No. 22-47

In the Supreme Court of the United States

KERRY BENNINGHOFF, INDIVIDUALLY, AND AS MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES,

Petitioner,

v.

2021 LEGISLATIVE REAPPORTIONMENT COMMISSION, ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

AMICI CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

ROBERT D. POPPER
ERIC W. LEE
JUDICIAL WATCH, INC.
425 Third Street, SW
Suite 800
Washington, DC 20024
(202) 646-5172

T. RUSSELL NOBILE
Counsel of Record
JUDICIAL WATCH, INC.
P.O. Box 6592
Gulfport, MS 39506
(202) 527-9866
rnobile@judicialwatch.org

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files amicus curiae briefs and lawsuits related to these goals.

As part of its election integrity mission, Judicial Watch has a substantial interest in the proper enforcement of Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301. Judicial Watch has filed several amicus briefs before this Court on cases involving the VRA. *See* Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioners, *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) (No. 19-1257) (Section 2 of the Voting Rights Act); *North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399 (2017) (No. 16-833) (Section 2 challenge to North Carolina's election laws).

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse

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[1] Amici state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Amici sought and obtained the consent of all parties to the filing of this amici curiae brief.

areas of study. AEF regularly files amicus curiae briefs as a means to advance its purpose and has appeared as an amicus curiae in this Court on many occasions.

Amici submit the Pennsylvania Supreme Court's one-page order affirming a blatant racial gerrymander fundamentally disregards this Court's precedent and respectfully request this Court grant Petitioner's Writ of Certiorari.

SUMMARY OF ARGUMENT

This case arises from the reapportionment of Pennsylvania's legislative districts following the 2020 Census. Petitioner, the Majority Leader for the Pennsylvania House of Representatives and a member of the Commission tasked with that reapportionment, challenged the adopted plan in state court as illegal racial gerrymandering. The Supreme Court of Pennsylvania summarily declared that the plan was constitutional in a one-page order without an opinion, following an abbreviated briefing schedule and without hearing oral argument. Petitioner now seeks review of that unexplained order in this Court.

This Court should grant certiorari so that this racial gerrymandering claim is reviewed under the applicable Equal Protection analysis, which the Pennsylvania Supreme Court inexplicably failed to do. Furthermore, this Court should grant certiorari to clarify how the strict scrutiny analysis set forth in its gerrymandering precedents applies to a state's

plan that was expressly designed to exceed any requirements imposed by the VRA.

The Court has held consistently that in matters of redistricting it is the VRA's *requirements* that are at issue. *See Shaw v. Reno,* 509 U.S. 603, 655 (1993) ("*Shaw I*"); *Miller v. Johnson*, 515 U.S. 900, 920 (1995); *Shaw v. Hunt*, 517 U.S. 899, 911-16 (1996) ("*Shaw II*"); and *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022). A State can never have a compelling interest in going beyond the bounds of the statute nor can a plan that exceeds the VRA's requirements qualify as narrowly tailored. The VRA is not an unlimited license for states to engaged in race-based classifications that are "antithetical to the Fourteenth Amendment." *Shaw II*, 517 U.S. at 906. Sorting citizens into voting districts based on their race—regardless of what a government actor believes is necessary to satisfy the VRA or any other statute—is a violation of the Equal Protection Clause.

ARGUMENT

I. The Court Should Grant Certiorari to Remand So the Pennsylvania Supreme Court Can Set Forth its Findings and Reasons in a Written Opinion.

The Pennsylvania Supreme Court's cryptic, one-sentence decision holding that the reapportionment plan "is in compliance with the mandates of . . . the United States Constitution and is not contrary to law" sets a troubling precedent. Pet.'s Ex. 1. The court's reasoning remains hidden from this Court, the

parties, and the legislature and citizens of Pennsylvania who are governed by its order. Its opaque ruling hinders appellate review, as this Court cannot determine what level of scrutiny was applied or whether the court below correctly employed the complex Equal Protection analysis used to assess race-based gerrymanders. Indeed, the one-sentence order violates the court's own publicly stated process for reviewing redistricting challenges. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 10 n.9 (2018).

