Electronically filed

COMMONWEALTH OF KENTUC
SUPREME COURT
CASE NO. 2023-SC-0079

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT — APPELLANT

v.

APPEAL FROM COURT OF APPEALS
NO. 2021-CA-0181

JENNIFER ALBRIGHT, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF DAVID K. ALBRIGHT — APPELLEES

AMICUS CURIAE BRIEF ON BEHALF OF KENTUCKY LEAGUE OF CITIES

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of this amicus curiae brief were served upon the following by U.S. Mail, first class postage prepaid, on the 22nd day of August, 2023: (i) Lee E. Sitlinger, Sitlinger & Theiler, 320 Whittington Parkway, Suite 304, Louisville, KY 40222; (ii) Kenneth Williams, Esq. and Dustin Haley, Williams Hall & Latherow, 1505 Carter Avenue #200, P. O. Box 2008, Ashland, KY 41105-2008; (iii) Carolyn Ely, Isaacs & Isaacs, 1601 Business Center Ct., Louisville, KY 40299; (iv) Adam T. Goebel, John W. Bilby, Adam C. Reeves, Stoll Keenon Ogden PLLC, 500 West Jefferson Street, Suite 2000, Louisville, KY 40202, (v) Clerk of the Court of Appeals, Kate Morgan, 360 Democrat Drive, Frankfort, Kentucky 40601; (vi) Hon. Ann Bailey Smith, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, KY 40202, (vii) Clerk of the Jefferson Circuit Court, David L. Nicholson, Louis D. Brandeis Hall of Justice, 600 W. Jefferson St., Suite 2008, Louisville, Kentucky 40202. The undersigned also certifies he has not removed the record on appeal from the Clerk's Office.

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STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF THIS BRIEF

Amicus Curiae is the Kentucky League of Cities ("KLC"), which is a membership association serving Kentucky's cities, as well as a number of municipal agencies and special purpose government entities. Formed in 1927, KLC provides Kentucky cities, leaders, and employees with many services, including legislative advocacy, legal services, financing options, insurance services, community consulting, training, policy development and research, and more. KLC has filed numerous amicus curiae briefs with this Court and the United States Court of Appeals for the Sixth Circuit on issues that impact the interests of Kentucky cities, local government agencies, and their constituents. As a representative of municipalities in Kentucky, KLC has a substantial and particular interest in the outcome of this matter.

As a representative of municipalities in Kentucky, KLC has a substantial and particular interest in the outcome of this matter. The decision in this case will impact municipalities, municipal agencies, and special purpose government entities in Kentucky that provide services to the public.

The Court of Appeals held that a policy-type decision made by the Louisville and Jefferson County Metropolitan Sewer District ("MSD") pursuant to its governmental powers may have been negligent. The interests of KLC and its represented cities are directly and seriously impacted by this holding because when a local governmental body takes action, by passing local legislation like ordinances or adopting internal policies, it is not judged by a

negligence standard but rather by whether the action taken is within its constitutional or statutory authority to do so. Under Kentucky law, local governmental entities are not suable because they took singular action, unpopular action, or action which didn't solve the problem before them.

This case is unique because it is the local governmental *entity*'s decision-making that is challenged here. What is squarely at issue is a decision made by MSD and a determination by the Court of Appeals that a local governmental body may be held liable for exercising its governmental decision-making powers. This case does not concern the action of an employee taken pursuant to a policy. This case does not concern an omission by an employee of an action they should have taken. This case does not concern the failure of a city official to exercise oversight of an independent third-party. This case does not concern a city employee failing to follow a city's adopted rule or directive. And this case does not concern a city employee choosing between two courses of action that the city has delegated.

But this case does concern an elective choice made by a governmental entity, for which the Court of Appeals decision erroneously concluded the Claims Against Local Governments Act is inapplicable. For that, KLC and Kentucky's cities have serious concern that the Court of Appeals ruling creates an expansion of liability to Kentucky's cities and other local governmental entities.

