**COMMONWEALTH OF KENTUCKY**
**SUPREME COURT**
**CASE NO. 2024-SC-0229**

**AMELIA LONG, et al.,** **APPELLANTS**
**DEPARTMENT OF REVENUE**

**V.**

**ON APPEAL FROM THE**
**KENTUCKY COURT OF APPEALS**
**CASE NO. 2023-CA-0411 & CASE NO. 2023-CA-0398**

**UNIVERSITY OF KENTUCKY, et al.,** **APPELLEES**

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# BRIEF OF APPELLEE COMMONWEALTH OF KENTUCKY DEPARTMENT OF REVENUE

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## INTRODUCTION

Appellee Commonwealth of Kentucky, Department of Revenue (the "Commonwealth") appeals from the March 1, 2024, Opinion of the Court of Appeals in this matter.

In 2013's *Beshear v. Haydon Bridge Co. Inc*., 416 S.W.3d 280 (Ky. 2013)("*Haydon Bridge II*"), this Court rejected the attempt of private plaintiffs to extract almost $33 million from the General Fund by finding that violative of the Commonwealth of Kentucky's sovereign immunity and the separation of powers between the judicial and legislative branches of State government. Now, in this action and the related Kimberly Bennett matter (2024-SC-0240, 2024-SC-0231, 2024-SC-0243), private parties seek court orders to force over $200 million from State funds, and that is just the beginning. Moreover, the arguments of the present plaintiffs are largely duplicative of those this Court rejected in *Haydon Bridge II*. This Court should uphold the Commonwealth's sovereign immunity against the monetary judgment sought by the Appellants.

## STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes oral argument will assist the Court in this matter.

## WORD COUNT CERTIFICATE

This document complies with the word limit of RAP 31(G)(2)(b) because, excluding the parts of the document exempted by RAP 15(E), this document contains 16,025 words.

## STATEMENT OF POINTS AND AUTHORITIES

Appellee Commonwealth of Kentucky, Department of Revenue (the "Commonwealth"), submits this Brief in Response to the Long plaintiffs' Appellants Brief ("Long Brief") regarding the March 1, 2024 Opinion of the Court of Appeals (the "Opinion") (*see* Exhibit 1).

## I. OVERVIEW.

The Long Plaintiffs expend a lot of heat over so-called "wrongfully collected" debts, but the truth of the matter is that this is an abusive lawsuit and is part of an abusive series of such litigation orchestrated by the same legal team. In this case, and the companion *Kimberly Bennett* action (2024-SC-0240, 2024-SC-0231, 2024-SC-0243), The Long plaintiffs central "insight" is that the Commonwealth is collecting state agency debts "as if the debt[s] were an unpaid tax," "without UK obtaining any [court] judgment."[1] Beginning in 1984, the General Assembly enacted a series of collection statutes designed to have the Commonwealth collect state agency debts as if they were taxes. That is the entire point of the various collection regimes.

With state taxes, the taxes are assessed, taxpayers are given the opportunity for an administrative appeal and, if they receive an adverse ruling administratively, they can seek judicial review of the administrative decision. If appeals are not sought or they are reversed judicially, then the assessed taxes are final, due and owing and the Commonwealth commences collection. Both with respect to 1984's state income tax refund withholding program (of KRS 131.560 to KRS 131.595), and the broader general debt collection programs at issue here (under statutes such as KRS 45.237, KRS 45.238

[1] Long Brief, at 2.

and KRS 45.241), the statutes explicitly contemplate administrative hearings followed by the opportunity for judicial appeals (see current KRS 131.565(2) and KRS 45.241(5)). In the case of the general debt collection program at issue here, the Commonwealth even issued regulations required by statute providing that, "[u]nless an agency is exempt from the provisions of KRS Chapter 13B, as specifically provided in KRS 13B.020, any debtor of an agency shall have all the rights contained in that chapter to appeal the finality of its debt." 103 KAR 1:070(3).

The Long plaintiffs ignored all of this and advanced a statutory "interpretation" that the statutes did not mean what they said but rather required state agencies to continue to pursue traditional debt collection lawsuits in circuit court.[2] Now, the general debt collection program at issue in this case has been in operation since 2008, and has been amended numerous times, including in 2022 when the General Assembly removed consumer health care debts from debts that could be collected while allowing the program to continue to collect other state agency debts (such as student debts at issue in the *Kimberly Bennett* case). See KRS 131.130(12). It is beyond absurd to contend that statutes that were administered by successive gubernatorial administrations and repeatedly amended by Kentucky legislature were only ever "truly" understood by the Long Plaintiffs' counsel and a single circuit court.

In this case, the Long plaintiffs did get the Franklin Circuit to rubber stamp their statutory theory. However, in the earlier case of *University of Kentucky v. Moore*, 599

[2] As for difficult to reconcile facts, like why the General Assembly would direct the Commonwealth to promulgate regulations requiring administrative hearings with appeals for state agency debts, or how Chapter 13B would fit in with a traditional debt collection lawsuit filed in a circuit court, the Long plaintiffs have simply ignored them.

S.W.3d 798 (2019) ("*Moore*"), the Long plaintiffs' counsel had gotten a different circuit court to hold that the University of Kentucky ("UK") was not in the executive branch of state government, and this Court unanimously reversed that holding. In the present case, the Long Plaintiffs also succeeded in getting a ruling that the State of Kentucky was **not protected** by sovereign immunity from Franklin Circuit Court, which this Court reversed in *Beshear v. Haydon Bridge Company, Inc*., 416 S.W.3d 280 (Ky. 2013) ("*Haydon Bridge II*"), on that very issue.

Our system often allows litigants to sue to their hearts' content. However, in the present action, there is a bigger issue at stake, which sovereign immunity exists to protect. As expressed by this Court in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (2009) (emphasis added):

> 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, 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**.[3]

As stated in the Commonwealth's own Appellant Brief (2024-SC-0230), the Commonwealth believes that the 2022 enactment of KRS 131.130(12), and the decision of the Court of Appeals below, rendered this case moot, and this case should be

[3] As an example of the burdens of broad reaching discovery, the Long plaintiffs already have indicated the absurdly detailed specific discovery they hope to seek for likely tens of thousands of individuals. *See* Exhibit 18.

dismissed accordingly.[4] Beyond that, the Commonwealth has invoked its right to sovereign immunity seeking just the type of protection this Court articulated in *Prater*. As KRS 131.130(12) prohibits the Commonwealth from collecting the health debts at issue in this case, the only conceivable meaningful judgment for the Long plaintiffs is monetary. In its separate appeal, the Commonwealth has requested this Court to uphold its sovereign immunity from such a judgment if this case is not dismissed as moot. The remainder of this Response addresses the Long plaintiffs' grounds for appeal.

## COUNTERSTATEMENT OF THE CASE

### A. Overview.

This case involves a challenge to the Commonwealth's collection of health care debts owed to the 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*.

[4] In their Brief, the Long plaintiffs admit that the health care debts at issue in this case are no longer subject to collection by the Commonwealth. See Long Brief, at 3-4 They note that health care debts are now prohibited from being collected by the Commonwealth ("**The General Assembly eventually, in 2022, enacted legislation expressly prohibiting DOR from using these methods to collect "consumer debts owed for health care goods and services**." KRS 131.130(12).") (emphasis added). *Id.* .

(2024-SC-0240, 2024-SC-0231, 2024-SC-0243), 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 state agency 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 1366-68), endorsed the arguments of the Long plaintiffs that sovereign immunity did not apply for the exact same three reasons that were rejected 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*. The Long plaintiffs' Brief contains a two-pronged challenge to the Opinion of the Court of Appeals. First, the Long plaintiffs contend that

the Commonwealth's appeal to the Court of Appeals on the issue of sovereign immunity was invalid. Second, the Long plaintiffs contend that the Court of Appeals erred in failing to find the Commonwealth sovereign immunity waived by every conceivable argument. Prior to discussing these contentions, the Commonwealth's Brief reviews the history and background of 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)(emphasis added).

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.[5] The

[5] *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,

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.[6] Under common law, the Long plaintiffs also 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**

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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 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.").

[6] The Long plaintiffs refer to this fee as "draconian." Long Brief, at 33. It is the same collection fee imposed on tax debts. See KRS 131.440.

> **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 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.[7]

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.

