

Citizens Groups incorporate by reference the following filings in this Cause: (1) Citizens Groups' Motion to Dismiss IKEC's Petition for Judicial Review and Complaint/Motion to Set Aside Order, with Brief in Support, filed on May 10, 2010; (2) Citizens Groups' Exhibits in Support of their Motion to Dismiss IKEC's Petition for Judicial Review and Complaint/Motion to Set Aside Order, filed on May 10, 2010; (3) Citizens Groups' Motion to Dismiss IKEC's Petition for Judicial Review and Amended Complaint to Set Aside Order and for Declaratory Judgment, with Brief in Support, filed on June 2, 2010; (4) Motion to Strike IKEC's Exhibits N, O, and P and associated allegations in IKEC's Petition for Judicial Review and Amended Complaint, with Brief in Support, filed on June 2, 2010; (5) Citizens Groups' Reply (Reply I) to IKEC's Response to Citizens Groups' Motion to Dismiss IKEC's Initial Petition/Complaint.

REPLY ARGUMENT

I. THIS CASE IS PARTICULARLY APPROPRIATE FOR DISMISSAL.

IKEC's request for relief in this review proceeding is truly extraordinary. After prevailing on the merits in OEA Cause No. 02-S-J-2989 below (the OEA Proceeding), IKEC invites this Court to disregard the binding ruling of the Indiana Court of Appeals in *Save the Valley v. IKEC*, 820 N.E.2d 677 (Ind. Ct. App. 2005), *aff'd on reh'g*, 824 N.E.2d 776, that Citizens Groups can rely on associational standing to obtain administrative review under AOPA, and requests that this Court (1) void intermediate OEA Orders deciding that Citizens Groups can rely on the doctrine of associational standing to obtain administrative review under AOPA; (2) direct OEA to vacate its final order granting IKEC summary judgment on the merits and instead dismiss the Proceeding; (3) void this Court's entry of remand that faithfully followed the *Save the Valley* decision; and (4) declare that as a matter of law Citizens Groups cannot rely on

associational standing to obtain administrative review, in direct opposition to the ruling in *Save the Valley*. IKEC's petition and complaints present only issues of law, and should be dismissed.

The *Save the Valley* ruling on associational standing generally allows trade, industry, and environmental associations to challenge, on behalf of their members, the actions of Indiana agencies. This ruling brought Indiana in line with federal law as well as with the prevailing view of the states. See *Save the Valley*, 820 N.E.2d at 680-81. IKEC now uses this proceeding to collaterally attack the *Save the Valley* ruling on associational standing. IKEC's petition for review of the OEA Orders, its Rule 60(B) complaint, and its declaratory judgment complaint are all geared toward the objective of avoiding and overturning the binding ruling in *Save the Valley*.

In their motions to dismiss, Citizens Groups move this Court to dismiss IKEC's action primarily for three reasons: (1) dismiss under Trial Rule 12(b)(1) because as a matter of law IKEC's challenge to the intermediate OEA Orders, after IKEC prevailed on the merits, is moot, and no exception to the mootness doctrine applies to this case (*e.g.*, no substantial public interest and no collateral consequences after *Save the Valley*); (2) dismiss under Trial Rule 12(b)(6) because as a matter of law IKEC is not "prejudiced" by the challenged OEA actions, as required by AOPA § 4-21.5-5-14(d), given that the intermediate OEA Orders had no effect on the substantive outcome of the OEA Proceeding in which IKEC prevailed; (3) dismiss under Trial Rule 12(b)(6) because the rulings by the Court of Appeals in *Save the Valley* are binding on this Court and on the OEA under the law-of-the-case and collateral estoppel doctrines, and no circumstances work against application of these doctrines.

IKEC's collateral attack on *Save the Valley* is appropriate for dismissal under either Trial Rule 12(b)(1) or 12(b)(6). IKEC cannot re-litigate the *Save the Valley* case, which is the authoritative and binding declaration of law on Citizens Groups' ability to rely on the doctrine of

associational standing to obtain administrative review under AOPA. IKEC had a full and fair opportunity to litigate this issue in the *Save the Valley* litigation, which ended in the denial of transfer by the Indiana Supreme Court. “One fair opportunity to litigate an issue is enough.” *Gilldorn Savings Ass’n v. Commerce Savings Ass’n*, 804 F.2d 390, 392 (7th Cir. 1986).

II. IKEC STILL HAS NOT DEMONSTRATED THAT IT IS “PREJUDICED” UNDER AOPA § 4-21.5-5-14(d) BY THE CHALLENGED OEA ORDERS.

AOPA § 4-21.5-5-14(d) states, “The court shall grant relief under section 15 of this chapter only if it determines that a person seeking judicial relief has been prejudiced by an agency action[.]” Irrespective of IKEC’s standing to initiate this review proceeding under AOPA § 4-21.5-5-3, IKEC must demonstrate that the OEA Orders in Cause -2989 caused it “prejudice” in order for this Court to grant IKEC’s requested relief. *See* Ind. Code § 4-21.5-5-14(a) (“The burden of demonstrating the invalidity of agency action is on the party to the judicial review proceeding asserting invalidity.”).

IKEC attempts to equate this “prejudice” requirement with the standard in AOPA § 4-21.5-5-3(a)(4) that a party has standing to bring an action for judicial review if it is “aggrieved or adversely affected” by the agency action. IKEC Response II, pp. 1-6, 70-71. IKEC previously argued that “prejudice” in AOPA § 4-21.5-5-14(d) is equivalent to “irreparable harm” in AOPA § 4-21.5-5-2(c)(1) (*see* Reply I, section II.C.). The Indiana legislature, however, intentionally used the term “prejudice” in § 4-21.5-5-14(d) rather than other available terms such as “aggrieved.” The dispositive question, then, is not whether IKEC satisfies the “irreparable harm” standard of § 4-21.5-5-2(c)(1) or the “aggrieved” standard of § 4-21.5-5-3(a)(4), but rather is whether IKEC satisfies the specific “prejudice” requirement in § 4-21.5-5-14(d).

