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IN THE
INDIANA SUPREME COURT

No. 23A-PL-705

THEODORE ROKITA, in his official capacity as Indiana Attorney General,
Appellant/Cross-Appellee,

v.

BARBARA TULLY,
Appellee/Cross-Appellant.

Appeal from the
Marion Superior Court,

No. 49D06-2107-PL-25333,

The Honorable Kurt M. Eisgruber,
Judge.

APPELLANT'S RESPONSE TO PETITION TO TRANSFER

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INTRODUCTION

The General Assembly created the Office of the Inspector General to address and prevent wrongdoing by public officials and employees. The Inspector General's duties include developing a state code of ethics, ensuring that state officers and employees are trained in the code, and providing advice and engaging in "other activities" to facilitate compliance with the code and deter misconduct. Ind. Code § 4-2-7-3. As one means to improve ethics compliance, the Inspector General offers public officials and employees confidential informal advisory opinions applying the code of ethics to their particular situation. This service allows employees and officials to confidentially ask questions before taking or continuing a course of action, and because of this confidentiality, ethics compliance is maintained and nurtured. Public servants can safely and confidentially seek the advice of the Office of the Inspector General to ensure they are in compliance with the ethics code without publicly disclosing their concerns. Over the years, the Inspector General has issued thousands of these confidential informal opinions (II App. 161–62).

Like many public officials before him, Attorney General Rokita requested a confidential advisory opinion from the Inspector General when he assumed office to determine how to handle matters of outside employment and his ownership stake in a private corporation—a matter more complicated than a simple resignation—believing the opinion would be confidential. After the trial court in this case declared the Inspector General's informal advisory opinions subject to disclosure under APRA, the General Assembly promptly clarified that such opinions are

confidential, and the Court of Appeals reversed in a thorough and thoughtful published opinion.

Further review by this Court is unwarranted. The Court of Appeals faithfully and correctly applied long-standing rules when it explained that waiver is a fact-specific doctrine and that merely disclosing the existence and bottom-line conclusion of a document did not waive exemption from disclosure under the Access to Public Records Act. So, too, did the Court correctly explain that the separation of powers is not violated when the appellate courts apply a change in the law to a case pending before them. This case presents none of the criteria for transfer, and Tully's petition should be denied.

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Attorney General Rokita sought and received an informal advisory opinion from the Office of Inspector General shortly after he assumed office in January 2021—having first become eligible to seek such an opinion when he became a state official. Like many state officials who seek opinions from the Inspector General, Attorney General Rokita sought advice regarding how the duties and obligations of his newly elected position impacted his existing interests and involvement with the private company in which he was an equity stakeholder. Several weeks later, in February 2021, the Indiana Business Journal ran a story reporting on the Attorney General's work for his private company while also serving as Attorney General (II App. 50). The article quoted an employee of Common Cause Indiana suggesting that the dual roles "are quite concerning," and asking, "how can we be assured there are

no conflicts of interest involved in this?" (II App. 51). The article quoted a response to these allegations from the Office of the Attorney General:

> "Todd Rokita has built up private sector business interests that he will maintain as Indiana Attorney General, which were and will continue to be disclosed as required in publicly available financial disclosure reports and which reflect income from several sources." Lauren Houck, a spokeswoman for Rokita, said in an email.
>
> Houck said he sought and received an opinion from the Indiana Inspector General's Office that indicated "his interests and outside employment are all squarely within the boundaries of the law and do not conflict with his official duties."

(II App. 51).

After the article ran, Barbara Tully submitted an access to public records request to the Office of the Attorney General requesting a copy of the informal advisory opinion issued by the Office of the Inspector General (II App. 54). The Office of the Attorney General declined to release the opinion citing the APRA exception for interagency advisory or deliberative material as well as the Office of the Inspector General's rule declaring its informal advisory opinions confidential (II App. 57). Tully turned to the Public Access Counselor, who agreed with the Office of the Attorney General that the opinion was deliberative material that was subject to withholding at the discretion of the Office of the Attorney General (II App. 55).

