

April 2, 2013

Hon. Brad R. Hill, Administrative Presiding Justice  
Honorable Associate Justices  
Fifth District Court of Appeal  
2424 Ventura Street  
Fresno, CA 93721

**Re: Application for Leave to File Letter Brief as *Amici Curiae* Combined with Letter Brief in Support of Continued Implementation of the Low Carbon Fuel Standard: *POET, LLC v. California Air Resources Board* (Court of Appeal Case No. F064045)**

Dear Administrative Presiding Justice Hill and Associate Justices:

The undersigned organizations respectfully submit this application for leave to file this letter brief from *amici curiae* in support of Respondents in the above-entitled action. This application and letter brief are submitted in response to the Court's February 26, 2013 correspondence to the parties in the case *POET, LLC et al. v. California Air Resources Board et al.* (Court of Appeals Case No. F064045).

This letter brief is submitted by the American Lung Association in California, the Coalition for Clean Air, the Conservation Law Foundation, Environmental Defense Fund and the Sierra Club in support of the California Air Resources Board (CARB) and uninterrupted operation of the California Low Carbon Fuel Standard (LCFS) while any violations of law are remedied.

*Amici* believe the LCFS is lawful. However, in accord with this Court's instructions, this letter does not address any alleged violations of law but rather the importance of keeping the LCFS in operation to protect the health and environment of Californians in response to Questions 8A-C.

#### APPLICATION

*Amici* are the American Lung Association in California, the Coalition for Clean Air, Conservation Law Foundation, Environmental Defense Fund, and the Sierra Club. *Amici* are health and environmental advocacy organizations that believe the regulation at issue should remain operative, even if this Court finds that any of the alleged violations call for further administrative action by CARB.

American Lung Association in California (ALA in CA) is a nonprofit organization dedicated to saving lives by improving lung health and preventing lung disease through education, advocacy, and research. As an organization that has long favored diversifying transportation fuels and increasing the use of low-carbon fuels in California, ALA in CA has been an active supporter of California's LCFS throughout the rulemaking process.

Coalition for Clean Air (CCA) is a nonprofit organization working to restore the state's air quality through advocacy, education and outreach. CCA's efforts target the California's worst pollution sources and help position the state as a world leader in improving air quality. To that end, CCA has been a consistent supporter of the LCFS, and has participated throughout the rulemaking process.

Conservation Law Foundation (CLF) is a nonprofit organization that uses the law, science, policymaking, and markets to solve New England's toughest environmental problems, including air pollution attributable to the use of carbon-intensive transportation fuels. Believing that the success of the California LCFS program is important to the success of efforts elsewhere in the United States, including in the Northeast/Mid-Atlantic region, to address transportation fuel carbon intensity and associated air pollution, CLF actively participated in California's LCFS rulemaking process.

Environmental Defense Fund (EDF) is a nonprofit nonpartisan environmental organization with over 60,000 members living in California. The organization represents members' interests by linking science, economics, and law to create solutions to urgent environmental problems. EDF is particularly involved in finding solutions to climate change, and, to that end, co-sponsored the Global Warming Solutions Act of 2006 (AB 32), through which the LCFS was adopted. EDF has participated in all stages of the LCFS rulemaking process.

Sierra Club is a nonprofit organization with more than 153,000 members in California. The organization is dedicated to protecting the environment and public health through practicing and promoting the responsible use of the earth's ecosystems and resources. The Sierra Club was an early and active supporter of AB 32, and has participated frequently in its implementation process, including the LCFS rulemaking.

As health and environmental advocacy organizations familiar with California's actions to reduce climate change pollution, including the LCFS, *amici* believe that enjoining the LCFS would undermine the efficacy of the regulation's climate protections and would seriously harm the health and environmental quality of the people of California. Accordingly, our organizations respectfully seek leave to submit an *amici curiae* letter brief to inform the Court of the LCFS's importance and the need for ongoing implementation.

A copy of this application and letter brief has been served on the parties to this case, as set forth in the attached proof of service (California Rules of Court 8.200(c)(4)). No party or counsel for a party in the appeal, or any other person or entity other than the proposed *amici* and their counsel authored the proposed letter brief in whole or in part or contributed monetarily to the preparation or submission of the proposed letter brief.

