

No. 22-1118

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**

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In March 2020, SARS-CoV-2, otherwise known as COVID-19, had, in a manner of weeks, gone from a blip in the news about a respiratory virus halfway across the world, to a full-blown global pandemic that fundamentally altered every aspect of society. In what felt like the blink of an eye, a deadly, unknown virus suddenly lurked behind every corner. For more than a year, until the vaccines provided relief, COVID-19 was the story. Schools shut down and moved online. Weddings and graduations were cancelled. People said goodbye to loved ones over FaceTime. Oral arguments were no longer in person. And the majority of the workforce retreated to the safety of their homes to work remotely.

Some did not have that luxury. America's front-line law enforcement workers had to bear the brunt of the COVID-19 pandemic, and endured wave after wave of infections. The Correctional Officers who work at the Federal Correctional Institution (FCI) Danbury, in Danbury Connecticut, were some of these front-line workers. They reported to work, day after day, during the pandemic as COVID-19 spread like wildfire throughout prisons, due to the close proximity of the inmates and Correctional Officers and the requirement for close physical contact with others to maintain the safety of the institution. Thousands of inmates and Correctional Officers caught the virus. Some lost their lives. Before vaccines, the Correctional Officers had to face this deadly threat head on. They could not socially distance. They *had* to be near others for prolonged periods of time to perform their job duties. The Correctional Officers were thrust into a new and hazardous situation, and their employer initially recognized it as such. Indeed, their employer, the United States government's Bureau of Prisons (BOP), carefully

tracked COVID-19 exposure so that on any given day, it was known if an Officer came in contact with an inmate or coworker who was infected with the virus.

Recognizing a need to provide additional remuneration to the federal workforce for working in such dangerous circumstances, Congress enacted a statutory scheme to compensate employees for duties “involving unusual physical hardship or hazard.” 5 U.S.C. § 5545(d). The hazardous duty pay (HDP) program was designed to provide additional pay to employees who were asked to take on unusual risks not normally associated with their job. *See Adair v. United States*, 497 F.3d 1244, 1254 (Fed. Cir. 2007). This is precisely the unusual situation Correctional Officers were in during the height of the pandemic.

In implementing the HDP statute, the Office of Personnel Management (OPM) established categories of hazardous work that require extra pay. 5 C.F.R. Part 550, Subpt. I, Appx. A. Here, the Correctional Officers “work[ed] with or in close proximity” to “virulent biologicals,” *id.*,¹ and sought HDP for taking on the additional risk of contracting COVID-19 when performing their jobs keeping the inmates, FCI Danbury, and the public, safe. The Federal Circuit incorrectly interpreted the implementing regulations in a way that not only resulted in the Correctional Officers being ineligible for HDP, but in a manner in which *no* employee could *ever* be eligible for hazardous duty pay for workplace exposure to a deadly infectious disease. This Court should grant certiorari to correct this error.

¹ It is undisputed that COVID-19 is a virulent biological.

ARGUMENT**I. The Federal Circuit’s Interpretation Cannot Be Correct Because It Creates a Category of Hazardous Duty Pay That Applies to No One.**

Contrary to the Government’s position, the Federal Circuit’s interpretation is manifestly incorrect because it voids the governing regulations and is contrary to Congressional intent.

A. No One is Eligible for HDP for Working with or in Close Proximity to Virulent Biologicals.

Hazardous duty pay is available to employees who perform unusually hazardous duties and who do not have the risk associated with those duties accounted for in their position classification. *See* 5 U.S.C. § 5545(d). According to OPM, it is a hazardous duty to work “with or in close proximity to” virulent biologicals. 5 C.F.R. Part 550, Subpt. I, Appx. A. The Federal Circuit interpreted this regulation to cover only “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.” Pet. App. at 21a (emphasis in original). The Federal Circuit read out the phrase “in close proximity to” from the regulations, as its interpretation only encompasses working *with* a listed hazard.