Tully then filed this suit seeking an order compelling disclosure of the opinion (II App. 45-49). On summary judgment, the trial court concluded the Inspector General's advisory opinions were not confidential and ordered release of a redacted version of the opinion. In the trial court's view, the Inspector General's rule declaring the informal opinions confidential conflicted with other Inspector

General rules and the Ethics Commission's role in providing advisory opinions (II App. 13-15). The trial court did not separately address the deliberative materials exception. *Id.*

The Office of the Attorney General appealed. With the appeal ongoing, the General Assembly passed House Enrolled Act 1001, which added issuing informal advisory opinions to the Inspector General's statutory duties and directed that "An informal advisory opinion by the office of the inspector general is confidential under IC 5-14-3-4, including any previously issued advisory opinion by the office of the inspector general that recites that it is confidential." I.C. § 4-2-7-3(9) (2023). Relying on the new statutory confidentiality, the Court of Appeals reversed in a published opinion. *Rokita*, slip op. at 2. In a carefully reasoned decision authored by Judge Kenworthy, the Court determined that the amended statute resolved any dispute over the confidentiality of the opinion and rejected Tully's other arguments against applying the statutory confidentiality. *Id.* at 2, 12. The Court first considered and rejected Tully's contention that the spokeswoman's comment to the Indiana Business Journal waived the confidentiality of the informal opinion because a generalized overview does not constitute waiver of confidentiality under APRA. Slip op. 9–11. Then the Court considered and rejected Tully's constitutional challenges to the new confidentiality statute: the separation of powers permits the appellate courts to consider and apply new laws, and adding the confidentiality provision to a bill addressing state administration did not violate the single-subject rule. *Id.* at 19–22.

ARGUMENT

This case does not present any issue warranting transfer and review by this Court. The Court of Appeals did not decide an issue of first impression, create a conflict with precedent, or depart from accepted law or practice. Rather, in a well-reasoned opinion, the Court faithfully applied long-settled principles when it held that under the facts of this case, disclosing the conclusion of a document did not waive its exception from disclosure under the Access to Public Records Act and the separation of powers did not prevent the Court from applying new law to an ongoing appeal. There is nothing novel about either holding, and this Court's review of the decision is unwarranted.

I.
Disclosing the bottom-line conclusion of a confidential record does not waive confidentiality under the Access to Public Records Act.

The Court of Appeals correctly held that a spokeswoman's scant recitation of the general conclusion of an informal opinion in response to a press inquiry did not waive APRA's exceptions to disclosure. While APRA establishes the State's public policy of an open and transparent government, the General Assembly also has crafted numerous exceptions to APRA's disclosure requirements. *WTHR-TV v. Hamilton Southeastern Schools*, 178 N.E.3d 1187, 1191 (Ind. 2022) (citing I.C. § 5-14-3-3(a), -4). To be sure, the Court of Appeals has held that public agencies may waive these exceptions from disclosure. *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 918–19 (Ind. Ct. App. 2003), *trans. denied*. Yet waiver requires the "voluntary and intentional

relinquishment of a known right." *Id.* at 919. And a court may find waiver if the agency selectively disclosed a record to some requestors but not others. *Id.* But a court will not find waiver if an agency simply releases a generalized overview of a withheld document. *Id.*

As the Court of Appeals concluded, the spokeswoman's summary response to a media inquiry did not waive APRA's confidentiality. The Indiana Business Journal contacted the Office of the Attorney General as part of a story raising questions about Attorney General Rokita's outside employment. A spokeswoman for the Office of the Attorney General responded to the inquiry, stating that Attorney General Rokita had made and would continue to make required financial disclosures and that he had received an advisory opinion from the Office of the Inspector General indicating that his "interests and outside employment are all squarely within the boundaries of the law and do not conflict with his official duties" (II App. 51). The spokeswoman's generalized conclusion about the informal advisory opinion does not disclose specific information contained in the opinion or substantial details that would evince an intentional waiver of confidentiality. And it contains far less detail than the multi-page summary and description in *Indiana Newspapers* that the Court of Appeals held was insufficient for waiver, *see* 787 N.E.2d at 919–21. Indeed, the spokeswoman's comment provides no more detail than a reasonable person would glean from the fact that the Attorney General obtained an advisory opinion from the Inspector General without any comment on its conclusion: for if the interest was not permitted, the Attorney General would be

obligated to discontinue it or the Inspector General would be obligated to bring it before the State Ethics Commission. *See* I.C. § 4-2-6-4. In short, the spokeswoman's response to a media inquiry about potential ethical concerns was not a sword at all,[1] let alone grounds to find waiver.

