21-1662

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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 1:20-cv-00783-CFL
JUDGE CHARLES F. LETTOW

EN BANC BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS, AND IN SUPPORT OF REVERSAL OF THE DECISION BELOW

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-1662

Short Case Caption Adams, et al. v. United States

Filing Party/Entity Amicus Curiae AFL-CIO

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 09/09/2022

Signature: /s/Harold C. Becker

Name: Harold C. Becker

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Harold C. Becker		
Raven L. Hall		
Matthew Ginsburg		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Proposed Regulations

Regulations

Other Authorities

STATEMENT OF INTEREST

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 58 national and international unions, representing over 12.5 million working men and women.[1]

The AFL-CIO has a direct interest in this matter as many of its affiliated unions represent employees in the federal sector, totaling over 800,000 workers. Many of these workers were deemed essential employees during the pandemic and were subjected to unsafe working conditions which led many to become infected with the coronavirus and, tragically, some cases were fatal.

During the public health crisis, these federal employees put their lives on the line, without premium pay, to ensure that our country kept running and critical services were provided. The AFL-CIO therefore files this brief in support of the Plaintiff-Appellants.

ARGUMENT

We demonstrate below that the unambiguous terms of both the hazard and environmental pay statutes apply to corrections officers working during the depth of the pandemic. The court below erred by adding limitations to the statutory grant

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[1] In accordance with Fed. R. App. P. 29(a)(4)(E), amicus states that no party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting the brief and no person (other than amicus) contributed money to fund this brief's preparation or submission.

of hazard and environmental pay that Congress has eliminated or that are inconsistent with accepted rules of construction. Indeed, Office of Personnel Management (OPM) and other agency actions are sharply at odds with the court's reasoning. Similarly, OPM's implementing regulations and schedules of duties entitling employees to hazard and environmental pay require a grant of such pay here.

We rely throughout on findings of the Occupational Safety and Health Administration (OSHA), the federal government's premier workplace safety agency. OSHA found that the novel coronavirus was a new and thus an unusual hazard that constituted a grave and severe danger and OSHA relied specifically on evidence of occupational exposure to the virus in the prison context in support of that conclusion. Although the Supreme Court found that OSHA's across-all-occupations vaccinate or test requirement was overly broad, it affirmed OSHA's regulatory authority to protect workers in particular settings where the risk of exposure was particularly grave, such as in prisons. The Supreme Court's decision suggests the types of limits on eligibility for hazard and environmental pay this Court seeks guidance about.

We proceed below as outlined, answering this Court's questions in bold type.

I. Correctional Officers Exposed to the Novel Coronavirus Are Entitled to Hazard and Environmental Pay Under the Statutes Because the Exposure Constituted an Unusual, and Unusually Severe, Hazard that Was Not Taken Into Account in the Classification

The Hazardous Duty Pay Act (the "Act"), 5 U.S.C. § 5545(d) imposes two requirements that must be met for an award of hazard pay to a General Schedule employee: (1) the employee's work involved "unusual physical hardship or hazard;" and (2) the employee's position classification did not take "into account the degree of physical hardship or hazard involved in the performance of the duties." *See* 5 U.S.C. § 5545(d). Once those requirements are met, the employee must be paid the 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." *Id.*

Similarly, for a Federal Wage System employee, 5 U.S.C. § 5343(c)(4) provides environmental pay for "duty involving unusually severe hazards." *Id.*

The only question in dispute here is whether the corrections officers' exposure to the novel coronavirus constitutes an unusual hazard. Thus, **this Court asks the parties to address the question of how the term "unusual[]" should be understood in this statutory context. As explained below, the term should be understood to refer to a hazard that the employee is not ordinarily exposed to either because employees are assigned duties that are not usual or, as here,**

because the employees perform their usual duties under conditions that are not usual.

A. The Plain Meaning of the Term "Unusual Hazard" Includes a New Hazard that Employees Encounter in the Course of their Existing Duties

There is no definition in the statutes or applicable regulations of "unusual hazard" or "unusually severe hazards" as those terms apply to employees seeking hazard or environmental pay. Therefore, courts must look to the text of the statute to discover Congress' intent, analyzing its words in light of their usual and ordinary meanings. *King v. Burwell*, 576 U.S. 473, 486 (2015). If the meaning of the statute is clear and unambiguous, then the court need not inquire any further. *Id.* at 492. Only if the language of the statute is unclear and ambiguous, may courts proceed beyond the statutory text and attempt to ascertain Congress' intent by looking at legislative history. *Id*.

