No. 21-2846

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

William Burrell, Jr. et al.,

Plaintiffs-Appellants,

v.

Lackawanna Recycling Center, Inc. et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Pennsylvania
No. 3:14-cv-01891 (Mariani, J.)

BRIEF AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS WILLIAM L. BURRELL, JR. ET AL.*

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January 13, 2022

*Amici Curiae seek reversal of the district court's dismissal of Counts III and IV of the Second Amended Complaint.

CORPORATE DISCLOSURE STATEMENT

Each amicus is a nonprofit, nonstock corporation. No amicus has a parent corporation, and because none issues stock, there is no publicly-held corporation that owns 10% or more of its stock.

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici curiae hereby file the following amicus brief in support of Plaintiffs-Appellants William L. Burrell, Jr., Joshua Huzzard, and Dampsey Stuckey (hereafter, "Plaintiffs").

Amici are non-profit organizations that engage in worker organizing or advancing the rights of people who are incarcerated, legal and policy advocacy, community education and technical assistance for low-wage workers or people incarcerated in Pennsylvania and states in the Third Circuit. Amici have a strong interest in this case because the district court's adoption of the "two-pronged test" to plead an employment relationship between Plaintiffs and Defendants-Appellees Lackawanna Recycling Center, Inc. ("LCRI"), Lackawanna County Solid Waste Management Authority ("the Authority"), and/or Lackawanna County ("the County") will effectively bar incarcerated people, including civilly detained debtors like Plaintiffs, from asserting their rights under the Fair Labor Standards Act ("FLSA"). Such an outcome would not only prevent these workers from supporting themselves and their families and paying off their debts, but also drive down wages for all workers and unfairly harm employers who pay at least the minimum wage.

The parties' counsel did not author this brief, in whole or in part, and the parties and their counsel did not contribute money intended to fund the preparation

or submission of the brief. No person, including amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of the brief.

The National Employment Law Project ("NELP") is a non-profit legal organization with over 50 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all employees, and especially those more susceptible to exclusion, receive the basic workplace protections guaranteed in our nation's labor and employment laws. NELP's Fair Chance Initiative develops and implements innovative incarceration reentry strategies in partnership with organizations, aiming to address and sustain long-term structural changes that increase access to quality jobs for marginalized people of color with records, and elevate the dangers of occupational segregation by race. NELP provides appellate and amicus support and legislative testimony across the country on these issues.

Community Legal Services of Philadelphia ("CLS") is a non-profit legal services organization founded in 1966 that represents thousands of low-income Philadelphians every year in a variety of civil legal cases, including employment cases. CLS advocates for workplace rights of its mostly non-union clients on the federal, state, and local levels on matters including unemployment compensation,

wage and hour rights, anti-discrimination, and other areas that impact poverty and economic inequality. CLS has litigated directly and participated as amicus curiae in cases before the Third Circuit and in Pennsylvania state courts on behalf of workers. CLS joins this case because, through direct representation of hundreds of individual workers in wage cases over the last five decades, we see how shortchanging them contributes to poverty, inequality, and lack of economic mobility in Pennsylvania. In addition to wage and hour litigation, CLS represents and advocates for individuals facing barriers to employment due to their criminal records. Many individuals leave incarceration owing large amounts in court debt due to imposition of fines and costs without regard to ability to repay, and are particularly vulnerable to falling into deep poverty even if they are able to find housing and employment, as employment is usually at poverty-level wages before deduction of court debt. This makes it even more crucial for incarcerated workers to be compensated fairly for work performed during incarceration.

The Pennsylvania Institutional Law Project ("PILP") is a civil legal aid organization that aims to advance the constitutional and civil rights of people incarcerated, detained, and institutionalized in prisons, jails, and immigration detention centers located in Pennsylvania. PILP strives to ensure that the thousands of clients it serves every year are treated with dignity. PILP pursues humane conditions of confinement, safety from violence, and access to medical

and mental health care, to the courts, and to religious and disability accommodations. PILP has sought equitable treatment relating to incarcerated people's funds and income, and litigated cases impelling prisons to comply with all constitutional and statutory requirements relating to incarcerated people's finances, which are vital to their experience in prison and for successful reentry back into society after release.

Justice at Work Pennsylvania ("JAW") is a non-profit organization supporting low-wage workers as they pursue economic and social justice through the provision of legal services, education, and advocacy. For over 45 years, JAW, formerly known as Friends of Farmworkers, has provided direct legal assistance to thousands of workers in Pennsylvania and improved the living and working conditions of a much larger number through advocacy and impact litigation. Through our work, JAW has witnessed the harm to individuals, families, communities, and economies when workers are excluded from the protections of employment laws.

