
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 REPLY BRIEF OF PLAINTIFFS-APPELLANTS
CODY L. ADAMS, ET AL.

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November 10, 2022

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT****CERTIFICATE OF INTEREST****Case Number** 21-1662**Short Case Caption** Cody Adams, et al. v. United States**Filing Party/Entity** Plaintiffs-Appellants Cody Adams, et al.

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Attachment A

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, undersigned counsel have identified the following related cases that will be directly affected by this Court's decision in the pending appeal:

- *Aaron, et al. v. United States*, Case No. 21-1117C (Fed. Cl.)
- *Abdelrehim, et al. v. United States*, Case No. 21-2254C (Fed. Cl.)
- *Abraham, et al. v. United States*, Case No. 20-1859C (Fed. Cl.)
- *Abrams et al. v. United States*, Case No. 21-1689C (Fed. Cl.)
- *Abrom, et al. v. United States*, Case No. 21-1230C (Fed. Cl.)
- *Ahern, et al. v. United States*, Case No. 21-1493 (Fed. Cl.)
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- *Mayle, et al. v. United States*, Case No. 20-1818C (Fed. Cl.)
- *Stewart, et al. v. United States*, Case No. 21-1293C (Fed. Cl.)

INTRODUCTION

Plaintiffs-Appellants Cody Adams, *et al.* (“Correctional Officers” or “Plaintiffs”), respectfully submit this Reply in response to the Defendant-Appellee United States’ (“Government”) brief filed on October 11, 2022. *See* Dkt. 55 (Government Brief).

The Government’s brief demonstrates why the decision below — *Cody Adams v. United States*, 152 Fed. Cl. 350 (Fed. Cl. 2021) — must be reversed. Throughout its brief, the Government sticks to its made-up, untenably narrow and incorrect “scientist rule.” Under this rule, the only employees potentially eligible for hazardous duty pay for working with or in close proximity to virulent biologicals would be federal scientists who handle test tubes of virulent biologicals. Yet, under this nonsensical rule, those very individuals would be ineligible to receive hazardous duty pay because exposure to the hazard would presumably be considered in the classification of the position, which is an absolute defense to a hazardous duty pay claim. While the Government gives a lone “example” of an employee who *might* be eligible for hazard pay, *see* Dkt. 55 at 48, in an attempt to show that *some employees*, just not the Correctional Officers, could be eligible for hazard pay for working with COVID-19, its example is so absurd that it is, instead, a convincing argument for why the Government’s proposed rule must be rejected. In truth, the Government simply does not want to allow any employees to be eligible for hazardous duty pay

(HDP) or environmental differential pay (EDP) for working with or in close proximity to virulent biologicals, and more specifically, COVID-19.

Furthermore, the Government's brief is full of illogical hypotheticals and irrelevant concerns that are meant to serve as a distraction from the issue this Court is to decide: whether, under the *lenient* pleading standard of Rule 8 of the United States Court of Federal Claims Rules, the Correctional Officers have stated claims for HDP and EDP. The Government should not be allowed to deny employees rightfully earned hazard pay by trotting out a "parade of horrors," none of which demonstrate that the Correctional Officers have failed to state a claim. The Correctional Officers propose a narrow test with a narrow application in a unique situation. The Correctional Officers' claims do not concern all federal workers; rather they are unique to their type of job. The Correctional Officers work in a confined space guarding inmates, some of whom they can prove, on a daily basis, potentially exposed them to COVID-19.

Here, the Correctional Officers performed their normal job duties under extraordinary and dangerous circumstances — working with COVID-infected inmates during a raging global pandemic without vaccines or adequate protective gear. This was a unique, rare, and once in a century event. The Correctional Officers risked their own lives and went above and beyond to help protect the country during

an unprecedented time. If these acts do not qualify for hazard pay, then the HDP and EDP statutes are essentially worthless.

ARGUMENT

I. An Unusual Hazard Is One Not Normally Confronted In the Performance of One’s Job Duties — Such as COVID-19 for the Correctional Officers

Within the HDP and EDP statutes, an “unusual” hazard has the potential to cause severe injury or death and is one that is not normally confronted in the employee’s job duties. The Government attempts to argue that COVID-19 is not an unusual hazard faced by the Correctional Officers, and that because COVID-19 was widespread, it cannot be considered an unusual hazard. Both arguments are fatally flawed.

a. COVID-19 Is an Unusual Hazard Faced by Correctional Officers

COVID-19 is undeniably an unusual hazard faced by the Correctional Officers. The Government alleges that COVID-19 is not such an unusual hazard because 1) the hazard of “exposure to communicable disease” is allegedly regularly encountered by Correctional Officers, *see* Dkt. 55 at 24; and 2) the Correctional Officers are performing the same job tasks as they did pre-pandemic, *see id.* at 28. The Government is wrong on both accounts.

