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, INDIVIDUALLY AND
ON BEHALF OF A CLASS OF
OTHERS SIMILARLY SITUATED — **APPELLEE**

BRIEF OF APPELLANT
COMMONWEALTH OF KENTUCKY
DEPARTMENT OF REVENUE

R. CAMPBELL CONNELL
FRANK L. DEMPSEY
AUSTIN T. GREEN
Counsel for Defendants
P.O. Box 5222
Frankfort KY, 40602-5222
(502) 564-4921 ex. 4404

CERTIFICATE OF SERVICE

I certify that this brief was served on the Kentucky Supreme Court and those listed on the following, by electronic and first-class mail, on this 18th day of November 2024.

R. CAMPBELL CONNELL
Counsel for Defendants

LIST OF THOSE SERVED

Thomas D. Wingate
Judge, Franklin Circuit Court
Franklin County Courthouse
222 St. Clair St.
Frankfort, KY 40601

E. Douglas Richards
401 Lewis Hargett Circle, Suite 210
Lexington, KY 40503
859-229-5851

Bryan C. Hix
McNamara & Jones 315 High Street
Frankfort, KY 40601

Griffin Terry Sumner
Frost Brown Todd LLP
400 W. Market St., 32nd Floor
Louisville, KY 40202

Bryan H. Beauman
Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507

Melissa Norman Bork
Brent R. Baughman
DENTONS BINGHAM GREENEBAUM LLP
3500 PNC Tower
101 South Fifth Street
Louisville, Kentucky 40202
Phone: (502) 589-4200

Sam P. Burchett
General Counsel Kentucky State Treasury
1050 U.S. Highway 127S, Suite 100
Frankfort, KY 40601
(502) 564-8820

INTRODUCTION & ORAL ARGUMENT STATEMENT

Appellant Commonwealth of Kentucky, Department of Revenue (the "Commonwealth") appeals from the March 1, 2024, Opinion of the Court of Appeals in this matter. Initially, the Court of Appeals correctly held that, under this Court's precedent, there was no applicable waiver of the Commonwealth's sovereign immunity that would allow the payment of the enormous monetary damages sought by the Long plaintiffs. However, relying on a thorough misreading of *University of Kentucky v. Moore*, 599 S.W.3d 798 (Ky. 2019), the Court of Appeals wrongly concluded that ripeness demanded the return of this case to the Franklin Circuit Court for resolution of the declaratory judgment causes of action and a "final judgment."

In fact, as the Commonwealth's Motion for Discretionary Review argued, what the Court of Appeals then should have done was to dismiss this case as moot given that 2022's enactment of KRS 131.130(12) mooted the Long plaintiffs' declaratory judgment causes of action. The Long plaintiffs alleged that the Commonwealth could not legally collect the health care debts of the University of Kentucky, and the Commonwealth now agrees as that is what KRS 131.130(12) explicitly provides.

In the event this Court declined to dismiss this case as moot, the Commonwealth requested and received discretionary review on errors made by the Court of Appeals regarding *Moore*, KRS 418.055, and the Court of Appeals's gross undermining of this Court's sovereign immunity holding in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (2009), by requiring a "final judgment" on the virtually every aspect of the Long plaintiffs' case.

The Commonwealth believes oral argument will aid the resolution of this dispute.

STATEMENT OF POINTS AND AUTHORITIES

The Commonwealth, by and through counsel, appeals the March 1, 2024, Opinion of the Court of Appeals (the "Opinion") (see Exhibit 1) in this matter and submits as follows.

STATEMENT OF THE CASE

A. 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 the enactment of KRS 131.130(12) in 2022, which prohibits the Commonwealth's collection of consumer debts owed for health care goods and services (but not other debts to state agencies). The Long plaintiffs' initial Complaint was filed on June 19, 2018, 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 and was then pending before this Court. A few months later, that same attorney brought the similar case *Kimberly Bennett v. University of Kentucky, et al.* (current 2024-SC-0240), which concerns student debts owed to state universities.

This case is really a sequel to two prior rulings of this Court, *Moore* and *Beshear v. Haydon Bridge Co. Inc.*, 416 S.W.3d 280 (Ky. 2013) ("*Haydon Bridge II*") as well as an attempt to relitigate the issues in *Haydon Bridge II*. *Moore* was the first case regarding the Commonwealth's collection of UK debts. In *Moore*, the legal theory presented to this Court, was that the Commonwealth was not statutorily authorized to collect debts because UK was not an agency "in the executive branch of state government." This Court unanimously rejected this unlikely contention.

Analogous to this present case, *Haydon Bridge II* was a challenge to the Commonwealth's sovereign immunity arising out of the Franklin Circuit Court. The specific arguments that the Kentucky Supreme Court rejected in *Haydon Bridge II* as defeating sovereign immunity were (1) Equitable restitution based upon *Ross v. Gross*, 188 S.W.2d 475 (Ky. 1945); (2) Equitable restitution based upon KRS 45.111; and (3) the claim that there was a "taking" of property under the Kentucky Constitution and sovereign immunity did not apply. *Haydon Bridge II*, 416 S.W.3d at 289-95. The Franklin Circuit's Order of August 15, 2022 (*see* Exhibit 2, at 7-9; TR at 1366-68), endorsed the arguments of the Long plaintiffs that sovereign immunity did not apply for the exact same three reasons that sovereign immunity was upheld by the Kentucky Supreme Court in *Haydon Bridge II.*

The Court of Appeals recognized that the Franklin Circuit's opinion in this case had failed to follow *Haydon Bridge II.* Unfortunately, instead of clearly affirming the Commonwealth's sovereign immunity, its Opinion was diverted by an erroneous comparison to Moore. In *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (2009) ("*Prater*"), this Court recognize the importance of sovereign immunity by granting an interlocutory appeal right when sovereign immunity is asserted. The final resolution of the Court of Appeals's Opinion in this case thoroughly undermines *Prater*, by returning the case to the Franklin Circuit for a "final judgment" on virtually every aspect of the Long plaintiffs' lawsuit. Moreover, the Court of Appeals created a fundamental error of law by directing the Franklin Circuit to address the Long plaintiffs' innumerable claims for declaratory judgement notwithstanding the fact that those claims

had been rendered moot by the enactment of KRS 131.130(12), and are not relevant to any continuing legal issue in this case.

