No. 23-1576

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Gleysi Idalia DIAZ VALDEZ, Petitioner

v.

Merrick B. GARLAND, Attorney General, Respondent

ON PETITION FOR REVIEW OF
THE ORDER FROM THE BOARD OF IMMIGRATION APPEALS

UNOPPOSED MOTION FOR LEAVE TO FILE *AMICI CURIAE* BY BOSTON COLLEGE LEGAL SERVICES LAB IMMIGRATION CLINIC; BOSTON UNIVERSITY SCHOOL OF LAW IMMIGRANTS' RIGHTS AND HUMAN TRAFFICKING PROGRAM; CENTRAL WEST JUSTICE CENTER; JUSTICE CENTER OF SOUTHEAST MASSACHUSETTS; MASSACHUSETTS LAW REFORM INSTITUTE; NORTHEASTERN UNIVERSITY SCHOOL OF LAW IMMIGRANT JUSTICE CLINIC; POLITICAL ASYLUM/IMMIGRATION REPRESENTATION PROJECT; SUFFOLK UNIVERSITY LAW SCHOOL IMMIGRANT JUSTICE CLINIC; BOSTON IMMIGRATION JUSTICE ACCOMPANIMENT NETWORK VOLUNTEER SUSANNA STERN; GEORGETOWN UNIVERSITY LAW CENTER ADJUNCT PROFESSOR PAUL SCHMIDT; HARVARD LAW SCHOOL CRIMMIGRATION CLINIC PROFESSOR PHILIP TORREY; HARVARD LAW SCHOOL IMMIGRATION AND REFUGEE ADVOCACY CLINIC PROFESSOR SABRINEH ARDALAN AND SUPERVISOR JANE ROCAMORA; ROGER WILLIAMS UNIVERSITY SCHOOL OF LAW IMMIGRATION CLINIC PROFESSOR DEBORAH GONZALES; UNIVERSITY OF MAINE SCHOOL OF LAW REFUGEE AND HUMAN RIGHTS CLINIC PROFESSORS ANNA WELCH AND SARA CRESSEY; AND UNIVERSITY OF MASSACHUSETTS SCHOOL OF LAW IMMIGRATION LAW CLINIC PROFESSOR RONI AMIT IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

(Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A))

Amici curiae the Boston College Legal Services LAB Immigration Clinic, Boston University School of Law Immigrants' Rights and Human Trafficking Program, Massachusetts Law Reform Institute ("MLRI"), Northeastern University School of Law Immigrant Justice Clinic, Political Asylum/Immigration Representation Project ("PAIR"), and Suffolk University Law School Immigrant Justice Clinic are nonprofit entities that do not have parent corporations.

Amicus curiae Central West Justice Center is a subsidiary of Community Legal Aid, while amicus curiae Justice Center of Southeast Massachusetts is a subsidiary of South Coastal Counties Legal Services, both of which are also nonprofit entities that do not have parent corporations.

No publicly held corporation owns 10 percent or more of any stake or stock in any amicus curiae.

The individuals signing on as amici curiae—Boston Immigration Justice Accompaniment Network ("BIJAN") volunteer Susanna Stern, Georgetown University Law Center adjunct professor Paul Schmidt, Harvard Law School Crimmigration Clinic professor Philip Torrey, Harvard Law School Immigration and Refugee Advocacy Clinic professor Sabrineh Ardalan and supervisor Jane Rocamora, Roger Williams University School of Law Immigration Clinic professor Deborah Gonzalez, University of Maine School of Law Refugee and Human Rights Clinic professors Anna Welch and

Sara Cressey, and University of Massachusetts School of Law Immigration Law Clinic professor Roni Amit—are doing so in their individual capacities.

UNOPPOSED MOTION OF PROPOSED AMICI CURIAE FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF THE PETITIONER

Pursuant to Federal Rules of Appellate Procedure 27 and 29, Boston College Legal Services LAB Immigration Clinic, Boston University School of Law Immigrants' Rights and Human Trafficking Program, Central West Justice Center, Justice Center of Southeast Massachusetts, MLRI, Northeastern University School of Law Immigrant Justice Clinic, PAIR, Suffolk University Law School Immigrant Justice Clinic, BIJAN volunteer Susanna Stern, Georgetown University Law Center adjunct professor Paul Schmidt, Harvard Law School Crimmigration Clinic professor Philip Torrey, Harvard Law School Immigration and Refugee Advocacy Clinic professor Sabrineh Ardalan and supervisor Jane Rocamora, Roger Williams University School of Law Immigration Clinic professor Deborah Gonzalez, University of Maine School of Law Refugee and Human Rights Clinic professors Anna Welch and Sara Cressey, and University of Massachusetts School of Law Immigration Law Clinic professor Roni Amit (collectively, "Amici") respectfully seek leave to file the attached brief as *amicus curiae* in support of the Petitioner's Petition for Review. Fed. R. App. P. 29(a).

Amici sought the consent of the parties to file their brief. Petitioner, Ms. Diaz-Valdez, has consented to the filing of the attached *amicus curiae* brief. Respondent, the U.S. Attorney General, does not oppose the filing of the attached *amicus curiae* brief.

Under Rule 29(a)(3), leave to file an amicus brief is properly granted when the motion states (1) the movant's interest; and (2) why the brief is "desirable" and "relevant to the disposition of the case." Fed. R. App. P. 29(a)(3). This Court has recognized the benefit of amicus briefs where appeals involve important legal issues. *See, e.g.*, *Iguarta-De La Rosa v. United States*, 404 F.3d 1, 1 (1st Cir. 2005).

A. Identities and Interests of Amici Curiae

The **Boston College Legal Services LAB Immigration Clinic, Boston University School of Law Immigrants' Rights and Human Trafficking Program, Northeastern University School of Law Immigrant Justice Clinic**, and **Suffolk University Law School Immigrant Justice Clinic** are law school clinics in which law students, under professors' supervision, represent noncitizens in removal proceedings and bond hearings before the Boston Immigration Court, Board of Immigration Appeals ("BIA"), and federal courts. Clients typically include asylum seekers and others seeking humanitarian relief.

