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Supreme Court of Kentucky

**COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
NO. 2022-SC-0505-D**

COMMONWEALTH OF KENTUCKY

APPELLANT

On Discretionary Review from  
the Court of Appeal  
No. 2021-CA-1115-MR

v.

Appeal from Jefferson Circuit Court  
No. 18-CI-2568

ALLTRADE SERVICE SOLUTIONS, LLC, et al.

APPELLEES

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BRIEF FOR THE APPELLEE, ALLTRADE SERVICE SOLUTIONS, LLC

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Respectfully submitted,

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## INTRODUCTION

This appeal concerns an order by the Jefferson Circuit Court, directed to the Office of the Commonwealth's Attorney, to produce certain criminal discovery materials to the parties in a parallel civil case. The Commonwealth argues that (1) they cannot be compelled to *do anything in any action* in which they are not a party, including but not limited to the production of relevant discovery, because of sovereign immunity, or, in the alternative that (2) a non-party (sovereign entity or otherwise) can never be compelled to produce discovery materials when a party to the action possesses the sought discovery. Both arguments propose this Court adopt drastic deviations from long-standing civil discovery practices. Neither argument is supported by Kentucky law, let alone competent law from equivalent courts. Either argument, if adopted, would substantially hamstring the ability of civil litigants to conduct discovery and prosecute civil actions. Accordingly, the Opinion of the Court of Appeals should be affirmed.

## STATEMENT CONCERNING ORAL ARGUMENT

Oral argument was ordered upon this Court's grant of discretionary review. The Appellee agrees oral argument is appropriate given the serious implications of the Commonwealth's appeal and welcomes the opportunity to discuss these issues with the Court.

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**COUNTERSTATEMENT OF THE CASE**

The Commonwealth’s recitation of the procedural history of this case is largely correct. For the sake of completeness, and for this Court’s ease of reference, that procedural history is reiterated below. In describing the Court of Appeals’ holding at issue, however, the Commonwealth misconstrues the lower court’s decision.<sup>1</sup> The Court of Appeals’ actual and correct holding is also addressed herein.

This is a wrongful death and personal injury action stemming from an apartment fire that occurred at 3409 Shanks Lane on December 5, 2017. The fire is alleged to have been intentionally started by Defendant Danesha Peden. [5th Amended Complaint at ¶¶ 12-16, R.567-573.] The Plaintiffs filed suit against Peden and other owners and managers of the property, including Appellee, Alltrade Service Solutions, LLC (hereinafter “Alltrade”), in Jefferson Circuit Court. [5th Amended Complaint at ¶ 13, R.567-573.] That civil case was assigned to Jefferson Circuit Court Division One (1). Congruently, Peden is being prosecuted in Criminal Action No. 17-CR-03708 in Jefferson Circuit Court, Division Six (6), on charges of murder, wanton endangerment, and arson in connection with the same apartment building fire. Thus, there are two corresponding cases – this civil action in Division One and a parallel criminal case in Division Six – which arise from the same underlying facts. Defendant Peden is incarcerated and represented in the civil case by a guardian ad litem. [Order Appointing Guardian Ad Litem, R.259-260.]

On October 29, 2019, Alltrade propounded upon Defendant Peden a single Request for Production of Documents, seeking all materials produced to her or her attorney by the Commonwealth’s Attorney’s Office in conjunction with the criminal charges (hereinafter

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<sup>1</sup> *E.g.*, “And it held that a court can unnecessarily burden a nonparty with discovery even when a party already possesses the sought-after materials.” Commonwealth Brief, page 3.

the “criminal discovery file”). [Notice of Service for Alltrade’s First Set of Requests for Production of Documents propounded on Defendant Danesha Peden, R.312-313.] RCr 7.24 and Jefferson Circuit Local Rule 803 require the Commonwealth to produce to the criminal defendant several materials, including statements given by the defendant, reports of examinations or tests, witness statements, inculpatory and exculpatory evidence, a bill of particulars, grand jury recordings, photographs, and digital images. Notably, RCr 7.24(2) excludes from the required production any “work product” or privileged information. (“This provision authorizes pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the commonwealth in connection with the investigation or prosecution of the case...”). *See* RCr 7.24. The Commonwealth produced the criminal discovery file to Peden’s criminal attorney, Kevin Coleman, on or about March 13, 2018. [Discovery Order, August 21, 2020, R.522-523, attached as Exhibit 1.]<sup>2</sup>

