SUPREME COURT OF KENTUCKY
2024-SC-0229
Electronically filed

AMELIA LONG, *et al.* *Appellants*

v.

COURT OF APPEALS CASE NOS.
2023-CA-0398 AND 2023-CA-0411
FRANKLIN CIRCUIT COURT CASE NO. 18-CI-00975

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

BRIEF OF THE UNIVERSITY OF KENTUCKY AND ITS TREASURER

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Certificate of Service

I certify that on January 21, 2025, I served a copy of this brief by email on E. Douglas Richards, 401 Lewis Hargett Circle, Suite 210, Lexington, KY 40503; Griffin Terry Sumner, Jason P. Renzelmann, 400 West Market Street, 32nd Floor, Louisville, KY 40202; Bryan C. Hix, 315 High Street, Frankfort, KY 40601; R. Campbell Connell, Frank L. Dempsey, Austin T. Green, Department of Revenue, P.O. Box 5222, Frankfort, KY 40602; Melissa Norman Bork, Brent R. Baughman, Sarah T. Laren, 3500 PNC Tower, 101 South Fifth Street, Louisville, KY 40202; Sam P. Burchett, Office of Kentucky State Treasurer, 1050 U.S. Highway 127 South, Suite 100, Frankfort, KY 40601; and by U.S. mail on Clerk, Kentucky Court of Appeals, 669 Chamberlin Avenue, Suite B, Frankfort, KY 40601; and Hon. Thomas D. Wingate, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601.

/s/ Bryan H. Beauman
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INTRODUCTION

These appeals present three fundamental questions:

1. Does governmental/sovereign immunity bar a declaratory judgment concerning the legality of governmental action?

2. If a court issues a declaratory judgment finding a violation of law, does governmental/sovereign immunity prohibit a judicial order directing the payment of money to private individuals?

3. If a court issues a declaratory judgment finding a violation of law and cannot order a payment of money, how is the violation corrected?

For the reasons below, this Court should answer these questions by holding: (1) immunity permits a declaratory judgment; (2) immunity prohibits a judicial order to pay money absent an express waiver by the legislature; and (3) the separation of powers doctrine requires the Executive and Legislative Branches be allowed to develop a means of correcting the violation, if any.

STATEMENT CONCERNING ORAL ARGUMENT

The University requests oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASES

The General Assembly has crafted statutory methods for state agencies to collect on the debts owed to the Commonwealth and its agencies. The *Long* and *Bennett* Appellants challenge those methods and seek two forms of relief.[1]

First, Appellants seek a declaratory judgment declaring the statutory scheme unconstitutional or declaring the Universities ineligible under the statutes to refer these debts to the Department of Revenue.

Second, with "entry of the declaratory judgment sought" the Appellants next seek "restitution" and that the "Kentucky State Treasurer, and . . . the University's Treasurer . . . be ordered to return all funds taken from the Plaintiffs and class members."[2] Put another way, as they request from this Court: "allow Plaintiffs' money damages claims to proceed."[3]

While the initial aspect of the relief may be permissible, the second demand is barred by sovereign and governmental immunity. Two cases filed in the Franklin Circuit Court form the foundation of five appeals for which this Court has granted discretionary review:

I. The *Bennett* case. *Bennett* involves claims brought by former students who failed to pay their tuition at the University of Kentucky, Morehead State University,

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1 Because these cases all concern the same legal issues, this same brief has been filed in each of the appeals pending before this Court, including case nos. 2024-SC-0229; 2024-SC-0230; 2024-SC-231; 2024-SC-240; and 2024-SC-0243.

2 Long Am. Complaint ¶ 97–98 [*Long* ROA Vol.V at pp. 650–51]. Bennett makes a similar demand. *See* Bennett Compl. Prayer for Relief [*Bennett* ROA Vol.I at pp. 657–58].

3 Response Br. of Appellees Amelia Long, *et al.*, Case No. 2024-SC-0230, at 14.

and within the Kentucky Community & Technical College System. Their suit also names the Department of Revenue and the State Treasurer.[4]

Kimberly Bennett attended the University of Kentucky for the 2009 Fall semester, but at some time during the 2010 Spring semester decided to leave.[5] She neither informed the University of her decision nor paid tuition for the 2010 Spring semester, and thus incurred an unpaid tuition balance of $2,241.18.[6] From May 2010 through November 2010, the University sent Bennett monthly paper statements about her past due tuition, but she never made any payments.[7] From 2011 through 2015, Bennett's past due accounts were sent to three different private collection agencies, but none were able to collect the balance.[8]

In March 2015, the University sent Bennett a final demand notice for the past due amount of $2,241.18, told her that she had twenty-one days to request a hearing to dispute the amount due, and told her that if she did not request a hearing her account would be referred to the Department of Revenue for collection.[9] After twenty-one days with no response, Bennett's account was referred to the Department.[10] Only

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4 Bennett Compl. ¶¶ 6, 8, 10, 12 [*Bennett* ROA Vol.I at p. 4, 5, 6]. Although the Appellants also sued each University's chief financial officer in his or her official capacity, those are claims against the Universities. *Cf. Autry v. W. Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 2007).

5 Bennett Compl. ¶ 17 [*Bennett* ROA Vol.I at p. 7]. Bennett makes no allegation that she informed the University she wished to withdraw in the middle of the academic year.

6 Aff. of Crista Fornash [*Bennett* ROA Vol.I at p. 308].

7 Bennett Compl. ¶ 3 [*Bennett* ROA Vol.I at p. 4].

8 Bennett Compl. ¶ 4 [*Bennett* ROA Vol.I at p. 4].

9 *Id.* at ¶ 5 [*Bennett* ROA Vol.I at p. 4].

10 *Id.* at ¶ 6 [*Bennett* ROA Vol.I at p. 4–5].

after the Department notified Bennett it would begin collection on her account did she then contact the Department. Bennett entered into a payment plan for her debt,[11] paid on her account between 2015 and 2017,[12] and eventually paid her debt in full.

Benjamin Lane attended Morehead State University from August 2006 to December 2007.[13] He paid his tuition in full to Morehead State for the Fall 2006 and Spring 2007 semesters. On August 13, 2007, he signed a statement of intent to attend Morehead State for the Fall 2007 semester,[14] completed his classes, received grades for those classes, and received academic credit for the classes he passed;[15] however, he never paid his tuition for the Fall 2007 semester owing $3,534.20.[16] Lane was notified of his past due balance,[17] his account was referred to the Department for collection, and after the Department initiated collection action, Lane, like Bennett, agreed to pay his tuition and entered into a payment plan.[18] The Department

11 Bennett Compl. ¶ 25, 27 [*Bennett* ROA Vol.I at p. 8].

12 *Id*. at ¶ 25–26 [*Bennett* ROA Vol.I at p. 8].

13 *Id*. at ¶ 30 [*Bennett* ROA Vol.I at p. 8].

14 Screenshot of Electronic Acknowledgement of Statement of Intent [*Bennett* ROA Vol.III at p. 311]; Exemplar Statement of Intent, Fall 2007 [*Bennett* ROA Vol.III at p. 313.

15 Lane Transcript [*Bennett* ROA Vol.III at pp. 315–16]; *see also* Bennett Complaint ¶ 30 [*Bennett* ROA Vol.I at p. 8]. Lane does not allege he did not attend MSU for the dates in question. *Id.*

16 Account Statement [*Bennett* ROA Vol.III at pp. 318–21].

17 Past Due Balance Email [*Bennett* ROA Vol.III at p. 323]; Affidavit of Tena Flannery [*Bennett* ROA Vol.III at p. 325].

18 Bennett Compl. ¶ 36 [*Bennett* ROA Vol.I at p. 8].

collected payments on Lane's account from 2011 through 2013.[19] Lane paid his account in full and later filed this lawsuit.[20]

These two former students joined two former Kentucky Community and Technical College System students in bringing their action. They assert four counts: Count I seeks a declaratory judgment on whether the Department may collect university debt under KRS 45.237, 45.238, and 45.241; Count II for various violations of the Kentucky Constitution; Count III for relief on the ground of mistake; and Count IV for excessiveness of the Department's collection fee.[21] While some of the former students' claims are styled as seeking a "declaration" (such as Count I), for every Count, they also explicitly seek a monetary award in the amount of money already collected from them and others by the Department.[22] Despite receiving the educational services they paid for, the *Bennett* Appellants seek to recover a total of more than $100 million for a purported class.[23]

II. The *Long* case. The *Long* Appellants are former patients of the University of Kentucky's medical facilities who each visited and received treatment at the University for themselves or their children.[24] Either because they were uninsured, had deductibles, or their insurance did not cover all the treatment they received, the *Long* Appellants were each billed for some portion of the healthcare services provided

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19 Bennett Compl. ¶¶ 36–37 [*Bennett* ROA Vol.III at pp. 9–10].

