Kentucky Court of Appeals

No. 2025-CA-1034

JILL STAHL HUSTON, *et al.* — *Appellants*

v.

On Appeal from
Boone Circuit Court
No. 25-CI-0550

COMMONWEALTH OF KENTUCKY, *et al.* — *Appellees*

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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Certificate of Service

I certify that on March 3, 2026, I electronically filed this brief in the Office of the Clerk of the Kentucky Court of Appeals and I served, via U.S. mail: Christopher Wiest, 50 East Rivercenter Boulevard, Suite 1280, Covington, Kentucky 41011; Thomas Bruns, 4555 Lake Forest Drive, Suite 330, Cincinnati, Ohio 45242; Bethany Atkins Rice, Lucas Roberts, Office of Legal Services, Department of Revenue, P.O. Box 423, Frankfort, Kentucky 40602; S. Travis Mayo, Office of the Governor, 501 High Street, Second Floor, Frankfort, Kentucky 40601; Barbara Dickens, Office of General Counsel, Finance and Administration Cabinet, 200 Mero Street, Fifth Floor, Frankfort, Kentucky 40622; and Clerk, Boone Circuit Court, 6025 Rogers Lane, Room 141, Burlington, Kentucky 41005. I further certify that the record was not checked out prior to filing this brief.

INTRODUCTION

When the General Assembly speaks clearly through legislation, its coordinate branches must listen. *See Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 661 (Ky. 2023) ("[T]he General Assembly is the policy-making body for the Commonwealth, not the Governor or the courts."). This appeal is the result of this core tenet of our separation of powers not being followed. First, when the House of Representative ruled the Governor's line-item veto of a sales-tax exemption in 2024 House Bill 8 invalid, the Governor persisted as if the exemption was not the law—despite an Attorney General opinion saying otherwise. And when the General Assembly remedied that problem with 2025 House Bill 2 by authorizing taxpayer-refund lawsuits, the circuit court agreed with the Governor and the Department of Revenue that general refund statutes rendered that legislative fix toothless. This Court should respect the General Assembly's plain commands and reverse the dismissal.

STATEMENT CONCERNING ORAL ARGUMENT

This appeal raises important questions about the separation of powers under the Kentucky Constitution, so the Commonwealth respectfully requests oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The General Assembly "is permitted to set the economic policy for the Commonwealth." *Zuckerman v. Bevin*, 565 S.W.3d 580, 597 (Ky. 2018). This appeal, at bottom, is about one way it does so: creating exemptions from sales taxes.

In particular, the General Assembly in 2024 House Bill 8 aligned Kentucky with nearly all its sister States by including the "sale, use, storage, or other consumption of" bullion and collectible currency among transactions exempt from sales taxes. 2024 Ky. Acts ch. 166, §§ 33, 34. The bill passed both chambers on March 28, 2024, and was delivered to Governor Beshear the same day. *House Bill 8*, General Assembly, https://perma.cc/W9YY-2WS2. The Governor in turn purported to line-item veto the section of the bill exempting bullion and currency from sales taxes, along with another section not at issue here. *Id.*

HB 8 thus returned to the House of Representatives with Governor Beshear's partial veto message. On point of order from Rep. Steven Rudy, the Speaker of the House ruled Governor Beshear's line-item veto invalid under Section 88 because HB 8 was not an "appropriation bill[]." *House Chambers (Part 1)* at 17:33–18:30, KET (April 12, 2024), https://ket.org/legislature/archives/2024/regular/house-chambers-6us305. The Speaker's ruling relied on Attorney General Opinion 03-003, 2003 WL 2004172 (April 21, 2003), for the proposition that an appropriation bill must have "the primary and specific aim"

of appropriating money. *House Chambers (Part 1)* at 17:33–18:30. Given that ruling, Rep. Rudy moved the House to transfer HB 8 to the Secretary of State. *Id.* at 18:33–43. The House did so without objection. *Id.*; *see also House Bill 8*, General Assembly, https://perma.cc/W9YY-2WS2. Accordingly, the provisions relevant here became law on August 1, 2024. *See* KRS 139.480(37).

Before the relevant parts of HB 8 became effective, the Speaker of the House and President of the Senate sought, and received, an opinion from the Attorney General about whether the Governor's line-item veto was valid. *See* OAG 24-06, attached at Tab 1. In answering this question in the negative, the Attorney General focused on the text of Section 88, which grants the Governor "the power to disapprove any part or parts of appropriation bills embracing distinct items." *See id.* at 2. Strictly construed, Section 88 limits the Governor's line-item veto authority to bills "with *the primary purpose* of spending public funds." *Id.* at 3–4. So the Attorney General reviewed the 68 sections of HB 8 to determine that it "is almost entirely addressed to sundry issues related to the taxes imposed, and fees assessed, by the state and local governments." *Id.* at 4–5. The Attorney General thus concluded in no uncertain terms that Governor Beshear's line-item veto was a "nullity," so the provisions he attempted to veto "must be included in the Kentucky Acts (session laws) and the official version of the Kentucky Revised Statutes." *Id.* at 7–8.

KRS 139.480(37) thus exists in the statute books as enacted by the General

Assembly, with a note explaining the above background. But not everyone agreed. Despite the House's action and the Attorney General's opinion, Governor Beshear deemed his line-item veto "intact" and ordered the Department of Revenue to continue as if KRS 139.480(37) was not the law. *See* Memorandum in Support of Governor Beshear, *et al.* Motion to Dismiss (MTD) at 4, attached at Tab 2; Appellant Br. 2; *see also* Victor Puente, *Good Question: What's the Situation With Sales Tax on Gold & Silver in Kentucky*, WKYT (Nov. 20, 2024), https://perma.cc/N6GK-RN7C ("[T]he last release from the Department of Revenue said, 'Accordingly, the sale, use, storage or other consumption of currency or bullion currency continues to be subject to the sales and use tax.'").

Confusion understandably followed. *See, e.g.*, Puente, *Good Question*, *supra* (noting the National Coin and Bullion Association's comment that the Department "put retailers in a difficult situation"); Rachael High Chamberlain, *Exempt or Not? Kentucky's Gold Bullion Tax Break Mess*, FBT Gibbons (Apr. 1, 2025), https://perma.cc/8BJ6-L9QU (describing the "dilemma for retailers" deciding whether to "(i) impose and collect the 6 percent sales and use tax, or (ii) not charge, collect, and remit it," both of which "opened them to potential liability").

To remedy the confusion Governor Beshear wrought, the General Assembly enacted House Bill 2 in 2025. *See* 2025 Ky. Acts ch. 100. It took two main steps. First, it voids any notice of sales-tax collection for currency or bullion on or after August 1, 2024—when KRS 139.480(37) became effective—and makes

publishing any official notice of such collection after March 27, 2025 illegal, subject to liquidated damages. KRS 139.4802(1), (4). Second, HB 2 allows "any person" who paid sales or use taxes on currency or bullion after August 1, 2024 to "maintain an action for refund of the tax paid," either individually or as a class under CR 23, without following the normal administrative-refund process. KRS 139.4802(2), (3). And HB 2 makes clear its intent to waive the Commonwealth's immunity for those refund actions. KRS 139.4802(5).

This lawsuit is such a refund action. Plaintiffs are a group of Boone County residents who purchased, and paid sales taxes on, silver bullion after August 1, 2024, and Money Metals Exchange LLC, a dealer in bullion and currency that collected and remitted sales taxes on bullion or currency after August 1, 2024. Appellant Br. at 2–3. They sued Governor Beshear, Finance and Administration Secretary Holly McCoy-Johnson, Revenue Commissioner Tom Miller, the Department, and the Commonwealth in Boone Circuit. *Id.* at 3. Because Plaintiffs' lawsuit is authorized by HB 2, the Commonwealth filed an answer.

On Commissioner Miller and the Department's motion, the circuit court dismissed Plaintiffs' case. As its primary holding, the circuit court found that Plaintiffs' claims were moot because the Department "provided notice and instructions on its website for taxpayers to seek refunds for sales use tax they paid on currency and bullion currency after August 1, 2024," thus, in the court's view, making a lawsuit "unnecessary." Order Dismissing at 7–8, attached at Appendix

1 to Appellant Br. Despite acknowledging (at 5) that finding mootness means it lacks jurisdiction to hear the case, the court also ruled, in the alternative, (1) that a retailer is "an indispensable party" to a refund action under KRS 139.4802(2) and (2) that such refund actions remain subject to general administrative-exhaustion requirements. *Id.* at 9–10. Lastly, the circuit court flagged its "concerns" that the lawsuit "was contrived." *Id.* at 10–12. Plaintiffs' appeal followed.

ARGUMENT

KRS 139.4082 rights a particular wrong—continued collection of sales tax for currency and bullion after August 1, 2024—by allowing a particular cause of action in the appropriate circuit court. The statute's plain language leads to one conclusion: the choice of whether to seek redress through a refund lawsuit belongs to the taxpayer in these limited circumstances. The circuit court was thus wrong to let the Department and Commissioner Miller avoid this lawsuit at the outset. This dispute is live, regardless of the Department's offer of alternative procedures to seek a refund.

This Court reviews these "pure question[s] of law" with fresh eyes. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010). Doing so here should mean reversal with a remand for this lawsuit to proceed under KRS 139.4082. In the process, the Court should reaffirm two principles: (1) that government officials ignore decisions made by the General Assembly (and Attorney General opinions confirming those decisions) at their own peril, and (2) that the General Assembly may enact

specific provisions that control in particular circumstances over generally applicable provisions codified elsewhere. The Commonwealth otherwise takes no position on the merits of Plaintiffs' claims, or any other issues in this appeal.

I. House Bill 2 remedied the harms caused by Governor Beshear's refusal to abide by the General Assembly's action and the Attorney General's opinion.

The main focus of this appeal is the circuit court's mistaken mootness holding. But the circumstances that give rise to it cut to the heart of Kentucky's separation of powers. Put simply, had Governor Beshear respected the limits on his own line-item veto power and given proper deference to the General Assembly's conclusion about those limits—a conclusion confirmed by an Attorney General opinion—neither HB 2 nor this appeal would have happened. The Court should thus take this opportunity to reaffirm the proper roles of the General Assembly, Governor, and Attorney General in the Commonwealth's system of government. That reminder will benefit future government officials.