Both Indiana and federal case law demonstrate that the requirement of “prejudice” in AOPA § 4-21.5-5-14(d) (as in the analogous § 706 of the federal APA) is tied to the harmless

error doctrine. An error is harmless in circumstances where the challenged action made no essential difference to the substantive outcome of the case, so long as the petitioner received a fundamentally fair hearing. Even if the OEA Orders denying IKEC's requests for dismissal of Citizens Groups' petitions were in error (which they were not), IKEC has not demonstrated that the OEA Orders made any difference to the substantive outcome of the OEA Proceeding in which IKEC prevailed (or for that matter, to the outcome in any other proceeding). And without a showing of this "prejudice," IKEC errs in contending that this Court can and should grant its requests for relief.

A. The § 4-21.5-5-14(d) "Prejudice" Requirement is Tied to the Harmless Error Doctrine, and to Satisfy the Requirement IKEC Must Show the Challenged OEA Orders Affected the Substantive Outcome of the OEA Proceeding.

Indiana and federal case law demonstrate that, in the context of AOPA § 4-21.5-5-14(d), the Indiana legislature intended the term "prejudiced" to be tied to the harmless error doctrine and to the question of whether the challenged agency action affects the substantive outcome of the case. Four bodies of case law point strongly in this direction.

First, Indiana case law is clear that judicial review courts must apply the concept of harmless error when reviewing agency actions. *See, e.g., Swingle v. State Employees' Appeal Comm'n*, 452 N.E.2d 178, 181 (Ind. Ct. App. 1983) ("The harmless error doctrine applies to judicial review of administrative hearings in Indiana."); *Dep't of Fin. Inst. v. Colonial Bank & Trust Co.*, 375 N.E.2d 285, 288 (Ind. Ct. App. 1978) ("In judicial appeals from administrative decisions, trial courts may not reverse for errors which are non-prejudicial and harmless."). The harmless error doctrine in Indiana's administrative context is analogous to the doctrine in the civil context as set forth in Indiana Appellate Rule 66(A) and Trial Rule 61, which relate harmless error to the lack of effect on "substantial rights." *See, e.g., Colonial Bank & Trust*, 375

N.E.2d at 288 (applying Indiana Trial Rule 61 to the analysis of agency’s procedural errors, and concluding that the agency’s failure to timely notify bank was harmless error); Indiana Trial Rule 61 (“The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”).

Second, the primary factor used to determine whether error affects the substantial rights of parties, and is thus harmful error, is whether the challenged action, if reversed, would likely change the substantive outcome of the proceeding. As explained in 6-61 Indiana Pleading and Practice P. 61.05 (LexisNexis, 2009):

What determines whether an error, or other occurrence, is harmful or harmless? In the language of Rule 61 proper relief should be granted where refusal to do so would be “inconsistent with substantial justice” or where the error or defect affect the “substantial rights” of the parties. As will appear more fully below, in the greatest number of cases, *the “substantial rights” of the parties will be deemed affected where it appears that the error or defect clearly did, or likely did affect the outcome.*

Emphasis added. *See also Kelley v. State*, 825 N.E.2d 420, 429 (Ind. Ct. App. 2005) (“[T]he statement in which Kelley implicated himself in dealing drugs in no way contributed to his conviction. Therefore, the admission of that information was harmless.”).

Third, Indiana courts tie the term “prejudice” to the harmless error doctrine when reviewing decisions of a lower court or tribunal. An early example is the Indiana Supreme Court’s opinion in *Kostanzer v. State ex rel. Ramsey*, 187 N.E. 337 (Ind. 1933), where the Court decided that the appellants were not “prejudiced” by the trial court’s ruling on appellants’ demurrer because the case had been fairly tried on the merits and the correct result reached:

It is not material whether the trial court erred in overruling appellants’ demurrer to appellee’s complaint. Appellants chose to go to trial on the merits and at the request of appellants the trial court made a special finding of facts. No question as to introduction of evidence is presented by appellant and nothing in the assignment of error challenges the sufficiency of the evidence to support the finding of facts. The policy of the law of our trial and appellate procedure is to

avoid reversals when a case has been tried fairly on its merits and the correct result reached even though the trial court may have erred in some particular ruling. This policy is given effect by express statutory enactment in respect to error in overruling demurrers. We recognize of course the limitation that the record must show that the merits of the cause have been fairly determined and that the erroneous ruling “did not affect the substantial rights of the adverse party.” *Miller v. Bottenberg et al.* (1886), 144 Ind. 312, 41 N.E. 804. An examination of the record in the instant case leaves no doubt that the parties and the trial court considered the issue to be simply whether the action of appellants in cancelling appellee’s indefinite contract was in accordance with the Teacher Tenure Act. The special answer of appellants presented this issue; the evidence was directed to it and the special finding of facts covered it. *We conclude that appellants were in no way prejudiced by the trial court’s ruling on the demurrer to the complaint.*

Id. at 340 (emphasis added). A more recent example of how prejudice, harmless error, substantial rights, and effect on the outcome are applied together is provided by *Roberts v. Cmty. Hosp. of Ind.*, 897 N.E.2d 458, 466 (Ind. 2008). In *Roberts*, the Indiana Supreme Court affirmed the trial court’s surprise consolidation of a trial on the merits with a hearing on a preliminary injunction motion. Such consolidation without notice is error as a matter of law but will be reversed only upon a showing of prejudice. *Id.* at 460. The Court concluded that “by failing to identify admissible and material evidence that would have changed the outcome on the merits, counsel’s post-hearing motion failed to show Dr. Roberts was prejudiced by the trial court’s surprise consolidation.” *Id.* at 467. The Court explained that the standard applied to determine prejudice – *i.e.*, whether the alleged error changed the outcome of the proceeding – “accords not only with the decisions of the federal courts, but also with traditional notions of harmless error,” citing to Trial Rule 61. *Id.* at 466. *See also* 6-61 Indiana Pleading and Practice P 61.06 (2009) (“As has been stated, in most cases a showing of harmful error requires a showing that the error or defect charged did cause or may well have caused the result, *i.e.* caused prejudice.”).