[7] See Exhibit 8, (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 (emphasis added).

**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." 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 (Exhibit 7).

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 9; *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 (Exhibit 7).

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.[8] 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

[8] *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).

"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 ceased at that time, but no change was made to the Commonwealth's ability to collect other types of state agency debts, including the student debts at issue in the Bennett litigation.[9]

**D. <u>The Orders of the Franklin Circuit</u>.**

In an Order dated August 15, 2022, the Franklin Circuit (*see* Exhibit 3, at 7-9; TR 1366-68) ruled on partial motions for summary judgment on three threshold issues: (1) 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, and their 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 (see Exhibit 10 and 11). After multiple

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

hearings and responses, the Franklin Circuit granted the Motion for Class Certification on March 28, 2023.

**E. <u>Proper Construction of the Commonwealth's Debt Collection Powers under KRS 45.237, KRS 45.238 and KRS 45.241 and the Misconstruction of the Franklin Circuit.</u>**

Forming an integral part of the Franklin Circuit's denial of the Commonwealth's sovereign immunity is its agreement with the Long Plaintiffs that "Plaintiffs seek to have their own property returned to them, which Defendants by mistake of law took or coerced from them." Exhibit 3 at 8, TR 1367. The Franklin Circuit reached these conclusions, and held that sovereign immunity was waived, without ever considering whether KRS 131.130(11) authorized the Commonwealth's collections. Regardless, its conclusions regarding the separate collection powers in KRS 45.237/KRS 45.238 and KRS 45.241 are wrong. How those provisions actually operate in the context of this case is seen below.

KRS 45.238(1) provides:

> Debts that are certified by an agency or by a local government as provided in KRS 45.237 shall be referred to the department for collection. The department shall be vested with all the powers necessary to collect any referred debts.

For this purpose, "debts" are defined, under KRS 45.237(1)(d)1, "[f]or agencies, [as] a sum certain which has been certified as due and owing." In this case, the Franklin Circuit ignores the fact that the operational language quoted above does not require it and holds that "the KRS 45.237 and KRS 45.238 do not allow the University to refer its patient accounts to the Department of Revenue for collection, because those accounts were not

and could not be certified as 'improper payments' that were made 'due to error, fraud, or abuse.'" This is erroneous. [10]

It is in its endorsement of Appellee's KRS 45.241 theory that the Franklin Circuit goes most seriously off track. Prior to the implementation of the Commonwealth's broad collection powers enacted in 2003 and 2004, debt collection for state agencies proceeded in court actions just like any private party. The Long Plaintiffs were never entirely clear about what they think the General Assembly's ultimate goal was in making the 2003 changes to KRS 131.130(11) and enacting KRS 45.237, KRS 45.238 and KRS 45.241 in 2004, but they contend that there was never really an intent to change debt collection process.[11]

The purpose of the provisions KRS 45.237, KRS 45.238, and KRS 45.241 was to treat debts owed to the Commonwealth as tax debts. The debt collection practices challenged by the Long plaintiffs are similar to decades of tax collection practices. Prior to 2004, KRS 131.030 generally described the Commonwealth's duties with respect to taxes. In the same Act as that which created KRS 45.241, KRS 131.030(4) was added[12] providing:

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[10] Amazingly enough, in the *Bennett* case, the Franklin Circuit largely interpreted the language of KRS 45.237 and KRS 45.238 correctly, and came to the opposite conclusion, writing, "While much of the discussion of KRS 45.237 revolves around getting accurate accountings of debts due to error, fraud, or abuse, KRS 45.237 does not limit what debts can be certified beyond requiring that they be 'final, due and owing.'" Exhibit 6, at 5.

[11] The Long plaintiffs' brief mourns, "When another hospital has an unpaid patient account and informal collection efforts fail, then that hospital must file a civil action, secure a judgment by proving to a court that the money is indeed owed, and then collect the judgment through traditional (and legal) means. UK and DOR bypassed these steps." Long Brief, at 8. There would have been no reason to enact KRS 45.237, KRS 45.238 and KRS 45.241 if the General Assembly had wished debts of state agencies to be collected like those of other debtors.

[12] 2004 Ky Acts Ch. 118 (HB 162), Section 3 (Exhibit 7).

> The department shall have **all the powers and duties necessary to collect any debts owed to the Commonwealth, or any local government of the Commonwealth**, that are referred to the department by an organizational unit or administrative body in the executive branch of state government, . . ., **the Court of Justice** . . ., and any local government, under KRS 45.237 and 45.241.

(Emphasis added). KRS 45.238(1) similarly provides, "**The department shall be vested with all the powers necessary to collect any referred debts**" (emphasis added). To maintain their fanciful claim regarding the Commonwealth's statutory authority for debt collection, the Long plaintiffs must ignore KRS 131.030(4), ignore the second sentence of KRS 45.238(1) and ignore how debts owed to the Courts of Justice (treated like state agencies by KRS 45.241), would fit.

Particularly in the case of KRS 45.241, the Long plaintiffs' theory ignores most of the KRS 45.241's statutory language, the legislative history of KRS 45.241, and the subsequent legislative history where the General Assembly considered or made changes to the agency debt collection process while leaving in place the aspects to which the Long plaintiffs object.

The basic operation of KRS 45.241 follows. KRS 45.241(6)(a) directs that "[e]ach agency . . . shall identify all liquidated debts." Under KRS 45.241(8), "Upon receipt of a referred liquidated debt . . . , the department shall pursue collection of the referred debt in accordance with KRS 131.030" (quoted above). **Thus, the General Assembly directed the Commonwealth to pursue the collection of that debt as it would a tax debt**.

For agencies, a "debt" is defined by KRS 45.241(1)(a)1 as "a sum certain which has been certified by an agency as due and owing." Similarly, for agencies, a "liquidated debt" is defined by KRS 45.241(1)(b)1 as "a legal debt for a sum certain which has been

certified by an agency as final due and owing, all appeals and legal actions having been exhausted." Beyond the provisions regarding what "debts" can be referred, and the Commonwealth collecting the referred debts as they would taxes, the other major portion of KRS 45.241 is the provision for regulations in KRS 45.241(5), which requires regulations "[f]or those agencies without statutory procedures for collecting debts . . . to prescribe standards and . . . and an appeals process."

The regulations called for by KRS 45.241(5) were promulgated in 103 KAR 1:070. Pursuant to Section 3 of this regulation, "**Unless an agency is exempt from the provisions of KRS Chapter 13B, as specifically provided in KRS 13B.020, any debtor of an agency shall have all the rights contained in that chapter to appeal the finality of its debt**." Emphasis added. Chapter 13B uses a model of administrative hearings followed by judicial appeal.

Endorsing the Long Plaintiffs' farfetched theory, the Franklin Circuit wrongly concludes, "KRS 45.241 requires the University to 'liquidate' a patient account before referring the account for collection by the Department of Revenue . . . by filing a "legal action" in court, by meeting its burden of proof that the patient owes it money, and by securing a final judgment against the patient." Exhibit 2, at 6. This is not remotely congruous with what the law is.[13]

[13] The Long plaintiffs state in their brief that, "[i]t is undisputed that UK did not secure a judgment against any class member, and therefore that it did not refer 'liquidated debts' to DOR." Long Brief, at 3. Although, as there was no need to under KRS 45.237, KRS 45.238 and KRS 45.241, UK did not file judicial lawsuits in cases referred to the Commonwealth for collection, it is far from "undisputed" that the debts referred to the Commonwealth were not "liquidated debts."

Regulations are not needed for appeals from court judgments. KRS 45.241(5), adopted in 2006, generally require Chapter 13B hearings, which are administrative hearings in lieu of court proceedings followed by the opportunity for a judicial appeal. The Long plaintiffs and the Franklin Circuit simply ignore KRS 45.241(5). Their "interpretation" ignores and defeats the entire evident purpose of the statutory program to streamline the debt collection process for state agencies and reduce the burden on the court system, while utilizing an administrative hearing to provide debtors due process.

