

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

**BRIEF OF *AMICUS CURIAE*
NATIONAL BORDER PATROL COUNCIL
IN SUPPORT OF THE PETITION**

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INTEREST OF AMICUS CURIAE

Amicus Curiae National Border Patrol Council (NBPC)¹ is the exclusive representative of approximately 20,000 Border Patrol agents and support personnel assigned to the U.S. Border Patrol. Many of the Border Patrol employees represented by NBPC have worked with and in close proximity to people infected with COVID-19, exposing them to a hazard not usually involved in carrying out their duties.

Border Patrol employees have been required to process and provide care for detainees, including those in quarantine areas designated for detainees with confirmed cases of COVID-19 and others exposed to them, without adequate protective equipment or the ability to physically distance. Employees have been ordered to transport detainees infected with COVID-19 in small vehicles without sufficient protective equipment. Border Patrol agents have apprehended and detained people suffering from COVID-19, which requires close physical contact, without adequate protective equipment.

Because of these and other job duties requiring work with and in close proximity to people infected with COVID-19, Border Patrol employees have suffered over 25,000 documented exposures to COVID-19, over 10,000

1. Pursuant to Supreme Court Rule 37.2, all parties received appropriate notice of the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than NBPC, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

positive cases, and over a dozen line-of-duty COVID-19 deaths. NBPC’s interest in the case is to ensure that hazardous duty pay is available to Border Patrol employees who risked—and in some cases lost—their lives performing these hazardous duties.

SUMMARY OF ARGUMENT

The majority’s opinion disregards a key portion of the applicable regulation, eliminating hazardous duty pay for Border Patrol agents and other federal employees who performed critical law-enforcement duties in close physical proximity to people infected with COVID-19 while other employees worked safely from home, and rendering the regulation applicable to no identifiable employee.

Under the plain language of the regulation and other interpretive guidance from the Office of Personnel Management, Border Patrol agents, the BOP employees at FCI Danbury, and other federal law-enforcement officers who were exposed to COVID-19 worked with or in close proximity to a virulent biological and are thus entitled to hazardous duty pay.

ARGUMENT

I. The majority opinion disregards a key portion of the applicable regulation.

By holding that hazardous duty pay (“HDP”) is only available for “work directly or indirectly with COVID-19 itself,” *Adams v. US*, 59 F.4th 1349, 1361 (Fed. Cir. 2023), the majority effectively read the phrase “or in close proximity to” out of the HDP regulation. As the dissent

noted, this exclusion makes the majority’s interpretation “overly narrow.” *Id.* at 1362 (Reyna, J., dissenting). When interpreting a statute or regulation, the starting point and ending point is the text. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414, (2017). The Court must “giv[e] each word its ‘ordinary, contemporary, common meaning.’” *Id.*

The plain language of the regulation provides for the payment of HDP for work *near* a virulent biological like COVID-19, in addition to work *with* the microbe. Instead of engaging in this straightforward textual analysis, the Federal Circuit looked to its prior decision in *Adair v. US*, 497 F.3d 1244 (Fed. Cir. 2007), in which it held that environmental tobacco smoke to which prison guards were exposed did not fall within the OPM regulation providing for environmental differential pay (“EDP”) for work “with or in close proximity to” toxic chemicals. After announcing that ruling, the *Adair* court wrote that the example covered duties in the non-exhaustive list in that regulation “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.

The majority viewed that note as a holding and relied on it in deciding to eschew the regulatory text in favor of a careful review of the non-exhaustive list of “examples listed in the EDP Schedule’s high risk Micro-organisms subcategory” and a non-exhaustive list of “exemplary duties” from a 1973 “HDP Supplement [that] comes from a Federal Personnel Manual that is no longer in force.” *Adams*, 59 F.4th at 1356–58. The majority concluded that those examples are limited to “assignments that involve

directly or indirectly working with a virulent biological *itself*” and therefore reasoned that OPM intended to provide HDP only for work with the virulent biological and not work that is merely in close proximity to the microbe. *Id.* at 1357–58.