Fourth, the “prejudice” requirement in AOPA § 4-21.5-5-14(d) is equivalent to the “prejudicial error” requirement in the analogous federal APA § 706, which the U.S. Supreme Court has tied to the harmless error doctrine. APA § 706 states in relevant part:

The reviewing court shall–

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, *and due account shall be taken of the rule of prejudicial error.*

Emphasis added. In *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009), the U.S. Supreme Court recently interpreted the “prejudicial error” requirement in APA § 706 and concluded that this requirement is a harmless error rule. The Supreme Court explained:

The Attorney General’s Manual on the Administrative Procedure Act explained that the APA’s reference to “prejudicial error” is intended to “su[m] up in succinct fashion the ‘harmless error’ rule applied by the courts in the review of lower court decisions as well as of administrative bodies.” Dept. of Justice, Attorney General’s Manual on the Administrative Procedure Act 110 (1947) (emphasis added). And we have previously described § 706 as an “administrative law . . . harmless error rule.” *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 660, 127 S. Ct. 2518, 2530, 168 L. Ed. 2d 467, 483 (2007) (quoting *PDK Labs. Inc. v. United States Drug Enforcement Admin.*, 360 U.S. App. D.C. 344, 362 F.3d 786, 799 (CADDC 2004)). . . . We have no indication of any relevant distinction between the manner in which reviewing courts treat civil and administrative cases.

Id. at 1704.

In the context of AOPA § 4-21.5-5-14(d), a party is “prejudiced” by an “agency action” only if the agency action affects the substantive outcome of the case. IKEC has not and cannot satisfy the “prejudice” requirement of AOPA § 4-21.5-5-14(d) because the OEA Orders did not

affect the outcome of the OEA Proceeding – the OEA Orders denied IKEC’s intermediate motions to dismiss the case but IKEC ultimately prevailed on the merits of the Proceeding.

B. The AOPA § 4-21.5-5-14(d) “Prejudice” Requirement is Not Equivalent to the AOPA § 4-21.5-5-3(a)(4) “Aggrieved” Standard.

Contrary to IKEC’s assertions, the AOPA § 4-21.5-5-14(d) “prejudice” requirement for relief on judicial review is not equivalent to or synonymous with the § 4-21.5-5-3(a)(4) “aggrieved” standard for standing to initiate judicial review. The difference between these terms is illustrated by considering a similar Indiana judicial review provision. *See State ex rel. Baker v. Grange*, 165 N.E. 239, 240 (Ind. 1929) (stating that a legislative construction in one act of the meaning of certain words is entitled to consideration in construing the same words in another act). Indiana Code § 5-22-19-2, which applies to judicial review of public purchasing determinations, illustrates that the Indiana legislature understands the difference between the terms “prejudice” and “aggrieved.”

5-22-19-2. Judicial review – Filing of petition – Standard of review.

(a) A person *aggrieved* by a determination under this article *may file a petition for judicial review* of that determination in a court of appropriate jurisdiction.

(b) The court *shall grant relief only if* it determines that a person seeking judicial relief has been *substantially prejudiced* by a determination that is any of the following:

- (1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
- (2) Contrary to constitutional right, power, privilege, or immunity.
- (3) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right.
- (4) Without observance of procedure required by law.
- (5) Unsupported by substantial evidence.

Emphasis added. Subsection (a) of § 5-22-19-2 applies the term “aggrieved” as the standard for whether a person has standing to initiate judicial review, and subsection (b) applies the term “prejudiced” as the standard for whether the court can grant relief on review. Thus, the lawmakers do not consider the terms “prejudice” and “aggrieved” to be synonymous. *See*

Indiana Waste Sys. of Ind., Inc. v. Ind. Dep't State Revenue, 633 N.E.2d 359, 366 (Ind. Tax Ct. 1994) (“Every legislative word choice is presumed to have been used intentionally and to have meaning.”). Each particular use of these terms must be evaluated in the statutory context, and there is no indication that the legislature intended the § 4-21.5-5-14(d) “prejudice” requirement for relief to be synonymous with the § 4-21.5-5-3(a)(4) “aggrieved” standard for standing.

C. IKEC’s Basis for Standing Pursuant to AOPA § 4-21.5-5-3(a) is Not Relevant to the “Prejudice” Requirement of AOPA § 4-21.5-5-14(d).

IKEC argues that Citizens Groups claim that “IKEC is without standing to obtain judicial review of the OEA Orders.” IKEC Response II, p. 3. But Citizens Groups make no claim with respect to IKEC’s standing argument. IKEC has already argued that it has standing to initiate judicial review of the OEA Orders pursuant to AOPA §§ 4-21.5-5-3(a)(1) and (a)(2). *See* IKEC Petition/Complaint, p. 3, ¶6 (“IKEC qualifies for standing under Ind. Code § 4-21.5-5-3 because it is a person to whom the OEA Orders are specifically directed and because IKEC was a party to the agency proceedings that led to the OEA Orders.”). Citizens Groups do not claim that the OEA Orders are not directed at IKEC or that it is not a party to the OEA Proceeding. Citizens Groups do claim, however, that IKEC is not entitled to relief under AOPA § 4-21.5-5-14(d) because IKEC has not demonstrated that the OEA Orders made a difference to the substantive outcome of the OEA Proceeding or that IKEC did not receive a fair hearing in the OEA. IKEC’s claimed basis for its standing to initiate this judicial review proceeding has no relation to the “prejudice” requirement in AOPA § 4-21.5-5-14(d).

Moreover, IKEC’s claimed basis for its standing to initiate this review proceeding has no relation to the “aggrieved” standard for standing in AOPA § 4-21.5-5-3(a)(4). This “aggrieved” standard does not apply to IKEC in this case.

D. IKEC's Specific Contentions of "Prejudice" are Without Merit.

Perhaps because IKEC realizes it cannot show that the OEA Orders affected the outcome of the OEA Proceeding, IKEC contends it is "prejudiced" by the OEA Orders because the Orders, which denied IKEC's intermediate motions to dismiss Citizens Groups' petitions for OEA review, (1) resulted in IKEC spending more money on litigation in the OEA Proceeding to prevail on the merits, and (2) resulted in IKEC's having to litigate the merits of its permits in other OEA proceedings. IKEC's contentions are flawed for two reasons.

First, as argued above, the AOPA § 4-21.5-5-14(d) "prejudice" requirement has a specific meaning tied to harmless error. IKEC has not cited a single case holding, or even suggesting, that this "prejudice" requirement is met by having spent money litigating the merits of a case after an intermediate motion to dismiss is denied. Similarly, no authority suggests that simply requiring a party to litigate the merits of a case affects that party's "substantial rights."