The only employees who work “directly or indirectly” *with* COVID-19 *itself* are scientists or employees who work in laboratories. But, because the statute makes an exception for duties that are taken into account in an employee’s job classification, there is *no* employee who would be eligible for HDP for working with or in

close proximity to virulent biologicals, because scientists and lab employees unquestionably already have risks associated with such duties accounted for in their position. Not even the Government can come up with an example of an employee who would be eligible for HDP under the current interpretation. In its opposition, the Government makes a feeble attempt to provide an example:

If, for example, a federal employee were assigned to collect biological samples from individuals—such as prison inmates—to test for communicable disease that meets the definition of virulent biological, and such collection was not included in the employee’s job classification, that scenario *might* satisfy the requirements for HDP.

Resp. Opp. at 15 (emphasis added). The Government’s example is ludicrous as there is no scenario in which a federal employee would be collecting biological samples from inmates and not have the risk of exposure to infectious disease taken into account in their job classification. Not surprisingly, Correctional Officers are not authorized to administer health-related tests nor to collect biological samples.²

The Government next asserts that the Federal Circuit did not actually read out “in close proximity to” from the regulation because employees who also

² In BOP facilities, members of the Health Services Division are responsible for “health care delivery, infectious disease management, and medical designations,” and they administer COVID-19 tests to inmates. See *Health Services Division*, Federal Bureau of Prisons, https://www.bop.gov/about/agency/org_hsd.jsp#:~:text=Leadership%3A%20ADM%20Chris%20Bina,disease%20management%2C%20and%20medical%20designations. (last visited Aug. 8, 2023).

“indirectly” work with a virulent biological are covered. *Id.* at 14. In support of this assertion, the Government again attempts to provide an example of an employee who would be eligible for HDP for working indirectly with a hazard. Its example is an employee who is assigned to maintain equipment in a laboratory. *Id.*

But this example contradicts both the Government’s position and the Federal Circuit’s interpretation. If this employee is working “indirectly” with a virulent biological, then the Correctional Officers surely are as well. This hypothetical employee is farther removed from exposure than the Correctional Officers, who have known, direct, exposure to COVID-19. Meanwhile, this hypothetical employee—who may have no *actual* exposure to a virulent biological at all—may be entitled to HDP in the Government’s estimation, merely because that employee works in a lab *near* a vial of COVID-19. It defies all logic that such an employee could be eligible for HDP but the Correctional Officers could not.

In issuing an emergency temporary standard (ETS) regarding COVID-19, the Occupational Safety and Health Administration found that the novel coronavirus was a “new hazard” that posed a “grave danger,” specifically in prisons. 86 Fed. Reg. 61,402, 61,411 (Nov. 5, 2021). Even though the ETS was struck down, this Court stated that “[w]here the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible.” *Nat’l Fed. of Independent Business v. Dep’t of Labor*, 142 S. Ct. 661, 665–66 (2022). The Correctional Officers are the quintessential example of employees who face a special danger because of the features of a prison, and who, through performing their job duties, would come into direct contact with

COVID-19 and would not have that risk accounted for in their job classification. Therefore, the Federal Circuit's interpretation that does not allow for HDP for exposure to COVID-19 cannot be correct.

Additionally, the Government itself conceded that Correctional Officers could get HDP for workplace exposure. During the *en banc* oral argument, the Court asked: "Is there a situation which human-to-human contact could lead to exposure to a biological that would entitle [Appellants] to hazardous duty pay?" Pet. App. at 36a. The Government answered that "there may be a narrow set of circumstances." *Id.* The Court then asked if the Government's position was that "human-to-human contact that's required as part of the job can lead to exposure to biologics and to compensation?" *Id.* at 37a. The Government answered "potentially." *Id.* Judge Reyna asked if there are "circumstances wherein a correctional officer can be entitled to hazardous pay?" *Id.* The Government answered "yes." *Id.* The Government therefore understood the regulations to encompass some situations in which an employee is exposed to COVID-19 through human-to-human contact while performing their required job duties.

