that the HDP Schedule would not "encompass contagious-disease transmission via ambient exposure not resulting from working directly or indirectly with the virulent biological"). Put another way, the majority opinion understands the regulations to only allow hazardous duty pay for "working with" a listed hazard. The consequence of this erroneous interpretation is that the Court deleted the clause "in close proximity to" from the regulations and foreclosed the possibility of an employee receiving hazardous duty pay for exposure to virulent biologicals.

The Federal Circuit's interpretation is contrary to several rules of statutory and regulatory interpretation. First, courts have an interpretive duty to "give effect" whenever possible to a statute's "every word and clause." *Duncan v. Walker*, 533 U.S. 167, 167

(2001); *see also Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (stating that a statute "should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant") (internal quotation marks and citation omitted); *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009) (stating that if possible, a court "must interpret the statute to give effect to [all] provisions"). Similarly, in interpretating regulations, courts should strive to construe the text so all provisions are given effect, as with statutory construction. *See APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003); *Mitchell v. Comm'r*, 775 F.3d 1243, 1249 (10th Cir. 2015) (in interpreting regulations, courts "apply the same rules [they] use to interpret statutes"); *see also Green v. Brennan*, 578 U.S. 547, 553–54 (2016) (applying rules of statutory interpretation to regulatory interpretation).

The Federal Circuit's interpretation renders the phrase "in close proximity to" void and meaningless, as it, in effect, deleted the phrase from the regulation. Throughout the opinion, the majority interprets the regulations to require working directly or indirectly *with* virulent biologicals themselves. While the regulations cover these types of scenarios, on the rare occasions, if ever, that such work is not taken into account in the classification of the position, the language of the regulations compels covering more circumstances—those in which an employee is not working directly with the hazard but is instead working *in close proximity* to the hazard. This is exactly what the Correctional Officers were doing when they were forced to closely interact with infected and contagious inmates and staff prior to any vaccines being available and when the virus was killing those who could not protect themselves through social distancing and other measures. OPM knows how to

distinguish categories of hazards, and intentionally included the broader language of "in close proximity to" in the virulent biological category. The Court should not read that clause out of the regulation.

Further, the Federal Circuit's interpretation of the regulations violates the disjunctive canon of statutory and regulatory interpretation. Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *see also United States v. Woods*, 571 U.S. 31, 45 (2013) (the word "or" is "almost always disjunctive, that is, the words it connects are to 'be given separate meanings'"). In the HDP Schedule, the phrase that connotes eligibility for pay is "working with *or* in close proximity to" virulent biologicals. 5 C.F.R. Pt. 550, Subpt. I, App. A (emphasis added). The use of the word "or" means that the two clauses on either side must mean two different things and encompass two different scenarios. Under the current interpretation, the Federal Circuit ignores the "or" and fails to provide separate meanings to the two clauses—work with and work in close proximity to. The use of the word "or" demonstrates that OPM envisioned eligibility for hazardous duty pay for more than just "working with" a hazard. OPM recognized that it is not only working with a hazard that should entitle a worker to extra pay, but also that working in close proximity to a hazard is dangerous as well. The Federal Circuit ignores the plain language of the regulations.

Moreover, the Federal Circuit's interpretation produces absurd results. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available." *Griffin v. Oceanic Contractors,*

Inc., 458 U.S. 564, 575 (1982); *see also United States v. Boynton*, 63 F.3d 337, 344 (4th Cir. 1995) ("[I]nterpretations of a regulation which would produce absurd results may be avoided by adopting an alternative interpretation consistent with the regulation's purpose."). Under the majority's opinion, only employees who work directly or indirectly with a virulent biological would be entitled to HDP. *See* Appx. at 21a. According to the Court, "ambient exposure" or exposure in a workplace that does not involve direct contact with a virulent biological is not covered under the regulations. *See id*. The only category of employees who work directly with virulent biologicals are those working in laboratory settings, who would be working with vials or test tubes of material infected with COVID-19. This rule can be appropriately called the "scientist rule" to indicate the narrow group of employees who could be eligible for hazardous duty pay under the majority opinion. However, the statute makes clear that HDP "does not apply to an employee in a position the classification of which takes into account the degree of physical hardship or hazard involved in the performance of the duties[.]" 5 U.S.C. § 5545(d)(1). There is *no scenario* in which an employee like a scientist is working directly with a virulent biological and does not have the risk associated with such duties accounted for in their job classification. Such a job does not exist. Any laboratory employee or scientist would certainly have the risk of working with a virulent biological accounted for already. Accordingly, under the Federal Circuit's interpretation, *no federal employees* would be entitled to hazardous duty pay for working with virulent biologicals—a result that is in conflict with statutory intent. *See Adair*, 497 F.3d at 1253–54 (stating that the purpose of enacting the hazardous duty pay program was to provide compensation "where

regularly assigned duties are performed under unusually hazardous conditions . . . [where] these conditions cannot be taken into consideration for position classification purposes"); *see also Charles Adams*, 151 Fed. Cl. at 527 (agreeing that accepting the Government's argument that working with infected people is not "working with or in close proximity to" COVID-19 would produce "absurd results").

Below, the Government itself recognized that certain non-scientist employees could be eligible for HDP for working with or in close proximity to COVID-19. *See* Appx. at 37a (describing the oral argument in which a dissenting judge asked if "there are circumstances wherein a correctional officer can be entitled to hazardous pay" and the Government responded "yes"); *id.* at 36a (the Government stated that there "may be a narrow set of circumstances" in which "human-to-human contact could lead to exposure to a biologic that would entitle [Appellants] to hazardous duty pay"); *id.* (the Government stated "I think that depending on the situation [a federal employee working with a patient sick with COVID-19] may be entitled to [HDP]"). If no party supports the interpretation under the "scientist rule," then it is absurd that the Federal Circuit adopted this incorrect interpretation. Furthermore, the conclusion that an employee can only receive hazardous duty pay for working directly with COVID-19 is contrary to OPM's own interpretation of the regulations issued in March 2020 at the height of the pandemic in which the agency envisioned that HDP *was* available for exposure to COVID-19 in certain circumstances. *See* Attachment to OPM Memorandum #2020-05 (Mar. 7, 2020), *available at* https://go.usa.gov/xdsTs.

The Court's interpretation swallows the statutory rule, reading out the phrase "in close proximity to" from the regulation and rendering the "virulent biological" category meaningless as no employee can realistically receive hazardous duty pay under that category. It further undermines the intent of Congress to provide pay differentials for employees facing hazards "not usually involved in carrying out the duties of his position," 5 U.S.C. § 5545(d), and is contrary to both the Government's position and OPM's position. This Court should grant this petition to address this question because it presents an important issue regarding regulatory interpretation.

B. The Federal Circuit's Decision is Wrong Because it Ignores the Plain Language of the Statute and Creates an Inconsistency Between the Statute and Regulations.

The Federal Circuit's ruling is incorrect because the Correctional Officers are unambiguously entitled to hazardous duty pay under both the statute and the relevant regulations. The hazardous duty pay statute covers workplace exposure to COVID-19 as an unusual hazard entitling workers to extra compensation, and the Federal Circuit ignores this plain language. By ignoring the plain language and holding that the regulations do not cover exposure to COVID-19, the Federal Circuit created a conflict with the statutory command.

To be entitled to hazardous duty pay under the statute, an employee must (1) face "unusual physical hardship or hazard" that is "not usually involved in carrying out the duties of his position" and (2) that the classification of the position does not take into account. 5 U.S.C. § 5545(d). Neither the statute nor the regulations define "unusual" and therefore, it should be

afforded its ordinary meaning. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *see also Levin v. United States*, 568 U.S. 503, 513 (2013) ("In determining the meaning of a statute, 'we look first to its language, giving the words used their ordinary meaning.'") (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). Here, it is undeniable that COVID-19 is an "unusual hazard" under the ordinary definition and understanding of the word. "Unusual" is defined as "not unusual, common, or ordinary." *Unusual*, Dictionary.com, https://www.dictionary.com/browse/unusual (last visited Apr. 18, 2023); *see also Unusual*, Merriam-Webster.com, https://merriam-webster.com/dictionary/unusual (last visited Apr. 18, 2023) (definition unusual as "uncommon" or "rare"). One cannot argue in good faith that the deadliest disease-causing pandemic in more than 100 years, for which there were no vaccines or treatments, was not an unusual hazard.

The Correctional Officers faced this unusual hazard head-on—they were required to be in close contact and physical proximity with infected and contagious inmates on a daily basis.[7] Further, COVID-19 was not an expected condition in the prison, and it was surely unusual for the Correctional Officers to have to face this novel infectious disease, particularly without

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[7] And, the Correctional Officers can prove, on a daily basis, exposure to specific individuals infected with COVID-19. *See COVID-19*, Federal Bureau of Prisons, https://www.bop.gov/coronavirus/ (last visited Apr. 18, 2023); *see also* 5 C.F.R. § 550.905(a) ("When an employee performs duty for which a hazard pay differential is authorized, the agency must pay the hazard pay differential for the hours in a pay status on the day . . . on which the duty is performed[.]")

adequate safety measures. While Correctional Officers face a multitude of known risks due to their jobs, including threats of violence and physical injury, direct exposure to an infectious, deadly, airborne disease like COVID-19 is not one of the known and accounted for hazards in the classification of their position. Therefore, the hazard is "not usually involved in carrying out the duties" of a Correctional Officer. 5 U.S.C. § 5545(d). Furthermore, the Correctional Officers' job descriptions do not account for the risk of exposure to dangerous, infectious diseases, including COVID-19. Accordingly, the Correctional Officers performed their regular duties while encountering an unusual hazard that is not accounted for in their job classifications, and therefore, the Officers are "entitled to be paid the appropriate differential." *Id.*[8]

Similarly, the Correctional Officers are entitled to hazardous duty pay for exposure to COVID-19 under OPM's regulations. Under the hazardous duty pay regulations, "[w]hen an employee performs duty for which a hazard pay differential is authorized, the agency *must pay* the hazard pay differential[.]" 5 C.F.R. § 550.905 (emphasis added); *see also* 5 C.F.R. § 550.904 ("An agency shall pay the hazard pay differential listed in Appendix A of this subpart to an employee who is assigned to and performs any duty specified in Appendix A of this subpart."). Therefore, under the regulations, the Correctional Officers have to show that they (1) worked with or in close proximity

[8] Job classifications, including the proper classes and grades, are determined by OPM, and take into account the "duties, responsibilities, and qualification requirements of the position." 5 U.S.C. § 5105(a). These factors are used to determine the official class title and pay grade, which determine how much an individual working in that job will be paid. *See id.*

to a hazard listed in the schedule, here, a virulent biological, and (2) that COVID-19 is a virulent biological. 5 C.F.R. § 550.904; 5 C.F.R. Pt. 550, Subpt. I, App. A. There can be no dispute, and the Government never argued to the contrary, that COVID-19 fits the regulatory definition of a virulent biological as a deadly airborne disease. *See* 5 C.F.R. Pt. 550, Subpt. I, App. A (defining virulent biological as "[m]aterials of microorganic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection"). And the Correctional Officers, due to the nature of their job, without doubt work *in close proximity to* inmates who are infected or contagious with COVID-19, and thus, worked in close proximity to a virulent biological. Accordingly, the Correctional Officers are indisputably entitled to hazardous duty pay under the relevant regulations. The Federal Circuit's decision completely missed the mark.

The Federal Circuit's interpretation of the hazardous duty pay regulations creates an inconsistency between the statutory command—that covered employees are "entitled to be paid" hazardous duty pay for any period of exposure to an unusual physical hardship or hazard, *see* 5 U.S.C. § 5545(d)—and the implementing regulations, *see* 5 C.F.R., Pt. 550, Subpt. I, App. A. Under the plain language of the statute, the Correctional Officers' sustained, close, often bodily contact with persons infected with and contagious with COVID-19 was an unusual hazard that merits HDP. Because COVID-19 is an unusual hazard covered under the hazardous duty pay statute, the regulations issued by OPM should have reflected that certain workers are entitled to hazardous duty pay for workplace exposure to COVID-19. However, under the majority's interpretation of the implementing regulations,

OPM's regulations *do not* allow for hazardous duty pay for working with or in close proximity to COVID-19. Thus, the incorrect interpretation creates a mismatch, as an employee *is* entitled to hazardous duty pay for exposure to COVID-19 under the statute but *is not* entitled to hazardous duty pay for exposure to COVID-19 under the regulations.

A Court should not interpret a regulation in a way that creates a conflict with the enabling statute. *See, e.g.*, *Joy Techs., Inc. v. Sec. of Labor*, 99 F.3d 991, 996 (10th Cir. 1996) (a regulation must not be interpreted in a way that conflicts with the objective of its organic statute); *Trustees of Ind. Univ. v. United States*, 223 Ct. Cl. 88, 94 (1980) ("[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements."); *United States v. Sperrazza*, 804 F.3d 1113, 1134 (11th Cir. 2015) (Rosenbaum, J., concurring in part) (stating that a regulation must not be read to "conflict with congressional intent"). Yet this is exactly the outcome of the majority opinion's interpretation. This regulatory interpretation also conflicts with Congressional intent in enacting the hazardous duty pay statute, which was intended to provide compensation "where regularly assigned duties are performed under unusually hazardous conditions." *Adair*, 497 F.3d at 1254.

The Correctional Officers are entitled to hazardous duty pay under the statute, and the Federal Circuit's interpretation of the regulations cannot eliminate this benefit. It is a bedrock principle of administrative law and statutory interpretation that when there is a conflict between a statute and relevant regulations, the statute must prevail. *See Nat'l Family Planning and Reproductive Health Ass'n, Inc. v. Gonzales*, 468

F.3d 826, 829 (D.C. Cir. 2006) ("[A] valid statute always prevails over a conflicting regulation."); *Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir. 1994) ("Regulations cannot trump the plain language of the statutes, and we will not read the two to conflict where such a reading is unnecessary."); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002) (stating that a regulation can never "trump the plain meaning of a statute"); *Pennsylvania v. U.S. Dep't of Health and Human Servs.*, 80 F.3d 796, 809 (3d Cir. 1996) ("[T]o the extent the regulation detracts from the clear imports of [the] statute, the statute must, of course, prevail."). Yet the Federal Circuit's holding and subsequent outcome have created a situation in which the regulations prevail over the statute, not the other way round.

The inconsistency the Federal Circuit created between the statute and regulations shows how wrong the majority interpretation is. An interpretation of a regulation that is contrary to the plain language and also eliminates a benefit that is provided by the statute is patently incorrect.

C. The Federal Circuit's Decision is Erroneous Because it is Contrary to OPM's Guidance and Practice.

The Federal Circuit's interpretation of the hazardous duty pay regulations is also wrong because it is contrary to OPM's position regarding HDP issued at the beginning of the pandemic when the rest of the world shut down and OPM told all federal workers who could go home to do so. Of course, law enforcement officers such as Correctional Officers could be afforded no such accommodation. At the outset of the pandemic, in response to inquiries from agencies, OPM issued guidance in which it specifically recognized that HDP could be paid to non-scientist employees for working

with or in close proximity to COVID-19. *See* OPM Memorandum at 11–12 ("Agencies may pay a hazard pay differential to a General Schedule employee for exposure to "virulent biologicals" only when the risk of exposure is *directly associated* with the performance of assigned duties.") (emphasis added). This demonstrates that—in OPM's estimation of the effect of its *own* regulations—hazardous duty pay was available on a case-by-case basis for workplace exposure to COVID-19. Under OPM's guidance, HDP was not limited to just scientists or laboratory employees. This is in direct contravention of the ruling by the Federal Circuit, which supposedly based its decision on an interpretation of the very same regulations OPM had interpreted in its guidance. Indeed, the Correctional Officers' allegations plainly meet the requirements laid out by OPM—namely, that their exposure is associated *directly through the performance of their assigned job duties. See id.* Performing their job and keeping the inmates and the country safe *requires* close contact in which exposure to COVID-19 occurred.

