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**SUPREME COURT OF KENTUCKY**  
**CASE NO. 2023-SC-0079**  
*Electronically Filed*

LOUISVILLE AND JEFFERSON COUNTY  
METROPOLITAN SEWER DISTRICT

APPELLANT

VS. ON APPEAL FROM KENTUCKY COURT OF APPEALS  
CASE NO. 2021-CA-0181

JENNIFER ALBRIGHT, INDIVIDUALLY,  
AND AS ADMINISTRATRIX OF THE  
ESTATE OF DAVID K. ALBRIGHT

APPELLEE

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**OPENING BRIEF**  
**BY APPELLANT LOUISVILLE AND JEFFERSON COUNTY**  
**METROPOLITAN SEWER DISTRICT**

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**  
**PURSUANT TO KENTUCKY RULE OF APPELLATE PROCEDURE 30(B)**

I hereby certify that on this 7th day of August, 2023, a copy of the Opening Brief of Appellant Louisville and Jefferson County Metropolitan Sewer District was served by U.S. First Class Mail, postage prepaid to the following: (i) Lee E. Sitlinger, Esq., Sitlinger & Theiler, 320 Whittington Parkway, Suite 304, Louisville, Kentucky 40222; (ii) Kenneth Williams, Esq. and Dustin Haley, Esq., Williams Hall & Latherow, 1505 Carter Avenue #200, P. O. Box 2008, Ashland, Kentucky 41105-2008; (iii) Carolyn Ely, Esq., Isaacs & Isaacs, 1601 Business Center Ct., Louisville, Kentucky 40299; (iv) the Clerk of the Court of Appeals, Kate Morgan, 360 Democrat Drive, Frankfort, Kentucky 40601; (v) Hon. Ann Bailey Smith, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, Kentucky 40202, and (vi) the Clerk of the Jefferson Circuit Court, David L. Nicholson, Louis D. Brandeis Hall of Justice, 600 W. Jefferson St., Suite 2008, Louisville, Kentucky 40202.

*/s/ Adam T. Goebel*

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## I. INTRODUCTION

This appeal asks whether a local government’s adoption of a rule regulating its stormwater drainage system, which it adopted after weighing competing public safety risks and its limited resources, constitutes a discretionary exercise of legislative or quasi-legislative authority for which a local government is immune from tort liability under Kentucky’s Claims Against Local Governments Act (“CALGA”). During a major storm on August 31, 2018, David Albright (“Albright”), aged 15, tragically drowned when he was pulled into a drainage pipe after sitting down in running stormwater directly in front of the pipe’s opening. Years earlier, the Louisville and Jefferson County Metropolitan Sewer District (“MSD”) adopted a rule prohibiting the installation of grates on the inlets to stormwater drainage pipes because it concluded that such grates would cause pipes to clog and create dangerous flooding. Albright’s mother and his estate (together, the “Albright Estate”) sued MSD claiming it was responsible for Albright’s death because of that rule. The trial court rightly granted MSD summary judgment, holding that MSD is immune from tort liability under CALGA. The Court of Appeals wrongly reversed.

In this appeal, MSD asks this Court to hold that MSD’s discretionary decision to adopt a rule prohibiting the use of grates over stormwater drainage pipes was an exercise of MSD’s legislative or quasi-legislative authority for which CALGA provides tort immunity and to reverse the Court of Appeals’ erroneous decision to the contrary.

## II. STATEMENT CONCERNING ORAL ARGUMENT

MSD respectfully requests oral argument. This appeal concerns an issue of statewide importance—the scope of a local government’s tort immunity under CALGA for its exercise of judgment and discretion in making decisions. Oral argument would benefit the Court’s understanding of the record, the governing law, and the parties’ arguments.

**STATEMENT OF POINTS AND AUTHORITIES**

**CERTIFICATE OF SERVICE** ..... ii

**I. INTRODUCTION**..... iii

**II. STATEMENT CONCERNING ORAL ARGUMENT** ..... iii

**III. STATEMENT OF THE CASE**..... 1

**A. Introduction**..... 1

*Yanero v. Davis*,  
65 S.W.3d 510 (Ky. 2001) ..... 1

KRS 65.2003 ..... 1-3

**B. MSD Inherits Responsibility for Louisville and Jefferson County’s Stormwater Drainage System in 1986**..... 4

*Louisville & Jefferson Cnty. Metro. Sewer Dist. v. Hill*,  
607 S.W.3d 549 (Ky. 2020) ..... 4

*Rash v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*,  
217 S.W.2d 232 (Ky. 1949)..... 4

KRS 76.080..... 4

*Veail v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*,  
197 S.W.2d 413 (Ky. 1946) ..... 4

Louisville Metro Ordinance § 50.58 ..... 5

Louisville Metro Ordinance § 50.64 ..... 5

Louisville Metro Ordinance § 50.65 ..... 5

Louisville Metro Ordinance § 50.73 ..... 5-6

**C. MSD Weighs the Safety Risks and Its Resources and Adopts a Rule Prohibiting Installation of Grates on Stormwater Drainage Pipes** ..... 6

KRS 76.080..... 7

Louisville Metro Ordinance § 59.01 ..... 10

**D. The Drainage Pipe Inlet At Issue**.....11

**E. MSD Did Not Receive Any Complaints About Safety at the Drainage Pipe Inlet At Issue**.....12

**F. The Incident At Issue**.....13

**G. The Albright Estate Sues MSD For Albright’s Death**.....13

**H. Discovery Proves There Is No Legal or Industry Minimum Standard Requiring Grates and Drainage Districts Have Full Discretion To Decide Whether To Install Grates on Drainage Pipes**.....14

**I. The Jefferson Circuit Court Grants Summary Judgment in MSD’s Favor on the Albright Estate’s Claims** .....17

**J. The Court of Appeals Erroneously Reverses the Jefferson Circuit Court’s Order Granting Summary Judgment to MSD**.....19

**IV. ARGUMENT**.....20

**A. Summary of the Argument** .....20

*Marson v. Thompson,*  
438 S.W.3d 292 (Ky. 2014) .....20

KRS 65.2003.....20, 22

*Haney v. Lexington,*  
386 S.W.2d 738 (Ky. 1964) .....20

KRS 65.2001.....20, 22

KRS 76.080.....21

**B. Standard of Review**.....22

*Metzger v. Auto-Owners Ins. Co.,*  
607 S.W.3d 695 (Ky. 2020) .....23

*Cumberland Valley Contrs., Inc. v. Bell Cnty. Coal Corp.,*  
238 S.W.3d 644 (Ky. 2007) .....23

**C. MSD Is a “Local Government” Subject to CALGA**.....23

Kentucky Rule of Appellate Procedure 46(A).....23

*Commonwealth v. Bell*,  
400 S.W.3d 278 (Ky. 2013).....23

KRS 65.200.....24

KRS 65.005.....24

*Louisville & Jefferson Cnty. Metro. Sewer Dist. v. Hill*,  
607 S.W.3d 549 (Ky. 2020).....24

*Calvert Invest., Inc. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*,  
805 S.W.2d 133 (Ky. 1991).....24

*Ballman v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*,  
2007 WL 528644, 2007 U.S. Dist. LEXIS 10745  
(W.D. Ky. Feb. 13, 2007) .....24

**D. MSD Is Immune From the Albright Estate’s Claims Under CALGA .....24**

**1. CALGA Immunizes Local Governments for Their Discretionary Exercises of Legislative and Quasi-Legislative Authority.....25**

*Schwindel v. Meade Cnty.*,  
113 S.W.3d 159 (Ky. 2003)..... 25-26

KRS 65.2001.....25

KRS 65.2003..... 25-26

*Bolden v. Covington*,  
803 S.W.2d 577 (Ky. 1991)..... 26-27

*Gas Service Co. v. London*,  
687 S.W.2d 144 (Ky. 1985)..... 26-27

*Grogan v. Commonwealth*,  
577 S.W.2d 4 (Ky. 1979) .....27

*Marson v. Thompson*,  
438 S.W.3d 292 (Ky. 2014) .....27

**2. MSD’s Actions Met the Statutory Definitions of Exercises of Legislative and Quasi-Legislative Authority under CALGA**.....27

KRS 65.2003..... 28, 31-32

Louisville Metro Ordinance § 50.01 .....29, n.15

*Bolden v. Covington*,  
803 S.W.2d 577 (Ky. 1991).....32

*Ashby v. Louisville*,  
841 S.W.2d 184 (Ky. App. 1992).....32

*Estate of Clark v. Daviess Cnty.*,  
105 S.W.3d 841 (Ky. App. 2003).....32

*Russell v. City of Owensboro*,  
2014 WL 1407238, 2014 Ky. App. Unpub. LEXIS 275  
(Ky. App. Apr. 11, 2014).....33

**E. The Court of Appeals Erred In Holding MSD Was Not Immune From Tort Liability Under CALGA**.....33

KRS 65.2003.....33

**1. The Court of Appeals Misinterpreted CALGA’s Plain Language and Rendered KRS 65.2003(a) through (e) Wholly Superfluous** .....33

*Merritt v. Cath. Health Initiatives, Inc.*,  
612 S.W.3d 822 (Ky. 2020).....33

*Travelers Indem. Co. v. Armstrong*,  
565 S.W.3d 500 (Ky. 2018).....34, 36

*Lindall v. Kentucky Ret. Sys.*,  
112 S.W.3d 391 (Ky. App. 2003).....34

*Stone v. Kentucky Ins. Guar. Ass’n.*,  
908 S.W.2d 675 (Ky. 1995).....34

KRS 65.2003..... 34-38

*Beavin v. Commonwealth ex rel. Beshear*,  
563 S.W.3d 74 (Ky. 2018) ..... 35-36

KRS 446.010.....36

*Ky. Bd. of Med. Licensure v. Strauss*,  
558 S.W.3d 443 (Ky. 2018) .....36

*Marson v. Thompson*,  
438 S.W.3d 292 (Ky. 2014) .....37 n.18

*Patton v. Bickford*,  
529 S.W.3d 717 (Ky. 2016) .....37 n.18

*Ashby v. Louisville*,  
841 S.W.2d 184 (Ky. App. 1992) ..... 37-38

**2. The Court of Appeals Mischaracterized MSD’s  
Actions as the Ministerial Failure to “Repair”  
the Stormwater Drainage System.....38**

KRS 65.2003.....39

KRS 65.200.....39

*Marson v. Thompson*,  
438 S.W.3d 292 (Ky. 2014) ..... 39-40, 43 n.22

*Yanero v. Davis*,  
65 S.W.3d 510 (Ky. 2001) .....39, 43

*Gaither v. Justice & Pub. Safety Cab.*,  
447 S.W.3d 628 (Ky. 2014) ..... 39-40

*Patton v. Bickford*,  
529 S.W.3d 717 (Ky. 2016) ..... 39-40

*Williams v. Dep’t of Educ.*,  
113 S.W.3d 145 (Ky. 2003) .....40

*Mason v. City of Mt. Sterling*,  
122 S.W.3d 500 (Ky. 2003) .....40

*Thompson v. Bracken Cnty.*,  
294 S.W.2d 943 (Ky. App. 1956) .....41

KRS 178.210.....41

*Siding Sales v. Warren County Water District,*  
984 S.W.2d 490 (Ky. App. 1998) .....42

*Estate of Clark v. Daviess Cnty.,*  
105 S.W.3d 841 (Ky. App. 2003) .....42

*Bolden v. Covington,*  
803 S.W.2d 577 (Ky. 1991) .....43

*Gas Service Co. v. London,*  
687 S.W.2d 144 (Ky. 1985) .....43

**3. The Court of Appeals Misinterpreted Kentucky  
Common Law in Concluding MSD Possesses No  
Legislative or Quasi-Legislative Authority over  
Jefferson County’s Stormwater Drainage System.....44**

*Haney v. Lexington,*  
386 S.W.2d 738 (Ky. 1964) .....44

*Comair, Inc. v. Lexington-Fayette Urban Cnty. Airport Corp.,*  
295 S.W.3d 91, 101 (Ky. 2009) .....44

*City of Maysville v. Brooks,*  
140 S.W. 665, 668 (Ky. 1911) ..... 44, 46-47

*Marson v. Thompson,*  
438 S.W.3d 292 (Ky. 2014) .....44

*Mason v. City of Mt. Sterling,*  
122 S.W.3d 500 (Ky. 2003) ..... 44, 46-48

*Ashby v. Louisville,*  
841 S.W.2d 184 (Ky. App. 1992) .....44

KRS 65.2001.....45

KRS 65.2003.....45

*Castle v. Commonwealth,*  
411 S.W.3d 754 (Ky. 2013) .....45

*Campbell v. Vanceburg,*  
101 S.W. 343 (Ky. 1907) .....47

*City of Frankfort v. Byrnes*,  
817 S.W.2d 462 (Ky. App. 1991) .....47, 48

*Gas Service Co. v. London*,  
687 S.W.2d 144 (Ky. 1985) .....47, 48

*Madden v. City of Louisville*,  
2004 WL 1588279, 2004 Ky. App. Unpub. LEXIS 581  
(Ky. App. July 16, 2004) ..... 48, 51-52

*Beck v. City of Evansville*,  
842 N.E.2d 856 (Ind. App. 2006) ..... 49, 51-52

*Russell v. City of Owensboro*,  
2014 WL 1407238, 2014 Ky. App. Unpub. LEXIS 275  
(Ky. App. Apr. 11, 2014)..... 49-52

*Bullock v. Warren*,  
2016 WL 3151339, 2016 Ky. App. Unpub. LEXIS 372  
(Ky. App. May 27, 2016).....50

*Estate of Clark*,  
105 S.W.3d 841 (Ky. App. 2003) ..... 50, 51-52

*Bolin v. Davis*,  
283 S.W.3d 752 (Ky. App. 2008) ..... 50, 51-52

*Hammers v. Plunk*,  
374 S.W.3d 324 (Ky. App. 2011) .....50

**4. The Court of Appeals Relied on a Rejected Distinction  
Between Proprietary and Governmental Action to  
Mischaracterize MSD’s Actions as Ministerial .....52**

