Case No. 21-1662

IN THE 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.

THE UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims
Case No. 20-783, Senior Judge Charles F. Lettow

CORRECTED EN BANC BRIEF OF DEFENDANT-APPELLEE

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October 13, 2022

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INTRODUCTION

Plaintiffs-appellants (plaintiffs) are 188 current or former employees of the Department of Justice, Bureau of Prisons (BOP), who worked in a Federal prison in Danbury, Connecticut (Federal Correctional Institution – Danbury (FCI Danbury)). Despite not being assigned to work with or in close proximity to the coronavirus[1] that causes COVID-19, plaintiffs allege that by continuing to perform their ordinary duties at FCI Danbury during the recent pandemic, they are entitled to additional pay on the basis that they were exposed to "objects, surfaces, and/or individuals infected with COVID-19" at their workplace.

[1] Severe Acute Respiratory Syndrome Coronavirus 2, or SARS-CoV-2.

Plaintiffs sued in the Court of Federal Claims seeking additional compensation under programs authorizing hazardous duty pay (HDP), 5 U.S.C. § 5545(d) and 5 C.F.R., pt. 550, subpt. I, and environmental differential pay (EDP), 5 U.S.C. § 5343(c)(4) and 5 C.F.R., pt. 532, subpt. E. These programs do not authorize additional pay for alleged workplace exposure to SARS-Cov-2 when the allegedly exposed employees were not assigned to work with or in close proximity to the coronavirus and were performing their routine functions. Accordingly, the trial court dismissed plaintiffs' suit for failure to state a claim upon which relief can be granted. *Cody Adams et al. v. United States*, 152 Fed. Cl. 350 (2021).

Workers at FCI-Danbury are not the only Federal employees who allege that they are owed hazardous duty or environmental differential pay because of SARS-CoV-2. Forty-three other cases have been filed at the Court of Federal Claims asserting virtually identical claims, and not just by employees at other prisons. For example, suits have been filed by more than 8,000 border patrol agents;[2] by data management specialists, information technology specialists, mail clerks, and other workers at a Naval installation in Florida;[3] and by more than *50,000* named

[2] *Abad et al. v. United States*, No. 22-243 (Fed. Cl.).

[3] *Baker et al. v. United States*, No. 22-586 (Fed. Cl.).

plaintiffs in a putative nationwide class action – whose plaintiffs include cashiers, food inspector supervisors, cooks, and Transportation Security Administration officers, among others. *Braswell v. United States*, No. 20-359C (Fed. Cl.). In *Braswell*, the named plaintiffs work for various agencies, in different job capacities, under different pay scales, performing different tasks, in different states, and under different job classifications. If the Court adopts the expansive reading of the HDP and EDP regulations that plaintiffs advocate here, the *Braswell* plaintiffs will seek to certify a class that includes the entire Federal workforce that did not work from home 100 percent of the time during the pandemic.

Plaintiffs' claims are contrary to both Congress's intent in adopting the HDP and EDP statutes, and to the language of the Office of Personnel Management's (OPM)implementing regulations. Plaintiffs did not engage in the type of extraordinary duties for which hazard pay was intended. The Court should therefore affirm the dismissal of the complaint.

STATEMENT OF THE ISSUES

1. How should the term "unusual[]" be understood in the context of establishing "pay differentials" and "proper differentials" under 5 U.S.C. §§ 5343(c)(4), 5545(d)?

2. In view of *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007), 5 C.F.R. § 550.902 (hazard duty pay (HDP) Regulation), and Appendix A of 5 C.F.R. pt. 550, subpt. I (HDP Schedule), what is the meaning of "accident?" What distinction, if any, is there between accidental exposure and incidental exposure?

3. If this Court holds that the HDP Schedule and 5 C.F.R. pt. 532, subpt. E, Appx. A (environmental differential pay (EDP) Schedule) are not limited to laboratory-specific duties, what limits, if any, are there to the "work[] with or in close proximity to" language in the HDP and EDP Schedules?

4. Are infected persons and surfaces "primary containers of organisms pathogenic for man," as recited in the EDP Schedule for distinguishing between high- and low-degree hazards?

5. If this Court concludes that the Court of Federal Claims properly granted dismissal, to what extent could the underlying complaint be amended to establish a plausible claim for relief that satisfies the "short and plain statement" standard of United States Court of Federal Claims Rule 8?

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Statutory And Regulatory Background

In 1966, Congress authorized OPM's predecessor, the U.S. Civil Service Commission, to create a program to pay additional compensation at fixed rates (pay differentials) to Federal civilian employees "for duty involving unusual physical hardship or hazard." Pub. L. No. 89-512, § 1, 80 Stat. 318, 318 (1966) (codified as amended at 5 U.S.C. § 5545(d)). Before Congress enacted legislation authorizing those pay differentials, certain military personnel, U.S. Public Health Service officers, and wage board employees were eligible for additional hazard-related compensation, but most civilian employees were not. No mechanism existed to compensate such an employee for performing assignments involving unusual physical hardships or hazards outside that employee's job classification. *Adair v. United States*, 497 F.3d 1244, 1253 (Fed. Cir. 2007) (citing H.R. Rep. No. 89-31, 1st Sess., at 2 (1965)).

Congress viewed the new hazardous duty pay program as a gap-filling measure to compensate employees for the rare times when they are assigned to "take unusual risks not normally associated with [their] occupation[s] and for which added compensation is not otherwise provided[.]" *Id.* at 1254 (quoting H.R. Rep. No. 89-31 at 2). Congress expected that this new program would be one of *narrow* application. According to the Committee report prepared in February

1965, Congress estimated that the "cost would be less than *$100,000 annually*."[4] H.R. Rep. No. 89-31 at 2 (emphasis added). Moreover, although an alternate legislative proposal would have authorized compensation for any "hardship or hazard not usually involved in carrying out the duties of [an employee's] position," Congress enacted legislation specifying that any such hardship or hazard must itself be "unusual." *Id.* at 5. Without the "unusual" qualifier limiting the program's scope, Congress expressed concern that the program would result in "greater cost and difficulty of administration." H.R. Rep. No. 89-31 at 5.

Six years later, in 1972, Congress established the Federal Wage System for trade, craft, and laboring employees, and enacted a similar enhanced pay program for those employees, which authorized environmental differential pay for "duty involving unusually severe working conditions or unusually severe hazards[.]" Pub. L. No. 92-392, § 5343(c)(4), 86 Stat. 564, 567 (1972) (codified as amended at 5 U.S.C. § 5343(c)(4)).

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[4] Based on inflation rates, $100,000 in 1965 dollars translates to approximately $937,000 in 2022 dollars. *See* https://go.usa.gov/x6Zk5 (last visited September 23, 2022). Notably, there were nearly 2 million civilian Federal employees in 1965, approximately the same number as in 2020. *See* https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/ (last visited October 11, 2022).

Not only did Congress intend for the hazardous duty and environmental differential pay programs to be of limited application, but Congress also specifically directed OPM's predecessor, the Civil Service Commission, "to establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard[.]" 5 U.S.C. § 5545(d). Similarly, Congress directed OPM to promulgate regulations authorizing "proper differentials, as determined by [OPM] for duty involving unusually severe working conditions or unusually severe hazards." 5 U.S.C. § 5343(c)(4).

Congress did not define hazardous duty or identify duties involving "unusual physical hardship or hazard" or "unusually severe working conditions or . . . hazards." Instead, it directed OPM to do so. 5 U.S.C. §§ 5545(d), 5343(c)(4). Under those statutory delegations, OPM defined hazardous duty as "duty performed under circumstances in which an accident could result in serious injury or death." 5 C.F.R. § 550.902. And OPM promulgated schedules of pay differentials for both HDP and EDP. *See* 5 C.F.R., pt. 550, subpt I, App. A; *id.*, pt. 532, subpt. E, App. A. Only employees who meet the regulatory requirements set forth by OPM are eligible to be paid HDP or EDP. *See* 5 U.S.C. § 5545(d) ("*Under such regulations as [OPM] may prescribe* . . . an employee . . . is entitled to be paid the appropriate differential . . . .") (emphasis added); 5 U.S.C. § 5343(c)

(OPM regulations "shall provide . . . for proper differentials, *as determined by the Office*, for duty involving unusually severe working conditions or unusually severe hazards") (emphasis added).

OPM's HDP schedule identifies 57 specific duties reflecting "duty involving unusual physical hardship or hazard." 5 C.F.R., pt. 550, subpt I, App. A. The duties specified in the HDP Schedule comprise extraordinary assignments such as serving as a test subject in spacecraft being dropped into the sea, performing experimental parachute jumps, working on a drifting sea ice floe, tropical jungle duty and, at issue here, "work[ing] with or in close proximity to" "virulent biologicals," which OPM classifies as a sub-category of "Hazardous Agents." *Id.*

Although the HDP Schedule does not provide examples of what it means to "work with or in close proximity to" virulent biologicals, earlier OPM guidance explained that the regulation covers duties involving biological experimentation or production with pathogenic micro-organisms, such as

- Operating or maintaining equipment in biological experimentation or production.
- Cleaning and sterilization of vessels and equipment contaminated with virulent micro-organisms.
- Caring for or handling disease-contaminated experimental animals in biological experimentation and production in medical laboratories, the primary mission of which is research and development not directly associated with patient care.

