

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BRENDA BRASWELL	:	
	:	
JERROD CARRIER	:	
	:	
GEORGE GUICE	:	
	:	
JASON PHILLIPS	:	
	:	
AUBREY MELDER	:	
	:	
WILLIAM BERTRAND	:	
	:	
JORGE FURONES	:	
	:	
KAREEN TROITINO	:	
	:	
RUDY VEGA	:	
	:	
ADRIENNE ANDERSON	:	
	:	
CHERI BRIAN	:	
	:	
SARAH CALVILLO	:	
	:	
KEVIN CARABETTA	:	
	:	
GERMAN GONZALEZ	:	
	:	
SUZETTE MAUZON	:	
	:	
TRENTON MCCLARY	:	Civil Action No. 20-359 C
	:	
NATASHA PRETTY-WHITNEY	:	Judge Victor J. Wolski
	:	
ELMA RASCON	:	Class and Collective Action
	:	
JOSE ROSADO	:	
	:	
JERRY SMITH	:	
	:	
MAJOR STEVENSON	:	
	:	
JARROD TOWNE	:	

U.S.C. § 5343(c)(4). Additionally, the Defendant violated the overtime provisions of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 207, during the time Plaintiffs were entitled to hazardous duty pay and/or environmental differentials by failing to include these differentials in the calculation of the overtime rates owed to the Plaintiffs who are classified as non-exempt from the overtime provisions of the FLSA, 29 U.S.C. § 201 *et seq.*

3. The Plaintiffs bring this action on behalf of themselves and all similarly situated federal employees for a declaratory judgment, damages and other relief, pursuant to 5 U.S.C. § 5545(d), 5 U.S.C. § 5343(c)(4), 28 U.S.C. §§ 2201 and 2202, 29 U.S.C. § 216(b), and 5 U.S.C. § 5596.

JURISDICTION AND VENUE

4. The United States Court of Federal Claims has jurisdiction and venue over this action pursuant to 28 U.S.C. § 1491, 5 U.S.C. § 5545(d), 5 U.S.C. § 5343(c)(4), 28 U.S.C. § 1401, 28 U.S.C. § 2501, 5 U.S.C. § 701 *et seq.*, 28 U.S.C. §§ 2201 and 2202, 29 U.S.C. § 216(b), and 5 U.S.C. § 5596.

PARTIES

5. Plaintiff Brenda Braswell is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. She is currently employed as a General Schedule Consumer Safety Inspector within the Food Safety and Inspection Service (“FSIS”) of the U.S. Department of Agriculture (“USDA”) in Pine Bluff, Arkansas. At various times, Plaintiff Braswell has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Braswell has been classified as FLSA non-exempt.

6. Plaintiff Jerrod Carrier is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a Wage Grade Maintenance Worker Foreman at the Bureau of Prisons (“BOP”) of the U.S. Department of Justice (“DOJ”) in Oakdale, Louisiana. At various times, Plaintiff Carrier has been required to perform duties involving unusually severe working conditions or unusually severe hazards within the meaning of 5 U.S.C. § 5343(c)(4). At all applicable times, Plaintiff Carrier has been classified as FLSA non-exempt.

7. Plaintiff George Guice is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a Wage Grade Food Service Foreman at the Bureau of Prisons (“BOP”) of the U.S. Department of Justice (“DOJ”) in Oakdale, Louisiana. At various times, Plaintiff Guice has been required to perform duties involving unusually severe working conditions or unusually severe hazards within the meaning of 5 U.S.C. § 5343(c)(4). At all applicable times, Plaintiff Guice has been classified as FLSA non-exempt.

8. Plaintiff Jason Phillips is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a General Schedule Diagnostic Radiology Technologist with the Portland Veterans Affairs Healthcare System of the U.S. Department of Veterans Affairs (“VA”) in Portland, Oregon. At various times, Plaintiff Phillips has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Phillips has been classified as FLSA non-exempt.

9. Plaintiff Aubrey Melder is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a Senior

Officer Specialist at the Bureau of Prisons (“BOP”) of the U.S. Department of Justice (“DOJ”) in Oakdale, Louisiana. At various times, Plaintiff Melder has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Melder has been classified as FLSA non-exempt.

10. Plaintiff Adrienne Anderson is an employee of the United States of America pursuant to Title 5 of the United States Code and the FLSA. She is currently employed as a General Schedule Store Checker within the Defense Commissary Agency of the U.S. Department of Defense in Gunter Air Force Base, Alabama. At various times, Plaintiff Anderson has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Anderson has been classified as FLSA non-exempt.

11. Plaintiff William Bertrand is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a General Scale Correctional Officer at the Federal Bureau of Prisons of the U.S. Department of Justice in Beaumont, Texas. At various times, Plaintiff Bertrand has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Bertrand has been classified as FLSA non-exempt.

12. Plaintiff Cheri Brian is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. She is currently employed as a General Scale Service Representative at the Social Security Administration in Hackensack, New Jersey. At various times, Plaintiff Brian has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Brian has been classified as FLSA non-exempt.

13. Plaintiff Kevin Carabetta is an employee of the United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a General Schedule Quality Assurance Inspector within the Defense Contracting Management Agency of the U.S. Department of Defense in Stamford, Connecticut. At various times, Plaintiff Carabetta has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Carabetta has been classified as FLSA non-exempt.

14. Plaintiff Sarah Calvillo is an employee of the United States of America pursuant to Title 5 of the United States Code. She is currently employed as a General Schedule Attorney at U.S. Immigration and Customs Enforcement within the U.S. Department of Homeland Security in El Paso, Texas. At various times, Plaintiff Calvillo has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d).

15. Plaintiff Jorge Furones is an employee of the United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a General Schedule Challenge Treatment Specialist at the Federal Bureau of Prisons of the United States Department of Justice in Coleman, Florida. At various times, Plaintiff Furones has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Furones has been classified as FLSA non-exempt.

16. Plaintiff German Gonzalez is an employee of Defendant United States of America pursuant to Title 5 of the United States Code. He is currently employed as a Transportation Security Officer at the Transportation Security Administration of the U.S. Department of Homeland Security in Chicago, Illinois. At various times, Plaintiff Gonzalez has been required to

perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d).

17. Plaintiff Suzette Mauzon is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. She is currently employed as a General Scale Asylum Officer at the U.S. Citizenship and Immigration Service of the U.S. Department of Homeland Security in Miami, Florida. At various times, Plaintiff Mauzon has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Mauzon has been classified as FLSA non-exempt.

18. Plaintiff Trenton McClary is an employee of Defendant United States of America pursuant to Title 5 of the United States Code. He is currently employed as a Transportation Security Officer at the Transportation Security Administration of the U.S. Department of Homeland Security in Dallas, Texas. At various times, Plaintiff McClary has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d).