The Central West Justice Center provides free civil legal services to low-income and elderly residents of central and western Massachusetts. As part of this work, attorneys represent noncitizens seeking humanitarian benefits, including in immigration court.

The Justice Center of Southeast Massachusetts provides free civil legal services to low-income residents of southeast Massachusetts. Immigration attorneys and advocates represent noncitizens in humanitarian benefits and removal defense and

participate in impact advocacy affecting immigrant populations.

MLRI engages in legislative and administrative advocacy, coalition-building, and impact litigation to secure economic, racial, and social justice for low-income people across Massachusetts. MLRI's immigration advocacy includes coordinating statewide strategies to respond to immigrants' legal needs; advocating for noncitizens' due process and fair treatment by local, state, and federal government actors; and protecting noncitizens' economic rights. MLRI previously authored an amicus brief on equitable tolling at the immigration court that this Court cited in its decision. *Jobe v. I.N.S.*, 238 F.3d 96, 99–100 (1st Cir. 2001).

PAIR provides free legal services to indigent asylum-seekers in Massachusetts and noncitizens detained in Massachusetts. PAIR also regularly conducts legal rights presentations and individual intakes for immigration detainees.

Sabrineh Ardalan teaches in, and Jane Rocamora supervises students in, Harvard Law School's Immigration and Refugee Advocacy Clinic. Deborah Gonzalez teaches in Rogers Williams University School of Law's Immigration Clinic. Anna Welch and Sara Cressey teach in the University of Maine School of Law's Refugee and Human Rights Clinic. Roni Amit teaches in the University of Massachusetts School of Law's Immigration Law Clinic. Law students in these clinics also represent asylum seekers and other noncitizens in removal proceedings.

Paul Schmidt is an adjunct professor at the Georgetown University Law Center, where he teaches immigration law. He served as BIA Chairman from 1995–2001, as a

BIA member from 2001–03, and as an Immigration Judge from 2003–16.

Susanna Stern is a volunteer with BIJAN, which is a network of community groups, faith-based organizations, and individuals supporting noncitizens affected by immigration enforcement. In addition to providing noncitizens released from detention with housing, transportation, and other immediate support, network members accompany noncitizens at immigration court hearings, fundraise for bond and legal fees, and draft community letters of support. Network members also regularly advocate for changes to immigration policy.

B. Reasons for Granting Leave to File

All Amici share a profound interest in ensuring that the BIA applies a reasonable standard for equitable tolling. The BIA's arbitrary and capricious application of its equitable tolling rule leads to a misapplication of its precedential standard and defeats the purpose of creating equitable intervention, which is "to correct…particular injustices". *Holland v. Florida*, 560 U.S. 631, 650 (2010).

This appeal concerns a misapplication of the BIA's precedential equitable tolling rule adopted in *Matter of Morales-Morales*. 28 I.&N. Dec. 714, 717 (BIA 2023) (adopting the equitable tolling rule from *Holland v. Florida*); *see Holland*, 560 U.S. at 653 (setting the standard that a noncitizen is entitled to equitable tolling when (1) he has exhibited reasonable diligence, and (2) extraordinary circumstances have prevented timely filing). Amici are concerned about the BIA's misapplication of this rule, and will explain in their brief the larger injustices and implications of this distortion of equitable

tolling.

Amici seek to be heard on implementing the appropriate common law standard of equitable tolling for thousands of noncitizens who continue to diligently assert their right to appeal through paper filings. Amici also seek to be heard on the appropriate standard of review for reviewing a mixed question of law and fact such as equitable tolling of a deadline at the BIA, and the appropriate amount of deference this Court should give to the BIA's interpretation of its regulations. These foregoing issues not only affect the Petitioner, but noncitizens whose cases are governed by this Court and who have meritorious appeal arguments before the BIA. Amici have vast experience and a distinct perspective that may assist this Court beyond the help of what the parties' lawyers can provide.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court grant them leave to file their brief in support of the Petitioner in this appeal.

DATED: November 24, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Mary Holper, certify that under Federal Rule of Appellate Procedure 27(d)(2)(A), this Motion for Leave to File Brief as Amici Curiae is 1,219 words, excluding the corporate disclosure statement and other exempted portions. I further certify that the brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6) in that it is proportionately spaced and has a type face of 14 points using Times New Roman font. I further certify, pursuant to Local Appellate Rule 46(a)(2), that I am a member of the First Circuit bar.

Dated: November 24, 2023

/s/ Mary Holper
Mary Holper, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused this Motion for Leave to File Brief as Amici Curiae to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 24, 2023

/s/ Mary Holper
Mary Holper, Esq.

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Human Rights Clinic professors Anna Welch and Sara Cressey, and University of Massachusetts School of Law Immigration Law Clinic professor Roni Amit—are doing so in their individual capacities.

/s/ Mary Holper
Mary Holper, Esq.

RULE 29 STATEMENTS

Pursuant to Rule 29(a)(2), counsel for *amicus curiae* certify that all parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4)(E), counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

/s/ Mary Holper
Mary Holper, Esq.

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INTERESTS OF AMICI CURIAE

Amici are nonprofit immigration legal services providers, immigration law and immigration clinic professors, and other members of the immigration legal community. Amici have represented noncitizens seeking to exercise their due process right to appeal decisions from an immigration judge ("IJ") to the Board of Immigration Appeals ("BIA"). A considerable amount of cases appealed to the BIA remain in paper filings and as such, amici have extensive experience in the process of appealing a decision to the BIA. All amici represent or otherwise advocate for noncitizens in appeals and motions before the Immigration Court and BIA and, as such, have an interest in the consistent application of the standard for equitably tolling appeals at the BIA.