B. **The *Amelia Long* Lawsuit.**

The Long plaintiffs filed their lawsuit on June 19, 2018, suing "individually and on behalf of others similarly situated," the Commonwealth, Kentucky State Treasurer Allison Ball, and UK. TR 1-32. The Long plaintiffs alleged that they were health care patients at UK, were billed for services received at UK, and had their medical debt referred to the Commonwealth for collection. They further alleged, as reflected in their Second Amended Complaint, that the Commonwealth collected these debts through payment plans, income tax refund offsets, and bank and wage levies. TR 626-42. In addition to other relief, the Long plaintiffs requested "[a]n Order requiring Defendants, Allison Ball, in her official capacity as Kentucky State Treasurer, and Penny Cox, in her official capacity as the University's Acting Treasurer, **to return all funds taken from the Plaintiffs and class members** as herein described." TR 658 (emphasis added).

As described by the Court of Appeals, UK and the Commonwealth followed the following procedures when patients at UK hospital failed to pay their bills:

> UK sent each Appellee statements for the unpaid balances.
>
> At all times relevant to this appeal, UK took additional steps to pursue payment in the event a patient's balance remained unpaid. UK sent unpaid accounts to CKMS, an affiliated debt collection corporation, which would send additional notices to the patient. Should these efforts prove unsuccessful, CKMS would mail a final notice letter, a "Letter 8," to the patient. The Letter 8 would inform the patient as to his or her right to contest the amount owed and how to initiate such contest. The contest procedure would include a hearing before a hearing officer.
>
> The Letter 8 also informed the patient that, should he or she fail to contest the amount owed, the balance would be referred to the Department for collection.

> KRS 45.238 [and KRS 45.241] empowers executive branch agencies to "certify" debts, and, having done so, must refer their certified debts to the Department for collection. See KRS 45.238.
>
> None of Appellees requested a hearing, and, therefore, each of their outstanding balances were referred to the Department for collection. The Department proceeded to collect the balances via wage garnishment, levies against bank accounts, and state income tax offsets. The Department imposed statutory interest and collection fees. All Appellees, except Marcum, entered voluntary payment plans with the Department. Pursuant to these agreements, the Department would agree to cease collection in exchange for regular payments toward the patient's outstanding balance.

Opinion, at 2-4 (footnotes omitted).

The Long plaintiffs' Second Amended Complaint alleged a long list of supposed violations of law, including that the University of Kentucky was not "an organizational unit or administrative body in the executive branch of state government as defined in KRS 12.010" (a theory unanimously rejected by this Court in *Moore*). Additionally, they advanced a theory that the referral of debts to the Commonwealth was not otherwise authorized by KRS 45.237, 45.238 and KRS 45.241, and they further alleged a very numerous list of claimed United States and Kentucky State Constitution violations.[1] The

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[1] *See* Second Amended Complaint, TR at 649 ("The actions, conduct and practices of the University and Department, as hereinabove described and as administered, violate various Kentucky and United States Constitutional provisions, including these sections of the Kentucky Constitution: a. Section 1, Fifth, by interfering with the right of the Plaintiffs and class members in "protecting property." b. Section 1, Sixth, by infringing the right of the Plaintiffs and class members to petition the "government for redress of grievances." c. Section 2, by amounting to an exercise of "Absolute and arbitrary power over the lives, liberty and property" of the Plaintiffs and class members. d. Section 7, by infringing on the right of the Plaintiffs and class members to a trial by jury as to the alleged debt owed to the University and the imposition by the Department of any fee, including the 25% fee. e. Section 10, by infringing on the right of the Plaintiffs and class members to be secure in their possessions and from unreasonable seizure. f. Section 13, by infringing the right of the Plaintiffs and class members not to have "property be taken or applied to public use without . . . just compensation being previously made to him." g. Section 14, by denying the right of the Plaintiffs and class members to have courts open to them to "have remedy by due course of law." h. Section 17, by imposing on the Plaintiffs and class members excessive fines, in the form of an arbitrary 25% collection

Long plaintiffs also claimed that UK had billed some patients in violations of former KRS 205.640(5), and that the 25% collection fee authorized by KRS 45.241(7) and imposed on debt collections by the Commonwealth was somehow illegal. Under common law, the Long plaintiffs requested "relief on grounds of mistake."

The Long plaintiffs further requested:

> A judgment under KRS 418.040 et seq. declaring that the University is not "an organizational unit or administrative body in the executive branch of state government as defined in KRS 12.010"; **that neither the University nor KMSF or CKMS may legally refer UK HealthCare or provider accounts or debts 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; that the Department may not legally take action to collect the UK HealthCare accounts allegedly owed by the Plaintiffs or class members, including specifically levying bank accounts or wages, offsetting tax refunds or similar credits, or asserting and perfecting liens against the real and personal property of the Plaintiffs or class members; that any funds collected by the Department are, and have been, the lawful property of the Plaintiffs and class members; that the Department may not lawfully collect accounts of UK HealthCare providers as referred to it by either CKMS or KMSF; that the practices of the University and Department in applying KRS 45.237 to 45.241 to the University's accounts are unconstitutional; that KRS 45.237 to 45.238 and KRS 45.41 would be facially unconstitutional if interpreted in the manner suggested by the Defendants; that the Department had no right or legal authority to collect a 25% fee from the Plaintiffs and class members, and their doing so is an unlawful taking without due process; **and that the Plaintiffs and class members are 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, and/or *the equitable remedy of restitution of their moneys* from the Defendants**.

TR 657-58 (emphasis added). The Long plaintiffs also 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**

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fee. The collection scheme in general amounts to a taking of the property of the Plaintiffs and class members, without due process of law, and amounts to an unlawful prejudgment attachment of the property and money of 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 Long plaintiffs additionally requested "An Order requiring [the] Kentucky State Treasurer [and UK] **to return all funds taken from the Plaintiffs and class members as herein described**. *Id.* (emphasis added). Thus, what the Long plaintiffs really wanted was an enormous monetary judgment estimated to be over $85 million dollars.[2]

This case proceeded in Franklin Circuit Court where basic discovery regarding the named plaintiffs and the operation of the Commonwealth's state agency collection program was conducted. At one point, the case was removed to federal District Court where the alleged United States Constitutional due process claims were dismissed. *See* Exhibit 4, TR 676-85 and 686-88.

C. A Brief History of the Commonwealth's Collection of State Agency Debts.

1. 1984: State Income Tax Refund Offsets -- KRS 131.560 to 131.595.

Originally enacted by 1984 Ky. Acts Ch. 405 (S.B. 197), the income tax refund offset program of KRS 131.560 to KRS 131.595 allows state agencies (as variously defined over the years) to request the withholding of a state income tax refund to offset a debt owed to the state agency. Originally, the program was limited to debts where there was "a specific statutory provision for debtor appeal and hearing rights for that particular debt."