19. Plaintiff Natasha Pretty-Whitney is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. She is currently employed as a General Scale Claims Specialist at the Social Security Administration in Newburgh, New York. At various times, Plaintiff Pretty-Whitney has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Pretty-Whitney has been classified as FLSA non-exempt.

20. Plaintiff Elma Rascon is an employee of Defendant United States of America pursuant to Title 5 of the United States Code. She is currently employed as a Border Patrol Agent at the U.S. Customs and Border Protection of the U.S. Department of Homeland Security in Yuma,

Arizona. At various times, Plaintiff Rascon has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d).

21. Plaintiff Joe Rosado is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a Police Officer at the Department of the Air Force of the U.S. Department of Defense in Homestead, Florida. At various times, Plaintiff Rosado has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Rosado has been classified as FLSA non-exempt.

22. Plaintiff Jerry Smith is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a Security Guard at the Department of the Army of the U.S. Department of Defense at Hunter Army Airfield. At various times, Plaintiff Smith has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Smith has been classified as FLSA non-exempt.

23. Plaintiff Major Stevenson is an employee of the United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a General Schedule Agricultural Commodity Grader within the Federal Grain Inspection Service of the U.S. Department of Agriculture in League City, Texas. At various times, Plaintiff Stevenson has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Stevenson has been classified as FLSA non-exempt.

24. Plaintiff Jarrod Towne is an employee of Defendant United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a General

Scale Mine Inspector at the Mine Safety and Health Administration of the U.S. Department of Labor in Anchorage, Alaska. At various times, Plaintiff Towne has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Towne has been classified as FLSA non-exempt.

25. Plaintiff Karen Troitino is an employee of the United States of America pursuant to Title 5 of the United States Code. He is currently employed as a General Schedule Teacher/Correctional Officer at the Federal Bureau of Prisons of the U.S. Department of Justice in Miami, Florida. At various times, Plaintiff Troitino has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d).

26. Plaintiff Rudy Vega is an employee of the United States of America pursuant to Title 5 of the United States Code and the FLSA. He is currently employed as a General Schedule Correctional Counselor at the Bureau of Prisons of the U.S. Department of Justice in Brooklyn, New York. At various times, Plaintiff Vega has been required to perform duties involving unusual physical hardship or hazard within the meaning of 5 U.S.C. § 5545(d). At all applicable times, Plaintiff Vega has been classified as FLSA non-exempt.

27. Defendant United States is an “employer” and “public agency” within the meaning of 29 U.S.C. § 203(d), (x).

FACTS

28. 5 U.S.C. § 5545(d) provides that the United States Office of Personnel Management (“OPM”) shall establish a schedule of pay differentials for duty involving unusual physical hardship or hazard. Pursuant to 5 U.S.C. § 5545(d), OPM has issued regulations at 5 C.F.R. §§ 550.901-550.907, which establish a schedule of hazardous duty pay differentials and

provide that an employee who qualifies for hazardous duty pay shall be paid the hazardous duty pay differential for each day that the employee is exposed to hazardous duty.

29. The schedule of hazardous duty pay differentials set forth in Appendix A to subpart I of Part 550 of Title 5, Code of Federal Regulations, provides that agencies shall pay a twenty five percent (25%) hazard pay differential when employees perform work with or in close proximity to "virulent biologicals," which are defined as "materials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection." 5 C.F.R. § Pt. 550, Subpt. I, App. A.

30. Pursuant to 5 U.S.C. § 5343(c)(4), OPM has issued regulations for prevailing rate employees which provide for environmental pay differentials for duty involving unusually severe working conditions or unusually severe hazards. See 5 C.F.R. § 532.511.

31. The schedule of environmental differentials set forth in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations, provides that agencies shall pay an eight percent (8%) environmental differential when employees perform work with or in close proximity to "micro-organisms which involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease" where "the use of safety devices and equipment, medical prophylactic procedures such as vaccines and antiserims and other safety measures do not exist or have been developed but have not practically eliminated the potential for such personal injury" and a four percent (4%) environmental differential when employees perform work with or in close proximity to "micro-organisms in situations for which the nature of the work does not require the individual to be in direct contact with primary containers of organisms pathogenic for man" where

“the use of safety devices and equipment and other safety measures have not practically eliminated the potential for personal injury” and 5 C.F.R. § Pt. 532, Subpt. E, App. A.

32. Since January 27, 2020 through the present and continuing and ongoing, Plaintiffs have performed work with or in close proximity to objects, surfaces, and/or individuals infected with the novel coronavirus (“COVID-19”).

33. As of the date of this Complaint, tens of thousands of employees of the Defendant United States of America and its public agencies have tested positive for COVID-19. Eric Katz, *More Than 39,000 Federal Employees Have Tested Positive for COVID-19*, GOVERNMENT EXECUTIVE (July 17, 2020), <https://www.govexec.com/workforce/2020/07/more-37000-federal-employees-have-tested-positive-covid-19/167014/>.

34. COVID-19 is a virus which when introduced into the body is likely to cause serious disease or fatality. The Centers for Disease Control and Prevention (“CDC”) has determined that COVID-19 meets the definition for “severe acute respiratory syndromes” as set forth in Executive Order 13295, as amended by Executive Orders 13375 and 13674, and, therefore, is a “quarantinable communicable disease.” See Attachment to OPM Memorandum No. 2020-05, *Coronavirus Disease 2019 (COVID-19): Additional Guidance* (March 7, 2020). COVID-19 can cause symptoms “ranging from mild illness to severe illness” and death. See *Coronavirus Disease 2019 (COVID-19), Symptoms of Coronavirus*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last updated May 13, 2020). More than 549,000 people worldwide, including more than 140,000 in the United States, have died from COVID-19. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated July 22,

2020 2:00 PM); Jin Wu et al., *153,000 Missing Deaths: Tracking the True Toll of the Coronavirus Outbreak*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/04/21/world/coronavirus-missing-deaths.html> (last updated July 9, 2020 2:10 AM). According to the American Medical Association, “Official tallies of deaths due to COVID-19 underestimate the full increase in deaths associated with the pandemic[.]” Daniel M. Weinberger, PhD; Jenny Chen, BS; Ted Cohen, MD, DPH; et al., *Estimation of Excess Deaths Associated With the COVID-19 Pandemic in the United States, March to May 2020*, J. OF THE AM. MED. ASS’N (July 1, 2020), available at <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2767980>. “The number of people infected with the coronavirus in different parts of the United States has been anywhere from two to 13 times higher than the reported rates for those regions[.]” Apoorva Mandavilli, *Coronavirus Infections Much Higher Than Reported Cases in Parts of U.S., Study Shows*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/health/coronavirus-infections-us.html?action=click&module=RelatedLinks&pgtype=Article>.

35. “The virus that causes COVID-19 is thought to spread mainly from person to person,” “seems to be spreading easily and sustainably,” and has been characterized as a pandemic by the World Health Organization (“WHO”). See *Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last updated July 15, 2020).

