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Supreme Court of Kentucky
 No. 2024-SC-0229

Court of Appeals Case Nos. 2023-CA-0398 and 2023-CA-0411

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AMELIA LONG, *et al.*, APPELLANTS,

VS. On Appeal from Franklin Circuit Court
 Case No. 18-CI-00975

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

REPLY BRIEF FOR APPELLANTS

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CERTIFICATE OF SERVICE

I certify that on February 5, 2025, this brief was electronically filed, and served via electronic mail and/or U.S. mail upon Kevin G. Henry, Bryan H. Beaman, Sturgill, Turner, Barker & Moloney, 333 West Vine Street, Suite 1500, Lexington, KY 40507, William E. Thro, University of Kentucky, Office of Legal Counsel, 301 Main Building, Lexington, KY 40506, Sam P. Burchett, General Counsel, Kentucky State Treasury, 1050 U.S. Highway 127S, Suite 100, Frankfort, KY 40601 R. Campbell Connell, Frank L. Dempsey, Austin T. Green, Division of Collections, Legal Branch, Department of Revenue, P.O. Box 5222, Frankfort, KY 40602, Hon. Thomas D. Wingate, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601, and Kate Morgan, Clerk, Kentucky Court of Appeals, 669 Chamberlin Ave., Ste B, Frankfort, KY 40601. I also certify that the record on appeal was not withdrawn.

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STATEMENT OF POINTS & AUTHORITIES

I. The Court of Appeals did not have appellate jurisdiction to consider the sovereign immunity issues in this appeal..... 2

CR 23.06 2, 3, 4, 5

Hensley v. Haynes Trucking, LLC,
549 S.W.3d 430 (Ky. 2018) 2, 5

RAP 3(1) 2

Napoli v. Town of New Windsor,
600 F.3d 168 (2d Cir. 2010) 3

Cuyahoga Valley Ry. Co. v. Tracy,
6 F.3d 389 (6th Cir. 1993)..... 3

Bowers v. Nat’l Collegiate Athletic Ass’n,
346 F.3d 402 (3d Cir. 2003) 3

Slattery v. J.F.,
2013-CA-000830, 2015 WL 3424794 (Ky. App. May 29, 2015) 3, 4

Commonwealth v. B.H.,
548 S.W.3d 238 (Ky. 2018) 5

Wilson v. Russell,
162 S.W.3d 911 (Ky. 2005) 5

II. Even if sovereign immunity was properly appealed, merits arguments are not part of this appeal..... 5

Baker v. Fields,
543 S.W.3d 575 (Ky. 2018) 6

Upper Pond Creek Volunteer Fire Dep’t, Inc. v. Kinser,
617 S.W.3d 328 (Ky. 2020) 7

Ross v. Gross,
188 S.W.2d 475 (Ky. 1945) 8

KRS 45.111..... 8

III. Sovereign immunity does not apply to the patients’ efforts to recover their wrongfully seized funds...... 8

Ross v. Gross,
188 S.W.2d 475 (Ky. 1945) 9

Calvert Inv., Inc. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.,
805 S.W.2d 133 (Ky. 1991) 10

