

No. 2021-1662

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

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CODY L. ADAMS, ROSE M. ADAMSON, JOSEPH P. AGIUS, DARA W. ALLICK,  
JENNIFER A. ANGEL, MICHAEL T. ANGELO, SAMMY APONTE, ALICIA K.  
AUSTIN-ZITO, LUKE M. BADARACCO, CHAD J. BARGSTEIN, ET AL.,  
Plaintiffs-Appellants

v.

UNITED STATES,  
Defendant-Appellee

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

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**CORRECTED BRIEF FOR AMICUS CURIAE NATIONAL  
TREASURY EMPLOYEES UNION IN SUPPORT OF  
PLAINTIFFS-APPELLANTS URGING REVERSAL**

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JULIE M. WILSON  
General Counsel  
PARAS N. SHAH  
Associate General Counsel  
For Litigation  
ALLISON C. GILES  
Assistant Counsel  
Principal Counsel  
NATIONAL TREASURY  
EMPLOYEES UNION  
800 K Street, N.W., Suite 1000  
Washington, D.C. 20001  
(202) 572-5500  
Counsel for Amicus Curiae NTEU  
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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**CERTIFICATE OF INTEREST**

**Case Number** 21-1662

**Short Case Caption** Cody Adams, et al., v. United States

**Filing Party/Entity** Amicus Curiae National Treasury Employees Union

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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 09/09/2022

Signature: /s/ Allison C. Giles

Name: Allison C. Giles

<p><b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).</p>	<p><b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).</p>	<p><b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>National Treasury Employees Union</p>		

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**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable                       Additional pages attached


## STATEMENT OF RELATED CASES

This case has not been previously before this Court or any other federal appellate court. Counsel is aware of the following related cases that will or may be directly affected by this Court's decision in this case:

- *Aaron, et al., v. United States*, Case No. 21-1117C (Fed. Cl.)
- *Abdelrehim, et al., v. United States*, Case No. 21-2254C (Fed. Cl.)
- *Abraham, et al., v. United States*, Case No. 20-1859C (Fed. Cl.)
- *Abrom, et al., v. United States*, Case No. 21-1230C (Fed. Cl.)
- *Ackley, et al., v. United States*, Case No. 21-874C (Fed. Cl.)
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- *Adams (Samantha), et al., v. United States*, Case No. 21-1827C (Fed. Cl.)
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- *Adegbite, et al., v. United States*, Case No. 22-64C (Fed. Cl.)
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**STATEMENT OF IDENTITY, INTEREST IN CASE, AND  
SOURCE OF AUTHORITY TO FILE**

The National Treasury Employees Union (NTEU) is the exclusive representative of bargaining unit employees in thirty-four federal departments and agencies. For nearly a half-century, NTEU has litigated cases interpreting federal pay statutes and Office of Personnel Management (OPM) pay regulations.

NTEU represents employees who have rightly received hazardous duty pay. And NTEU represents tens of thousands of other employees who are being shortchanged the hazardous duty pay that they are owed. Throughout the COVID-19 pandemic, these dedicated public servants have worked in proximity to infected persons and surfaces, putting themselves at risk to serve and to protect the nation. NTEU is committed to getting these employees the pay that they are owed. NTEU submits this brief pursuant to this Court's Order inviting the views of amici curiae without need of consent or leave of the Court.<sup>1</sup>

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<sup>1</sup> No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than NTEU, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

## SUMMARY OF ARGUMENT

The lower court was wrong to hold categorically that employees forced to work in proximity to a lethal airborne virus—one that has killed over one million people in this country alone—are not entitled to hazardous duty pay as a matter of law.<sup>2</sup> NTEU submits this brief to endorse the arguments that the Appellants have made and to emphasize three points.

*First*, if this Court affirms the lower court’s incorrect legal rulings, the effect of that decision would extend far beyond this case. It would effectively foreclose hazardous duty pay claims across the board for employees who have exposed themselves to the deadly COVID-19 virus through their official duties. That would include tens of thousands of employees performing law enforcement duties that cannot be done without close contact with infected persons.