The Federal Circuit's interpretation read the phrase "in close proximity to" entirely out of the regulations, and thus, it found that OPM established a category of hazard that does not apply to anyone. This absurd result that eliminates a federal regulation should be corrected.

B. Direct Workplace Exposure to COVID-19 Must Be and Is Covered Under the Regulation.

Throughout the Federal Circuit's opinion, and the Government's opposition, Petitioners' exposure to

COVID-19 is characterized as “ambient.” This is a mischaracterization of Petitioners’ position. There is an important difference between ambient exposure and direct exposure through the performance of one’s required job duties. The Correctional Officers were not incidentally exposed to COVID-19. They were directly exposed because they *are required* to be in close proximity to others for prolonged periods of time to perform their job of keeping the inmates and staff at FCI Danbury safe and secure. While ambient exposure may not warrant HDP, direct exposure from performing one’s job does.

The Government wrongly asserts that the language and structure of the regulations support the idea that workplace exposure is not compensable. The Government points to other categories of hazard pay, such as “Tropical Jungle Duty” which states that “[w]ork[ing] outdoors in undeveloped jungle regions” is a hazard when there is an “unusual danger of serious injury or illness due to” “known exposure to serious disease for which adequate protection cannot be provided.” 5 C.F.R. Part 550, Subpt. I, Appx. A. According to the Government, this shows that OPM knew how to include exposure itself as a hazard, and therefore, exposure to virulent biologicals is not covered. The Government, however, ignores that the hazard of “work[ing] with or in close proximity” to virulent biologicals is a subset of the category of hazard called “[e]xposure to hazardous agents.” *Id.* (emphasis added). The entire category is related to exposure, and therefore, covers more than just working directly or indirectly *with* virulent biologicals. Additionally, the phrase “in proximity to” shows that OPM intended there to be compensation for more than just working directly with a virulent biological. Thus, the language and structure of the regulations show that certain workplace

exposure to COVID-19 is covered as a hazard, and that the Federal Circuit erred in its ruling.

II. The Federal Circuit’s Interpretation is Wrong Because it Conflicts with OPM’s Understanding of its Own Regulations.

The Federal Circuit’s interpretation is also inconsistent with what OPM itself has said the regulations cover. In March of 2020, at the beginning of the pandemic, OPM issued a memorandum that addressed, in part, whether HDP was available to employees for exposure to COVID-19. *See* Attachment to OPM Memorandum #2020-05 (Mar. 7, 2020), *available at* <https://go.usa.gov/xdsTs> (“OPM Memorandum”). Notably, this memorandum is still on OPM’s website and constitutes leading guidance on the regulations.³ Because there is recent guidance on what the regulations mean in this exact instance, there is no need to rely on a defunct personnel manual that was sunset 50 years ago, as the Government attempts. *See* Resp. Opp. at 11.

The Government asserts that the OPM Memorandum “explicitly rejected the notion that potential ambient exposure to COVID-19 can give rise to enhanced pay under . . . HDP[.]” *Id.* at 18. The Government is correct that the memorandum states that *potential* exposure to COVID-19 does not give rise to HDP. *See* OPM Memorandum (Asking “[c]an employees receive hazardous duty pay . . . for potential exposure to COVID-19?” and answering, “No. There is no authority within the hazardous duty pay . . . statute[] for pay for *potential* exposure.”) (emphasis in original).

³ *Hazardous Duty Pay Related to Exposure to COVID-19*, OPM, <https://www.opm.gov/frequently-asked-questions/coronavirus-faq/hazardous-duty-pay-related-to-exposure-to-covid-19/> (last visited Aug. 8, 2023).