- Cultivating virulent organisms on artificial mediums, including embryonated hen's eggs and tissue cultures where inoculation or harvesting of living organisms is involved for production of vaccines, toxides, etc. or for sources of material for research investigations such as antigenic analysis and chemical analysis.

Background Info. on App. A to Part 550, Fed. Personnel Manual, Supp. 990-2 § 550-E-4, 1973 WL 151518 (1973). The Civil Service Commission, which drafted these examples, explained that they "are intended to serve as an aid to agencies in determining what situations a hazardous duty described in Appendix A to part 550 covers."[5] *Id.*

HDP is not authorized when the hazardous duty has been taken into account in the classification of the employee's position. 5 C.F.R. § 550.904(a). A hazardous duty is "taken into account in the classification" of a position when the duty is a part of the "knowledge, skills, and abilities required to perform that duty[.]" 5 C.F.R. § 550.904(c); *see also In re Fernandez*, U.S. Office of Personnel Management Compensation Claim Decision No. 16-0001 (August 9, 2016), available at https://www.opm.gov/policy-data-oversight/pay-leave/claim-decisions/compensation-leave/claims/2016/16-0001/ (last visited October 11,

[5] As we noted in our panel brief, although OPM has since retired the Federal Personnel Manual containing these examples, this Court regards it as a "valuable resource when construing regulations that were promulgated or were in effect" before the Manual's retirement. *See Schmidt v. Dep't of Interior*, 153 F.3d 1348, 1353 n.4 (Fed. Cir. 1998).

2022) (denying a claim for HDP where the risks of serving in the Pentagon Force Protection Agency were taken into account in the classification of the claimant's duty position).

Similarly, the EDP program authorizes "environmental differential pay" when an employee is "exposed to a working condition or hazard that falls within one of the categories approved by OPM." 5 C.F.R. § 532.511(a)(1). Like the HDP Schedule, the EDP Schedule identifies categories of "duty involving unusually severe working conditions or unusually severe hazards" that qualify for payment of an environmental differential, one of which is "work with or in close proximity to" "micro-organisms," where safety precautions "have not practically eliminated the potential for personal injury[.]" 5 C.F.R., pt. 532, subpt. E, App. A. Included among the 35 EDP Schedule categories are both "high degree" and "low degree" micro-organism hazards. *Id*. Examples of high degree hazards include:

- Direct contact with primary containers of organisms pathogenic for man *such as culture flasks, culture test tubes, hypodermic syringes and similar instruments*, and biopsy and autopsy material. Operating or maintaining equipment in biological experimentation or production.
- Cultivating virulent organisms on artificial media, including embryonated hen's eggs and tissue cultures where inoculation or harvesting of living organisms is involved for production of vaccines, toxides, etc., or for sources of material for research investigations such as antigenic analysis and chemical analysis.

Id. (emphasis added). Low degree EDP hazards, on the other hand, are encountered when employees work "with or in close proximity to micro-organisms[,]" but "do[] not require the individual to be in direct contact with primary containers of organisms pathogenic for man," and require only that "the potential for personal injury" has not been practically eliminated. *Id*. Unlike the high degree EDP hazard, the EDP Schedule provides no examples of a low degree hazard.

II. This Court's Previous Analysis Of The HDP And EDP Programs, And The Trial Court's Decision Below

In *Adair*, this Court was asked to analyze claims brought by correctional workers who alleged that they were entitled to HDP or EDP based on workplace exposure to environmental tobacco smoke (ETS) emitted by prisoners. Although the plaintiffs in that case alleged that ETS was a "toxic chemical" under the HDP Schedule, and not a virulent biological, *Adair's* analysis is instructive here.[6]

The Court noted that the HDP and EDP statutes did not cover all physical hardships or hazards, but only those that are "unusual." *Adair*, 497 F.3d at 1253;

[6] Both toxic chemicals and virulent biologicals are sub-categories of the same "Exposure to Hazardous Agents" category of hazards in Appendix A to Subpart I of Part 550, and thus both toxic chemicals and virulent biologicals qualify as a hazard only if an employee is assigned to "work with or in close proximity to" them.

see also id. at 1256. Relying on the legislative history, the Court explained that unusual hazards included those that are "irregular or intermittent" and thus cannot be controlled by "safety training and precautions." *Id*. at 1254 (quoting H.R. Rep. No. 89-31). The Court then reviewed OPM's definitions of hazardous duty in the HDP and EDP regulations and concluded that they were consistent with the plain meaning of the statute, and thus entitled to deference. *Id.* at 1255-1257.

This Court held that ETS fell outside OPM's definition of hazardous duty because it could be adequately alleviated by protective or mechanic devices, such as ventilation systems, and because ETS does not constitute an "accident" under the definition of hazardous duty. *Id.* at 1255. The Court further held that ETS was not a "toxic chemical" as defined by the regulations because that hazard required a "possibility of leakage or spillage[,]" and ETS does not have a "possibility of leaking or spilling from cigarettes." *Id.* at 1256. Addressing EDP, the Court explained that exposure to airborne cigarette smoke "does not share any commonality with the examples of either high or low degree hazards provided in the regulations." *Id*. at 1257. The Court emphasized that the regulatory examples "all describe scenarios where the job assignment requires directly or indirectly working *with* toxic chemicals or containers that hold toxic chemicals as part of a job assignment via *e.g.*, marking, storing, neutralizing, operating, preparing,

analyzing, transferring, disposing, or otherwise handling toxic chemicals." *Id*. at 1258. The Court expressly noted that the examples do not cover situations in which the employees work with or in close proximity to inmates who incidentally smoke, for there is no work "with" ETS in this context. *Id*. The Court concluded that the regulatory examples do not include situations in which known hazards "are common *or ubiquitous* in the ambient work environment." *Id*. (emphasis added).

In dismissing plaintiffs' complaint, the trial court below relied on *Adair*, first holding that plaintiffs' allegations about working with "objects, surfaces, and/or individuals infected with COVID-19" could not qualify as hazardous duty because, as this Court held in *Adair*, "potential exposure to the virus is dissimilar to an 'accident' . . . such as duty performed on a high structure where protective facilities are not used." *Cody Adams*, 152 Fed. Cl. at 355. The trial court further recognized the importance *Adair* had placed on the regulatory examples in understanding the overall regulatory scheme and held that potential exposure to airborne coronavirus is not equivalent to being assigned duty to work *directly with* coronavirus. *Id.* at 356.

SUMMARY OF THE ARGUMENT

Despite clear evidence that Congress intended the HDP and EDP programs to apply only in exceptional circumstances, and despite *Adair's* well-reasoned analysis upholding OPM's regulatory scheme, plaintiffs urge the Court to stretch the interpretation of the HDP and EDP regulations in a way that would vastly expand the reach of both HDP and EDP, effectively rendering them not unusual at all. This could be accomplished only by departing from Congress's instruction that such hazard be "unusual" and by ignoring the guidance in both the regulatory examples and the Federal Personnel Manual, which was specifically intended to aid agencies in interpreting those regulations.

Plaintiffs' claims here fail to satisfy the regulatory requirements applicable to either the HDP or EDP program. The keystone to both requirements is that an employee must be assigned specifically to "work with or in close proximity to" virulent biologicals (for HDP) or micro-organisms (for EDP), *i.e.*, the virulent biological material or micro-organism must itself be the focus of the duty. Merely alleging that employees were potentially exposed to individuals or surfaces infected with SARS-CoV-2 fails this test.

Our interpretation of the regulations is consistent with the plain meaning of both the statute and regulations, as well as Congress's intent. In response to the

Court's first question, "unusual" in the context of establishing pay differentials should be defined as "not commonly occurring," but must also be defined in relation to the job duties that correctional workers routinely perform. Plaintiffs propose a facially similar definition, but their understanding of "unusual" is overbroad in practice because they urge the Court to define hazards at a granular level inconsistent with both Congress's intent that the hazard pay programs apply only in exceptional circumstances and OPM's regulations implementing that intent.

