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KENTUCKY DEPARTMENT OF FISH AND WILDLIFE RESOURCES COMMISSION **APPELANT**

v.

2024-CA-0170 & 2022-CA-0192
Franklin Circuit Court Case No. 21-CI-00680
Hon. Thomas D. Wingate

KENTUCKY OPEN GOVERNMENT COALITION, INC. **APPELLEE**

UNIVERSITY OF KENTUCKY'S AMICUS CURIAE BRIEF

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CERTIFICATE OF SERVICE

On October 29, 2024, I electronically filed this amicus brief using KYeCourt's filing system, and I served a copy via U.S. Mail on Judge Thomas D. Wingate, Franklin County Courthouse, 222 St. Clair Street, Frankfort, Kentucky 40601; and via email on Jan M. West, jwest@goldbergsimpson.com, Goldberg Simpson, LLC, 9301 Dayflower Street, Prospect, Kentucky 40059; William R. Adams, II, radams@-kaplanjohnsonlaw.com, Jon L. Fleischaker, jfleischaker@kaplanjohnsonlaw.com, and Michael P. Abate, mabate@kaplanjohnsonlaw.com, 710 West Main Street, Louisville, KY 40202. I did not withdraw the record.

/s/ Bryan H. Beauman
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STATEMENT OF POINTS AND AUTHORITIES

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INTEREST OF AMICUS

The University of Kentucky, an "independent body politic"[1] within the Executive Branch,[2] is governed by a volunteer Board of Trustees who are appointed or elected to serve terms as long as six years.[3] It is home to nearly 34,000 students and more than 26,000 employees, including nearly 3,000 full-time faculty. As a public agency, it is subject to the United States and Kentucky Constitutions,[4] as well as Kentucky statutes governing public agencies,[5] including the Open Records Act.[6]

When complying with its statutory obligations under the Open Records Act, the University must resolve an inherent tension in the statute.[7] On the one hand, an agency is expected to respond to a request within five business days.[8] On the other hand, an agency must determine whether a record is exempt in whole or in part,[9] and, if so, whether it is necessary or feasible to

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1 *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 379–82 (Ky. 2016).

2 *University of Kentucky v. Moore*, 599 S.W.3d 798, 806 (Ky. 2019).

3 KRS § 164.131(1), (2).

4 *Cunningham v. Blackwell*, 41 F.4th 530, 536 (6th Cir. 2022).

5 *Kearney v. Univ. of Kentucky*, 638 S.W.3d 385, 399 (Ky. 2022).

6 KRS § 61.870, *et seq*.

7 The University receives over 1,000 Open Records Requests per year and has three full-time employees and one part-time employee devoted to gathering records, reviewing records for exemptions, and redacting records of exempt material, as required by the Open Records Act.

8 KRS § 61.880(1).

9 KRS § 61.878(1). In some instances, such as when records are prohibited from disclosure by federal law, KRS § 61.878(k), the agency *must* deny disclosure. *See In re Patrick Cahill/University of Kentucky*, 24-ORD-196 (2024) (upholding the University's denial of education records protected by

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redact the exempted information.[10] Moreover, when performing redactions, the University must ensure that the redactions are sufficient to prevent the identification of individuals via a skilled internet search.[11]

Although the statute generally requires agencies to respond within five business days,[12] this process often will take more than five business days, more than the statute allows.[13] While the statute allows an agency to decline requests that are unreasonably burdensome,[14] the University must be able to demonstrate that burden by clear and convincing evidence.[15] At times, the burdensome nature of a request may be obvious on its face. Other times, the burdensome nature of a request is not apparent until the records are retrieved, reviewed, and analyzed for redaction.

In its most recent decision interpreting the Open Records Act, this Court recognized it could not adopt an interpretation that would "render a

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the federal Family Education Rights and Privacy Act). In other instances, such as when the materials are preliminary, KRS § 61.878(1)(i) & (j), the agency *may* deny the request. *See In re Herald-Leader/University of Kentucky*, 24-ORD-153 (2024); *In re Jones/University of Kentucky*, 24-ORD-157 (2024) (both upholding the University's denial of records as preliminary).

10 KRS 61.878(4).

11 *University of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43, 59 (Ky. 2021).

12 KRS § 61.872(5).

13 *But see* KRS § 61.872(5) (allowing an agency more time to respond under certain conditions).