Additionally, the Federal Circuit's ruling is incorrect and contrary to the statute and regulations because some federal employees *did in fact receive HDP for COVID-19 exposure during the pandemic*. For example, the Department of Health & Human Services, Public Health Service/Indian Health Service ("IHS") paid all employees working on-site at healthcare facilities HDP in 2020 and 2021. *See* Indian Health Service, COVID-19 Response, *available at* https://www.ihs.gov/sites/coronavirus/themes/responsive2017/display_objects/documents/IHS_COVID_100DayReview.pdf (last visited May 9, 2023) at 14 ("IHS personnel are performing hazardous duty involving physical hardship and job-related exposure to the COVID-19 virus."); *see also id.* at 12 ("IHS implemented Hazardous Pay Differential

. . . for employees in IHS direct service facilities performing hazardous duty, including physical hardship and job-related exposure to COVID-19. Over 10,000 IHS employees have received these payments since implementation."). Additionally, members of the Commissioned Corps of the U.S. Public Health Service (USPHS) who were assigned positions in BOP facilities received hazardous duty pay for COVID-19 exposure. *See* Frequently Asked Questions, Commissioned Corp of the U.S. Public Health Service, https://dcp.psc.gov/ccmis/CovidHazardPayFaq.aspx (last visited May 9, 2023) (stating that the USPHS Commissioned Corp will pay HDP to an officer who is assigned to primary duties related to the COVID-19 pandemic response that involves situations where officers are "continuously at risk for injury or illness as first responders; encounter unrecognized safety issues; or must continue to identify, investigate, and correct hazardous events that place their own safety at risk"). These employees were forced into harm's way and were rightly compensated for working with or in close proximity to the unusual hazard that was COVID-19. They faced similar conditions and risks that the Correctional Officers faced. That some federal employees received hazardous duty pay for workplace exposure to COVID-19 demonstrates that OPM and federal agencies understood the statute and regulations to cover this exact scenario. It would be incongruous for certain employees to have already received hazardous duty pay for workplace exposure to COVID-19 when other employees have had that opportunity foreclosed by a plainly wrong ruling from the Federal Circuit.

II. The Federal Circuit Decided an Important Question of Law That the Supreme Court Should Resolve.

Certiorari is also appropriate because the Federal Circuit has decided an important question of federal law—namely, whether federal employees can be entitled to hazardous duty pay for exposure to an unusual and deadly disease—that the Supreme Court has not addressed and should resolve. This is an issue that presents a question of great importance to the nation's invaluable front-line workers, the workers who went headfirst into the pandemic while most of the nation's workforce remained safely at home and implicates the availability of hazardous duty pay for future pandemics.

A. The Question is of Great Importance, and this Case Presents it Clearly.

The outcome of this case is of the utmost importance. The Correctional Officers at FCI Danbury, and at 122 other BOP institutions[9], faced the deadly and unknown risks of COVID-19 head on, without adequate safety measures, when the vast majority of the federal workforce was able to work safely from home or, at the very least, in settings that did not demand close, even bodily contact with contagious individuals. During the time before there were vaccines and treatments for COVID-19, before masks were readily available, when schools, offices, and courts closed, the Correctional Officers had to report to work in person, where they were forced to be locked inside a crowded, poorly ventilated prison, in which social distancing was

[9] *About Our Facilities*, Federal Bureau of Prisons, https://www.bop.gov/about/facilities/federal_prisons.jsp (last visited May 2, 2023).

impossible and close physical contact was a necessity of the job. *See* Appx. at 54–55a. As expected, due to the conditions in prisons, COVID-19 spread quickly throughout correctional institutions, including at FCI Danbury. *See id*. Throughout the Bureau of Prisons, more than 15,000 staff members contracted COVID-19, including 130 staff members at FCI Danbury.[10] Additionally, at least seven BOP employees lost their lives to COVID-19.[11] But unlike schools and courts that could shut down and move online if there was a COVID-19 outbreak, the Correctional Officers had to keep showing up for work, knowing that they were in close physical contact with infected and contagious inmates. These law enforcement officers deserve to be compensated for the hazards that they encountered during the height of the COVID-19 pandemic, as Congress intended.

This case does not only impact the 188 Correctional Officers at FCI Danbury. There are 122 BOP institutions[12], and more than 12,000 Correctional Officers employed by the BOP.[13] Further, there are currently 22 pending cases before the Court of Federal Claims seeking hazardous duty pay for Correctional Officers at BOP institutions. Additionally, there are nearly 20,000 Border Patrol agents who also put their lives

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[10] *BOP COVID-19 Statistics*, Federal Bureau of Prisons, https://www.bop.gov/coronavirus/covid19_statistics.html (last visited Apr. 18, 2023).

[11] *Id.*

[12] *About Our Facilities*, Federal Bureau of Prisons, https://www.bop.gov/about/facilities/federal_prisons.jsp (last visited May 2, 2023).

[13] *Federal Bureau of Prisons Fact Sheet*, Federal Bureau of Prisons (Jan. 2023), https://www.bop.gov/about/statistics/docs/bop_fact_sheet.pdf?v=1.0.6.

on the line working in close proximity to infected individuals who, as a result of the Federal Circuit's decision, will never be paid the HDP that Congress intended for them if the Federal Circuit's decision is allowed to stand undisturbed.[14] These Correctional Officers, Border Patrol agents, and other law enforcement officers, put their lives on the line every day, defending this country and keeping communities safe. They were forced to work in close proximity to a deadly disease. Receiving compensation for the additional risk these employees faced is crucial.

Additionally, this case is the perfect vehicle to determine which federal employees can be eligible for hazardous duty pay for workplace exposure to people with COVID-19 or other similar, deadly infectious diseases. The Correctional Officers are the quintessential example of a worker who should have received hazardous duty pay for exposure to a virulent biological like COVID-19, due to the particular conditions in a prison. Their job, by its nature, requires close and prolonged physical contact or close proximity to others, but under the normal conditions anticipated in their position description, does not result in the risk of contracting a deadly, pandemic-inducing disease. Moreover, unlike many other workers, the Correctional Officers can prove on a daily basis exposure to individuals infected with COVID-19; thus, Correctional Officers and certain other types of employees, like certain law enforcement officers, would be eligible for hazardous duty pay for working in close proximity to COVID-19.

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[14] *U.S. Border Patrol Fiscal Year Staffing Statistics (FY 1992 – FY 2020)*, U.S. Customs and Border Patrol (Aug. 10, 2021), https://www.cbp.gov/document/stats/us-border-patrol-fiscal-year-staffing-statistics-fy-1992-fy-2020.

While the importance of this case to the Correctional Officers and other law enforcement employees cannot be exaggerated, and while some federal employes did receive hazardous duty pay for exposure to COVID-19, it is important to note that the underlying claims are applicable only to a particular subset of federal employees. This case is *not* about *all* federal workers, and it is not about any federal worker who had to work in person during the pandemic. This case is only about those federal employees who had to work in person, and, due to the very nature of their jobs, had to come into contact or close physical proximity with individuals known to be infected or contagious, and these employees could not implement adequate safety precautions such as social distancing. Unlike many other federal employees whose work did not require close, in-person exposure to the unusual hazard of individuals contagious with COVID-19, Correctional Officers *cannot* do their jobs without being physically close to or touching inmates. Unlike many other federal employees, the Correctional Officers' job is grounded in close proximity to others, from performing pat-downs, searches, and restraining inmates, to inmate transfers. A Department of Justice lawyer, on the other hand, *can* do their job without physical contact with other people, even if they are working in person. Allowing the Correctional Officers to receive hazardous duty pay will not, as the Federal Circuit seemed concerned, open the floodgates to allow any employee who worked in person to receive such payment. This case applies to a subset of federal workers, but for whom this compensation is crucially important. Therefore, the Supreme Court should hear this case to conclude that these front-line workers are entitled to hazardous duty pay.

B. The Outcome of the Case is Important Because the Interpretation of the Statute and Regulations is not only Related to COVID-19.

Not only does this case present a question of great importance for the subset of front-line workers who were forced to face the threat of COVID-19 in-person and hands-on, but it also presents a question that will be of great importance concerning the availability of hazardous duty pay during future pandemics or for other infectious diseases. Under the Federal Circuit's interpretation of the regulations, only those employees who work directly or indirectly with a virulent biological in a test tube are eligible for additional compensation for working with that hazard. *See* Appx. at 21a. The consequence of this ruling, as addressed above, is that effectively *no* employees would be eligible for HDP for working with or in close proximity to virulent biologicals under the regulations. *See* 5 U.S.C. § 5545(d) (no hazardous duty pay available for those, like the laboratory employees contemplated by the Federal Circuit, whose job classification accounts for the particular risk in question). Not only does this foreclose the possibility of hazardous duty pay for exposure to COVID-19, but it also eliminates the possibility of HDP for exposure to any future pandemics.

Any infectious disease that causes a pandemic, including the COVID-19 pandemic, would plainly constitute a "virulent biological" under the HDP Schedule. *See* 5 C.F.R. Pt. 550, Subpt. I, App. A. While for the majority of the population, the COVID-19 pandemic is a once-in-a-century event in terms of scale and severity, the chances of a future pandemic are increasing. Scientists estimate that a pandemic on the scale of COVID-19 is somewhere between 2 and 3 percent in any given year, and as high as 47-57% chance in the

next 25 years.[15] Therefore, it is imperative that the regulations are read in a way that does not eliminate hazardous duty pay for exposure to *any* communicable and infectious disease. OPM clearly intended for exposure to virulent biologicals to be covered, and understood the risks associated with these hazards, when it enacted the schedule of hazards to include "virulent biologicals." Reading the regulation to eliminate HDP for any and all infectious diseases is contrary to the intent of OPM and to the intent of Congress in enacting the statute.

A future pandemic could be even more severe or transmissible, yet the Correctional Officers would, of course, still be required to report to work in person. Workers forced to face a future pandemic and put themselves in harm's way would have no recourse for hazardous duty pay if the Federal Circuit's interpretation of "work with or in close proximity" stands. In addition to the obvious importance to those future potential claimants, leaving the Federal Circuit's ruling as it stands could have dire consequences for the entire nation, should the front-line employees on whom we all rely be asked once again to risk the unusual hazard of a global pandemic, now with no hope of receiving hazardous duty pay for those efforts.

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[15] Eleni Smitham & Amanda Glassman, *The Next Pandemic Could Come Soon and Be Deadlier*, Center for Global Development (Aug. 25, 2021), https://www.cgdev.org/blog/the-next-pandemic-could-come-soon-and-be-deadlier (stating that a pandemic on the scale of COVID-19 happening in any given year is 2.5-3.3%); Michael Penn, *Statistics Say Large Pandemics Are More Likely Than We Thought*, Duke Global Health Institute (Aug. 23, 2021), https://globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought (stating that the probability of a pandemic with similar impact to COVID-19 is about 2% in any year).

It could not have been the intent of Congress to foreclose the payment of HDP for exposure to any deadly disease, as the Federal Circuit has effectively done, and the Supreme Court should take this case to decide such an important issue.

C. The Federal Circuit Recognized the Importance of the Issue.

As the Federal Circuit recognized in *sua sponte* deciding to consider this case *en banc*, there is a deep importance to this issue. After briefing and oral argument were completed in the appeal before the three-judge panel, a majority of the full Court took the unusual step of voting *sua sponte* to hear the case *en banc* without the panel first rendering an opinion. *See* Appx. at 47a. Granting rehearing *en banc* is a rare occurrence, and granting rehearing *sua sponte* before the panel decision was released further indicates that the full Court recognized how important it was for all of them to hear and decide this case. *See* Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 Mo. L. Rev. 733, 738 (2011) (noting that the Federal Circuit only hears 0.3% of cases *en banc* out of the total number of cases terminated between 2001 and 2009). Thus, in deciding to hear this case *en banc*, and taking the unusual step of doing so before the panel issued its ruling, the Federal Circuit recognized that this case concerns an issue that has not been ruled on before, and that it holds great importance to front-line workers.

Additionally, the *en banc* Federal Circuit did not rule unanimously; rather, two judges joined in dissent. The dissent in this case demonstrates that this is an issue about which judges can disagree, and that this disagreement should be resolved by the Supreme Court. Moreover, there was also a split at the trial

court level, within the Court of Federal Claims, with one judge in a different case ruling that Correctional Officers did state a claim for HDP for working with or in close proximity to COVID-19, and the judge in this case finding the exact opposite. *Compare Charles Adams*, 151 Fed. Cl. 522 *with Cody Adams*, 152 Fed. Cl. 350. These intra-court splits further highlight the importance—and divisiveness—of this issue, which deserves consideration by this Court.

Finally, review by the Supreme Court is the only avenue the Correctional Officers have to receive hazardous duty pay. While such cases could be brought in any district court, *see* 28 U.S.C. § 1346(a)(2), the Federal Circuit has exclusive jurisdiction for any appeal, *see* 28 U.S.C. § 1295(a)(2). Thus, no other appellate court will ever hear or decide this issue. Accordingly, it is impossible for there to be a circuit split on the question of whether workplace exposure to COVID-19 or other virulent biologicals creates an entitlement to hazardous duty pay.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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May 12, 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-1662

CODY L. ADAMS, ROSE M. ADAMSON, JOSEPH P. AGIUS, DARA W. ALLICK, JENNIFER A. ANGEL, MICHAEL T. ANGELO, SAMMY APONTE, ALICIA K. AUSTIN-ZITO, LUKE M. BADARACCO, CHAD J. BARGSTEIN, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in No. 1:20-cv-00783-CFL,
Senior Judge Charles F. Lettow

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

February 14, 2023
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-1662

CODY L. ADAMS, ROSE M. ADAMSON, JOSEPH P. AGIUS, DARA W. ALLICK, JENNIFER A. ANGEL, MICHAEL T. ANGELO, SAMMY APONTE, ALICIA K. AUSTIN-ZITO, LUKE M. BADARACCO, CHAD J. BARGSTEIN, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in No. 1:20-cv-00783-CFL,
Senior Judge Charles F. Lettow.

Decided: February 14, 2023

MOLLY A. ELKIN, McGillivary Steele Elkin LLP, Washington, DC, argued for plaintiffs-appellants. Also represented by THEODORE REID COPLOFF, GREGORY K. MCGILLIVARY.

ALBERT S. IAROSSI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, ERIC P. BRUSKIN, ERIC LAUFGRABEN, PATRICIA M. MCCARTHY, CATHARINE PARNELL, LIRIDONA SINANI; ADAM GARRET

EISENSTEIN, DOUGLAS SETH GOLDRING, Office of General Counsel, Federal Bureau of Prisons, United States Department of Justice, Washington, DC.

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ALLISON GILES, National Treasury Employees Union, Washington, DC, for amicus curiae National Treasury Employees Union. Also represented by PARAS NARESH SHAH, JULIE M. WILSON.

Before MOORE, *Chief Judge,* NEWMAN, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* CHEN, in which MOORE, *Chief Judge,* LOURIE, DYK, PROST, TARANTO, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges,* join.

Dissenting opinion filed by *Circuit Judge* REYNA, in which *Circuit Judge* NEWMAN joins.

CHEN, *Circuit Judge.*

This case involves differential payment programs established by the Office of Personnel Management (OPM), via regulations promulgated pursuant to 5 U.S.C. §§ 5545(d) and 5343(c)(4), to provide hazardous duty and environmental differential pay to federal employees. Plaintiffs-Appellants appeal from a Court of Federal Claims (Claims Court) decision dismissing

their broad claims for hazardous duty and environmental differential pay (along with related overtime, interest, and attorneys' fees and costs) based on allegations that they "work[ed] with or in close proximity to objects, surfaces, and/or individuals infected with" the novel coronavirus (COVID-19)[1] "without sufficient protective devices." *See Adams v. United States,* 152 Fed. Cl. 350, 351-52, 355 (2021). This appeal was initially argued before a panel of the court on October 6, 2021. Prior to disposition by the panel, however, we sua sponte ordered en banc review. *Adams v. United States,* 38 F.4th 1040, 1041 (Fed. Cir. 2022). Oral argument before the en banc court was held on December 9, 2022.

COVID-19 is a serious national and international health concern, and the potential ramifications of this case are far-reaching and cut across the entire federal workforce. Appellants' asserted basis for hazardous duty and environmental differential pay might encompass many federal employees in federal workplaces where ambient exposure to COVID-19 might occur.[2]

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[1] For clarity and consistency with the Claims Court's decision, "COVID-19" is used herein to encompass both the novel coronavirus, SARS-CoV-2, and the disease caused by that novel coronavirus, COVID-19. *See Adams,* 152 Fed. Cl. at 351 n.1.