SUMMARY OF ARGUMENT

This case concerns the proper application of the equitable tolling doctrine to a Notice of Appeal filed one day late with the BIA because a costly private courier service failed to fulfill its overnight delivery guarantee. The BIA did not equitably toll the appeal deadline. Amici ask this Court to consider the BIA's misapplication of law to the facts of Petitioner Gleysi Idalia Diaz-Valdez's equitable tolling claim de novo. Ms. Diaz-Valdez's case is not entitled to the deference normally afforded to agency decisions because: the BIA's unreasonable decision directly contradicts with its prior statement in a precedential case, resulting in a system whereby

noncitizens whose cases involve paper filing are arbitrarily treated differently than those whose cases involve electronic filing; Ms. Diaz-Valdez's BIA opinion is unpublished, indicating that the BIA did not intend to speak authoritatively on the issue; and her case involves equitable tolling, a question on which the BIA has no special substantive expertise beyond that of a court. The proper standard of review is de novo because the agency decision below, which is a mixed question of law and fact, concerns an application of a legal standard to undisputed facts. The notice of appeal deadline should be equitably tolled in Ms. Diaz-Valdez's case because: the proper test should be reasonable diligence, not maximum feasible diligence; she displayed reasonable diligence throughout the thirty-day filing period; and her appeal arrived late solely due to an extraordinary circumstance—a costly private courier service failed to meet its overnight delivery guarantee.

ARGUMENT

I. THE BIA'S APPLICATION OF THE EQUITABLE TOLLING STANDARD SHOULD BE REVIEWED DE NOVO.

This court should review Ms. Diaz-Valdez's case de novo because (1) the BIA's unpublished, unreasonable decision is not entitled to *Auer* deference, and (2) assessing the BIA's equitable tolling decision constitutes a question of law, rather than a question of fact.

A. The BIA's interpretation of equitable tolling does not meet the standards of *Auer* deference.

The BIA's misapplication of its own equitable tolling standard in Ms. Diaz-Valdez's case constitutes an arbitrary and capricious interpretation of the thirty-day deadline for a notice of appeal in 8 C.F.R. § 1003.38. *See* 8 C.F.R. § 1003.38. Thus, this Court should reject the BIA's erroneous interpretation of its own regulation in this case and reverse the BIA's denial of Ms. Diaz-Valdez's motion for consideration of her late filed notice of appeal. *See generally Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). As the Supreme Court stated in *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019), "in a vacuum, our most classic formulation of the test—whether an agency's construction is 'plainly erroneous or inconsistent with the regulation,' *Seminole Rock*, 325 U.S. at 414, 65 S.Ct. 1215—may suggest a caricature of the doctrine, in which deference is "'reflexive.'" However, the *Kisor* Court went on to describe when *Auer* deference to an agency's interpretation of its regulations is inappropriate. *Id.* at 2415–18.

As the Supreme Court clarified in *Kisor*, courts should accord deference under *Seminole Rock* and *Auer* to an agency's regulatory interpretation only when (1) the "regulation is genuinely ambiguous"; (2) the agency's interpretation "fall[s] 'within the bounds of reasonable interpretation'"; *and* (3) "the character and

context of the agency interpretation entitles it to controlling weight." *Kisor*, 139 S.Ct. at 2414, 2416 (citing *Arlington v. FCC*, 569 U.S. 290, 296 (2013)). The *Auer* deference analysis "gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions." *See Kisor*, 139 S.Ct. at 2415 (recognizing that not all agency interpretations of regulations are entitled to *Auer* deference).

1. The Notice of Appeal regulation is ambiguous as to the BIA's standard of equitable tolling.

8 C.F.R. § 1003.38 is ambiguous because neither it, nor any other BIA regulation, mentions equitable tolling. *See* 8 C.F.R. § 1003.38; *Kisor*, 139 S.Ct. at 2414. Indeed, equitable tolling is a common law principle that courts have been left to interpret. *See Morales-Morales*, 28 I. & N. Dec. at 716 (determining that the BIA may equitably toll the Notice of Appeal deadline under § 1003.38 because the agency interpreted it as a claim-processing, rather than a jurisdictional, rule).

2. The BIA's misapplication of its adopted equitable tolling standard in Ms. Diaz-Valdez's case is not reasonable.

The BIA's arbitrary and capricious application of equitable tolling in Ms. Diaz-Valdez's case does not "fall 'within the bounds of reasonable interpretation,'" as it directly defies the BIA's own prior statement in a precedential case. *See Kisor*, 139 S.Ct. at 2416 (citing *Arlington*, 569 U.S. at 296); *Morales-Morales*, 28 I. & N. Dec. at 717. In *Morales-Morales*, the case in which the BIA first held that

it could equitably toll a notice of appeal deadline, the BIA stated that the quintessential example of an extraordinary circumstance warranting equitable tolling is when "a party uses a guaranteed delivery service, and the service fails to fulfill its guarantee." *See Morales-Morales*, 28 I. & N. Dec. at 717. When presented with exactly those facts, however—FedEx's Priority Overnight service failed to deliver Ms. Diaz-Valdez's notice of appeal on time, violating its guarantee—the BIA arbitrarily and capriciously refused to equitably toll the deadline. BIA Decision on June 15, 2023, A.R. 3.

The BIA's refusal to equitably toll Ms. Diaz-Valdez's notice of appeal deadline is also arbitrary and capricious, and therefore unreasonable, because, in conjunction with the BIA's lack of a mailbox rule, it makes her case's outcome wholly dependent on a circumstance unrelated "to [her] fitness to remain in the country" — FedEx's failure to meet its delivery guarantee. *See Judulang v. Holder*, 565 U.S. 42, 55, 64 (2011) (striking a BIA policy distinguishing between excludable and deportable noncitizens as "arbitrary and capricious" because it "neither focuse[d] on nor relate[d] to an alien's fitness to remain in the country," and stating that if "cheapness alone" justified arbitrary agency policy, "flipping coins would be a valid way to determine an alien's eligibility for a waiver"). For paper filings, the BIA refuses to recognize the common law mailbox rule, in which a filing is deemed to be submitted upon mailing. *See* 8 C.F.R. § 1001.1(dd) ("A

paper filing…will be deemed filed on the date it was *received by the Board*") (emphasis added); *Irigoyen-Briones v. Holder*, 644 F.3d 943, 950 (9th Cir. 2011) (defining "mailbox rule"); National Immigrant Justice Center et al., Comment on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure (Nov. 6, 2023), at 13 (advocating for a mailbox rule at the BIA, and stating that such a rule "would eliminate the possibility of delays or other mail issues, especially for *pro se* and detained respondents"); Boston College Legal Services LAB Immigration Clinic, Comment on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure (Nov. 7, 2023), at 4–5 (advocating for a mailbox rule at the BIA and immigration courts, and listing the many agencies and federal courts that use such a rule).