i. The Correctional Officers' Position Description Does Not Consider Exposure to COVID-19

It is manifestly clear that the Correctional Officers' position description does not account for such an unusual hazard like COVID-19. *Indeed, exposure to communicable disease is not included in the Correctional Officers' position descriptions at all*, let alone exposure to diseases that present a risk of serious injury or death. Exposure to communicable diseases, let alone exposure to COVID-19, has not been taken into account in the classification of the Correctional Officers' positions. In short, the Government's claim that exposure to communicable diseases is part of the Correctional Officers' job *was made up by the Government without proof* and is inconsistent with the Government's own position description for the job, which describes various occupational hazards to which the incumbent officer is exposed (e.g., attack, hostage situation) but does not include exposure to communicable disease as such a hazard.

Moreover, to be eligible for HDP, workers do not need to perform unusual or new tasks, in contrast to the Government's repeated claims. *See id.* at 3 ("Plaintiffs did not engage in the type of extraordinary duties for which hazard pay was intended."); *Id.* at 28 ("Plaintiffs' duty descriptions have not changed and [] they have not been assigned any materially different or more dangerous tasks since the beginning of the pandemic."). Importantly, under the relevant statutes and

regulations, no new duties are required for HDP eligibility — instead, what is required is performing regular duties under new and unusually hazardous circumstances or conditions.¹ See *Adair v. United States*, 497 F.3d 1244, 1254 (Fed. Cir. 2007) (stating that HDP and EDP are for “regularly assigned duties [that] are performed under *unusually hazardous* [or severe] conditions”) (emphasis added) (quoting H.R. Rep. 89-31 (1st Sess. 1965)). The Correctional Officers easily meet this test. They were assigned to perform their normal duties in unusually hazardous conditions in which they could easily and accidentally contract the novel coronavirus, causing serious injury or death, while the majority of the federal workforce was isolating and working from home.²

Next, the Government contends that “Plaintiffs cannot distinguish *Adair* based on the definition of ‘unusual hazard,’ nor can they provide a compelling reason why this Court should depart from *Adair*’s interpretation of how the overall

¹ The Government additionally states that unusual hazards are those that are “irregular or intermittent.” See Dkt. 55 at 12 (citing *Adair*, 497 F.3d at 1254). However, it is noteworthy that such language has been removed from the statutes. Thus, “Congress clearly intended to eliminate the restriction that hazardous duty pay only attaches to ‘irregular or intermittent’ job duties.” See Dkt. 52 (*En Banc* Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae*) at 8.

² See Memorandum from Russel T. Vaught, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus, COVID-10*, M-20-16 at 1 (Mar. 17, 2020) available at <https://whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>.

regulatory framework applies to what constitutes ‘work with or in close proximity to’ hazardous agents.” Dkt. 55 at 31. The Correctional Officers can and continue to provide numerous reasons to distinguish *Adair*. See, e.g., Section III (discussing the “work with or in close proximity to” element).

First, in contrast to the Government’s argument, the fact that there are marked differences between the nature of second-hand smoke and COVID-19 is directly relevant. See Dkt. 55 at 30–31; Dkt. 41 (*En Banc* Opening Brief of Plaintiffs-Appellants) at 18–19. Furthermore, the underlying reasoning that the *Adair* Court employed in determining that second-hand smoke was not an unusual hazard qualifying for HDP as a toxic chemical is inapplicable to determining whether COVID-19, a contagious viral disease, is an unusual hazard in this case. In *Adair*, the Court, in part, reasoned that second-hand smoke was not an “unusual hazard” because it was an expected condition of employment, and the risks from it were unknown at the time the statute was enacted. See *Adair*, 497 F.3d at 1253–54. This reasoning is inapposite to COVID-19, as it was not an expected condition of employment and because Congress was well aware of the dangers caused by contagious viruses at the time the statute was enacted.