Start with the line-item veto power. It's an offshoot of the "legislative power" that rests with the General Assembly under Section 29. In general, Section 28 demands a strict separation of powers among the three "departments" described in Section 27. But it makes an exception for "the instances hereinafter expressly directed or permitted." Ky. Const. § 28. The veto power is one such instance of allowing the Governor to perform "a legislative function." *Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d 852, 862 (Ky. 2005); *see also LRC ex rel.*

Prather v. Brown, 664 S.W.2d 907, 912 n.9 (Ky. 1984). That's because it involves the Governor shaping the contents of the Commonwealth's laws through his "approval or disapproval." *See Arnett v. Meredith*, 121 S.W.2d 36, 37–38 (Ky. 1938).

When our Constitution permits "encroachments by one department in the exercise of functions properly belonging to another," its terms "are not only mandatory, but should be strictly construed." *Id.* at 38. Put another way, government officials must strictly follow Section 88's terms, lest they weaken the separation of powers. Section 88 provides: "The Governor shall have the power to disapprove any part or parts of appropriation bills embracing distinct items." Ky. Const. § 88; *see also LRC v. Brown*, 664 S.W.2d at 928 ("[I]t is only in the case of 'appropriation bills' that a line-by-line veto may be exercised."). So the primary question—when deciding whether a line-item veto is valid—is whether the bill is an "appropriation" bill.

No caselaw has defined that term in the Section 88 context. But helpful clues to the meaning of "the plain language of the Constitution" abound. *Graham v. Adams*, 684 S.W.3d 663, 681 (Ky. 2023). For one, "[a]n appropriation by the Legislature is the setting apart of a particular sum of money for a specific purpose." *Davis v. Steward*, 248 S.W. 531, 532 (Ky. 1923); *see also Miller v. Sturgill*, 202

S.W.2d 632, 634 (Ky. 1947) (amounts "payable out of the state treasury" are appropriations). Bills taking other actions, like HB 8's creation of a sale-tax exemption, thus cannot fairly be described as appropriation bills.

The Constitution elsewhere draws a clear distinction between revenue bills and appropriation bills. *Compare* Ky. Const. § 47 (requiring "bills for raising revenue" to originate in the House), *with* Ky. Const. § 55 (exempting "general appropriation bills" from the general rule governing effective dates). So the terms are distinct when used in the Constitution. And the Supreme Court has elsewhere described a revenue bill as one in which "the *primary purpose* of that piece of legislation is to generate income." *Yeoman v. Commonwealth, Health Pol'y Bd.*, 983 S.W.2d 459, 471 (Ky. 1998) (emphasis added) (citation omitted). Following that logic, it makes sense that an appropriation bill is one with the primary purpose of spending state dollars. Making that purpose the lodestar under Section 88 is most faithful to the command to "strictly construe[]" the Governor's legislative power. *Arnett*, 121 S.W.2d at 38.

It's beyond question that HB 8, when assessed for its primary purpose, is not an appropriation bill subject to the Governor's line-item veto. But that issue is not directly before the Court—there's a bigger question at stake here: When the legislature and Governor disagree about a line-item veto's validity, who decides whether the bill becomes Kentucky law?

One answer is the Court of Justice. The Governor and the Department, however, never sought judicial clarification about their duty to enforce every provision of HB 8. To be sure, the Governor and the Department noted below that "the Governor's veto was not challenged in court." MTD at 4. But that gets things backwards. The Governor had a duty to enforce HB 8 until a court ordered otherwise. *See Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 369 (Ky. 2016) ("[T]he Governor has a special duty with respect to the law, as he is commanded to 'take care that the laws be faithfully executed.'" (citation omitted)). Indeed, in many other contexts, the Governor has not hesitated to sue and ask for relief that allows him not to enforce a duly enacted Kentucky law. *See, e.g.*, *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021); *Beshear v. Coleman*, No. 2024-SC-0228 (Ky.); *Shell v. Beshear*, No. 2024-SC-0254 (Ky.). The Governor's outright refusal to enforce HB 8 in the absence of a court order is thus deeply problematic under our separation of powers.

The General Assembly, by comparison, didn't have any obligation to sue the Governor to confirm that HB 8 is valid and enforceable. Indeed, the legislature may well have lacked standing to bring such a suit. *See Commonwealth ex rel. Beshear*, 498 S.W.3d at 367 ("The idea that individual legislators have standing to challenge an action by the Governor—under the premise of an injury to an interest in a statute being carried out properly or the legislators' duty to vote on legislation—is simply too attenuated to create a justiciable controversy."). The

General Assembly did all that was necessary to ensure HB 8 is valid and enforceable. The House issued a ruling that the line-item veto was invalid, the Attorney General confirmed that ruling, and HB 8 became law in its original form.

The Constitution expects nothing more from the General Assembly. To see why, consider the alternative. If the Governor—whose legislative power to line-item veto a bill must be strictly construed—is the sole initial arbiter of whether his vetoes are valid, then the General Assembly must "reconsider" every invalid line-item veto and "a majority of all the members" in both chambers must override the veto. That flips the burden to the branch where the legislative power is vested and extends the Governor's power past Section 88's tight limits.

If that alone does not confirm that the General Assembly got this process right, two reasons to prefer it come to mind. First, if the General Assembly concludes that the Constitution forbids a Governor's line-item veto, the General Assembly has no reason to sanction such an act by passing a veto override anyway. As one commentator put it, "overriding this veto could be interpreted as allowing the [G]overnor to veto a revenue bill not formally part of a budget bill—a precedent the General Assembly did not want to set." Chamberlain, *Exempt or Not?*, *supra*. What's more, the veto-override process takes precious legislative time, often at a premium during the final days of a busy legislative session. The best course is the one the General Assembly chose here—rule the line-item veto

invalid and allow it to become "a law in like manner as if he had signed it." Ky. Const. § 88.

The General Assembly went above and beyond what the Constitution requires with HB 8 by asking the Attorney General for an opinion on this issue. The Attorney General has been tasked with opining on Kentucky law since the Commonwealth's earliest days. *See* Ky. Const. art. II, § 16 (1792) ("An attorney general . . . shall give his opinion when called upon for that purpose, by either branch of the legislature or by the Executive."). Today, the Attorney General's statutory duty to write opinions is tied to his role as "the chief law officer of the Commonwealth of Kentucky." KRS 15.020(1). He is "the legal adviser of all state officers, departments, commissions, and agencies, and when requested in writing shall furnish to them his . . . written opinion touching any of their official duties." *Id.*; *accord* KRS 15.025. Those opinions are "highly persuasive, but not binding on the recipient." *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. 1991) (citation omitted). Still, "government officials *are expected to abide by the opinion* until a court decrees otherwise or the legislature changes the law." *Id.* (emphasis added).

Governor Beshear and the Department instead chose to ignore the General Assembly's ruling *and* the Attorney General's opinion and unilaterally decline to enforce the sales-tax exemption in HB 8. That decision is the sole source of the breakdown in the legislative process here. As the Commonwealth described above (at 3), retailers and consumers faced uncertainty over whether purchases

of currency and bullion were still subject to sales tax, with potential consequences for either choice. So the General Assembly took action to resolve all uncertainty by enacting HB 2.

The upshot of this background is twofold. It first should give this Court pause regarding the circuit court's assumption that Governor Beshear or the Department complied with the law here—the Governor's invalid assertion of his line-item veto power, and his unwillingness to accept its limits, forced the General Assembly to act. Second, because HB 2 remedies a specific harm to specific individuals or entities, the Court should allow Plaintiffs to take advantage of the unique cause of action it creates.

II. House Bill 2 exempts Plaintiffs from the general refund process.

Under HB 2, "any person who paid sales tax . . . or use tax . . . on currency or bullion currency that is exempt from sales and use tax under KRS 139.480(37) may maintain an action for a refund of the tax paid, as an individual or by seeking certification as a class under Rule 23." KRS 139.4802(2). Such a person may do so "[n]otwithstanding" the provisions providing a general tax-refund process. *Id.* And those refund actions "may be brought in the Circuit Court of any county where the named plaintiff resides or where the currency or bullion currency transaction took place." KRS 139.4802(3). By design, HB 2 strays from the normal refund process, which requires an individual "application or claim for the

refund" to be made with the Department. KRS 134.580(3); *see also* KRS 139.770 (applying KRS 134.580 to sales tax refunds).

A few background principles guide how this Court interprets these statutory provisions. Chief among them is "the fundamental principle . . . that when the General Assembly clearly expresses its intent, that intent is controlling." *Martin v. Warrior Coal LLC*, 617 S.W.3d 391, 396 (Ky. 2021) (citation omitted). So when the General Assembly uses plain terms, Kentucky courts "assume that the Legislature meant exactly what it said, and said exactly what it meant." *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (citation omitted) (cleaned up). That's especially true when asking whether a statute waives sovereign immunity. *See Withers v. Univ. of Ky.*, 939 S.W.2d 340, 346 (Ky. 1997). To fulfill that commitment to enforcing clear language, Kentucky's "rules of statutory construction provide that where there is both a specific statute and a general statute seemingly applicable to the same subject . . . the specific statute controls." *Bd. of Educ. of Paris v. Earlywine*, 719 S.W.3d 1, 10 (Ky. 2025) (citation omitted).

Applied here, it's clear that the General Assembly meant to enact a specific cause of action for refunding improperly collected sales taxes for bullion and currency, not add a new layer to the general refund process. As the circuit court admitted, the statute "does not specifically state and require a party to exhaust administrative remedies" by using the general process. Order Dismissing at 9.

That is an understatement. HB 2 expressly disclaims any need to follow the general refund process before bringing its specific cause of action. *See* KRS 139.4802(2) ("Notwithstanding KRS 49.220 and 139.770 . . ."). The latter statute directs taxpayers to the general refund process. *See* KRS 139.770(1) (making KRS 134.580 as applicable to sales tax refunds). And the former lays out the process for appealing an adverse refund decision as a part of that process. *See* KRS 49.220(3).