How the state court reached its conclusion is a mystery. Since the issuance of its *per curiam* order, no further written opinion has followed, nor is one expected. Given the factual and legal complexity of racial gerrymandering claims, it is baffling that the court would determine the constitutionality of a redistricting plan without explanation. Certiorari is justified on this basis alone, even if the Court simply remands this case for a written opinion.

As it stands, this Court has no ability to discern how the Pennsylvania Supreme Court reached its conclusion. One can speculate: perhaps the court performed an extensive review of the redistricting plan, considered thoughtfully this Court's numerous and lengthy decisions on racial gerrymandering, and only then concluded that the plan was lawful under the Equal Protection Clause. Assuming so, did it apply the predominance test accurately? Did the state abide by traditional redistricting criteria? Or were these criteria subordinated to race? Did the court determine that strict scrutiny applied? If so, what was

the compelling government interest that satisfied this test? Was it compliance with the VRA? If so, how was that interest achieved through a narrowly tailored remedy? Were there "good reasons" to believe the VRA required the plan to be drawn in a certain way? If such an analysis was performed—as the law requires—why did the court not explain its reasoning in an opinion issued to the public?

Alternatively, if the court did not in fact engage in the analysis demanded by this Court's precedents, how did it determine the plan was lawful? What precedent or other analytical framework did the court apply? Or did the court simply neglect its responsibility as the supreme judicial power of the Commonwealth to apply the law to the question before it? *See* 2 Pa. Cons. Stat. § 501. These questions remain unanswered as the issue of whether Pennsylvania's voters were sorted into districts based on their race was not deemed worthy of a written opinion.

The court's failure to even address important legal issues calls the propriety of its order into question, especially given the subject matter of this case. This Court recently rejected the judicial imposition of race-based districts where the court below did not "carefully evaluat[e]" the evidence, but "improperly relied on generalizations to reach the conclusion" that the VRA was violated. *Wis. Legis.*, 142 S. Ct. at 1250 (citing *Cooper v. Harris*, 137 S. Ct. 1455, 1471 n.5 (2017) (a "generalized conclusion fails to meaningfully (or indeed, at all) address the relevant local question" under the VRA)). If generalizations cannot support

such rulings, the Pennsylvania Supreme Court's virtual silence must be even less adequate for the purpose.

The court's failure is inexcusable. Among other things, the court ignored its own publicly stated decision-making process as announced in another redistricting case. *See League of Women Voters*, 645 Pa. at 8 (finding that Pennsylvania's 2010 congressional redistricting was a partisan gerrymander). The Democratic plaintiffs in that case alleged gerrymandering by Republican officials. *Id.* at 8-9. The court issued a *per curiam* order that the redistricting plan violated the state constitution and stated that a written opinion would follow. *Id.* at 9. That subsequent, written opinion included a footnote specifically describing the court's "process in issuing orders with opinions to follow," as well as its opinion-drafting process. *Id.* at 10, n.9. The court explained that "[u]pon agreement of the majority of the Court, the Court may enter, shortly after briefing and argument, a *per curiam* order setting forth the court's mandate, so that the parties are aware of the court's ultimate decision and may act accordingly." *Id*. The court added that this practice was appropriate "in election matters, where time is of the essence." *Id.*

The Pennsylvania Supreme Court particularly noted that the legal analysis in the gerrymandering challenge before it was "complex and nuanced," and took special care to assure the public that its opinion-drafting process was careful and deliberative. *Id.* "[T]he Court's process involves, in the first instance, the drafting of an opinion by the majority author, and,

of course, involves exhaustive research and multiple interactions with other Justices." *Id*. Only "after every member of the Court has been afforded the time and opportunity to express his or her views, are the opinions finalized . . . and released to the public." *Id*. The court stressed that this process "is one to which this Court rigorously adheres." *Id.*

The court's emphasis on transparency contrasts with its actions in these proceedings. There is no reason to question the practice of issuing a *per curiam* order to make the parties aware of the ultimate decision in an election case. However, the court cannot justify its failure to comply with its own process for following such an order with a written opinion. To be sure, the footnote in *League of Women Voters* largely describes the standard procedure for opinion-drafting in an appellate court, but it begs the question: why was this process "rigorously adhere[d]" to in that case but not in this case? There can be no doubt, as this Court's precedents reveal, that racial districting raises at least as many "complex and nuanced" factual and legal issues as partisan gerrymandering. The lack of transparency by a state's highest court on an issue like race-based gerrymandering is a disturbing precedent that should not stand.

