APPEAL NO. 09-16478

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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JOSE PADILLA AND ESTELA LEBRON,

Plaintiffs-Appellees,

v.

JOHN YOO,

Defendant-Appellant.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit, public interest organization that has no parent company, and no publically-held corporation has a 10% or greater ownership interest in Judicial Watch.

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STATEMENT OF *AMICUS CURIAE*[1]

Judicial Watch, Inc. is a public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly monitors on-going litigation, files *amicus curiae* briefs, and prosecutes lawsuits on matters that it believes are of public importance. Matters in which Judicial Watch has submitted *amicus curiae* briefs in the past include, among others: (1) *In re Marriage Cases,* Appeal No. S147999 (Cal. Sup. Ct.) (Same-sex marriages cases); (2) *U.S. v. Rayburn House Office Building, Room 2133,* Appeal No. 06-3105 (D.C. Cir.) (FBI search of congressional office); (3) *Lozano v. City of Hazleton,* Appeal No. 07-3531 (3d Cir.) (Local regulation of immigration efforts); (4) *American Civil Liberties Union v. National Security Administration,* Appeal Nos. 06-2095 & 06-2140 (6th Cir.) (NSA terrorist surveillance program); (5) *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* Appeal No. 06-55750 (9th Cir.) (Day labor solicitation); (6) *Phelps-Roper v. Nixon,* Appeal No. 07-1295 (8th Cir.) (Military funeral protests); and (7) *Gonzales v. Carhart,* No. 05-380 (U.S. Sup. Ct.) (Federal partial-birth abortion statutes). Judicial Watch's proposed *amicus*

[1] All parties have consented to the filing of this brief.

curiae brief in this matter, while supporting the position of former Deputy Assistant Attorney General John Yoo ("Yoo"), is primarily for the purpose of addressing what Judicial Watch believes are vital public policy concerns.

Specifically, Judicial Watch is deeply concerned about the District Court's ruling, which authorizes a *Bivens* action against an advisor to the President allegedly for legal and policy advice that he provided to the President in the aftermath of the September 11, 2001 terrorist attacks on the United States. Judicial Watch's primary concern is that the District Court failed to consider adequately the weighty separation of powers concerns that arise whenever the Judicial Branch seeks to involve itself in the presidential decision-making process. These separation of powers concerns are all the more significant when the decision-making process involves national security and the exercise of the President's powers as Commander in Chief. If the decision is allowed to stand, it would represent an unprecedented expansion by the Judicial Branch into the President's ability to receive war time advice from his advisors. While Judicial Watch does not assert or imply that the judiciary has no role to play with respect to the designation and detention of enemy combatants in times of war -- the U.S. Supreme Court repeatedly has recognized otherwise, albeit in the limited context of authorizing certain types of habeas corpus petitions -- allowing presidential

advisors to be sued in their personal capacities for the war time advice they give the President has substantial potential to interfere with the presidential decision-making process at times that are most critical to our nation.

FACTUAL BACKGROUND

Jose Padilla ("Padilla"), who currently is serving a seventeen-year sentence in federal prison after being convicted of providing material support to terrorists, among other criminal offenses, brings this lawsuit against Yoo for alleged violation of Padilla's rights under the First, Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution.[2] According to Padilla's First Amended Complaint, Yoo was "a key member of a small, secretive, and highly-influential group of senior administration officials known as the 'War Council,' which met regularly 'to develop policy in the war on terrorism.'" *See* First Amended Complaint at par. 15. Padilla alleges that Yoo took instructions "directly from White House Counsel Alberto Gonzales" and provided Gonzales with verbal and written advice "without first consulting Attorney General Ashcroft." *Id.* at para.

[2] Padilla's mother, Estela Lebron, also is a plaintiff in this lawsuit. As Padilla's mother also seeks to imply *Bivens* remedies against Yoo based on the same factual allegations made by her son, Judicial Watch's concerns about the District Court's ruling apply equally to both Padilla's claims and Padilla's mother's claims.

16. Padilla describes Yoo as "the *de facto* head of war-on-terrorism legal issues" for the administration of then-President George W. Bush. *Id.* at para. 19.