Based on the foregoing, *amici* respectfully request that this Court grant this application to file their *amici curiae* letter, the substance of which follows.

## ARGUMENT

### INTRODUCTION

The court's February 26 letter asked, among other questions:

*8.A. Based on the three assumed CEQA violations, should this court allow the LCFS regulations to remain operative pending CARB taking the corrective action necessary to achieve CEQA compliance?*

**Answer: Yes.**

*8B. Are you aware of any published California case in which the appellate court allowed a regulation, rule, ordinance, general order or other type of written requirement governing third party action to remain operative pending the public agency taking the corrective action necessary to achieve CEQA compliance? Yes or No. If you answer "yes," include the citation to each such case.*

**Answer: Yes.**

Examples of such cases include the following:

*Laurel Heights Improvement Assn. v. Regents of University of California* (1988), 47 Cal. 3d 376 - discussed further below under 8C.

In *Laurel Heights*, the California Supreme Court found that the challenged EIR was inadequate, but also stated "UCSF and the general public might be unduly prejudiced if we were to enjoin the present activities...[because] UCSF's research is designed to improve the state of medical knowledge and thus improve and even save lives...we are especially reluctant to interfere unnecessarily with such a salutary enterprise." *Id.* at 424. In addition, the court stated that despite the CEQA violation that needed to be corrected, "we decline, however, to order UCSF's present activities at the new location stayed pending certification of a new EIR."

*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1603

In *County Sanitation Dist. No. 2*, the court stated that "a remedy less severe than immediately voiding the heightened treatment standards may be ordered if supported by equitable principles" and that because the regulation in question had been in place for two years, the court decided to "follow the more steady course of allowing the status quo to continue pending the completion of an EIR."

8C. Set forth the statutory construction, arguments and authority that support your answer to Question 8A.

**Answer:**

As health and environmental advocacy organizations familiar with California's actions to reduce greenhouse gas emissions and harmful air pollution, *amici* believe that enjoining operation of the standard would undermine the short- and long-term success of the LCFS. This, in turn, would harm public health and the State's natural environment.

Accordingly, *amici* submit this letter brief to inform the court of the importance of the LCFS and the need for its ongoing implementation to advance lower carbon, lower polluting transportation fuels and to reduce the pollution that is harming Californians.

**THE BENEFITS OF THE LCFS FOR CLIMATE CHANGE MITIGATION AND PUBLIC HEALTH PROTECTION SUPPORT CONTINUED IMPLEMENTATION IN THE EVENT THE COURT REQUIRES CARB TO ADDRESS ANY CEQA ISSUES**

California burns about twenty billion gallons of fossil fuel annually in the transportation sector, resulting in significant impacts on California's air quality, climate and economy. Although the state is doing a great deal to increase vehicle efficiency and reduce the amount of vehicle miles traveled, a fuel-specific strategy is needed to fully address the pollution from the transportation system. As such, the LCFS complements other strategies by directly addressing carbon in fuels.

The transportation sector contributes the highest percentage of California's greenhouse gas pollution, about 40 percent. While climate change results from emissions worldwide, the state's massive greenhouse gas emissions contribute to the overall process of climate destabilization. Accordingly, pollution from California sources exacerbates the harmful effects of climate change on communities in California, including intensifying heat waves, degraded air quality, decreased snow pack, reduced access to fresh water, and rising sea levels.<sup>1</sup> The LCFS promotes investments in and use of technologies and fuels that reduce climate pollution from the transportation sector.<sup>2</sup>

In addition to contributing to climate change, gas and diesel fuel also release significant amounts of air pollution that contribute to California's consistent failure to meet health

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<sup>1</sup> California Natural Resources Agency, *Final Statement of Reasons for Regulatory Action: Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97* (Dec. 2009) at 5-7, available at [http://ceres.ca.gov/ceqa/docs/Final\\_Statement\\_of\\_Reasons.pdf](http://ceres.ca.gov/ceqa/docs/Final_Statement_of_Reasons.pdf).

