Supreme Court of Kentucky

No. 2024-SC-0229

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

Electronically Filed

AMELIA LONG, *et al.,* APPELLANTS,

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

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

BRIEF FOR APPELLANTS AMELIA LONG, *et al.*

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CERTIFICATE OF SERVICE

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INTRODUCTION

This suit challenges the state's unlawful and unconstitutional collection of state agency debts – including levies on accounts and wages, property liens, and tax refund withholdings – with no judicial supervision or adjudication of the debt. The Court of Appeals held that, even if these collections were unlawful, sovereign immunity left no judicial recourse to recover the money.

The Court of Appeals erred. First, the court did not have appellate jurisdiction to review the immunity issue, because this interlocutory appeal was taken from a class certification order under CR 23.06, and such appeals are strictly limited to certification issues only. There was no timely appeal from the circuit court's actual immunity ruling, issued six months earlier.

Second, the Court of Appeals is wrong on the merits. Sovereign immunity does not bar a claim for recovery of one's own funds that were wrongfully collected by the state, which does not divert general revenues to private parties. Even if immunity applied, this Court has recognized that KRS 45.111 waives immunity for such claims. KRS 131.565-.570 also waives immunity for wrongful tax refund withholdings. And Kentucky law is clear that immunity never bars constitutional takings claims.

STATEMENT REGARDING ORAL ARGUMENT

This appeal raises fundamental questions of broad significance to Kentucky courts and the people of the Commonwealth. Oral argument is requested.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

This appeal challenges the practices of Defendants-Appellees University of Kentucky ("UK") and the Department of Revenue ("DOR") to engage in coercive collection of allegedly unpaid medical accounts. A related appeal, *University of Kentucky v. Bennett*, No. 2022-CA-1276, raises a similar challenge to the collection of educational accounts. Plaintiffs-Appellants are a class of former patients treated at UK's medical facilities who were subject to the challenged debt collection practices. These practices have affected more than 20,000 patients and resulted in unlawful collections of tens of millions of dollars.[1]

Coercive collection of unadjudicated, alleged debt

Prior to 2008, UK collected medical accounts like any private hospital. If informal collection failed, it would obtain a judgment on the account and pursue available judicial remedies for collection, with the attendant due process safeguards for debtors, such as the constitutional right to a trial by jury on the validity of the purported debt.

Beginning in 2008, however, UK began to refer its unpaid medical accounts to DOR under the guise of KRS 45.237-.238 and 45.241. DOR then

[1] This Court previously addressed one narrow issue relating to these collection practices in *University of Kentucky v. Moore*, 599 S.W.3d 798 (Ky. 2019), which determined that UK was an executive branch "agency" under the debt collection statutes here. But many other issues remain, some of which are presented here.

added interest, plus a 25% collection fee that it retained on collection.[2] DOR then began coercive collection measures as if the debt were an unpaid tax, including levies on wages and accounts and tax refund withholdings under KRS 131.130, *et seq*., without UK obtaining any judgment on the account and without DOR submitting to any judicial supervision.[3]

Judge Wingate has squarely ruled that these statutes do not allow DOR to collect UK's healthcare accounts. KRS 45.237(4) allows certain Executive Branch agencies to request that DOR collect "improper payments" made to third parties by the agency "due to error, fraud, or abuse." Judge Wingate ruled that KRS 45.237-.238 clearly did not apply here:

> KRS 45.237 and KRS 45.238 are not general debt collection statutes. Instead, they are narrow in scope—providing a means for executive agencies to recover funds that an agency has "certified" to have improperly paid out, due to causes like error, fraud, and abuse. The statutes do not allow an agency to refer its ordinary trade accounts to the Department of Revenue.[4]

Judge Wingate thus held that "KRS 45.237 and KRS 45.238 do not allow the University to refer its patient accounts to the Department of Revenue for collection, because those accounts were not and could not be certified as "improper payments" that were made "due to error, fraud, or abuse."[5]

[2] RA vol 623-659: 2nd Am. Compl., 4/9/20, at ¶¶ 16-17, 26-27, 35-36, 42-43, 51-52.

[3] *Id.* at ¶¶ 18-22, 28-30, 37-38, 44-47, 53-56, 58.

[4] RA vol 10, 1360-1369: Order, 8/15/22 at 3 (attached as APX B).

[5] *Id.* at 5.

Similarly, Judge Wingate found that KRS 45.241, which was enacted separately from KRS 45.237-.238, did not permit DOR to collect UK HealthCare accounts, unless they had been "liquidated" as required by KRS 45.241(6). A "liquidated debt" is defined at 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 appeal and legal actions have been exhausted*…" KRS 45.241(1)(b)(1) (emphasis added). Judge Wingate then found that:

> KRS 45.241 requires the University to "liquidate" a patient account before referring the account for collection by the Department of Revenue. The University may "liquidate" an account 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.[6]

It is undisputed that UK did not secure a judgment against any class member, and therefore that it did not refer "liquidated debts" to DOR.

Judge Wingate's rulings on KRS 45.237-.238 and KRS 45.241 are not reviewable by the Court in this interlocutory appeal, but they do establish the narrow issue before the Court: when the Plaintiffs have properly stated a claim that the State has taken or received money that it had no right to keep, does the doctrine of sovereign immunity preclude the aggrieved citizen from recovering that money? The Court of Appeals answered in the affirmative.

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). But before

[6] RA vol 10, 1360-1369: Order, 8/15/22 at 6 (attached as APX B).

this legislative action to halt these collection actions by DOR and UK, tens of millions of dollars were unlawfully collected from more than 20,000 class members.[7]

The patients

The class members are thousands of former UK Healthcare patients who had their accounts unlawfully referred to DOR for collection. DOR added interest and its 25% fee to the account, and then levied against the patients' wages and bank accounts, offset their Kentucky individual tax refunds, and filed liens against their real and personal property, without any adjudication of the validity of the purported debt.

The named class representatives' experience show the financial and other injuries that UK and DOR inflicted on the patients.

Amelia Long was treated during two visits to UK healthcare facilities in 2012 and 2013.[8] Ms. Long had health insurance through a Medicaid plan, or else should have had costs covered through UK's financial assistance program.[9] She never received any itemized bill or other communication about an alleged medical debt.[10] Indeed, the first knowledge of, or communication about, any alleged debt was when DOR levied Ms. Long's wages while she

[7] As of February 2018, DOR had improperly collected more than $57 million. Extrapolation suggests that amounts would have exceeded $70 million by October 2019, and may now have exceeded $90 million. RA vol 5, 623-659: 2nd Am. Compl., 4/9/20, at ¶ 66.

[8] *Id.* at ¶ 13.

[9] *Id.*

[10] *Id.* at ¶ 14.

was working as a veterinary technician.[11] Ms. Long contacted DOR and was advised her only option was a payment plan.[12] Later, when pregnancy complications forced her to temporarily stop working, those payments paused.[13] One day after Ms. Long gave birth, DOR levied against her bank account.[14]

Karen Devin was treated for a cardiac issue at a UK healthcare facility in 2013.[15] She explained her financial condition and lack of insurance to UK, which has her financial forms and told her that she should be eligible for financial assistance.[16] She was never told differently and never received any itemized bill or communication about any alleged medical debt.[17] Her first notice of any alleged debt was when DOR offset her individual state income tax refund in 2016.[18] She was also told a payment plan was her only option, or else the levies and offsets would continue.[19]

Richard Hardy II was treated for kidney stones at a UK healthcare facility in 2012.[20] He told UK he had no insurance due to an employment

[11] *Id.* at ¶19.
[12] *Id.* at ¶ 20.
[13] *Id.*
[14] *Id.* at ¶ 21.
[15] *Id.* at ¶ 23.
[16] *Id.* at ¶ 23, 24.
[17] *Id.* at ¶ 25.
[18] *Id.* at ¶ 29.
[19] *Id.* at ¶ 30.
[20] *Id.* at ¶ 33.

change and gave UK information that should have informed UK that he should qualify for financial assistance, but UK never informed him whether he was in fact eligible for financial assistance.[21] He never received any itemized bill or other communication about an alleged medical debt.[22] Instead, Mr. Hardy learned of an alleged debt when DOR garnished his wages in 2015.[23] DOR later levied a bank account and filed a lien on property in Estill County.[24]

Tabitha Marcum's infant daughter was treated at UK in 2015.[25] She had health insurance that should have covered the treatments.[26] Ms. Marcum never received any itemized bill or other communication about medical debt with UK.[27] She learned of the alleged debt when her bank account was levied in 2018.[28] When she protested the levy, her protest was denied.[29] DOR eventually collected all of the amounts purportedly owing on her account, plus interest and the 25% collection fee assessed by DOR.