14 KRS § 61.872(6).

15 KRS § 61.872(6). *See also In re Frazier/University of Kentucky*, 24-ORD-180 (2024) (finding that an extraordinarily broad request seeking numerous records from multiple offices over a period of years was unreasonably burdensome).

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meaningful portion of the Open Records meaningless" and, thus, has a "duty to harmonize conflicts statutes so as to give effect to each of the General Assembly's enactments."[16] Thus, this Court must find a way to reconcile the requirement to respond within five business days,[17] the requirement to review for exemptions,[18] the requirement to redact exempt material,[19] and the exclusion for requests that are unreasonably burdensome.[20]

Unless this Court reverses the Court of Appeals or at least limits the scope of its decision to individuals who are "state officers," the University's obligations under the Open Records Act could expand exponentially.[21] First, the University may have to process Open Records requests to account for the text messages on the private cell phones of the twenty members of the Board

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16 *Shively Police Dep't v. Courier-Journal, Inc.*, ___ S.W.3d ___, 2024 WL 431055 at *8 (Ky. 2024). *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 152–53 (2012).

17 KRS § 61.880(1).

18 KRS § 61.878(1).

19 KRS § 61.878(4).

20 KRS § 61.872(6). One way to reconcile these provisions is to say if the agency can demonstrate that the process of gathering, reviewing, and redacting will take more than five days, then the request is unreasonably burdensome.

21 The University has denied requests for text messages, and its decision has been upheld when challenged. On occasion, the requester has appealed to the Attorney General, who has affirmed the University's decision. *See, e.g.*, *In re Rosen/University of Kentucky*, 24-ORD-118 (2024); *In re Miller/University of Kentucky*, 23-ORD-349 (2023)) (both affirming the University's denial of a request for text messages on a private cell phone); *see also In re Frazier/University of Kentucky*, 24-ORD-180 (2024) (affirming the University's denial of a request that included text messages on the grounds that the request was unreasonably burdensome.).

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of Trustees as well as nearly 30,000 employees of the University and its affiliated corporations.[22] Second, because both employees and board members have constitutional rights, the University will be required to persuade its employees and board members to allow the University to search their private cell phones. When the employee or board members refuse, the University will be unable to fulfill its obligations under the Act. Inevitably, appeals to the Attorney General or litigation in circuit court will follow.[23]

ARGUMENT

I. Text messages on private cell phones are not public records.

A. Text messages on an employee's private cells are not public records.

"Not every paper in the office of a public agency is a public record subject to public inspection."[24] Yet the Court of Appeals' decision threatens to expand the sweep of the Open Records Act to include a far broader and evolving set of communications for which there is no indication the General Assembly ever intended to capture through a statute first adopted in the 1970s. To be a "public

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22 With employees in all 120 counties, College of Medicine campuses in three locations, a regional health system in Eastern Kentucky, a community hospital in Morehead, agricultural research facilities throughout the Commonwealth, and a need to provide instruction and support to more than 34,000 students, the University of Kentucky and its affiliated corporations may well be the State's largest employer. The overwhelming majority of those employees own private cell phones with text message capability. Similarly, all twenty members of the Board of Trustees own private cell phones with text message capability.

23 KRS § 61.880.

24 *Mr. Laurence J. Zielke*, Ky. Op. Att'y Gen. No. 78-626 (Sept. 6, 1978).

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record," the record at issue must be "prepared, owned, used, in the possession of, or retained by the public agency."[25] Text messages on a private cell phone do not qualify as public records under Kentucky law.

As the Attorney General has explained, the statute defines "public records" in terms of property rights.[26] In determining whether text messages on an individual employee's private cell phone are "property" of the agency, it is crucial to recognize the distinction between an individual being a "public agency" and an individual being *employed* by a "public agency."

Under the clear terms of the statute, a "state officer" is also a "public agency" for purposes of the Open Records Act.[27] Thus, any text messages on a device that are the "property" of a "state officer" are, by operation of law, the "property" of a "public agency."[28] In sharp contrast, the University's employees are not "state officers;" they are simply public employees. The University's employees are not a "public agency;" they simply work for a "public agency." Consequently, any text messages on the employee's cell phones are the "property" of the employees, not property of the University. Therefore, the employees' text messages are not "public records" of a "public agency."[29]

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25 KRS § 61.870(2).