Here, the meaning of the statute is clear and unambiguous on its face. The word "unusual" means "not usual or common; strange; rare; exceptional." Webster's New World Dictionary (2d College Ed. 1972). As used here, "subjected to . . . hazard not usually involved in carrying out the duties of his position" includes occupational exposure to COVID-19 because such exposure was not a "usual" or "common" element of being a corrections officer prior to the pandemic.

Precisely because it was an entirely new hazard, it was not usual or common and thus was "unusual."

Moreover, COVID-19 constituted an exceptional occupational hazard for corrections officers. Unlike other biological hazards that are highly communicable in a prison environment, *e.g.*, seasonal flu, or are very dangerous to those exposed, *e.g.*, HIV, COVID-19 is *both* highly communicable and very dangerous. It need hardly be stated that COVID-19 – which achieved pandemic status and led to the closure of large swathes of the U.S. and global economies – constituted an unusual hazard.

Of course, words in a statute must be construed in context. "It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the plain meaning of the word "unusual" is supported by both the second criteria in § 5545(d) and the purpose of the statutes. The second criteria in § 5545(d)(1) is that the hazard was not considered in the classification. That will almost always be true when the hazard is a new one, either because the employees perform new duties or because they perform their usual duties under new conditions. Thus, our proposed definition of "unusual" is consistent with the remainder of the statute. Moreover, the clear purpose of the statute is to compensate employees for exposure to hazards

for which their ordinary salary does not already compensate. That will also be true when the hazard is a new one for either of those reasons. Thus, the plain meaning of the term "unusual" fits into the statutory framework and is consistent with the statute's purpose.[2]

B. The Court Below Failed to Honor the Plain Meaning of the Statutes and Improperly Added Two Conditions for Receipt of Hazard Pay Not in the Statute

The Court below erroneously concluded that the plain language of the statute does not support plaintiffs' claim for hazard pay, holding that the claim "lacks textual support from the relevant statute." *Adams v. United States*, 152 Fed. Cl. 350, 355 (2021) ("*Adams*"). The Court's analysis is flawed for two reasons.

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[2] Relatedly, **this Court asks, "[W]hat is the meaning of 'accident" and "What distinction, if any, is there between accidental exposure and incidental exposure?"** The term "accident" is used in 5 C.F.R. § 550.902, defining "hazardous duty" to mean "duty performed under circumstances in which an accident could result in serious injury or death." We submit that **incidental exposure means exposure that is "likely to happen as a result of or concomitant…with" employees' performance of their assigned duties**. *Webster's New World Dictionary* (2d College Ed. 1972). Correctional officers performing their assigned duties during the pandemic were incidentally exposed to the novel coronavirus just as in the example provided in § 550.902, where employees working "on a high structure" are incidentally exposed to a risk of fall. **An accident, as the term is used in the regulation, means "an unpleasant and unexpected happening."** *Webster's New World Dictionary* (2d College Ed. 1972). Correctional officers who are incidentally exposed to the novel coronavirus experience an accident when they contract COVID-19, for example, when an infected inmate coughs while being restrained by an officer. Clearly then, correctional officers performing their assigned duties during the pandemic were performing duties "under circumstances in which an accident could result in serious injury or death." *Adair*'s less than one sentence conclusion that exposure to secondhand smoke "does not constitute an accident," *Adair v. U.S.*, 497 F.3d 1244, 1255 (Fed. Cir. 2007), is unpersuasive and beside the point.

1. The statutes do not limit entitlement to hazard or environmental pay to exposure outside employees' regular duties

First, the Court improperly narrowed the ordinary meaning of the term "unusual." The Court stated that: "[t]he employees' potential exposure to the novel coronavirus is not the result of an 'irregular or intermittent assignment'... but appears to stem from their regular duties at FCI Danbury." *Id.* at 355 (citing *Adair v. U.S.*, 497 F.3d 1244, 1254 (Fed. Cir. 2007)). The Court then concluded that, because plaintiffs were exposed to COVID-19 in the performance of their regular duties, exposure to the virus was not an "unusual" hardship under 5 U.S.C. § 5545(d). *Id*. But the plain meaning of the terms "unusual hazard" and "unusually severe hazards" encompasses both hazards that are faced because employees are required to perform unusual *duties* as well as because employees are required to perform their usual duties under unusual *conditions*. Here, the hazard is "unusual" because the novel coronavirus did not previously or ordinarily exist in the employees' workplace. The Court below improperly truncated the plain meaning of the term unusual.

