Case No. 21-1662

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CODY L. ADAMS, 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

BRIEF OF DEFENDANT-APPELLEE

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STATEMENT OF THE ISSUE

Congress directed the Office of Personnel Management (OPM) to promulgate regulations governing hazardous duty and environmental differential pay for Federal employees. Do OPM's regulations, which provide additional compensation for "work with or in close proximity to" "virulent biologicals" or "micro-organisms," apply to plaintiffs-appellants' alleged workplace exposure to COVID-19?

INTRODUCTION

Plaintiffs-appellants (plaintiffs) are 183 current or former employees of the Department of Justice, Bureau of Prisons (BOP), Federal Correctional Institution – Danbury, in Danbury, Connecticut (FCI Danbury). Plaintiffs assert that, by continuing to perform their ordinary correctional duties at FCI Danbury during the

COVID-19 pandemic, they were exposed to "objects, surfaces, and/or individuals infected with COVID-19" at their workplace. As a result, plaintiffs filed suit in the Court of Federal Claims seeking additional compensation under programs authorizing hazardous duty and environmental differential pay. 5 U.S.C. § 5545(d), 5 C.F.R., pt. 550, subpt. I; 5 U.S.C. § 5343(c)(4), 5 C.F.R., pt. 532, subpt. E. However, because these programs do not mandate additional pay for alleged workplace exposure to COVID-19, the trial court dismissed plaintiffs' suit for failure to state a claim upon which relief can be granted.

Although the COVID-19 pandemic has presented many challenges for workers, the hazardous duty and environmental differential pay regulations do not currently provide for additional compensation under these circumstances. Congress can modify the statutes or enact new ones to cover claims like plaintiffs' and, in fact, has considered several proposals to provide Federal employees with additional compensation for performing on-site work during the COVID-19 pandemic. Moreover, OPM's implementing regulations permit amendments that could authorize additional compensation for workplace exposure to COVID-19. The existing programs, however, do not provide plaintiffs with the additional compensation they seek here. Accordingly, the judgment below should be affirmed.

STATEMENT OF THE CASE

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." *Adair v. United States*, 497 F.3d 1244, 1253-54 (Fed. Cir. 2007); *see also* 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 not most civilian employees, "even those who labored beside [eligible] individuals, doing the same work." *Adair*, 497 F.3d at 1253. To the extent that unusual physical hardships or hazards were part of a civilian employee's duties, the employee would receive compensation through the classification system, which is used to determine the pay grade of a position. *See id.* at 1253-54. However, no mechanism existed to compensate an employee for performing assignments involving unusual physical hardships or hazards outside that employee's job classification. *Id.* (citing H.R. Rep. No. 89-31 at 2 (1965)).

Thus, Congress established the hazardous duty pay program as a gap-filling measure to compensate employees in those unique cases in which 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 (1965)). In enacting section 5545(d), Congress "visualize[d] assignments such as those requiring":

> irregular or intermittent participation in hurricane weather flights, participation in test flights of aircraft during their developmental period or after modification, participation in trial runs of newly built submarines or in submerged voyages of an exploratory nature such as those under the polar icefields, and performance of work at extreme heights under adverse conditions[.]

H.R. Rep. No. 89-31 at 7.

Congress anticipated 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." H.R. Rep. No. 89-31 at 2.[1] Moreover, although an alternate legislative proposal would have provided compensation for any "hardship or hazard not usually involved in carrying out the duties of his position," Congress enacted legislation specifying that any such hardship or hazard must be "unusual." *Id.* at 5. Without the

[1] Based on inflation rates, $100,000 in 1965 dollars translates to approximately $856,000 in 2021 dollars. *See* https://go.usa.gov/x6Zk5 (last accessed June 17, 2021).

"unusual" qualifier limiting the program's scope, Congress anticipated that the program would result in "greater cost and difficulty of administration." *Id.*

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 performing "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)).

A. The Hazardous Duty Pay Program

Given OPM's expertise in civilian personnel matters, Congress directed OPM to "establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard[.]" 5 U.S.C. § 5545(d). Congress further provided that "[u]nder such regulations as [OPM] may prescribe, and for such minimum periods as it determines appropriate, an employee . . . is entitled to be paid the appropriate differential for any period in which he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position." *Id.*

Congress did not define "duty involving unusual physical hardship or hazard"; instead, it directed OPM to identify those duties. Aside from a statutory amendment in 2003 singling out "any hardship or hazard related to asbestos," for

over 50 years, Congress has delegated to OPM all authority to identify the precise duties that qualify for additional compensation under the hazardous duty pay program. 5 U.S.C. § 5545(d).

Pursuant to that statutory delegation, OPM promulgated a Schedule of Pay Differentials Authorized for Hazardous Duty Pay, which sets forth 57 specific duties reflecting "duty involving unusual physical hardship or hazard." 5 C.F.R., pt. 550, subpt I, App'x A. The duties specified in Appendix A 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 with or in close proximity to" "virulent biologicals." *Id.*

Although Appendix A neither defines nor provides examples illustrating when an employee "work[s] with or in close proximity to" "virulent biologicals," earlier OPM guidance in the Federal Personnel Manual explained that "work with or in close proximity to" "virulent biologicals" refers to duties involving biological experimentation or production with pathogenic micro-organisms:

- 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. This includes manipulating animals infected with virulent organisms, such as inoculating of animals, obtaining blood and tissue specimens, and disposing of excreta and contaminated bedding and cages.
>
> - 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'x A to Part 550, Fed. Personnel Manual, Supp. 990-2 § 550-E-4, 1973 WL 151518 (1973). 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).

The Civil Service Commission, OPM's predecessor, which drafted these examples, explained that they "reflect[] some of the facts the Commission considered in making its determination to authorize a hazard differential" and "are intended to serve as an aid to agencies in determining what situations a hazardous duty described in Appendix A to part 550 covers." Fed. Personnel Manual, Supp. 990-2 § 550-E-1.

In turn, the regulations mandate payment when an employee "is assigned to and performs" one of the specified duties in Appendix A, unless the employee's

classification already accounts for the hazardous duty or physical hardship. 5 C.F.R. § 550.904(a).

Accordingly, an employee's entitlement to additional compensation under the hazardous duty pay program depends on whether OPM identified that duty as compensable in Appendix A. If not, the regulations provide OPM with authority to amend Appendix A "on its own motion or at the request of the head of an agency[.]" *Id.* § 550.903(b). But until OPM actually amends Appendix A to include that duty, it is not compensable under the hazardous duty pay program.