36. The virus can be spread by touching infected objects or surfaces and by breathing in areas where an infected person has coughed or exhaled. As the World Health Organization explained, “The disease spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks. People can catch COVID-19 if they breathe in these droplets from a person infected with the

virus...These droplets land on objects and surfaces around the person such as tables, doorknobs and handrails. People can become infected by touching these objects or surfaces, then touching their eyes, nose or mouth.” *Q&A on coronaviruses (COVID-19)*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last updated Apr. 17, 2020).

37. According to the World Health Organization, “Studies have shown that the COVID-19 virus can survive for up to 72 hours on plastic and stainless steel, less than 4 hours on copper and less than 24 hours on cardboard.” *Q&A on coronaviruses (COVID-19)*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last updated Apr. 17, 2020). Accordingly, contact with an infected object or surface may present a risk of transmission for “up to 72 hours” from the time the object or surface became infected.

38. A person who is infected with COVID-19 may not present symptoms immediately. Rather, there is an “incubation period” in which a person is infected but has not begun to present symptoms. According to the World Health Organization, “The time between exposure to COVID-19 and the moment when symptoms start is commonly around five to six days but can range from 1 – 14 days.” *Q&A on coronaviruses (COVID-19)*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last updated Apr. 17, 2020).

39. An infected individual may spread COVID-19 before he or she begins to present significant symptoms. As the World Health Organization explained, “many people with COVID-19 experience only mild symptoms. This is particularly true at the early stages of the disease. It is possible to catch COVID-19 from someone who has just a mild cough and does not feel ill.”

Q&A on coronaviruses (COVID-19), WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last updated Apr. 17, 2020).

40. From January 27, 2020 through the present and continuing and ongoing, Plaintiffs and others similarly situated have performed work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices.

41. For example, during the week of March 2, 2020, Plaintiff Braswell performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when she performed work in the same facility as at least one food industry employee who was infected with COVID-19. Additionally, on March 11, 2020, Plaintiff Braswell performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when she monitored the work of a food industry employee who was later determined to be infected with COVID-19. Plaintiff Braswell was not provided, nor did she wear, any personal protective equipment on any of these occasions.

42. For example, on or about March 8, 2020, Plaintiff Phillips performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when he performed work in the same facility with an individual(s) infected with COVID-19 and even performed a procedure on a patient infected with COVID-19. Mr. Phillips was not apprised of the patient's condition prior to performing the procedure on him. With the exception of gloves, Plaintiff Phillips was not provided, nor did he wear, any personal protective equipment.

43. For example, during March 2020, Plaintiffs Carrier, Guice, and Melder performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when they performed work inside the same federal prison as inmates and other staff infected with COVID-19. In addition to working in the same institution with individuals infected with COVID-

19, up through March 20, 2020, Plaintiffs Carrier and Guice performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when they supervised inmates on their work details who were infected with COVID-19. Indeed, on or about March 19, 2020, Plaintiff Melder performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when he transported an inmate infected with COVID-19 and provided correctional supervision of the inmate at the hospital. With the exception of gloves that Plaintiff Melder wore on or about March 19, 2020 and the limited personal protective gear the outside hospital personnel provided to him after he had spent a significant amount of time with the inmate, Plaintiffs Carrier, Guice, and Melder were not provided, nor did they wear, any personal protective equipment on any of these occasions.

44. For example, prior to March 30, 2020, when she developed symptoms consistent with COVID-19 and started to feel sick at work, Plaintiff Anderson performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when she worked as a cashier and general helper and interacted with numerous customers and co-workers at her commissary, several of whom later tested positive for COVID-19. Plaintiff Anderson was not provided, nor did she wear, any personal protective equipment on any of these occasions. With the exception of bleach and water to clean the cash registers, Plaintiff Anderson was not provided with any other safety measures to prevent the spread of COVID-19 in her workplace. On April 3, 2020, she tested positive for COVID-19.

45. For example, during the pandemic, Plaintiff Carabetta performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 while monitoring private industry manufacturing operations pursuant to a government contract. Between March 2020 and the date of this filing, several private industry employees in the facility where he works

have tested positive for COVID-19, including employees who share the same work area as Plaintiff Carabetta. Prior to June 2020, Plaintiff Carabetta was not provided, nor did he wear, any personal protective equipment. In approximately June 2020, Plaintiff Carabetta was issued face masks which are not sufficient to protect individuals from exposure to COVID-19.

46. For example, during the pandemic, Plaintiff Stevenson performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 while conducting inspections of grain shipments. Plaintiff Stevenson regularly interacts with ship personnel, industry employees, and foreign nationals, often in enclosed spaces with poor ventilation. As of July 2020, at least one industry employee working in Plaintiff Stevenson's duty station has tested positive for COVID-19. With the exception of one or two cloth masks, Plaintiff Stevenson was not provided, nor did he wear, any personal protective equipment.

47. For example, during the pandemic, Plaintiff Gonzalez has performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 while screening passengers traveling through the busiest terminal at Chicago's O'Hare International Airport. Plaintiff Gonzalez comes into close contact with as many as 1,000 people during a busy day and pats down over 100 members of the public during each shift. Between March 2020 and the date of this filing, several employees in Plaintiff Gonzalez's duty station have tested positive for COVID-19. Plaintiff Gonzalez has had to self-quarantine for 14 days on two occasions because two separate officers at his checkpoint tested positive for COVID-19. Plaintiff Gonzalez worked in close proximity to these officers just before they were diagnosed, including on or around May 20–25, 2020 and July 2, 2020. The Agency did not require or provide masks until approximately June 2020, and Plaintiff Gonzalez estimates one out of ten passengers do not wear masks within the airport.

48. For example, during the pandemic, Plaintiff McClary performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 while screening passengers traveling through at Dallas/Fort Worth International Airport (“DFW”). Plaintiff McClary comes into close contact with at least three to four hundred members of the public every day. Initially TSA told employees they were not allowed to wear masks because the Agency was afraid it would scare the public. Between March 2020 and the date of this filing, at least 60 TSA employees tested positive for COVID-19 at DFW. Plaintiff McClary worked with at least six of those employees. On April 8, 2020, Plaintiff McClary tested positive for COVID-19. Plaintiff McClary was out of work for four weeks because of the diagnosis and had to go to the Emergency Room during that time.

49. For example, during the pandemic, Plaintiff Vega performed work, including overtime, in close proximity to objects, surfaces, and/or individuals infected with COVID-19 at MDC Brooklyn, New York. For example, on March 16, Plaintiff Adams worked in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when performing an intake search on an inmate infected with COVID-19. On March 16, Plaintiff Vega also worked overtime in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when he counseled an inmate infected with COVID-19. The Agency did not provide masks or gloves during the screenings.