Padilla alleges that Yoo "read the intelligence reports" on him, and he attaches to his First Amended Complaint an August 27, 2002 declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, which purportedly sets forth the United States' intelligence information on Padilla as of 2002. *See* First Amended Complaint at para. 42 and Exhibit K thereto.[3] Mobbs' declaration contains what apparently is the only factual recitation in the record of the basis for Padilla's designation as an enemy combatant and his subsequent detention and interrogation by the U.S. military.[4]

According to Mobbs' declaration:

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[3] As Judicial Watch is not a party to the underlying action or this appeal, it does not have ready access to the Excerpts of Record and therefore cites to the First Amended Complaint and Mobbs' declaration directly.

[4] While Padilla alleges that Yoo based his recommendation that Padilla be detained on "the uncorroborated statement of two confidential sources detained and interrogated outside the United States, at least one of whom had been questioned while under treatment with various kinds of medication" (*see* First Amended Complaint at para. 42), Mobbs' declaration, on which Padilla purportedly relies in support of this assertion, clearly states at least three times that this information was corroborated by other sources and "has proven accurate and reliable." *See id.* at Exhibit K, para. 3 & n.1.

- Padilla was born in New York. He was convicted of murder in Chicago in approximately 1983 and incarcerated until his eighteenth birthday. In Florida, in 1991, he was convicted of a handgun charge and sent to prison. After his release from prison, Padilla began referring to himself as Ibrahim Padilla. In 1998, he moved to Egypt and was subsequently known as Abdullah al Muhajir. In 1999 or 2000, Padilla traveled to Pakistan. He also traveled to Saudi Arabia and Afghanistan. *See* First Amended Complaint at Exhibit K, para. 4.

- During his time in the Middle East and Southwest Asia, Padilla had been closely associated with known members and leaders of the Al Qaeda terrorist network. *Id.* at Exhibit K, para. 5.

- While in Afghanistan in 2001, Padilla met with senior Usama Bin Laden Lieutenant Abu Zubaydah. Padilla and an associate approached Zubaydah with their proposal to conduct terrorist operations in the United States. Zubaydah directed Padilla and his associate to travel to Pakistan for training from Al Qaeda operatives in wiring explosives. *Id.* at Exhibit K, para. 6.

- Padilla and his associate conducted research in the construction of a "uranium-enriched" explosive device. In particular, they engaged in research on

this topic at one of the Al Qaeda safehouses in Lahore, Pakistan. *Id.* at Exhibit K, para. 7.

- Padilla's discussion with Zubaydah specifically included the plan of Padilla and his associate to build and detonate a "radiological dispersal device" (also known as a "dirty bomb") within the United States, possibly in Washington, D.C. The plan included stealing radioactive material for the bomb within the United States. The "dirty bomb" plan of Padilla and his associate allegedly was still in the initial planning stages, and there was no specific time set for the operation to occur. *Id.* at Exhibit K, para. 8.

- In 2002, at Zubaydah's direction, Padilla traveled to Karachi, Pakistan to meet with senior Al Qaeda operatives to discuss Padilla's involvement and participation in terrorist operations targeting the United States. These discussions included the noted "dirty bomb" plan and other operations including the detonation of explosives in hotel rooms and gas stations. The Al Qaeda officials held several meetings with Padilla. It was believed that Al Qaeda members directed Padilla to return to the United States to conduct reconnaissance and/or other attacks on behalf of Al Qaeda. *Id.* at Exhibit K, para. 9.

- Although one confidential source stated that he did not believe that Padilla was a "member" of Al Qaeda, Padilla had significant and extended

contacts with senior Al Qaeda members and operatives. He acted under the direction of Zubaydah and other senior Al Qaeda operatives, received training from Al Qaeda operatives in furtherance of terrorist activities, and was sent to the United States to conduct reconnaissance and/or other attacks on their behalf. *Id.* at Exhibit K, para. 10.

Padilla traveled from Pakistan to Chicago via Switzerland and on May 8, 2002 was apprehended by U.S. Marshals upon his arrival at O'Hare Airport pursuant to a material witness warrant. *Id.* at Exhibit K, para. 11; *see also* First Amended Complaint at para. 35.

