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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2024-CA-_____

KKR & CO., L.P., HENRY R. KRAVIS, GEORGE R. ROBERTS, PRISMA CAPITAL PARTNERS, L.P., GIRISH REDDY, BLACKSTONE GROUP L.P., BLACKSTONE GROUP INC., BLACKSTONE ALTERNATIVE ASSET MANAGEMENT L.P., J. TOMILSON HILL, STEPHEN A. SCHWARZMAN, PACIFIC ALTERNATIVE ASSET MANAGEMENT COMPANY, LLC, JANE BUCHAN

PETITIONERS

v.

HON. THOMAS WINGATE
FRANKLIN CIRCUIT COURT

RESPONDENT

and

TIA TAYLOR, ASHLEY HALL-NAGY, BOBBY ESTES, and JACOB WALSON, as Members and Beneficiaries of Trust Funds of the KENTUCKY RETIREMENT SYSTEMS, Its Pension and Insurance Trusts for the Benefit of Those Trusts

REAL PARTIES IN INTEREST

PETITION PURSUANT TO RAP 60 FOR RELIEF
IN THE NATURE OF A WRIT DIRECTED TO
HON. THOMAS WINGATE, FRANKLIN CIRCUIT COURT,
IN *TAYLOR* v. *KKR & CO. INC.*, CIVIL ACTION NO. 21-CI-00645

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STATEMENT OF POINTS AND AUTHORITIES

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May It Please The Court:

Petitioners KKR & Co., L.P., Henry R. Kravis, George R. Roberts (the "KKR & Co. Inc. defendants"),[1] Prisma Capital Partners, L.P., Pacific Alternative Asset Management Company, LLC, Girish Reddy, Jane Buchan, (the "Prisma/PAAMCO defendants"), Blackstone Group L.P., Blackstone Group Inc., Blackstone Alternative Asset Management L.P., J. Tomilson Hill, and Stephen A. Schwarzman (the "Blackstone defendants")[2] urge this Court to issue a writ vacating the Franklin Circuit Court's opinion of May 1, 2024—which denied petitioners' motions to dismiss the action captioned *Taylor* v. *KKR & Co. Inc.*, Civ. No. 21-CI-00645—and directing the circuit court to dismiss the action.

This case is a flawed attempt to resurrect a lawsuit that this Court and the Kentucky Supreme Court previously dismissed for lack of constitutional standing. A writ is again necessary because the circuit court lacks subject-matter jurisdiction over this suit. As future retirees who have no property interest in the pension plan assets held by the Kentucky Retirement Systems (KRS), the "Tier 3" plaintiffs have suffered no concrete or redressable harm and therefore have no constitutional standing to sue third parties like defendants to seek damages "for" KRS based on highly profitable investments KRS made in 2011. As the Supreme Court and this Court have made clear, Kentucky law prohibits individual KRS pension plan members from claiming alleged injury to KRS as injury to themselves. The authority to sue for KRS lies with the KRS Board of Trustees and the Attorney General

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[1] Since the filing of the complaint, the hedge-fund entities are now named KKR & Co. Inc. (formerly KKR & Co., L.P.), PAAMCO Prisma, LLC (formerly Pacific Alternative Asset Management Company, LLC), and Blackstone Inc. (formerly Blackstone Group L.P. and Blackstone Group Inc.).

[2] Petitioners Blackstone Inc., Schwarzman, Hill, KKR & Co. Inc., Kravis, and Roberts appear without waiver of, and expressly preserve, all defenses based on lack of personal jurisdiction.

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who is already asserting the same claims against the same defendants for the same alleged damages on behalf of KRS for the potential benefit of all KRS members—including plaintiffs.

For the past seven years, these same plaintiffs' counsel have unsuccessfully attempted to bring various versions of these same claims in multiple lawsuits. For their first set of clients, who were members of KRS's Tier 1 and Tier 2 plans, they asserted claims "derivatively" on behalf of KRS. This Court and the Kentucky Supreme Court dismissed those claims because Tier 1 and Tier 2 members had received all the benefits due to them, suffered no concrete injury, and therefore lacked constitutional standing. The Attorney General, as chief legal officer of the Commonwealth, soon filed those same claims directly, seeking damages for KRS and all its members; that litigation remains ongoing.

Represented by the same counsel as the original Tier 1 and Tier 2 plaintiffs, plaintiffs unsuccessfully sought to intervene in the Attorney General's lawsuit *and* filed two additional lawsuits: this lawsuit and a federal RICO putative class action that was removed to federal court and has been stayed. Named plaintiffs in this action are members of KRS's Tier 3 plan. For the same reasons the prior attempts failed, this action should also be dismissed—these plaintiffs lack constitutional standing and their interests are already being represented by the Attorney General bringing the same claims for the same recovery.

In denying defendants' motions to dismiss, the circuit court ruled that the Tier 3 plaintiffs had constitutional standing on the theory that the Tier 3 plan incorporates a variable benefit feature that could potentially increase future payments to them. But the features of the Tier 3 plan do not give its members a "concrete stake" in the claims against

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defendants or a "redressable" injury any more than those of the Tier 1 and Tier 2 plans did. Like the Tier 1 and Tier 2 members, the Tier 3 plaintiffs have no equity interest in the pension plan assets, have no individual accounts, and bear no risk of losses from plan investments. Instead, when they become eligible to retire, their benefits will be determined by a statutorily defined formula. The circuit court also concluded that the Tier 3 plaintiffs have "trust law" standing to sue for the KRS pension plans. But the Tier 3 plan and any rights under it are governed by Kentucky *statute*, not the common law of trusts. Indeed, this Court has held that KRS, a state pension fund, is not a common-law trust. And even if common-law principles applied here, common-law trust beneficiaries cannot sue third parties on behalf of the trust where, as here, a non-conflicted trustee is already pursuing those claims. The Attorney General has already brought these claims on behalf of the Commonwealth's agencies—including KRS and its trusts—and has made clear that the Tier 3 plaintiffs are attempting to undermine the Commonwealth's case through this litigation.

Permitting these individual private plaintiffs (and the out-of-state contingency-fee lawyers who represent them) to proceed with claims they have no standing to assert, and which are entirely duplicative of those pressed by the Attorney General in a separate action, is not only outside of the circuit court's jurisdiction, but also causes irreparable harm that would justify issuance of a writ standing alone. The Attorney General and the Tier 3 plaintiffs have already served almost 1,500 burdensome, overlapping, and potentially conflicting document requests and interrogatories spanning decades, and there is no prospect for coordination among these rival camps. These competing plaintiffs claim to represent the same interests, but they proceed on conflicting theories while seeking duplicative recoveries. Indeed, the circuit court has issued inconsistent and erroneous rulings on the same

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claims in these parallel actions, leaving defendants uncertain as to which claims are proceeding. Continued litigation on these two fronts risks only more rulings subjecting defendants to redundant and incompatible requirements, in an already meritless litigation challenging indisputably profitable investments that has cost defendants tens of millions of dollars to defend. This Court should issue a writ requiring the dismissal of the Tier 3 plaintiffs' action.

STATEMENT OF THE CASE

A. Factual Background

1. KRS is a state administrative entity that was created by statute to administer three public defined-benefit pension plans for state and local government employees. *See* KRS 61.645(1); Ex. B, Tier 3 Compl. ¶¶ 18, 26.

For years leading up to the 2011 investments in this case, the Commonwealth failed to fund the annually required employer contribution for KRS. According to reports made public in 2010, KRS had been "underfunded for 17 years" and would remain substantially underfunded for the next 15 years. *See* Ex. F, Consolidated Mot. to Dismiss, Ex. F, at 6-7.