In response to the Court's second question, both "accidental" and "incidental" should also be given their ordinary meaning. An "accident" is an unforeseen occurrence that causes injury and cannot be reasonably anticipated. "Incidental," on the other hand, is something subordinate to something of greater importance; having a minor role. Although plaintiffs again suggest a definition of "accident" that closely tracks the Government's definition, plaintiffs then present examples of "accidents" that are divorced from their proposed definition. Indeed, despite arguing that accident means "an unforeseen *event* that can lead to injury," Applnt. Br. 23 (emphasis added), plaintiffs urge this Court to consider each of these an unforeseen *event*: (1) the "prison environment;" (2) "inmates;" (3) exposure to SARS-CoV-2; and (4) "*potential* exposure" to SARS-CoV-2. Thus, in

practice, plaintiffs' theory of what constitutes an "accident" for purposes of the HDP and EDP regulations is illogical and unworkable. Moreover, plaintiffs' theory of what may be considered "accidental" would swallow the distinction this Court drew in *Adair* – relying upon the governing statutes and regulations – between accidental and incidental exposure to a hazard. The Government's approach, in contrast, in which accidental exposure is possible only when an employee is assigned duties that specifically require an employee to work with or in close proximity to a virulent biological or micro-organism itself, accords with the regulatory text, Congressional intent, and the sensible construction of the statutes and regulations that this Court adopted in *Adair*.

As to the Court's third question, the Court should adopt the meaning of "work with or in close proximity to" virulent biologicals and micro-organisms that this Court endorsed in *Adair*, and which the trial court applied in both *Adair* and this case. To satisfy the phrase "work with or in close proximity to," an employee must be assigned to work with or in close proximity to virulent biologicals or micro-organisms, such that the virulent biological or micro-organism is itself the focus of the assigned duty. Put differently, to qualify for HDP or EDP, work with or in close proximity to the virulent biological or micro-organism must be the focus of the employee's job duties; it is insufficient that the employee encountered

it incidentally while performing ordinary job responsibilities. This understanding provides a workable limitation for implementing the narrow scope of the HDP and EDP regulations that Congress intended. Plaintiffs' proposal, by contrast, would eliminate any reasonable boundaries and thus undermine Congress's intent that the HDP and EDP statutes apply only in limited circumstances. According to their theory, all that is required is for an employee to show that *someone* at their workplace tested positive for SARS-CoV-2 in an undefined area where the plaintiff-employee "*may be required to go*" without regard to the particular duty the employee is assigned to perform. Plaintiffs contend that their theory has a key limitation because employees would need to show they were in close proximity to "*potentially infected* individuals." But plaintiffs' proposal would vastly expand the class of workers who may be entitled to HDP or EDP given the enormous number of "potentially infected" individuals. This definition is also expressly contradicted by OPM guidance that was issued in March 2020, the examples set forth in the Federal Personnel Manual, and the examples set forth in the high-degree EDP regulations.

As to the Court's fourth question, human beings are not "containers." Any attempt to interpret the EDP regulations in such a manner would violate the most basic canons of statutory interpretation. Plaintiffs have abandoned any argument

that infected "surfaces" could be considered "primary containers of micro-organisms pathogenic for man," but even if they had not, such an interpretation would fail for the same reasons why their effort to transform human beings into "primary containers" fails.

Finally, plaintiffs concede that if this Court declines to overrule *Adair* and affirms the decision of the trial court based on the reasoning set forth in its opinion, they would be unable to amend their complaint to state a claim upon which relief may be granted. Whether plaintiffs may state a claim in an amended complaint would depend on the allegations contained therein. At bottom, however, any future complaint would have to address all the elements of a claim for HDP or EDP. Those elements are straightforward: (1) an employee was assigned to and performed work with or in close proximity to a virulent biological or micro-organism; (2) SARS-CoV-2 meets the definition of a virulent biological or micro-organism; and (3) for HDP, the employee's job classification does not already take into account such work with virulent biologicals.

Ultimately, because plaintiffs' arguments cannot be squared with Congress's intent when it enacted the HDP and EDP statutes and conflict with OPM's reasonable implementation of those statutes, this Court should affirm the trial court's judgment and deny plaintiffs' appeal accordingly.

ARGUMENT

I. Standard Of Review

This Court reviews *de novo* whether a complaint was properly dismissed for failure to state a claim. *Ingham Reg'l Med. Ctr. v. United States*, 874 F.3d 1341, 1346 (Fed. Cir. 2017) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1273 (Fed. Cir. 1991)).

To avoid dismissal for failure to state a claim, "a complaint must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). When the complaint fails to "state a claim to relief that is plausible on its face," the court must dismiss it. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is facially implausible if it does not permit the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556). Allegations "that are 'merely consistent with' a defendant's liability" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. (quoting *Twombly*, 550 U.S. at 557).

This Court reviews judgments, not opinions. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1392 (Fed. Cir. 1987). Thus, this Court "may

affirm the [trial] court on a ground not selected by the [trial] judge so long as the record fairly supports such an alternative disposition of the issue." *Banner v. United States*, 238 F.3d 1348, 1355 (Fed. Cir. 2001) (cleaned up); *accord United States v. New York Tel. Co*., 434 U.S. 159, 166 n.8 (1977) ("[T]he prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted.").

II. "Unusual" In The Context Of Establishing Pay Differentials Should Be Defined As "Not Usual; Uncommon," And Must Also Be Defined In Relation To The Job Duty Being Performed

A. The Court Should Adopt The Plain Meaning Of "Unusual"

Congress restricted HDP to employees assigned duty "involving unusual . . . hazard" and "hazard not usually involved in carrying out the duties of [the employee's] position." 5 U.S.C. § 5545(d). Congress similarly restricted EDP to employees who are assigned "duty involving . . . unusually severe hazards." 5 U.S.C. § 5343(c)(4).

Neither "unusual" nor "unusually" is defined in the statutes, but "it is well settled that the legislature's failure to define commonly-used terms does not create ambiguity, because the words in a statute are deemed to have their ordinarily understood meaning." *Exec. Jet Aviation, Inc. v. United States*, 125 F.3d 1463, 1468 (Fed. Cir. 1997) (cleaned up); *see also Allen v. Principi*, 237 F.3d 1368, 1375 (Fed. Cir. 2001) ("To interpret a statute we first look to the statutory language and

then to the legislative history if the statutory language is unclear."). The Court's "inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Clary v. United States*, 333 F.3d 1345, 1348 (Fed. Cir. 2003).

The Court should thus give the term "unusual[]" its ordinary meaning: not usual, uncommon. *Unusual*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/unusual (last visited Oct. 5, 2022). Plaintiffs agree. Applnt. Br. 12 (stating that the term "unusual" should be understood as "uncommon, or out of the ordinary"). But, "unusual" as used in the HDP statute modifies "physical hardship or hazard." Thus, the physical hardship or hazard itself must be "unusual"—or not commonly occurring. 5 U.S.C. § 5545(d). Similarly, "unusually" as used in the EDP statute modifies "severe hazards," so it cannot simply mean any uncommon hazard, but an uncommonly severe hazard. 5 U.S.C. § 5343(c)(4).

Not only must the hazard be uncommon both in its incidence and in its severity, but it also must be a hazard that is "not usually involved in carrying out the duties of [the employee's] position. 5 U.S.C. § 5545(d). Thus, "unusual" in the context of establishing pay differentials must also be informed by the job duty being performed. Again plaintiffs agree. Applnt. Br. 15 ("Unusual must be

understood in terms of the relationship of the hazard to the employee's regular job duties.").

Rather than articulating how these requirements apply in particular cases, Congress delegated authority to OPM to implement these requirements. 5 U.S.C. § 5545(d) ("The Office [of Personnel Management] shall establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard."); *id.* § 5343(c)(4) ("The Office of Personnel Management, by regulation, . . . shall provide . . . for proper differentials, as determined by the Office, for duty involving unusually severe working conditions or unusually severe hazards.").

Under that statutory delegation, and consistent with Congress' intent that HDP be available only for unusual hazards that are "not usually involved in carrying out the duties of [an employee's] position," OPM has identified unusual hazards in the HDP Schedule, which sets forth specific duties reflecting "duty involving unusual physical hardship or hazard," 5 C.F.R., pt. 550, subpt I, App. A, and in the EDP Schedule, which sets forth categories of "duty involving unusually severe working conditions or unusually severe hazards," C.F.R., pt. 532, subpt. E, App. A. In *Adair*, the Court determined that OPM's implementing regulations, including the HDP and EDP Schedules, reflect a reasonable construction of the statutes and are entitled to deference. *See Adair*, 497 F.3d at 1255-58 (deferring to

5 C.F.R. § 550.904, *id*., pt. 550, subpt. I, App'x A; *id*. § 532.511; *id.* pt. 532, Subpt. E, App. A). Plaintiffs do not challenge that holding here, and there is no reason to revisit the issue.