The notion that COVID-19 was not “unusual,” as the Government here attempts to argue, is belied by the world, the nation, and more specifically, the

Government’s and the Federal courts’ reaction to it. Beginning in early 2020,³ COVID-19 was taken as a serious and unprecedented threat to human health, and people did everything they could to avoid it — employing techniques not available to Correctional Officers like social distancing or teleworking. Indeed, the courts heard oral arguments remotely and issued emergency rules to avoid direct contact between the public and the court.⁴ ***Unlike second-hand smoke, the presence and potential exposure to COVID-19 was not an expected condition of employment*** for the Correctional Officers. Further, the risks of infectious diseases were well-documented and considered in the HDP and EDP Schedules, as Congress clearly intended to include such diseases as unusual hazards. *See* 5 C.F.R. Pt. 550, Subpt. I, App. A; 5 C.F.R. Pt. 532, Subpt. E, App. A. Therefore, the Government’s reliance on *Adair* to conclude that COVID-19 was not an unusual hazard is fundamentally flawed.

ii. The Hazard Should be Defined At the Specific Level

The Government’s assertion that the hazard at issue is “exposure to communicable disease” and not “exposure to COVID-19” is unavailing. Defining

³ *CDC Museum COVID-19 Timeline*, David J. Spencer CDC Museum, <https://www.cdc.gov/museum/timeline/covid19.html>.

⁴ *See, e.g., Administrative Order 2021-07, Restricting Court Access to the National Court’s Building Through April 30, 2021*, United States Court of Appeals for the Federal Circuit & United States Court of Federal Claims (Mar. 25, 2021).

the hazard at such a high level of generality would make it impossible for any new hazardous virulent biological to be considered unusual. Under the Government's proposed definition, any new, novel, highly communicable and dangerous virus that creates a global pandemic would not be considered "unusual" because it would merely fall under the rubric of a "communicable disease." This could not have been the intent of Congress. According to the Government's proposal, even a disease like the Ebola virus would not be considered unusual under these circumstances, even though no reasonable person could argue that the Correctional Officers' position description considers transmission of the Ebola virus as an occupational hazard.

Further, defining the hazard at a more specific level tracks with the Court's analysis in *Adair*. In *Adair*, the hazard was defined as "second-hand smoke." See generally *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007). It was not defined as, for example, exposure to "air-borne pollutants." Naming the specific hazard at issue is necessary for determining whether it was unusual under the given circumstances. Therefore, the Correctional Officers agree with the Government that any new variant of any communicable disease that is deemed sufficiently unusual and dangerous such that it can cause serious disease or death should merit HDP or EDP if it is not taken into account in the position description. See Dkt. 55 at 24 ("Plaintiffs are only correct that SARS-CoV-2 is an unusual hazard if the Court

interprets ‘unusual’ to include every new variant of any communicable disease that can cause severe injury.”).

The Government attempts to divert attention from its incorrect claim that COVID-19 is not unusual by proffering that under the Correctional Officers’ definition, “each new strain of the flu” could be considered an unusual hazard. *See id.* at 25–26. As an initial matter, this proclamation is plainly wrong, as the flu is simply incomparable to COVID-19 in transmissibility, severity, and prevention techniques. *See* Dkt. 52 at 5 (“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.”). Under the Correctional Officers’ rule, a hazard would need to meet the high standard of being considered unusual to merit HDP, and not every type of virus that causes illness would qualify. Whether future unknown viruses or strains merit HDP is beside the point — COVID-19 clearly does.

b. COVID-19 Being Pervasive Does Not Negate The Fact That It Is Unusual

COVID-19 is undoubtedly an unusual hazard. *See* Dkt. 52 at 5 (“It need hardly be stated that COVID-19 — which achieved pandemic status and led to the closure of large swaths of the U.S. and global economies — constituted an unusual hazard.”). The world has not seen a global pandemic on the scale of the COVID-19 pandemic

in more than a hundred years.⁵ Just because “coronaviruses” are a common family of viruses, does not mean that COVID-19 itself is common or usual. Even now, nearly three years into the pandemic, there is still an immense amount of information that experts do not know about COVID-19 — about how it spreads and about how it affects people, both short term and long term.⁶ COVID-19 is not the flu, nor is it a common cold. It is not just another virus. It is novel, it is new, it is unusual, and during the period covered by this lawsuit, it was deadly. Absent precautions such as vaccines and boosters, it leads to serious disease or death.⁷

⁵ See Elizabeth Gamillo, *COVID-19 Surpasses 1918 Flu to Become Deadliest Pandemic in American History*, Smithsonian Magazine (Sept. 24, 2021), <https://www.smithsonianmag.com/smart-news/the-covid-19-pandemic-is-considered-the-deadliest-in-american-history-as-death-toll-surpasses-1918-estimates-180978748/>

⁶ See *The COVID-19 Questions We Don't Have Answers For Yet*, Johns Hopkins Bloomberg School of Public Health (Jun. 23, 2021) <https://publichealth.jhu.edu/2021/the-covid-19-questions-we-dont-have-answers-for-yet> (stating that we do not know who is at risk of developing long COVID, do not know how much immunity is enough and, do not know how much of the virus is necessary to be exposed to); Renée Onque, *'We Don't Even Agree On How to Define it Yet': It's Year Three of the Pandemic and Scientists Still Know Very Little About Long COVID*, CNBC (Aug. 9, 2022), <https://www.cnbc.com/2022/08/09/what-we-know-about-long-covid-according-to-experts.html>.