Second, even if the AOPA § 4-21.5-5-14(d) "prejudice" requirement is subject to a collateral consequences exception (although IKEC has cited no authority for this contention), IKEC's argument would still fail because the OEA Orders do not have collateral consequences for IKEC. As Citizens Groups explained in their Reply I, OEA's conclusions of law in Cause - 4106 expressly state that the OEA's continued acceptance of petitions relying on associational standing is based on the binding effect of the *Save the Valley* Court's ruling on that issue. No OEA order, non-final or final, is the basis for OEA's current or future conclusions with regard to associational standing. If IKEC wants to try its luck and the patience of the judicial system by seeking interlocutory review under AOPA of the OEA ruling on associational standing in Cause -4106, that is IKEC's choice, though the claim should be easily disposed of because of the *Save the Valley* ruling.

The situation in *Ghosh v. Indiana State Ethics Comm'n*, 2010 Ind. LEXIS 411 (Ind. June 30, 2010), cited by IKEC, is easily differentiated from the situation facing IKEC here. Ghosh was subject to administrative collateral estoppel of a final decision of the State Employees Appeals Commission because he litigated his issue in the Commission and could have obtained judicial review had he petitioned correctly. In *Ghosh* there was no ruling of a higher court that bound the agency's decisions. Here, in contrast, the Court of Appeals' ruling in *Save the Valley* became the basis for OEA's rulings on associational standing. Moreover, the *Ghosh* Court applied collateral estoppel to a final decision of the agency, whereas only intermediate rulings of the agency, not subject to collateral estoppel, are at issue here.

IKEC also cites to *In re DES Litig.*, 7 F.3d 20 (2d Cir. 1993), for IKEC's contention that the OEA Orders have collateral consequences. IKEC's citation to *In re DES Litig.* is an interesting choice because the opinion is not favorable to IKEC. The appeal in *In re DES Litig.* "primarily concerns the ability of a party that prevails on the merits to obtain appellate review of adverse interlocutory rulings." *Id.* at 21. IKEC's petition and complaints are controlled by the general rule stated in *In re DES Litig.* that prevailing parties cannot appeal a judgment in their favor. *Id.* at 23; *see generally* E. H. Schopler, *Right of Winning Party to Appeal From Judgment Granting Him Full Relief Sought*, 69 A.L.R.2d 701, § I.2 Summary (West Group, 2010), stating:

[A] party who has fully prevailed in the court below is not entitled to ask for a reversal of the judgment or its modification . . . In particular, the prevailing party may not, by way of appeal, attack the reasons or conclusions of the court below . . . nor may he seek relief on theories or grounds other than those upon which the judgment in his favor is based, or urge defects in the proceedings on which the judgment is founded or in the prejudgment rulings of the trial court.

The *In re DES Litig.* Court described two exceptions to this general rule: if the judgment has collateral estoppel effect or if the party is aggrieved by some aspect of the judgment. IKEC claims both exceptions. IKEC Response II, p. 5 (although this general rule and its exceptions

typically apply to mootness or standing, IKEC appears to apply them to the “prejudice” requirement). Interestingly, the *In re DES Litig.* Court ruled that the appellant, who had prevailed on the merits below, could not use either of these exceptions, and the Court’s reasons for this ruling are applicable to IKEC’s situation.

The Second Circuit first ruled that the interlocutory rulings did not have collateral estoppel effect because the trial court’s judgment was “not dependent upon the interlocutory rulings in favor of the [appellee].” 7 F.3d at 23. Re-litigation of an issue in a second action is precluded “only if the judgment in the prior action was dependent upon the determination made of the issue.” *Id.* Similarly, IKEC is petitioning to vacate the OEA’s final judgment so it can be replaced with dismissal of Citizens Groups’ petitions, yet the OEA’s final judgment did not depend on its intermediate rulings in the OEA Orders. Moreover, as discussed above, the OEA’s continued acceptance of associational standing does not depend on the OEA Orders but rather on the binding effect of *Save the Valley*, an additional reason to reject IKEC’s claim of a collateral consequences exception. The *In re DES Litig.* Court also rejected the appellant’s contention that he was aggrieved by the trial court’s judgment. The Second Circuit saw through appellant Boehringer’s claim on appeal after winning on the merits in the trial court:

Boehringer’s appellate brief does not ask us to vacate any portion of the judgment; what Boehringer seeks is a reversal of the interlocutory rulings. Though Boehringer suggested at oral argument that it wanted the judgment vacated, that contention is something of a ploy. Boehringer does not want to abandon the outcome that dismisses the plaintiffs’ claim with prejudice. It verbalizes a request to vacate the judgment only to provide a basis to invite us to review the interlocutory rulings with which it disagrees. It is unlikely that, if we accepted the invitation and disappointed Boehringer by upholding Judge Weinstein’s interlocutory rulings, Boehringer would be content with a remand that afforded the plaintiffs a renewed opportunity to prosecute their claims.

Id. at 25. *In re DES Litig.* illustrates the unproductive machinations of an appellant that requests a court to review intermediate rulings of a tribunal below where the appellant prevailed on the

merits and the tribunal's final judgment does not depend on the intermediate rulings, which is the case for IKEC. *In re DES Litig.* also demonstrates the correct fate of such an appeal. *Id.* at 25 (appeal dismissed).

III. THE COURT OF APPEALS' RULING ON ASSOCIATIONAL STANDING IN *SAVE THE VALLEY* IS BINDING UNDER THE LAW-OF-THE-CASE AND COLLATERAL ESTOPPEL DOCTRINES.

IKEC devotes Sections III and IV of Response II (pp. 22-64) to its contention that the ruling in *Save the Valley* on associational standing has no binding effect on this Court or the OEA. IKEC's contention ignores the well-established law pertaining to the binding effect of rulings material to jurisdictional decisions, and is an attempt to create an alternative forum for appealing *Save the Valley*. IKEC did appeal *Save the Valley*, however, and the Supreme Court denied transfer. This Court should reject IKEC's request to re-litigate the Court of Appeals' ruling on associational standing.