As for the language of KRS 45.241(1)(b)1's definition of liquidated debt, it is largely borrowed from language relating to the provisions of the state income tax refund offset program, a discussed above. As noted, KRS 45.241 was enacted by 2004 Ky. Acts chapter 118 (HB 162) (Exhibit 7). Chapter 118 also included several other significant provisions regarding the collection of amounts due the Commonwealth, including amendments in Section 4 to KRS 131.565(2), concerning state income tax refund offsets. The fact that KRS 45.241 was enacted as part of a bill that made changes to KRS 131.565 is particularly important considering much of the definition of "liquidated debt" in KRS 45.241 seems adapted from KRS 131.565(3). In 2004, KRS 131.565(3) defined "liquidated debt" as "a legal debt for a sum certain, which has been certified by the claimant agency as final due and owing." This language is identical to the beginning language of the definition of "liquidated debt" in KRS 45.241(1)(b)1.

As for the remainder of KRS 45.241(1)(b)1's definition of liquidated debt, "all appeals and legal actions having been exhausted," that language seems derived from another statute governing the state income tax refund offset program, KRS 131.570(1),

which then provided that, "No funds shall be transferred to a claimant agency ***until the debtor's appeal rights have been exhausted***." (Emphasis added).

Following the theory of the Long Plaintiffs, the Franklin Circuit reaches its erroneous conclusion by pretending that KRS 45.241's definition of "liquidated debt" is entirely novel, ignoring KRS 45.241(5) and the subsequently enacted regulations, ignoring the fact that the state tax refund offset program had been using a model of an administrative hearing followed by the opportunity for a judicial appeal for 20 years prior to KRS 45.241's enactment, and ignoring that the General Assembly considered a major change to the Commonwealth's state agency collections program in 2013 and made a major change to that program in 2022 while leaving the Commonwealth's model for that program otherwise intact. This conclusion, which underlies the Long plaintiffs' and the Franklin Circuit's sovereign immunity analysis, is simply not plausible.

**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 1-46 (Second) (Exhibit 5). 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 [the Long plaintiffs]' 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).

## COUNTERARGUMENT OF THE COMMONWEALTH

### I. THE COMMONWEALTH PROPERLY APPEALED ON SOVEREIGN IMMUNITY AND THE COURT OF APPEALS PROPERLY CONSIDERED THE COMMONWEALTH'S APPEAL.

The Commonwealth followed applicable precedent for appealing sovereign immunity. There is nothing that prohibits a class certification interlocutory appeal from being joined with another separately authorized interlocutory appeal. The Long plaintiffs make inaccurate and misleading comments about the opinion of the Court of Appeals and of the record.

#### A. The Commonwealth Properly Appealed on the Issue of Sovereign Immunity.

In reaching its holding in *Prater*, this Court indicated that it was following the example of the United States Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), where the Supreme Court explained "the denial of a substantial claim of absolute

immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." In the present case, the Franklin Circuit's initial ruling on sovereign immunity was styled as a "partial judgment on the pleadings." After its issuance, multiple requests for reconsideration were filed. As the Long plaintiffs were going to proceed with a motion for class certification, which the Commonwealth planned to oppose partially for reasons under CR 23, and as some in the Commonwealth's chain of command believed that the Commonwealth should seek to comply with the unpublished opinion of the Court of Appeals in *Slattery v. J.F.*, 2013–CA–000830 (Ky. App. May 29, 2015), the decision was made to oppose class certification on the basis of both sovereign immunity and CR 23. As the Franklin Circuit had already indicated its willingness to grant the Long plaintiffs whatever they wished, when the expected class certification came, the Commonwealth then would appeal to the Court of Appeals on both issues.

With complete indifference to the record, the Long plaintiffs refer to "DOR's reliance on the Court of Appeals' unpublished decision in *Slattery*." Long Brief, at 21. The Commonwealth has never claimed any reliance on *Slattery*, and the Long plaintiffs do not quote any such thing. The conclusion in *Slattery* that a thirty-day rule applies to sovereign immunity appeals seems to be the basis of the Long plaintiffs' current position and is presumably the reason why the decision was unpublished. The Commonwealth mentioned *Slattery* merely in explaining the timing of its sovereign immunity appeal, as detailed above.

This Court explained in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (2009):

> 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.[14]

Further, in *Metro Louisville/Jefferson County Government v. Abma*, 326 S.W.3d 1, 14 (2009), this Court stated:

> Since sovereign immunity cannot be waived, except by the General Assembly, Kentucky Constitution § 231; Knott County Bd. of Ed. v. Mullins, 553 S.W.2d 852, 854 (Ky.App.1977), **the defense may be asserted at any time**."

Thus, the Commonwealth made sovereign immunity the primary basis for its opposition to class certification and devoted the first six pages of its "Response to Plaintiffs' Motion for Class Certification" to asserting its sovereign immunity.[15] *See* TR 1591-96, Exhibit 10, at 1-6. It began that Response by stating, "The Commonwealth reasserts and objects to the further proceeding of this action on the grounds of Sovereign Immunity to the extent this action seeks relief beyond prospective injunctive relief." TR 1591. When the Commonwealth later responded to the Long plaintiffs proposed class certification order, it renewed its sovereign immunity objection, and stated, "The Commonwealth's Response to Plaintiffs' Motion for Class Certification objected to the Motion being granted, and the continuance of this action, and requests this Court to address this objection as part of any ruling on Plaintiffs' Motion." Exhibit 11, TR 1760. It further explained, "The Commonwealth objects to its being required to continue in this action,

[14] The Long Plaintiffs claim that "DOR has never articulated a reason why the merits of its sovereign immunity defense are relevant to the question of class certification." Long Brief, at 18. As this Court has made clear, the defense of sovereign immunity is one to be free from the burdens of defending the action, especially the person specific discovery on each and every class member that the Long plaintiffs already had advanced. *See* Exhibit 18.

[15] The Long plaintiffs hypothesize about how a party might "wait and see how the case develops," Long Brief, at 23, but they provide no explanation of how the present case would differ with separate sovereign immunity and class certification appeals.

and requests that its objection to that effect be upheld on the basis of Sovereign Immunity." TR 1761. *See* Exhibit 11, at 1-2.

Upon filing its Notice of Appeal eight days after the entry of the class certification order, the Commonwealth properly appealed on the basis of both *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (2009), and CR 23.06. See Exhibit 5.

The timing of the Commonwealth's sovereign immunity appeal was raised at oral argument on the Long plaintiffs' proposed class certification order. When the *Slattery* case was raised, Judge Wingate stated, "**That's a wrong ruling. That you have to do it within 30 days**." VR 02/15/23 at 9:39:51 a.m. to 9:39:55 a.m. (emphasis added). The Long plaintiffs did not disagree with this at the time.

Furthermore, at that hearing, Judge Wingate orally acknowledged that the Commonwealth would appeal on both sovereign immunity and class certification. He stated:

> **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 (emphasis added). The Long plaintiffs did not disagree with Judge Wingate regarding this either.

In their Court of Appeals Response brief to the Commonwealths' Brief of Appeal, the Long plaintiffs noted that "The DOR uses thirteen pages of its seventeen-page brief to address sovereign immunity issues, and only four pages on the class certification issue." Brief of Appellees, Amelia Long et al., as Representatives of a Class (Sept. 8, 2023) (2023-CA-0398 and 2023-CA-0411), at 25. Despite this, the Long plaintiffs chose not to make a substantive response on sovereign immunity. Instead, the sole argument the Long

plaintiffs chose to make in their brief was that CR 23 does not give parties the right to appeal issues other than class certification. *Id.*, at 25-26. The Long Plaintiffs never addressed the fact that the Commonwealth possessed an independent right to an interlocutory appeal under *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (2009), and the Long plaintiffs did not raise the 30-day issue at that time. In their current Appellant brief, the Long plaintiffs misleadingly state that they "preserved the argument" at the Court of Appeals when the only argument their briefs made was about CR 23. Long Brief, at 14 n.54. .

The consequences of the Long plaintiffs' failure to raise this issue in their brief is explained in *Serv. Fin. Co. v. Ware*, 473 S.W.3d 98, 101 n.3 (Ky. App. 2015), where this Court quoted *Johnson v. Commonwealth*, 450 S.W.3d 707, 713 (Ky.2014), to make clear, "'[E]rror raised for the first time in a petition for rehearing will not be considered,' – 'failure to raise it in the original briefs would have amounted to a waiver.'" *Johnson v. Commonwealth*, 450 S.W.3d 707, 713 (Ky.2014). In *Ware*, the appellant raised additional grounds for rehearing that were not raised in the original brief, and this Court would not consider them. This Court rejected this, quoting *Herrick v. Wills*, 333 S.W.2d 275, 276 (Ky.1960), that "[i]t is incumbent upon the [parities] to present to this Court before submission all of his grounds for reversal," and "[q]uestions . . . not argued in the briefs, will not be considered by the Court of Appeals." The same should apply here.