Karen Sansom began treatments with UK as early as 2011, when she had no employer-provided insurance but should have been eligible for

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[21] *Id.*
[22] *Id.* at ¶ 34.
[23] *Id.* at ¶ 37.
[24] *Id.*
[25] *Id.* at ¶ 40.
[26] *Id.*
[27] *Id.* at ¶ 41.
[28] *Id.* at ¶ 45.
[29] *Id.* at ¶ 46.

Medicaid.[30] She later was found to be disabled for purposes of Social Security, and hence eligible for Medicare, with an onset date prior to most of the medical services delivered to her by UK, and by providers employed by UK.[31] Ms. Sansom should have been eligible for Medicare, Medicaid and/or UK's financial assistance program, but UK never explained to her why UK had not found her eligible for these programs.[32] DOR filed a Notice of Lien on real property owned Ms. Sansom, who had to pay DOR to subordinate that lien and who then was forced into a payment plan with DOR.[33]

The patients' claims

This class action challenges these practices. The patients assert that the debt collection practices of UK and DOR are not authorized by the relevant Kentucky statutes; that DOR's retention of a 25% collection fee is unlawful; and that these practices violate various constitutional guarantees, including the prohibition on taking of private property without just compensation. The patients have also raised challenges to UK's billing practices, including violations of statutory prohibitions on balance-billing tied to UK's receipt of Medicaid funds.[34]

[30] RA vol 5, 623-659: 2nd Am. Compl., 4/9/20, at ¶48.
[31] *Id.* at ¶ 50.
[32] *Id.* at ¶ 53.
[33] *Id.* at ¶ 54.
[34] *See generally* RA vol 5, 623-659: 2nd Am. Compl., 4/9/20.

These practices allowed UK to collect accounts in ways that other healthcare facilities or other businesses cannot. 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 –all of which protect the due process rights of the patients.

The circuit court's denial of sovereign immunity defenses

UK and DOR asserted that sovereign immunity barred the patients claims.[35] To streamline the case, Judge Wingate suggested that the parties brief certain "threshold" issues that needed to be decided early in the case. The parties agreed that three such issues were: (1) the meaning of KRS 45.237-.238; (2) the meaning of KRS 45.241; and (3) whether the Defendants had immunity from the patients' claims.[36]

These issues were thoroughly briefed throughout the latter half of 2021.[37] Judge Wingate heard arguments and entered an order resolving what he called "threshold" issues. [38]

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[35] RA vols 1-2, 87-233, UK Mot. to Dismiss, 8/3/18; RA vol 1, 71-86: DOR Mot. to Dismiss, 8/3/18; RA vol 6, 822-847: UK Mot. for Judgment on the Pleadings, 10/4/21; and RA vol 6, 848-872: DOR Mot. for Partial Judgment on the Pleadings 10/4/21.

[36] *See* RA vol 5, 712-714, Pls' Mot. for Hearing Date, 9/30/21, and RA vol 7, 907-909, Order, 11/22/21.

[37] *See, e.g.,* RA vol 6, 783-821, 873-903: Pls' Threshold Br.; RA vol 6, 910-987: Resp. Threshold Br.

[38] RA vol 10, 1360-1369: Order, 8/15/22 (attached as APX B).

First, Judge Wingate determined that KRS 45.237-.238 did not authorize collection of the accounts at issue, and that KRS 45.241 required UK to obtain a judicial adjudication of the debt before a class member could be subjected to DOR's coercive collection practices.[39] The court did not address the merits of the patients' other statutory or constitutional claims.

Second, the court's threshold order denied the motions for judgment on the pleadings based on sovereign immunity. The court found that under *Ross v. Gross*, 188 S.W.2d 475 (Ky. 1945), sovereign immunity did not bar a claim for return of specific funds wrongfully collected by – and never vested in – the state, unlike claims for damages payable from general revenues as compensation for private injuries.[40] The court also held that sovereign immunity for such claims was waived by KRS 45.111, which provides that "[a]ny 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."[41] Based on these conclusions, the court did not need to reach the patients' other responses to the assertions of sovereign immunity.[42]

Neither UK nor DOR filed an interlocutory appeal following the threshold order, and the litigation continued.

[39] *Id.* at 3-4.
[40] *Id.* at 7-8.
[41] *Id.* at 8.
[42] *Id.* at 7-8.

Subsequently, in the related *Bennett* litigation, Judge Wingate entered an order addressing similar issues, again holding that the relevant statutes did not authorize the collection practices and declining to dismiss based on sovereign immunity.[43] Judge Wingate's sovereign immunity analysis in *Bennett* elaborated on his reasoning in this case and concluded that immunity was also waived for improper withholding of tax refunds. *See* KRS 131.570(4).[44] The *Bennett* order also noted that sovereign immunity is not a defense to constitutional takings claims, but did not address the merits of those claims.[45] The *Bennett* defendants appealed from that denial of sovereign immunity.

Class certification and interlocutory appeal

Several months after the immunity decision in this case, the circuit court granted class certification, finding that the claims arose from a uniform pattern of conduct and turned on the same legal questions.[46] The class certification order did not address any issues related to the merits of Defendants' sovereign immunity defense.

UK and DOR both filed notices of appeal within ten days of the class certification, as required by CR 23.06. UK's notice only sought appeal of the

[43] Order Denying Mots. Dismiss, 10/19/22, *Bennett, et al. v. Univ. of Ky., et al.,* No. 18-CI-975 (Franklin Cir. Ct.) ("*Bennett* Order") (attached as APX D).

[44] *Id.* at 6.

[45] *Id.* at 7 & n.5.

[46] RA vol 13, 1809-1823: Class Certification Order, 3/28/23 (attached as APX C).

class certification order.[47] But DOR's notice asserted that along with class certification, DOR was also appealing the denial of sovereign immunity from several months before.[48]

The Court of Appeals reverses the immunity denial in the appeal from the class certification order

DOR moved to hold its appeal in abeyance pending resolution of the *Bennett* appeal, or in the alternative for an extension of the briefing schedule, based on its purported attempt to appeal the related sovereign immunity issue in this case. The patients responded that the immunity ruling was not properly on appeal, because it was not timely appealed and CR 23.06 appeals are limited to class certification issues. The Court of Appeals granted an extension of the briefing schedule, without explanation, but otherwise denied DOR's requested relief.

After briefing and argument, the Court of Appeals issued an Opinion affirming the class certification but reversing the denial of sovereign immunity. 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.[49]

[47] RA vol 13, 1824-1828: UK Notice of Appeal, 4/5/23.

[48] RA 1-3, DOR Notice of Appeal, 4/6/23 (this reference is to the limited certified record in DOR's appeal, Case No. 2023-CA-0411).