Ky. Const. § 230 10

Ky. Const. § 231 10

IV. If sovereign immunity applies, it has been waived. 11

KRS 45.111 11

Beshear v. Haydon Bridge Co., Inc.,
416 S.W.3d 280 (Ky. 2013) 11

KRS 131.565 11

KRS 131.570 11

A. KRS 45.111 waives sovereign immunity for wrongful collection claims...... 11

KRS 45.111 11, 12, 13

Beshear v. Haydon Bridge Co., Inc.,
416 S.W.3d 280 (Ky. 2013) 11, 12

KRS 45.020 11

Ky. Const. § 230 12, 13

Ky. Const. § 231 13

B. KRS 131.565 and KRS 131.570 waive immunity for wrongfully retained tax refunds...... 13

KRS 131.565 13, 14

KRS 131.570 13, 14

KRS 131.560 to 131.595 14

KRS 44.030 15

V. Separation of powers concerns are unfounded..... 155

Beshear v. Haydon Bridge Co., Inc.,
416 S.W.3d 280 (Ky. 2013) 15

Univ. of Ky. v. Regard,
670 S.W.3d 903 (Ky. 2023) 16

Rose v. Council for Higher Educ.,
790 S.W.2d 186 (Ky. 1989) 16, 17

CONCLUSION 177

CERTIFICATE OF COMPLIANCE 177

In both this case, and the related *Bennett* appeal, the Court of Appeals established a precedent that – even assuming the state confiscated Kentucky citizens’ private funds with no lawful authority – sovereign immunity bars **any** judicial remedy for return of those funds. In an interlocutory immunity appeal, the sole issue is immunity; the merits of plaintiffs’ claims are not before the Court. So the only question is whether immunity would bar the patients’ claims, even if they prevailed on the merits. The Court of Appeals answered yes, ruling that sovereign immunity bars any judicial remedy to order the return of a plaintiff’s own wrongfully confiscated private funds, no matter how unlawfully or unconstitutionally the state has acted in seizing those funds. That is not Kentucky law, and the circuit court’s denial of sovereign immunity should be reinstated.

But the Court of Appeals did not merely err in its substantive consideration of the immunity issue. It had no appellate jurisdiction to reach the immunity question at all. DOR did not timely appeal from the circuit court’s order denying its motion to dismiss on sovereign immunity grounds, or even from the circuit court’s denial of its motion to reconsider that order. Rather, it sought appellate review of sovereign immunity in its appeal from the circuit court’s class certification order, which did not even address the merits of DOR’s immunity defense. Thus, the immunity issue was not properly before the Court of Appeals in this appeal, and it had no jurisdiction to address it.

I. The Court of Appeals did not have appellate jurisdiction to consider the sovereign immunity issues in this appeal.

This is an appeal from a class certification order, and the Court of Appeals' jurisdiction was limited to that narrow issue. DOR improperly and untimely injected sovereign immunity issues (and merits issues) into the class certification appeal and persuaded the Court of Appeals to disregard clear precedent to reach those issues.

CR 23.06 appeals are limited to whether class certification is proper. CR 23.06 only authorizes interlocutory appeal of “[a]n order granting or denying class action certification.” CR 23.06. It does not confer appellate jurisdiction over other orders – such as orders denying motions for judgment on the pleadings – entered months before a class certification decision. *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430, 436 (Ky. 2018). This Court has emphasized that it is necessary to “scrupulously respect the limitations” of such appeals. *Id.* The Court of Appeals' decision to address the merits, including the Appellees' sovereign immunity defenses, was outside those limitations on the scope of a CR 23.06 appeal.

The appeal of sovereign immunity issues was also improper because no party timely appealed the circuit court's immunity order. No authority suggests that interlocutory appeals of immunity denials are exempt from the time limitations applicable to all other appeals. *Cf.* RAP 3(1).

The circuit court’s order denying sovereign immunity was entered on August 15, 2022.¹ No notice of appeal was filed within 30 days. DOR filed a motion for reconsideration that was denied on September 19, 2022.² Again, no notice of appeal was filed within 30 days.

Instead, DOR waited ***more than six more months*** – until after class certification had been briefed and decided – to file an interlocutory appeal under CR 23.06 and belatedly try to smuggle immunity issues into it. But once the time to appeal has passed, the mere entry of a later order addressing “issues completely unrelated to ... immunity does not restart the time in which defendants can seek an interlocutory appeal.” *Napoli v. Town of New Windsor*, 600 F.3d 168, 170-71 (2d Cir. 2010). *See also Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 394-95 (6th Cir. 1993). Without a timely notice of appeal from an interlocutory immunity order, review of the immunity issues should typically occur “following final judgment.” *Bowers v. Nat’l Collegiate Athletic Ass’n*, 346 F.3d 402, 412 n.8 (3d Cir. 2003).

The reference to reliance by someone in DOR’s “chain of command” on the Court of Appeals’ unpublished decision in *Slattery v. J.F.*, 2013-CA-000830, 2015 WL 3424794 (Ky. App. May 29, 2015) (unpub., non-binding),

¹ RA vol 10, 1360-1369: Order, 8/15/22 at 3 (attached to the patients’ opening brief as APX B).

² RA vol 10, 1401-1402: Order, 9/19/22.

does not excuse the delay. *Cf.* DOR Brief at 20.³ *Slattery* does not apply. The Court of Appeals in *Slattery* allowed an interlocutory appeal from a circuit court's denial of a CR 54.02(1) motion to reconsider a prior interlocutory order denying immunity. *Slattery*, 2015 WL 3424794, at *3. That is not what happened here. DOR did not timely appeal from the September 19, 2022 denial of its motion to reconsider the Threshold Order.

