IN THE SUPREME COURT OF WISCONSIN
APPEAL NO. 2020AP1634-CQ

DEMOCRATIC NATIONAL COMMITTEE,

Petitioner,

v.

MARGE BOSTELMANN,

Respondent.

ON EMERGENCY PETITION FOR ORIGINAL ACTION
AND DECLARATORY JUDGMENT

NON-PARTY BRIEF OF TONY EVERS, GOVERNOR OF THE STATE OF WISCONSIN

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INTRODUCTION

The Court accepted certification of this question from the Seventh Circuit Court of Appeals ("the 7th Circuit"):

> Whether, under Wis. Stat. § 803.09(2m), the State Legislature has authority to represent the State of Wisconsin's interest in the validity of state laws.

In other words, did the Wisconsin Legislature ("the Legislature") give itself the power to act in court as if were the Executive?

The answer is "no." The Wisconsin Constitution vests executive power in the Governor, including the power and duty to "take care that the laws be faithfully executed." *Serv. Employees Internat'l Union (SEIU), Local 1 v. Vos*, 2020 WI 67, ¶¶ 1-2, 55, 393 Wis. 2d 38, 946 N.W.2d 35 (hereinafter, "*SEIU*"); Wis. Const. art. V, §§ 1, 4. Thus, "representing the State in litigation is predominately an executive function." *Id.* ¶ 63.

SEIU did not recognize any general legislative authority to represent the State's interests in court. Instead, to save Wis. Stat. § 803.09(2m) from being found facially unconstitutional, this Court interpreted it to permit the legislature to intervene in cases

"concerning the validity of a statute, at least where its *institutional interests* are implicated," *id.* ¶ 72 Accordingly, the 7th Circuit explained that "this statute [Wis. Stat. § 803.09(2m)], if taken as broadly as its language implies, violates the state's constitution, which commits to the executive branch of government the protection of the state's interests in litigation." *Democratic Nat'l Committee v. Bostelmann*, Nos. 20-2835 & 20-2844, Slip Op. at 5 (7th Cir. Sept. 29, 2020). [1]

This Court should certify to the 7th Circuit that its understanding of *SEIU* and the limitations of Wis. Stat. § 803.09(2m) are correct. There are three reasons why it should do so.

First, representing the State in court is "predominantly an executive function." Section § 803.09(2m) of the Wisconsin Statutes must continue to be given a limiting interpretation to render it constitutional, thereby rejecting the Legislature's claim that it can

[1] By doing so, the Court will also be rejecting the Legislature's insulting assertion that the 7th Circuit's interpretation of *SEIU* is a "train wreck." (Br. in Supp. of Pet. for Orig. Action at 3-5 filed in Case No. 20-AP-1629)

always exercise an executive power through a mandatory right to intervene on behalf of the State in cases that concern the validity of a statute.

Second, the *Bostelmann* case does not threaten or implicate any legislative interest or prerogative.

Third, the Legislature's interpretation of Wis. Stat. § 803.09(2m) as it seeks to apply it in *Bostelmann* would unduly burden and substantially interfere with the Executive Branch, which is already defending the State there.

ARGUMENT

I. The Executive Branch, not the Legislative, represents the state's interests in court.

SEIU recognized the Legislature's ability to intervene in cases concerning the validity of a statute to assert its institutional interests. But *SEIU* did not limit the core power of the Executive—whether exercised by the Governor or the Attorney General—to represent the State's interests in court. To avoid interpreting Wis. Stat. § 803.09(2m) as facially unconstitutional, *see State v. Horn*, 226

Wis. 2d 637, 645, 594 N.W.2d 772 (1999) ("intrusions by one branch on another's core powers are invalid under any circumstance"), and consistent with the plain statutory language, the Court in *SEIU* held allowing legislative intervention related to an institutional interest would be constitutional.