Citizens Groups begin their reply to IKEC's contention with a clarification of two issues. First, although law of the case and collateral estoppel are related doctrines, they are not identical. *Save the Valley* was binding law of the case in the OEA Proceeding and is binding in this judicial review proceeding. *See Ind. Farm Gas Prod. Co., Inc. v. S. Ind. Gas & Elec. Co.*, 662 N.E.2d 977 (Ind. Ct. App. 1996) (applying law of the case to ruling on appeal after remand to agency). Collateral estoppel binds OEA in other cases, such as in the separate OEA Cause -4106. Even if this review proceeding is deemed a separate action from *Save the Valley*, the Court of Appeals' decision would be binding in this review proceeding under the collateral estoppel doctrine.

Second, any use Citizens Groups make of collateral estoppel is defensive, not offensive as IKEC wrongly claims. IKEC is the plaintiff in this action, and more importantly, it was also the plaintiff in the interlocutory action that gave rise to the *Save the Valley* ruling on

associational standing, which was adverse to IKEC. *See Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165, 168 fn. 4 (Ind. 1996) (ruling that Hayworth invoked “defensive” collateral estoppel because object of estoppel claim was “in a position analogous to that of a plaintiff seeking a form of relief that was previously denied to it as a plaintiff in another judicial proceeding”); *Small v. Centocor*, 731 N.E.2d 22, 28 (Ind. Ct. App. 2000) (“Where a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost, the use has been termed ‘defensive’ collateral estoppel.”). Collateral estoppel prevents IKEC from now re-litigating the ruling in *Save the Valley* that Citizens Groups can rely on associational standing, after IKEC initiated the *Save the Valley* litigation and ultimately lost on the associational standing issue.

In Parts A and B, respectively, Citizens Groups briefly show that all of the elements of the law-of-the-case doctrine and the collateral estoppel doctrine are satisfied here and thus that *Save the Valley* is binding in this judicial review proceeding and on the OEA.

A. The Court of Appeals’ Ruling on Citizens Groups’ Ability to Rely on Associational Standing to Obtain Administrative Review is Law of the Case.

The law-of-the-case doctrine as relevant here mandates that when an appellate court decides a legal issue, the trial courts are bound by that determination at different stages of the same case involving substantially the same facts. *Pinnacle Media, L.L.C. v. Metro. Dev. Comm’n of Marion County*, 868 N.E.2d 894, 901 (Ind. Ct. App. 2007); *In re Change to Established Water Level of Lake of Woods in Marshall County*, 822 N.E.2d 1032, 1042 (Ind. Ct. App. 2005); *Ind. Farm Gas*, 662 N.E.2d at 981. Indiana has recognized a narrow exception in cases where the issue is not conclusively decided and is not the only possible construction of the opinion. *Hanson v. Valma M. Hanson Revocable Trust*, 855 N.E.2d 655, 662 (Ind. Ct. App.

2006). Indiana, however, “has applied this doctrine in its strictest sense and has resisted creating exceptions to the strict application of the doctrine.” *Ind. Farm Gas*, 662 N.E.2d at 981.

The law-of-the-case doctrine is mandatory when applied by a lower court to a decision of a higher court, as in this review proceeding. *See Hopkins v. State*, 782 N.E.2d 988, 990 (Ind. 2003) (“The law of the case doctrine mandates that an appellate court’s determination of a legal issue binds the trial court and ordinarily restricts the court on appeal in any subsequent appeal involving the same case and relevantly similar facts.”); 3-30 Moore’s Manual–Federal Practice and Procedure § 30.30 (stating that law-of-the-case doctrine is discretionary only when applied by a court to its own prior decisions or to the decisions of a coordinate or equal court).

The Court of Appeals’ ruling on associational standing in *Save the Valley* is the law of the case. As such, the ruling was binding on the OEA in the OEA Proceeding and is binding on this Court on judicial review of that OEA Proceeding. Even if this Court disregarded *Save the Valley* and granted IKEC’s requested relief, OEA still would be bound to follow *Save the Valley* on remand. The *Save the Valley* Court conclusively decided the issue of whether Citizens Groups can rely on associational standing to obtain administrative review, the Court of Appeals expressly determined that the issue was necessary to the judgment, and no new facts or law address or compromise the *Save the Valley* decision. The Court of Appeals’ statement of its decision is clear and allows only one construction with regard to associational standing:

[B]ecause the Appellants had associational standing to seek administrative review and the OEA had jurisdiction over the case, it necessarily follows that the trial court was without subject matter jurisdiction and that the Appellees must comply with AOPA procedures for seeking judicial review.

Save the Valley, 824 N.E.2d at 776 (opinion on rehearing).

B. The Court of Appeals' Ruling in *Save the Valley* on Citizens Groups' Ability to Rely on Associational Standing Has Collateral Estoppel Effect.

Collateral estoppel (issue preclusion) generally “operates to bar a subsequent relitigation of the same fact or issue where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in the subsequent lawsuit.” *Sullivan v. Am. Casualty Co.*, 605 N.E.2d 134, 137 (Ind. 1992). Collateral estoppel is relevant to two of IKEC’s arguments. First, IKEC argues that there still is a live controversy in this case because the OEA Orders in Cause -2989 required OEA to accept associational standing in the separate Cause -4106. In other words, IKEC argues that OEA is bound by its prior rulings in the OEA Orders under the collateral estoppel doctrine. However, as discussed above (*see* Section II.D), the OEA Orders do not have collateral consequences because (1) OEA has expressly stated that its continued rulings on associational standing do not depend on the OEA Orders but rather on the binding effect of *Save the Valley*; and (2) re-litigation of an issue in a second action is precluded “only if the judgment in the prior action was dependent upon the determination made of the issue,” *In re DES Litig.*, 7 F.3d at 23, and OEA’s final judgment did not depend on its intermediate rulings in the OEA Orders. The OEA Orders in Cause -2989 do not preclude IKEC from seeking interlocutory review of the OEA ruling on associational standing in Cause -4106, though the claim should be easily disposed of because of the *Save the Valley* ruling.

