

No. 22-1118

In the Supreme Court of the United States

CODY ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Congress directed the United States Office of Personnel Management (OPM) to implement a program providing hazardous duty pay to certain federal employees “for * * * duty involving unusual physical hardship or hazard.” 5 U.S.C. 5545(d). OPM has in turn promulgated regulations defining “hazardous duty” and providing pay differentials for various specified duties, including “work with or in close proximity to” “[v]irulent biologicals.” Petitioners, a group of federal corrections officers, filed this action contending they were entitled to hazardous duty pay due to the potential for ambient exposure in the workplace to SARS-CoV-2, the virus that causes COVID-19. The Court of Federal Claims dismissed petitioners’ complaint for failure to state a claim. The en banc court of appeals affirmed.

The question presented is whether petitioners’ alleged ambient workplace exposure to SARS-CoV-2 constitutes “work with or in close proximity to” “virulent biologicals” entitling them to additional compensation under OPM’s regulations.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-45a) is reported at 59 F.4th 1349. The opinion of the Court of Federal Claims (Pet. App. 50a-67a) is reported at 152 Fed. Cl. 350.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on February 14, 2023. The petition for a writ of certiorari was filed on May 12, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1966, Congress authorized the United States Civil Service Commission, the predecessor of the Office of Personnel Management (OPM), to implement a program of pay differentials for federal civilian employees “for * * * duty involving unusual physical hardship or

hazard.” Act of July 19, 1966, Pub. L. No. 89-512, § 1, 80 Stat. 318, 318 (5 U.S.C. 5545(d)). Before Congress enacted legislation authorizing those pay differentials, certain military personnel, Public Health Service officers, and wage board employees were eligible for additional hazard-related compensation, but most civilian employees were not. And no mechanism existed to compensate such employees for performing assignments involving unusual physical hardships or hazards outside their job classifications. See *Adair v. United States*, 497 F.3d 1244, 1253 (Fed. Cir. 2007).

The new hazardous duty pay (HDP) program was adopted as a gap-filling measure to compensate employees for the rare times when they are assigned to “take unusual risks not normally associated with [their] occupation[s] and for which added compensation is not otherwise provided.” *Adair*, 497 F.3d at 1254 (quoting H.R. Rep. No. 31, 89th Cong., 1st Sess. 2 (1965) (House Report)). Moreover, although an alternative proposal would have authorized compensation for any “hardship or hazard not usually involved in carrying out the duties of [an employee’s] position,” Congress specified that any such hardship or hazard must itself be “unusual.” House Report 5. Congress made that choice after the Executive Branch objected to the alternative proposal, explaining that without the “unusual” qualifier limiting the program’s scope, it would result in “greater cost and difficulty of administration.” *Ibid.*

Congress did not define duties involving “unusual physical hardship or hazard.” Nor did it identify specific duties falling within those categories. Instead, Congress directed the Civil Service Commission to “establish a schedule or schedules of pay differentials for

duty involving unusual physical hardship or hazard.” 5 U.S.C. 5545(d).

In 1972, Congress established the federal Wage System for trade, craft, and laboring employees, and enacted a similar enhanced pay program for those employees, which authorized environmental differential pay (EDP) for “duty involving unusually severe working conditions or unusually severe hazards.” Act of Aug. 19, 1972, Pub. L. No. 92-392, 86 Stat. 564, 567. As with the HDP program, Congress did not define the phrase “unusually severe working conditions or * * * hazards,” again directing the Civil Service Commission to promulgate regulations authorizing proper differentials for such duties. 5 U.S.C. 5343(c)(4).

Pursuant to these statutory mandates, OPM has promulgated schedules of pay differentials for both HDP and EDP. See 5 C.F.R. Pt. 550, Subpt. I, App. A; 5 C.F.R. Pt. 532, Subpt. E, App. A. Only employees who meet the regulatory requirements set forth by OPM are eligible to be paid HDP or EDP. See 5 U.S.C. 5545(d); 5 U.S.C. 5343(c). HDP and EDP are not authorized when the hazardous duty has been taken into account in the classification of the employee’s position. 5 C.F.R. 550.904(a). A hazardous duty is “taken into account in the classification” of a position when the “knowledge, skills, and abilities required to perform that duty” are considered in the classification. 5 C.F.R. 550.904(c).