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA strives to protect the rights

of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

In this case, Plaintiffs were required to work for $5 a day under dangerous conditions, sorting trash and other materials at a recycling center operated by LCRI, a private company, under contract with the Authority. Each Plaintiff worked five days a week, eight hours a day, under LCRI's supervision and control. Vol. 2 at 117, 120, 122, 128.[1] LCRI relies on incarcerated people to staff its recycling services rather than hiring workers from the community and paying at least the minimum wage. *Id*. at 128. LCRI, the Authority, and the County jointly exercised control over and/or retained the right to control workers at the center by selecting incarcerated people to work at the center, determining their work rules and assignments, determining their schedules, and supervising them while performing their duties. *Id*. at 129-30.

In this submission, amici discuss the history of prison labor and its connection to American slavery. They also discuss the unique breadth of the FLSA's coverage of employees, how courts have interpreted the FLSA's definitions, and the policy purposes behind the FLSA and why the district court's standard fails to uphold those policies. There is no specific exemption in the FLSA or state law for incarcerated workers. The FLSA's remedial goals require an

[1] All references to Appendix Volume 2 are to the Second Amended Complaint.

expansive interpretation of the statute's coverage that considers "the circumstances of the whole activity . . . rather than any one particular factor." *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985). For these reasons, amici urge the Court to reverse the district court's dismissal of the FLSA claims and remand to allow the Plaintiffs to prove that Defendants were their employers subject to the requirements of federal and state worker protections.

ARGUMENT

I. Historical Roots of Forced Prison Labor.

There is a growing movement to outlaw forced prison labor,[2] which many agree is connected to the vestiges of anti-Black slavery. The "convict lease" system, under which incarcerated people were leased as free laborers to private and

[2] For example, in November 2020, both Nebraska and Utah passed state constitutional amendments removing language from their constitutions disallowing involuntary servitude except as punishment for a crime. *See* Kaelan Deese, *Utah, Nebraska voters approve measures stripping slavery language from state constitutions*, The Hill, Nov. 4, 2020, https://thehill.com/homenews/state-watch/524469-utah-nebraska-voters-approve-measure-stripping-slavery-language-in. Similar efforts are underway in Nevada, New York, and California. *See* Michael Lyle, *Why the Legislature is hearing a resolution to abolish slavery*, Nevada Current, Mar. 24, 2021, https://www.nevadacurrent.com/blog/why-the-legislature-is-hearing-a-resolution-to-abolish-slavery/; George Joseph, *50 Years After Attica, Activists Are Still Fighting to End Coerced Prison Labor*, Gothamist, September 14, 2021, https://gothamist.com/news/50-years-after-attica-activists-are-still-fighting-end-coerced-prison-labor; Maria L. La Ganga, *He wants to kick Jim Crow out of the California Constitution,* L.A. Times, February 24, 2021, https://www.latimes.com/california/story/2021-02-24/ridding-the-california-constitution-of-americas-original-sin.

public employers, grew in strength in the aftermath of Reconstruction after the Thirteenth Amendment outlawed slavery except as "punishment for a crime."[3] These labor practices greatly resembled, and at times directly duplicated, slavery.[4] The labor force that resulted was overwhelmingly Black, as Black people were targeted for trivial or minor crimes that required the payment of fines that they could not afford or in disproportionate sentences.[5]

According to James Gray Pope, Distinguished Professor of Law & Sidney Reitman Scholar at Rutgers Law School:

> Convict leasing systems came to be shaped not primarily for the purpose of punishing crime but for a range of economic purposes including profit for private masters, pay for individual public officials, revenues for government, and expendable labor for fast-paced industrial development. Employers confronted a severe shortage of labor in many regions of the South, and they did not hesitate to solve the problem with forced labor. "In a region where dark skin and forced labor went hand in hand," observes David Oshinsky, "leasing would become a functional replacement for slavery, a human bridge between the Old South and the New." Convict labor played a crucial role not only in plantation agriculture, but also in the most dynamic industrializing

[3] *See* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. Law Review 1465, 1467-68, 1501-03 (Dec. 2019); *see also* Douglas A. Blackmon, *Slavery by Another Name: the Re-Enslavement of Black Americans from the Civil War to World War II* (2008); Kelly Lytle Hernandez, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771-1965* (2017); Talitha L. LeFlouria, *Chained in Silence: Black Women and Convict Labor in the New South* (2015).

[4] *See, e.g.*, Pope, *supra* note 3, at 1478-80, 1506-09; Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008).