Thus, to demonstrate entitlement to hazardous duty pay for "work with or in close proximity" to COVID-19 as a "virulent biological" pursuant to 5 C.F.R. § 550.904(a), in this case an employee must show the following:

(1) The employee was "assigned to and perform[ed]" "work with or in close proximity" to COVID-19. 5 C.F.R. § 550.904(a); 5 C.F.R., pt. 550, subpt. I, App'x A.

(2) COVID-19 is a "virulent biological," meaning a "material[] of micro-organic nature, which when introduced into the body [is] likely to cause serious disease or fatality and for which protective devices do not afford complete protection." 5 C.F.R., pt. 550, subpt. I, App'x A.[2]

[2] Plaintiffs' statements that "OPM has already determined infectious diseases that meet the regulatory definitions of 'virulent biologicals' and 'micro-organisms' found in the HDP [hazardous duty pay] and EDP [environmental differential pay] Schedules are qualifying hazards" and that the "Government admitted this in the proceeding below," App. Br. at 27, are incorrect. First, we did not admit plaintiffs' allegations that COVID-19 meets the regulatory definitions for "virulent biologicals" or "micro-organisms"; rather, we simply accepted

(3) Work with or in close proximity to virulent biologicals has not been "taken into account" in the employee's position classification. 5 C.F.R. § 550.904(a), (c).

B. The Environmental Differential Pay Program

Although hazardous duty pay is only available for certain General Schedule employees, as noted above, Congress directed OPM to implement a similar regulatory program for Federal Wage System employees. 5 U.S.C. § 5343(c)(4). Title 5, Section 5343(c)(4) directs 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).

In turn, the implementing regulation, 5 C.F.R. § 532.511(a), 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. In Appendix A to the environmental differential pay

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plaintiffs' allegations as true for the purposes of a Rule 12(b)(6) motion to dismiss and we reserve our right to contest those allegations. Moreover, as plaintiffs recognize, a distinction exists between the novel coronavirus, SARS-CoV-2 (a virus) and COVID-19 (a disease). App. Br. at 3 n.1. Nonetheless, in the trial court and in this appeal, plaintiffs use "COVID-19" to encompass both the novel coronavirus and the COVID-19 disease. *Id.* For the purposes of the motion to dismiss and this appeal, we have simply taken plaintiffs at their word that their references to COVID-19 refer to both the novel coronavirus and COVID-19. To avoid doubt, however, we do not agree that the novel coronavirus and COVID-19 possess the same meaning and reserve our right to object to plaintiffs' use of COVID-19 as shorthand for both the novel coronavirus and COVID-19, the disease it causes.

regulations, OPM identifies 35 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'x A.

Within the "micro-organisms" category, the appendix provides separate pay differentials for duty involving high degree (8%) and low degree hazards (4%). *Id.* Plaintiffs here allege entitlement to environmental differential pay for both high degree and low degree hazards. High degree hazards "involve[] potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease." *Id.* Codified in the regulation are the following examples of high degree hazards, both of which reflect assignments involving biological experimentation and production with pathogenic micro-organisms:

- 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.

By contrast, low degree hazards "do[] not require the individual to be in direct contact with primary containers of organisms pathogenic for man[.]" *Id.*

The regulations require payment "when the employee is performing assigned duties which expose him or her to an unusually severe hazard, physical hardship, or working condition listed in [A]ppendix [A.]" Fed. Wage Sys. Operating Manual § S7-8f(1). If an agency identifies a duty it believes should be compensable under the program, but that duty does not yet appear in Appendix A, "a differential may not be paid, but action is to be initiated to request OPM to consider authorizing the payment of an environmental differential." *Id.* § S7-8g(2)(b).

Thus, to demonstrate entitlement to environmental differential pay for "work with or in close proximity to" COVID-19 as a micro-organism (low degree hazard), in this case an employee must show the following:

(1) The employee "work[ed] with or in close proximity to" COVID-19 during the performance of "assigned duties." 5 C.F.R., pt. 532, subpt. E, App'x A; Fed. Wage Sys. Operating Man. § S8-7f(1).

(2) COVID-19 is a "micro-organism" and safety precautions have not "practically eliminated the potential for personal injury." 5 C.F.R. § 532.511(d); 5 C.F.R., pt. 532, subpt. E, App'x A.

To demonstrate entitlement to environmental differential pay for "work with or in close proximity to" COVID-19 as a micro-organism (high degree hazard), in this case an employee must show the elements above, plus that:

(3) The work "involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease." 5 C.F.R., pt. 532, subpt. E, App'x A.

C. The FLSA Overtime Pay Program

Plaintiffs also assert a claim for additional overtime pay that derives from their claims for hazardous duty and environmental differential pay. By regulation, an employing agency must determine whether an employee is entitled to overtime pay pursuant to the FLSA (non-exempt) or ineligible for that pay (exempt). *See* 5 C.F.R., pt. 551, subpt. B. As a general rule, employees are treated as non-exempt, unless the agency determines that an employee's substantive duties are "executive, administrative, [or] professional" in nature. *Id.* §§ 551.205-207.

Pursuant to the FLSA and its implementing regulations, non-exempt employees are entitled to overtime pay "'for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay,' subject to certain exceptions[.]" *Alamo v. United States*, 850 F.3d 1349, 1351 (Fed. Cir. 2017) (quoting 5 C.F.R. § 551.501(a)). A non-exempt "employee's 'hourly regular rate' is computed by dividing the total remuneration paid to an employee in the workweek by the total number of hours of

work in the workweek for which such compensation was paid." 5 C.F.R. § 551.511(a); *see also id*. § 551.511(b) (specifying types of pay excluded from "total remuneration"). Hazardous duty and environmental differential pay are included in the computation of an employee's hourly regular rate. *See generally id.* § 551.511.

II. The Trial Court Dismissed Plaintiffs' Complaint For Failure To State A Claim Upon Which Relief Can Be Granted

On June 26, 2020, plaintiffs filed this suit seeking hazardous duty and environmental differential pay based on their alleged workplace exposure to "objects, surfaces, and/or individuals infected with COVID-19." Appx002. This was the third suit filed in the Court of Federal Claims raising such allegations. *See Braswell v. United States*, No. 20-359 (Fed. Cl.); *Plaintiff No. 1 v. United States*, No. 20-640 (Fed. Cl.). After plaintiffs filed this suit, Federal employees filed 18 additional suits also seeking hazardous duty and environmental differential pay based on alleged workplace exposure to "objects, surfaces, and/or individuals infected with COVID-19." These 21 suits currently name as plaintiffs over 2,900 Federal employees, employed by 17 different agencies in 17 different states. Four of those suits are putative class actions, one of which was filed on behalf of all Federal employees exposed to "objects, surfaces, and/or individuals infected with COVID-19." *See, e.g.*, Am. Compl. ¶¶ 2, 32, 40, *Braswell v. United States*, No.