The amicus brief focuses on two issues. First, how the Court of Appeals opinion tethers a local governmental body's decision-making discretion to a negligence standard which undermines Kentucky's home-rule principles. Second, how the Claims Against Local Government Act, working in tandem with the home-rule, mandates that when the city legislative bodies throughout Kentucky take action whether through ordinances, orders, or policies, that action cannot be negligent.

ARGUMENT

I. The Court of Appeals' opinion to evaluate a local governmental body's decision under a negligence standard undermines Kentucky's home-rule principles.

"Perhaps no state in the Union holds a stronger affection for local government than does the Commonwealth of Kentucky."[1] This affection is reflected in Kentucky's Home Rule Statutes, KRS 82.081 *et seq.* which vests cities in Kentucky with "broad authority"[2] and "permit[s] cities to act without specific statutory authorization."[3] KRS 82.082 gives local governments and cities broad authority "delegate[ing] all possible municipal powers to cities except those specifically denied to them."[4] Of course, the General Assembly is free to set state-wide standards and override any decision of a local

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[1] *Kentucky Rest. Ass'n v. Louisville/Jefferson Cnty. Metro Gov't*, 501 S.W.3d 425, 426 (Ky. 2016).
[2] *Id.* at 427; *See* KRS 82.082.
[3] Lexington Fayette Cnty. Food & Beverage Ass'n v. Lexington-Fayette Urb. Cnty. Gov't, 131 S.W.3d 745, 749 (Ky. 2004).
[4] *Dannheiser v. City of Henderson*, 4 S.W.3d 542, 548 (Ky. 1999).

government.[5] However, a local government's power to act will be presumed valid unless "it is expressly prohibited by a statute or there is a comprehensive system of legislation on the same subject embodied in state law."[6] "The legislature certainly knows the scope of its power to provide mandatory legislation" to set a state-wide policy and require cities to act a certain way.[7] "With the institution of Home Rule, the General Assembly changed the equation and delegated all essential and implied powers to cities except those specifically denied to them."[8]

When the General Assembly is silent, Kentucky's local governments are free to speak and act, are not required to do so in uniformity, and may follow whatever course the local legislative body believes to be in the best interests of their community.[9] For example, this Court has held that local governments have the power to prohibit smoking in "'any building open to the public' with certain defined exceptions."[10] Also, this Court has held that a county may fund its 911 service by charging an fee upon each occupied and residential

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[5] *See Kentucky Rest. Ass'n*, 501 S.W.3d at 428; *and Whitehead v. Estate of Bravard*, 719 S.W.2d 720, 722-23 (Ky. 1986).
[6] *Dannheiser*, S.W.3d at 548 (*citing* KRS 82.082)
[7] *Id.* at 549.
[8] *Id.* (quoting J. David Morris, *Municipal Law*, 70 KY. L.J. 293-96).
[9] *Id.* at 548. *See also City of Covington v. Tranter*, 673 S.W.2d 744, 747 (Ky. 1984) (explaining that the ordinance was not in conflict with the statute because the statute authorizing the City to establish and run a pension plan was silent regarding appeals of the city pension board).
[10] *Lexington Fayette Cnty. Food & Beverage Ass'n*, 131 S.W.3d at 751.

commercial unit[11] and the Court of Appeals upheld another county's alternative method of funding its 911 services by applying a monthly fee to its water meters.[12] With this home-rule authority comes the right to act alone, the right to experiment, and the right not to follow other communities, especially, when the local government seeks to "promote the health, safety, morals, or general welfare of the people.[13]

In this case, the Court of Appeals' decision erodes the home-rule principle because it subjects decision-making by a local government to a negligence standard. Doing so means legislation, rule-making, and policy decisions by a city may be challenged based on whether a city council's action was "reasonably prudent" or meets the "standard of care." That query is only answered by comparing one city to another. But Kentucky's home-rule principles grounded in our unique "affection for local government" requires more. Because one local government cannot establish a standard for others, local governments are immune from liability for performing their decision-making functions.