*Second*, the lower court erred in using an unduly narrow construction of what qualifies as an “unusual’ hardship or hazard for

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<sup>2</sup> For simplicity’s sake, this brief refers to “hazardous duty pay,” which applies to General Schedule employees (5 U.S.C. § 5545(d); 5 C.F.R. Part 550), but NTEU’s arguments apply equally to “environmental differential pay” for Wage Grade employees (5 U.S.C. § 5343(c)(4); 5 C.F.R. Part 532).

which hazardous duty pay may be available. Using the plain meaning of the term, as this Court’s precedent requires, exposure to COVID-19 must be considered an “unusual” hardship or hazard. The government, from the President on down, has repeatedly stated that this pandemic is novel and unprecedented. Given those statements, this Court should find that this requirement for hazardous duty pay is satisfied here.

*Third*, the lower court erred in creating a distinction between “accidental” and “incidental” exposure to COVID-19 while in the line of duty. That phantom distinction—and the lower court’s conclusion that COVID-19 exposure while on the job would be incidental and not accidental—was a key basis for the court’s ruling that hazardous duty pay is unavailable for COVID-19 exposure. This Court should reject that conclusion and hold that if an employee is exposed to COVID-19 in the course of his or her duties, hazardous duty pay may be available.

### **ARGUMENT**

**I. The Lower Court’s Sweeping and Incorrect Rulings Could Affect Tens of Thousands of Employees with Strong Claims to Hazardous Duty Pay.**

A. The lower court’s incorrect rulings, if affirmed, will likely adversely affect tens of thousands of front-line government workers who were required to work near COVID-infected persons and surfaces. Many

court cases and other actions seeking hazardous duty pay on behalf of federal employees have been stayed pending the outcome of this matter. If affirmed, the trial court's erroneous rulings will likely foreclose recovery for the employees in those matters.

For example, the lower court concluded that Congress could not have intended for the hazardous duty pay statute, 5 U.S.C. § 5545(d), to cover exposure to COVID-19 because the disease did not exist “at the time the statute was enacted.” Appx007 (quoting *Adair v. United States*, 497 F.3d 1244, 1254 (Fed. Cir. 2007)). The Supreme Court, though, has rejected this type of reasoning and instructed the lower courts that applying a statute “in situations not expressly anticipated by Congress . . . simply demonstrates the breadth of a legislative command.” *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020) (cleaned up).<sup>3</sup>

Similarly incongruent with governing precedent is the lower court's ruling that employees may receive hazardous duty pay *only* if they are performing “new” or “irregular or intermittent” duties due to

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<sup>3</sup> Indeed, that COVID-19 is new and unanticipated by Congress bolsters the argument that the virus is “unusual.” *See* Argument, Section II.

the hazard. *See* Appx007 (quoting *Adair*, 497 F.3d at 1254). That is a flat misreading of *Adair*. *Adair* did not limit the definition of “unusual” to situations involving new or irregular duties.

Instead, *Adair* held that an “unusual” hazard is one that is “not usually involved in carrying out the duties of an employee’s position.” 497 F.3d at 1253 n.2. As this Court explained, in Congress’s view, it was “logical that the Government offer some additional remuneration to the employee asked to take unusual risks not normally associated with his occupation and for which added compensation is not otherwise provided . . . .” *Id.* at 1254 (internal citation omitted).

**B.** If affirmed, the lower court’s plainly incorrect rulings could doom federal employees with otherwise strong claims to hazardous duty pay. That includes tens of thousands of NTEU-represented Customs and Border Protection Officers (CBPOs). These employees’ public safety duties require face-to-face interaction with travelers and migrants—and, since 2020, those duties have included the screening of individuals for COVID-19.

CBPOs work at more than 300 ports of entry throughout the

United States.<sup>4</sup> These CBPOs are responsible for border security, including counterterrorism, customs, immigration, trade, and agriculture.<sup>5</sup> Their duties include detecting and preventing terrorists and terrorist weapons from entering the United States; enforcing customs, immigration, and agricultural laws and regulations; and apprehending persons and merchandise entering the country illegally.<sup>6</sup>

CBPOs routinely interact with and interview people entering our ports. Although there were some restrictions on travelers during the pandemic, the ports necessarily remained open.<sup>7</sup> At those entry points,

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<sup>4</sup> U.S. Customs and Border Protection, *What We Do*, <https://www.cbp.gov/careers/cbpo-what-we-do> (last visited Sept. 7, 2022).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *See, e.g.*, The Port of Los Angeles *Frequently Asked Questions*, <https://www.portoflosangeles.org/covid-19> (“All cargo terminals at the Port of Los Angeles have remained open and operational throughout the COVID-19 pandemic. As part of America’s supply chain, port operations . . . are essential and continue without interruption.”) (last visited Sept. 7, 2022); Press Release, U.S. Customs and Border Protection, *Dulles CBP Officers* (Apr. 8, 2020) <https://www.cbp.gov/newsroom/local-media-release/dulles-cbp-officers-have-processed-over-14000-covid-19-evacuees> (CBP employees continue to process thousands of returning Americans at Dulles International Airport) (*Dulles CBP Press Release*).