That plain text should end the inquiry. The word "notwithstanding," when used in a statute, "mean[s] 'in spite of' or 'without prevention or obstruction from or by.'" *Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 791 (Ky. 2019) (citation omitted) (cleaned up). So nothing in the statutes directing aggrieved parties to the general refund process should prevent their claims under KRS 139.4802(2). Put another way, "notwithstanding is a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail." *Bloyer v. Commonwealth*, 647 S.W.3d 219, 225 (Ky. 2022) (citation omitted) (cleaned up). If the General Assembly wanted these specific individuals to follow the general refund process, it would have said so. It said the exact opposite by including a notwithstanding clause.

If that's not enough, several parts of KRS 139.4802 are incompatible with the general refund process. That general process requires individual applications, *see* KRS 134.580(3), while HB 2 allows a class action "on behalf of the person

and other persons similarly situated against the Commonwealth," KRS 139.4802(2). And the general process calls for judicial review to occur under KRS 49.220, which, as noted above (at 12–13), KRS 139.4802(2) expressly disclaims. *See* KRS 139.4802(2).

What's more, the circuit court's suggestion that a refund action is only "appropriate" after the refund process plays out, *see* Order Dismissing at 8, would make little sense even without the statute's disclaimer. When the Department denies a refund claim, it "may be protested and appealed in accordance with KRS 49.220 and 131.110." KRS 134.580(3). Under either, the administrative process requires an appeal to the Board of Tax Appeals. KRS 49.220(3); KRS 131.110(4). From that board, an aggrieved party "may appeal to the Franklin Circuit Court or to the Circuit Court of the county in which the aggrieved resides or conducts his place of business." KRS 49.250(1). So in the circuit court's view, a party can seek redress under KRS 139.4802 only after it has exhausted every step of the administrative process—including its appeals to the Court of Justice. The far better reading of KRS 139.4802 is that the General Assembly intended to bypass this general process completely, in these limited circumstances, to allow a plaintiff to proceed directly to the appropriate circuit court.

Against that plain language, the circuit court fell back on a mootness analysis based on what it called the Department's "compliance with HB 2"—the process by which the Department has directed consumers to seek refunds. Order

Dismissing at 7–8. But a state agency cannot unilaterally offer a settlement to refuse to enforce a statute. In any event, the Department's process is not a unique settlement process designed to right the wrongs corrected by HB 2. It is the same "longstanding administrative process" the Department uses for all refunds. *See Instructions on Refunds for Sales and Use Tax Paid for Purchases of Bullion and Collectible Currency*, Ky. Dep't of Revenue, https://perma.cc/Z75J-3RKM. Of course, as explained above (at 12–13), HB 2 expressly exempts its cause of action from that administrative process.

Put simply, the circuit court conflated (inapplicable) administrative exhaustion requirements with mootness. The only case it relied on to do so—*Ky. Board of Nursing v. Sullivan University System, Inc.*, 433 S.W.3d 341 (Ky. 2014)—is inapposite. There, a university challenged an administrative decision to place its program on probation but, while its appeal was pending, a new administrative decision gave it all the relief it sought in court. *Id.* at 343. So the well-settled principle that a case becomes moot when a party "already received the relief it sought" applied. *Id.* at 344. But *Sullivan* has nothing to say about a plaintiff with two options two receive relief—a straightforward lawsuit or a complicated administrative process—deciding to take the simpler route.

That's what happened here. No doubt, an aggrieved party could choose to follow the general refund process offered to all taxpayers. But HB 2 rights a specific wrong by giving certain parties a choice: the administrative process or a

refund action. That choice belongs to parties like Plaintiffs, not to the Department. And Plaintiffs have received no relief. Simply put, their claims are not moot.

CONCLUSION

The Commonwealth agrees that the Court should reverse the circuit court and remand for proceedings consistent with KRS 139.4082.

Respectfully submitted,

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WORD-COUNT CERTIFICATE

This brief complies with the word limit of 8,750 under RAP 31(G)(2)(a) because, excluding the parts of the brief exempted by RAP 15(D) and 31(G)(5), this brief contains 4,048 words.

APPENDIX

1. Attorney General Opinion, OAG 24-06 (May 20, 2024).

2. Memorandum in Support of Governor Beshear, *et al.*, Motion to Dismiss

000024 of 000058

TAB 1

OAG 24-06 (May 20, 2024)

000025 of 000058

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May 20, 2024

OAG 24-06

Subject: Whether the Governor's purported line-item vetoes of 2024 House Bill 8 are valid, and whether the Reviser of Statutes should include the vetoed sections of the bill in the Kentucky Acts and the Kentucky Revised Statutes.

Requested by: Hon. David W. Osborne
Speaker of the Kentucky House of Representatives

Hon. Robert Stivers
President of the Kentucky Senate

Written by: Aaron J. Silletto, Executive Director
Office of Civil and Environmental Law

Syllabus: Because 2024 House Bill 8 is not an appropriations bill, the Governor's purported use of the line-item veto exceeds the powers granted to him by Section 88 of the Kentucky Constitution and is therefore invalid. The sections of House Bill 8 that the Governor purported to veto became law when the rest of the bill did, and therefore, those sections must be included in the Kentucky Acts and the Kentucky Revised Statutes.

Opinion of the Attorney General

During the 2024 Regular Session, the Kentucky General Assembly enacted House Bill 8, which is titled "AN ACT relating to fiscal matters, making an appropriation therefor, and declaring an emergency." The final version of the bill passed both chambers on March 28, 2024—by votes of 34-0 in the Senate and 87-9 in the House of Representatives—and was delivered to the Governor the same day. On April 9, 2024, the Governor, citing Section 88 of the Kentucky Constitution, issued a veto message as to House Bill 8, in which he purported to line-item veto two parts of the bill. Three days later, the House of Representatives ruled that the Governor's two

line-item vetoes of the bill were invalid and filed the bill without the Governor's signature with the Secretary of State.[1]

The Speaker of the House and the President of the Senate now request an Opinion of this Office regarding two questions:

> 1. Was the Governor's purported use of the line-item veto power found in Section 88 of the Kentucky Constitution effective to strike language from the Act, or because the bill was not an appropriation bill, was the veto a nullity such that the purportedly vetoed language is and remains the law of the Commonwealth?
>
> 2. Should both the Kentucky Acts and the Official version of the Kentucky Revised Statutes, as codified by the Reviser of Statutes, include as enacted law the sections purportedly vetoed by the Governor?

The nature of the Governor's line-item veto power is important to answering the first question. Section 27 of the Kentucky Constitution separates the powers of government among the three "departments": Legislative, Executive, and Judicial. "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, *except in the instances hereinafter expressly directed or permitted*." Ky. Const. § 28 (emphasis added). Section 29 of the Constitution vests the "legislative power" in the General Assembly, and Section 69 vests the "supreme executive power" in the Governor.

Section 88 of the Kentucky Constitution provides in relevant part:

> Every bill which shall have passed the two Houses shall be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the House in which it originated, which shall enter the objections in full upon its journal, and proceed to reconsider it. . . . The Governor shall have the power to disapprove *any part or parts of appropriation bills embracing distinct items*, and the part or parts disapproved shall not become a law unless reconsidered and passed, as in case of a bill.

(Emphasis added.) The Governor's veto power under Section 88 is a *legislative* power, as it provides the Governor with power to determine, or at least shape, the content of the Commonwealth's laws. *See, e.g.*, *Arnett v. Meredith*, 121 S.W.2d 36, 37–38 (Ky. 1938); *Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d 852, 862 (Ky. 2005); *see also Legislative Research Comm'n ex rel. Prather v. Brown*, 664 S.W.2d 907, 912 n.9 (Ky. 1984). The veto power is one of the "instances" under Section 28 in which a member of one branch of government is "expressly directed or permitted" to exercise

[1] 2024 Ky. Acts ch. 166.

a governmental power otherwise belonging to another branch. *Arnett*, 121 S.W.2d at 37; *Fletcher*, 163 S.W.3d at 862. "[A]ll provisions for such permitted encroachments by one department in the exercise of functions properly belonging to another, that may be found in the Constitution, are not only mandatory, but *should be strictly construed*." *Arnett*, 121 S.W.2d at 38 (emphasis added); *LRC v. Brown*, 664 S.W.2d at 912. Because Section 88 provides for an exception to the otherwise generally applicable separation of powers by conferring a legislative power on the Governor, it must be "strictly construed."

The final sentence of Section 88 grants to the Governor the power to issue a "line-item veto" of a bill passed by the General Assembly, also called a "partial veto." But the Governor's line-item veto power does not apply to all bills: "While the Governor's veto power applies to all bills, it is only in the case of 'appropriation bills' that a line-by-line veto may be exercised." *LRC v. Brown*, 664 S.W.2d at 928. Thus, the first question that must be answered in analyzing the validity of the Governor's line-item vetoes is whether House Bill 8 is an "appropriation bill[ ]" within the meaning of Section 88.

The Kentucky Constitution itself distinguishes between bills for raising revenue and appropriation bills. *See* Ky. Const. § 47 (requiring "bills for raising revenue" to originate in the House of Representatives); *id.* § 55 (exempting "general appropriation bills" from general rule that all bills enacted by the General Assembly take effect 90 days after adjournment); *id.* § 88 (providing for a line-item veto of "appropriation bills"); *see also id.* § 46 (requiring approval of a majority of members elected to both the Senate and the House of Representatives to pass "[a]ny act or resolution for the appropriation of money"). Thus, the terms appear to be mutually exclusive categories. *See Commonwealth ex rel. Ky. Dep't of Revenue v. N. Atl. Operating Co.*, No. 2008-CA-00304-MR, 2009 WL 792727, at *2 (Ky. App. Mar. 27, 2009) (holding that including a revenue measure in a general appropriation bill violates the "single subject" rule in Section 51 of the Constitution).