[49] Court of Appeals Opinion, 3/1/24 ("Opinion") at 8 (attached as APX A).

On the immunity issue, the Court of Appeals held that the circuit court's ruling conflicted with this Court's decision in *Beshear v. Haydon Bridge Co.*, 416 S.W.3d 280, 291 (Ky. 2013) ("*Haydon Bridge II*"). The court reached that result, even though it acknowledged that *Haydon Bridge II* determined *Ross* and KRS 45.111 were inapplicable because the sums at issue in that case "were literally 'due to the state'" and "because the plaintiffs did not seek a refund of their premiums directly."[50] The Court of Appeals recognized that "important distinction between *Haydon Bridge II* and [this case], as Appellees assert the amounts collected for healthcare services were not due to the state" and Appellees did seek a refund.[51] The Court of Appeals, however, then ignored the very distinction that it recognized. The court held that because *Haydon Bridge II* did not permit monetary relief, however characterized, such relief was unavailable in this case.[52] Yet the court held that the patients' claims for declaratory relief were not barred by immunity, and that the availability of monetary relief pursuant to any declaratory relief was not yet ripe for review.[53]

ARGUMENT

The circuit court's denial of sovereign immunity should be reinstated and the Court of Appeals' decision should be reversed.

[50] *Id.* at 27.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 31-35.

First, the Court of Appeals did not have appellate jurisdiction to consider issues beyond the narrow question of class certification, including the issue of sovereign immunity. The Court of Appeals disregarded this Court's established precedent and the appellate rules about the need for strict adherence on the scope and applicable time limitations for interlocutory appeals from both class certification and immunity rulings. By agreeing to review the sovereign immunity defenses to the merits of the patients' claims in a CR 23.06 class certification appeal, the Court of Appeals paved the way for future litigants to smuggle otherwise unappealable merits issues into class certification appeals. By suggesting the appeal was a proper "collateral order" appeal from the circuit court's order denying immunity, even though that order was issued more than six months earlier with no appeal being taken, the Court of Appeals also set a precedent that allows government defendants to disregard time limits on interlocutory immunity appeals, sandbag appellate review of immunity decisions, and strategically disrupt the orderly resolution of claims in the circuit court.

Second, the Court of Appeals' immunity decision conflicts with Kentucky precedent about the inapplicability of sovereign immunity to claims for refunds of wrongfully collected funds, ignores clear statutory language waiving immunity, and mischaracterizes precedent from this Court, including *Haydon Bridge II*, about the meaning and scope of sovereign immunity and legislative waivers of such immunity. The Court of Appeals

decision sets a deeply troubling precedent that authorizes the government to wantonly seize private citizens' money with no lawful authority, and then leave those citizens powerless to pursue recovery of those funds in court, as it seeks to do to the patients in this case. No prior Kentucky decision has ever endorsed such a rule. This case should not be the first.

These are pure issues of law, which this Court reviews *de novo*. *Benningfield v. Field*s, 584 S.W.3d 731, 737 (Ky. 2019); *Hicks v. Ky. Emp.'s Mut. Ins. C*o., 686 S.W.3d 215, 219 (Ky. 2024). The Court of Appeals erred as a matter of law, and this Court should reverse the Court of Appeals' Opinion and affirm the decision of the Franklin Circuit Court.

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

The Court of Appeals disregarded the clear limitations on its own appellate jurisdiction to reach the sovereign immunity issue in this appeal.[54]

[54] There is no question of appellate preservation, at least not by the patients. Indeed, it is UK and DOR who are seeking appellate relief from the circuit court's decision, not the patients, so it is their burden to preserve any issues for appellate review. And DOR and UK failed to preserve ***any*** interlocutory appellate review of the August 15, 2022 immunity Order, at all, by failing to file a notice of appeal within 30 days of that Order.

The patients nonetheless preserved the argument that there was no appellate jurisdiction to review sovereign immunity in the class certification appeal. *See* Mot. Disc. Rev., 5/24/24, at 9-14; Br. for Appellees Amelia Long, *et al.* as Representatives of a Class, Case Nos. 2023-CA-0398 and 2023-CA-0411, 9/8/23, at 25-26; 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.

Regardless, the question of appellate jurisdiction cannot be waived. Jurisdiction is a prerequisite to action, and an appellate court has a mandatory obligation to determine its jurisdiction, whether or not the issue is raised by the parties. *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005).

This interlocutory appeal was taken from a class certification order under CR 23.06. This Court's precedents strictly limit appellate jurisdiction in CR 23.06 appeals solely to the question of whether class certification was proper, and do not permit the parties to smuggle otherwise non-appealable merits questions into class certification appeals.

While it is true that interlocutory appeals from orders denying a claim of immunity are permitted, such interlocutory appeals must be taken within the time limits for any notice of appeal. *See, e.g., Kennedy v. City of Cleveland*, 797 F.2d 297, 304 (6th Cir. 1986). Government defendants denied immunity cannot simply hold their interlocutory appeal rights in their back pocket and exercise them whenever they choose – in the middle of the litigation. Here, DOR did not seek to appeal the circuit court's order denying DOR's motion for judgment on the pleadings on immunity grounds until more than six months after the order was entered. That was untimely. The Court of Appeals' decision to ignore that delay effectively eliminates any time limitations on interlocutory immunity appeals and creates an unworkable precedent threatening orderly appellate procedures when immunity is at issue.

The presence of appellate jurisdiction is a "threshold issue," which "cannot be waived or conferred by agreement of the parties." *Childers v. Albright*, 636 S.W.3d 523, 526 (Ky. 2021). "Jurisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass

prior to having their substance examined." *Wilson*, 162 S.W.3d at 913. The Court of Appeals here plainly disregarded the limits of its own jurisdiction and reached out to decide immunity issues that were not properly before it. That decision should be reversed.

A. CR 23.06 narrowly limits appellate jurisdiction to class certification issues.

Initially, the Court of Appeals did not have jurisdiction to consider the sovereign immunity defenses to the merits of the patients' claims as part of CR 23.06 appeals from the circuit court's class certification order. 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.

Indeed, this Court has stressed that "[b]ecause of the strict parameters of interlocutory appeals, the ***only question*** this Court may address today [under CR 23.06] is whether the trial court properly certified the class to proceed as a class action lawsuit." *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430, 436 (Ky. 2018) (emphasis added). The Court in *Hensley* held it was necessary to "scrupulously respect the limitations of the crossover between (1) reviewing issues implicating the merits of the case that happen to affect the class-certification analysis and (2) ***limiting our review to the class certification issue itself***." *Id.* (emphasis added). The "only question" in an interlocutory CR 23.06 appeal is the "*procedural right*" to certification,

which is entirely "ancillary to the litigation of substantive claims." *Id*. at 437 (emphasis in original) (cleaned up).

Thus, in *Hensley*, the Court held it was "not at liberty on interlocutory appeal" to consider whether some claims should be dismissed for lack of subject-matter jurisdiction, because the only question it could consider was whether "the trial court ha[d] the requisite subject-matter jurisdiction to certify the class." *Id*. at 438. The other issues went to the claims' merits, not to the propriety of class certification.

Federal courts "have also been scrupulous about limiting Rule 23(f) inquiries to class certification issues," under the corresponding federal rule. *McKowan Lowe & Co. v. Jasmine, Ltd*., 295 F.3d 380, 390 (3d Cir. 2002). *See also, e.g.*, *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002) ("[A]n appeal under Rule 23(f) should be limited to review of class certification issues.").