On June 9, 2002, the President determined that Padilla "is, and was at the time he entered the United States in May 2002, an enemy combatant in the ongoing war against international terrorism, including the Al Qaeda international terrorist organization." *See* First Amended Complaint at para. 40 and Exhibit J thereto. The President specifically determined that Padilla had engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States." *Id.* at Exhibit J. The President further determined that Padilla "posed a continuing, present and grave danger to the national security of the United States," and that "detention of Mr. Padilla is necessary to prevent him from

aiding Al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Id.* The President directed the Secretary of Defense to detain Padilla as an enemy combatant. *Id.* Acting on the President's direction, the Secretary of Defense took control of Padilla on June 9, 2002 and held him at the U.S. Naval Consolidated Brig in Charleston, South Carolina until January 5, 2006. *Id.* at para. 44 and Exhibit J, para. 16.

Padilla alleges that the President designated him as an enemy combatant and ordered his detention by the U.S. military "[b]ased on [Yoo's] legal opinion and [then-Attorney General John] Ashcroft's recommendation." *See* First Amended Complaint at para. 40. Padilla also alleges that Yoo "personally recommended [his] unlawful military detention as a suspected enemy combatant." *Id.* at para. 53. Padilla claims that "as a proximate and foreseeable result of [Yoo's] actions, [he] was declared an 'enemy combatant' and held in military custody at the Brig for over three and a half years." *Id.* at para. 44.

Padilla denies that he is an "enemy combatant" and asserts that the factual basis for his detention as such has never been reviewed by any court. *Id.* at 43. Padilla alleges that, while in military custody, he was subjected to "gross physical and psychological abuse as part of a systemic program of abusive interrogations," which included, but was not limited to:

> extreme isolation; interrogation under threat of torture, deportation, and even death; prolonged sleep adjustment and sensory deprivation; exposure to extreme temperatures and noxious odors; denial of access to necessary medical and psychiatric care; substantial interference with his ability to practice his religion; and almost two years without any access to family, counsel, or the courts.

Id. at para. 1; *see also id.* at paras. 55, 63-72. Padilla alleges that the conditions of confinement and the interrogation methods to which he was subjected were "all well beyond the physical and mental discomfort that normally accompanies incarceration." *Id.* at para. 45.

Padilla also alleges that, from June 9, 2002 until March 4, 2004, his only human contact was with interrogators during interrogation sessions or with guards when they delivered his meals through a slot in his cell door or escorted him to the shower or the concrete cage in which he was intermittently permitted to exercise. *Id.* at paras. 56-57. Padilla further alleges that, beginning on March 4, 2004, he was permitted sporadic contact with his attorneys, although this contact allegedly was subjected to severe restrictions, including recording of conversations and review of correspondence. *Id.* at para. 58. He further alleges that, during the two-year period from March 4, 2004 and January 5, 2006, he was permitted to receive only three twenty-minute telephone calls and one visit from his mother and that,

during these interactions, he was forbidden to discuss the interrogations to which he was being subjected. *Id.* at para. 62.

Padilla alleges that, "on information and belief," Yoo, apparently in his capacity as the "*de facto* head of war-on-terrorism legal issues," "gave interrogators and custodians a green light for abusive interrogation and detention, thereby setting in motion the abuses" he suffered. *Id.* at paras. 18 and 47.

ARGUMENT

Because the President of the United States enjoys absolute immunity for his official acts, Padilla does not seek to hold the President -- the person who actually designated him as an enemy combatant and ordered his detention by the U.S. military -- personally liable for alleged constitutional wrongs. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Rather, Padilla seeks to hold Yoo personally liable for alleged constitutional wrongs, as Yoo allegedly was the presidential advisor who recommended to the President that Padilla be designated as an enemy combatant and detained by the U.S. military.

Bivens actions obviously are court-made remedies, not legislatively enacted causes of action. Given the implied, non-statutory nature of *Bivens* actions, they are disfavored. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009). The U.S. Supreme Court "has been reluctant to extend *Bivens* liability to any new context or

new category of defendants" beyond the three categories it recognized between 1971 and 1980. *Id.* (internal quotations omitted); *see Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (alleged violations of Fourth Amendment by federal narcotics agents); *Davis v. Passman*, 442 U.S. 228 (1979) (alleged violation of the Due Process Clause arising from employment discrimination by Member of Congress); and *Carlson v. Green*, 446 U.S. 14 (1980) (alleged violations of the Eighth Amendment by federal prison officials). In most instances, the U.S. Supreme Court has "found a *Bivens* remedy unjustified." *Wilkie v Robbins*, 551 U.S. 537, 550 (2007). Indeed, in 1988, the U.S. Supreme Court declared that its "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988).