A. Litigation on behalf of the state is a core power of the executive branch.

In *SEIU*, this Court did not find that representation on behalf of the State is a power shared between the Executive and Legislative branches. Instead, it stated that "the attorney general's power to litigate on behalf of the State is not, **at least in all circumstances**, within the exclusive zone of the executive authority." 393 Wis. 2d 38, ¶ 63 (emphasis added) which means that there is litigation in which the Executive's representation of the State is a core power of that branch. *State* ex rel. *Friedrich v. Circuit Court for Dane County* similarly recognized that merely because two branches may have overlapping authority over an institution or practice, that does not necessarily mean that such overlapping authority constitutes an area

of shared power. 192 Wis. 2d 1, 20, 531 N.W.2d 32, 39 (1995). Applying that principle here, it remains an exclusive Executive function to represent the State **as a polity** in litigation.

The Governor is vested with the executive authority in Wisconsin, including the power to "take care that the laws be faithfully executed." Wis. Const. art. V, §§ 1, 4. This power is detailed by statute: the Governor informs the Attorney General when representation of the State is needed, *see* Wis. Stat. §§14.11(1), 165.25(1m), or employs special counsel "if in the governor's opinion the public interest requires such action," Wis. Stat. §14.11(2); *see also State* ex rel. *Reynolds v. Smith,* 19 Wis. 2d 577, 585-586, 120 N.W.2d 664, 669 (1963) (holding that Wis. Stat. § 165.25 and Wis. Stat. § 14.11 "must be construed together" and grant the Governor standing on behalf of the polity as *parens patriae*). Those portions of Wis. Stat. §§14.11 and 165.25(1m) originated with the enactment of the Constitution and are a strong statement of the Framers' intent. [2]

[2] *Compare* R.S.1849, c. 9, § 36 *with* Wis. Stat. § 165.25(1m); *see State v. Coubal*, 248 Wis. 247, 256, 21 N.W.2d 381 (1946) ("The enactment and its subsequent continuance to the present day is a constitutional interpretation which is

When an executive branch officer, be it the Governor or the Attorney General, defends the validity of a statute in Court, that executive officer represents the entire polity "act[ing] in a representative capacity **in behalf of the legislature** and the people of the state to uphold the constitutionality of a statute of statewide application." *City of Kenosha v. Dosemagen*, 54 Wis. 2d 269, 271, 195 N.W.2d 462, 464 (1972) (emphasis added); *State v. Woodington*, 31 Wis. 2d 151, 167, 142 N.W.2d 810 (1966) ("[t]he attorney general is a high constitutional executive officer …. In a broad sense he is the attorney for our body politic."). Similarly, this Court has long held that the power of the Governor to employ and direct special counsel in the stead of the Attorney General is exclusive. *Orton v. State*, 12 Wis. 509, 511–12 (1860).

Moreover, when the validity of a statute is challenged in a declaratory judgment action, the defendants are necessarily the executive officers because they have the authority to enforce or

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conclusive."); *compare* R.S.1849, c. 9, § 2 and *Orton v. State*, 12 Wis. 509, 511-12 (1860) *with* Wis. Stat. § 14.11(1), (2).

interpret the statutes and, as defendants, they "act in a representative capacity in behalf of **all persons** having an interest in upholding the validity of the statute... under attack**."** *White House Milk Co. v. Thomson*, 275 Wis. 243, 249, 81 N.W.2d 725, 728–29 (1957) (emphasis added); *see also Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 334, 81 N.W.2d 713, 717 (1957). Thus, the Legislature's interest in the validity of the statutes it has—and the Governor has approved—passed is fully represented by the executive. The Legislature has no further role in defending them.

B. The Legislature has no authority to represent the State in court.

The Legislature is not vested with the constitutional authority to defend the validity of statutes on behalf of the State. Nor is it granted a general, institutional interest in the validity of state statutes. At most, as this Court held in *SEIU*, the Legislature may intervene in cases when the statutes at issue implicate its own institutional interests.