There is no dispute by any party that the documents contained in the criminal discovery file are highly relevant, material, and important to the litigation of the civil action. While Alltrade does not know the exact contents of the criminal discovery file, it is led to believe (by representations made by the Commonwealth and otherwise) that the file contains body camera footage from the police and fire responders, witness statements

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<sup>2</sup> As members of this Court are undoubtedly aware, it was the common practice in Jefferson County and many other counties to file these criminal discovery files with the presiding trial court. This practice was changed in Jefferson County by an amendment to Jefferson Circuit Court Local Rule 803(g), wherein the words “[t]he parties shall not file discovery documents or exhibits with the court unless either party requests or the court requires such filing during pretrial litigation, trial, or appellate review.” *See* KY JPR RULE 803 Amendment, February 8, 2018, attached as Exhibit 2.

obtained in the course of the arson investigation, and statements made by Ms. Peden herself.

After receiving no response to this discovery request for several months, Alltrade filed a motion to compel the criminal discovery file on January 30, 2020. [Alltrade’s January 30, 2020, Motion to Compel, R.352-354.] In an Order entered August 21, 2020, the trial court granted Alltrade’s motion to compel and ordered Peden’s guardian ad litem to obtain the criminal discovery file from Peden’s criminal defense attorney and produce it to Alltrade within seven days. [Exh.1, R.522-523]. On August 28, 2020, Peden’s criminal defense attorney filed a non-party motion to stay that discovery order. [Non-Party’s Motion to Stay Discovery Order, R. 1041-1043, attached as Exhibit 3.] As grounds for that motion, Peden’s criminal defense attorney explained that he had not been made aware of the Court’s August 21, 2020 Order until August 27, 2020 after being contacted by the Plaintiffs’ attorney in the civil case.

It is through this motion that Defendant Peden raised the “constitutional objections” that the Commonwealth and the Court of Appeals fault the Trial Court for not resolving.<sup>3</sup> First and foremost, this issue is not before this Court. But, for the sake of clarity, Alltrade wishes to address the Commonwealth’s assertions on this point. The Commonwealth describes the objections asserted by Ms. Peden’s public defender as being primarily related to the Sixth Amendment right to a fair trial.<sup>4</sup> Unlike the Fifth and Fourteenth Amendments,

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<sup>3</sup> “Oddly though, the court did not first resolve Peden’s constitutional objection that the production of the materials could harm her rights in the civil case.” Commonwealth Brief, page 2; “We find that Division One abused its discretion, however, in not ruling on Peden’s motion to stay the order promulgated by it ordering *her* to turn over the discovery provided her, a party to the action before it.” Court of Appeals Opinion, page 13.

<sup>4</sup> Commonwealth Brief, page 2.

which are asserted specifically therein (and which *were* addressed by the Trial Court, see below), reference to the Sixth Amendment does not appear in this motion. Likewise, Peden, the only party with standing to assert any constitutional protections on her behalf, *has not* challenged the trial court order finding that the constitutional arguments advanced in her Motion to Stay did not prohibit production of the criminal discovery file and has never sought appellate review of that ruling.<sup>5</sup>

At a subsequent hearing on August 31, 2020, Peden's criminal defense attorney advised the trial court that he was refusing to produce the criminal discovery file to Peden's appointed guardian ad litem. [Discovery Order, September 30, 2020, R. 527-528, attached as Exhibit 4]. Due to that refusal, on September 30, 2020, the trial court entered a subsequent Order, ordering the Commonwealth to produce the criminal discovery file to the trial court, indicating the trial court would then produce the criminal discovery file to the parties in the civil action. [Exh.4, R.527-528.] The trial court explicitly did not grant the motion to stay filed by Peden's criminal defense attorney.

After the entry of that Order, Commonwealth's Attorney, Thomas B. Wine informed the trial court that he wanted to wait until the outcome of another case on appeal, *Commonwealth of Kentucky v. Brian C. Edwards*, 2020-CA-0984. [Discovery Order, July 7, 2021, R.948-952, attached as Exhibit 5.] In that case, the Commonwealth had sought a writ of prohibition after being ordered to produce a similar criminal discovery file to parties in a different civil suit. [Exh.5, R.948-952.] The parties and the court in this action agreed that the trial court would withhold enforcement of the previously entered discovery orders pending the resolution of that action. [Exh.5, R.948-952.] On March 31, 2021, the Court

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<sup>5</sup> See Discovery Order of July 7, 2021, discussed below. [Exh.5, R.948-952.]

of Appeals issued an Order in that case, *Commonwealth of Kentucky v. Brian C. Edwards*, 2020-CA-0984, dismissing the writ petition as moot without making any substantive rulings. [Exh.5, R.948-952.] Thus, on April 8, 2021, Alltrade filed a motion to compel compliance with the August 21, 2020, and September 30, 2020, discovery orders. [Alltrade's Motion to Compel, R.810-833, attached as Exhibit 6.]