20-359 (Fed. Cl.), ECF No. 11 (July 22, 2020); *see also* Statement of Related Cases.

The complaint in this case contains minimal information about the 183 plaintiffs or their duties: one plaintiff is a correctional officer, another is a cook supervisor, and the rest are current or former FCI Danbury employees with unspecified occupations.[3] Appx024. Plaintiffs allege that COVID-19 is easily transmissible through "objects, surfaces, and/or individuals," and that inmates and staff have contracted COVID-19. Appx028-029. Although plaintiffs identify no change in the "performance of their official duties"—*e.g.*, confiscating contraband, breaking up fights, and supervising inmates, App. Br. at 32, 41—plaintiffs allege that by reporting to the facility during the pandemic where they may encounter infected inmates or staff, plaintiffs "work with or in close proximity to" "virulent biologicals" and "micro-organisms." *See* Appx029. As a result, plaintiffs paid under the General Schedule seek a 25% pay differential, and plaintiffs paid under the Federal Wage System seek either 4% or 8% differentials, for each hour of the workday, on an ongoing basis, from January 2020 to the present and continuing into the future. Appx031-033. In addition, plaintiffs eligible for FLSA overtime pay allege that their overtime rates must be increased to account for the owed-but-

[3] Although plaintiffs refer to themselves collectively as "Correctional Officers," the complaint only identifies the occupations of two plaintiffs: correctional officer and cook supervisor. Appx024.

unpaid hazardous duty and environmental differential pay they seek in the complaint. Appx035.

On February 16, 2021, the trial court granted the United States' motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Appx002-010. The trial court determined that plaintiffs failed to state a claim for hazardous duty pay because neither 5 U.S.C. § 5545(d) nor its implementing regulations provide additional compensation for alleged workplace exposure to objects, surfaces, and/or individuals infected with COVID-19. Appx007 (citing *Adair*, 497 F.3d at 1254-55).

The trial court also determined that this Court's construction of the regulatory phrase "work with or in close proximity to" in *Adair*, 497 F.3d at 1257-58, foreclosed plaintiffs' claim for environmental differential pay based on alleged "work with or in close proximity to" "micro-organisms." Appx009. Although *Adair* construed "work with or in close proximity to" "toxic chemicals," whereas this case concerns "work with or in close proximity to" "micro-organisms," the trial court noted that both categories contain the same operative verb phrase: "work with or in close proximity to." Appx009. Accordingly, the trial court determined that the similarities between the provisions "present a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Appx009 (quoting

Sullivan v. Stroop, 496 U.S. 478, 484 (1990)). Given that construction, the trial court concluded that "work with or in close proximity to" "micro-organisms" did not apply to plaintiffs' alleged workplace exposure to COVID-19. Appx009.

Finally, because plaintiffs' FLSA claim relied on the viability of their hazardous duty and environmental differential pay claims, the failure of those claims compelled the trial court to dismiss the FLSA claim, too. Appx010.

The trial court entered judgment on February 5, 2021. Appx011. This appeal followed.

SUMMARY OF THE ARGUMENT

The hazardous duty and environmental differential pay programs, which authorize additional compensation when employees "work with or in close proximity to" "virulent biologicals" and "micro-organisms," do not apply to plaintiffs' alleged workplace exposure to COVID-19.

Binding precedent and regulatory text, structure, and history compel this conclusion. As plaintiffs recognize, this Court's decision in *Adair v. United States* is the "leading case" construing the hazardous duty and environmental differential pay regulations. App. Br. at 21. *Adair* forecloses plaintiffs' claims for relief. In *Adair*, this Court construed a parallel provision of the environmental differential pay regulation concerning "work[] with or in close proximity to" "toxic chemicals," and held that it did not apply to correctional officers' work with or in

close proximity to inmates who emit toxic chemicals by smoking cigarettes; rather, it applied to work with or in close proximity to toxic chemicals themselves.

Here, the premise underlying plaintiffs' argument—that workplace exposure to COVID-19 is a compensable duty under the hazardous duty and environmental differential pay programs—is flawed for the same reasons this Court found the plaintiffs' argument flawed in *Adair*. Because the regulations only apply to "work with or in close proximity to" "virulent biologicals" or "micro-organisms" themselves—such as in biological experimentation and production—the trial court correctly held that plaintiffs failed to state a claim based on their alleged workplace exposure to COVID-19.

Although plaintiffs take issue with portions of the trial court's opinion that led to its proper judgment, the fundamental authority on which the trial court relied—*Adair*—is a precedential decision that requires dismissal of this case. In addition, the plain language of the regulations, informed by their text, structure, and history, further demonstrate that the categories for "work with or in close proximity to" "virulent biologicals" and "micro-organisms" do not apply to plaintiffs' alleged workplace exposure to COVID-19.

Plaintiffs' indeterminate reading of the existing regulations to require only that they perform their ordinary duties as FCI Danbury employees in close proximity to "objects, surfaces, and/or individuals infected with COVID-19,"

would impose an administrative and financial burden on agencies beyond that intended by the governing statutes and regulations. It would require agencies to either (1) make day-by-day, employee-by-employee determinations as to whether a particular employee came "in close proximity to" an object, surface, and/or individual infected with COVID-19, or (2) pay additional compensation to virtually all on-site Federal workers without limitation. Either way, mandating hazardous duty and environmental differential pay for simply reporting to the workplace during the pandemic's duration would impose extraordinary administrative and financial burdens on the United States beyond anything Congress intended under the current statutory framework. *See* H.R. Rep. No. 89-31 at 2.

Finally, affirmance of the judgment below does not leave plaintiffs without the possibility of a remedy. As demonstrated below, Congress has recently considered several proposals to provide additional payments to Federal employees, like plaintiffs, who have continued to report to their usual worksites and perform their regular duties during the pandemic. Additionally, OPM regulations could be amended to provide similar relief. The existing programs, however, do not provide plaintiffs with the additional compensation they seek here. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. Standard Of Review

This Court reviews *de novo* the Court of Federal Claims' dismissal of a complaint for failure to state a claim upon which relief may be granted. *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000). To avoid dismissal for failure to state a claim under Rule 12(b)(6), "a complaint must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). The Court should dismiss a complaint if it fails to "state a claim to relief that is plausible on its face." *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*.