Prior decisions have recognized that

> **by claiming an interest in defending its statutes against constitutional challenges, the Legislature conflates the roles of our government's separate branches**. Under our tripartite system of government, the legislature's role is to determine public policy by enacting legislation. In contrast, it is exclusively the judiciary's role to determine the constitutionality of such legislation, and **it is the executive's role to defend the constitutionality of statutes.**

Helgeland v. Wisconsin Municipalities, 2006 WI App 216, ¶ 14, 296 Wis. 2d 880, 903, 724 N.W.2d 208, 219, *aff'd*, 2008 WI 9, ¶¶ 10-14, 307 Wis. 2d 1, 745 N.W.2d 1 (emphasis added) (citations omitted). "The Legislature's interest in this respect is limited to establishing policy through the enactment of constitutional legislation." *Id.* ¶ 11; *see also Schuette v. Van De Hey*, 205 Wis. 2d 475, 480–81, 556 N.W.2d 127 (Ct. App. 1996) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them…").

The Legislature, its bodies, and membership do not even possess the right to testify to the courts on the legislative intent for a law on behalf of the State. *See Wis. S. Gas Co. v. Pub. Serv. Comm'n*, 57 Wis. 2d 643, 652, 205 N.W.2d 403 (1973) ("a legislator, let alone a private citizen, cannot testify as to what the intent of the legislature

was in the passage of a particular statute"). "Ex post facto explanations from legislators cannot be relied upon to determine legislative intent." *Responsible Use of Rural and Agr. Land v. PSC,* 2000 WI 129, ¶39 n.20, 239 Wis. 2d 660, 619 N.W.2d 888. Yet that is essentially what intervention by the legislature—including different legislatures beyond the one that passed the challenged statute—would allow.

SEIU certainly did not recognize a broad right of the Legislature to intervene in any litigation concerning the validity of a statute. *See* 393 Wis. 2d 38, ¶ 63. The Court had a narrower charge: to assess whether Wis. Stat. § 803.09(2m) was facially unconstitutional, i.e., whether the statute could be enforced "'under any circumstances.'" *Id.* ¶ 38 (quoting *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 13, 357 Wis. 2d 360, 851 N.W.2d 302). It found that the statute was constitutional, at least insofar as it permitted the Legislature to appear in cases that "implicate an institutional interest of the legislature." *Id.* ¶ 63. For example, "[t]he legislature may have an institutional interest in

litigation implicating the public purse or in cases arising from its statutorily granted right to request the attorney general's participation in litigation." *Id*. ¶ 10.[3]

The phrase "institutional interest" as related to the Legislature was used no less than thirteen times in the *SEIU* majority opinion. *Id*. ¶¶ 10, 63, 64, 67-69, 71-73. The decision did not recognize any other constitutional application of Wis. Stat. § 803.09(2m), or a general, institutional interest in litigating the validity of state statutes.

In fact, an affirmative holding here would not just be that Wis. Stat. § 803.09(2m) is constitutional on its face, per *SEIU*, but that it will always be constitutional in every circumstance. Such an interpretation would vastly expand the holding of *SEIU* beyond its logical breaking point. It would also undermine *SEIU*'s message

[3] In three cases cited in a footnote to *SEIU,* legislators participated in litigation in their individual capacities. 393 Wis. 2d 38, ¶ 72 & n.21. In *State* ex rel. *Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988), the Wisconsin Senate was also a party, but the court considered it unnecessary "to resolve questions of the apparent authority of those purporting to represent the legislature" because individual legislators also appeared "in their individual capacities." *Id*. at 435-36.

that the constitutionality of different applications of the statute must be decided on an as-applied basis. 393 Wis. 2d 38, ¶¶ 72-73. As-applied challenges are decided on the facts of each case, which inherently assumes some kind of fact-finding process. *Id*. ¶ 42 & n.13 ("Requiring a party to prove a law is unconstitutionally applied to the facts of a given case is precisely how as-applied challenges work."). That has not happened here.

The Seventh Circuit correctly observed that the Legislature does not have a right to represent the State in litigation under Wis. Stat. § 803.09(2m) or otherwise, except to the limited extent described in *SEIU*.

C. The Court should reject the Legislature's interpretation of Wis. Stat. § 803.09(2m) and related statutes.

The Court should reject any request by the Legislature, through this certification request from the Seventh Circuit, to allow the Legislature to act as a shadow Attorney General or Governor and act on behalf of the State when statutes are challenged in court.