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[2] See Exhibit 3, (Affidavit of Wes Smothermon). Consequently, the Long plaintiffs named the Kentucky State Treasurer as a party and requested "[a]n Order requiring Defendants, Allison Ball, in her official capacity as Kentucky State Treasurer, and Penny Cox, in her official capacity as the University's Acting Treasurer, to return all funds taken from the Plaintiffs and class members as herein described." TR, at 658.

1984 Ky. Acts Ch. 405 (S.B. 197), Section 8(1). In 2004, regulatory provisions also were allowed. 2004 Ky. Acts Ch. 118 (HB 162), Section 4.

The state income tax refund offset program always has been separate from other debt collection activities of the Commonwealth. It never required state agencies participating in it to sue debtors prior to submitting debts for state income tax refund offset. For example, the Kentucky Higher Education Assistance Authority participates in the program and currently contracts with the Kentucky Attorney General's office for hearing officers. See Exhibit 5; *Amelia Long*, TR 950-51 (Affidavit of Miles Justice).

2. 2003: Collections Pursuant to MOA (KRS 131.130(11)).

In 2003, 2003 Ky Acts Ch. 135 (HB 442), Section 1, expanded KRS 131.130(11) to allow the Commonwealth to enter into memoranda of agreement with "any state agency, officer, board, commission, corporation, institution, cabinet, department, or other state organization to assume the collection duties for any debts due the state entity." Unlike the Commonwealth's limited role with the state income tax refund offset program, for debts referred under KRS 131.130(11), the Commonwealth is authorized to use "all the powers, rights, duties, and authority with respect to the collection, refund, and administration of those liquidated debts as provided under: (a) KRS Chapters 131, 134, and 135 for the collection, refund, and administration of delinquent taxes." The Commonwealth entered into a series of MOAs with UK for the collection of Health Care debts.

3. 2004: Collection Under KRS 45.237/KRS 45.238 and/or KRS 45.241.

With state budgets tight, in 2004, the Kentucky General Assembly again created separate provisions to allow and encourage the Commonwealth's collection of state agency debts. The first of these, KRS 45.237 and KRS 45.238 were enacted by 2004 Ky. Acts Ch.

192 (SB 228), Sections 1 and 2. The second was KRS 45.241, enacted by 2004 Ky Acts Ch. 118 (HB 162), Section 1.

4. Developments from 2004 to 2022.

The Commonwealth's collection of UK health care debts began in earnest around 2008. During the post-2004 / pre-2022 period, there were numerous minor changes to the provisions affecting the Commonwealth's collection of state agency debts, including those of UK.[3] In 2014, HB 122, 2014 Reg. Sess. (Ky. 2014), proposed to change the definition of "agency" in KRS 45.237(1)(a) to exclude "any public college or university, or any quasi-governmental entity," but this bill was never enacted.

5. The Enactment of KRS 131.130(12).

In 2022, 2022 Ky. Acts Ch. 212 (HB 8), Section 28, created new KRS 131.130(12) and made changes to KRS 131.130(11) to provide that the Commonwealth "shall not collect or continue collection duties of any consumer debts owed for health care goods and services." The Commonwealth's collection of medical debts then ceased.[4]

D. The Orders of the Franklin Circuit.

In an Order dated August 15, 2022, the Franklin Circuit (*see* Exhibit 2, at 7-9; TR at 1366-68) ruled on partial motions for summary judgment on three threshold issues: (1)

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[3] *See* **KRS 45.237** (2017 c 158, § 7, eff. 6-29-17; 2013 c 88, § 3, eff. 6-25-13; 2005 c 85, § 61, eff. 6-20-05); **KRS 45.238** (2013 c 88, § 4, eff. 6-25-13; 2008 c 44, § 1, eff. 7-15-08; 2005 c 85, § 62, eff. 6-20-05) **KRS 45.241** (2017 c 158, § 8, eff. 6-29-17; 2013 c 88, § 5, eff. 6-25-13; 2009 c 10, § 54, eff. 1-1-10; 2008 c 44, § 2, eff. 7-15-08; 2005 c 85, § 64, eff. 6-20-05).

[4] See also Opinion, at 3 n.3.

the Commonwealth's authority to collect UK's debts under KRS 45.237 and KRS 45.238; (2) the Commonwealth's authority to collect UK's debts under KRS 45.241; and (3) the Commonwealth's entitlement to assert sovereign immunity against the Long plaintiffs' monetary claims. After endorsing the Long plaintiffs' claims that the Commonwealth lacked authority under KRS 45.237, KRS 45.238 and KRS 45.241 to collect UK's debts, including the Long plaintiffs' particularly gross misconstruction of KRS 45.241, the Franklin Circuit ruled that the Commonwealth was not entitled to sovereign immunity as its sovereign immunity supposedly had been "waived." As noted above, the grounds for those "waivers" were those that this Court had rejected as waiving sovereign immunity in *Haydon Bridge II.*

On October 24, 2022, the Long plaintiffs filed their motion for class certification. The Commonwealth objected to this on the basis of both sovereign immunity and class action law. TR, at 1591-1608 and 1760-1804. After multiple hearings and responses, the Franklin Circuit granted the Motion for Class Certification on March 28, 2023.

E. Appeal to the Court of Appeals.

The Commonwealth filed its Notice of Appeal on April 6, 2023, and appealed both class certification and the Franklin Circuit's denial of the Commonwealth's defense of sovereign immunity. See Notice of Appeal, TR, at 1-46 (Second). The Commonwealth's sovereign immunity appeal was taken under the authority of this Court's holding in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (2009). UK also appealed, but only on the issue of class certification.

F. The Court of Appeals Ruling on Sovereign Immunity.

The Opinion of the Court of Appeals correctly rejected the conclusions of the Franklin Circuit that sovereign immunity was somehow waived with regard to the Long plaintiffs' claims. It correctly holds that "sovereign immunity bars Appellees' requested relief in the form of an order directing the return of the money at issue." Opinion, at 30. It further correctly finds:

> As for Appellees' requested declarations that they are entitled to an order and judgment which returns the collected funds, as well as to the "equitable remedy of restitution," R. at 657-58, we conclude such relief is monetary relief disguised as declaratory relief. **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).

The Court of Appeals Opinion thus disposes of the Long plaintiffs' claims for monetary damages under common law, but then gets diverted by a consideration of declaratory judgment actions and an inaccurate comparison to this Court's ruling in *Moore*. The Opinion states, "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." It then returns this case to resolve "Appellees' [innumerable] challenges to the constitutionality of KRS 45.237 et seq." and for the ultimate granting of "monetary relief flowing from a declaratory judgment." Opinion, at 35.