The HDP schedule identifies 57 specific duties OPM has identified as “involving unusual physical hardship or hazard.” 5 C.F.R. Pt. 550, Subpt. I, App. A. The duties identified by OPM as entitled to HDP include extraordinary assignments such as serving as a test subject in spacecraft being dropped into the sea, performing experimental parachute jumps, working on a

drifting sea ice floe, and tropical jungle duty. 5 C.F.R. Pt. 550, Subpt. I, App. A. As relevant here, the HDP schedule includes employees whose duties include “work[ing] with or in close proximity to” “[v]irulent biologicals,” which OPM classifies as a sub-category of “Hazardous Agents.” *Ibid* (emphasis omitted). “Virulent biologicals” are defined 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.” *Ibid*.

Although the HDP Schedule does not provide examples of what it means to “work with or in close proximity to” virulent biologicals, OPM issued illustrative guidance when it promulgated the HDP schedule explaining that the virulent biological regulation covers duties involving experimentation with or production of pathogenic micro-organisms, such as:

- Operating or maintaining equipment in biological experimentation or production.
- Cleaning and sterilization of vessels and equipment contaminated with virulent microorganisms.
- 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 associated directly with patient care.
- 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.

U.S. Civil Serv. Comm'n, *Federal Personnel Manual, FPM Supp. 990-2: Hours of Duty, Pay, & Leave, Annotated*, Background Info. on App. A to Pt. 550, § 550-E-4 (1973) (FPM Supp.).¹

Similarly, the EDP program authorizes “environmental differential pay” when an employee is “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). Like the HDP Schedule, the EDP Schedule identifies categories of “duty involving unusually severe hazards or working conditions” that qualify for payment of an environmental differential, 5 C.F.R. 532.501, one of which is “work with or in close proximity to” “[m]icro-organisms,” where safety precautions “have not practically eliminated the potential for personal injury,” 5 C.F.R. Pt. 532, Subpt. E, App. A. Examples of micro-organism hazards listed in the 35 EDP Schedule categories include:

- 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.

¹ The Federal Personnel Manual containing this guidance remained in effect for more than 20 years before being phased out in the 1990s. Pet. App. 20a. The Federal Circuit regards it as a “valuable resource when construing regulations that were promulgated or were in effect” during that time. *Ibid.* (quoting *Schmidt v. Department of Interior*, 153 F.3d 1348, 1353 n.4 (Fed. Cir. 1998)).

- 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.

Ibid.

2. Petitioners are 188 current or former employees of the Bureau of Prisons assigned to the Federal Correctional Institution—Danbury (FCI Danbury). In June 2020, petitioners filed this suit in the United States Court of Federal Claims seeking additional compensation under the programs authorizing HDP and EDP. Petitioners allege that by continuing to perform their ordinary duties at FCI Danbury during the COVID-19 pandemic, they became entitled to additional pay because they were exposed to “objects, surfaces, and/or individuals” at their workplace that were infected with SARS-CoV-2, the virus that causes the COVID-19 disease.

The Court of Federal Claims dismissed petitioners’ complaint for failure to state a claim. Pet. App. 51a-66a. As relevant here, the court held that the HDP and EDP programs do not authorize additional pay for alleged workplace exposure to SARS-CoV-2 when the allegedly exposed employees were not assigned to work “with or in close proximity to” the coronavirus and were instead performing their routine functions. *Id.* at 56a-66a.

The Court of Federal Claims observed that this conclusion followed from the Federal Circuit’s decision in *Adair, supra*. In that case, prison guards sought “enhanced back pay for their exposure to inmates’ smoking.” 497 F.3d at 1249. The Federal Circuit affirmed

the dismissal of their complaint, 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). The Court of Federal Claims reasoned that, like the plaintiffs in *Adair*, petitioners could not establish that their potential exposure to COVID-19 was the result of an “‘irregular or intermittent’ assignment” beyond their normal duties. Pet. App. 60a (quoting *Adair*, 497 F.3d at 1254).