As a result of the dot-com bubble bursting in 2000 and 2001 and the financial crisis in 2008 and 2009, KRS's pension plans had also lost billions of dollars in the stock market, which "severely damaged KRS's investment portfolio." Tier 3 Compl. ¶ 39. In 2008, a working group established by then-Governor Steve Beshear conducted a comprehensive review of KRS's investments. *See* Ex. D, Consolidated Mot. to Dismiss, Ex. C. The working group commissioned by then-Governor Beshear found that, for the 10-year period ending on June 30, 2008, KRS held a "higher allocation" to U.S. stocks and "lower allocation" to "alternative assets than the median fund." Ex. E, Consolidated Mot. to Dismiss, Ex. D, at 13. The working group recommended that KRS "develop a new investment policy to broadly

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diversify [its] assets among traditional and alternative asset classes." *Id.* at Appendix 1, Strategic Investment and Governance Review Final Recommendations at 7.

KRS then hired R.V. Kuhns & Associates, Inc. ("RVK")—a national, sophisticated investment consultancy whose mandate included a review of KRS's assets, liabilities, and portfolio to determine if there was a way to diversify KRS's investment risks. Tier 3 Compl. ¶¶ 161, 163. In 2009-2010, with the assistance of RVK and its analysis of KRS's investments, the KRS trustees decided to diversify KRS's portfolio and invest ten percent of it in so-called "absolute return" fund-of-funds investments. *Id.* ¶¶ 30, 243, 247. A fund of hedge funds invests with multiple underlying hedge fund managers with the goal of creating a diversified portfolio that delivers volatility-minimizing returns uncorrelated to the broader stock market. *See id.* ¶¶ 121, 127, 133, 141.

In consultation with RVK, KRS conducted a search process for the appropriate managers to oversee the new absolute return strategy in order to diversify its portfolio and decided to invest in three funds of funds managed by defendants Prisma Capital Partners L.P., PAAMCO Prisma, LLC, and Blackstone Alternative Asset Management L.P. *See* Tier 3 Compl. ¶¶ 247, 270. It is undisputed that the investment managers subsequently met KRS's established performance targets and benchmarks for these investments, generating approximately $400 million, net of fees, in returns for KRS.

B. KRS's Retirement Plans

KRS administers three retirement plans. The Tier 1 retirement plan is available for employees who started participating before September 1, 2008; the Tier 2 retirement plan is available to employees who started participating between September 1, 2008, and December 31, 2013; and the Tier 3 retirement plan is available to employees who started

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participating after January 1, 2014. Plaintiffs are members of the Tier 3 retirement plan. Tier 3 Compl. ¶ 2.

The Tier 1 and Tier 2 plans are defined-benefit plans. Plaintiffs describe the Tier 3 plan as a "hybrid" cash-balance plan with "characteristics of both a defined benefit plan and a defined contribution plan." Tier 3 Compl. ¶ 26. In reality, per statute and KRS's own public records, the cash balance plan is definitively a "defined benefit plan." *Id.* The plan "resembles a defined contribution plan because it determines the value of benefits for each participant based on individual accounts," but "the assets of the plan remain in a single, comingled investment pool like a traditional defined benefit plan." *Id.* The employer and employee contributions for Tier 3 members are held in a general pool and invested alongside, and in the same manner, as the rest of the KRS-administered pension system. *See id.* ¶ 202. Tier 3 members do not hold an equity interest in pooled funds or have control over how the pooled funds are invested.

Tier 3 benefits are defined by statute. *See* Tier 3 Compl. ¶¶ 195-197. Each member of the Tier 3 plan contributes into the investment pool a portion of his or her salary. Employers also contribute into that same investment pool on an aggregate basis. Over time, each Tier 3 member's notional account is updated to reflect the value of the member's accumulated benefits. *See id.* ¶ 196. Additionally, "[i]f the member has participated in the plan during the fiscal year," the member receives a "guaranteed" four percent base interest on the value of his or her notional account, and is eligible to receive an additional interest credit when certain conditions are met. *Id.* The Commonwealth does not guarantee this additional interest credit, called "upside sharing." Tier 3 members' "account[s] will be credited with 75% of the amount of return over 4%" only if KRS's "geometric average net investment return" for the preceding five years exceeds four percent and "the member was

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active and contributing to the plan in the fiscal year." *Id.* The member's pension benefit is only "calculated based on the member's accumulated account balance" when a member is eligible to retire. *Id.*

The value of Tier 3 members' accrued benefits cannot be reduced or lost, even if KRS's investment portfolio loses money or becomes insolvent in the future. Tier 3 Compl. ¶ 196. Individual plan members do not have separate investment accounts, or hold a property or equitable interest in any KRS accounts or the statutory trusts that hold the investments. The General Assembly can suspend or reduce future benefits, cost of living adjustments, and health insurance benefits to Tier 3 members only if it determines that "the welfare of the Commonwealth so demands." *Id.* ¶¶ 196-197. Plaintiffs have never alleged they have failed to receive the Tier 3 benefits that they were owed under the plan.

C. Related Litigation

1. In December 2017, individual plaintiffs filed a complaint as a purported derivative suit on behalf of KRS and the Commonwealth. *See Mayberry* v. *KKR & Co., L.P.*, No. 17-CI-1348 (Dec. 26, 2017). The original *Mayberry* plaintiffs, represented by the same counsel as plaintiffs in this lawsuit, included only participants of KRS's Tier 1 and Tier 2 plans. *See* Tier 3 Compl. ¶¶ 13, 195.

Defendants moved to dismiss on the grounds that the *Mayberry* plaintiffs lacked standing to sue on behalf of KRS and the Commonwealth, which the circuit court denied. That decision was challenged by defendants in interlocutory appeals and by a writ action in light of the Kentucky Supreme Court's decision in *Commonwealth Cabinet for Health & Family Services* v. *Sexton*, 566 S.W.3d 185 (Ky. 2018). On April 23, 2019, the Court of Appeals granted the writ based on lack of standing. Among other things, this Court held that KRS is a statutory pension fund, and not a common-law trust for purposes of standing. *See*

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Ex. K, Order *Prisma Capital Partners, LP* v. *Shepherd*, No. 2019-CA-00043-OA, Op. 18 (Ky. App. Apr. 23, 2019). On July 9, 2020, on interlocutory appeal, the Supreme Court unanimously held that the *Mayberry* plaintiffs lacked constitutional standing and ordered the circuit court to dismiss the complaint. *See Overstreet* v. *Mayberry*, 603 S.W.3d 244, 266 (Ky. 2020). This was because the *Mayberry* plaintiffs had not suffered a concrete injury in fact and lacked standing to bring claims that properly "belong[ed] to the Commonwealth." *Id.* at 266-267. The Supreme Court's dismissal of *Overstreet* for lack of constitutional standing mooted the appeal from this Court's writ decision. *Id.* at 251 n.6.

Upon remand, the Attorney General moved to intervene, and the original *Mayberry* plaintiffs sought leave to file an amended complaint to add as new named plaintiffs three Tier 3 members who are now plaintiffs in this lawsuit—Ms. Taylor, Ms. Hall-Nagy, and Mr. Estes. The circuit court denied plaintiffs' motion for leave to amend, and granted the Attorney General's motion to intervene in the *Mayberry* action. This Court ultimately reversed the circuit court's decision permitting the Attorney General to intervene, *see* Ex. N, *KKR & Co. Inc.* v. *Mayberry*, No. 2021-CA-1307, Op. 12 (Ky. App. Apr. 14, 2023), and the case was dismissed in accordance with the Supreme Court's mandate in *Mayberry*.