Kentucky courts have held that a bill is a "bill[ ] for raising revenue" under Section 47 of the Constitution "when *the primary purpose* of that piece of legislation is to generate income." *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 471 (Ky. 1998) (emphasis added). On the other hand, no Kentucky case has squarely defined "appropriation bills" as the term is used in Section 88.[2] An appropriation is an authorization, however worded, to pay money out of the state treasury. *See, e.g., Miller v. Sturgill*, 202 S.W.2d 632, 634 (Ky. 1947); *Davis v. Steward*, 248 S.W. 531,

[2] Where a bill created a government program, levied or assessed a fee to support that program, and then directed the disbursement of those funds collected to implement the program, the Supreme Court held the bill was an "appropriation bill." *D & W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 422 (Ky. 1980). But in *D & W Auto Supply*, it was "not seriously argued" that the law at issue, the Litter Control Act, "d[id] not *contain* an appropriation." *Id.* (emphasis added). The Court did *not* hold that any bill containing a single appropriation provision, *see* KRS 48.010(3)(b) (defining "[a]ppropriation provision"), is an "appropriation bill[ ]" for purposes of Section 88.

532 (Ky. 1923) (defining "appropriation" as "the setting apart of a particular sum of money for a specific purpose"); *see also* KRS 48.010(3)(a) (defining "appropriation" to mean "an authorization by the General Assembly to expend a sum of money not in excess of the sum specified, for the purposes specified in the authorization. . ."). Because the categories of bills for raising revenue and appropriation bills appear to be mutually exclusive, an "appropriation bill[ ]" for which the line-item veto is authorized in Section 88 must mean a bill with *the primary purpose* of spending public funds. So, if the bill primary deals with raising revenue—*e.g.*, establishing new taxes, modifying tax rates, creating exemptions from existing taxes, and the like—it is not an "appropriation bill[ ]" under Section 88.

According to its title, House Bill 8 is a bill "relating to fiscal matters." A bill relating to fiscal matters could, of course, be an appropriation bill. But it could also be a bill for raising revenue, *i.e.*, a tax bill. Thus, the first part of House Bill 8's title does not resolve conclusively whether it is an "appropriation bill" subject to the Governor's line-item veto under Section 88. A brief review of the contents of the bill is necessary.

House Bill 8 is 198 pages long and consists of 68 sections. The bill addresses a number of matters related to the fiscal health of the Commonwealth, such as extending the petroleum storage tank environmental assistance fund (§§ 1–3), requiring a Department of Revenue report (§ 4), allocating the current excise tax on racetrack admissions among various Kentucky Horse Racing Commission funds (§§ 5–8), correcting a statutory citation regarding advance deposit account wagering licenses (§ 9), providing sales tax exemptions for certain services (§ 10), providing for a new tax credit for broadband (§§ 11–13), changing a date reference to the Internal Revenue Code in an income tax statute (§ 14), amending a definition in an income tax statute (§ 15), extending a deduction applicable to the corporate income tax (§ 16), extending a coal severance tax refund process (§ 17), and eliminating the electric vehicle ownership fee as to "hybrid vehicles" (§§ 18–20). The bill also has provisions relating to driver's license fees (§ 21), amending certain requirements for Department of Revenue publications (§§ 22–27), allowing a deduction against the ride share tax (§ 28), extending a date applicable to tax increment financing (§ 29), transferring revenue received from the sale of child victims' trust fund special license plates (§ 30), amending the statute authorizing certain counties to impose a license fee on vehicle rentals (§ 31), and extending the state fee on new tires (§ 32). The bill also has provisions regarding powers of appointment (§ 35), changing a date reference in a corporate income tax statute (§ 36), and creating new tax incentives for data centers (§§ 37–42). Finally, the bill has several non-codified provisions regarding the cost of county audits (§ 48), authority for the Kentucky Communications Network Authority and Labor Cabinet to sell certain property (§§ 49–50), Kentucky Group Self-Insurance Guaranty Fund assessments (§ 51), Kentucky State Police billing for certain security services it provides (§ 52), jailer canteen accounts (§ 53), authorization of Kentucky Infrastructure Authority fees (§ 54), the cost of certain audits performed by the Auditor of Public Accounts (§ 55), Personnel Board

assessments (§ 56), Kentucky River Authority water withdrawal fees (§ 57), school district reimbursements for Urgent School Needs Assistance (§ 58), the use of insurance premium taxes (§ 59), Personnel Cabinet employee health insurance benefits assessments (§ 60), increasing Executive Branch Ethics Commission registration fees (§ 61), a tax expenditure analysis by the State Budget Director (§ 62), and providing effective dates of certain provisions of the bill (§§ 63–67) and an emergency clause (§ 68). The Governor purported to exercise his line-item veto power regarding two other portions of House Bill 8: the sections allowing an exemption from the sales tax on currency or bullion (§§ 33–34) and those extending a Department of Revenue tax amnesty program (§§ 44–47).[3]

As can be seen from this brief summary of the contents of House Bill 8, the bill is almost entirely addressed to sundry issues related to the taxes imposed, and fees assessed, by the state and local governments.[4] It is thus clear that the primary purpose of the bill is generating income for the state and local governments, not spending public funds. House Bill 8 is therefore a "bill[ ] for raising revenue" under Section 47 of the Kentucky Constitution and not an "appropriation bill[ ]" under Section 88. Because the Governor's veto power must be strictly construed, and because House Bill 8 is not an "appropriation bill[ ]," Section 88 does not empower the Governor to use his line-item veto on it. The Governor's attempted line-item vetoes of House Bill 8 were nullities, as they exceeded his constitutional authority. Therefore, those portions of the bill against which the Governor purported to use his line-item veto[5] became law with the rest of the bill when it was filed with the Secretary of State on April 12, 2024.

This conclusion is consistent with this Office's one prior opinion assessing the validity of the Governor's exercise of his line-item veto power. In 2003, the General Assembly passed a bill that included a section making an appropriation from the tobacco master settlement agreement ("MSA") fund. *See* 2003 Ky. Acts ch. 194 § 17 ("HB 390"). A different section of the bill, Section 15, enacted a new provision of the corporate tax code but did not itself include an appropriation. *Id.* § 15. When HB 390 was presented to Governor Paul Patton, he issued a line-item veto as to Section 15 only, leaving the provisions of the bill relating to the MSA fund intact. A Representative then asked this Office "a question of first impression in Kentucky," specifically, "May a Governor use the line item [*sic*] veto power found in Section 88 to veto a non-appropriating provision that is contained in a bill that makes an unrelated

[3] The Governor did not purport to veto a fifth section of the bill applicable to the Department of Revenue tax amnesty program (§ 43).

[4] The second part of House Bill 8's title does state that the bill "mak[es] an appropriation." But the bill does not directly appropriate any new monies from the state treasury. To the extent there is any "appropriation" in the bill at all, it would appear to be limited to extending into future years certain fees that are earmarked for designated purposes.

[5] 2024 Ky. Acts ch. 166 §§ 33–34, 44–47.

appropriation elsewhere?" OAG 03-003, 2003 WL 2004172, at *2. The Office answered that question in the negative.

To answer the Representative's question, the Office surveyed the scope of the line-item veto power in those states having such a provision in their constitutions. It found that the majority rule was adopted by the U.S. Supreme Court as follows:

> The term "appropriation act" obviously would not include an act of general legislation; and a bill proposing such an act is not converted into an appropriation bill simply because it has had engrafted upon it a section making an appropriation. *An appropriation bill is one the primary and specific aim of which is to make appropriations of money from the public treasury*. To say otherwise would be to confuse an appropriation bill proposing sundry appropriations of money with a bill proposing sundry provisions of general law and carrying an appropriation as an incident.

OAG 03-003, 2003 WL 2004172, at *3 (quoting *Bengzon v. Secretary of Justice of Philippine Islands*, 299 U.S. 410, 413 (1937)) (emphasis added).[6] The Office concluded:

> Applying the majority rule to the Governor's line item [*sic*] veto of section 15 of HB 390, it is plain that it is invalid. Under this case law, HB 390 is simply not an "appropriations bill." Unlike, for instance, the three branch budget bills whose introduction, analysis, and enactment is governed by KRS Chapter 48 . . . the only appropriation in HB 390, found in section 17, is 'incidental' to the Revenue Cabinet fulfilling its new duties. In fact, section 15, the vetoed piece, does not even contain an appropriation. We believe a Kentucky court would not hesitate to strike down this veto.

Id. at *4. Thus, Governor Patton's purported line-item veto of HB 390 was "unconstitutional, violate[d] the separation of powers, and [was] a nullity." *Id*. at *5.

The *Bengzon* definition of an appropriation bill, and thus, the definition employed in OAG 03-003—"one the primary and specific aim of which is to make appropriations of money from the public treasury"—is entirely consistent with the "primary purpose" test applied herein. It is not the "primary and specific aim" of House Bill 8 to appropriate money from the state treasury. Nor is House Bill 8 a bill "proposing sundry appropriations of money,"[7] as opposed to "a bill proposing sundry

[6] *Bengzon* is not the decision of a State's highest court interpreting its own constitution. Rather, the U.S. Supreme Court was interpreting the line-item veto provision in the Organic Act applicable to the pre-World War II provisional government of the Philippines. 299 U.S. at 411.

[7] Under the *Bengzon* test, a bill "proposing sundry appropriations of money" would certainly include each of the four biennial branch budget bills. *See* KRS 48.010(6) (defining "branch budget bill"); *see*

provisions of general law and carrying an appropriation as an incident."[8] Accordingly, it is simply not an "appropriation bill[ ]" against which the Governor may use his line-item veto.

All this is not to say, of course, that the Governor has no power under the Kentucky Constitution with respect to a bill the primary purpose of which is to raise revenue. He still has power under Section 88 to either veto the bill *in toto*, or to approve it *in toto*. But because Section 88 does not authorize a line-item veto of a bill for raising revenue, it "must be approved or rejected as a whole and an attempted partial veto is a nullity." 1 Sutherland, *Statutes and Statutory Construction* § 16:8 (7th ed.).