The BIA *does* effectively recognize a mailbox rule for represented noncitizens whose cases were initiated after the agency adopted electronic filing, since documents submitted electronically are received immediately. Executive Office for Immigration Review ("EOIR") Electronic Case Access and Filing, 86 Fed. Reg. 70,708 (Dec. 13, 2021). Noncitizens like Ms. Diaz-Valdez, whose cases were initiated before February 11, 2022, must submit filings in paper, however. *See id.* at 70,710 ("EOIR is unable to provide electronic filing in existing paper cases at this time due to resource constraints"). It thus is arbitrary and capricious that Ms. Diaz-Valdez and a noncitizen with factually identical claims to hers,

appearing before the same immigration judge at the merits stage, could face starkly different outcomes after a BIA appeal—summary dismissal and removal, compared to the granting of relief—because their cases were initiated before and after the adoption of electronic filing. *See* National Immigrant Justice Center et al., Comment on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure (Nov. 6, 2023), at 13 ("[G]iven that all new counseled cases use the ECAS system, in which filing is instantaneous, a mailbox rule is necessary to prevent respondents without ECAS access from being at a significant time disadvantage when compared to other respondents").

Other federal courts have remarked disfavorably upon the BIA's receipt rule for paper filings, although this Court has not yet discussed the matter. *See, e.g.*, *Irigoyen-Briones*, 644 F.3d at 950 ("The Board tosses an additional red herring across the path to justice by arguing it does not have a 'mailbox rule.'...[M]ore than fifteen years ago, we noted that the BIA could obviate much of the problem by allowing filing within a reasonable distance of the alien's residence."); *Gonzalez-Julio v. I.N.S.*, 34 F.3d 820, 823 (9th Cir. 1994) (noting that for a large group of Ninth Circuit petitioners, it is nearly impossible to make personal deliveries of notice of appeal of immigration judge decisions due to the extraordinary cost of travel); *Centro Legal de la Raza v. Executive Office for Immigration Review*, 524 F.Supp. 3d 919 at 965 (N.D. Calif. 2021) ("[T]he

challenges of briefing on a compressed timetable are compounded by the BIA's mail-based system [and] failure to follow the 'mailbox rule.'").

In declining to endorse a mailbox rule for BIA appeals, the Eighth Circuit has specifically cited "the Board's procedures for accepting even untimely notices of appeal based on individual unique circumstances" and suggested that petitioners use express mail or a private courier like FedEx—just as Ms. Diaz-Valdez did. *See Holder v. Gonzales*, 499 F.3d 825, 830 (8th Cir. 2007); *Talamantes-Penalver v. I.N.S.*, 51 F.3d 133, 136–37 (8th Cir. 1995). Here, however, when given the opportunity to exercise flexibility where a noncitizen used a private courier's overnight service, the BIA instead refused to recognize that the courier's failure to meet its guarantee was not an "extraordinary circumstance." *Morales-Morales*, 28 I. & N. Dec. at 717.

The two cases in which the Eighth Circuit declined to endorse a mailbox rule for the BIA were also distinguishable on their facts. In *Holder*, the "error was attributable to Holder, not the mail courier," because the noncitizen wrote the incorrect zip code for the BIA's address. 499 F.3d at 828. In *Talamantes-Penalver*, the appeal practices in effect at the time allowed the noncitizen to deliver a simple one-page notice of appeal form and receipt of payment to the local immigration court. 51 F.3d at 136. Ms. Diaz-Valdez, by contrast, correctly completed the BIA's address and could not feasibly deliver her notice of appeal without the use of an

expensive courier service, because the BIA is located 448 miles away from her attorney's office. Thus, it is arbitrary and capricious for the BIA to reject what amounts to a "day-before" mailbox rule for those who rely on an expensive courier service that fails to fulfill its delivery guarantee. *See* Boston College Legal Services LAB Immigration Clinic, Comment on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure (Nov. 7, 2023), at 9–10 (advocating in the alternative for a limited "day-before" mailbox rule for those who use private courier services, and stating that this rule would still encourage noncitizens to use private couriers to ensure timely delivery, while preventing the unfairness resulting from couriers' rare mistakes).

3. The BIA's interpretation of equitable tolling in Ms. Diaz-Valdez's case is not entitled to controlling weight.

Under the third requirement for deference to agency interpretations that the Supreme Court identified in *Kisor*, the BIA's interpretation of equitable tolling does not have "the character and context…entitl[ing] it to controlling weight." *See* 139 S.Ct. at 2416. In *Kisor*, the Supreme Court stated that to have this "character and context," the agency interpretation (1) "must be the agency's authoritative or official position, rather than an ad hoc statement"; (2) "must in some way implicate its substantive expertise"; *and* (3) "must reflect fair and considered judgment." *Id.* at 2416–17 (internal quotations omitted).

Under the first of these prongs, the BIA's denial of Ms. Diaz-Valdez's motion was not an "authoritative or official position," as it was merely an unpublished opinion. *Kisor*, 139 S.Ct. at 2416 (internal quotations omitted). Unlike in *Morales-Morales*, the precedential opinion in which the BIA adopted equitable tolling—and which specifically named courier delays as a circumstance warranting equitable tolling—the BIA in Ms. Diaz-Valdez's unpublished case was clearly making an "ad hoc statement," not "authoritative policy in the relevant context." *See Kisor*, 139 S.Ct. at 2416; *Morales-Morales*, 28 I. & N. Dec. at 716–17; *see also U.S. v. Mead Corp.*, 533 U.S. 218, 232-234 (2001) (reasoning that agency's ruling letters that do not bind third parties do not have the force of law and therefore are not entitled to *Chevron* deference) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); *Arobelidze v. Holder*, 653 F.3d 513, 520 (7th Cir. 2011) (joining other circuits that addressed the issue in holding that "non-precedential Board decisions that do not rely on binding Board precedent are not afforded *Chevron* deference"); *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 116 (1st Cir. 2009) (holding that an unpublished decision by the Administrative Appeals Office of Citizenship and Immigration Services lacks authoritative force and therefore does not merit *Chevron* deference).

