FILED, Clerk of the Supreme Court, 02 Dec 2024, **089641**

DONALD WHITEMAN, PATRICIA A. DOLOBACS, JUDITH A. ERDMAN AND 282 OTHER PETITION SIGNERS OF SOUTH SEASIDE PARK HOMEOWNERS & VOTERS ASSOCIATION, Plaintiffs, vs. TOWNSHIP COUNCIL OF BERKELEY TOWNSHIP; TOWNSHIP OF BERKELEY, JOHN DOES 1-10, ABC CORPS. 1-10, Defendants.	SUPREME COURT OF NEW JERSEY DOCKET NO. 089641 App. Div. Docket No.: A-003786-21 SAT BELOW: Hon. Marlene Lynch-Ford, A.J.S.C. ON APPEAL FROM: Superior Court of New Jersey Law Division, Ocean County Docket No.: OCN-L-2667-20 *CIVIL ACTION* SAT BELOW: Hon. Marlene Lynch-Ford, A.J.S.C.

BRIEF OF DEFENDANTS/APPELLANTS, TOWNSHIP OF BERKELEY AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF BERKELEY

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PRELIMINARY STATEMENT

This matter would be the first case to reach this court on municipal annexation since the legislature amended our Annexation statute, N.J.S.A. 40A:7-12, over 42 years ago. It would also be the first time the court has had the opportunity to address municipal annexation petitions since its decisions in West Point Island Civic Ass'n v Twp. Comm. Of Dover Twp, 54 NJ 339 (1969) and Ryan v Borough of Demarest 64 N.J. 593 (1974); cases decided more than 50 years ago, under a prior statute with a different burden of proof. It involves the petition of certain barrier island residents of Berkeley Township (an area known as South Seaside Park) who wish to leave the mainland portion of Berkeley Township, of which it has been a part of since the Township's incorporation in 1875, so they can become part of an adjoining barrier island community. In doing so, the petitioners would realize a substantial property tax savings while the remaining residents of Berkeley Township would be losing more than 10% of the township's tax ratable base.

As will be addressed herein, the purpose of the 1982 amendments was to make it harder for annexations to occur. The public policy advanced by the amendments was the legislature's intent to preserve historical boundaries by shifting the burden of persuasion, to "impose a heavier burden on the petitioners, thereby making deannexation more difficult, or perhaps, discouraging attempts to undertake the

effort at all." Avalon Manor Improvement Ass'n v Twp. of Middle, 370 NJ Super. 74, 91(App Div.) certif, denied, 182 N.J. 143 (2004).

As a result of this policy shift the statute was sparingly utilized for its first 20 years. However, since the property tax crisis expanded throughout the state and with state education funding fluctuating from year to year and literally from town to town, more and more residents have attempted to utilize this procedure to obtain property tax relief, resulting in a notable increase in annexation petitions during the last 20 years. See Bay Beach Way Realignment Committee v. Toms River, Docket No. A-5733-07T1 (2009); Citizens for Strathmere & Whale Beach v. Upper Township, Docket No. A-1528-10T4 (2012); Avalon Manor Improvement Ass'n v Middle Township 370 N.J. Super 73 (App. Div 2004); Seaview Harbor Realignment Committee v Egg Harbor Township 470 N.J. Super. 71 (App Div. 2021). Notably, as in this case, each of these more recent annexation matters involve waterfront areas, with higher property values, seeking to deannex from mainland municipalites where average property values are lower. There is certainly no reason to believe this increase in petitions will not continue.

Against this backdrop, the Township of Berkeley submits that the courts below have not only applied the incorrect standard of review to the township's decision to deny deannexation, but they have also expanded the due process standards which are nowhere to be found in the annexation statute and which are in

direct conflict with the limited case law which has been established to date. Even assuming these judicially created standards should be grafted onto the statute, the courts below erred in reversing the township's denial of the deannexation petition. The proper remedy is a remand consistent with the newly announced procedural standard.

Finally, Berkeley Township submits that the decision below is in direct conflict with the Appellate Division's decision in Seaview Harbor Realignment Committee, LLC v. Township Committee of Egg Harbor Township, 470 N.J. Super. 71 (App. Div. 2021), where the Appellate Division found that it was not arbitrary for a township to conclude that the potential loss of 2.4% of its tax base justified the denial of the deannexation petition. Here it is undisputed that Berkeley Township stands to lose more than 10% its tax base yet the court below found it was arbitrary and unreasonable of the governing body to reach a similar conclusion.

