No. 20-2195

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SIERRA CLUB, NATURAL RESOURCES COUNCIL OF MAINE, and APPALACHIAN MOUNTAIN CLUB,
Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL JOHN A. ATILANO, II, Commander and District Engineer, in his official capacity; JAY L. CLEMENT, Senior Project Manager, in his official capacity; CENTRAL MAINE POWER COMPANY
Defendants-Appellees,

On Appeal from December 16, 2020, Order of the United States District Court for the District of Maine, Case No. 2:20-cv-00396-LEW

BRIEF OF ENVIRONMENTAL LAW CLINIC DIRECTORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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INTERESTS OF *AMICI CURIAE*[1]

Amici are faculty in environmental law clinics at law schools around the country. Based on their extensive experience as both teachers and litigators, they believe that it is essential for federal district courts to be provided sufficient flexibility when deciding preliminary injunction ("PI") motions. In particular, given the uncertainties and incomplete information at an early stage in litigation, courts should have the discretion to balance the likelihood-of-success showing against other factors. This approach is particularly important in the context of environmental cases, which typically involve unique, permanent, and incommensurable interests and harms. A full list of *amici* is attached as an addendum to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal courts, when deciding whether to grant a PI, weigh four factors: the plaintiff's likelihood of success on the merits, whether the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, the balance of the equities, and whether an injunction is in the public interest. Courts have for more than a century weighed these factors against each other. One version of this

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* state that all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that no person or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

"sliding scale" approach, known as the "serious questions" test, directs a court to grant a PI if the plaintiff raises serious questions as to the merits and the balance of the equities strongly favors the plaintiff.

This test is based on fundamental principles of equity jurisdiction, which stress judicial flexibility. Rather than favoring any party, the serious questions test changes the nature of a plaintiff's overall burden without reducing it, allowing courts to grant PIs based on preliminary assessments of the strength of a plaintiff's case at an early stage in the litigation. Accordingly, by the time the Supreme Court decided *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), a majority of circuits allowed a strong showing of irreparable harm or the balance of harms to compensate for a lesser merits showing. *Winter* did not overrule this approach, and six circuits have continued to use their sliding scale tests. This Circuit has not ruled on the survival of the serious questions test after *Winter*. The test, however, is consistent with this Circuit's precedents, and this Court should take this opportunity to endorse it.

ARGUMENT

I. THE SERIOUS QUESTIONS TEST IS A NATURAL CONSEQUENCE OF BASIC PRINCIPLES OF EQUITY JURISDICTION

The serious questions test implements fundamental equitable principles. "The great and primary use of a court of equity is to give relief in *extraordinary*

cases, which are *exceptions* to general rules." THE FEDERALIST NO. 83, at 505 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Equity therefore relies on judges' ability to shape relief to the unique circumstances of each case. The serious questions test promotes this core equitable tenet by allowing play in the joints of the PI analysis. Moreover, the test does not systematically favor one side or the other; rather than lowering a plaintiff's burden, it merely changes the nature of that burden when the circumstances warrant doing so.

Thus, at bottom, the serious questions test promotes flexibility, which is the cornerstone of equity. As the Supreme Court has noted, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). Because of the varying nature of cases in their early stages, judges need flexibility in making the "preliminary estimate of the strength of [a] plaintiff's suit." 11A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.3 (3d ed. 2002).[2] At the time of the PI hearing, there are often significant factual disputes that are difficult or impossible to evaluate in the

[2] *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc) ("The very nature of the inquiry on petition for preliminary relief militates against a wooden application of the probability test.").

absence of discovery, or complicated legal issues which require significantly more time to assess properly. In such cases, "it can seem almost inimical to good judging to hazard a prediction about which side is likely to succeed." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1140 (9th Cir. 2011) (Mosman, J., concurring).[3] The serious questions test avoids this hazard by ensuring PIs are not "mechanically confined to cases that are simple or easy," *Citigroup Glob. Mkts, Inc. v. VCG Special Opport. Master Fund, Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010), a result which would "deprive the remedy of much of its utility," Wright, Miller & Kay, *supra*, § 2948.3.