Before the civil court could rule on Alltrade's April 8th motion, both Peden and the Commonwealth, in an apparent move to subvert the civil court's discovery orders, sought entry of an order in Jefferson Circuit Court Division Six (the criminal court) to seal the criminal discovery materials. [Defendant's Motion for Court Order Sealing Discovery Pursuant to Agreement of the Parties, R.1054-1056.] Other than Peden, no parties to this action were given notice that such an order was being sought, nor was the civil trial court given notice. Likewise, nowhere in that Motion or during motion hour was it mentioned that both the Commonwealth and Peden had already been ordered to produce the criminal discovery materials in the civil court months before. Unaware of the civil court's discovery orders, the presiding judge in the criminal case entered an Order for Protection of Discovery on April 19, 2021, barring any parties from sharing the criminal discovery file. [R.950.] That Order was entered as tendered because it was presented to the criminal judge as an agreed order between both parties to the criminal action. [R.1054-1056.]

On October 13, 2021, Alltrade and other Defendants filed a motion in the criminal court to vacate its Order for Protection of Discovery. [Non-Parties' Motion to Vacate, R.1158-1168.] Immediately upon learning of the fact that the civil court had previously ordered the production of the criminal discovery file, the criminal court vacated its prior

order. [Order, R.1177.] There is currently no order in place in the criminal court prohibiting the production of the sought criminal discovery file.

In a July 7, 2021 Order, the civil court again ordered the Commonwealth's Attorney to produce the criminal discovery file. [Exh.5, R.948-952.] The civil court acknowledged the constitutional arguments raised by Peden, but correctly recognized that "those constitutional protections do no[t] create an absolute bar to a civil litigant's right to obtain copies of relevant non-testimonial documents collected by law enforcement or the office of the Commonwealth's Attorney related to a fatal fire." *Id.* The court also noted that it would conduct an in camera inspection of the documents and then forward a copy of all relevant documents to all counsel in this civil action. [Exh.5, R.948-952.]

On July 15, 2021, the Commonwealth's Attorney moved the civil court to vacate its order requiring the Commonwealth to turn over the criminal discovery file. [Commonwealth's Motion to Vacate, R.991-997, attached as Exhibit 7.]

On August 12, 2021, the presiding judge in the Division One civil case entered an Order Denying the Commonwealth's Motion to Vacate its Discovery Order. [Order Denying the Commonwealth's Motion to Vacate, R.1062-1063, attached as Exhibit 8.] The Commonwealth then appealed to this Court on September 10, 2021. [Commonwealth's Notice of Appeal, R.1065-1067.]

Sovereign immunity, now the thrust of the Commonwealth's argument against compliance with the Trial Court's discovery orders, was not raised until appeal. That argument was rejected by the Court of Appeals, holding specifically that "immunity does not protect the Commonwealth from being ordered to produce discovery as a matter of course." Contrary to the Commonwealth's assertion, the Court of Appeals did not hold

“that a court can unnecessarily burden a nonparty with discovery even when a party already possess the sought-after materials.”<sup>6</sup> As referenced above, the Court of Appeals remanded the case to the Trial Court to determine whether Ms. Peden’s constitutional rights are implicated in the production of the criminal discovery file. While Alltrade contends that (1) Ms. Peden’s rights are not implicated, and (2) that this issue *has* been addressed by the Trial Court, Alltrade does not cross-appeal this issue and does not object to a secondary determination of the same by the Trial Court.

### ARGUMENT

The Office of the Commonwealth Attorney should not be exempt from the production of relevant and discoverable information to parties in a civil action by virtue of sovereign immunity. Likewise, a non-party entity that possesses relevant and discoverable information should not be exempt from production solely because another party possesses that information. The ability to obtain records from government agencies and other non-party entities is a fundamental tool in civil litigation. From police reports to state hospital medical records, government-compiled information is essential to civil litigation. In the almost two-hundred years that Kentucky has recognized the doctrine of sovereign immunity, Kentucky *has never* held that sovereign immunity protects a government entity from compliance with a court order to produce documents. Doing so would entirely upend centuries of common practice.

Of equal concern is the Commonwealth’s assertion that *all* non-party entities (governmental, private, individual, or otherwise) should be exempt from compliance with discovery orders if a party already possesses the sought discovery. By the

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<sup>6</sup> Commonwealth Brief, page 3.