The Commonwealth filed for discretionary review on issues related to the Court of Appeals ruling other than class certification.

ISSUES ON APPEAL

This Court's order of September 18th granted the Commonwealth's Motion for Discretionary Review on the following questions of law.

Question Related to Mootness

Whether, having held that the Long plaintiffs' causes of action other than requests for declaratory judgment were barred by sovereign immunity, the Court of Appeals erred in not dismissing the action as the declaratory judgment requests are now moot due to the 2022's enactment of KRS 131.130(12)?

Questions Related to the Sovereign Immunity Portion of the Court of Appeals's Opinion

This Court only would need to address the following issues in the event that they did not dismiss this matter as moot.

1. Whether the Court of Appeals misread and misapplied this Court's opinion in *University of Kentucky v. Moore*, 599 S.W.3d 798 (Ky. 2019), regarding the ripeness of ruling on the Commonwealth's defense of sovereign immunity against a monetary judgment?

2. Whether KRS 418.055 lacks the clear and express language required under Kentucky law to constitute a waiver of the Commonwealth's sovereign immunity for the multi-million-dollar judgment sought by the Long plaintiffs?

3. Whether the Court of Appeals determination that this matter be returned to the circuit court for a "final judgment" on virtually every aspect of the Long plaintiffs' lawsuit effectively nullifies this Court's holding in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (2009), and renders this Court's granting of a right to an interlocutory appeal meaningless?

ARGUMENT

PART I: MOOTNESS

As this Court stated in *Ward v. Westerfield*, 653 S.W.3d 48, 53 (Ky. 2022), "The Kentucky Constitution limits the jurisdiction of Kentucky courts to justiciable causes." Having foreclosed the Long plaintiffs' causes of action other than the seeking of declaratory judgment, the Court of Appeals should have been mindful of the proviso in *Ward* that, "litigants may not establish constitutional standing by simply seeking declaratory relief," but rather "[a]n actual, justiciable controversy is a condition precedent to an action under our Declaratory Judgment Act." 653 S.W.3d at 55. As the Long plaintiffs' requests for declaratory judgment are now moot, the proper course of action for the Court of Appeals should have been to dismiss the case entirely. There was no longer an "actual, justiciable controversy."

The Court of Appeals's Opinion states, "Appellees' requested declaratory relief – except for that relief identified previously as being, in truth, monetary relief – is not barred by sovereign immunity." (Opinion, at 34). As previously noted, it then remands the case to circuit court for "final judgment" of almost every conceivable issue the Long plaintiffs raised. Although the Commonwealth agrees that a declaratory judgment action

generally is not barred by sovereign immunity, changes in the applicable law since this lawsuit was initiated serve to render the Long plaintiffs' requests for declaratory judgment now moot.

The Opinion states:

> UK stopped referring unpaid healthcare balances to the Commonwealth of Kentucky, Department of Revenue in 2020. In 2022, the General Assembly amended Kentucky Revised Statute (KRS) 131.130 to prohibit Department collection of debt for healthcare goods and services. See KRS 131.130(12).

Opinion, at 3 n.1. The statutory provisions which authorized the Commonwealth's collection of health care debts are the same as those that authorized and continue to authorize the collection of other types of debts (such as student debts). This change simply reflects the General Assembly's determination that the often-large health care debts not be collected by the Commonwealth.

The Long plaintiffs claimed a right to monetary judgment via various theories, including declaratory relief. The Opinion denies those except declaratory relief, but such relief is itself moot, and "under Kentucky law, mootness is a question of justiciability, which may be raised at any time." *Swan v. Gatewood*, 678 S.W.3d 463, 469 (Ky. App. 2023).

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, either alone or with other relief; and the court may make a binding declaration of rights." (Emphasis added). At the time the Long plaintiffs brought suit, they contended that the Commonwealth lacked authority to collect medical debts referred by UK. At that time, the Commonwealth disagreed. As

a result of the 2022 changes to the law, the Commonwealth now agrees that it does not have the right to collect UK medical debts from the Long plaintiffs or other consumer health care debtors, and the Commonwealth's Briefs to the Court of Appeals noted that it has ceased collecting such debts and is statutorily barred from resuming collection of these debts. Under this Court's holding in *Appalachian Racing, LLC v. Family Trust Foundation of Kentucky, Inc.*, 423 S.W.3d 72, 735 (Ky. 2014) (emphasis added), "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 from the Long plaintiffs. At most, there is a disagreement about what the law was formerly. A court's declaration that the Commonwealth lacked authority two or three years ago to collect such debts would not be more than advisory as it would not resolve any disputed rights between the parties. Although the Commonwealth collected health care debts from the Long plaintiffs in the past, the Court of Appeals's Opinion rejects the view of the circuit court (citing *Ross v. Gross*, 188 S.W.2d 475 (Ky. 1945)), that those amounts never "vested with the state treasury." (Opinion, at 24-25). Moreover, the Long plaintiffs effectively admit that they are seeking their money judgment from the state treasury by naming the Kentucky State Treasurer as a party. Thus, there are no disputed funds just as there is no dispute as to the Commonwealth's authority to collect medical debts from the Long plaintiffs currently. There is no controversy, and the Long plaintiffs' requests for declaratory judgment are moot.

Kentucky's courts lack jurisdiction to consider a moot issue. See *Com., Kentucky Bd. of Nursing v. Sullivan University System, Inc.*, 433 S.W.3d 341, 343 (Ky. 2014).

Changes 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. In the present case, the General Assembly's decision to bar the Commonwealth from collecting consumer health care debts, including those of the Long plaintiffs, is a similar change in the underlying facts. This Court has held that in a circumstance such as this, the case should be remanded and dismissed. See *Bevin v. Beshear*, 526 S.W.3d 89, 90 (Ky. 2017) ("[W]e hold that intervening statutory law enacted by the General Assembly has rendered moot the legal issues decided by the circuit court. We dismiss the appeal and remand the case to the circuit court with directions to dismiss the complaint with prejudice."). Having resolved all causes of action other than requests for declaratory judgment, the Court of Appeals should have dismissed this case. On appeal, this Court should correct the Court of Appeals's failure to do that and order this case **dismissed with prejudice**.

PART II: ISSUES WITH THE OPINION'S SOVEREIGN IMMUNITY RULING

The Commonwealth's Motion for Discretionary Reviews raised three issues with the Court of Appeals's Opinion that are relevant should this Court decline to dismiss this action as moot. Although the Opinion initially recognized the importance of sovereign immunity in Kentucky law and the Commonwealth's entitlement to it, the Court of Appeals committed several error of law that substantially undermined its central sovereign immunity holding. These are discussed below.