As a result of the decision below there is now both uncertainty and ambiguity facing local municipalities which must address similar petitions in the future. Municipalities and Petitioners alike are now left with unclear procedural requirements on deannexation petition hearings, as well as conflicting decisions regarding when deannexation is appropriately denied by a municipality.

The Township of Berkeley respectfully requests that this Honorable Court grant certification in this matter and clarify the requirements of a statute it has not previously addressed, to ensure consistency and stability in this growing and extremely consequential subject area.

STATEMENT OF THE CASE

The Township of Berkeley denied the Deannexation Petition of certain residents of South Seaside Park on September 21, 2020. This denial came after 38 hearings before the Berkeley Township Planning Board, during which the Board heard from various lay and expert witnesses presented by the Petitioners, followed by various Township officials and experts. At the conclusion of this process the Planning Board adopted a report recommending to the Berkeley Township Council that it deny the Petition for Deannexation due the significant injury deannexation would cause to Berkeley Township's economic, financial and social well-being. Mainly, the planning board and governing body both found that the significant tax increases to remaining residents of Berkeley Township as a result of deannexation created a substantial detriment to the municipality and deannexation was improper.

The Petitioners for Deannexation then filed an action in lieu of prerogative writ in the Superior Court of New Jersey, Ocean County under Docket No. L-2667-20. After two days of trial, the Honorable Marlene Lynch Ford, A.J.S.C. reversed the decision of the Township of Berkeley, finding, in part, that the Petitioners were

denied due process and that the Petitioners faced a detriment if deannexation were denied. Da460-462.

Thereafter, the Township of Berkeley appealed, arguing that the Township of Berkeley followed and exceeded the due process required under the applicable annexation statute. After the submission of briefs and oral argument, the Appellate Division affirmed the trial court decision, finding that the Township of Berkeley failed to provide adequate due process to the Petitioners. Pa035-036. This Petition for Certification follows.

LEGAL ARGUMENT

POINT I.

THE APPELLATE DIVISION IMPROPERLY FOUND THAT THE TOWNSHIP OF BERKELEY AND THE TOWNSHIP'S PLANNING BOARD FAILED TO AFFORD PLAINTIFFS ADEQUATE DUE PROCESS. [Pa026-028]

The statutes which govern annexation proceedings, N.J.S.A. 40A:12-4.1, are completely silent on what a planning board is required to do other than submit a report to the governing body on the impact of the proposed annexation within 45 days of a referral received by them from the governing body. N.J.S.A. 40A:7-12. Despite this clear and unambiguous statutory language, the courts below found that the Berkeley Township Planning Board violated the petitioners due process rights and determined that as a result, the governing body's decision to deny deannexation was itself arbitrary. It is important to note that this Appellate Division decision is the

first time, whether under the current statute or the predecessor deannexation statute, and accompanying case law, that the courts have created an actual due process requirement for the deannexation process.

Importantly, the New Jersey Legislature did not include a procedure or due process requirement in the statute governing deannexation. In fact, the Township submits that the due process afforded to these Plaintiffs went well beyond the due process ever contemplated by the Legislature when it created the annexation statute. The statute expressly states, in pertinent part:

> Prior to action on a resolution to consent or to deny the petition for annexation, the governing body of the municipality in which the land is located shall, within 14 days of the receipt of the petition, refer the petition to its planning board, which shall, within 45 days of its receipt, report to the governing body on the impact of the annexation upon the municipality. Action on a resolution to content to or deny the annexation shall be taken within 30 days of the planning board's report.
>
> [N.J.S.A. 40A:7-12.]

This is the only reference to any sort of due process required under the statute. Notably, the statute does not even require that the local planning board hold *any* hearings on the petition for deannexation. In fact, under the plain language of the statute, the local planning board could simply review the petition itself, not hear from any witnesses, and make a recommendation to the local governing body based on its own review. The statute certainly does not require a local planning board to hold 38 hearings, over several years, require all testimony be submitted under oath, allow

the petitioners to present lay and expert witnesses, permit cross-examination of every witness who testifies including any township employee or official. Nevertheless, that is exactly the due process the Berkeley Township Planning Board provided to the petitioners herein.