26 *In re Rosen/University of Kentucky*, 24-ORD-118 (2024); *In re Miller/University of Kentucky*, 23-ORD-349 (2023).

27 KRS § 61.870(1).

28 *Kentucky Open Gov't Coal., Inc. v. Kentucky Dep't of Fish & Wildlife Res. Comm'n, 2023* WL 7095744, at *9 (Ky. App. 2023)

29 *In re Rosen/University of Kentucky*, 24-ORD-118 (2024); *In re Miller/University of Kentucky*, 23-ORD-349 (2023). *See also In re WEKU/City of Richmond*, 21-ORD-146 (2021); *In re Mackey/Department*

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B. Text messages on a board member's private cell phone are not public records.

While the employees' text messages are not public records, a different analysis applies to the board members' text messages.

The Governor, with the advice and consent of the State Senate, appoints sixteen of the twenty members of the Board of Trustees.[30] The University's students, faculty, and staff elect the remaining four members.[31] All of these individuals are volunteers and receive no compensation other than reimbursement for expenses.[32]

Unlike ordinary employees, there is a plausible argument that each individual board member might be deemed a "state officer" and, thus, each individual board member is a "public agency" for purposes of the Open Records Act. If each individual board member is a "public agency," then the individual board member's text messages are "property" of a public agency. Indeed, this is exactly the analysis used by the Court of Appeals below.[33]

However, the analysis of the Court of Appeals ignores one of the cardinal rules of statutory construction—the Constitutional Doubt Canon.[34] Under that

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of Fish & Wildlife, 21-ORD-127 (2021); *In re Dickens/Louisville Water Company*, 15-ORD-226 (2015).

30 KRS § 164.131.

31 KRS § 164.131(3), (4), (5).

32 KRS § 164.170(1).

33 *Kentucky Open Gov't Coal., Inc.*, 2023 WL 7095744 at *9. (*discretionary review granted*).

34 "This cardinal principle has its roots in Chief Justice Marshall's opinion in *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804), and

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Canon, this Court should reject "not only those interpretations that would render the statute invalid but also those that would even raise serious questions of constitutionality."[35] "In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail[.]"[36]

The Court of Appeals' interpretation—that volunteers who are appointed by the Governor to serve on state boards are "state officers" with the responsibility to search and potentially turn over their personal text messages[37]—raises "grave and doubtful constitutional questions."[38] As explained in more detail in Part II of this Brief, the United States and Kentucky Constitutions prohibit the University from compelling an individual

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has for so long been applied by [the Supreme Court of the United States] that it is beyond debate." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988); *see also Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94, 96 (Ky. 2000) (Cooper, J.) ("It is a well-established principle of constitutional law and statutory construction that if a statute is reasonably susceptible to two constructions, one of which renders it unconstitutional, the court must adopt the construction which sustains the constitutionality of the statute.").

35 ANTONIN SCALIA & BRYAN A. GARNER, SCALIA AND GARNER'S READING LAW: THE INTERPRETATION OF LEGAL TEXTS 197 (2012).

36 *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005).

37 While the University may lack standing to challenge the constitutionality of the statute in this case, any individual board member who is deemed to be a "public agency" would have standing.

38 *United State ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

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to surrender their personal device.[39] Any interpretation that forces an individual to surrender their constitutional rights is constitutionally dubious.[40] If there is an alternative interpretation that avoids those doubts, then this Court should adopt that interpretation.[41] After all, there is a "reasonable presumption that [the General Assembly] did not intend the alternative which raises serious constitutional doubts."[42]

There is such a plausible alternative interpretation that resolves the constitutional doubts inherent in the Court of Appeals' interpretation. Rather than conclude the term "state officer" means an individual, the term could mean the "office of a state officer." In other words, the Governor is not personally a "public agency," but the "Office of the Governor" is.[43] Similarly, individual commissioners on the Fish & Wildlife Commission or individual board members on the University of Kentucky Board of Trustees are not a "public agency," but the Commission itself or the Board itself are "public agencies." An Open Record Request to the Commission or the Board would be

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39 *See Lefkowitz v. Turley*, 414 U.S. 70, 79 (1973).