The Court of Appeals ignored *Hensley* and other authorities limiting appellate jurisdiction in an interlocutory CR 23.06 appeal of a class certification order. The class certification order appealed by UK and DOR did not address the merits of the sovereign immunity issue at all.[55] The Court of Appeals Opinion, which affirmed the class certification order, likewise did not mention sovereign immunity in its class certification analysis, confirming

[55] RA vol 13, 1809-1823: Class Certification Order 3/28/23.

that the merits of the sovereign immunity defense did not affect the class certification decision.[56]

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 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 footnote in a class certification brief re-arguing every prior interlocutory ruling in the case and thereby permit interlocutory review of all of those issues on review of the certification decision. That is not the law. *Hensley*, 549 S.W.3d 430.

DOR has never articulated a reason why the merits of its sovereign immunity defense are relevant to the question of class certification, rather than to the ultimate merits of the case. Even if DOR's immunity argument were relevant to the class certification question, the Court of Appeals' jurisdiction would be limited to considering whether the immunity issue was capable of being resolved on a classwide basis, or instead depended on individualized factual inquiries (which it plainly does not). Appellate jurisdiction would not extend to the merits of whether UK and DOR were entitled to judgment on the pleadings dismissing the patients' damages

[56] *Cf.* Opinion at 8-19.

claims, which is the issue that the Court of Appeals improperly decided in this appeal.

B. The Opinion effectively removes any time limits on interlocutory immunity appeals.

The Court of Appeals also lacked appellate jurisdiction to review the circuit court's threshold immunity decision under its "collateral order" jurisdiction to review interlocutory orders denying immunity, because no defendant timely appealed the circuit court's immunity order. DOR's notice of appeal was filed more than six months later. And UK did not appeal from it at all.

Under RAP 3(1), a notice of appeal must be filed "no later than 30 days" after "the judgment or order being appealed."[57] This time limit "is both mandatory and subject to strict compliance." *Willis v. Willis*, 361 S.W.3d 341, 342 (Ky. App. 2012). If DOR wished to obtain interlocutory appellate review of the threshold sovereign immunity order, it needed to file an appeal within 30 days of its entry on August 15, 2022. DOR did not do so, and neither did it timely appeal the circuit court's Order denying DOR's motion to reconsider the immunity decision.[58] It instead waited more than six more months to attempt an appeal.

No authority suggests that interlocutory appeals of immunity denials are somehow exempt from the time limitations applicable to all other

[57] CR 72.02(2), the predecessor to RAP 3, contained identical language.
[58] RA vol 10, 1401-1402: Order, 9/19/22.

appeals. While *Breathitt County Board of Education v. Prater* holds that a party may appeal a denial of immunity "immediately," it does not hold that a defendant has an evergreen right to initiate an interlocutory appeal – and grind the rest of the case to a halt – at any time that it chooses after a denial of immunity. 292 S.W.3d 883, 887 (Ky. 2009).

To the contrary, in adopting a right of interlocutory appeal, this Court expressly followed the approach of federal courts for interlocutory immunity appeals. *See id*. (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Federal courts have repeatedly recognized that "the appealability of orders denying absolute and qualified immunity is governed by the same temporal limitations and subject to the same rules as other appeals, whether interlocutory or final," and therefore "any later effort to appeal would not be timely." *Kennedy v. City of Cleveland*, 797 F.2d 297, 304 (6th Cir. 1986). "The quid pro quo is obvious: in exchange for the defendant's right to interrupt the judicial process, the court may expect a reasonable modicum of diligence in the exercise of that right." *Id*. at 301. *See also, e.g*., *Napoli v. Town of New Windsor*, 600 F.3d 168, 170-71 (2d Cir. 2010). Without a timely notice of appeal from an interlocutory immunity order, review of these 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).

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*, 600 F.3d at 171. *See also Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 394-95 (6th Cir. 1993).

DOR's reliance 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), is wholly unwarranted. It does not apply. *Slattery* held the Court of Appeals could entertain 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. DOR did file a motion to reconsider the Threshold Order, but the circuit court denied that motion more than six months ***before*** DOR filed a notice of appeal.[59] The circuit court's only reference to immunity in the class certification order was to note that adjudicating the immunity issue would not require individualized findings, and therefore was a common issue appropriate for certification.[60]

Moreover, the unpublished *Slattery* Opinion's expansive view of government litigants' rights to obtain successive appeals on immunity rulings is against the weight of persuasive authority on the issue. *E.g.*, *Kennedy*, 797 F.2d at 304-05; *Sinclair v. Schriber*, 834 F.2d 103, 105 (6th Cir. 1987) ("*Forsyth* … did not contemplate … that plaintiffs might be subjected to an endless number of successive appeals before trial"); *Abel v. Miller*, 904 F.2d

[59] RA vol 10, 1401-1402: Order, 9/19/22.

[60] RA vol 13, 1809-1823: 3/28/23 Class Certification Order at 5.

394 (7th Cir. 1990) (Easterbrook, J.). In *Kennedy*, 797 F.2d at 305, for example, the Sixth Circuit held a party waived its right to interlocutory appeal of a denial of summary judgment on immunity by not appealing within 30 days, and could not resurrect that right by moving to reconsider the decision months later, particularly where "no new facts or previously unavailable legal arguments were offered and no good cause has been shown to excuse the inordinate delay."

The Court of Appeals took an even more expansive view than *Slattery*, concluding it was sufficient that DOR merely "indicated it would raise the immunity issue in its notice of appeal" of the class certification order.[61] But that reasoning creates a new rule that time limits are irrelevant to immunity appeals, as long as the issue is flagged in the notice of appeal. That is not the law in Kentucky, or anywhere. Here, DOR's notice of appeal was filed more than six months after both the August 15, 2022 order denying immunity, and the September 19, 2022 order denying the motions to reconsider. Such a late notice of appeal could not confer appellate jurisdiction to review the immunity ruling, no matter what the notice said.

The Court of Appeals also asserted review of the immunity issue "will promote efficient and economic resolution of this matter."[62] "Nevertheless, a court of appeals cannot create jurisdiction on a theory that it would be

[61] Opinion at 8.

[62] *Id.*

convenient to do so." *Bowers*, 346 F.3d at 412 n.8. It is a very slippery slope to hold that convenience is the proper limiting factor for appellate jurisdiction.

A right of interlocutory appeal does not permit a party to wait and see how the case develops, and then reach back and appeal any prior order addressing immunity, no matter how long ago it was entered. This Court should clarify that a party's right to an interlocutory appeal of an immunity denial does not mean it can do so whenever it pleases.

II. Sovereign immunity is no bar to the patients' claims here.

Beyond the lack of appellate jurisdiction over the immunity issue, the Court of Appeals' Opinion is incorrect on the merits as well. The Opinion holds that even assuming that UK and DOR wrongfully seized and appropriated the patients' personal funds without lawful authority, sovereign immunity nonetheless bars any suit to recover the funds that were wrongfully seized.

That is not the law in Kentucky. To the contrary, Kentucky precedent holds that sovereign immunity does not apply, at all, to an action for recovery of a plaintiff's ***own*** funds that were unlawfully collected or paid to the state, rather than a claim seeking money damages to be paid from the state's general revenues (collected from all taxpayers) to compensate for private injuries. The patients here are not seeking to compel payment of general revenues collected from other taxpayers for the patients' private benefit. They merely seek the return of their own money, which was wrongfully seized by

the state without notice or adjudication of any actual debt, and without any valid statutory authority. Sovereign immunity has never protected such actions by the government.

And even if sovereign immunity did apply to such claims, this Court has recognized KRS 45.111 is a legislative waiver of immunity for suits seeking recovery of wrongfully collected funds. *Haydon Bridge II,* 416 S.W.3d at 291. Another statute, KRS 131.570, provides a specific waiver of immunity for wrongfully withheld tax refunds. Finally, sovereign immunity is no defense to the patients' constitutional takings claims, which have yet to be adjudicated.