*Haney v. Lexington*,  
386 S.W.2d 738 (Ky. 1964) ..... 53-54

*Gas Service Co. v. London*,  
687 S.W.2d 144 (Ky. 1985) ..... 53-54

*Grogan v. Commonwealth*,  
577 S.W.2d 4 (Ky. 1979) .....53

*Commonwealth, Dep’t of Banking & Securities v. Brown*,  
605 S.W.2d 497 (1980).....53

*Ackermann Enters. v. City of Bellevue*,  
 2016 U.S. Dist. LEXIS 127198  
 (E.D. Ky. Sept. 19, 2016).....54

KRS 65.2003..... 54-55

*Lindall v. Kentucky Ret. Sys.*,  
 112 S.W.3d 391 (Ky. App. 2003) .....55

*Bolden v. Covington*,  
 803 S.W.2d 577 (Ky. 1991) .....55

*Ashby v. Louisville*,  
 841 S.W.2d 184 (Ky. App. 1992) .....55

**5. In Reversing the Trial Court, the Court of Appeals Rewrites  
 the Law on Local Governmental Immunity .....55**

*Russell v. City of Owensboro*,  
 2014 WL 1407238, 2014 Ky. App. Unpub. LEXIS 275,  
 (Ky. App. Apr. 11, 2014) .....56

*Estate of Clark*,  
 105 S.W.3d 841 (Ky. App. 2003) .....56

*Bolin v. Davis*,  
 283 S.W.3d 752 (Ky. App. 2008) .....56

*Madden v. City of Louisville*,  
 2004 WL 1588279, 2004 Ky. App. Unpub. LEXIS 581,  
 (Ky. App. July 16, 2004) .....56

*Beck v. City of Evansville*,  
 842 N.E.2d 856 (Ind. App. 2006) .....56

KRS 65.2001.....56

KRS 65.2003.....56

*Marson v. Thompson*,  
 438 S.W.3d 292 (Ky. 2014) .....57

**V. CONCLUSION .....57**

**WORD COUNT CERTIFICATION.....58**

**APPENDIX.....59**

A

000012 of 000070

### III. STATEMENT OF THE CASE

#### A. Introduction.

This Court should reverse the Court of Appeals’ January 20, 2023 Opinion that, for the first time, exposes local governments in Kentucky to tort liability for their discretionary exercises of legislative and quasi-legislative authority.<sup>1</sup> It is well-established that governing is not a tort. *See Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). Accordingly, by enacting CALGA in 1988, the General Assembly codified the rule that a local government is immune from tort liability for claims arising out of its exercise of discretionary legislative and quasi-legislative authority. KRS 65.2003(3). In doing so, the General Assembly provided guidance by giving specific examples of a local government’s exercise of such authority. These examples include (i) adopting rules, (ii) deciding whether and how to use limited resources, and (iii) performing (or not performing) inspections. KRS 65.2003(3)(a), (d), and (e).

The undisputed record below proved that MSD did just that—MSD exercised its legislative and quasi-legislative authority when, pursuant to its legal mandate, MSD exercised its discretion and judgment, weighed competing public safety risks and its resources, and adopted a rule implementing a policy-type decision barring the use of grates on Jefferson County’s stormwater drainage system. Specifically, under Kentucky law, MSD has authority to adopt rules that regulate the use, operation, and alteration of Jefferson County’s stormwater drainage system. However, there is no law or minimum industry standard that prescribes the manner in which grates must be used on inlets to drainage pipes

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<sup>1</sup> The Court of Appeals’ January 20, 2023 Opinion (short cited as “COA Op.”) is included in the Appendix to this brief at Tab A.

in that system. In the absence of such standards, MSD exercised its legislative and quasi-legislative authority by deciding grates should not be installed in the drainage system it inherited in 1986. MSD evaluated the various risks associated with installing grates on drainage pipes, like the risk of blockages and flooding, and considered its own limited resources to decide whether to devote capital and other resources to allow grates. Then, based on its evaluation, MSD adopted a rule aimed at eliminating the safety risks caused by flooding that would result from the use of grates. Consistent with this rule, MSD did not appropriate capital to install grates, nor did MSD inspect pipes for the installation of a grate. MSD's actions, therefore, met the statutory examples of a local government's discretionary exercise of legislative and quasi-legislative authority under CALGA and entitled MSD to immunity from the Albright Estate's claims.

The Court of Appeals erred in holding MSD's actions were not entitled to immunity under CALGA. The Court of Appeals misinterpreted (or ignored) the plain language of CALGA, misapplied Kentucky law, and substituted its own judgment for that of MSD's concerning a discretionary policy-type question that Kentucky courts have always reserved to local governments. First, the Court of Appeals ignored that the actions specified in CALGA at KRS 65.2003(3)(a) through (e) are, by definition, examples of a local government's discretionary exercise of legislative and quasi-legislative authority. In doing so, the Court of Appeals rendered the language in KRS 65.2003(3)(a) through (e) wholly superfluous.

Second, the Court of Appeals erred in holding MSD's actions were "ministerial." (COA Op., pp. 20-21.) Although MSD exercised discretion to adopt a rule after weighing the competing public safety risks and MSD's resources concerning a matter within its legal

and regulatory authority, the Court of Appeals wrongly concluded MSD's actions were instead ministerial. The Court of Appeals did so because it believed MSD's actions purportedly concerned MSD's "underlying" ministerial function to "repair" the stormwater drainage system. (*Id.*) In reasoning that "MSD's rule preventing placement of grates on drainage pipes squarely deals with the repair of its drainage system," the Court of Appeals erroneously conflated the concepts of discretionary and ministerial exercises of authority addressed by KRS 65.2003. This error fundamentally mischaracterizes MSD's actions and the authority MSD exercised and misapplies the well-established distinctions between ministerial and discretionary government action under Kentucky law.

Third, the Court of Appeals also erred in holding that CALGA implicitly excludes certain subjects—like the regulation of an existing stormwater drainage system—entirely from a local government's exercise of legislative or quasi-legislative authority. CALGA contains no such exclusion, and several prior decisions by the Court of Appeals recognize that a government may exercise discretionary legislative or quasi-legislative authority in matters concerning existing public infrastructure. Indeed, pursuant to KRS 65.2001, CALGA explicitly applies to claims arising out of alleged defects or dangerous conditions on public property, and KRS 65.2003(3) expressly confirms that a local government is immune from such claims where they concern the local government's discretionary exercise of legislative or quasi-legislative authority. Finally, the Court of Appeals, in its effort to claim that MSD's action was "ministerial," erroneously revived a distinction between governmental and proprietary actions that this Court rejected decades ago.

CALGA immunizes MSD from tort liability for the Albright Estate's claims because those claims arise from MSD's discretionary legislative and quasi-legislative

decision to adopt a rule prohibiting the installation of grates on stormwater drainage pipes. The Jefferson Circuit Court rightly concluded that CALGA immunizes MSD from the Albright Estate's claims, and it correctly granted summary judgment in MSD's favor.<sup>2</sup> This Court should reverse the Court of Appeals' January 20, 2023 Opinion to the contrary.

**B. MSD Inherits Responsibility for Louisville and Jefferson County's Stormwater Drainage System in 1986.**

In 1946, the City of Louisville created MSD as a "special district" pursuant to the enabling legislation of KRS Chapter 76. *Louisville & Jefferson Cnty. Metro. Sewer Dist. v. Hill*, 607 S.W.3d 549, 554 (Ky. 2020); *Rash v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 217 S.W.2d 232, 236 (Ky. 1949). Today, under that statute, MSD has jurisdiction, control, possession, and supervision over the sewer and stormwater drainage system in Jefferson County, and enjoys all of the "rights, privileges, and jurisdiction necessary or proper for carrying such powers into execution." KRS 76.080(1). Included within that authority is MSD's power to make "bylaws and agreements" for "the regulation of the use of property under its control." KRS 76.080(7).

At its creation, MSD was initially responsible only for Jefferson County's sanitary sewer system. *Veail v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 197 S.W.2d 413, 415 (Ky. 1946); (TR Vol. 6, p. 901). Later, in 1986, pursuant to local ordinances and an Interlocal Cooperation Agreement, Louisville and Jefferson County gave MSD all authority for the county's stormwater drainage and flood control systems as well. (Tr. Ct.

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<sup>2</sup> The Jefferson Circuit Court's November 17, 2020 Opinion and Order Granting MSD's Motion for Summary Judgment (short cited herein as "Tr. Ct. Op.") is included in the Appendix to this brief at Tab B and appears in the record at TR Vol. 21, pp. 3487-3505. The Jefferson Circuit Court's January 29, 2021 Order Denying the Albright Estate's CR 59.05 Motion is included in the Appendix to this brief at Tab C and appears in the record at TR Vol. 15, p. 2259.

Op., p. 3; Interlocal Cooperation Agreement (“Interlocal Agreement”) (Dec. 23, 1986)).<sup>3</sup> Among other things, MSD was granted the authority to “regulate” the use, operation, and alteration of the stormwater drainage system. (TR Vol. 5, pp. 671-72, 678-79.)

Upon merger, the merged city and county government of Louisville and Jefferson County enacted local ordinances confirming MSD as the comprehensive stormwater drainage authority for Jefferson County. (TR Vol. 4, pp. 635-654.) As reflected in these ordinances, MSD is granted all “authority, powers and abilities . . . relating to flood control and storm and surface water drainage systems and facilities.” (Louisville Metro Ordinance § 50.58, TR Vol. 4, p. 649.) This included the power to regulate, operate, alter, and inspect the stormwater drainage system. (Louisville Metro Ordinance §§ 50.64, 50.65, TR Vol. 4, pp. 650-651.)

These ordinances also gave MSD the explicit power to adopt and enforce rules and regulations governing the use, operation and alteration of Jefferson County’s stormwater drainage system:

[T]o secure the best results from the construction, operation, and maintenance [of the stormwater drainage facilities], and to prevent the damage and misuse of any of the drainage facilities . . . **MSD may make and enforce regulations and rules** that are necessary and reasonable which include but are not limited to the following . . .

(A) To prescribe the manner in which storm sewer, ditches, channels, and other stormwater facilities are to be designed, installed, used, altered or otherwise changed. . . .

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<sup>3</sup> The local ordinances appear in the record at TR Vol. 4, pp. 636-654, and are included in the Appendix to this brief at Tab D. Their original versions are reflected in Louisville Metro Ordinance No. 275 (Dec. 6, 2007) (<https://mca.louisvilleky.gov/2007/ord/Ord%20275%2007.pdf>) (last visited August 7, 2023). The Interlocal Cooperation Agreement appears in the record at TR Vol. 5, pp. 655-725.

(C) To prescribe the manner in which such facilities are operated. . . . [and]

(G) To protect the public health, safety and welfare.

(Louisville Metro Ordinance § 50.73, TR Vol 4, pp. 653-654 (emphasis added).) In other words, MSD has the power to issue rules to ensure Jefferson County’s stormwater drainage system functions properly.

**C. MSD Weighs the Safety Risks and Its Resources and Adopts a Rule Prohibiting Installation of Grates on Stormwater Drainage Pipes.**

Thus, as of 1986, MSD was given a broad mandate to administer Louisville and Jefferson County’s sanitary sewer, stormwater, and flood control systems. With this broad mandate came an even larger “backlog of problems that had been accumulating for more than 200 years” and which had been “accelerating rapidly since World War II.”<sup>4</sup> (TR Vol. 6, p. 804.) MSD’s mandate, then, required it to evaluate its priorities, issue rules, and to use its limited resources to address a number of competing priorities that extended beyond just the need to maintain the county’s existing infrastructure.

From 1985 until 2003, MSD spent close to \$1 billion on improvements to the wastewater collection and treatment system to address high priority public health and safety issues. (TR Vol. 6, p. 866.) Beginning in 2005, MSD entered into the first of three consent decrees with the Commonwealth of Kentucky and the United States Environmental Protection Agency that obligated MSD to implement a vast number of other projects to upgrade the aging sanitary sewer system in Jefferson County.<sup>5</sup> MSD spent an additional

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<sup>4</sup> This information appears in MSD’s Drainage Manual, which appears in the record at TR Vol. 6, pp. 800-830. Excerpts from MSD’s Drainage Manual are included in the Appendix to this brief at Tab E.

<sup>5</sup> These consent decrees are publicly available and appear as Docket Entries 23 and 46 in *United States v. Louisville & Jefferson Cnty. Metro Sewer Dist.*, Civil Action No.

\$1 billion implementing these projects, and the consent decree remains in place today. *See* Second Amended Consent Decree, DE [46] at ¶ 11, *United States v. Louisville & Jefferson Cnty. Metro Sewer Dist.*, Civil Action No. 3:05-CV-236 (W.D. Ky.); (TR Vol. 6, p. 867). While MSD focused its priorities on this massive federal mandate, MSD also identified needs and priorities within Jefferson County’s stormwater drainage system that it estimates would cost approximately \$4.3 billion to address over twenty years. (TR Vol. 6, pp. 867-868.)

Pursuant to its regulatory authority under KRS 76.080(7), the Interlocal Agreement, and Louisville Metro Ordinances, MSD also issued a Drainage Manual in the late 1990s that adopts certain rules for Jefferson County’s stormwater drainage system. (Tr. Ct. Op., p. 4; TR Vol. 6, pp. 800-830.) In it, MSD stated that it had studied the stormwater drainage system’s numerous mounting problems “in depth” and that it was “focusing its limited resources on resolving the most serious and widespread problems first, based on engineering studies, community priorities and available funds.” (TR Vol. 6, p. 804.) The Drainage Manual set forth various “Principles” to determine “whether MSD should accept responsibility for addressing a particular drainage service need.” (*Id.*, pp. 820-821.) The Drainage Manual also acknowledged that MSD’s “resource constraints come into play in establishing the timing and manner” in which MSD would resolve issues pertaining to the stormwater drainage system. (*Id.*, p. 823.)