⁷ See Edouard Mathieu and Max Rose, *How do Death Rates from COVID-19 Differ Between People Who Are Vaccinated and Those Who Are Not?*, Our World in Data (Nov. 23, 2021), <https://ourworldindata.org/covid-deaths-by-vaccination>.

Moreover, the fact that COVID-19 was present in all facets of society does not somehow negate its unusual nature in the context of the HDP and EDP statutes. The Government argues that unusual “should be understood to exclude situations in which the hazard is present everywhere, including prisons, office buildings, grocery stores, schools, ports of entry, theaters, and the like.” Dkt. 55 at 31. However, no such requirement is found in the definition of unusual that both the Correctional Officers and the Government agree on. *See id.* at 21; Dkt. 41 at 15 (defining the term “unusual” as “uncommon, or out of the ordinary”). Being pervasive or widespread and being unusual are not mutually exclusive. While it is true that COVID-19 was not just present in prisons, those in prisons, from the inmates to the Correctional Officers, were much more highly impacted than nearly any other group of individuals. *See COVID-19 Death Rate in Prisons and the General Population*, The Center for Law and Social Policy (Mar. 15, 2021), <https://www.clasp.org/article/covid-19-death-rate-prisons-and-general-population> (stating that COVID-19 death rate in prisons is 2.3 times higher than the general population).⁸ The argument that COVID’s widespread nature negated its status as “unusual” is an illogical conclusion that should be rejected.

⁸ In fact, COVID-19 was so unusual and hazardous, specifically within prisons, that prisoners themselves were released. *See Reducing Jail and Prison Populations During the COVID-19 Pandemic*, Brennan Center for Justice (Jan. 7, 2022) <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and->

c. It Was Congress’s Intent to Classify Hazards Like COVID-19 as Unusual

The Government asserts in its brief on multiple occasions that HDP and EDP were only meant to cover rare or unprecedented situations. *See* Dkt. 55 at 5 (stating that Congress viewed the new hazardous duty pay program to compensate employees for “rare times” when they perform unusual hazardous duties); *Id.* at 49 (stating that it is Congress’s “clear intent that the hazard pay programs apply only in exceptional situations”); *Id.* at 17 (stating that it is Congress’s “intent that the HDP and EDP statutes apply only in limited circumstances”). The Correctional Officers agree. COVID-19 presented a quintessential example of a rare and exceptional situation — a global pandemic on a scale not seen in more than 100 years. A global pandemic that fundamentally changed the way every aspect of society functioned. A global pandemic that has infected nearly 100,000,000 individuals and taken the lives

prison-populations-during-covid-19-pandemic (noting that more than 100,000 people were released from state and federal prisons during the pandemic); Matt Grant, *Thousands of Federal Prisoners Released Due to COVID-19 Concerns Could Go Back*, KXAN (Feb. 2, 2022) <https://www.kxan.com/investigations/thousands-of-federal-prisoners-released-due-to-covid-19-concerns-could-go-back/> (stating that “more than 7,000 low-level federal prisoners” were released due to the pandemic), However, the Correctional Officers who worked in the prisons were not afforded this choice — they still had to come into work in person and face the deadly virus head-on every day.

of more than 1,000,000 individuals in the United States alone.⁹ A global pandemic that forced the Correctional Officers to confront this novel, highly dangerous virus head-on, without safety protections, when most of the federal workforce could isolate at home. What could be more rare, unprecedented, and unusual than that?

II. The Correctional Officers Face the “Accident” of Exposure or Potential Exposure to COVID-19 Through the Performance of Their Job Duties.

The “accident” faced by the Correctional Officers is the exposure or potential exposure to COVID-19, while performing their required job duties, without adequate safety protections. This definition is narrow and only a small set of employees would encounter such “accidents” under the definition. The Government repeatedly misconstrues the Correctional Officers’ proposed definition of an “accident” in an attempt to argue the definition is overly broad.

a. The Correctional Officers’ Definition of Accident is Narrow and Clear

The Government claims that the Correctional Officers’ proffered definition of “accident” would “gut the meaning of the word.” Dkt. 55 at 38. The Government, however, is wrong, as it relies on misunderstandings of the proposed definition. Contrary to the Government’s assertion, the Correctional Officers are not arguing that “the prison environment” or “inmates” are themselves accidents, *see id.* at 33,

⁹ *See COVID Data Tracker*, CDC, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last updated Oct. 18, 2022)

but rather than the prison environment and inmates *contribute* to the risk of accidents, i.e., exposure to COVID-19. The nature of prisons — an indoor, crowded environment with a lack of ventilation, adequate safety measures, and unpredictability — all make such accidents more likely to occur.¹⁰ The proposed definition is actually quite narrow. Only those with jobs that may *require contact with or close proximity* to contagious or infected persons would potentially experience such accidents.