Moreover, 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) (internal quotation marks and citations omitted); *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. The Hazardous Duty And Environmental Differential Pay Programs Do Not Authorize Additional Compensation For Alleged Workplace Exposure To COVID-19

Given OPM's unique expertise in civilian personnel matters, Congress directed OPM to identify categories of "duty involving unusual physical hardship or hazard" within the meaning of 5 U.S.C. § 5545(d), and "duty involving unusually severe working conditions or unusually severe hazards" within the meaning of 5 U.S.C. § 5343(c)(4). Congress did not define those terms, instead delegating that responsibility to OPM. Thus, plaintiffs' entitlement to either hazardous duty or environmental differential pay turns on whether workplace exposure to COVID-19 is included in OPM's schedules of qualifying duties. The hazardous duty pay regulations identify 57 specific duties; the environmental differential pay regulations identify 35. Neither set of regulations contains a duty category applicable to plaintiffs' alleged workplace exposure to COVID-19 or any other infectious disease.

The absence of such a duty category is sufficient to foreclose plaintiffs' claims. *See Adair*, 497 F.3d at 1255. Plaintiffs are incorrect that the existing categories for "work with or in close proximity to" "virulent biologicals" or "micro-organisms" apply to their alleged workplace exposure to COVID-19. App. Br. at 17-21; Appx029. Plaintiffs' view of the regulations is inconsistent with binding precedent, and regulatory text, structure, and history.

A. "Work With Or In Close Proximity To" "Virulent Biologicals" And "Micro-Organisms" Must Be Construed Consistently With *Adair*'s Construction Of "Work With Or In Close Proximity To" "Toxic Chemicals"

As plaintiffs acknowledge, *Adair* is the "leading case interpreting the HDP [hazardous duty pay] and EDP [environmental differential pay] statutes and regulations[.]" App. Br. at 21. In *Adair*, this Court interpreted a parallel provision in the environmental differential pay regulation, which authorizes additional compensation for "working with or in close proximity to . . . toxic chemicals," and determined that the provision did not apply to correctional officers' workplace exposure to environmental tobacco smoke. *Adair*, 497 F.3d at 1258. In reaching this determination, *Adair* examined the regulatory examples reflecting "working 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 and structure, *Adair* construed "working 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.* Accordingly, this Court determined that "work with or in close proximity to toxic chemicals" "does not cover situations in which the employees work with inmates who . . . smoke" because even if environmental tobacco smoke contains toxic chemicals, the regulation requires an employee to "work with or in close proximity to" actual toxic chemicals themselves. *Id.*

The phrase "work with or in close proximity to" must be read the same way when applied to "virulent biologicals" and "micro-organisms" as this Court read that phrase in *Adair* because the same words used in the same or related statutes and regulations are presumed to have the same meaning. *See* Appx009 (quoting *Sullivan*, 496 U.S. at 483-85); *see also Butler v. Social Sec. Admin*., 331 F.3d 1368, 1372 (Fed. Cir. 2003) (stating that the presumption that identical words in "sister provisions" have the same meaning "has particular force where 'the words at issue are used in different sections of a complex statutory scheme and those two sections serve the same purpose.'") (quoting *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Vet. Affairs*, 260 F.3d 1365, 1379 (Fed. Cir. 2001)); *Vorackey v. Nicholson*, 421 F.3d 1299, 1304 (Fed. Cir. 2005) (applying presumption that identical terms have the same meaning in case involving regulatory interpretation).

Thus, in this case, applying *Adair*'s construction of "work with or in close proximity to," an employee may only show entitlement to hazardous duty or environmental differential pay for "work with or in close proximity to" "virulent biologicals" or "micro-organisms" if that employee's duties involve directly or indirectly working with pathogenic micro-organisms *themselves*, or containers that hold pathogenic micro-organisms themselves, as part of a job assignment. *See Adair*, 497 F.3d at 1258. Plaintiffs do not allege that they were assigned to work with COVID-19 directly or indirectly, but only that exposure to COVID-19 was an unintended consequence of their ordinary duties as FCI Danbury employees. Under the regulations and *Adair*, these allegations are insufficient to satisfy the requirements for enhanced pay.

B. Plaintiffs' Efforts To Distinguish *Adair* Do Not Overcome The Presumption That OPM Intended "Work With Or In Close Proximity To" To Have The Same Meaning Whether Applied To "Toxic Chemicals," "Virulent Biologicals," Or "Micro-Organisms"

Notwithstanding the presumption that the same terms in the same or related programs have the same meaning, plaintiffs contend that factual differences between this case and *Adair* justify setting aside that presumption here. This Court should reject plaintiffs' contention.

First, that *Adair* concerned "toxic chemicals," while this case concerns "virulent biologicals" and "micro-organisms," App. Br. at 21-22, 26-27, is irrelevant. The operative verb phrase attached to all duty categories at issue in

both *Adair* and in this case is "work with or in close proximity to."[4] Although plaintiffs cite to *Charles Adams v. United States*, 151 Fed. Cl. 522 (2020), which denied the United States' motion to dismiss a complaint similar to plaintiffs' complaint, *Charles Adams* is not binding on this Court and the Court should not adopt its reasoning. *See Varilease Tech. Grp. v. United States*, 289 F.3d 795, 800 (Fed. Cir. 2002) (Federal Circuit is not bound by decisions from the Court of Federal Claims). *Charles Adams* identified various distinctions between that case and *Adair*, but neither explained why those factual distinctions rendered *Adair*'s rulings inapplicable nor addressed the regulatory presumption that the same words carry the same meaning. *Charles Adams*, 151 Fed. Cl. at 527. Accordingly, plaintiffs cite no legitimate basis why *Adair*'s construction of "work with or in close proximity to" is inapplicable here.