This analysis ignores the touchstone of OPM’s intent: the words used in the regulation. The regulation covers work “in close proximity to virulent biologicals.” This phrase “unambiguously encompasses COVID-19 exposure.” *Adams*, 59 F.4th at 1367 (Reyna, J., dissenting). None of the authorities cited by the majority justify its excision of that language from the regulation.

In addition, the majority’s ruling, when combined with the regulation’s exclusion for HDP when the hazardous exposure is “accounted for in the employee’s job description,” effectively eliminates this category of HDP. Employees who are performing lab work with microbes in test tubes presumably have the risk of exposure to those microbes accounted for in their job descriptions. Under the majority’s interpretation, the regulation applies to no one. *Adams*, 59 F.4th at 1367 (Reyna, J., dissenting) (noting that “the narrower interpretation effectively eliminates the virulent biologicals and microorganisms categories” and postulating that this “may have been a reason why the government conceded this position before the en banc court”). This result conflicts with the Court’s charge to “avoid rendering [the provision] devoid of reason and effect.” *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002).

The plaintiffs in this case adequately pleaded that they are entitled to HDP because they worked in close

proximity to virulent biologicals. The Court should grant the Petition and reverse the Federal Circuit's ruling to the contrary.

II. The Federal Circuit's conclusion that HDP is only available for work with or in close proximity to COVID-19 when the virus has been isolated from a human host lacks supporting authority.

Even if the Court accepts the majority's ruling that "work with or in close proximity to virulent biologicals" is limited to working directly or indirectly with the microbes, the Federal Circuit's decision that one can only work with COVID-19 if the virus is isolated in a test tube, but not if it is infecting a human host, does not follow. The applicable regulation is focused on "Exposure to Hazardous Agents" by work with or near "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." 5 C.F.R., Pt. 550, Subpt. I, Appx. A.

Employees who work with people infected with COVID-19 are exposed to a hazardous microbe likely to cause serious disease: "The principal mode by which people are infected with SARS-CoV-2 (the virus that causes COVID-19) is through exposure to respiratory fluids carrying infectious virus." CENTERS FOR DISEASE CONTROL AND PREVENTION, SCIENTIFIC BRIEF: SARS-CoV-2 TRANSMISSION, *available at <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html>*. Nothing in the regulation excludes such exposures from coverage. As the dissenting opinion highlighted, the majority position is so extreme that the

government abandoned it at oral argument, conceding that HDP could be available for “healthcare workers treating COVID-19 patients.” *Adams*, 59 F.4th at 1366 (Reyna, J., dissenting). The exposures that the plaintiffs in this case were subjected to when they were assigned to work with prisoners infected with COVID-19 are not meaningfully different from healthcare workers’ exposures.

The plaintiff BOP employees at FCI Danbury, along with Border Patrol agents and other federal law-enforcement officers, have worked directly or indirectly with COVID when they have been assigned to supervise, provide care for, apprehend, transport, and detain people who have been confirmed to be infected with COVID-19. *See Adams v. US*, 151 Fed. Cl. 522, 527 (2020) (“[T]he Court agrees with Plaintiffs that “[t]he added specificity of “objects, surfaces, and/or individuals infected with” COVID-19 in the Complaint merely clarifies how Plaintiffs have been working “with or in close proximity to” COVID-19.”). Those exposures are no less eligible for HDP than exposures to COVID-19 in a research laboratory setting. The Court should grant the petition to reverse the Federal Circuit’s conclusion to the contrary.

III. The Federal Circuit incorrectly interpreted OPM’s guidance on HDP for working with or in close proximity to COVID-19.

The Federal Circuit acknowledged 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”) makes clear that exposure to COVID-19 can be a basis for eligibility for HDP and EDP. *Adams*, 59 F.4th at 1360–61.

