IN THE
INDIANA SUPREME COURT

Case No. _____

THEODORE EDWARD ROKITA,	) On Petition to Transfer from the Indiana
	) Court of Appeals
Appellant/Cross-Appellee,	)
	) Case No. 23A-PL-705
v.	)
	) Appeal from the Marion Superior Court,
BARBARA TULLY,	) Case No. 49D06-2107-PL-025333
	)
Appellee/Cross-Appellant.	) Hon. Kurt Eisgruber, Judge

APPELLEE/CROSS-APPELLANT BARBARA TULLY'S PETITION TO TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

1. Whether the Court of Appeals properly analyzed and decided whether Attorney General Rokita, in his capacity as a civil defendant in Petitioner Barbara Tully's action under the Indiana Access to Public Records Act (APRA), implicitly waived any right to confidentiality when his office made a self-serving public statement that an ethics opinion he had requested from the Indiana Inspector General (IG) had completely exonerated him of any ethical breach.

2. Whether the Court of Appeals incorrectly construed "final judgment" in rejecting Ms. Tully's contention that by enacting retroactive legislation that annulled the trial court's final judgment, the legislature intruded on the manner and mode in which Indiana courts shall discharge their judicial duties, in violation of the separation of powers provision of Article 3, Section 1, of the Indiana Constitution.

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BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

This petition involves a suit brought by Appellee/Cross-Appellant-Plaintiff Barbara Tully under the Indiana Access to Public Records Act, Indiana Code 5-14-3-1, et seq., requesting that Attorney General Theodore Rokita make available for inspection an informal advisory opinion issued at his request by the Office of the Inspector General. After Rokita refused to produce that opinion, Tully sued. The trial court entered summary judgment in her favor and against defendant Rokita on purely statutory grounds. However, while Rokita's appeal was pending in the appellate court, the General Assembly amended the relevant statute and expressly made that amendment retroactive, providing for the first time stated that such opinions are confidential.

The Court of Appeals reversed on that basis alone. In so doing, it first addressed, and rejected, Tully's alternative argument made in the trial court that Rokita had waived any confidentiality privilege when his spokesperson made a public claim to the media that the Inspector General's opinion had completely exonerated him of any ethical misconduct when, after being sworn in as Attorney General, he had continued to receive payments from private employers. The trial court had not addressed that waiver argument after ruling in Tully's favor on purely statutory grounds.

The Court of Appeals agreed with Rokita's argument that the legislature's subsequent retroactive amendment had completely resolved the case in Rokita's favor. The Court of Appeals also rejected Tully's argument that by enacting this retroactive amendment--one that Rokita's office was intimately involved in drafting and shepherding through to passage--the legislature had improperly voided the trial court's final judgment and thereby interfered with the judiciary's exclusive powers, in violation of the separation of powers mandate of Article 3, Section 1, of the Indiana Constitution.

Further background may be found in the Court of Appeals' April 29, 2024, opinion. Slip. Op. at 2-7.

ARGUMENT

I. ISSUE 1—Implied Waiver

A. *Procedural background*

As is recited in the Court of Appeals' opinion issued April 29, 2024, __ N.E. 3d___, 2024 Ind. App. LEXIS 117 (Slip Op. 2), Ms. Tully requested a public record from the Office of the Indiana Attorney General (OAG), specifically an informal opinion issued by the IG at the request of Attorney General Todd Rokita. Soon after Attorney General Rokita received that opinion, his spokesperson assured the public, through a member of the local media, that the IG had concluded that Rokita's "interests and outside employment are all squarely within the

boundaries of the law and do not conflict with his official duties." (Slip Op. 10). After he refused to make the opinion available for her inspection, Ms. Tully filed suit under APRA seeking a court order that he do so.