Commonwealth's proposed rule, a civil defendant could not subpoena a plaintiff's medical records if the plaintiff already has those records, a court could not order a non-party employer to produce a defendant employee's employment file if the employee claimed to already possess that file, and, as is the case here, a civil litigant could not obtain through alternative means a relevant and discoverable file in the possession of a party, otherwise unobtainable by virtue of that party's refusal to comply with a discovery order. From chain-of-custody and authentication issues to concerns related to the completeness and accuracy of a party's production, there are endless reasons why civil litigants might seek documents in the possession of one party from non-party sources. Our civil rules allow exactly that and there is no basis in law to prohibit this common practice.

The Court of Appeals reached the correct result. Upon the resolution of any constitutional concerns on behalf of Defendant Peden concerning the production of the criminal discovery file, the Commonwealth should be compelled to produce the documents as ordered by the Trial Court.

**1. Kentucky state sovereign immunity does not apply to non-party discovery orders directed to the Commonwealth or its agencies or departments.**

The fact that the Commonwealth of Kentucky (and certain of its "departments, boards or agencies") enjoy sovereign immunity is not disputed in this case. *See Withers v. University of Kentucky*, 939 S.W.2d 340, 344 (Ky. 1997). Likewise, Alltrade does not dispute that the Jefferson County Office of the Commonwealth's Attorney, the state entity to which the subject discovery order was directed, is one of those state departments that enjoys sovereign immunity.<sup>7</sup> At issue in this case is the Commonwealth's novel argument

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<sup>7</sup> The Commonwealth does attempt to distinguish their office, that is the Office of the County Attorney, from other state agencies in arguing that they, by virtue of being the

that sovereign immunity prevents a court from ordering the Commonwealth Attorney's Office to produce relevant and discoverable information and materials to parties in a civil case.

The novelty of this argument is worth emphasizing. The Commonwealth's brief attempts to establish their arguments as pre-dating the United States Constitution – as ancient and obvious. Yet, no Kentucky appellate court has ever held that the Commonwealth Attorney's Office (or *any other* state agency) is shielded from non-party discovery orders by virtue of sovereign immunity. It is telling that the Commonwealth did not assert sovereign immunity in opposing the Trial Court's discovery order, instead relying on those defenses to discovery traditionally available under the Rules of Civil Procedure (*i.e.*, that the requests were overly broad and burdensome).<sup>8</sup> While this lack of assertion is not fatal to the appeal,<sup>9</sup> it undermines the Commonwealth's argument that nonparty discovery orders have been within the bounds of protection provided by sovereign immunity, and that such protection has been evident, since the days of our founding fathers.<sup>10</sup>

Sovereign immunity was first recognized in Kentucky as early as 1828. *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. Ct. App. 2020). Since that time, sovereign immunity has been understood as protecting the sovereign from civil liability. *Divine v. Harvie*, 23 Ky.

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“Commonwealth”, enjoy a different, more primary version of sovereign immunity. For reasons discussed below, this differentiation does not matter in this case.

<sup>8</sup> The Commonwealth also made misplaced arguments under the work-product doctrine and the Open Records Act that have since been abandoned. *See* Motion to Vacate, filed July 15, 2021 [R. 991-97, Exh.7.]

<sup>9</sup> Alltrade acknowledges that sovereign immunity can be raised for the first time on appeal. *Wells v. Commonwealth Department of Highways*, 384 S.W.2d 308 (Ky. 1964).

<sup>10</sup> Commonwealth Brief, pages 14-15.

(7 T.B. Mon.) 439 (1828) (“It seems to be conceded on all hands, that the State can not [sic] be made a party defendant, and is not suable in her own courts.”). No Kentucky court has ever extended sovereign immunity to extend beyond protection from civil suits. To the contrary, Kentucky has permitted suits directly against the sovereign where there is no claim for damages and no threat of harm to the resources of the state:

Sovereign immunity is founded on the notion that the resources of the state, its income and property, cannot be compelled as recompense for state action that harms a plaintiff through the ordinary suit-at-law process.

...

As the trial court found, a declaratory judgment action is not a claim for damages, but rather it is a request that the plaintiff’s rights under the law be declared. There is no harm to state resources from a declaratory judgment.

*Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833, 836-838 (Ky. 2013) (Finding that a declaratory judgment action against the Commonwealth is not barred by sovereign immunity because monetary damages are not at issue).

The Commonwealth’s assertion that the doctrine of sovereign immunity prevents a court from compelling the Commonwealth to take *any action* is a drastic deviation from how Kentucky courts have interpreted sovereign immunity and is unsupported by Kentucky law.