Certiorari should be granted, if for no other reason, to direct the Pennsylvania Supreme Court to issue a written opinion addressing the requisite legal issues.

II. The Racial Gerrymander in This Case Cannot Withstand Strict Scrutiny.

This Court recognized that an allegation of race-based districting could establish a claim under the Fourteenth Amendment's Equal Protection Clause in *Shaw I*. 509 U.S. 630. In the thirty years since that ruling, courts and states have struggled to balance the inherent tension between the Equal Protection Clause and compliance with the Voting Rights Act. This Court has held that, despite the Equal Protection Clause's prohibition against race-based state action, states may still treat voters differently in redistricting if it is necessary to comply with the VRA. But the question of what must be shown to establish a compelling justification based on the need to comply with the VRA remains unsettled. The Court's voting rights jurisprudence in this area has been variously described by justices as either unclear or misguided. *See Wis. Legis.*, 142 S. Ct. at 1251 (Sotomayor, J., dissenting) ("the Court today faults the State Supreme Court for its failure to comply with an obligation that, under existing precedent, is hazy at best"); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 294 (2015) (Thomas, J., dissenting) ("This is nothing more than a fight over the 'best' racial quota. . . . [O]ur jurisprudence in this area continues to be infected with error.").

The Court should grant certiorari to determine that the district plan in this case cannot possibly satisfy the requirements of strict scrutiny, because it admittedly created more race-based districts than the VRA would require.

A. Strict Scrutiny from *Shaw I* to *Wisconsin Legislature*.

As noted *supra*, *Shaw I* was the first case in which the Court recognized the possibility of an Equal Protection claim for racial gerrymandering. In reviewing whether "extremely irregular" districts were racial gerrymanders, the *Shaw I* Court held: "a plaintiff . . . may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 509 U.S. at 649. If "the allegation of racial gerrymandering remains uncontradicted," strict scrutiny applies, and the court must determine whether "the plan is narrowly tailored to further a compelling governmental interest." *Id*. at 658.

The Court addressed racial gerrymandering again two years later in *Miller*, 515 U.S. at 913. In that case the Court focused the inquiry on whether "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* The Court explained that "the essence of the equal protection claim recognized in [*Shaw I*] is that the State has used race as a basis for separating voters into districts." *Id.* at 911. The Court further clarified that proof of a racial gerrymander did not depend on "bizarreness" or the shape of a district alone. *Id.* at 912-913. Rather, *Miller* characterized the plaintiff's burden as "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence

going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 916. To satisfy that burden, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

The year after *Miller*, the Court again considered race-based districting claims under the Equal Protection Clause in *Shaw II*. 517 U.S. 899. The *Shaw II* Court affirmed *Miller*'s holding that a "constitutional wrong occurs when race becomes the 'dominant and controlling' consideration" in redistricting. *Id.* at 905 (citation omitted). The Court also clarified that even if a state complies with traditional redistricting principles in forming a plan, strict scrutiny will still apply "when race is the predominant consideration." *Id.* at 906 (internal quotation marks omitted). While the State had "effectuated" traditional and race-neutral interests in creating the districts, the Court was clear that even if "the legislature addressed those interests," that would "not in any way refute the fact that race was the legislature's predominant consideration." *Id.* at 907. This was because race "was the criterion that, in the State's view, could not be compromised," and it was "only after the race-based decision had been made" that the traditional districting principles had been used. *Id.*

Some two decades later, the Court seemingly reaffirmed the predominance test set forth in *Miller* and *Shaw II*. *See Alabama*, 575 U.S. at 278. Yet, the Court's definition of what constitutes "narrow tailoring" appeared to diverge from those earlier decisions. In both *Miller* and *Shaw II*, the States claimed the need to comply with the VRA as the "compelling government interest" that necessitated the use of race in redistricting decisions. In both cases, the Court found the plans were not narrowly tailored to meet that interest because the districts created were not necessary to comply with the VRA. *See Miller*, 515 U.S. at 921; *Shaw II*, 517 U.S. at 911. Despite those decisions, the *Alabama* Court stated that "the narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the (race-based) choice that is has made," and "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." 575 U.S. at 278 (citing Brief for United States as *Amicus Curiae*). The Court further stated that "legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id*. (internal quotation marks omitted).