A municipal planning board serves various functions. The functions of a planning board "may be considered ministerial or administrative in nature, rather than quasi-judicial, as is true in the case of a zoning board." 36 N.J. Prac., Land Use Law § 12.11 (3d ed.). While hearings in front of a planning board under the Municipal Land Use Law require the same procedural due process considerations as those before a zoning board, "it should be kept in mind that the planning board functions, to a certain extent, as a political policy-making body, directing and controlling the general development of the municipality as a whole. This policy-making role is clearly evidenced in the make-up of the board's membership." Id.

In fact, a local planning board exercises several roles which are clearly legislative or policy making in nature and not quasi-judicial. This includes reviewing proposed zoning ordinances, which are referred to the planning board pursuant to N.J.S.A. 40:55D-26(a). In such instance the board has 35 days to submit a report or its recommendations on the ordinance back to the governing body. Notably this is only 10 days less than a board has to submit its report on

a proposed deannexation petition. A planning board also may be tasked by the governing body to prepare a municipal capital improvements program, N.J.S.A. 40:55D-29-30. Under N.J.S.A. 40:55D-31(b), if a municipality has adopted a master plan any local school board must submit its long-range facilities plan to the planning board for review. Likewise, pursuant to N.J.S.A. 40:55D-31(a) any governing body, local school board, housing authority, redevelopment agency, parking authority etc., before taking action necessitating the expenditure of public funds incidental to the location, character or extent of a project, must refer the matter to the local planning board for their review and recommendation and such entity cannot act until 45 days have elapsed after such referral. Once again, just as with the annexation statute, the legislature established a maximum of 45 days for the board to prepare a report but did not require any public hearings, sworn testimony, expert reports or cross examination. A local planning board is also responsible for the preparation and review of the Township's Master Plan. N.J.S.A. 40:55D-28, 89.

Based on these ancillary powers given to a local planning board by the legislature, it is certainly reasonable to assume the legislature had a similar process in mind when it adopted the 1982 amendments to N.J.S.A. 40:12-7, established no procedural requirements for the board to use and required their report be submitted back to the governing body within 45 days. As noted, the

Berkeley Township Planning Board held 38 meetings on the deannexation petition, they permitted sworn testimony, lay and expert testimony, expert reports and a full opportunity for the cross examination of every single witness who testified before the board. Unlike any previous case decided under the statute, the court found that even more due process is required.

A planning board is created by the governing body of the municipality and may consist of either seven (7) or nine (9) members. N.J.S.A. 40:55D-23(a). In Berkeley Township, the Planning Board consists of nine (9) members. Pursuant to N.J.S.A. 40:55D-23, the planning board membership consists of the following classes of members: Class I- the mayor or the mayor's designee; Class II-one of the officials of the municipality appointed by the mayor; Class III- a member of the governing body appointed by it; and Class IV- other citizens of the municipality to be appointed by the mayor. N.J.S.A. 40:55D-23.

The Legislature was well-aware of the functions, make-up and duties of a planning board when it adopted the new annexation statute in 1982. The Legislature specifically directed that such petitions should be referred to the local planning board to prepare and submit a report on annexation petitions. Had the Legislature intended for a completely independent fact-finding operation, it could have required that deannexation petitions be brought before a zoning board, whose members, by statute, may not hold any other elective or appointive position under the

municipality, NJSA 40:55D-69, some other separate body of uninterested and/or independent members, or perhaps the Courts. Instead, knowing the role in which a planning board plays and knowing the individual make up of planning board members, the Legislature intended for deannexation petitions to be referred to the local planning board made up of local residents and elected and appointed officials.

The role of a planning board in reviewing a deannexation petition is clearly administrative, legislative and ministerial in nature, rather than quasi-judicial. Notably, deannexation petitioners are not "applicants" before a planning board. Petitions do not fall within the provisions of the New Jersey Municipal Land Use Law. A deannexation petition is filed with the municipality, not the planning board. Per the statute, the governing body refers the petition to the planning board to determine the impacts deannexation will have on the municipality.