First, Wis. Stat. § 803.09(2m) itself does not at all give **the Legislature** the right to intervene in cases on behalf of the State. It merely states that in certain cases—those challenging the constitutionality of a statute, arguing a statute is preempted by federal law, or otherwise challenging the validity of a statute—the legislature may intervene, and then only "as set forth under s. 13.365 . . ." Wis. Stat. § 803.09(2m).

The words of Wis. Stat. § 13.365 support the Court's interpretation in *SEIU* that the Legislature's ability to intervene in cases is limited to those cases concerning the Legislature's institutional interests. The statute provides in relevant part,

> 1) The committee on assembly organization may intervene at any time in the action **on behalf of the assembly**. . .
> 2) The committee on senate organization may intervene at any time in the action **on behalf of the senate**. . .
> 3) The joint committee on legislative organization may intervene at any time in the action **on behalf of the legislature**. . . .

Wis. Stat. § 13.365(1)-(3) (emphasis added); *see also id*. § 13.90(2).

The statute does not provide that any of those legislative committees may intervene in cases "on behalf of the State." Rather, they may intervene on behalf of their respective legislative bodies.

Notably, there is no situation where "the Legislature" may be a party at all, much less one that represents the State. Only, the "joint committee" is the proper plaintiff when the legislature has an interest in the litigation.

"The legislature is presumed to. . . have chosen its words carefully." *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 14, 256 Wis. 2d 859, 650 N.W.2d 81 (citations omitted). Accordingly, this Court should give effect to the statutory language and confirm that it only permits legislative bodies' intervention on behalf of themselves.

Second, it makes sense that the Governor and Attorney General, and not the Legislature, are entrusted with representing the State in litigation, because they are state-wide office holders who represent all the people of Wisconsin. Neither the Legislature's leaders nor the committee for the assembly, the committee for the senate, or the Joint Committee on Legislative Organization represent all the people of Wisconsin. Rather, the Court recognizes that "the Governor is given such an important role by our constitution in the

entire legislative process. . . [and] **is the only person involved in the legislative process that represents the people as a whole**." *State* ex rel. *Reynolds v. Zimmerman*, 22 Wis. 2d 544, 557–58, 126 N.W.2d 551, 558–59 (1964) (emphasis added).

Thus, the Legislature does not possess the constitutional and legal authority required to intervene on behalf of the State, and it would be wholly inappropriate for the Legislature— and especially committees within the Legislature—to claim they are capable of representing "the people as a whole."

Finally, rejecting the Legislature's interpretation avoids a separation of powers conflict—and not just with the executive branch. *In re Commitment of Hager*, 2018 WI 40, ¶ 31, 381 Wis. 2d 74, 911 N.W.2d 17 ("where we can reasonably adopt a saving construction of a statute to avoid a constitutional conflict, we do so"). If the Legislature is correct that Wis. Stat. § 803.09(2m) gives it a default or mandatory right to intervene in any case concerning the validity of a statute, or even those where no other government party is defending a state statute, this implicates the judicial power. Courts

have "inherent authority to ensure that 'the court functions efficiently and effectively to provide the fair administration of justice.'" *State v. Chvala*, 2003 WI App 257, ¶ 19, 268 Wis. 2d 451, 673 N.W.2d 401. This authority is undermined where the Legislature can grant itself a free pass to intervene in cases, without any judicial say in the matter. In fact, while Wis. Stat. § 803.09(2m) permits the Legislature to intervene "as of right," "intervention 'as of right' usually turns on judgment calls and fact assessments." *Helgeland*, 307 Wis. 2d 1, ¶ 41 (citing *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999)).

Similarly, courts determine matters of representation, including representation of state entities where the Attorney General is unwilling or unable to represent a party:

> [t]he regulation of the practice of the law is a judicial power and is vested **exclusively** in the supreme court. . . Representation of a client before this court is most certainly the 'practice of law.' *See* SCR 23.01(3)(defining the practice of law to include '[r]epresentation of another entity or person(s) in a court'). It is thus within the purview of our superintending authority to decide a question of representation.