**B. <u>Even if a 30 Day Rule Applied, the Commonwealth Complied with It</u>.**

Even if a 30-day rule applied on top of *Prater*, the Commonwealth properly raised sovereign immunity as an objection to the Motion for Class Certification and filed its Notice of Appeal within 30 days of the Franklin Circuit's Order certifying the class.

Under this Court's decision in *MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324, 331 (2014), "the critical point in preservation of an issue remains: was the question fairly brought to the attention of the trial court." The Commonwealth did that.

The Long plaintiffs state, "The Court of Appeals' only justification for reviewing the immunity ruling was that DOR indicated it would raise the issue in its Notice of Appeal, and the court believed it would be 'efficient and economic' to consider it." Long Brief, at 11. The Opinion actually states:

> Appellees argue the sovereign immunity issue is not properly before this Court for our review. We disagree. The circuit court plainly ruled on sovereign immunity as a threshold issue in this dispute in its August 15, 2022 order. The Department indicated it would raise the immunity issue in its notice of appeal. And, analysis of both the interlocutory issues of class certification and sovereign immunity will promote efficient and economic resolution of this matter.

Opinion, at 8. The Court of Appeals did not address the 30-day issue, but the Long plaintiffs never raised it in their Response to the Commonwealth's Brief of Appeal.[16] The sole grounds they gave why sovereign immunity could not be considered was that CR 23 did not grant authority for interlocutory appeals on issues other than class certification.[17] *See* Brief of Appellees, Amelia Long et al., as Representatives of a Class

[16] The Long plaintiffs did raise the 30-day rule in responding to the Commonwealth's earlier Court of Appeals Motion to extend the briefing schedule and in making their own motion to consolidate the appeals of the Commonwealth and of UK. However, they never moved to limit the issues on appeal, and they failed to object to the Commonwealth's sovereign immunity appeal on the 30 days basis in their Court of Appeals Brief. *See* Brief of Appellees, Amelia Long et al., as Representatives of a Class (Sept. 8, 2023) (2023-CA-0398 and 2023-CA-0411).

[17] The Long plaintiffs bizarrely claim, "Nor is there any merit to DOR's argument that it may appeal under CR 23.06 simply because it included argument about sovereign immunity in its opposition to class certification." The Commonwealth never has claimed or argued that authority for its sovereign immunity appeal came from CR 23.06. The Commonwealth's Notice of Appeal stated, "In issuing its March 28 order, the Franklin Circuit effectively denied Appellant's entitlement to absolute immunity. Appeal on that

(Sept. 8, 2023) (2023-CA-0398 and 2023-CA-0411), at 25-26). However, that point was irrelevant in light of *Prater*, which the Long plaintiffs failed to address.

Even if the Long plaintiffs had made their present argument in a timely manner before the Court of Appeals, the Commonwealth properly appealed on the issue of sovereign immunity. Even if a 30-day rule applied, the Commonwealth raised sovereign immunity as an objection to class certification and filed its Notice of Appeal within 30 days of the class certification order being issued (actually eight days). This Court has held that an immunity "**defense may be asserted at any time**." *Metro Louisville/Jefferson County Government v. Abma*, 326 S.W.3d 1, 14 (2009). As recognized by the Court of Appeals, the Commonwealth's sovereign immunity appeal was proper.

## II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT SOVEREIGN IMMUNITY BARS THE LONG PLAINTIFFS' MONETARY CLAIMS

The Long plaintiffs failed to offer any substantive argument against the Commonwealth's assertion of its sovereign immunity at the Court of Appeals. See Brief of Appellees, Amelia Long, et al., as Representative of a Class, at 25-25 (2023-CA-0398 and 2023-CA-0411)(Sept. 8, 2023). Notwithstanding this, the Long plaintiffs' brief advances numerous theories to challenge the Opinion of the Court of Appeals that the Long plaintiffs failed to raise at that time (and some of which were not even argued to the Franklin Circuit Court). Regardless of what arguments are considered, the Court of

ground is warranted pursuant to the opinion of the *Kentucky Supreme Court in Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (2009)." Exhibit 5, TR (Part II), at 2.

Appeals correctly determined that sovereign immunity protected the Commonwealth from the Long plaintiffs' monetary claims.

### A. Sovereign Immunity Under Kentucky Law and Standards for Waivers of Sovereign Immunity.

This Court explained sovereign immunity in Kentucky as follows:

> 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.

*Yanero v. Davis*, 65 S.W.3d 510, 523-24 (Ky. 2003)(emphasis added). In *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp*., 295 S.W.3d 91, 94 n.3 (2009), this Court further stated that, "The closest the Constitution comes to directly expressing sovereign immunity is in Section 230, which bars the taking of money from the treasury except by appropriations by the legislature."

Kentucky Constitution Section 230 provides:

> No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published annually. No money derived from excise or license taxation relating to gasoline and other motor fuels, and no moneys derived from fees, excise or license taxation relating to registration, operation, or use of vehicles on public highways shall be expended for other than the cost of administration, statutory refunds and adjustments, payment of highway obligations, costs for construction, reconstruction, rights-of-way, maintenance and repair of public highways and bridges, and expense of enforcing state traffic and motor vehicle laws.

As for Kentucky Constitution Section 231, it provides:

> The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.

This Court explained the interplay between Sections 230 and 231 in *Coppage Construction Company, Inc. v. Sanitation District No. 1*, 459 S.W.3d 855, 866-67 (2015):

> This principle is expressly reflected in the seminal case of *Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327, 329 (Ky.1990):
>
> > [O]ur Court has recognized [§ 230] as constitutionally protecting sovereign immunity in "suits against the Commonwealth" because otherwise it has no meaning. From its genesis in the First Constitution of 1792, Article VIII, § 4, to the Fourth Constitution of 1891 (the present Constitution), the pronouncement has followed immediately in sequence a proviso that "no money shall be drawn from the state treasury but in consequence of appropriations made by law." The "Debates, Kentucky Convention 1849," pp. 628–30, confirm the tie-in between §§ 230 and 231 of the present Constitution. These two sections recognize the existence at common law of sovereign immunity and authorize the General Assembly, by general act, to establish a method for adjusting claims against the state government as an alternative to private, special legislation. The purpose of the second section in the sequence (now § 231) is to make it possible for the General Assembly to provide a formula to pay claims by general law from the state treasury without violating the first section. Without §231, a statute permitting judgments against the Commonwealth to be paid out of the state treasury would violate the previous section.

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

sovereign immunity to be waived, there must be a statute that "specifically and expressly" waives it. Moreover, the purpose of waiving sovereign immunity must be "clearly expressed" by the General Assembly.

Regarding sovereign immunity in Kentucky law, the Amicus Brief filed by the Kentucky Attorney General's office helpfully articulates three principles:

> 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.[18] **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 forecloses the plaintiffs' claims for monetary relief because their favored caselaw and statutes do not amount to an unmistakable statutory waiver.

Office of the Attorney General, Amicus Brief of the Commonwealth of Kentucky ("Attorney General Brief"), at 2-3 (Dec. 3, 2024)(emphasis added)(footnote omitted). Thus, as explained by the Kentucky Attorney General's Office, there is no specific and express waiver of sovereign immunity that would allow the Long plaintiffs' access to the Commonwealth's revenues to satisfy their monetary claims. What follows addresses the various purported sovereign immunity waivers and other theories they employ in service of the massive payday they seek.

[18] The Attorney General's brief does not explore the issue raised in the Commonwealth's own appeal (2024-SC-0230) that, because collection of the consumer health care debts involved here have ceased and are no longer allowed by law, the declaratory judgments sought by the Long plaintiffs are now moot as there is no present dispute.