Second, whether COVID-19 is "unusual" or "unusually severe" within the meaning of the statutes, App. Br. at 22, 26, 28-30, similarly does not resolve the question whether plaintiffs' claims meet the required standard of "work with or in close proximity to" "virulent biologicals" or "micro-organisms." Plaintiffs concede that Congress did not define "duty involving unusual physical hardship or

[4] Plaintiffs erroneously state that the trial court made a "premature factual finding that COVID-19 is identical to secondhand smoke as a hazard in prisons." App. Br. at 11. The trial court made no factual findings in its decision and properly applied the correct legal standard for deciding a motion to dismiss for failure to state a clam on which relief can be granted. Appx004.

hazard" or "duty involving unusually severe working conditions or unusually severe hazards." *Id.* at 26. Instead, Congress left it to OPM to identify qualifying duties. 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"). OPM did so, identifying those duties in the implementing regulations. Plaintiffs' argument that the COVID-19 pandemic is unusual or unusually severe does not overcome the legal hurdle that the regulatory duty categories for "work with or in close proximity to" "virulent biologicals" or "micro-organisms" do not encompass alleged workplace exposure to COVID-19. Plaintiffs' argument that Congress was aware of the "dangers caused by contagious viruses" also does not overcome this legal hurdle because entitlement to compensation depends on whether a duty appears in Appendix A. *Compare* App. Br. at 35-36, *with Adair*, 497 F.3d at 1255; *see also* C.F.R. § 550.904(a); Fed. Wage Sys. Operating Man. § S8-7f(1). In any event, plaintiffs' reliance upon the word "unusual" to broaden the applicability of the statute is in direct conflict with Congress' purpose in including that word in the statute, which was to *limit* the program's scope. *See* H.R. Rep. No. 89-31 at 2.

Third, plaintiffs are incorrect when they contend that the *Adair* plaintiffs lost because they failed to sufficiently allege that environmental tobacco smoke constituted a toxic chemical under any category and the Court did not need to consider the meaning of "work with or in close proximity to" as applied to toxic chemicals. App. Br. at 27-29. Although environmental tobacco smoke did not fit the definition of a "toxic chemical" in the hazardous duty pay regulations or the definition of a "toxic chemical (high degree hazard)" in the environmental differential pay regulations, this Court stated it was unclear whether environmental tobacco smoke could meet the definition of a "toxic chemical (low degree hazard)" under the environmental differential pay regulations. *See Adair*, 497 F.3d at 1257. Accordingly, *Adair* did address whether "work with or in close proximity to" "toxic chemicals" applied to the plaintiffs' exposure to environmental tobacco smoke to resolve plaintiffs' environmental differential pay claims. *Id.* at 1257-58. Thus, even if environmental tobacco smoke itself was a toxic chemical, *Adair* determined that plaintiffs failed to state claims for relief because their workplace exposure to environmental tobacco smoke did not constitute "work with or in close proximity to" "toxic chemicals." *Id.* at 1258.

Fourth, plaintiffs argue that *Adair*'s construction of "work with or in close proximity to" was wrong because it improperly "cabin[s] any EDP claims only to circumstances where an individual works directly with a hazard," and does not

address when an employee works "in close proximity" to it. App. Br. at 42-43. But *Adair* states that its interpretation encompasses "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[.]" *Adair*, 497 F.3d at 1258 (first emphasis added). Thus, *Adair*'s construction of the regulation sufficiently accounts for both "work with" and "work" "in close proximity to."

No basis exists to entertain plaintiffs' proposed, competing interpretation of "work" "in close proximity to" "virulent biologicals" or "micro-organisms" to mean potential exposure to virulent biologicals or micro-organisms. Although plaintiffs state that two non-binding Court of Federal Claims decisions support that interpretation, the first, *Charles Adams*, did not address whether plaintiffs could pursue claims for hazardous duty and environmental differential pay based on potential exposure to COVID-19; rather, *Charles Adams* stated that questions concerning each plaintiff's exposure to COVID-19-positive individuals were matters for discovery. *See Charles Adams*, 151 Fed. Cl. at 528. The second is a non-binding, unpublished order on a joint request to use test plaintiffs in *Abbott v. United States*, No. 94-424 C, 2002 BL 26479, at *2 (Fed. Cl. Apr. 12, 2002). *See* App. Br. at 45-56. In *Abbott*, issued five years before *Adair*, the trial court stated that "work" "in close proximity to" "virulent biologicals" means that plaintiffs may obtain "hazardous duty pay for performing jobs that potentially expose them to

virulent biologicals," and that the Court "does not believe that the regulations require actual exposure to virulent biologicals." *Abbott*, 2002 BL 26479, at *2. The *Abbott* court cited no authority for this conclusion, which is inconsistent with this Court's later, binding reasoning in *Adair*. *See Varilease Tech. Grp.*, 289 F.3d at 800.

III. The Plain Language Of The Regulations Does Not Apply To Alleged Workplace Exposure To COVID-19

Although *Adair*'s construction of "work with or in close proximity to" already demonstrates that the hazardous duty and environmental differential pay regulations do not apply to alleged workplace exposure to COVID-19, the plain language of the regulations compels the same conclusion.

The rules that govern statutory interpretation apply to regulatory interpretation. *See Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006). "When construing a regulation or statute, it is appropriate first to examine the regulatory language itself to determine its plain meaning. [The Court] may also consider the language of related regulations. If the regulatory language is clear and unambiguous, the inquiry ends with the plain meaning." *Id.* (citing *Meeks v. West*, 216 F.3d 1363, 1366 (Fed. Cir. 2000); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1577-78 (Fed. Cir. 1995)).

Plain meaning of a term, however, "cannot be determined in isolation, but must be drawn from the context in which it is used." *Garco Constr., Inc. v. Sec'y*

of Army, 856 F.3d 938, 943 (Fed. Cir. 2017) (quoting *Textron Lycoming Reciprocating Engine Div. v. United Auto., Aerospace & Agric. Implement Workers of Am.*, 523 U.S. 653, 657 (1998)). Thus, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). Accordingly, because "statutory construction is a holistic endeavor, [a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

As demonstrated below, regulatory text, structure, and history further demonstrate that neither "work with or in close proximity to" "virulent biologicals" nor "work[] with or in close proximity to" "micro-organisms" applies to plaintiffs' alleged workplace exposure to COVID-19.