The Court of Federal Claims further held that petitioners’ alleged exposure to COVID-19 “does not qualify as either a ‘duty involving physical hardship’ or a ‘hazardous duty’ as defined by OPM.” Pet. App. 61a. Among other things, the court noted that potential ambient exposure to COVID-19 was “dissimilar to” the kind of “accident[s]” referenced in OPM’s definition of hazardous duty. *Id.* at 62a (citation omitted).

3. Petitioners appealed to the Federal Circuit. A three-judge panel heard argument in October 2021, but the court *sua sponte* ordered that the case be heard en banc before the panel issued an opinion. Pet. App. 46a-48a. The en banc court then affirmed the dismissal of petitioners’ claims in a 10-2 decision. *Id.* at 1a-45a.

a. The court of appeals first noted that petitioners “agree[d] that Congress delegated to OPM the authority to determine the types of duties that are entitled to [HDP or EDP] pay differentials.” Pet. App. 13a. The court further noted that petitioners did not “challenge[] the validity of OPM’s existing regulations.” *Ibid.* Therefore, the court observed, petitioners had “concede[d] that their HDP and EDP claims fail if they do not fall under the HDP Schedule’s Virulent Biologicals category or the EDP Schedule’s Micro-organisms category.” *Id.* at 13a-14a.

To interpret those schedules, the court of appeals first looked to its decision in *Adair*, which had construed the phrase “working with or in close proximity to” in the context of the Toxic Chemicals category of OPM’s HDP and EDP schedules. Pet. App. 15a (brackets omitted). Reviewing the text of the schedules and the examples in the Toxic Chemicals category, the court concluded in *Adair* that the category was “not so broad that [it] would ‘cover situations in which employees work with inmates who incidentally smoke, *for there is no work ‘with’ second-hand smoke in that context.’*” *Id.* at 15a-16a (quoting *Adair*, 497 F.3d at 1258) (brackets omitted).

Turning to the present case, the court of appeals explained that, as in *Adair*, the HDP and EDP schedules relied on by petitioners describe scenarios where job assignments “require working directly or indirectly *with*” a hazardous substance—in this case, virulent biologicals, micro-organisms, or containers that hold those hazardous agents. Pet. App. 18a; see *id.* at 16a-18a. And as in *Adair*, the HDP and EDP schedules “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.’” *Id.* at 16a (brackets in original). The court of appeals noted that although petitioners had argued *Adair* was “distinguishable,” they “d[id] not seek to overturn *Adair*” or its construction of the phrase “working with or in close proximity to” in OPM’s regulations. *Id.* at 18a n.6 (citations omitted).

The court of appeals found additional support for its interpretation of OPM’s regulations in the Federal Personnel Manual, which provided contemporaneous

guidance on the HDP program. The examples in that guidance, the court concluded, further demonstrated that the virulent biologicals category “do[es] not cover situations in which employees working with inmates face contagious-disease transmission.” Pet. App. 20a; see *id.* at 19a-20a. Instead, those examples indicate that enhanced pay would be warranted only for “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.” *Id.* at 21a (emphasis omitted).

The court of appeals also observed that other categories within the HDP and EDP schedules “use[] clear language” “indicating that a possibility of exposure to infectious diseases” or other airborne hazards “is entitled to differential pay.” Pet. App. 21a; see *id.* at 21a-23a (discussing OPM’s Tropical Duty and Asbestos categories). The court reasoned that the inclusion of such language demonstrated that “[i]f OPM intended for the HDP Schedule’s ‘virulent biologicals’ category or the EDP Schedule’s ‘microorganisms category to provide differential pay for ambient exposure to dangerous, communicable diseases, it certainly ‘knew how to say so.’” *Id.* at 24a (citation omitted).