50. For example, during the pandemic, Plaintiff Rosado performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19. Among his other duties, Plaintiff Rosado worked at the entrance to Homestead Air Force Base screening around 150-200 people on the days he was assigned to that post. Plaintiff Rosado regularly interacted with members of the military and civilians entering the base. Prior to March 2020, Plaintiff Rosado

did not receive any protective equipment. He was issued two masks in March 2020, which he had to reuse. Many people entering the base do not wear masks. Since January or February, 13-14 individuals have tested positive for COVID-19 within Plaintiff Rosado's department.

51. For example, until March 16, 2020, Plaintiff Pretty-Whitney performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when she interviewed members of the public and processed claims for visitors to the Social Security Administration office in Newburgh, New York. Plaintiff Pretty-Whitney interacted in close proximity with 50-250 people per day. Additionally, Plaintiff Pretty-Whitney performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when she worked with four coworkers on March 20, 2020 who later tested positive for COVID-19. The Agency told Plaintiff Pretty-Whitney that employees did not need to wear masks. For weeks, Plaintiff Pretty-Whitney experienced symptoms of COVID-19 beginning in March and had to take time off due to the severity of her symptoms on or around March 24 and 25.

52. For example, until March 16, 2020 Plaintiff Brian performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when she interviewed dozens of members of the public and processed claims for visitors to the office. Additionally, Plaintiff Brian performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when she worked with two coworkers on March 20 who later tested positive for COVID-19. The Agency did not inform Plaintiff Brian that coworkers tested positive and did not provide employees with any PPE. On March 28, Plaintiff Brian developed symptoms and stayed overnight at the hospital on April 1, testing positive for COVID-19 later that week. As a result of Plaintiff Brian's exposure at the workplace, Plaintiff Brian's twelve-year-old and six-month-old

grandchildren tested positive for COVID-19. Plaintiff Brian's six-month-old grandchild developed a fever of 104 degrees.

53. For example, during the pandemic, Plaintiff Mauzon has performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19, including when she worked alongside coworkers infected with COVID-19 on March 16 and June 23. Additionally, Plaintiff Mauzon likely performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 on March 17 and 18 when she conducted face-to-face interviews in a Miami detention center. Miami had the highest positive rate in Florida for COVID-19 at the time. On June 23, Plaintiff Mauzon was required to come into the office to conduct a video interview while the subject was in another room. One coworker infected with COVID-19 went back and forth multiple times between her office and the interview subject's.

54. For example, during the pandemic, Plaintiff Towne has performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when inspecting mines where at least 40 employees were infected with COVID-19. Additionally, on June 16, Plaintiff Towne had direct contact with at least one employee infected with COVID-19 during a face-to-face meeting. Employees at the mine are supposed to wear masks, but many do not when Plaintiff Towne has been in close proximity, and he occasionally has to ride in enclosed vehicles with employees. Plaintiff Towne has had to self-quarantine on two occasions since April 4, 2020.

55. For example, since January 2020, Plaintiff Calvillo performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19. Throughout the pandemic she has appeared in person at her office and/or the El Paso Processing Center where she encounters other people including court personnel and detainees. Several individuals in these

locations have tested positive for COVID-19. Moreover, individuals in the building are not always wearing masks or exercising social distancing.

56. For example, Plaintiff Furones performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 when he worked inside the same federal prison in Coleman, Florida as inmates and other staff infected with COVID-19. As another example, Plaintiff Furones worked as a correctional officer on July 4, 2020, supervising an inmate who had been admitted to a hospital, tested positive for COVID-19, and later died. Plaintiff Furones started exhibiting symptoms around July 10 and later tested positive for COVID-19.

57. For example, throughout the pandemic, Plaintiff Rascon performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19. In addition to encountering coworkers, national guard members and others, Plaintiff Rascon she has worked closely with detainees at the Border Patrol Station in Yuma, Arizona. Among other things, she screens them, has them sign paperwork, and serves them food. Other employees in the Yuma Border Patrol Station have tested positive for COVID-19 and detainees have exhibited symptoms typical of COVID-19.

58. For example, during the pandemic, Plaintiff Bertrand performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 inside the prison at FCC Beaumont in Beaumont, Texas.

59. For example, during the pandemic, Plaintiff Smith performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19. In addition to working out of a building where at least one other employee works who has tested positive, Plaintiff Smith worked at the entrance to Hunter Army Airfield screening large numbers of people through the entrance to the base where many people are quarantined and/or have tested positive

for COVID-19. On numerous occasions, Plaintiff Smith was in close contact with individuals who he screened at the check-point who were on a quarantine list who often are not wearing masks. He has only been provided surgical masks to wear when screening people at the entrance to the base. Prior to approximately April 3, 2020, employees were not authorized to wear masks.

60. For example, during the pandemic, Plaintiff Troitino performed work in close proximity to objects, surfaces, and/or individuals infected with COVID-19 at FCI Miami in Miami, Florida. In addition to working in the “Everglades” housing unit from 10:00pm – 6:00am on June 28-29, 2020, where the first inmate who tested positive at the institution lived, he worked in the “Gator” housing unit with a large number of inmates who exhibited symptoms consistent with COVID-19 and who later tested positive. As another example, Plaintiff Troitino worked as a correctional officer on numerous occasions supervising inmates who had been admitted to an area hospital, which had other COVID-19 patients. During this time, Miami had the highest COVID-19 positive rate in Florida.

61. Exposure to objects, surfaces, and/or individuals infected with COVID-19 was not taken into account in the classification of Plaintiffs’ positions.

62. As a result of plaintiffs’ performance of their official duties in close proximity to objects, surfaces, and/or individuals infected with COVID-19, the plaintiffs have been exposed to “virulent biologicals” within the meaning of subpart I of Part 550 of Title 5, Code of Federal Regulations and hazardous micro-organisms within the meaning of subpart E of Part 532 of Title 5, Code of Federal Regulations.

63. Defendant has not compensated plaintiffs with hazardous duty pay differential for exposure to virulent biologicals as set forth in Appendix A to subpart I of Part 550 of Title 5,

Code of Federal Regulations or the environmental differential for exposure to hazardous micro-organisms set forth in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations.

64. Accordingly, since January 27, 2020, and continuing to date, the defendant has failed to provide hazardous duty and environmental differential pay to the plaintiffs when they work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 as required by 5 U.S.C. § 5545(d) and 5 U.S.C. § 5343(c)(4).

65. The overtime provisions of the FLSA, 29 U.S.C. § 207, require that employers must compensate employees who are classified as non-exempt from the overtime provisions of the FLSA at a rate not less than one and one-half times the regular rate at which they are employed for work performed in excess of the overtime threshold set forth in the overtime provisions of the FLSA, 29 U.S.C. § 207.

66. Defendant has not properly compensated Plaintiffs who are classified as non-exempt from the overtime provisions of the FLSA and who, during the applicable time period, have performed work in excess of the threshold hourly levels set forth in the overtime provisions of the FLSA, 29 U.S.C. § 207. When the Defendant failed to include hazardous duty pay and/or environmental differentials in calculating the Plaintiffs' regular rate of pay, it also failed to include these amounts when calculating and paying overtime owed pursuant to the FLSA.