[2] For example, plaintiffs in the class-action suit *Braswell v. United States* seek hazardous duty pay, environmental differential pay, and overtime pay based on substantially similar allegations as raised here. *See* Second Amended Complaint TT 162-65, 176-178, *Braswell,* No. 1:20-cv-00359, (Fed. Cl. Mar. 2, 2022) ECF No. 27-1 (seeking hazardous duty and environmental differential pay for "perform[ing] work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices"); *see also* Appellee's En Banc Br., at viii (Statement of Related Cases). *Braswell's* original complaint included plaintiffs from the Bureau of Prisons, Department of Agriculture, and the Department of Veterans

See J.A. 29-30 ¶¶ 25, 30. Appellants accept that, in order for them to prevail, it is not enough that COVID-19 can readily be characterized as "unusual"—one of the requirements of the statutory provisions at issue. Rather, recognizing Congress's commitment of the necessary judgments to OPM, they agree that their case depends on whether their allegations come within OPM's existing regulations, which Appellants do not challenge and which delimit particular situations in which federal employees are entitled to hazardous duty and environmental differential payments. We conclude that OPM simply has not addressed contagious-disease transmission (e.g., human-to-human, or through human-contaminated intermediary objects or surfaces) outside two settings not present here—e.g., certain situations within laboratories and a jungle-work situation. Although OPM might well be able to provide for differential pay based on COVID-19 in various workplace settings, it has not to date adopted regulations that do so. Under existing regulations, we *affirm.*

BACKGROUND

I. Statutory and Regulatory Background

At issue in this case are statutes and regulations related to (1) a hazardous duty pay program, and (2) an environmental differential pay program. In 1966,

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Affairs. Complaint IT 4-8, *Braswell* (Fed. Cl. Mar. 27, 2020), ECF No. 1. An amended complaint subsequently added plaintiffs from the Department of Labor, Social Security Administration, Federal Grain Inspection Service, multiple Department of Defense components, and multiple Department of Homeland Security components. Amended Complaint 11 10, 12-14, 16-24, *Braswell* (July 22, 2020), ECF No. 11. The Claims Court partially stayed *Braswell* pending the disposition of this appeal. Order at 5, *Braswell* (Fed. Cl. Aug. 20, 2021), ECF No. 25.

Congress authorized OPM's predecessor, the U.S. Civil Service Commission, to provide additional compensation at fixed rates (pay differentials) to salaried, General Schedule employees "for duty involving unusual physical hardship or hazard." *Adair v. United States,* 497 F.3d 1244, 1252-54 (Fed. Cir. 2007); *see also* Pub. L. No. 89-512, § 1, 80 Stat. 318, 318 (1966) (codified as amended at 5 U.S.C. § 5545(d)). At the time, there was no mechanism for compensating General Schedule employees who performed assignments involving unusual physical hardships or hazards outside those employees' job classification. *See Adair,* 497 F.3d at 1253 (citing H.R. Rep. No. 89-31, 1st Sess., at 2 (1965)). The hazardous duty pay program was thus intended to serve as a gap-filling measure to provide "additional remuneration to [an] employee asked to take unusual risks not normally associated with [their] occupation and for which added compensation is not otherwise provided[.]" *Id.* at 1254 (quoting H.R. Rep. No. 89-31 at 4).

In 1972, Congress established a Federal Wage System applicable to a different class of federal employees and authorized OPM to pay environmental differentials to those employees for "duty involving unusually severe working conditions or unusually severe hazards[.]" Pub. L. No. 92-392, § 5343(c)(4), 86 Stat. 564, 567 (1972) (codified as amended at 5 U.S.C. § 5343(c)(4)).

There is no dispute that Congress did not expressly define "duty involving unusual physical hardship or hazard," *see* 5 U.S.C. § 5545(d), nor "duty involving unusually severe working conditions or unusually severe hazards," *see id.* § 5343(c)(4). Congress instead directed OPM to establish pay differential schedules for such duties. *Id. §* 5545(d) ("The Office shall estab-

lish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard . . . ."); *id.* § 5343(c)(4) ("The Office of Personnel Management, by regulation, shall prescribe practices and procedures for . . . administering the prevailing rate system[, and t]he regulations shall provide . . . for proper differentials, as determined by the Office, for duty involving unusually severe working conditions or unusually severe hazards . . . ."). Pursuant to congressional delegation, OPM (and its predecessor) promulgated 5 C.F.R. § 550.901 et seq., covering hazardous duty pay, and 5 C.F.R. § 532.501 et seq., covering environmental differential pay. We previously determined that OPM's regulations are reasonable in view of their authorizing statutes and the legislative histories therefor. *See Adair,* 497 F.3d at 1255, 1257. Neither party disputes this. *See* Appellants' Br. 17-21; Appellee's Br. 20-21.

OPM's regulations define "hazardous duty" as "duty performed under circumstances in which an accident could result in serious injury or death, such as duty performed on a high structure where protective facilities are not used or on an open structure where adverse conditions such as darkness, lightning, steady rain, or high wind velocity exist."[3] 5 C.F.R. § 550.902. In other words, an employee performs a hazardous duty where there is a recognized danger or risk that the employee would suffer a serious injury or death if an accident were to occur. In addition to various examples of such duties that could give rise to a serious accident provided by OPM's "hazardous duty"

[3] Appellants only allege that they are entitled to hazardous duty pay pursuant to OPM's hazardous duty pay schedule. Appellants do not seek payments for duties involving physical hardship. *See* Appellants' Br. 36-39.

definition, OPM has promulgated specific schedules, pursuant to Congress's statutory mandate, that itemize several dozen inherently dangerous, specific duties approved for hazardous duty and environmental differential pay.

Specifically, "[a}n agency shall pay the hazard pay differential listed in appendix A of this subpart to an employee who is assigned to and performs any duty specified in appendix A," provided that the hazardous duty has not been accounted for in the employee's job description. *See* 5 C.F.R. § 550.904(a). Appendix A is a table titled "Schedule of Pay Differentials Authorized for Hazardous Duty Pay" that lists various duties and their corresponding pay differential. 5 C.F.R., Pt. 550, Subpt. I, Appx. A (HDP Schedule).

Similarly, OPM's environmental differential pay regulations specify that "an employee shall be paid an environmental differential when exposed to a working condition or hazard that falls within one of the categories approved by [OPM]," 5 C.F.R. § 532.511(a)(1), and as set forth in OPM's Schedule of Environmental Differentials, *see* 5 C.F.R., Pt. 532, Subpt. E, Appx. A (EDP Schedule); *see also* 5 C.F.R. § 532.511(d). Like the HDP Schedule, the EDP Schedule lists various degrees of hazards, hardships, and unusual conditions and their corresponding pay differential. *See* EDP Schedule.

The HDP Schedule was first promulgated in 1969, and certain compensable categories of the EDP Schedule were first promulgated in 1970. *See* Pay Differentials for Irregular or Intermittent Hazardous Duty, 34 Fed. Reg. 11,083, 11,083-84 (July 1, 1969) (codified at HDP Schedule); Prevailing Rate Systems, 55 Fed. Reg. 46,140, 46,180-85 (Nov. 1, 1990) (codified at EDP Schedule). The schedules have been amended

over time to include additional duties that OPM approved for differential pay. For example, OPM amended the HDP Schedule in 1990 to add a Tropical Jungle Duty category that authorizes hazardous duty pay for "employees who are working in undeveloped tropical jungle regions outside the continental United States and who are exposed to . . . unusual hazards." *See* Pay Differentials, 55 Fed. Reg. 1,353, 1,353-54 (Jan. 16, 1990). OPM also amended the HDP and EDP Schedules in 1993 and 1975, respectively, to authorize differential pay for employees whose assigned duties exposed them to asbestos fibers at concentrations that could potentially cause illness or injury. *See* Pay Administration (General); Hazard Pay Differentials, 58 Fed. Reg. 32,048, 32,048-51 (June 8, 1993) (indicating that an Asbestos category will be codified in the HDP Schedule); *see also* Prevailing Rate Systems, 55 Fed. Reg. at 46,184 (referencing an Asbestos category for which environmental differential pay was available as of March 9, 1975). In total, to date, the HDP and EDP Schedules respectively identify 57 and 35 specific duties—e.g., involving hazardous materials, hazardous weather or terrain, physiological hazards, flight-related hazards, etc.—that are currently entitled to differential pay.

Relevant here, the HDP Schedule establishes a 25-percent pay differential for "work with or in close proximity to" "virulent biologicals," which are hazardous agents defined as Imiaterials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection" (Virulent Biologicals category). HDP Schedule. The EDP Schedule also establishes pay differentials for "working with or in close proximity to" "micro-organisms" (Micro-organisms category) at two differ-

ent levels of risk—(1) those that pose a "high degree hazard" and "involvel] potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease" (high risk subcategory); and (2) those that pose a "low degree hazard" (low risk subcategory). *Id.* The high risk subcategory covers "work situations wherein the use of safety devices and equipment, medical prophylactic procedures such as vaccines . . . and other safety measures do not exist or have been developed but have not practically eliminated the potential for . . . personal injury." *Id.* The EDP Schedule provides two examples for understanding the scope of the high risk subcategory:

> - Direct contact with primary containers of organisms pathogenic for man such as culture flasks, culture test tubes, hypodermic syringes and similar instruments, and biopsy and autopsy material. Operating or maintaining equipment in biological experimentation or production
>
> - Cultivating virulent organisms on artificial media, including embryonated hen's eggs and tissue cultures where inoculation or harvesting of living organisms is involved for production of vaccines, toxides, etc., or for sources of material for research investigations such as antigenic analysis and chemical analysis

Id. The low risk subcategory covers "situations for which the nature of the work does not require the individual to be in direct contact with primary containers of organisms pathogenic for man. . . ." *Id.*

II. Procedural Background

Appellants are current and former employees of the United States Federal Bureau of Prisons working at Federal Correctional Institute Danbury (FCI Danbury) in Danbury, Connecticut. FCI Danbury is a low-security federal correctional institution which houses over 650 inmates. These current and former employees are either General Schedule employees eligible for hazardous duty pay pursuant to 5 U.S.C. § 5545(d), or are employees under the Federal Wage System eligible for environmental differential pay pursuant to 5 U.S.C. § 5343(c)(4).

On June 26, 2020, Appellants initiated this action against the government, alleging that they are entitled to hazardous duty and environmental differential pay due to their "work [with] or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices," which resulted in them being exposed to COVID-19. J.A. 30-35 ¶¶ 35-38, 45-51. There is no dispute that COVID-19 is a communicable disease that can cause injury. *See* Appellee's En Banc Br. 24; Appellants' En Banc Reply Br. 8. Appellants allege that (1) COVID-19 is easily transmissible in the workplace through "objects, surfaces, and/or individuals," (2) inmates and staff have contracted COVID-19, and (3) by reporting to the facility during the COVID-19 pandemic where they may encounter infected inmates or staff, Appellants "work with or in close proximity to" "virulent biologicals" and "micro-organisms." J.A. 27-30 IT 17, 21-24, 30. Appellants also sought deficiencies in overtime pay, under the Fair Labor Standards Act (FLSA), "caused by the failure of the agency to include hazardous duty and environmental pay differential

payments" in their overtime calculations. J.A. 34-35 ¶ 57.

On February 5, 2021, the Claims Court granted the government's motion to dismiss Appellants' complaint for failure to state a claim upon which relief can be granted. *See Adams,* 152 Fed. Cl. at 351 (citing Rule 12(b)(6) of the United States Court of Federal Claims). The Claims Court determined that Appellants failed to state a claim for hazardous duty pay because neither 5 U.S.C. § 5545(d) nor OPM's implementing regulations provide hazardous duty pay for workplace exposure to objects, surfaces, and/or individuals infected with COVID-19. *Adams,* 152 Fed. Cl. at 355 (citing *Adair,* 497 F.3d at 1254, 1255). The Claims Court also determined that our prior construction of the regulatory phrase "work[] with or in close proximity to" foreclosed Appellants' claim for environmental differential pay based on alleged "workp with or in close proximity to" "micro-organisms." *Id.* at 356-57 (citing *Adair,* 497 F.3d at 1257-58). Finally, the Claims Court determined that Appellants' FLSA claims are derivative of their hazardous duty and environmental differential pay claims and, therefore, barred.[4] *Id.* at 357.

Appellants timely appealed, and we have jurisdiction under 28 U.S.C. § 1295(a)(3).

STANDARD OF REVIEW

This Court reviews de novo the Claims Court's dismissal of a complaint for failure to state a claim upon which relief can be granted. *Creative Mgmt. Serus., LLC v. United States,* 989 F.3d 955, 961 (Fed.

[4] Appellants concede that their FLSA claims are derivative of their claims for hazardous duty and environmental differential pay. Appellants' Br. 4 n.2.

Cir. 2021). Moreover, because we review judgments, not opinions, *see Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1392 (Fed. Cir. 1987), we "may affirm the [trial] court on a ground not selected by the [trial] judge so long as the record fairly supports such an alternative disposition of the issue," *Banner u. United States,* 238 F.3d 1348, 1355 (Fed. Cir. 2001) (citation omitted).

DISCUSSION

Neither party disputes that Congress did not define the scope and meaning of "unusual physical hardship or hazard" entitled to hazardous duty pay or "unusually severe hazards" entitled to environmental differential pay. *See* Appellants' Br. 26; Appellee's Br. 20; *see also* 5 U.S.C. §§ 5343(c)(4), 5545(d). Both parties agree that Congress delegated to OPM the authority to determine the types of duties that are entitled to such pay differentials, and neither side challenges the validity of OPM's existing regulations. *See* Appellants' Br. 16-17, 26; Appellee's Br. 5-6, 8-12. So regardless of whether Appellant's allegations could be plausibly understood as describing an "unusual physical hardship or hazard" or "unusually severe hazards," only employees who meet OPM's regulatory requirements are entitled to hazardous duty or environmental differential pay. *See* 5 U.S.C. § 5545(d) ("Under such regulations as [OPM] may *prescribe* . . . an employee . . . is entitled to be paid the appropriate differential . . . .") (emphasis added); 5 U.S.C. § 5343(c)(4) (OPM regulations "shall provide . . . for proper differentials, as *determined by the Office,* for duty involving unusually severe working conditions or unusually severe hazards") (emphasis added). Indeed, Appellants concede that their HDP and EDP claims fail if they do not fall under the HDP Schedule's Vir-

ulent Biologicals category or the EDP Schedule's Micro-organisms category. *See* En Banc Oral Arg. at 3:12-3:35. Thus, the only issue is whether Appellants' theory of recovery satisfies one of OPM's specifically delineated categories for hazardous duty or environmental differential pay.[5]

Appellants argue that they stated viable claims for environmental differential pay involving "micro-organisms" and hazardous duty pay involving "virulent biologicals" because they "were assigned to work with or in close proximity to objects, surfaces, and/or individuals (including inmates and coworkers) who were infected with COVID-19." Appellants' Br. 17-21; *see also* Appellants' Reply Br. 20-21; Appellants' En Banc Reply Br. 21 (arguing that "it is the circumstances and surroundings that make the duties hazardous, not necessarily the duty itself'). We disagree with Appellants, based on the text, structure, and history of the Schedules, as well as on our decision in *Adair*.

As an initial matter, neither party argues that "work[] with or in close proximity to" should be interpreted differently with respect to the HDP Schedule's Virulent Biologicals category and the EDP Schedule's Micro-organisms category. Nothing in the

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[5] Although the dissent focuses on whether Appellants adequately plead the "unusually" hazardous requirement of the HDP and EDP statutes, Dissent Op. at 3-8, Appellants do not argue that they are entitled to hazardous duty or environmental differential pay based solely on 5 U.S.C. §§ 5343(d) and 5545(d) for the reason that COVID-19 in the workplace could be understood as a "hazard" that is "unusual" or "unusually severe," nor do Appellants argue that OPM is required to promulgate regulations that cover ambient exposure to COVID-19 in the workplace. *See* En Banc Oral Arg. at 2:28-3:35.

language of HDP or EDP Schedules persuades us otherwise. Moreover, our analysis in *Adair,* where we reviewed a closely analogous provision in the EDP Schedule covering "[working with or in close proximity to poisons (toxic chemicals)" is informative as to the scope of the HDP and EDP Schedule's Virulent Biologicals and Micro-organisms categories at issue here. *See* 497 F.3d at 1255-58. *Adair* involved exposure to second-hand tobacco smoke in a prison environment, which the plaintiffs alleged was a "toxic chemical" covered by the Toxic Chemicals category of OPM's HDP and EDP Schedules. 497 F.3d at 1255-58. Similar to the structure of the Microorganisms category, the EDP Schedule describes examples of high degree toxic chemical hazards (high risk subcategory), including handling and staring toxic chemical agents, visually examining chemical agents, transferring chemical agents between containers, etc. *See* EDP Schedule. For low degree toxic chemical hazards (low risk subcategory), on the other hand, the EDP Schedule states that "the nature of the work does not require the individual to be in as direct contact with, or exposure to, the more toxic agents." *Id.* We therefore determined that "one key difference" between the high and low risk subcategories for "toxic chemicals" is that "the employee in the low [risk subcategory can be many degrees removed from the toxic agent." *Adair,* 497 F.3d at 1257.

Considering the high and low risk Toxic Chemicals subcategories together, we concluded that "[a]lthough the examples are not exhaustive, they all describe scenarios where the job assignment requires directly or indirectly working *with* toxic chemicals or containers that hold toxic chemicals as part of a job assignment." *Id.* at 1258. We further explained that the EDP Schedule's Toxic Chemicals category is not so

broad that they would "cover situations in which employees work with inmates who incidentally smoke, *for there is no work 'with' [second-hand smoke] in th[at] context." See id.* (emphasis added). For these reasons, among others, we affirmed the dismissal of the complaint for failure to state a claim.

