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# Supreme Court of Kentucky

Nos. 2024-SC-0229, -0230, -0231, -0240, -0243

AMELIA LONG, individually and on behalf  
of a class of others similarly situated

*Appellants*

v.

Franklin Circuit Court,  
Nos. 18-CI-00627, -00975;  
Court of Appeals, Nos. 2022-CA-1276,  
-1321, -1353, 2023-CA-0398, -0411

DEPARTMENT OF REVENUE, *et al.*

*Appellees*

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## AMICUS BRIEF OF THE COMMONWEALTH OF KENTUCKY

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## INTRODUCTION

This Court's decision in *Beshear v. Haydon Bridge Co., Inc.* is the yardstick for measuring a defense of sovereign immunity when monetary relief is sought against the state. 416 S.W.3d 280 (Ky. 2013) (*Haydon Bridge II*). That decision instructs that absent a statutory waiver of sovereign immunity, the judiciary cannot order relief, monetary or otherwise, that requires the Commonwealth to withdraw money from the state treasury. *Id.* at 294. The claims here test the strength of *Haydon Bridge II*. In the decisions below, the Franklin Circuit Court broadly held that the Commonwealth, its agencies, and its officials lack immunity whenever a court determines that the funds at issue were wrongfully received by the state.

The Commonwealth, through Attorney General Russell Coleman, respectfully urges the Court to chart a narrower path. Under *Haydon Bridge II*, the General Assembly has not unmistakably waived sovereign immunity for the claims here. This is not to say that Kentucky courts are powerless to remedy what the plaintiffs allege was unlawful conduct by the state defendants in collecting healthcare and educational debts. As appropriate, a court can issue a declaratory judgment about the legality of the state defendants' conduct. And as necessary, a court can order prospective injunctive relief to ensure that the state defendants conform their future conduct to the law. But a court cannot order the withdrawal of the disputed funds from the state treasury. That conclusion is

nothing new. As *Haydon Bridge II* instructs, “[u]nder our tripartite form of government, the courts have *never* had the power to draw on the State Treasury without the legislature’s consent in circumstances such as those before us.” *Id.* at 297 (emphasis added).

## ARGUMENT

In the Commonwealth’s view, these appeals require the Court to apply three established propositions. First, Kentucky courts are fully empowered to issue declaratory judgments and prospective injunctions to remedy unlawful government conduct. Applied here, this first proposition allows the plaintiffs to secure meaningful relief if the state defendants are in fact acting unlawfully.<sup>1</sup> Second, sovereign immunity prevents Kentucky courts from ordering a draw on the state treasury no matter the form of relief. Applied here, this second proposition prohibits the plaintiffs from securing monetary relief however denominated, including by using a declaratory judgment as a workaround. And third, to overcome sovereign immunity, a plaintiff must identify a Kentucky statute unmistakably waiving immunity. Applied here, this third proposition

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<sup>1</sup> The lawfulness of the state defendants’ conduct is not before the Court in these interlocutory appeals. *Baker v. Fields*, 543 S.W.3d 575, 578 (Ky. 2018) (“[T]he scope of interlocutory appellate review should be limited to the issue of immunity, and no substantive issues.”). As a result, the Commonwealth takes no position on whether the state defendants followed Kentucky law in collecting healthcare and educational debts.

forecloses the plaintiffs' claims for monetary relief because their favored caselaw and statutes do not amount to an unmistakable statutory waiver.

**I. Kentucky courts can issue declaratory judgments and prospective injunctions to remedy unlawful government conduct.**

Kentucky courts' duty to "say what the law is" is always important. When the government acts unlawfully, that responsibility takes on added significance. In those circumstances, the courthouse doors are open to citizens to vindicate their rights against the government. Ky. Const. § 14. And Kentuckians have an elected representative, the Attorney General, whose job includes going to court to protect the public from unlawful government action. *See Commonwealth ex rel. Beshear v. Commonwealth Off. of Governor ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016).