With these “Principles” in mind, and in an exercise of its discretionary authority to regulate and set rules for the stormwater drainage system it inherited, MSD promulgated a

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3:05-CV-236 (W.D. Ky.). Reference to MSD’s Consent Decree obligations also appears in the record at TR Vol 6, pp. 866-867.

rule in the Drainage Manual regarding the use of grates on the openings of stormwater drainage pipes in Jefferson County's stormwater drainage system. (TR Vol. 6, p. 827; Tr. Ct. Op., pp. 4-5.) That rule stated:

MSD will not place grates on existing drainage systems, or allow their use in newly installed drainage systems where the potential for flooding damage or a safety hazard exists.

(TR Vol. 6, p. 827; Tr. Ct. Op., pp. 4-5.)

Molly Jones, who assisted MSD in developing its Drainage Manual, gave deposition testimony confirming that MSD had, through its issuance of this rule, adopted the "standard procedure [and] policy" that "we don't put grates" on stormwater drainage pipes. (TR Vol. 13, pp. 1999-2000.<sup>6</sup>) Ms. Jones stated that the committee MSD created to develop the Drainage Manual debated all of the policies included therein, especially the policy not to install grates on the stormwater system's drainage pipes. (*Id.*, p. 2000.) Ms. Jones testified that "[t]he grate issue . . . was a pretty significant issue for MSD." (*Id.*)

David Johnson, previously MSD's Development and Stormwater Services Director, and now MSD's Chief Engineer, explained why it was important to MSD to prohibit grates:

It's a practice that we don't do . . . [grates] lead to blockages, which leads to flooding. Flooding leads to damaged properties, it leads to safety risks for people around the flooded area, . . . It leads to risks for our employees to have to go out there and clean those. It also leads to a risk even for the customers because a lot of times when customers see a system backing up with water, they want to go in there and clean it out themselves. So that's – that's why we don't have those grates in front of systems is because they lead to blockages, which lead to flooding.

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<sup>6</sup> Excerpts from those portions of Ms. Jones's deposition testimony that appear in the record are also included in the Appendix to this brief at Tab F.

(TR Vol. 6, p. 902.<sup>7</sup>) Mr. Johnson gave two examples where blocked stormwater drainage pipes had caused dangerous flooding—one where a blocked drainage pipe caused water to surround a house and pop out a window, which required the homeowner to evacuate his family that lived in the flooding basement, and another where the fire department was called to rescue residents from flooding at an apartment complex. (*Id.*, p. 903.)

Mr. Johnson explained that because grates would block drainage pipes *during* storms, MSD could not reduce the flooding danger grates created simply through preventative maintenance:

[I]f you put grates in front of [storm sewer pipes], you're going to cause blockages. **And the blockages don't occur prior to the rain event, they occur during the rain event. So you can't do preventive maintenance on them because the – the blockages occur during the rain event.** That's when you start getting limbs, you know, Kroger bags, leaves, debris or whatever else that comes down there gets in front of that, and then you – you cause a flooding problem.

(*Id.*, p. 904 (emphasis added).)

Mr. Johnson explained that, in MSD's analysis, the public safety risks posed by installing grates on stormwater drainpipes were simply too great:

[W]e're definitely – definitely concerned about the flooding risk there is out there. . . . you have to realize that we have thousands of those [stormwater drainpipes] in Jefferson County, . . . to have grates on those types of structures throughout Jefferson County, we would have flooding risk all over our community. And it's not just flooding risks for the backyard flooding, but I'm talking about homes flooding, garages flooding, streets flooding, you know, people not expecting areas to be underwater that are underwater.

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<sup>7</sup> Excerpts from those portions of Mr. Johnson's deposition testimony that appear in the record are included in the Appendix to this brief at Tab G.

(TR Vol. 6, p. 910.) Mr. Johnson also noted that beyond the public safety risks, MSD must take steps to avoid blockages in its stormwater drainage system because the federal government evaluates the risk of blockages when it audits MSD's system pursuant to the rating system of the flood insurance program. (*Id.*, p. 909.) In addition, Louisville Metro Ordinance § 59.01(1) provides that nothing shall be done that prevents the free flow of water in the stormwater system. (TR Vol. 4, p. 638.)

Accordingly, Mr. Johnson testified that MSD evaluated the risks associated with the use of grates and MSD's limited resources and concluded that adopting a rule prohibiting the installation of grates on stormwater drainage pipes in the Jefferson County drainage system was appropriate. Specifically, Mr. Johnson testified "[w]e've looked at our system. . . . The flooding risk is substantial enough that we don't put [grates] in [the system]." (TR Vol. 6, p. 908.; *see also id.*, p. 906 ("[Y]ou have to weigh the risks there. And when you look at the risk that is associated with flooding, it's much higher."); *id.*, p. 907 ("[W]e've decided that the – the blockage risk is there and the flooding risk that is there, we – we've looked at that.").)

MSD's rule prohibiting the installation of grates on stormwater drainage pipes applies in conjunction with another MSD publication—its Design Manual. (TR Vol. 5, pp. 726-799.) MSD's Design Manual establishes the standards and requirements for the design of all sanitary and stormwater facilities in Jefferson County (whether built by MSD or a developer), in part to comply with federal, state, and local laws. (TR Vol. 5, p. 736.) MSD's Design Manual does not require grates over stormwater drainage pipes. (Tr. Ct. Op., p. 4; TR Vol. 5, pp. 726-799.) In other words, MSD's design requirements for Jefferson County's stormwater drainage system do not call for the installation of grates

over stormwater drainpipe openings and MSD's Drainage Manual affirmatively prohibits their installation.

Discussed more below, *see infra* at Section III(H), and as the trial court recognized (*see* Tr. Ct. Op., pp. 17-18), MSD evaluated whether to use grates in the absence of any legal or industry minimum standard mandating their installation on stormwater drainage pipes. Specifically, it is undisputed in this case that there are no prescriptive rules or minimum industry standards governing the installation of grates over stormwater drainage pipes. Nor are there any statutes, ordinances, or regulations mandating that a stormwater drainage pipe must have a grate. Industry standards, rather, recognize that drainage districts like MSD have complete discretion to decide whether to install and use grates *at all*. Indeed, industry literature confirms that grates clog when needed most during storms, and that this clogging renders a stormwater drainage pipe ineffective during a storm.

In the absence of any legal or industry minimum standard requiring the installation of grates on drainage pipes in the stormwater drainage system MSD inherited, MSD had to govern and regulate by exercising its discretion and authority to make a decision. MSD weighed its resources and the risks associated with grates, and it exercised its legislative and quasi-legislative authority by adopting a rule prohibiting the use of grates in order to decrease the dangerous risk of flooding caused by blocked drainage pipes.

**D. The Drainage Pipe Inlet At Issue.**

Albright, aged 15, lived with his mother and younger brother at their home in Jefferson County, Kentucky. (TR Vol. 4, pp. 579, 610.) A shallow drainage ditch runs along the rear of the Albrights' home. (*Id.*) That drainage ditch eventually terminates at a concrete headwall and a 21-inch diameter stormwater drainage pipe approximately 80 feet

“downstream” from the Albrights’ backyard. (TR Vol. 4, p. 579.<sup>8</sup>) From there, the drainage pipe carries stormwater underground to a detention basin located across the street. (*Id.*)

This stormwater drainage pipe was installed in 1984. (*Id.*) MSD did not design or construct it. (*Id.*) Rather, MSD inherited responsibility for this drainage pipe two years later in 1986. *Supra* at Section III(B). Consistent with its rule in the Drainage Manual, MSD did not install a grate over this existing drainage pipe’s opening after inheriting responsibility for the stormwater drainage system in 1986. (TR Vol. 6, p. 902.)

**E. MSD Did Not Receive Any Complaints About Safety at the Drainage Pipe Inlet At Issue.**

As the trial court recognized, between 1986 and 2018, MSD never received any complaints about a dangerous condition existing at the inlet described above. (Tr. Ct. Op., n.6.<sup>9</sup>) While MSD did receive calls about obstructions in the system, and an overflow during a 10-year storm, MSD never received a call about the inlet near the Albright’s home being potentially unsafe. (*Id.*) Also, it is undisputed that this drainage system, headwall, and drainage pipe were in proper repair before Albright drowned. (*Id.*, p. 17 (“In the instant case, the drainage pipe in which David Albright drowned was, apparently, fully functional.”).)

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<sup>8</sup> A photograph of the headwall and inlet to the drainage pipe appears in the record at TR Vol. 10, p. 1483 and is included in the Appendix to this brief at Tab H. Other photographs of the stormwater drainage system at issue in this appeal appear in the record at TR Vol. 4, pp. 624-628.

<sup>9</sup> The Jefferson Circuit Court noted that in 1995 there was a single request for MSD to place a grate over a *different* stormwater drainage pipe than the one at issue in this appeal. (Tr. Ct. Op., n. 6.) MSD denied this request, citing its rule against installing grates on stormwater drainage pipes. (*Id.*)

**F. The Incident At Issue.**

Albright tragically drowned on August 31, 2018. (Tr. Ct. Op., p. 1.) The facts concerning the incident are not contested. A major thunderstorm occurred between approximately 6:30 p.m. and 7:00 p.m. (TR Vol. 4, pp. 581-582.) Although lightning was occurring during the storm, Albright, along with his mother and younger brother, went outside during the storm to play in the water in the drainage ditch behind their home. (*Id.*) The drainage ditch and the stormwater drainage pipe were operating as designed, in that stormwater was flowing through the drainage ditch to the headwall, where it then travelled through the drainage pipe to the detention basin across the street. (TR Vol. 4, pp. 581-82; TR Vol 6, pp. 848-849.)

Eventually, all three of the Albrights moved to the headwall and inlet to play in the flowing water. (TR Vol. 4, pp. 582-583.) Ms. Albright sat on the headwall while Albright and his younger brother jumped in the water. (*Id.*) After a time, Albright deliberately sat down in the flowing stormwater at the headwall approximately two feet in front of the inlet to the drainpipe. (TR Vol. 4, p. 583.) The stormwater current swept Albright from his seated position, feet first, into the drainage pipe. (*Id.*) The stormwater carried Albright through the underground drainage pipe and first responders located him in the detention basin approximately 150 feet away across the street. (*Id.*) Albright died from his injuries on September 7, 2018. This incident is the first and only time a person has drowned in the stormwater drainage system. (TR Vol. 6, p. 906.)

**G. The Albright Estate Sues MSD for Albright's Death.**

The Albright Estate sued MSD in the Jefferson Circuit Court on December 7, 2018. (TR Vol. 1, pp. 1-28.) The Albright Estate alleged claims for (1) negligence, (2) failure to warn, (3) negligence *per se*, (4) attractive nuisance, and (5) negligent infliction of

emotional distress. (*Id.*) The Complaint did not identify any defect in the repair or maintenance of the drainage pipe in which Albright drowned. (TR Vol. 1, p. 3 (¶13).) Rather, the Albright Estate contended MSD was liable for Albright's death because MSD had not installed a grate over the opening of the stormwater drainage pipe. (*Id.*; *see also* TR Vol. 6, p. 845; TR Vol. 9, p. 1408.) In other words, the Albright Estate claimed that MSD failed to prevent Albright's death due to its rule prohibiting the installation of grates over drainage pipes in the stormwater drainage system. (TR Vol. 6, p. 845.)

**H. Discovery Proves There Is No Legal or Industry Minimum Standard Requiring Grates and Drainage Districts Have Full Discretion To Decide Whether To Install Grates on Drainage Pipes.**

In pursuit of these claims, the Albright Estate retained an engineer, Dr. Andrew Earles, to opine that MSD should have installed a grate over the drainage pipe at issue. (TR Vol. 2, pp. 186-349.) Dr. Earles, however, conceded at his deposition that there are no prescriptive engineering or industry minimum standards requiring that grates must be used on stormwater drainage pipes. (Tr. Ct. Op., pp. 16-17; TR Vol. 13, pp. 1914-15, 1917-20, 1922-23, 1926-27.<sup>10</sup>) Nor is there any Kentucky statute, regulation, or local ordinance governing the installation of grates on stormwater drainage pipes. Indeed, Dr. Earles recognized that each jurisdiction in the United States may be different and that “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.” (TR Vol. 13, p. 1914.)

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<sup>10</sup> MSD provided these excerpts of Dr. Earles' deposition testimony to the trial court in a supplement to its Motion for Summary Judgment (TR Vol. 13, pp. 1900-1929), which the trial court accepted (TR Vol. 13, p. 2006). These portions of Dr. Earles' deposition testimony are also included in the Appendix to this brief at Tab I.

Accordingly, Dr. Earles conceded drainage districts have full discretion to decide the policy they will adopt concerning whether to install grates in the drainage system. (TR Vol. 13, pp. 1914-15, 1919-20, 1922-23 (“It’s their decision. It’s the local government to decide whether they do it or not.”).) In fact, Dr. Earles testified that when it comes to grates “nothing is mandated,” and the decision to install a grate is ultimately up to the discretion of the district approving the project. (*Id.* at pp. 1926-27.) He also agreed that there was no single factor that would require a district to install a grate over an inlet, and that there is no rule requiring grates over inlets in residential neighborhoods. (*Id.*)

Additionally, the industry literature Dr. Earles relied upon does not reflect any accepted standard governing the installation of grates on stormwater drainage pipes. (Tr. Ct. Op., pp. 16-17; TR Vol. 13, pp. 1912-15.) One non-binding publication—*Public Safety Guidance for Urban Stormwater Districts*—supports MSD’s conclusion to prohibit grates. It states “[w]hile there is a sound argument for the use of racks [i.e., grates] for safety reasons, **field experience has shown that when the culvert is needed the most, that is, during the heavy runoff, trash racks [i.e., grates] can become clogged and the culvert is rendered ineffective.**”<sup>11</sup> (TR Vol. 12, pp. 1883-84 (emphasis added).)