Additionally, an application of equitable tolling does not "implicate [the BIA's] substantive expertise." *See Kisor*, 139 S.Ct. at 2417. Equitable tolling is a

common law principle that is not specific to the BIA or to immigration law. *See Williams v. Garland*, 59 F.4th 620, 637 (4th Cir. 2023) (applying de novo review to equitable tolling of deadline and numerical bar to motion to reopen because "equitable tolling was originally a concept fashioned by judges" and "our cases continue to 'provide legal interpretations' of the doctrine"). The BIA did not rely upon any immigration-specific expertise in interpreting its adopted standard of equitable tolling. *See Partillo v. U.S. Dep't of Homeland Sec.*, 69 F.4th 25, 29 (1st Cir. 2023) (stating that this Court does not give any deference to the BIA's reading of an underlying criminal statute "as to which it has no expertise") (citation omitted); *Francis v. Reno*, 269 F.3d 162, 168 (3rd Cir. 2001) ("*Chevron* deference will only apply to an inquiry 'that implicates agency expertise in a meaningful way'"). Indeed, the BIA adopted its equitable tolling standard from a Supreme Court case in a criminal law context. *See Morales-Morales*, 28 I. & N. Dec. at 717 ("We will apply the equitable tolling rule from *Holland v. Florida*, 560 U.S. 631, 653 (2010)"). The principle of diligence in equitable tolling has arisen in other agency contexts, including veterans affairs jurisprudence. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 89–90 (1990). Thus, the BIA has no "comparative expertise" when resolving the regulatory ambiguity of tolling the deadline for an appeal under 8 C.F.R. § 1003.38. *See Kisor*, 139 S. Ct. at 2417.

Lastly, as discussed above, the BIA's arbitrary and capricious misapplication of equitable tolling here does not "reflect fair and considered judgment," as it conflicts with the BIA's prior statement in *Morales-Morales* that an extraordinary circumstance includes "where a party uses a guaranteed delivery service, and the service fails to fulfill its guarantee." *See Kisor*, 139 S.Ct. at 2417 (internal quotations omitted); *Morales-Morales*, 28 I. & N. Dec. at 717. In fact, the Supreme Court has expressly said that it has "only rarely given *Auer* deference to an agency construction conflict[ing] with a prior one." *Kisor*, 139 S.Ct. at 2417 (internal quotations omitted). This is because no deference is due to a new interpretation that "creates 'unfair surprise'" to regulated parties. *Id.* at 2417–18 (internal quotations omitted). The Board's decision here created that unfair surprise, because Ms. Diaz-Valdez and her lawyer could reasonably rely on the Board's instruction in *Morales-Morales* that the failure of a guaranteed delivery service was an extraordinary circumstance. 28 I. & N. Dec. at 717.

B. Assessing the BIA's equitable tolling decision constitutes a question of law.

Because mixed questions of law and fact in the context of equitable tolling are regarded as "questions of law" under *Guerrero-Lasprilla v. Barr*, the BIA's misapplication of the equitable tolling standard should be entitled to de novo review. 140 S.Ct. 1062, 1068 (2020). Under *Guerrero-Lasprilla*, the application of

law to undisputed facts is a "question of law." *Id.* at 1068 (concluding "that the phrase 'questions of law' does include *this* type of review," in reference to a petitioner's claim of due diligence for equitable tolling purposes) (emphasis added). Although *Guerrero-Lasprilla* did not resolve the question of the applicable standard of review in equitable tolling cases, the Fourth Circuit recently stated, "the [*Guerrero-Lasprilla*] Court squarely did *not* contemplate…putting equitable tolling to agency discretion." *Williams*, 59 F.4th at 636; *see also Nkomo v. AG of the United States*, 986 F.3d 268, 272 (3rd Cir. 2021) (The "[a]pplication of the equitable tolling standard 'to undisputed or established facts' is a question of law that we review de novo").

In *Williams*, the Fourth Circuit held that de novo was the appropriate standard of review for its review of whether the BIA correctly denied equitable tolling of the numerical limit and ninety-day deadline for a motion to reconsider. 59 F.4th at 639. The court reviewed the "lone factual question" at issue in the Board's resolution of the motion to reconsider under substantial evidence review. *Id.* The court reasoned that "when it comes to reviewing the BIA's equitable-tolling rulings, then, our only choice should be between de novo and substantial evidence, depending on whether we think our review 'entails primarily legal or factual work.'" *Id.* at 637 (quoting *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018)). The court further reasoned that equitable tolling is an

entitlement once an applicant has met the standard, and is a question that the Supreme Court and other courts have reviewed as a matter of law. *Id.* at 636–39 (internal citations omitted). In addition, the court reasoned that a federal appellate court is equally positioned to the BIA in making the decision, as the decision involves an application of a legal standard to facts as asserted in declarations, and does not involve review of facts found by an immigration judge. *Id.* at 638.