In this interlocutory appeal, the sole question before the Court is whether – if the patients prevail on the merits of their claims – sovereign immunity nonetheless bars any right to recover those funds. *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 circuit court held that the patients have stated a claim that funds were seized unlawfully, and review of that ruling must await a final judgment. What UK and DOR have requested here, which the Court of Appeals obliged, is a ruling that even if they unlawfully take private citizens' money, sovereign immunity protects them from ***any*** effort to get it back in court.

While sovereign immunity is well established in Kentucky, this Court has nonetheless cautioned that "sovereign immunity should be limited strictly to what the Constitution demands," because "[t]he concept that the government can do no wrong or that 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) (Liebson, J.) (cleaned up). Accordingly, "[e]xcept for an occasional lapse, [the Court] has marched along this enlightened path" and declined to expand the scope of immunity beyond its historical origins. *Id.*

The Court of Appeals turned sharply from this "enlightened path," and disregarded both established limitations on the fundamental scope of sovereign immunity and express legislative restrictions on that immunity. As a result, the lower court's Opinion creates a dangerous precedent permitting the state to unlawfully seize – and then retain – private funds. This Court should reverse, and restore Kentucky law to the proper path.

A. Sovereign immunity does not apply to the wrongful collection claims.

Kentucky has long recognized that sovereign immunity does not bar recovery of one's own specific funds that were wrongfully collected by the state. *E.g.*, *Ross*, 188 S.W.2d 475. This is not a question of waiver. Sovereign immunity simply does not apply to such claims, which do not seek to divert

general revenues of the state to private injuries, but merely seek to return plaintiffs' own funds that the state has wrongfully seized. [63]

1. Sovereign immunity prevents the diversion of general government revenues to private individuals, without legislative authority.

"Sovereign immunity protects public coffers or, as is sometimes denominated, the public purse." *Haydon Bridge II*, 416 S.W.3d at 291. *See also, e.g.*, *Jacobi v. Holbert*, 553 S.W.3d 246, 256 (Ky. 2018) ("[T]he historical origin of the doctrine of sovereign immunity was, in part, the protection of the king's purse.") (cleaned up). Accordingly, "sovereign immunity is founded on the notion that the resources of the state … cannot be compelled as recompense for state action that harms a plaintiff through the ordinary suit-at-law process." *Com. v. Ky. Ret. Sys.*, 396 S.W.3d 833, 836 (Ky. 2013). That is, the doctrine recognizes that the general revenues of the state – derived from the contributions of all taxpayers – cannot be levied to compensate

[63] As discussed in Part I of the patients' argument, DOR and UK failed to preserve ***any*** interlocutory appellate review of the August 15, 2022 immunity Order, at all, by failing to file a notice of appeal within 30 days of that Order. And – as the successful party in the circuit court – the patients did not have any duty to preserve arguments. Nonetheless, the patients did preserve the issue as they extensively argued below that sovereign immunity does not apply to the wrongful collection claims. *See* Mot. Disc. Rev., 5/24/24, at 15-19; Br. for Appellees Amelia Long, *et al.* as Representatives of a Class, Case Nos. 2023-CA-0398 and 2023-CA-0411, 9/8/23, at 25-26; 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; RA vol 7, 910-987: Pls. Resp. Threshold Issues, 11/22/21, at 21-22; RA vol 6, 783-821: Pls. Br. Threshold Issues, 10/04/21, at 27-29; RA vol 2, 242-261: Resp. Mtns. Dismiss, 9/6/18, at 10-13.

private parties for private injuries, even injuries caused by the state, absent consent of the legislature. *Haydon Bridge II*, 416 S.W.3d at 291.

2. Sovereign immunity has never applied to prevent private individuals from recovering their own funds that were wrongfully seized or collected by the state.

This doctrine has no application to a suit to recover specific funds that were improperly collected or seized by the state. Such a suit does not divert general taxpayer revenue to private individuals. It merely returns specific property that the state never had a right to take in the first place, and which therefore never lawfully became part of the "public purse."

That is the express holding of *Ross v. Gross*, 188 S.W.2d 475 (1945). There, officers of Harlan County sued to recover funds wrongfully paid to the state under a statute applicable only to counties with a population exceeding 75,000, which Harlan County did not have. The Attorney General conceded the funds should not have been collected, and accordingly, "the sole question" was whether the funds could be refunded from the General Fund without "legislative appropriation for that purpose" under "Section 230 of the Constitution." *Id.* at 477. The Court held that because the money was not properly subject to collection, "its payment into the State Treasury did not vest the State with title thereto or a right to its custody," so no appropriation was required. *Id.*

As the Court explained, "the purpose of the constitutional provision [Section 230] … was to prevent the expenditure of the State's money without

the consent of the Legislature," and "it could not have been the intention of the framers of the Constitution to require the true owner of money so placed in the State Treasury to await the pleasure of the Legislature in order to recover that which had been adjudged by a Court of competent jurisdiction to have been at all times his own." *Id*. *Accord Thompson v. Ky. Reinsurance Ass'n*, 710 S.W.2d 854, 857-58 (Ky. 1986) (discussing *Ross*, concluding employer premiums paid into reinsurance fund "are clearly *private* funds, as opposed to public, and are therefore not subject to control by the General Assembly") (emphasis in original).

This principle had also been recognized in *Barnes v. Stearns Coal & Lumber*, 175 S.W.2d 498 (Ky. 1943), which ordered the Treasurer to refund monies mistakenly paid into the Unemployment Insurance Fund. "Money paid without consideration and which in law, honor, or good conscience was not payable ought in law, honor, and good conscience to be recoverable, and that rule applicable to transactions between individuals should be generally made applicable to municipalities and other governments." *Id*. at 501 (quoting *Great Atl. & Pac. Tea Co v. City of Lexington*, 76 S.W.2d 894, 895 (Ky. 1934)).

The Court of Appeals tried to side-step *Ross* and cases applying it by noting simply that the *Ross* decision does not specifically use the phrase "sovereign immunity."[64] But *Ross'* conclusion that the court could order a

[64] Opinion at 29.

refund of monies from the Treasury despite the lack of appropriations goes to the heart of the sovereign immunity question. Indeed, the Court of Appeals expressly premised its application of sovereign immunity on the fact that "there has been no direct appropriation directing the return of Appellees' money."[65] *Ross* squarely holds that no appropriation is necessary under these circumstances.

Nor is this principle anomalous to Kentucky law. To the contrary, it is widely recognized that "[g]enerally, … where money not belonging to the State is paid into the state treasury, the payment does not vest the State with title or the right to custody of the money. Accordingly, ***payment of the money to the true owners may be compelled although*** the money has been deposited in the State's general fund and ***there is no legislative appropriation***." 81A CORPUS JURIS SECUNDUM, States § 407 (emphasis added).

Many other jurisdictions have therefore recognized that sovereign immunity does not apply to actions for recovery of one's own funds collected without lawful authority by the state. *Gatesco, Inc. v. City of Rosenburg*, 312 S.W.3d 140, 144 (Tex. App. 2010) ("[G]overnmental immunity will not defeat a claim … seeking the refund of illegally collected taxes or fees" paid under compulsion or duress); *Bill Stroop Roofing, Inc. v. Metro. Dade Cnty.*, 788 So.2d 365, 366 (Fla. Dist. Ct. App. 2001) (sovereign immunity did not bar to

[65] *Id.* at 30.

suit for "refund of illegally extracted monies"); *River Fleets, Inc. v. Carter*, 990 S.W.2d 75, 77 (Mo. Ct. App. 1999) ("[S]overeign immunity did not prevent the refund of fees improperly collected….").