<sup>2</sup> See California Air Resources Board, *2012 LCFS Reporting Tool (LRT) Quarterly Data Summary – Report No.4*, 2 fig.4 (Mar. 29, 2013), available at [http://www.arb.ca.gov/fuels/lcfs/20130329\\_q4datasummary.pdf](http://www.arb.ca.gov/fuels/lcfs/20130329_q4datasummary.pdf) (showing the LCFS is already resulting in reduced climate pollution stemming from an increase in both the diversity and volume of lower carbon fuels).

based air quality standards.<sup>3</sup> Emissions from this sector also expose local communities to a wide range of pollutants that can cause cancer and respiratory health complications.<sup>4</sup> As documented recently, even with stringent standards for fuels, vehicles, and stationary sources, a startling 90% of residents are living in areas with unhealthy levels of air pollution.<sup>5</sup> Lower-carbon fuels and technologies generally emit less of these pollutants as well. For example, electric vehicles have zero tailpipe emissions.<sup>6</sup> Similarly, hydrogen vehicles can be designed to emit only water vapor. Renewable diesel produces less nitrogen oxide (NO<sub>x</sub>), particulate matter, carbon monoxide, and hydrocarbon emissions than petroleum diesel.<sup>7</sup> These are just three alternatives that can generate reduction credits for LCFS compliance and also contribute to cleaning up California's air. The LCFS creates strong incentives to develop and expand the use of such cleaner fuels, incentives that would be weakened if the program were enjoined even for a limited period.

Driven by the LCFS and other renewable fuel incentive programs, venture capitalists have invested at least \$1.8 billion in active North American biofuel companies from 2007 through the first quarter of 2011.<sup>8</sup> The LCFS has also begun to diversify California's fuel mix: after more than two years of implementation, the volume of next generation, very-low-carbon fuels is rising.<sup>9</sup> Despite this progress, California still has some of the worst air quality in the nation and emits the most climate pollution of any state, underlining the importance of the LCFS and its continued operation.

This Court unquestionably has the authority to consider the important implications for the public of any action that would interrupt the LCFS and the market transformation it is designed to bring about. In enacting Public Resources Code Section 21168.9, the Legislature recognized the importance of "giv[ing] the trial courts some flexibility in

<sup>3</sup> California Air Resources Board, *Area Designations for State Ambient Air Quality Standards* (Apr. 1, 2013), available at <http://www.arb.ca.gov/regact/2012/area12/area12fro.pdf>.

<sup>4</sup> US EPA Mobile Source Air Toxics Website, available at <http://www.epa.gov/otaq/toxics.htm>

<sup>5</sup> American Lung Association, *State of the Air 2012 – California: Statewide Notes*.

<sup>6</sup> Though the source of the power for electric vehicles may produce emissions, EVs that use relatively low-polluting energy sources have fewer well-to-wheel emissions than vehicles running on traditional sources of fuel. United States Department of Energy Alternative Fuels Data Center, *Emissions from Hybrid and Plug-in Electric Vehicles*, [http://www.afdc.energy.gov/vehicles/electric\\_emissions.php](http://www.afdc.energy.gov/vehicles/electric_emissions.php).

<sup>7</sup> Note that both renewable diesel and commercially-produced FAME (fatty acid to methyl ester) biodiesel are 'biomass-based fuels,' but they are chemically distinct, and combusting renewable diesel produces less NO<sub>x</sub> emissions than FAME biodiesel. California Environmental Protection Agency, *California Renewable Diesel Multimedia Evaluation: Draft Final Tier I Report* at 6 (Dec. 2010), available at [http://www.arb.ca.gov/fuels/multimedia/RenewableDieselTierI\\_DftFinal.pdf](http://www.arb.ca.gov/fuels/multimedia/RenewableDieselTierI_DftFinal.pdf). These different fuels are produced by applying different processes to similar feedstocks. *Id.*

<sup>8</sup> California Air Resources Board, *Low Carbon Fuel Standard 2011 Program Review Report* 94 (Dec. 8, 2011), available at: [http://www.arb.ca.gov/fuels/lcfs/workgroups/advisorypanel/20111208\\_LCFS%20program%20review%20report\\_final.pdf](http://www.arb.ca.gov/fuels/lcfs/workgroups/advisorypanel/20111208_LCFS%20program%20review%20report_final.pdf).