In sum, merely defining "unusual" as the term is used in the statute does not resolve whether plaintiffs have stated a claim for HDP or EDP. Congress intended for OPM to give further content to what constitutes an "unusual" hazard in its regulations, and so the Court must analyze how OPM has interpreted the term in those regulations. *See* 5 C.F.R. § 550.904; 5 C.F.R., pt. 550, subpt. I; 5 C.F.R. § 532.511; 5 C.F.R., pt. 532, subpt. E. Here, plaintiffs are required to meet the specific regulatory requirements for a specific duty category before HDP or EDP must be paid. That is, they must plausibly allege that they "were assigned to and perform[ed]" "work with or in close proximity to" "virulent biologicals" or "micro-organisms," as defined in the HDP and EDP Schedules. 5 C.F.R. § 550.904(a), (c); 5 C.F.R. pt. 550, subpt. I, App. A; 5 C.F.R. § 532.511; 5 C.F.R., pt. 532, subpt. E, App. A; *see also* Fed. Wage Sys. Operating Manual § S7-8f(1).

B. Plaintiffs Urge The Court To Adopt An Overly Broad And Incorrect Interpretation Of "Unusual" That Would Vastly Expand What Constitutes Compensable Hazards

While plaintiffs concur that "unusual" for purposes of the HDP and EDP statutes means uncommon in the context of an employee's particular duties, they

are incorrect that SARS-CoV-2 meets that definition of an unusual hazard. Plaintiffs attempt to prove this point by first claiming that exposure to infectious diseases in general is an "unusual" occurrence in relation to a correctional worker's job responsibilities. Applnt. Br. 8, 12, 20-21. They then claim that SARS-CoV-2 is an unusual hazard *to society* because it is a new virus variant, so it must also be an unusual hazard to plaintiffs under the HDP and EDP regulations. *Id*. Both contentions are incorrect. As we show below, plaintiffs' contention that potential exposure to airborne illnesses is uncommon in prisons conflicts with their own allegations. And 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 (for HDP) or injury (even one that is not severe) for EDP. Adopting such a broad interpretation renders "unusual" almost meaningless as a limitation on the availability of hazard pay.

If a hazard is of a type regularly encountered during the performance of an employee's job duties, it cannot be "unusual." The type of hazard at issue here – exposure to communicable illnesses via close contact with others – is inherent in the types of functions that plaintiffs perform as correctional workers. This contrasts with the types of extraordinary hazards that OPM has long concluded merit HDP and EDP. *See, e.g.*, 5 C.F.R., pt. 550, subpt. I, App. A (providing HDP

for "personnel [who] are required to serve as test subjects in spacecraft being dropped into the sea," or for employees who are "working on a drifting sea ice floe . . . installing scientific equipment," or for employees who disarm explosive ordinance or toxic propellants "on vehicles on the launch pad that have reached a point in the countdown where no remote means are available for returning the vehicle to a safe condition").

Plaintiffs attempt to defeat this conclusion by arguing that the Court should not view the nature of the hazard to be exposure to transmissible illnesses generally. Rather, they urge that the relevant hazard must be potential exposure to the specific virus giving rise to the transmissible illness at issue – here, COVID-19 – or even the coronavirus variants to which they may have potentially been exposed.[7] But this approach would vastly expand the coverage of the HDP and EDP statutes in direct contravention of Congress's expectation and intent when those statutes were enacted. Under plaintiffs' view, for example, each new strain

[7] Coronaviruses are not new, and plaintiffs admit as much. Applnt. Br. 19, n.8 (conceding that "coronaviruses themselves have been a known hazard since at least 1937"). Although SARS-CoV-2 is a "novel" coronavirus, it is still a contagious, respiratory-illness-causing virus that replicates its genome in the human body, like influenza viruses, rhinoviruses, and parainfluenza viruses. And so, it is unsurprising that plaintiffs urge this Court to define the relevant hazard as a specific virus variant – the more specifically plaintiffs define the hazard, the more "unusual" it appears.

of the flu could be an "unusual hazard" for which Federal employees could claim hazard pay.

But potential exposure to infectious diseases is not an unusual aspect of correctional workers' jobs. Indeed, plaintiffs emphasize that they always work in close contact and in confined spaces with both prisoners and co-workers. *See, e.g.*, Applnt. Br. 27 ("at any moment, a situation may arise that would require a correctional officer to have prolonged physical contact" with an inmate); *id.* at 35 ("proximity to inmates is necessary for them to effectively perform their jobs; tasks such as pat downs and inmate transfers cannot be performed without being close to or physically touching the inmates, or their coworkers"); *id.* at 44, n.21 ("positions to which plaintiffs have been assigned within the Institution involve prolonged, close-quarters exposure to coworkers and/or inmates, often in indoor or enclosed settings"). It is therefore hard to imagine a scenario where plaintiffs, whose job responsibilities include the close contact situations they describe, are not routinely exposed to airborne hazards, including transmissible illnesses, when performing their normal job duties.

Moreover, *whenever* people are required to be in close physical contact for a long time in confined spaces, the possibility of airborne or fomite transmission of communicable diseases is and always has been inherent. Studies abound showing

that outbreaks of communicable diseases are not unusual in prisons, as they are in other close and confined settings. For example, researchers at Oxford University studying effective infection control strategies at prison facilities reviewed more than 100 articles illustrating how common infectious-disease-outbreaks are in prisons around the world. *See* Gabrielle Beaudry *et al.*, *Managing outbreaks of highly contagious diseases in prisons: a systematic review* (BMJ Global Health Journal, Oct. 6, 2020) (https://gh.bmj.com/content/5/11/e003201). This study showed that in just the last 20 years, outbreaks of tuberculosis, influenza (types A and B), H1N1 (swine flu), varicella, measles, mumps, adenovirus, and SARS-CoV-2 have all occurred at prisons in the United States and other countries. And that is without even considering outbreaks of bloodborne pathogens, such as HIV, Hepatitis B, or Hepatitis C (bloodborne pathogens such as these could presumably be considered virulent biologicals).[8]

Plaintiffs' reliance on a previously undisclosed copy of a correctional officer position description, which is not part of the record below, does not help their

[8] Plaintiffs point to several extra-record studies to portray prisons as exceedingly dangerous repositories of SARS-CoV-2, *see e.g.* Applnt. Br. 18 n.7, but those studies only show that SARS-CoV-2 is like other airborne infectious illnesses in that outbreaks frequently occur in prisons. The studies do not address whether exposure to SARS-CoV-2 carried by both coworkers and inmates constitutes an "unusual" hazard in the context of plaintiffs' employment.

argument. Applnt. Br. Add. at 60. Even that position description shows that correctional workers' job duties require them to continually interact with prisoners and co-workers in close contact in confined spaces. *See, e.g.*, Applnt. Br. Add. at 60 (stating that correctional officers may have to use physical force to maintain control of inmates); *id.* at 61 (requiring officers to "supervise[] and instruct[] inmates regarding proper sanitation [and] personal hygiene" and to "escort prisoners"); *id.* at 62 (requiring officers to search inmates, inmate housing areas, and inmate work areas); *id.* at 63 (stating that "the duties of this position require frequent direct contact with individuals in confinement . . .").

That plaintiffs' duty descriptions have not changed and that they have not been assigned any materially different or more dangerous tasks since the beginning of the pandemic cuts against their argument that their duties were subject to an "unusual" hazard or a hazard that is "not usually involved in carrying out the duties of [the employee's] position." 5 U.S.C. § 5545(d). And, as discussed below, OPM's regulations reasonably determine the situations in which such hazards are deemed to exist, and they do not cover the scenario here, where Federal employees go on about their usual work and could be exposed to a communicable disease as a by-product of a public health crisis affecting "society at large," including, but not limited to, the plaintiffs' workplace.

Thus, the plaintiffs' claim that "direct exposure to an infectious airborne disease" is not a known hazard, Applnt. Br. 17, can only be true if this Court defines the hazard as exposure to the SARS-CoV-2 variant *specifically*. Put differently, plaintiffs can only prevail here if the Court were to define an "unusually severe hazard" as every new variant of any communicable disease that can cause severe injury (for HDP) or injury (even one that is not severe) for EDP. Such a holding would transform a program that Congress intended to have a limited scope and application into a broad basis for additional compensation based on the common hazard of living in a population of human beings capable of contracting and spreading disease caused by viruses. OPM correctly concluded that Congress intended a more limited understanding of what constitutes a qualifying hazard and has reasonably defined those circumstances in its implementing regulations.

Plaintiffs also claim that, because OPM has already determined that virulent biologicals are qualifying hazards for HDP, then SARS-CoV-2 must also be a qualifying hazard. Applnt. Br. 16 n.4 ("The test for whether COVID-19 is an unusual hazard is simply whether it meets the regulatory definition of 'virulent biological' or 'micro-organism' in the HDP and EDP schedules."). This is an incorrect oversimplification of the regulatory requirements. The *hazard* is *not* the

mere existence of a virulent biological, or whether a particular contagion meets the regulatory definition of a virulent biological. The *hazard* is *working* with or in close proximity to a virulent biological as defined in the regulations. *See* 5 C.F.R., pt. 550, subpt I, App. A ("Exposure to Hazardous Agents, work with or in close proximity to[]… virulent biologicals[.]"). As demonstrated below, the premise underlying plaintiffs' argument—that they are entitled to additional compensation for work with or in close proximity to people infected with COVID-19, or objects and surfaces those individuals may have contacted, without more—is flawed for the same reasons the Court found the plaintiffs' argument flawed in *Adair*. Because the regulations require work with or in close proximity to a "virulent biological" or a "micro-organism" itself, plaintiffs cannot state a claim based solely on alleged work with or in close proximity to "objects, surfaces, and/or individuals infected with COVID-19."