Another publication—a 1992 manual of practice published by the American Society of Civil Engineers and the Water Environment Federation (“ASCE Manual”)—states only that the advantages and disadvantages of installing a grate on a stormwater drainage pipe should be considered on a case-by-case basis. (TR Vol. 6, p. 895; TR Vol. 12, pp. 1878-81.) Not only does the ASCE Manual not identify any mandate or minimum

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<sup>11</sup> The terms “racks,” “trash racks,” “safety grates,” and “grates” are all used interchangeably in this context. A copy of this publication is included in the Appendix to this brief at Tab J.

industry standard requiring the installation of grates, the ASCE Manual also specifically states that it “**is not in any sense a standard**” itself. (TR Vol. 12, p. 1879 (emphasis added).) Accordingly, the ASCE Manual, by its own terms, is not a standard, nor does it identify a minimum standard that local districts must follow.

Dr. Earles acknowledged in his deposition that none of the guidance in these industry publications constituted any kind of accepted minimum industry standard requiring the installation of grates on stormwater drainage pipes. (TR Vol. 13, pp. 1914-15; *see also* TR Vol. 12, p. 1879 (ASCE Manual stating it is not a standard).) Dr. Earles also agreed that local stormwater districts like MSD may deviate from the criteria in the ASCE Manual when establishing, in their discretion, their own rules of practice. (TR Vol. 12, pp. 1880-81; TR Vol. 13, pp. 1917-18.)

Dr. Earles ultimately faulted MSD for not evaluating the specific stormwater drainage pipe in question. (Tr. Ct. Op., p. 16.) Dr. Earles claimed MSD should have evaluated the drainage pipe in question to determine if installing a grate was appropriate based on whether (1) one could not see daylight from one end of the pipe to the other; (2) the culvert pipe was less than 42 inches in diameter; and (3) there were bends in the pipe. (Tr. Ct. Op., p. 16.) Again, however, Dr. Earles admitted that there was no single factor that would require a grate to be installed, that grates are not required in residential neighborhoods, and that it was ultimately within the discretion of the district to decide whether a grate should be installed. (TR Vol. 13, pp. 1912-13, 1926-27.) He also conceded “there was never a directive from . . . ASCE or anyone [else] that drainage districts in the United States are required to adopt the standard that [he] described.” (TR Vol. 13, p. 1921.) Accordingly, it is undisputed in this case that MSD was free to exercise its discretion to

adopt its own rule concerning whether or not to install grates in the drainage system. (TR Vol. 13, pp. 1922-23, 1926-27.)

**I. The Jefferson Circuit Court Grants Summary Judgment in MSD’s Favor on the Albright Estate’s Claims.**

MSD moved for summary judgment on all of the Albright Estate’s claims on January 8, 2020. (TR Vol. 4, pp. 575-602.<sup>12</sup>) Among other arguments, MSD argued it was entitled to summary judgment because its adoption of a rule prohibiting the installation of grates over the stormwater drainage pipes in Jefferson County was a discretionary exercise of its legislative and quasi-legislative authority for which it was immune under CALGA. (TR Vol. 4, pp. 591-601.) The parties thoroughly briefed this issue and submitted hundreds of pages of record evidence in support of their arguments.<sup>13</sup> The trial court held a two-hour oral argument on MSD’s motion on June 25, 2020.

The Jefferson Circuit Court issued its Opinion and Order Granting MSD’s Motion for Summary Judgment on November 17, 2020. The trial court concluded that MSD is a “local government” subject to the protections of CALGA and that MSD’s adoption of a rule prohibiting the installation of grates over Jefferson County’s stormwater drainage pipes was a discretionary exercise of MSD’s legislative or quasi-legislative authority for

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<sup>12</sup> The exhibits to MSD’s Motion for Summary Judgment appear in the record at TR Vol. 4, pp. 605-654, at TR Vol. 5, pp. 655-799, and at TR Vol. 6, pp. 800-938.

<sup>13</sup> Albright’s Estate filed a Response opposing MSD’s Motion at TR Vol. 9, pp. 1388-1418, the exhibits to which appear in the record at TR Vol. 9, pp. 1419-1426, TR Vol. 10, pp. 1427-1586, and TR Vol. 11, pp. 1587-1716. MSD filed a Reply in support of its motion at TR Vol. 11, pp. 1727-1737, the exhibits to which appear in the record at TR Vol. 12, pp. 1738-1762. Albright’s Estate filed a sur-reply opposing MSD’s motion, which was omitted from the record. MSD filed a response to that sur-reply at TR Vol. 12, pp. 1781-1789. MSD also filed a supplemental brief in support of its motion at TR Vol. 13, pp. 1901-1929. Albright’s Estate filed a response to MSD’s supplemental brief at TR Vol. 13, pp. 1985-2002.

which MSD was immune from suit under CALGA and Kentucky common law. (Tr. Ct. Op., pp. 6-18.)

In reaching this second conclusion, the trial court rejected the Albright Estate's argument that MSD had a "ministerial" duty to install a grate on the drainage pipe in question, which would have rendered MSD subject to tort liability. (Tr. Ct. Op., pp. 16-17.) The trial court held that MSD is immune under CALGA because (1) MSD has the express regulatory authority to adopt rules governing the use, operation and alteration of the drainage system; (2) MSD considered the impact of installing grates on the system, MSD's budget, and public safety; and (3) as the Albright Estate's own expert witness recognized, there was no legal or industry minimum standard that made it "absolute, certain, imperative, and clear" that MSD should install grates on drainage pipes such that MSD would have had a ministerial duty to do so. (Tr. Ct. Op., pp. 16-17.)

Rather, the trial court recognized that:

MSD considered the impact installing grates would have on its storm water drainage systems, on its budget, and on public safety. MSD could have decided to place grates over existing pipes or [it] could have decided not to do so, and either decision would have been lawful under existing statutes and regulations. The decision MSD made to not install grates over existing drainage pipes therefore fall[s] within its discretionary rulemaking authority under common law . . . and CALGA.

(Tr. Ct. Op., p. 18 (internal citations omitted).) As such, the trial court correctly held that MSD was immune from liability for the Albright Estate's claims under CALGA and granted summary judgment in MSD's favor on all of those claims. (Tr. Ct. Op., p. 18.) The Albright Estate appealed this ruling to the Court of Appeals. (TR Vol. 21, pp. 3484-85.)

**J. The Court of Appeals Erroneously Reverses the Jefferson Circuit Court's Order Granting Summary Judgment to MSD.**

The Court of Appeals erroneously reversed the trial court's order in an unpublished January 20, 2023 Opinion. Although it agreed with the Jefferson Circuit Court that MSD is a "local government" subject to the protections of CALGA (COA Op., p. 12), the Court of Appeals disagreed that MSD's adoption of a rule not to install grates on stormwater drainage pipes was a discretionary exercise of MSD's legislative or quasi-legislative authority (COA Op., pp. 20-21). Rather, the Court of Appeals concluded that MSD's action was "ministerial" because a municipality possesses a "ministerial duty to non-negligently construct, maintain, and repair [its] sewer system" under Kentucky common law, and that the "construction, maintenance, and repair of sewer systems are not," by definition, "legislative, or quasi-legislative functions." (COA Op., p. 17.)

The Court of Appeals then summarily concluded that "MSD's rule preventing placement of grates on drainage pipes squarely deals with the **repair** of its drainage system, which has long been regarded as a nonimmune function of local government." (COA Op., pp. 20-21 (emphasis added).) The Court of Appeals also concluded that MSD's regulation of the operation, use and alteration of the drainage system was no different from any regulation performed by private industry and, therefore, was not legislative or quasi-legislative. (*Id.*)

Disagreeing with MSD's own evaluation of its resources and the competing public safety risks posed by the installation of grates, as well as MSD's conclusion that risks associated with flooding are the primary risks that MSD should address when it comes to the stormwater drainage system, the Court of Appeals said that "[a] drainage pipe located close to homes in a residential subdivision that presents a significant safety risk to those in

its immediate vicinity could reasonably be viewed as needing ‘repair.’” (COA Op., p. 21.) In reaching this conclusion, the Court of Appeals ignored the fact that the pipe was not broken and in need of “repair” as that term is defined—indeed, it was fully functional and conveying water as it was supposed to at the time of the incident. The Court of Appeals also ignored that MSD exercised its discretion, judgment and authority in deciding to prohibit grates in the stormwater drainage system for very specific reasons based on MSD’s evaluation.

MSD timely moved this Court to grant discretionary review over the Court of Appeals’ January 20, 2023 Opinion, which this Court granted on June 7, 2023.

#### IV. ARGUMENT

##### A. Summary of the Argument.

Governing is not a tort. *Marson v. Thompson*, 438 S.W.3d 292, 296 (Ky. 2014). Both CALGA and Kentucky common law immunize local governments from tort claims arising out of their discretionary exercises of legislative and quasi-legislative authority. KRS 65.2003(3); *Haney v. Lexington*, 386 S.W.2d 738 (Ky. 1964). As expressly enumerated in CALGA, a local government exercises its legislative and quasi-legislative authority by exercising judgment and discretion (i) to adopt a rule or regulation, (ii) to make a discretionary decision in the face of competing demands concerning whether, and how, to utilize its limited resources, and (iii) to fail to perform an inspection. KRS 65.2003(3)(a), (d), (e). Pursuant to CALGA, a local government is immune from claims for “death [and] personal injury” caused by any alleged defect in public property that arise out of these discretionary actions. KRS 65.2001(1)(a).

Here, CALGA immunizes MSD from the Albright Estate’s claims because MSD’s decision to adopt a rule prohibiting the installation of grates on Jefferson County’s

stormwater drainage pipes was a quintessential exercise of its legislative and quasi-legislative authority. As a “local government” responsible for Jefferson County’s sewer systems, MSD has express authority pursuant to KRS 76.080(7), Louisville Metro Ordinances, and the Interlocal Agreement to adopt rules that regulate the use, operation and alteration of the stormwater drainage system. In the absence of any legal or industry minimum standard requiring the use of grates on Jefferson County’s stormwater drainage pipes, MSD exercised its legislative and quasi-legislative authority in evaluating whether to permit the use of grates in that system.

In doing so, MSD exercised judgment and discretion by weighing the competing public safety risks involved with the use of grates as well as MSD’s own limited resources. MSD concluded that prohibiting the use of grates was the best way to ensure the stormwater drainage system served its purpose to convey water freely and prevent flooding because grates were known to clog drainage pipes and cause or exacerbate flooding. After considering this question, which was well within its regulatory authority, MSD exercised judgment and discretion in adopting a rule prohibiting the installation of grates on Jefferson County’s stormwater drainage pipes. In short, MSD governed, and its actions meet the statutory and common law definitions of immune conduct by a local government.

The Court of Appeals erroneously reversed the Jefferson Circuit Court’s order granting summary judgment to MSD on this basis. The Court of Appeals, first, misconstrued CALGA by ignoring the General Assembly’s plain language providing that a local government’s adoption of a rule, exercise of discretion in the face of competing demands concerning whether, or how, to use its resources, and failure to make an inspection are all, by definition, exercises of legislative or quasi-legislative authority. In

doing so, the Court of Appeals rendered much of KRS 65.2001(1) and 65.2003(3) wholly superfluous. Second, the Court of Appeals erred by mischaracterizing MSD's exercise of judgment and discretion to adopt a rule pursuant its authority as, instead, the failure to perform a ministerial act to "repair" a pipe in Jefferson County's stormwater drainage system. Third, the Court of Appeals misconstrued Kentucky common law when it concluded that the existence of MSD's ministerial duty to "construct, maintain, and repair" its sewer system displaced and precluded MSD from exercising legislative or quasi-legislative authority over the regulation of that system. Fourth, the Court of Appeals resurrected a distinction between proprietary and governmental functions that this Court jettisoned from its local governmental immunity analysis decades ago because it was contrived and inherently unsound.

Ultimately, the Court of Appeals' decision rewrites Kentucky law concerning local government tort liability. Left intact, the Court of Appeals' Opinion would permit courts throughout the Commonwealth to ignore CALGA's plain language and second-guess local governments' exercises of judgment and discretion pursuant to their authority over how to regulate competing risks and how to utilize their limited resources. The General Assembly enacted CALGA to prevent such second-guessing by courts in the context of a tort action. Accordingly, this Court should reverse the Court of Appeals' January 20, 2023 Opinion because CALGA and Kentucky common law protect a local government like MSD for its discretionary acts of governance.

**B. Standard of Review.**

The Jefferson Circuit Court's November 17, 2020 Opinion and Order granted MSD's Motion for Summary Judgment. Under Kentucky Rule of Civil Procedure 56.03,

summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Metzger v. Auto-Owners Ins. Co.*, 607 S.W.3d 695, 698 (Ky. 2020).

“Because summary judgments involve no fact finding,” appellate review of a trial court’s summary judgment decision is *de novo*. *Id.* (internal citation omitted). This Court, then, should afford no deference to the legal conclusions of the Court of Appeals in reviewing whether MSD was entitled to summary judgment below. *Cumberland Valley Contrs., Inc. v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007) (“we review the trial court’s and the Court of Appeals’” statutory construction as a “matter of law subject to a *de novo* standard of review”).

**C. MSD Is a “Local Government” Subject to CALGA.**

There is no question that MSD is a “local government” within the meaning of CALGA because MSD is a “special district.” Both the Jefferson Circuit Court and Court of Appeals agreed that MSD is a local government under CALGA. (Tr. Ct. Op., pp. 6-12; COA Op., p. 12 (“As a special district created by a local government, we agree with the circuit court’s conclusion that MSD falls within the definition of “local government” under CALGA.”).)

The Albright Estate is precluded from arguing otherwise in this appeal. The Albright Estate did not file a cross-motion for discretionary review of the Court of Appeals’ opinion that MSD was a “local government” for purposes of CALGA. The Albright Estate’s failure to do so prohibits this Court from reviewing that decision. *See* Kentucky Rule of Appellate Procedure 46(A); *Commonwealth v. Bell*, 400 S.W.3d 278, 281 (Ky. 2013).