A. Sovereign Immunity under Kentucky Law and in the Court of Appeals's Opinion.

This Court explained in *Yanero v. Davis*, 65 S.W.3d 510, 523-24 (Ky. 2003):

> As noted in *Reyes v. Hardin Memorial Hospital*, supra, the words "sovereign immunity" are not found in the Constitution of Kentucky. Rather, sovereign immunity is a common law concept recognized as an inherent attribute of the state. *Commonwealth v. Kelley*, 314 Ky. 581, 236 S.W.2d 695, 696 (1951). Thus, contrary to assertions sometimes found in our case law, Sections 230 and 231 of our Constitution are not the source of sovereign immunity in Kentucky, but are provisions that permit the General Assembly to waive the Commonwealth's inherent immunity either by direct appropriation of money from the state treasury (Section 230) and/or by specifying where and in what manner the Commonwealth may be sued (Section 231). *Reyes, supra*, at 338.

In *Withers v. University of Kentucky*, 939 S.W. 340, 344 (Ky. 1997), this Court also explained, "Once it has been determined that an entity is entitled to sovereign immunity, this Court has no right to merely refuse to apply it." This determination is based on **the nature of the entity**, **not** the circumstances of the case. This Court further explained in *Withers*, 939 S.W.2d at 346, that, "***All claims*** against immune entities fall squarely within the purview of the Board of Claims Act." (Emphasis added).

Indeed, KRS 49.060 (emphasis added) provides:

> It is the intention of the General Assembly to provide the means to enable a person negligently injured by the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies to be able to assert their just claims as herein provided. **The Commonwealth thereby waives the sovereign immunity defense only in the limited situations as herein set forth. It is further the intention of the General Assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth, its cabinets, departments, bureaus, and agencies and its officers, agents, and employees while acting in the scope of their employment in all other situations *except where sovereign immunity is specifically and expressly waived as set forth by statute*. The Board of Claims shall have exclusive jurisdiction to hear claims for damages**, except as otherwise specifically set forth by statute, against the Commonwealth, its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment.

In fact, in a contemporaneous, unpublished and nonbinding (*see* RAP 41(A)) Court of Appeals opinion, that court considered the case of a UK health care debtor who lost an administrative appeal at the UK level, declined to seek judicial review of that appeal, and then had his debt referred and collected by the Commonwealth. When he later brough suit in Fayette Circuit Court against the Commonwealth for collecting his debt, the Court of Appeals upheld the dismissal of his lawsuit against the Commonwealth, in part, because it found that "the [Commonwealth/Department of Revenue] is immune from this type of suit, pursuant to KRS Chapter 49,"- which "grants exclusive jurisdiction of such claims to either the Kentucky Board of Claims – KRS 49.040 – or the Kentucky Board of Tax Appeals. KRS 49.220." *McGinnis v. University of Kentucky, et al.*, NO. 2022-CA-1494-MR (9-29-2023), at 6 (*see* Exhibit 6).

As the body responsible for revenue collection from state taxes and debts, the Commonwealth is clearly integral to state government. The effect here of the Commonwealth's sovereign immunity is that the Long plaintiffs' action for a money

judgment, however styled, is barred. No mistake should be made, what the Long plaintiffs seek are monetary damages, however styled. Under Kentucky law, "[T]he bottom principle of the law of damages . . . [t]o restore the party injured, as near as may be, . . . a money equivalent of his property which has been taken, injured, or destroyed." *Hughett v. Caldwell County*, 230 S.W.2d 92, 96 (1950) ("*Hughett*"). When the Long plaintiffs seek "the return of all funds taken from the Plaintiffs," they are seeking of "damages" under *Hughett*.

As stated in *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833, 836 (2013), "**Sovereign immunity is founded on the notion that the resources of the state, its income and property, *cannot* be compelled as recompense** for state action that harms a plaintiff through the ordinary suit-at-law process." (Emphasis added). Therefore, "[t]his governmental immunity generally **operates as a complete bar to claims for both monetary damages** and injunctive relief." *Hamblen ex rel. Byars v. Kentucky Cabinet for Health and Family Services*, 322 S.W.3d 511, 515 (Ky. 2010) (emphasis added). Thus, in *Haydon Bridge II*, 416 S.W.3d 280 (Ky. 2013), this Court reversed an order granting a retrospective injunction requiring funds to be transferred from the general fund to a restricted agency account as **it "impinge[d] on sovereign immunity because [it] require[d] monetary relief that can only be satisfied by draws on a state's treasury**." Id. at 292 (emphasis added). Here, as noted previously, the fact that the Long Plaintiffs have named Kentucky's State Treasurer as a Defendant shows what their aims are.

Under Kentucky law, **sovereign immunity can be disregarded only where it is "is specifically and expressly waived as set forth by statute.**" KRS 49.060 (emphasis

added). Moreover, that the Commonwealth's "sovereignty may be upheld and not narrowed or destroyed and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, **unless the intention of the legislature to effect this object is clearly expressed**." *Lexington-Fayette Urban County Bd. of Health v. Board of Trustees of University of Kentucky*, 879 S.W.2d 485, 486 (Ky. 1994) (emphasis added).

This Court recognized the importance of sovereign immunity in *Breathitt County Bd of Educ v Prater*, 292 S.W.3d 883 (2009), when it granted the right to an interlocutory appeal when sovereign immunity is raised. In doing so, it recognized "immunity entitles its possessor to be free 'from the burdens of defending the action, not merely ... from liability,'" and "**such an entitlement cannot be vindicated following a *final judgment*** for by then the party claiming immunity has already borne the costs and burdens of defending the action." *Id.* at 886 (emphasis added).

As noted, the Court of Appeals's Opinion showed awareness of the sovereign immunity's place in Kentucky law. Citing *Yanero*, and other authorities, it correctly stated that, "Legal actions may only be maintained against the Commonwealth where immunity has been waived." Citing *Transit Auth of River City v. Bibelhauser*, 432 S.W.3d 171, 173 (Ky. App. 2013), its Opinion explains that "[i]mmunity is not simply a defense," and "[w]here it applies, it "affords the state absolute immunity from suit[.]" Consequently, citing , the Court of Appeals concludes, "those afforded sovereign immunity do not have to incur the expenses arising from trial and discovery." (*citing Lexington-Fayette Urb. Cnty. Gov't v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004)). Opinion, at 21. And it further points out, quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525

(1985), that "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." Opinion, at 22.