The Court appears to have committed this error because it relied on text that previously existed in § 5545(d), but was eliminated prior to the events in question as well as on materials applying that superseded text. The Court disregarded both the relevant amendment of the statute and its legislative history, which demonstrate

that Congress clearly intended to eliminate the restriction that hazardous duty pay only attach to "irregular or intermittent" job duties.

Prior to November 5, 1990, 5 U.S.C. § 5545(d) authorized the Civil Service Commission (subsequently renamed OPM) to "establish a schedule or schedules of pay differentials for *irregular or intermittent* duty involving unusual physical hardship or hazard." Classification Act of 1949, Pub. L. No. 89-512, 80 Stat. 318 (emphasis added). In 1990, the Federal Employees Pay Comparability Act, Section 230, modified § 5545(d) by striking the words "irregular or intermittent." Treasury, Postal Service and General Government Appropriations Act of 1991, Pub. L. No. 101-509, 104 Stat. 1389. The purpose of the modification was to authorize the payment of hazard pay for regular duties involving unusual physical hardship or hazard -- "[t]he bill would provide a differential for duty that involves physical hardship or hazard on a regular basis; under current law, the differentials may be paid only if the hardship or hazard is intermittent or irregular." S. Rep. No. 101-457 at 46 (1990). The Court below did not discuss the amendment or analyze its significance.

Instead, the Court erroneously relied on a written statement from the Chair of the Civil Service Commission quoted in a 1965 House Report explaining the since-repealed limiting language "irregular or intermittent." *Adams*, 152 Fed. Cl. at 354 (quoting H.R. Rep. No. 31 at 4, 89th Cong. (1st Sess. 1965). The Court

contrasts the examples given in 1965 under the repealed language with the hazard posed by exposure to the novel coronavirus. *Id*. at 354-55. *See* H.R. Rep. No. 31 at 3 (making clear in its first substantive paragraph which states, "[t]his bill would authorize the payment . . . of pay differentials . . . to . . . employees performing irregular or intermittent duties involving unusual physical hardship or hazard"). That legislative history, tied to a since-repealed statutory provision, is obviously not relevant to the analysis here.

Not surprisingly, given Congress's amendment of the statute, OPM, the agency charged with applying the statutory language, does not share the Court's narrow construction of what constitutes an unusual hazard. To the contrary, OPM makes clear that hazardous duty work can include work performed on a regular basis: "[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." Memorandum 2020-05 from Dale Cabaniss, Director of the U.S. Office of Personnel Management, Attachment 12, G(1) (Mar. 7, 2020) (hereinafter "OPM Guidance"). Nowhere in its guidance does OPM restrict application of the statute to employees who are not performing their regular duties as the Court below does. To the contrary, as discussed further *infra*, the specific examples of employees entitled to hazard pay as a result of exposure to the novel coronavirus provided by OPM are employees who are exposed while performing

their regular duties – "a poultry handler or health care worker." *Id*. at (G)(2). Similarly, OPM's regulations provide that an agency shall pay hazard pay to an employee "who is assigned to and performs *any duty* specified in appendix A." 5 C.F.R. § 550.904(a) (emphasis added). The regulation does not limit entitlement to hazard pay to irregular or intermittent assignments.

The Court below erred in imposing this additional restriction on eligibility for hazard pay.

2. The statutes do not limit entitlement to hazard or environmental pay to exposure to hazards known to Congress when the statutes were enacted

Second, the Court below erred in its conclusion that "'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 355 (quoting *Adair*, 497 F.3d at 1254). That construction – that Congress could not have intended a hazard to be unusual if the hazard did not exist when the statute was enacted – is not only at odds with the plain meaning of the term "unusual," but is sharply at odds with the remainder of the provision that grants hazard pay only if the hazard was not taken "into account" in the classification. § 5545(d)(1). The Court's rule of construction is particularly inapt as applied to the term "unusual" because a hazard may be unusual precisely because it arose suddenly and did not

exist when the statute was enacted. Indeed, the most logical reason why the second statutory condition would be satisfied – that the employee's classification does not take into account the degree of hazard – is that the hazard did not exist at the time of the classification and thus at the time the statute was adopted. Nowhere does the statute in any way suggest that Congress had to be aware of a hazard before the differential can apply.