Adair is instructive because just as the EDP Schedule's Toxic Chemicals category requires "working with or in close proximity to" "toxic chemicals," EDP Schedule's Micro-organisms category requires "working with or in close proximity to" "micro-organisms." Like the Toxic Chemical category's examples considered in *Adair,* the examples listed in the EDP Schedule's high risk Micro-organisms subcategory require (1) "[direct contact with primary containers of organisms pathogenic for man . . . ," (2) "[o]perating or maintaining equipment in biological experimentation or production," or (3) "[c]ultivating virulent organisms on artificial media." EDP Schedule. These examples do not cover situations in which employees working with inmates face contagious-disease transmission via ambient exposure to COVID-19 in the workplace by way of infected humans, for "there is no work 'with' [COVID-19] in this context." *See Adair,* 497 F.3d at 1258. And we agree with the Claims Court that Appellants' alleged duties are not analogous to the class of exemplary duties provided in the high risk micro-organism subcategory of the EDP Schedule. *See Adams,* 152 Fed. Cl. at 356. Like the high risk Toxic Chemicals subcategory we analyzed in *Adair,* the high risk Micro-organisms subcategory contemplates directly working *with* micro-organisms or containers holding micro-organisms.

In addition, tracking the same high/low risk structural relationship for Toxic Chemicals, the

EDP Schedule defines the low risk Micro-organisms subcategory in *direct relation* to a specific example in the high risk micro-organism subcategory—i.e., "does not require" "*direct contact with primary containers of organisms pathogenic for* man, such as culture flasks, culture test tubes, hypodermic syringes and similar instruments, and biopsy and autopsy material." *Compare* EDP Schedule at Micro-organisms – low degree hazard (emphasis added), *with id.* at Micro-organisms – high degree hazard, first example. There is thus a strong inference that the low risk Micro-organisms subcategory requires that an employee's assigned duty must at least involve working *indirectly* with the primary containers of pathogenic organisms identified in the high risk Micro-organisms subcategory. This inference is consistent with the language and overall design of the EDP Schedule, and, in particular, our conclusion in *Adair* for the similarly-defined low risk Toxic Chemicals subcategory, which likewise "does not require the [employee] to be in as direct contact with, or exposure to, the [toxic chemicals]" and which we concluded requires "indirectly working with toxic chemicals or containers that hold toxic chemicals as part of a job assignment." *See Adair,* 497 F.3d at 1257-58; *see also K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281,291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." (citation omitted)); *Green v. Brennan,* 578 U.S. 547, 553-54 (2016) (applying statutory interpretation canons to regulations).

Although the Micro-organisms category's examples are not exhaustive, like *Adair's* Toxic Chemicals category, they uniformly reflect the nature and locus of work contemplated in the Micro-organisms

category—i.e., they require working directly or indirectly *with* "micro-organisms which involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease" as part of a job assignment. *See Adair,* 497 F.3d at 1258 (concluding that "working with or in close proximity to" "toxic chemicals" involves "directly or indirectly working *with* toxic chemicals . . . as part of a job assignment," as opposed to "situations in which known hazards . . . are common or ubiquitous in the ambient work environment"). Moreover, the substantial relationship between the EDP Schedules' Toxic Chemical category that we considered in *Adair*[6] and the Micro-organisms category here—i.e., their shared usage of the "work[] with or in close proximity to" language and specific examples focused on working directly or indirectly with the hazardous material—implicates the rule of "construction that identical words used in different parts of the same act [or provision] are intended to have the same meaning." *See Sullivan v. Stroop,* 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Sec'y of Treasury,* 475 U.S. 851, 860 (1986)).[7]

Appellants' theory that "primary containers," as that term is used in the EDP Schedule, includes infected humans because humans are primary carriers for incubating and spreading COVID-19 is unconvinc-

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[6] Appellants argue that *"Adair* is distinguishable from this case in many ways." *See* Appellants' En Banc Reply Br. 27; *see also* Appellants' En Banc Br. 19, 22, 30-31. Appellants, however, do not seek to overturn *Adair*. *See* Appellants' En Banc Reply Br. 27.

[7] While *Sullivan* dealt with a rule of statutory interpretation, the same approach is taken to interpret regulations. *See Green,* 578 U.S. at 553-54.

ing. *See* Appellants' En Banc Br. 38-42; Appellants' En Banc Reply Br. 25-27; Appellee's En Banc Br. 53-57. The EDP Schedule's listed examples of "primary containers" uniformly reflect objects of research or experimentation. *See* EDP Schedule (listing culture flasks, culture test tubes, hypodermic syringes and similar instruments, and biopsy and autopsy material). Given that nothing in the regulatory history suggests such an unusual understanding of living humans as containers, we think it would be an unreasonable stretch of the term "containers" to include infected humans. Put simply, the relevant indicia in the EDP Schedule, coupled with our reasoning in *Adair* for the same "workU with or in close proximity to" language used in the EDP Schedule's analogous Toxic Chemicals category, compels the conclusion that the EDP Schedule's Micro-organisms category requires working directly or indirectly *with* pathogenic micro-organisms *themselves.*

The HDP Schedule does not expressly recite examples illustrating when an employee "work[s] with or in close proximity to . . . [v]irulent biologicals," but historical, contemporaneous guidance from OPM provides several exemplary duties that are very similar to the above-discussed examples listed in the EDP Schedule's high risk Micro-organisms subcategory:

- Operating or maintaining equipment in biological experimentation or production.
- Cleaning and sterilization of vessels and equipment contaminated with virulent micro-organisms.
- Caring for or handling disease-contaminated experimental animals in biological

> experimentation and production in medical laboratories, the primary mission of which is research and development not directly associated with patient care. This includes manipulating animals infected with virulent organisms, such as inoculating of animals, obtaining blood and tissue specimens, and disposing of excreta and contaminated bedding and cages.
>
> - Cultivating virulent organisms on artificial mediums, including embryonated hen's eggs and tissue cultures where inoculation or harvesting of living organisms is involved for production of vaccines, toxides, etc., or for sources of material for research investigations such as antigenic analysis and chemical analysis.

Background Info. on Appx. A to Part 550, Fed. Per. Manual, Supp. 990-2 § 550-E-4, 1973 WL 151518 (1973) (HDP Supplement). These examples likewise do not cover situations in which employees working with inmates face contagious-disease transmission via ambient exposure to COVID-19 in the workplace, for "there is no work 'with' [COVID-19] in this context." *See Adair,* 497 F.3d at 1258.

Although the HDP Supplement comes from a Federal Personnel Manual that is no longer in force, we have continued to regard the Federal Personnel Manual as "a valuable resource for construing regulations that were promulgated or were in effect" before it was discontinued in 1993. *See Schmidt v. Dep't of Interior,* 153 F.3d 1348, 1353 n.4 (Fed. Cir. 1998). Because the Virulent Biologicals category was first promulgated in 1969 and has not been amended since then, *see* 34 Fed. Reg. at 11,083-84, the HDP

Supplement "serve[s] as an aid to agencies in determining what situations a hazardous duty described in [the HDP Schedule] covers." *See* HDP Supplement at 1. The HDP Supplement's examples for "work[mg] with or in close proximity to . . . [v]irulent biologicals" uniformly reflect "the nature of the hazard the differential is intended to compensate"—i.e., assignments that involve directly or indirectly working with a virulent biological *itself* rather than ambient exposure to a virulent biological in the workplace due to transmission by infected humans.

Additionally, it does not appear that OPM intended that "works with or in close proximity to" "virulent biologicals" or "micro-organisms" in the HDP and EDP Schedules, respectively, would encompass contagious-disease transmission via ambient exposure not resulting from working directly or indirectly with the virulent biological or pathogenic micro-organism because the schedules use, for other hazardous material categories, specific language when indicating that ambient exposure to hazardous materials is entitled to differential pay. For example, the HDP Schedule uses clear language in the Tropical Jungle Duty category indicating that a possibility of exposure to infectious diseases in a jungle work environment is entitled to differential pay. *See* HDP Schedule (covering "[w]ork outdoors *in undeveloped jungle regions* outside the continental United States . . . . involv[ing] . . . [a]n unusual danger of serious injury or illness due to . . . *[k]nown exposure to serious disease* for which adequate protection cannot be provided" (emphasis added)). As such, the HDP Schedule covers ambient exposure to infectious diseases that may be inherently present in a jungle environment. In contrast, the Virulent Biologicals and Micro-organisms categories lack any corresponding description of ambient expo-

sure in a workplace to those hazardous materials from outside sources; they instead are directed to working directly or indirectly with the hazardous material itself.[8]

In addition to Tropical Jungle Duty, OPM also added an Asbestos category to both the HDP and EDP Schedules to compensate federal employees who are required to work "in an area where airborne concentrations of asbestos fibers may expose them to potential illness or injury." *See* Pay Differentials, 55 Fed. Reg. 31,190, 31,190 (Aug. 1, 1990) (Proposed Rule); *see also* Prevailing Rate Systems, 55 Fed. Reg. at 46,184 (referencing an Asbestos category that was codified into the EDP Schedule on March 9, 1975). Due to concern that OPM's proposed Asbestos category for the HDP Schedule lacked a "clear definition of 'exposure'" and was "too permissive [such] that agencies would end up paying almost all . . . employees who could conceivably have been exposed to any level of asbestos," OPM incorporated a reference to the Occupational Safety and Health Administration's permissible exposure limit standard into the final Asbestos category and explained that "mere existence of airborne concentrations of asbestos fibers in a particular work environment is not enough, by itself, to warrant [hazardous duty pay]." Pay Administration

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[8] We disagree with the dissent's view that government's, counsel made concessions during the en banc oral argument that "nullify" our interpretation of the regulations. Dissent Op. at 9-11. The government counsel's vague, open-ended answers are a weak basis for declining to give the Virulent Biologicals and Micro-organisms categories their best interpretation within the framework of the HDP and EDP Schedules. Moreover, the government has not argued in this case for any form of deference for its reading of OPM's regulations.

(General); Hazard Pay Differentials, 58 Fed. Reg. 32,048, 32,048 (codified at HDP Schedule).

The HDP Schedule's Asbestos category thus includes express language covering "[s]ignificant risk of exposure to airborne concentrations of asbestos fibers in excess of the permissible exposure limits (PELS) in the standard for asbestos provided in title 29, Code of Federal Regulations, §§ 1910.1001 or 1926.58, when the risk of exposure is directly connected with the performance of assigned duties." HDP Schedule; *see also* EDP Schedule *("Asbestos.* Working in an area where airborne concentrations of asbestos fibers may expose employees to potential illness or injury. This differential will be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 as published in title 29, Code of Federal Regulations, §§ 1910.1001 or 1926.1101."). Thus, for employees who are required to do their work in an environment with a hazardous, airborne concentration level of asbestos fibers, OPM specifically created a category to compensate employees who bear the risk of performing assigned duties in such a hazardous environment, including employees who did not work with the asbestos material itself. *See* HDP Schedule (Asbestos category); *see also* EDP Schedule (Asbestos category).

As evident by OPM's inclusion of language covering general, ambient exposure in the Tropical Jungle Duty and Asbestos categories, OPM knows how to distinguish categories involving ambient exposure to hazardous materials from categories involving exposure to the hazardous materials themselves resulting from work with those materials (e.g., toxic

chemicals, unstable explosives, virulent biologicals, etc.). The logical conclusion, then, is that OPM intended the Virulent Biologicals and Micro-organisms categories to apply only when the employee is working with or near a virulent biological or micro-organism itself, not doing any task that might incur exposure to a virulent biological or micro-organism generally. If OPM intended for the HDP Schedule's "virulent biologicals" category or the EDP Schedule's "micro-organisms" category to provide differential pay for ambient exposure to dangerous, communicable diseases, it certainly "knew how to say so." *See Rubin v. Islamic Republic of Iran,* 138 S. Ct. 816, 826 (2018) (discussing congressional intent); *Green,* 578 U.S. at 553-54 (applying statutory interpretation canons to regulations). So even though the HDP Schedule's Asbestos category includes the same "work[] with or in close proximity to" language present in, e.g., the Toxic Chemicals or Virulent Biologicals categories, the additional "risk of exposure" language and concentration standard present in the Asbestos category indicates that the Asbestos category is not as limited as the other categories. In other words, because OPM did not include any "risk of exposure" language in the Virulent Biologicals or Micro-organism categories as it did for other categories, "workU with or in close proximity to" "virulent biologicals" or "micro-organisms" in the context of the HDP and EDP Schedules cannot reasonably encompass duties that involve assignments unrelated to working with or near virulent biologicals or micro-organisms themselves.

That said, both Appellants and the government argue that OPM's March 7,2020, Memorandum entitled "Questions and Answers on Human Resources Flexibilities and Authorities for Coronavirus Disease 2019 (COVID-19)" (OPM Memo) is instructive and

favorable to their respective positions. *See* Appellants' Br. 39 n.9; Appellants En Banc Br. 31-32; Appellee's Br. 37 n.7; Appellee's En Banc Br. 41. We determine, however, that the OPM Memo does not take any definitive position as to whether the HDP or EDP Schedules (a) cover contagious-disease transmission via ambient exposure to virulent biologicals due to transmission by infected humans, or (b) require directly or indirectly working with virulent biologicals or micro-organisms themselves. *See* OPM Memo at 12 ("Agencies may pay a hazard pay differential . . . for exposure to 'virulent biologicals' only when the risk of exposure is directly associated with the performance of assigned duties."); *but see id.* at 12-13 (explaining that "hazard pay differential cannot be paid to an employee who may come in contact with the [COVID-19] virus or another similar virus through *incidental exposure* to the public or other employees who are ill," "employees may not receive an environmental differential for *incidental exposure* to the pandemic COVID-19," and "[t]here is no authority within the hazardous duty pay or environmental differential statutes to pay for *potential* exposure" (first and second emphases added)).

In our view, the OPM Memo does not speak with one clear, consistent voice that conflicts with the overall design of the HDP and EDP Schedules—as indicated by OPM's contemporaneously-specified duty-examples in the EDP Schedule and the Federal Personnel Manual associated with the HDP Schedule—to require work directly or indirectly with COVID-19 itself. Moreover, the OPM Memo did not engage in any interpretive analysis of the relevant "work with or in close proximity" language, let alone even suggest that it provides a regulatory interpretation of the HDP and EDP Schedules. And because it quickly issued at the

very start of a pandemic emergency, affording it deference would raise concerns about the use of informal, interpretive announcements instead of formal rulemaking to make significant regulatory changes. *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2416 (2019) (explaining *Auer* deference is not warranted when a "regulatory interpretation" is "merely ad hoc statement[s]" rather than the "agency's 'authoritative' or 'official position'").

Because Appellants read "work[ing] with or in close proximity to" "virulent biologicals" or "microorganisms" broadly to encompass contagious-disease transmission via ambient exposure and have not alleged that they worked directly or indirectly with COVID-19 itself, they have not sufficiently pled claims for hazardous duty and environmental differential pay.[9] Accordingly, the Claims Court did not err in concluding that Appellants' complaint failed to sufficiently plead claims for hazardous duty and environmental differential pay and FLSA overtime.[10]

CONCLUSION

COVID-19 has undoubtedly presented a significant health risk to both Appellants and the general population. And we recognize that pandemics are historically rare. But the current Virulent Biologicals and Microorganisms categories of OPM's HDP and EDP Schedules do not cover ambient exposure to serious, communicable diseases transmitted by infected humans. That is, the HDP and EDP Schedules do not

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[9] We requested briefing on the question of whether an amendment to the complaint should be permitted. Appellants' supplemental briefing makes no demonstration that an amendment would resolve the problems with the original complaint.

[10] *See* discussion *supra* n.4.

provide payment in situations where an employee is exposed to another employee or individual carrying an infectious disease. Appellants' theory would broaden the Virulent Biologicals and Micro-organisms categories to cover a significantly large number of federal employees—far more than any other category in the HDP and EDP Schedules. Administering such a differential pay would no doubt require significant amounts of investigation and review throughout the government on a workplace-to-workplace basis to determine whether a particular risk of ambient exposure in a given location was serious enough to warrant extra pay. That is not to say that such differential pay may not be warranted; rather, OPM's schedules—as currently written—do not cover these kind of situations.