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[11] *Greater Cincinnati/Northern Kentucky Apartment Association, Inc. v. Campbell Co. Fiscal Court*, 479 S.W.3d 603, 604 (Ky. 2015).
[12] *City of Lancaster v. Garrard Co.*, 2017 WL 3446983 (Ky. App. Aug. 11, 2017) on remand from the Kentucky Supreme Court by Opinion and Order entered February 18, 2016, in Appeal No. 2014–SC–000738.
[13] *Lexington Fayette Cnty. Food & Beverage Ass'n*, 131 S.W.3d at 749.

In other words, a city is not required to act like other cities have acted in order to avoid being deemed negligent. Cities should not be put in a situation where they cannot make independent decisions. That principle may be sound when the General Assembly speaks or federal law controls. But when Kentucky law and home-rule encourage local governments to make their own decisions based on the best interests of *that* community, it necessarily means a uniform—or benchmark—standard will *not* (and should not) exist.

Some local governments may adopt landlord-tenant protections, and some may regulate "tiny" houses or short-term rentals. Other local governments might expand definitions of protected classes under local non-discrimination ordinances. Still others may prohibit smoking in certain public places. Or as in this case, one government may decide a sewer drain should not have grates to help prevent large scale flooding. These examples illustrate that it is not negligent for a city to *adopt* any of these measures, and it is not negligent for a city to *decline* to do so. The check on this local government exercise of authority is not based in negligence or a duty of ordinary care but rather: Is it an act in furtherance of a public purpose and in conflict with the Constitution or a statute?[14] If not, it is permissible since "it is not a tort for a government to govern" as this Court has frequently recognized.[15]

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[14] KRS 82.082.

[15] *Comair, Inc. v. Lexington-Fayette Urban Cnty. Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009) (quoting *Dalehite v. United States*, 346 U.S. 15, 57, (1953) (Jackson, J., dissenting)).

Home-rule is important for another reason: Kentucky's local governments learn from each other through this experimental and experiential process, which in turn advances the Commonwealth. That should be—and is—encouraged by Kentucky law.

As Jeffrey Sutton, Chief Judge of the United States Court of Appeals for the Sixth Circuit, wrote, "local power allows smaller groups of citizens to *audition innovative fixes* to policy challenges and to customize solutions to a discrete group of people and place."[16] As the Supreme Court of the United States put it: "local policies 'more sensitive to the diverse needs of a heterogeneous society,' *permits 'innovation and experimentation,'* enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'"[17]

The relationship between the Commonwealth and its cities is analogous to the federal structure. Much like what is good for California may or may not be good for Kentucky, what is good for Paducah may or may not be good for Paris. At the same time, Pikeville and Princeton may choose to follow Paducah's approach, Paris's approach, both, or neither. Other cities have the option of being a bystander to see which approach works best and, most importantly, the option of deciding what approach works best for *that*

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[16] Chief Judge Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 303 (2022)(emphasis added).
[17] *Bond v. United States*, 564 U.S. 211, 221 (2011)(emphasis added)(quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

community. In a state as geographically and economically diverse as Kentucky, the General Assembly has deferred to the local prudent governance for local governments to design and improve their sewer systems and how to allocate resources to do so.

Even Appellee's retained expert in this litigation agreed there is no comparative standard to be applied to MSD's decision to not grate its sewer drain openings and that no standard would apply to MSD as it would in any other local community: "you can't establish, necessarily, a hard and fast standard that would work in Louisiana, and work in Minnesota, and work in Washington, and work in Kentucky".[18] To his point, there likewise is no "hard and fast standard that would work" for all communities in the Cumberland Plateau, the Jackson Purchase, the Bluegrass, and all regions in between of our Commonwealth. These types of decisions are exactly those designed to be protected by home-rule.