Though she had contended in the trial court that this self-serving public announcement had waived any confidentiality privilege, the trial court granted Ms. Tully summary judgment on a different ground without addressing waiver. The trial court rejected Rokita's reliance on Rule 8, 42 IAC §1-8-1, and instead concluded that Rule 5, 42 IAC § 1-5-1, rather than Rule 8 was the applicable rule because it specifically dealt with issues involving outside employment that required presentation to the Indiana Ethics Commission in a public proceeding. Because it had granted summary judgment on that issue alone, the trial court did not address Tully's alternative non-constitutional argument that Attorney General had waived confidentiality by his public announcement of exoneration.

While Attorney General Rokita's appeal of the trial court's adverse ruling was pending, the General Assembly, at the OAG's instigation,[1] amended the

[1] That amendment did not become law until after the trial court's jurisdiction had lapsed. Ind. App. R. 8. Ms. Tully thus had no opportunity to conduct discovery regarding this last-minute amendment to the must-pass budget bill. However, an independent journalist, Marilyn Odendahl of The Indiana Citizen, interviewed key legislators while looking into the circumstances leading to the eventual passage of that amendment. In the process she discovered that the amendment inserted into the budget bill late in the legislative session was much more than a mere "corrective" measure. The uncontradicted evidence, gathered without the benefit of formal discovery, shows that the OAG drafted and shepherded the retroactive amendment through the legislature, all the while concealing its true purpose, and at the direction of a litigant seeking to

relevant statute to provide that the IG's advisory opinions are confidential and, at the discretion of the recipient, exempt from disclosure under APRA. The legislature made that amendment retroactive to a date prior to Ms. Tully filing her APRA request.

Based on that retroactive amendment, the Court of Appeals reversed the trial court's judgment in favor of Tully, rejecting her contention that the retroactive amendment Rokita' office had put in motion improperly interfered with the judicial branch's prerogatives by assuming judicial powers and thus violated the express separation of powers provision of the Indiana Constitution. Slip Op. at 13-19. Before reaching that constitutional argument, in just over two (2) pages of its 23-page opinion, the Court of Appeals addressed, but rejected, Ms. Tully's non-constitutional argument that Attorney General Rokita had waived confidentiality. Slip Op. at 9-11.

B. *Arguments relating to implied waiver.*

By limiting its holding to the question of whether Attorney General Rokita explicitly waived discretionary confidentiality, the Court of Appeals, in conflict with prior decisions of this Court, its own precedents, and decisions of United States Courts of Appeal, decided a question of law and fact in a case involving an

moot a final judicial judgment for his personal and political benefit. Odendahl's article is included in the record at App. Vol. II, pp. 2-4.

important statute intended to promote open and transparent state government, and an issue that has not been directly addressed by this Court. Ind. App. R. 57 (H)(1), (2), (3), and (4).

1. APRA's discretionary privileges should be narrowly construed and applied.

Even when supported by sound public policy, all statutory and common law privileges are to be strictly construed and applied. Privileges "are not lightly created nor expansively construed [because they are] are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974); *see also In re C.P.* 563 N.E.2d 1275, 1277 (Ind. 1990). Opinions of this Court and the Indiana Rules of Evidence establish that a privilege invoked to shield selected information from disclosure can be waived when the holder of that privilege "voluntarily and intentionally discloses or consents to disclosure of *any significant part* of the privileged matter." Evid. R. 501(b) (emphasis added). Discretionary privileges under section 4(b) of APRA, Indiana Code § 5-14-3-4(b), can be waived. *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893, 919 (Ind. Ct. App. 2003).

Freedom of Information Act (FOIA) cases have also recognized that an implied waiver of a statutory privilege can occur. *See, e.g. North Dakota ex rel. Olson v. Andrus,* 581 F.2d 177, 181 (8th Cir. 1978). Other state's appellate courts have concluded similarly in public records cases. *See, e.g., Oregonian Publ'g Co.*

v. Portland Sch. Dist. No. 1J, 952 P. 2d 66, 68 n.3 (Ore. Ct. App. 1996) (waiver applies to requests for public records even absent express mention of waiver in Oregon's public records law). The inquiry into whether a specific disclosure constitutes waiver is fact specific. *Mobil Oil Corp. v. EPA,* 879 F.2d 698, 700 (9th Cir. 1982) (the extent to which prior agency disclosures may constitute a waiver of the FOIA exemptions depends on both the circumstances of the prior disclosure and on the particular exemptions claimed).