In addition, the serious questions test is not more lenient than a test that considers each factor in isolation. Instead, it merely changes the nature of the plaintiff's burden. "Because the moving party must not only show that there are 'serious questions' going to the merits, but must additionally establish that 'the balance of the hardships tips *decidedly*' in its favor, its overall burden is no lighter

[3] Having to make a definitive statement about the likelihood of success in the early stages of a case can also skew a court's later rulings through a form of cognitive bias known as the "lock-in effect." This occurs when judges who have taken a concrete stand on the merits become less likely to change their minds in later stages of litigation regardless of new information or evidence. *See* Kevin J. Lynch, *The Lock-in Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 804–05 (2014). By giving judges more flexibility, the serious questions test "achieve[s] the purposes of a preliminary injunction while avoiding the risk of lock-in." *Id.* at 779.

than the one it bears under the 'likelihood of success' standard." *Citigroup*, 598 F.3d at 35 (citation omitted).

II. FEDERAL COURTS HAVE APPLIED VERSIONS OF THE SERIOUS QUESTIONS TEST FOR MORE THAN A CENTURY

The principle underlying the serious questions test—that a court may weigh the strength of a plaintiff's showing on the merits against other factors when deciding whether to grant a PI—has deep roots in American jurisprudence. In one of the first cases decided by the U.S. Supreme Court, Justice Blair supported the decision to grant an injunction when the issues presented were a "fair foundation for future judicial investigation" and the threatened harm—the true owner of certain monies losing its title to them—"may [have been] out of [the Court's] power to repair." *Georgia v. Brailsford*, 2 U.S. 402, 407 (1792).

Over the course of the nineteenth century, courts increasingly granted PIs when "the plaintiff had raised fair matter for investigation or a prima facie case."[4] For example, the Eighth Circuit in 1897 held that "[w]hen the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the" balance of harms. *City of*

[4] John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 532–3 (1978); *see* WILLIAM W. KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 11 (1871) (A PI is proper if there are "substantial question[s] to be tried" or "fair question[s] as to the existence of the right.").

Newton v. Levis, 79 F. 715, 718 (8th Cir. 1897).[5] Among the early adopters of versions of this approach were the First Circuit and its district courts. For instance, in *Singer Sewing-Mach. Co. v. Union Button-Hole & Embroidery Co.*, 22 F. Cas. 220, 221 (C.C.D. Mass. 1873), the court held a PI is warranted if "the complainant has made such a reasonable prima facie case for the relief . . . that it is fairly entitled to maintain the status quo."[6]

The test then became increasingly well-established into the second half of the twentieth century. In 1953, in its widely cited opinion in *Hamilton Watch Co. v. Benrus Watch Co.*, the Second Circuit held that a temporary injunction is "ordinarily" justified if "the balance of hardships tips decidedly toward" the movant, who also "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." 206 F.2d 738, 740 (2d Cir. 1953). Following *Hamilton Watch*, many circuits "move[d] . . . toward an analysis under which the

[5] *See also Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur*, 53 F. 98, 101 (6th Cir. 1892) (To grant a PI, a court "must satisfy itself, not that the plaintiff has certainly a right, but that he has a fair question to raise as to the existence of such a right . . . [and that] 'interim' interference, on a balance of convenience or inconvenience to the one party and to the other, is or is not expedient.").