20 Lane Account Detail [*Bennett* ROA Vol.III at p. 329].

21 Bennett Compl. [*Bennett* ROA Vol.I at pp. 16–23].

22 Bennett Complaint ¶¶ 77, 85, 93, 103, and paragraphs A–D [*Bennett* ROA Vol.I at pp. 17, 19–20, 21, 23, 24–25].

23 Department of Revenue Br. in *Bennett* at 24.

24 Long Am. Compl. ¶¶ 13, 23, 33, 40, 48 [*Long* ROA Vol.V at p. 623–659].

to them.[25] For over a decade before legislation in the 2022 Regular Session of the General Assembly, Kentucky's public universities relied on the Department of Revenue to collect debts, including the medical debts incurred in the University of Kentucky healthcare system.[26]

Amelia Long visited a University healthcare facility in 2012 and received medical treatment.[27] For that medical treatment, Long alleges in the alternative either she had health coverage through Kentucky Passport Health Care or she "should have been" eligible to participate in the University's financial assistance program ("FAP") or disproportionate share hospital program ("DSH").[28] However, Long was told she would need to submit appropriate documentation to support her FAP application and never did.[29] As a result, Long was billed for the healthcare services that were provided to her.[30]

In May 2015, after three years of the University repeatedly contacting Long about her failure to pay her medical bills, the University sent Long a final notice before referral to the Department for collection, referred to as Letter 8. That letter

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25 *Id.*

26 KRS 131.130(12).

27 Long Am. Compl. ¶13 [*Long* ROA Vol.V at p. 627].

28 *Id.* The DSH does not provide discounts or health benefits on an individual basis. Rather, the DSH provides a funding pool for hospitals that serve a disproportionate number of uninsured patients.

29 *See* Long Hospital Notes, UK_002032–2097, which were filed under seal. Some of the medical records of the Named Patients were filed under seal and are contained in the ROA in a "White Envelope," as stated in the certification of the record.

30 Even if Long had obtained financial assistance, that does not necessarily mean she would not have a balance due to the University. The FAP provides different levels of discount based on total household income levels.

informed Long she had the right to protest the bill by requesting a conference with a hearing officer and provided information on how to request that hearing.[31] Long failed to respond or request a hearing, and her account was referred to the Department.

The Department then began to take action on Long's account. In 2016, Long agreed to pay her medical debt owed and entered a payment plan with the Department and continued making voluntary payments under that plan until 2018 when this lawsuit was filed.[32] Despite having entered a voluntary payment plan, Long now "disputes that she owes any amounts to the University."[33]

Karen Devin received University health care services in 2013.[34] At the time, Devin alleges she did not have health insurance and that she "should have been" eligible for financial assistance. Devin alleges she applied for financial assistance and submitted documentation to the University by fax.[35] University employees spoke to Devin and advised her they had not received this information, so she should resend it. The University also advised Devin that under the financial assistance program it was her responsibility to ensure that the necessary documents were received and that she should follow up to ensure participation.[36] After the fact, Devin also asserted that her healthcare charges should be billed to her auto insurance because she was in a

31 Long Letter 8 [*Long* ROA Vol.XI at p. 1576].
32 Long Am. Compl. ¶ 20 [*Long* ROA Vol.V at p. 628].
33 *Id.* ¶ 22 [*Long* ROA Vol.V at p. 629].
34 *Id.* ¶ 23 [*Long* ROA Vol.V at p. 629].
35 *Id.*
36 Devin Hospital Notes, UK_001713–1769 [*Long* ROA White Envelope].

motor vehicle accident.[37] On March 13, 2014, Devin was sent a Letter 8 for each of her accounts, advising her of her right to protest the bill and request a conference with a hearing officer before referral to the Department for collection.[38] Devin did not request a conference with a hearing officer and her accounts were referred to the Department for collection.

After referral to the Department, in 2016, Devin also entered into a voluntary payment plan with the Department, under which she paid $25 per month toward her outstanding balance.[39] After about two years of paying under a payment plan, Devin joined in this lawsuit in which she now "disputes that she owes any amounts to the University."[40]

Richard Hardy II visited a University medical facility in 2012 and received medical services.[41] At that time, Hardy alleges he was employed, but was not yet eligible for health insurance.[42] Despite being employed, Hardy alleges he should have been eligible for financial assistance.[43] After his visit, Hardy promised several times to either pay his medical bills or to enter into a payment plan for them.[44] Regardless, Hardy did not pay his outstanding bills.

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37 *Id.* at UK_001721.
38 Devin Letter 8 [*Long* ROA Vol.XI at pp. 1579–81].
39 Long Am. Compl. ¶ 30 [*Long* ROA Vol.V at pp. 630–31].
40 *Id.* at ¶ 32 [*Long* ROA Vol.V at p. 631].
41 *Id.* at ¶ 33 [*Long* ROA Vol.V at p. 631].
42 *Id.*
43 *Id.*
44 Hardy CKMS FACS Notes, UK_001843–1846 [ROA White Envelope].

On July 17, 2014, Hardy was sent a Letter 8, advising him of the right to protest the amount and validity of his debt and request a conference with a hearing officer.[45] Hardy did not request a conference with a hearing officer and his accounts were referred to Department for collection. Then, Hardy too entered a voluntary payment plan with the Department under which he pays $25 per week.[46] Despite being on a payment plan, Hardy now "disputes that he owes any amounts to the University."[47]

Tabitha Marcum took her minor daughter to a University of Kentucky health care facility in 2015 and obtained medical services.[48] She believes insurance should have covered this treatment.[49] After she had failed to pay the medical bills from this visit, on April 12, 2017, Marcum was sent a Letter 8, informing her of the right to protest the amount and validity of the debt and to request a hearing with a hearing officer.[50] Marcum did not request a hearing and her account was referred to the Department for collection.

Unlike Long, Devin, and Hardy, Marcum does not allege she entered into any payment agreement with the Department. Instead, Marcum alleges the Department

45 Hardy Letter 8 [*Long* ROA Vol.XI at p. 1584]

46 Long Am. Complaint ¶ 38 [*Long* ROA Vol.V at p. 632].

47 Long Am. Complaint ¶ 39 [*Long* ROA Vol.V at p. 632].

48 Marcum Hospital Notes, UK_002203–2243 [ROA White Envelope]; Long Am. Complaint ¶ 40 [*Long* ROA Vol.V at p. 633].

49 Long Am. Complaint ¶ 40 [*Long* ROA Vol.V at p. 633].

50 Marcum Letter 8 [*Long* ROA Vol.XI at p. 1587].

has collected approximately $3,574.34 of a "total liability" of $4,541.56.[51] Like the other Appellees, Marcum "disputes that she owes any amounts to the University."[52]

Karen Sansom visited a University health care facility and received medical services in 2011.[53] At the time, Sansom did not have health insurance coverage through her employer but alleges she "should have been eligible for Medicaid."[54] She also alleges she was later found to be disabled by the Social Security Administration.[55] According to Sansom, she was admitted to a University hospital and "was kept there at least two days longer than necessary to diagnose and treat her condition."[56]

While she alleges she "should have been eligible for Medicaid," Sansom makes no allegation that she applied for or attempted to enroll in Medicaid.[57] Regardless, on June 4, 2012, Sansom was sent a letter telling her that if she did not contact the University about her account, it would be referred to the Department for collection.[58] Sansom's account was later referred to the Department and, in January 2014, over four years before this lawsuit was filed, she entered into a payment plan.[59] Despite

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51 Long Am. Compl. ¶ 47 [*Long* ROA Vol.V at p. 634].
52 *Id.*
53 *Id.* at ¶ 48 [*Long* ROA Vol.V at p. 633].
54 *Id.*
55 *Id.*
56 *Id.* at ¶ 49 [*Long* ROA Vol.V at p. 635].
57 *Id.* at ¶ 48, 49 [*Long* ROA Vol.V at p. 634–35].
58 Sansom Letter 8 [*Long* ROA Vol.XI at p. 1590].
59 Long Am. Compl. ¶ 55 [*Long* ROA Vol.V at p. 636].

being on a payment plan, she "disputes that she owes any amounts to the University."[60]

On June 19, 2018, these patients filed suit on behalf of themselves and a putative class alleging five claims: (1) "Declarations of Rights as to KRS 45.237 *et seq.* and KRS 45.241, And on Other Issues Related to the Defendants' Collection Activities"; (2) "Constitutional Violations"; (3) "Violation of KRS 205.640(5)"; (4) "Relief on the Grounds of Mistake"; and (5) "Unlawfulness of the Department's 25% Collection Fee."[61]

Yet before any collections efforts, the University sent multiple statements to each of the Appellants at the last known address they provided. Then, the University's affiliated corporation, Central Kentucky Management Services, sent them letters to provide the opportunity to dispute their debt,[62] and offered each of the Long Appellants the opportunity to request a conference with a hearing officer.[63] That letter invited each debtor to provide a written explanation to protest the bill, documentary evidence, and offered each the option to appear in person or by telephone before a hearing officer.[64] Although any decision may be appealed,[65] the *Long* Appellants never sought any appeal nor engaged in any attempt to dispute their

60 *Id.* at ¶ 57 [*Long* ROA Vol.V at p. 637].