Second, IKEC argues that OEA is not bound by the ruling on associational standing in *Save the Valley* under the collateral estoppel doctrine. (IKEC’s citation to the Restatement 2d of Judgments, § 20 is inapplicable because § 20 is relevant only to “claim preclusion” where dismissal of a claim is based on alternative determinations; the applicable doctrine here is “issue preclusion” (*i.e.*, collateral estoppel) applied to a jurisdictional determination.) Citizens Groups

have already argued in their filings in this review proceeding that the Court of Appeals' ruling on associational standing has collateral estoppel effect for the following reasons:

(1) The Court of Appeals had jurisdiction to determine its own and the trial court's jurisdiction, along with any issue necessary for that determination.

(2) The Court of Appeals decided that its ruling on Citizens Groups' ability to rely on associational standing was necessary and material to its jurisdictional determination (as expressly stated by the Court of Appeals on rehearing).

(3) Any issue material to the jurisdictional determination and actually decided, even when intertwined with a substantive claim, has collateral estoppel effect. *See, e.g., Orlando Residence, LTD v. GP Credit Co., LLC*, 553 F.3d 550, 556 (7th Cir. 2009) ("If a court of competent jurisdiction . . . resolves a jurisdictional issue in a full and fair hearing, that resolution is entitled to the same collateral estoppel effect that a ruling on a substantive issue would be entitled to."); *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000) ("Perry cannot escape the preclusive effect of Perry I by the rote intonation that this is not a judgment on the merits. The determination that Perry lacked standing in Perry I precludes relitigation of the same standing argument in Perry II."); *see generally* E. H. Schopler, *Res Judicata Effect of Judgment Dismissing Action, or Otherwise Denying Relief, for Lack of Jurisdiction or Venue*, 49 A.L.R.2d 1036 (West Group, 2010), stating:

In some cases it has been stated that where a cause of action has been dismissed for want of jurisdiction, the parties are left in the same position as if no suit had ever been brought, and that the dismissal is not res judicata of anything. But this statement of the law is much too sweeping to be correct. [§ 2]

[I]t has been generally held that a judgment for defendant based on lack of jurisdiction is a conclusive adjudication of questions material to the court's jurisdiction and actually decided by the judgment. [§ 6a]

(4) IKEC’s petitions and complaints argue a single issue in this review proceeding – whether Citizens Groups can rely on associational standing to obtain administrative review – and that issue was litigated and conclusively decided in *Save the Valley*.

Citizens Groups now address specifically the “identity of issues” and “full and fair opportunity to litigate” arguments in IKEC’s Response II.

1. The issue for which IKEC seeks relief is identical to the issue decided in *Save the Valley*.

IKEC argues that the “issues” it raises in this review proceeding are “not identical” to the issue of associational standing decided in *Save the Valley*. IKEC’s request for relief in this review proceeding reveals otherwise. For example, IKEC’s declaratory judgment action requests from this Court the following declaration:

WHEREFORE, IKEC respectfully prays that this Court order, adjudge, and declare as follows:

Defendants are “persons” within the meaning of IND. CODE §§ 4-21.5-1-12 and the remainder of IND. CODE §§ 4-21.5. The statute and only the statute, defines the class of persons who can seek administrative review of agency action. The statute treats all persons identically and does not contain any special provisions for membership corporations or associations. Whether a person is entitled to seek administrative review depends upon whether the person is “aggrieved or adversely affected” (as provided in IND. CODE §§ 4-21-5-3.7(a)(1)) by the administrative agency’s decision, and the rules for determining whether the person has “standing” to file a lawsuit do not apply.

An organization or membership association does not satisfy the requirement of IND. CODE §§ 4-21.5-3-7(a)(1)(B) by stating facts that demonstrate that its members are aggrieved or adversely affected by the order of which review is sought. In order to invoke administrative review under Indiana’s Administrative Orders and Procedures Act, a petitioner seeking review under IND. CODE §§ 4-21.5-3-7(a)(1)(B) must petition for review in a writing that states facts demonstrating that “the petitioner is aggrieved or adversely affected by the order” of which review is sought. *Id.* Allegations by an unaffected association that members of the association (or any persons than the petitioner itself) are aggrieved are not sufficient to satisfy the statute.

IKEC Petition and Amended Complaint, filed May 17, 2010, p. 54. This requested declaration represents the identical issue litigated in *Save the Valley*, notwithstanding IKEC's calculated omission of the term "associational standing." IKEC's arguments in its petition also reveal the true nature of its request for relief. For example:

The Indiana Supreme Court's decision in *Huffman v. Indiana Office of Env'tl Adjudication*, 811 N.E.2d 806, 808, 809, 812 (Ind. 2004) says expressly that "the judicial doctrine of standing" (which includes "associational standing") "does not apply" to administrative proceedings under the Statute. See ¶¶ 42-56 below. Because the OEA Orders are inconsistent with these cases, they are not in accordance with law and should be vacated.

IKEC Petition, p. 7. IKEC cannot hide that the sole issue in this review proceeding is whether Citizens Groups can rely on associational standing to obtain administrative review under AOPA, the same issue decided in *Save the Valley*.

IKEC's list of so-called "issues" in its Response II (starting at p. 40) are not issues as that term is used in the collateral estoppel doctrine. Rather, IKEC has simply reworded the various arguments and implications pertaining to the associational standing issue. These listed arguments are not independently significant as separate or new issues.

With respect to IKEC's listed arguments that reference the 2006 and 2008 OEA Orders, any claim by IKEC that the challenged OEA Orders present issues for review separate from the issue decided in *Save the Valley* lacks merit. The 2003 Order ruled that Citizens Groups could rely on associational standing to obtain administrative review under AOPA, and the 2006 and 2008 Orders denied IKEC's repetitive requests to change OEA's ruling on that same issue.

Specifically, the June 23, 2003 OEA Order denied IKEC's motions to dismiss:

Order Denying Motions To Dismiss

72. Because OEA has subject matter jurisdiction over this case and because Petitioners have met the requirements of Ind. Code § 13-15-6-2 through their amended petition, IKEC's first motion to dismiss is hereby DENIED.

73. Because Petitioners have alleged facts sufficient to confer associational standing in their amended petition for review, IKEC's second motion to dismiss is hereby DENIED.