The same Tier 3 members filed another motion for leave to file an amended complaint and a motion to intervene in the *Mayberry* Action. The circuit court denied both motions, concluding that the Attorney General adequately represented the interests of KRS and all of its members, including all Tier 3 members, and was "actively pursuing broad, plan-wide relief on behalf of . . . KRS beneficiaries across all tiers of KRS pension plans." Ex. M, Order, *Commonwealth* v. *KKR & Co. LLP*, Civ. No. 17-CI-01348, Op. 11 (Franklin Cir. Ct. June 14, 2021) ("June 14, 2021 Op."). The circuit court further recognized that the "Tier 3 Group has no statutory right to pursue a derivative action on behalf of KRS" and

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was not permitted to intervene in the action on that basis. *Id.* at 11-14. In September 2021, the circuit court summarily denied yet another attempt by one new Tier 3 member—Mr. Walson, the fourth plaintiff in this lawsuit—to intervene in the *Mayberry* action.

In parallel to the Commonwealth's motion to intervene in the *Mayberry* action, the Commonwealth also filed a separate action (the "Attorney General action"). *See Commonwealth* v. *KKR & Co. Inc.*, No. 20-CI-00590 (July 21, 2020). On May 1, 2024, the circuit court denied in part and granted in part defendants' motions to dismiss the Commonwealth's Second Amended Complaint in the Attorney General Action. *See* Ex. R, Order, *Commonwealth* v. *KKR & Co. Inc.*, Civ. No. 20-CI-00590 (Franklin Cir. Ct. May 1, 2024) ("Cir. Ct. Order in the Attorney General Action"). The court permitted the breach of fiduciary duty, breach of trust, and aiding and abetting claims to proceed against the Blackstone, Prisma/PAAMCO, and KKR & Co. Inc. defendants. *Id.* at 1-2. While the circuit court dismissed civil conspiracy claims against certain defendants, it upheld the civil conspiracy claims against the Blackstone, Prisma/PAAMCO, and KKR & Co. Inc. defendants. *Id.* at 6-8. In addition, the circuit court appeared to find that the tort claims are barred by the five-year statute of limitations, but nevertheless appeared to hold that those claims against the Blackstone, Prisma/PAAMCO, and KKR & Co. Inc. defendants were subject to a fifteen-year statute of limitations for "an action upon a written contract." *Id.* at 5, 8.

Having failed to intervene in the *Mayberry* action, the Tier 3 plaintiffs pivoted to filing separate lawsuits. As a "backstop" measure, the Tier 3 plaintiffs filed an action captioned *Taylor* v. *KKR & Co., L.P.*, No. 21-CI-00020 (Franklin Cir. Ct.), which they amended to include class action allegations and federal RICO claims against certain defendants. Defendants therefore removed that action to federal court, *see* No. 3:21-CV-00029 (E.D. Ky.),

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and it remains stayed pending resolution of the state court proceedings in both this action and the Attorney General action. *See* Ex. O, ECF No. 76 (Feb. 8, 2024).

D. Proceedings Below

On August 19, 2021, less than a month after defendants removed the Tier 3 plaintiffs' putative class action to federal court, the same plaintiffs filed this lawsuit. They styled the complaint as an action "to recover damages for the various trusts of the Kentucky Retirement Systems"—*i.e.*, the same KRS pension plans for which the Attorney General is seeking damages in the Attorney General action. *See* Tier 3 Compl. ¶ 1. In the complaint, the Tier 3 plaintiffs purported to modify their theory of standing to file so-called "direct claims" as so-called "trust beneficiaries" who seek to recover "damages for [KRS's] trusts" and do not seek any recovery for themselves. *Id.* ¶¶ 1, 16.

Defendants moved to dismiss on several grounds, including that: (i) the Tier 3 plaintiffs lacked constitutional standing; (ii) the Attorney General, as the real party in interest bringing claims on behalf of KRS and each of its members, occupied the field and foreclosed a duplicative lawsuit by the KRS trust "beneficiaries"; and (iii) the Tier 3 plaintiffs did not have statutory authority to assert claims "for" KRS's trusts. Additionally, certain defendants argued that plaintiffs' claims were untimely under the relevant statutes of limitations.

On May 1, 2024, the circuit court denied in part and granted in part defendants' motions to dismiss. The circuit court held that the Tier 3 plaintiffs had constitutional standing "[d]ue to the nature of the Tier 3 Plaintiffs' pension and insurance benefits, and the structure of their individual retirement accounts held within the Trusts." Ex. A, Cir. Ct. Order at 3. The circuit court found that the Tier 3 members are "impacted by better or worse investment results" since they participate in a "Hybrid Plan" that "incorporates the variable benefit feature of defined contribution plans." *Id.* Moreover, the court held that this

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action and the Attorney General action were "not entirely duplicative," and that plaintiffs could bring their claims as "beneficiaries" under the "common law of trusts." *Id.* at 3-5.

With respect to the statute of limitations defenses, the circuit court found that the civil conspiracy claim should be dismissed against the Prisma/PAAMCO defendants, but, oddly, not against the KKR & Co. Inc. defendants and the Blackstone defendants, even though this claim is identical against all defendants. *Id.* at 7-17. Further confusing matters, in an opinion issued on the same day, the circuit court had upheld the identical civil conspiracy claim as to all the fund-manager defendants in the Attorney General action. Cir. Ct. Order in the Attorney General Action at 6-8, 13-14. The court summarily denied defendants' motions to dismiss based on the five-year statute of limitations for the breach of fiduciary duty and breach of trust claims—even though the court recognized that a "five-year limitation period applies" to those types of claims. Ex. A, Cir. Ct. Order at 17. Instead, the circuit court permitted those claims to proceed, only noting that "there may be facts that have not yet been fully disclosed" that would permit a ten-year statute of limitations or various tolling doctrines to apply. *Id.*

LEGAL STANDARDS

A writ of mandamus or prohibition may be granted either when (1) a "lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court," or (2) a "lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." *Hoskins* v. *Maricle*, 150 S.W.3d 1, 10 (Ky. 2004).

Questions of law are reviewed *de novo*. *See Grange Mutual Insurance Co.* v. *Trude*, 151 S.W.3d 803, 809-810 (Ky. 2004). The first class of writ cases—those regarding claims

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that a lower court is acting outside of its jurisdiction—are reviewed *de novo* because jurisdiction is "generally only a question of law." *Id.* Similarly, with respect to the second class of writ cases—those occurring when a lower court's erroneous action will produce a miscarriage of justice and there exists no adequate remedy by appeal—errors of law made by the lower court are reviewed *de novo* after the reviewing court determines that there is "no adequate remedy on appeal, and great and irreparable harm." *Id.*

QUESTIONS OF LAW INVOLVED

1. Whether the Tier 3 plaintiffs have constitutional standing.

2. Whether the Tier 3 plaintiffs have "trust law" standing.

3. Whether competing litigation by the Attorney General and the Tier 3 plaintiffs will cause great injustice and irreparable harm.

ARGUMENT

I. THE CIRCUIT COURT ACTED OUTSIDE ITS JURISDICTION BY DENYING THE MOTION TO DISMISS BECAUSE PLAINTIFFS LACK CONSTITUTIONAL STANDING TO ASSERT THEIR CLAIMS.

The Kentucky Constitution limits courts' judicial power to "justiciable causes," and a cause is not justiciable where plaintiffs lack standing to sue. *Sexton*, 566 S.W.3d at 196 (citing Ky. Const. § 112(5)). Constitutional standing requires a plaintiff to demonstrate "(1) an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury is redressable by a ruling favorable to the plaintiff." *Overstreet* v. *Mayberry*, 603 S.W.3d 244, 249 (Ky. 2020).

In *Overstreet*, the Kentucky Supreme Court held that plaintiffs failed to allege standing in circumstances nearly identical to this case. *See* 603 S.W.3d at 266. There, Tier 1 and Tier 2 members sued KRS's trustees and officers, and third parties who did business with KRS—including the defendants here—on claims that these parties caused KRS to

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enter into the same purportedly improper investments at issue here. *See id.* at 250. The Court explained that, for standing purposes, an injury must be "concrete, particularized, and actual or imminent," meaning the injury must "actually exist" and, if occurring in the future, be "certainly impending." *Id.* at 252 (citations and emphasis omitted). The Court held that plaintiffs failed to demonstrate an injury in fact, because they had received their benefits under their pension plans and would continue to do so, and because the alleged risk to the KRS plans created by KRS's investment decisions was "too speculative" to confer standing. *See id.* at 253-254.