[5] *See* Pope, *supra* note 3, at 1510-14.

sectors of the Southern economy including railroad construction and coal mining.[6]

Modern-day mass incarceration is subject to similar criticisms.[7] For a variety of reasons, ranging from over-policing and racial profiling to racist charging and sentencing decisions, the people impacted by incarceration are disproportionately Black and Latinx.[8] Racism in the criminal justice system is well-documented.[9]

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[6] Pope, *supra* note 3, at 1506-7.

[7] *Id.* at 1528-30 (discussing the rise in prison rates beginning in the 1960s, stemming from "a host of new statutory crimes, harsh sentences, and enforcement policies targeted at behaviors, conditions, and locations associated with poverty and racial disadvantage").

[8] The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons; The Nat'l Judicial College, "Most Judges Believe the Criminal Justice System Suffers from Racism," July 14, 2020, https://www.judges.org/newsand-info/most-judges-believe-the-criminal-justice-system-suffers-from-racism/.

[9] *See* Pope, *supra* note 3, at 1528-29; *see also* Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act*, https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions (citing statistics showing that "African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population" and that "African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population"); The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons (noting that, on average in state prisons, Black people are incarcerated at over five times the rate of white people; in five states, at over 10 times the rate).

These racial disparities cannot be attributed to different rates of offense.[10] Corporations are able to cut costs and increase profits by using low- or unpaid prison labor.[11] During the COVID-19 pandemic, for example, while many businesses were required to close to protect the safety of their workers, prison laborers continued to work, including making masks and hand sanitizer to protect others from the virus and fighting wildfires.[12]

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[10] Studies demonstrate that, for example, while rates of drug usage are essentially equal among white and Black populations, arrests and convictions for drug offenses are much higher in the Black community. The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons. *See also* The Hamilton Project, "Chart: Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race" (2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice

[11] *See* Pope, *supra* note 3, at 1530-31, 1549 & nn. 354, 462.

[12] *The Industry Behind Prisons Profits, Even During the Coronavirus Outbreak*, Associated Press, May 9, 2020, https://www.latimes.com/world-nation/story/2020-05-09/coronavirus-us-prisons-pandemic-inmate-work-programs; Aaron Mak, *New York Will Use Prison Labor to Make Hand Sanitizer*, Slate, March 9, 2020, https://slate.com/news-and-politics/2020/03/new-york-prison-labor-hand-sanitizer-coronavirus.html; Lauren-Brooke Eisen, Brennan Center for Justice, *COVID-19 Highlights the Need for Prison Labor Reform*, April 17, 2020, https://www.brennancenter.org/our-work/analysis-opinion/covid-19-highlights-need-prison-labor-reform (examining how more than a dozen states relied on incarcerated people earning less than $1 per hour to make supplies related to fighting the spread of coronavirus); Claire Hannah Collins & Erik Himmelsbach-Weinstein, *Meet the Formerly Incarcerated Fire Crew Protecting California from Wildfires*, L.A. Times, Nov. 10, 2021, https://www.latimes.com/california/story/2021-11-10/former-incarcerated-firefighters-create-private-fire-crew-to-battle-california-wildfires.

II. The Court Must Reverse the District Court's Dismissal of the FLSA Claims Because It Failed to Apply the Correct Legal Standards.

As courts have long recognized, the FLSA is a "remedial" statute "written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy." *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984); *accord DialAmerica Mktg.*, 757 F.2d at 1382 ("Congress and the courts have both recognized that, of all the acts of social legislation, the Fair Labor Standards Act has the broadest definition of 'employee.'"). In the absence of a specific exemption in the statute, it must be read broadly, with its purposes in mind. The district court's cramped interpretation of the FLSA runs counter to the breadth of the statute and to Congressional intent to encompass incarcerated people's labor bearing indicia of "traditional free-market employment," including the Plaintiffs' labor in this case. *Tourscher v. McCullough*, 184 F.3d 236, 243-44 (3d Cir. 1999).

A. The FLSA Does Not Exempt Incarcerated People.

Courts have consistently held that "prisoners are [not] *categorically* barred from ever being 'employees' within the meaning of the FLSA merely because of their prisoner status." *Henthorn v. Dep't of Navy*, 29 F.3d 682, 685 (D.C. Cir. 1994) (citing *Vansikike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992), and *Hale v. Arizona*, 993 F.2d 1356, 1393 (9th Cir. 1992)). As the district court correctly recognized, "prisoners as a class are not exempted from FLSA coverage." Vol. 1

at 75.[13] "Congress has set forth an extensive list of workers who are exempted expressly from FLSA coverage. The category of prisoners is not on that list. It would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act." *Carter*, 735 F.2d at 13.