Nor is there any merit to DOR's argument that it may appeal under CR 23.06 simply because it repeated an earlier argument about sovereign immunity in its opposition to class certification.⁴ The circuit court's order granting class certification did not address DOR's sovereign immunity argument.⁵ The mere inclusion of an immunity argument – which seeks dismissal of the case, not denial of certification – in a class certification opposition brief does not extend CR 23.06 appellate jurisdiction to the sovereign immunity issue. If it did, any party could simply drop a paragraph or footnote in a class certification brief re-arguing every prior trial court ruling and thereby secure interlocutory review of any merits issues in a CR 23.06 certification appeal. Or a party could include a paragraph on sovereign

³ DOR's brief on this point is not completely clear whether it missed the appellate deadline or *chose* to wait to appeal after seeing what happened on class certification. Either way, *Slattery* does not justify a later appeal.

⁴ *Cf.* DOR Brief 21-22.

⁵ RA vol. 13, 1809-1823: Order, 3/28/23.

immunity in every pleading it files on every issue and then wait to appeal whenever it wants. That is not the law. *Hensley*, 549 S.W.3d 430.

DOR makes a similarly unpersuasive argument that, at the Court of Appeals, the patients (as appellees) at first only argued that the immunity appeal was improper because of the limited scope of a CR 23.06 appeal but did not also point out that the appeal was untimely.⁶ Once the Court of Appeals had disregarded precedent to decide issues based on an untimely appeal of the earlier immunity denial, the patients raised those issues in a Petition for Rehearing.⁷ That is not a waiver.

The question of appellate jurisdiction cannot be waived; “a party may challenge a court’s lack of subject matter jurisdiction any time, even for the first time on appeal.” *Commonwealth v. B.H.*, 548 S.W.3d 238, 245 (Ky. 2018) (cleaned up). And an appellate court has a mandatory obligation to determine its jurisdiction, even if the parties did not raise the issue. *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005).

II. Even if sovereign immunity was properly appealed, merits arguments are not part of this appeal.

Although it certainly is not evident from the Appellees’ briefs, if the Court goes beyond class certification, the sole issue would be sovereign

⁶ *Cf.* DOR Brief at 23.

⁷ The patients preserved the argument that there was no appellate jurisdiction to review the untimely appeal of sovereign immunity issues in the class certification appeal. *See* Mot. Disc. Rev., 5/24/24, at 9-14; Pet. Reh’g of Appellees Amelia Long *et al.* as Representatives of a Class, Case Nos. 2023-CA-0398 and 2023-CA-0411, 3/21/24, at 5-7.

immunity: whether it applies at all and, if so, whether it has been waived. *Baker v. Fields*, 543 S.W.3d 575 (Ky. 2018). In interlocutory immunity appeals, “the scope of interlocutory appellate review should be limited to the issue of immunity, and no substantive issues.” *Id.* at 578. “Otherwise, interlocutory appeals would be used as vehicles for bypassing the structured appellate process.” *Id.*

The merits of the patients’ underlying claims are not within the jurisdictional scope of this appeal. *Id.* Thus, the Court of Appeals did not – and could not – question the circuit court’s holding that the patients had stated a claim that the Appellees acted without statutory authority in collecting these funds, or the sufficiency of any of the patients’ other legal challenges to the unlawful collections.

Still, the Appellees have spent many pages avoiding the sovereign immunity questions with efforts to portray their coercive and judicially unsupervised collection scheme as reasonable – UK does not even argue sovereign immunity issues until page 26 of its brief. But whether the statutory scheme really does authorize these collections or require a judgment, whether there is a valid takings claim, and whether the amounts are actually owed or not, are all issues that have yet to be adjudicated and are beyond the jurisdictional scope of this interlocutory immunity appeal.

Appellees assert that those merits questions are relevant and that sovereign immunity depends on whether patients’ funds were “due to the

state.”⁸ But in the unlikely event this Court finds that the answer to sovereign immunity depends on resolution of the merits of the patients’ claims – that is, whether the funds were validly owed and lawfully collected – then by definition the trial court would not have made a final adjudication of sovereign immunity, in which case there could be no proper interlocutory appeal of the immunity denial and the case should be remanded to the trial court for a final judgment. “[A] trial court’s order is not immediately appealable simply because immunity is at issue. If the trial court’s decision leaves the immunity question unresolved, that order is not immediately appealable.” *Upper Pond Creek Volunteer Fire Dep’t, Inc. v. Kinser*, 617 S.W.3d 328, 333 (Ky. 2020) (holding denial of immunity is not immediately appealable where “additional factual development was necessary to determine if governmental immunity applied” *Id.* at 334).