Moreover, the suggestion that Congress does not intend broad statutory terms to apply to new circumstances is at odds with the ordinary rules of statutory construction and would freeze the application of innumerable statutes in a manner clearly not intended by Congress (*e.g.*, consider the application of numerous federal statutes to email and other internet communications and transactions).[3] Just two years ago, the Supreme Court made clear, "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result [barring discrimination against LGBT employees] . . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations

[3] One example is the federal wire fraud statute. Enacted in 1952, prior to the advent of the internet or e-mail, it covers transmissions by "wire, radio, or television communication." 18 U.S.C. § 1343. Although Congress could not at that time intend have intended it to apply to the Internet or e-mail (because they did not yet exist), numerous federal courts have without question applied the broad terms of the law to these new forms of communication. *See, e.g.*, *United States v. Drummond,* 255 F. App'x 60, 64–65 (6th Cir. 2007) (defendant who made reservations over the internet using credit card issued to another sufficient to support wire fraud conviction).

suggest another, it's no contest. Only the written word is the law." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020). Rejecting precisely the argument accepted by the Court below, the Supreme Court continued, "When a new application emerges that is both unexpected and important, [employers] would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime. That is exactly the sort of reasoning this Court has long rejected." *Id*. at 750.

The lower Court's error is also made evident by the fact that OPM has construed the statutes to apply to numerous other hazards that were not known to Congress when the laws were enacted, specifically, to exposure to the novel coronavirus as explained *supra*. In addition, OPM has adopted broad regulatory terms that clearly apply to hazards that were not known at the time of enactment. Most relevant here, OPM has applied the statute to exposure to "virulent biologicals" without limiting that term to "virulent biologicals" known to Congress when the statute was adopted. 5 C.F.R. app. A pt. 550 (2022). It is clear that both Congress and OPM intentionally left the categories broad enough to cover the "unknown" hazards that federal workers could face in the future.

The Court below erred by failing to honor the plain meaning of the statutes, by imposing restrictions that Congress removed from the statute, and by failing to apply the rules of statutory construction mandated by the Supreme Court.

C. Correctional Officers Exposed to the Novel Coronavirus Satisfy the Statutory Conditions for Hazard and Environmental Pay

Having established the proper meaning of the term "unusual," we do not believe extended argument is needed to demonstrate that (1) correctional officers' exposure to the novel coronavirus was "not usually involved in carrying out their duties" and presented "unusually severe hazards" and (2) the officers' classification did not "take[] into account the degree of . . hazard involved in the performance of the duties" once the performance of those duties involved significant occupational exposure to the novel coronavirus.

1. Correctional Officers' Exposure to the novel coronavirus was clearly an "unusual" or an "unusually severe" hazard

Sections 5455(d) and 5343(c)(4) require that an employee perform work which involves an "unusual physical hardship or hazard" or a "duty involving unusually severe hazards" to qualify for hazard duty or environmental differential pay. Exposure to the novel coronavirus met those statutory requirements.

The hazard was unusual because it did not exist prior to the introduction of the novel coronavirus in the U.S. In the prison workplace, the existence of the novel coronavirus was an "unusual hazard" under § 5455(d) and an "unusually severe hazard" under § 5343(c)(4) because of the acute risk it posed for officers in that context of contracting COVID-19 and consequently suffering severe illness or death.

The actions of OSHA strongly support that conclusion.[4]

Congress has charged OSHA with taking action necessary "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). Specifically, OSHA is charged with issuing emergency temporary standards (ETS) when it determines:

> (A) that employees are **exposed to grave danger** from exposure to substances or agents determined to be toxic or physically harmful or from **new hazards**, and
> (B) that such emergency standard is necessary to protect employees from such danger.

29 U.S.C. § 655(c)(1) (2022) (emphasis added).

Pursuant to this statutory mandate, OSHA issued two emergency temporary standards in response to the appearance of the novel coronavirus. *See* Occupational Exposure to COVID-19; Emergency Temporary Standard, 86 Fed. Reg. 32,376 (June 21, 2021); COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,4021 (Nov. 5, 2021). The agency found that the virus was a "new hazard," *i.e.,* that it was unusual, and that the virus presented a "grave danger," *i.e*. that it was a severe hazard. OSHA concluded, "without question," that

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[4] It is notable that the environmental pay statute specifically references OSHA as the authoritative source concerning permissible levels of exposure to specified hazards. *See* 5 U.S.C. § 5343(c)(4). Similarly, OPM regulations implementing the hazard pay provisions rely on OSHA standards to determine when hazard pay may be terminated. *See* 5 C.F.R. § 550.906(b).

the novel coronavirus was a "new hazard" -- "SARS-CoV-2 was not known to exist until January 2020, and since then more than 725,000 people have died from COVID-19 in the U.S. alone." *Id*. at 61,406. The basis for OSHA's finding that exposure to the novel coronavirus posed a "grave danger" was that employees exposed to the virus in a work setting can contract COVID-19 and that infection, in turn, can cause death or serious impairment of health, especially in those who are unvaccinated. 86 Fed. Reg. at 61,411 (citations omitted). OSHA observed that COVID-19 can "involve respiratory failure, blood clots, long-term cardiovascular and neurological effects, and organ damage." 86 Fed. Reg. at 61,408; *see also id.* at 61,410 (explaining that "the disease's most common complications" include "pneumonia, respiratory failure, acute respiratory distress syndrome (ARDS), acute kidney injury, sepsis, myocardial injury, arrhythmias, and blood clots").