61 *Id.* at pp. 18–30 [*Long* ROA Vol.V at pp. 640–52].

62 *Id.* at ¶ 88 [*Long* ROA Vol.V at pp. 646–647].

63 *Id.*

64 The Letter 8 is described and quoted in part in Paragraph 88 of the Long Amended Complaint.

65 KRS 13B.120.

debt before bringing suit here.[66] Regardless, the *Long* Appellants now seek to recover more than $85 million.[67]

After this case was filed, the circuit court held it in abeyance pending the Supreme Court's ruling in *University of Kentucky v. Moore*.[68] *Moore* involved a similar challenge to the University's authority to refer debts to the Department for collection—though it did not involve the monetary relief the former students and patients seek here. In *Moore*, the plaintiff claimed the University of Kentucky was not a part of the executive branch of state government and therefore not eligible to refer debts to the Department for collection. This Court disagreed and held the University is in the executive branch of state government.[69]

At the time *Moore* was decided, the plaintiff there had voluntarily dismissed any claim for injunctive or monetary relief and sought *only* declaratory relief that the University of Kentucky was not in the executive branch.[70] As a result, *Moore* did not reach the issue of whether monetary claims against the State Treasury, like those here, are barred by immunity. That question is squarely raised here.[71]

Following *Moore*, the Universities in these cases moved to dismiss, asserting (1) the claims for money damages are barred by governmental immunity; (2) failure

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66 The Complaint faults the Letter 8 for not including information about the right to appeal, but that is because the Letter 8 is beginning of the administrative process.

67 Department of Revenue Br. in *Long* at p. 6.

68 *University of Kentucky v. Moore*, 599 S.W.3d 798 (Ky. 2019).

69 *Id.* at 810.

70 *Id.* at 812–13.

71 *Id.* at 813.

to state a claim; and (3) in *Bennett* that the circuit court lacked subject matter jurisdiction because no former student on their own met the circuit court's jurisdictional amount-in-controversy requirement of $5,000.[72] KCTCS and the Department moved to dismiss on similar grounds.[73] The Franklin Circuit Court denied those motions and permitted the claims to proceed.[74]

III. ***The challenged statutes***. While the five appeals pending before the Court involve different parties and types of debt, the core issues are the same: whether the Universities properly referred their debts under KRS 45.237, KRS 45.238, and KRS 45.241, and whether the Department was authorized under KRS Chapter 131 to levy their financial accounts, assert liens, and withhold tax refunds.[75] If not, the question is whether sovereign or governmental immunity bars the Plaintiffs' demands for money damages. Thus, how those statutes operate is important context for resolving the questions presented.

First, KRS 45.238 requires state agencies—like the Universities here—to refer "certified debts" to the Department of Revenue, which is "vested with all the powers necessary to collect any referred debts."[76] KRS 45.237 provides the definitions for KRS 45.238, and defines a "debt" as a "sum certain which has been certified as due

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72 *See* University Defendants' Renewed Motion to Dismiss [*Long* ROA Vol.II–III at pp. 279–336].

73 KCTCS Renewed Motion to Dismiss [*Long* ROA Vol.II at pp. 209–38]; Department of Revenue Motion to Dismiss [ROA Vol.III at pp. 337–68].

74 Long Order [*Long* ROA Vol.X at pp. 1360–1368]; Bennett Order [*Bennett* ROA at pp. 734–43].

75 In this brief, these statutes are collectively called the "challenged statutes."

76 KRS 45.238(1).

and owing."[77] Debts may only be certified as "due and owing" after the Universities have given notice and opportunity to be heard to the account debtors and after any administrative hearing rights have been exhausted. That was done in every case by the Universities.

KRS 45.241 demands that the Department collect interest and a twenty-five percent collection fee on the "liquidated debts" referred to it,[78] and mandates that an "agency *shall not* forgive any debt owed to it unless that agency has entered into a forgivable loan agreement with a borrower, or unless otherwise provided by statute."[79] By statute, a liquidated debt is a "legal debt for a sum certain which has been certified by an agency as final due and owing, all appeals and legal actions having been exhausted."[80] "Upon receipt of a referred liquidated debt and after its determination that the debt is feasible and cost-effective to collect," the Department must collect on the debt "in accordance with KRS 131.030."[81] That statute, which is titled "Collection of debts referred under KRS 45.237 and 45.241," vests in the Department "all the powers and duties necessary to collect any debts owed to the Commonwealth . . . under KRS 45.237 and 45.241."[82]

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77 KRS 45.237(1)(d)(1).

78 KRS 45.241(7)(b)1 ("the liquidated debt shall accrue the following amounts . . ."). Although KRS 45.238(3)(a) provides for similar interest and fee, those interest and fee provisions turn on conditions under KRS 45.237(4) and (5), which by their text, are not relevant here.

79 KRS 45.241(4).

80 KRS 45.241(1)(b).

81 KRS 45.241(8).

82 KRS 131.030.

KRS Chapter 131 *commands* that the Department "shall withhold the Kentucky individual income tax refund otherwise due a taxpayer . . . who . . . is indebted to any state agency . . . which has complied with the requirements of KRS 131.565."[83] That statute requires, among other things, that the "claimant agency must have made reasonable efforts to collect such debt, and must have provided the debtor the opportunity for appeal and formal hearing,"[84] and that the withholding of any individual income tax refund must be on a "liquidated amount."[85] Before any individual income tax refund is subject to setoff, the Department must *again* provide yet another notice of appeal rights, which the statute admonishes must be exercised "in a timely manner."[86]

IV. The "offset" statute. Through the challenged statutes, state law establishes a framework for referring and collecting debts owed to state agencies. State law has long mandated that "[n]o money shall be paid to any person . . . when the person . . . is indebted to the state."[87] In these cases, however, the *Long* and *Bennett* Appellants demand recovery of payments for medical services and education they undeniably received. Yet "KRS 44.030 forbids the payment of money by the Commonwealth to

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83 KRS 131.560.

84 KRS 131.565(3).

85 KRS 131.565(5). Although this provision uses the term "liquidated amount," it also defines "liquidated debt" as "a legal debt for a sum certain, which has been certified by the claimant agency as final due and owing."

86 KRS 131.570(1).

87 KRS 44.030(1).

any one indebted to it until that debt is satisfied."[88] Whatever happens, the *Long* and *Bennett* Appellants' debts must be paid.

V. The procedural history and threshold issues. These cases follow on the heels of *University of Kentucky v. Moore*, and ultimately require an answer to the question left open in *Moore* left: whether state Universities are "executive branch entit[ies] entitled to refer debts to the Department of Revenue for collection pursuant to KRS 45.238."[89] In ruling on three "threshold issues" in these cases, the circuit court held that the Universities could rely on KRS 45.237 and 45.238 to refer debts to the Department in *Long*, but not the students debts in *Bennett*.[90]

The circuit court next concluded that neither the medical debt in *Long* nor the educational debt in *Bennett* were "liquidated," which the Universities should have done by filing a legal action related to each debt. Because the Universities had not liquidated the debts in that way, the circuit court found that the debts were not properly referred to the Department of Revenue.

Finally, the circuit court found that the General Assembly had waived immunity to allow suits for money damages in cases like this. In reaching that conclusion, the circuit court incorrectly focused on the nebulous issue of whether the

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88 *Lipson v. Univ. of Louisville*, 556 S.W.3d 18, 30 (Ky. App. 2018).

89 *Moore*, 599 S.W.3d at 810 ("As to the statutes at hand, KRS 45.237 *et seq.*, we only declare that the University is in the executive branch of state government. On remand, the circuit court must determine whether UK is an executive branch entity entitled to refer debts to the Department of Revenue for collection pursuant to KRS 45.238.").