Thus, having found no waiver of sovereign immunity that would allow access to the resources of the state, and having recognized that those afforded sovereign immunity "do not have to incur the expenses arising from trial and discovery," the Court of Appeals's Opinion concludes by stripping its holding and that of this Court in *Prater*, of any practical meaning. *Prater* recognizes that the right to sovereign immunity cannot be vindicated following a "final judgment," but the Court of Appeals sought to return this case to the Franklin Circuit for exactly that. As noted, the Commonwealth believes this case should be dismissed as moot. However, if this Court declines to do so, the Commonwealth requested and was granted discretionary review of the several errors of the Court of Appeals.

B. The Court of Appeals's Findings Regarding the Ripeness of Resolving the Long Plaintiffs' Quest for a Money Judgment Misreads and Misapplies *University of Kentucky v. Moore*.

The Court of Appeals's conclusions regarding the ripeness of whether a monetary judgment is obtainable erroneously proceed from the glossing over of material facts in the record of this case and those in *University of Kentucky v. Moore*, 599 S.W.3d 798 (Ky. 2019), as well as misconstruing the arguments of the parties in both cases.

The Court of Appeals's discussion of sovereign immunity, *Moore*, and ripeness, is as follows:

> This leads us to the next issue, which the *Moore* Court discussed: whether sovereign immunity functions as a bar to monetary relief flowing from a declaratory judgment. *Moore*, 599 S.W.3d at 813. [T]he Supreme Court determined this issue to be unripe. *Id.* at 813 (modification original) (quoting *Ret Sys.*, 396 S.W.3d at 838). It observed several necessary questions were not yet

> resolved, including UK's status as an agency for purposes of KRS 45.237 *et seq.* *Id.*
>
> 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 (emphasis added). In reaching these determinations, the Court of Appeals completely misunderstands this case, *Moore*, and sovereign immunity law in Kentucky.

As the Court of Appeals noted, *Moore* concerns some of the same debt statutes at issue in the present case, namely KRS 45.237, KRS 45.238 and KRS 45.241. Opinion, at 33. Importantly, under these statutes, in order to refer health care debts to the Commonwealth for collection prior to 2022, UK had to be an "agency" as defined in either KRS 45.237(1)(a) or KRS 45.241(1)(c). Both of these provisions define "agency" as "an organizational unit or administrative body in the executive branch of state government as defined in KRS 12.010."

Although the *Moore* Complaint initially raised many of the same causes of action requested by the Long plaintiffs, the Complaint was subsequently narrowed. As described by the *Moore* Court:

> **In her amended complaint, Moore requested a declaration that** UK is not an agency, defined in KRS 45.237(1)(a) as an "organizational unit or administrative body in the executive branch of state government"; **that the University may not lawfully refer the accounts of UK HealthCare to the Department of Revenue under KRS 45.237 et. seq. for collection**; and that the Department of Revenue may not lawfully collect such accounts. **By separate motion, Moore presented the narrow question of whether UK is an agency "within the executive branch**."

Moore, 599 S.W.3d at 802 (emphasis added). The circuit court granted the Motion and held, "[j]udgment shall be entered pursuant to the Kentucky Declaratory Judgment Act that the defendant, University of Kentucky, is not 'in the executive branch of state government' for purposes of KRS 45.237 et seq. and KRS 12.010." *Id.* The Commonwealth and UK appealed on that issue.

At this point, it should be noted that the Opinion apparently gets confused about what declaratory judgment was subject to review by this Court in *Moore*. It quotes from a different 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**." Opinion, at 33 (*quoting Moore* at 801)(emphasis added).[5]

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[5] The Court of Appeals's Opinion makes another error about *Moore*. It states, "Moore therefore did not seek monetary relief." Opinion, at 33. **This is false**. As noted, *Moore* was brought by the same lead attorney as in the present case. His plan always was to take any declaratory judgment and demand "'the equitable remedy of restitution" by shoehorning that concept into KRS 418.055 as "further relief," based on the dubious theory that money in the state Treasury really were not state funds. Thus, in *Moore*, the Kentucky Supreme Court Brief of Appellee Sarah R. Moore, explained, "Ms. Moore does not seek damages to be paid from a public purse, but instead alleges that the Appellants have taken her money unlawfully[, and] Ms. Moore has secured a declaratory judgment in Fayette Circuit Court, and she may later seek further relief, as allowed under KRS 418.055." 2019 WL 2162953 (Ky.), at *41. If that is not sufficiently clear, that Brief later explained, "to the extent that it remains an issue now, Ms. Moore will not ask for the State's money; **she will instead ask that her own money be paid back to her**." *Id.* at *41-*41. The present case of the Long plaintiffs, *Moore*, and the *Kimberly Bennett* action always have been primarily about money, and the potential legal fees generated by a large judgment.

It is true that the plaintiff sought that, but that was not the subject of the Fayette Circuit Court's ruling or the decision that this Court opined on.[6] As explained by this Court and quoted above, what the Fayette Circuit Court ruled on in *Moore* was the separate question of "whether UK is an agency 'within the executive branch.'" Thus, it is misleading when the Court of Appeals's Opinion states that '[t]he circuit court in *Moore* had already entered a declaratory judgment in the underlying action," when the motion the Fayette Circuit granted **was NOT** regarding the declaratory judgment it prominently quoted about the legality of the Commonwealth's collections, but rather was on the more limited matter of whether UK was in the executive branch of state government. 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 of state government, 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. When this Court found that UK was in the executive branch of state government, it remained unanswered whether UK was an "organizational unit" or "administrative body" that could be an "agency." It remanded the case for the resolution of those questions.[7]

Despite the very limited question upon which discretionary review had been granted in *Moore*, the appellants at the time urged this Court to adopt the broad holding

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[6] The Court of Appeals's Opinion states the ultimate holding in *Moore* correctly early on, but that understanding seems to have gotten lost later in the substantive portions of its analysis. Opinion, at 4 n.3.

[7] On remand, after the Commonwealth and UK won summary judgment on those issues, and the Fayette Circuit Court determined that UK was an "agency," the plaintiff failed to further pursue the lawsuit. *Moore v. University of Kentucky*, Opinion and Order Granting Defendants' Motion for Summary Judgment, Fayette Circuit Court, 3d Div., 17-CI-479 (April 21, 2019).

of *Green v. Mansour*, 474 U.S. 64 (1985). As framed by the *Moore* appellants, under *Green*, sovereign immunity would not simply protect the state Treasury. Instead, if somehow "a plaintiff may use a declaratory judgment to obtain a monetary judgment against the state treasury in another proceeding," then a court would be prohibited from issuing the declaratory judgment altogether. *Moore*, 599 S.W.3d at 812. Given the limited question on which the *Moore* Court had accepted discretionary review, it is not surprising that it declined to adopt the broad holding of *Green*.