OSHA supported these findings with evidence specific to the prison workplace. In the latter ETS that applied to prisons, 86 Fed. Reg. 61,402, OSHA cited "a number of studies," to emphasize "the impact of COVID-19 in law enforcement and related fields such as correction." *Id.* at 61,414. One such study found, for example, that the percentage of correctional officers with COVID-19 antibodies was *the highest observed* among all the occupations surveyed, and another revealed that one month into the pandemic, 86 percent of state health department jurisdictions had reported at least one COVID-19 case from a

correctional facility, totaling nearly 3,000 cases and 15 deaths. *Id.* A later study documented that from March to November 2020, COVID-19 cases among prison staff were three to five times higher than in the general population. *Id.* One of these papers observed that "correctional and detention facilities face challenges in controlling the spread of infectious diseases because of crowded, shared environments." *Id*.

While OSHA's original ETS applied only to healthcare employers and the later ETS was struck down by the Supreme Court in *Nat'l Fed. of Independent Business, et al. v. Dep't of Labor*, 142 S. Ct. 661 (2022), on grounds of overbreadth, neither of those facts undermine the agency's conclusions that the coronavirus was a new hazard and one that exposed employees to grave danger in workplaces like prisons.[5] Indeed, the Supreme Court clearly endorsed OSHA's key findings on that point, making clear that OSHA could adopt a standard protecting workers in workplaces where the hazard posed by the novel coronavirus was more acute because of the nature of the work or workplace as in prisons. The Court explained, "Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly

[5] The Supreme Court held that OSHA did not have authority to mandate a "general public health measure" applicable in almost all workplaces. *Nat'l Fed. of Independent Business,* 142 S. Ct. at 666.

permissible." *Id*. at 665. As an example, the Court stated that OSHA could regulate "risks associated with working in particularly crowded or cramped environments." *Id*. at 666. "[T]he danger presented in such workplaces," the Court explained, "differs in both degree and kind from the everyday risk of contracting COVID-19 that all face." *Id*. That description is on all fours with the prison workplace.

There is no doubt that the Plaintiff correctional officers experienced "unusual physical . . . hazard" and "unusually severe hazards" when exposed to the novel coronavirus while performing their assigned duties, and, therefore, met this requirement of § 5545(d) and § 5343(c)(4).

2. The risk of contracting COVID-19 was not taken into account in plaintiffs' position classification

While the statute establishes pay differentials for "duty involving unusual physical hardship or hazard," § 5545(d)(1) provides that the hazard pay differential "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…."

In this case, plaintiff corrections officers' job description lists several safety hazards they could expect to encounter such as "hostile or life-threatening situations," including "riots, assaults, and escape attempts," but not exposure to

biological hazards in general, such as communicable diseases, and certainly not exposure to the novel coronavirus in particular. *See* En Banc Opening Br. of Pls-Appellants at 17, *Adams v. U.S.*, Case. No. 21-1662 (Fed. Cir. Aug. 26, 2022) (hereinafter "Pls-Appellants Br."). Additionally, COVID-19 is a "new hazard" and therefore, was not considered in any classification made before 2020. *See* 86 Fed. Reg. at 61,406.

This new and thus unusual hazard was not taken into account in corrections officers' classification.

II. OPM and Other Agency Actions Undermine the Lower Courts' Rationale

OPM, the agency charged with applying the statute, and several federal agencies have concluded that exposure to the novel coronavirus of the type experienced by the corrections officers was grounds for hazard and environmental pay. These actions sharply contradict the reasoning of the Court below.

In a Guidance Memorandum issued on March 7, 2020, OPM addresses the question, "[m]ay an employee receive hazard pay differentials or environmental differential pay if exposed to COVID-19 through the performance of assigned duties?" by acknowledging that an employee *can* receive differential pay for exposure to COVID-19. OPM Guidance at 11, G(1). OPM states that:

> To 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 and that the hazardous duty has not been taken into account in the classification of the employee's position. *Id.* at 11-12.