40 Constitutional issues aside, the Court of Appeals' approach has significant public policy implications. If those who are appointed to state boards and commissions are forced to surrender their privacy rights, few will volunteer to do so. The Commonwealth will no longer be able to get the best possible board members.

41 *Clark*, 543 U.S. at 380–82.

42 *Id.* at 382.

43 *See In re Flanary/Office of the Secretary of State*, 22-ORD-184 (2022) (Office of the Secretary of State responded to Open Records request for the personal social media records of the Secretary of State).

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limited to records that are "property" of the Commission or the Board and not include the personal "property" of the individuals.

Because this alternative interpretation is plausible and because this interpretation resolves and avoids any constitutional doubts, this Court should reject the Court of Appeals' interpretation and adopt the alternative.[44] Doing so means that the text messages on the private cell phones of the Commissioners are not "public records." Therefore, the judgment of the Court of Appeals should be reversed.

II. Because the National and Commonwealth Constitutions prohibit unreasonable searches, the University cannot compel its employees or its board members to surrender their personal devices.

Even if this Court concludes that text messages on a private cell phone are "public records," both the National and Commonwealth Constitutions prohibit the University from compelling its employees or its board members to surrender their personal devices. Therefore, expecting the University to produce the text messages "places an unreasonable burden" on the University.[45]

Both the National and Commonwealth Constitutions prohibit unreasonable searches and seizures.[46] This prohibition extends to cell phones.[47] University employees "do not surrender their [constitutional] rights

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44 *Clark*, 543 U.S. at 381.

45 KRS § 61.872(6).

46 *See* U.S. Const. amend IV; Ky. Const. § 10.

47 *See Riley v. California*, 573 U.S. 373, 393-96 (2014).

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by accepting public employment."[48] Nor do members of the Board of Trustees surrender their constitutional rights by accepting a gubernatorial appointment or winning an election among students, faculty, or staff.[49] While employees and board members could voluntarily waive their constitutional rights,[50] the University cannot compel them to do so.[51] Moreover, as the Attorney General observed, "the mere threat of one's personal communications being subject to scrutiny simply by virtue of his or her public employment could also cause a chilling effect on his or her speech in violation of the First Amendment."[52]

Because the University cannot obtain the text messages on the personal devices of its employees or its board members, there is clear and convincing evidence that any request for text messages on private cell phones is unreasonably burdensome.[53] Therefore, the judgment of the Court of Appeals should be reversed.

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48 *Lane v. Franks*, 573 U.S. 228, 231 (2014).

49 *Lindke v. Freed*, 601 U.S. 187, 196 (2024).

50 If the University were to adopt a practice of asking employees to waive their constitutional rights and allow the University to search their personal cell phones, many members of the university community would feel intimidated and pressured to comply. Under those circumstances, there is doubt as to whether the waiver would be voluntary.

51 *See Lefkowitz*, 414 U.S. at 79.

52 *In re Miller/University of Kentucky*, 23-ORD-349 n.6 (2023).

53 While the record in this case may not contain such evidence, this Court must recognize the existence of individual constitutional rights and can conclude that an agency's inability to compel surrender of those rights is unduly burdensome.

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III. Because an agency may not take final action via text messages, all text messages are exempt as preliminary materials.

Even if text messages on private cell phones are "public records" and even if the University somehow obtains authorization to search its employees' or board members' personal devices, text messages are exempt as preliminary materials.[54] As the Attorney General explained, a public agency cannot take final agency action via text message.[55] Therefore, *all* text messages are preliminary.[56]

To explain, the Open Records Act has two exemptions for preliminary materials. First, there is an exemption for "preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency."[57] "Not every paper in the office of a public agency is a public record subject to public inspection. . . . Yellow pads can be filled with outlines, notes, drafts and doodlings which are unceremoniously thrown in the wastebasket or which may in certain cases be kept in a desk drawer for future reference."[58] Thus, this exemption "relates to preliminary drafts and notes, which by their very nature are rejected when a

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54 KRS § 61.878(1)(i); KRS § 61.878(1)(j).

55 *In re Miller/University of Kentucky*, 23-ORD-349 (2023).

56 *Id.* at 6.

57 KRS § 61.878(1)(i).

58 *Mr. Laurence J. Zielke*, Ky. Op. Att'y Gen. No. 78-626 (Sept. 6, 1978).