A. Regulatory Examples Reflecting "Work[] With Or In Close Proximity To" "Micro-Organisms" Codified In The Environmental Differential Pay Regulation Demonstrate That The Category Does Not Apply To Alleged Workplace Exposure To COVID-19 Or Other Infectious Diseases

The text and structure of the environmental differential pay regulations also demonstrate that "work with or in close proximity to" "micro-organisms" does not apply to alleged workplace exposure to COVID-19. OPM structured the

environmental differential pay regulation to include examples illustrating the 35 categories of compensable duties. 5 C.F.R., pt. 532, subpt. E, App'x A. OPM included several examples reflecting "work with or in close proximity to" "micro-organisms." *Id.* These examples include: "[o]perating or maintaining equipment in biological experimentation or production," "[c]ultivating virulent organisms on artificial media," and "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.*[5]

Although plaintiffs argue that construing "work with or in close proximity to" "micro-organisms" in a manner consistent with these examples would render the category "far too narrow," App. Br. at 43, these are the examples that OPM chose to illustrate the meaning of its regulation. And although plaintiffs argue that this Court should follow *Charles Adams* and dismiss those regulatory examples of "work with or in close proximity to" "micro-organisms" as "non-exhaustive, and

[5] Although the regulations do not provide separate examples of low degree hazards, the key distinction between the high degree and low degree hazards is the extent of potential personal injury. Low degree hazards require that "the use of safety devices and equipment and other safety measures have not practically eliminated the potential for personal injury." High degree hazards require that devices, equipment, and safety measures have not practically eliminated the potential for death, loss of faculties, or loss of the ability to work due to disease. 5 C.F.R., pt. 532, subpt. I, App'x A. Further, the regulations specify that low degree hazards do not "require the individual to be in direct contact with primary containers of organisms pathogenic for man." *Id.*

not binding on the Court," *Charles Adams*, 151 Fed. Cl. at 528, the examples have been codified in the environmental differential pay regulations for over 50 years and, as this Court held in *Adair*, they are entitled to deference, *see Adair*, 497 F.3d at 1252, 1257. Moreover, even if the examples are not exhaustive, they uniformly reflect the nature of the work subsumed in the category—namely, biological production and experimentation with pathogenic micro-organisms. That the regulatory examples (*e.g.*, cultivating, harvesting, operating) bear no resemblance to the duties allegedly performed by correctional officers, cook supervisors, and other FCI Danbury employees (*e.g.*, confiscating, escorting, supervising), further demonstrates that "work with or in close proximity to" "micro-organisms" does not apply to plaintiffs' alleged workplace exposure to objects, surfaces, and/or individuals infected with COVID-19. Appx009.

B. OPM Guidance And The Context Of The Hazardous Duty Pay Regulations Demonstrate That "Work With Or In Close Proximity To" "Virulent Biologicals" Does Not Apply To Alleged Workplace Exposure To COVID-19 Or Other Infectious Diseases

1. OPM's Initial Guidance Explaining The "Work With Or In Close Proximity To" "Virulent Biologicals" Category Demonstrates That OPM Did Not Intend That Category To Apply To Alleged Workplace Exposure To COVID-19 Or Other Infectious Diseases

With respect to hazardous duty pay, although the current regulation does not provide examples of specific duties constituting "work with or in close proximity to" "virulent biologicals," the examples contained in OPM's initial guidance reflect

OPM's intent that the category would apply to duties involving biological production and experimentation with pathogenic micro-organisms: "operating equipment in biological experimentation or protection"; "cleaning and sterilizing vessels contaminated with virulent micro-organisms"; "cultivating virulent organisms on artificial media"; and "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 associated with patient care." Fed. Personnel Manual, Supp. 990-2 § 550-E-4. These examples are similar, and in some cases identical, to those contained in the environmental differential pay regulations demonstrating "work with or in close proximity to" "micro-organisms." *Compare id.*, *with* 5 C.F.R., pt. 532, subpt. E, App'x A.

OPM explained the purpose of the guidance was to aid in interpreting the regulation—the very task now before this Court:

> The material in this appendix is intended to serve as an aid to agencies in determining what situations a hazardous duty described in appendix A to part 550 covers. This material reflects some of the facts the Commission considered in making its determination to authorize a hazard differential, and we hope that it will serve better to identify the nature of the hazard the differential is intended to compensate.

Id. at 550-E-1.

As noted above, although OPM has retired the Manual, this Court considers it a "valuable resource when construing regulations that were promulgated or were in effect" before the Manual's retirement. *Schmidt*, 153 F.3d at 1353 n.4; *see also Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997) (noting the value of regulatory history when interpreting a regulation). Plaintiffs' characterization of the Manual as "defunct," App. Br. at 43 n.10, does not undermine the utility of the Manual's content given that it describes OPM's intent in promulgating the regulations at issue in this case. Indeed, no subsequent examples contradict the ones contained in the Manual.

Thus, the examples contained in OPM's guidance further show that OPM did not intend "work with or in close proximity to" "virulent biologicals" to apply to alleged workplace exposure to objects, surfaces, and/or individuals infected with COVID-19 (or any other infectious disease).

2. Reading "Work With Or In Close Proximity To" "Virulent Biologicals" In Its Regulatory Context Reveals That It Does Not Apply To Workplace Exposure To COVID-19

As noted above, Appendix A to the hazardous duty pay regulation identifies 57 distinct duty categories that qualify for additional compensation. Examining the category "work with or in close proximity to" "virulent biologicals" within the overall context of its sister categories contained in Appendix A further demonstrates that it does not apply to alleged workplace exposure to COVID-19.

Garco Constr., Inc., 856 F.3d at 943 (in construing a regulation, the meaning of a term "cannot be determined in isolation, but must be drawn from the context in which it is used.") (quoting *Textron Lycoming Reciprocating Engine Div.*, 523 U.S. at 657). Regulations "must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

Plaintiffs' allegations that they were "exposed to COVID-19" and lacked "sufficient protective devices" more closely resemble a different provision in Appendix A: "known exposure to serious diseases for which adequate protection cannot be provided," which is a sub-element of a separate category, Tropical Jungle Duty. *Compare* Appx029, *with* 5 C.F.R., pt. 550, subpt. I, App'x A (Tropical Jungle Duty ¶ 2(c)).[6]

That OPM included "known exposure to serious disease for which adequate protection cannot be provided" as a sub-element of Tropical Jungle Duty further demonstrates that it is not synonymous with the separate category for "work with or in close proximity to" "virulent biologicals." If OPM intended to authorize

[6] Plaintiffs erroneously contend that the trial court misapplied the proper standard for evaluating the sufficiency of a complaint on a motion to dismiss in observing that plaintiffs alleged no facts that would support their conclusory assertion that protective devices were inadequate. App. Br. at 31. Contrary to plaintiffs' assertion, the trial court did not require proof at the pleading phase; rather, the trial court found plaintiffs' allegation conclusory and unsupported by facts. Appx007.

hazardous duty pay for "known exposure to serious disease for which adequate protection cannot be provided," without any further limitation, it certainly "knew how to say so." *See generally Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018).