90 *Compare* Aug. 15, 2022, Order on threshold issues [*Long* ROA at p. 1360–69] *with* Oct. 19, 2022, Order on threshold issues [*Bennett* ROA at pp. 734–43].

General Assembly "authorized suits against the Commonwealth to recover funds unlawfully seized or paid into the Treasury."[91] According to the circuit court, the General Assembly waived such immunity in KRS 45.111, KRS 131.565(6), and KRS 131.570.

From there, the cases diverge slightly. In *Bennett*, the Universities and the Department sought an immediate appeal under *Breathitt County Bd. of Educ. v. Prater*,[92] which resulted in three cases before the Court of Appeals.[93] In *Long*, the circuit court certified a class. The University of Kentucky and the Department appealed that class certification, and the Department again raised its immunity.[94]

ARGUMENT

In answering the three questions raised in these appeals, the Court takes a fresh look and writes on a clean slate because immunity is an issue of law reviewed *de novo*.[95] Moreover, the "trial court's and Court of Appeals's construction of statutes is also entitled to no deference on appeal because statutory construction is a matter of law subject to a de novo standard of review."[96]

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91 Oct. 19, 2022, Order on threshold issues [*Bennett* ROA at pp. 739]; Aug. 15, 2022, Order on threshold issues [*Long* ROA at p. 1366–68].

92 *Breathitt County Bd. of Educ. v. Prater,* 292 S.W.3d 883 (2009).

93 Those cases include Case nos. 2022-CA-1321; 2022-CA-1353; and 2022-CA-1276.

94 Usually state agencies, like the Universities here, receive governmental immunity. This Court has, however, explained, "to the extent that the agency is performing a governmental function, as a state university does, its governmental immunity is functionally the same as sovereign immunity." *Furtula v. Univ. of Kentucky*, 438 S.W.3d 303, 306 (Ky. 2014).

95 *Moore*, 599 S.W.3d at 803.

96 *Cumberland Valley Contractors, Inc. v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

I. By statute, the Universities were authorized to refer debts to the Department for collection.

The Commonwealth's universities help produce a "well-educated and highly trained workforce."[97] They specialize in education—not debt collection. That is why the General Assembly fashioned a statutory method for universities, and other state agencies within the Executive Branch, to refer debts to the Department of Revenue for collection under the challenged statutes.

Whether to refer those debts for collection is not a matter left to the Universities' discretion.[98] Instead, the statutes are mandatory. On the one hand, KRS 45.238 *requires* the Universities to refer "certified debts" to the Department of Revenue,[99] and KRS 45.241 *prohibits* an agency from "forgiv[ing] any debt owed to it unless . . . provided by statute."[100] While the referred debts must be "certified" under KRS 45.238, or liquidated under KRS 45.241, the *Long* and *Bennett* Appellants argue that a debt may be neither liquidated nor certified unless the Universities first sue to obtain a judgment.

Not so. The challenged statutes allow the Universities, and other state agencies, to collect their debts through administrative proceedings rather than filing suit. When those administrative proceedings are exhausted, the debt becomes "liquidated" for the purposes of KRS 45.241(6) and can be referred to the Department

97 KRS 164.003.
98 *See* KRS 45.238(1); KRS 45.241(4).
99 KRS 45.238(1).
100 KRS 45.241(4).

for collection.[101] In essence, the statutory debt-collection process challenged here is an alternative to the traditional process of suing debtors, and does not *require* suing debtors.

Resisting this, the *Long* and *Bennett* Appellants argue that the definition of "liquidated debt" in KRS 45.241 requires the Universities to sue them and obtain a judgment *before* they may refer those debts to the Department so it can undertake collection effort. KRS 45.241(1)(b)(1) defines "liquidated debt" as "a legal debt for a sum certain which has been certified by an agency as final due and owing, all appeals and legal actions having been exhausted." The *Long* and *Bennett* Appellants construe that last clause as a requirement that the Universities first sue to obtain a judgment against them in court before referring the debts.

This Court has rejected the argument that "for a debt to be liquidated there must be a final determination establishing both the existence and amount of that debt."[102] In general, "'liquidated' means made certain or fixed by agreement of parties or by operation of law."[103] The statute means what it says: a debt is "liquidated" for purposes of KRS 45.241 when the *debtor* exhausts—*or fails to exhaust*—the available

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[101] The debt is liquidated twice over when the debtor fails to exhaust the administrative appeals provided *before* referral to the Department, *see* KRS 45.241(1)(b), and the additional appeal rights provided *after* referral, *see* KRS 131.570(1).

[102] *Lipson*, 556 S.W.3d at 30.

[103] *Nucor Corp. v. Gen. Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991) (quoting Black's Law Dictionary 930 (6th ed.1990)) (cleaned up).

administrative and judicial appeal rights.[104] When a debtor fails to appeal or exhaust administrative remedies, that debt is liquidated "by operation of law." Moreover, the Appellants' construction impermissibly renders the appeal language meaningless.[105] The Universities are each an "independent body politic," and have always had the authority to sue their debtors.[106]

The purpose of the administrative procedures in the challenged statutes is to provide debtors notice and opportunity to dispute the debts.[107] The administrative process would be useless and a waste of valuable resources if the Universities were also required to sue their debtors. Instead, each debt was "made certain" after the Universities gave notice of that debt and each debtor failed to request an administrative hearing to challenge it. That failure has consequences. "When grace to appeal is granted by statute, a strict compliance with its terms is required."[108]

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104 *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) ("In other words, we assume that the "[Legislature] meant exactly what it said, and said exactly what it meant.").

105 *Wilson v. Commonwealth*, 628 S.W.3d 132, 140 (Ky. 2021) ("[W]e must assume that the General Assembly intends that a statute be read as a whole such that each of its constituent parts have meaning."); *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005) ("The statute must be read as a whole and in context with other parts of the law. All parts of the statute must be given equal effect so that no part of the statute will become meaningless or ineffectual.").

106 *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 379–82 (Ky. 2016)

107 As the *Long* and *Bennett* Appellants admit, the Universities provided each of the Appellants notice and opportunity to disputes their medical and tuition bills. *See* Long Letter 8 [*Long* ROA at p. 1576]; Devin Letter 8 [*Long* ROA at p. 1579–81]; Hardy Letter 8 [*Long* ROA at p. 1584]; Marcum Letter 8 [*Long* ROA p. 1587]; Bennett Am. Compl. at ¶ 5 [*Bennett* ROA Vol.I at p. 4].

108 *Bd. of Adjustments of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978).

The General Assembly developed the challenged statutes as a comprehensive method for state agencies like the Universities to collect debts. Those statutes included multiple opportunities for a hearing to dispute the debts. Yet the *Long* and *Bennett* Appellants failed to appeal in order to dispute the charges they incurred. When the time for doing so expired, the debts became liquidated and were thus appropriately referred to the Department for collection. Having failed to exhaust the administrative process, the Appellants cannot now claim any right to challenge the amounts they owe because no court would have any jurisdiction on such claims.[109] That explains why the *Long* and *Bennett* Appellants ask this Court to *relieve* them of this failure by holding that the Universities must sue their debtors—even though there is no such requirement stated in any of the challenged statutes.[110]

Against this backdrop, the *Long* and *Bennett* Appellants sued the Universities and the Department. While the *Long* and *Bennett* Appellants may be entitled to declaratory judgment, sovereign immunity prohibits Kentucky courts from ordering any relief that requires accessing the state treasury.

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109 *Id.* at 2 ("Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy.").

110 *Beckham v. Bd. of Educ. of Jefferson Cnty.*, 873 S.W.2d 575, 577 (Ky. 1994) ("We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used.").