Because, under *Overstreet*, plaintiffs lack constitutional standing, the circuit court here is proceeding outside of its jurisdiction. Plaintiffs did not allege an injury in fact because their claimed injury—a potentially lower "upside sharing" interest on top of a guaranteed interest rate—is neither concrete nor "certainly impending." What is more, plaintiffs have failed to demonstrate redressability, because the relief they seek—damages paid to KRS's trusts—would not redress their alleged individual injuries.

A. Plaintiffs Failed to Establish an Injury in Fact.

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 330 (2016) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiffs fall short on both fronts. They lack a concrete and particularized injury, because they received "the benefits due to them": a guaranteed benefit based on a cash balance that accrued interest according to a predetermined statutory formula. Tier 3 Compl. ¶ 196; *see Thole* v. *U.S. Bank N.A.*, 590 U.S. 538, 542 (2020). And any injury is not "imminent," because their claimed injury can only occur after a "speculative chain of possibilities." *Clapper* v. *Amnesty International*

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USA, 568 U.S. 398, 414 (2013). The circuit court's contrary decision was erroneous as a matter of law, and this Court should grant the writ.

1. Recent decisions of both the Kentucky Supreme Court and the U.S. Supreme Court have confirmed that beneficiaries of defined-benefit pension plans lack a "concrete stake" in a lawsuit where they bring claims based on the alleged mismanagement of a fund that continues to provide them benefits according to its terms. *Thole*, 590 U.S. at 542. The same is true of the Tier 3 plaintiffs.

In *Overstreet*, the Kentucky Supreme Court explained that, because those plaintiffs who participated in defined-benefit plans "*have* received and will continue to receive all their monthly pension benefits," they lacked a "requisite injury in fact." 603 S.W.3d at 253. The *Overstreet* Court relied on *Thole*, where the U.S. Supreme Court explained that participants in an ERISA-governed defined-benefit plan who continued to be entitled to the same benefits—regardless of whether the fiduciary misconduct they claimed actually occurred—demonstrated no concrete injury. *See* 590 U.S. at 541-542. The *Thole* Court contrasted those plaintiffs with members of ERISA defined-contribution plans, in which "retirees' benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions." *Id.* at 540. Defined-benefit plans are "more in the nature of a contract" because "the plan participants' benefits are fixed and will not change," "[t]he benefits paid to the participants in a defined-benefit plan are not tied to the value of the plan," and "the employer, not plan participants, is on the hook for plan shortfalls." *Id.* at 542-543.

In its constitutional standing analysis, the circuit court erred in conflating a cash balance plan, such as the Tier 3 plan, with a defined-contribution plan. *See* Cir. Ct. Order 3. As the U.S. Supreme Court explained in *Thole*, "participants in a defined-benefit plan are

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not similarly situated to the beneficiaries of a private trust or to the participants in a defined-contribution plan." 590 U.S. at 542. In a defined-benefit plan, participants receive "a fixed payment" based on an established formula. *Id.* at 540. Moreover, contributions to a defined-benefit plan are commingled and participants do not have individualized accounts, so that "the employer typically bears the entire investment risk and—short of the consequences of plan termination—must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999). By contrast, rather than establishing benefits through a fixed formula, a defined-contribution plan ties benefits to the specific assets in each participant's segregated account, which directly bears the risks of losses from investment decisions. *See Hughes Aircraft Co.*, 525 U.S. at 439 (explaining that, in a defined-contribution plan, "each beneficiary is entitled to whatever assets are dedicated to his individual account").

To be sure, the Tier 3 plan is a "hybrid" cash balance plan that shares characteristics of both a defined-benefit and a defined-contribution plan. *See Overstreet*, 603 S.W.3d at 253 n.21; Tier 3 Compl. ¶ 196. But for the purposes of the injury-in-fact inquiry, that is a distinction without a difference. KRS's public reports confirm that the Tier 3 plan is a "defined benefits plan[]."[3] *See also* KRS 61.597(2) (setting out defined-benefit feature of Tier 3 plan). As with any defined-benefit plan, Tier 3 members have no cognizable interest in plan assets, which are commingled with assets from other KRS plans and invested. Such plans pool participants' contributions into common funds, but "employers do not deposit funds in

[3] *See, e.g.*, KRS 2016 Comprehensive Annual Financial Report 14 (2016) <tinyurl.com/2016-KRS-Report> (describing Tier 3 plan as a "defined benefit plan[]"); KRS 2020 Comprehensive Annual Financial Report 58 (2020) <tinyurl.com/2020-KRS-Report> (describing Tier 3 plan as a "Defined Benefit Pension Plan"); KPPA 2021 Annual Comprehensive Financial Report 67 (2021) <tinyurl.com/2021-KRS-Plan> (same); KPPA 2022 Annual Comprehensive Financial Report 74 (2022) <tinyurl.com/2022-KRS-Report> (same); KPPA 2023 Annual Comprehensive Financial Report 73 (2023) <tinyurl.com/2023-KRS-Plan> (same).

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actual individual accounts, and employers, not employees, bear the market risks." *Hirt* v. *Equitable Retirement Plan for Employees, Managers & Agents*, 533 F.3d 102, 105 (2d Cir. 2008). And as with other defined-benefit plans, Tier 3 plan members' only interest is a contractual right to receive defined benefits described in the plan. Courts in the ERISA context thus have consistently reasoned that cash balance plans qualify as defined-benefit plans under that statute. *See, e.g.*, *Drutis* v. *Rand McNally & Co.*, 499 F.3d 608, 609 (6th Cir. 2007) (explaining that "'[c]ash balance' plans are *defined benefit* plans that are structured like defined contribution plans" (emphasis added)); *Hurlic* v. *Southern California Gas Co.*, 539 F.3d 1024, 1028-1029 (9th Cir. 2008) (collecting cases); *French* v. *BP Corp. North America*, No. 08-216-DLB, 2010 WL 2219337, at *2 (E.D. Ky. May 28, 2010) ("Despite any resemblance it might bear to a defined contribution plan, a cash balance plan is considered a defined benefit plan.").

Like other cash balance plans and other defined-benefit plans, the Tier 3 plan fixes benefits for participants based on a defined formula, and participants do not bear the risk of poor investment performance. As plaintiffs themselves allege, the Tier 3 plan combines assets into a single pool, and members receive a "guaranteed amount of interest"—four percent base interest on member and employer contributions—provided by statute. Tier 3 Compl. ¶ 196; *see* KRS 61.597(4). While the Tier 3 plan also provides for the possibility of an "upside sharing" interest credit, KRS's materials to participants make clear that this credit was "not guaranteed." Tier 3 Compl. ¶ 196. And, more importantly, participants bear no risk of loss: no matter how investments perform, their accounts earn at least a four percent return pursuant to the statutory formula. In short, Tier 3 plan members have a contractual right to a four percent interest rate and the application of a defined formula based on the fund's performance to determine upside interest—and that is precisely what

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the Tier 3 plaintiffs have received. Their preference for a better result after the application of the upside-sharing formula is not a concrete injury, because they will receive all of the pension benefits to which they are "legally entitled." *Overstreet*, 603 S.W.3d at 266. Because plaintiffs have no personal stake in the Tier 3 plan assets and have not suffered an adverse effect to their benefits, they have not alleged a concrete injury.