If local governmental bodies may be held liable for decisions made pursuant to their governmental powers, as the Court of Appeals held here, then the consequences are far-reaching for Kentucky's local governments. Local governments would no longer be independent laboratories responding to their specific local needs. Instead, local governments will now be concerned about ensuring that their rules, policies, and laws track other communities for fear

[18] *See* Testimony of Dr. Andrew Earles at TR Vol. 13, p. 1914.

of being held liable for not following the "majority rule" set by other communities, or some other "standard" established by a different local government. When local governmental bodies are not free to make the decisions they deem best for their community, then they are stripped of their uniqueness and Kentucky home-rule exemplar for the nation would no longer exist.

II. CALGA works in tandem with home-rule and protects a local government's legislative decision from being second guessed by the courts.

"[CALGA] simply provides that all subsequent sections of the Act apply, *inter alia*, to 'actions in tort' brought 'against any local government' because of a 'defect or hazardous condition' existing on public property[.]"[19] Further, CALGA grants cities and municipalities immunity for torts that stem from the performance of legislative or judicial or quasi-legislative or quasi-judicial functions.[20] The General Assembly proscribes that "a local government shall not be liable for injuries or losses" that result from the local government adopting or failing to adopt a rule, deciding how to best allocate its resources, or failing to make an inspection.[21] Essentially, the General Assembly extended the principle "that it is not a tort for government to govern"[22] to local governments. Or in other words, "courts should not be called upon to pass

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[19] *Schwindel v. Meade Cnty.*, 113 S.W.3d 159, 164 (Ky. 2003).
[20] KRS 65.200(3); *Schwindel*, 113 S.W.3d at 164.
[21] KRS 65.2003(3).
[22] *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting).

judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy."[23]

Simply put, CALGA protects a local government when it makes difficult policy decisions on how to govern, which by CALGA's explicit terms includes a city's rulemaking and resource allocating authority. KRS 82.081(1) expressly delegates to local governments these powers, as long as the powers do not conflict with an act of the General Assembly.[24] Thus, it becomes apparent that CALGA and the home-rule work in tandem to establish that local governments have the authority to act, and when they act, they are protected from liability for an injury that is caused by that act.

It is helpful in this instance to consider the definitions of "quasi-judicial" and "quasi-legislative" before reviewing the decision of MSD here. This Court has defined these terms as the following:

> Quasi–Judicial—A term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and exercise discretion of a judicial nature.

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[23] *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky.2001) (citing 63C Am.Jur.2d, *Public Officers and Employees*, § 303 (1997)).
[24] *Dannheiser*, 4 S.W.3d at 548.

> Quasi–Legislative Power—The power of an administrative agency to engage in rule-making.[25]

The definitions for quasi-judicial and quasi-legislative adopted by the Court in *Bolden* reinforce CALGA's mandate that these actions by a local government are entitled to immunity.

The decisions made by MSD, any other local government, or other water and sewer districts, squarely fall within these definitions and CALGA's examples. MSD plainly relied upon its experience, studies, and consulting experts and the record is replete with why MSD chose to not grate its sewer drains in order to help prevent flooding.[26] These are exactly the types of decisions that the home rule has delegated to the local government, and which are subsequently protected by CALGA.

Thus, this Court's take-away from *Bolden* is correct: "There is no more legal liability in this situation for the [local government] than there would be where a judge fails to make a decision or makes a wrong one. The [Court of Appeals'] decision that the [local government] must respond in tort in this situation was in error, not because the [local government] enjoys immunity from tort liability, but because the incompetent performance of decision-

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[25] *Bolden v. City of Covington*, 803 S.W.2d 577, 581 (Ky. 1991) (quoting Black's Law Dictionary, Sixth Edition (1990), p. 1245).
[26] *See, e.g.*, Brief of the Appellant, at pp. 6-11.

making activity of this nature by a governmental agency is not the subject of tort liability."[27]

CONCLUSION

For these reasons, KLC supports the position of Appellant that the opinions of the Court of Appeals should be reversed.

Respectfully submitted,

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WORD COUNT CERTIFICATE

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[27] *Id.*