II. Immunity *does not prohibit* a court from declaring the Appellants' rights for claims that are not moot.

A. Sovereign immunity is no bar to declaratory judgment.

The Declaratory Judgment Act broadly provides that "the court may make a binding declaration of rights," and "specifically recognizes that a declaratory judgment may be granted when a person's rights are affected by a statute or other government regulation."[111] As this Court explained in *Haydon Bridge II*, the "Commonwealth . . . is clearly subject to a traditional declaratory judgment action."[112] "[A]ny suggestion that the Commonwealth was immune from lawsuits seeking a declaration that the General Assembly has acted or failed to act in a constitutional manner was put to rest by *Rose v. Council for Better Education, Inc*., the landmark public education case."[113]

Declaratory judgment is another method of scrutinizing state government, just as the "state is subject to appropriate scrutiny . . . through elections, public access to records and meetings, public attendance at hearings on proposed regulations, and other means."[114] This method of scrutiny is permissible, however, because it "is qualitatively different from an action requiring the state to pay out the people's resources as damages for state injury to a plaintiff."[115] Put another way, sovereign immunity is no bar to declaratory judgment because there "is no harm to state

111 *Moore*, 599 S.W.3d at 810.
112 *Beshear v. Haydon Bridge Co*., 416 S.W.3d 280, 287 (Ky. 2013).
113 *Id*. (cleaned up).
114 *Commonwealth v. Kentucky Ret. Sys*., 396 S.W.3d 833, 839 (Ky. 2013).
115 *Moore*, 599 S.W.3d at 812 (cleaned up).

resources from a declaratory judgment."[116] On that basis, "the state is not sovereignly immune from a declaratory judgment action."[117]

B. The *Long* Appellants seek declaratory judgment on a claim that is moot.

Despite the general rule, the *Long* Appellants demand for declaratory judgment must fail for a different reason: intervening legislative changes in the General Assembly's 2022 Regular Session. The issue on which they seek declaratory judgment is now moot, and an "an appellate court is required to dismiss an appeal when a change in circumstance renders that court unable to grant meaningful relief to either party."[118] "[T]his Court has repeatedly reaffirmed the proposition that Kentucky courts have no jurisdiction to decide issues which do not derive from an actual case or controversy."[119] The "actual controversy requirement is of fundamental importance" and "requires a controversy over present rights, duties, and liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion."[120] The standing requirement is not relaxed in an action under the Declaratory Judgment Act," and is instead "a condition precedent."[121]

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116 *Id.*

117 *Id.* at 813.

118 *Kentucky Bd. of Nursing v. Sullivan Univ. Sys., Inc.*, 433 S.W.3d 341, 344 (Ky. 2014).

119 *Id.* (citing Ky. Const. § 110).

120 *Foley v. Commonwealth of Kentucky*, 306 S.W.3d 28, 31 (Ky. 2010).

121 *Cameron v. Beshear*, 628 S.W.3d 61, 68 (Ky. 2021).

In *Alexander v. Miller*, the U.S. District Court for the Eastern District of Kentucky dismissed a nearly identical claim for declaratory judgment involving the challenged statutes. There, the court found that the claim for declaratory judgment had been mooted by subsequent legislation by Kentucky's General Assembly. In *Alexander*, the plaintiff, along with four other representatives of a class, alleged that the Department and the University of Kentucky had violated the due process clause of the Fourteenth Amendment when the University had referred medical debt to the Department of Revenue for collection.[122] There, the plaintiffs sought declaratory judgment and prospective injunctive relief against the University. Yet in March 2020, the University had stopped referring new accounts to the Department for collection, and in April 2022 the Kentucky General Assembly passed House Bill 8, which revised the challenged statutes that previously enabled the Department of Revenue to collect such medical debt.[123]

The University moved to dismiss the case as moot, and the court agreed. The court explained that a "case becomes moot if events occur during the pendency of a litigation which render the court unable to render the requested relief,"[124] and that for a "live controversy" to exist, the court must "conclude that it possesses the power to afford effectual relief."[125] The court could not do that. Thus, it dismissed the entire

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122 *Alexander v. Miller*, No. 3:20-CV-00044-GFVT, 2023 WL 6439887, at *1 (E.D. Ky. Sept. 29, 2023).

123 2022 Ky. Acts 1930; KRS 131.130(11) (excepting "consumer debt owed for health care goods and services" from the debts for which the Department may collect on behalf of state agencies).

124 *Alexander*, 2023 WL 6439887, at *4.

125 *Id.* at *4.

lawsuit because the "potential mechanism for seizing funds" under KRS Chapter 131 was no longer available and the plaintiffs' reliance on "past harms" did not permit Ms. Alexander to seek declaratory relief.[126]

In dismissing the claim, the court explained that the plaintiff could not "receive declaratory relief to any extent her injury in fact [was] premised only on issues with the process used by the Department of Revenue."[127] The court's conclusion relied on the "distinction between past and ongoing or future harms," which "is significant because the type of harm affects the type of relief available. Past harm allows a plaintiff to seek damages, but it does not entitle a plaintiff to seek injunctive or declaratory relief. The fact that a harm occurred in the past does nothing to establish a real and immediate threat that it will occur in the future, as is required for injunctive relief."[128]

This Court has recognized a similar rule in the context of declaratory judgment. In *Foley v. Commonwealth of Kentucky*, the appellant "sought to have Kentucky's self-defense statutes as they existed at the time of his 1991 trial . . . declared unconstitutional."[129] He "suggest[ed] that a favorable judgment could lead to a future federal habeas corpus case or impact future pardon or clemency proceedings."[130] That is, he sought a declaration of rights so could seek "further relief

126 *Id.* at *6.
127 *Id.*
128 *Id.*
129 *Foley*, 306 S.W.3d at 29.
130 *Id.* at 31.

. . . in an independent action."[131] The Court rejected that claim because such "theoretical possibilities [were] unrelated to any present right, duty, or liability," and that "his contemplation of future legal proceedings [was] outside the scope of the statute."[132]

The same is true here. The *Long* Appellants have asked for a declaration "that no UK HealthCare debt may be referred to the Department for collection, unless the University has taken that debt to final judgment, all appeals having been exhausted."[133] Yet in 2022 the General Assembly cut off any authority for the Department to collect such medical debt.[134] The question they ask has been answered.

As in *Alexander*, the *Long* Appellants "cannot receive declaratory relief to any extent [their] injury in fact is premised only on issues with the process used by the Department of Revenue."[135] That past harm "does not entitle a plaintiff to seek injunctive or declaratory relief,"[136] and there is no prospective injunctive relief the courts may order because the statute is now materially different.[137] The statutory changes foreclose entirely the Department's ability to collect the type of debt about which the *Long* Appellants complain. Their claim for declaratory judgment is thus moot because, as in *Foley*, it is "unrelated to any present right, duty, or liability," and

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131 KRS 418.055.

132 *Foley*, 306 S.W.3d at 31.

133 Long Am. Compl. ¶ 97 [*Long* ROA Vol.V at p. 650–51].

134 2022 Ky. Acts 1930; KRS 131.130(11).

135 *Alexander*, 2023 WL 6439887, at *6

136 *Id.* at *5.

137 *Green v. Mansour*, 474 U.S. 64, 73 (1985) ("There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction.").

thus "outside the scope of the statute."[138] Put another way: if the Court's duty is to say "what the law *is*," the *Long* Appellants ask this court for an advisory opinion on what the law *was*. Kentucky's courts do not function for that purpose.[139]

III. Immunity *prohibits* a judicial order to pay money for an alleged violation.

Of course, it is apparent these cases are not about declaratory judgment or prospective injunctive relief. The *Long* and *Bennett* Appellants want money damages for past conduct. The Complaints in each case make clear monetary relief is the "centerpiece of this dispute."[140] Therefore, immunity too is at the heart of the case.

Kentucky's Constitution provides that "[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law,"[141] and sovereign immunity, "as embodied in Ky. Const. § 231 . . . prohibit[s] claims against the government treasury absent the consent of the sovereign."[142] A "bedrock component of the American governmental ideal" that predates each of the Commonwealth's four Constitutions and "the Commonwealth itself,"[143] "[s]overeign immunity is both *broad*

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138 *Foley*, 306 S.W.3d at 31.

139 *Newkirk v. Commonwealth*, 505 S.W.3d 770, 774 (Ky. 2016) ("[O]ur courts do not function to give advisory opinions, even on important public issues, unless there is an actual case in controversy.").

140 *Haydon Bridge II*, 416 S.W.3d at 288.

141 Ky. Const. § 230; *see also* Federalist No. 48 ("[T]he legislative department alone has access to the pockets of the people.").

142 *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009) (plurality).

143 *Id.*

and *exacting* and if the sovereign has not waived immunity or consented to suit an injunction is foreclosed in most circumstances."[144]

The *Long* Appellants, for example, seek a declaration about the unconstitutionality of the statutes or the process followed, but then seek money damages:[145]

> 84. Under KRS 418.055, "Further relief, based on a declaratory judgment, order or decree, may be granted whenever necessary or proper." Upon securing the declaratory judgments described herein, the Plaintiffs and class members will be entitled to such further relief in the form or an order and judgment requiring the Defendants to return to the Plaintiffs and class members all funds unlawfully collected by the Defendants as to the UK HealthCare accounts. *See* KRS 45.111, which provides that: "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 amounts herein referenced are not and never were property of the State, but instead property of the Plaintiffs and class members that was unlawfully taken. The Plaintiffs and class members will thus be entitled to the equitable remedy of restitution of their moneys from the Defendants.
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> 85. As a result of the foregoing, the Defendants, Allison Ball, in her official capacity as Kentucky State Treasurer, and Susan Krauss, in her official capacity as the University's Treasurer, should be ordered to return all funds taken from the Plaintiffs and class members as herein described.