The question is whether immunity would bar the patients’ claims, even if they prevailed on the merits. The Court of Appeals answered yes, sovereign immunity bars any judicial remedy to order the return of a plaintiff’s own wrongfully confiscated private funds, no matter how unlawfully or unconstitutionally the state has acted in seizing those funds. That is not Kentucky law.

⁸ See, e.g., Appellee Brief of University of Kentucky and Morehead State University (“UK Brief”) at 31.

Here, the patients have denied that the funds were owed, and that the DOR and the Universities had any lawful authority to extrajudicially withhold or levy their property even if any funds were owed. *Ross v. Gross*, 188 S.W.2d 475 (Ky. 1945), and KRS 45.111 both recognize that immunity is no bar to recovery of such funds that the state had no authority or entitlement to receive. Appellees' argument that these exceptions and waivers of immunity are inapplicable because the Appellees were lawfully entitled to the patients' funds is a defense to the merits, not to sovereign immunity. Appellate review of that question must await final judgment. Thus, arguments about the circuit court's construction of the underlying collection statutes to require a judicial adjudication of debt; whether the patients actually owe any money; or whether the patients have stated a claim for an unconstitutional taking are not before the Court in this interlocutory appeal, just as they were not addressed in the Court of Appeals' Opinion (and are not the subject of this discretionary appeal for that reason as well). And it is beyond the scope of this Reply brief to address all of the new, non-immunity-related merits arguments raised for the first time in the Appellee briefs. Thus, as much as Appellees seemingly want to argue about anything but immunity, this Court's review is narrowly confined to that issue.

III. Sovereign immunity does not apply to the patients' efforts to recover their wrongfully seized funds.

Contrary to the Appellees' assertions, the patients here are not seeking to compel payment of general revenues collected from other taxpayers for

their private benefit. The patients merely seek return of their own money, which was seized by the state without notice or adjudication of any actual debt, and with no valid statutory authority. Sovereign immunity only protects the state's funds: it does not bar recovery of a private citizen's own specific funds that were wrongfully collected or received by the state. *See, e.g., Ross*, 188 S.W.2d 475. The question is not one of waiver. Sovereign immunity simply does not apply to such claims, which seek to return private citizen's own funds that the state has wrongfully seized.

DOR argues that there are no "specific" funds or property that can be returned here because the wrongfully seized funds have been distributed and spent.⁹ Under that logic, any claim for restitution would be defeated if the state spends the money that it had unlawfully received. That is not Kentucky law. No Kentucky case has ever held that the right to restitution or recovery of one's own funds is limited to the same literal physical (or digital) dollars that were taken from a plaintiffs' possession. DOR's argument also ignores the fact that money is fungible. The amounts are clear and can indeed be returned.¹⁰

⁹ *Cf.* Appellee Brief of Dept. of Revenue ("DOR Brief") at 30.

¹⁰ Repeated references by all of the parties and the amicus to the size of any future potential judgment are similarly unavailing and suggest this Court should prioritize the magnitude of the damages over the rule of law. *See* DOR Brief at ii, 9, 28; Amicus Brief of Commonwealth of Kentucky ("Amicus Brief") at 6, 17. First, nothing in the record addresses the ability of any party to refund the wrongfully seized funds. Nor is it relevant. The law does not forgive wrongful seizures merely because a large amount of money was wrongfully taken. "The concept that the government can do no wrong or that

Adopting the argument made by the amicus and articulated by the Court of Appeals, Appellees also argue that *Ross v. Gross* does not apply because the decision does not expressly reference sovereign immunity.¹¹ While *Ross* did not use the specific words “sovereign immunity,” the legal issue in that case was undeniably the same: whether the state could be compelled to refund money that was wrongfully collected without any legislative appropriation under Kentucky Constitution Section 230.

The Attorney General’s argument that *Ross* did not discuss Kentucky Constitution Section 231 misses the point. Kentucky Constitution Section 231 defines the legislature’s power to *waive* sovereign immunity where Kentucky Constitution Section 230 would otherwise bar ordering payment from the state. *Ross* held that Kentucky Constitution Section 230 did not apply at all, because the suit sought return of money that never properly belonged to the state. That is, *Ross* is not about waiver, but about cases where sovereign immunity does not apply at all. Thus, there was no reason to address the legislature’s authority to waive immunity under Section 231. The legislature need not waive immunity where it does not exist.

the government cannot afford to compensate those whom it wrongs in circumstances where a private entity would be required to pay is unacceptable in a just society.” *Calvert Inv., Inc. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 805 S.W.2d 133, 138 (Ky. 1991) (cleaned up).