Nevertheless, MSD is indeed a “local government” under CALGA. CALGA defines a “local government” as “any special district . . . created or controlled by a local government.” KRS 65.200(3). A “special district,” in turn, is “any agent, authority, or political subdivision of the state which exercises less than statewide jurisdiction and which is organized for the purpose of performing governmental or other prescribed functions within limited boundaries.” KRS 65.005(2)(a). This Court has on several occasions recognized MSD as a “special district.” *See Hill*, 607 S.W.3d at 554 (holding that MSD was “originally created by the City of Louisville . . . [and] retains the same characteristics of a special district” under KRS Chapter 76); *Calvert Invest. Inc.*, 805 S.W.2d at 135 (“MSD . . . [is a] special district[] established and structured by statutes enacted by the General Assembly to carry out a limited public purpose in a local area.”). The United States District Court for the Western District of Kentucky has previously held MSD is a “local government” for purposes of CALGA. *See Ballman v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, Case No. 3:06-CV-279H, 2007 WL 528644, 2007 U.S. Dist. LEXIS 10745 at \*15 (W.D. Ky. Feb. 13, 2007).<sup>14</sup> MSD, then, is a “local government” subject to the protections of CALGA and this question cannot be reviewed now.

**D. MSD Is Immune From the Albright Estate’s Claims Under CALGA.**

The sole question before this Court is whether MSD’s exercise of judgment and discretion to adopt a rule prohibiting the installation of grates over Jefferson County’s stormwater drainage pipes, which MSD made after evaluating how to ensure the best operation of the drainage system in light of competing public safety risks and MSD’s

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<sup>14</sup> A copy of the opinion in *Ballman* is included within the Appendix to this brief at Tab K.

resources, was an exercise of MSD’s legislative or quasi-legislative authority that CALGA immunizes from tort liability. The answer to that question is **yes**. The Court of Appeals’ decision must therefore be reversed.

**1. CALGA Immunizes Local Governments for Their Discretionary Exercises of Legislative and Quasi-Legislative Authority.**

CALGA protects a local government from tort claims arising out of its acts of governing. The Kentucky General Assembly passed CALGA in 1988 “to specify what damages could be obtained against local governments that are subject to common law judgments.” *Schwindel v. Meade Cnty.*, 113 S.W.3d 159, 163 (Ky. 2003). By its terms, CALGA’s provisions apply to “every action in tort” against a local government for “death, personal injury or property damages” that a plaintiff alleges was caused by, among other things, “[a]ny defect or hazardous condition in public lands, buildings, or other public property.” KRS 65.2001(1)(a); *see also Schwindel*, 113 S.W.3d at 164 (noting that KRS 65.2001(1) “provides that all subsequent sections of [CALGA] apply, *inter alia*, to ‘actions in tort’ brought . . . because of a ‘defect or hazardous condition’ existing on public property”).

Where a plaintiff’s claim for injuries or losses arises from the local government’s “exercise of judicial, quasi-judicial, legislative, or quasi-legislative authority,” CALGA affords a local government *complete* immunity from tort liability. KRS 65.2003(3); *Schwindel*, 113 S.W.3d at 166 (describing CALGA as “an apparent attempt to limit the damages awardable against a local government for its non-immune tortious acts, e.g., a municipality’s tortious performance of a function that is **not** legislative, judicial, quasi-legislative, or quasi-judicial in nature” (emphasis added)).

In a provision entitled “Claims disallowed,” CALGA provides as follows:

[A] local government shall not be liable for injuries or losses resulting from . . .

- (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, **which shall include** by example, but not be limited to:
  - (a) The adoption [of] or failure to adopt any ordinance, resolution, order, regulation, or rule; . . .
  - (d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources; or
  - (e) Failure to make an inspection.

KRS 65.2003 (emphasis added). CALGA, however, “does not exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.” KRS 65.2003; *see Schwindel*, 113 S.W.3d at 166.

In short, CALGA immunizes a local government from tort claims for injury or death from an alleged defect or hazardous condition on public property where the claim arises from the local government’s exercise of its legislative or quasi-legislative authority. In doing so, CALGA provides guidance and simplifies the immunity analysis for courts by expressly providing that certain acts—like the adoption of a rule, the exercise of discretion in the face of competing demands concerning how to utilize limited resources, and the failure to make an inspection—are, by definition, protected exercises of legislative and quasi-legislative authority. Indeed, the examples provided in CALGA were well recognized at common law. *See Bolden v. Covington*, 803 S.W.2d 577, 580 (Ky. 1991) (defining “Quasi-legislative power” as the power to “engage in rule-making”); *Gas Service Co. v. London*, 687 S.W.2d 144, 151-152 (Ky. 1985) (Wintersheimer, J., concurring)

(stating that local governments should not be responsible for formulation of policy, which includes cases where, in the face of competing demands, the local government determines how, or whether, to utilize its existing resources); *Grogan v. Commonwealth*, 577 S.W.2d 4, 5-6 (Ky. 1979) (holding that the City of Southgate was not liable for the Beverly Hills Supper Club disaster due to its failure to inspect the building for code violations).

The General Assembly enacted CALGA for important reasons. Since governing cannot be a tort, the General Assembly, and courts, recognize that governments must make policy-type decisions in performing their discretionary functions, which requires them to weigh various risks and resources, and the government must risk acting in a discretionary manner when it governs. *Marson*, 438 S.W.3d at 296-97. Courts, therefore, “should not be called upon to pass 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.” *Id.* at 297. Thus, without immunity, local governments would have their discretionary policymaking relitigated by a coordinate branch of government under the guise of a tort claim. Accordingly, a local government is immune from tort liability for performing its “decision making” functions where the local government is accused of “having failed to prevent [an injury] by proper exercise of regulatory functions which have elements appearing quasi-judicial and quasi-legislative in nature.” *Bolden*, 803 S.W.2d at 580 (quoting *Gas Service Co.*, 687 S.W.2d at 149).

**2. MSD’s Actions Met the Statutory Definitions of Exercises of Legislative and Quasi-Legislative Authority under CALGA.**

MSD’s actions in this case unequivocally met CALGA’s statutory definitions of protected discretionary exercises of legislative or quasi-legislative authority by a local

government. Namely, MSD (1) exercised discretion, in the absence of any governing legal or industry minimum standards governing the use of grates on stormwater drainage pipes, to determine how to use its limited resources considering the competing demands and public safety risks, (2) adopted a rule implementing its decision, and (3) did not make an inspection of the pipe at issue, consistent with that rule. *See* KRS 65.2003(3)(a), (d), and (e). Because the Albright Estate claims MSD is responsible in tort because its rule prohibiting the installation of grates on Jefferson County’s stormwater drainage pipes did not prevent Albright’s death, MSD is immune from the Albright Estate’s claims under CALGA.

To start, there is no question that MSD has express legal authority to adopt rules regulating the use, operation and alteration of the public property under its control—here, the stormwater drainage system. *Supra* at Section III(B). It is also undisputed that there is no legal or industry standard mandating that MSD install grates in the stormwater drainage pipes it inherited in 1986. *Supra* at Section III(H). The Albright Estate’s own expert witness agreed that there is no minimum industry standard requiring the installation of grates on any stormwater drainage pipes, and there is no minimum industry standard that requires grates over drainage inlets in residential neighborhoods. *Id.* To the contrary, the industry literature that the Albright Estate’s own expert relied upon recognizes that while there may be a “sound argument” for using grates, “field experience” has shown that when functioning stormwater drainage pipes are “needed the most, that is, during the heavy runoff” of stormwater, grates “can become clogged,” rendering those drainage pipes “ineffective.” (TR Vol. 12, p. 1884.)

As such, the Albright Estate’s expert acknowledged that when it comes to whether to install grates on stormwater drainage pipes, “nothing is mandated,” and that it is instead up to a local government, in its discretion, “to decide whether they [install grates] or not.” (TR Vol. 13, pp. 1926, 1922-23.) The Albright Estate’s expert witness also acknowledged there was no single factor, such as the presence of a residential neighborhood, that might require MSD to install a grate on its stormwater drainage pipes. (TR Vol. 13, pp. 1926-27.) There can be no dispute that MSD (the local government charged with regulating Jefferson County’s stormwater drainage system, *supra* at Section III(B)), was required to exercise its own judgment and discretion when evaluating whether to install grates on the drainage pipes in that system.

MSD exercised that discretion, and its specific authority to regulate the stormwater drainage system, when it decided how MSD should address the safety risks posed by the use of grates and how to utilize MSD’s limited resources. *Supra* at Section III(C). As documented in the Drainage Manual, MSD studied the Jefferson County stormwater drainage system’s numerous problems “in depth” after inheriting responsibility for it in 1986. (TR Vol. 6, p. 804.) As part of this study, the question of whether to install grates on the system’s drainage pipes “was a pretty significant issue for MSD.” (TR Vol. 13, p. 2000.) Consistent with industry literature, MSD concluded that grates cause or exacerbate dangerous flooding because they clog the drainage pipes.<sup>15</sup>

David Johnson, now MSD’s chief engineer, testified that grates “lead to blockages, which leads to flooding. Flooding leads to damaged properties . . . [and] to safety risks for

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<sup>15</sup> Additionally, as set forth above, Louisville Metro Ordinance § 50.01 prohibits actions being taken that inhibit the free flow of water in the stormwater drainage system.

people around the flooded area . . . [and] for our employees.” (TR Vol. 6, p. 902.) Mr. Johnson also explained that MSD could not reduce this risk through preventative maintenance because it was only *during* the rain event that grates would cause drainage pipes to clog and flood. (*Id.*, p. 904.) In MSD’s judgment, the public safety risks from the installation of grates on stormwater drainage pipes were simply too great. (TR Vol. 6, p. 908 (Mr. Johnson testified “[w]e’ve looked at our system . . . The flooding risk is substantial enough that we don’t put [grates] in [the system]”); *see also id.*, p. 906 (“you have to weigh the risks there. And when you look at the risk that is associated with flooding, it’s much higher”).)

In the absence of a legal or industry mandate to install grates, and after weighing the risks posed by their installation and MSD’s own limited resources, MSD then exercised its discretionary authority and adopted a rule in its Drainage Manual that prohibited the installation of grates over Jefferson County’s existing stormwater drainage pipes. (TR Vol. 6, p. 827.) This rule reflected MSD’s “standard procedure [and] policy” that “we don’t put grates” on stormwater drainage pipes. (TR Vol. 13, pp. 1999; *see also* TR Vol. 6, p. 902.) After that, though, MSD did not receive a complaint before August 2018 regarding the drainage pipe at issue presenting a dangerous condition, and MSD did not inspect that pipe further for the installation of a grate because MSD followed the rule it adopted. *Supra* at Section III(E).

As a result, MSD’s actions here squarely meet the statutory definitions of an exercise of legislative or quasi-legislative authority set forth in CALGA. First, MSD exercised its discretion to determine how, or whether, to use its limited resources in the face of competing demands and based on MSD’s evaluation of the competing risks. *Supra*

at Section III(C). CALGA states that an exercise of protected legislative and quasi-legislative authority “shall include” when “in the face of competing demands,” a local government “exercise[s] [] discretion” and “determines whether and how to utilize or apply existing resources.” KRS 65.2003(3)(d). Absent any legal or industry mandate to install grates on its stormwater drainage pipes, and in light of MSD’s conclusion about the significant problems with safety caused by flooding that grates pose, MSD exercised its discretion and made a policy-type decision that, in its judgment, was most appropriate for the best operation of the drainage system and best managed the risks and MSD’s own resources. *Id.* Indeed, due to MSD’s conclusion that grates pose a significant flooding risk, MSD did not appropriate capital to install grates within the stormwater drainage system. This exercise of judgment meets CALGA’s fourth example of an immune exercise of legislative or quasi-legislative authority in KRS 65.2003(3)(d).

Next, MSD exercised its discretionary authority to adopt a rule. CALGA expressly provides that a local government’s protected exercise of its legislative or quasi-legislative authority “shall include” its adoption of a rule. KRS 65.2003(3)(a). There is no question MSD had the legal authority to adopt rules regulating the use, operation, and alteration of Jefferson County’s stormwater drainage system. *Supra* at Section III(B). Nor is there any disputing MSD exercised that authority to adopt a rule prohibiting the installation of grates on stormwater drainage pipes in Jefferson County. *Supra* at Section III(C). This act, by itself, satisfies CALGA’s first example of an immune exercise of legislative or quasi-legislative authority in KRS 65.2003(3)(a).

Finally, because MSD had already evaluated its stormwater drainage system and decided to not to install grates, MSD did not to make a further inspection, which CALGA

also immunizes. CALGA provides that an example of a local government's exercise of legislative and quasi-legislative authority "shall include" its "[f]ailure to make an inspection." KRS 65.2003(3)(e). Here, MSD already weighed the risks and its own resources, and decided it should not install grates over inlet pipes. *Supra* at Section III(C). MSD's failure to inspect the drainage pipe near the Albrights' residence for the installation of a grate, then, meets the final example of an immune exercise of legislative and quasi-legislative authority in KRS 65.2003(3)(e).

As a result, whether under KRS 65.2003(3)(a), (d), or (e), MSD's actions met the statutory definitions of an exercise of legislative or quasi-legislative authority under CALGA. MSD is therefore immune from tort liability in this case because the Albright Estate's claims arise out of MSD's adoption of a rule prohibiting the installation of grates over stormwater drainage pipes. *Bolden*, 803 S.W.2d at 580.