Aside from its appearance as a sub-element of Tropical Jungle Duty, "known exposure to serious disease" appears nowhere else in the hazardous duty or environmental differential pay regulations. Thus, the logical implication from the regulatory structure is that "work with or in close proximity to" "virulent biologicals" does not encompass "known exposure to serious disease for which adequate protection cannot be provided." *See, e.g.*, *Schlafly v. St. Louis Brewery LLC*, 909 F.3d 420, 425 (Fed. Cir. 2018) (The "interpretive canon of *expressio unius est exclusio alterius* provides that 'expressing one item of [an] associated group or series excludes another left unmentioned.'") (quoting *N.L.R.B. v. Sw. Gen., Inc.*, 137 S. Ct. 929, 933 (2017)).

IV. Plaintiffs' Arguments Improperly Seek To Modify Or Ignore The Applicable Regulatory Requirements

A. Plaintiffs Do Not Plausibly Allege That They Were "Assigned To And Perform[ed]" "Work With Or In Close Proximity To" "Virulent Biologicals" Or "Micro-Organisms"

Although plaintiffs argue that the COVID-19 pandemic is "unusual" or "unusually hazardous" within the meaning of the applicable statutes, plaintiffs acknowledge that that they must satisfy the elements set forth in OPM's

regulations. *Compare* App. Br. at 11, 22, 29-31 (arguing that the pandemic is "unusual"), *with id.* App. Br. at 18, 20-21 (listing the elements of hazardous duty and environmental differential pay claims). But showing the existence of an "unusual hazard" is not one of those elements. The hazardous duty pay regulations specify that an employee must be "assigned to and perform any duty specified in Appendix A[.]" The environmental differential pay program contains a similar requirement. *See* Fed. Wage Sys. Operating Man. § S8-7f(1) ("An agency shall pay the environmental differential in [Appendix A] to a wage employee . . . when the employee is performing assigned duties which expose him or her to an unusually severe hazard, physical hardship, or working condition listed in [Appendix A].").

Notably, plaintiffs do not argue that the regulations themselves are invalid, nor could they given that *Adair* already determined that OPM's implementing regulations reflect a reasonable construction of the statutes and were entitled to deference. *See Adair*, 497 F.3d at 1255-58 (granting deference to 5 C.F.R. § 550.904, *id.*, pt. 550, subpt. I, App'x A; *id.* § 532.511). Thus, plaintiffs cannot state viable claims merely by alleging that the pandemic is "unusual" or "unusually hazardous."

It is not our position "that HDP and EDP should not be available unless the Government can *control the hazardous conditions*." App. Br. at 49. The

regulations include compensation for some duties performed under hazardous conditions outside the control of the employer, such as extreme weather, extreme air turbulence, and dangerous wildlife. *See* 5 C.F.R. pt. 550, subpt. I, App'x A. The point is that plaintiffs are required to meet the specific regulatory requirements for a specific duty category before hazardous duty or environmental differential pay *must* be paid. As demonstrated above, plaintiffs have not sufficiently alleged facts that would meet those requirements here.[7]

At bottom, plaintiffs argue that their entitlement to hazardous duty or environmental differential pay should not depend on whether they actually "were assigned to and perform[ed]" "work with or in close proximity to" "virulent biologicals" or "micro-organisms." *See* App. Br. at 34, 49-50. Under plaintiffs' view, so long as "objects, surfaces, and/or individuals infected with COVID-19" may have been present in their workplace, without more, they should be entitled to hazardous duty and environmental differential pay. *See id.* at 33 ("Indeed, it matters not that Plaintiffs' underlying work tasks (confiscating contraband,

[7] As plaintiffs note, OPM issued a March 7, 2020 memorandum, which stated that its regulations do not apply to "incidental exposure [to COVID-19] from co-workers and the public." App. Br. at 39 n.9 (citing Attachment to OPM Memorandum #2020-05, at 12 (Mar. 7, 2020)). Although plaintiffs contend this statement has "no basis in the law or regulations," OPM's understanding of its regulations is consistent with *Adair*'s ruling that "work with or in close proximity to" "toxic chemicals" did not apply to prison guards' workplace exposure to environmental tobacco smoke by working "with inmates who incidentally smoke[.]" *Adair*, 497 F.3d at 1258.

escorting inmates, breaking up inmate fights, etc.) remain the same; what matters is that their duties during the pandemic expose them to "*unusual risks not normally associated with [their] occupation and for which added compensation is not otherwise provided*.") (quoting H.R. Rep. 89-31 at 4) (emphasis added by plaintiffs).[8]

But the underlying regulatory framework specifies that hazardous duty pay is only available when: (1) an employee is "assigned to and performs any duty specified in Appendix A"; and (2) that duty was not taken into account in that employee's job classification. 5 C.F.R. § 550.904(a), (c); *id.*, pt. 550, subpt. I, App'x A; *see also* Fed. Wage Sys. Operating Manual § S7-8f(1).

In this case, plaintiffs cannot meet the first requirement given the absence of a plausible allegation that they were "assigned to and perform[ed] a duty specified in Appendix A." As plaintiffs confirm in their brief, the duties for which plaintiffs

[8] Plaintiffs also contend that any other reading of the regulations would render meaningless the categories in Appendix A, such as those under "Exposure to Hazardous Weather or Terrain" because no duty would be compensable "if the employees were performing their regular work tasks when they encountered said hazardous weather or terrain." App. Br. at 33. But those regulations refute plaintiffs' point because certain categories authorize payment for performing work under specific environmental or physiological conditions. For instance, the hazardous duty pay regulations recognize "[w]orking on a drifting sea ice floe" and "working in confined spaces wherein the employee is subject to temperatures in excess of 43° C (110° F)" as compensable categories. 5 C.F.R., pt. 550, subpt. I, App'x A. The regulations resolve the hypotheticals set forth in plaintiffs' brief. *See* App. Br. at 33.

seek additional compensation are their ordinary duties as FCI Danbury employees—*e.g.*, confiscating contraband, escorting inmates, breaking up inmate fights. App. Br. at 32, 41. The existence of the pandemic did not transform these duties into "work with or in close proximity to" "virulent biologicals" or "micro-organisms." Accordingly, plaintiffs' allegations about the pandemic cannot support a plausible claim that they performed "work with or in close proximity to" "virulent biologicals" or "micro-organisms."

B. Applying The Plain Language Of The Regulations Would Not Produce "Absurd Results"

Finally, plaintiffs urge the Court to disregard the plain meaning of the hazardous duty pay regulation based on an assumption that doing so would produce "absurd" results because employees who typically handle pathogenic micro-organisms probably work in laboratory settings, and presumably their job classifications already would take into account the associated hazards. App. Br. at 23, 44, 51 (citing *Charles Adams*, 151 Fed. Cl. at 527).