Consideration of a *Bivens* claim follows a familiar, two-step sequence. *Id.* First, "there is the question whether any alternative, existing process for protecting the [alleged constitutional] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilke*, 551 U.S. at 550. There is no "automatic entitlement" to a *Bivens* remedy regardless of "what other means there may be to vindicate a protected interest." *Id.* at 550. Second, "even in the absence of an alternative," "'the federal courts

must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation.'" *Id*., *quoting Bush v. Lucas*, 462 U.S. 367, 378 (1983). More broadly, both factors counsel judicial restraint.

Judicial Watch is concerned that, in undertaking this analysis, the District Court failed to give sufficient consideration to separation of power concerns in finding that no "special factors" counseled against allowing Padilla's claims to proceed. Concern for the presidential decision-making process, especially when national security and the exercise of the President's powers as Commander in Chief are involved, are "special factors" that counsel against allowing such claims to proceed.

Separation of powers considerations typically have led the Judicial Branch to be very hesitant to involve itself in the presidential decision-making process. The most obvious example of this hesitation arises in the context of the presidential communication privilege, which seeks to protect the confidentiality of that process:

> A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications; the privilege is

> fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

United States v. Nixon, 418 U.S. 683, 708 (1974). "As the Court in *United States v. Nixon* explained, these principles do not mean that the 'President is above the law.'" *Cheney v. U.S. District Court*, 542 U.S. 367, 382 (2004), *quoting United States v. Nixon*, 418 U.S. at 715. "Rather, they simply acknowledge that the public interest requires that a coequal branch of Government 'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.'" *Id.*; *see also Clinton v. Jones*, 520 U.S. 681, 701 (1997), *quoting Loving v. United States*, 517 U.S. 748, 757 (1996) ("We have recognized that, '[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'").

These same concerns for separation of powers and protecting the presidential decision-making process also led the U.S. Supreme Court in *Cheney* to review the denial of the Vice President's petition for a writ of mandamus. The Vice President had challenged a trial court order authorizing discovery of him and members of his National Energy Policy Development Group:

> As we have already noted, special considerations control when the Executive Branch's interests in maintaining the autonomy of its office

> and safeguarding the confidentiality of its communications are implicated. This Court has held, on more than one occasion, that [t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery, and that the Executive's constitutional responsibilities and status [are] factors counseling judicial deference and restraint in the conduct of litigation against it.

Cheney, 542 U.S. at 385 (internal quotations omitted). The U.S. Supreme Court also expressed concern about the "paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Id.* at 382. In the context of that mandamus action, it declared "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President." *Id.*

These same concerns about separation of powers and protecting the presidential decision-making process led the U.S. Supreme Court to hold that presidential advisors enjoyed qualified immunity from civil suits for money damages in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court in *Harlow* described this concern in the following terms:

> . . . it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of

> public office. **Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public] officials, in the unflinching discharge of their duties."**

457 U.S. at 814, *quoting Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 338 U.S. 949 (1950) (emphasis added). The Court in *Harlow* also quoted with approval from an appellate court ruling regarding another lawsuit against high level White House officials:

> We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damages awards against high government officials in their personal capacities based on alleged constitutional torts . . . The effect of this development upon the willingness of individuals to serve their country is obvious.

457 U.S. at 817, n.29, *quoting Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981). In *Harlow*, the Court specifically declined to consider the issue of whether *Bivens* remedies should be implied against presidential advisors, citing the fact that it "took jurisdiction over the case only to resolve the qualified immunity issue under the collateral order doctrine." 457 U.S. at 820 n.36. It noted, however, that the question was "not insubstantial." *Id.*

Padilla's lawsuit seeking money damages from Yoo over advice Yoo allegedly gave the President implicates the presidential decision-making process

even more directly than did the facts in *Harlow*. This is because Yoo is alleged to have advised the President to take particular actions -- designate Padilla as an enemy combatant and hold him in military custody -- which the President undeniably took. By contrast, the claims in *Harlow* concerned an alleged conspiracy among presidential advisors to have a whistleblower fired by the agency that employed him. *Harlow* does not appear to have concerned any direct action by the President, much less recommendations by presidential advisors that the President take any particular action.