B. Coverage Determinations Under the FLSA Are Fact-Intensive and Require Consideration of All Relevant Factors.

FLSA coverage is a highly factual inquiry that requires consideration of "the circumstances of the whole activity . . . rather than any one particular factor." *DialAmerica Mktg.*, 757 F.2d at 1382 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

The district court's bright-line rule, which would exempt most incarcerated people from the FLSA's coverage, fails to undertake the particularized inquiry into the facts of each case that the FLSA requires. *See Carter*, 735 F.2d at 13 (noting that caselaw in the prisoner context reflects a detailed analysis of each case's facts rather than the imposition of bright-line exclusions). "A full inquiry into the economic reality is necessary." *Id*. Here, the district court did not consider any of the economic reality factors that courts typically apply. It only considered the two prongs of the "two-pronged test" that it adopted from a D.C. Circuit case bearing no indicia of traditional free-market employment, especially important when the

[13] All references to Appendix Volume 1 are to the district court's Memorandum Opinion, filed on August 6, 2021.

employer is a private entity, as here. *See Henthorn*, 29 F.3d at 685 (federal incarcerated person who performed janitorial, maintenance, and other chores on the grounds of the U.S. Naval Air Station was not an employee under the FLSA).

C. This Court Has Distinguished Prison Support Work from Labor Bearing Indicia of Traditional Free-Market Employment.

In *Tourscher v. McCullough*, this Court held that incarcerated people "producing goods and services used by the prison"—*i.e.*, prison support work—are not employees of the prison under the FLSA. 184 F.3d at 242 (citing cases). Citing the Second Circuit's decision in *Danneskjold v. Hausrath*, 82 F.3d 1119 (2d Cir. 1996), the Court reasoned that such work occurs "out[side] of the national economy," and thus "most such labor does not compete with private employers[.]" *Tourscher*, 184 F.3d at 243 (quoting *Danneskjold*, 82 F.3d at 42-43) (internal quotation marks omitted).

However, the Court recognized a distinction between prison support work inside the prison, such as cooking, staffing the library, and performing janitorial services, from other situations bearing indicia of "traditional free-market employment contemplated by the FLSA." *Id*. at 243-44 (quoting *Villarreal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997)). For example, in *Watson v. Graves*, which the Court cited in *Tourscher*, the Fifth Circuit held as a matter of law that incarcerated individuals were employees of an outside construction company to which the sheriff and the warden of the parish jail had assigned them

to work under a work release program in which they were paid $20 a day. 909 F.2d 1549, 1551 (5th Cir. 1990).

In applying the economic reality test to the plaintiffs' relationship with the construction company, the Fifth Circuit considered "the purposes behind the Act," including the FLSA's goal of "eliminat[ing] unfair competition among employers competing for business in the market and among workers looking for jobs." *Id*. at 1554 (citing *Carter*, 735 F.2d at 14). The prison's arrangement with the construction company undermined this goal by providing the company with "a 'captive' pool of workers" to whom the company paid "token wages" that were "well below the legal minimum, and . . . even further below the 'going rate' for workers with the Inmates' skills and abilities." *Id*. at 1555. Moreover, "[u]nlike [its] competitors," the construction company "incurred no expense for overtime, unemployment insurance, social security, worker's compensation insurance, or other employee benefit plans because [it] had no 'employees.'" *Id*. The company "had no need to hire any non-inmate employees because [its] labor needs were in cheap and easy supply[.]" *Id*. "Such a situation is fraught with the very problems that the FLSA was drafted to prevent—grossly unfair competition among employers and employees alike." *Id*.

The facts of the present case are comparable to those in *Watson*. Here, the Plaintiffs were assigned to work outside of the prison at a recycling center run by a

private entity, LRCI, for just $5 a day. Vol. 2 at 113. LRCI operates largely employee-free by relying on incarcerated people's labor. *Id*. These workers perform LRCI's core service—working on conveyor belts separating recyclable materials from garbage, under dangerous and unsanitary working conditions. *Id*. As in *Watson*, it is likely that LRCI's competitors "could not compete with [LCRI's] prices because they had to pay *at least* minimum wage" as well as unemployment, social security, and other "overhead costs" that LCRI avoided by using nearly free, prison labor. *Watson*, 909 F.2d at 1555.

D. The District Court's Construction of the Applicable Test Is Unduly Narrow and Divorced from the FLSA's Purposes.

Notwithstanding the district court's recognition that the FLSA does not exclude incarcerated people, it effectively created a *de facto* exclusion by tethering coverage to an arbitrary "prerequisite" that is divorced from the FLSA and its purposes. Thus, in order to assert an FLSA claim, an incarcerated person must allege that: (1) he has "freely contracted" to sell his own labor rather than being compelled to do so, and (2) his pay "was set and paid by a non-prison source." Vol. 1 at 77 (quoting *Henthorn*, 29 F.3d at 686-87) (internal quotation marks omitted).