[6] *See also Munoz v. Porto Rico R. Light & Power Co.*, 83 F.2d 262, 268–69 (1st Cir. 1936); *Carpenter v. Knollwood Cemetery*, 188 F. 856, 857 (D. Mass. 1911); *MacArthur v. Port of Havana Docks Co.*, 247 F. 984, 991 (D. Me. 1917).

necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

By the time the U.S. Supreme Court decided *Winter*, the overwhelming majority of circuit courts used sliding scale tests under which the strength of the merits showing needed for a PI varied based on the showing of irreparable harm or the balance of harms.[7] While the language varied across circuits, Judge Posner described the different approaches as "equivalent." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 388 (7th Cir. 1984). The serious questions test—used by the Second, Fourth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits—was the most common formulation.[8]

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[7] *See, e.g.*, *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979); *Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978); *Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189, 194–96 (4th Cir. 1977), *overruled by Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2009); *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228–30 (6th Cir. 1985); *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007); *Dataphase Sys., Inc.*, 640 F.2d at 113–14; *Glob. Horizons, Inc. v. U.S. Dep't of Labor*, 510 F.3d 1054, 1057 (9th Cir. 2007); *Fed. Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1194–95 (10th Cir. 1999); *Wash. Metro.*, 559 F.2d at 843–45; *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993).

[8] *See, e.g.*, *Glob. Horizons, Inc.*, 510 F.3d at 1057; *Fed. Lands Legal Consortium*, 195 F.3d at 1195; *In re DeLorean Motor Co.*, 755 F.2d at 1229; *Dataphase*, 640 F.2d at 113; *Jackson Dairy*, 596 F.2d at 72; *Wash. Metro*, 559 F.2d at 844; *Blackwelder Furniture*, 550 F.2d at 196.

III. THE SERIOUS QUESTIONS TEST SURVIVES *WINTER*

The Supreme Court has never rejected a lower court's ability to weigh one factor against another when deciding whether to grant a PI and, in particular, has never forbidden use of the serious questions test. Although some lower courts have read *Winter* to foreclose use of the test, *see Real Truth About Obama*, 575 F.3d at 346–47, *Dinè Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016), these decisions are based on a misreading of the case. *Winter*, in fact, preserved judicial flexibility to balance the PI factors.

The plaintiffs in *Winter* challenged the Navy's National Environmental Policy Act analysis for certain training exercises. In particular, the plaintiffs argued that the Navy's use of active sonar posed severe threats to marine life and that the Navy erred in failing to prepare an environmental impact statement to assess those harms. The Court held that the Ninth Circuit erred in granting a PI based on a showing of only a "possibility" of irreparable harm. *Winter*, 555 U.S. at 22. It further held that the Navy's interest in preparedness outweighed the environmental harms associated with the use of active sonar, and therefore that the balancing of the equities and the public interest warranted denying a PI. *Id.* at 23–24. The Court did not address the likelihood-of-success factor. *Id.*

Indeed, the *Winter* court did not reject, or even directly address, the "serious questions" test or other sliding scale tests. As Justice Ginsburg wrote in her dissent,

"[f]lexibility is a hallmark of equity jurisprudence" and pursuant to that flexibility, "courts have evaluated claims for equitable relief on a 'sliding scale.'" *Id.* at 51 (Ginsburg, J., dissenting). She added, "[t]his Court has never rejected that formulation, and I do not believe it does so today." *Id.*

Moreover, the Ninth Circuit test rejected by the Court was unlike the serious questions test in at least two respects: first, it involved a lesser showing on the irreparable harm prong rather than on likelihood of success; and second, a "possibility" is a lower threshold than a "serious questions" standard. In addition, it is implausible that the Court would have rejected by implication the "sliding scale" or "serious questions" tests, which had been in widespread use by the overwhelming majority of circuit courts: "a major departure from the long tradition of equity practice should not be lightly implied." *Weinberger*, 456 U.S. at 320.

This reading of *Winter* aligns with subsequent decisions of the Court. Citing *Winter*, the Court has reiterated the utility of judicial flexibility: "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). In the context of applications for a stay pending appeal, the Court has held that a plaintiff must only demonstrate "more than a mere possibility that relief will be granted" or that its chances of success exceed a "better than negligible" standard.

Nken v. Holder, 556 U.S. 418, 434 (2009). Similarly, when issuing a stay pending the resolution of a petition for certiorari, the Court has required only a "fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Thus, the Supreme Court has continued to recognize, after *Winter*, the importance of judicial flexibility and that a likelihood of success less than "more likely than not" is sufficient for an award of interim relief.