Having determined that the Governor's attempted line-item vetoes of House Bill 8 were nullities, the answer to the second question posed by the House Speaker and Senate President follows as a matter of course. The Governor's attempted line-item vetoes had no effect on the bill. Thus, the Governor took no valid action as to House Bill 8 under the legislative power granted him by Section 88 of the Constitution. When the Governor takes no action on a bill that has been passed by the General Assembly within ten days after its presentment to him under Section 56 of the Constitution, it becomes a law. Ky. Const. § 88; *see Ficke v. Bd. of Trs. of Erlanger Consol. Graded Sch. Dist.*, 90 S.W.2d 66, 68 (Ky. 1936) ("[I]f the Governor returned the act to the Secretary of State without approval or disapproval, it would take effect as of the date such return was made by him at any time within the ten-day period, since that action on his part was in its essence and effect an approval by him of the act."). The same must be true when the Governor purports to act, but he does not act as required by the Constitution. Thus, the entirety of House Bill 8, including those sections the Governor purported to veto, became law when it was filed with the Secretary of State.

"The official version of the Kentucky Revised Statutes shall contain all permanent laws of a general nature that are in force in the Commonwealth of Kentucky." KRS 7.131(2). Because the sections of House Bill 8 that the Governor purported to veto became law, notwithstanding his attempted vetoes, when filed with

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also 2024 Ky. Acts ch. 148 (House Bill 264) (the 2024–26 Judicial Branch budget bill); 2024 Ky. Acts ch. 175 (House Bill 6) (the 2024–26 Executive Branch budget bill); 2024 Ky. Acts ch. 179 (House Bill 263) (the 2024–26 Legislative Branch budget bill); 2024 Ky. Acts ch. 180 (House Bill 265) (the 2024–26 Transportation Cabinet budget bill). Doubtless, such a bill also would include any bill that, though not one of the four branch budget bills, also is primarily aimed at appropriating money from the state treasury. *See, e.g.*, 2024 Ky. Acts ch. 173 (House Bill 1) (making multiple one-time appropriations from the Budget Reserve Trust Fund Account); 2024 Ky. Acts ch. 223 (Senate Bill 91) (amending previously enacted branch budget bills and making supplemental appropriations).

[8] Under *Bengzon*, "a bill proposing sundry provisions of general law and carrying an appropriation as an incident," like House Bill 8, might include an "appropriation provision," *see* KRS 48.010(3)(b) (defining "appropriation provision"), even though the primary purpose of the bill is not spending public funds.

the Secretary of State, the amendments to the Kentucky Revised Statutes made by those sections must be included in the Kentucky Acts (session laws) and the official version of the Kentucky Revised Statutes. The Reviser of Statutes has a statutory duty to incorporate these provisions of House Bill 8 into the permanent laws of the Commonwealth. KRS 7.140(1).

Russell Coleman
Attorney General

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Office of Civil and Environmental Law

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TAB 2

Memorandum in Support of Governor Beshear, *et al.* Motion to Dismiss

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COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
DIVISION III
CIVIL ACTION 25-CI-00550
Electronically filed

JILL STAHL HUSTON, ***et al.***,	)
	)
	)
Plaintiffs,	)
v.	)
	)
ANDY BESHEAR, in his official capacity as Governor of Kentucky, ***et al.***,	)
	)
	)
Defendants.	)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT ON BEHALF OF GOVERNOR ANDY BESHEAR, SECRETARY HOLLY JOHNSON, COMMISSIONER TOM MILLER, AND KENTUCKY DEPARTMENT OF REVENUE

This case does not present a justiciable controversy as Plaintiffs do not have standing, have failed to exhaust their administrative remedies and any claim that could have existed is moot. When House Bill 2 (R.S. 2025) ("HB 2") was finally passed, and before Defendants were served with this lawsuit, the Department of Revenue ("Revenue") posted a notice on its website that it will issue refunds allowed under HB 2 to taxpayers who paid sales tax under KRS 139.200 and use tax under KRS 139.310 on currency or bullion currency after August 1, 2024, through the administrative process outlined in statute.[1] This administrative refund process existed well before House Bill 2 ("HB 2") was passed – in fact, since at least 1978 when KRS 139.770 was first enacted.[2] As KRS 134.580(3) states, "[n]o refund shall be made unless each taxpayer individually files an application or claim for the refund within four (4) years from the date payment was made. Each claim or application for a refund shall be in writing and state the

[1] *See* Instructions on Refunds for Sales and Use Tax Paid for Purchases of Bullion and Collectible Currency, available at https://revenue.ky.gov/News/Pages/Instructions-on-Refunds-for-Sales-and-Use-Tax-Paid-for-Purchases-of-Bullion-and-Collectible-Currency.aspx (last visited Apr. 16, 2025).
[2] *See id.*

specific grounds upon which it is based." Revenue has already agreed to expeditiously issue refunds to taxpayers under HB 2 who paid sales and use tax on currency and bullion currency on or after August 1, 2024. However, Plaintiffs do not allege that they have sought any relief through the administrative process for refunds that has existed, and which Revenue has already agreed to provide. As a result, no actual case or controversy exists between the parties.

Further, no actual case or controversy exists between the parties because under KRS 139.200 and KRS 139.310 – which HB 2 expressly applies – the person who paid sales tax and use tax is the retailer. Each of those statutes impose the payment of sales and use tax on retailers, and under HB 2 the retailers have the authority to apply for refunds of the taxes the retailers paid from Revenue. House Bill 2 does nothing to change who the taxpayer is; in fact it specifically applies the statutes imposing the payment of taxes on retailers by stating, "… on and after August 1, 2024, any person who paid sales tax ***under KRS 139.200*** or use tax ***under KRS 139.310*** on currency or bullion currency … may maintain an action for a refund of the sales tax paid … ." (Emphasis added). Under HB 2, the "person" who paid that sales tax or use tax is the retailer. None of the plaintiffs in this action are retailers that Plaintiffs allege they purchased currency or bullion currency from, and none of the retailers identified in receipts attached to Plaintiffs' separate motion for class certification are parties to this action. As such, Plaintiffs lack standing under HB 2 to bring this action. They also fail to join an indispensable party under Kentucky Rule of Civil Procedure ("CR") 19.01.

Plaintiffs lack standing because there is no justiciable case or controversy between the parties under HB 2, Plaintiffs suffer no injury as Defendants are acting in compliance with HB 2, and Plaintiffs fail to join a necessary party under CR 19. Plaintiffs have not exhausted all administrative remedies by seeking a refund under KRS 139.770, and, if any claim ever existed,

it is moot because Revenue is acting in compliance with HB 2 and affording any and all relief it may warrant. Therefore, the Court should dismiss this case.

Further, the Court should dismiss this case as to the Governor because he is not a proper party to this action, and Plaintiffs cannot state a claim for relief as to the Governor. The Governor does not issue tax refunds, and HB 2 only mentions the Governor in that the budget of the Office of the Governor could be subject to payment of liquidated damages awarded, which are not sought here. As Plaintiffs admit in their Complaint, they present no claim for personal liability for any violation of HB 2 and have no basis to assert a claim for liquidated damages.

For the same reason, the Court should dismiss the Finance Secretary and the Revenue Commissioner. Plaintiffs set forth no claim for personal liability against either Defendant. Neither do they have any basis to state a claim for liquidated damages.

The Court should also dismiss Plaintiffs' Complaint under the "unclean hands doctrine." Representative T.J. Roberts sponsored HB 2 throughout its passage. Roberts was employed in the same law firm as Plaintiffs' counsel during that time and remains employed in that firm.[3] As the Complaint shows, the individual Plaintiffs purchased bullion on March 17, 2025, *three days after* HB 2 was first passed and delivered to the Governor. These Plaintiffs did not purchase bullion at any time between August 1, 2024 and March 17, 2025. A tax refund through this lawsuit and judicial relief instead of the existing administrative refund process is seeking to enrich the very sponsor of HB 2, his employer or his law firm for filing and pushing the bill. Kentucky law prohibits a legislator from using his position as a legislator to enrich himself or a business associate and prohibits a legislator from using his influence as a legislator in any matter

[3] *See* http://chriswiest.com/ (last visited Apr. 16, 2025).

that involves a substantial conflict between his personal interest and his duties in the public interest. *See* KRS 6.731, KRS 6.761.

The Court should dismiss this action, with prejudice, under Kentucky Rule of Civil Procedure ("CR") 12.02(a), (f) and (g), and the "unclean hands doctrine."

FACTUAL SUMMARY

During the 2024 Regular Session, the General Assembly passed House Bill 8 and sent it to the Governor. House Bill 8, titled, "An ACT relating to fiscal matters, **making an appropriation therefor**, and declaring an emergency[,]" amended KRS 139.480 to exempt the sale, use, storage or consumption of currency and bullion from the sales and use tax after August 1, 2024. HB 8 (R.S. 2024) (emphasis added). Pursuant to his authority under Section 88 of the Kentucky Constitution, the Governor vetoed parts of HB 8, an appropriation bill by title and content, to strike the exemption of currency and bullion from the sales and use tax. The General Assembly did not vote to override that veto and delivered it to the Secretary of State with the Governor's veto message attached.[4] On August 1, 2024, HB 8 became effective with the Governor's lawful line-item veto intact, and the Governor's veto was not challenged in court.

In the 2025 Regular Session, the General Assembly passed HB 2, which establishes a refund for any person who paid sales tax or use tax on currency or bullion currency on or after August 1, 2024. The bill allows any person who on or after August 1, 2024 paid sales tax under KRS 139.200 and use tax under KRS 139.310 on currency or bullion currency that is exempt from sales and use tax under KRS 139.480(37) ot bring an action to seek a refund of those paid taxes. HB 8 § 1(2). In applying KRS 139.200 and KRS 139.310, HB 2 makes the "person" who can bring an action for a refund the retailer that those statutes require pay the sales and use tax.

[4] *See* https://web.sos.ky.gov/execjournalimages/2024-Reg-HB-0008-4760.pdf (last visited Apr. 16, 2025).