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final report is approved. In other words, a first draft is not 'adopted' when a second draft is written, and the first draft is always exempt."[59]

A similar analysis applies to "notes," which are the majority of interoffice emails and other communications.[60] An agency's final action may adopt the contents of notes, but "the initial and preliminary thoughts on what the final product should contain, which are expressed during the drafting process through emails, do not lose their preliminary status once a final end-product is produced."[61] Were it otherwise, there could be no "full and frank discussion between and among public employees and officials" prior to a final agency decision.[62]

Second, there is an exemption for "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended."[63] If a senior university administrator is making a decision, they may seek recommendations or proposed policies from a variety of individuals. Of course, individuals will not offer a candid perspective if their opinions will be revealed after the final agency action is taken. Therefore, like

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59 *In re Boxx/Murray State University*, 23-ORD 24 (2023).

60 *Id.*

61 *Id.*

62 *Id.*

63 KRS § 61.878(1)(j).

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the drafts and notes exception, these materials do not lose their preliminary status once the agency takes final action. [64]

To be sure, in *University of Kentucky v. Kernel Press, Inc.*, this Court held that those portions of an investigative file "that were once preliminary in nature lost that exemption status" once the University took final agency action.[65] Read broadly, *Kernel Press* could be interpreted as holding that all preliminary materials lose their exempt status when the agency takes final agency action. Such an interpretation would have an extensive chilling effect on public officials and public employees as they assess the financial, policy, public relations, internal political, and external political considerations before final agency action.

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64 *See In re Cummins/Daviess Fiscal Court*, 23-ORD-296 (2023); *In re Webster/Christian County Board of Education*, 23-ORD-250 (2023); *In re Grunner/Louisville Metro Government*, 23-ORD-207 (2023); *In re Moore/Fayette County Public Schools*, 23-ORD-188 (2023); *In re* Ray/Cabinet for Health & Family Services, 23-ORD-116 (2023); *In re Lamkin/Department of Financial Institutions*, 23-ORD-095 (2023); *In re Boxx/Murray State University*, 23-ORD 24 (2023); *In re Abate/Louisville Metro Government*, 21-ORD-089 (2021).

65 *Kernel Press, Inc.*, 620 S.W.3d at 62. Of course, in *Kernel Press*, this Court was simply expanding the investigative materials exception that it recognized in *University of Kentucky v. Courier-Journal & Louisville Times Co.* 830 S.W. 2d 373, 378 (Ky. 1992). Prior to *Kernel Press*, the Court of Appeals held records "which are of an internal, preliminary and *investigatory nature* lose their exempt status once they are adopted by the agency as part of its action." *University of Kentucky v. Lexington H-L Servs., Inc.*, 579 S.W.3d 858, 863 (Ky. App. 2018) (emphasis added).

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Yet, as the Attorney General repeatedly has observed, neither of the statutory exemptions "discusses preliminary 'investigative materials.'"[66] Rather, the statutory exemption relates to preliminary materials "which by their nature are rejected when a final report is approved."[67] Indeed, in *Kernel Press*, this Court acknowledged that *nothing* in the statute suggests that preliminary materials lose their preliminary status,[68] but asserted its previous decision in *University of Kentucky v. Courier-Journal & Louisville Times Co.*[69] had "created a narrow exception to the plain language of the statute."[70] Although creating such an exception to the express statutory text is inconsistent with this Court's recent approach to statutory interpretation,[71]

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66 *In re Cummins/Daviess Fiscal Court*, 23-ORD-296 (2023); *In re Moore/Fayette County Public Schools*, 23-ORD-188 (2023); *In re Ray/Cabinet for Health & Family Services*, 23-ORD-116 (2023); *In re Boxx/Murray State University*, 23-ORD 24 (2023).

67 *In re Cummins/Daviess Fiscal Court*, 23-ORD-296 (2023); *In re Moore/Fayette County Public Schools*, 23-ORD-188 (2023); *In re Ray/Cabinet for Health & Family Services*, 23-ORD-116 (2023); *In re Boxx/Murray State University*, 23-ORD 24 (2023).

68 *Kernel Press*, 620 S.W.3d at 61.

69 *Courier-Journal & Louisville Times Co.*, 830 S.W.2d at 378.

70 *Kernel Press*, 620 S.W.3d at 61.