More recently, in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-98, 802 (2017), the Court reaffirmed the predominance inquiry used in *Miller* and *Shaw II*. Additionally, *Bethune-Hill* made clear that "a conflict or inconsistency between the

enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering." *Id.* at 799. The Court explained that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Id.* at 798 (citation omitted). The *Bethune-Hill* Court recognized that "[t]raditional redistricting principles . . . are numerous and malleable," and that a State could use those factors "in various combinations" to form "a plethora of potential maps that look consistent with traditional, race-neutral principles." *Id.* at 799. "But," the Court held, "if race for its own sake is the overriding reason for choosing one map over others, race still may predominate." *Id.*

The *Bethune-Hill* Court also reaffirmed "the basic narrow tailoring analysis explained in *Alabama*," and stated that the "standard does not require the State to show that its action was actually necessary to avoid a statutory violation," and that "the requisite strong basis in evidence exists when the legislature has *good reasons* to believe it must use race in order to satisfy the Voting Rights Act." *Id.* at 801, 802 (internal quotation marks and citations omitted).

The Court decided *Cooper v. Harris* in the same term as *Bethune-Hill*. *Cooper* applied the "good reasons" strict scrutiny analysis described in *Bethune Hill* to yet another districting plan from North Carolina. 137 S. Ct. at 1469. The *Cooper* Court rejected the State's argument that a race-based district was necessary to comply with Section 2 of the

VRA and held that the plan failed to satisfy strict scrutiny. *Id.* at 1468-1472.

The latest ruling from the Court on racial gerrymandering is *Wis. Legis*. The Court clarified that to satisfy strict scrutiny the state had to have "'good reasons' for thinking that the Act *demanded* such steps." 142 S. Ct. at 1249 (citing *Cooper*, 137 S. Ct. at 1469). "That principle grew out of the more general proposition" that an institution making racial distinctions must have "a 'strong basis in evidence' to conclude that remedial action was *necessary*, '*before* it embarks on an affirmative-action program.'" *Id.* at 1249-50 (citing *Shaw II*, 517 U.S. at 910). The Court made clear that a state may not "adopt a racial gerrymander that the State does not, at the time of imposition, 'judg[e] necessary under a proper interpretation of the VRA.'" *Id.* at 1250 (citing *Cooper*, 137 S. Ct. at 1472).

B. Because Pennsylvania's Districting Plan "Goes Beyond" What the VRA Requires, it Cannot Be Serving a Compelling State Interest.

The Commission in Pennsylvania admitted that its plan went "beyond the minimum requirements of the Voting Rights Act" to create districts that provided provide more electoral influence for certain racial minorities. *See* Petition for Writ of Certiorari, at 6-10, citing, *inter alia*, Pet. App. 143a.

The Court should take this opportunity to make clear that a districting plan that deliberately "goes

beyond" the requirements of the VRA will fail strict scrutiny. There simply cannot be a compelling government interest in drawing more race-based districts than may be required by federal law. While the Court has assumed that compliance with the VRA can be a "compelling interest" when drawing such districts, (*see, e.g.*, *Cooper*, 137 S. Ct. at 1459), it has never given any indication that a state has such an interest in *exceeding* the requirements of the Act. To the contrary, the Court has insisted that the state must have "'good reasons' for thinking that the [VRA] *demanded*" such districts. *Wis. Legis.*, 142 S. Ct. at 1249 (citation omitted). "Extra" racial districts, beyond what the VRA requires, are, by definition, not "demanded" by the VRA. Race necessarily predominated in the deliberate creation of these districts.[2]

C. Because Pennsylvania's Districting Plan "Goes Beyond" What the VRA Requires, It Cannot Be Considered "Narrowly Tailored."