The demands plainly seek money from the State coffers and are barred by sovereign and governmental immunity.[146]

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144 *Haydon Bridge II*, 416 S.W.3d at 288 (emphasis added).

145 Long Am. Compl. ¶ 84, 85 [*Long* ROA Vol.V at p. 645].

146 Long Am. Compl. ¶ 97 and Prayer for Relief [*Long* ROA Vol.V at p. 650, 657–58].

The *Bennett* Appellants seek relief that is similarly barred by immunity. Consider their prayer for relief:[147]

> A. On Count I, a judgment declaring that the Universities may not legally refer debts to the Enterprise Collections Office for collection, that the Department of Revenue and/or the Enterprise Collections Office may not legally undertake efforts to collect the debts allegedly owed by the Plaintiffs or similarly situated persons; a judgment for relief in the form of the equitable remedy of restitution of their moneys from the Defendants; and an Order requiring Defendants, Allison Ball, in her official capacity as Kentucky State Treasurer, Susan Krauss, in her official capacity as the UK Treasurer, Teresa Lindgren, in her official capacity as Morehead Chief Financial Officer, and David Adkins, in his official capacity as KCTCS Director of Treasury Management, to return all funds taken from the Plaintiffs and class members as herein described;
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> B. On Count II, a judgment declaring that KRS 45.237 to 45.241 are facially unconstitutional as hereinabove described; that the practices of the Universities and Department in applying KRS 45.237 to 45.241 to the Universities' accounts are unconstitutional; and that the Plaintiffs and class members are entitled to such further relief in the form or an order and judgment requiring the Defendants to return to the Plaintiffs and class members all funds unlawfully collected by the Defendants as to the Universities' accounts; a judgment for relief in the form of the equitable remedy of restitution of their moneys from the Defendants; and an Order requiring Defendants, Allison Ball, in her official capacity as Kentucky State Treasurer, Susan Krauss, in her official capacity as the UK Treasurer, Teresa Lindgren, in her official capacity as Morehead Chief Financial Officer, and David Adkins, in his official capacity as KCTCS Director of Treasury Management, to return all funds taken from the Plaintiffs and class members as herein described;
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> C. On Count III, a judgment for relief in the form of the equitable remedy of restitution of their moneys from the Defendants; and an Order requiring Defendants, Allison Ball, in her official capacity as Kentucky State Treasurer, Susan Krauss, in her official capacity as the UK Treasurer, Teresa Lindgren, in her official capacity as Morehead Chief Financial Officer, and David Adkins, in his official capacity as KCTCS Director of Treasury Management, to return all funds taken from the Plaintiffs and class members as herein described;

The Commonwealth's "broad and exacting" immunity bars this type of relief. Such immunity is "broad" because it "protects public coffers or, as it is sometimes

147 *Bennett* Compl. Prayer for Relief [Bennett ROA Vol.I at pp. 23–25].

denominated, the public purse"—even against monetary claims disguised as something else.[148] It is "exacting" because Kentucky's courts "will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction."[149]

When the General Assembly waives immunity, it does so clearly. Consider just two examples. First, in KRS 45A.245, the General Assembly "has explicitly waived the defense of 'governmental immunity' for claims based upon 'lawfully authorized written contracts with the Commonwealth.'"[150] There, the General Assembly authorized those persons with lawfully authorized written contracts to "bring an action against the Commonwealth on the contract,"[151] capped the damages that could be awarded,[152] set the venue for any such civil actions, and preserved "[a]ll defenses in law or equity, except the defense of governmental immunity."[153]

Compare that to the more limited, yet similarly express, immunity waiver in KRS Chapter 49. There, the General Assembly declared its "intent . . . to provide the means to enable a person negligently injured by the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the

148 *Haydon Bridge II*, 416 S.W.3d at 291–92.
149 *Withers v. Univ. of Kentucky*, 939 S.W.2d at 346.
150 *Furtula v. Univ. of Kentucky*, 438 S.W.3d 303, 305 (Ky. 2014).
151 KRS 45A.245(1).
152 KRS 45A.245(2).
153 KRS 45A.245(1).

Commonwealth."[154] Thus, the General Assembly statutorily "waive[d] the sovereign immunity defense" in those "limited situations" described in KRS Chapter 49. There again, however, the General Assembly vested the Board of Claims with "exclusive jurisdiction,"[155] and authorized appeals to the Franklin Circuit Court in only those cases exceeding a certain amount in controversy.[156]

Unlike these statutes, the *Long* and *Bennett* Appellants have identified no similar statutory provisions containing the exacting language that waives the broad scope of sovereign or governmental immunity.

A. The Commonwealth's immunity in this case has not been waived.

None of the statutes on which the *Long* and *Bennett* Appellants rely include the sort of "express language" required to waive immunity, and no judicial opinion can do so.[157]

Start with KRS 45.111. Although in *Haydon Bridge II*, the Court concluded that "the refund provisions of KRS 45.111 constitute a limited waiver of sovereign immunity," the court was clear that the "statute applies to funds not 'due to the state.'"[158] Despite the Court's construction of that statute, its statement was

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154 KRS 49.060.

155 *Id.*

156 KRS 49.150(1).

157 *Withers*, 939 S.W.2d at 344 ("Once it has been determined that an entity is entitled to sovereign immunity, this Court has no right to merely refuse to apply it or abrogate the legal doctrine.").

158 *Haydon Bridge II*, 416 S.W.3d at 291.

ultimately unnecessary to the decision and thus dicta.[159] Regardless, the Court explained that KRS 45.111 had no application because the "workers' compensation insurance premiums were lawfully subject to assessment pursuant to KRS 342.122 and those assessments were literally 'due to the state.'"[160] There was thus "no credible argument that KRS 45.111" had any application.[161] If KRS 45.111 had no application, the Court's statement about its efficacy in waiving sovereign immunity was dicta.

As in *Haydon Bridge II*, "there is no credible argument that KRS 45.111 applies to these facts."[162] The *Long* and *Bennett* Appellants incurred medical and educational debts from each of the Universities, and they did not dispute any of those debts through the administrative process. Instead, they claim those debts are meaningless because the Universities did not sue them to reduce those debts to judgments following litigation. In this context, however, the Court need not accept as true that legal assertion.[163] As explained above, it was the Appellants' responsibility to challenge or dispute their debt and they failed to do so. Those debts were "due to the state," and thus KRS 45.111 does not apply.

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159 *Cawood v. Hensley*, 247 S.W.2d 27, 29 (Ky. 1952) ("A statement in an opinion not necessary to the decision of the case is obiter dictum.").

160 *Haydon Bridge* II, 416 S.W.3d at 289.

161 *Id.*

162 *Id.*

163 CR 12.02(f); *Gahafer v. Ford Motor Co.*, 328 F.3d 859, 861 (6th Cir. 2003); *See* Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1997) (noting that courts, when examining 12(b)(6) motions, have rejected "legal conclusions," "unsupported conclusions," "unwarranted inferences," "unwarranted deductions," "footless conclusions of law," or "sweeping legal conclusions cast in the form of factual allegations").

Regardless, KRS 45.111 is what it claims to be: a discretionary administrative process through which funds "later determined not to be due to the state may be refunded to the person who paid such funds into the Treasury."[164] It requires that a "request for refund must be approved by the head of the budget unit or his designated assistant," and allows the Finance and Administration Cabinet to "require any documentation deemed necessary."[165] Even then, the "Finance and Administration Cabinet *may* issue a warrant to disburse the funds."[166] In short, the statute lacks any express language waiving immunity. The informal and discretionary process is nothing like the express waiver of immunity found in the Board of Claims Act or the Model Procurement Code.[167] Even if KRS 45.111 constitutes some limited waiver, the General Assembly has "by law" directed the "manner" in which a refund may be requested, and the courts are not part of that process.[168]

Next consider KRS 131.565(6) and KRS 131.570(1). Under those statutes, a state agency that asks the Department to withhold an individual income tax refund must "indemnify the department against any and all damages, court costs, attorneys' fees, and any other expenses related to litigation."[169] Together, the statutes simply

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164 KRS 45.111.