Putting aside that plaintiffs' assumption lacks any support, it reflects a misunderstanding of the purpose of hazardous duty pay. To the extent that an employee routinely works with or in close proximity to virulent biologicals, the employee is ordinarily compensated for that hazard through the classification process. *See Adair*, 497 F.3d at 1253. The same is true for many categories in Appendix A. For example, employees engaged in another hazard category—

Firefighting—are likely to be firefighters whose classifications already account for, and compensate for, that work. But that does not render the Firefighting category "too narrow," nor does it provide any basis to expand the regulatory definition of Firefighting beyond its plain meaning. *See* 5 C.F.R., pt. 550, subpt. I, App'x A. Indeed, the point of hazardous duty pay is to fill a gap in those unique circumstances when an employee is assigned to and performs work involving "unusual physical hardship or hazard" for which the employee does not already receive compensation through the classification process. *Adair*, 497 F.3d at 1253 (citing legislative history).

In making their argument, plaintiffs conflate two separate elements of the hazardous duty pay claim, that: (1) plaintiffs performed "work with or in close proximity to" "virulent biologicals," 5 C.F.R., pt. 550, subpt. I, App'x A; and (2) such work has not been taken into account in plaintiffs' position classifications, 5 C.F.R. § 550.904(a), (c). App. Br. at 18, 20-21. These are separate issues. Before considering a plaintiff's position classification, the Court first would need to find that the plaintiff performed "work with or in close proximity to" "virulent biologicals." Thus, whether an individual plaintiff's position classification already takes into account a particular hazard pursuant to 5 C.F.R. § 550.904(a), (c), does

not inform the scope of the duties OPM recognized in Appendix A. *Id*.[9] And in any event, Congress designed the program to be of narrow application, H.R. Rep. No. 89-31 at 7, and only apply in those unique instances when an employee's classification does not already account for a qualifying duty identified by OPM.

Finally, plaintiffs do not explain why construing the environmental differential pay regulation for "work with or in close proximity to" "micro-organisms" in a manner consistent with *Adair* and the regulatory examples contained in the text would lead to absurd results. Job classification is only relevant to the question of entitlement to hazardous duty pay; the environmental differential pay program, however, authorizes additional compensation without regard to job classification. *See* 5 U.S.C. § 5545(d)(1); *see also* 5 C.F.R. § 550.904(a). Thus, the allegedly "absurd" result plaintiffs describe derives from an underlying statutory requirement in 5 U.S.C. § 5545(d)(1)—not *Adair*'s construction of "work with or in close proximity to" or the regulatory examples.

[9] Even if an employee's classification accounts for work with or in close proximity to virulent biologicals, 5 C.F.R. § 550.904(b) provides agencies with authority to pay those employees discretionary hazardous duty pay, subject to certain conditions. 5 C.F.R. § 550.904(b). The underlying duty, however, is still defined in Appendix A.

V. Plaintiffs' Remedy May Be Legislative Or Administrative, But It Is Not Judicial

As demonstrated below, either Congress or OPM may provide plaintiffs relief, but no judicial remedy is currently available. The hazardous duty and environmental differential pay programs do not authorize additional compensation for exposure to COVID-19 without regard to the nature of the underlying duty. The type of program plaintiffs envision more closely resembles programs that compensate employees who work within a covered area, regardless of their particular duties, such as the statutory program that authorizes enhanced pay for service members when they serve in a "hostile fire area designated by the Secretary," 37 U.S.C. § 351(a)(1), or the statutory program authorizing a "danger pay allowance" for civilian employees serving in foreign areas "on the basis of civil insurrection, civil war, terrorism, or wartime conditions which threaten physical harm or imminent danger to the health or well-being of the employee," 5 U.S.C. § 5928.

Congress could enact a similar program to compensate Federal employees who, like plaintiffs, have not been able to work remotely on a full-time basis during the pandemic. Indeed, over the past year, Congress has introduced legislation to provide Federal workers with pay differentials for workplace exposure to individuals infected with COVID-19, or simply the public at large. This further demonstrates a congressional sense that the current statutory and

regulatory schemes do not already provide hazardous duty and environmental differential pay for workplace exposure to COVID-19.

For instance, the Hazardous Duty Pay for Frontline Federal Workers Act, which was introduced on April 20, 2021, would "provide hazardous duty pay for Federal employee who may be exposed to COVID-19" by amending 5 U.S.C. § 5545 to authorize OPM to "establish a schedule or schedules of pay differentials for duty during which an employee is exposed to an individual who has (or who has been exposed to) COVID-19." H.R. 2744, 117th Cong. (2021), § 2.

In addition, the proposed Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act of 2020), which was passed by the House of Representatives on May 15, 2020, would have established a $13/hour "Pandemic Duty Differential" for Federal employees who either (1) "have regular or routine contact with the public" or (2) "report to a worksite" where "social distancing is not possible" and "other preventative measures with respect to COVID-19 are not available[.]" H.R. 6800, 116th Cong. (2020), §§ 170201(2); 170202(a)(1), (b). Such a program would be far broader than the existing hazardous duty and environmental differential pay programs; indeed, Congress would have required an initial appropriation of $10 billion to fund Pandemic Duty Differential payments. *Id.* § 170202(d).

Another legislative proposal, the Helping Emergency Responders Overcome Emergency Situations Act of 2020, would have compensated "qualified first responders," including correctional officers, by permitting them to exclude three months of wages from their gross income for tax purposes. H.R. 6433, 116th Cong. (2020), § 2(a), (c).

Alternatively, OPM could amend its Schedules of Hazardous Duty Pay Differentials to include a separate category for alleged workplace exposure to COVID-19 on its own motion or at the request of an agency. 5 C.F.R. § 550.903(b). OPM also could amend its Schedule of Environmental Differentials to add a category for workplace exposure to COVID-19, at the request of an agency, or at the request of the national office of a labor organization, and after receiving the advice of the Federal Prevailing Rate Advisory Committee. Fed. Wage Sys. Operating Manual, § S8-7e.

But none of these statutory or regulatory changes have yet occurred, and the existing hazardous duty and environmental differential pay programs do not provide compensation for alleged workplace exposure to COVID-19. Accordingly, the judgment below should be affirmed.

CONCLUSION

For these reasons, we respectfully request that the Court affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Further, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in a proportionally spaced typeface, Times New Roman, 14 point, using Microsoft Word.

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