This Court should apply a de novo standard review because Ms. Diaz-Valdez's equitable tolling claim is more comparable to *Nkomo* and *Williams* than to a fact-intensive case like *Alzaben v. Garland. See* 66 F.4th 1, *7 (1st Cir. 2023). In *Alzaben*, this court applied the substantial evidence standard of review in assessing whether the BIA erred in determining a petitioner failed to prove the bona fides of his marriage. *See id.* at *7, *10–11 (applying the substantial evidence standard to the BIA's determination because a petitioner cannot disguise "what is essentially a factual claim in the raiment of…legal error"). Assessing the merits of a good faith marriage was therefore a fact-intensive inquiry that required analyzing the facts underlying the immigration judge's decision. In contrast, in Ms. Diaz-Valdez's case, the BIA has relied on an incorrect legal premise. *See Williams*, 59 F.4th at 639 (reviewing equitable tolling de novo with substantial evidence review for "the lone, subsidiary, factual issue" that the BIA decided in determining whether deadline and numerical bars were equitably tolled); *Nkomo*, 986 F.3d at

272 ("we retain jurisdiction to 'review the BIA's reliance on an incorrect legal premise'") (citation omitted).

Ms. Diaz-Valdez's circumstances are similar to the circumstances in *Nkomo*, where the court applied de novo review. *See id.* at 271. In Nkomo's case, the BIA denied her motion to reopen removal proceedings because "no exceptional circumstances justified sua sponte reopening." *Id.* These procedural circumstances are comparable to the BIA's denial of Ms. Diaz-Valdez's motion to accept a late filed notice of appeal when a delivery service failed to fulfill its delivery guarantee. A.R. 4. The BIA mistakenly represented that it did not have the authority to equitably toll Nkomo's deadline, similar to the way that it misrepresented the legal standard of equitably tolling Ms. Diaz-Valdez's case. *See id.; Nkomo v. AG of the United States*, 986 F.3d at 271. As discussed *infra* Section II, the BIA misrepresented the equitable tolling standard of reasonable diligence and extraordinary circumstances.

Ms. Diaz-Valdez's circumstances are also similar to the circumstances in *Williams*, where the court applied de novo review to whether the petitioner acted diligently in pursuing his rights in order to equitably toll the deadline and numeric limits on a motion to reopen. 59 F.4th at 639-643. There was one factual question embedded within the question of diligence, and the court found that the record reflected the opposite of the BIA's conclusion on that fact. *Id.* at 642. Similar to

the case at hand, the entire analysis that the BIA undertook to decide Ms. Diaz-Valdez's motion to reconsider involved the resolution of legal questions—whether she acted diligently and whether the failure of a courier's next-day guarantee was an extraordinary circumstance. *See* A.R. 3–4. The "lone factual question"—whether her attorney delivered the notice of appeal to FedEx on September 4, 2021—is easily ascertained by a review of the attorney's sworn statement that he made such a delivery on that date, and the corroborating FedEx shipping label. *See* A.R. 10–11, 66. To the extent that the Board had to resolve an additional factual question—whether FedEx Priority Overnight shipping guarantees next-day delivery—the Board could have taken judicial notice of the fact that it does. *See* Petitioner's Motion to Take Judicial Notice (Nov. 17, 2023).

Therefore, this court should review Ms. Diaz-Valdez's case de novo because (1) *Auer* deference does not apply and (2) assessing the BIA's equitable tolling decision is a question of law.

II. THE BIA HAS MISAPPLIED THE STANDARD IT SET FORTH IN *MATTER OF MORALES-MORALES* FOR EQUITABLY TOLLING MS. DIAZ-VALDEZ'S APPEAL.

Under the BIA's standard for equitably tolling a late-filed appeal, Ms. Diaz-Valdez has demonstrated both that (1) she has pursued her right to appeal diligently, and (2) that an extraordinary circumstance prevented timely filing.

A party has thirty calendar days after an immigration judge's oral decision or mailing of a written decision to file a Notice of Appeal from a Decision of an IJ with the BIA. 8 C.F.R. § 1003.38(b). In *Matter of Morales-Morales*, the BIA overruled its prior holding in *Matter of Liadov*, 23 I. & N. Dec. 990 (BIA 2006), and adopted the Second Circuit's interpretation of § 1003.38(b) as a claim-processing, rather than a jurisdictional, rule. 28 I. & N. Dec. at 716 (citing *Attipoe v. Barr*, 945 F.3d 76, 82-83 (2d Cir. 2019); *see also Boch-Saban v. Garland*, 30 F.4th 411, 413 (5th Cir. 2022) (per curiam) (holding that § 1003.38(b) is a claim-processing rule); *Irigoyen-Briones*, 644 F.3d at 946–49 (same). The BIA determined that as a claim-processing rule, the thirty-day deadline should be equitably tolled if a party has been pursuing her rights diligently and some extraordinary circumstance prevented timely filing. *See Morales-Morales*, 28 I. & N. Dec. at 717; 8 C.F.R. § 1003.38(b).

A. The appropriate test for equitably tolling the BIA's thirty-day appeal deadline is reasonable diligence, not maximum feasible diligence.

Pursuant to the standard under *Morales-Morales*, Ms. Diaz-Valdez exhibited reasonable diligence in filing her notice of appeal. *See id.* In *Morales-Morales*, the BIA stated, "adopting the suggestion from *Attipoe*, we will apply the equitable tolling rule from *Holland v. Florida*," which sets forth a standard of reasonable diligence. *See* 28 I. & N. Dec. at 716 (citations omitted).

In *Holland*, the Supreme Court held that "diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" 560 U.S. at 653 (citation omitted). The Supreme Court therefore rejected maximum feasible diligence as the standard for equitable tolling. *See id.* The First Circuit has interpreted the *Holland* "reasonable diligence" requirement broadly. This requirement "does not demand a showing that the petitioner left no stone unturned." *Ramos-Martínez v. United States*, 638 F.3d 315, 324 (1st Cir. 2011); *see also Holmes v. Spencer*, 685 F.3d 51, 65 (1st Cir. 2012) ("If Holmes did what he reasonably thought was necessary to preserve his rights…then he can hardly be faulted for not acting more 'diligently' than he did").

Here, Ms. Diaz-Valdez exercised reasonable diligence in pursuing her rights by retaining legal representation through the thirty-day period, meeting with her attorney, and paying a private courier service to ship her Notice of Appeal via Priority Overnight shipping on September 4, 2021. A.R. 66. FedEx received this shipment three days before the deadline. *See id.* A reasonable individual would expect FedEx to deliver the next business day after the Labor Day holiday, as Ms. Diaz-Valdez did.