When such lawsuits are filed, Kentucky courts have several remedial tools to keep the government in check (assuming the case is justiciable). One such remedy is a declaratory judgment. Our Declaratory Judgment Act is broadly written—intentionally so. It allows a plaintiff to "ask for a declaration of rights, either alone or with other relief" and empowers a court in a justiciable case to "make a binding declaration of rights, whether or not consequential relief is or could be [sought]." KRS 418.040. As written, the text of the Declaratory Judgment Act does not limit the topics about which a court may issue a "binding declaration of rights." Not only that, the Act "specifically

recognizes that a declaratory judgment may be granted when a person's rights are affected by a statute or other government regulation." *Univ. of Ky. v. Moore*, 599 S.W.3d 798, 810 (Ky. 2019) (citing KRS 418.045).

Under well-established Kentucky caselaw, issuing a declaratory judgment does not implicate sovereign immunity. The key case is *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013). There, the Court held that "[t]here is no harm to state resources from a declaratory judgment." *Id.* at 838. Because sovereign immunity protects "the resources of the state, its income and property," *id.* at 836, a declaratory judgment simply does not trigger sovereign immunity. A contrary rule, the Court explained, would lead to "a government that is beyond scrutiny." *Id.* at 839. In sum, *Kentucky Retirement Systems* "makes clear that the state is not sovereignly immune from a declaratory judgment action." *Moore*, 599 S.W.3d at 813.

Another remedy that Kentucky courts can use to address unlawful government conduct is a prospective injunction—a judicial order requiring a state official to conform his or her conduct to the law going forward. In this day, no one questions that "[i]njunctive relief is available to restrain an unconstitutional exercise of . . . executive power." *Haydon Bridge II*, 416 S.W.3d at 296 (emphasis omitted). And a prospective injunction against a state official does not implicate sovereign immunity. A prospective injunction empowers the judiciary to "accord[] relief" without "stretching its powers to reach the State

Treasury and thereby order a withdrawal from the General Funds after the fact, no matter how fitting that might appear.”<sup>2</sup> *Id.* at 297. Kentucky courts can issue prospective injunctions on both a temporary and permanent basis. *Id.* at 289; *see* CR 65.01. Thus, they can pause allegedly unlawful government conduct in the short term while they consider whether permanent relief is warranted.

Declaratory judgments and prospective injunctions are powerful tools to remedy unlawful government action. With a declaratory judgment, a court can “say what the law is” between the government and a citizen. And with a prospective injunction, a court can ensure that state officials follow the law while the case proceeds and after its resolution. Here, a declaratory judgment and prospective injunction (if appropriate) would provide meaningful relief to the plaintiffs. A declaratory judgment would allow a court to declare whether the defendants are acting unlawfully in collecting medical and educational debt from the plaintiffs. And an injunction would enable a court to ensure that the state defendants act lawfully vis-à-vis the plaintiffs going forward.<sup>3</sup>

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<sup>2</sup> This rule is the Kentucky-law analog to *Ex parte Young*, 209 U.S. 123 (1908). *Haydon Bridge II*, 416 S.W.3d at 289.

<sup>3</sup> The General Assembly has already addressed some of the issues presented here. In 2022, it directed that “consumer debts owed for health care goods and services” cannot be collected by the Department of Revenue under specified statutes. 2022 Ky. Acts ch. 212, § 28(12) (adding KRS 131.130(12)).

**II. Sovereign immunity prevents courts from ordering a draw on the state treasury no matter the form of relief.**

The plaintiffs seek relief that goes beyond a declaratory judgment and a prospective injunction. They also seek a court-ordered return of the funds collected from them. *Univ. of Ky. v. Long*, 2024 WL 874779, at \*2 (Ky. App. Mar. 1, 2024) (summarizing the “variety of relief” sought); *Ky. Cmty. & Tech. Coll. Sys. v. Lawrence*, 2024 WL 994934, at \*1 (Ky. App. Mar. 8, 2024) (same). Those monetary demands are an enormous ask. As the Department of Revenue estimates in its *Bennett* brief (at 6), the plaintiffs’ demand in that case could be “over \$100 million dollars.” And in its *Long* brief (at 6), the Department estimates that the requested amount could be “over \$85 million dollars.” All told, the plaintiffs’ monetary demand is well into the nine figures.