Plaintiffs claim that *Adair* is inapplicable to the question of whether SARS-CoV-2 is an unusual hazard because *Adair* was analyzing ETS, and not virulent biologicals or micro-organisms. Applnt. Br. 19. But that contention is also incorrect. This Court's interpretation of the HDP and EDP statutes in *Adair* is revealing, and correct, as is the Court's analysis of the deference due OPM's implementing regulations. The salient issue is not whether ETS and SARS-CoV-2

are equivalent (though both arguably may fall within the "Hazardous Agents" category in OPM's schedule), or whether SARS-CoV-2 existed at the time the HDP and EDP statutes and regulations were enacted. The issue for this Court is how to apply the critical element in OPM's regulations of "work[ing] with or in close proximity to" qualifying hazards, irrespective of whether they are from different subsets of the more general "Hazardous Agents" category. 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 regulatory framework applies to what constitutes "work with or in close proximity to" hazardous agents that qualify employees for HDP and EDP.

Plaintiffs' final justification for an expansive view of the HDP and EDP regulations is that SARS-CoV-2 is an unusual work hazard because it was an unusual hazard for society at large. Applnt. Br. 20. But that rationale cuts against plaintiffs. "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. SARS-CoV-2 was present throughout the community during the relevant periods. In any event, OPM has reasonably determined that hazard pay should exist for exposure to communicable

diseases or other virulent biologics only when the employee was specifically tasked to work with that biologic, *i.e.*, that the biologic was the focus of the duty. That was not the case here.

In sum, the Court should find that "unusual" means uncommon, and that OPM's regulations fairly implement that requirement by defining the unique circumstances under which a hazard may be said to exist. The Court should reject plaintiffs' attempt to redefine "unusual" in a manner that would parse common hazards so finely that it would make hazard pay routine rather than exceptional.

III. An "Accident" In The Context Of The HDP And EDP Programs Should Refer To An Unforeseen Occurrence That Causes Injury And Cannot Be Reasonably Anticipated

A. Both "Accidental" And "Incidental" Should Be Given Their Ordinary Meaning

In *Adair*, this Court reviewed the legislative history of the HDP and EDP programs and concluded that Congress intended the HDP statute "to cover assignments that were inherently dangerous because they posed a risk of accident." *Adair*, 497 F.3d at 1254 (citing H.R. Rep. No. 89-31 at 3-4). OPM regulations similarly define "hazardous duty" as "duty performed under circumstances in which an accident could result in serious injury or death, such as duty performed on a high structure where protective facilities are not used or on an open structure where adverse conditions such as darkness, lightning, steady rain, or high wind

velocity exist." 5 C.F.R. § 550.902. This Court "construe[s] a regulation in the same manner as [it] construe[s] a statute, by ascertaining its plain meaning." *Adair,* 497 F.3d at 1252 (citing *Tesoro Haw. Corp. v. United States*, 405 F.3d 1339, 1346 (Fed. Cir. 2005)). Neither the statutes nor the regulations define "accident" but, like "unusual," the term should be given its ordinary meaning. *Id*.

Black's Law Dictionary defines accident as "an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated." *Accident*, Black's Law Dictionary 15 (7th ed. 1999). Plaintiffs similarly describe an "accident" as an unforeseen event that can lead to injury. Applnt. Br. 23. Confusingly, however, plaintiffs proceed to describe each of these as "accidents":

- "the prison environment" (Applnt. Br. 24);
- "inmates" (Applnt. Br. 27);
- "exposure" to SARS-CoV-2 (Applnt. Br. 28); and
- "*potential exposure*" to SARS-CoV-2 (Applnt. Br. 30 ("[F]or the correctional officers, *potential exposure* to COVID-19 without proper safety precautions is an accident." (emphasis added)).

Rather than adopt plaintiffs' understanding of "accident," which encompasses a variety of situations bearing little resemblance to its ordinary meaning, "accident"

in the context of the HDP and EDP regulations should refer to an unforeseen injurious occurrence that cannot be reasonably anticipated.

As for hazards involving virulent biologicals or micro-organisms, "accident" is best understood to mean an adverse event flowing from a particular assignment to work with or in close proximity to the agent. As this Court observed, compensable hazardous assignments "are always accompanied by the undeniable awareness of *the inherent danger of the activity* and the knowledge that an accident, should it occur would almost certainly be fatal." *Adair*, 497 F.3d at 1254. The assignment to work with or in close proximity to a hazardous agent is the "inherently dangerous activity," and an "accident" for purposes of the regulations should refer to an unforeseen injurious occurrence resulting from that inherently dangerous assignment. Thus, it would not involve exposure, even if unforeseen, that was merely a consequence of the performance of an employee's regular assigned duties.

"Incidental," on the other hand, is something subordinate to something of greater importance; having a minor role. *Incidental*, Black's Law Dictionary 765 (7th ed. 1999). Something incidental is not a major part of the item or situation in question. In the HDP and EDP context, this means 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. Rather, for a hazard to be compensable because of the risk of an accident and not merely an incidental exposure, the focus of the assigned duty must be the virulent biological or micro-organism itself. *Adair*, 497 F.3d at 1258; *Cody Adams*, 152 Fed. Cl. at 356.

The Court of Federal Claims articulated this distinction when it analyzed the EDP regulations in *Adair*. In that decision, the trial court held that the toxic chemicals regulation did not "contemplate compensation for incidental exposure to toxins in the surrounding atmosphere while performing their assigned duties." *Adair v. United States*, 70 Fed. Cl. 65, 80 (2006). The trial court explained that "the telling characteristic of the example provided [in the EDP regulation] is that the work with the toxic chemical materials is itself an assigned duty . . . exposure to second-hand smoke, which is incidental to and not part and parcel of their assigned duties, is excluded from coverage under this category." *Id*. This Court reinforced this principle when it held that the examples in the OPM regulations "do not cover situations in which the employees work with inmates who incidentally smoke, for there is no work 'with' ETS in this context." *Adair*, 497 F.3d at 1258. In such a situation, the Court explained, exposure to an inmate's cigarette smoke is not the type of "inherently dangerous assignment . . . [that] pose[s] a risk of accident" that Congress intended to cover. *Id*. at 1254.

Requiring exposure to the hazard and the risk of an ensuing accident to be part of the employee's assigned duties accords with OPM's regulations, which provide HDP pay "to an employee *who is assigned to and performs*" "work with or in close proximity" to "virulent biologicals." 5 C.F.R. § 550.904(a) (emphasis added); *id.*, pt. 550, subpt. I, App. A. Plaintiffs here do not allege that the focus of their assignments was to work with SARS-CoV-2 or that their assignment intended specifically for them to work with a qualifying biologic. Instead, they allege that their exposure to the virus was a by-product of their assigned duties. The performance of job duties that do not require working with SARS-CoV-2, and only incidentally may have exposed employees to the virus, does not constitute hazardous duty under 5 C.F.R. § 550.902 for which HDP is available.

B. Plaintiffs' Theory Of What Constitutes An Accident For Purposes Of The Hazard Pay Regulations Is Unworkable And Conflicts With OPM's Regulations

Although plaintiffs propose a definition of "accident" that accords with the word's plain meaning, they then seek to apply the term to situations that stray from that definition. Applnt. Br. 24-30. Plaintiffs' position on how the term "accident" should be understood in practice would render the term effectively meaningless.

For example, plaintiffs argue that the "prison environment" is an "accident." Applnt. Br. 24. To begin with, it is hard to understand how an "environment"

could be considered "an unintended and unforeseen injurious occurrence." Plaintiffs cite a statement by the Chairman of the Civil Service Commission in the HDP statute's legislative history in support of their position. *Id*. In the portion of the Chairman's statement that the plaintiffs recite, he describes how, in most regularly recurring hazardous work situations, precautions have been developed that reduce the possibility of accidents so much that the degree of hazard becomes negligible. *Id.* (citing H.R. Rep. No. 89-31 at 4). The Chairman added that *compensable* hazardous duty goes beyond such conditions, and the examples of compensable hazardous duty that he included in his letter to Congress "take into consideration . . . exposure to elements or conditions over which little or no control can be exercised," and "always are accompanied by the undeniable awareness of the inherent danger of the activity." *Id*. at 24-25 (citing H.R. Rep. No. 89-31 at 4).

