COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2024-SC-0230

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF REVENUE — **APPELLANT**

V.

ON APPEAL FROM THE
KENTUCKY COURT OF APPEALS
CASE NO. 2023-CA-0411

AMELIA LONG, INIDIVIDUALLY AND
ON BEHALF OF A CLASS OF
OTHERS SIMILARLY SITUATED — **APPELLEE**

REPLY BRIEF OF APPELLANT COMMONWEALTH OF KENTUCKY DEPARTMENT OF REVENUE

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STATEMENT OF POINTS AND AUTHORITIES

The Commonwealth makes this Reply to the Response filed by the Long plaintiffs (the "Long Response") to the Commonwealth's Appellant Brief ("Appellant Brief") in its appeal the March 1, 2024, Opinion of the Court of Appeals (the "Opinion").

I. OVERVIEW.

This case involves a challenge to the Commonwealth's collection of health care debts owed to the University of Kentucky ("UK") hospital prior to 2022's enactment of KRS 131.130(12), prohibiting the Commonwealth's collection of consumer health care debts. The Long plaintiffs' Complaint was filed by the same attorney who brought the *University of Kentucky v. Moore*, 599 S.W.3d 798 (Ky. 2019) ("*Moore*") case, which also dealt with health care debts. A few months later, that same attorney brought the similar *Bennett* case (current 2024-SC-0240), concerning student debts.

The Long plaintiffs' Complaint sued on both common law grounds and requests for declaratory judgment. Their causes of action all alleged that the Commonwealth's collection of the UK's debts was contrary to statutory and Kentucky constitutional law. The primary relief sought by each cause of action was "the equitable remedy of restitution" of "all funds taken from the Plaintiffs and class members." TR 637-45.

In its Opinion, the Court of Appeals correctly determined:

> **The rationale in *Haydon Bridge II* applies** we must look to the nature of the requested declarations to determine whether sovereign immunity prohibits it. **The Kentucky Supreme Court determined requests for equitable restitution and retroactive injunctive relief were effectively requests for monetary damages, and therefore barred**. By extension, **Appellees' requested declarations that they are entitled to an order and judgment returning money they paid and that they are entitled to equitable restitution is also barred**.

Opinion, at 30-31 (emphasis added). However, after having reached the correct result to the question on appeal, the Court of Appeals made an unwarranted comparison to this Court's opinion in *Moore*, and decided to remand this case to the Franklin Circuit for a "final judgment" on virtually every aspect of the Long plaintiffs' case.

This Court granted the Commonwealth's request for discretionary review on whether, having resolved the Long plaintiffs' common law claims, the Court of Appeals erred in not dismissing the action as the declaratory judgment requests are now moot due to the enactment of KRS 131.130(12). In the event the Court declines to dismiss this case as moot, it also granted the Commonwealth's request on other issues regarding the Court of Appeals's Opinion, including whether its ultimate holding effectively nullifies this Court's decision in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (2009) ("*Prater*").

II. THE COURT OF APPEALS SHOULD HAVE DISMISSED THIS CASE AS MOOT, AS IT FOUND THE ONLY CLAIMS OF THE LONG PLAINTIFFS REMAINING WERE MOOT DECLARATORY JUDGMENT ACTIONS.

The Opinion found that the Long plaintiffs' "requested declaratory relief – except for that relief identified previously as being . . monetary relief – is not barred by sovereign immunity." (Opinion, at 34). KRS 418.040 provides, "In any action in a court of record of this Commonwealth having general jurisdiction **wherein it is made to appear that an actual controversy exists**, the plaintiff may ask for a declaration of rights." As a result of statutory changes, the Commonwealth now agrees that it does not have the right to collect UK medical debts from the Long plaintiffs (the Commonwealth ceased collecting such debts in 2022).

Under this Court's holding in *Appalachian Racing, LLC v. Family Trust Foundation of Kentucky, Inc*., 423 S.W.3d 72, 735 (Ky. 2014), "**For a cause to be justiciable [under KRS 418.040], there must be a present and actual controversy**." As there is no "present" dispute over the Commonwealth's authority to collect health care debts, or the Long plaintiffs' liability to the Commonwealth, there is no longer an "actual controversy" with respect to the Commonwealth's rights to collect UK medical debts. At most, there is a disagreement about what the law was formerly.