That demand for monetary relief has to implicate sovereign immunity.<sup>4</sup> Sovereign immunity is “an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity.” *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). “The doctrine has been included in all four of the Commonwealth’s

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<sup>4</sup> A quick word on terms: The Commonwealth uses the term “sovereign immunity” throughout even though state agencies like public universities and the Department of Revenue receive governmental immunity. *Furtula v. Univ. of Ky.*, 438 S.W.3d 303, 305 n.1 (Ky. 2014). But because the state-agency defendants here performed and are performing governmental functions, sovereign and governmental immunity are “functionally the same.” *See id.* And as to the state-official defendants here, sovereign immunity applies. *Meinbart v. Louisville Metro Gov’t*, 627 S.W.3d 824, 831 (Ky. 2021).

constitutions and predates each.” *Caneyville Volunteer Fire Dep’t v. Green’s Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009) (plurality op.). The words “sovereign immunity” are not in the current Constitution. But the Constitution presumes the doctrine’s existence. *See Reyes v. Hardin Cnty.*, 55 S.W.3d 337, 338–39 (Ky. 2001).

Section 230 makes clear that only the legislature can order money to be withdrawn from the state treasury. The text is emphatic: It directs that “[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law.” Ky. Const. § 230 (emphasis added). And Section 231 similarly specifies that the General Assembly determines “by law . . . in what manner and in what courts suits may be brought against the Commonwealth.” These two provisions “delegat[e] to the General Assembly the authority to waive the Commonwealth’s inherent immunity by direct appropriation of money from the state treasury and/or by specifying where and in what manner the Commonwealth may be sued.” *Reyes*, 55 S.W.3d at 339.

Under our strict separation of powers, this constitutional designation of responsibility has real meaning. Taken together, Sections 230 and 231 keep the executive and the judiciary in their constitutional lanes—out of the state treasury absent legislative approval. As to the executive, Section 230 means that the executive branch cannot spend funds in the state treasury without legislative say-so, even in an emergency. *Fletcher v. Commonwealth*, 163 S.W.3d

852, 869–71 (Ky. 2005). And as to the judiciary, these provisions mean that courts lack the power to order monetary relief without the legislature’s express consent. So understood, “[s]overeign immunity is an indisputable *limitation* on the power of the judiciary.” *Haydon Bridge II*, 416 S.W.3d at 287 (emphasis added). And the judiciary has no license to overcome sovereign immunity, even if there are persuasive, case-specific reasons for doing so. Kentucky courts have “no right to merely refuse to apply [sovereign immunity] or abrogate the legal doctrine.” *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 344 (Ky. 1997).

In the typical case, sovereign immunity prohibits a court from ordering the Commonwealth to pay money damages out of the state treasury. But sovereign immunity does not turn on the form of relief sought. It instead “protects public coffers or, as it is sometimes denominated, the public purse.” *See Haydon Bridge II*, 416 S.W.3d at 291. Because sovereign immunity safeguards the state treasury, the doctrine also protects against monetary relief disguised as other relief. For example, sovereign immunity prohibits a court from entering a “retroactive injunction” restoring the plaintiff to the financial position that he occupied before the state defendant’s wrongful conduct. *See id.* at 292–94. That’s because such a retroactive injunction “would require the Commonwealth to withdraw monies from the General Fund, an action the Commonwealth has not consented to through waiver of its sovereign immunity.” *Id.* at 294.