APRA's discretionary privileges must be strictly construed and applied, not only because their invocation undermines the search for truth and the policy of government transparency, but also because APRA is remedial legislation whose exceptions therefore must be strictly construed and applied. *See, e.g., Sullivan v. National Election Defense Coalition*, 182 N.E.3d 859, 868 (Ind. Ct. App. 2022). APRA waiver decisions are in harmony with this Court's declaration that "a [remedial] statute's broad and liberal purpose is not to be frittered away by narrow construction." *Consumer Atty. Servs., P.A. v. State,* 71 N.E.3d 362, 366 (Ind. 2017).

Moreover, the General Assembly has expressly directed courts to construe and apply APRA "liberally," to ensure that its "fundamental philosophy" and "public policy" that all persons are entitled to "full and complete information regarding the affairs of government," are vindicated. I. C. § 5-14-3-1. As this Court

has held, liberal construction "requires narrow construction of [the statute's] exceptions." *Consumer Atty. Servs., supra,* at 366. Waiver of a discretionary privilege under APRA must also be evaluated in light of the "fundamental" public policy of governmental transparency. *Shepherd Properties Co. v. Int'l Union of Painters*, 972 N.E.2d 845, 852 (Ind. 2012) (courts are required to generously construe and apply APRA but narrowly construe and apply its discretionary exceptions).

2. Discretionary privileges may not be wielded offensively as a sword.

All privileges are subject to waiver when used offensively, *i.e*., "as a sword rather than a shield." *State v. IBM*, 964 N.E.2d 206, 212 (Ind. 2010) (Sullivan, J., concurring); *Purdue Univ. v. Wartell*, 5 N.E.3d 797, 807 (Ind. Ct. App. 2014) (statutory privileges "may not be wielded as swords at the will of a party"). For example, this Court explained that a litigant waives the physician-patient privilege after placing his or her mental or physical condition at issue. *Collins v. Bair*, 256 Ind. 230, 268 N.E.2d 95, 99 (1971) ("when a patient elects to publish the *substance* of otherwise privileged communications, the privilege's objective can no longer be legitimately accomplished, and the privilege must be deemed waived." (emphasis added).

Attorney General Rokita deliberately chose to have his office publicly announce that the IG had completely exonerated him of any misconduct relating to

his continued outside employment. By voluntarily disclosing the substance, conclusion, and essence of the IG's opinion in a self-serving public announcement, Attorney General Rokita implicitly waived his discretionary privilege to withhold disclosure of that opinion from Ms. Tully.

3. The Court of Appeals failed to analyze and correctly decide the implied waiver issue.

The Court of Appeals neglected to acknowledge that a privilege can be waived either explicitly or implicitly. An implied waiver occurs when the party asserting the privilege acts affirmatively to place the purportedly privileged communication in issue such that denying access to that communication becomes "manifestly unfair" to the party seeking disclosure of that record. *Waterfield v. Waterfield*, 61 N.E.3d 314, 326 (Ind. Ct. App. 2016), *trans. denied* 76 N.E.3d 141 (2017). Thus, "a party may not place an issue before the trier of fact [or, as here, the public] and then assert a privilege to prohibit" its disclosure.