Changes in facts that occur after a case is brought initially can render them moot. Thus, in *Lococo v. Kentucky Horse Racing Commission*, 483 S.W.3d 848 (Ky. App. 2016), it was held that the Appellant's action for declaratory judgment did not survive his death due to mootness. Under *Bevin v. Beshear*, 526 S.W.3d 89, 90 (Ky. 2017), the proper course for the Court of Appeals to have taken was to dismiss the Long plaintiffs' case with prejudice.

Although the Long plaintiffs dispute that the case is moot overall, the Long plaintiffs really have no argument against the mootness of their requested declaratory judgment actions. They assert that they have "forward-looking declaratory judgment claims," but they are unable to explain what those are. They also claim that they have challenges to UK's billing practices, but the Long plaintiffs' lawsuit is regarding UK debts referred to the Commonwealth for collection and not against UK generally, and the Commonwealth ceased collecting referred UK health care debts in 2022. Moreover, although the Long plaintiffs alleged that UK had violated KRS 205.640 with some of its billing practices, the provision they complained about was repealed in 2018, as the Long plaintiffs themselves admitted with their second amended complaint in 2020. TR 640.

Thus, contrary to their Response's false representations, there are no alleged improper "ongoing billing practices." Long Response, at 14-16.

There is no present dispute regarding rights that can be the subject of a declaratory judgment action. Consequently, as the Commonwealth's sovereign immunity bars the Long plaintiffs' common law causes of action, this case should be dismissed as moot.

III. THE LONG PLAINTIFFS' RESPONSES TO THE COMMONWEALTH'S APPEAL REGARDING SOVEREIGN IMMUNITY & RIPENESS.

A. The Court of Appeals Erroneously Remanded this Case as Unripe.

Having correctly seen that the Long plaintiffs were seeking the type of equitable restitution this Court held in *Beshear v. Haydon Bridge Co. Inc*., 416 S.W.3d 280 (Ky. 2013) ("*Haydon Bridge II*"), was violative of the Commonwealth's sovereign immunity, the Court of Appeals undid the effect of its conclusion by an erroneous comparison to *Moore*:

> The circuit court in *Moore* had already entered a declaratory judgment . . . . *Id*. **In the instant case, the circuit court has ruled** on select issues on the merits, including holding **that UK was not entitled to refer debts to the Department for collection**. R. at 1360-69. However, Appellees' challenges to the constitutionality of KRS 45.237 et seq. are still pending. And, Appellees have yet to pursue monetary relief flowing from a declaratory judgment – which the circuit court has yet to enter. . . . Because this issue is unripe, we decline to examine it.

Opinion, at 35 (emphasis added). This corresponds to the Opinion's earlier conclusion that "**because Appellees have not yet obtained any final judgment** declaring that Appellants' debt referral and collection scheme is contrary to law for any of the reasons that Appellees argue, **the question of whether sovereign immunity bars monetary relief sought pursuant to such declaratory judgment is unripe**." Opinion, at 25. In

reaching these determinations, the Court of Appeals completely misunderstands this case, *Moore,* and sovereign immunity law in Kentucky.

The Commonwealth argued to the Court of Appeals simply that "effect here of the Commonwealth's sovereign immunity is that the Plaintiffs' action for a money judgment, however styled, is barred." Commonwealth Appellant Brief, No. 2023-CA-0411 (July 10, 2023), at 6. However, in an apparent attempt to address *Moore*, the Court of Appeals seemingly got confused about what declaratory judgment was subject to review. It quotes from a portion of *Moore* that states that the plaintiff had sought a declaratory judgment that the Commonwealth "may not legally undertake efforts to collect debt owed to UK" (quoting *Moore* at 801), and erroneously claims, "*Moore* therefore did not seek monetary relief." Opinion, at 33. In fact, what the Fayette Circuit ruled on in *Moore* was the separate question of "whether UK is an agency 'within the executive branch.'" Thus, stating that "[t]he circuit court in *Moore* had already entered a declaratory judgment in the underlying action" is misleading when the motion the Fayette Circuit granted **was NOT** regarding the declaratory judgment the Court of Appeals prominently quoted, but rather was on the more limited matter of whether UK was in the executive branch. Opinion, at 35. **This is a crucial distinction that directly impacts the issue of ripeness.**