Notably, OPM does not apply the extra-statutory limitations applied by the Court below. OPM does not state that employees are not eligible for hazard pay if exposed to the hazard while performing their "regular duties." To the contrary, OPM gives the example of a "health care worker" who might be entitled to hazard or environmental pay even though that worker's exposure is clearly the result of performing regular duties. OPM Guidance at 12, G(2). OPM's response further clearly rejects the Court's categorical exclusion of exposure to COVID-19 as a ground for hazard and environmental pay on the basis that Congress was not aware of the hazard when it adopted the statutes.

Moreover, in several instances, agencies did grant hazardous duty and environmental differential pay to employees for COVID-19 exposure. For example, the Department of Health & Human Services, Public Health Service/Indian Health Service ("IHS") recognized COVID-19 as a virulent biological and paid all employees working on-site at healthcare facilities hazard pay and environmental pay in 2020 and 2021. IHS, *Hazardous Pay Differential for COVID-19 Pandemic* (2020) [Fact sheet]; Ronald S. Baron to Tammy Wilson, "Informational Notice: Process Used For Discontinuing Hazardous Pay Differential and Environmental Differential Pay Related to COVID-19 Pandemic"

June, 10 2020 (hereinafter "IHS Letter"). As explained above, the grant of hazard and environmental pay to healthcare workers is sharply inconsistent with the lower Court's limitation of such compensation to pay for work outside the employees' ordinary duties. And, when IHS eventually discontinued hazard and environmental pay for such workers, it did so not because it had made an error under the statutes, but rather because the Service had provided sufficient personal protective equipment (PPE) to the employees and taken other protective measures to reduce its employees' risk of contracting COVID-19 such that the virus no longer constituted an unusual hazard for this particular group of workers. *See* IHS Letter; § 550.906(b).

These agency actions were sharply at odds with the lower Court's reasoning.

III. Correctional Officers Exposed to COVID-19 Are Entitled to Hazard Pay Under 5 C.F.R. § 550.901 et seq. and Environmental Pay Under 5 C.F.R. § 532.511

Not surprisingly, given the clear statutory coverage of corrections officers' exposure to the novel coronavirus, such exposure also clearly falls into the categories of work specified in regulations and schedules adopted by OPM under the two statutes. Both the implementing regulations for § 5545 contained in 5 C.F.R. §§ 550.901 et seq., and Appendix A to 5 C.F.R. Part 550 (Schedule of Pay Differentials Authorized for Hazardous Duty); and those for § 5343 contained in 5 CFR § 532.511, and Appendix A to 5 C.F.R. § Part 532 (Schedule of

Environmental Differentials Paid for Exposure to Various Degrees of Hazards, Physical Hardships, and Working Conditions of an Unusual Nature) clearly apply to corrections officers' exposure to the novel coronavirus.

OPM's regulations provide that an agency shall pay hazard pay to an employee "who is assigned to and performs any duty specified in appendix A." 5 C.F.R. § 550.904(a). Appendix A, in turn, specifies,

> Exposure to Hazardous Agents, work with or in close proximity to: . . . (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.

Similarly, OPM's regulations provide that an employee shall be paid an environmental differential "when exposed to 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 approved by OPM, in turn, include:

> 6. Micro-organisms - high degree hazard. Working with or in close proximity to 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. These are work situations wherein the use of safety devices and equipment, medical prophylactic procedures such as vaccines and antiserims [sic] and other safety measures do not exist or have been developed but have not practically eliminated the potential for such personal injury.
>
> . . . .

> 7. Micro-organisms - low degree hazard. a. Working with or in close proximity to micro-organisms in 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, such as culture flasks, culture test tubes, hypodermic syringes and similar instruments, and biopsy and autopsy material.
>
> b. Working with or in close proximity to micro-organisms in 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, such as culture flasks, culture test tubes, hypodermic syringes and similar instruments, and biopsy and autopsy material and wherein the use of safety devices and equipment and other safety measures have not practically eliminated the potential for personal injury. *Id*.

Both regulations require only that (1) the employee work with or in close proximity to a "virulent biological" or a "micro-organism;" (2) the virulent biological/micro-organism could cause serious disease, personal injury or death; and (3) safety devices, equipment and other measures do not provide complete protection. Each of those regulatory conditions is satisfied here.