Federal employees who do not fit into one of the HDP or EDP Schedules' categories, but whose duties nonetheless expose them to particularly heightened risk associated with an infectious disease circulating within the general population, such as COVID-19, might understandably believe that they should receive additional compensation for such work during a pandemic. But that is a matter for Congress or OPM to address. For example, OPM might promulgate new HDP and EDP categories or amend existing categories to cover human-to-human exposure to serious, communicable diseases while working during a pandemic. But absent action by Congress or OPM, no judicial remedy is available. Accordingly, the Claims Court's dismissal is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-1662

CODY L. ADAMS, ROSE M. ADAMSON, JOSEPH P. AGIUS, DARA W. ALLICK, JENNIFER A. ANGEL,MICHAEL T. ANGELO, SAMMY APONTE, ALICIA K. AUSTIN-ZITO, LUKE M. BADARACCO, CHAD J. BARGSTEIN, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in No. 1:20-cv-00783-CFL, Senior Judge Charles F. Lettow.

REYNA, *Circuit Judge,* with whom NEWMAN, *Circuit Judge,* joins, dissenting.

Appellants are one hundred and eighty-eight current or former correctional employees of the Department of Justice, Bureau of Prisons, assigned to work at the federal prison located in Danbury, Connecticut.[1] Appellants filed a complaint with the U.S. Court of Federal Claims asserting that they were entitled to additional compensation commonly known as hazardous duty pay ("HDP") and environmental differential

[1] *See* J.A. 23; *see also* En Banc Op. Br. at 2.

pay ("EDP"), for work performed while exposed to COVID-19.

The government moved to dismiss the complaint under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims. The Court of Federal Claims granted the motion and dismissed Appellants' complaint on grounds that it did not allege a plausible claim for relief. Appellants appealed the dismissal of their complaint.

The question before us is simple: whether Appellants' complaint states plausible claims for HDP and EDP. As shown below, the answer is "yes" for various reasons. For example, the Court of Federal Claims adopted overly narrow interpretations of the applicable statutes and regulations. In addition, the government made several admissions and concessions during the en banc argument that clarified in the affirmative the question of whether the COVID-19 pandemic gave rise to HDP and EDP. These admissions are consistent with extrinsic material referenced in the complaint that showed that COVID-19 exposure could give rise to HDP and EDP, and that at least one other department of the government was already paying COVID-19 related HDP and EDP compensation. Finally, the Court of Federal Claims departed from established law on Rule 12(b)(6) determinations by requiring actual proof of HDP and EDP eligibility—no less under its restrictive, overly narrow interpretations of the statute and regulations—instead of inquiring whether Appellants have alleged a plausible claim under the plain terms of the statutes and regulations.

Under the correct statutory and regulatory interpretations, and in view of the plain and unambiguous meaning of the words of the statutes, I believe that Appellants have pleaded sufficient facts to satisfy both

key elements needed to plead HDP and EDP. I would thus reverse the Court of Federal Claims.

But there is more. In this case, experience sheds light on the fundamental question of whether, at the time of the complaint, Appellants plausibly worked "unusually" hazardous duties involving "work with or in close proximity to" a virulent biological or micro-organism. We all have personal COVID-19 experiences. While those personal experiences are not part of the record before the court, certain national experiences are, as are their transformative effect.

It is clear that the COVID-19 pandemic adversely affected our workplaces, schools, airlines, hotels, meat-packing houses, and hospitals. Schools, businesses, and churches closed under government order. We all went virtual because it was not safe to gather at weddings, funerals, and hospital bedsides. Even court-houses were momentarily shuttered on the premise that COVID-19 was in the streets roaring like a lion. We cannot shake off those experiences like dust from a rug.

UNUSUALLY HAZARDOUS DUTY

The first element required to plead HDP and EDP is found in the applicable statutes. General schedule salaried employees qualify for HDP under 5 U.S.C. § 5545(d) when they are "subjected to physical hardship or hazard not *usually* involved in carrying out the duties of [their] position." 5 U.S.C. § 5545(d) (emphasis added). For waged employees, the Office of Personnel and Management ("OPM") is required to establish pay differentials for duties involving "*unusually* severe hazards." 5 U.S.C. § 5343(c)(4) (emphasis added). While the HPD and EDP statutes recite the "unusualness" element differently, the parties

agree that these statutes required Appellants to allege a plausible claim that their duties were unusually hazardous as compared to their typical job duties. En Banc Op. Br. at 1415; En Banc Resp. Br. at 24-26.

The Court of Federal Claims misinterpreted this court's opinion in *Adair* and incorrectly concluded that it was not unusually hazardous for Appellants "to work with objects, surfaces, and/or individuals infected with" COVID19.[2] J.A. 27. I agree with Appellants that the trial court's interpretation of the statutes was erroneous and overly narrow.

Neither the statutes nor the relevant regulations define "unusual." This means that the courts should apply its ordinary meaning. *Adair u. United States,* 497 F.3d 1244, 1253 n.2 (Fed. Cir. 2007). When the common understanding of the term "unusual" is applied, exposure to COVID-19 is clearly distinguishable from the issue in Adair—exposure to secondhand tobacco smoke at a facility that had long allowed inmates to smoke. *Id.* at 1252-56 (finding that

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[2] The majority elected not to address whether Appellants adequately plead the "unusually" hazardous element because "regardless . . . only employees who meet OPM's regulatory requirements are entitled to hazardous duty or environmental differential pay." Maj. Op. at 11-12. This shortcut is mistaken. The court was required to address this issue because it is, for purposes of this appeal, the key requirement in the HDP and EDP statutes. *See Yates v. U.S.,* 574 U.S. 528, 537 (2015) (explaining that statutory text should be interpreted by "the specific context in which El language is usedl] and the broader context of the statute as a whole"); *FTC v. Mandel Bros., Inc.,* 359 U.S. 385, 389 (1959) ("[O]ur task is to fit, if possible, all parts into al] harmonious whole."). This omission is also significant because, as discussed below, the government's arguments directed to the regulations are unpersuasive. *See infra* note 8 (regulations should not trump statutory command).

secondhand smoke was not an "unusual" hazard). Because smoking by both workers and prisoners was long permitted at correctional facilities, the *typical* working environment knowingly included exposure to secondhand smoke. *Id.* Conversely, it is plausible that exposure to COVID-19 was not reasonably foreseen as a condition of Appellants' work, unlike the "expected condition" of exposure to secondhand smoke in *Adair*. *Id.* at 1253. It is also plausible that, unlike in *Adair,* the hazards created by exposure to COVID-19 created extraordinary risks in the performance of even Appellants' most ordinary duties as federal prison employees.

In *Adair,* we also recognized that when Congress last amended the HDP statute, it was aware of the risks posed by exposure to secondhand smoke but chose not to add a separate compensable category for such exposure. *Id.* at 1254-55. Here, there is no evidence that Congress at the time of last amendment was aware of COVID-19 or of the risks associated with exposure to COVID-19.

The government asserts that COVID-19 exposure was not unusual, but "is inherent in the types of functions that [Appellants] perform" as correctional officers. En Banc Resp. Br. at 24. In the government's view, "[s]tudies abound showing that outbreaks of communicable diseases are not unusual in prisons." *Id.* at 26-27. The government further argues that Appellants' statutory construction would drastically expand the law and would cover "each new strain of the flu." *Id.* at 25-26.

In making these arguments, the government misapplies well-established pleading principles.[3] To survive a motion to dismiss "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft u. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. u. Twombly,* 550 U.S. 544, 570 (2007)); *see also Cary v. United States,* 552 F.3d 1373, 1376 (Fed. Cir. 2009) (stating that RCFC 8 "does not require the plaintiff to set out in detail the facts upon which the claim is based, but enough facts to state a claim to relief that is plausible on its face"). For a complaint to be "plausible," it "does not need detailed factual allegations," but must simply contain enough detail "to raise a right of relief above the speculative level." *Twombly,* 550 U.S. at 555. Granting a motion under RCFC 12(b)(6) requires, after accepting all well-pleaded factual allegations as true, determining that the claims are facially implausible. *Lindsay v. United States,* 295

[3] The government's argument and the Court of Federal Claims' decision appear tainted by improper hindsight bias. For example, the Court of Federal Claims found that Appellants failed to "*establish* that the hazard posed by the virus is not adequately alleviated by protective or mechanical devices." *Adams v. U.S.,* 152 Fed. Cl. 350,355 (2020) (emphasis added, citation omitted). This is an evidentiary requirement that Appellants are not required to make at the 12(b)(6) stage. Whether such equipment was available and effective such that the COVID-19 working conditions were rendered not unusually hazardous is a factual issue. The issue before the court is not whether the hazards of working in a prison with COVID-19 are unusual today, but whether they were unusual during the period alleged in the complaint—which runs from the early stages of the pandemic until vaccines "became readily available to" Appellants. En Banc Oral Arg. at 4:30-5:23; J.A. 29, 33. There is no doubt that Appellants have sufficiently alleged that the COVID-19 hazards during that time period were at least plausibly unusual for the purposes of a 12(b)(6) motion.

F.3d 1252, 1257 (Fed. Cir. 2002). Here, the Court of Federal Claims failed to adhere to these basic tenets of pleading and required Appellants to prove the merits of their claim for relief.

Appellants were not required to plead, as the government's argument suggests, detailed factual allegations as to how their duties were "unusually" hazardous. Nor were they, at this stage, required to prove their case. Appellants were merely required to plead enough facts to state claims that are plausible on their face, which they have done.[4] The government, to succeed on its 12(b)(6) motion, had to establish that Appellants' claims were facially implausible, which it did not.

The courts are not heads of hardened fenceposts. The court can also draw—based on common knowledge about prisons—reasonable inferences to conclude that COVID-19 was, at least plausibly, unusually hazardous for Appellants. *See Iqbal,* 556 U.S. at 679 ("[T]he reviewing court [can] draw on its judicial experience and common sense."). It is reasonable to infer, for example, that Appellants were required to work in small, confined areas with poor ventilation.[5]

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[4] *See* J.A. 27-33 (pleading that "Plaintiffs have performed work with or in close proximity to objects, surfaces, and/or individuals infected with the novel coronavirus;" "To date, more than 100 employees and inmates of FCI Danbury have been confirmed to be infected with COVID-19;" "COVID-19 is a virus which when introduced into the body is likely to cause serious disease or fatality;" "Exposure to objects, surfaces, and/or individuals infected with COVID19 was not taken into account in the classification of plaintiffs' positions;" and the employees lacked "sufficient protective devices").

[5] During the period in question, were there not shutdowns, courthouse and school closures, hospitals filled to capacity, mobile morgues, and grocery washing? Indeed, when this case

To the extent more specific allegations were required, Appellants should be allowed to amend their complaint. *See* RCFC 15(a)(2) ("The court should freely give leave when justice so requires."). In cases involving HDP and EDP, the court should be loath to close its doors too quickly.

In sum, Appellants have adequately pleaded facts describing duties involving "unusual" hazards, satisfying the statutory requirement of 5 U.S.C. §§ 5545(d) and 5343(c) (4).

WORK WITH OR IN CLOSE PROXIMITY TO

The second element required to plead HDP and EDP is found in the regulations. The parties agree that Appellants were required to plead that they worked "with or in close proximity to" a "virulent biological" (for HDP) or a "microorganism" (for EDP). En Banc Op. Br. at 34-35; En Banc Resp. Br. at 45-46. I believe that Appellants have adequately pleaded this element.

In its briefs, the government argues that the "work with or in close proximity to" element includes only "biological production and experimentation with pathogenic micro-organism[s]." Panel Resp. Br. at 31-32; *see also id.* at 23 (arguing that the "employee's duties [must] involve directly or indirectly working with pathogenic micro-organisms *themselves,* or containers that hold pathogenic microorganisms themselves, as part of a job assignment"). The government's position on this point limits the regulations' scope to cover only employees who work in a laboratory or perform

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was argued before the panel, counsel argued from behind plexiglass dividers, masks and social distancing were required, the number of counsel appearing for each side was limited, and the entire courthouse building was closed to the public, all for the express purpose of avoiding COVID-19 exposure.

substantially similar duties. *See* En Banc Resp. Br. at 45-46 (arguing that the "focus of the work [must be on] the biological material itself"). Under this theory, scuffling with an inmate who is infected with COVID-19 would not plausibly allege "work with or in close proximity to" the COVID-19 virus. To qualify, the correctional officer would have to scuffle with a container of COVID-19, and the scuffle would have to take place in a lab.

At the en banc oral argument, however, the government unambiguously abandoned this position. The government conceded that healthcare workers treating COVID-19 patients could qualify for HDP and EDP. En Banc Oral Arg. at 44:30-47:25 (discussing potentially eligible doctors), 50:20-51:15 (conceding that a nurse working in a radiology unit transferred to work in a COVID-19 unit "would be eligible"). Counsel for the government explaine d:

> I think it ultimately depends on both the job description and exactly the tasks that are involved. . . . I think that depending on the situation [a federal employee working with a patient sick with COVID-19] may be entitled to [HDP or EDP].

Id. at 1:00:25-1:01:10; *see also id.* at 1:01:10-1:03:31.

In light of these concessions, the court asked several related questions, including the following:

> Q. [I]s there a situation which human-to-human contact could lead to exposure to a biologic that would entitle [Appellants] to hazardous duty pay?
>
> A. There may be a narrow set of circumstances. . . .

Id. at 47:47-48:25.

> Q. Is your position that human-to-human contact that's required as part of the job can lead to exposure to biologics and to compensation?
>
> A. . . . Is there any situation in which being near another individual could give rise [to enhanced pay]? Potentially.

Id. at 57:12-58:00.

To sum up the government's position, I asked the government whether "there are circumstances wherein a correctional officer can be entitled to hazardous pay," and the government responded "yes."[6] *Id.* at 56:05-21. This statement by the government, in my view, belies the argument that Appellants have not alleged plausible claims.

The majority dismisses out of hand the government's stated position at oral argument. The majority asserts that the government's answers at oral argument were "vague" and "open ended." Maj. Op. at 19 n.8. But the "yes" or "no" question whether "there are circumstances wherein a correctional officer can be

[6] The government did not explain at the en banc oral argument why it changed its position. But one member of the en banc court remarked, "I know you are trying to not foreclose a reading that would give benefits to people in the future if they come up with a better argument," and the government did not dispute it. En Banc Oral Arg. 1:02:581:03:45. This effort to buoy the government's position cements Appellants' point that they have stated plausible claims for relief. It recognizes that the majority's focus has been on whether Appellants *proved* entitlement and not whether they stated plausible claims for relief. In addition, by not holding the government's feet to its concessions, the majority unwisely takes this policy decision out of the government's hands.

entitled to hazardous pay" was neither vague nor open ended. En Banc Oral Arg. at 56:0521. Nor was the answer "yes" vague or open ended. *Id.* There is no lack of clarity in either.

Second, the majority determines that the government's statements are "a weak basis for declining to give the Virulent Biologicals and Micro-organisms categories their best interpretation." Maj. Op. at 19 n.8. But statements made by counsel before the en banc court are not a "weak basis" for resolving the issue at hand. This court often accepts such statements as "concessions" or "admissions" and relies on them in reaching and writing its determinations. *See Taylor Energy Co. LLC v. United States,* 975 F.3d 1303, 1312 n.8 (Fed. Cir. 2020) (declining to consider a "compelling," potentially "dispositive" argument because the government conceded it during oral argument); *see also Checo u. Shinseki,* 748 F.3d 1373,1378 n.5 (Fed. Cir. 2014) (questioning a tribunal's "reluctance to accept [the government's] concession" in view of the general rule that admissions are binding (collecting cases)). The majority advances no persuasive reason why in this appeal we should treat the government's responses to the court's questions as weak.

Third, the majority argues that the government's statements before the en banc court should be ignored because "the government has not argued in this case for any form of deference for its reading of OPM's regulations." Maj. Op. at 19 n.8. This argument misapprehends what is required at a Rule 12(b)(6) stage. Appellants need not prove that the government believes in and stands by its own statements made before the court.

The en banc statements undermine the majority's holding which limits this element to employees that

are "working directly or indirectly with" a virulent biological or microorganism. *See* Maj. Op. at 18-19 (stating that the regulations do not "encompass contagious-disease transmission via ambient exposure not resulting from working directly or indirectly with the virulent biological or pathogenic micro-organism"); *id.* at 4 (explaining that the regulations limit enhanced pay to "certain situations within laboratories"). Appellants' complaint alleging COVID-19 exposure, analogous to that of a healthcare worker, adequately pleads this element. *See* J.A. 27-33.

In addition, there exists principled substantive reasons why COVID-19 exposure falls within the scope of the regulations and why the regulations are not limited to the narrower construction of "working directly or indirectly with the virulent biological or pathogenic micro-organism." Maj. Op. at 18-19.