Koschkee v. Evers, 2018 WI 82, ¶¶ 10-11, 382 Wis. 2d 666, 913 N.W.2d 878. The "inherent powers exclusive to courts are few in number. Under our system of separation of powers, those finite exclusive powers should be 'jealously guarded.'" *Barland v. Eau Claire Cty.*, 216 Wis. 2d 560, 599, 575 N.W.2d 691, 707 (1998).

All of this points against interpreting Wis. Stat. § 803.09(2m) as allowing a general right of legislative intervention or standing in cases concerning the validity of a statute. Instead, Legislative intervention must be determined on a case-by-case basis, so that courts can assess whether the Legislature meets the statutory and constitutional criteria for intervention—including, as appropriate, whether it has an institutional interest in the matter being litigated. The Legislature did not make that showing in *Bostelmann*.

II. The Legislature has not demonstrated an institutional interest in *Bostelmann*.

The Legislature does not have an institutional interest in participating in an appeal in *Bostelmann*.

As discussed above, Wis. Stat. § 803.09(2m) does not give the Legislature a general right of standing, and the Seventh Circuit found no individualized interest, either. Rather, the court properly held that "the interest at stake here. . . is not the power to legislate but the validity of rules established by legislation. All of the legislators' votes were counted; all of the statutes they passed appear in the state's code. Constitutional validity of a law does not concern any legislative interest." *Bostelmann*, Slip Op. at 3. "None of the appellants has suffered an injury to its own interests," including the legislature. *Id*. at 5.

The Legislature has no standing to represent the State in federal litigation when the State was properly represented by the executive: "The Court has **never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage.**" *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019). Only rarely has the court granted both

bodies of a Legislature collective standing to appeal in federal court, and these exceptions are restricted to gerrymandering cases. *Id.*

In *Bethune-Hill*, the Court discussed two statutory schemes which may grant a State Legislature standing to appeal a federal court order/judgment. First, "if the State had designated the House to represent its interests, and if the House had in fact carried out that mission, [then] the House could stand in for the State." *Id*. at 1951. Second, and not relevant to this case, if a redistricting order causes sufficient harm to the legislative body itself, it has standing to appeal. *Id*. at 1953.

The Seventh Circuit correctly interpreted Wis. Stat. § 803.09(2m) to provide no general legislative right of intervention, noting that the *SEIU* decision "puts Wisconsin in agreement with federal decisions such as *Arizona Independent Redistricting Commission*." *Bostelmann*, Slip Op. at 5. Instead, the power to "represent a general state interest in the validity of enacted legislation . . . belongs to Wisconsin's executive branch." *Id*.

Governor Evers exercised that power in *Bostelmann*: he appointed counsel to represent the State's interests. The assertion that "no sovereign party" was defending state law in *Democratic National Committee, et al. v Bostelmann, et al* (W.D. Wis. Case No. 20-cv-249); that the Wisconsin Elections Commission ("WEC") did not have the authority to defend state law; and that the election laws were not being defended are demonstrably false.

The WEC Commissioners were sued in their official capacity under 42 U.S.C § 1983. The United States Supreme Court has held that:

> [O]fficial-capacity suits, . . . "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, **for the real party in interest is the entity**.

Kentucky v. Graham, 473 U.S. 159, 165–66, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985) (citations omitted) (emphasis added).

The 7th Circuit recently applied that principle, stating, "[a]s long as the government entity receives notice and an opportunity to

respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Bridges v. Dart*, 950 F.3d 476, 478 n. 1 (7th Cir. 2020).