Finally, the court of appeals rejected petitioners’ contention that a memorandum issued by OPM in March 2020 supported their position. Pet. App. 24a-26a. The court believed that the memorandum “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 microorganisms themselves.” *Id.* at 25a.

b. Judge Reyna wrote a dissenting opinion, joined by Judge Newman. Pet. App. 28a-45a. Those judges would have held that “based on common knowledge about prisons,” it would be reasonable to draw the inference “that COVID-19 was, at least plausibly, unusually hazardous for Appellants.” *Id.* at 34a.

ARGUMENT

Petitioners contend (Pet. 8-22) that the court of appeals erred in determining that, under OPM’s HDP regulations, petitioners are not entitled to enhanced pay due to their alleged ambient exposure to the SAR-CoV-2 virus. That contention is incorrect. The court’s interpretation is consistent with the text, structure, and history of the relevant regulatory provisions. The court’s decision neither conflicts with any decision of this Court or another court of appeals nor otherwise warrants further review. And this case would be a poor vehicle for considering the issues petitioners seek to raise because they previously failed to raise or expressly disavowed several of the arguments they now seek to assert. The petition for a writ of certiorari should be denied.

1. Petitioners argued below that they stated viable claims for HDP under OPM’s regulations 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.” Pet. App. 14a (citation omitted).² According to petitioners, the court of appeals erred by interpreting the

² In their complaint and in the court of appeals, petitioners contended that they were also entitled to enhanced pay under the EDP program. Petitioners do not renew that claim in this Court.

regulations to require “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.” Pet. 9 (citation omitted). That contention lacks merit.

a. As the court of appeals explained, the HDP regulation’s requirement that an employee “work with or in close proximity to” virulent biologicals does not encompass workplace exposure to individuals with potentially contagious illnesses. That conclusion followed from the court’s interpretation of materially identical language in *Adair*, which involved a provision of OPM’s regulations providing for differential pay for working “with or in close proximity to” toxic chemicals. The toxic chemicals EDP category contains examples that, although “not exhaustive, * * * 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.” Pet. App. 15a (quoting *Adair*, 497 F.3d at 1258).

The HDP Schedule’s “virulent biologicals” category uses identical “work with or in close proximity to” language. Consistent with its construction of that phrase in *Adair*, the court of appeals held the HDP Schedule does 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.’” Pet. App. 16a (brackets and citation omitted).

The court of appeals’ interpretation accords with the contemporaneous regulatory guidance OPM issued in the early years of the hazard pay programs’ existence. FPM Supp. at 990-2, § 550-E-4. Although the HDP

Schedule itself does not expressly recite examples illustrating when an employee “work[s] with or in close proximity to” a virulent biological, OPM’s guidance provides several exemplary duties, including “operating or maintaining equipment in biological experimentation or production,” “cleaning and sterilization of vessels and equipment contaminated with virulent micro-organisms,” and “cultivating virulent organisms on artificial mediums.” *Ibid.* As the court of appeals observed, “[t]hese examples likewise do not cover situations in which employees working with inmates face contagious-disease transmission.” Pet. App. 20a (citation omitted).

The language and structure of the Hazardous Agents category further supports the court of appeals’ interpretation. Ambient exposure to SARS-CoV-2 is not compensable under the “virulent biologicals” subcategory because, for other hazardous materials subcategories, the schedule uses specific language to indicate that ambient exposure entitles an employee to differential pay. For example, the “Tropical Jungle Duty” category uses clear language indicating that a possibility of exposure to infectious diseases in a jungle work environment is entitled to differential pay. See Pet. App. 21a (citing 5 C.F.R., Pt. 550, Subpt. I, App. A (Tropical Jungle Duty ¶ 2(c)) (discussing “work outdoors in undeveloped jungle regions outside the continental United States . . . involving * * * an unusual danger of serious injury or illness due to * * * *known exposure to serious disease* for which adequate protection cannot be provided” (brackets omitted)). Similarly, under OPM’s “Asbestos” category, federal employees are entitled to differential pay when they are required to work “in an area where airborne concentrations of asbestos fibers may expose them to potential illness or injury.” *Id.* at 22a

(citing *Pay Differentials*, 55 Fed. Reg. 31,190 (Aug. 1, 1990) (Proposed Rule); see *Prevailing Rate Systems*, 55 Fed. Reg. 46,184 (Nov. 1, 1990) (referencing an asbestos category that was codified in the EDP Schedule on March 9, 1975)).