165 *Id.*

166 *Id.*

167 *Compare* 45.111 *with* KRS 49.060 ("The Commonwealth thereby *waives* the sovereign immunity defense only in the limited situations as herein set forth.") *and* KRS 45A.245(1) ("Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract[.]").

168 Ky. Const. § 231.

169 KRS 131.565(6).

provide for an allocation of costs between the Department of Revenue and a requesting state agency when a person appeals Departmental action. That is not the sort of express language necessary to waive immunity.[170] There is no discussion of a civil suit for monetary relief against the Department, nor does it mention waiving immunity for a state agency that requests the Department's services in collecting debts. Instead, these provisions merely include an indemnification provision, and *Withers* says that such indemnity provisions do not waive immunity.[171]

Neither does KRS 131.570(1) waive immunity. It recognizes an administrative procedure available to debtors to challenge income tax refund withholding by the Department. Contrary to the Appellants' claim, this provision underscores the responsibility they had to timely appeal any withholding. That a claimant may *appeal* an agency's decision does not mean a claimant may later *sue* the agency without having exhausted the administrative remedies provided by that statute. Such construction ignores the statute's plain text.

Finally, consider *Ross v. Gross* and the refund cases. Because the General Assembly has not waived the Commonwealth's immunity for any of the claims at issue here, the *Long* and *Bennett* Appellants primarily rely on a handful of judicial opinions in an attempted work-around to the Commonwealth's sovereign immunity and the Universities' governmental immunity.

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170 *Withers v. Univ. of Kentucky*, 939 S.W.2d at 344.

171 *Id.* ("If immunity exists, it is not lost or diminished or affected in any manner by the purchase of liability insurance or the establishment of an indemnity fund, whether directed or authorized by statute.").

However, neither *Ross v. Gross* nor *Barnes v. Stearns Coal & Lumber Co.* justifies ignoring immunity here. In *Ross*, Harlan County sued to recover funds wrongfully paid to the state under a statute that applied only to certain counties. The court ordered the money be refunded on the basis that the "money belonged to the appellees or the County, its payment into the State Treasury did not vest the State with title thereto or a right to its custody; that the purpose of the constitutional provision and the statutory enactment cited was to prevent the expenditure of the State's money without the consent of the Legislature." The Court ignored Section 230 because, it reasoned, "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."[172]

As this Court observed in *Haydon Bridge II*, "the concept of sovereign immunity does not appear to have been raised in *Ross*, but equally importantly, as in KRS 45.111, the refund concept is one applicable when a person pays monies into the State Treasury that are not owed to the state."[173] Thus, *Ross* has no relevance to the Court's analysis here and does not apply for the same reason KRS 45.111 does not apply. The debts collected were "due to the state," and "they are not purely private funds as the Plaintiffs attempt to characterize them."[174] Under *Ross*, "the 'true owner' of money placed in the Treasury need not 'await the pleasure of the Legislature in

[172] *Gross*, 188 S.W.2d at 477.
[173] *Haydon Bridge II*, 416 S.W.3d at 290.
[174] *Id* at 295.

order to recover that which [has] been adjudged by a Court of competent jurisdiction to have been at all times his own.'"[175] Yet *Ross* did not address circumstances like those presented here. In *Ross*, the plaintiffs sought a refund on the basis that they never owed the debt to begin with. In contrast, the *Long* and *Bennett* Appellants seek a refund based on the way their debts were collected.

The same is true with *Barnes v. Stearns Coal & Lumber Co*. There, the court ordered the refund of money mistakenly paid into the Treasury based on the principle that "[m]oney 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."[176] "Law, honor, and good conscience" do not justify the refunds sought here, and there was no mistaken payment "without consideration." Rather, the debt collected from the *Long* and *Bennett* Appellants was for medical and educational services rendered.[177]

B. The *Long* and *Bennett* Appellants have not stated takings claims.

In a last-ditch effort to avoid immunity, the *Long* and *Bennett* Appellants try to disguise their claims as takings claims under Sections 13 and 242. They do so because, they argue, those sections "represent a waiver of governmental sovereign

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175 *Id.* at 290.

176 *Barnes v. Stearns Coal & Lumber Co.*, 175 S.W.2d 498, 501 (Ky. App. 1943) (emphasis added).

177 By their terms, *Ross* and the refund cases have no application here. To the extent they have any application, the Court should revisit and overrule those cases as inconsistent with modern sovereign immunity jurisprudence.

immunity."[178] *Haydon Bridge II* answered this claim too. There, the plaintiffs also sought to disguise their claim as takings claims under Section 242. The Court rejected that argument, saying this "provision has no application to these facts. As its title implies, it has been used almost exclusively to assure 'just compensation' in the 'condemning [of] private property' for public use."[179]

The same is true here. These cases involve whether the Universities lawfully referred debts to the Department under the challenged statutes. To establish liability for a constitutional "taking" claim, each individual would have to prove that their property was taken without "just compensation." The Appellants plead medical or educational services were provided to them or their family members—not that "private property" was "condemned" for public use. As in *Haydon Bridge II*, Sections 13 and 242 do not apply here. The *Long* and *Bennett* Appellants have not articulated takings claims that entitle them to sue the Commonwealth. Instead, each of them received valuable consideration—health treatment or educational services—that gave rise to their account debt. There was no "taking" without just compensation.

The Appellants rely on two cases from the United States Supreme Court for the claim that "takings protections apply to takings of money personal property, as

[178] Long Br. at 44; Bennett Br. at 32.

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

well as real property."[180] Yet those cases apply in only "narrow circumstances,"[181] and expressly recognize that a taxpayer must render to the public fisc what is owed.[182]

C. Even if the *Long* and *Bennett* Appellants prevail, KRS 44.030 bars any recovery.

Finally, the *Long* and *Bennett* Appellants demand a massive payment from the State Treasury. KRS 44.030 provides, however, that "[n]o money shall be paid to any person on a claim against the state . . . when the person . . . is indebted to the state."[183] Under that statute, any refund to which the *Long* and *Bennett* Appellants may be entitled must "first be credited to the account of the person indebted to the state." Only "if there is any balance due the person after settling the whole demand of the state," may that balance "be paid to the person."[184] On this basis, if the Court determines that these claims may proceed, it should instruct the circuit court to credit those amounts to the balance due each University for the medical and educational services rendered.

IV. The Executive and Legislative Branches must decide how to remedy any alleged violation.

As explained above, the judiciary *must* decide whether certain state agencies have acted unconstitutionally or illegally, but the judiciary *must not* order those state

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180 Long Br. at 4; Bennett Br. at 34.

181 *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

182 *Tyler v. Hennepin Cnty., Minn.*, 598 U.S. 631, 647 (2023) ("A taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar's, but no more.").

183 KRS 44.030(1).

184 KRS 44.030(1).

agencies to pay money to remedy any alleged violation. This does not mean that there is no remedy for an unconstitutional or illegal act. Rather, it means that the judiciary must determine how to ensure that those agencies conform to the law while also respecting the constitutional discretion of the political branches.[185]

The judiciary must "not shrink from [its] duty 'as the bulwar[k] of a limited constitution against legislative encroachments.'"[186] When a court determines there has been a constitutional violation, its "remedial powers . . . must be adequate to the task,"[187] but legislative and executive officials have "primary responsibility for elucidating, assessing, and solving" the problems of constitutional compliance.[188] If a violation occurs, federal[189] and state courts[190] must enforce the law,[191] but constitutional actors "have a high degree of competence in deciding how best to discharge their governmental responsibilities. A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions."[192]

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185 William E. Thro, *Who, What, Why, & How: Reimagining State Constitutional Analysis in School Finance Litigation,* 2020 BYU Educ. & L. J.29, 33–34 (2020) (discussing the question of how courts should remedy constitutional violations).

186 *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009).

187 *Whitcomb v. Chavis,* 403 U.S. 124, 161 (1971).

188 *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955).

189 *Ex parte Young*, 209 U.S.123 (1908).

190 Every state court has the authority to enjoin state officials from prospective violations of the National and State Constitutions. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 317 n. 15 (1997) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

191 Thro, *supra* at 51–52.

192 *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004).

Indeed, "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions," particularly when "those institutions are ready, willing, and able to remedy the deprivation of constitutional rights themselves."[193] Therefore, "in devising a remedy," the judiciary "must take into account the interests of [the legislative and executive] authorities in managing their own affairs, consistent with the Constitution."[194] Constitutional actors do not have carte blanche,[195] but officials "should at least have the opportunity to devise their own solutions to these problems."[196]

In other words, when developing a remedy for a violation, "each branch of government should stay within its own lane. It is the legislature's job to make policy. It is the court's job to interpret the laws and determine if the legislature is meeting its constitutional mandate."[197] "There was a time when [the judiciary] presumed to

193 *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990)

194 *Milliken v. Bradley*, 433 U.S. 267, 280–81(1977).