These cases, like *Ross*, recognize that mere "[p]ayment of funds into the state treasury does not necessarily vest the state with title to those funds. Only monies raised by the operation of some general law become public funds." *Navajo Tribe v. Ariz. Dep't of Admin.*, 528 P.2d 623, 624 (Ariz. 1974) (en banc) (citing *Ross*, 188 S.W.2d 475).

Sovereign immunity prevents the diversion of funds collected from the ***general public*** to compensate for an individual's personal injuries without legislative authorization. It does not authorize the state to "'extract millions in unlawful fees and fines, decide the whole thing was a mistake, keep the money, and insist the whole matter is moot.'" *McDaniel v. Town of Double Oak*, 02-10-00452-CV, 2012 WL 662367, at *8 (Tex. App. Mar. 1, 2012) (quoting *Lowenburg v. City of Dallas*, 261 S.W.3d 54, 59 (Tex. 2008)) (attached as APX E).

Because sovereign immunity does not apply to these claims in the first instance, there is no cause to consider whether immunity has been waived. *Nivens v. City of League City*, 245 S.W.3d 470, 474 (Tex. App. 2007) (holding unlawfully collected funds "should not be treated as property of the State or municipality to which the principles of sovereign immunity apply" and "[n]o legislative consent to sue is needed under these circumstances").

3. *Haydon Bridge II* does not support the Court of Appeals' analysis.

The Court of Appeals cannot rely on *Haydon Bridge II* on this issue. In *Haydon Bridge II*, this Court did not question the principle in *Ross* and cases applying it. It merely found *Ross* inapplicable to the claims at issue in that case because: (1) the *Haydon Bridge* plaintiffs did not contend the money was wrongfully collected; (2) the funds at issue in *Haydon Bridge II* included both public and private funds, and were not limited to specific funds belonging to plaintiffs; and (3) the *Haydon Bridge* plaintiffs were "not seeking a refund [of money] to private payors," but sought an intergovernmental transfer from one agency of government to another. 416 S.W.3d at 290. The employer plaintiffs in *Haydon Bridge II* did not seek the return of any funds, or allege any funds were wrongfully collected from them. They merely claimed that those funds, once paid, could not be diverted from the Workers Compensation Benefit Reserve Fund to the General Fund. *Id*.

Haydon Bridge II distinguished other jurisdictions' wrongful collections cases on the same basis: those cases "involved monies that were improperly collected," while the *Haydon Bridge* plaintiffs did ***not*** allege any funds were improperly collected and were ***not*** seeking to have "funds restored to the employers." *Id*. at 290 n.4.

By contrast, this case presents the precise type of claim that this Court stressed was ***not*** at issue in *Haydon Bridge II*. The patients here contend – and the circuit court expressly held – that the funds at issue were

"improperly collected" and that UK and DOR never lawfully obtained title to them, and the remedy they seek is a return of the wrongfully seized funds to their rightful owners.

4. The rule established by the Court of Appeals' Opinion immunizes government seizures regardless of the illegality or unconstitutionality of the government's actions.

Again, the merits of the patients' underlying claims are not within the jurisdictional scope of this appeal. *Baker*, 543 S.W.3d 575. Thus, the Court of Appeals did not – and could not – question the circuit court's holding that the patients had stated a claim that DOR and UK acted without statutory authority in collecting these funds, or the sufficiency any of the patients' other legal challenges to the unlawful collections.

DOR and UK have made great efforts to portray their coercive and judicially unsupervised collection scheme as reasonable. Those efforts, of course, ignore the General Assembly's recent decision to prohibit these exact practices to collect medical debt. They are also belied by the experiences of the patients here, many of whom did not even learn about the alleged existence of the debt – much less have an opportunity to dispute it – until DOR had already levied against their wages and bank accounts, and had withheld their tax refunds without notice.

But more importantly, those are questions to be resolved at the merits phase. The issue on appeal is simply, whether DOR and UK are immune from having to return any wrongfully collected funds and retain enjoyment of the

money, ***even if*** the patients prevail on their claims (as the circuit court has held they could) that the collection practices and assessment of draconian 25% collection fees are not statutorily authorized, are contrary to constitutional due process and takings protections, and violate statutory limits on billing Medicaid recipients, among other things.

The Court of Appeals 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. No Kentucky decision has ever embraced that principle, and Kentucky precedent is directly to the contrary, as is the weight of authority across the nation. This Court should reverse.

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

Even if sovereign immunity applied to suits for return of funds unlawfully collected by the state, KRS 45.111 expressly waives that immunity. This Court explicitly recognized in *Haydon Bridge II* that KRS 45.111 is a waiver of immunity for wrongful collection claims; it merely held the claims in *Haydon Bridge II* were not wrongful collection claims. But wrongful – indeed, unlawful, arbitrary, unconstitutional, and harassing – collection is precisely what happened to the patients here. Thus, sovereign immunity is waived for these claims.[66]

[66] As the successful party in the circuit court, the patients did not have any duty to preserve arguments, but nonetheless argued below that sovereign

1. The General Assembly has broad authority to waive sovereign immunity, either expressly or implicitly.

When sovereign immunity applies, Sections 230 and 231 of the Kentucky Constitution delegate discretion to the General Assembly to authorize payment of claims from general revenues. *Haydon Bridge II*, 416 S.W.3d at 286-87 (citing *Reyes v. Hardin Cnty.*, 55 S.W.3d 337 (Ky. 2001)). Thus, "where sovereign immunity exists by reason of the Constitution, the General Assembly may extend or limit waiver [of this immunity] as it sees fit." *Ky. Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 329 (Ky. 1990). A legislative waiver may be found based on express language, or by clear implication from the statutory text and scheme. *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 346 (Ky. 1997); *Ky. Ret. Sys.*, 396 S.W.3d at 837-38.

Thus, a statute does not need to specifically reference "sovereign immunity" to be a waiver. *Benningfield*, 584 S.W.3d 731; *Madison Cnty. Fiscal Ct. v. Ky. Lab. Cabinet*, 352 S.W.3d 572 (Ky. 2011); *Dep't of Corr. v. Furr*, 23 S.W.3d 615 (Ky. 2000). It is sufficient that the structure and design of the statute makes clear the legislature intended to impose obligations on the sovereign.

For example, in *Benningfield*, this Court found immunity waived by anti-harassment provisions of the Workers' Compensation Act, even though "[t]he statute does not *expressly* waive immunity." 584 S.W.3d at 737

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immunity is waived by KRS 45.111. *See, e.g.,* Mot. Disc. Rev., 5/24/24 at 19-21; RA vol 2, 242-261: Resp. Mtns. Dismiss, 9/6/18, at 11-13.

(emphasis in original). Waiver was sufficiently implied from the fact that the provisions applied to all "employers," which was defined to include government employers, and because failing to recognize a waiver would frustrate the Act's clear purpose "'to safeguard all individuals from discrimination.'" *Id*. (quoting *Furr*, 23 S.W.3d at 617) (emphasis in original).

Applying these standards, there can be little doubt that KRS 45.111 sufficiently conveys a legislative intent to waive sovereign immunity, as this Court has already recognized.

2. As this Court expressly recognized in *Haydon Bridge II*, KRS 45.111 is a waiver of sovereign immunity for wrongful collection claims.

In *Haydon Bridge II*, this Court acknowledged that "the refund provisions of KRS 45.111 constitute a limited waiver of sovereign immunity" for suits seeking return of funds improperly collected by the state. 416 S.W.3d at 291. KRS 45.111 embraces the same principle underlying *Ross v. Gross*: that monies improperly collected by the state should be returned to their rightful owner, without the need for appropriations or a legislative waiver. The statute states:

> ***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.

KRS 45.111 (emphasis added).

This statute was originally enacted in 1968, only two years after enactment of the immunity waiver for express contracts in KRS 45A.245,[67] so the legislators who adopted it were no doubt conscious of their legislative prerogative to waive sovereign immunity.