In reaching its determination that a due process violation occurred, the Appellate Division stated that the Board's expert, Mr. Wiser's, involvement in the proceedings was "tantamount to a court-appointed expert participating in strategy sessions and witness preparation meetings for a party appearing before a court[. . .]" Pa027. Comparing the Planning Board to a court of law under this statute, or the board's planning expert to a court appointed expert or special master is, respectfully, irrational under the provisions of the statute at issue. First, a planning board is permitted, pursuant to N.J.S.A. 40:55D-24 to employ or contract for the services of

experts. Certainly, the Legislature was well aware of this provision when they designated the planning board to review such petitions and issue a report thereon to the governing body. He is appointed, retained and paid by the planning board through the township itself. How is the planning board supposed to discharge its responsibility to report to the governing body on the impact of deannexation if its planning expert cannot discuss with township employees and officials whether statements made by the petitioners are true or not? How can the board make a recommendation without attempting to obtain that information? Certainly, petitioners would like nothing better than the record to contain only their testimony, only their expert opinions and only their legal arguments. That is not the boards role established by the legislature. The board is entitled to obtain as much information as it may deem necessary to make their report and they utilized their planning expert to assist them in obtaining it.

The Appellate Division decision in this case essentially requires a planning board to act as a completely neutral, judicial-equivalent body. Simply by the makeup of the planning board, this is not possible. If the Legislature intended for deannexation petitions to be brought before a non-interested, completely neutral body, it would have required deannexation petitions be filed with the Superior Court. It did not. Instead, the Legislature, acknowledging the individual local impact of

deannexation, chose the petitions to be heard in front of a political, policy-making local planning board.

In its decision regarding due process, the Appellate Division cited the doctrine of "fundamental fairness," as found in the case of Doe v. Poritz, 142 N.J. 1, 108 (1995). The case states:

> New Jesey's doctrine of fundamental fairness "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental *procedures* that tend to operate arbitrarily. [It] services, depending on the context, as an augmentation of existing constitutional protections or as an independent source of protection against state action."
>
> [Doe v. Poritz, 142 N.J. 1, 108 (1995) (citing State v. Ramseur, 106 N.J. 123 (1987).]

The Poritz Court went on to state:

> This unique doctrine is not appropriately applied in every case but only in those instances where the interests involved are especially compelling. "Fundamental fairness is a doctrine to be sparingly applied. It is appropriately applied in those rare cases where not to do so will subject the defendant to oppression, harassment, or egregious deprivation.
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> [Doe, supra, at 108. (citing State v. Yoskowitz, 116 N.J. 679 (1989) (Garibaldi, J., concurring and dissenting.)]

Importantly, the case cited by the Appellate Division regarding the doctrine of fundamental fairness not only states that the doctrine should be used sparingly and was used in the context of a quasi-criminal matter, but it ignores the Legislature's direct intent for a deannexation petition to be heard by the local planning board.

Unless the decision in this matter is reversed, every municipality which receives a deannexation petition will be hamstrung. The local planning board will most certainly be required to act as an independent, quasi-judicial body. Future petitioners will point out that in the Berkeley township case the Appellate Division found that 38 hearings weren't enough, that sworn testimony and cross examination of every witness is not enough, that local boards cannot utilize their own planners and every member of the planning board, including the mayor (Class I), Township official (Class II) and governing body member (Class III) must have no preconceived opinions or thoughts on the potential impact a deannexation may have on their municipality and its residents. The hallmark of a judicial or quasi-judicial proceeding is an adversarial one, where there are two sides, usually represented by counsel, who present their own testimony and experts and question their adversary's witnesses. Yet under this decision, such a quasi-judicial proceeding will have no adversary, only the petitioners will be permitted to present evidence and the boards experts will be prohibited from talking to any township officials to determine the impact the deannexation would have on the municipality. The municipality would be in a catch-22, if the board or township wish to challenge any fact or opinion of the petitioners on the record, that would mean they are in an adversarial position, apparently in opposition to the petition, have prejudged the matter and are biased. Such a result flies in the face of both the statutory language and the legislative intent

of the 1982 amendments. Respectfully, such a process was never contemplated or intended by the legislature. The Appellate Division here has essentially rewritten the statute and expanded due process requirements which have never existed previously.