Plaintiffs suggest that the prison environment is like the situation described by the Chairman because workers allegedly have little or no control over hazardous conditions and SARS-CoV-2 makes prisons inherently dangerous. But plaintiffs omit a key clause of the Chairman's testimony that undermines this premise. The Chairman also stated that "normally, *few accidents occur in these* [compensable] *hazardous situations*." H.R. Rep. No. 89-31 at 4 (emphasis added). According to plaintiffs, however, SARS-CoV-2 is an "invisible monster that

plagued the institution," Applnt. Br. 8, and so "accidents" would be occurring every day, and everywhere. In fact, as plaintiffs claim in their brief, the "prison environment" is *itself* the accident. Applnt. Br. 24. To define accident in such a way guts the meaning of the word. Here, plaintiffs were performing their regular job functions, not a temporary or unusual duty that may have given rise to a temporary hazard. The times when employees are asked to perform uniquely dangerous functions are rare, but plaintiffs' contention that their ordinary work environment is itself an "accident" opens the door for all employees in the environment to claim that they have been exposed to a hazard, contrary to the very limited situations that Congress envisioned.

According to plaintiffs' understanding of "accident," the Court should also consider an "inmate" to be an accident. Applnt. Br. 27. Although hard to parse, in plaintiffs' view, an inmate could, "at any moment" "require a correctional officer to have prolonged physical contact" with a potentially infected inmate. *Id*. Whether that physical contact is the accident, or whether the *inmate* is the accident (as plaintiffs expressly contend) is unclear. What *is* clear, however, is that by coming into physical contact with prisoners, correctional officers (and correctional workers in general, including teachers, nurses, cooks, plumbers, etc.) are unquestionably performing their regular job responsibilities. Such physical contact

is explicitly described in the correctional officer position description that plaintiffs attached to their *en banc* brief. Applnt. Br. Add. at 60 (stating that correctional officers may have to use physical force to maintain control of inmates); *id.* at 62 (requiring officers to search inmates); *id.* at 63 (stating that "the duties of this position require *frequent direct contact with individuals in confinement* . . .") (emphasis added). Thus, whether plaintiffs contend that the inmates themselves are accidents or that the "required" physical contact between themselves and inmates constitutes the accident in this scenario, they are describing their normal, everyday job responsibilities. And to suggest that the performance of an employee's normal job responsibilities is an "accident" for purposes of the HDP and EDP regulations reinforces the fact that plaintiffs' proposed definition of an accident is flawed. *See* 5 C.F.R. § 550.904(a) ("[H]azard pay may not be paid to an employee when the hazardous duty or physical hardship has been taken into account in the classification of his or her position . . . .").

Plaintiffs also contend that both potential and actual exposure to SARS-CoV-2 constitute accidents.

Plaintiffs' contention that "*potential exposure*" should be considered an accident is meritless. Applnt. Br. 30 ("[P]otential exposure to COVID-19 without proper safety precautions is an accident."). It is unclear how the possibility of

something occurring could itself be considered an "accident."[9] Plaintiffs' effort to categorize "potential exposure" as an "accident" under OPM's regulations is also expressly contradicted by the OPM Guidance Memorandum on which they rely in their brief. On March 7, 2020, OPM issued a memorandum for heads of Executive Departments and Agencies containing additional guidance about COVID-19.[10] That memorandum included an attachment entitled "Questions and Answers on Human Resources Flexibilities and Authorities for Coronavirus Disease 2019 (COVID-19)."[11] Section G of that attachment addresses hazardous duty pay related to exposure to SARS-CoV-2. Plaintiffs rely on this memorandum to support their claim that "accidental" and "incidental" exposure may easily be differentiated, despite plaintiffs' expansive views of what should be considered an "accident" for purposes of the HDP and EDP statutes. Applnt. Br. 31-34.

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[9] The only logical reason for plaintiffs to urge this Court to treat "potential exposure" to SARS-CoV-2 as an accident is to lower their burden of proof at trial. It would be far easier to prove entitlement to HDP because a worker would presumably be "potentially exposed" to airborne illnesses from the moment they walked through the door of their workplace. Relieving plaintiffs of their burden to present a *prima facie* case is not, however, grounds for adopting such a flawed interpretation of the hazard pay regulations.

[10] Available at https://go.usa.gov/xdsTs (last visited October 11, 2022).

[11] Available at https://www.opm.gov/policy-data-oversight/covid-19/questions-and-answers-on-human-resources-flexibilities-and-authorities-for-coronavirus-disease-2019-covid-19.pdf (last visited October 11, 2022).

But Section G(4) of the memorandum explicitly rejects plaintiffs' "potential exposure" theory. It asks: "Can employees receive hazardous duty pay or environmental differential pay for potential exposure to COVID-19?" *See* Attachment to OPM Memorandum #2020-05 at 13 (March 7, 2020). The OPM guidance unambiguously declares, "No. There is no authority within the hazardous duty pay or environmental differential statutes to pay for *potential* exposure." *Id*. (emphasis in original).

Finally, while actual exposure to SARS-CoV-2 comes the closest to satisfying the concept of an unforeseen event, that exposure would be incidental, not accidental in the context of the HDP and EDP regulations, if an employee has not been assigned specifically to work with or in close proximity to SARS-CoV-2. The concept of an accident in the regulations derives from the duty being performed – thus, for example, working with or in close proximity to a virulent biological presents the possibility of an accident with those virulent biologicals. That understanding accords with how this Court analyzed plaintiffs who were actually exposed to ETS in *Adair*. There, the Court concluded that even though correctional workers were actually exposed to ETS, "unlike assignments at extreme heights," such exposure was incidental to, rather than the manifestation of a risk inherent in, the duties to which the workers were assigned.

Plaintiffs' theory of how "accidental" and "incidental" potential exposure may be distinguished is also unworkable. According to plaintiffs, it would be an "accident" if a correctional worker were potentially exposed to SARS-CoV-2 during a pat-down of a prisoner, but "incidental" potential exposure if the same correctional worker were eating lunch with a co-worker. Applnt. Br. 33. Left unexplained, however, is whether potential exposure through speaking with a colleague or prisoner while performing the correctional worker's duties is an accident or simply incidental exposure. Nor would there be any easy way to prove whether potential exposure resulted from an accident or was merely incidental, unless the Court adopts plaintiffs' expansive view that would entitle workers to hazard pay for every moment they were in a prison (or walking down a crowded street, or working in a mail room, or as a cashier).

The plaintiffs here are not the only ones seeking to unduly expand the availability of hazard pay by converting incidental occurrences into actionable hazards. Among the tens of thousands of other named plaintiffs in similar cases pending at the trial court are Federal workers who claim entitlement to hazard pay based on similarly strained interpretations of the HDP and EDP regulations. For example, plaintiffs in another case allege that they are entitled to hazardous duty pay because, as FBI agents, they had to surveil individuals who were under

investigation, which "required walking along crowded streets and going into businesses such as convenience stores and department stores." *Plaintiff No. 1 v. United States*, Fed. Cl. No. 20-640 at ECF No. 1 ¶ 21. These plaintiffs also claim entitlement to HDP because they had to surveil a medical building and the individuals who went inside, *id.*, or because they had "to conduct surveillance amongst the public, walking around crowds and checking license plates." *Id*. at ¶ 22. Thus, the overly expansive interpretation of the HDP and EDP regulations that plaintiffs' urge the Court to adopt would also allow Federal employees to demand hazard pay for engaging in any other work functions – including walking down the street and checking license plates – that potentially brought them into close proximity with individuals potentially infected with a communicable disease.

Finally, plaintiffs argue that potential exposure to SARS-CoV-2 should entitle them to HDP and EDP in part because, unlike hazard pay for exposure to toxic chemicals, which requires working with or in close proximity to toxic chemicals "when there is a possibility of leakage or spillage," the "virulent biologicals" regulation does not include language regarding a "leak" or "spill." Applnt. Br. 29 (citing 5 C.F.R. pt. 550, subpt. I, App. A). In plaintiffs' view, this suggests that the regulatory threshold for hazard pay for work with or in close proximity to virulent biologicals is lower, so the biologics should be considered

dangerous whether or not they have been properly contained. Applnt. Br. 29. Although the toxic chemicals regulation does have that added language, *Adair* did not turn on whether ETS was susceptible to leakage or spillage. While this Court observed that ETS did not meet the definition of a "toxic chemical" because ETS "does not have a *possibility* of leaking or spilling from cigarettes," *Adair*, 497 F.3d at 1256 (emphasis in original), it also concluded that exposure to ETS in the air did not constitute the type of circumstance that qualified as an accident for purposes of HDP and that plaintiffs were ineligible for EDP because they were not required to work directly with ETS. *Id.* at 1255, 1258. The issue of leakage and spillage was thus not dispositive.