OEA Order, June 23, 2003, p. 12. OEA's March 24, 2006 Order denied IKEC's motion to reconsider the June 23, 2003 Order and another motion to dismiss Citizens Groups' petition:

Order Denying Motion to Reconsider and to Dismiss and Motion to Dismiss

116. Because there has been no change in controlling law or any other special circumstance since the OEA Order of June 23, 2003 that would warrant reconsideration of that Order, and because the Court of Appeals opinion in *Save the Valley* remains the binding law of the case in this litigation with respect to the OEA's jurisdiction over Citizens Groups' amended petition and Citizens Groups' ability to rely on associational standing to meet the AOPA standing requirement for administrative review, IKEC's motion to reconsider and to dismiss is hereby DENIED.
117. Because the OEA has subject matter jurisdiction over this case and because Citizens Groups' initial petition was sufficient with respect to the requirements of both Ind. Code § 4-21.5-3-7(a) and Ind. Code § 13-15-6-2 to invoke the OEA's jurisdiction necessary to authorize amendment of the initial petition, and because Citizens Groups' initial and amended petitions are prosecuted in the names of the real parties in interest, IKEC's motion to dismiss is hereby DENIED.

OEA Order, March 24, 2006, p. 24. Finally, OEA's August 28, 2008 Order denied IKEC's further motions to reconsider OEA's prior conclusions on Citizens Groups' ability to rely on associational standing, pursuant to Trial Rule 53.4(B) (stating that unless a repetitive motion or motion to reconsider is ruled upon within five days it shall be deemed denied). The dispute in the current review proceeding is precisely the same dispute over Citizens Groups' ability to rely on associational standing that began with OEA's June 23, 2003 Order, that was decided in *Save the Valley* in 2005, and that IKEC carried over to the 2006 and 2008 OEA Orders.

The remaining items in IKEC's list are simply arguments and rewordings of arguments pertaining to the issue of associational standing decided in *Save the Valley*. The *Save the Valley*

decision necessarily rejected, explicitly or implicitly, all of the arguments IKEC now presents as “issues.”

Any legal issue can be dissected into a multitude of arguments and rewordings of arguments, but each argument or rewording is not a separate “issue” for purposes of collateral estoppel. Where the issue is one of law, new arguments may not be presented to obtain a different determination of an issue. *See* Restatement of the Law 2d, Judgments, 1982, § 27(c), Issue Preclusion–General Rule. Otherwise, the previously litigated “issue” would be a moving target as parties thought up new angles relevant to the issue, and the policy of finality served by collateral estoppel would be undermined. To advance the policy of issue preclusion, the “issue” must not be defined too narrowly. *See* Restatement of the Law 2d, Judgments, 1982, § 27(c), Illustration 4. Too narrow a definition of the “issues” resolved increases the risk of inconsistent results, invites re-litigation of disputes already decided, and threatens the policy of finality. The Courts will not re-open and re-litigate the issue of Citizens Groups’ ability to rely on associational standing to obtain administrative review, an issue conclusively decided by the Court of Appeals, simply because IKEC crafts a new reason, or rewords an old reason, why that issue should be decided differently.

2. IKEC had a full and fair opportunity to litigate the issue of associational standing decided in *Save the Valley*.

IKEC contends that it did not have “a full and fair opportunity to litigate the issue of the correctness of the 2003 OEA Order.” IKEC Response II, p. 61. This contention lacks merit. The 2003 OEA Order adjudicated the question of Citizens Groups’ ability to rely on associational standing to obtain review. IKEC expressly litigated that issue in *Save the Valley*. Indiana case law is clear that a party has been afforded a “full and fair” opportunity to litigate an issue irrespective of whether particular arguments on that issue were waived or not appealed by

the party. *See, e.g., Ghosh*, 2010 Ind. LEXIS 411 at *3, 7, 12-13 (ruling that Ghosh had “a fair opportunity to litigate the issue of his termination” and is collaterally estopped from seeking review of that termination, even though his initial application for judicial review was dismissed for failure to timely file agency record); *Small v. Centocor*, 731 N.E.2d 22, 28 (Ind. Ct. App. 2000) (ruling that “[t]he trial court properly entered summary judgment on the basis of collateral estoppel” because “[a]lthough Small was afforded a full and fair opportunity to litigate these issues in the prior action, he failed to avail himself of that opportunity”); *Studio Art Theater of Evansville, Inc. v. Montrose*, 76 F.3d 128, 131 (7th Cir. 1996) (“Where a party is represented by counsel, had ample opportunity to present evidence and exhibits, and also had appellate review, he is presumed to have had a full and fair opportunity to litigate.”). Indeed, the record of *Save the Valley* amply demonstrates the vigor of IKEC’s litigation effort and the openness of the Courts to consideration of IKEC’s claims. IKEC’s current choice to reframe its arguments on why Citizens Groups cannot rely on associational standing to obtain administrative review does not mean that IKEC was not given a full and fair opportunity to argue the issue in 2003-2005.

In particular, the Court of Appeals expressly considered *Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806 (Ind. 2004), in the initial *Save the Valley* opinion. *See* 820 N.E.2d at 679. The *Save the Valley* Court also ruled on rehearing that IKEC waived untimely arguments. 824 N.E.2d at 776. Yet IKEC had a full and fair opportunity to litigate its case, irrespective of the brevity of its argument interpreting *Huffman* or its waiver of untimely arguments. Furthermore, IKEC had every opportunity to argue in its petition for transfer to the Indiana Supreme Court that the Court of Appeals in *Save the Valley* did not adequately consider *Huffman* or that the Court of Appeals lacked jurisdiction to rule on Citizens Groups’ ability to rely on associational standing. Finally, it hardly requires mention that the Supreme Court’s

denial of transfer does not mean that IKEC did not have a full and fair opportunity to litigate the issue of associational standing.

IV. IKEC’S DECLARATORY JUDGMENT ACTION VIOLATES THE EXCLUSIVITY PROVISION OF AOPA BECAUSE OEA HAS ALREADY RULED ON THE SUBJECT MATTER IN AN ACTIVE AOPA PROCEEDING.