### B. The Long Plaintiffs' Canard that they are Merely Seeking the Return of Their Own "Specific Property" not State Funds, and that Kentucky's Courts are Empowered to Order Enormous Payments from the State Treasury Irrespective of the Enactments of the General Assembly

#### 1. The Long Plaintiffs' *Ross v. Gross* Argument.

The Long plaintiffs correctly state that, "'Sovereign immunity protects public coffers or, as is sometimes denominated, the public purse'" (quoting *Haydon Bridge II*, 416 S.W.3d at 291). Long Brief, at 26. They further correctly add, "[T]he doctrine recognizes that the general revenues of the state – derived from the contributions of all taxpayers – cannot be levied to compensate private parties for private injuries, even injuries caused by the state, absent consent of the legislature." *Id*. at 26-27. At that point, the Long plaintiffs' argument goes awry.

The Long plaintiffs ask this Court to accept the fantasy that their lawsuit "does not divert general taxpayer revenue to private individuals." Long Brief, at 27. They claim that it merely seeks the return of "specific property." However, the Long plaintiffs are not suing for "specific property." They are suing for a monetary award. **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***.

The Long plaintiffs seek a dollar figure. There is no 'specific property" to which they can point. The class certified by the Franklin Circuit includes everyone from whom

the Commonwealth collected UK health care debt from between 2008 and 2022 in an amount exceeding $85 million.[19] Some of that amount was returned to the University of Kentucky, some was used to pay the expenses of the Commonwealth's debt collection services, and some was returned to the State Treasury and used for general state expenses. There is no pot of "specific" funds that the Long plaintiffs seek. The fact that they name the Kentucky State Treasurer as a party to their suit shows what their true aims are. That is to take "the general revenues of the state – derived from the contributions of all taxpayers – . . . to compensate" themselves (and their attorneys). This is something the Long plaintiffs concede that sovereign immunity forbids.

The Long plaintiffs claim that their contention that sovereign immunity has "no application to a suit to recover specific funds that 'were improperly collected or seized by the state'" is "the express holding of *Ross v. Gross*, 188 S.W.2d 475 (1945)."[20] Like so many claims the Long plaintiffs make about cases, statutes or the legal positions of the Commonwealth, this statement is not true at all. As this Court itself pointed out, "Notably, the concept of sovereign immunity does not appear to have been raised in *Ross*." *Haydon Bridge II*, 416 S.W.3d at 290. Thus, it is impossible for the Long plaintiffs' contention to have been the "express holding" of *Ross*.

The Amicus Brief of the Office of the Attorney general cogently discusses *Ross*:

> 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).

[19] See Exhibit 8.
[20] Long Brief, at 27.

> 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.

Attorney General Brief, at 14-15.

The Long plaintiffs claim that the language in *Ross* about funds that the receipt of which did not "vest the State with title thereto," justifies the enormous monetary payment out of the State Treasury they seek. As the Attorney General points out, even if *Ross* had something meaningful to say about Kentucky Constitution Section 230, it is a not an authorization by the General Assembly to sue the Commonwealth as required by Section 231.

The Long plaintiffs cite *Thompson v. Kentucky Reinsurance Ass'n*, 710 S.W.2d 854, 857-58 (Ky. 1986), and claim it is in "accord" with *Ross* and supports their position, but this is grossly misleading. Like *Ross*, it never mentions sovereign immunity.[21] Moreover, crucial to the outcome of *Thompson* was the Court's conclusion that the "premiums collected by KRA are not state funds—they are private funds." Such

[21] Neither do the other Kentucky cases relied upon by the Long plaintiffs, *Barnes v. Stearns Coal & Lumber*, 175 S.W.2d 498 (Ky. 19430), and *Great Atl. & Pac. Tea Co v. City of Lexington*, 76 S.W.2d 894, 895 (Ky. 1934).

premiums therefore did not meet the definition of "state funds" in KRS 446.010(41), which provides:

> "State funds" or "public funds" means sums actually received in cash or negotiable instruments from all sources unless otherwise described by any state agency, state-owned corporation, university, department, cabinet, fiduciary for the benefit of any form of state organization, authority, board, bureau, interstate compact, commission, committee, conference, council, office, or any other form of organization whether or not the money has ever been paid into the Treasury and whether or not the money is still in the Treasury if the money is controlled by any form of state organization, except for those funds the management of which is to be reported to the Legislative Research Commission pursuant to KRS 42.600, 42.605, and 42.615

All of the amounts at issue in this case were collected by Commonwealth, indisputably a state agency, and all of those amounts meet Kentucky law's definition of "state funds." The Long plaintiffs claim that they merely seek the return of "specific funds" or "specific property""[22] but there is no "specific property" and the Long plaintiffs cannot identify any. There is nothing analogous to the Kentucky Reinsurance Association in this case. That is why the Long plaintiffs have named the Kentucky State Treasurer as a defendant. The Long plaintiffs are seeking a giant payment out of unquestionably public funds. Sovereign immunity clearly prevents that.

The Long plaintiffs view *Ross* as concluding that "the court could order a refund of monies from the Treasury despite the lack of appropriations."[23] This is a license to ignore Section 230's requirement that "No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law." The Attorney General notes:

[22] Long Brief, at 27.
[23] Long Brief, at 28-29.

> 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).

Attorney General Brief, at 16.

The Long plaintiffs place great emphasis on this Court's *Haydon Bridge II* observation that Ross and KRS 45.111[24] involve funds not "due to the state." Long Brief, at 12; *Haydon Bridge II*, 416 S.W.3d at 291. Yet, as noted above, what their Complaint seeks out of this lawsuit is a massive money judgement as so called "equitable restitution," and the heart of the *Haydon Bridge II* opinion is its holding that such is prohibited by sovereign immunity:

> Here, the retroactive injunctive relief sought by Plaintiffs 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. . . . We see no relevant difference in the retroactive injunctive relief ordered here and that disallowed in *Edelman* and *Native Village*—all of these retroactive orders impinge on sovereign immunity because they require monetary relief that can only be satisfied by draws on a state's treasury.

*Haydon Bridge II*, 416 S.W.3d at 294. This Court then concludes:

> **In sum, 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**. KRS 45.111 and *Ross v. Gross*, along with Section 242 of the Kentucky Constitution, are simply inapplicable to this dispute. **The funds at issue are clearly part of the "public purse"** and, although subject to statutory restrictions, they are not purely private funds as the Plaintiffs attempt to characterize them.

[24] The Long plaintiffs' claim that KRS 45.111 provides legislative authorization for their lawsuit is addressed below.

*Haydon Bridge II*, 416 S.W.3d at 295.

The Court of Appeals examined this Court's *Haydon Bridge II* ruling and correctly concluded:

> 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.
>
> Therefore, Appellees' requested monetary relief – both their requests for injunctive relief and those requests for declaratory relief discussed above – is barred by sovereign immunity and the circuit court erred in applying a blanket waiver of sovereign immunity.

Opinion, at 31.

### 2. The Long Plaintiffs Really Contend that the Courts Have License to Ignore Kentucky's Constitution.

On the other hand, the Long plaintiffs assert that the chief error the Court of Appeals made was failing to ignore Kentucky's Constitution and the Commonwealth's sovereign immunity. The Long plaintiffs take the statements in *Haydon Bridge II* regarding funds not "due to the state" as a precondition to the applicability of both Sections 230 and 231. They state that the Court of Appeals erred as follows:

> That fundamentally misunderstands this Court's reasoning in *Haydon Bridge II*. ***Haydon Bridge II*** **first concluded** that neither *Ross v. Gross* nor the waiver in KRS 45.111 applied because the *Haydon Bridge* plaintiffs did not request return of money wrongfully collected[25] from them. 416 S.W.3d at 289-90.

[25] It is worth noting that, as detailed earlier, the Long plaintiffs' contention that the funds were wrongfully collected always was baseless. The collection program always envisaged administrative hearings followed by an opportunity for judicial appeals (see KRS 45.241(5) and the regulations thereunder). The relevant statutes were amended numerous times and, in 2022, the General Assembly chose to end the collection of health care debts while leaving unchanged the collection of student and other state agency debts.

> ***Haydon Bridge II* then held** that characterizing the relief as "injunctive" or "equitable restitution" also would not avoid sovereign immunity because, however characterized, the effect of the relief was the same: an order to remove public funds from the Treasury without a legislative appropriation or waiver of immunity. . . .
>
> **This case departs from *Haydon Bridge II* at step one of the analysis, *so step two is irrelevant*. 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.*[26]** Accordingly, the Court of Appeals cannot rely on *Haydon Bridge II* to bar the patients' claims. The point is that sovereign immunity does not bar these types of improper collection claims, which were not at issue in *Haydon Bridge II*.