First, the government's narrower "work directly or indirectly" interpretation is at odds with the common meaning of the regulatory language "work with or in close proximity to." *See, e.g.,* Proximity, *Black's Law Dictionary* (11th ed. 2019) ("The quality, state, or condition of *being near* in time, place, order, or relation." (emphasis added)). If the OPM intended to limit the phrase to mean only laboratory experimentation, it could have done so. But it chose instead to use a phrase that unambiguously encompasses COVID-19 exposure. *See Conn. Nat. Bank v. Germain.,* 503 U.S. 249, 253-54 (1992) ("A court should always turn first to one, cardinal canon before all others . . . [w]hen the words of a statute are unambiguous, then, this first canon is also the last[.]"); *see also Wis. Cent. Ltd. v. U.S.,* 138 S. Ct. 2067, 2074 (2018) ("[W]ords generally should be interpreted as taking their ordinary, contemporary, [and] common meaning. . ." (citation omitted)).

Limiting the regulations to the narrower construction of "working directly or indirectly" with COVID-19 also renders the phrase "in close proximity to" in the regulations superfluous. *Corley v. United States,* 556 U.S. 303, 314 (2009) ("[A] statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (citation omitted)). Working "directly" or "indirectly" with something is still "working with" it. "In close proximity to" provides the regulations with expanded, not limited, scope.

The government contends that because the section involving "Tropical Jungle Duty" of the HDP Schedule includes known exposure to disease, the other sections of the schedule necessarily exclude such exposure. Panel Resp. Br. at 33-35; *see also* Maj. Op. at 18-21 (discussing the Tropical Jungle Duty and Asbestos categories). This *expressio unius* argument is unpersuasive because the phrase "work with or in close proximity to" includes within its plain meaning "exposure to serious disease." *See* 5 C.F.R., Pt. 550, Subpt. I, App. A (HDP Schedule) ("work with or in close proximity to . . . Virulent biologicals . . . which when introduced into the body are *likely to cause serious disease or fatality"* (emphasis added)). As a result, I would not read out exposure from the broader phrase just because other sections of the HDP schedule cover narrower circumstances. *Orlando Food Corp. v. U.S.,* 423 F.3d 1318, 1325 (Fed. Cir. 2005) ("[T]he maxim *expressio unius est exclusio alterius* is not useful when its application would produce a result that is inconsistent with the plain language of the statute."). It seems just as logical that the Tropical Jungle Duty category, which falls within the same schedule as the at-issue "virulent biologicals" category, supports an expansive reading because it shows

that the OPM was aware of the risks associated with exposure to hazards and intended the regulations to encompass them.[7] *See Marx v. Gen. Revenue Corp.,* 568 U.S. 371, 381 (2013) (The canon "can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion." (citation omitted)).

Second, the narrower interpretation effectively eliminates the virulent biologicals and microorganisms categories because, as discussed above, the duty must also be unusual compared to the employee's typical job duties. During oral argument before the panel, when pressed to explain what circumstances would permit HDP under the government's proposed interpretation, the only example the government could provide was if someone untrained to work with viruses was required to harvest virulent tissue culture. Oral Arg. at 31:00-31:30. But the regulations do not require a "training" or other similar limitations. This explanation exposes the weakness of the narrower reading, and may have been a reason why the government conceded this position before the en banc court.[8] *See Lau Ow Bew v.*

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[7] The government also relied on examples of what qualifies for EDP in the regulation to argue that the "microorganism" category should be limited to those examples. Panel Resp. Br. at 29-31; *see also* Maj. Op. at 14-16 (applying a limiting interpretation because of the EDP examples). There is no compelling reason to narrow a regulation's expansive scope because of non-limiting examples.

[8] The narrower interpretation also raises serious questions as to the regulations' validity. *Corley,* 556 U.S. at 314; *Belkin Int'l, Inc. v. Kappos,* 696 F.3d 1379, 1384 (Fed. Cir. 2012) ("[R]egulations cannot be interpreted to trump fl statutory command. . . ."). Nothing in the statutes suggests that enhanced pay may be limited to employees who work "directly or indirectly" with a virus or microorganism in a laboratory. *See* 5 U.S.C. §§ 5545(d), 5343(c)(4) (requiring merely that the hazard be unusual); *see also* En Banc Oral Arg. at 47:47-48:25, 57:12-

United States, 144 U.S. 47, 59 (1892) ("Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."); *Green v. Brennan,* 578 U.S. 547, 553-54 (2016) (applying canons of statutory interpretation to regulations).

Third, *Adair* does not compel the narrower interpretation. *Contra* Maj. Op. at 14-16. *Adair* considered a completely different factual situation—whether employees working around "inmates who incidentally smoke" constituted "[w]orking with or in close proximity to *poisons (toxic chemicals)." Adair,* 497 F.3d at 1257-58 (emphasis added). Appellants' allegations here are substantially more aligned with the regulatory language and more plausible. *See id.* at 1258 (explaining that secondhand smoke was a "known hazard" that had long been "ubiquitous in the ambient work environment").

Fourth, extrinsic materials support including COVID-19 exposure in the regulatory requirement. *Contra* Maj. Op. at 17-18, 22-23. On March 7, 2020, OPM published a memorandum (the "OPM Memo"), which explains that federal employees may recover EDP or HDP for COVID-19 exposure.[9] *U.S. Office of*

1:03:31 (the government conceding that human-to-human contact could satisfy the "work with or in close proximity to" element). *See supra* note 2.

[9] For its part, the government relied on a non-operative Federal Personnel Manual, which provided examples of what qualified for HDP. En Banc Resp. Br. at 8-9 (citing Fed. Personnel Manual, Supp. 990-2 § 550-E-4); *see also* Maj. Op. at 17-18. Setting aside the expansive regulatory language, I do not believe non-limiting examples from a manual that was retired in 1993

Personnel Management Questions and Answers on Human Resources Flexibilities and Authorities for Coronavirus Disease 2019 (*COVID-19),* OPM Memorandum No. 2020-05, Attach. A at 11-13 (Mar. 7, 2020).[10] The OPM Memo provides that COVID-19 exposure falls within the HDP "virulent biologicals" category when the employee is "exposed to the virus during the performance of assigned duties (e.g., as in the case of a poultry handler or health care worker)" but not when the employee is incidentally exposed "to the public or other employees who are ill." *Id.* at 11-12. "Poultry handlers" and "health care workers" are obviously not laboratory employees working directly or indirectly with COVID19. These employees' jobs, like the poultry handlers, require them to work closely with or around other people, subjecting the employees to the hazard of COVID-19 exposure while on the job. The OPM Memo also counsels that EDP may be granted in similar situations. *Id.* at 11-13.

Consistent with the OPM Memo, the government recognizes that agencies have awarded HDP and EDP for COVID-19 exposure or published internal guidance explaining that their employees may be entitled to enhanced pay for COVID-19 exposure. For instance,

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are more persuasive than the 2020 OPM Memo that addresses the precise issue in this case.

[10] During en banc argument I incorrectly stated that the OPM Memo was attached to Appellants' complaint. In fact, the Appellants reference the OPM Memo in the complaint. *See* J.A. 27 (J 18); *Celgene Corp. v. Mylan Pharms. Inc.,* 17 F.4th 1111, 1128 (Fed. Cir. 2021) ("[A] document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment." (citation omitted)); Maj. Op. at 22 (noting that "both Appellants and the government argue that [the OPM Memo] is instructive and favorable to their respective positions").

the government acknowledged that the Indian Health Service, an agency within Department of Health & Human Services, awarded enhanced pay for COVID-19 exposure. *See* En Banc Oral Arg. at 43:23-44:04; *see also Brief for AFL-CIO as Amicus Curiae Supporting Appellants,* 2022 WL 4354602 at *2021. The U.S. Department of the Interior likewise published guidance explaining that its employees may be entitled HDP or EDP. *Memorandum from Raymond A. Limon, Deputy Assistant Secretary-Human Capital and Diversity Chief Human Capital Officer, to Human Capital Officers* (April 21, 2020); *U.S. Dep't of the Interior Human Resources Flexibilities Guide for Employees, Emergency Response Reference for Coronavirus Disease 2019 (COVID-19)* at 10 (Mar. 3, 2020). On this point, we should recognize both what the government does and what it says.

In the majority's view, "the OPM Memo does not speak with one clear, consistent voice" or provide "any interpretive analysis." Maj. Op. at 22-23. But it cites no legal authority for such a rigid test. As discussed above, the OPM Memo—based on its text and how other agencies have understood it—is a persuasive extrinsic material for the interpretation issues in this case.

The majority also states that it does not need to afford the OPM Memo "deference" because the OPM Memo did not go through "formal rulemaking." *Id.* at 23. But the parties do not argue deference. *See, e.g.,* En Banc Op. Br. at 31-32; En Banc Resp. Br. at 40-41,49. The OPM Memo illustrates, in the government's own words, what the government practice was during the time period in question. It shows that HDP and EDP were available on a case-by-case basis for COVID-19 related risks. It evidences OPM's understanding of

its regulations' scope and is therefore indicative of whether the regulations cover COVID-19 exposure.[11]

Thus, the regulatory language encompasses COVID-19 exposure, and Appellants plausibly alleged that they were assigned duties that required them to "work with or in close proximity to" a virulent biological or microorganism.

CONCLUSION

Appellants have stated plausible claims on which relief may be granted. Questions of fact remain to determine ultimately whether, and which, Appellants are entitled to any, and what amount of HDP, EDP, and the derivative claims. For these reasons, I respectfully dissent.

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[11] The majority states that "Appellants' theory would broaden the Virulent Biologicals and Micro-organisms categories to cover . . . far more [employees] than any other category in the HDP and EDP Schedules. Administering such a differential pay would no doubt require significant amounts of investigation and review throughout the government on a workplace-to-workplace basis." Maj. Op. at 24. This court should not justify decisions based on policy considerations that more appropriately belong in the hallways and hearing rooms of Congress, or within agency policy-setting directorates. In any event, the majority's policy considerations are belied by the record before this court given that agencies have published instructive guidance that addresses and unites HPD, EDP, and COVID-19 exposure.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-1662

CODY L. ADAMS, ROSE M. ADAMSON, JOSEPH P. AGIUS, DARA W. ALLICK, JENNIFER A. ANGEL, MICHAEL T. ANGELO, SAMMY APONTE, ALICIA K. AUSTIN-ZITO, LUKE M. BADARACCO, CHAD J. BARGSTEIN, *et al.*,

Plaintiffs-Appellants

v.

UNITED STATES,

Defendant-Appellee

Appeal from the United States Court of Federal Claims in No. 1:20-cv-00783-CFL, Senior Judge Charles F. Lettow.

MOLLY A. ELKIN, McGillivary Steele Elkin LLP, Washington, DC, argued for plaintiffs-appellants. Also represented by GREGORY K. MCGILLIVARY, THEODORE REID COPLOFF.

ERIC LAUFGRABEN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, ERIC P. BRUSKIN, ALBERT S. IAROSSI, PATRICIA M. MCCARTHY, CATHARINE PARNELL, LIRIDONA SINANI; ADAM GARRET EISENSTEIN, DOUGLAS SETH GOLDRING, Office of General Counsel,

Federal Bureau of Prisons, United States Department of Justice, Washington, DC.

PER CURIAM.

ORDER

This case was argued before a panel of three judges on October 6, 2021. Thereafter, a sua sponte request for a poll on whether to hear this case en banc was made. A poll was conducted, and a majority of the judges in regular active service voted for en banc consideration.

Accordingly,

IT IS ORDERED THAT:

(1) This case will be heard en banc under 28 U.S.C. § 46 and Federal Rule of Appellate Procedure 35(a). The court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified.

(2) The parties are requested to file supplemental briefs to address the following issues:

A. How should the term "unusual[]" be understood in the context of establishing "pay differentials" and "proper differentials" under 5 U.S.C. §§ 5343(c)(4), 5545(d)?

B. In view of *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007), 5 C.F.R. § 550.902 (HDP Regulation), and Appendix A of 5 C.F.R. Pt. 550, Subpt. I (HDP Schedule), what is the meaning of "accident?" What distinction, if any, is there between accidental exposure and incidental exposure?

C. If we hold that the HDP Schedule and 5 C.F.R. Pt. 532, Subpt. E, Appx. A (EDP Schedule) are

not limited to laboratory-specific duties, what limits, if any, are there to the "work[] with or in close proximity to" language in the HDP and EDP Schedules?

D. Are infected persons and surfaces "*primary* containers of organisms pathogenic for man," as recited in the EDP Schedule for distinguishing between high- and low-degree hazards? *See* EDP Schedule, at Microorganisms (emphasis added).

E. If we conclude that the Court of Federal Claims properly granted dismissal, to what extent could the underlying complaint be amended to establish a plausible claim for relief that satisfies the "short and plain statement" standard of RCFC 8?

(3) Appellants' en banc opening brief is due 60 days from the date of this order. Appellee's en banc response brief is due within 45 days of service of Appellants' en banc opening brief, and Appellants' reply brief within 30 days of service of the response brief. The court requires 28 paper copies of all briefs and appendices provided by the filer within 5 business days from the date of electronic filing of the document. The parties' briefs must comply with Fed. Cir. R. 32(b)(1).

(4) The court invites the views of amici curiae. Any amicus brief may be filed without consent and leave of court. Any amicus brief supporting Appellants' position or supporting neither position must be filed within 14 days after service of Appellants' en banc opening brief. Any amicus brief supporting the Appellee's position must be filed within 14 days after service of the Appellee's en banc response brief. Amicus briefs must comply with Fed. Cir. R. 29(b).

(5) This case will be heard en banc based on all of the briefing and oral argument.

(6) Oral argument will be scheduled at a time and date to be announced later.

June 27, 2022
Date

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

[Filed: February 5, 2021]

No. 20-783 C

CODY L. ADAMS, *et al*

Plaintiffs

v

THE UNITED STATES

Defendant

JUDGMENT

Pursuant to the court's Opinion And Order, filed February 5, 2021, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' complaint is dismissed for failure to state a claim. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Anthony Curry
Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

[Filed: February 5, 2021]

No. 20-783C

CODY L. ADAMS, *et al.*,
Plaintiffs,

v.

UNITED STATES,
Defendant.

Claim by prison guards and food workers for hazardous duty pay or environmental differential pay; 5 U.S.C. §§ 5545(d), 5343(c)(4); work with, and in close proximity to, persons infected with COVID-19 virus

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Theodore R. Coploff, McGillivary Steele Elkin LLP, Washington, D.C., for plaintiffs.

Eric E. Laufgraben, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the briefs were Jeffrey Bossert Clark, Acting Assistant Attorney General, Robert E. Kirschman, Jr., Director, Allison Kidd-Miller, Assistant Director, and Liridona Sinani, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., as well as Marie C. Clarke, Douglas S. Goldring, and Kathleen Haley Harne, Office of General Counsel, Federal

Bureau of Prisons, United States Department of Justice, Washington, D.C.

OPINION AND ORDER

LETTOW, Senior Judge.

Plaintiffs, current and former employees of the Federal Bureau of Prisons, Federal Correctional Institution in Danbury, Connecticut ("FCI Danbury") have sued the United States, seeking a declaratory judgment, hazardous duty pay, environmental differential pay, overtime pay, interest, and attorneys' fees and costs. *See* Compl. at 16-22, ECF No. 1. The current and former employees assert that they are entitled under federal law to additional pay due to their "work with or in close proximity to objects, surfaces, and/or individuals infected with" the novel coronavirus.[1] Compl. ¶¶ 25, 30. Defendant has moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"). *See* Def.'s Mot. to Dismiss or, in the Alternative, for a More Definite Statement ("Def.'s Mot."), ECF No. 9. After briefing, *see* Pls.' Resp. to Def.'s Mot. ("Pls.' Resp."), ECF No. 10; Def.'s Reply to Pls.' Resp. ("Def.'s Reply"), ECF No. 13, the court held a hearing on December 22, 2020. The motion is ready for disposition.

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[1] The novel coronavirus, or SARS-CoV-2, causes the disease known as COVID-19. *See* Vivien Williams, *How the Virus that Causes COVID-19 Differs from Other Coronaviruses*, Mayo Clinic News Network (Mar. 30, 2020), https://newsnetwork.mayoclinic.org/discussion/how-the-virus-that-causes-covid-19-differs-from-other-coronaviruses/. While the terms for the virus and the disease are often conflated, the novel coronavirus itself is the "virulent biological[]" or "hazardous micro-organism[]" relevant to plaintiffs' claims. Compl. ¶ 28.

The court concludes that, in light of binding precedent, plaintiffs' alleged exposure to the novel coronavirus does not entitle them to compensation pursuant to 5 U.S.C. §§ 5545(d) or 5343(c)(4). Given that plaintiffs' claim for overtime pay under the Fair Labor Standards Act ("FLSA") is derivative of their claims for hazardous duty pay and environmental differential pay, this claim must also be dismissed. Because plaintiffs have failed to state a claim upon which relief may be granted, the government's motion to dismiss is GRANTED and plaintiffs' complaint is DISMISSED.