Statutory privileges created to shield selected information from disclosure "may not be wielded as swords at the will of a party." *Madden v. Ind. Dept. of Transp.*, 832 N.E.2d 1122, 1128 (Ind. Ct. App. 2005); *see also Chevron Corp. v. Pennzoil Co.,* 974 F.2d 1156, 1162 (9th Cir. 1992) (a privilege may not be used both as a sword and a shield, and a litigant who does so implicitly waives the privilege); *Conkling v. Turner,* 883 F.2d 431, 434 (5th Cir. 1989) (a "great weight of authority" holds that a privilege is implicitly waived when a litigant "place[s]

information protected [by a privilege] in issue through some affirmative act *for his own benefit*…") (emphasis added); and *Cox v. Admin. U.S. Steel & Carnegie*,7 F.3d 1386, 1416-18 (11th Cir. 1994) (citing *Conkling*). Implicit waiver may also occur where a person invoking a privilege has *partially* disclosed the substance of a privileged communication. *Sims v. Blot,* 534 F.3d 117, 132 (2nd Cir. 2008) (a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then seek to shield the underlying communications from scrutiny).

By consenting to the issuance of a self-serving public announcement that the IG's opinion had exonerated him of any ethical breach related to his outside employment, Attorney General Rokita used the confidentiality privilege as a sword. In doing so he implicitly waived any discretionary confidentiality privilege APRA may have otherwise allowed him to shield that opinion from the public whose interests he is sworn to serve.

The doctrine of implied waiver is memorialized in Indiana Evidence Rule 501(b), which states that a litigant waives a privilege by using it to shield a document from disclosure after "voluntarily and intentionally disclos[ing] "*any significant part* of the privileged matter." A person who voluntarily discloses, for one's own benefit, the ultimate conclusion of a state official's investigative report has disclosed a "significant part" of that report. Allowing that person then to

shield that otherwise public record from disclosure would allow the privilege holder to "thwart the truth-seeking process." *Madden v. Ind. DOT*, 832 N.E.2d at 1228 (citing, *inter alia, Collins v. Bair,* 268 N.E.2d at 101); *see also Doe v. Netflix, Inc.,* 2023 U.S. Dist. LEXIS 54755, *4, 2023 WL 2712365 (S.D. Ind. 2023) (Dinsmore, M.J.) (noting that the classic "sword and shield problem" creates an implied waiver, citing both *Madden* and *Waterfield*).

In distinguishing *Unincorporated Operating Div. of Ind. Newspapers, Inc.,* 787 N.E.2d at 918-19,[2] the Court of Appeals merely noted that it had held that a university's disclosure of a "very generalized overview" of the investigative report did not waive the university's privilege of confidentiality.

Indiana University's "very generalized overview" of its investigation of Coach Knight is starkly different from Attorney General Rokita's self-serving public announcement that the IG had concluded his "interests and outside employment are all squarely withing the boundaries of the law and do not conflict with his official duties." This public announcement, made for Attorney General

[2] The facts of *Ind. Newspapers* are far different from those of the present case. The subject of the investigation there, Coach Bob Knight, was not the same person who had issued the university's summary report, and neither had Coach Knight made a public proclamation that the university's investigative report had completely exonerated him. That opinion thus did not have occasion to address the issue of implied waiver, and it offers scant guidance to lower courts regarding under what circumstances a discretionary privilege under APRA has been waived.

Rokita's personal and political benefit was far more specific than the "very generalized overview" in *Ind. Newspapers.*

The Court of Appeals recently observed, citing Evid. R. 501(b), that an implicit waiver of a statutory privilege depends on the circumstances and that the facts and circumstances of each case must be considered to determine whether an implied waiver of a privilege has occurred. *Akinribade v. State,* 202 N.E.3d 468, 471 (Ind. Ct. App. 2023) (citing Evid. R. 501(b)); *see also* 202 N.E.3d at 473 (May, J. dissenting) ("when Akinribade intentionally disclosed one page of his expert's report, the State was entitled to discovery of the undisclosed information in the remaining six pages of that expert's report, so that the entire seven pages could be, in fairness, considered together.").