Long Brief, at 38-39 (emphasis added). Thus, the Long plaintiffs ask this Court to endorse their exception to the application of Kentucky's Constitution. Such a result would be absurd. The Court of Appeals decided correctly.

### 3. Acceptance of the Long Plaintiffs' Position Would Violate the Separation of Powers Just as This Court Outlined in *Haydon Bridge II*.

Although not previously focused on by the parties, there is another aspect of *Haydon Bridge II* of extreme importance in light of what the Long plaintiffs demand. In *Haydon Bridge II*, this Court concluded that doing what the plaintiffs in that matter requested would violate Kentucky's separation of powers.

This Court explained that:

> Section 27 of the Kentucky Constitution provides that the powers of government "shall be divided into three distinct departments, and each of them confined to a separate body of magistracy." The legislative, executive and judicial branches of our state government are to operate within their respective spheres and "no person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others" except as expressly

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The notion that the state agency debt collection program was not statutorily authorized always lacked any merit.

[26] As noted, *infra*, actions for "damages" are the proper province of the Board of Claims.

> directed or permitted by the Constitution. Ky. Const., § 28. Focusing on these two provisions, this Court has often noted that "Kentucky is a strict adherent to the separation of powers doctrine." *Diemer v. Commonwealth of Ky., Transp. Cab*., 786 S.W.2d 861, 864 (Ky.1990). As we stated in *Legislative Research Comm. v. Brown*, 664 S.W.2d 907 [at 912] (Ky.1984):
>
> > Our present constitution contains explicit provisions which, on the one hand, *mandate* separation among the three branches of government, and on the other hand, specifically *prohibit* incursion of one branch of government into the powers and functions of the others. Thus, our constitution has a double-barreled, positive-negative approach.

*Haydon Bridge II*, 416 S.W.3d at 295. Regarding the application of the separation of powers to the facts of the case, this Court further stated:

> The Governor invokes the separation of powers doctrine, correctly we find, as another bar to the trial court's order that $32,781,000.00 be transferred from the General Fund . . . . **The Kentucky Constitution is not only clear about the separation of powers among the three branches of government, it is also exceedingly clear that the State Treasury is solely under the control of the legislative branch**. Section 230 states, in pertinent part, that "[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law."

*Id*. at 295-96 (emphasis added). This Court then continued, "**To order monetary relief in this case would create a perfect storm, an unprecedented collision of the constitutional powers accorded the three separate branches of government**." *Id*. at 296 (emphasis added). It then explained:

> The impact of this hypothetical sequence of events one time is concerning but the potential future consequences are almost unfathomable. The General Assembly would be routinely summoned into special session by the Governor in order to pay "bills" emanating from court judgments following litigation . . ..
>
> **The enormity of this scenario illustrates why the judicial branch's declaration of unconstitutionality does not translate into monetary relief unless the General Assembly has expressly authorized it.** See, e.g., KRS 134.590 (allowing refund of taxes "paid under a statute held unconstitutional.").

*Id*. at (emphasis added).

In a striking similarity to the present case, this Court then noted that, although they are not empowered to disburse funds from the State Treasury, Kentucky courts do have the authority to issue prospective injunctions, but the *Haydon Bridge II* plaintiffs had never sought them. *Haydon Bridge II*, 416 S.W.3d at 297. So too, the Long plaintiffs never sought an injunction to enjoin the Commonwealth's collections in this case. It is not clear why, although it is true that the less money the Commonwealth collected, the less would be any percentage-based fee the Long plaintiffs' attorneys could charge. This Court concluded:

> **Under 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.15 Ky. Const., §§ 27, 28, 230. . . . Here, the right to injunctive relief was alleged by Plaintiffs but they never followed through to secure a ruling. **The separation of powers provisions in our Kentucky Constitution, as well as sovereign immunity, manifestly prohibit the monetary relief they now seek.**

*Id.* at 297-98 (emphasis added). The Long plaintiffs' claims regarding alleged statutory waivers will be addressed below, but it is clear that their argument that Kentucky Constitution Sections 230 and 231 should be ignored would generate the same potential separation of powers violation outlined by this Court in *Haydon Bridge II*. **Thus, with regard to the Long plaintiffs demands for an enormous monetary judgment, it can again be said that "The separation of powers provisions in our Kentucky Constitution, as well as sovereign immunity, manifestly prohibit the monetary relief they now seek**." *Id*. at 298.

### C. The Court of Appeals Correctly Concluded that KRS 45.111 Was Not a Statutory Waiver of Sovereign Immunity that Allowed the Long Plaintiffs Suit for a Monetary Judgment.

KRS 45.111 provides:

> Any funds received into the State Treasury which are later determined not to be due to the state **may be refunded** to the person who paid such funds into the Treasury. The Finance and Administration Cabinet **may issue a warrant** to disburse the funds upon a request from the budget unit that originally received and deposited the funds. The request for refund must be approved by the head of the budget unit or his designated assistant. The Finance and Administration Cabinet **may require** any documentation deemed necessary.

As noted above, under Kentucky law, sovereign immunity is not waived unless such waiver is specifically and clearly expressed by statute. This Court stated in *Haydon Bridge II* that "the refund provisions of KRS 45.111 constitute a limited waiver of sovereign immunity." *Haydon Bridge II*, 416 S.W.3d at 291. Previously, in this litigation, the Commonwealth has taken the position that KRS 45.111 was not a waiver at all. After further consideration, however, the Commonwealth has refined its position and better understands this Court's reference to it as a "limited waiver."

As this Court explained in *Yanero v. Davis*, 65 S.W.3d 510, 523-24 (Ky. 2003) (quoted above), the Commonwealth's sovereign immunity is reflected in Sections 230 and 231 of the Kentucky Constitution. In *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 n.3 (2009), this Court stated that, "The closest the Constitution comes to directly expressing sovereign immunity is in Section 230, which bars the taking of money from the treasury except by appropriations by the legislature." In its Amicus Brief, the Office of the Attorney General further explains, "The Demand for monetary relief has to implicate sovereign immunity." Attorney General Brief, at 10.

KRS 45.111 allows the Finance and Administration Cabinet to disburse funds on a discretionary basis in certain instances without seeking a new appropriation from the General Assembly. It is therefore a limited waiver of Kentucky Constitution Section 230 given by the General Assembly to the executive branch. However, it is by no means a waiver of Kentucky Constitution Section 231. Kentucky Constitution Section 231 provides, "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

KRS 45.111 nowhere authorizes lawsuits or the award of damages against the Commonwealth. Its language is entirely permissive in granting the executive branch discretion as demonstrated by its repeated use the verb "may." Thus, funds "***may*** be refunded," the "Finance and Administration Cabinet ***may issue*** a warrant to disburse the funds," the "Finance and Administration Cabinet ***may require***." As stated in *Stringer v. Realty Unlimited, Inc.*, 97 S.W.3d 446, 448 (2002), "We have no quarrel with the Court of Appeals' conclusion that "'may' ... ordinarily imports permission or liberty to act."[27]

Although similar language to KRS 45.111 was contained in former KRS 45.020, enacted in 1968 and referred to by the Long plaintiffs,[28] that provision was repealed (not renumbered) in 1982.[29] KRS 45.111 was enacted as part of a comprehensive revision of the state budget process[30] and is best understood as a provision to allow the executive branch the discretion to return amounts received without seeking an appropriation.[31]

[27] Despite the header, KRS 45.111 does not mention "funds illegally received," and that header has no legal import. *See* KRS 446.140.
[28] Long Brief, at 36.
[29] 1982 Ky.Acts ch. 450 (HB 649), Section 79.
[30] 1982 Ky. Acts Ch. 450 (H.B. 649), Section 43.
[31] See Commonwealth Brief of Appeal, Exhibit 6, at 8-10.

KRS 45.111 was enacted by 1982 Ky. Acts Ch. 450 (H.B. 649) (§ 43), which created KRS chapter 48 and Kentucky's modern budget process. It also followed in the wake of *Brown v. Barkley*, 628 S.W.2d 616, 621 (1982), which, in part, held that "to the extent that the Governor has any implied or inherent powers in addition to those the Constitution expressly gives him, it seems clear that such unexpressed executive power is subservient to the overriding authority of the legislature." The purpose of H.B. 649 was to delineate the relationship between the legislative branch and the executive branch as it related to expenditures of funds. KRS 45.111 was present in the bill from introduction. *See* Exhibit 12, p.1803.