To reassure the Court that the definition does not impermissibly broaden hazard pay applicability, the Correctional Officers clarify what “potential for exposure” means. To qualify for HDP and EDP, there must be a *diagnosed case of COVID-19* in the specific area that the Correctional Officer was required to work or may have been required to go as part of their job duties. However, under relevant case law, the Correctional Officers need not *actually* be exposed to COVID-19. All they need to show is that they may have been required to be in contact with or in close proximity to a COVID-positive or infectious inmate due to the nature of their job duties; hence, potential for exposure to the disease. *See Abbott v. United States*, No. 94-424 C, 2002 BL 26479, at *2 (Fed. Cl. Apr. 12, 2002) (finding that there is

¹⁰ The Correctional Officers point the Court to their Opening Brief for a more in-depth discussion on how there was a lack of adequate precautions against COVID-19 in prisons. *See* Dkt. 41 at 26–27.

a difference between “requiring that an employee be *actually at risk*” and “requiring that the employee be *actually exposed*”) (emphasis in original); *see also* Section III. Not everyone is at risk of “potential for exposure” under this limitation — the duties still must require the possibility of contact or proximity as an inherent part of the job.

According to the Government, for hazards involving virulent biologicals or micro-organisms, an accident “is best understood to mean an adverse event flowing from a particular assignment to work with or in close proximity to the agent” and that the accident “for purposes of the regulations should refer to an unforeseen injurious occurrence resulting from [an] inherently dangerous assignment.” Dkt. 55 at 34. The Correctional Officers agree. They experienced the adverse event of being exposed to COVID-19 through their inherently dangerous assignments that required them to be in contact with or in close proximity to COVID-infected inmates. The Government, though, then argues that the Correctional Officers do not qualify because they were “performing their regular job functions, not a temporary or unusual duty that may have given rise to a temporary hazard.” *Id.* at 38.¹¹ But again, an employee need not be performing an unusual duty to qualify for hazard pay and to experience the potential accident. *What is required is performing usual duties*

¹¹ Again, the Government seems to be relying on outdated language of “intermittent” duties that was removed from the statute. *See supra* fn. 1.

under unusually hazardous circumstances. Here, the Correctional Officers performed their standard job duties while facing an unusual hazard that could lead to an accident and are therefore entitled to hazard pay. Here, accidental exposure means that the Correctional Officers do not have to prove that the infected inmates or the United States, their employer, *intended* to infect them with COVID-19.¹²

Further, the Government again relies on a “parade of horrors” argument to attempt to discredit the Correctional Officers’ position in two ways: First, the Government contends that it would be impossible to know who was exposed to COVID-19 and when, *see id.* at 42, and second, by asserting that the Correctional Officers’ “overly expansive” interpretation would open the floodgates for hazard pay eligibility, *see id.* at 42–43. Both of these arguments are untrue. First, prisons have a robust contact tracing program, and it is easily provable as to who had COVID, where they were, and which Correctional Officers, based on their assignments, could be required to come into contact or close proximity to them on a particular day. Thus, there would be an easy way to prove from where the exposure came. Contrary to the Government’s assertion that the Correctional Officers’ view would “entitle workers to hazard pay for every moment they were in a prison,” *see*

¹² *See Accidental*, <https://www.merriam-webster.com/thesaurus/accidental> (stating that the antonym of “accidental” is “intentional”).

id. at 42, discovery will show exactly when a Correctional Officer was exposed or could have been exposed.

Second, whether other federal employees are seeking hazard pay is not relevant to whether the Correctional Officers state a claim for relief. The Correctional Officers perform unique jobs in which they can establish, on a daily basis, whether they were working in jobs with potential exposure to an infected inmate. The Correctional Officers do not contend that anyone who did not work from home during the COVID pandemic is entitled to hazardous duty pay. Under the proposed interpretation, only employees whose job duties could require contact or close physical proximity to contagious or infected individuals would be eligible. Checking a license plate, for example, does not by its nature require contact with an individual. *See id.* at 43. Thus, granting the Correctional Officers hazard pay would not open the floodgates for every individual who did not work from home to qualify for HDP or EDP. The Correctional Officers' proposed definition of accident is specific and narrow, requiring potential physical contact or close proximity as *part of the job duties*, to an actual diagnosed case of COVID-19 in an area where they worked, and a lack of safety precautions.

b. The Correctional Officers Face An Accidental Exposure From the Performance of Their Job Duties

The Correctional Officers are accidentally, rather than incidentally, exposed to COVID-19 because they are exposed through the performance of their job duties that by their nature, require contact or close physical proximity to the inmates. The Government asserts that to qualify as a compensable hazard, “the exposure to a virulent biological or micro-organism must be more than a by-product of an employee’s assigned duty.” Dkt. 55 at 34–35. While not conceding this point, the Correctional Officers meet this test — the exposure they face is more than a by-product, it stems from the core nature of their assigned job duties.