¹¹ *Cf.* DOR Brief at 29; UK Brief at 33-34.

IV. If sovereign immunity applies, it has been waived.

Even if sovereign immunity applied to suits for return of wrongfully collected private funds, the General Assembly has waived that immunity. First, this Court specifically recognized that KRS 45.111 is indeed a waiver of immunity. *See Beshear v. Haydon Bridge Co., Inc.*, 416 S.W.3d 280, 291 (Ky. 2013) (“*Haydon Bridge II*”). Second, KRS 131.565 and .570 also waive immunity for wrongfully retained tax refunds.

A. KRS 45.111 waives sovereign immunity for wrongful collection claims.

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.¹²

And this Court has acknowledged that “the refund provisions of KRS 45.111 constitute a limited waiver of sovereign immunity.” *Haydon Bridge II*, 416 S.W.3d at 291.

Appellees argue that this waiver can only apply when there has been a determination that funds are not “due to the state.”¹³ Unlike *Haydon Bridge II*, the patients here dispute that these funds are or were “due to the state,” and the circuit court agreed with the patients. That issue is outside the

¹² The relevance of DOR’s insistence that the statutory language was not adopted until 1982 is unclear. *Cf.* DOR Brief at 40. But it cannot be disputed that the statutory language was adopted years earlier and merely moved from KRS 45.020 and re-enacted into KRS 45.111 at that point.

¹³ *See, e.g.*, UK Brief at 31; DOR Brief at 33-34.

parameters of this interlocutory appeal. In *Haydon Bridge II*, there was no question that the state lawfully came into possession of the funds. The dispute was about what the state did with the money after it was properly received. The petitioners in *Haydon Bridge II* acknowledged that their payments into the Benefit Reserve Fund (“BRF”) were properly paid and collected; they only challenged the state’s diversion of those funds from the BRF to the General Fund. That is not the circumstance here. The patients dispute whether the funds were owed **and** – whether or not the funds were owed – whether the state had the lawful authority to seize or retain the funds.

Appellees also argue that the presence of “may” in the statutory language means that KRS 45.111 does not authorize the refunds here.¹⁴ That argument directly conflicts with this Court’s decision in *Haydon Bridge II*. The argument also ignores the point of KRS 45.111: that the Finance Cabinet is authorized to – *i.e.*, **may** – pay refunds for funds “determined” to be wrongfully collected, without the need for a legislative appropriations. That is the definition of a waiver of sovereign immunity. If a court makes such a “determination,” pursuant to a judgment, then it cannot be said that compliance is merely discretionary. A state officer subject to a judicial judgment has no discretion to refuse compliance, unless Kentucky Constitution Section 230 and sovereign immunity preclude that compliance.

¹⁴ *Cf.* DOR Brief at 39.

The purpose of KRS 45.111 is to make clear that sovereign immunity does not preclude compliance.

Even further off point is DOR’s argument that KRS 45.111 is only “a limited waiver of Kentucky Constitution Section 230 ... [but] is by no means a waiver of Kentucky Constitution Section 231.”¹⁵ Kentucky Constitution Section 231 is the constitutional authority for the legislature to waive immunity. It would make no sense for the legislature to waive its own authority to waive sovereign immunity. The patients have not asserted that KRS 45.111 is a waiver of Kentucky Constitution Section 231. Instead, the statute is an *exercise* of the General Assembly’s power under Section 231 to waive immunity as it sees fit.

B. KRS 131.565 and KRS 131.570 waive immunity for wrongfully retained tax refunds.

KRS 131.565 and KRS 131.570 expressly address litigation seeking damages from DOR for wrongfully withheld tax refunds. That is an express waiver of sovereign immunity.

Again trying to raise merits issues, Appellees argue that the trial court’s interpretation of these statutes is incorrect because it is premised on a false assumption that the funds at issue belong to the patients. But that is incorrect. The circuit court made that determination. And if it had not, and

¹⁵*Id.*

the merits question is dispositive of immunity, the only recourse would be for this Court to remand for the circuit court to make that finding.