But the Correctional Officers are not seeking HDP for *potential* exposure to COVID-19. They are seeking HDP for *actual* exposure through performing their job duties, and they will be able to prove on a day-to-day basis that they were actually exposed to COVID-19.⁴

The Government also ignores the rest of OPM's answer to that question, which provides, “[t]o pay hazardous duty pay . . . for an unusual . . . hazard covered under the regulations, a local installation must find that there is credible evidence that an employee was actually exposed.” *Id.* Further, another question in the memorandum asks, “May an employee receive hazard pay differentials . . . if exposed to COVID-19 through the performance of assigned duties?” *Id.* OPM's response provides, “employees may receive additional pay for the performance of hazardous duty . . . [and] [t]o be eligible for the hazard pay differential, the agency must determine that the employee is exposed to a qualifying hazard through the performance of his or her assigned duties[.]” *Id.* These questions and answers unmistakably show that OPM understood the HDP regulations to cover workplace exposure to COVID-19 when such exposure occurs through the performance of official job duties.

III. This Case Presents an Important Issue that the Supreme Court Should Resolve.

In its zeal to shield the federal government from having to pay hazardous duty pay, the Federal Circuit exaggerated the impact of doing so with respect to front-line law enforcement workers such as the Correctional Officers here, and instead decided to take away the

⁴ See *BOP COVID-19 Statistics*, Federal Bureau of Prisons, https://www.bop.gov/coronavirus/covid19_statistics.html (last visited Aug. 8, 2023).

right to HDP for any workers at any time forever for exposure to virulent biologicals that cause serious disease or death. The Federal Circuit incorrectly ruled that workplace exposure to a deadly infectious disease through the performance of one's official job duties does not qualify employees for HDP. This interpretation is contrary to principles of statutory and regulatory interpretation and is contrary to Congressional intent when implementing the HDP program. This is an issue of great importance that the Court has yet to address.⁵

According to the Government, the Federal Circuit's interpretation reflects "Congress's intent that the hazard pay program would be one of limited application," Resp. Opp. at 13, and that "the point of HDP is to account for unique circumstances." *Id.* at 15. Petitioners agree. Facing a deadly global pandemic without adequate safety precautions is a once in a century, unique circumstance. However, the Federal Circuit's interpretation would allow for *no* employees to receive HDP. Congress and OPM surely did not intend there to be a category of hazardous duty pay for which *no employee could ever be eligible*.

The Government also asserts that "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." *Id.* at 15. (emphasis added). This argument is flawed. As

⁵ The Government is incorrect that Petitioners are challenging the validity of the regulations. Resp. Opp. at 16. OPM's regulations are valid and cover the Correctional Officers' exposure to COVID-19; Petitioners challenge the Federal Circuit's nonsensical interpretation of the regulations.

stated, to be eligible for HDP, employees must *actually* have been exposed to COVID-19 through performing their job duties, without adequate safety protections, and must be able to prove so on a daily basis.⁶ This is not about a belief. This is a narrow test that does not open the floodgates for hazardous duty pay eligibility.

Finally, the Government asserts that because the Federal Circuit's decision does not conflict with another court of appeals case, this issue does not warrant further review. *Id.* at 10. However, there *will never be* another court of appeals that rules on this issue because the Federal Circuit has exclusive jurisdiction over such claims. *See* 28 U.S.C. § 1295(a)(2). The Supreme Court is the only next step federal employees have to gain their rightfully earned hazardous duty pay.

Courts should not be permitted to read statutes and regulations out of existence. Congress mandated hazard pay for workers facing unusual hazards and asked OPM to define those hazards. OPM issued a regulation that provides for hazard pay for working with or in close proximity to virulent biologicals, such as COVID-19, and acknowledged as such in a memorandum. Yet, when federal law enforcement employees, who did not have exposure to virulent biologicals taken into account when their jobs were classified, were exposed to virulent biologicals in the course of performing their jobs, the Federal Circuit denied them the compensation they are owed on the pretense that this regulation does not apply to any federal worker.

For the thousands of federal Correctional Officers who put themselves and their families in harm's way to keep inmates and communities safe at the height of

⁶ The Correctional Officers meet this test because the BOP tracked the spread of COVID-19 on a daily basis.

the pandemic, this case is of the utmost importance, and one that the Court should hear.

CONCLUSION

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

Respectfully submitted,

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