Adopting Tully's contrary rule would discourage public transparency. If a public agency waives an APRA exception simply by disclosing the general conclusion drawn in a confidential record, agencies and officeholders will be much more reticent to volunteer information to the public. The General Assembly has carved out APRA exceptions that serve important purposes: for example, they protect confidential court proceedings, I.C. § 5-14-3-4(a)(8); the integrity of law enforcement investigations, I.C. § 5-14-3-4(b)(1); the work product of public attorneys, I.C. § 5-14-3-4(b)(2); and records used for executive branch decision making, I.C. § 5-14-3-4(b)(6). If release of any information about a document risked waiving confidentiality as to the whole of the sensitive information contained in the document, "agencies would be loath to release any information or make any public comment for fear of waiving the exceptions they might otherwise claim." *Indiana Newspapers*, 785 N.E.2d at 920. And discouraging the release of information to the

[1] Tully repeatedly asserts that Attorney General Rokita used the advisory opinion as a sword that "exonerated" him of ethical misconduct (Transfer Pet. 2, 4, 10, 12, n.2, 14). No oversight authority has ever alleged misconduct by Attorney General Rokita related to his private employment. A public official responding to media speculation about the mere possibility of an ethical concern is a far cry from the type of official proceeding from which one seeks exoneration. Likewise, it is not comparable to the offensive use of privileged information to establish legal claims in court to the detriment of the rights of other parties that is at issue in the cases cited by Tully (Transfer Pet. 12-14).

public undermines the purpose and intent of APRA to foster an open and transparent government.

The Court of Appeals' holding that there was no waiver in the disclosure does not warrant review by this Court. As the Court of Appeals noted twenty years ago, there is "no reason to punish" an agency for providing "general information to the public regarding" a decision "by requiring it to disclose otherwise non-discloseable [sic] materials." *Indiana Newspapers*, 787 N.E.2d at 920. The observation holds true here. When asked to comment on an article asking how the public could know whether Attorney General Rokita's employment presented a conflict of interest, his spokesperson responded that the public could be assured that it did not in two ways: 1) he provided financial disclosures of his interests that the public could inspect, and 2) he sought and received an opinion from the Inspector General that no conflict of interest existed. There is no reason to punish the Office of the Attorney General's decision to reassure the public by providing this general information about the Inspector General's opinion by forcing it to disclose all of the otherwise confidential information given and received in the process of obtaining that opinion. The Court of Appeals correctly resolved this issue, and the petition should be denied.

II.
The separation of powers does not prevent the courts from applying new law to an ongoing case.

Like the Court of Appeals' holding on waiver, this Court's review of Tully's separation-of-powers argument is unnecessary. This Court has been clear that only

after it has reviewed a case or the time for review has passed does the separation of powers isolate a case from changes in the law. The separation of powers does not bar appellate courts from applying newly passed laws to cases pending before them. Found in Article 3, Section 1, Indiana's explicit, constitutional separation of powers divides the powers of the coordinate branches of government and is intended to "rid each separate department of government from any influence or control by the other department." *Berry v. Crawford*, 990 N.E.2d 410, 415 (Ind. 2013). Put simply, these coordinate responsibilities empower the legislative branch to create (or limit) causes of action and remedies, while the judicial branch applies them to a particular case. *State v. Doe*, 987 N.E.2d 1066, 1072 (Ind. 2013).

This Court has articulated the general rules that establish the boundaries between the legislative and judicial branch. The General Assembly is empowered "to enact general laws, regulating the practice in courts of justice, which may materially affect or change the decision of causes pending before the courts." *Columbus, C. & I. C. R. Co. v. Board of Com'rs of Grant County*, 65 Ind. 427, 442 (1878). But the General Assembly may not by legislation "set aside a final judgment of a court of record." *See, e.g., Lemmon v. Harris*, 949 N.E.2d 803, 814 (Ind. 2011); *Thorpe v. King*, 227 N.E.2d 169, 171 (Ind. 1967); *Board of Com'rs of Grant County*, 65 Ind. at 442. Nor may the Court "by a special act, directed to a particular case then pending before the courts, [] change the decision of that case." *Board of Com'rs of Grant County*, 65 Ind. at 441–42.