“CBP personnel conduct initial inspections for symptoms or risk factors associated with COVID-19 and consult with onsite medical personnel.”<sup>8</sup>

Suspected COVID cases are then referred to local health systems for appropriate testing, diagnosis and treatment.<sup>9</sup>

CBPOs have suffered gravely because “[a]s frontline workers,” they “continue to perform public-facing duties during the pandemic, and some have contracted COVID-19.”<sup>10</sup> According to CBP, it has had 23,574 employees test positive for COVID-19, and it has had 64 employees die from the virus.<sup>11</sup>

CBPOs are just one example of federal employees whose claims for hazardous duty pay might be foreclosed by the lower court’s broad and

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<sup>8</sup> Lauren Giella, *Fact Check: Are COVID-Positive Migrants Allowed to Cross Southern Border Into U.S.?*, Newsweek (Mar. 5, 2021).

<sup>9</sup> *Id.*; see also *Dulles CBP Press Release* (CBP employees process arriving airport travelers and identify those who may need enhanced health screening).

<sup>10</sup> U.S. Gov’t Accountability Off., GAO-21-431, *Border Security: CBP’s Response to COVID-19* (2021) at 11 (*GAO Border Security Report*).

<sup>11</sup> U.S. Customs and Border Protection, *CBP COVID-19 Updates and Announcement*, <https://www.cbp.gov/newsroom/coronavirus> (last visited Sept. 7, 2022). See also Danyelle Khmara, *COVID Is No. 1 Killer of CBP Officers . . .*, Tuscon.com (Feb. 10, 2022) (“COVID-19 is the top killer of agents with Customs and Border Protection. . .”).



incorrect rulings. Those rulings must be reversed.

**II. COVID-19 is “Unusual” for Purposes of the Hazardous Duty Pay Scheme. The Lower Court’s Contrary Ruling Must Be Reversed.**

To recover hazardous duty pay, a hardship or hazard must be “unusual” (*see* 5 U.S.C § 5545(d)), but neither the relevant statute nor regulation defines that term. This Court has thus asked for guidance on how the term “unusual” should be construed. *See* Order dated June 27, 2022 at 2.A.

A. This Court should reject the cramped interpretation of “unusual” espoused in the lower court’s decision. *See* Appx007. Under that interpretation, an alleged hazard is “unusual” only if it causes an employee to perform “new duties” or “an ‘irregular or intermittent’ assignment.” *Id.* (quoting *Adair*, 497 F.3d at 1254). That is a flat misreading of *Adair*.

In *Adair*, this Court stated, by way of example, that “irregular or intermittent” duties *may* indicate the type of “unusual” hazard for which hazardous duty pay is available. *See* 497 F.3d at 1254. But *Adair* did not limit the definition of “unusual” to such situations. Instead, this Court gave “unusual” its “ordinary meaning”: it held that an unusual

hazard is one that is “not usually involved in carrying out the duties of an employee’s position.” *Id.* at 1253 n.2.

In the absence of a statutory or regulatory definition, this Court should continue to afford “unusual” its ordinary meaning. A hardship or hazard should be deemed unusual if it is one that employees do not usually encounter when carrying out their duties, i.e., one that is “uncommon” or “rare.”<sup>12</sup>

**B.** No matter what precise language this Court uses in construing the term “unusual,” it should not pose an obstacle to the employees in this matter, given the government’s own statements regarding the COVID-19 pandemic.