A. The Correctional Officers Worked in Close Proximity to the Novel Coronavirus Which is a Biologic and a Micro-organism

It is beyond dispute that the novel coronavirus is a "biologic" and a "micro-organism." OSHA issued the two emergency standards based on its "authority to regulate workplace exposure to biological hazards" and its regulations define "biological agent" to include a "virus." 86 Fed. Reg. 61,406; 29 C.F.R.

§ 1910.1020(c)(13). And, the standard definition of "micro-organism" includes "any . . . viruses." *Webster's New World Dictionary* (2d College Ed. 1972).

In addition, it is beyond dispute that the correctional officers worked "in close proximity" to the novel coronavirus. We now know that people are the carriers of the novel coronavirus and that many people housed in prisons were carriers of virus. As fully explained by Plaintiffs-Appellants, the assigned duties of correctional officers often involve working in "close proximity," indeed, in physical contact with inmates. Pls-Appellants Br. at 35.

The Court below concluded that the plaintiff correctional officers did not "work with or in close proximity to" the novel coronavirus, but only "with or in close proximity to objects, surfaces, and/or individuals infected with" the COVID-19, and therefore, did not meet this regulatory requirement. *Adams*, 152 Fed. Cl. at 356. But it hardly requires explanation after two and a half years of experience with the pandemic that working with or in close proximity to a person infected with COVID-19 is necessarily working in close proximity to the novel coronavirus because the virus is carried by people and transmitted by them. The hazard here is being in close proximity to infected persons and thus to the virus they carry. As OSHA explained, "[t]he degree of risk from droplet-based transmission may vary based on the duration of close proximity to a person infected with SARS–CoV–2, . . . but the simple and brief act of sneezing, coughing, talking, or even breathing

can significantly increase the risk of transmission." 86 Fed. Reg. 61,411. Some biological hazards may be more dangerous in a petri dish, but the danger of the novel coronavirus lies precisely in working in close proximity to infected persons and thus to the virus in the form in which it is most likely to be transmitted.

For those reasons, the correctional officers worked in close proximity to a biologic and micro-organism.

This Court asks if infected persons are "primary containers of organisms pathogenic for man" for purposes of distinguishing high and low degree hazards under the environmental pay regulations. Of course, that question is only relevant to entitlement to the higher level of environmental pay and not to the entitlement to hazard pay or environmental pay generally. And, in any event, the answer is yes. We now know that the virus is carried by and transmitted by people. Thus, for the statutory purpose of addressing hazards to federal workers, people are "primary containers" of the novel coronavirus. While the examples cited in the regulations do not include live people, they are not all inclusive. Moreover, the example of "autopsy materials" indicates that OPM recognized that the human body can be a "primary container" of "organisms pathogenic to man" and that recognition surely applies to live bodies as well.

B. The Novel Coronavirus is Virulent and Can Cause Death or Serious Injury

The second regulatory criteria under both statutes is that the biologic be "virulent," *i.e.*, "likely to cause serious disease or fatality" or "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 explained *supra*, OSHA has conclusively determined that the novel coronavirus can cause death or serious injury. It is without question "virulent," as that word means "extremely injurious." *Webster's New World Dictionary* (2d College Ed. 1972). OSHA's second ETS explained, "The health effects of symptomatic COVID–19 illness can range from mild disease consisting of fever or chills, cough, and shortness of breath to severe disease. Severe cases can involve respiratory failure, blood clots, long-term cardiovascular and neurological effects, and organ damage, which can lead to hospitalization, ICU admission, and death." 86 Fed. Reg. 61,408. The second regulatory criteria are also clearly met here.

C. Safety Devices, Equipment and Measure Were Not Able to Provide Complete Protection During the Time Period at Issue

The final regulatory criteria for the award of hazard and environmental pay is that "protective devices do not provide complete protection" or "the use of safety devices and equipment, medical prophylactic procedures such as vaccines and antiserims [sic] and other safety measures do not exist or have been developed but

have not practically eliminated the potential for such personal injury." These criteria are also met here.

It is beyond question that, at least prior to the general availability of vaccines, safety devices, equipment and other measure were not able to protect correctional officers from infection at the workplace. OSHA found in its second ETS in November 2021 that "many employees in the U.S. who are not fully vaccinated against COVID-19 face grave danger from exposure to SARS-CoV-2 in the workplace." 86 Fed. Reg. 61,403. Of course, prior to vaccines being generally available, that was clearly the case.

Indeed, at the start of the pandemic, not even those other safety measures were available. A lack of knowledge about the virus and how it was transmitted precluded implementation of effective safety measures. Shortages of personal protective equipment prevented implementation of safety measures even as the experts began to describe what they should be. Similarly, shortage of tests prevented identification and isolation of infected individuals.