195 *Swann v. Charlotte–Mecklenburg Bd. of Education*, 402 U.S. 1 (1971)

196 *Jenkins*, 495 U.S. at 52; *Cf. Sixty–seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 196 (1972) (*per curiam*).

197 Larry J. Obhof, *School Finance Litigation and the Separation of Powers*, 45 Mitchell Hamline L. Rev. 539, 566–67 (2019). Mr. Obhof served as President of the Ohio State Senate.

make such binding judgments for society,"[198] but the "myth of the legal profession's omnicompetence . . . was exploded long ago."[199]

This Court's decision in *Rose v. Council for Education*, illustrates the correct approach.[200] In *Rose*, this Court invalidated the entire educational system,[201] but

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198 *United Haulers v. Oneida Harkimer Solid Waste Management Authority,* 550 U.S. 330, 347 (2007) (Roberts, C.J., joined by Souter, Ginsburg, & Breyer, JJ., announcing the judgment of the Court) (citation omitted).

199 *People Who Care v. Rockford Bd. of Educ. School District No. 205*, 111 F.3d 528, 536 (7th Cir. 1997).

200 *Rose*, 790 S.W.2d at 189. *Rose* is this Court's most momentous decision. First, *Rose*, together with the decisions from Montana and Texas, launched the third wave of school finance litigation. Second, *Rose* and the other 1989 decisions validated the adequacy theory of school finance litigation. Third, by invalidating the entire educational system, *Rose* recognized that educational equality depends not on money or racial desegregation, but involves the complex interaction of multiple factors. William E. Thro, *Judicial Humility: The Enduring Legacy of Rose v. Council for Better Education,* 98 Ky. L. J. 717 (2010).

201 The Court declared that: "Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system-all its parts and parcels. This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.

While individual statutes are not herein addressed specifically or considered and declared to be facially unconstitutional, the statutory system as a whole and the interrelationship of the parts therein are hereby declared to be in violation of Section 183 of the Kentucky Constitution. Just as the bricks and mortar used in the construction of a schoolhouse, while contributing to the building's facade, do not ensure the overall structural adequacy of the schoolhouse, particular statutes drafted by the legislature in crafting and designing the current school system are not unconstitutional in and of themselves. Like the crumbling schoolhouse which must be redesigned and revitalized for more efficient use, with some component parts found to be adequate, some found to be less than adequate, statutes relating to education may be reenacted as components of a constitutional system if they

rather than creating a judicial solution,[202] the Court "directed the General Assembly to recreate and redesign a new system" that would "guarantee to all children the opportunity for an adequate education, through a *state* system."[203] The Court emphasized that "the *sole responsibility* . . . lies with the General Assembly."[204]

In doing so, this Court understood that the separation of powers cannot be used to justify abdication of responsibility and that the judicial role is limited.[205] This Court was careful to "not instruct the General Assembly to enact any specific legislation" or "direct the members of the General Assembly to raise taxes."[206] Rather,

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combine with other component statutes to form an efficient and thereby constitutional system." *Rose*, 790 S.W.2d at 215.

202 For example, the Court could have ordered specific reforms such as a finance system that did not utilize local property taxes, a system of public-school vouchers, a transformation of the teacher certification process, the consolidation or division of school districts, or the centralized administration of education.

203 *Rose*, 790 S.W.2d at 212.

204 *Id.* at 216.

205 As the Court explained: "The issue before us-the constitutionality of the system of statutes that created the common schools-is the only issue. To avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.

We believe that what these several cases cited as controlling by appellants mean is that great weight should be given to the decision of the General Assembly. We believe they mean that the presumption of constitutionality is substantial. We believe that they mean that legislative discretion-in this specific matter of common schools-is to be given great weight and, we do so in this decision. We do not question the wisdom of the General Assembly's decision, only its failure to comply with its constitutional mandate. In so doing, we give deference and weight to the General Assembly's enactments; however, we find them constitutionally deficient." *Rose*, 790 S.W.2d at 209.

206 *Id.* at 212.

its role was to "only decide the nature of the constitutional mandate."[207] Similarly, this Court understood the separation of powers constrains the remedial powers of the courts.[208] Because of Kentucky's explicit separation of powers provisions,[209] the remedial powers of Kentucky courts are more limited than the remedial powers of the federal judiciary.[210]

In *Haydon Bridge II*, this Court recognized these concerns. There, the Court detailed the "perfect storm" that would result if it ordered a draw on the State Treasury "to remove more than $32 million from the General Fund and transfer it."[211] As the Court explained, "Presumably, the Governor would then have to exercise his power to call an emergency session of the General Assembly. In short, the legislative branch would be convening at the direction of the executive branch to determine how to deal with the situation, to-wit, how to pay what the judicial branch says the sovereign owes, all while continuing the necessary functions of state government. The impact of this hypothetical sequence of events one time is concerning but the potential

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207 *Id*.

208 In reversing the trial court's decision to exercise continuing jurisdiction, the Court declared: "The implications of such an open-ended judgment are very clear. The trial court retains jurisdiction and supervision of the General Assembly's effort to provide a constitutional system of common schools. Under such an order, the General Assembly, in theory if not in practice, would literally have to confer, report, and comply with the judge's view of the legislation proposed to comply with the order. The legislation would be that of the joint efforts of the General Assembly and the trial court, with the latter having the final word. This is, without doubt, the type of action that was eschewed when the framers of the four constitutions of this state placed the separation of powers doctrine in the organic law of this state." *Rose*, 790 S.W.2d at 214.

209 Ky. Const. §§ 27, 28, 29.

210 *Rose*, 790 S.W.2d at 214.

211 *Haydon Bridge II*, 416 S.W.3d at 296.

future consequences are almost unfathomable. The General Assembly would be routinely summoned into special session by the Governor in order to pay 'bills' emanating from court judgments following litigation over budget bills."[212] Whereas *Haydon Bridge II* involved a claim of $32 million among state and local governments, these cases involve a demand that the courts order the State Treasury to pay more than $180 million to private individuals. Sovereign immunity—broad and exacting—is meant to protect against such an "unfathomable" demand on the public purse.[213]

These principles are instructive here. It "would be a violation of the separation of powers doctrine . . . for [this] Court to tell the [Executive and Legislative Branches] what to do, . . . by its very nature, judicial exercise of this responsibility requires great restraint."[214] If the circuit court concludes that there has been a violation, then the Governor and the General Assembly must determine what steps will be taken to remedy the violation. Perhaps they will do as the *Long* and *Bennett* Appellants have asked and refund all monies paid. Perhaps they will develop an administrative system, consistent with the commands of due process, to determine both the validity of the debts and the amount of the debts. Perhaps they will develop some other solution.

The General Assembly has, for example, shown it is not deaf to such pleas. The Commonwealth has long entertained legislative claims "submitted by vendors for

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212 *Id.*

213 *Id.* at 291 ("Sovereign immunity protects public coffers or, as it is sometimes denominated, the public purse.").

214 *Id.* at 287–88.

goods and services provided to agencies, but not received on a timely basis or purchased without proper authority."[215] The statute governing legislative claims provides that any "claim against any agency, department, or budget unit not presented or encumbered for payment within the fiscal year in which the obligation was incurred may, after determination by the secretary of the Finance and Administration Cabinet, be found to be a valid claim against the Commonwealth, and may be authorized for payment out of the appropriation for the prior year claims."[216] There is a process and form for making such requests, and it ultimately results in a bill draft considered by the General Assembly, and payment in appropriate cases.[217]

Whatever the solution may be—the determination must rest with the People's Representatives—not the courts.

Conclusion

For these reasons, this Court should hold that (1) immunity permits a declaratory judgment; (2) immunity prohibits a judicial order to pay money absent an express waiver by the legislature; and (3) the separation of powers doctrine requires the Executive and Legislative Branches be allowed to develop a means of correcting the violation, if any.

Respectfully submitted,

/s/ *Bryan H. Beauman*
Counsel for Appellees

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215 Legislative Claims, Finance and Administration Cabinet, https://perma.cc/9WUT-XC7T.

216 KRS 45.231.

217 *See* n. 215.

Word Count Certificate

This document complies with the word limit of RAP 31(G)(3)(b) because, excluding the parts of the document exempted by RAP 15(D) and RAP 31(G)(5), this document contains 11,629 words.

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