House Bill 2 also allows a person who paid such taxes under those statutes and prevails in the civil action to seek pre- and post-judgment interest, injunctive relief, reasonable attorney's fees and costs, and, for alleged violations of Section 1(1) of the bill, liquidated damages of $1,000 for each day of a violation, with those liquidated damages coming from the administrative budget of the Finance and Administration Cabinet, Revenue, or the Office of the Governor. *Id.*, § 1(4). Section 1(6) of the bill creates personal liability for any person who directs, instructs, or causes a violation, and Section 1(1) of the bill defines a violation as occurring when the Finance Secretary or the Revenue Commissioner publishes an official notice instructing that taxpayers should continue to collect and remit sales and use tax on the sale, use, storage or other consumption of currency or bullion.

The Governor vetoed HB 2 on March 25, 2025. The veto message stated:

> In 2024, I vetoed part of an appropriation bill that waived the sales and use tax for gold. The General Assembly failed to override that veto and it was never challenged in court. The veto is therefore valid. During this session, the legislature has not passed a bill that would waive the sales and use tax on the purchase of gold. Instead, House Bill 2 retroactively allows people who paid sales or use tax on currency or bouillon after August 1, 2024, to file a lawsuit to collect a refund. The decision to not simply permit a refund, but instead allow for lawsuits by purchasers, appears to be designed to cost the Commonwealth tax dollars while enriching certain lawyers. The bill would also make executive branch officials personally liable to pay monetary damages to a taxpayer who is awarded a refund on gold, even in situations when those officials have acted in good faith and in accordance with the law. At a time when Kentuckians are hurting because of higher prices at the grocery, at the pump, and for everyday consumer goods, prioritizing tax breaks for purchasers of gold is out of touch with reality for most people in Kentucky.

The General Assembly voted to override the Governor's veto on March 27, 2025. Under its emergency clause, HB 2 became effective on March 27, 2025.

In compliance with HB 2, when the legislature voted to override the Governor's veto on March 27, 2025, Revenue immediately provided notice and instructions on its website for taxpayers to seek refunds for sales use tax they paid on currency and bullion currency after

August 1, 2024.[5] This statutory refund process under KRS 139.770 has existed since at least 1978, when that statute was first enacted, and allows refunds of sale and use taxes imposed on and paid to Revenue by retailers under KRS 139.200 and KRS 139.310, which retailers are required to collect from purchasers under KRS 139.210 and KRS 139.340. As the plain language of KRS 139.480 shows, the items listed in that statute are exempt from sales and use taxes that Kentucky law requires be imposed on and paid by retailers.[6]

Regardless of HB 2, KRS 134.580 still applies to sales and use tax refunds, including sales and use taxes paid on the purchase of bullion and collectible currency. As KRS 134.580(3) states, "[n]o refund shall be made unless each taxpayer individually files an application or claim for the refund … ." Although HB 2 notwithstands KRS 49.220 and KRS 139.770 in Section 1(2), it does not suspend KRS 134.580. This shows that if the legislature did not want the mandatory refund process to be followed by taxpayers and applied under HB 2, it could have done so. The Kentucky Supreme Court has held that the procedure under KRS 134.580 must be followed and the administrative remedies provided under it must be exhausted before relief can be sought in the circuit court. *Revenue Cabinet v. Gillig*, 957 S.W.2d 206, 211-12 (Ky. 1997).

Rather than submitting information necessary to obtain refunds from Revenue, Plaintiffs Jill Stahl Huston, Stacie Earl, Karen Strayer and Money Metals Exchange LLC, filed this underlying action against Governor Andy Beshear, Secretary of Finance and Administration

[5] Instructions on Refunds for Sales and Use Tax Paid for Purchases of Bullion and Collectible Currency, available at https://revenue.ky.gov/News/Pages/Instructions-on-Refunds-for-Sales-and-Use-Tax-Paid-for-Purchases-of-Bullion-and-Collectible-Currency.aspx (last visited Apr. 16, 2025).

[6] Although Plaintiffs do not assert a claim for a refund for use taxes paid by retailers, KRS 139.310 imposes such a use tax, KRS 139.330(1) requires retailers to collect the use tax imposed by KRS 139.310, KRS 139.360 makes the use tax the retailer is required to collect a debt owed by the retailer to the state, and KRS 139.330 provides that the purchaser of the item the use tax is imposed on is relieved of liability for the use tax if the retailer gives the purchaser a receipt pursuant to KRS 139.340. Thus, as with the sales tax imposed on retailers under KRS 139.200, the use tax under KRS 139.310 is imposed on retailers, and the "person" who paid the use tax under HB 2 is the retailer. Further, KRS 134.580 applies to refunds of that use tax paid and HB 2 does not alter such application.

Holly Johnson, Commissioner of the Department of Revenue Tom Miller, the Department of Revenue, and the Commonwealth of Kentucky asserting a claim for a refund under HB 2. No retailer that Plaintiffs allege in their Complaint they purchased currency or bullion currency from are named parties in this action, and neither are any of the retailers identified in receipts attached to Plaintiffs' separate motion for class certification.

On the first page of their Complaint, Plaintiffs admit that no published notice about continued collection of gold or silver bullion or currency was posted and that it appears such notice was removed prior to HB 2 taking effect. *See* Complaint, p. 1 n. 1. Thus, Plaintiffs present no claim for liquidated damages. *See id. generally*.

Because Revenue previously agreed to issue refunds, has a long-standing statutory process for issuing refunds, gave notice of both, and is in compliance with HB 2, this action does not create a justiciable controversy that invokes this Court's jurisdiction. Moreover, no justiciable case or controversy exists because Plaintiffs do not have standing under HB 2 to bring this action, because no Plaintiff is a "person" who paid sales tax under KRS 139.200 or use tax under KTS 139.310 on currency or bullion currency on or after August 1, 2024. Consequently, Plaintiffs' Complaint fails to name or join an indispensable party under CR 19.01 and should be dismissed under CR 12.02(g).

In addition, because Plaintiffs admit in their Complaint that they have no claim for personal liability or liquidated damages, there is no case or controversy as to the Governor, the Finance Secretary or the Revenue Commissioner. Plaintiffs set forth no claim against the Governor, Finance Secretary or the Revenue Commissioner upon which relief can be granted. Further, the Governor does not issue tax refunds and is not a proper party.

Plaintiffs' Complaint should also be dismissed under the "unclean hands doctrine," because the sponsor of HB 2 works in the same law firm as Plaintiffs' counsel. Plaintiffs bought currency or bullion currency *three days after* HB 2 was first passed and delivered to the Governor, not at any time between August 1, 2024 and March 17, 2025. A tax refund through this lawsuit and judicial relief instead of the existing administrative refund process is seeking to enrich the sponsor of HB 2, his business associate or his law firm for filing and pushing the bill.

As such, the Court should dismiss this action, with prejudice, under CR 12.02(a), (f) and (g), as well as the "unclean hands doctrine."

LEGAL STANDARD

A court lacks jurisdiction to decide non-justiciable controversies. *See Commonwealth, Bd. of Nursing v. Sullivan Univ. Sys., Inc.*, 433 S.W.3d 341, 343-44 (Ky. 2014). Under CR 12.02(a), dismissal is appropriate when a court lacks jurisdiction over the subject matter of the suit. A plaintiff must demonstrate standing to sue a defendant to invoke a court's jurisdiction. *Commonwealth Cabinet for Health and Family Servs., Dep't for Medicaid Servs. v. Sexton by and through Appalachian Regional Healthcare, Inc.*, 556 S.W.3d 185, 195 (Ky. 2018).

Under CR 12.02(f), the Court may dismiss a complaint for failure to state a claim upon which relief can be granted. The Court should not grant a motion to dismiss under CR 12.02(f) "unless it appears that the pleading party would not be entitled to relief under any set of facts which would be proved in support of his claim." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). In ruling on a motion to dismiss, the Court should liberally construe the pleadings in the light most favorable to the plaintiff, all allegations being taken as true. *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009) (citing *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007)).

Exclusive jurisdiction over all tax refunds is vested in a statutory procedure providing for an administrative review by Revenue. KRS 134.580. While HB 2 removes the Board of Tax Appeals' jurisdiction to review Revenue final orders *de novo*, HB 2 does not remove the initial step of filing applications and claims with Revenue. The Kentucky Supreme Court has reaffirmed that this procedure must be followed and the administrative remedies provided must be exhausted before relief can be sought in the circuit court, ruling that an action like Plaintiffs' action here is improper until relief is denied through that administrative process. *Gillig*, 957 S.W.2d at 211-12.

Under CR 19.01(a), a person who is subject to service of process shall be joined as a party in the action if in his absence complete relief cannot be accorded among those already parties. Further, CR 19.01(b)(ii) requires a party be joined in an action if he claims an interest relating to the subject of the action an is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. Pursuant to CR 12.02(g), a court may dismiss an action for failure to join a party under CR 19.

Plaintiffs in this case are not the taxpayer identified under KRS 139.200 for sales tax or the taxpayer identified under KRS 139.310 for use tax that HB 2 allows to bring a civil action for refund, and therefore lack standing and present no justiciable controversy. As a result of no taxpayer – a retailer – being a plaintiff, Plaintiffs fail to join an indispensable party under CR 19.01(a) and (b). In the absence of any retailer who paid the sales taxes at issue in this action, complete relief cannot be given to the named parties. Additionally, the absence of retailers would impair or impede the ability to protect their interests, and would also subject Defendants to

substantial risk of incurring double, multiple or otherwise inconsistent obligations. Thus, the Court should dismiss the action under CR 12.02(g).

ARGUMENT

Plaintiffs fail to invoke the subject matter jurisdiction of this Court because no justiciable controversy exists between the parties. As it notified the public on its website when HB 2 became effective, Revenue is providing refunds of sales and use tax paid on currency or bullion on or after August 1, 2024, through the administrative process mandated by KRS 134.580(3) that existed before HB 2. Thus, Revenue is complying with HB 2. As a result, Plaintiffs lack standing to sue because they are not the taxpayers identified as able to raise a claim under HB 2, they have suffered no injury, they have failed to exhaust their administrative remedy, and any claim that may have existed is now moot. Dismissal is warranted under CR 12.02(a), (f) and (g).