Primary sponsor Rep. David Thomason, explained H.B. 649's purpose to the House Appropriations & Revenue Committee on March 18, 1982 (Exhibit 13):

> This bill relates again to legislative independence. . . . *Brown vs. Barkley* says that the Governor's Office has no authority except what authority is given to him by the Constitution and what the Legislature chooses to give him. . . . **Now, there had been considerable discussion lately about, is the Legislature going too far? Are we trying to get involved in *purely administrative function*? You only have to look and see what the independent body--the judicial branch has said. We are not attempting to get involved in inde--*purely administrative functions***.
>
> . . . Now, the Legislature in the past has given up many of its duties and many of its functions to the Executive Branch and that's all we are talking about here. . . .
> . . .
> The Constitution says that the Governor will propose a budget to the Legislature and the Legislature will adopt the budget and then the Executive Branch will administer the budget. **What's been happening--the Governor's been proposing the budget, the Legislature has been adopting the budget, and then the budget has been changed after the Legislature has left**.

Thus, H.B. 649's enactment arose out of a concern that that the executive branch was not following the General Assembly's directives when it came to spending, and the General Assembly wanted to reassert control. However, the General Assembly was not

going to interfere with what it saw as "purely administrative functions." In this context, KRS 45.111, with its use of the verb "may" and its repeated reference to administrative discretion in refunding funds makes perfect sense. KRS 45.111 tells the executive branch that if they find an error in some amount received, they are allowed to return the excess without returning to the General Assembly for a new appropriation. It has nothing to do with authorizing lawsuits against the State Treasury for large sums.

The Long plaintiffs find it significant that the repealed KRS 45.020 (wrongly stated to be KRS 45.111) was enacted two years after the enactment of some uncited predecessor to current KRS 45A.245 (enacted by 1978 Ky. Acts. Ch. 110, Section 49). They suggest that KRS 45A.245 waives sovereign immunity, so KRS 45.111 must as well. Long Brief, at 36. Closer examination shows just how different the statutes are. In relevant part, KRS 45A245 provides:

> (1) **Any person**, . . . , having a lawfully authorized written contract with the Commonwealth . . . **may bring an action against the Commonwealth** on the contract. . . . Any such action shall be . . . tried by the court sitting without a jury. **All defenses** in law or equity, **except the defense of governmental immunity**, shall be preserved to the Commonwealth.
>
> (2) **If damages awarded** . . . exceed the original amount of the contract, such excess shall be limited to an amount which is equal to the amount of the original contract.

Thus, KRS 45A.245 specifically authorizes "action[s] against the Commonwealth," eliminates "the defense of governmental immunity," and contemplates and limits an award of monetary "damages."

KRS 45A.245 meets the standards in Kentucky law for a clear and specific waiver of sovereign immunity. It authorizes suites against the Commonwealth, prevents the Commonwealth from asserting immunity, and specifically contemplates a judicial

monetary award. KRS 45.111 does not do any of that. It allows the Finance and Administration Cabinet to make its own determination that funds were received in error. It does not authorize lawsuits against the Commonwealth or empower the Judicial Branch to order massive payments from the State Treasury.

Having failed to make the case that KRS 45.111 expressly waives sovereign immunity, the Long plaintiffs suggest that a waiver may be "implied," citing *Withers v. University of Kentucky*, 939 S.W. 340, 342 (Ky. 1997). Actually, *Withers* endorsed the conclusion of *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), where the United States Supreme Court stated, "We will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Withers*, 939 S.W.2d at 346. The primary example the Long plaintiffs give is *Benningfield v. Fields*, 584 S.W.3d 731 (2019).[32] In that case, KRS 392.197 allowed employees who were harassed in pursuing a workers compensation claim to file a civil action, and this court found that the relevant definitions included the appellee as an employee and Taylor County as his employer. Id. at 737-38. Given that, it is difficult to argue that there was not an overwhelming implication of a sovereign immunity waiver in *Benningfield*. What is missing in KRS 45.111, however, is an explicit authorization for a lawsuit. KRS 392.197 explicitly provided that a covered employee "' shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained by him,'" but there is nothing comparable in KRS 45.111. The fact that, in KRS 45.111, the legislature allows the executive branch to

[32] Long Brief, at 34-35.

make discretionary refunds of amounts received does not imply that private parties have a right to sue for damages.

The Court of Appeals addressed KRS 45.111 as follows:

> The plaintiffs in *Haydon Bridge II* argued KRS 45.111 waived sovereign immunity against their claims because it provides for repayment of funds not due to the state. *Id*. at 289. However, the workers' compensation insurance premiums at issue were "literally 'due to the state'" because they were lawfully subject to assessment. *Id*. . . . Though the Supreme Court did determine that KRS 45.111 supplied "a limited waiver of sovereign immunity," *id.* at 291, it was not required to explain the parameters of this waiver due to the inapplicability of KRS 45.111. This marks an important distinction between *Haydon Bridge II* and the instant appeal, as Appellees assert the amounts collected for healthcare services were not due to the state.

Opinion, at 27. It correctly concluded, "Because there has been no direct appropriation directing the return of Appellees' money, and, as discussed above, **the general assembly has not waived sovereign immunity against suits seeking repayment of money wrongfully paid – by enacting KRS 45.111 or otherwise –sovereign immunity bars Appellees' requested relief in the form of an order directing the return of the money at issue**." Opinion, at 36.

Under Kentucky law, sovereign immunity applies unless **"specifically and expressly waived as set forth by statute**," KRS 49.060 (emphasis added), where "**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). KRS 45.111 does not authorize lawsuits against the Commonwealth under Kentucky Constitution, and does not waive the Commonwealth's sovereign immunity against private plaintiffs. The Court of Appeals decided correctly.

### D. Even if They Were Properly Raised, the Long Plaintiffs Arguments Regarding KRS 131.565 and KRS 131.570 Fail to Show a Sovereign Immunity Waiver.

The Long plaintiffs **never argued** to the Franklin Circuit that KRS 131.565 or KRS 131.570 waived the Commonwealth's sovereign immunity.[33] The Franklin Circuit Court **never opined** in the Long plaintiffs' action that KRS 131.565 or KRS 131.570 waived the Commonwealth's sovereign immunity.[34] The Long plaintiffs Response Brief before the Court of Appeals **never argued** that KRS 131.565 or KRS 131.570 waived the Commonwealth's sovereign immunity.[35] The Court of Appeals Opinion in this case **never addressed** those provisions. Opinion (March 1, 2024). Now, the Long plaintiffs claim that "**The Court of Appeals also erred** in its analysis of the waiver of immunity in KRS 131.565(6) and .570, which the circuit court correctly held waived sovereign immunity for improperly withheld tax refunds." Long Brief, at 39. Even more absurdly, it is only in a footnote that the Long plaintiffs inform this Court that the referred to Circuit Court finding was in a completely different case.

The Long plaintiffs' arguments regarding KRS 131.565 and KRS 131.570 are not properly raised, but even were they, they do not show an applicable waiver of sovereign immunity. First of all, KRS 131.565 and KRS 131.570 are **NOT** relevant to this case. This case does not deal with the state income tax refund offset program. The University of Kentucky was not a participant in that program, and it did not request withholding of state income tax refunds under KRS 131.565(3). The state income tax refund offset

**[33] TR, at**
**[34] TR, at**
[35] Brief of Appellees, Amelia Long et al., as Representatives of a Class (Sept. 8, 2023) (2023-CA-0398 and 2023-CA-0411).

program is the oldest state agency debt collection program, and many of its provisions are reflective of that. In this case, UK sought generalized collection services from the Commonwealth. As the Long plaintiffs noted, these services involved the Commonwealth collecting UK's debts "as if they were taxes." This program derived its collection powers from KRS 45.238(1), which gives the Commonwealth "all the powers necessary to collect any referred debts," and KRS 131.030(4), which gives the Commonwealth "all the powers and duties necessary to collect any debts owed to the Commonwealth, or any local government [or] the Court of Justice in the judicial branch of state government, and any local government."