BACKGROUND[2]

The novel coronavirus was first identified in 2019 "as the cause of a disease outbreak that originated in China." *Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC (Dec. 22, 2020), https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963. COVID-19, a contagious respiratory illness caused by the virus, can result in symptoms ranging from mild to severe. *See Symptoms of Coronavirus*, CENTERS FOR DISEASE CONTROL & PREVENTION (Dec. 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html. On March 11, 2020, the World Health Organization declared the coronavirus outbreak a pandemic.[3] The United States

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[2] The recitations that follow do not constitute findings of fact, but rather are recitals attendant to the pending motions and reflect matters drawn from the complaint, the parties' briefs and records, and documents appended to the complaint and briefs.

[3] *See* WHO Director-General's opening remarks at the media briefing on COVID-19, WORLD HEALTH ORGANIZATION (Mar. 11, 2020), https://www.who.int/director-general/ speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

continues to struggle with preventing the spread of the virus as states report new infections and deaths every day. *See generally Coronavirus Resource Center*, JOHNS HOPKINS UNIVERSITY & MEDICINE, https://coronavirus.jhu.edu/map.html (last visited Feb. 4, 2021).

The virus "can [be] spread by a person being exposed to small droplets or aerosols that stay in the air for several minutes or hours." *Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC (Dec. 22, 2020), https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963. Infection can also result when "a person touches a surface or object with the virus on it and then touches his or her mouth, nose or eyes, although this isn't considered to be a main way it spreads." *Id.* These characteristics enable the virus to spread rapidly in confined spaces, leaving prison populations and staff susceptible to infection. As of February 2021, 2,164 federal inmates and 1,745 staff members of the Bureau of Prisons currently "have confirmed positive test results for COVID-19 nationwide," while more previously have had the virus or tested positive for the disease, and have recovered. *COVID-19 Update*, FEDERAL BUREAU OF PRISONS (Feb. 4, 2021), https://www.bop.gov/coronavirus/. The deaths of 216 federal inmates and 3 staff members have been attributed to the disease. *Id.*

FCI Danbury, which houses over 650 inmates, is a low security federal correctional institution. Compl. ¶¶ 7, 11. The plaintiffs employed at FCI Danbury include a correctional officer, a cook supervisor, and other "current or former correctional worker[s] employed by the United States Department of Justice, Bureau of Prisons, at FCI Danbury." Compl. ¶¶ 3-7. According to the complaint, over 100 employees and inmates of FCI Danbury have tested positive for COVID-19.

Compl. ¶ 17. Plaintiffs filed suit in this court on June 26, 2020, seeking "a declaratory judgment, damages and other relief" pursuant to federal statutes. Compl. ¶ 1. These current and former employees are either general schedule salaried employees eligible for hazardous duty pay pursuant to 5 U.S.C. § 5545(d), or waged employees eligible for environmental differential pay pursuant to 5 U.S.C. § 5343(c)(4). *See* Compl. ¶¶ 33, 43; *see also Adams v. United States*, ___ Fed. Cl. ___, ___, 2020 WL 7334354, at *2 (Dec. 14, 2020) (hereinafter "*Charles Adams*") ("[H]azardous duty pay is available to general schedule salaried employees, while environmental differential pay is available to waged employees."). Plaintiffs allege that they are entitled to differential pay due to their "work in or in close proximity to objects, surfaces, and/or individuals infected with" the novel coronavirus. Compl. ¶¶ 36-38, 48-51.

STANDARDS FOR DECISION

Under RCFC 12(b)(6), a complaint will survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The factual matters alleged "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555-56 (citations omitted).

When reviewing the complaint, "the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (citing *Papasan v. Allain*, 478 U.S. 265, 283 (1986)) (additional citation omitted). Conclusory statements of law and fact, however, "are not entitled to the assumption of truth" and "must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. "'[N]aked assertion[s]' devoid of 'further factual enhancement'" are insufficient to state a claim. *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557); *accord Bradley v. Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim.").

ANALYSIS

I. Hazardous Duty Pay Pursuant to 5 U.S.C. § 5545(d)

General schedule salaried federal employees qualify for hazardous duty pay when they are assigned and perform a "duty involving unusual physical hardship or hazard," unless their employment classification "takes into account the degree of physical hardship or hazard involved in the performance of [their] duties." 5 U.S.C. § 5545(d). In this respect, the "physical hardship or hazard" must be one that is "not *usually* involved in carrying out the duties of [the] position." *Id.* (emphasis added). Congress tasked the Office of Personnel Management ("OPM") with establishing schedules of pay differentials for hazardous duty pay, *see id.*, as well as prescribing regulations necessary for the administration of the statute, 5 U.S.C. § 5548(d). OPM has defined "[d]uty involving physical hardship" as "duty that may not in itself be hazardous, but

causes extreme physical discomfort or distress and is not adequately alleviated by protective or mechanical devices, such as . . . exposure to fumes, dust, or noise that causes nausea, skin, eye, ear, or nose irritation." 5 C.F.R. § 550.902. OPM further defined "[h]azardous duty" as "duty performed under circumstances in which an accident could result in serious injury or death, such as duty performed on a high structure where protective facilities are not used . . . ." *Id.*

Under its Schedule of Pay Differentials Authorized for Hazardous Duty Pay, OPM set forth numerous categories of duties involving physical hardship or hazard. 5 C.F.R. Part 550, Subpart I, Appx. A. Among these categories is "work with or in close proximity to . . . [v]irulent biologicals." *Id.* Plaintiffs rely on this category in asserting their claim for hazardous duty pay. *See* Compl. ¶¶ 32-38. OPM elaborates that the term "[v]irulent biologicals" refers to "[m]aterials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection." 5 C.F.R. Part 550, Subpart I, Appx. A. The Federal Personnel Manual provides examples of when an employee works "with or in close proximity to . . . [v]irulent biologicals," including "[o]perating or maintaining equipment in biological experimentation or production[, c]leaning and sterilization of vessels and equipment contaminated with virulent microorganisms," and "[c]aring for or handling disease-contaminated experimental animals in biological experimentation and production in medical laboratories, the primary mission of which is research and development not associated directly with patient care." Federal

Personnel Manual Supp. 990-2, § 550-E-4, 1973 WL 151518 (Feb. 28, 1973).[4]

In sum, plaintiffs who are current or former general schedule salaried employees of FCI Danbury must establish three elements in order to state a claim for hazardous duty pay: (1) the employee was assigned to and performed work "with or in close proximity to" the novel coronavirus, 5 C.F.R. Part 550, Subpart I, Appx. A; (2) the virus itself is a "[v]irulent biological[]," *id.*; and (3) the employees' job classifications do not take exposure to the virus into account, *i.e.*, the employees' exposure to the virus is an "*unusual* physical hardship or hazard," 5 U.S.C. § 5545(d) (emphasis added); *see also* 5 C.F.R. § 550.904(a).[5]

In its motion to dismiss, the government avers that plaintiffs have failed to sufficiently allege that they worked "with or in close proximity to" the novel coronavirus itself, only that they have performed "work with or in close proximity to objects, surfaces, and/or individuals infected with" the virus. Def.'s Mot. at 15 (quoting Compl. ¶¶ 25, 30) (emphasis removed). Plaintiffs counter that the language used in their

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[4] While OPM retired the Federal Personnel Manual on December 31, 1993, the publication "continues to be a valuable resource for construing regulations that were promulgated or were in effect" prior to the date of retirement. *Schmidt v. Department of Interior*, 153 F.3d 1348, 1353 n.4 (Fed. Cir. 1998) (citing *Markland v. Office of Pers. Mgmt.*, 140 F.3d 1031, 1034 (Fed. Cir. 1998)).

[5] "As the statute does not define 'unusual,' [courts should] apply its ordinary meaning. It is clear from a plain reading of the statute that [the term] 'unusual physical hardship or hazard' include[s] those 'not usually involved in carrying out the duties' of an employee's position." *Adair v. United States*, 497 F.3d 1244, 1253 n.2 (Fed. Cir. 2007) (quoting 5 U.S.C. § 5545(d)).

complaint does not distinguish their claims from the regulation in any meaningful way. Pls.' Resp. at 11.

The Federal Circuit addressed the scope of both 5 U.S.C. § 5545(d) and 5 C.F.R. § 550.902 in *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007). In *Adair*, prison guards employed by the Federal Correctional Institution in Jesup, Georgia sought "enhanced back pay for their exposure to inmates' smoking . . . ." *Adair*, 497 F.3d at 1249. The Federal Circuit affirmed the Court of Federal Claims' dismissal of plaintiffs' complaint under RCFC 12(b)(6), emphasizing that 5 U.S.C. § 5545(d) "[c]learly . . . does not cover all physical hardships or hazards, but only those that are 'unusual.'" *Id.* at 1253 (footnote omitted). In concluding that exposure to secondhand smoke was not an "unusual" hardship under the plain meaning of the statute, the court contrasted the prison guards' claim to examples of "unusual physical hardships or hazards" provided by the Chairman of the U.S. Civil Service Commission:

> We would visualize assignments such as those requiring *irregular or intermittent participation* in hurricane weather flights, participation in test flights of aircraft during their developmental period or after modification, participation in trial runs of newly built submarines or in submerged voyages of an exploratory nature such as those under the Polar ice fields, and performance of work at extreme heights under adverse conditions, as among those meeting the criteria of unusual physical hardships or hazard. . . .The examples cited above . . . take into consideration, for example, such matters as the need to deliberately operate equipment such as newly developed or modified aircraft beyond its known design capabilities or safe

> operating limits, and exposure to elements or conditions over which little or no control can be exercised.

Id. at 1254 (quoting *Hazardous Duty Pay: House Report No. 31*, 89th Cong. (1st Sess. 1965)) (emphasis added). While the cited examples were assignments requiring "irregular or intermittent participation," *id.*, secondhand smoke at the prison "was commonly encountered indoors and outdoors," *id.* at 1253. The court also noted that "Congress . . . could not have intended to have included [secondhand smoke] as an unusual risk or hazardous work situation because at the time the statute was enacted, Congress was unaware of the dangers of" exposure to secondhand smoke. *Id.* at 1254.

In the present case, plaintiffs encounter an analogous obstacle in their workplace. While secondhand smoke and the novel coronavirus pose distinct risks to human health, neither qualifies as an "unusual" hardship under the plain meaning of 5 U.S.C. § 5545(d). The employees' potential exposure to the novel coronavirus is not the result of an "irregular or intermittent" assignment, *Adair*, 497 F.3d at 1254 (citation omitted), but appears to stem from their regular duties at FCI Danbury. Plaintiffs do not allege they have performed new duties since the beginning of the pandemic, but that "[a]s a result of plaintiffs' performance of their official duties . . . [they] have been exposed" to the novel coronavirus. Compl. ¶ 28. Just as the prison guards in *Adair* were exposed to secondhand smoke when their duties of employment "involved the caretaking and monitoring of inmates," plaintiffs here were and have been allegedly exposed to the novel coronavirus in executing their official duties at FCI Danbury. *See Adair*, 497 F.3d at 1253. "Congress,

moreover, could not have intended to have included" exposure to the novel coronavirus "as an unusual risk or hazardous work situation because at the time the statute was enacted, Congress was unaware of the dangers of" the virus. *Id.* at 1254. In light of binding precedent, therefore, exposure to the virus at FCI Danbury cannot be characterized as an "unusual" hardship under 5 U.S.C. § 5545(d).

Congress "left open the possibility," however, that exposure to the virus "could be covered by the statute by delegating to OPM the authority to establish 'pay differentials for duty involving unusual physical hardship or hazard.'" *Adair*, 497 F.3d at 1254 (quoting 5 U.S.C. § 5545(d)) (emphasis removed). To date exposure to the novel coronavirus at FCI Danbury does not qualify as either a "duty involving physical hardship" or a "hazardous duty" as defined by OPM. While plaintiffs allege that they "have performed work in or in close proximity to objects, surfaces, and/or individuals infected with" the novel coronavirus "without sufficient protective devices," Compl. ¶ 36, an allegation of insufficient protective equipment does not establish that the hazard posed by the virus "is not adequately alleviated by protective or mechanical devices," *Adair*, 497 F.3d at 1255 (noting that secondhand smoke "can be adequately alleviated by protective or mechanic[al] devices, such as ventilation systems); *see* 5 C.F.R. § 550.902.[6] Furthermore,

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[6] OPM's guidance regarding hazardous duty pay based on potential exposure to the novel coronavirus further calls into question plaintiffs' claim under 5 U.S.C. § 5545(d):

> The hazard pay differential cannot be paid to an employee who may come in contact with the virus or another similar virus through incidental exposure to the public or other employees who are ill rather than

plaintiffs' work cannot be categorized as a "hazardous duty," as potential exposure to the virus is dissimilar to an "accident . . . such as duty performed on a high structure where protective facilities are not used . . . ." 5 C.F.R. § 550.902. Plaintiffs' claim for hazardous duty pay, therefore, lacks textual support from the relevant statute, the corresponding regulation, and binding precedent.[7]

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being exposed to the virus during the performance of assigned duties (e.g., as in the case of a poultry handler or health care worker). Also, the virus must be determined to be likely to cause serious disease or fatality for which protective devices do not afford complete protection.OPM Memorandum No. 2020-05, Attach. A at 12 (Mar. 7, 2020), *available at* https://go.usa.gov/xG2KS. While plaintiffs allege that over 100 employees and inmates of FCI Danbury have tested positive for COVID-19, Compl. ¶ 17, the widespread nature of the pandemic raises the probability that plaintiffs have come into contact with the virus via "incidental exposure" as described by OPM.

[7] The court acknowledges the recent decision in *Charles Adams*, in which correctional workers at the Bureau of Prisons Federal Medical Center in Lexington, Kentucky sued the United States for hazardous duty pay, environmental differential pay, and overtime pay. *See Charles Adams*, ____Fed. Cl. ____, 2020 WL 7334354. Plaintiffs assert that *Charles Adams* presented and resolved "near-identical factual and legal issues" to the case currently before the court. *See* Pls.' Notice of Suppl. Authority at 4, ECF No. 16. To the extent that the facts and legal issues in the present case parallel those presented in *Charles Adams*, the court respectfully disagrees with the decision in that case to hold that the plaintiffs there had "stated a claim for relief that rises above the speculative level." *Charles Adams*, ____Fed. Cl. ____, 2020 WL 7334354, at *6. The Federal Circuit's interpretation of the relevant terms in 5 U.S.C. § 5545(d), 5 C.F.R. § 550.902, and OPM's schedule of pay differentials precludes this court from concluding that plaintiffs have stated a claim for hazardous duty pay.

II. Environmental Differential Pay Pursuant to 5 U.S.C. § 5343(c)(4)

While general schedule salaried employees are eligible for hazardous duty pay in certain scenarios, waged employees qualify for environmental differential pay "for duty involving unusually severe working conditions or unusually severe hazards . . . ." 5 U.S.C. § 5343(c)(4). OPM promulgated 5 C.F.R. § 532.511 in response to the statute, authorizing "environmental differential pay when [an employee is] exposed to a working condition or hazard that falls within one of the categories approved by the Office of Personnel Management." 5 C.F.R. § 532.511(a)(1). The categories upon which plaintiffs rely are "work[] with or in close proximity to micro-organisms" which present a "high degree hazard," and "work[] with or in close proximity to micro-organisms" which present a "low degree hazard." 5 C.F.R. Part 532, Subpart E, Appx. A. OPM elaborated on the "high degree hazard" category in Appendix A, stating that it covers "work situations wherein the use of safety devices and equipment, medical prophylactic procedures such as vaccines . . . and other safety measures do not exist or have been developed but have not practically eliminated the potential for . . . personal injury." *Id.* If waged employees seek environmental differential pay under this category, their work must "involve[] potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease." *Id*. The examples cited by OPM for "work[] with or in close proximity to micro-organisms" posing a "high degree hazard" include "[d]irect contact with primary containers of organisms pathogenic for man such as culture flasks, culture test tubes, hypodermic syringes and similar instruments," and "cultivating virulent organisms on

artificial media." *Id.* The category of "work[] with or in close proximity to micro-organisms" which pose a "low degree hazard" encompasses "situations for which the nature of the work does not require the individual to be in direct contact with primary containers of organisms pathogenic for man . . . ." *Id.*

Plaintiffs seeking environmental differential pay, therefore, must show that (1) they "work[ed] with or in close proximity to" the novel coronavirus; (2) the virus is a "micro-organism" and safety precautions "have not practically eliminated" the risk of infection and "personal injury;" and, if seeking pay under the "high degree hazard category, (3) plaintiffs' duties "involve[] potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease." 5 C.F.R. Part 532, Subpart E, Appx. A.