The same result logically follows for a declaratory judgment used to seek monetary relief. Although the Court has not resolved this legal issue, it has come very close to doing so. In *Kentucky Retirement Systems*, the Court was careful to note that by allowing declaratory relief against the state it was not approving follow-on monetary relief. 396 S.W.3d at 839 (“[I]t is also true that in subsequent or contemporaneous actions to enforce declared rights, the immunity issue could be relevant if the revenue or property of the state would be affected.”). The Court made a similar reservation in *Moore*. 599 S.W.3d at 813. That said, *Haydon Bridge II* all but settles this issue. If sovereign immunity bars monetary relief disguised as an injunction, as *Haydon Bridge II* holds, the doctrine likewise prohibits a declaratory judgment used to seek monetary relief. Sovereign immunity is not driven by the form of relief. It protects the state treasury no matter how a plaintiff pleads her case. Under *Haydon Bridge II*, if judicial relief “can only be satisfied by draws on [the] state’s treasury,” sovereign immunity applies absent a statutory waiver. *See* 416 S.W.3d at 294.

Some might argue that applying sovereign immunity in this way prevents the judiciary from according full relief to citizens who are affected by unlawful government conduct. But as summarized above, Kentucky courts are far from powerless to remedy such action. They can issue declaratory judgments and prospective injunctions, both temporary and permanent, to remedy unlawful government action. These forms of relief have real teeth. For example, upon

suing in 2018, the plaintiffs (as appropriate) could have secured a restraining order and a temporary injunction immediately prohibiting the state defendants from collecting healthcare and educational debts from them going forward. Although the courts' inability to award monetary relief to the plaintiffs absent a statutory waiver "is an indisputable limitation on the power of the judiciary," *id.* at 287, the Court has rejected any suggestion that this limitation "restrict[s], surrender[s] or, as it has been colorfully expressed, 'gut[s]' judicial authority," *id.* at 297. The answer to this point is simple: The "judicial branch cannot give up something it never had." *Id.* More to the point, to say that the plaintiffs cannot access the state treasury without legislative consent simply describes a legal doctrine that predates Kentucky itself. *See Caneyville Volunteer Fire Dep't*, 286 S.W.3d at 799 (plurality op.).

**III. The plaintiffs have not identified an unmistakable statutory waiver of sovereign immunity.**

For a plaintiff to overcome sovereign immunity, the General Assembly must waive it. The legislature can do so broadly. Or it can do so with a scalpel. Under Section 231, it gets to "direct in what manner and in what courts suits may be brought against the Commonwealth." So any plaintiff asking a court for monetary relief against the state has the same burden. He must point to a statute that allows the claims being pressed in the court in which suit was

brought. See *Withers*, 939 S.W.2d at 344 (“[T]he granting of waiver is a matter exclusively legislative.”).

Under Kentucky caselaw, sovereign immunity cannot be waived by mere implication. If a court thinks a statute *might* waive sovereign immunity, that’s not a sufficient waiver. A waiver of sovereign immunity must be unmistakable. To quote the well-known standard from *Withers*, sovereign immunity can be waived only “by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.” *Id.* at 346 (citation omitted); accord *Dep’t of Corr. v. Furr*, 23 S.W.3d 615, 616 (Ky. 2000) (“The line demarcating where the doctrine of sovereign immunity applied and where it did not apply was long drawn in shifting sands before we chiseled the line in stone in *Withers*.” (internal citation omitted)).

To get an idea of what an unmistakable waiver of sovereign immunity looks like, consider two examples. In the Board of Claims Act, the legislature codified its “intent[]” to “provide the means to enable a person negligently injured by the Commonwealth . . . to be able to assert their just claims as herein provided.” KRS 49.060. The statute satisfies the unmistakable-waiver standard by specifically stating that it “waives the sovereign immunity defense.” *Id.* The General Assembly, however, cabined that waiver consistent with Section 231. As this Court has summarized, “persons having negligence claims against the

Commonwealth may be heard in the Board of Claims, but not elsewhere.” *Withers*, 939 S.W.2d at 346; see KRS 49.040(1), .150(5), .160, .170. In sum, in the Board of Claims Act, the General Assembly unmistakably waived sovereign immunity for negligence claims, but it did so narrowly by specifying the manner in which relief may be sought.