Moreover, just as in *Adair*, other aspects of the regulatory language preclude application of the HDP and EDP regulations here. OPM guidance on duties that would qualify for HDP when working with "toxic chemicals" are instructive. The Civil Service Commission described work "with or in close proximity to" toxic chemicals as "[p]reparing toxic chemical test solution for aerosol and vapor dispersion;" "[o]perating various types of chemical engineering equipment in a restricted area, such as reactors, filters, stripping units, fractioning columns, blenders, mixers, or pumps, utilized in the development, manufacturing, and processing of toxic and experimental chemical warfare agents and the

impregnating of chemicals;" and "[h]andling or working with the toxic chemical agents such as mustard, nerve, phosgene, or chlorine." *See* Background Info. on App. A to Part 550, 1973 WL 151518.

Much like the examples provided for "work with or in close proximity to" virulent biologicals, these examples envision the payment of HDP for work handling, moving, storing, and manipulating vessels that contain these substances. Like virulent biologicals, the work that triggers HDP for toxic chemicals is work that involves directly manipulating and interacting with the hazard itself (*i.e.*, the focus of the duty is the toxic chemical itself). Nothing in these regulations suggests that HDP is available for exposure to a virulent biological as a by-product of working with individuals exposed or "potentially infected" with that virulent biological.

IV. "Work With Or In Close Proximity To" Virulent Biologicals And Micro-Organisms Must Be Limited To Situations In Which The Virulent Biological Or Micro-Organism Is Itself The Focus Of The Assigned Duty

Employees may only receive hazard pay when they "work with or in close proximity to" virulent biologicals or micro-organisms. *See* 5 C.F.R. pt. 550, subpt. I, Appx. A; 5 C.F.R. pt. 532, subpt. E, Appx. A. Plaintiffs have repeatedly mischaracterized the Government's arguments about this critical limiting language. Plaintiffs claim that the Government is arguing for a so-called "Scientist Rule," in

which only workers in laboratory settings may be eligible for hazard pay. *See, e.g.,* Applnt. Br. 10, 33, 42-43. That is incorrect. Rather, the Government has argued that, to satisfy the phrase "work with or in close proximity to," an employee must be assigned to work *with* or in close proximity to virulent biologicals where the focus of the work is the biological material itself—as this Court held in *Adair* and the trial court in this case recognized. *Adair*, 497 F.3d at 1258; *Adair*, 70 Fed. Cl. at 80; *Cody Adams*, 152 Fed. Cl. at 356.

Put differently, for hazardous agents like virulent biologicals and micro-organisms (and, like *Adair* found, toxic chemicals), the focus of the assigned duty controls, not simply the setting. This was illustrated in a statement by the President of American Federation of Government Employees (AFGE), who explained to Congress that the proposed hazard pay legislation "would equalize the treatment of all classified employees who from time to time may be called upon to risk their lives in the performance of their duties." *Hazardous Duty Pay: Hearing on H.R. 1159 and H.R. 2478 Before the H. Comm. On Post Office and Civil Service*, 88th Cong. At 8 (March 20, 1963). The AFGE President gave examples of such situations, including when "an electronic technician or engineer" is assigned to aid in test flights of airplanes where newly designed equipment is tested, or

when an engineer is assigned to be aboard a submarine under operation at sea so that the engineer can test new equipment. *Id*. at 9.

In *Adair*, the Court interpreted the toxic chemicals provision in the EDP regulation and determined that it did not encompass exposure to second-hand smoke in the workplace. *Adair*, 497 F.3d at 1258. In reaching this determination, the Court examined the regulatory examples reflecting "work with or in close proximity to toxic chemicals," which include "marking, storing, neutralizing, operating, preparing, analyzing, transferring, disposing, or otherwise handling toxic chemicals." *Id.* Given that context, the Court construed "work with or in close proximity to toxic chemicals" to mean "scenarios where the job assignment requires directly or indirectly working *with* toxic chemicals or containers that hold toxic chemicals as part of a job assignment," not "work[ing] with inmates who incidentally smoke." *Id.* (emphasis in original). Accordingly, the Court determined that "work with or in close proximity to toxic chemicals" does not encompass work with inmates who emit cigarette smoke because even if cigarette smoke *contains* toxic chemicals, the regulation requires an employee to "work with or in close proximity to" actual toxic chemicals themselves, rather than "work with or in close proximity to" cigarette smokers. *Id.*

The phrase "work with or in close proximity to" should be read the same way when applied to virulent biologicals or micro-organisms. *See Sullivan v. Stroop*, 496 U.S. 478, 483-485 (1990) ("identical words" used in related programs are intended to have the same meaning); *Nat. Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501 (1998) ("similar language contained within the same section of a statute must be accorded a consistent meaning"). Thus, an employee may be eligible for HDP or EDP only if he or she were assigned to and performed "work with or in close proximity to" a "virulent biological" or "micro-organism" where the focus of the duty was the biological material itself. That is, the assignment must have specifically intended that the employee work with or in close proximity to the biological material, not merely encounter the material incidentally.

This understanding does not necessarily mean that only employees working in a laboratory setting are entitled to receive hazard pay for working with virulent biologicals or micro-organisms. For example, if a Federal employee 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, that might satisfy the requirement for HDP. As noted, however, plaintiffs do not allege that they were assigned to perform any such task.

This understanding of what it means to work with or in close proximity to a virulent biological or micro-organism is a reasoned and appropriate interpretation of the regulations given Congress's clear intent that the hazard pay programs apply only in exceptional situations. It also accords with the regulatory guidance OPM issued in the early years of the hazard pay programs' existence, Background Info. On App. A to Part 550, Fed. Personnel Manual, Supp. 990-2 § 550-E-4, 1973 WL 151518 1973, as well as OPM's more recent 2020 Guidance Memorandum. And such an interpretation can also be administered consistently across the wide array of jobs that employees perform for dozens of Federal agencies.

By contrast, plaintiffs' attempt to divorce the "work with or in close proximity to" language from any requirement that such work be part of an employee's specific, intended duties results in the absence of any workable limitation. While plaintiffs contend that there are still limits "such that not every Federal worker who may have been exposed to COVID-19 would be eligible for [HDP or EDP]," Applnt. Br. 34, a close examination of their proposed test betrays its flaws. According to plaintiffs, all that a worker would need to show is that "*someone* had a diagnosed case of COVID-19 in the area to which the worker was assigned *or may be required to go* as part of their job responsibilities." *Id*. (emphasis added). The "key limitation" in plaintiffs' view is that an employee

would need to be in proximity to "*potentially infected* individuals." *Id*. at 34-35 (emphasis added).

These so-called limitations are illusory, and plaintiffs' test would capture a vast array of situations that the HDP and EDP programs were never meant to cover. First, it is unclear how agencies could determine when hazard pay must be paid if all that is required is for *some* individual to have had a diagnosed case of COVID-19. This presumably would include not just prisoners, who have been the focus of plaintiffs' briefing and arguments, but also other correctional workers, custodial workers, prison health workers, administrative workers, *etc*. And if a co-worker were the individual diagnosed with COVID-19, it is unclear whether that would be considered an "incidental" exposure, given plaintiffs' arguments about the distinction between "accidental" and "incidental."[12]

In addition, agencies would likely struggle to track the "area" in which *someone* who was later diagnosed with COVID-19 had been. Would this include intake areas through which an employee walked to reach their main duty area?

[12] Plaintiffs argue elsewhere in their brief that exposure to SARS-CoV-2 while eating lunch with co-workers would be considered an "incidental" exposure, Applnt. Br. 33, but such a conclusion is incompatible with the argument they now make that an employee has a right to hazard pay so long as *someone* was diagnosed with COVID-19 in an area where a plaintiff performed their job responsibilities, or even *may* have to go.

Lunch rooms? Certain administrative offices? For that matter, plaintiffs do not suggest any temporal limitation on when an infected individual would trigger hazard pay for a particular area. Thus, even if an agency knew precisely who had been infected, and every area where that infected individual had been, agencies would not know when hazard pay should commence, and when the hazard would have ended.

Even worse, the "key limitation" according to plaintiffs is that an employee would have to be in close proximity to "potentially infected individuals" to be eligible for hazard pay. Applnt. Br. 34-35. But *everyone* is a "potentially infected individual." After all, plaintiffs argue that SARS-CoV-2 is "invisible and unknown, and transmission can occur unknowingly," and that "one can never know where COVID-19 is lurking, in what person the virus may be present, in what room, and at what concentration." Applnt. Br. 31 ("A person may also never exhibit symptoms and still be contagious."). By their own admission, plaintiffs would not require *actual* exposure to SARS-CoV-2 to be entitled to hazard pay. And in the same paragraph, they first suggest that *some* individual must be

diagnosed with COVID-19 to trigger hazard duty pay, but then change the test to being in close proximity with potentially infected individuals.[13]

Plaintiffs also suggest that there is a limit to the phrase "working with or in close proximity" by attempting to distinguish between office workers and the correctional worker plaintiffs here. Applnt. Br. 35. They reassure the Court that a hypothetical office worker who had to work in person would not need to have "physical contact with a potentially infected person, while a correctional officer [would]." *Id.* But that is not plaintiffs' test. All that they would require is "*proximity* to potentially infected individuals[.]" *Id*. at 34-35.