The Government relies on *Adair* to assert that the Correctional Officers are only incidentally exposed to COVID-19. *See id.* at 35–36. Again, this comparison is misguided. As previously described, exposure to second-hand smoke and exposure to COVID-19 are inherently different. Furthermore, the Court in *Adair* was tasked with analyzing whether second-hand smoke was a “toxic chemical,” while this Court is tasked with analyzing whether COVID-19 is a “virulent biological” or “micro-organism.” These differences make any direct comparison to *Adair* tenuous at best. The Court in *Adair* stated that “exposure to second-hand smoke . . . is not part and parcel of their assigned duties, [and is therefore] excluded from coverage under this category.” *Adair v. United States*, 70 Fed. Cl. 65, 80 (Fed. Cl. 2006). In contrast, the

Correctional Officers' *assigned duties are to work with inmates, some of whom are infected with COVID-19, and who can be specifically identified on a daily basis.* Thus, the Correctional Officers' exposure is, indeed, part and parcel of their assigned duties, making it an accidental, rather than incidental exposure.

The Government then tries to diminish the important differences between the “toxic chemical” category and the “virulent biological” category to again rely on *Adair* for their assertion that the Correctional Officers do not “work with” COVID-19. *See* Dkt. 55 at 43–44. The Court, however, should not ignore the critical differences in definitions that not only make *Adair* inapplicable, but also support the conclusion that the accident faced here is the exposure itself. As the Correctional Officers point out in their Opening Brief, *see* Dkt. 41 at 29–30, the “toxic chemical” hazard definition that the *Adair* court analyzed contains limiting language requiring there to be a “possibility of leakage or spillage.” *See* 5 C.F.R. Pt. 550, Subpt. I, App. A. The absence of this language in the “virulent biological” definition demonstrates that the potential for exposure is all that is required to “work with or in close proximity to” a virulent biological, and that comparisons to working with toxic chemicals are misplaced. The Government cannot just ignore the plain language of the regulation to get around the fact that the Correctional Officers clearly work with or in close proximity to a virulent biological and face the accident of exposure or potential exposure due to the lack of safety precautions.

III. The “Work With or in Close Proximity to” Language Limits Relief to Those Employees Whose Jobs Put Them at Risk of Contact or Close Proximity with Infected Individuals

Despite the Government’s continuous misinterpretations, the Correctional Officers’ proffered limitations concerning the “work with or in close proximity to” language are narrow and workable. To meet the “work with or in close proximity to” requirement, an employee must show that someone had a *diagnosed case* of COVID-19 in the area to which the employee was assigned or may be required to go *as part of their job responsibilities*, and that, due to the nature of their job, the employee may be required to come into contact with or in close proximity to the infected or infectious individual.

a. The Government’s “Scientist” Test is a Blatantly Incorrect, Nonsensical Interpretation of the Regulation

Notwithstanding the Government’s attempt to argue that it is not proposing and employing the so-called “scientist rule,” *see* Dkt. 55 at 45–46, the arguments in its brief suggests otherwise. The Government asserts that the “focus of the work [must be] the biological material itself,” and that the “focus of the assigned duty controls, not simply the setting.” *Id.* at 46. This does not comport with the relevant statute and regulations and is just the “scientist rule” using different words. To be eligible for HDP, an employee must perform their regular duties under circumstances that present an unusual hazard. *See* 5 U.S.C. § 5545(d). This focus is

on the setting, not the assigned duty — it is the circumstances and surroundings that make the duties hazardous, not necessarily the duty itself.¹³ By proposing a limitation that the “focus of the duty” is itself the biological material, the Government is proposing that only employees who are assigned scientific or laboratory-related tasks would be eligible. However, because of the limitation that employees who have the hazard considered in their job descriptions are ineligible for HDP, *see* 5 U.S.C. § 5545(d); 5 C.F.R. § 550.904(a), there is no employee who would be eligible under the Government’s proposed limitation.