Kentucky case law confirms such an application of CALGA. These cases are discussed in greater detail below. *See infra* Sections IV(E)(2) and (3). In short, though, Kentucky cases confirm that a local government's actions like those described in KRS 65.2003(a) through (e) are, by definition, exercises of discretionary legislative or quasi-legislative authority for which a local government is immune from tort liability. *Ashby v. Louisville*, 841 S.W.2d 184, 187 (Ky. App. 1992). Furthermore, like MSD's decision not to install grates, Kentucky courts hold that a government's decision whether to install a guardrail on a road is a discretionary exercise of authority for which government officials are immune. *Estate of Clark v. Daviess Cnty.*, 105 S.W.3d 841, 845 (Ky. App. 2003). Kentucky courts also hold that a local government's adoption of a plan to address the maintenance and repair of its sidewalks in phases is a discretionary exercise of authority

for which tort immunity under CALGA applies. *Russell v. City of Owensboro*, 2014 WL 1407238, 2014 Ky. App. Unpub. LEXIS 275, at \*10 (Ky. App. Apr. 11, 2014) (unpublished).<sup>16</sup> Accordingly, MSD's actions met the statutory definitions of an exercise of legislative and quasi-legislative authority in CALGA, and MSD's actions are consistent with how Kentucky courts have construed the exercise of such discretionary authority. The Jefferson Circuit Court was right to grant MSD summary judgment on the Albright Estate's claims.

**E. The Court of Appeals Erred in Holding MSD Was Not Immune From Tort Liability Under CALGA.**

The Court of Appeals erroneously reversed the trial court's order granting summary judgment to MSD. It ignored CALGA's plain language and rendered KRS 65.2003(3)(a) through (e) wholly superfluous. It wrongly equated MSD's discretionary exercise of authority with the ministerial act to "repair" the stormwater drainage system. It also erroneously concluded that under Kentucky common law, a local government effectively lacks discretionary legislative or quasi-legislative authority to regulate its existing sewer system. And, finally, the Court of Appeals relied on a distinction between governmental and proprietary action that this Court rejected decades ago because it is fundamentally unsound. The Court of Appeals' entire analysis is in error and must be reversed.

**1. The Court of Appeals Misinterpreted CALGA's Plain Language and Rendered KRS 65.2003(a) through (e) Wholly Superfluous.**

The Court of Appeals' most basic error was its misinterpretation of CALGA. When interpreting a statute, a court should first "look to the plain language of the statute." *Merritt v. Cath. Health Initiatives, Inc.*, 612 S.W.3d 822, 829 (Ky. 2020). "[I]f the language is

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<sup>16</sup> A copy of the decision in *Russell* is included in the Appendix to this brief at Tab L.

clear, our inquiry ends.” *Id.* Courts must “hold fast to the rule of construction that the plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source.” *Id.* Moreover, a statute should be construed “so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Travelers Indem. Co. v. Armstrong*, 565 S.W.3d 500, 563 (Ky. 2018). Finally, a court cannot add or subtract from the legislative enactment, nor may courts create exceptions to the terms of the statute when the legislature has not created any. *Lindall v. Kentucky Ret. Sys.*, 112 S.W.3d 391, 394 (Ky. App. 2003); *Stone v. Kentucky Ins. Guar. Ass’n.*, 908 S.W.2d 675, 677 (Ky. 1995).

In holding that CALGA did not protect what was an obvious exercise of discretion and judgment by MSD here, the Court of Appeals effectively rewrote CALGA by narrowing its application in a manner that is not supported by the wording of the statute. By its plain language, the actions described in KRS 65.2003(3)(a) through (e) are examples that “**shall**” constitute the “exercise of judicial, quasi-judicial, legislative or quasi-legislative authority” by a local government that CALGA protects. KRS 65.2003(3) (emphasis added). As such, if a local government engages in an action listed in KRS 65.2003(3)(a) through (e) then it has, by definition, exercised discretionary legislative or quasi-legislative authority and is therefore immune from a tort claim arising out of that action.

But the Court of Appeals did not interpret CALGA this way. The Court of Appeals wrongly held that the actions described in KRS 65.2003(3)(a) through (e) are not actually examples of a local government’s exercise of legislative or quasi-legislative authority.

Rather, the Court of Appeals held that a local government is immune for these actions “**only** where they arise from **underlying** judicial, quasi-judicial, legislative, or quasi-legislative **functions**.” (COA Op., p. 17 (emphasis added).) Under the Court of Appeals’ interpretation of CALGA, then, even if a local government takes one of the actions specified in KRS 65.2003(3)(a) through (e), it is not immune from tort liability unless, *in addition*, that action also arises out of an “underlying function” that is defined as legislative or quasi-legislative.<sup>17</sup> Or put another way, the list of examples in KRS 65.2003(3)(a) through (e) are not dispositive when deciding the immunity question because they are not examples of the discretionary exercise of legislative or quasi-legislative authority that CALGA protects. Instead, to the Court of Appeals, it is the “underlying function” being performed by the local government that ultimately decides whether it is immune.

This “underlying function” requirement created by the Court of Appeals has no support in the plain language of CALGA. CALGA is clear—a local government is immune from tort liability for its exercise of legislative or quasi-legislative authority, which “**shall include by example**” the actions listed in the statute—*e.g.* the adoption of a rule, the exercise of discretion in determining whether and how to use limited resources in the face of competing demands, and the failure to make an inspection. KRS 65.2003(3); KRS 65.2003(3)(a), (d), (e). (emphasis added.) The word “shall” is a “word of command . . . and must be given compulsory meaning” when used in a statute. *Beavin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 89 (Ky. 2018); *see also* KRS 446.010(39) (“shall” means

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<sup>17</sup> The Court of Appeals later compounded this error even further in concluding that MSD had no legislative or quasi-legislative authority over the administration of Jefferson County’s stormwater drainage system. This error is addressed separately below. *Infra* at Section IV(E)(3).

mandatory). Thus, the General Assembly has provided guidance on the actions by local governments that are, by definition, immunized from tort liability by CALGA. Because CALGA specifically states that certain enumerated acts “shall” constitute examples of a local government’s exercise of legislative or quasi-legislative authority, a local government is therefore immune from tort liability when it takes one or more of those enumerated actions. A reviewing court need look no further to determine whether a local government’s action that falls within KRS 65.2003(3) (a) through (e) *also* arises out of an “underlying function” that is legislative or quasi-legislative—the examples in KRS 65.2003(3)(a) through (e) directly answer the immunity question. The General Assembly has been clear that such actions “shall” not give rise to tort liability. KRS 65.2003(3)(a) through (e).

Reading CALGA as the Court of Appeals does renders KRS 65.2003(3)(a) through (e) without meaning and wholly superfluous, which this Court cannot do. *See, e.g., Ky. Bd. of Med. Licensure v. Strauss*, 558 S.W.3d 443, 452 (Ky. 2018) (rejecting a litigant’s interpretation of a KRS 13B.110(1) because it would have rendered the phrase “if any” to be “unnecessary and superfluous”). Contradicting the wording of the statute, the Court of Appeals effectively reads KRS 65.2003(3)(a) through (e) as nothing more than a list of a government’s generalized activities that do not ultimately determine whether it might be entitled to immunity under CALGA. But if these examples do not determine whether a local government is immune from tort liability, then there is no reason to include them in the statute at all. Courts must presume that the General Assembly intended for “all [of a statute’s] parts to have meaning.” *Travelers Indem. Co.*, 565 S.W.3d at 563 (internal citation omitted). The only reasonable interpretation of CALGA is that the General Assembly intended the specific activities enumerated in KRS 65.2003(3)(a) through (e) to

be examples of the kinds of exercises of authority by a local government that the statute immunizes from tort liability, and a court need not perform any additional analysis.<sup>18</sup>

The Court of Appeals' reliance on *Ashby* to support its erroneous interpretation of CALGA is misplaced; indeed, *Ashby* refutes the Court of Appeals' interpretation and confirms the interpretation discussed above. (COA Op., pp. 15-17.) *Ashby* addressed the meaning of the phrase "or others" within KRS 65.2003(3)'s list of examples identifying the type of actions that enjoy CALGA immunity.<sup>19</sup> 841 S.W.2d at 187. There, the plaintiff sued the City of Louisville alleging that its police officers failed to arrest a domestic abuser before he murdered the decedent. *Id.* at 186. The City of Louisville argued it was immune from tort liability under CALGA in KRS 65.2003(3). *Id.* The City did not argue, however, that its officers' failure to arrest the murderer constituted an exercise of its judicial, quasi-judicial, legislative, or quasi-legislative authority. *Id.* Instead, the City argued that the officers' failure constituted an exercise of discretion in performing the "other" authority referenced in KRS 65.2003(3). *Id.* But the Court of Appeals in *Ashby* could not determine what the General Assembly meant by its inclusion of this phrase "or others" within KRS 65.2003(3). *Id.* Without any clearer meaning, the Court of Appeals held that KRS

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<sup>18</sup> This approach is consistent with the approach taken in Kentucky caselaw, where the immunity question turns on an evaluation of the nature of the act being performed by the government in order to decide whether the government performed a discretionary or a ministerial act. *Marson*, 438 S.W.3d at 296; *Patton v. Bickford*, 529 S.W.3d 717, 724 (Ky. 2016).

<sup>19</sup> In pertinent part, KRS 65.2003(3) provides that a local government is immune for "[a]ny claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority **or others**, exercise of judgment or discretion vested in the local government, which shall include by example, but not to be limited to . . ." those activities enumerated in KRS 65.2003(3)(a) through (e). (Emphasis added).

65.2003(3) did not immunize a local government for its exercise of authority *other* than its judicial, quasi-judicial, legislative or quasi-legislative authority. *Id.* at 187-88.

In doing so, the *Ashby* Court refuted the Court of Appeals' analysis here and confirmed that KRS 65.2003(3)(a) through (e) are, indeed, examples of a local government's exercise of its legislative and quasi-legislative authority for which CALGA provides immunity. *Id.* at 187. The Court of Appeals in *Ashby* stated "**KRS 65.2003(3) includes several examples of the types of claims against which cities are immune from liability.**" *Id.* (emphasis added). This is because "[e]ach one of those examples pertains to the use of judgment or discretion in the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority." *Id.* (emphasis added). Clearly, in contrast to the Court of Appeals' decision here, this holding in *Ashby* states that the examples listed in CALGA are, by definition, examples of the "use of judgment or discretion in the exercise of" legislative or quasi-legislative authority that CALGA protects from tort liability. *Id.*

The Court of Appeals in this case, then, erred by misinterpreting the plain language of CALGA. Because MSD's actions squarely satisfied three of the statutory definitions of an exercise of legislative or quasi-legislative authority, *supra* at Section IV(D)(2), this Court must reverse the Court of Appeals and hold that CALGA immunizes MSD from the Albright Estate's claims.

**2. The Court of Appeals Mischaracterized MSD's Discretionary Actions as the Ministerial Failure to "Repair" the Stormwater Drainage System.**

The Court of Appeals compounded its misinterpretation of CALGA by mischaracterizing MSD's discretionary actions as merely the failure to perform a ministerial act to "repair" a pipe in Jefferson County's stormwater drainage system. (COA Op., pp. 17-20.) CALGA, as noted above, does not protect a local government from

liability for negligence “arising out of acts or omissions of its employees in carrying out their *ministerial* duties.” KRS 65.2003 (emphasis added). CALGA does not define what it means by “ministerial duties.” *See* KRS 65.200; KRS 65.2003.

But Kentucky courts have explained the difference between ministerial acts and discretionary acts. Kentucky courts hold that a “ministerial act,” for which there is no immunity, involves an employee simply “following orders” or “where the officer’s duty is absolute, certain, and imperative, involving merely the execution of a specific act arising from fixed and designated facts.” *Marson*, 438 S.W.3d at 297 (quoting *Yanero*, 65 S.W.3d at 522); *see also Gaither v. Justice & Pub. Safety Cab.*, 447 S.W.3d 628, 633-34 (Ky. 2014) (same). These holdings are consistent with the term’s ordinary meaning. *See* Black’s Law Dictionary (11th ed. 2019) (defining “ministerial act” as “an act performed without the independent exercise of discretion or judgment”).

In contrast, Kentucky courts define discretionary acts for which a government is immune as involving “the exercise of discretion and judgment, or personal deliberation, decision and judgment.” *Patton*, 529 S.W.3d at 724; *see also Marson*, 438 S.W.3d at 296 (holding that whether government officers were immune from tort claims “turns on whether the acts of the various defendants were discretionary or ministerial”). “[A]t their core, discretionary acts are those involving quasi-judicial or policy-making decisions.” *Marson*, 438 S.W.3d at 296; *see also* Black’s Law Dictionary (11th ed. 2019) (defining a “discretionary act” as a “deed involving an exercise of personal judgment and conscience”). “Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where

it is left to the will or judgment of the performer to determine in which way it shall be performed.” *Gaither*, 447 S.W.3d at 633-34.

The difference between a discretionary act and a ministerial one “is essentially the difference between making higher level decisions and giving orders to effectuate those decisions,” on the one hand, and “simply following orders” on the other. *Marson*, 438 S.W.3d at 296. Or, put “somewhat rudimentar[il]y,” the difference is that “[p]romulgation of rules is a discretionary function; enforcement of those rules is a ministerial function.” *Patton*, 529 S.W.3d at 724 (quoting *Williams v. Dep’t of Educ.*, 113 S.W.3d 145, 150 (Ky. 2003)).

Here, the Court of Appeals concluded that even though MSD exercised discretion and judgment in adopting a rule prohibiting the installation of grates on stormwater drainage pipes, that action was, in actuality, ministerial because it was no different than a failure to “repair” the drainage pipe at issue. (COA Op., p. 17 (citing *Mason v. City of Mt. Sterling*, 122 S.W.3d 500, 505 (Ky. 2003)).) Citing nothing in the record, the Court of Appeals reasoned:

MSD’s rule preventing placement of grates on drainage pipes squarely deals with the **repair** of its drainage system, which has long been regarded as a nonimmune function of local government. A drainage pipe located close to homes in a residential subdivision that presents significant safety risks to those in its immediate vicinity could reasonably be viewed as needing ‘**repair**.’

(*Id.*, pp. 20-21 (emphasis added).) This conclusion mischaracterizes MSD’s actions and the case law differentiating ministerial from discretionary acts.