Thus, although plaintiffs declare that there are limits to recovery under their "potential exposure" theory, their explanations prove otherwise. The only true limit to plaintiffs' theory of recovery is that employees who worked from home 100 percent of the time, or who never encountered other people, would be unable

[13] Plaintiffs rely on a non-binding Court of Federal Claims decision to defend their position that *potential exposure* to SARS-CoV-2 is sufficient to trigger HDP and EDP. Applnt. Br. 35-36 (citing *Abbott v. United States*, No. 94-424, 2002 BL 26479 (Fed. Cl., Apr. 12, 2002)). But *Abbott's* two-page non-binding order preceded both this Court's decision in *Adair* and OPM's 2020 Guidance Memorandum. Attachment to OPM Memorandum #2020-05 at 13 ("There is no authority within the hazardous duty pay or environmental differential statutes to pay for *potential* exposure.").

to recover.[14] In short, while plaintiffs try to formulate a test that applies to correctional workers in particular, they cannot do so without capturing virtually any Federal employee who works near other individuals. That is not the law, and the Court should decline plaintiffs' invitation to expand the HDP and EDP programs in such a dramatic way.

V. Human Beings Are Not "Containers"

The EDP regulations distinguish between "high degree" and "low degree" hazards for employees who are directed to work with or in close proximity to micro-organisms pathogenic for people. 5 C.F.R. pt. 532, subpt. E, App. A. High degree hazards involve work with micro-organisms where exposure could result in "death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease." *Id*. Low degree hazards, on the other hand, do not require the same level of significant harm, but only that an employee is directed to work with or in close proximity to micro-organisms, and "the use of

[14] OPM reports that in fiscal year 2020, of approximately 2.2 million civilian Federal employees, only 1.015 million were even eligible to telework, which means that more than one million Federal employees would have worked outside the home and, according to plaintiffs' test, in "proximity to potentially infected individuals." *See* 2021 OPM Status of Telework in the Federal Government Report to Congress at 9, available at https://www.telework.gov/reports-studies/reports-to-congress/2021-report-to-congress.pdf (last visited October 11, 2022).

safety devices and equipment and other safety measures have not practically eliminated the potential for *personal injury*." *Id*. (emphasis added). The low degree regulation also provides that, unlike high degree hazards, the nature of low degree environmental hazard duty "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." *Id*.

The Court has asked the parties whether infected persons are "primary containers of organisms pathogenic for man." The answer is no.[15] Container means container, not human beings. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

Plaintiffs cannot reasonably argue that a human being fits within the definition of "a container." The ordinary and usual meaning of "container" is "one that contains, such as (a) a receptacle (such as a box or jar) for holding goods." *Container*, MERRIAM-WEBSTER.COM, https://www.merriam-

[15] The Court also asked whether infected "surfaces" can be considered "primary containers" under the EDP regulations. Plaintiffs appear to have abandoned this argument. Applnt. Br. 40-41, n.19. Nevertheless, the answer is also no, for the same reasons that human beings do not qualify as containers.

webster.com/dictionary/container (last visited Oct. 11, 2022). A human being would not normally be thought of as "a receptacle such as a box or jar."

Even if the definition of "container" could encompass a human being standing alone, the EDP regulations specifically describe what "container" means in this context. The EDP regulations provide explicit examples of "primary containers of micro-organisms pathogenic for man," and all of them are items that one might normally use to handle, manipulate, or store micro-organisms when the micro-organism is the focus of an employee's duty. 5 C.F.R. pt. 532, subpt. E, App. A. (listing, among other things, culture flasks, culture test tubes, hypodermic syringes and similar instruments). Construing the term "primary container" to include human beings would significantly depart from these examples and violate a well-established canon of statutory construction: *noscitur a sociis*, which holds that a word is known by the company it keeps. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

Additionally, plaintiffs' attempt to shoehorn human beings into the definition of a "container" by arguing that people are primary carriers of SARS-CoV-2 proves too much. It was no secret to OPM that human bodies are carriers of micro-organisms. It defies common sense for plaintiffs to claim that OPM, knowing that "organisms pathogenic for man" are found in human beings, and

supposedly intending to include people in the definition of "primary containers," would list as examples of "primary containers" items such as flasks, test tubes, and syringes without ever mentioning people.

Amici argue that because the EDP regulation includes "autopsy material" as an example of a "primary container," the Court should conclude that live human beings should also be considered "containers." ECF No. 47 at 24. But there is a meaningful difference between autopsy material and human beings – specifically, the former in this context is a source of study while the latter is not. This argument thus reinforces the fact that OPM intended EDP to apply only where an employee is specifically assigned to work with covered micro-organisms.

Plaintiffs also argue that the "primary container" restriction does not apply to high degree hazards under the EDP regulations because that language appears only in the low degree hazard definition, and in the high degree examples, but not the high degree definition. Applnt. Br. 38-40. It makes little sense to interpret the regulations in such a fashion because both hazard regulations contain the same language, though in different parts of the text. More importantly, the low degree hazard uses the "primary container" language in its definition specifically to differentiate low degree hazards (which do not require such contact) from high degree hazards, which implicitly do. "Our normal canons of construction caution

us to read the statute as a whole, and, unless there is a good reason, to adopt a consistent interpretation of a term used in more than one place within a statute." *United States v. Thompson Ctr. Arms Co.*, 504 U.S. 505, 512 (1992); *see also Nat. Credit Union Admin.*, 522 U.S. at 501 ("It is an 'established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning.'").

The Court should therefore hold that infected persons are not "primary containers" of micro-organisms pathogenic for man for purposes of the EDP statute, and that "[d]irect contact" with "primary containers" is, in fact, a requirement for high degree EDP when working with or in close proximity to micro-organisms.

VI. Plaintiffs May Only State A Claim By Satisfying Each Of The Regulatory Elements Required For HDP Or EDP Entitlement

The Court has asked the parties whether plaintiffs could amend their complaint if the Court holds that the trial court properly granted dismissal. Plaintiffs concede that if this Court declines to overrule *Adair* and affirms the decision of the trial court based on the reasoning set forth in its opinion, plaintiffs would be unable to amend in a way that would permit them to state a claim upon which relief may be granted. Applnt. Br. 42. Plaintiffs then explain that they could, however, amend to elaborate on "the nature of Correctional Officers' duties

and potential exposures" and "facts regarding their assigned job duties and the circumstances of their repeated accidental exposure to COVID-19." *Id*. at 43.

As we explained in our motion to dismiss at the trial court, to show entitlement to hazardous duty pay for work with or in close proximity to SARS-CoV-2 under 5 C.F.R. § 550.904(a), an employee must show the following:

(1) The employee was "assigned to and perform[ed]" "work[] with or in close proximity" to SARS-CoV-2. 5 C.F.R. § 550.904(a); 5 C.F.R., pt. 550, subpt. I, App. A.

(2) SARS-Cov-2 is a "virulent biological" because "when introduced into the human body [it is] likely to cause significant injury or death," and "protective devices are insufficient to afford protection." 5 C.F.R., pt. 550, subpt. I, App. A.

(3) The employee's job classification does not already "take[] into account" work with or in close proximity to virulent biologicals. 5 C.F.R. § 550.904(a).

The burden of proof rests on the employee to plausibly allege and then to prove each of these elements. *O'Neall v. United States*, 797 F.2d 1576, 1582-83 (Fed. Cir. 1986) (in construing the related regulatory scheme governing EDP, the Federal Circuit held that "[e]mployees bear the burden of proof of entitlement").

A critical component of satisfying their burden to state a claim, however, is for the plaintiffs to plausibly allege that their work with a virulent biological or micro-organism was itself an assigned duty, *i.e.*, that the focus of their assignment was the virulent biological or micro-organism itself, and that any exposure to such a substance was not just incidental to the performance of their normally assigned duties. Plaintiffs do not contend that they were specifically tasked to work with or in close proximity to a virulent biological or micro-organism, and we therefore do not believe that the extra details that plaintiffs have said they would add regarding the ordinary job duties performed by correctional workers could establish their entitlement under the applicable statutes and regulations.

CONCLUSION

For these reasons, this Court should affirm the judgment of the Court of Federal Claims.

Respectfully submitted,

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October 13, 2022

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Federal Circuit Rule 32(b)(3), I hereby certify that the foregoing brief complies with the Rules of this Court in that it contains 12,962 words including text, footnotes, and headings. This is within the limit of 14,000 words set by Federal Circuit Rule 32(b)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure (FRAP) 32(a)(5) and the type style requirements of FRAP 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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