2. In any event, plaintiffs' claimed injury is also speculative, because it is not "certainly impending." *Overstreet*, 603 S.W.3d at 252 (quoting *Clapper*, 568 U.S. at 409 (emphasis omitted)). Their alleged harm is, in essence, a theoretical possibility that their future benefits are lower as a result of a lower upside sharing interest, and a harm to the financial condition of the applicable plans that "increase[ed] the likelihood that those pension and insurance plans will fail." Tier 3 Compl. ¶ 200; *see also id.* ¶ 206. But those are exactly the types of "increased-risk standing arguments" that the Supreme Court considered in *Overstreet* to be "too speculative largely because even mismanagement that results in severe underfunding still requires the realization of several additional risks beyond plan termination before beneficiaries are denied their benefit." 603 S.W.3d at 254; *see id.* at 256 (finding allegation that "the plan mismanagement increases the relative likelihood that the Commonwealth . . . will eventually have to fund the KRS plan's actuarial shortfall . . . too speculative and hypothetical to confer standing"). For that reason, too, plaintiffs lack standing.

As the *Thole* Court recognized, because a "bare allegation of plan underfunding" fails to "demonstrate a substantially increased risk that the plan and the employer would both fail," claims resting on such risks are often too conjectural to support standing. *See* 590 U.S. at 546. This is consistent with the approach taken in the ERISA context, where injury based on a plan's increased costs or mismanagement is deemed too speculative to

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confer standing—especially where the plaintiffs have not alleged that the financial harms would be passed onto participants. *See, e.g.*, *Loren* v. *Blue Cross & Blue Shield of Michigan*, 505 F.3d 598, 608 (6th Cir. 2007) (claim that insurance plans overpaid for healthcare was "arguably conjectural and hypothetical" where it assumed that the employers "would pass on any increase" in costs); *Lee* v. *Verizon Communications, Inc.*, 837 F.3d 523, 546 (5th Cir. 2016) (defined-benefit plan participants did not allege injury where "fiduciary misconduct, standing alone without allegations of impact on individual benefits, is too removed to establish the requisite injury" regardless "of whether the plan is allegedly under- or overfunded"); *David* v. *Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (explaining that "risk-based theories of standing [are] unpersuasive, not least because they rest on a highly speculative foundation lacking any discernible limiting principle").

Because a participant in a defined-benefit plan, including a cash balance plan like Tier 3, does not bear the risk of a fund's underperformance, the participant could demonstrate injury from fund mismanagement only if a plan's termination were to be impending and an employer were unable to cover underfunding. *See Overstreet*, 603 S.W.3d at 254-256. As the Kentucky Supreme Court reasoned, "several additional risks beyond plan termination" must occur before members are denied benefits, even in the case of "mismanagement that results in severe underfunding" rather than investments that, like those here, exceeded performance targets. *Id.* at 254. But, here, the Tier 3 plaintiffs have made no allegation that KRS would be incapable of covering any shortfall caused by its investments. To the contrary, the Commonwealth is obligated by statute to pay members of the Tier 3 plan "the amount of benefits the member has accrued," even if it changes these plans in the future. KRS 61.692(2)(a).

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Again, the circuit court disregarded the speculative nature of plaintiffs' claimed injury based on its observation that, as a cash-balance plan, the Tier 3 plan has "upside credits" that provide additional interest, on top of a guaranteed four percent return, in accordance with a statutorily defined formula. *See* Cir. Ct. Order 3. But plaintiffs have not contested that such credits were (or will be) applied; instead, they contend that the investments made by KRS diminish the future benefits they could potentially receive upon retirement based on the application of the credit formula. The "risk that [plaintiffs'] pension benefits will at some point in the future be adversely affected"—notwithstanding whatever other investment or fund-management decisions KRS would have made or will make in the future—is "too speculative" to confer standing. *David*, 704 F.3d at 338. Plaintiffs' claim that they have a freewheeling entitlement to *additional* interest regardless of the steps KRS takes to manage the fund misconstrues the contractual rights provided in cash balance plans, and the circuit court's acceptance of that theory impermissibly opens the door to speculative standing claims in the future. Furthermore, it encourages plaintiffs, with the benefit of hindsight, to bring actions that result in second guessing every investment decision on the basis that they purportedly should have had "better results." The circuit court thus erred in concluding that the Tier 3 plaintiffs had demonstrated a concrete and non-speculative injury.

B. Plaintiffs Failed to Establish Redressability.

Plaintiffs also lack standing because they failed to show that their claims were "likely to be redressed by the requested relief." *Sexton*, 566 S.W.3d at 196 (citation omitted). Standing requires that the relief sought must "remedy the injury suffered." *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 107 (1998). But here, the Tier 3 plaintiffs seek relief only for "KRS's trusts," and damages paid to the trusts would not affect how

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plaintiffs' benefits are calculated as provided by statute. Tier 3 Compl. ¶ 23 n.11, Prayer for Relief ¶¶ 1-3. The requested relief, in other words, does not remedy plaintiffs' alleged injury, and it cannot "bootstrap" their case into court. *Steel Co.*, 523 U.S. at 107. By overlooking this issue—and, indeed, by omitting any discussion of redressability—the circuit court further erred in concluding that it had jurisdiction.

A claim is not redressable where a judicial decision would not address a plaintiff's alleged injury. *See Sexton*, 566 S.W.3d at 198. In *Sexton*, the Supreme Court noted that, even if it agreed with the plaintiff on the merits that a state agency should conduct an administrative hearing to resolve a managed-care organization's denial of a reimbursement to a healthcare provider, "nothing in [the plaintiff's] life would change," because the reimbursement would go to a third party (the healthcare provider). *Id.* Similarly, in *Kentucky Unemployment Insurance Commission* v. *Nichols*, 635 S.W.3d 46 (Ky. 2021), the Court reasoned that the plaintiff could not show that his injury (the denial of his unemployment insurance benefits) was "fairly traceable" to the claimed violation (the presence of a non-lawyer at the unemployment insurance hearing), and thus failed to establish causation and redressability. *Id.* at 52. There were "too many steps that hinge on uncertainty in the causal chain for [the Court] to find that any injury suffered is fairly traceable" to the challenged conduct. *Id*. at 53 (quotation marks omitted).

The same is true here. The injury the Tier 3 plaintiffs claim cannot be redressed by a decision ordering damages to the KRS plan. Plaintiffs expressly sought damages for "KRS's trusts" and disclaimed recovery of "their individual damages." Tier 3 Compl. ¶ 23 n.11. But their claimed "injury in fact" rests on the purportedly decreased benefits that they, individually, suffered as a result of lower upside sharing interest. *See id.* ¶¶ 200-206. Once again, those benefits are defined by statute to include a four percent interest

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calculation and a portion of the average investment return exceeding that base interest over the prior five years. KRS 61.597(4). That interest calculation for an individual member's benefits does not change regardless of any later award of funds to KRS arising out of litigation. And because the Tier 3 plaintiffs sought no relief from KRS, which is not a party to their action, no defendant in the Tier 3 action could redress plaintiffs' purported injury.

In contesting that point before the circuit court, plaintiffs relied only on a decision by the U.S. Court of Appeals for the Fourth Circuit holding that members of a defined-contribution plan had established redressability. *See* Ex. H, Pls.' Omnibus Opp. to Defs.' Mots. to Dismiss the Compl. 57-58 (citing *In re Mutual Funds Investment Litigation*, 529 F.3d 207, 216-219 (4th Cir. 2008)). But that decision only underscores why the Tier 3 plaintiffs have not alleged redressability. In that case, after an award of damages, the Fourth Circuit explained that it was "the plan assets *in the individual accounts* that are restored." 529 F.3d at 218. Cash balance plans like the Tier 3 plan, in fact, do not allocate assets to individual accounts. Moreover, if plaintiffs prevailed, any recovery would go to KRS, which commingles the assets in all three tier plans, *see* Tier 3 Compl. ¶ 202, while Tier 3 plaintiffs' benefits would remain defined by statutory formula, *see In re Mutual Funds Investment Litigation*, 529 F.3d at 218 (explaining that, where plaintiffs "were participants in *defined* benefit plans," the plan itself may have been injured but that any injury "did not *necessarily* affect a participant's defined benefit"). Plaintiffs' argument, as well as the circuit court's implicit agreement, is merely another instance of their continued mischaracterization of the Tier 3 plan and the benefits due to them.