One only need look to the lone “example” the Government suggests in its brief to understand that the “scientist rule” is untenable. According to the Government, “a Federal employee” *might* be eligible for HDP if they “were assigned the duty of collecting biological samples from individuals — such as prison inmates — to test for a communicable disease that meets the definition of a virulent biological.” Dkt. 55 at 48. This so-called example of an employee eligible for HDP under the “scientist

¹³ Other regulatory definitions of hazards challenge the Government’s argument that the focus of the duty must be the hazard. *See* Dkt. 55 at 45. For example, under the regulations, it is a hazardous duty to “work outdoors in undeveloped jungle regions” when there is an “unusual danger of serious injury or illness” due to “travel on unimproved roads or rudimentary trails,” or “known exposure to serious disease for which adequate protection cannot be provided.” 5 C.F.R. Pt. 550, Subpt. I, App. A. Persons working in the jungle generally do not have as their core job duties the assignment of working with terrain or disease, but those circumstances create an inherently hazardous environment that could lead to an accident.

rule” is nonsensical. The situation the Government is proposing simply does not and could not exist. In what scenario would a Correctional Officer be tasked with collecting biological samples from inmates? Such tasks would be required to be performed by a medical professional, in which case, such exposure to COVID-19 would be considered in their position descriptions. The Government cannot possibly be suggesting that untrained Correctional Officers may be performing biopsies or blood draws on inmates. The “scientist rule” completely swallows any eligibility for HDP — no one can come up with an example of an eligible employee because such an example does not exist. That could not have been the intent of Congress. Accordingly, the Government’s proposed limitation on the “work with or in close proximity to” language should be rejected.

b. The Correctional Officers’ Limitations Regarding the “Work With or in Close Proximity to” Language are Narrow and Specific

The Correctional Officers’ limitations concerning the “work with or in close proximity to” language are such that only a small and specific subset of employees would be eligible for hazard pay. The Government calls the limitations that the Correctional Officers proffer “illusory” and asserts that the test would lead to a wide variety of employees receiving HDP or EDP. Dkt. 55 at 50. This is simply wrong.

First, the Government again relies on various concerns regarding application of the rule that hold no weight. *See id.* at 50–52. What the Government fails to

consider is that prisons have a well-established contact tracing program — they know who was diagnosed with COVID-19 and when, and exactly where that person was at each moment of the day. It would not be difficult for a prison to determine, on a day-by-day basis, which Correctional Officers came into contact with, or due to the nature of their job duties, could have been required to come into contact with a COVID-infected person.

Second, the Government incorrectly asserts that all the Correctional Officers require under their test is “proximity to potentially infected individuals.” *Id.* at 52. This, however, leaves off key parts of the limitation, including there being a known, diagnosed case of COVID-19 and that the nature of the employees’ job requires potential contact with or close physical proximity to an infected or contagious individual.

Throughout its brief, the Government takes issue with the “potentially infected individuals” language, asserting that “anyone” could be considered potentially infected. This is not what the Correctional Officers intended nor what they argued. The Government has created a straw man argument the Correctional Officers never made. In truth, in the Correctional Officers’ view, a “potentially infected individual” is not just anybody — the test still requires there to have been an actual diagnosed case of COVID-19. The “potentially infected individual” refers to an individual who is *contagious because they are later diagnosed with COVID-*

19 but was not yet diagnosed at the time of contact or close physical proximity due to the incubation period for the virus. Therefore, an employee would still be eligible for hazard pay if they were required to be in contact with or close proximity to someone who was deemed infectious at the time, even though they had not yet tested positive at the time of the contact. *See If You've Been Exposed to the Coronavirus*, Harvard Medical School (Aug. 25, 2022), <https://www.health.harvard.edu/diseases-and-conditions/if-youve-been-exposed-to-the-coronavirus> (stating that a person with COVID-19 may be contagious 48 hours before starting to experience symptoms).

Moreover, under the applicable case law, employees need not actually be exposed to the hazard to be eligible for HDP or EDP. The employees need to show that 1) someone had a diagnosed case of COVID-19, 2) in an area in which the employee was assigned or may be required to go, 3) the nature of their job *requires contact or close physical proximity* with the individual, and 4) the individual in the area was COVID-positive or was deemed to be contagious at the time. *See Abbott*, 2002 BL 26479, at *2 (stating that the HDP regulations entitle plaintiffs to hazard pay “for performing jobs that *potentially expose* them to virulent biologicals” and that the regulations do not require “*actual exposure*”) (emphasis added). The “potential for exposure” under the proposed limitation refers to proof that on a particular day the Correctional Officers’ core job duties *may require* them to be in

contact with or in close proximity to a person with a diagnosed case of COVID-19 or who is deemed to have been infectious at the time of contact.