The court of appeals properly concluded that “OPM’s inclusion of language covering general, ambient exposure in the Tropical Jungle Duty and Asbestos categories” reveals that “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.” Pet. App. 23a. “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.” *Id.* at 24a.

Finally, the court of appeals’ interpretation of the hazard pay regulations also accords with Congress’s intent that the hazard pay program would be one of limited application. See House Report 2. Although petitioners claim (Pet. 25) that “[t]his case is *not* about *all* federal workers” or “any federal worker who had to work in person during the pandemic,” nothing about the logic of petitioners’ position is limited to prisons, or even to the COVID-19 pandemic. Accepting petitioners’ arguments would thus open the door to claims for differential pay whenever federal employees believe they may have been exposed to COVID-19—or other contagious diseases—in the workplace, expanding the HDP program far beyond its intended scope.

b. Petitioners primarily contend (Pet. 9) that the court of appeals’ interpretation of the phrase “work with or in close proximity” improperly “reads out” the words “in close proximity to.” That is incorrect. As interpreted by the court of appeals, the HDP Schedule’s “virulent biologicals” category reaches not only individuals who work directly with virulent biologicals, but also those whose contact with virulent biologicals is “indirect[.]” Pet. App. 21a. Consider an employee assigned to “maintain[] equipment in biological experimentation or production,” one of the examples provided in OPM’s contemporaneous guidance. *Id.* at 16a (citation omitted). Because the court of appeals’ interpretation encompasses work indirectly involving a virulent biological, such an employee could qualify for HDP even if the equipment maintained by the employee did not itself contain an infectious virus, and instead the employee merely worked in the same room as—*i.e.*, “in close proximity to”—that virus. The court’s interpretation thus gives effect to the full text of OPM’s regulation.

In any event, petitioners did not argue below that work “in close proximity” to virulent biologicals should be understood to refer to a class of activities broader than those covered by work “with” virulent biologicals. The court of appeals accordingly did not address petitioners’ current “surplusage” argument, and this Court should not consider it in the first instance. See *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is “a court of review, not of first view”).

Petitioners contend that the HDP Schedule’s “virulent biologicals” category must encompass ambient exposure to diseases like COVID-19 to avoid the “absurd” result that the only employees who would ever work “with or in close proximity to” virulent biologicals would

be “scientist[s],” most of whom would have had that hazard accounted for in their job classification. Pet. 11-12 (citation omitted). That argument fails for several reasons. To begin with, employees who are not working in a laboratory setting (*i.e.*, non-scientists) may be entitled to receive hazard pay for working with or in close proximity to virulent biologicals or microorganisms. If, for example, a federal employee were assigned to collect biological samples from individuals—such as prison inmates—to test for a communicable disease that meets the definition of a virulent biological, and such collection of biological samples was not included in the employee’s job classification, that scenario might satisfy the requirements for HDP.

Moreover, even if the situations where employees would be entitled to HDP under the “virulent biologicals” category are quite rare, that would not be absurd. The point of HDP is to account for unique circumstances when an employee is assigned to and performs work involving “unusual physical hardship or hazard” for which the employee does not already receive compensation through the classification process. *Adair*, 497 F.3d at 1253. To the extent an employee routinely works with or in close proximity to virulent biologicals, the employee is ordinarily compensated for that hazard through the classification process. *Ibid.* Far from being unduly narrow, the court of appeals’ interpretation is faithful to the important but narrow purpose of the HDP program.

Nor does the court of appeals’ interpretation make the “virulent biologicals” category the only narrow category in the HDP Schedule. For example, the HDP Schedule identifies “Firefighting” as another hazardous duty, but to qualify for hazard pay for such duty, an

employee must “participat[e] as a member of a fire-fighting crew in fighting forest and range fires on the fireline.” See 5 C.F.R. Pt. 550, Subpt. I, App. A. It is difficult to envision a scenario where a federal employee who is part of a firefighting crew and fighting a forest fire on the fireline would *not* be a firefighter whose job classification already takes into account the risk of fighting fires. But that does not render the Firefighting HDP category “too narrow,” nor does it provide any basis to expand the regulatory definition of Firefighting beyond its plain meaning. So too here.