In resolving separation of powers claims, this Court has often looked to other states and to federal precedent, which consistently recognize the same distinction between fully adjudicated cases and cases pending on appeal. "It is the obligation of the last court in the hierarchy that rules on the case to give effect to [the legislature's] latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (quoting *U.S. v. Schooner Peggy*, 1 Cranch 103, 109 (1801)). But once a judgment reaches that finality, where the judiciary as a branch has offered its "last word," then the legislature "may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." *Plaut*, 514 U.S. at 227.

Consistent with these principles, this Court has regularly applied newly-enacted statutes to ongoing appeals. For example, the defendant in *Martin v. State*, 774 N.E.2d 43, 44 (Ind. 2002), was entitled to credit time for his time on home detention based upon a statute passed while his appeal was pending. Similarly in *Rodriguez v. State*, 100 N.E.3d 696 (Ind. 2018), this Court granted transfer and remanded a defendant's appeal from a motion to modify a sentence and explicitly directed the Court of Appeals "to reconsider in light of the amended statutes" passed while the appeal was pending. *See also State v. Stafford*, 128 N.E.3d 1291 (Ind. 2019). So, too, was the defendant in *N.G. v. State*, 148 N.E.3d 971, 974-75 (Ind. 2020), entitled to the benefit of a clarifying amendment passed by the legislature

shortly after the Court of Appeals affirmed the trial court. Likewise, in *Guzzo v. Town of St. John*, 131 N.E.3d 179, 181 (Ind. 2019), this Court granted transfer and remanded for a trial court to apply a newly passed statute to an eminent domain proceeding. The Court of Appeals simply did the same here when it applied the newly enacted confidentiality statute to Tully's claim. *Rokita*, slip op. at 22.

As the Court of Appeals observed, Tully's argument to the contrary rests on a misapprehension of these principles. *Rokita*, slip op. 17–18. The boundaries of the separation of powers are not set by the definition of the final judgment found in the appellate rules. *See Rokita* Slip Op. at n. 11 (citing Ind. Appellate Rule 2(H); *DeCola v. Norfolk S. Corp.*, 222 N.E.3d 938, 939 (Ind. 2023)). Rather, the limitation is grounded in the Constitution and the respective roles of the branches of government. As the United States Supreme Court articulated in *Plaut*, the judicial obligation to apply the law applies equally to each court in the judicial hierarchy even if it means overturning the decision of a lower court. Only after a judgment is truly final—and all appeal rights exhausted—is the law for that case settled and subsequent legislative enactments ineffective to change it. *Plaut*, 514 U.S. at 227; *Thorpe*, 227 N.E.2d at 287; *Board of Com'rs of Grant County*, 65 Ind. at 442. Indeed, as the Court of Appeals correctly noted, creating a rule that prohibits the legislature from ever applying laws retroactively to cases pending appeal "might result in our state's judiciary infringing upon the legislature's province to write and revise the law." *Rokita*, slip op. at 18 (internal citations omitted).

It has been settled law for more than a century that the appellate courts can recognize and apply changes in the law to cases pending before them. The Court of Appeals rested on that long-standing principle when it rejected Tully's separation of powers argument, and her petition to transfer seeking review of that decision should be denied.

CONCLUSION

The Court should deny transfer because the Court of Appeals simply applied well-settled principles of law when it rejected Tully's challenges to the application of a newly-passed law to her suit. Further review is not warranted and the petition to transfer should be denied.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I affirm that the above contains no more than 4,200 words.

/s/ Benjamin M. L. Jones
Benjamin M. L. Jones

CERTIFICATE OF SERVICE

I certify that on July 2, 2024, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I also certify that on July 2, 2024, the following persons were served electronically with the foregoing document through the IEFS:

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