Two Presidents, the Centers for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA), the Department of Health and Human Services (HHS), CBP, and others have underscored the highly unusual, if not unprecedented, nature of the COVID-19 pandemic. These representations should bind the government on the issue of whether COVID-19 is “unusual” under the

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<sup>12</sup> *Unusual*, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/unusual>.

hazardous duty pay scheme, notwithstanding its contrary litigation position in this case. For example:

- Regarding the COVID-19 pandemic, then-President Trump stated that “[n]obody has ever seen anything like this.”<sup>13</sup>
- Both former-President Trump and President Biden have declared the pandemic a national emergency.<sup>14</sup>
- The CDC has called the pandemic “unprecedented.”<sup>15</sup>
- OSHA has echoed the CDC’s statements about the unprecedented nature of the pandemic, stating that “[f]or the first time in its 50-year history, OSHA faces a new hazard.”<sup>16</sup>

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<sup>13</sup> President Trump, *Remarks in Press Briefing*, White House (Mar. 19, 2020).

<sup>14</sup> Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337 (Mar. 18, 2020); Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, 86 Fed. Reg. 11599 (Feb. 24, 2021); Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, 87 Fed. Reg. 10289 (Feb. 23, 2022).

<sup>15</sup> Erika Edwards, *Aggressive Action Necessary to Counter the “Unprecedented Threat” of Coronavirus, CDC Says*, nbc.com (Feb. 3, 2020).

<sup>16</sup> Occupational Exposure to COVID–19; Emergency Temporary Standard, 86 Fed. Reg. 32376 (June 21, 2021).

- HHS has declared the pandemic a national public health emergency since January 2020.<sup>17</sup>
- CBP has called the pandemic “unprecedented” and described 2020 as “a year like no other.”<sup>18</sup>

Thus, by the government’s own admission, COVID-19 is nothing like mundane hazards such as second-hand smoke for which hazardous duty pay is not available. *Cf. Adair*, 497 F.3d at 1253. It is at a minimum “unusual,” as that term is commonly understood and as this Court should interpret it for purposes of hazardous duty pay.

C. Even for law enforcement personnel like CBPOs who regularly face dangers, exposure to COVID-19 is plainly something that is not usually involved in carrying out their duties. The deadly airborne disease radically altered the way of life for our country. It caused a significant portion of the nation to cease or to avoid contact with other individuals—a luxury that CBPOs, of course, could not afford, given

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<sup>17</sup> See U.S. Department of Health and Human Services, *Renewal of Determination that a Public Health Emergency Exists* (July 15, 2022), <https://aspr.hhs.gov/legal/PHE/Pages/covid19-15jul2022.aspx>.

<sup>18</sup> See U.S. Customs and Border Protection, *CBP Meets the Challenges Presented by COVID-19*, <https://www.cbp.gov/frontline/cbp-meets-challenges-presented-covid-19> (last updated June 27, 2022).

their obligation to keep our nation safe.

Even other global health crises that CBPOs have been forced to work through bear little resemblance to this one, in terms of their scope and the ease of the disease's transmission. During the Ebola outbreak in 2014, for example, some containment and focused response was possible because CBP was able to focus on travelers and flights coming from Africa.<sup>19</sup> COVID-19, in contrast, quickly became a world-wide problem. And COVID-19 is starkly different in scope from the swine flu outbreak in 2009. Swine flu caused approximately 12,469 deaths in this country.<sup>20</sup> COVID-19 has caused 1,042,581 deaths and counting<sup>21</sup>—an increase of more than 8000%.

Thus, even for employees like CBPOs, COVID-19 is an “unusual”

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<sup>19</sup> U.S. Customs and Border Protection, *CBP Access*, (Oct. 31, 2014), [https://www.cbp.gov/sites/default/files/documents/CBPAccessV3.14\\_103114.pdf](https://www.cbp.gov/sites/default/files/documents/CBPAccessV3.14_103114.pdf) (enhanced screening for travelers arriving from or through an Ebola-affected country; travelers from three specific African countries funneled to designated ports of entry).

<sup>20</sup> Centers for Disease Control and Prevention, *2009 H1N1 Pandemic (H1N1pdm09 virus)*, <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> (last visited Sept. 7, 2022).

<sup>21</sup> Centers for Disease Control and Prevention, *Covid Data Tracker*, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last updated Sept. 6, 2022).

hazard, as that term is generally defined. And exposure to COVID-19 is plainly “not usually involved in carrying out the duties of” a CBPO.

*Adair*, 497 F.3d at 1253 n.2. It is therefore “logical that the

Government offer some additional remuneration” to these employees.