Had the *Moore* Court agreed that UK was not in the executive branch, UK would not have been an "agency" that could "lawfully refer" debts for collection, and the plaintiff could proceed with seeking the broader declaratory judgment on illegality. When this Court found that UK was in the executive branch, it remained unanswered

whether UK was an "organizational unit" or "administrative body" that could be an "agency," and this Court remanded for the resolution of those questions.

Importantly, **unlike the situation in *Moore*** and, as explicitly recognized in the Court of Appeals's Opinion, "**the [Franklin] circuit court has ruled . . . that UK was not entitled to refer debts to the Department for collection**." Opinion, at 35 (quoted above). There is **no reason** for this case to be returned to the Franklin Circuit for further justifications for its ruling, or for reframing a substantive ruling in the magic words of "declaratory judgment."

Regarding the Commonwealth's position on ripeness, the Long plaintiffs state:

> DOR claims that, unlike *Moore*, the outcome of the declaratory claim is not in question because circuit court here has already ruled on all relevant issues. That is simply incorrect. **There has been no** declaratory relief granted – **nor any explanation of what the legal basis would be**.

Long Response, at 18. Beyond the fact that there was no formal "declaratory judgment," this statement is **COMPLETELY FALSE**. As pointed out, the Long plaintiffs Complaint requested "A judgment under KRS 418.040 et seq. declaring that the University . . . may [not] legally refer UK HealthCare . . . to the Department for collection under KRS 45.237 to 45.238 and KRS 45.241; that the UK HealthCare accounts are not the types of accounts that may be referred for collection under the language of KRS 45.237 to 45.238 and KRS 45.241." Appellant Brief, at 5 (*quoting* TR 657-58). The Franklin Circuit then held "that KRS 45.237 and KRS 45.238 do not allow the University to refer its patient accounts to the Department of Revenue for collection," and that there was no authority to refer debts under KRS 45.241 because it required UK

"to 'liquidate' a patient account before referring the account for collection by the Department of Revenue" by "filing a 'legal action' in court." TR 1364-65.

Thus, contrary to this misrepresentation, the Franklin Circuit already ruled exactly what the Long plaintiffs requested that they rule—that the UK could not legally refer debts to the Commonwealth "for collection under KRS 45.237 to 45.238 and KRS 45.241." As well, contrary to the **FALSE** statement made by the Long plaintiffs, the Franklin Circuit was completely clear regarding the "explanation of what the legal basis would be." Although the Franklin Circuit's ruling was not styled with the "magic words" "declaratory judgment," this is exactly the declaratory judgment the Long plaintiffs requested, and it is the substance of the declaratory judgment on which the circuit court in *Moore* had **NOT** ruled.

The Long plaintiffs also argued that debts could not be referred to the Commonwealth for innumerable supposed Constitutional violations, including such obvious legal pablum as violation of "the right to petition for redress of grievances," but these only were overlapping allegations of illegality. *See* Appellant Brief, at 4-5. The Franklin Circuit already had ruled on the merits of the Long plaintiffs' core declaratory judgments. Unlike in *Moore*, it was ripe for the Court of Appeals to decide whether the Commonwealth's sovereign immunity barred the enormous monetary judgment they sought.

B. The Court of Appeals Erred in Failing to Uphold the Commonwealth's Sovereign Immunity from the Large Monetary Judgment Sought Including under KRS 418.055.

In *Haydon Bridge II*, this Court held that "sovereign immunity bars the retroactive monetary relief ordered by the trial court regardless of whether it is labeled a retroactive

injunction, equitable restitution, or some other type of remedy." *Haydon Bridge II*, at 295. The Commonwealth appealed to the Court of Appeals asking it to hold exactly that with respect to the Long plaintiffs' claims. Unfortunately, as detailed above, the Court of Appeals misread *Moore*.