<sup>9</sup> California Air Resources Board, *2012 LCFS Reporting Tool (LRT) Quarterly Data Summary – Report No.4*, 2 fig.4 (Mar. 29, 2013), available at [http://www.arb.ca.gov/fuels/lcfs/20130329\\_q4datasummary.pdf](http://www.arb.ca.gov/fuels/lcfs/20130329_q4datasummary.pdf).

tailoring a remedy to fit a specific CEQA violation.” *San Bernardino Valley Audubon Soc’y v. Metro. Water Dist.*, 89 Cal. App. 4th 1097, 1103 (2001). Section 21168.9 thus provides courts the option to order specific action to bring the agency’s decision in compliance with CEQA, § 21168.9 (a)(3).<sup>10</sup> The choice of remedy under Section 21168.9 involves the court’s consideration of “traditional equitable principles.” *See, e.g., Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376, 423 (1988). Applying these principles, the Court should account for the great benefits of the LCFS to the public interest as laid out above. Furthermore, the Court should take account of the fact that enjoining implementation of the LCFS would disrupt the market signals it provides, imperiling progress to date and the ability to make further progress.

Accordingly, *amici* urge the Court, in accord with the equitable considerations that properly guide its remedial choices, to allow the LCFS to remain in place while any issues identified by the Court are remedied.

**SUSPENDING THE LCFS WOULD LIKELY DISRUPT ONGOING INVESTMENTS IN ALTERNATIVE, LOW-CARBON FUELS - CONSISTENT LONG-TERM MARKET SIGNALS ARE NEEDED TO FULLY COMMERCIALIZE THOSE FUELS AND PREVENT CURRENT PROGRESS FROM BEING STALLED**

The LCFS encourages companies to invest in low-carbon fuels to meet increasingly stringent performance targets. Based on statements from alternative fueling industries<sup>11</sup> and the CARB LCFS Fourth Quarterly 2012 Update,<sup>12</sup> even at this early stage of implementation, the LCFS has resulted in rising quantities of lower carbon fuels being consumed in California and the market is rewarding investments in cutting edge, low-carbon fuels. Market reports indicate that as a result of clean fuel standards such as the Renewable Fuel Standard at the federal level and the LCFS at the state level, 27 biofuel refineries will be constructed or retrofit by 2015 to generate sufficient advanced fuels to meet the resulting demand for biofuels and next-generation biofuels are moving into the commercialization phase.<sup>13</sup>

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<sup>10</sup> *See also Preserve Wild Santee v. City of Santee*, 210 Cal. App. 4th 260 (2012) (“[A] reasonable, commonsense reading of section 21168.9 plainly forecloses plaintiffs’ assertion that a trial court must mandate a public agency decertify the EIR and void all related project approvals in every instance where the court finds an EIR violates CEQA. Such a rigid requirement directly conflicts with the . . . language in section 21168.9.”).

<sup>11</sup> Declaration of Harrison Clay, Exhibit U, Appellants’ Motion for a Stay of the District Court’s Orders and Judgments Pending Appeal, *Rocky Mountain Farmers Union v. Goldstene*, No. 1:09-CV-02234-LJO-DLB (“Harrison decl.”).

<sup>12</sup> California Air Resources Board, *2012 LCFS Reporting Tool (LRT) Quarterly Data Summary – Report No. 4*, 2 fig.4 (Mar. 29, 2013), available at [http://www.arb.ca.gov/fuels/lcfs/20130329\\_q4datasummary.pdf](http://www.arb.ca.gov/fuels/lcfs/20130329_q4datasummary.pdf).

<sup>13</sup> *See, e.g., Environmental Entrepreneurs, Advanced Biofuel Market Report 2012* at 18, available at <http://www.e2.org/ext/doc/E2AdvancedBiofuelMarketReport2012.pdf>.