Recognizing that, the Governor chose to appoint special counsel to represent the WEC members, i.e. the interests of the "sovereign," after the Attorney General withdrew from representation in March 2020 due to a potential conflict of interest. The Governor did so under his authority to appoint counsel found in Wis. Stats. § 14.11(2). The WEC has been ably represented in the underlying federal case by Attorney Dixon Gahnz, a partner in the Madison law firm of Lawton & Cates, and his colleagues. *E.g.*, Notice of Appearance, Doc. #48, W.D.Wis. Case No. 20-CV-284 (Mar. 25, 2020). Pleadings filed by WEC's appointed counsel confirm they are opposing the plaintiffs' complaint. *E.g.*, Defs' Answer to the Amend. Compl., Doc. #192, W.D.Wis. Case No. 20-CV-284 (Apr. 13, 2020).

The Legislature incorrectly asserts *Bostelmann* is about the **validity** of a state election statute. In fact, it addressed whether the statute, as applied during a pandemic caused by an uncontrollable

virus, violated the 14th amendment rights of voters. After an evidentiary hearing, the district court found that a constitutional violation existed under these extraordinary circumstances, and issued a preliminary injunction to remedy it for the November 3, 2020 election only. The statute otherwise remains in effect.

Under those circumstances, and as the 7th Circuit correctly found, the Legislature has no statutory or institutional interest in the *Bostelmann* litigation.

III. The Legislature's intervention would unduly burden or substantially interfere with the Executive.

Assuming, *arguendo*, that the Legislature had some institutional interest in appearing in the *Bostelmann* appeal and its involvement did not violate the Executive's core powers, this is not the end of the story. The Legislature's involvement is still unconstitutional if it unduly burdens and substantially interferes with the Executive.

Even when two branches of government share a power, the separation of powers doctrine may be violated if one branch unduly

burdens or substantially interferes with another branch. *Martinez v. Dep't of Industry, Labor & Human Rels.*, 165 Wis. 2d 687, 696-97, 478 N.W.2d 582 (1992). In this situation, "[t]he concern is with actual and substantial encroachments by one branch into the province of another, not theoretical divisions of power." *Id.* (internal quotation marks and citation omitted).

In *SEIU*, the Court stated that "[w]here the legislature has appropriate institutional interests, legislative exercise of this shared power **in at least some cases** does not unduly burden or substantially interfere with the attorney general's executive authority." 393 Wis. 2d 38, ¶ 72 & n.21 (emphasis added). This inquiry is inappropriate in a facial challenge, *see id.*, but makes more sense in an as-applied challenge, addressing a specific application of the statute against the challenging party, *see id.* ¶ 37.

Here, the Legislative intervention in the *Bostelmann* appeal unduly burdens or substantially interferes with the Executive branch. Governor Evers appointed counsel to represent the WEC members in federal court, as explained above. "The suit in the

district court presented a case or controversy because the plaintiffs wanted relief that the defendants were unwilling to provide in the absence of a judicial order." *Bostelmann*, Slip Op. at 5. An order has since been issued interpreting Wisconsin election law and directing the WEC's conduct, and the Legislature apparently disagrees with the decision of WEC's counsel not to appeal that order. Essentially, the Legislature disagrees with the WEC defendants' litigation strategy and wants to micromanage litigation on behalf of the State.

That is impossible. The State cannot be represented by two parties, represented by separate counsel, with different litigation strategies. Doing so would create confusion among the Court and parties about who is representing the State's interests. Permitting the Legislature to assert that it is defending the State's interests when WEC is already doing so unduly burdens and substantially interferes with the ability of WEC and its counsel, as the named defendant, to make litigation decisions, such as motion practice, discovery, settlement, or, as in this case, appeal. This not only burdens the Executive's constitutional and statutory authority, but

the ethical obligations of counsel to fully and completely represent his or her client. The Court cannot endorse an interpretation of Wis. Stat. § 803.09(2m) that permits such conflict.

CONCLUSION

The Court should certify to the 7th Circuit that its understanding of *SEIU* and the limitations of Wis. Stat. § 803.09(2m) are correct.

Respectfully submitted this 5th day of October, 2020.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 4,287 words.

I further certify that I have submitted an electronic copy of this brief, which complies with the October 2, 2020 order of this court.

I further certify that all counsel of record in this matter were served via electronical mail with copies of this nonparty brief.

Dated this 5th day of October, 2020.

/s/ Lester A. Pines

Lester A. Pines