The Court should also dismiss this action as to the Governor, Finance Secretary and the Revenue Commissioner because they are not proper parties under HB 2 or otherwise. The Governor does not issue sales and use tax refunds. As Plaintiffs admit, the Governor, the Finance Secretary and the Revenue Commissioner cannot be held personally liable for a violation under HB 2. First, the Governor cannot violate HB 2 under its own language. Second, no violation has occurred because the only officials who can by definition violate HB 2 have not published an offensive notice. Consequently, Plaintiffs cannot seek liquidated damages that could, if awarded, be paid from the administrative budgets of the Office of the Governor, the Finance and Administrative Cabinet or the Department of Revenue. Plaintiffs do not state a claim against the Governor, the Finance Secretary or the Revenue Commissioner upon which relief can be granted and the Court should dismiss the action under CR 12.02(f).

I. Plaintiffs Fail To Meet Their Burden Of Establishing A Justiciable Controversy Necessary To Invoke This Court's Jurisdiction.

The Kentucky Constitution limits circuit courts to decide only "justiciable" cases. KY. CONST. § 112. A case may not be justiciable because a plaintiff lacks standing to sue or the claim has become moot. *Sexton*, 556 S.W.3d at 193.

A. Plaintiffs' Lack Standing to Bring This Action.

The existence of standing is a threshold inquiry and is a predicate for a court to hear a case. *Id*. at 192. Standing requires a plaintiff establish, at a minimum, an (1) injury, (2) causation, and (3) redressability. *Id*. at 196. This means:

> "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." [A] litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent ...." "The injury must be ... 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical.'" "The injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision."

Id. (internal citations omitted).

Here, Plaintiffs cannot point to an injury caused by Defendants under HB 2 because Revenue already has a process for the refunds Plaintiffs seek through this action.[7] Plaintiffs' only conceivable injury occurred when Revenue collected sales and use tax on bullion and currency collectibles after August 1, 2024. Plaintiffs do not allege a claim for that potential injury; instead, they allege an injury under HB 2 because they are entitled to a reimbursement. However, merely because Plaintiffs failed to file an application or claim for a refund under that administrative process, and instead chose to file this action, does not create any injury caused by Revenue. Revenue is complying with HB 2; Plaintiffs are not suffering from any injury.

[7] (Instructions on Refunds for Sales and Use Tax Paid for Purchases of Bullion and Collectible Currency, available at https://revenue.ky.gov/News/Pages/Instructions-on-Refunds-for-Sales-and-Use-Tax-Paid-for-Purchases-of-Bullion-and-Collectible-Currency.aspx, last visited Apr. 16, 2025.)

Plaintiffs also lack standing to bring this action under HB 2, because they are not the taxpayers who paid sales tax under KRS 139.200 or use or use tax under KRS 139.310. Again, each of those statutes impose the payment of sales and use tax on retailers, and HB 2 allows taxpayers who paid sales or use tax on currency or bullion under those statutes to bring a civil action for a refund. None of the plaintiffs in this action are retailers who paid sales or use tax on currency or bullion currency. Therefore, because they are not the taxpayers who can bring this action under HB 2, Plaintiffs present no justiciable case or controversy.

B. Plaintiffs Fail to Join Indispensable Parties Under CR 19.

For the same reason they lack standing by not being the taxpayers who can file an action under HB 2, Plaintiffs' failure to join indispensable parties under CR 19 warrants dismissal under CR 12.02(g). Plaintiffs are not taxpayers under KRS 139.200 for sales tax or taxpayers under KRS 139.310 for use tax that HB 2 allows to bring a civil action for refund. As a result of no proper taxpayer – a retailer – being a plaintiff, Plaintiffs fail to join an indispensable party under CR 19.01(a) and (b). In the absence of any retailer who paid the sales taxes at issue in this action, complete relief cannot be given to the named parties. Moreover, the absence of retailers would impair or impede the ability to protect their interests and would also subject Defendants to substantial risk of incurring double, multiple or otherwise inconsistent obligations. Thus, the Court should dismiss the action under CR 12.02(g) for failure to join parties under CR 19.

C. Plaintiffs' Action is Improper for Failure to Exhaust Administrative Remedies.

In addition, Plaintiffs have not exhausted their administrative remedies, which they must do before seeking judicial relief. "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may: (1) function efficiently and have an opportunity to correct its own errors; (2) afford the parties and the courts the benefit

of its experience and expertise without the threat of litigious interruption; and (3) compile a record which is adequate for judicial review." *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456 at 471 (Ky. 2004). With increasing caseloads and demands upon the courts, it is important to note that, "[t]he rule requiring exhaustion also promotes judicial economy by resolving issues within the agency, eliminating the unnecessary intervention of the court." *Id.* (citing 2 AM.JUR.2D Administrative Law § 505 (1994)). The rule is also that a court will not take jurisdiction to render a declaratory judgment where another statutory remedy has been especially provided for the character of cause presented, nor where the purpose is to affect proceedings which may be taken or pending before a public board which is vested with full power to act in the premises. *Black v. Utter*, 190 S.W.2d 541, 542 (Ky. 1945).

While HB 2 removes the Board of Tax Appeals' jurisdiction over final orders relating to sales and use taxes on currency or bullion currency paid on or after August 1, 2024, HB 2 does not remove the taxpayer's requirement under KRS 134.580(3) to file an application or claim for a refund with Revenue. That it is the legislative intent for taxpayers to still file an application or claim for a refund is made further evident by the plain language in HB 2 that only states, "notwithstanding KRS 49.220 and 139.770." Had the legislature intended those seeking refunds to be able to skip the initial requirements of filing an application or claim for a refund with Revenue, HB 2 would state "notwithstanding KRS 134.580" as well. The law requires Plaintiffs to exhaust those administrative remedies, especially here where no justiciable controversy exists because Revenue has already agreed to provide those administrative remedies to the proper taxpayers under HB 2.

D. Plaintiffs' Claims are Moot.

Although Revenue provided a process for refunds immediately upon HB 2 becoming effective, even if Plaintiffs ever had a claim under HB 2 their claim is now moot. Mootness is a threshold matter that must be decided before a court reaches the merits. *Ky High School Athletic Ass'n v. Edwards*, 256 S.W.3d 1, 4 (Ky. 2008). A case is moot when "a change in circumstances renders th[e] court unable to grant meaningful relief to either party." *Med. Vision Group, P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008) (citing *Brown v. Baumer*, 191 S.W.2d 235, 238 (Ky. 1945)).

The voluntary performance of the action sought in a claim renders a case moot. *Shelby Petroleum Corp. v. Croucher*, 814 S.W.2d 930, 933 (Ky. App. 1991). In *AEP Industries, Inc. v. B.G. Properties, Inc.*, the Kentucky Supreme Court discussed several cases involving contractual disputes over specific performance under the contract. In each of those, upon a party's performance of the action under the contract sought to be enforced, the cases were dismissed as moot. 533 S.W.3d 674, 679 (Ky. 2017) (citing *Rose v. Cox*, 179 S.W.2d 871 (Ky. 1944); *Sedley v. Louisville Trust Co.*, 419 S.W.2d 531, 532 (Ky. 1967)). The Court held that when performance occurs, it deprives the Court of the ability to grant relief and renders the case moot. Similarly, Revenue's compliance with HB 2 renders any claim Plaintiffs may have had moot.

Because Plaintiffs lack standing, have not exhausted their administrative remedies, and any claim is moot, this Court should dismiss the Complaint for lack of subject matter jurisdiction.

II. Plaintiffs Fail To State A Claim For Relief Against The Governor, The Finance Secretary and the Revenue Commissioner.

The Court should also dismiss Plaintiffs' Complaint against the Governor, the Finance Secretary and the Revenue Commissioner under CR 12.02(f) because Plaintiffs do not state a

claim upon which relief can be granted. The Governor does not issue tax refunds, including refunds for sales and use tax paid on currency or bullion. Plaintiffs' claim under HB 2 does not implicate the Governor, at all. By their own admission, Plaintiffs do not allege a violation of HB 2. (Plaintiffs' Complaint, p. 1 n. 1.) Even if they did allege a violation of HB 2, by the plain language of HB 2 the Governor is not an official who could be alleged to violate the bill. *See* HB 2 § 1(1). Because Plaintiffs do not claim any violation of HB 2, liquidated damages cannot be awarded under the bill, even if the case was justiciable and Plaintiffs were to succeed. *See id.*, § 1(4). As a result, liquidated damages cannot be ordered to be paid from the administrative budget of the Office of the Governor under Section 1(4) of HB 2.

Likewise, Plaintiffs fail to state a claim for relief as to the Finance Secretary and the Revenue Commissioner. Again, Plaintiffs do not allege the Finance Secretary or the Revenue Commissioner have violated HB 2, do not have a claim for personal liability against them, and have no basis to assert a claim for liquidated damages against either Defendant. Further, the Finance Secretary does not issue tax refunds.

Plaintiffs state no claim against the Governor, the Finance Secretary, or the Revenue Commissioner upon which relief can be granted. Therefore, this Court should also dismiss the Complaint under CR 12.02(f) as to the Governor, the Finance Secretary and the Revenue Commissioner.

III. This Case Warrants Application of the "Unclean Hands Doctrine."

In addition, this Court should dismiss Plaintiffs' action under the "unclean hands doctrine." Under that rule of equity, "a party is precluded from judicial relief if that party 'engaged in fraudulent, illegal, or unconscionable conduct' in connection 'with the matter in

litigation.'" *S.I.A. Limited, Inc. v. Wingate*, 677 S.W.3d 487, 501 (Ky. 2023) (quoting *Suter v. Mazyck*, 226 S.W.3d 837, 843 (Ky. App. 2007)). The Court should apply the doctrine here.