The Commonwealth, in the present litigation, has not argued for the adoption of the broad rule of *Green*. Rather, it has asked that existing Kentucky sovereign immunity law be reaffirmed in the present case. As reflected in *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833, 836 (2013), this means that "the resources of the state, its income and property, *cannot* be compelled as recompense for state action that harms a plaintiff through the ordinary suit-at-law process." Moreover, "**sovereign immunity bars . . . retroactive monetary relief . . . regardless of whether it is labeled a retroactive injunction, equitable restitution, *or some other type of remedy*.**" *Haydon Bridge II*, 416 S.W.3d at 295 (emphasis added).

The Long plaintiffs brought common law actions and declaratory judgment actions seeking identical monetary judgments, which they explicitly termed the "equitable remedy of restitution" in both cases. See Second Amended Complaint, TR 645, 650, 650, 657, and 658. Under *Haydon Bridge II*, sovereign immunity is not inapplicable because a monetary damages award is simply retitled as the "other type of remedy" "further relief, based on a declaratory judgment." Here, the Commonwealth's actual argument to the Court of Appeals was that the Long plaintiffs' action for a money

judgment, however styled, is barred. This follows directly from the holdings of *Kentucky Retirement Systems* and *Haydon Bridge II.*

In the present case, the Long plaintiffs brought numerous causes of action including requests for declaratory judgment. All of those causes of action depended on the Commonwealth's collection of UK health care debts being unlawful for some reason, including that the Commonwealth lacked authority to collect the debts under KRS 45.237, KRS 45.238 and KRS 45.241. Second Amended Complaint, TR 657.

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)(emphasis added). 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 a declaratory judgment.

When the *Moore* Court stated, "At this juncture, UK's status as an agency for purposes of KRS 45.237 et seq. and other issues that would necessarily be addressed preliminary to any monetary relief remain undecided," *Moore*, at 813, the "other issues" were those in the broader declaratory judgment on which the Fayette Circuit Court had **NOT RULED** (because the Fayette Circuit Court only had ruled that UK was not in the executive branch of state government). In the present case, the Franklin Circuit already has ruled on those "other issues."

As noted above, the Long plaintiffs have alleged an extensive list of supposed violations of the Kentucky Constitution. Very few of these supposed violations have

been addressed beyond a few words by either party. Regardless of how these various other claims were litigated, the ultimate outcome of returning this case to the Franklin Circuit will be a finding that the that "that UK was not entitled to refer debts to the Department for collection." TR at 1360-69.[8] This is because the Franklin Circuit already has held that. The result is the same regardless of the reason. This is completely unlike the situation in *Moore* where, once this Court held that UK was in the executive branch of state government, it was still an open question whether the Commonwealth's collection of its health care debts was legally permissible.

As the Commonwealth's statutory authority for its debt collection activities was important to multiple causes of action claimed by the Long plaintiffs, including relief on grounds of mistake, the Circuit Court's August 15, 2022, Order was not phrased as the granting of a declaratory judgment, but rather a partial judgment on the pleadings. However, as stated by the Court of Appeals, the substantive question of the legality of the Commonwealth's collection activities under KRS 45.237, KRS 45.238 and KRS 45.241 already has been answered. There is no reason to doubt that the Franklin Circuit would not reframe this conclusion in terms of a declaratory judgment. Thus, the question of whether sovereign immunity protects the Commonwealth from a raid on its Treasury is ripe.

As noted above, the Long plaintiffs' Second Amended Complaint makes clear their ultimate aim is a large monetary judgment amounting to every cent the

[8] As previously alluded to, the Commonwealth believes that the judgment of the Franklin Circuit, endorsing the theories of the primary *Moore* attorney in this regard, is without any legal merit. Nevertheless, the Franklin Circuit already has indicated its views.

Commonwealth collected over fourteen years. TR 643. In essence, this is the "equitable restitution" the Court of Appeal's Opinion held is barred by *Haydon Bridge II*. Opinion, at 31. However, later, the Opinion posits the question of "whether or not sovereign immunity bars monetary relief flowing from a declaratory judgment," and claims it is unripe as "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." Opinion, at 34-35.

Thus, the Opinion reaches the correct result, gets diverted by an inaccurate comparison to *Moore*, and then undoes its conclusions and undermines the very rationale it articulated for sovereign immunity. This is all due to the Opinion's misunderstanding of what happened in *Moore* and its erroneous conclusion regarding ripeness that is not justified by this Court's *Moore* decision. This Court should reaffirm *Kentucky Retirement Systems* and *Haydon Bridge II* and hold, as the Commonwealth requested the Court of Appeals to hold, that the Long plaintiffs' quest for a monetary judgment is prohibited by the Commonwealth's sovereign immunity.

C. The Vague Words "further relief" in KRS 418.055 are Insufficiently Clear and Specific to Waive the Commonwealth's Sovereign Immunity Against the Multi-Million Dollar Monetary Judgment the Long Plaintiffs Seek.

Although a declaratory judgment is simply a "declaration of rights," the Long plaintiffs seek to turn that declaration into a de facto damages judgment by claiming that the monetary judgment they seek is authorized by KRS 418.055. KRS 418.055 simply states, "Further relief, based on a declaratory judgment, order or decree, may be granted whenever necessary or proper." This language is simply too vague and unspecific to

constitute a waiver of the Commonwealth's sovereign immunity from the Long plaintiffs desired monetary judgment.

Regarding waivers of sovereign immunity, KRS 49.060 provides, "It is further the intention of the General Assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth. . . **except where sovereign immunity is specifically and expressly waived as set forth by statute**." (Emphasis added). This Court has repeatedly opined that the Commonwealth's "sovereignty may be upheld and not narrowed or destroyed and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, **unless the intention of the legislature to effect this object is clearly expressed**." *Lexington-Fayette Urban County Bd. of Health v. Board of Trustees of University of Kentucky*, 879 S.W.2d 485, 486 (Ky. 1994) (emphasis added).