As discussed *supra*, this Court has assumed that a state can have a compelling interest in complying with the requirements of the VRA. Where that is the case, however, the plan must be narrowly tailored to

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[2] For the same reason the Court should reject any argument that the Commission's plan comports with the Equal Protection Clause because it took into account certain traditional districting principles. Race necessarily predominated in the deliberate drawing of race-based districts that were not required by compliance with the VRA. This remains true regardless of how the plan performs on a traditional redistricting principles scoresheet.

meet that interest. *See Shaw I*, 509 U.S. at 655. But an action cannot be "narrowly tailored" to fit within certain requirements if it "goes beyond" them; that is, in fact, the opposite of narrow tailoring. Therefore, Pennsylvania's plan, which "goes beyond" what the VRA may require, cannot satisfy the narrow tailoring requirement of strict scrutiny.

This reasoning is not new. In 1993, the *Shaw I* Court stated unequivocally: "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." 509 U.S. at 655. Subsequently, in *Miller*, the Court specifically stated that "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." 515 U.S. at 921. The *Miller* Court held that because the correct reading of section 5 of the VRA did not require the gerrymandered district, the plan was not narrowly tailored. *Id.* Likewise, in *Shaw II*, the Court determined that the plan at issue was not narrowly tailored because it did not actually remedy a VRA violation: "creating an additional majority-black district was not required under a correct reading of § 5" and the district "could not remedy any potential § 2 violation." 517 U.S. at 911, 916. Put another way, "there neither has been a wrong nor can be a remedy." *Id.* at 911, 916 (citation and internal quotations omitted). This Court's precedents do not allow a finding of narrow tailoring where a plan, like

Pennsylvania's, has gone beyond what the VRA requires.

III. The Division of Citizens Based on Race Causes Irreparable Harm to the Individual and to Society.

Racial segregation under the guise of redistricting is nevertheless segregation. This Court should make clear that sorting citizens into voting districts based on their race, regardless of what a government actor believes is necessary to satisfy the VRA or any other statute, is a violation of the Equal Protection Clause.

This Court recognized in its earliest opinions on racial gerrymandering the harm it threatens to inflict. It noted that allowing racial stereotypes to govern redistricting "may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract," *Shaw I,* 509 U.S. at 648. And it noted that "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Miller*, 515 U.S. at 911-12 (citations omitted).

Indeed, when this Court first determined that racial gerrymandering violated the Equal Protection Clause, it explained that such racialized decision-making "injures voters" because it "reinforces stereotypes and threatens to undermine our system of democracy by signaling to elected officials that they

represent a particular racial group rather than their constituency as a whole." *Shaw I*, 509 U.S. at 650. This system "emphasiz[es] differences between candidates and voters that are irrelevant in the constitutional sense," and "is at war with the democratic ideal." *Id*. at 648-49 (quoting *Wright v Rockefeller*, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting)). "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters." *Id*. at 657. Moreover, racial gerrymanders are bad democratic practice. They send a pernicious message to elected representatives: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group," which is "altogether antithetical to our system of representative democracy." *Id*. at 648.

This Court has compared race-based districting to segregation of "public parks, . . . buses, . . . and schools," and warned that we "should not be carving electorates into racial blocs." *Miller*, 515 U.S. at 912, 928 (internal citations and quotations omitted). That is because "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw I*, 509 U.S. at 643 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Racial gerrymandering, like all "[r]acial

classifications of any sort" cause "lasting harm to our society" because "[t]hey reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw I*, 509 U.S. at 657; *see United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part) ("An explicit policy of assignment by race may . . . suggest[] the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.").

There should be no question that race-based division of citizens for purposes of redistricting is a violation of the Equal Protection Clause, the "central purpose" of which "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw I*, 509 U.S. at 642 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). The same may be said of the Voting Rights Act.

This Court should grant certiorari and take the opportunity make clear that race-based districting hinders, not furthers, the goals of those provisions.

CONCLUSION

For these reasons, amici curiae respectfully request the Court grant the petition for certiorari.

Respectfully submitted,

T. RUSSELL NOBILE
Counsel of Record
JUDICIAL WATCH, INC.
P.O. Box 6592
Gulfport, MS 39506
(202) 527-9866
rnobile@judicialwatch.org

ROBERT D. POPPER
ERIC W. LEE
JUDICIAL WATCH, INC.
425 Third Street, SW
Suite 800
Washington, DC 20024
(202) 646-5172

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Attorneys for Amici Curiae