In keeping with this reading of these Supreme Court decisions, the Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits have each maintained their sliding scale tests, and all but the Sixth Circuit have directly held that their approaches survived *Winter*.[9] Only two circuits have held to the contrary, and neither provided a lengthy explanation. *See Real Truth About Obama*, 575 F.3d at 346–47; *Dinè Citizens*, 839 F.3d at 1281–82.[10]

[9] *Citigroup*, 598 F.3d at 37; *Reilly v. City of Harrisburg*, 858 F.3d 173, 178 (3d Cir. 2017); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012); *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 993 n.7 (8th Cir. 2011); *All. for the Wild Rockies*, 632 F.3d at 1132.

[10] The D.C., Fifth, and Federal Circuits, which all used a sliding scale approach prior to *Winter*, have not yet decided whether *Winter* precludes their approaches. *Archdiocese of Washington v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018); *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 n.1 (5th Cir. 2018); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018).

The circuits that have stuck with their sliding scale approaches have done so for several reasons. Most importantly, *Winter*'s requirement of a "likelihood of success on the merits" was not new and did not require a merits showing of more likely than not. Indeed, a number of courts have indicated that the "serious questions" and "likelihood" standards are not incompatible: both are more stringent than a "better than negligible" standard and neither requires showing success is "more likely than not." *See Citigroup*, 598 F.3d at 37 & n.7 (explaining how the "serious questions" test aligns with *Nken*, 556 U.S. at 434 (2009));[11] *see also Likelihood-of-Success-on-the-Merits Test*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The rule that a litigant who seeks a preliminary injunction . . . must show a reasonable probability of success in the litigation or appeal").

Moreover, *Winter* did not remark "at all, much less negatively, upon the application of a preliminary injunction standard that softens a strict 'likelihood' requirement in cases that warrant it." *Citigroup*, 598 F.3d at 37. Instead, *Winter* explicitly endorsed judicial flexibility. *See City of Harrisburg*, 858 F.3d at 178 (quoting *Winter* in saying an "injunction is a matter of equitable discretion" that requires "the balanc[ing] of equities"); *All. for the Wild Rockies*, 632 F.3d at 1132 (citing *Winter*'s "particular regard" for an injunction's public consequences as

[11] *Accord City of Harrisburg*, 858 F.3d at 179 & n.3; *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020).

evidence that sliding scale approaches survived). Thus, "*Winter* did not disapprove the sliding scale approach." *All. for the Wild Rockies*, 632 F.3d at 1132; *accord City of Harrisburg*, 858 F.3d at 178.

IV. THIS COURT HAS NEVER REJECTED THE SERIOUS QUESTIONS TEST AND SHOULD ENDORSE IT NOW

The validity of the serious questions test is an open question in this Court. *Cf. Russomano v. Novo Nordisk Inc.*, 960 F.3d 48 (1st Cir. 2020) (declining to take a side in the post-*Winter* debate on sliding scale tests). This Court has used a variety of formulations to describe its application of the four PI factors, ranging from close approximations of the serious questions test to versions that prioritize the likelihood-of-success factor. Given this variety of approaches—all of which are consistent, or even align, with the serious questions test—this case presents an opportunity for the Court to consider and approve that test.

In some cases, this Court has applied versions of the serious questions test. For example, the Court affirmed an injunction when the movant demonstrated "fair grounds for further litigation—this lesser standard being defensible in light of the rather powerful showing of irreparable injury made by [the movant]." *Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 26–27 (1st Cir. 1998). This Court has also applied the "serious questions" standard for a stay pending appeal, finding it sufficient that appellants showed that their appeal raised "serious legal questions" when a denial would have "utterly destroy[ed] the status quo, irreparably harming

appellants, but the granting of a stay [would] cause relatively slight harm to appellee." *Providence J Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979).