As the Franklin Circuit already ruled that the Commonwealth's collection of UK medical debts was not authorized by KRS 45.237, KRS 45.238 and KRS 45.241, the issue was and is ripe for a decisive holding that the Commonwealth's sovereign immunity bars the Long plaintiffs' quest for a monetary judgment, including via KRS 418.055. Although declaratory judgment actions are allowed under Kentucky law, the Court of Appeals's Opinion correctly notes that "**statutory waivers [of sovereign immunity] are strictly construed in favor of the government, and waiver will only be identified where 'the intention of the legislature to effect this object is clearly expressed,'**" and "**waivers of immunity are construed narrowly**." Opinion, at 22 (emphasis added). The Court of Appeals should have held that that the vague words "further relief" are not a sufficiently "clear[] express[ion]" to allow the general waiver of

sovereign immunity for declaratory judgments to encompass a monetary judgment of what amounts to the "equitable restitution" barred by *Haydon Bridge II*. There is no "narrow" construction of KRS 418.055 that will allow the Long plaintiffs' quest for an $85 plus multi-million dollar "equitable restitution" verdict to be shoehorned as "[f]urther relief." If this Court does not direct the Franklin Circuit to dismiss this action as moot, it should uphold the Commonwealth's sovereign immunity to the monetary judgment the Long plaintiffs seek.

D. <u>The Court of Appeals Determination to Remand This Matter for a "Final Judgment" on Almost All of the Long Plaintiffs' Claims and Requests for Monetary Judgments Effectively Nullifies the Holding of *Breathitt County Bd. of Educ. v. Prater*</u>.

This Court held in *Prater*:

> Unlike other defenses, immunity is meant to shield its possessor not simply from liability but from the costs and burdens of litigation as well. An order denying a substantial claim of immunity is not meaningfully reviewable, therefore, at the close of litigation, and that fact leads us to conclude, as has the Supreme Court of the United States, that an interlocutory appeal is necessary in such cases notwithstanding the general rule limiting appellate jurisdiction to "final" judgments.

292 S.W.3d at 888 The *Prater* Court expressed its rationale for this holding in the following terms:

> As we observed recently in *Rowan County v Sloas*, 201 S.W.3d 469 (Ky. 2006), immunity entitles its possessor to be free "from the burdens of defending the action, not merely ... from liability." Id. at 474. See also *Lexington–Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004). ("Immunity from suit includes protection against the cost of trial and the burdens of broad-reaching discovery that are peculiarly disruptive of effective government.") (citation and internal quotation marks omitted). Obviously, **<u>such an entitlement cannot be vindicated following a *final judgment* for by then the party claiming immunity has already borne the costs and burdens of defending the action</u>**.

Prater, at 886 (emphasis added).

Notwithstanding the holding of *Prater*, and the fact that the Franklin Circuit already held that the Commonwealth's collection of UK medical debts was unauthorized, the Court of Appeals directed that this case be remanded for resolution of the Long plaintiffs' innumerable "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. Directly contradicting *Prater*, the Court of Appeals stated that a meaningful ruling on sovereign immunity could not be reached prior to "final judgment." Opinion, at 25.

It is known what the Long plaintiffs' full pursuit of a monetary judgment will entail. These statements from the Court of Appeals absurdly are made within a few pages of legal maxims like "[l]egal actions may only be maintained against the Commonwealth where immunity has been waived," "those afforded sovereign immunity do not have to incur the expenses arising from trial and discovery," and "'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages[9] action.'" Opinion, at 21-22. Prior to class certification, the Long plaintiffs submitted far reaching and person specific discovery request regarding every individual from whom the Commonwealth collected UK medical debts between 2008 and 2022. For those likely **tens of thousands of people**, the Long plaintiffs seek such detailed information as the following (and this is not all, *see* Exhibit 7):

> ***For each person*** . . . : (a) state the total balance of each and every UK Healthcare account as of the date it was referred by the University to the DOR . . .; (b) state when the medical services for each such unpaid account were delivered, and the

[9] As elsewhere noted, the "further relief" the Long plaintiffs supposedly seek under KRS 418.055 is indistinguishable from what they seek in their civil damages action. Under *Haydon Bridge II*, such a monetary judgment is barred by sovereign immunity "regardless of whether it is labeled a retroactive injunction, equitable restitution, **or some other type of remedy**." Id. at 294-95 (emphasis added).

> name of the patient for who received the purportedly unpaid medical care; (c) state amounts initially added to each referred account by the DOR as interest . . . describe the rationale and/or formula by which such additional amounts were added to each account; and (d) state the amount of the DOR's cost of collection fee were added to each such account referred to the DOR.

Interrogatory 2, Exhibit 7.

The Court of Appeals's Opinion correctly states that sovereign immunity means that "rather than simply absolving the state from liability, the immune party is free 'from the burden of defending oneself altogether.'" Opinion, at 21. However, that conclusion is not consistent with its returning of this case to Franklin Circuit Court. Indeed, this Court's granting of a right to an interlocutory appeal in *Prater* is meaningless if it leaves so much[10] for a "final judgment." *Prater* specifically endorsed the statement in *Lexington–Fayette Urban County Government v Smolcic*, 142 S.W.3d 128, 135 (Ky.2004)(emphasis added), that "**[i]mmunity from suit includes protection against the cost of trial and the burdens of broad-reaching discovery that are *peculiarly disruptive of effective government*.**" Yet the Court of Appeals's Opinion sends the Commonwealth back to the Franklin Circuit for exactly that sort of "**broad-reaching discovery**."

Under *Prater*, the Court of Appeals should have upheld the Commonwealth's assertion of sovereign immunity against the Long plaintiffs' pursuit of a monetary judgment.

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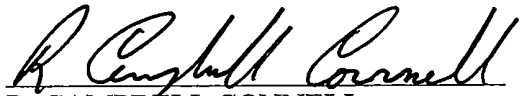
[10] The Court of Appeals indicates, Opinion at 35, that a "final judgment" must be had not only on a detailed monetary judgment (following person specific discovery) but every one of the Long plaintiffs' lengthy laundry list of supposed "constitutional" issues. *See supra*, note 1.

CONCLUSION

As the Court of Appeals already correctly ruled that the Long plaintiffs' common law causes of action are barred by sovereign immunity, and as the Long plaintiffs' remaining causes of action are requests for declaratory judgment, this Court should order this case be dismissed as moot. There is no present dispute over rights between the Commonwealth and the Long plaintiffs due to the enactment of KRS 131.130(12) in 2022. There is no longer any basis for a declaratory judgment.

Should this Court not dismiss this case as moot, it should reverse the conclusion of the Court of Appeals that this case be returned to the lower court for final judgment and monetary award. It should hold that the Long plaintiffs' monetary claims are barred by sovereign immunity.

Respectfully submitted,



R. CAMPBELL CONNELL
FRANK L. DEMPSEY
AUSTIN T. GREEN
Counsel for Defendants
P.O. Box 5222
Frankfort KY, 40602-5222
(502) 564-4921 ex. 4404