A correct interpretation of the reasonable diligence standard is crucial for a noncitizen who faces a host of pressures in appealing to the BIA. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative

Closure, 88 Fed. Reg. 62255, 62255 (proposed Sept. 8, 2023) (stating that shortening the thirty-day timeline "would impede access to the appellate process and the fair and efficient adjudication of appeals"). This Court should follow the Ninth Circuit, which on nearly identical facts to Ms. Diaz-Valdez's case—a noncitizen's Notice of Appeal arrived a day late to the BIA due to unexpected courier delay—held that the noncitizen had displayed reasonable diligence for the purpose of equitably tolling a notice of appeal. *Irigoyen-Briones,* 644 F.3d at 950. The Ninth Circuit stated, "[a]n appellant who has deposited his notice of appeal to the BIA with the U.S. Postal Service or an approved carrier the day before it is due, for guaranteed next-day delivery, has done all that reasonable diligence requires." *Id.*

As the Ninth Circuit reasoned in *Irigoyen-Briones*: "The alien owns the thirty days, and all of them are likely to be essential." 644 F.3d at 950. Here, Ms. Diaz-Valdez lost seven days just on the time it took for the immigration judge's decision to wind its way through the mail. The judge signed the removal order and sent it to Ms. Diaz-Valdez by regular mail on August 6, 2021, which started the thirty-day clock. 8 C.F.R. § 1003.38(b) (the thirty-day deadline begins "after the starting of an immigration judge's oral decision or the mailing or electronic notification of an immigration judge's written decision" and *not* once the party's counsel receives a mailed decision). Ms. Diaz-Valdez's counsel received the order

seven days later, on Friday, August 13, 2021. A.R. 10. This left Ms. Diaz-Valdez with just twenty-three days to appeal.

During this window, a noncitizen must first consult with her attorney on the strength of her case, and then may take days to decide that she would like to appeal. Someone with private counsel, like Ms. Diaz-Valdez, must also furnish funding to retain the attorney for the entirety of the appeal—money that in "a typical case" can take "a few days" to raise—as well as obtain a money order to file with the appeal. *See Irigoyen-Briones*, 644 F.3d at 950; 8 C.F.R. § 1003.3(a)(1) ("An appeal is not properly filed unless it is received at the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time specified in the governing sections of this chapter."); BD. OF IMMIGR. APPEALS, BIA PRACTICE MANUAL 4.4(b)(5) (indicating that a filing fee, fee receipt, or fee waiver request must accompany a notice of appeal to the BIA). Here, Ms. Diaz-Valdez was only able to inform her attorney of her decision to appeal on the afternoon of September 3, 2021, four days before the deadline. A.R. 10.

In many cases, only after the client decides to pursue her appeal and retain the attorney can the attorney embark in earnest on the legal research "necessary to formulate a notice of appeal"—which, under BIA requirements, must state the legal conclusions and factual findings being challenged, with supporting authority. *Irigoyen-Briones*, 644 F.3d at 944, 950 ("The lawyer could not do anything

without listening to the Immigration Court's tapes (not yet transcribed, of course), and she needed a retainer before she invested the time that it would take."); 8 C.F.R. § 1003.3(b). A noncitizen whose appeal notice fails to delineate sufficient reasons risks summary dismissal of her case. 8 C.F.R. § 1003.1(d)(2)(i)(A). Despite immigrant advocates' objections that spelling out issues in the notice of appeal "essentially require[s] an appellant to argue his or her case prematurely," the Executive Office for Immigration Review ("EOIR") imposes these strict requirements because this "meaningful information…aids the Board's review." EOIR, Motions and Appeals in Immigration Proceedings, 61 Fed. Reg. 18900, 18903 (Apr. 9, 1996).

As such, drafting the notice of appeal can be time-intensive. *See Irigoyen-Briones*, 644 F.3d at 950. Even where the same attorney filing a BIA appeal represented a noncitizen before the immigration judge, as in Ms. Diaz-Valdez's case, listening to the Immigration Court's lengthy tapes of the merits hearing often remains necessary, as an attorney focused on making objections and building the evidentiary record during a merits hearing cannot transcribe the proceedings with the detail needed to assess arguments' strength on appeal.

Finally, because the BIA adopts the receipt rule rather than the mailbox rule for noncitizens' filings, a party located in another state must mail their appeal to the BIA before the deadline. The BIA's sole office in Falls Church, Virginia, has

nationwide jurisdiction. Mailing times slice into litigants' case preparation time in two directions—EOIR's notices go into effect upon mailing, starting the clock for deadlines, but a noncitizen must send out notices and briefs with enough days to spare to guarantee receipt within the allotted time frame. Essentially, the agency benefits from the mailbox rule while noncitizens do not.

B. Ms. Diaz-Valdez's timely filing was prevented by the extraordinary circumstance of a private courier service's failure to deliver in a timely manner.

Under *Morales-Morales*, Ms. Diaz-Valdez's timely Notice of Appeal was prevented by an extraordinary circumstance of an expensive overnight delivery service failing to fulfill its guarantee. *See* 28 I. & N. Dec. at 717. The BIA's example of an extraordinary circumstance provided in *Morales-Morales* exactly describes Ms. Diaz-Valdez's situation—when "a party uses a guaranteed delivery service, and the service fails to fulfill its guarantee." *See id.* The Second, Sixth, and Ninth Circuits have all reasoned that private couriers' delays, where noncitizens used overnight delivery, may constitute "extraordinary or unique circumstances" warranting the BIA's acceptance of a late-filed appeal notice. *See Zhong Guang Sun v. U.S. Department of Justice*, 421 F.3d 105, 106, 111 (2nd Cir. 2005) (remanding to the BIA and holding that the BIA had erred in declining to consider whether a private courier's delay constituted an "extraordinary or unique" circumstance, where the noncitizen had dropped off his appeal notice for overnight

delivery the day before the deadline); *Vasquez Salazar v. Mukasey*, 514 F.3d 643, 645–46 (6th Cir. 2008) (remanding to the BIA and instructing the BIA to acknowledge its authority to consider whether FedEx's delay presented an extraordinary circumstance, where the noncitizen had sent his appeal notice for overnight delivery two days before the deadline); *Oh v. Gonzales*, 406 F.3d 611, 613, 614 (9th Cir. 2005) (remanding to the BIA to decide whether to accept an appeal notice that had arrived late due to courier delay, and stating that "use of one of the overnight delivery services the BIA recommends…would appear to qualify [the noncitizen] for relief from late filing as a unique or rare circumstance").