* * * * *

The "irreducible constitutional minimum" of standing requires that a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of

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the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at 338 (citations omitted); *see Overstreet*, 603 S.W.3d at 252. Here, the Tier 3 plaintiffs have failed to meet at least two of those requirements, because they demonstrated neither an injury in fact nor redressability. Because the circuit court failed to recognize that plaintiffs lacked standing, and instead continued to exercise jurisdiction erroneously, this Court should grant a writ requiring the dismissal of the Tier 3 plaintiffs' action.

II. THE CIRCUIT COURT ACTED OUTSIDE ITS JURISDICTION BY DENYING THE MOTION TO DISMISS BECAUSE PLAINTIFFS LACK "TRUST LAW" STANDING TO ASSERT THEIR CLAIMS.

Separately, the circuit court also acted outside of its jurisdiction by concluding that plaintiffs had standing under the common law of trusts to bring a lawsuit as trust "beneficiaries" against third parties. *See* Cir. Ct. Order 3-4. The Kentucky Supreme Court has already rejected a similar trust-law theory, holding that participants in a KRS defined-benefit plan "possess no equitable or property interest in the plan assets" and that, as a result, "common-law trust principles also do not provide a viable theory of standing." *Overstreet*, 603 S.W.3d at 262. Here, as in *Overstreet*, plaintiffs disclaim recovery for themselves, and seek recovery only "for KRS's trusts." *Compare* Tier 3 Compl. ¶ 23 n.11, *with Overstreet*, 603 S.W.3d at 257 n.45. And here, as in *Overstreet*, no standing theory permits plaintiffs to sue in a representational capacity. *Overstreet*, 603 S.W.3d at 257-66.

In parting ways with the Supreme Court, the circuit court made two fundamental errors. *First*, the court's application of trust law to standing doctrine failed to recognize that the Tier 3 plan and the rights under it are governed by *statute*, not the common law of trusts. *Second*, even if common-law principles applied here, the Tier 3 plaintiffs would still have no grounds to pursue their claims: at common law, a trust beneficiary may only bring a claim against third parties when the trustee is conflicted, but plaintiffs have not alleged

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that the trustees here (the KRS Board) have any conflict that prevents them from bringing a claim. Indeed, the Attorney General's parallel action brought on behalf of all KRS members, which seeks payment to the KRS trusts from the same defendants based on the same allegations, confirms that there is no conflict that prevents these claims from being brought. To avoid serious jurisdictional issues and irreparable harm to defendants, this lawsuit should be dismissed.

A. As this Court has already held, "a state pension fund is not a 'trust'" for purposes of determining whether individual pension members can bring claims. *See Prisma Capital Partners, LP* v. *Shepherd*, No. 2019-CA-00043-OA, Op. 18 (Ky. App. Apr. 23, 2019). And for good reason: KRS is "a statutorily created agency of state government," and its governing statute "makes it abundantly clear that the Kentucky Retirement Systems is an 'arm, branch, or alter ego' of the [S]tate." *Commonwealth* v. *Kentucky Retirement Systems*, 396 S.W.3d 833, 837 (Ky. 2013). The legislature has defined the KRS Board of Trustees, its duties, and the claims that it can bring (as well as those that can be brought against it). *See* KRS 61.645. The Board of Trustees has the power to "sue and be sued in its corporate name," KRS 61.645(2)(a), including for the same relief that plaintiffs seek here: the "recover[y] [of] damages for KRS's trusts." Tier 3 Compl. ¶ 23 n.11; *see also id.* Prayer for Relief ¶¶ 1-3. In contrast, the statute permits KRS members to seek certain limited relief against KRS (and not third parties) only if they do not receive the benefits they are owed—but those circumstances are not present here. *See* KRS 61.645(14), (16). Because the legislature provided "a remedy for a specific unlawful act" alleged by the Tier 3 plaintiffs, and in fact *excluded* the claims plaintiffs seek to bring from the statutory scheme, that statute preempts any common law claim. *McCoy* v. *Ten Ten Group, LLC*, 2023 WL 2618406, at *4 (Ky. App. Mar. 24, 2023) (emphasis omitted).

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Moreover, the Supreme Court in *Overstreet* already expressed disapproval of a "trust law" standing theory nearly identical to the Tier 3 plaintiffs' argument in this case. *See* 603 S.W.3d at 261-263. In *Overstreet*, the plaintiffs sought to demonstrate constitutional standing to bring their claims by arguing that "they have standing as common-law beneficiaries of a trust." *Id*. at 253. The Supreme Court rejected that theory because members of a defined-benefit plan "possess no equitable or property interest in the plan assets," and thus could not bring a claim even if the trustee was unable to protect their interests. *Id.* at 261-262. The assets of the Tier 3 plan, like the defined-benefit plans in *Overstreet*, are commingled with other KRS assets, and plaintiffs are entitled only to "the receipt of promised funds" defined by contract. *Id.* at 262 (quoting *Jones* v. *Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710, 715 (Ky. 1995)). Because the Tier 3 plaintiffs lack an interest in the plan assets, this Court should follow *Overstreet* and reject the circuit court's attempt to expand trust-law standing principles to this case.

B. Even if the common law of trusts applied to this litigation, it still would not permit plaintiffs to maintain their claims. In general, a beneficiary may maintain a claim against a third party only if "the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest." *Overstreet*, 603 S.W.3d at 262 (quoting Restatement (Third) Trusts § 107(2)); *see also Osborn* v. *Griffin*, 865 F.3d 417, 447 (6th Cir. 2017) (permitting trust beneficiary to sue a third party where "the trustee improperly refuses or neglects to bring an action"). Plaintiffs have not shown that the KRS Board of Trustees is improperly refusing or neglecting to bring an action. The opposite is true; the Attorney General is already bringing these same claims on behalf of the KRS Board of Trustees and all members of KRS, including all Tier 3 members, against the same defendants named here. *See* Commonwealth's Third Am. Compl. ¶¶ 1, 4. If anything, it is the

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Attorney General, as the Commonwealth's chief legal officer, not members of the Tier 3 plan, who has statutory authorization to bring suit on behalf of KRS. *See* KRS 15.020(3). That is because the Attorney General has the authority to bring suits when the Commonwealth is the real party in interest. *See Overstreet*, 603 S.W.3d at 265 & 265 n.97. And a "real party in interest is one who is entitled to the benefits of the action upon the successful termination thereof." *Miller* v. *Paducah Airport Corp.*, 551 S.W.2d 241, 243 (Ky. 1977).

Courts therefore do not allow individual pension members to bring claims where the Attorney General is pursuing the same claims for the real party in interest. In *In re New England Mutual Life Insurance Co. Litigation*, 841 F. Supp. 345 (W.D. Wash. 1994), *aff'd*, 56 F.3d 786 (9th Cir. 1995) (mem.), members of public pension funds brought claims against third-party investment advisors based on investments made by the state investment board, the trustee for the pension fund; however, Washington's attorney general simultaneously pursued an action encompassing the same claims. *See id.* at 347-348. The court explained that the fund members could not maintain their claims against the third parties because the attorney general represented the trustee. *See id.* 348. With "no evidence" indicating that the attorney general "will not vigorously investigate and prosecute the pending . . . litigation for the benefit of all trust beneficiaries," the plaintiffs could not fall within an exception to the general common-law principle disfavoring suits by beneficiaries against third parties. *Id.* at 349.