Again, *Adair* compels the court to conclude that plaintiffs have failed to state a claim. Just as exposure to the novel coronavirus is not "unusual" under § 5545(d), such exposure cannot be characterized as "unusually severe" under § 5343(c)(4). Plaintiffs in *Adair* argued that exposure to cigarette smoke entitled them to environmental differential pay under two categories: "Poisons (toxic chemicals)—high degree hazard . . . and . . . Poisons (toxic chemicals)—low egress hazard." *Adair*, 497 F.3d at 1256-57. In holding that the plaintiffs in *Adair* had failed to state a claim under § 5343, the Federal Circuit emphasized the importance of the examples of "high or low degree hazards provided in the regulations . . . . Although the examples are not exhaustive, they all describe scenarios where the job assignment requires directly or indirectly working *with* toxic chemicals or containers that hold toxic chemicals as part of a job assignment

. . . ." *Id.* at 1257-58 (emphasis in original). Notably, the Federal Circuit pointed out that "[t]he examples do not cover situations in which the employees work with inmates who *incidentally* smoke, for there is no work '*with*' [second-hand smoke] in this context." *Id.* at 1258 (emphasis added).

In the present case, plaintiffs have not worked "with" the novel coronavirus, but "with or in close proximity to objects, surfaces, and/or individuals infected with" the virus. Compl. ¶ 48. In other words, plaintiffs allegedly have worked with objects and surfaces infected with the virus, as well as "with inmates who incidentally" have COVID-19. *Adair*, 497 F.3d at 1258. OPM's examples of "work[] with or in close proximity to micro-organisms" are instructive. As correctional officers, cook supervisors, and other employees at FCI Danbury, plaintiffs' duties are not analogous to those which require "[d]irect contact with primary containers of organisms pathogenic for man such as culture flasks, culture test tubes, hypodermic syringes and similar instruments," or "cultivating virulent organisms on artificial media." 5 C.F.R. Part 532, Subpart E, Appx. A.

Plaintiffs point to *Abbott v. United States*, 47 Fed. Cl. 582 (2000), in arguing that *Adair* does not foreclose their claims. Pls.' Resp. at 4; Hr'g Tr. 34:17 to 36:5 (Dec. 22, 2020). In *Abbott*, the court concluded that plaintiffs had stated a well-pleaded claim insofar as they allegedly worked near contaminated rivers containing "virulent biologicals." *Abbott*, 47 Fed. Cl. at 584. To be sure, *Adair* addressed categories involving "toxic chemicals," *Adair*, 497 F.3d at 1256-57, while plaintiffs allege exposure to "virulent biologicals," as in *Abbott*, 47 Fed. Cl. at 584, and "micro-organisms," Compl. ¶ 28. Even putting aside the fact that *Adair*

was decided after *Abbott*, the phrase "with or in close proximity to" is used in OPM's schedules for differential pay when working with "virulent biologicals," "micro-organisms," and "toxic chemicals." *See* 5 C.F.R. Part 550, Subpart I, Appx. A; 5 C.F.R. Part 532, Subpart E, Appx. A. *Adair* addressed a different category under the schedule for environmental differentials, but this detail does not render the Federal Circuit's decision irrelevant. "[T]he substantial relation[s] between" the categories and schedules promulgated by OPM "present[] a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)) (additional citations and quotation marks omitted). Therefore, the Federal Circuit's interpretation of the phrase "with or in close proximity to" in the context of environmental differential pay is binding on this court.[8]

III. Overtime Pay Under the Fair Labor Standards Act

Plaintiffs also claim that they "have been unlawfully deprived of overtime compensation" under FLSA. Compl. ¶ 58. The government violated FLSA, plaintiffs

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[8] The court in *Charles Adams* held that plaintiffs had sufficiently pled their claim for environmental differential pay to survive the motion to dismiss. 2020 WL 7334354, at *6. Here also, however, the Federal Circuit's interpretation of the term "with or in close proximity to," as well as its emphasis on the examples provided in OPM's schedule of environmental differentials, compel the court to dismiss plaintiff's environmental differential claim. *Compare* Compl. ¶ 48, *with Adair*, 497 F.3d at 1258 (concluding from the examples provided in 5 C.F.R. Part 532, Subpart E, Appx. A that plaintiffs did not work "with" secondhand smoke).

allege, "by failing to include hazardous duty pay and environmental differential payments . . . in the regular rate of pay at which FLSA overtime is paid." Compl. ¶ 57. The government counters that plaintiffs' failure to state a claim under either 5 U.S.C. § 5545(d) or § 5343(c)(4) precludes recovery additional overtime pay. Def.'s Mot. at 23.

The court concurs with the government, because plaintiffs' claim for overtime pay under FLSA is derivative of their claims for hazardous duty pay and environmental differential pay. FLSA provides that an employee who works over 40 hours in a workweek is entitled to "compensation for his employment in excess of the [40] hours . . . at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). The "regular rate" which employees of FCI Danbury were paid would be higher if they could claim entitlement to hazardous duty pay or environmental differential pay. Plaintiffs' failure to state a claim for these payments, however, bars their claim under FLSA as well.

CONCLUSION

For the reasons stated, the government's motion to dismiss is GRANTED. Plaintiffs' complaint shall be DISMISSED for failure to state a claim. The clerk shall enter judgment accordingly.

No costs.

It is so ORDERED.

s/ Charles F. Lettow
Charles F. Lettow
Senior Judge

APPENDIX F

5 U.S.C. § 5545(d)

(d) The Office shall establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard, and for any hardship or hazard related to asbestos, such differentials shall be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970. Under such regulations as the Office may prescribe, and for such minimum periods as it determines appropriate, an employee to whom chapter 51 and subchapter III of chapter 53 of this title applies is entitled to be paid the appropriate differential for any period in which he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position. However, the pay differential—

(1) does not apply to an employee in a position the classification of which takes into account the degree of physical hardship or hazard involved in the performance of the duties thereof, except—

(A) an employee in an occupational series covering positions for which the primary duties involve the prevention, control, suppression, or management of wildland fires, as determined by the Office; and

(B) in such other circumstances as the Office may by regulation prescribe; and

(2) may not exceed an amount equal to 25 percent of the rate of basic pay applicable to the employee.

5 C.F.R. Part 550, Subpart I – Pay for Duty Involving Physical Hardship or Hazard

5 C.F.R. § 550.901 - Purpose

This subpart prescribes the regulations required by sections 5545(d) and 5548(b) of title 5, United States Code, for the payment of differentials for duty involving unusual physical hardship or hazard to employees.

5 C.F.R. § 550.902 – Definitions

In this subpart: *Agency* has the meaning given that term in 5 U.S.C. 5102(a)(1).

Duty involving physical hardship means duty that may not in itself be hazardous, but causes extreme physical discomfort or distress and is not adequately alleviated by protective or mechanical devices, such as duty involving exposure to extreme temperatures for a long period of time, arduous physical exertion, or exposure to fumes, dust, or noise that causes nausea, skin, eye, ear, or nose irritation.

Employee means an employee covered by the General Schedule (i.e., covered by chapter 51 and subchapter III of chapter 53 of title 5, United States Code).

Hazardous duty means duty performed under circumstances in which an accident could result in serious injury or death, such as duty performed on a high structure where protective facilities are not used or on an open structure where adverse conditions such as darkness, lightning, steady rain, or high wind velocity exist.

Hazard pay differential means additional pay for the performance of hazardous duty or duty involving physical hardship.

Head of an agency means the head of an agency or an official who has been delegated the authority to act for the head of the agency in the matter concerned.

5 C.F.R. § 550.903 – Establishment of Hazard Pay Differentials

(a) A schedule of hazard pay differentials, the hazardous duties or duties involving physical hardship for which they are payable, and the period during which they are payable is set out as appendix A to this subpart and incorporated in and made a part of this section.

(b) Amendments to appendix A of this subpart may be made by OPM on its own motion or at the request of the head of an agency (or authorized designee). The head of an agency (or authorized designee) may recommend the rate of hazard pay differential to be established and must submit, with its request for an amendment, information about the hazardous duty or duty involving physical hardship showing -

(1) The nature of the duty;

(2) The degree to which the employee is exposed to hazard or physical hardship;

(3) The length of time during which the duty will continue to exist;

(4) The degree to which control may be exercised over the physical hardship or hazard; and

(5) The estimated annual cost to the agency if the request is approved.

5 C.F.R. § 550.904 – Authorization of Hazard Pay Differentials

(a) An agency shall pay the hazard pay differential listed in appendix A of this subpart to an employee

who is assigned to and performs any duty specified in appendix A of this subpart. However, hazard pay differential may not be paid to an employee when the hazardous duty or physical hardship has been taken into account in the classification of his or her position, without regard to whether the hazardous duty or physical hardship is grade controlling, unless payment of a differential has been approved under paragraph (b) of this section.

(b) The head of an agency may approve payment of a hazard pay differential when -

(1) The actual circumstances of the specific hazard or physical hardship have changed from that taken into account and described in the position description; and

(2) Using the knowledge, skills, and abilities that are described in the position description, the employee cannot control the hazard or physical hardship; thus, the risk is not reduced to a less than significant level.

(c) For the purpose of this section, the phrase "has been taken into account in the classification of his or her position" means that the duty constitutes an element considered in establishing the grade of the position - i.e., the knowledge, skills, and abilities required to perform that duty are considered in the classification of the position.

(d) The head of the agency shall maintain records on the use of the authority described in paragraph (b) of this section, including the specific hazardous duty or duty involving physical hardship; the authorized position description(s); the number of employees paid the differential; documentation of the conditions described in paragraph (b) of this section; and the annual cost to the agency.

(e) So that OPM can evaluate agencies' use of this authority and provide the Congress and others with information regarding its use, each agency shall maintain such other records and submit to OPM such other reports and data as OPM shall require.

5 C.F.R. § 550.905 – Payment of Hazard Pay Differential

(a) When an employee performs duty for which a hazard pay differential is authorized, the agency must pay the hazard pay differential for the hours in a pay status on the day (a calendar day or a 24-hour period, when designated by the agency) on which the duty is performed, except as provided in paragraph (b) of this section. Hours in a pay status for work performed during a continuous period extending over 2 days must be considered to have been performed on the day on which the work began, and the allowable differential must be charged to that day.

(b) Employees may not be paid a hazardous duty differential for hours for which they receive annual premium pay for regularly scheduled standby duty under § 550.141, annual premium pay for administratively uncontrollable overtime work under § 550.151, or availability pay for criminal investigators under § 550.181.

5 C.F.R. Part 550, Subpart I, Appendix A – Schedule of Pay Differentials Authorized for Hazardous Duty Pay Under Subpart I

Duty	Rate of hazard pay differential (percent)	Effective date
Exposure to Hazardous Agents, work with or in close proximity to:		
* * *		
(2) Toxic chemical materials. Toxic chemical materials when there is a possibility of leakage or spillage.	25	Do.
* * *		
(5) Virulent biologicals. Materials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection.	25	Do.

APPENDIX G

LIST OF PLAINTIFFS

1. Cody L. Adams
2. Rose M. Adamson
3. Joseph P. Agius
4. Dara W. Allick
5. Jennifer A. Angel
6. Michael T. Angelo
7. Sammy Aponte
8. Alicia K. Austin-Zito
9. Luke M. Badaracco
10. Chad J. Bargstein
11. Courtney R. Barnett
12. Ashley N. Bartone
13. John T. Batista
14. Marc P. Bauknecht
15. Robert E. Beddoe
16. Michael A. Beehe
17. Crystal J. Benoit
18. Andrew Bennett
19. Steven M. Bergquist
20. Matt R. Bindner
21. Yaritza Bisono
22. William K. Birdsell
23. Raul M. Blanco

24. Khadijah M. Bobon
25. Matthew A. Bouressa
26. Shaun P. Boylon
27. Daniel J. Bozek
28. Daniel T. Braga
29. Mandy M. Breece
30. Jermaine F. Brown
31. Michael Canarozz
32. William R. Carr
33. Darlene C. Castrovinci
34. Jared S. Caswell
35. Jonathan Chamorro
36. Clinton D. Chaput
37. Pasquale Chieffalo
38. Gerald F. Connors, Jr
39. Synquan A. Cooper
40. Pedro Cortes
41. Erika L. Coury
42. Daniel T. Coutinho
43. Patrick S. Crampton
44. Justin M. Cromwell
45. Leighsha Crosley
46. Timothy Cummings
47. Robert Curnan
48. Frederick W. Curtis

49. Harrison L. Ditzion
50. Brian T. Dobek
51. Jason Draper
52. Jonathan J. Drouin
53. Keith D. DuBose
54. Ryan J. DuBret
55. Brian Eagen
56. Johnny Espinal
57. Christopher K. Ethier
58. Julie Fabregas-Schindler
59. David Fay
60. Ashley R. Foisey
61. Lesley Foreman
62. John J. Foristall
63. Michael J. Fortin
64. Rubin M. Gabriel
65. Jeremiah M. Gaynor
66. John H. Garcia
67. Bose George
68. Justin D. Gibson
69. Christopher D. Glahn
70. Dylan R. Golden
71. Norberto E. Gonzalez
72. Alaina G. Goulart
73. Luther I. Grimsley

74. Sean P. Hanley
75. Gregory J. Hansen
76. Jennifer A. Harrington
77. Thomas E. Harrington
78. Eric J. Henett
79. Spencer N. Hennes
80. Michael Hoover
81. Gail M. Hornkohl
82. Raul V. Illescas
83. Barrett H. Johnson
84. Jocquel Johnson
85. Michael E. Johnson III
86. Raymond S. Johnson
87. Daniel J. Kane
88. Marvin Kinnel
89. Brian E. Kirwan-Welsh
90. Eric T. Klimiszewski
91. Thomas E. Knight
92. Mateusz P. Koniecenowski
93. Pamela J. Koniecki
94. Kevin M. Kootz
95. Ahmed Kouhail
96. Veronica T. Krener
97. William J. Kulp
98. Michael T. Lahiff

99. Angel M. LaPlante
100. Raymond J. Leahey
101. LeeOndra L. Lee
102. William A. Leger
103. Matthew J. Lehane
104. Briana E. Levesque
105. Karl E. Lewis
106. Mario M. Longo
107. Vincent J. Longo
108. Jose A. Lopez
109. Chad Loveland
110. Donnie Lui
111. Christopher M. Lumb
112. Nicholas J. Marcinek
113. Jermaine Marshall
114. Nathan S. Marshall
115. Erick A. Martinez
116. Daniel A. Matos
117. Artesia Mattis
118. Steven I. Mays
119. Christianne McGuine
120. Greg L. McKenzie
121. Steven R. McMahon
122. Sabrina L. Medvinsky
123. Tamara L. Meliti

124. Darryl M. Mendyk
125. Andrew W. Misiolek
126. Matthew R. Moca
127. Matt J. Muccioli
128. Gregory B. Murphy
129. Jose B. Nevarez
130. Brian J. Nielsen
131. Denny Nikolopoulos
132. Joshua Ochoa
133. Justin P. Olson
134. Daniel L. Ortiz
135. Brian T. Overton
136. John Pallas
137. Volodymyr Pankiv
138. Michael S. Parady
139. Joshua W. Parker
140. Anthony T. Pate
141. Michael T. Perrone
142. David Peterson
143. Shana M. Peterson
144. Mattias J. Piazza
145. Michael A. Piccirillo
146. Jamie R. Pisano
147. Jason E. Plachemski
148. Eric F. Porter

149. Zachary R. Prastine
150. John J. Puglisi
151. Loreto A. Quintiliano
152. Jessly G. Ramos
153. Andre J. Rivera
154. Samantha J. Rodriguez
155. David L. Rogers
156. Edward A. Roman, Jr.
157. Luke D. Roser
158. Richard J. Rosini
159. Brandon T. Roy
160. Randy Roy
161. Frank Rufino
162. Joseph J. Russell
163. Torianne Ruther
164. James A. Sabella
165. Julie M. Santiago
166. Nicholas N. Santos
167. Kevin S. Saunders
168. Christopher H. Schultz
169. Eric E. Schutz
170. Donald J. Shortell
171. Rebecca L. Stacy
172. Joshua Stevenson
173. Jesse D. Sylvia

174. Christopher J. Talbot
175. Johnnie J. Tardiff
176. Amos D. Telo
177. James J. Tiernan
178. Valerie L. Toth-O'Sullivan
179. Xi V. Tran
180. Andrew J. Ueberroth
181. Kashonda Van Duyne
182. Jonathan M. Vasquez
183. Alex J. Velez
184. Elizabeth M. Vermette
185. Gloria E. Wilcox
186. Maurice J. Woodbury
187. Patrick J. Wynne
188. Toby R. Yeager