DOR and UK nonetheless argue that KRS 45.111 is not a waiver because the statutory language includes the permissive "may." That directly conflicts with this Court's decision in *Haydon Bridge II*.

The argument that KRS 45.111 is not a waiver also shows a misunderstanding of the purpose of this statute. The point of the statute is to recognize that the Finance Cabinet is ***authorized*** to – *i.e.*, "may" – pay validly "determined" claims for refund of wrongfully collected funds, and "issue a warrant to disburse the funds," without the need for further legislative appropriations. If sovereign immunity applied, executive branch officials would be prohibited from doing so without legislative appropriations.

Thus, KRS 45.111 supplies standing legislative authority to issue warrants and disburse funds to pay valid refund claims for wrongfully collected money, without the need for further appropriations — the definition of a waiver of sovereign immunity. Authority to make payments in response to "determin[ations]" that payment is not due plainly encompasses juridical determinations. When that "determination" is made by a court as part of a

[67] 1968 Ky. Acts, Ch. 119, §14.

judgment, moreover, there can be no discretion to refuse payment, given KRS 45.111's explicit recognition that there was no need for additional legislative authority or appropriation. Indeed, KRS 45.111 adopts the explicit holding in *Ross v. Gross*, that repayment of such funds need not await a legislative appropriation.

DOR and UK have cited nothing in the legislative history, or any legal authority, to suggest that the use of "may" in the statute was intended to give executive branch officials the discretion to ignore and refuse to honor valid claims for return of funds that the state never had any entitlement to receive.

3. The Court of Appeals' waiver analysis misconstrues *Haydon Bridge II*.

While the *Haydon Bridge II* Court squarely – and correctly – recognized that KRS 45.111 waived immunity, it ultimately concluded that, like *Ross v. Gross*, the statute did not apply in that case because the *Haydon Bridge* plaintiffs did not allege any funds were improperly collected, or seek a return of wrongfully collected funds to their owners. 416 S.W.3d at 289. ("For the statute to apply, the funds would have to 'not … be due to the state' … and the refund would have to be due to the paying party….").

By contrast, that is precisely the claim here. Thus, under this Court's clear teaching in *Haydon Bridge II*, KRS 45.111 waives immunity for such claims.

The Court of Appeals Opinion nonetheless declined to follow this precedent because "we cannot read *Haydon Bridge II* to arrive at two opposite

conclusions: that sovereign immunity does not apply to claims for monetary relief –including claims for equitable restitution or for an injunction ordering the return of money – while also concluding sovereign immunity applies to relief which would require withdrawal from the state treasury."[68]

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 from them. 416 S.W.3d at 289-90. *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. *Id*. at 294 ("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 the state treasury.").

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

[68] Opinion at 28.

restitution, a refunding injunction, or simply damages. 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*.

Haydon Bridge II's significance here lies in the Court's recognition that KRS 45.111 represents a legislative waiver of immunity for suits to recover private funds wrongfully collected by the state. Because the students assert exactly those kinds of claims here, the Court of Appeals committed a clear error of law in holding that sovereign immunity bars their claims.

C. KRS 131.565(6) and .570 waive immunity for wrongfully retained tax refunds.

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.[69]

As the circuit court recognized, KRS 131.565(6) expressly contemplates judicial litigation seeking "damages" against DOR relating to withholding of

[69] This issue is properly addressed in this appeal. While the circuit court did not rely on KRS 131.565, or .570 in its August 15, 2022 immunity Order in this case, the court did invoke this waiver in its immunity Order entered several months later in the *Bennett* case. As discussed above, the August 15, 2022 immunity Order in this case was not timely appealed, and UK and DOR never moved to reconsider or amend that Order in this case, and instead attempted to smuggle an untimely appeal of the immunity Order into this class certification appeal. Had UK and DOR moved to amend the immunity Order, the circuit court would have had an opportunity to address the merits of the KRS 131.565 waiver. Since the issue is currently already before the Court in the companion *Bennett* appeal, *if* this Court is going to decide the sovereign immunity issues in this case, then judicial economy weighs in favor of addressing it now in both appeals.

tax refunds to collect debts on behalf of other Executive Branch agencies, and requires those agencies to indemnify DOR:

> Each state agency requesting the withholding of any individual income tax refund shall indemnify the department against any and all ***damages***, court costs, attorneys fees, and any other 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***.

KRS 131.565(6) (emphasis added).[70]

It is hard to imagine language more clearly contemplating litigation against the Commonwealth of the type here than this. It expressly recognizes the possibility of "litigation" seeking "damages" relating to "a refund withholding action requested by [an] agency."

Similarly, KRS 131.570 expressly contemplates refunding of income tax refunds wrongfully withheld on behalf of an agency:

> In 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. The ***department shall promptly refund to the taxpayer*** the appropriate amount of such returned funds with interest as provided in KRS 131.183(2).

KRS 131.570(4).[71]

[70] 10/19/22 *Bennett* Order (attached as APX D).

[71] In a footnote, the circuit court's order in *Bennett* quoted subsection (1) of this statute, rather than subsection (4), but the body of the order clearly refers to KRS 131.570 in its entirety as the basis for waiver. 10/19/22 *Bennett* Order (attached as APX D).

Thus, while it is true that waivers of sovereign immunity will be found "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, that standard is satisfied here. The express references in KRS 131.565 and .570 to "damages" and "litigation" concerning "refund withholding action[s]" plainly "leave no room for any other reasonable construction" than that the General Assembly contemplated civil lawsuits against DOR to recover refunds withheld on behalf of an agency.

This language is at least as explicit as other necessarily implied waivers found by Kentucky courts. *E.g.*, *Benningfield*, 584 S.W.3d 731; *Madison Cnty. Fiscal Ct.*, 352 S.W.3d 572; *Furr*, 23 S.W.3d 615; *Ky. Ret. Sys.*, 396 S.W.3d 833 (holding Kentucky retirement statutes waive immunity); *Lipson v. Univ. of Louisville*, 556 S.W.3d 18 (Ky. App. 2018) (holding Wage and Hour Act language direction to pay specified wage waived immunity).

There is no merit to the Court of Appeals' contention that these statutes are inapplicable because the state agencies referred the patients for collection under KRS 45.237 *et seq.*, and not KRS Chapter 131. KRS 45.237 *et seq*. do not provide any independent authority to withhold income tax refunds. They merely address general procedures for agency referrals of debt to the DOR. Once referred, KRS 131.565-.595 provides the sole authority to withhold this specific category of funds. KRS 131.595 says so explicitly: "***no***

Kentucky individual income tax refund shall be withheld for or transmitted to any other person, agency, officer, board, commission, corporation, institution, cabinet, department, or other organization ***except as provided by KRS 131.560 to 131.595***." *Id.* (emphasis added). Thus, any withholding of tax refunds must be conducted under KRS Chapter 131, including the statutory waiver of immunity in KRS 131.565(6) and .570.

Indeed, the waiver in KRS 131.565 expressly addresses claims to recoup tax refunds withheld by DOR when "requested by [an] agency," and KRS 131.570(4) similarly refers to tax refunds transferred to a "claimant agency," which is precisely what is at issue here. That referrals to DOR were purportedly made under KRS 45.237 *et seq.* in no way renders this waiver inapplicable.