Finally, even once all these potential safety measures became available, they remained difficult, if not impossible, to implement in prisons. Correctional facilities were identified early as places for increased risk of COVID-19 spread due to the difficulty of implementing mitigation measures such as physical distancing, isolation and quarantine. *See* Oladeru, O.T., Tran, NT., Al-Rousan, T. *et al*., A Call

to Protect Patients, Correctional Staff and Healthcare Professionals in Jails and Prisons During the COVID-19 Pandemic. Health Justice 8, 17 (2020), at https://doi.org/10.1186/s40352-020-00119-1. Implementation of mitigation measures was further complicated by overcrowding, understaffing, high staff turnover, high inmate turnover, inadequate health care resources, and poor cleaning and hygiene present in many facilities. *Id.*

For at least the time period until vaccines were widely available, there were no safety devices or other measures that adequately protected correctional officers from contracting COVID-19 at work. As such, plaintiffs meet the regulatory requirements to receive hazard and environmental pay.

IV. Temporal and Workplace Limits Would Be Appropriate on the Award of Hazard and Environmental Pay for Exposure to the Novel Coronavirus

Plaintiffs in this action are all correctional officers employed at a single federal prison. The Court below granted the government's motion to dismiss. Thus, all this Court must decide is whether, under the liberal pleading standard applicable in federal court, these specific plaintiffs stated a claim under the two statutes for any period of time after the pandemic began. This Court need not decide during what period of time Plaintiffs were entitled to hazard or environmental pay or whether any other federal employees are so entitled.

Nevertheless, because **this Court asked the question of "what limits, if any, are there to the 'work[] with or in close proximity to' language in the HDP and EDP Schedules?," we suggest two such limits here – one temporal and one occupational.**

First, outside of the specific regulatory language cited by this Court, there will be a temporal limit on eligibility for hazard and environmental pay. Section 5343(c)(4) requires environmental pay only for duties involving "unusually severe hazards." And OPM has promulgated regulations under both statutes that make clear that the entitlement to extra pay does not exist once "protective devices," "safety devices and equipment, medical devices and equipment, medical prophylactic procedures such as vaccines and antiserim [sic] and other safety measures" sufficiently mitigate the hazard. § 550.902; § 532.511; 5 C.F.R. app. A pt. 532 (2022). At the start of the pandemic, that was clearly not true for any classification due to a lack of knowledge about how the virus was transmitted, shortages of personal protective equipment, shortages of testing capacity, and the absence of vaccines. At some point after greater knowledge, PPE, testing, and vaccines became widely available, it would be reasonable for specific agencies or OPM to terminate eligibility for hazard and environmental pay for some or all employees who were otherwise eligible (which the Indian Health Service did, as described *supra*).

Second, based on both the "close proximity" language cited by this Court and the statutory requirement of an "unusually severe hazard," there will be significant occupational limits to hazard and environmental pay eligibility, *i.e.*, not all occupations involving a non-negligible risk of exposure to COVID-19 will be entitled to such pay. Here, we suggest this Court (or specific agencies and OPM) look to the Supreme Court's decision in *Nat'l Fed. of Independent Business,* discussed *supra*. While the Court struck down the broad ETS that OSHA had promulgated requiring vaccination or regular testing in almost all workplaces, the Court made clear that OSHA could adopt a standard protecting workers in workplaces where the hazard posed by the novel coronavirus was more acute because of the nature of the work or workplace. The Court explained, "Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible." *Id*. at 665. As one example, the Court stated that OSHA could regulate "risks associated with working in particularly crowded or cramped environments." *Id*. at 666. "[T]he danger presented in such workplaces," the Court explained, "differs in both degree and kind from the everyday risk of contracting COVID-10 that all face." *Id*.

The "particular features of [corrections officers'] job" and the "particular features of [their] workplace" clearly place them into the category of workers that OSHA would protect and that were entitled to hazard and environmental play. In

reaching this conclusion, this Court cannot, at this time, identify every classification of workers entitled to hazard and environmental pay. Rather, like the Supreme Court, this Court should provide general guidance to both federal agencies and OPM as to the circumstances in which the award of such pay is appropriate based on occupational exposure to COVID-19.

CONCLUSION

For the foregoing reasons, this Court should reverse the court below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Case Number: 21-1662

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I hereby certify that on this 9th day of September, 2022, a copy of the foregoing *En Banc* Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Plaintiffs-Appellants, and In Support of Reversal of the Decision Below was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Harold C. Becker
Harold C. Becker