CLASS ACTION ALLEGATIONS (“HAZARDOUS DUTY CLASS”)

67. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

68. Plaintiffs Brenda Braswell, Jerrod Carrier, George Guice, Jason Phillips, Aubrey Melder, William Bertrand, Jorge Furones, Kareen Troitino Rudy Vega, Adrienne Anderson, Cheri Brian, Sarah Calvillo, Kevin Carabetta, German Gonzalez, Suzette Mauzon, Trenton

McClary, Natasha Pretty-Whitney, Elma Rascon, Jose Rosado, Jerry Smith, Major Stevenson, and Jarrod Towne bring this class action pursuant to Fed. R. Civ. P. 23(a) and (b) on behalf of the following class (hereinafter “Hazardous Duty Class”):

All federal employees who from January 27, 2020 through the present and continuing and ongoing performed work with or in close proximity to objects, surfaces, and/or individuals infected with the novel coronavirus (“COVID-19”) without sufficient protective devices and were not paid the hazardous duty pay differential for exposure to virulent biologicals set forth in Appendix A to subpart I of Part 550 of Title 5, Code of Federal Regulations, or the environmental differential for exposure to hazardous micro-organisms set forth in in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations.

69. Plaintiffs Brenda Braswell, Jerrod Carrier, George Guice, Jason Phillips, Aubrey Melder, William Bertrand, Jorge Furones, Kareen Troitino Rudy Vega, Adrienne Anderson, Cheri Brian, Sarah Calvillo, Kevin Carabetta, German Gonzalez, Suzette Mauzon, Trenton McClary, Natasha Pretty-Whitney, Elma Rascon, Jose Rosado, Jerry Smith, Major Stevenson, and Jarrod Towne are members of the Hazardous Duty Class they seek to represent.

70. The proposed members of the Hazardous Duty Class identified herein are so numerous that joinder of all members is impracticable. Based on reports in various sources, Plaintiffs are informed and believe that there are over 100,000 federal employees who have performed and continue to perform work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices and were not paid the hazardous duty pay differential for exposure to virulent biologicals set forth in Appendix A to subpart I of Part 550 of Title 5, Code of Federal Regulations or the environmental differential for exposure to hazardous micro-organisms set forth in in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations. *See* Apoorva Mandavilli, *Coronavirus Infections Much Higher Than Reported Cases in Parts of U.S., Study Shows*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/health/coronavirus-infections-us.html?action=click>

[k&module=RelatedLinks&pgtype=Article](#); Eric Katz, *More Than 39,000 Federal Employees Have Tested Positive for COVID-19*, GOVERNMENT EXECUTIVE (July 17, 2020), <https://www.govexec.com/workforce/2020/07/more-37000-federal-employees-have-tested-positive-covid-19/167014/>.

71. However, only the Defendant's own records will reveal the actual number of federal employees who performed such work. A class action is the most efficient means for resolution of the claims alleged.

72. Questions of law and fact are common to the Hazardous Duty Class, and these questions predominate over any questions that may affect only individual class members. Questions of law and fact that are common to all members of the Hazardous Duty Class include: (1) whether the class member performed work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19; (2) whether the class member performed such work without sufficient protective devices; (3) whether exposure to COVID-19 has been taken into account in the classification of his or her position; and (4) whether the class member was paid the hazardous duty pay differential for exposure to virulent biologicals or the environmental differential for exposure to hazardous micro-organisms for each day that they performed such work. The claims of Plaintiffs Brenda Braswell, Jerrod Carrier, George Guice, Jason Phillips, Aubrey Melder, William Bertrand, Jorge Furones, Kareen Troitino Rudy Vega, Adrienne Anderson, Cheri Brian, Sarah Calvillo, Kevin Carabetta, German Gonzalez, Suzette Mauzon, Trenton McClary, Natasha Pretty-Whitney, Elma Rascon, Jose Rosado, Jerry Smith, Major Stevenson, and Jarrod Towne are typical of the claims of the Hazardous Duty Class. Specifically, like all members of the class, Plaintiffs performed work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices;

Plaintiffs were not paid the hazardous duty pay differential for exposure to virulent biologicals set forth in Appendix A to subpart I of Part 550 of Title 5, Code of Federal Regulations or the environmental differential for exposure to hazardous micro-organisms set forth in in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations; and their claims rest on proof and legal theories common to all proposed class members.

73. Plaintiffs Brenda Braswell, Jerrod Carrier, George Guice, Jason Phillips, Aubrey Melder, William Bertrand, Jorge Furones, Kareen Troitino Rudy Vega, Adrienne Anderson, Cheri Brian, Sarah Calvillo, Kevin Carabetta, German Gonzalez, Suzette Mauzon, Trenton McClary, Natasha Pretty-Whitney, Elma Rascon, Jose Rosado, Jerry Smith, Major Stevenson, and Jarrod Towne as Representative Plaintiffs, will fairly and adequately represent and protect the interests of the members of the Hazardous Duty Class because: (1) they are willing and able to represent the proposed class and have every incentive to pursue this action to a successful conclusion; (2) their interests are not antagonistic to those of the other class members; and (3) they are represented by counsel experienced in litigating class actions involving federal employees.

74. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because the Defendant has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. Specifically, the Defendant has and continues to require members of the Hazardous Duty Class to perform work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices and the Defendant has failed, and continues to fail to pay members of the Hazardous Duty Class the twenty five percent (25%) hazardous duty pay differential set forth in Appendix A to subpart I of Part 550 of Title 5, Code of Federal

Regulations or the environmental differential for exposure to hazardous micro-organisms set forth in in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations for each day.

75. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(3) because common questions of fact and law predominate over any questions affecting only individual members of the Hazardous Duty Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. The class members have been damaged and are entitled to recovery as a result of the Defendant's common practice of failing to compensate Plaintiffs correctly as a result of their performance of work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices. Requiring each class member to pursue his or her claim individually would result in needless duplication of proof and would waste the resources of both the parties and the courts. Finally, monetary relief would be easily calculable for the financial injuries suffered by members of the Hazardous Duty Class, consisting of a twenty five percent (25%) hazard pay differential for each day they performed work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 covered by 5 U.S.C. § 5545(d), and an eight or four percent environmental differential for employees covered by 5 U.S.C. § 5343(c)(4).

76. Plaintiffs have given their written consent to join this action pursuant to U.S. Ct. Fed. Claims R. 23 and 29 U.S.C. § 216(b). Such written consents, containing each Plaintiff's name, address, and signature, are appended to this Complaint.