POINT II.

IF THE DUE PROCESS REQUIREMENT FOR DEANNEXATION HAS BEEN EXPANDED, THE MATTER SHOULD BE REMANDED, NOT REVERSED.

With the above arguments in mind, it is clear that Berkeley Township, as well as many other municipalities who have heard deannexation cases, have exceeded the procedural requirements intended by the Legislature when it adopted the deannexation statute. The Township permitted the testimony of lay and expert witnesses, cross-examination and public participation over the course of 38 public hearings. Despite this, the Appellate Division has now established a new requirement; quasi-judicial, but apparently non-adversarial proceedings, without the board being able to utilize their own experts or investigate for themselves what the impact of deannexation would be on the municipality. The court has failed to establish how the board can possibly meet its statutory responsibilities under such a scenario however, in affirming the complete reversal of the governing body's decision on these new grounds, the court has deprived the township of the opportunity to decide the matter under the courts new guidelines. Respectfully, the proper remedy in this matter would be a remand to the Planning Board to abide by

this procedural requirements now in place. In In Re Matter of Corbo, this Honorable Court stated:

> The Appellate Division's remedy of reversing the ALJ's determination without remand prevents the City from arguing its case on the merits. The preferred remedy to rectify procedural errors at the administrative level is to remand the matter to allow for further evidentiary findings.
>
> [In re Matter of Corbo, 238 N.J. 246 (2019).]

In this case, while the Township submits it provided the Plaintiffs with a full and fair hearing and no due process violations occurred (which arguments are more detailed in the Township's Appellate Brief in this matter), even if there were such due process violations, the proper remedy is a remand to the Planning Board and not reversal of the governing body's decision. Any other result deprives the township of their right under the statute to make a threshold determination which may only be upset on appeal if they act in an arbitrary or unreasonable way.

POINT III.

THE LOWER COURTS FOUND THAT THERE WOULD BE A DETRIMENT TO THE TOWNSHIP OF BERKELEY, WHICH REQUIRES THAT THE PETITION FOR DEANNEXATION BE DENIED.

Under the N.J.S.A. 40A:7-12.1, the Plaintiffs were required to show that the refusal to consent to deannexation is detrimental to the economic and social well-being of a majority of the residents of the affected land **and** that the deannexation will not cause a significant injury to the well-being of the municipality. The Appellate Division conceded that Berkeley Township is set to

lose nearly 11% of its tax ratables, but somehow concludes that this does not create a detriment to the Township. Respectfully, the Appellate Division failed to consider the impact deannexation would have not only on the Township itself, but its residents through the increase in taxes for the school district. The loss of nearly 11% of the township's ratables will have a devastating impact on the remaining residents of Berkeley Township with an increase in the school tax rate. When considering the tax increase Berkeley residents are set to face should deannexation occur, the Plaintiffs own expert testified that the average residential property on the mainland would see a first-year post-deannexation School Tax increase of $121.18. Pa0235-244. This number accounts only for the increase in school taxes which the Appellate Division failed to consider. Notably, that increase is not an increase felt once, it is an increase felt and compounded on the remaining residents of Berkeley Township in perpetuity. The failure of the court to address the school tax impact is directly contrary to decisions of two other appellate panels under this statute. See Avalon Manor Improvement Ass'n, Inc., supra, 370 N.J. Super. at 88 (App. Div. 2004). See also Seaview Harbor Realignment Committee, LLC, supra at 81, 100-101 (App. Div. 2021).

So what does the next town which receives a deannexation petition do? Do they include the loss of school tax revenue as a potential impact or not? Respectfully; this court must settle this issue.

POINT IV.

THE APPELLATE DIVISION'S DECISION IN THIS MATTER IS IN DIRECT CONFLIT WITH ITS DECISION IN SEAVIEW HARBOR REALIGNMENT COMMITTEE V. EGG HARBOR TOWNSHIP.