By comparison, the Model Procurement Code has a slightly broader waiver of sovereign immunity. It allows “actions either for breach of contracts or for enforcement of contracts or for both” against the Commonwealth after a specified contract date. KRS 45A.245(1). The statute also identifies the venue for such lawsuits, limits the amount of damages, and directs that “[a]ll defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.” KRS 45A.245(1), (2). Based on that language, the Court has held that this provision unmistakably waives immunity for claims against the Commonwealth based on a lawfully authorized written contract. *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 651 (Ky. 2017).

The plaintiffs push back on these two examples by noting that the Court has sometimes allowed an “implicit” waiver of sovereign immunity. But their three favored cases all simply apply the rule from *Withers*, which as noted above allows waiver by “overwhelming implications from the [statutory] text . . . [that] leave no room for any other reasonable construction.” 939 S.W.2d at 346 (citation omitted). For example, in *Benningfield v. Fields*, the Court found a waiver

when the applicable statutes creating a legal claim clearly encompassed the plaintiff, his particular claim, and his government employer. 584 S.W.3d 731, 737–38 (Ky. 2019). The plaintiffs’ other caselaw is of a piece. They found a waiver by implication only when that conclusion was “overwhelming” based on the applicable statutes. *Furr*, 23 S.W.3d at 618; *Madison Cnty. Fiscal Ct. v. Ky. Lab. Cabinet*, 352 S.W.3d 572, 576 (Ky. 2011).

The plaintiffs cannot point to a comparably unmistakable waiver of sovereign immunity. In arguing to the contrary, they primarily rely on a case and several statutes.<sup>5</sup> None gets them to an unmistakable waiver.

Start with the case, which is *Ross v. Gross*, 188 S.W.2d 475 (Ky. 1945). To state the obvious, a waiver of sovereign immunity must be found in a statute, not in a judicial decision. A court cannot write around sovereign immunity in a judicial opinion, even if the equities in a particular case might justify it. *Withers*, 939 S.W.2d at 344. Nor can *Ross* be justified as a case interpreting a statute waiving sovereign immunity. As this Court has recognized, “[n]otably, the concept of sovereign immunity does not appear to have been raised in *Ross*.”<sup>6</sup>

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<sup>5</sup> There has been some discussion in these cases about whether the plaintiffs can assert a constitutional takings claim. The Court of Appeals did not reach that issue, so the Commonwealth takes no position on it.

<sup>6</sup> Sovereign immunity also went unconsidered in the plaintiffs’ other favored case of *Barnes v. Stearns Coal & Lumber Co.*, 175 S.W.2d 498 (Ky. 1943). In any event, *Barnes* rejected the state agency’s assertion that a refund statute covering

*Haydon Bridge II*, 416 S.W.3d at 290. A judicial decision that fails to consider sovereign immunity has no applicability in determining when sovereign immunity applies in future cases. See *Ward v. Westerfield*, 653 S.W.3d 48, 53 (Ky. 2022) (holding that a judicial decision that did not discuss constitutional standing “has no impact” on whether standing exists in a similar case).

Rather than dispute these points about *Ross*, the plaintiffs focus on the final paragraph in the decision. There, without citing any caselaw, this Court’s predecessor stated that it “seems” that paying money into the state treasury does not “vest the State with title thereto or a right to its custody” if the money does not “belong[]” to the state. 188 S.W.2d at 477. In the plaintiffs’ view, this sentence means that money that lawfully “belongs” to them (or any other potential plaintiff for that matter) can be withdrawn from the state treasury without ever implicating sovereign immunity.

That expansive view cannot be right. For one thing, *Ross* was a dispute between government actors—several county officials were seeking the return of money from the General Fund. *Id.* at 476. *Ross* did not consider, as here, private parties seeking to access the public fisc. It was a case about shifting money among government actors. In addition, although *Ross* mentioned Section 230 of the Constitution, it never grappled with Section 231. *Id.* at 477.