Equally untenable is the Court of Appeals' reliance on the caption associated with KRS 131.560 *et seq.* in the Kentucky Revised Statutes – "Application of Refunds to Taxes Due" – which the Opinion misdescribes as the title of the statute.[72] The statutory heading in the KRS "is *not* the Act's title, it is merely the caption as prepared by the statutory reviser," and forms no part of the law. *Arciero v. Hager*, 397 S.W.2d 50, 53 (Ky. 1965) (emphasis in original), *overruled on other grounds by Hicks v. Enlow*, 764 S.W.2d 68 (Ky. 1989). "Title heads, chapter heads, section and subsection heads or titles … in

[72] Opinion at 18 ("There is an obvious reason why one statutory mechanism was appropriate and the other was not. The act comprised of KRS 131.560 et *seq*. is titled 'Application of Refunds to Taxes Due.' See KRS 131.560 to 131.595 (emphasis added). Appellees' debts at issue are not unpaid taxes.").

the Kentucky Revised Statutes do not constitute any part of the law…" KRS 446.140.

Thus, the Court of Appeals' analysis of KRS 131.565 and .570 is fundamentally flawed, and adopts an interpretation of these provisions far narrower than their plain meaning or intended scope.

Ultimately, the Court need not reach the scope of this statutory waiver, because sovereign immunity does not apply at all to the patients' claims for recovery of their own funds under *Ross* and because, even if immunity did apply, KRS 45.111 provides a much broader waiver for any claims seeking recovery of improperly collected funds regardless of the source of those funds or how they were seized. Nonetheless, KRS 131.565 and .570 make clear that, whatever the applicability of immunity to the patients' claims, it cannot bar recovery of wrongfully withheld tax refunds. The Court of Appeals' Opinion should be reversed for this reason as well.

D. The Court of Appeals Opinion ignores well-established precedent that sovereign immunity has no application to constitutional takings claim.

The Opinion's broad conclusion that sovereign immunity bars all of the patients' claims for monetary relief[73] also ignores longstanding Kentucky precedent that sovereign immunity has no application to a constitutional takings claim, which the patients have asserted here. The underlying merits

[73] Excepting only – possibly – some yet unspecified claims for monetary relief after declaratory relief, which the Court of Appeals did not identify or substantively discuss, other than to say application of immunity to such hypothetical claims is currently unripe. Opinion at 21-25.

of the patients' constitutional takings claim have not been adjudicated and are beyond the jurisdictional scope of this immunity appeal. *Baker*, 543 S.W.3d 575. But Kentucky law is clear that if the patients were to establish a taking on the merits, sovereign immunity would be no bar to monetary relief. At a minimum, therefore, the Court of Appeals should be reversed to permit the patients to pursue their constitutional takings claims, which cannot be barred by immunity, as a matter of law.[74]

It has long been recognized that constitutional protections against government taking of private property without just compensation, including KY. CONST. §§ 13 and 242, "represent a waiver of governmental sovereign immunity." *Stathers v. Garrard Cnty. Bd. of Educ.*, 405 S.W.3d 473, 484 (Ky. App. 2012). *See also, e.g.*, *Holloway Const. Co. v. Smith*, 683 S.W.2d 248, 249 (Ky. 1984) (sovereign immunity is "deemed to be waived" for takings claims based on "an unauthorized taking, destruction or injury to their property"); *Lehman v. Williams*, 193 S.W.2d 161, 163 (Ky. 1946).

The Kentucky Constitution's takings provisions are "self-executing and in cases where property has been appropriated, the owner, despite a lack of statutory authority, has been permitted to recover damages." *V.T.C. Lines,*

[74] As the successful party in the circuit court, the patients did not have any duty to preserve arguments, but nonetheless argued below that sovereign immunity does not apply to constitutional takings claims. *See* Mot. Disc. Rev., 5/24/24, at 21-22; Br. for Appellees Amelia Long, *et al.* as Representatives of a Class, Case Nos. 2023-CA-0398 and 2023-CA-0411, 9/8/23, at 25-26; RA vol 7, 910-987: Pls. Resp. Threshold Issues, 11/22/21, at 14-15; RA vol 6, 783-821: Pls. Br. Threshold Issues, 10/04/21, at 24-27; RA vol 2, 242-261: Resp. Mtns. Dismiss, 9/6/18, at 13-16.

Inc. v. City of Harlan, 313 S.W.2d 573, 575 (Ky. 1957).[75] Thus, "[t]he Commonwealth cannot claim immunity if it violates specific provisions of the state constitution prohibiting an uncompensated taking." *Com., Uninsured Emp. Fund v. Cnty. of Hardin Plan. & Dev. Comm'n*, 390 S.W.3d 840, 843 (Ky. App. 2012).[76]

It is also clear that federal and state constitutional takings protections apply to takings of money and personal property, as well as real property. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 639-40 (2023) (county's retention of surplus funds after foreclosure sale was a taking); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (retention of interest

[75] This rule is not unique to Kentucky. *See*, *e.g.*, *Rose v. California*, 123 P.2d 505, 510 (Cal. 1942) (the California takings clause is self-executing and actions for damages are permissible); *State ex rel. Smith v. 0.24148*, *0.23831 & 0.12277 Acres of Land*, 171 A.2d 228, 231 (Del. 1961) (Delaware constitutional provision on takings is a self-executing waiver of sovereign immunity); *Angelle v. State*, 34 So. 2d 321,323 (La. 1948) (Louisiana constitutional provision on takings is "self-executing" and where private property has been appropriated for public purposes, the courts will entertain actions by the owner to recover adequate compensation, as an exception to the general rule on sovereign immunity); *Schmutte v. State*, 22 N.W.2d 691,694 (Neb. 1946) (Nebraska constitutional provision on takings is self-executing); *Cereghino v. State Highway Comm'n*, 370 P.2d 694, 696 (Or. 1962) (where the state exercises power of eminent domain without bringing a condemnation action, the owner may sue to recover the value of the property and damages under the Oregon and United States Constitutions); *Chick Springs Water Co. v. State Highway Dep't*, 157 S.E. 842, 850 (S.C. 1931), *abrogated on other grounds by McCall v. Batson*, 329 S.E.2d 741 (S.C. 1985) (no immunity from suit under the South Carolina Constitution where the act complained of constitutes a taking of private property without just compensation); *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589, 596 (Tex. App. 1991) (the eminent domain provision of the Texas Constitution is a waiver of governmental immunity for the taking or damage of property for public use).

[76] Moreover, the federal takings clause indisputably preempts state-law sovereign immunity under the Supremacy Clause of the U.S. Constitution, whatever the waiver analysis.

on private funds held under deposit with state was unconstitutional taking). If UK and DOR took the patients' property, either by collecting on a debt that was not due or retaining a "collection fee" without entitlement, sovereign immunity is inapplicable.

Of course, the merits of the patients' takings claims have yet to be adjudicated, but that is not relevant to this appeal. On interlocutory appeal of an immunity denial, the sole question is whether immunity bars the claim and, if it does not, it should be allowed to proceed to adjudication on the merits. *Accord Hardin Plan.*, 390 S.W.3d at 843 (noting with approval trial court denial of motion to dismiss on immunity, allowing litigation on merits of takings claim to proceed). *See also generally Baker*, 543 S.W.3d at 578 (only immunity question, and not underlying merits of claim, reviewable on interlocutory appeal).[77]

The Court of Appeals, for its part, ignored the waiver of immunity for the patients' takings claim. Thus, along with the other errors in the Court of Appeals' immunity analysis, this Court should reverse the Court of Appeals to the extent that it forecloses the patients from pursuing money damages on their takings claims.

[77] To the extent further adjudication of any issues not yet addressed by the circuit court is necessary to determine the immunity question, then the circuit court's order is not yet a final adjudication of immunity and is not appealable anyway. *Upper Pond Creek Volunteer Fire Dep't v. Kinser*, 617 S.W.3d 328, 333 (Ky. 2020) (only final rulings on immunity are appealable). That is true of any of the circuit court's immunity rulings, to the degree that there are subsidiary issues related to immunity remaining to be adjudicated.

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 Appellants

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 11,623 words.

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