More broadly, this Court has endorsed flexibility as to the likelihood-of-success showing. For instance, one case indicated that the "necessary degree of likelihood of success" can range from "at least some substantial possibility" to a "reasonable possibility . . . depend[ing] upon various considerations." *Tuxworth v. Froehlke*, 449 F.2d 763, 764 (1st Cir. 1971). Likewise, another case explained that a lower degree of likelihood can be sufficient "where the harm to [the injunction seeker] is particularly severe and disproportionate." *Cintron-Garcia v. Barcelo*, 671 F.2d 1, 4 n.2 (1st Cir. 1982). A party's likelihood-of-success showing can support an injunction even when the "legal issues governing th[e] case are close and difficult, such that their final resolution . . . requires a developed record." *JL Powell Clothing L.L.C. v. Powell*, 590 F. App'x 3, 5 (1st Cir. 2014). This Court has also endorsed balancing all four factors "inter sese." *Maram v. Universidad Interamericana De Puerto Rico, Inc.*, 722 F.2d 953, 958 (1st Cir. 1983). It has emphasized that the four PI factors "are guidelines, not mechanical formulae," and "are no substitute for the careful exercise of a judgment sensitive to all of the interests likely to be affected." *Cintron-Garcia*, 671 F.2d at 8.

Within this flexible, balancing framework, this Court has repeatedly singled out irreparable harm as the most important factor—a "prime," *Nat'l Tank Truck*

Carriers, Inc. v. Burke, 608 F.2d 819, 824 (1st Cir. 1979), or "essential prerequisite," *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 81 (1st Cir. 2009), constituting "a necessary threshold showing" for preliminary injunctive relief, *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004). In determining whether to afford injunctive relief, therefore, "a federal court cannot dispense with the irreparable harm requirement." *Gately v. Mass.*, 2 F.3d 1221, 1232 (1st Cir. 1993). This Court has emphasized that this approach is particularly appropriate in cases involving real property, because "[r]eal estate has long been thought unique, and thus, injuries to real estate interests frequently come within the ken of the chancellor." *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991) (quoting *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914 (1st Cir. 1989)). Similarly, environmental cases typically involve permanent or at least long-lasting injuries that cannot be remedied with monetary damages, which is why, so long as the injury is "sufficiently likely, . . . the balance of harms [in environmental cases] will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

In other cases, this Court has "recognized the first two factors . . . as 'the most important.'" *Bruns v. Mayhew*, 750 F.3d 61, 65 (1st Cir. 2014) (quoting *Gonzalez-Droz*, 573 F.3d at 79). Because irreparable harm "cannot be evaluated in

a vacuum," the Court has "juxtaposed and weighed [these two factors] in tandem." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996).

While this Court has on occasion identified the movant's likelihood of success on the merits as the most important factor,[12] such statements are far from universal, as indicated above. This formulation is particularly common in trademark cases, "because the resolution of the other three factors will depend in large part on whether the movant is likely to succeed in establishing infringement." *Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 115 (1st Cir. 2006). To the extent these decisions imply that the outcome of a PI motion should depend purely on plaintiffs' likelihood of success on the merits, they would be inconsistent with the other decisions of this Circuit cited above, as well as decisions of the Supreme Court and other circuits. *See*, *e.g.*, *Nken*, 556 U.S. at 433–34 (stating, in the analogous context of a request for a stay pending appeal, that the "first two factors of the traditional standard are the most critical"); *City of Harrisburg*, 858 F.3d at 179 (identifying "the first two 'most critical' factors").

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the district court.

[12] *See, e.g.*, *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10 (1st Cir. 2012); *Ryan v. ICE*, 974 F.3d 9, 18 (1st Cir. 2020).

DATED: FEBRUARY 9, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I hereby certify that this brief complies with the Court's Order filed January 15, 2021 (Doc#00117693279), because the brief is 15 pages in length, half of the 30-page maximum length authorized by this Court for principal party briefs in its Order. I further certify that this brief has been prepared in Microsoft Word 2016 using 14-point Times New Roman typeface and is double-spaced (except for headings, footnotes, and block quotations).

/s/ Shaun A. Goho
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2021, I electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit via the CM/ECF System the foregoing Amicus Brief. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

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