The same is true here. Plaintiffs have not adequately alleged that any current members of the KRS Board of Trustees are conflicted, and they do not (and cannot) show that there is any obstacle to the KRS Board bringing the same claims. In fact, the Attorney General's action demonstrates that he is *already* bringing the same claims on behalf of the Board of Trustees and all KRS members, such that the claims are being brought by the

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trustee. *See* Tier 3 Compl. ¶¶ 1, 3. In these circumstances, trust law offers no avenue for individual KRS members to assert duplicate claims. The circuit court already recognized as much in denying a motion to intervene in the *Mayberry* action by three of the same plaintiffs here: it reasoned that the statute does not authorize beneficiaries to sue third parties on a derivative basis where the Attorney General "has stepped forward to litigate those claims." *Commonwealth* v. *KKR & Co. LLP*, Civ. No. 17-CI-01348, Op. 12 (Franklin Cir. Ct. June 14, 2021). Its reasoning applies equally to the purportedly "direct trust law" claims brought by the plaintiffs here.

In short, the circuit court erred in relying on trust law standing to permit plaintiffs' claims to proceed because plaintiffs' rights are determined by statute. And even if the common law of trusts applied, plaintiffs' claims are already encompassed in the Attorney General's action and should have been dismissed. The decision below would expand the approach to trust law standing beyond what Kentucky courts have permitted, and it would cause irreparable injury to defendants by allowing this action to proceed despite a lack of jurisdiction. For this reason too, the writ should be granted.

III. THIS LITIGATION WILL CAUSE GREAT AND IRREPARABLE HARM TO DEFENDANTS.

Alternatively, this Court should grant the writ petition because the circuit court is acting erroneously and defendants face great and irreparable harm that cannot be adequately remedied by a direct appeal. By denying defendants' motions to dismiss in both the Tier 3 action and the Attorney General action, the circuit court erroneously allowed separate actions with conflicting legal theories to proceed in parallel. The inconsistencies between those two decisions have left defendants in the position of having to decipher whether certain claims remain against them, with the risk of taking potentially conflicting positions throughout the remainder of the litigations. This Court should intervene.

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A. The Circuit Court's Errors Require Defendants to Litigate Conflicting Actions Seeking Unlawfully Duplicative Relief.

If defendants must continue to litigate both the Tier 3 action and the Attorney General action alongside one another, defendants will face great and irreparable harm because the circuit court has permitted plaintiffs in both actions to pursue what would result in identical relief, raising the risk of duplicative damages.

1. The circuit court acknowledged that the "central theory underlying" the Tier 3 action—that the prior board, "as a whole and as the sole trustee of the KPPA trust funds[,] committed breaches of trust, in collusion with the third-party defendants"—was "different from the theory underlying the AG's case." Cir. Ct. Order 5. But the circuit court erred in finding that the "relief is not the same" and that the "differing theories of the case may well result in different remedies." *Id.*

The Commonwealth's theory that it is the real party in interest on behalf of KRS and its pension fund members stands in stark contrast to the Tier 3 plaintiffs' position that they are suing as "beneficiaries" to the trusts because the trustees engaged in conflicted transactions and would not bring suit on their own. In the Tier 3 action, plaintiffs have brought their cause of action "to recover damages for the various trusts of the Kentucky Retirement System," because the KRS Board—as the "sole [t]rustee of those trusts"—"could not and will not sue the [h]edge [f]und [s]ellers" due to the risk of "expos[ing] their own mistakes[,] misconduct," and conflicts of interest. Tier 3 Compl. ¶¶ 1, 7, 8, 10, 16, 372. While the Attorney General alleges that certain KRS trustees and officers conspired with defendants, he claims that KRS generally is the victim of the alleged conduct, *see id.* at ¶ 5, rather than being "in on and part of the wrongdoing," as the Tier 3 plaintiffs allege, *see* Tier 3 Compl. ¶¶ 1, 16.

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Requiring defendants to litigate these differing theories in both the Tier 3 action and Attorney General action at the same time, when both plaintiffs indisputably represent the exact same interests, will cause great and irreparable harm. *See, e.g.*, June 14, 2021 Op. 11 ("[T]he Attorney General is actively pursuing broad, plan-wide relief on behalf of not only KRS or the Commonwealth, but also KRS beneficiaries across all tiers of KRS pension plans"). Indeed, under the circuit court's logic, it remains unclear who may properly represent the Tier 3 members' interests. For example, the Commonwealth has brought its action on behalf of its agencies, including KRS, and claims to speak for the Tier 3 plaintiffs, but the Tier 3 plaintiffs argue that only they can represent their own interests. Defendants will not be able to effectively negotiate with parties who claim to represent identical interests, while simultaneously maintaining differing strategies and objectives. Therefore, defendants may be required to take contrary positions throughout these litigations, which will cause substantial prejudice.

With respect to the separate claims for relief, the Tier 3 plaintiffs have asked the circuit court to "[d]etermin[e] and award[] to KRS's trusts[] the damages sustained by them." Tier 3 Compl., Prayer for Relief ¶ 2. Meanwhile, the Attorney General is seeking to recover all "damages for the losses incurred by the Commonwealth, including KRS," and including "the loss of trust assets, the loss of prudent investment opportunities[,] and positive investment returns" for alleged "financial injury to the Commonwealth, its departments, commissions, agencies, political subdivisions, citizens, taxpayers, *and all pension plan beneficiaries*." Commonwealth's Third Am. Compl. ¶¶ 1, 4 (emphasis added). If damages were awarded in both actions, defendants would have to pay double the amount of damages for the same types of claims. *Cf. MV Transportation, Inc.* v. *Allgeier*, 433 S.W.3d

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324, 334 (Ky. 2014) (explaining that "duplicative damage awards" should be avoided in a case involving competing claims for negligent hiring and *respondeat superior*).

2. Furthermore, permitting multiple baseless lawsuits to proceed through discovery when the lower court has acted without jurisdiction, *see* pp. 12-26, will cause great and irreparable harm to defendants. Courts often recognize that there is no adequate remedy by appeal in related contexts involving discovery orders. "As a practical matter," when discovery is permitted in error, "a party will not have an adequate remedy by appeal because once the information is furnished it cannot be recalled." *Wal-Mart Stores* v. *Dickinson, Inc.*, 29 S.W.3d 796, 800 (Ky. 2000); *see also Allstate Property & Casualty Insurance Co.* v. *Kleinfeld*, 568 S.W.3d 327, 333 (Ky. 2019) (quoting *Grange Mutual Insurance Co.*, 151 S.W.3d at 810)); *Bender* v. *Eaton*, 343 S.W.2d 799, 802 (Ky. 1961).

The same concerns arise here. The Tier 3 plaintiffs and the Attorney General have already served defendants with thousands of burdensome, duplicative, and potentially conflicting discovery requests spanning decades.[4] Defendants have already begun producing thousands of documents in the Attorney General action, and the Tier 3 plaintiffs have sought to engage simultaneously in broad discovery, which will be massive in both scope and cost. Defendants will need to conduct various discovery searches, iron out custodians of documents, and conduct depositions multiple times in each action. At every turn,

[4] For example, the Tier 3 plaintiffs' Request 40 states: "[f]or each Underlying Hedge Fund please produce all audited annual financial statements and/or reports, quarterly investment statements and/or reports, and K-1s issued to Henry Clay for the Investment Period." Ex. U, First Set of Requests for Production and First Set of Interrogatories to Blackstone Group, L.P. and Blackstone Alternative Asset Management, L.P. at 21. That request is functionally identical to Request 12 served on March 14, 2024, in the Attorney General action, which asks, "[f]or each Underlying Hedge Fund identified in response to this discovery, please produce all annual financial statements and/or reports, quarterly investment statements and/or reports, whether audited or unaudited, and K-1s issued to Your Fund of Hedge Funds for the Investment Period." Ex. V, First Set of Interrogatories and Requests for Production to Blackstone Parties at 19.