In their Complaint, the Long plaintiffs explained:

> Under KRS 418.055, "Further relief, based on a declaratory judgment, order or decree, may be granted whenever necessary or proper." **Upon securing the declaratory judgments described herein, the Plaintiffs and class members will be entitled to such further relief in the form or an order and judgment requiring the Defendants to return to the Plaintiffs and class members all funds unlawfully collected by the Defendants as to the UK HealthCare accounts**. . . . The Plaintiffs and class members will thus be entitled to the ***equitable remedy of restitution of their moneys*** from the Defendants.

TR 645 (emphasis added). The Commonwealth's Appellant Brief argued that the words of KRS 418.055 are too "vague and unspecific to constitute a waiver of the Commonwealth's sovereign immunity from their requested monetary judgment."[1] More directly, it does not meet the standards of KRS 49.060 for a case "**where sovereign immunity is specifically and expressly waived as set forth by statute**" so as to allow the Courts to bypass the mandate of Kentucky Constitution Section 230 giving the legislature authority over Kentucky's Treasury. The contention that KRS 418.055 could be used in service of the Long plaintiffs' desired $85 million plus judgment[2] also conflicts with this Court's holding in *Lexington-Fayette Urban County Bd. of Health v. Board of Trustees of University of Kentucky*, 879 S.W.2d 485, 486 (Ky. 1994), that the Commonwealth's sovereign "prerogatives, rights, or remedies" cannot be waived "**unless the intention of the legislature to effect this object is clearly expressed**." As the

[1] Appellant Brief, at 27-28.
[2] Appellant Brief, at 6.

Franklin Circuit already had ruled on the substance of the Long plaintiffs' key declaratory judgment requests, the issue was ripe for a decisive upholding of the Commonwealth's sovereign immunity.

The Long plaintiffs' Response misleadingly claims that the nature of any "further relief" is "speculat[ion]." Long Response, at 20. It states, "The nature of the 'further relief' authorized by KRS 418.055, and the application of sovereign immunity to that relief, necessarily depends on the nature and legal basis of the underlying declaratory judgment." *Id.* In fact, there was only one sort of relief the Long plaintiffs requested.

The Long Complaint had multiple counts. The relief sought under each count was to "return all funds taken from the Plaintiffs and class members as herein described." TR 645. The Long plaintiffs requested this as "further relief," common law damages, equitable restitution or whatever. In their appeal of the Opinion, the Long plaintiffs make it clear that they want to turn KRS 418.055 "further relief" into something indistinguishable from common law money damages,[3] and eviscerate this Court's holding in *Haydon Bridge II*. The Court of Appeals erred in leaving the question open that the enormous monetary judgment the Long plaintiffs sought might be achieved simply by retitling it "further relief."

[3] Brief of [Long] Appellants (2024-SC-0229), at 38-39 ("Because the claims here fall into both the exception to immunity set forth in *Ross v. Gross* and the waiver of immunity in KRS 45.111, **it does not matter whether the relief is characterized as equitable restitution, a refunding injunction, or simply damages**.") (emphasis added). Under KRS 49.060, the Kentucky Board of Claims has exclusive jurisdiction to hear claims for "damages." To the extent that the Long plaintiffs sought a monetary judgment, the Board of Claims was the proper venue to seek it. *See* Exhibit 1, at 42-42.

C. The Court of Appeals Erred in Returning This Matter to Circuit Court for a Final Judgment on Virtually Every Aspect of the Long Plaintiffs' Lawsuit.

When this Court returned the *Moore* case to the Fayette Circuit Court, it was on the very limited issue of whether UK was an "administrative body" or and "organizational unit," and whether UK's debts could be referred under KRS 45.237 et. seq. The Court of Appeals stated this case was remanded for resolution of the Long plaintiffs' numerous "challenges to the constitutionality of KRS 45.237 et seq.," and their full pursuit of "monetary relief flowing from a declaratory judgment." Opinion, at 35. Such an outcome effectively would nullify the holding of *Prater*.