The sponsor of HB 2, Representative T.J. Roberts, is employed in the same law firm representing Plaintiffs in this case. *See* http://chriswiest.com/ (last visited Apr. 9, 2025).[8] He was employed at that same law firm when sponsoring HB 2 and pushing it through the General Assembly for passage. House Bill 2 first passed both legislative chambers on March 14, 2025, and was delivered to the Governor on that same date.[9] ***Three days later***, on March 17, 2025, the individual Plaintiffs purchased bullion. (Complaint, ¶¶ 1-3.) The Complaint shows that these Plaintiffs did not purchase bullion on August 1, 2024, when HB 8 (R.S. 2024) took effect with the Governor's line-item veto intact, or any time in 2024 or 2025 ***before*** HB 2 was filed. *See id. generally*.

Based on these facts, it appears this lawsuit was filed in order to enrich the sponsor of HB 2, his employer, or the law firm where he is employed. Indeed, rather than go through the already-existing administrative refund process, Plaintiffs filed this lawsuit seeking judicial relief to obtain the same refund and the opportunity to seek attorney's fees.

The Legislative Ethics Code prohibits legislators from using their position to enrich themselves or their business associates. Specifically, KRS 6.731(2) bars a legislator from using his official position or office to obtain financial gain for himself, any members of his family, or a business associate of the legislator. Likewise, under KRS 6.761(1)(a) a legislator must not intentionally participate in the discussion of a question in committee or on the floor of the

[8] *See also* Lucas Aulbach, *KY residents sued Beshear over gold and silver taxes the same day a new law passed*, The Courier-Journal (Apr. 4, 2025), available at https://www.courier-journal.com/story/news/politics/2025/04/04/kentucky-legislature-2025-bullion-currency-taxes-lawsuit-andy-beshear/82774669007/ (last visited Apr. 16, 2025) (attached as Exhibit A).

[9] *See* https://apps.legislature.ky.gov /record/25rs/hb2.html (last visited Apr. 16, 2025).

General Assembly, vote, or make a decision in his official capacity on any matter in which he, his family members, or his business associate will derive a direct monetary gain as a result of his vote or decision. As KRS 6.731(1) provides, a legislator is prohibited from using or attempting to use his influence as a legislator in any matter that involves a substantial conflict between his personal interest and his duties in the public interest. Under KRS 6.731(3), a legislator cannot use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in direct contravention of the public at large.

Here, Representative Roberts filed, sponsored, testified on, debated on, carried and voted on HB 2 to create a path for lawsuits to be filed, and attorneys to be hired to file them, to claim a refund of sales and use tax on bullion and collectible currency – despite the well-established administrative process already being in place. During his participation in the passage of HB 2, Representative Roberts worked in the law firm of Plaintiff's counsel, and he continues to work there.[10] He intentionally participated in the discussion of questions in committee or on the floor, voted and made decisions as a legislator in the passage of HB 2 – twice, because of the vote to override the veto – a matter in which he or his business associate now seek to derive a direct monetary gain in this litigation. Representative Roberts's actions in sponsoring, pushing passage of and voting on HB 2 presented a substantial conflict between his personal interests and his duties in the public interest, creating privileges, treatment or advantages for himself or his business associates in contravention of the public interest at large.

This Court should apply the "unclean hands doctrine" to preclude Plaintiffs from judicial relief because of the conduct in connection with the matter in litigation – tax refunds.

[10] *See* http://chriswiest.com/ (last visited Apr. 16, 2025).

CONCLUSION

The Plaintiffs fail to invoke the subject matter jurisdiction of this Court because they do not raise a justiciable issue. The Plaintiffs lack standing, fail to accept, let alone exhaust, their administrative remedy already provided by Revenue, and their claim, if ever ripe, is now moot as a result of Revenue's compliance with HB 2. Furthermore, Plaintiffs fail to state a claim for relief as to the Governor, the Finance Secretary, or the Revenue Commissioner. This Court should dismiss the Complaint, with prejudice, pursuant to CR 12.02(a), (f) and (g), as well as under the "unclean hands doctrine."

Respectfully submitted,

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Filed

EXHIBIT A

Filed 25-CI-00550 04/17/2025 David S. Martin, Boone Circuit Clerk

courier journal

POLITICS

KY residents sued Beshear over gold and silver taxes the same day a new law passed

Lucas Aulbach
Louisville Courier Journal

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Key Points

House Bill 2, approved last month by the Kentucky legislature, ends taxes on gold and silver sales and allows buyers to seek refunds for taxes paid since last August.

A lawsuit was filed against Gov. Andy Beshear by a gold and silver dealer along with three Kentucky residents who paid taxes on "bullion currency" purchases last month.

A spokesperson for Beshear's office said they've "received the complaint and will respond accordingly in court."

It didn't take long for a lawsuit to hit the courts after legislators passed a new law giving Kentucky residents the power to sue the governor over taxes collected recently on gold and silver sales.

In a complaint filed in Boone Circuit Court on March 27, the same day the legislation was delivered to the secretary of state's office, an online bullion exchange and three Northern Kentucky residents said they and others are owed refunds on taxes improperly collected for their precious metals in the past eight months, naming Gov. Andy Beshear and several state offices as defendants.

The lawsuit is a result of House Bill 2, put forward by freshman Rep. TJ Roberts, R-Burlington, who successfully sued Beshear over COVID-19 restrictions during the governor's first term.

Plaintiffs in the case are represented by attorney Christopher Wiest, whose firm employs Roberts. The state representative, a frequent foil to Beshear who told colleagues in the House he sponsored the bill to ensure Kentuckians do not "pay taxes that were never lawful in the first place," said he is not involved in the lawsuit.

HB 2 ensures the sale, use, storage or other consumption of "bullion currency" — gold, silver, platinum and other precious metals — cannot be taxed, overriding a line-item veto by Beshear that was included in a separate bill passed in 2024. In his veto, Beshear said he struck down that portion of the bill because "if you own gold, you can afford to pay sales tax," which applies to other collectible goods.

In an interview with The Courier Journal, a plaintiff in the lawsuit took issue with Beshear's reasoning, as well as a refund process set up for affected buyers.

When reached for comment, a spokesperson for Beshear's office said they've "received the complaint and will respond accordingly in court" and directed a reporter to a March 28 release from the state noting buyers who'd purchased gold and silver since last August could reach out to retailers where they'd bought the coins to seek a refund. Proof of purchase is required.

The 2024 legislation, House Bill 8, would have gone into effect on Aug. 1 of that year. Legislators did not override Beshear's veto, arguing it was invalid — Kentucky governors are only allowed line-item vetoes in budget bills, while HB 8 supporters contended it was a revenue bill. Attorney General Russell Coleman issued an opinion last May that agreed with lawmakers, though that filing did not override Beshear's veto.

HB 2, which was filed in January and approved on party-line votes in the House and Senate, allows anyone who paid taxes on gold and silver after that Aug. 1 deadline to seek a refund in court. It also sets damages at $1,000 per day to be paid by the executive branch's administrative budget if taxes continue to be charged after the law went into effect.

HB 2 came with an emergency clause, putting the law in place immediately upon its passage. And Stefan Gleason, president and CEO of Money Metals Exchange, was prepared, along with other plaintiffs in the case.

Purchases by three plaintiffs — Stacie Earl, Jill Huston and Karen Strayer, all Northern Kentucky residents who have been mainstays for years on the region's political scene — took place on March 17, less than two weeks before the new law took effect. The lawsuit notes all three "will make additional purchases in the future including, explicitly, on March 28, 2025."

Earl attempted to run for a state House seat as an Independent candidate in 2018, with support from then-Gov. Matt Bevin. Huston is listed online as secretary of the Boone County Republican Party. And Strayer is the former chair of the Boone County Moms for Liberty advocacy organization but was removed from the position after posing for a photo with members of the far-right Proud Boys group at a 2023 rally in Frankfort. Attempts to reach them were unsuccessful.

Part of the motivation to move quickly on the lawsuit, Gleason told The Courier Journal, was pent-up demand by consumers. Money Metals Exchange has worked with thousands of customers in Kentucky, he said, and "they've been engaged in this, they've contacted the legislature about this issue over the last year — actually, several years."

In all, the lawsuit estimates 10,000 or more buyers could be eligible for refunds, with more than 1,000 dealers or retailers involved in sales and an estimated total of nearly $700,000 in taxes collected since last August. It's a class action lawsuit that seeks to expand outside of current plaintiffs to represent other dealers in and out of the state that have been impacted, along with all buyers who have paid taxes.

Gleason took issue with other aspects of the approach to the issue by Beshear and other state officials as well.

The governor's initial veto last year was "insulting (to) small-time savers, people that don't have stock accounts, people that don't own real estate, people that are

using gold and silver just as a way of hedging against the inflation that's been going on," he said. And the refund procedure that requires buyers to seek reimbursement by going back to dealers is "hugely burdensome on both the taxpayer and dealers, and it also doesn't provide for interest."

"I don't think that we're asking for an apology, but I think an apology would be appropriate," Gleason added.

The state release outlining the process to obtain a refund noted that since sales taxes are collected from retailers, "refunds from the state can only be given to those retailers. It is therefore incumbent upon the consumer to work with the retailer from which they made a purchase to recoup any taxes they have paid." The release also said the process to request a refund of eligible taxes "has always existed" and taxpayers "do not need to file a lawsuit or go to court" to get it.

Along with Beshear, other defendants sued in their official capacity include Finance and Administration Cabinet Secretary Holly Johnson, Department of Revenue Commissioner Tom Miller, the state Department of Revenue and the Commonwealth of Kentucky.

The defendants have not filed an answer to the lawsuit as of Thursday afternoon. The Finance and Administration Cabinet's spokesperson reiterated Kentuckians "do not need to file a lawsuit or go to court to get a refund" when asked for comment, directing a reporter to the state's news release.

Gleason said he believes many dealers in Kentucky are probably still collecting taxes on gold and silver sales, calling the notice on the state's website announcing the change in law and protocol for receiving a refund "insufficient."

"It basically says, 'Go to the dealer and demand it from them,'" he said. "... Basically, they need to figure out who's owed money and issue payments, not put everyone through all the trouble."

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