Moreover, concern about protecting the presidential decision-making process is all the more substantial in this case because the advice at issue directly relates to the President's constitutional powers as Commander in Chief and those powers had been augmented by Congress through the Authorization for Use of Military Force Joint Resolution, Public Law No. 107-40, 115 Stat. 224 (2001). Thus, the presidential powers Yoo allegedly recommended that the President employ against Padilla were at their apex. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

In this regard, implying a *Bivens* action against a presidential advisor for war time advice the advisor gives to the President creates a substantial likelihood that the Judicial Branch will be required to delve into areas constitutionally

committed to the President or otherwise substitute its judgment about such matters for the judgment of the President. Indeed, the District Court already has found:

> However, here, Padilla's allegations concern the possible constitutional trespass on a detained individual citizen's liberties **where the detention was not a necessary removal from the battlefield.** The Court is not persuaded that such conduct constitutes a core strategic warmaking power.

Padilla v. Yoo, 633 F. Supp.2d 1005, 1028 (N.D. Cal. 2009) (emphasis added). Implicit in the District Court's finding is that the courts can (or should) decide where the battlefield lies and who necessarily must be removed from that battlefield.[5] While Judicial Watch submits that deciding such questions are a quintessential part of the President's war making powers, especially where Congress has given the President express authorization to use military force, if a *Bivens* remedy is implied here, the District Court will be placed in the position of having to decide these questions itself, or at least review the decisions of the President. The District Court will have to determine whether the territory of the United States is part of "the battlefield" in the nation's unconventional war against Al Qaeda and whether Padilla's removal from that battlefield was "necessary." It

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[5] Few would dispute that, on September 11, 2001, "the battlefield" was New York, Washington, D.C., and the skies above Pennsylvania. Nor was it unreasonable to conclude, as the President apparently did when Padilla landed at O'Hare on May 8, 2002 and was believed to be planning a "dirty bomb" attack in the United States, that "the battlefield" included Chicago.

is precisely this type of judicial second guessing in the context of lawsuits seeking to hold presidential advisors personally liable, for money damages, for war time advice they give the President, that counsels against implying *Bivens* actions against a President's war time advisors.

This is not to say that war time designations and detentions cannot be reviewed by the Judicial Branch, as indeed they have been and are being reviewed by the courts through petitions for writs of habeas corpus. The fact that one type of remedy, a petition for writ of habeas corpus, may be available to detainees, but a statutory cause of action for money damages is not, has not caused other courts to imply new *Bivens* remedies where Congress has not acted. *See Rasul v. Myers*, 563 F.3d 527, 532, n.5. (D.C. Cir. 2009); *see also Wilson v. Libby*, 535 F.3d 697, 706 (D.C. Cir. 2008) ("the availability of *Bivens* remedies does not turn on the completeness of the available statutory relief").

Indeed, as the U.S. Supreme Court has noted, the "point . . . is not to deny that Government employees sometimes overreach, for of course they do, and they may have done so here if all the allegations are true." *Wilke*, 551 U.S. at 561. Instead, "[t]he point is the reasonable fear that a general *Bivens* cure would be worse than the disease." *Id.* The authority to create a remedy should remain with Congress because "Congress is in a far better position than a court to evaluate the

impact of a new species of litigation against those who act on the public's behalf," and "Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiatives on the part of the Government's employees." *Id.* at 562 (internal quotations omitted).

CONCLUSION

The District Court's ruling gave far too little weight to the substantial separation of powers concerns raised by Padilla's attempt to imply a *Bivens* claim against Yoo. In addition to concerns about national security and the President's powers as Commander in Chief, the District Court should have taken into account the substantial separation of powers concerns that arise from seeking to hold a presidential advisor personally liable for damages allegedly caused by advice given to the President. These concerns are only heightened by the fact that, in this particular matter, the advice in question involved national security issues and the exercise of the President's powers as Commander in Chief. Judicial Watch respectfully submits that Congress is in a far better position than the courts to evaluate the impact of such a new species of litigation and tailor an appropriate remedy, if any, that balances the important, competing concerns raised by this lawsuit.

Dated: November 18, 2009

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANT AND REVERSAL** is proportionally spaced, has a typeface of 14 points or more, and contains 4,906 words.

Dated: November 18, 2009 s/ Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2009, I electronically filed the foregoing **BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANT AND REVERSAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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