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defendants will not only expend twice the resources and time, but will have to navigate discovery and motion practice with two sets of counterparties who demand that defendants subject themselves to conflicting demands. For example, the Attorney General has agreed to a standard protective order to safeguard protected confidential documents, while the Tier 3 plaintiffs have sought to set up the litigation as an "open proceeding" at all times. Defendants will be severely prejudiced by proceeding against competing adversaries who claim to represent the same interest, and such prejudice cannot be remedied on appeal. *See Wal-Mart Stores*, 29 S.W.3d at 800.

B. The Circuit Court Committed Numerous Other Legal Errors.

In addition to the circuit court's decision to permit these competing actions to proceed, the obvious inconsistencies in the circuit court's decisions themselves have already caused defendants to face great and irreparable harm. In its May 1, 2024 orders, the circuit court issued conflicting rulings on the same claims in the parallel Tier 3 and Attorney General actions, leaving defendants uncertain as to which claims are proceeding against them and on which bases. Continued litigation on these two fronts will cause defendants substantial prejudice by subjecting them to redundant, confusing, and potentially unnecessary requirements in a burdensome and meritless litigation that has spanned nearly seven years.

With respect to the statutes of limitations, the circuit court issued confusing decisions without reasoning. For example, in the Tier 3 action, the circuit court recognized that the one-year statute of limitations applies to civil conspiracy claims and dismissed the civil conspiracy claim against Prisma/PAAMCO only, *see* Tier 3 Cir. Ct. Order 13-14; yet it erroneously did not make the same finding with respect to those same civil conspiracy claims against the Blackstone or KKR & Co. Inc. defendants. Compounding this confusion, in the Attorney General action, the circuit court did not dismiss as time barred the same civil

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conspiracy count against Prisma/PAAMCO that it had dismissed in the Tier 3 action; instead, the circuit court upheld the civil conspiracy claim against the Prisma/PAAMCO, Blackstone, and KKR & Co. Inc. defendants on the same alleged facts. *See* Cir. Ct. Order in the Attorney General Action 8. Additionally, in the Attorney General action, while the circuit court acknowledged that breach of fiduciary duty claims are subject to a five-year statute of limitations, it appeared to apply the fifteen-year statute of limitations against the Prisma/PAAMCO, Blackstone, and KKR & Co. Inc. defendants on the theory that those claims were purportedly "based on the terms of the written LLC agreements." Cir. Ct. Order in the Attorney General Action 5, 9. Meanwhile, in the Tier 3 action, while the circuit court similarly stated that "[a] five-year limitation period applies to breach of fiduciary duty and breach of trust claims," it did not explain why it believed that the ten-year statute of limitations and various tolling doctrines may instead operate to toll the applicable limitations periods as to the Prisma/PAAMCO, Blackstone, and KKR & Co. Inc. defendants. Tier 3 Cir. Ct. Order at 17. The circuit court vaguely claimed that "there may be facts that have not yet been fully disclosed," without stating what those facts might be. *Id.*

Given these obvious inconsistencies in the parallel actions, "great injustice and irreparable injury will result if the petition is not granted." *Hoskins*, 150 S.W.3d at 10. This Court's review is warranted so that defendants may have clarity as to what claims remain.

CONCLUSION

Plaintiffs have no standing to assert their duplicative claims. The circuit court acted outside its jurisdiction by erroneously concluding that the Tier 3 plaintiffs have suffered a concrete, non-speculative, and redressable injury sufficient to give them constitutional standing, and by concluding that plaintiffs have "trust law" standing to assert claims to recover for KRS. Permitting the Tier 3 plaintiffs to pursue the same claims that the

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Attorney General, in his capacity as the Commonwealth's chief legal officer, is currently litigating on their behalf, seeking the same remedies, would not only set a precedent for the initiation of similarly groundless lawsuits in Kentucky courts, but would also impose great and irreparable harm on defendants. Petitioners respectfully urge the Court to issue a writ requiring the circuit court to dismiss the Tier 3 action.

Respectfully Submitted,

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WORD-COUNT CERTIFICATE

This document complies with the word limit of Rule of Appellate Procedure 60(F) because, excluding the parts of the document exempted by Rules of Appellate Procedure 15(D), this document contains 10,094 words.

/s/ *Sean G. Williamson*
Sean G. Williamson

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2024, this Petition Pursuant to RAP 60 for Relief in the Nature of a Writ Directed to Hon. Thomas Wingate, Franklin Circuit Court, in *Taylor* v. *KKR & Co. Inc.*, Civil Action No. 21-CI-00645, was served via U.S. mail, postage prepaid, upon the following: Hon. Thomas Wingate, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601.

I further certify that on July 3, 2024, this Petition Pursuant to RAP 60 for Relief in the Nature of a Writ Directed to Hon. Thomas Wingate, Franklin Circuit Court, in *Taylor* v. *KKR & Co. Inc.*, Civil Action No. 21-CI-00645, was served via electronic mail upon the following:

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INDEX TO DOCUMENTARY APPENDIX

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TAB K: Order Granting Petitions for Writ of Prohibition, *Prisma Capital Partners, LP* v. *Shepherd*, No. 2019-CA-00043-OA (Ky. App. Apr. 23, 2019), attached hereto as **Exhibit K**

TAB L: Order, *Mayberry* v. *KKR & Co. LLP*, Civ. No. 17-CI-01348 (Franklin Cir. Ct. Dec. 28, 2020), attached hereto as **Exhibit L**

TAB M: Order, *Commonwealth* v. *KKR & Co. LLP*, Civ. No. 17-CI-01348 (Franklin Cir. Ct. June 14, 2021), attached hereto as **Exhibit M**

TAB N: Opinion Affirming in Part and Vacating in Part, *KKR & Co., Inc.* v. *Mayberry*, No. 2021-CA-1307-MR (Ky. App. Apr. 14, 2023), attached hereto as **Exhibit N**

TAB O: Joint Status Report, *Taylor* v. *KKR & Co., L.P.*, No. 3:21-cv-0029-KKC (E.D. Ky. Feb. 8, 2024), ECF No. 76, attached hereto as **Exhibit O**

TAB P: Commonwealth's Motion for Leave to Amend and to File Third Amended Complaint, *Commonwealth* v. *KKR & Co. Inc.*, Civ. No. 20-CI-00590 (Franklin Cir. Ct. March 31, 2024), attached hereto as **Exhibit P**[*]

TAB Q: Commonwealth's Notice of Filing of Third Amended Complaint, *Commonwealth* v. *KKR & Co. Inc.*, Civ. No. 20-CI-00590 (Franklin Cir. Ct. Apr. 9, 2024), attached hereto as **Exhibit Q**[*]

TAB R: Order, *Commonwealth* v. *KKR & Co. Inc.*, Civ. No. 20-CI-00590 (Franklin Cir. Ct. May 1, 2024), attached hereto as **Exhibit R**

TAB S: *McCoy* v. *Ten Ten Group, LLC*, No. 2022-CA-0011-MR, 2023 WL 2618406 (Ky. App. Mar. 24, 2023), attached hereto as **Exhibit S**

TAB T: *French* v. *BP Corp. North America, Inc.*, No. 08-216-DLB, 2010 WL 2219337 (E.D. Ky. May 28, 2010), attached hereto as **Exhibit T**

TAB U: First Set of Requests for Production and First Set of Interrogatories to Blackstone Group, L.P. and Blackstone Alternative Asset Management, L.P., dated June 6, 2024, attached hereto as **Exhibit U**

[*]The Commonwealth refers to the operative complaint in these documents as the "Second Amended Complaint."

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TAB V: First Set of Interrogatories and Requests for Production to Blackstone Parties, *Commonwealth* v. *KKR & Co. Inc.*, Civ. No. 20-CI-00590 (Franklin Cir. Ct. Mar. 14, 2024), attached hereto as **Exhibit V**