2. Petitioners argue that the Federal Circuit’s decision creates an “inconsistency” between Section 5545 and OPM’s implementing regulations. Pet. 17; see Pet. 14-19. This case presents a poor vehicle to explore that argument, which was neither raised below nor addressed by the court of appeals. And the argument is meritless in any event.

In Section 5545, Congress directed OPM to “establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard.” 5 U.S.C. 5545(d). According to petitioners (Pet. 15), SARS-CoV-2 is an “‘unusual hazard’ under the ordinary definition and understanding of the word.” They further contend that because they “are entitled to hazardous duty pay *under the statute*, * * * the Federal Circuit’s interpretation of the regulations cannot eliminate this benefit.” Pet. 18 (emphasis added).

As a threshold matter, petitioners have forfeited any challenge to the validity of OPM’s implementing regulations. See Pet. App. 13a (“[N]either side challenges the validity of OPM’s existing regulations.”). And petitioners affirmatively waived any claim that they are entitled to be paid a differential irrespective of whether

their allegations satisfy OPM's implementing regulations. See *id.* at 13a-14a (noting that petitioners "concede that their HDP and EDP claims fail if they do not fall under the HDP Schedule's Virulent Biologicals category or the EDP Schedule's Micro-organisms category."); see also *id.* at 14a n.5 ("[Petitioners] 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.'").

Even if petitioners had not forfeited or waived the argument, it would not warrant this Court's review. Petitioners object (Pet. 19) that "the Federal Circuit's holding and subsequent outcome have created a situation in which the regulations prevail over the statute." But that misapprehends the interplay between the statute and regulations in the HDP system. Congress did not define the term "unusual hazard" or identify any class of duties that is statutorily entitled to HDP pay differentials. Instead, it specifically delegated to OPM the authority to determine the types of duties that are entitled to HDP. 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). Thus, there can be no "inconsistency" between the statute and the regulations' omission of a particular type of duty because the *only* way for a federal employee to be eligible for pay differentials is if the employee meets the regulatory requirements that OPM sets. There is no situation where an employee can be entitled to HDP or EDP under the *statute*, but not the regulations, because by congressional design, an

employee must fall within the regulations to qualify under the statute.

3. Petitioners also argue (Pet. 19-21) that the court of appeals' interpretation is contrary to OPM's guidance and practice. That argument rests primarily on an informal memorandum that OPM issued on March 7, 2020, during the first weeks of the pandemic. In fact, however, the memorandum explicitly rejected the notion that potential ambient exposure to COVID-19 can give rise to enhanced pay under either HDP or EDP. Section G of the memorandum asks: "Can employees receive hazardous duty pay or environmental differential pay for potential exposure to COVID-19?" Attachment to OPM Memorandum #2020-05 at 13 (OPM, Mar. 7, 2020). In response, the Memorandum declares: "No. There is no authority within the hazardous duty pay or environmental differential statutes to pay for potential exposure." *Ibid.* (emphasis omitted).

4. Finally, petitioners' assertion that the question presented "is of great importance" does not justify review. Pet. 22 (capitalization and emphasis omitted). The court of appeal held that petitioners and other federal employees who faced ambient exposure to SARS-CoV-2 are not entitled to hazard pay. But Congress and OPM could amend the hazard pay statutes or regulations to provide such pay. Indeed, Congress has already considered several legislative proposals to that effect. See H.R. 2744, 117th Cong., 1st Sess., § 2 (2021); H.R. 6800, 116th Cong., 2d Sess., §§ 170201(2), 170202(a)(1) and (b) (2020); see also H.R. 6433, 116th Cong., 2d Sess., § 2(a) and (c) (2020). That neither Congress nor OPM has yet provided the relief petitioners seek does not foreclose the possibility that they will do so in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 2023