Prior to the trial court's decision in this matter, the Appellate Division decided Seaview Harbor Realignment Committee, LLC v. Township Committee of Egg Harbor Township. The facts in Seaview Harbor are incredibly similar in this matter. In fact, in Seaview Harbor, the Egg Harbor Planning Board had the same expert planner, Mr. Wiser. Bias concerns were raised in that case, and the Court stated:

> As discussed, Judge Menendez concluded plaintiffs' bias claim lacked merit because plaintiffs received a full and fair opportunity to present their case to Egg Harbor, and Egg Harbor's decision to deny consent was fully supported by the record and entitled to deference. Further, judge denied plaintiffs' motion to supplement the record with the documents showing communication between Miller, Wiser and Marcolongo because it found that plaintiffs had cross-examined Wiser on these documents during the Planning Board Hearing. Thus, the relevant information was already in the record. Because Marcolongo served as the Board's attorney, and not a witness, plaintiffs did not cross-examine him.
>
> Judge Menendez's evidential ruling is not an abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). Plaintiffs' cross-examination of Wiser spanned five days and included extensive

> questioning on the information Miller provided to Wiser and whether Miller, or anyone else on behalf of Egg Harbor, had influenced his conclusions. We are satisfied from our independent review of the extensive record, that relevant information contained in the documents was already in the record, and the documents plaintiffs wishes to include would not have added any significant information material and consequential to any issue before us.
>
> With respect to Miller, he had served as Township Administrator for twenty-five years. He was the "chief administrative officer of the Township," and thus, had access to relevant information, to which he testified. While it would have been better practice for him not to have expressed his opinions on deannexation, nothing in the record suggested that he was motivated by any concern other than to save taxpayers the expense of litigation that he believes was highly unlikely to succeed in light of the facts and applicable standard.
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> [Seaview Harbor Realignment Committee, LLC v. Township Committee of Egg Harbor Township, 470 N.J. Super. 71, 104-106 (2021).]

Seaview Harbor and this case are similar, not only in the bias concerns raised at trial, but also in the physical make-up of the deannexing land. Like in this case, the Seaview Harbor section of Egg Harbor Township included a barrier island section of a mainland municipality. Due to its proximity to the water, property values and associated property taxes were much higher than on the mainland. As in this case, petitioners included arguments concerning distance to the mainland municipality, public parks, police and fire protection, as well as social and economic arguments as to both the petitioners and the municipality. The only startling difference in these two cases was the fact that in Seaview

Harbor, Egg Harbor Township stood to lose 2.3-2.4% of its tax ratables. Berkeley Township is facing the loss of 10.65% of its ratables. Yet, the Appellate Division found that Egg Harbor Township properly denied the petition for deannexation based on the economic detriment deannexation would cause to Egg Harbor Township. Likewise in Avalon Manor, another Appellate Division panel found that the Middle Township did not act arbitrarily when it denied a deannexation petition because the Township would lose 2.5-2.6% of its tax base. In this case, the Appellate Division found that the economic impact on Berkeley Township was not so detrimental as to justify deannexation. Respectfully, future petitioners and municipalities must have clear guidelines on what may or may not be considered arbitrary under the holdings of these three cases.

POINT V.

THE APPALLTE DIVISION ERRED IN FINDING THAT DEANNEXATION WOULD RESULT IN THE TOWNSHIP LOSING ITS RIGHT OF FEE SIMPLE OWNERSHIP TO THE OCEANFRONT BEACHES.

One of the most egregious statements made by the Appellate Division in this matter concerns the oceanfront beach owned and currently operated by the Township of Berkeley. The Court equated deannexation with the Township losing its ownership of the oceanfront beaches. Pa021. First, this issue was never addressed at trial or before the Appellate Division. The Township of Berkeley owns the

oceanfront in South Seaside Park in fee. Therefore, it is the property of the Township of Berkeley. Should deannexation occur (though the Township argues it should not), the Township would still have ownership over its property located in South Seaside Park. See N.J.S.A. 40A:12-4 and N.J.S.A. 40A:12-12 which permit municipalities to purchase and own property located in another municipality or even another state, respectively. Again, this issue was not addressed or briefed at the lower courts and this statement stands for the proposition that property owned by the Township (not simply a right-of-way) becomes the property of Seaside Park should Seaside Park agree to an annexation petition made by Plaintiffs.

CONCLUSION

For the foregoing reasons, the Township of Berkeley respectfully requests that this Honorable Court grant its Petition for Certification.

Respectfully submitted,

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DATED: July 18, 2024