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the payments at issue was inapplicable. *Id.* at 500 (citing KRS 341.300); accord *Barnes v. Levy Bros.*, 175 S.W.2d 495, 498 (Ky. 1943).

But the latter provision is what specifies how a plaintiff gains entry into court to sue for money in the state treasury. So even if *Ross* was right about Section 230, it made no holding about Section 231.

That aside, *Ross* is altogether irreconcilable with the modern doctrine of sovereign immunity. In *Ross*, the General Assembly included a provision in the budget allowing a refund of money “which may be later determined not to be a lawful collection of the State” up to \$5,000 in each fiscal year in certain circumstances. *Id.* at 476. Under Section 231 as applied in cases like *Withers* and *Haydon Bridge II*, that narrow waiver of sovereign immunity would be followed to the letter. After all, that budget provision is little different from the damages caps in the Board of Claims Act and the Model Procurement Code. KRS 49.040(1); KRS 45A.245(2). Yet *Ross* failed to apply Section 231. Instead, the trial court there allowed the county officials to access the state treasury because the General Assembly’s “appropriation for refunding money unlawfully collected and paid into the State Treasury was wholly inadequate for the purpose.” 188 S.W.2d at 477. But sovereign immunity (not to mention the separation of powers) forbids the judiciary from second-guessing the policy judgment of the General Assembly.

Beyond that, the plaintiffs’ view of *Ross* cannot be squared with *Haydon Bridge II*. In particular, while discussing a statute that allows for a refund of funds paid to the state in specific circumstances (KRS 45.111), *Haydon Bridge II*

described the statute as a “limited *waiver* of sovereign immunity.” 416 S.W.3d at 291 (emphasis added). If a refund statute implicates sovereign immunity, as *Haydon Bridge II* holds, it follows that *Ross* could not have properly held that money in the public fisc that “belongs” to the plaintiffs can be refunded without implicating sovereign immunity. *Haydon Bridge II* teaches that removing any money from the public fisc, even if that money should be refunded, triggers sovereign immunity.

In this sense, *Haydon Bridge II* tracks the constitutional text. Section 230 states that “[n]o money” can be withdrawn from the state treasury without legislative appropriation. That language is categorical and admits of no exception. Put differently, Section 230 does not premise its prohibition on whether the money in the state treasury rightfully “belongs” to the state or to someone else, as the plaintiffs read *Ross* to hold. As written, Section 230 applies to every penny in the public fisc—full stop. The same is true of Section 231. *Ross* therefore runs headlong into Section 230’s text (and into Section 231’s text, which *Ross* failed to mention). The Court has not hesitated to move away from dated judicial precedents that do not reflect the Constitution’s text. *E.g.*, *Ward v. Westerfield*, 599 S.W.3d 738, 748 (Ky. 2019) (noting that the Court was “unable to square [a prior judicial holding] with the plain text” of the Kentucky Constitution). As much as *Ross* applies, the Court should reject it as the poorly reasoned anachronism that it is.

One final point on *Ross*. The plaintiffs' unbounded view of it would open the state's coffers to monetary relief whenever a court concludes that an individual (or a class of individuals) wrongfully paid money to the state. Pause to realize just how far-reaching that proposition is. In just these two cases, the plaintiffs' theory of *Ross* could involve monetary relief in the low nine figures—up to \$185 million, by the Department of Revenue's count. A single monetary judgment of that size against the state would be a shock to state government. This is not idle speculation. In *Haydon Bridge II*, the Court recognized that awarding a far smaller amount of monetary relief involving the state treasury—only \$32 million—“would create a *perfect storm*, an unprecedented collision of the constitutional powers accorded the three separate branches of government.” 416 S.W.3d at 296 (emphasis added). Such enormous monetary liability, the Court emphasized, would mean that “the legislature would be convening at the direction of the executive branch to determine how to deal with the situation, to-wit, how to pay what the judicial branch says the sovereign owes, all while continuing the necessary functions of state government.” *Id.* If the Court adopts the plaintiffs' view of *Ross*, all of state government would be open to individual and class-wide claims demanding money from the state treasury. To quote *Haydon Bridge II*, the “impact” of such monetary relief in these cases is “concerning[,] but the potential future consequences [in later cases] are almost unfathomable.” *See id.*