To start with, MSD’s action here cannot be deemed ministerial because MSD’s action did not involve a failure to “repair” as that term is commonly understood. The word “repair” means to “restore to a sound or good state after decay, injury, dilapidation, or

partial destruction; to reinstate, remedy, heal, make right or mend.” *Thompson v. Bracken Cnty.*, 294 S.W.2d 943, 946 (Ky. App. 1956) (defining the common usage of the term “repair” in determining legality of special tax authorized for the improvement and construction of county roads under KRS 178.210). But it is undisputed that the stormwater drainage pipe at issue in this case was in good and working order at the time of the incident. *Supra* at Section III(E). Since the drainage pipe was in good and working order, there is no basis for concluding that MSD failed to satisfy an obligation to repair it.<sup>20</sup>

Indeed, the Court of Appeals concluded the only “broken” condition in need of repair was simply the lack of a grate over the inlet, and this conclusion was based on nothing more than the Court of Appeal’s own opinion.<sup>21</sup> But the Court of Appeals is obviously in error because, unlike a truly “broken” pipe that merely needs to be restored to its proper functioning condition, the undisputed record here proves that there is no “absolute” or “certain” requirement mandating the installation of grates on pipes so that installing a grate would not involve the exercise of independent judgment or discretion. Since there is no fixed or certain requirement mandating a grate and, in fact, there are specific reasons identified by MSD for not installing grates, there is no logical or legal basis for equating the lack of a grate with a ministerial failure to repair. Instead, MSD

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<sup>20</sup> Also, the Court of Appeals’ attempt to equate the failure to install a grate with a lack of “repair” is in error because, pursuant MSD’s Design Manual and the Drainage Manual, grates may not be installed on *new* drainage pipes either. Since grates are not even supposed to be installed on new drainage pipes in the first place, one cannot conclude that the lack of a grate on a drainage pipe means that the pipe is in need of repair.

<sup>21</sup> The standard the Court of Appeals appears to have adopted in explaining why the pipe required “repair”—*i.e.*, because it was located in a residential and therefore presented a “significant” safety risk—appears nowhere in the record. *Supra* at Section III(H). Nor does the Court of Appeals cite any authority supporting this conclusion other than its own judgment. (COA Op., pp. 20-21.)

decided not to appropriate capital to add a certain feature to the system because MSD concluded grates would negatively impact the system, and MSD prioritized the risks caused by flooding as the most important risks to mitigate. CALGA provides immunity for such decisions because they are not ministerial and, instead, the decisions are discretionary because they are characterized by judgment, discretion and the weighing and prioritization of resources. *See Siding Sales v. Warren Cnty. Water Dist.*, 984 S.W.2d 490, 493-494 (Ky. App. 1998) (water district was immune under CALGA for failure to make capital improvements to upgrade water supply); *Estate of Clark*, 105 S.W.3d at 845 (failure to install a guardrail on road was not ministerial, it was discretionary).

The Court of Appeals simply ignored the undisputed record mandating this conclusion. Again, the Albright Estate's own expert, Dr. Earles, acknowledged there is no industry minimum standard requiring the installation of a grate on any stormwater drainage pipe, and MSD has discretion to decide whether to allow grates. *Supra* at Section III(H). Indeed, Dr. Earles confirmed there was no single factor that might have required the use of a grate on any stormwater drainage pipe, and there is no mandate that requires grates over pipes in residential neighborhoods. *Id.* MSD might even adopt an approach to utilizing grates that is different than sewer districts in other jurisdictions. *Id.* In other words, the Albright Estate's own expert confirmed that a stormwater drainage pipe is not "broken" simply because it does not have a grate. *Id.* As such, the Court of Appeals wrongly equated MSD's actions to the failure to repair that pipe.

In doing so, the Court of Appeals also ignored that MSD's exercise of discretion and judgment to adopt the rule prohibiting grates, which was based on MSD's evaluation of the risks, MSD's resources and MSD's desire to minimize blockages and flooding in the

system, is the specific kind of discretionary act that Kentucky courts hold is *not* ministerial. For example, this Court has repeatedly held that the adoption of a rule by a government is an inherently discretionary, quasi-legislative act, not a ministerial act. *See Bolden*, 803 S.W.2d at 581; *Patton*, 529 S.W.3d at 724; *Yanero*, 65 S.W.3d at 529. Similarly, a local government performs a discretionary act by exercising “discretion when, in the face of competing demands, it determines how or whether to utilize or apply existing resources.” *Gas Services Co.*, 687 S.W.2d at 151 (Wintersheimer, J., concurring). Finally, this Court has held that the failure to make an inspection is a discretionary, non-ministerial act. *Bolden*, 803 S.W.2d at 581.

Just because the Court of Appeals believed it would have been wise to install a grate does not mean there was only one answer to this question or that MSD had a “ministerial” duty to install a grate.<sup>22</sup> In fact, there was no “absolute” or “certain” approach requiring the use of a grate that would render installing a grate a “ministerial” act under Kentucky law. Rather, though the Court of Appeals ignored it, in the absence of any minimum legal or industry standard, MSD exercised judgment and discretion in evaluating whether to install grates on Jefferson County’s stormwater drainage pipes, weighing the risks and resources involved, and adopted a rule reflecting MSD’s judgment that grates created unacceptable risks of flooding. Under Kentucky law, these actions were anything but “ministerial,” and so the Court of Appeals erred in concluding otherwise.

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<sup>22</sup> Indeed, as discussed in this brief, governments are granted immunity for their discretionary exercises of governing authority in order to prevent courts from passing judgment on policy decisions made by coordinate branches of government. *See Marson*, 438 S.W.3d at 297.

**3. The Court of Appeals Misinterpreted Kentucky Common Law in Concluding MSD Possesses No Legislative or Quasi-Legislative Authority over Jefferson County’s Stormwater Drainage System.**

The Court of Appeals further erred in interpreting Kentucky common law to effectively exclude a local government from exercising legislative or quasi-legislative authority over its existing sewer system. Before CALGA’s passage, Kentucky courts had long protected local governments from suit over their discretionary acts of governance. *See Haney*, 386 S.W.2d 738; *Comair, Inc. v. Lexington-Fayette Urban Cnty. Airport Corp.*, 295 S.W.3d 91, 101 (Ky. 2009) (“[E]ven the cases most restrictive of immunity admit that legislative and quasi-legislative functions are entitled to immunity.”) As early as 1911, Kentucky’s then-highest court recognized that a local government is not liable in tort for its exercise or non-exercise of “those discretionary powers which are classed as of a public or legislative character . . . [i]f the duty be judicial in its nature, as calling for the exercise of judgment.” *City of Maysville v. Brooks*, 140 S.W. 665, 668 (Ky. 1911).

As discussed above, governments are immune from liability for performing their decision-making functions. *Marson*, 438 S.W.3d at 296-97. Local governments must make policy decisions, which require them to weigh various risks and resources, when deciding how to govern. *Id.* Courts, therefore, should not pass judgment on discretionary policy-type decisions made by governments in the context of a tort action. *Id.* at 297.

Against this backdrop, the Court of Appeals nevertheless emphasized that “[f]or over 100 years, the Kentucky Supreme Court has held that a municipality possesses a ‘ministerial duty to non-negligently construct, maintain, and repair the sewer system’ at common law. (COA Op., p. 17 (citing *Mason*, 122 S.W.3d at 505; *Maysville*, 140 S.W. at 668).) After noting that CALGA did not broaden the common law’s grant of immunity to a local government (*id.* at pp. 15-16 (citing *Ashby*, 841 S.W.2d at 187-88)), the Court of

Appeals then seemed to infer that because MSD possessed certain ministerial duties over its existing sewer system, MSD could not also possess the ability to exercise legislative or quasi-legislative authority over that system as well (COA Op., pp. 18-21). Put simply, this is not a correct statement of Kentucky common law. In fact, the Court of Appeals' conclusion conflicts with the plain language of CALGA, MSD's express legal authority to regulate the stormwater drainage system, and established Kentucky law.

First, the Court of Appeals' holding impermissibly rewrites CALGA to eliminate tort immunity for claims that arise out of alleged defects or dangerous conditions on public property. As discussed, CALGA applies to tort claims arising out of alleged defects or dangerous conditions on public property (*see* KRS 65.2001), and KRS 65.2003(3) explicitly states if any such claim arises out of a local government's exercise of discretionary legislative or quasi-legislative authority described in subsections (3)(a) through (e), then the local government is immune from liability. The Court of Appeals' reasoning here effectively means that MSD's ministerial duty to maintain and repair the sewer system displaces any legislative or quasi-legislative authority it might also have over that same system. The Court of Appeals, then, would essentially write out of CALGA any protection for claims arising from defects in public property. Basic rules of statutory interpretation preclude this result. *Castle v. Commonwealth*, 411 S.W.3d 754, 757-758 (Ky. 2013) (a court's duty is "to read all statutes in harmony with one another in order to effectuate all statutes, if possible"). The plain text of CALGA does not permit an interpretation that a ministerial duty to repair infrastructure somehow negates a local government's ability to also exercise discretionary legislative or quasi-legislative authority on a matter concerning that same infrastructure.

Nor is the Court of Appeals' decision supported by Kentucky common law. For instance, while some cases have imposed certain ministerial duties with respect to a sewer system, no prior decision by a Kentucky court, including this Court's prior decisions in *Mason* and *Maysville*, holds that MSD is precluded from also exercising legislative or quasi-legislative authority to regulate the use, operation and alteration of that system. In *Mason*, the plaintiff sued the city of Mt. Sterling over the death of a nine-year-old, who drowned after floodwaters pulled him into a stormwater drainage pipe. 122 S.W.3d at 503-04. The plaintiff alleged Mt. Sterling was responsible for this death because the drainage pipe was damaged and undersized for ordinary rainfall, both of which the plaintiff argued exacerbated the flooding and caused the drowning death. *Id.* at 504.

This Court concluded that the city bore a ministerial duty "to ensure that [its] sewer system can handle runoff from reasonably expected ordinary rainfalls" which might increase over time as the city's population grew. *Id.* at 505-06. In other words, this Court recognized that a local government possesses a ministerial duty to ensure that a stormwater drainage system functions for its intended purpose—the conveyance of stormwater to eliminate flooding. Notably, *Mason* is inapposite here, because the issue in *Mason* involved a non-functioning broken pipe, while this case involves the local government exercising judgment and discretion to adopt a policy-type decision based on its analysis of a specific issue. Indeed, MSD adopted its rule prohibiting grates in order to mitigate the very condition that gave rise to the city's liability in *Mason*—flooding.

The *Maysville* decision is no different. 140 S.W. at 669. There, the Commonwealth's then-highest court recognized that a city could be liable for damage caused by flooding due to a malfunctioning sewer system. *Id.* The *Maysville* Court refused

to subject the city to liability in that case, however, because the city had not yet taken responsibility for the particular sewer system that flooded the plaintiff's home. *Id.* (quoting *Campbell v. Vanceburg*, 101 S.W. 343 (Ky. 1907) (“[I]f the city does not undertake to make improvements, or to build streets, sidewalks, drains or gutters, or reconstruct old ones, it will not be liable for any damage caused by the overflowing of the premises, because if it has not interfered in any (way) with the natural condition of affairs the overflow cannot be attributed to its acts.”)). Thus, *Maysville* is quite limited and cannot control the resolution to the question presented here. Also, like *Mason*, *Maysville* warns of a city's potential for liability for flooding; the very condition MSD sought to prevent by prohibiting grates.

Other cases recognizing a local government's potential liability for the failure to perform a ministerial act in connection with a sewer system do not reject the notion that a local government might exercise legislative or quasi-legislative authority over that same infrastructure. Indeed, these cases merely involved situations where the local government did not size the system to function properly or did not correctly fix damage to that system to restore it to proper functioning. *See, e.g., City of Frankfort v. Byrnes*, 817 S.W.2d 462 (Ky. App. 1991) (flooding occurred because the local government did not properly size the system to accommodate ordinary rainfall); *Gas Service Co.*, 687 S.W.2d at 144 (negligent failure to repair gas transmission line led to that line's failure and explosion). These cases make clear, then, that while a local government may have a ministerial duty to “construct, maintain, and repair” its sewer system, the cases do not apply here because they only address situations where a malfunctioning system must be restored in order to operate correctly to serve its basic purpose.

Importantly, none of these decisions involving sewers announced a rule that a local government lacks *any* ability to exercise legislative or quasi-legislative authority when it comes to regulating the use, operation and alteration of an existing stormwater drainage system. Neither *Byrnes*, *Mason*, nor *Gas Service Co.* addressed a situation like the one in this case, where a local government evaluated specific risks associated with a particular course of action related to the sewer system, its own limited resources and competing demands and then exercised discretion and its regulatory authority to adopt a rule to implement the result of its decision-making. Rather, in those cases, the local government either did not fix their damaged infrastructure at all or did so negligently.