Attorney General Rokita, as the "chief legal officer of the State of Indiana," *In re Hill,* 144 N.E.3d 184, 193-94 (Ind. 2020), has a broad role in the administration of justice. I.C. § 4-6-1-6 (setting forth rights, powers, and duties of Attorney General). He is subject to APRA just as is every other governmental official, and by virtue of his public office has a special obligation to be transparent after claiming a report had completely exonerated him.

The public statement by Attorney General Rokita's office voluntarily disclosed both the existence of the IG's opinion--and "a significant part," of that opinion, *i.e.,* its conclusion. By consenting to that disclosure, Attorney General

Rokita waived any discretionary privilege of confidentiality that might have otherwise attached to that report. This Court should grant transfer and hold that under the facts of this case, there was an implied waiver of confidentiality.

II. ISSUE 2 -Separation of Powers

The fundamental purpose of the separation of powers provision of Article 3, Section 1, is to rid each separate department of government "from *any* influence or control by the other department." *A.B. v. State*, 949 N.E.2d 1204, 1212 (Ind. 2011) (emphasis added). To protect the independence of the judicial branch, it is essential that neither the legislative nor administrative branches interfere with the courts' exclusive judicial functions of determining what is reasonably necessary to discharge their duties. *Id.* at 1213.

Just as the judiciary must respect and not usurp legislative powers, so too the legislature may not infringe on judicial powers. The distribution of powers doctrine "works both ways." *Horner v. Curry,* 125 N.E. 3d 584, 589 n. 4 (Ind. 2019) (citing *State v. Monfort,* 723 N.E.2d 407, 412 (Ind. 2000) (the legislature may abolish a superior or circuit court but not in the middle of a judge's term); *Lemmon v. Harris*, 949 N.E.2d 803, 811 (Ind. 2011) (noting that is "well-settled" that under the express separation of powers mandate of Article 3, Section 1, the legislature may not set aside a final judgment of a court); *Thorpe v. King,* 248 Ind. 283, 287, 227 N.E.2d 169, 171 (1967) (same).

Notwithstanding this Court's broad pronouncements in *Lemmon* and *Thorpe*, the Court of Appeals (Slip Op. at 15 n. 11) held that "final judgment" for separation of powers purposes has a different meaning than "final judgment" in Indiana Appellate Rule 2(H) and Indiana Trial Rules 5(E), 6(B), 50, 54, 56(E), 59, 62, 63.1(A), and 77(G). The Court of Appeals does not contend with the fact that neither *Lemmon* nor *Thorpe* hold that the legislature may interfere with a final judgment *only* if that judgment is not subject to appeal. Indeed, the Court of Appeals *did* acknowledge that this Court held that the General Assembly's act in *Thorpe* was "unconstitutional and ineffective" because it would have "the legal effect of setting aside and nullifying a final decree of the Lake Superior Court." (Slip Op. 17, citing *Thorpe*, 227 N.E.2d at 170). So too here: the General Assembly sought to set aside and nullify a final decree of the Marion Superior Court. But the holding in *Thorpe* does not turn on the fact that the time to appeal had expired and thus does not contain the limiting principle the Court of Appeals reads into it.

After noting that this Court has held that federal separation of powers decisions do *not* determine the distribution of powers analysis under Article 3 of the Indiana Constitution, *Bayh v. Sonnenburg,* 573 N.E.2d 398, 404 (Ind. 1991) (Slip Op at 14), the Court of Appeals cited a federal decision that did not construe Article 3 of the Indiana Constitution, that this Court has never adopted, and that it

has cited but a single time, and then only in *dicta* for the unexceptional proposition that "good fences make good neighbors." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 240 (1994). "Final judgment," in the panel's opinion, does not mean final judgment as defined in the Indiana Trial Rules or Rules of Appellate Procedure, or in Indiana caselaw. Instead, it means something akin to a judgment from which all appeals have been exhausted. Slip. Op. at 15-19. The Court of Appeals argues, essentially, that "final judgment" means something other than the straightforward meaning of the words as used throughout Indiana practice.