On the waiver question before the Court, KRS 131.565 could not be clearer in waiving immunity: It expressly requires the requesting agency (*i.e.*, the state agency creditor who receives the withheld tax refund) to indemnify DOR and remit payment for any “**damages**, court costs, attorneys fees, and any other expenses” from “**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.**” (emphasis added).

Similarly, KRS 131.570(4) expressly directs that when a refund is withheld “erroneously,” DOR “**shall promptly refund** to the taxpayer the appropriate amount ... with interest.” (emphasis added).

DOR implausibly suggests that the explicit references to “damages” and “litigation” somehow reflect the fact that this statutory scheme was Kentucky’s first foray into debt collection, and the only “expenses” contemplated would be litigating defenses incurred if DOR is “dragged into any dispute between the referring agency and the agency debtor.”¹⁶ But DOR offers no legal support for this narrative about the legislative intent beyond its own conjecture, nor does it explain how DOR could be dragged into an action between the agency and debtor as to the validity of the underlying debt. Further, DOR’s conjecture does not match the statutory language,

¹⁶ DOR Brief at 46.

which speaks expressly of “damages” awarded in litigation and orders DOR to “promptly refund” erroneously withheld refunds – exactly the kind of claims at issue here.

UK’s argument that KRS 44.030 somehow bars payment is similarly unpersuasive.¹⁷ While it might provide a potential offset defense on the merits of the patients’ claims, it is not an immunity question and is well beyond the scope of this interlocutory appeal. Application of the statute also depends on an adjudication of the patients’ indebtedness, which has not occurred and is therefore premature.

V. Separation of powers concerns are unfounded.

Citing *Haydon Bridge II*, DOR echoes the argument by the amicus that a denial of sovereign immunity here raises separation of powers concerns.¹⁸ But the separation of powers concerns in *Haydon Bridge II* were unique – those plaintiffs were asking the court to shift money between two state funds, not merely to give the funds back to the person from whom they had been wrongfully collected. The *Haydon Bridge II* plaintiffs thus invited the courts to micromanage the General Assembly’s budgetary accounting and spending power. Usurping the legislative function of appropriating budget revenues is not the same thing as ordering the return of wrongfully collected money.

¹⁷ UK Brief at 37.

¹⁸ See DOR Brief at 35-37; Amicus Brief at 8.

Nor does the potential size of any eventual judgment that might be entered in this case call for a more expansive view of sovereign immunity, or for judicial abdication to the Executive and Legislative Branches to devise their own remedies for any wrongdoing they are adjudicated to have done. There is no special immunity for large judgments in cases where immunity would not otherwise apply. Appellees' argument effectively asks the Court to excuse their potential liability because the magnitude of their unlawful action is so great they cannot afford to compensate their victims. The Court would not be swayed by that argument by any private defendant, and there is no constitutional basis to decide differently in this case. This Court recently addressed a similar argument: "The argument is essentially that because the damages may be really high, we should find governmental immunity. Kentuckians, however, have a higher expectation of this Court as impartial arbiters of the law than to accept such a blatantly results-oriented argument. . . ." *Univ. of Ky. v. Regard*, 670 S.W.3d 903, 920 (Ky. 2023).

Appellees' attempt to analogize this case to *Rose v. Council for Higher Education*, 790 S.W.2d 186 (Ky. 1989), is entirely off base. In *Rose*, the Court confined itself to declaring the public education system unconstitutional, but declined to order specific remedies, instead deferring to the Executive and Legislative Branches to bring the public school system into constitutional compliance. That decision was based on the fact that "remedying" the unconstitutional condition required detailed restructuring of the state's

public educational system, which is fundamentally a policymaking task properly reserved for the political branches. *Rose*, 790 S.W.2d at 211-12. Here, by contrast, the remedy is simply ordering the return of specific sums of money that are judicially determined to have been wrongfully collected. That is a quintessential judicial function, not a legislative or policymaking one, so *Rose* does not apply.

CONCLUSION

For all these reasons, the Court of Appeals’ decision should be REVERSED, and the Franklin Circuit Court’s denial of UK’s and DOR’s Motions for Judgment on the Pleadings based on sovereign immunity should be AFFIRMED.

Respectfully submitted,

/s/Griffin Terry Sumner
Counsel for Appellees

CERTIFICATE OF COMPLIANCE

It is hereby certified that this document complies with the word limit of RAP 31 because, excluding the parts of the document exempted by that rule and RAP 15, this document contains 4,013 words.

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