The way the State income tax refund offset program works is this. Participating agencies have debts owed by individuals. Those individuals have an opportunity to contest those debts in an administrative hearing provided for by either statute or regulation, and adverse rulings from such a hearing can be appealed to a court (KRS 131.565(2)). Agencies can request the Commonwealth to offset tax refunds by the amount of those "liquidated debts" (KRS 131.565(3)[36]). Although there are some differences in details, this is the same overall structure that the Long plaintiffs claim is impossible with respect to the collection provisions at issue in this case.

[36] Under KRS 131.565(3), "liquidated debts" are defined as "a legal debt for a sum certain, which has been certified by the claimant agency as final due and owing." It is also stated, "The claimant agency must have made reasonable efforts to collect such debt, and must have provided the debtor the opportunity for appeal and formal hearing as provided by statute, administrative regulation, or local ordinance. The claimant agency shall send thirty (30) days' prior written notification to the debtor of the intention to submit the claim to the department for setoff as provided in KRS 131.570."

The state agency tax refund offset program was the first agency debt collection regime enacted by the Kentucky legislature. Its provisions reflect the understandable uncertainties about what might happen. KRS 131.565(6) requires that "Each state agency requesting the withholding of any individual income tax refund shall indemnify the" Commonwealth "against any and all expenses related to litigation which arises concerning the administration of KRS 131.560 to 131.595 as it pertains to a refund withholding action requested by such agency." This does not authorize any lawsuit or allow for a monetary award against the Commonwealth as Kentucky Constitution Section 231 requires for a waiver of sovereign immunity. KRS 131.565(6) simply says that if the Commonwealth is dragged into any dispute between the referring agency and the agency debtor, that that participating agency must indemnify the Commonwealth for "expenses related to litigation."

The Long plaintiffs also claim that KRS 131.570(4) is a waiver of sovereign immunity. It provides that, "[i]n the event the department erroneously transfers funds to a claimant agency, the claimant agency shall immediately upon notification thereof reimburse the department for the amount erroneously transmitted to such agency" and "[t]he department shall promptly refund to the taxpayer the appropriate amount of such returned funds." This provision also does not authorize lawsuits against the Commonwealth. Even if the state income tax refund offset program provisions were relevant to the current case, the predicate for the Commonwealth returning any funds has not been met as no funds have been reimbursed to the Commonwealth by UK. Even were the Long plaintiffs properly raised this issue, their entire argument in this regard is baseless.

### E. The Long Plaintiffs Other Claims Not Raised to the Court of Appeals or Addressed in the Opinion of the Court of Appeals.

Although they did not make the claim to the Court of Appeals, the Long plaintiffs now argue that the collections made in this case were "takings" "of private property without just compensation." Long Brief, at 44. They wrongly state that, "The underlying merits of the patients' constitutional takings claim have not been adjudicated," but that is FALSE. 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 ruled as such. *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.").

This is not a takings case. If it is, 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." In the present case, the Court of Appeals did not address the "takings" aspect of the Franklin Circuit order, which amounted to only a single sentence, but the Court of Appeals may not have found the "takings" contention serious enough to merit addressing. 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.

### F. <u>The Proper Venue for Any of the Long Plaintiffs' Damages Claims was the Kentucky Board of Claims</u>.

The Long plaintiffs hyperbolically claim that the Court of Appeals' Opinion "established a precedent that even if one assumes the state confiscated private citizens' funds with no lawful authority, sovereign immunity bars any judicial remedy for return of those funds unless the General Assembly enacts new legislation." Long Brief, at 33. Actually, the Commonwealth's position has always been that the Board of Claims is the proper venue for any monetary claims the Long plaintiffs may have had. As noted previously, 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). Thus, the Long plaintiffs' monetary claims are claims for damages under Kentucky law.

KRS 49.060 provides:

> It is the intention of the General Assembly to provide the means to enable a person negligently injured by the Commonwealth . . . 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 . . . except where sovereign immunity is specifically and expressly waived as set forth by statute. **<u>The Board of Claims shall have exclusive jurisdiction to hear claims for damages, except as otherwise specifically set forth by statute, against the Commonwealth</u>.**

Emphasis added. Although the initial portion of this section states an intention to cover negligence claims, the operative portion gives the Board of Claims "**<u>exclusive jurisdiction to hear claims for damages, except as otherwise specifically set forth by statute, against the Commonwealth</u>**." As the monetary portion of what the Long plaintiffs assert are "damages" under Kentucky law (and the Long plaintiffs' Brief asserts

that it does not matter if they are described as "damages"), the Board of Claims would have been the proper venue to file any action seeking that.

Indeed, this Court has held that, "***All claims* against immune entities fall squarely within the purview of the Board of Claims Act**." *Withers v. University of Kentucky*, 939 S.W. 340, 346 (Ky. 1997) (emphasis added). Similarly, in *Franklin County, Ky. v. Malone*, 957 S.W.2d 195, 205 (1997), this Court explained:

> **The *only possible recourse* for those who believe they are injured or damaged in some way by the activities of the government or its agents is a resort to a proper claim before the Board of Claims**. Section 231 of the Kentucky Constitution is commonly referred to as providing immunity, but a reading of the exact language of the constitutional section indicates that it provides a direction for those who have claims and a method by which they can seek some limited redress of such claims. . . . The adequacy of compensation is primarily a responsibility of the legislative branch of government.

The Long plaintiffs request for relief "on grounds of mistake," as well as a claim for alleged tortious conversion, could have been brought before the Board of Claims. In the unpublished, nonbinding case *McGinnis v. University of Kentucky, et al*., 2022-CA-1494-MR (9-29-2023), a UK healthcare debtor who is now technically a Long class member, requested an administrative hearing from UK for his debt, failed to appeal the adverse determination to a court, and later sued the Commonwealth in Fayette Circuit Court. On appeal, the Court of Appeals, in part, held that the Commonwealth was "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." *See* Exhibit 17, at 6. Of course, redress in the Board of Claims means no class actions and no giant paydays for attorneys after limited effort, but the Long plaintiffs' allegations about the effect of the Court of Appeals' Opinion are simply untrue.

It is also worth noting that this Court has discussed its decision in *Commonwealth, Transportation Cabinet v. Roof,* Ky, 913 S.W.2d 322 (1996), in the following terms:

> Sovereign immunity is a doctrine of law created by section 231 of the Constitution of Kentucky. *Withers v. University of Kentucky*, Ky., 939 S.W.2d 340, 342 (1997); *Brown*, 605 S.W.2d at 498. Section 231 "grants the General Assembly the exclusive authority to decide when and under what conditions the Commonwealth will allow itself to be subjected to suit." *Brown* at 500. This Court recently reiterated this fundamental principle in *Commonwealth, Transportation Cabinet v. Roof*, Ky, 913 S.W.2d 322, 325 (1996), stating, "**It is the province of the General Assembly to waive immunity, if at all, and only to the extent it sees fit**."

*Collins v. Commonwealth of Ky. Natural Resources and Environmental Protection Cabinet*, 10 S.W.3d 122, 124 (1999)(emphasis added). In a subsequent case, this Court reiterated this position:

> Appellant urges us to revisit and overrule *Roof*. **While we still believe that the result seems unfair, we also still conclude that the intent of the General Assembly is clear, and we are bound by their words. As we reiterated in *Roof*, "the Commonwealth is under no obligation to make payment to injured parties because of the protections provided by the doctrine of sovereign immunity. Ky. Const. § 231. It is the province of the General Assembly to waive immunity, if at all, and only to the extent it sees fit**." Id. at 325.

*Boarman v. Commonwealth*, 37 S.W.3d 759, 763 (2001)(emphasis added).

Finally, it should be noted that the Long plaintiffs' suit specifically challenges the manner in which the debts were collected, but not the amount the amount of the debts. If Long plaintiffs' attorneys were successful, there would be a massive payout from the State Treasury, their attorneys would take a massive chunk out of that, and then the Long class members would be left owing debts that, in many cases, already had been paid. The denial of the Commonwealth's sovereign immunity in this case would not be a victory for the Long class members.

## CONCLUSION

For the reasons articulated above, the Opinion of the Court of Appeals, except as detailed in the Commonwealth's separate appeal (2024-SC-0230), should be AFFIRMED.

Respectfully submitted,

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