Contrary to the Government’s assertion, this test does not “virtually [capture] any Federal employee who works near individuals.” Dkt. 55 at 53. Most Federal employees’ job duties do not include contact with individuals who it can be determined had COVID-19. Simply put, Correctional Officers *cannot do their jobs* without being in physical contact with others. Their entire job is based on physical proximity to inmates. Thus, the proposed limitation on the “work with or in close proximity to” language would not open the floodgates and would only be applicable to a narrow set of employees.

IV. Human Beings are “Primary Containers of Organisms Pathogenic for Man.”

Humans are how COVID-19 is transmitted. Humans carry and incubate the virus, and expel the virus via breathing, sneezing, or coughing.¹⁴ Humans are the *vessels* by which COVID-19 spread throughout the globe. Thus, humans are indeed, the “primary containers of organisms pathogenic for man.” *See* Dkt. 52 at 25.

The Government argues that the EDP regulations specifically describe what a “container” means, and that does not include human beings. Dkt. 55 at 55 (citing 5

¹⁴ *See Scientific Brief: SARS-CoV-2 Transmission*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html> (last updated May 7, 2021)

C.F.R. pt. 532, Subpt. E, App. A). This argument is misplaced for two reasons. First, the list in the EDP regulations is a non-exhaustive list of two *examples*, and therefore, contact with “primary containers” is not required to establish entitlement for EDP. Moreover, the exclusion of humans from the list of just *two examples* is not dispositive that they do not count as “primary containers.” Second, the EDP regulations in fact do support the contention that human beings are primary containers. One of the examples of a primary container is “biopsy and autopsy material.” *Id.* This indicates that “OPM recognized that the human body can be a ‘primary container.’” *See* Dkt. 52 at 25. There is not a meaningful difference between an infected biopsy material and an infected human, in terms of risk of exposure. Therefore, classifying human beings as “primary containers” conforms with the EDP regulations.

The Government also opposes the Correctional Officers’ position that high-degree EDP hazard does not require working with primary containers of organisms pathogenic to man. *See* Dkt. 55 at 56–57. However, the language of the high-degree hazard is clear that the *only requirements* are that an employee must 1) work with or in close proximity to micro-organisms that, 2) have the potential for personal injury such as death, or temporary, partial, or complete loss of faculties, and 3) where safety devices and other safety measures have not eliminated the potential for injury. *See* 5 C.F.R. Pt. 532, Subpt. E, App. A. Working with “primary containers of

organisms pathogenic for man” is plainly not a requirement. Thus, regardless of whether this Court finds human beings to be primary containers, the Correctional Officers have met the requirements for being eligible for high-degree EDP.

V. The Correctional Officers Have Stated A Claim for Relief For Working With or In Close Proximity to COVID-19

As an initial matter, the Government incorrectly asserts that the Correctional Officers are asking this Court to overrule *Adair*. See Dkt. 55 at 57. As stated multiple times throughout this brief, and throughout the Correctional Officers’ Opening Brief, *see generally* Dkt. 41, *Adair* is distinguishable from this case in many ways. Therefore, the Court can overrule the trial court here without overruling *Adair*.

In its brief, the Government lists three elements that an employee must show to be entitled to hazardous duty pay for working with or in close proximity to COVID-19. First, the employee must be assigned to and performed work with or in close proximity to COVID-19; second, the employee must show that COVID-19 is a virulent biological that can cause significant injury or death, and that protective equipment is insufficient; and third, the job classifications do not consider the hazard. Dkt. 55 at 58. The Correctional Officers have sufficiently met all three of these requirements. See Dkt. 19 (Appendix) at 029–033. Thus, the operative Complaint contains sufficient details to plausibly allege a claim for HDP and EDP. However, if necessary, the Correctional Officers could provide additional details

regarding specific job duties and the nature of contact should the Court require it. *See* Dkt. 41 at 44. They could also set forth facts regarding the contact tracing and recording of inmates who test positive for COVID-19 such that they can prove exposure or the potential for exposure on a daily basis based on the Correctional Officers' job duties.

CONCLUSION AND RELIEF SOUGHT

For all of these reasons, and for the reasons set forth in the Correctional Officers' opening *en banc* brief, *see* Dkt. 41, and their briefs before the original panel, *see* Dkts. 11, 18, this Court should reverse the decision of the Court of Federal Claims, reinstate the Correctional Officers' Complaint, and remand with instructions to deny the Government's motion to dismiss in full.

Respectfully submitted,

Dated: November 10, 2022

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CERTIFICATE OF FILING

I hereby certify that on this 10th day of November 2022, a copy of the foregoing “En Banc Reply Brief for Plaintiffs-Appellants Cody Adams, et al.” 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/ Molly A. Elkin

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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