If the LCFS were enjoined, even temporarily, *amici* believe that widespread uncertainty would have a pronounced chilling effect on the market. This uncertainty would disrupt the market for LCFS compliance credits that have already been developed from fuel previously produced and sold - decreasing overall demand for those credits. Decreased credit demand would in turn lower credit prices, reducing the market value of investments made by entities that have taken steps to comply or develop next-generation fuels. Such a result would effectively punish those who have already invested in low-carbon fuels and credits to facilitate compliance with the standard. Furthermore, investor confidence in future demand for low-carbon fuels and LCFS credits - the primary driver of the system - would very likely suffer. The investment market for ongoing project capital would likely contract, reducing new operations funding for both major fuel facilities and smaller scale projects.<sup>14</sup>

A midstream disruption of implementation as proposed by POET, LLC would likely create even more disruption than the injunction that a federal court imposed early in the program. When the Eastern District of California enjoined LCFS enforcement in 2011, trading in LCFS credits immediately froze as market participants faced stark uncertainty about the future regulatory status and therefore market value of LCFS credits.<sup>15</sup> Shortly after the court ordered the injunction, one regulated entity “indicated that it intended to back out of [a prior credit purchase] agreement based on the uncertainty created by the injunction and CARB’s inability to enforce the LCFS.”<sup>16</sup>

The alternative fuel industry has also cited that injunction as a barrier to financing commercial-scale production of advanced biofuels, which have lower NO<sub>x</sub> emissions than conventional biodiesel.<sup>17</sup> Although biodiesel is a mass-produced fuel that is already established in the market, significant investments are necessary to commercialize low-NO<sub>x</sub> fuels like renewable diesel. ISOR B-12 (citing annual U.S. biodiesel production

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<sup>14</sup> *Id.* at 12; Declaration of Christian Morgen, Exhibit Y, Appellants’ Motion for a Stay of the District Court’s Orders and Judgments Pending Appeal, Rocky Mountain Farmers Union v. Goldstene, No. 1:09-CV-02234-LJO-DLB, ¶12-13 (“During 2011 Inbicon committed substantial time and resources to introduce low carbon biofuels into the U.S. market, with the expectation that California’s LCFS would assure investors of favorable pricing for their products. . . . [the injunction] creates uncertainty that discourages equity and financial investment in Inbicon projects. Projects slated for 2012 will be put on hold.”); *see also* Harrison Decl. ¶8 (“The obvious and direct result of the injunction, therefore, is the immediate loss of expected revenue from sales of our credits, and less investment in the production of low carbon fuels.”); Declaration of Harrison Dillon, Exhibit X, Appellants’ Motion for a Stay of the District Court’s Orders and Judgments Pending Appeal, Rocky Mountain Farmers Union et al v. Goldstene, No. 1:09-CV-02234-LJO-DLB, ¶6 (predicting that the injunction “will create confusion in the market and is likely to reduce the availability of equity and project financing to companies seeking to commercialize low CI fuels in California.”).

<sup>15</sup> “First California LCFS credits traded”, Argus Media (March 26, 2012), available at <http://www.argusmedia.com/News/Article?id=791459>. A robust credit market is necessary to ensure that California transitions to advanced low-carbon fuels as quickly and efficiently as possible. *See* FSOR at 407.

<sup>16</sup> Harrison Decl. ¶6.

<sup>17</sup> *See* Environmental Entrepreneurs, *supra* note 12, at 3 (also noting that “[t]he advanced biofuels industry has sufficient, proven technology to meet the LCFS requirements . . . The risks for delivering fuel are regulatory certainty and production capacity.”).

capacity of 2.61 billion gallons); *see* ISOR B-13 (listing hydrogenation-derived renewable diesel facilities, which are mostly demonstration projects or U.S. Department of Energy-funded); ISOR B-25 (projecting that additional renewable diesel technologies will be available for commercial use around 2015). Without the LCFS, industry would lose an important incentive for developing these clean, low-carbon fuels and bringing their production to scale.

In sum, even a brief delay in the LCFS at this critical juncture could damage the development of new and emerging fuels and technologies for many years to come.