COLLECTIVE ACTION ALLEGATIONS

“FLSA OVERTIME COLLECTIVE ACTION”

77. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

78. Plaintiffs Brenda Braswell, Jerrod Carrier, George Guice, Jason Phillips, Aubrey Melder, Rudy Vega, Kevin Carabetta, Joe Rosado, Adrienne Anderson, Jerry Smith, Major Stevenson, Natasha Pretty-Wilson, Cheri Brian, Suzette Mauzon, Jarrod Towne, Jorge Furonos, William Bertrand, and Kareen Troitino bring this collective action on behalf of themselves and other similarly situated employees (Hereinafter “FLSA Overtime Collective Action”) who are classified as non-exempt from the overtime provisions of the Fair Labor Standards Act (“FLSA”), 5 U.S.C. § 207, who, during the applicable time period, worked in excess of the hourly thresholds set forth in the FLSA and whose overtime rate of pay did not include hazardous duty pay and/or environmental differentials.

79. Plaintiffs Brenda Braswell, Jerrod Carrier, George Guice, Jason Phillips, Aubrey Melder, Rudy Vega, Kevin Carabetta, Joe Rosado, Adrienne Anderson, Jerry Smith, Major Stevenson, Natasha Pretty-Wilson, Cheri Brian, Suzette Mauzon, Jarrod Towne, Jorge Furonos, William Bertrand and Kareen Troitino are members of the FLSA Overtime Collective Action they seek to represent.

80. All members of the FLSA Overtime Collective Action are classified as non-exempt from the overtime provisions of the FLSA, 29 U.S.C. § 201 *et seq.*, and performed work in excess of the applicable overtime thresholds during weeks in which they performed work with or in close proximity to objects, surfaces, and/or individuals infected with the novel coronavirus (“COVID-19”) without sufficient protective devices and were not paid the hazardous duty pay differential for exposure to virulent biologicals set forth in Appendix A to subpart I of Part 550

of Title 5, Code of Federal Regulations, or the environmental differential for exposure to hazardous micro-organisms set forth in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations. During this time, FLSA Overtime Collective Action members were entitled to be paid at overtime rates calculated based on a regular rate of pay incorporating the hazardous duty pay and/or environmental differentials.

81. At all applicable times, Defendant uniformly failed to pay members of the FLSA Overtime Collective Action overtime rates incorporating the hazardous duty pay and/or environmental differentials. In doing so, Defendant violated the FLSA by not paying the FLSA Overtime Collective Action members the applicable overtime rates for overtime work performed.

82. The amount of wages owed and liquidated damages due Plaintiffs, including the amount of unpaid overtime and liquidated damages due, can be computed for all FLSA Overtime Collective Action members using the same methodologies and Defendant's payroll records and employee data.

83. Upon information and belief, Defendant conducted no analyses to determine whether its failure to pay FLSA Overtime Collective Action members overtime wages incorporating the hazardous duty pay and/or environmental differentials complied with the FLSA.

84. Defendant's violation of the FLSA described above is willful, and in conscious or reckless disregard of the requirements of the FLSA.

85. Because of the actions alleged above, the FLSA Overtime Collective Action members have suffered monetary damages and are entitled to wages owed, liquidated damages, and all other appropriate relief available under the FLSA.

86. Plaintiffs have given their written consent to be party Plaintiffs in this action pursuant to 29 U.S.C. § 216(b). Such written consents, containing each Plaintiff's name, address, and signature, are appended to this Complaint.

87. Based on reports in various sources, Plaintiffs are informed and believe that there are over 100,000 federal employees who were affected by the actions and failures alleged here. A collective action is the most efficient means for resolution of the claims alleged. *See* Apoorva Mandavilli, *Coronavirus Infections Much Higher Than Reported Cases in Parts of U.S., Study Shows*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/health/coronavirus-infections-us.html?action=click&module=RelatedLinks&pgtype=Article>; Eric Katz, *More Than 39,000 Federal Employees Have Tested Positive for COVID-19*, GOVERNMENT EXECUTIVE (July 17, 2020), <https://www.govexec.com/workforce/2020/07/more-37000-federal-employees-have-tested-positive-covid-19/167014/>.

CLAIMS

COUNT ONE – Hazard Pay

88. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

89. 5 U.S.C. § 5545(d) provides that the United States Office of Personnel Management (“OPM”) shall establish a schedule of pay differentials for duty involving unusual physical hardship or hazard.

90. Pursuant to 5 U.S.C. § 5545(d), OPM has issued regulations at 5 C.F.R. §§ 550.901- 550.907 regarding hazardous duty pay differentials. These regulations establish a schedule of hazardous duty pay differentials and provide that an employee who qualifies for hazardous duty pay shall be paid the hazardous duty pay differential for each day that the employee is exposed to the hazard.

91. The schedule of hazardous duty pay differentials is contained in Appendix A to subpart I of Part 550 of Title 5, Code of Federal Regulations. See 5 C.F.R. § 550.903.

92. Pursuant to 5 C.F.R. § 550.904, federal agencies “shall pay the hazard pay differential listed in appendix A of this subpart to an employee who is assigned to and performs any duty specified in appendix A of this subpart” unless “the hazardous duty or physical hardship has been taken into account in the classification of his or her position[.]”

93. When an employee performs any duty for which a hazard pay differential is authorized, the agency must pay the hazard pay differential for all hours that the employee worked on the day on which he or she performed the hazardous duty. 5 C.F.R. § 550.905.

94. The schedule of hazardous duty pay differentials set forth in Appendix A to subpart I of Part 550 of Title 5, Code of Federal Regulations, provides that agencies shall pay a twenty five percent (25%) hazard pay differential when employees perform work with or in close proximity to "virulent biologicals," which are defined as “materials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection.” 5 C.F.R. § Pt. 550, Subpt. I, App. A.

95. COVID-19 is a virus which when introduced into the body is likely to cause serious disease or fatality. The Centers for Disease Control and Prevention (“CDC”) has determined that COVID-19 meets the definition for “severe acute respiratory syndromes” as set forth in Executive Order 13295, as amended by Executive Orders 13375 and 13674, and, therefore, is a “quarantinable communicable disease.” See Attachment to OPM Memorandum No. 2020-05, Coronavirus Disease 2019 (COVID-19): Additional Guidance (March 7, 2020). COVID-19 can cause symptoms “ranging from mild illness to severe illness” and death. See *Coronavirus Disease 2019 (COVID-19), Symptoms of Coronavirus*, CENTERS FOR DISEASE

CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last updated May 13, 2020). More than 549,000 people worldwide, including more than 140,000 in the United States, have died from COVID-19. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated July 22, 2020 2:00 PM); Jin Wu et al., *153,000 Missing Deaths: Tracking the True Toll of the Coronavirus Outbreak*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/04/21/world/coronavirus-missing-deaths.html> (last updated July 9, 2020 2:10 AM). According to the American Medical Association, “Official tallies of deaths due to COVID-19 underestimate the full increase in deaths associated with the pandemic[.]” Daniel M. Weinberger, PhD; Jenny Chen, BS; Ted Cohen, MD, DPH; et al., *Estimation of Excess Deaths Associated With the COVID-19 Pandemic in the United States, March to May 2020*, J. OF THE AM. MED. ASS’N (July 1, 2020), available at <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2767980>. “The number of people infected with the coronavirus in different parts of the United States has been anywhere from two to 13 times higher than the reported rates for those regions[.]” Apoorva Mandavilli, *Coronavirus Infections Much Higher Than Reported Cases in Parts of U.S., Study Shows*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/health/coronavirus-infections-us.html?action=click&module=RelatedLinks&pgtype=Article>.