71 Recent decisions of this Court are clear and unequivocal. The judiciary may not "displace the legislature's judgment for our own." *Owen v. University of Kentucky*, 486 S.W.3d 266, 273 (Ky. 2016); "[T]he words of the text are of paramount concern, and what they convey, in their context, is what the text means. In determining what the text means, words will be presumed to be understood in their ordinary meanings, unless context mandates otherwise." *Id.* at 270. Accordingly, the judiciary assumes the General Assembly "meant exactly what it said and said exactly what it meant." *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). "Where a statute is plain and unambiguous on its face, [the courts] are not at liberty to construe the language otherwise, *even though such a construction may*

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this Court insisted that the General Assembly had adopted this interpretation by enacting later amendments to the Open Records Act.[72]

Nevertheless, because the issue of "whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference,"[73] "judge-made exceptions to properly enacted statutes are to be narrowly construed."[74] As the judicial function "does not extend to psychoanalyzing the legislature and applying what it may have meant to say,"[75] the judicially created exception for "preliminary investigative materials" has no application for other preliminary materials.[76]

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be more consistent with the statute's legislative purpose." *Pennyrile Allied Cmty. Servs., Inc. v. Rogers*, 459 S.W.3d 339, 343 (Ky. 2015) (emphasis added). The judicial "function in interpreting statutes is limited to analyzing and applying what the legislature has said and does not extend to psychoanalyzing the legislature and applying what it may have meant to say. Cries for modification should be addressed to the legislature." *Apache Coal Co. v. Fuller*, 541 S.W.2d 933, 935 (Ky. 1976).

72 *Kernel Press*, 620 S.W.3d at 62.

73 *United States v. Rutherford*, 442 U.S. 544, 559 (1979) (cleaned up).

74 *CLS Bank Int'l v. Alice Corp. Pty.*, 717 F.3d 1269, 1303 (Fed. Cir. 2013) (Lourie, J. concurring).

75 *Apache Coal Co.*, 541 S.W.2d at 935.

76 Since this Court's decision in *Kernel Press*, the Attorney General has consistently found that preliminary materials, which are not adopted into the final agency action, do not lose their preliminary status. *See In re Herald-Leader/University of Kentucky*, 24-ORD-153 (2024); *In re Jones/University of Kentucky*, 24-ORD-157 (2024); *In re Cummins/Daviess Fiscal Court*, 23-ORD-296 (2023); *In re Webster/Christian County Board of Education*, 23-ORD-250 (2023); *In re Grunner/Louisville Metro Government*, 23-ORD-207 (2023); *In re Moore/Fayette County Public Schools*, 23-ORD-188 (2023); *In re Ray/Cabinet for Health & Family Services*, 23-ORD-116 (2023); *In re Lamkin/Department of Financial Institutions*, 23-ORD-095 (2023); *In re*

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Because all text messages are preliminary and because preliminary materials do not lose their preliminary status after final agency action, all text messages are exempt.[77] Therefore, the judgment of the Court of Appeals should be reversed.

CONCLUSION

For the reasons above, and those in the Opening and Reply Briefs of the Commission, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

/s/ Bryan H. Beauman
Counsel for amicus curiae,
University of Kentucky

Boxx/Murray State University, 23-ORD 24 (2023); *In re Abate/Louisville Metro Government*, 21-ORD-089 (2021).

77 While all text messages are preliminary, there are additional exemptions that may apply. *Kentucky Open Gov't Coal.*, 2023 WL 7095744 at *12 (McNeil, J. concurring) (discussing the broad range of exemptions that may apply to text messages). First, those text messages "containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" are exempt under the Personal Privacy Exemption. KRS § 61.878(1)(a). Second, those text messages that are "communications of a purely personal nature unrelated to any governmental function" are exempt under the Governmental Function Exemption. KRS § 61.878(1)(s). Third, those text messages thar are "education records" under the Family Educational Rights & Privacy Act, 20 U.S.C. § 1232g, are exempt under the KRS § 61.878(1)(k). Finally, those text message that contain legal advice or provide information on which the University's attorneys can formulate legal advice are exempt under the attorney-client privilege. Ky. R. Evid. 503.

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This amicus brief complies with the word limit of RAP 34(B)(4), because, excluding the parts of the document exempted by RAP 15(D), this document contains 4,207 words.

/s/ Bryan. H. Beauman
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