In fact, contrary to the Court of Appeals' decision here, several Kentucky cases expressly hold that a government may indeed exercise discretionary legislative and quasi-legislative authority in matters that involve existing public infrastructure such that the government is immune from tort liability. Concerning sewer systems, in *Madden v. City of Louisville*, for example, the plaintiffs complained that MSD had not extended drainage infrastructure to address the drainage issues in the plaintiff's neighborhood, which they claimed resulted in flood damage to their property. 2004 WL 1588279, 2004 Ky. App. Unpub. LEXIS 581, at \*20-21 (Ky App. July 16, 2004).<sup>23</sup> Evidently, the plaintiffs thought "that alleviating the flooding of their residences should [have] be[en] a higher priority for MSD than other projects." *Id.* at \*21. The Court of Appeals held that MSD did not have liability for its exercise of discretion. It recognized instead that "the exercise of discretion when in the face of competing demands, the local government determines whether and how

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<sup>23</sup> A copy of the decision in *Madden* is included in the Appendix to this brief at Tab M.

to utilize or apply existing resources’ is listed as an example of the type of discretionary act for which a local government is immune from tort liability under CALGA.” *Id.*

Courts in other jurisdictions agree. In *Beck v. City of Evansville*, the city experienced issues with chronic flooding caused by a drainage system that was inadequate to address expanded development. 842 N.E.2d 856, 858 (Ind. App. 2006).<sup>24</sup> Because the city could not fix all of the issues at once, the city commissioned a storm water master plan that would correct the flooding problem in coordinated phases. *Id.* After a heavy rainstorm caused significant flooding, property owners filed a lawsuit against the city claiming that the city had negligently maintained the sewer system. *Id.* at 860. Indiana’s Court of Appeals held that the city was immune from liability because the city engaged in a discretionary, policy-oriented decision-making process when it commissioned and adopted the sewer master plan to address the flooding issue in phases. *Id.* at 862-863. Because the city made a discretionary policy type decision based on its resources, and it was following the master plan it adopted, the city was immune from liability. *Id.*

Outside of just sewer systems, Kentucky courts have held that a local government may exercise discretionary legislative and quasi-legislative authority over other kinds of public infrastructure. In *Russell v. City of Owensboro*, the Court of Appeals held in a well-reasoned but unpublished opinion that, under CALGA, a city’s adoption of a plan to address the maintenance of its sidewalks was an exercise of its legislative and quasi-legislative authority because the plan involved the city’s judgment concerning how to allocate its resources to implement sidewalk repairs in phases. 2014 WL 1407238, 2014 Ky. App. Unpub. LEXIS 275, at \*10 (Ky. App. Apr. 11, 2014) (unpublished). The plaintiff

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<sup>24</sup> A copy of the decision in *Beck* is included in the Appendix to this brief at Tab N.

there sued the City of Owensboro alleging the city breached its duty of care to maintain its public sidewalks. *Id.* at \*1, \*3-4. The city, however, could not repair all sidewalks at once so it evaluated its sidewalks and adopted a plan governing how it would repair its sidewalks in phases. *Id.* at \*10. The Court of Appeals held the city's adoption of the maintenance plan was a legislative and quasi-legislative decision, not a ministerial one, and held that the city was immune from liability under CALGA. *Id.*; *see also Bullock v. Warren*, 2016 WL 3151339, 2016 Ky. App. Unpub. LEXIS 372, at \*7 (Ky. App. May 27, 2016) (unpublished) (“The Board of Education is the decision-making body responsible for building and renovation decisions. With a limited budget, the Board’s decisions as to allocation of financial resources for construction and renovation must be considered discretionary decisions.”).<sup>25</sup>

Kentucky courts have reached the same conclusions in cases involving a government’s administration of its roads. While a government possesses a ministerial duty to construct, maintain, and repair its roads, three published Court of Appeals decisions hold that a government’s decision whether to install a guardrail or a sign at a particular location on the road is a discretionary act. *See Estate of Clark*, 105 S.W.3d at 845; *Bolin v. Davis*, 283 S.W.3d 752, 758-759 (Ky. App. 2008); *Hammers v. Plunk*, 374 S.W.3d 324, 330 n. 3 (Ky. App. 2011). There is no substantive difference between the question of whether to install a guardrail on a road and whether to install a grate over a stormwater drainage pipe.

The *Estate of Clark* decision involved a fatality on a roadway, where the plaintiff claimed that the county had negligently maintained the roadway by not installing a guardrail at the location of the accident. 105 S.W.3d at 845. Evidence showed, however,

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<sup>25</sup> A copy of the opinion in *Bullock* is included in the Appendix to this brief at Tab O.

that the county developed a plan to evaluate the maintenance of its roadways, and that it contemplated public policy, fiscal and geographic factors in deciding where to install guardrails. *Id.* Based on that evaluation, the county rejected installing a guardrail at the location in question. *Id.* Because this decision not to install a guardrail was a policy-type decision based on several factors, and not a matter of routine, the Court of Appeals held the decision was discretionary and therefore that the county was immune from suit for it. *Id.*

The *Bolin* decision involved a nearly identical set of facts. 283 S.W.3d at 758-59. That case also involved a fatality on a roadway and a claim that the roadway had been negligently maintained because a guardrail had not been installed. *Id.* The Court of Appeals there noted that the local government had no directives governing the installation of guardrails, that no car had previously slid into the creek at the location at issue in 37 years, and that the county officials had specifically evaluated the location and decided not to install a guardrail there. *Id.* at 758. The Court of Appeals held that this decision was discretionary, and therefore given immunity, because it involved an exercise of discretion by the county official concerning what action to take. *Id.* at 759. The official's action could not be ministerial because it was not one where the official was merely obeying orders or executing "specific act arising from fixed and designated facts." *Id.*

The reasoning and holdings in the prior Kentucky decisions in *Madden*, *Russell*, *Estate of Clark*, *Bolin*, and the Indiana decision in *Beck*, answer the question presented in this case. These cases hold that a local government may exercise discretionary legislative or quasi-legislative authority in connection with decisions involving its existing infrastructure, like its roads and sewer system. MSD engaged in the same type of

discretionary decision making here that the courts in *Madden*, *Russell*, *Estate of Clark*, *Bolin*, and *Beck* held to be discretionary decision making to which immunity applied. Similar to those cases, MSD exercised its discretion by evaluating the safety risks posed by grates on stormwater drainage pipes and MSD's limited resources. MSD also exercised discretion and judgment to adopt its rule prohibiting grates based on the results of that exercise and MSD's conclusion that it must reduce flooding. There was no legal or industry minimum standard that dictated the result of MSD's analysis. Thus, like in *Madden*, *Russell*, *Estate of Clark*, *Bolin*, and *Beck*, MSD's action was an exercise of discretionary legislative or quasi-legislative authority for which it should be immune from tort liability. Indeed, if the failure to install a guardrail on the roads at issue in *Estate of Clark* and *Bolin* was a discretionary act, MSD's decision not to install grates over stormwater inlet pipes must be discretionary as well—there is no logical basis for concluding the former is discretionary while the latter is ministerial. The Court of Appeals, then, misinterpreted Kentucky law in ignoring that MSD possessed and exercised legislative and quasi-legislative authority over Jefferson County's stormwater drainage system, even if it also had a ministerial duty to maintain and repair that system.

**4. The Court of Appeals Relied on a Rejected Distinction Between Proprietary and Governmental Action to Mischaracterize MSD's Actions as Ministerial.**

The Court of Appeals also erroneously relied upon a long-rejected and discredited legal distinction between proprietary and governmental action to conclude that MSD's adoption of a rule prohibiting the use of grates on Jefferson County's stormwater drainage pipes was ministerial and not discretionary. (COA Op., p. 20.) Specifically, the Court of Appeals reasoned that MSD's adoption of a rule prohibiting the installation of grates was "ministerial" because its implementation of that rule did not "constitute a regulatory

function different from any performed by private industry and would not create a new kind of tort liability.” (*Id.*) The Court of Appeals continued that “[a] private corporation providing drainage services could promulgate a rule forbidding placement of grates on drainage pipes.” (*Id.* at n.3.)

In treating MSD’s adoption of its rule as a proprietary and not governmental function, the Court of Appeals has revived a distinction that this Court rejected decades ago because it was unsound. *Haney*, 386 S.W.2d at 740. (“At most, the distinctions [between governmental and propriety functions] seemed to be contrived and without sensible basis.”) The Court of Appeals’ error stems from a passage in *Gas Service Co.*, which pre-dates CALGA, wherein this Court sought to describe prior cases in which a local government was granted tort immunity. That passage highlighted two cases recognizing a government’s immunity “where the government takes upon itself a regulatory function . . . which is different from any performed by private persons or in private industry, and where, if it were held liable for failing to perform that function, it would be a new kind of tort liability.” *Gas Service Co.*, 687 S.W. 2d at 148-49 (citing *Grogan*, 577 S.W.2d at 5-6; *Commonwealth, Dep’t of Banking & Securities v. Brown*, 605 S.W.2d 497 (1980)). And though the majority wrote this passage when seeking to articulate some principle on which to apply local governmental immunity more consistently, it nonetheless recognized that this Court previously rejected this distinction between governmental and proprietary functions, calling it “contrived and without sensible basis.” *Id.* at 146 (quoting *Haney*, 386 S.W.2d at 740). Justice Wintersheimer, in his concurrence, attacked the distinction between governmental and proprietary function more fiercely. He wrote that “[a]ny

distinction between governmental and proprietary activity is artificial. . . . There is no legitimate way to distinguish between private and public negligent acts.” *Id.* at 150.

Accordingly, in the context of local governmental immunity, it is abundantly clear that courts may not distinguish between governmental and proprietary functions when deciding whether a government’s action is ministerial or discretionary. *Haney*, 386 S.W.2d at 740. This Court in *Gas Service Co.* did not invite future courts to revive that distinction, especially when evaluating a local government’s immunity under CALGA. Indeed, the General Assembly passed CALGA in 1988 after *Gas Service Co.*, in part, as a reaction to Justice Wintersheimer’s call in that case for legislative action to resolve the uncertainty created by the use of this distinction between proprietary and governmental functions. *See Gas Service Co.*, 687 S.W.2d at 151 (Wintersheimer, J., concurring) (“The General Assembly might aid the people who have incorporated into municipalities by enacting a comprehensive tort claims act which could be applicable to all units of government.”); *Ackermann Enters. v. City of Bellevue*, 2016 U.S. Dist. LEXIS 127198, at \*12 (E.D. Ky. Sept. 19, 2016) (noting that after *Haney* there was “no shortage of calls for the Kentucky legislature to step in” to clarify the uncertainty surrounding the extent of a local government’s immunity and observing that “[t]he result” was CALGA).<sup>26</sup> Put another way, if the General Assembly wanted to define a local government’s exercise of legislative or quasi-legislative authority by distinguishing between proprietary and governmental functions, it could have done so. But it did not. *See* KRS 65.2003(3)(a)-(e).

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<sup>26</sup> A copy of the decision in *Ackermann Enters.* is included in the Appendix to this brief at Tab P.

Therefore, the Court of Appeals' summary analysis, which is premised upon simply asking whether a private company could have performed the same action (COA Op., p. 20), has absolutely no support in CALGA's language and is patently wrong, *Lindall*, 112 S.W.3d at 394. The Court of Appeals' analysis also completely misses the point of CALGA immunity. CALGA immunity has nothing to do with whether a private entity may also theoretically perform the same action as the one performed by a local government; this question is entirely irrelevant. In fact, a private entity may theoretically take several of the actions listed in KRS 65.2003(a) through (e), such as adopting a rule or making decisions on whether, or how, to spend money. The point, rather, is that private entities are not tasked with governing like MSD is. In exercising their authority as governmental entities, local governments must apply discretion and judgment to make policy-based decisions, and weigh various risks and limited resources, in performing their discretionary decision-making functions. *See Bolden*, 803 S.W.2d at 581 (describing "Quasi-legislative power" as the "power of an administrative agency to engage in rule-making" and holding that the common law immunizes "the decision-making functions performed by courts and legislative bodies"). CALGA was enacted to protect local governments from tort liability for making these types of discretionary decisions when exercising their authority. *Id.*; *Ashby*, 841 S.W.2d at 187. As such, the Court of Appeals erred in concluding that MSD's adoption of a rule prohibiting the use of grates in Jefferson County's stormwater drainage pipes was a ministerial act because it could have been performed by a private entity.

**5. In Reversing the Trial Court, the Court of Appeals Rewrites the Law on Local Governmental Immunity.**

Ultimately, the practical result of the Court of Appeals' Opinion below is that courts throughout the Commonwealth may now ignore CALGA and create exceptions to

CALGA's plain language defining the exercise of discretionary legislative and quasi-legislative authority. In doing so, courts would be free to second-guess the wisdom and judgment of discretionary policy-type decisions by local governments by erroneously characterizing those decisions as "ministerial." Under the Court of Appeals' erroneous interpretation of CALGA and the common law, anytime a local government possesses certain ministerial duties over existing infrastructure or some other subject, there would be no ability for the local government to also exercise legislative or quasi-legislative authority and make policy-type decisions concerning the same subject matter.

But this is not the law. The courts in *Russell*, *Estate of Clark*, *Bolin*, *Madden*, and *Beck* recognize that local governments may be immune when they exercise their legislative and quasi-legislative authority and make discretionary policy-type decisions about their infrastructure. Indeed, CALGA itself provides that it applies to tort claims for defects or dangerous conditions on public property. KRS 65.2001(1). Though KRS 65.2003(3) would immunize local governments for such claims if the claim arises out of the local government's exercise of legislative or quasi-legislative immunity, the Court of Appeals would effectively carve out from this grant of immunity claims concerning certain kinds of public property, like sewer systems.

This Court should reverse the Court of Appeals' Opinion and reinstate the Jefferson Circuit Court's order granting summary judgment to MSD. MSD's actions met the statutory definitions of a local government's exercise of legislative and quasi-legislative authority set forth in CALGA. That the Court of Appeals, or even this Court, might disagree with MSD's evaluation of grates and MSD's adoption its rule prohibiting the use of grates on Jefferson County's stormwater drainage system is not a basis to subject it to

liability, nor is it a basis for deciding that MSD's action was ministerial. As this Court recognized in *Marson*, governments have immunity for discretionary actions to prevent exactly the kind of second-guessing the Court of Appeals below engaged in. If the Court of Appeals is not reversed, local governments will be left only to speculate whether their policymaking will be relitigated by a coordinate branch of government under the guise of a tort claim. Governments should be free to govern without such fear.

## V. CONCLUSION

This Court should reverse the decision of the Court of Appeals and hold that MSD, by adopting a rule prohibiting the installation of grates on Jefferson County's stormwater drainage pipes, MSD exercised its legislative and quasi-legislative authority for which it is immune from tort liability under CALGA. The Court should order that the Jefferson Circuit Court's decision granting summary judgment to MSD on the Albright Estate's claims be reinstated.

Respectfully submitted,

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**WORD COUNT CERTIFICATION PURSUANT TO RAP 15 AND RAP 31**

This motion complies with the word limit imposed in RAP 31(G)(3)(a) because, excluding the parts of the document exempted by RAP 31(G)(5), this document contains **17,206** words, as calculated by the “word count” feature of Microsoft Word.

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