However, the majority incorrectly ruled that “the OPM Memo does not speak with one clear, consistent voice that conflicts with the” majority’s conclusion that HDP and EDP “require work directly or indirectly with COVID-19 itself.” *Id.* at 1361.

Contrary to the majority’s claim, the OPM Memo draws a clear line on eligibility for HDP. If employees are exposed to COVID-19 through the performance of their assigned duties, they are eligible for HDP if the other criteria are met. OPM MEMO 11–12, available at <https://www.opm.gov/policy-data-oversight/covid-19/questions-and-answers-on-human-resources-flexibilities-and-authorities-for-coronavirus-disease-2019-covid-19.pdf>. In contrast, employees who are incidentally exposed to COVID-19 in a manner not directly associated with the performance of their assigned duties are not eligible, nor are employees who have only potential exposure. *Id.* at 12–13.

The OPM Memo provides that “To pay hazardous duty pay or environmental differential pay for an unusual physical hardship or hazard covered under the regulations, a local installation must find that there is credible evidence that an employee was actually exposed.” *Id.* at 13. As mentioned above, the plaintiffs and this case and other similarly situated federal law-enforcement officers have such evidence related to specific assignments working with people with confirmed cases of COVID-19. This evidentiary requirement separates those law-enforcement officers from the “many federal employees in federal workplaces where ambient exposure to COVID-19 might occur,” whom the Federal Circuit worried would claim entitlement to HDP and EDP. *Adams*, 59 F.4th at 1351.

The OPM Memo sets the standards for eligibility for HDP related to COVID-19 exposure in a manner that is consistent with the regulation and that will not open the floodgates to claims by federal employees who encountered incidental or potential exposures. The plaintiffs in this case meet those standards—or at the very least they have adequately pleaded that they meet those standards—and as such, the Federal Circuit’s decision should be reversed.

IV. It is crucial for the Court to decide this case.

The issues involved in this Petition have divided every court that has considered them. The trial judge dismissed this case for failure to state a claim, but a different Court of Federal Claims Judge found that a nearly identical lawsuit plausibly states claims entitling the plaintiffs to relief. *Adams v. US*, 151 Fed. Cl. 522 (2020). Then, after the appellate court decided *sua sponte* to hear the case *en banc*, two Federal Circuit Judges dissented from the majority opinion. No other appellate court will have a chance to rule on these issues because of the Federal Circuit’s exclusive jurisdiction, so the status quo is as close to a circuit split on these issues as is possible. The majority’s erroneous decision will control all similar future cases unless the Court steps in.

This case is uniquely suited for a Supreme Court decision because the facts pleaded allow the Court to explicate the limited scope of HDP for COVID-19 exposures. The plaintiffs in this case have pleaded that they necessarily work in close proximity to prisoners, and that they have proof of regular exposures to prisoners confirmed to be infected with COVID-19 through the performance of their assigned duties. Accordingly, the

Court can endorse the line drawn by OPM and make clear that exposures like the ones the plaintiffs were subjected to qualify for HDP, but that incidental or potential exposures are insufficient to show eligibility.

The question of whether on-duty exposure to COVID-19 or other virulent biologicals creates eligibility for HDP is of utmost importance to the law-enforcement professionals who risked their lives to perform their job duties at the height of the COVID-19 pandemic, including before any vaccines or treatments were available. While other federal employees were working remotely from the safety of their homes, essential law-enforcement personnel continued to work in the field, bringing them into regular close contact with COVID-19, and heightening the risk that they would catch it and bring it home to their families. Many officers were infected, some of whom continue to suffer from long-term consequences, and several of whom died from COVID-19 because of on-duty exposures. HDP exists to compensate these officers for the unusual hazards they faced in keeping the public safe. The Court should grant the Petition to make that clear.

CONCLUSION

For all the reasons argued above, along with all the reasons argued in the Petition, Amicus Curiae National Border Patrol Council respectfully prays that the Court grant the petition for certiorari.

Respectfully submitted,

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