IKEC argues in its Response II, Section VII (pp. 69-70), that it is entitled to seek declaratory judgment on the issue of associational standing, citing to *Twin Eagle*, 798 N.E.2d 839 (Ind. 2003). IKEC seeks a declaratory judgment that Citizens Groups cannot rely on associational standing to obtain administrative review under AOPA. With respect to OEA Cause -2989, which ended with IKEC prevailing on the merits, the issue of Citizens Groups’ ability to obtain administrative review is moot. A declaratory judgment action is thus inappropriate in Cause -2989 because there are no ripening seeds of a controversy. The separate OEA Cause -4106 is a live proceeding, but in that proceeding OEA has already issued orders ruling that Citizens Groups can rely on associational standing. Again, there are no ripening seeds of a controversy on the issue of associational standing in Cause -4106. IKEC’s declaratory action is in substance a challenge to non-final OEA orders already issued. IKEC’s arguments about “exhaustion” (IKEC Response II, p. 70) show that IKEC is attempting to bypass the AOPA procedures that apply to non-final orders issued in Cause -4106.

IKEC’s declaratory judgment action is unlike the declaratory judgment action in *Twin Eagle*. *Twin Eagle*’s declaratory action was not brought in the midst of a live AOPA proceeding and, moreover, the agency had not yet decided the issue on which *Twin Eagle* sought a declaration. *See Twin Eagle*, 798 N.E.2d at 843 (issue of whether waters owned by *Twin Eagle* fall under IDEM jurisdiction not yet decided by agency). The purpose of a declaratory judgment action “is to quiet and stabilize legal relations and thereby provide a remedy in a case or

controversy when there is still an opportunity for peaceable judicial settlement.” *Ferrell v. Dunescape Beach Club Condos. Phase I*, 751 N.E.2d 702, 707 (Ind. Ct. App. 2001) (emphasis added). Under the circumstances in *Twin Eagle*, the Court determined that a declaratory judgment action was appropriate to address the ripening seeds of a controversy and to avoid an unnecessary administrative process.

In IKEC’s situation, in contrast, OEA has already decided the precise issue on which IKEC seeks a declaration. IKEC’s declaratory action does not reflect the “ripening seeds” of a controversy because the issue has already been decided, most recently in the active stages of OEA Cause -4106. Once in the midst of an active AOPA proceeding that adjudicated the issue IKEC raises for declaratory judgment, AOPA provides the “exclusive means for judicial review of an agency action” (AOPA § 4-21.5-5-1) and AOPA procedures supersede other forms of relief – such as a declaratory judgment action – on that same issue. Thus, the only way for IKEC to avoid further administrative process is to show that it is entitled to judicial review of the non-final orders in Cause -4106 that decided the issue. *See* AOPA § 4-21.5-5-2(c) (“A person is entitled to judicial review of a non-final agency action only if the person establishes both of the following: (1) Immediate and irreparable harm. (2) No adequate remedy exists at law.”). IKEC has not petitioned for interlocutory review in Cause -4106.

Even if this Court decides that IKEC’s declaratory judgment action does not violate AOPA’s exclusivity provision, the declaratory action should still be dismissed under Trial Rule 12(b)(6) for two reasons: first, because the declaration requested by IKEC is directly contrary to the Court of Appeals’ ruling on associational standing in *Save the Valley*, a ruling which is binding on this Court, and second, because the use of a declaratory judgment “is unnecessary

where a full and adequate remedy is already provided by another form of action” (*Ferrell*, 751 N.E.2d at 707), which is the case here with IKEC’s judicial review action.

V. SECTIONS II, VI, AND PARTS OF VII OF IKEC’S RESPONSE II ARE NONRESPONSIVE TO CITIZENS GROUPS’ MOTION TO DISMISS.

Citizens Groups contend in their motions to dismiss that the issue on which IKEC seeks relief is moot, that IKEC is not prejudiced by the challenged agency action, that the *Save the Valley* Court’s ruling on associational standing is binding under the law-of-the-case and collateral estoppel doctrines, that this Court’s 2005 entry of remand is valid, that IKEC’s declaratory judgment action is improper, and that IKEC is attempting to bypass AOPA procedures for review of non-final orders in the separate Cause -4106. In several parts of IKEC’s Response II (*e.g.*, pp. 7-22, 65-67, 72-73), IKEC attempts to re-litigate the *Save the Valley* case and therefore IKEC’s arguments are nonresponsive to Citizens Groups’ motions.

For example, IKEC now argues that Citizens Groups cannot rely on associational standing to obtain administrative review because the associational standing doctrine is not “law” under AOPA.¹ That argument does not address any of Citizens Groups’ arguments for dismissal. Rather, with that argument IKEC attempts to re-litigate *Save the Valley*. Such arguments could have been raised to the Indiana Court of Appeals and Supreme Court during the *Save the Valley* litigation, and many of IKEC’s arguments in its Response II were in fact raised during the *Save the Valley* litigation. IKEC devotes many pages in its Response II to the

¹ The *Save the Valley* ruling on associational standing is entirely consistent with AOPA and the other statutes cited by IKEC in its Response II. As the Court of Appeals stated in *Save the Valley*, “[t]he statute and *Huffman* are silent regarding an association’s standing to sue on behalf of its members.” *Save the Valley*, 820 N.E.2d at 679. The Court of Appeals then interpreted the requirement of AOPA § 4-21.5-3-7: “Because the Appellants were simply acting in a representational capacity on behalf of the members who were aggrieved or adversely affected by the granting of the permit, Indiana Code Section 4-21.5-3-7 is satisfied.” *Id.* at 681-82. There is nothing unusual or improper about courts interpreting the meaning of statutes.

contention that Citizens Groups cannot rely on associational standing to obtain administrative review under AOPA, which is the ultimate ruling that IKEC seeks from this Court.

The question now before this Court on Citizens Groups' motions to dismiss, however, is whether this Court can grant IKEC's extraordinary request for relief. Granting IKEC's request for relief would require this Court to disregard the binding ruling of *Save the Valley*, to adopt an unsupportable interpretation of the prejudice requirement in AOPA § 4-21.5-5-14(d), and to fail to apply the general rule that a case is moot where a prevailing party appeals intermediate rulings that had no effect on the final judgment or on any other proceedings. Instead, this Court should dismiss IKEC's petition and complaints.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by hand delivery or U.S. Mail, postage prepaid, this 16th day of August, 2010, on the following counsel of record:

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