96. “The virus that causes COVID-19 is thought to spread mainly from person to person,” “seems to be spreading easily and sustainably,” and has been characterized as a pandemic by the World Health Organization (“WHO”). See *Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last updated July 15, 2020).

97. The virus can be spread by touching infected objects or surfaces and by breathing in areas where an infected person has coughed or exhaled. As the World Health Organization explained, “The disease spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks...People can catch COVID-19 if they breathe in these droplets from a person infected with the virus... These droplets land on objects and surfaces around the person such as tables, doorknobs and handrails. People can become infected by touching these objects or surfaces, then touching their eyes, nose or mouth.” *Q&A on coronaviruses (COVID-19)*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last updated Apr. 17, 2020).

98. A person who is infected with COVID-19 may not present symptoms immediately. Rather, there is an “incubation period” in which a person is infected but has not begun to present symptoms. According to the World Health Organization, “The time between exposure to COVID-19 and the moment when symptoms start is commonly around five to six days but can range from 1 – 14 days.” *Q&A on coronaviruses (COVID-19)*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last updated Apr. 17, 2020).

99. An infected individual may spread COVID-19 before he or she begins to present significant symptoms. As the World Health Organization explained, “many people with COVID-19 experience only mild symptoms. This is particularly true at the early stages of the disease. It is possible to catch COVID-19 from someone who has just a mild cough and does not feel ill.” *Q&A on coronaviruses (COVID-19)*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last updated Apr. 17, 2020).

100. According to the World Health Organization, “Studies have shown that the COVID-19 virus can survive for up to 72 hours on plastic and stainless steel, less than 4 hours on copper and less than 24 hours on cardboard.” *Q&A on coronaviruses (COVID-19)*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last updated Apr. 17, 2020). Accordingly, contact with an infected object or surface may present a risk of transmission for “up to 72 hours” from the time the object or surface became infected.

101. From January 27, 2020 through the present and continuing and ongoing, Plaintiffs Braswell, Phillips, Melder, Vega, Carabetta, Rosado, Anderson, Stevenson, Pretty-Wilson, Brian, Mauzon, Towne, Furones, Rascon, Calvillo, Gonzalez, McClary, Smith, Bertrand and Troitino and others similarly situated have performed work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices.

102. Exposure to COVID-19 was not taken into account in the classification of Plaintiffs’ positions.

103. Defendant has failed, and continues to fail to pay plaintiffs the twenty five percent (25%) hazardous duty pay differential for each day that the plaintiffs have been exposed to COVID-19 through the performance of their official duties without sufficient protective devices.

104. By failing to pay plaintiffs a twenty five percent (25%) pay differential on these occasions, and continuing to fail and refuse to pay plaintiffs for this hazardous duty, the Defendant has violated, and is continuing to violate, the provisions of Title 5 relating to hazardous duty pay at 5 U.S.C. § 5545(d).

105. As a consequence of defendant's failure to pay the plaintiffs hazardous duty pay, the plaintiffs have been unlawfully deprived of hazardous duty pay and other relief.

106. As a result of the defendant's willful and purposeful violations of Title 5, there has become due and owing to each of the plaintiffs various amounts which have not yet been precisely determined. The employment and work records for each plaintiff are in the possession, custody and control of the Defendant and the Plaintiffs are unable to state at this time the exact amounts owing to each of them. Defendant is under a duty imposed by the Government Accounting Office retention schedule, the FLSA (29 U.S.C. § 211(c)) and various statutory and regulatory provisions to maintain and preserve payroll and other employment records with respect to plaintiffs and other employees similarly situated from which the amounts of defendant's liability can be ascertained.

COUNT TWO – Environmental Differential Pay

107. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

108. Pursuant to 5 U.S.C. § 5343(c)(4), OPM has issued regulations regarding wage schedules and rates for prevailing rate employees which provide for environmental pay differentials for duty involving unusually severe working conditions or unusually severe hazards. See 5 C.F.R. § 532.511.

109. The schedule of environmental differentials is contained in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations. See 5 C.F.R. § 532.511(d).

110. The schedule of environmental differentials provides that agencies shall pay an eight percent (8%) environmental differential when employees perform work with or in close proximity to "micro-organisms which involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease" in situations where "the use of safety devices and equipment, medical prophylactic procedures such as vaccines and antiserims and other safety measures do not exist

or have been developed but have not practically eliminated the potential for such personal injury” or a four percent (4%) environmental differential when employees perform work with or in close proximity to “micro-organisms in situations for which the nature of the work does not require the individual to be in direct contact with primary containers of organisms pathogenic for man” where “the use of safety devices and equipment and other safety measures have not practically eliminated the potential for personal injury.” 5 C.F.R. § Pt. 532, Subpt. E, App. A.

111. The regulations provide that “An employee entitled to an environmental differential shall be paid an amount equal to the percentage rate authorized by the Office of Personnel Management for the category in which the working condition or hazard falls, multiplied by the rate for the second step of WG-10 for the appropriated fund employees and NA-10 for the nonappropriated fund employees on the current regular non-supervisory wage schedule for the wage area for which the differential is payable, counting one-half cent and over as a whole cent.” 5 C.F.R. § 532.511(b)(1).

112. An employee entitled to an environmental differential on the basis of hours in a pay status “shall be paid for all hours in a pay status on the day on which he/she is exposed to the situation.” 5 C.F.R. § 532.511(b)(3).

113. From January 27, 2020 through the present and continuing and ongoing and continuing to the present, Plaintiffs Carrier and Guice and other similarly situated prevailing rate employees have performed work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19.