**THOUGH BIODIESEL USE RESULTS IN WIDE RANGING BENEFITS, NO<sub>x</sub> POLLUTION IS A SERIOUS ISSUE THAT CALIFORNIA MUST CONTINUE TO ADDRESS AND A CRITICAL RULEMAKING IS UNDERWAY**

Although *amici* believe that the health and welfare of Californians would be harmed by an interruption in the LCFS implementation, it is also critically important to address any NO<sub>x</sub> pollution resulting from biodiesel use. Biodiesel has important clean air advantages. Conventional diesel and gasoline fuels are sources of criteria pollutants and toxic air contaminants that cause harmful health impacts. Among the key benefits of biodiesel are that it is non-toxic, biodegradable, and results in reduced emissions (compared to traditional diesel) of ozone causing (precursor) gases, aromatic compounds, carbon monoxide, particulate matter, and sulfates.<sup>18</sup>

However, California cannot afford, nor would our organizations support, regulatory programs that resulted in increases of NO<sub>x</sub> from biodiesel. Biodiesel use can and should be managed to avoid increases in NO<sub>x</sub> emissions. To this point, we are strong supporters of CARB's plan to enact regulations, starting in 2013, to manage biodiesel use in California.<sup>19</sup> Among other efforts, these regulations would certify fuels for sale to ensure biodiesel fuel is either emission neutral or used in an emission-neutral blend. Some of the *amici* plan to participate in those administrative proceedings to ensure CARB maintains its commitment to mitigating any air quality issues that may arise from biodiesel.

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<sup>18</sup> US EPA, *A Comprehensive Analysis of Biodiesel Impacts on Exhaust Emissions: Draft Technical Report* (Oct. 2002).

<sup>19</sup> California Environmental Protection Agency, *White Paper: Discussion of Conceptual Approach to Regulation of Alternative Diesel Fuels* (Feb. 15, 2013); *see also* California Air Resources Board, Meeting Notice and Agenda for Public meeting in Sacramento on April 23, 2013 (providing for discussion of regulatory concepts for establishing fuel requirements for alternative diesel fuels (ADF), including biodiesel, renewable diesel and other emerging diesel fuel substitutes) (March 22, 2013).



## CONCLUSION

For the reasons set forth above, *amici* American Lung Association in California, Coalition for Clean Air, Conservation Law Foundation, Environmental Defense Fund and Sierra Club urge this Court to allow the LCFS to remain operative should the Court find that any of the CEQA violations alleged call for further administrative action by CARB. The LCFS is leading to increasing production of low-carbon fuels to meet the standard's requirements, and, in the process, has brought California closer to attaining its greenhouse gas reduction and air quality goals. Enjoining the regulation after two years of implementation would significantly disrupt these positive developments both today and into the future.

Sincerely,



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cc: All parties as listed in the attached Proof of Service

**DECLARATION OF SERVICE BY U.S. MAIL**

I am employed in the County of San Francisco, State of California. I am over the age of eighteen and am not a party to the within action; my business address is 123 Mission Street, 28<sup>th</sup> Floor, San Francisco, CA, 94105.

On April 01, 2013, I served the foregoing document described as:

Application for Leave to File Letter Brief as *Amici Curiae* Combined with Letter Brief in Support of Continued Implementation of the Low Carbon Fuel Standard: *POET, LLC v. California Air Resources Board* (Court of Appeal Case No. F064045)

on the interested parties in this action, as designated on the attached Service List for this case.

**[ X ] BY U.S. MAIL**

I am "readily familiar" with the firm's practice of collection and processing correspondence for U.S. Mail. It is deposited with the U.S. Mail on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

**[ X ] BY ELECTRONIC MAIL**

I caused such documents to be scanned into PDF format and sent via electronic mail to the electronic mail addressee(s) of the addressee(s) designated.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 01, 2013, at San Francisco, California

  
Larissa Koehler

123 Mission Street, 28<sup>th</sup> Floor, San Francisco, CA, 94105

## MAILING LIST

### Addressee:

Supreme Court of California  
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***Via U.S. Mail***

Honorable Jeffrey Y. Hamilton, Jr.  
Judge of the Superior Court  
c/o Appeals Clerk  
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### Attorney For:

Trial Judge

Appellants/Petitioners

Respondent

Intervenor