The Court should reject the district court's rule. First, the rule fails to acknowledge the economic reality that few incarcerated people are in a position to freely contract their services. Thus, it effectively creates an exclusion for most

incarcerated people that Congress did not authorize when it designated the categories of workers who are exempted from FLSA coverage. *See Carter*, 735 F.2d at 13.

Second, the rule ignores a key rationale underlying the distinction between prison support work and situations bearing indicia of traditional free-market employment—eliminating unfair competition between private employers paying substandard wages and those paying at least the minimum wage. The achievement of this goal would be thwarted if a private employer were permitted to use free or subminimum wage prison labor simply because it did not set the rate of pay or because an incarcerated person, lacking other means of earning income, "freely contracted" to sell his own labor at less than the minimum wage rate.

Finally, the rule fails to consider the value of the minimum wage in protecting workers and their families from dire poverty and, under the facts of this case, enabling the Plaintiffs and civil debtors like them to repay their child support debts. The Plaintiffs' paltry earnings—just $5 a day despite working under dangerous conditions from 7 in the morning to 3 in the afternoon—are "well below the legal minimum, and . . . even further below the 'going rate' for workers" in the

industry who, according to the U.S. Bureau of Labor Statistics, are paid a median wage of $18.80 per hour.[14] *Watson*, 909 F.2d at 1555.

E. Whether Defendants Employed Plaintiffs Is a Factual Question that Should Not Be Decided on a Rule 12(b)(6) Motion.

Plaintiffs have sufficiently alleged facts that, if proved, would render them employees of Defendants under the FLSA. Specifically, they alleged that the County jointly employed them with the Authority, LCRI, and LCRI's owners by selecting Plaintiffs to work at LCRI and reserving the right to remove them from their positions; that Defendants together decided the days and hours during which Plaintiffs worked; that Defendants jointly supervised Plaintiffs' work; and that Defendants jointly had the power to determine Plaintiffs' pay. Vol. 2 at 129-30; *Watson*, 909 F.2d at 1554-56 (finding that incarcerated people were employees for purposes of the FLSA under "a realistic analysis of the four prongs of the economic realities test" and "in light of the policies behind the Act"); *Carter*, 735 F.2d at 15 (applying economic reality test and finding a genuine dispute of material fact as to employer's liability where it had a say in worker's pay, developed eligibility criteria, was not required to take incarcerated people it did not want, and

[14] Occupational Employment and Wages, May 2020, Refuse and Recyclable Material Collectors, https://www.bls.gov/oes/current/oes537081.htm.

determined how long an incarcerated person would work). Accordingly, the Court should reverse the District Court's dismissal of the claims and allow the Plaintiffs to proceed to discovery.

CONCLUSION

For the foregoing reasons, the district court's dismissal of the FLSA claims should be reversed. The two-prong test that the district court adopted is inconsistent with the FLSA's broad coverage and goals of eliminating unfair competition among employers by setting a wage floor and protecting workers and their families by ensuring a basic standard of living. The Court should instead adopt a standard that considers all of the relevant facts and circumstances in light of the FLSA's policy goals.

Dated: January 13, 2022

Respectfully submitted,

/s/ Catherine Ruckelshaus, NY Bar 890639

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CERTIFICATION OF BAR MEMBERSHIP

I, Catherine Ruckelshaus, certify pursuant to Local Rule 46.1 that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit Court of Appeal.

Dated: January 13, 2022

s/ Catherine Ruckelshaus
Catherine Ruckelshaus, Esq.

CERTIFICATE OF COMPLIANCE

I, Catherine Ruckelshaus, hereby certify as follows:

(1) the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 14-point Times New Roman font;

(2) the brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3,912 words, excluding those parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated using the word count function on Microsoft Word software;

(3) the text of the electronic and hard copies of the brief is identical; and

(4) the electronic copy of the brief was scanned for electronic viruses on January 13, 2022 before transmission to this Court using Windows Defender, and no viruses were detected.

Dated: January 13, 2022

/s/ Catherine Ruckelshaus
Catherine Ruckelshaus, Esq.

CERTIFICATE OF SERVICE

I, Catherine Ruckelshaus, certify that on January 13, 2022, I caused a copy of the Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae to be filed with the Clerk of Court using the *CM/ECF* system.

Dated: January 13, 2022 s/ Catherine Ruckelshaus
Catherine Ruckelshaus, Esq.