*See id.* at 1254 (quoting legislative history).

**III. The Lower Court Erred in Creating a Distinction Between “Accidental” and “Incidental” Exposure to COVID-19. What Matters is that the Exposure Occurred in the Line of Duty.**

This Court has asked “[w]hat distinction, if any, is there between accidental exposure and incidental exposure” for purposes of the

hazardous duty pay regulation. *See* Order dated June 27, 2022 at 2.B.

The answer is none. The lower court’s conclusion to the contrary therefore cannot stand.

**A.** In the course of dismissing the employees’ claims, the lower court manufactured a distinction between accidental and incidental exposure to COVID-19. In its view, if your government forces you to work in close proximity to COVID-19 and you come into contact with the virus, that exposure is not *accidental* but instead *incidental*. *See* Appx007-008.

This baseless distinction had an enormous consequence—one that

will reverberate beyond this case if it is upheld. That is because OPM’s regulations define “hazardous duty” as “duty performed under circumstances in which an *accident* could result in serious injury or death . . . .” 5 C.F.R. § 550.902 (emphasis added). Thus, the lower court’s ruling that exposure to COVID-19 would not be “accident[al]” but instead “incidental” took the employees here out of the coverage of the hazardous duty pay regulation.

Yet the relevant statutes and regulations do not define “accident” or “accidental”—or, for that matter, “incidental.” It defies commonsense to conclude, as the lower court did, that a federal employee’s contracting of COVID-19 in the line of duty would *not* be “an ‘accident.’” *See* Appx007-008. This Court should reject that erroneous conclusion.

**B.** As OPM’s guidance on hazardous duty pay suggests, what matters is that the exposure occur “during the performance of assigned duties.” *See* Appx007-008 (quoting OPM guidance). And, here, Congress has taken the fact-finding into its own hands. For public-facing federal employees, Congress has declared, as a matter of law, that any exposure to COVID-19 has occurred in the line of duty.

The American Rescue Plan Act of 2021 provides that covered

employees shall be “deemed to have an injury proximately caused by exposure to COVID-19 arising out of the nature of the covered employee’s employment.” The American Rescue Plan Act of 2021, Pub. L. No. 117-2, sec. 4016, 135 Stat. 81 (2021). The law broadly covers any employee diagnosed with COVID-19 who “carries out duties that [] require contact with patients, members of the public, or co-workers.” *Id.*

Congress codified a similar presumption that COVID-19 infection is acquired “in the line of duty” for first responders. The Safeguarding America’s First Responders Act of 2020 states that “COVID-19 . . . suffered by the public safety officer shall be presumed to constitute a personal injury . . . sustained in the line of duty by the officer.” Safeguarding America’s First Responders Act of 2020, Pub. L. No., 116-157, sec 3, 134 Stat. 704 (2020).

In light of these congressional statements, federal employees’ exposure to COVID-19 while working near infected persons and surfaces must be deemed to have occurred in the course of their duties. In line with Congress’s view, the GAO has concluded that tens of thousands of CBP employees “run the risk of being exposed to COVID-



19 *in the line of duty.*”<sup>22</sup> This indicates, of course, that they should be entitled to hazardous duty pay.

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<sup>22</sup> *GAO Border Security Report* at 1 (emphasis added)

**CONCLUSION**

For the foregoing reasons and for the reasons stated in Appellants' brief, this Court should reverse the Court of Federal Claims' decision below and remand this matter for further proceedings.

Respectfully submitted,

/s/ Julie M. Wilson  
JULIE M. WILSON  
General Counsel

/s/ Paras N. Shah  
PARAS N. SHAH  
Associate General Counsel for  
Litigation

/s/ Allison C. Giles  
ALLISON C. GILES  
Assistant Counsel  
Principal Counsel

NATIONAL TREASURY  
EMPLOYEES UNION  
800 K Street, N.W. Suite 1000  
Washington, D.C. 20001  
(202) 572-5500  
julie.wilson@nteu.org  
paras.shah@nteu.org  
allie.giles@nteu.org

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Counsel for Amicus Curiae National  
Treasury Employees Union

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B), as modified by Circuit Rule 32(a), because this brief contains 2909 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(b).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in Century, 14-point font, using Microsoft Office Word 2013.

/s/Allison C. Giles  
Allison C. Giles