In *Prater*, this Court observed that "immunity entitles its possessor to be free "from the burdens of defending the action, not merely ... from liability." 292 S.W.3d at 886. This Court authorized an interlocutory appeal because "[a] trial court's order denying immunity would prove effectively unreviewable on appeal from a **final judgment** . . . because by that time the movant's interest in avoiding litigation would be lost beyond the appellate court's ability to provide a meaningful remedy." *Id.* at 885. Here, to the contrary, the Court of Appeals stated that "a meaningful ruling on sovereign immunity could not be reached prior to 'final judgment.'" Opinion, at 25. Thus, it directly contradicted *Prater*.

Citing *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833, 840 (Ky. 2013), the Long plaintiffs' primary argument is that "DOR has no sovereign immunity from declaratory relief claims, and thus no entitlement to avoid the burdens of litigating against such claims." Long Response, at 14. However, in *Kentucky Retirement Systems*, this Court explained:

> As the trial court found, a declaratory judgment action **is not a claim for damages**, but rather it is a request that the plaintiff's rights under the law be declared. **There *is no harm to state resources from a declaratory judgment***.

Id. at 838. In the present case, the Long plaintiffs are happy to have their claims be termed "damages,"[4] and they want to strip state resources of over $85 million. The rationale of *Prater* demands that their quest be ended now.

IV. THE LONG PLAINTIFFS' OTHER GROUNDS FOR OPPOSITION.

A. The Claim that the Commonwealth's Sovereign Immunity Appeal was not Proper.

The Long plaintiffs repeat their claim from their separate appeal (2024-SC-0229) that the Commonwealth was not entitled to appeal on the basis of sovereign immunity. The Commonwealth dealt with this erroneous contention at length in its Response Brief in that matter. See Exhibit 1, at 19-25. Key pointes are as follows:

1. The Commonwealth had a right to an interlocutory appeal of sovereign immunity under *Prater*.

2. Under *Metro Louisville/Jefferson County Government v. Abma*, 326 S.W.3d 1, 14 (2009), a sovereign immunity defense may be asserted "at any time."

3. Judge Wingate stated in court that he expected the Commonwealth to appeal on the basis of two issues:

> **What's going to happen is that the that [this case, once] certified as a class, you all are going to go up on certification and sovereign immunity, right**?

VR 02/15/23 at 9:39:23 am to 9:39:29 am. The Long plaintiffs voiced no disagreement with this at the time.

[4] Long Response, at 14-15 and 23.

4. The Commonwealth properly raised sovereign immunity as an objection prior to the issuance of the Franklin Circuit Court's order certifying a class.

5. Even if a 30-day rule applied, the Commonwealth's Notice of Appeal appealing on both *Prater* and CR 23 was filed within that time.

6. Contrary to the false claims of the Long plaintiffs, the Commonwealth never claimed authority for its sovereign immunity appeal from CR 23.

B. The Long Plaintiffs' Claim that the Commonwealth's Collection of the Debts Amounted to an Unconstitutional "Taking".

The Long plaintiffs again make the **FALSE** statement that "[t]here has been no ruling on whether the actions by UK and DOR amount to an unconstitutional taking." Long Response, at 18. On the basis of their far-fetched statutory "interpretation," the Long plaintiffs argued to the Franklin Circuit (TR 783-821) that the amounts collected by the Commonwealth were "takings" and not covered by sovereign immunity and the Franklin Circuit so ruled. See Exhibit 3, at 1; TR 1360 ("Furthermore, sovereign immunity is inapplicable as these attachments were . . . in violation of Section 13 of the Kentucky Constitution.").

If the present matter were a "takings" case, then every tax collection case will have a "takings" component. In in *Richardson v. Brunner*, 356 S.W.2d 252, 254 (Ky. 1962), this Court dismissed the argument that the sale of a piece of land to satisfy a tax debt was a "taking" as "obviously fallacious." Moreover, here, the Long plaintiffs admit that they received healthcare services from UK. In the present case, the Court of Appeals did not address the "takings" aspect of the Franklin Circuit order, but it may have found the contention unserious. When the respondents in *Haydon Bridge II* made a similar

attempt to defeat sovereign immunity by throwing out a "takings" claim under the "just compensation" provision of Kentucky Constitution Section 242, this Court simply dismissed it as having "no application to these facts." *Haydon Bridge II*, at 395. The same should happen here.

Respectfully submitted,

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