Here, Ms. Diaz-Valdez's counsel submitted her appeal via Priority Overnight shipping on September 4, 2021, three days before the deadline. A.R. 66. On September 4, FedEx was open and capable of receiving packages. The administrative record shows that FedEx received the package on September 4. A.R. 10, 66. Ms. Diaz-Valdez has asked this Court to take judicial notice of the fact that FedEx was open on this date pursuant to the company's 2021 holiday schedule, as well as the fact that FedEx's Priority Overnight shipping guarantees next business day service by 10:30 a.m. for most businesses and by 5:00 p.m. in rural areas.[1] *See* Pet'r's Mot. to Take Judicial Notice (Nov. 17, 2023); FED. R.

[1] https://www.fedex.com/content/dam/fedex/us-united-states/shipping/images/FedEx-Holiday-Schedule.pdf; https://www.fedex.com/en-us/shipping/overnight.html

EVID. 201(d) ("The court may judicially notice a fact that is not subject to reasonable dispute"); *Jackson v. ING Bank, FSB (In re Jackson)*, 988 F.3d 583, 594 (1st Cir. 2021) ("Courts may take judicial notice at any stage of the proceeding"); *Hospital San Jorge v. Secretary of Health, Education & Welfare*, 616 F.2d 580, 585 n.6 (1st Cir. 1980) (taking "judicial notice that mail from Baltimore to Puerto Rico takes at least four days in transit"). Because the BIA could take administrative notice of these facts, it should have easily determined that FedEx failed to fulfill its shipping guarantee. *See Morales-Morales*, 28 I. & N. Dec. at 717; 8 C.F.R. § 1003.1(d)(3)(iv)(A) ("The Board may take administrative notice of facts that are not reasonably subject to dispute"); *Gebremichael v. I.N.S.*, 10 F.3d 28, 34, 37 (1st Cir. 1993) ("In keeping with standard principles of administrative procedure and in the absence of any prohibition in the INA itself," BIA could properly take administrative notice of "extra-record" facts not presented by the noncitizen).

Despite this concrete evidence of failure on behalf of the private courier service that delivered Ms. Diaz-Valdez's notice of appeal, the BIA stated that there was "insufficient evidence that the respondent delivered the appeal to Federal Express on the claimed date." A.R. 3. This finding is contrary to the record, as the upper righthand corner of the FedEx shipping label used to send Petitioner's notice of appeal a "Ship Date" of "04SEP21" is clearly listed, supporting Petitioner's

contention that her notice of appeal was dropped off with FedEx on September 4, 2021 for overnight delivery the next business day. A.R. 66. Additionally, the BIA's role in reviewing any facts in a motion is to serve as an appellate body, not a factfinder; the BIA is not meant to assess the credibility of evidence. *See* 8 C.F.R. § 1003.1(d)(3)(iv)(A) ("The Board will not engage in factfinding in the course of deciding cases, except that the Board may take administrative notice of facts that are not reasonably subject to dispute"); *Trujillo Diaz v. Sessions*, 880 F.3d 244, 252–53 (6th Cir. 2018) (reasoning that the BIA "must accept as true reasonably specific facts proffered by an alien in support of a motion to reopen unless it finds those facts to be inherently unbelievable.") (internal citations omitted). As such, the BIA has been reversed for "fail[ing] to consider relevant evidence in denying a motion for reconsideration." *Lopez-Lopez v. Garland*, No. 22-863, 2023 U.S. App. LEXIS 28122, at *2 (9th Cir. Oct. 23, 2023) (holding that the BIA "erred in concluding that Lopez-Lopez had not offered any support for the claim that her counsel did not receive notice that her notice of appeal was rejected" because it was required to consider counsel's sworn declaration that he had not received notice); *compare Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that a court must accept a complaint's allegations as true when evaluating a motion to dismiss, in order to grant aggrieved parties access to the court system). As attorneys have an ethical duty of candor to the tribunal, there is no reason that Ms. Diaz-Valdez's

attorney's statement that he went to FedEx on September 4 is inherently unbelievable, especially because the statement is corroborated by the FedEx shipping label. *See* A.R. 66; MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2023).

In addition, the BIA mischaracterized counsel's argument by stating, "the respondent's contention that the federal holiday is an exceptional circumstance for her untimely filing is unpersuasive because the holiday is not an unexpected event." A.R. 4. Ms. Diaz-Valdez never contended that Labor Day was the extraordinary circumstance in question. Counsel accommodated for the holiday by delivering the appeal when FedEx was open, three days before the filing deadline, and paying for Priority Overnight shipping. This should have guaranteed that FedEx delivered the motion on the next business day, the day of the deadline. Ms. Diaz-Valdez's Notice of Appeal was processed late because of FedEx's failure to process the mail on September 4, despite all of her reasonable diligence in paying an expensive overnight courier service that did not fulfill its guarantee.

CONCLUSION

For the foregoing reasons, this Court should vacate the BIA's order and remand Ms. Diaz-Valdez's case to the BIA to correctly apply its equitable tolling standard as stated in *Morales-Morales*. *See* 28 I. & N. Dec. at 717.

Dated: November 24, 2023

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The Brief, containing 6,199 words, exclusive of those items that, under Fed. R. App. P. 32(f), are excluded from the word count, was prepared in proportionally spaced Times New Roman 14-point type.

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Dated: November 24, 2023

CERTIFICATE OF SERVICE

I certify that this Brief is served to all counsel of record registered in ECF on November 24, 2023.

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Dated: November 24, 2023