Aside from *Ross*, the plaintiffs invoke KRS 45.111 as an alleged waiver of sovereign immunity. To be sure, as noted above, KRS 45.111 constitutes a “limited waiver of sovereign immunity.” *Haydon Bridge II*, 416 S.W.3d at 291. But saying that a statute waives sovereign immunity does not tell us the “manner” in which it is waived under Section 231. On that score, KRS 45.111 is extremely narrow and very specific. The statute does not unmistakably allow the judiciary to decide whether a refund is proper and in what amount. It does not mention the courts, legal claims, damages, or litigation. The statute instead creates an inter-agency process to determine whether to grant a refund. In this way, KRS 45.111 is like the Board of Claims Act, which makes “the jurisdiction of the Board of Claims . . . exclusive.” KRS 49.040(1). In KRS 45.111, the General Assembly authorized the Finance and Administration Cabinet—and it alone—to refund money “upon a request from the budget unit that originally received and deposited the funds.” In addition, by twice using the term “may,” the statute entrusts the Cabinet with discretion to decide whether to grant a refund. So the only thing statutorily required is that the Cabinet exercise its discretion. In short, KRS 45.111 comes nowhere close to unmistakably waiving sovereign immunity to the extent of allowing the plaintiffs to seek nine figures of monetary relief in court.

All that said, KRS 45.111 is not irrelevant to these cases. The statute shows that the General Assembly is not indifferent to citizens who mistakenly

pay money to the state. With KRS 45.111, the legislature provided an inter-agency process for returning those funds without going through the hoops of getting a legislative appropriation. Sovereign immunity demands that the courts respect the “manner” in which the General Assembly waived sovereign immunity in KRS 45.111. If the General Assembly becomes convinced that KRS 45.111’s refund process is inadequate, it “retains the power to subsequently enact other waivers as its discretion dictates.” *See Withers*, 939 S.W.2d at 346.

The plaintiffs’ final favored statutes are KRS 131.565(6) and KRS 131.570(1). The former statute applies when an agency asks the Department of Revenue to withhold an individual’s income-tax refund to cover a specified debt to the requesting agency. In that circumstance, the statute requires the requesting agency to indemnify the Department in certain respects—including, as the plaintiffs note, as to certain “damages.” This provision is not the silver bullet that the plaintiffs claim. It’s just an indemnification provision between state agencies. It’s not an unmistakable waiver of sovereign immunity for monetary claims in court by private parties against one or both agencies. This Court’s caselaw is clear that a statutory indemnity provision is not an unmistakable waiver of sovereign immunity as to the indemnified matters. *See Withers*, 939 S.W.2d at 346 (“If immunity exists, it is not lost or diminished or affected in any manner by the purchase of liability insurance or the

establishment of an indemnity fund, whether directed or authorized by statute or merely undertaken without authorization, notwithstanding that such may have been an unnecessary expenditure of funds.”). And as to KRS 131.570(1), that provision simply provides a process for a taxpayer to contest a planned tax-refund setoff. It does not unmistakably authorize post-setoff litigation against the state for money damages.

### CONCLUSION

For the above reasons, the Commonwealth respectfully asks the Court to hold that the plaintiffs have not identified an unmistakable waiver of sovereign immunity to pursue monetary relief in court against the state defendants.

Tendered

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### WORD-LIMIT CERTIFICATE

This brief complies with the word limit of RAP 34(B)(4) because, excluding the parts of it exempted by RAP 15(D) and 31(G)(5), it contains 4,800 words.

*Matthew F. Kl*

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