114. Exposure to objects, surfaces, and/or individuals infected with COVID-19 poses a risk of personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease. The Centers for Disease Control and

Prevention (“CDC”) has determined that COVID-19 meets the definition for “severe acute respiratory syndromes” as set forth in Executive Order 13295, as amended by Executive Order 13375 and 13674, and, therefore, is a “quarantinable communicable disease.” *See Coronavirus Disease 2019 (COVID-19), Symptoms of Coronavirus*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last updated May 13, 2020). More than 549,000 people worldwide, including more than 140,000 in the United States, have died from COVID-19. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated July 22, 2020 2:00 PM); Jin Wu et al., *153,000 Missing Deaths: Tracking the True Toll of the Coronavirus Outbreak*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/04/21/world/coronavirus-missing-deaths.html> (last updated July 9, 2020 2:10 AM). According to the American Medical Association, “Official tallies of deaths due to COVID-19 underestimate the full increase in deaths associated with the pandemic[.]” Daniel M. Weinberger, PhD; Jenny Chen, BS; Ted Cohen, MD, DPH; et al., *Estimation of Excess Deaths Associated With the COVID-19 Pandemic in the United States, March to May 2020*, J. OF THE AM. MED. ASS’N (July 1, 2020), available at <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2767980>. “The number of people infected with the coronavirus in different parts of the United States has been anywhere from two to 13 times higher than the reported rates for those regions[.]” Apoorva Mandavilli, *Coronavirus Infections Much Higher Than Reported Cases in Parts of U.S., Study Shows*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/health/coronavirus-infections-us.html?action=click&module=RelatedLinks&pgtype=Article>.

115. Representative Plaintiffs Jerrod Carrier and George Guice and other similarly situated prevailing rate employees have performed work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices.

116. Defendant has failed, and continues to fail to pay plaintiffs the eight or four percent environmental differential listed in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations for each period when they have been exposed to COVID-19 through the performance of their official duties.

117. By failing to pay plaintiffs the eight or four percent environmental differential on these occasions, and continuing to fail and refuse to pay plaintiffs for this hazardous duty, the Defendant has violated, and is continuing to violate the provisions of 5 U.S.C. § 5343(c)(4).

118. As a consequence of defendant's failure to pay the plaintiffs environmental differential pay, the plaintiffs have been unlawfully deprived of environmental differential pay and other relief.

119. As a result of the defendant's willful and purposeful violations of Title 5, there has become due and owing to each of the plaintiffs various amounts which have not yet been precisely determined. The employment and work records for each plaintiff are in the possession, custody and control of the Defendant and the Plaintiffs are unable to state at this time the exact amounts owing to each of them. Defendant is under a duty imposed by the Government Accounting Office retention schedule, the FLSA (29 U.S.C. § 211(c)) and various statutory and regulatory provisions to maintain and preserve payroll and other employment records with respect to plaintiffs and other employees similarly situated from which the amounts of defendant's liability can be ascertained.

COUNT THREE – FLSA Overtime Pay

120. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

121. The overtime provisions of the FLSA, 29 U.S.C. § 207, require that employers must compensate employees who are classified as non-exempt from the overtime provisions of the FLSA at a rate not less than one and one-half times the regular rate at which they are employed for work performed in excess of the overtime threshold set forth in the overtime provisions of the FLSA, 29 U.S.C. § 207.

122. Defendant failed to pay the correct overtime rate to employees classified as non-exempt from the FLSA overtime provisions who performed work in excess of the applicable overtime thresholds during weeks in which they performed work with or in close proximity to objects, surfaces, and/or individuals infected with the novel coronavirus (“COVID-19”) without sufficient protective devices and were not paid the hazardous duty pay differential for exposure to virulent biologicals set forth in Appendix A to subpart I of Part 550 of Title 5, Code of Federal Regulations, or the environmental differential for exposure to hazardous micro-organisms set forth in in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations. When the Defendant failed to include hazardous duty pay and/or environmental differentials in calculating the Plaintiffs regular rate of pay, it also failed to include these differentials when calculating and paying overtime owed pursuant to the FLSA.

123. As a result, the FLSA Overtime Collective Action members suffered injuries, including monetary damages, and are entitled to wages owed and to liquidated damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court grant relief against Defendant as follows:

(a) Enter judgment declaring that the Defendant violated 5 U.S.C. § 5545(d) by failing and refusing to pay Representative Plaintiffs Braswell, Phillips, Melder, Vega, Carabetta, Rosado, Anderson, Stevenson, Pretty-Wilson, Brian, Mauzon, Towne, Furones, Rascon, Calvillo, Gonzalez, McClary, Smith, Bertrand and Troitino and other similarly situated employees the twenty five percent (25%) hazardous duty pay differential for exposure to “virulent biologicals” listed in Appendix A to subpart I of Part 550 of Title 5, Code of Federal Regulations, for each day that they have been required to work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without protective devices that afford complete protection;

(b) Enter judgment declaring that the Defendant violated 5 U.S.C. § 5343(c) by failing and refusing to pay Representative Plaintiffs Carrier and Guice and other similarly situated prevailing rate employees the eight or four percent environmental pay differential for exposure to hazardous micro-organisms listed in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations for each period that they have been required to work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 where the use of safety devices and equipment, medical prophylactic procedures such as vaccines and antiserims and other safety measures do not exist or have been developed but have not practically eliminated the potential for such personal injury;

(c) Enter judgment declaring that Defendant violated its statutory and legal obligations pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, and deprived Plaintiffs and all other FLSA Overtime Collective Action members of their rights, privileges, protections and compensation under the law, that the violations were not in good faith and that

Defendant did not have reasonable grounds for believing that its acts complied with its obligations under the FLSA, and that the violations were willful;

(d) Certify a class consisting of all federal employees who from January 27, 2020 through the present and continuing and ongoing performed work with or in close proximity to objects, surfaces, and/or individuals infected with the novel coronavirus (“COVID-19”) without sufficient protective devices, and were not paid the hazardous duty pay differential for exposure to virulent biologicals set forth in Appendix A to subpart I of Part 550 of Title 5, Code of Federal Regulations, or the environmental differential for exposure to hazardous micro-organisms set forth in in Appendix A to subpart E of Part 532 of Title 5, Code of Federal Regulations;

(e) Convene a collective action pursuant to 29 U.S.C. § 216(b) consisting of all members of the Hazardous Duty Class who are classified as non-exempt from the overtime provisions of the Fair Labor Standards Act (“FLSA”), 5 U.S.C. § 207, who, during the applicable time period, worked in excess of the hourly thresholds set forth in the FLSA and whose overtime rate of pay did not include hazardous duty pay and/or environmental differentials.

(f) Order a complete and accurate accounting of all the compensation to which the plaintiffs and all similarly situated employees are entitled;

(g) Award each Hazardous Duty Class member monetary damages in the form of back pay compensation plus interest;

(h) Award each FLSA Overtime Collective Action member classified as non-exempt from the FLSA’s overtime provisions the wages they are owed and monetary damages in the form of liquidated damages;

(i) Award Plaintiffs and all other Hazardous Duty Class and FLSA Overtime Collective Action members their reasonable attorneys' fees to be paid by Defendant, and the costs of this action; and

(j) Grant such other legal and equitable relief as may be just and proper.

Respectfully submitted,

s/ Heidi R. Burakiewicz
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Of Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Federal Claims by using the CM/ECF system. I also certify that the foregoing document is being served on Defendant's counsel of record and that service will be accomplished by the CM/ECF system.

Respectfully,

s/ Heidi R. Burakiewicz
Heidi R. Burakiewicz

July 22, 2020