This conclusion is unsupported by Indiana statute, rules, and caselaw. "Final judgment" is a legal term of art our legislature has never defined. As a legal term of art, other federal and state courts have held that "final judgment" virtually always designates the judgment by a court that determines all the rights and obligations of the parties in a case so that it can be appealed. *Hantz Fin. Servs. v. Amer. Int'l Specialty Lines Ins. Co*., 664 Fed. Appx. 452, 459 (6th Cir. 2016); *Smith v. Volkswagen SouthTowne, Inc.*, 547P.3d 198 (Ut. Ct. App. 2024) (each holding that "final judgment" is a legal term of art that traditionally means a judgment that disposes of all issues, *not* one from which all appeals have been exhausted). This is consistent with this Court's holding in *Georgos v. Jackson,* 790 N.E.2d 448, 451 (Ind. 2003), that a final judgment is one which "disposes of all issues as to all parties thereby ending the particular case," and "leaves nothing for future

determination," a position that soon thereafter became App. R. 2(H). Moreover, this Court handed down *Lemmon* seventeen years (17) after *Plaut* and *still* did not adopt the meaning of the term "final judgment" to accord with that used in the earlier case.

The power of the judiciary is "dominant and exclusive" and "almost unfettered." *State ex rel. Hovey* v. *Noble* (1888), 118 Ind. 350, 352, 21 N. E. 244. The legislature cannot, directly or indirectly, interfere with a court's final judgment, for *any* such interference "impairs the control of the courts over their own judgments." *Progressive Improv. Asso. v. Catch All Corp.,* 254 Ind. 121, 126, 227 N.E.2d 229 (1969) (citing, *inter alia, Thorpe* v. *King*, *supra*).

Allowing the legislature to interfere with final judgments when an appeal is pending would be contrary to the clear language of Article 3, Section 1, and would cede exclusive judicial powers to the legislature. The Court of Appeals seems to acknowledge this danger (Slip Op. at 15), but its interpretation of "final judgment," will, ironically, only make such interference more likely and more common because appeals can and do often take longer than one year, during the course of which the legislature will convene and may reverse any holding with which it disagrees. Under the novel rule proposed by the Court of Appeals, every trial court determination and even some appellate decisions can now invite improper

legislative interference. Article 3, Section 1 of the Indiana Constitution does not countenance such an intrusion upon the judicial function.[3]

Whether the legislature's nullification of a final judgment constitutes legislative interference in violation of Article 3, Section 1, should not and does not depend on whether or not that final judgment is subject to appeal, contrary to the federal view relied on by the Court of Appeals. Just as this Court in *Monfort* held that the legislature may not abolish a court in the middle of a judge's term, so too the legislature should not be permitted enact retroactive legislation aimed at annulling a final judgment issued by an Indiana court, regardless of whether or not an appeal of that final judgment is pending.

CONCLUSION

Ms. Tully respectfully asks this Court to grant transfer on the non-constitutional issue of implied waiver. Unless disposed of in Ms. Tully's favor on that non-constitutional issue, this Court should grant transfer on the constitutional separation of powers issue, and remand to the trial court to resolve any remaining issues consistent with this Court's opinion.

[3] The Court of Appeals' citation to and quotation from *Columbus, C & I Co. v. Bd. of Comm'rs of Grant Cnty,,* 65 Ind. 427 (1878) (Slip Op. at 14), is puzzling. That decision appears to actually support Ms. Tully's position. ("..the Legislature [here] invaded, held and exercised the functions of the judicial department…The powers of the General Assembly are almost unlimited; but they cannot, as a rule, try and determine the rights of parties to a pending lawsuit."). *Id.* at 439.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 4,200 words.

/s/ William R. Groth

CERTIFICATE OF FILING AND SERVICE

I certify that on June 12, 2024, the foregoing document was filed using the Indiana E-filing System and was served, contemporaneously with this filing, via the IEFS, to the following attorneys for Appellant/Cross-Appellee:

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