**a. State sovereign immunity belongs to the state.**

The Commonwealth’s Brief begins with a discussion of the history of sovereign immunity – both from a federal and state perspective. In this discussion, the Commonwealth attempts to establish several distinct sovereign immunity concepts – state sovereign immunity, federal sovereign immunity, Eleventh Amendment sovereign immunity, and Native American tribal immunity – as equivalent. There are parallels to be drawn between these concepts, to be sure. Alltrade does not dispute that these separate concepts have common origins in the English common law. But the assertion that “cases

applying federal sovereign immunity [or tribal sovereign immunity, or Eleventh Amendment immunity] are directly analogous to when state sovereign immunity applies”<sup>11</sup> is plainly untrue. As is discussed in the very cases cited by the Commonwealth, state sovereign immunity is left to the sole control of state courts. The tribal immunity and Eleventh Amendment immunity cases relied upon by the Commonwealth are neither controlling nor particularly persuasive authority in establishing the bounds of Kentucky state sovereign immunity.

In Justice Gorsuch’s dissent in *PennEast Pipeline Company, LLC v. New Jersey*, cited multiple times in the Commonwealth’s brief, the distinction between the several types of immunity enjoyed by states is acknowledged. “States have two distinct federal law immunities from suit” which is separate from the immunity of states in state court. 141 S.Ct. 2244, 2264 (2021) (Gorsuch, J. dissenting).

States may also have state-law immunity from suit in a state forum. That immunity derives from a State’s “sole control” of “its own courts.” *Alden*, 527 U.S., at 740, 749, 119 S.Ct. 2240. A State is free to develop its own justiciability rules governing state tribunals. See *Missouri v. Lewis*, 101 U.S. 22, 30, 25 L.Ed. 989 (1880); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). That is why this Court has found that state-law immunity provides an adequate and independent state ground for affirming a state-court judgment. *E.g.*, *Georgia R. & Banking Co. v. Musgrove*, 335 U.S. 900, 69 S.Ct. 407, 93 L.Ed. 435 (1949) (per curiam); *Palmer v. Ohio*, 248 U.S. 32, 34, 39 S.Ct. 16, 63 L.Ed. 108 (1918). Because PennEast sued in federal court, state-law immunity is not implicated here.

*Id.* at 2264, n.1.

In *Alden v. Maine*, the United States Supreme Court addressed this principle. 119 S.Ct. 2240, 2264 (1999) (“Although the immunity of one sovereign in the courts of another has often depended in part on comity or agreement, **the immunity of a sovereign in its own**

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<sup>11</sup> Commonwealth Brief, page 7.

**courts has always been understood to be within the sole control of the sovereign itself.”**) (emphasis added).

Thus, Kentucky’s own case law setting the bounds of state sovereign immunity and its case law addressing court orders to non-party government agencies are far more relevant to the question of sovereign immunity in this case than the tribal immunity and Eleventh Amendment immunity cases upon which the Commonwealth relies.<sup>12</sup> Kentucky allows discovery requests to state entities – entities that enjoy the protection of sovereign immunity in the correct context – by statute, by case law, and by tradition.

**b. Kentucky law allows non-party discovery directed to state agencies and sovereign immunity does not protect against such requests.**

The particular question of law advanced by the Commonwealth – whether sovereign immunity protects the Commonwealth Attorney’s Office from compliance with non-party discovery orders – is an issue of first impression in Kentucky, if only because the Commonwealth has never been so bold as to propose such a drastic expansion of the doctrine. On the other hand, Kentucky law, both statutory and case law, is replete with discussions of government compliance with non-party discovery orders. It is clear from these statutes and case law that it has always been taken for granted that the state government is beholden to valid discovery orders.

Before addressing this law, the scope of sovereign immunity available to the “Commonwealth” needs to be addressed. In discussing the varieties of sovereign immunity recognized in Kentucky, the Commonwealth does much to differentiate between

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<sup>12</sup> Moreover, as is discussed below, the cases relied upon by the Commonwealth are themselves outliers and the Court of Appeals’ holding on sovereign immunity in this case is consistent with most extra jurisdictional case law.

“sovereign immunity” and “governmental immunity.”<sup>13</sup> For reasons that are not clearly articulated, the “Commonwealth” argues that it is subject to some more direct form of sovereign immunity than other government agencies. It appears that the “Commonwealth”, *i.e.*, the party appellant, views itself as something different than a state department or agency. This view is incorrect and irrelevant.

While the case caption in this matter refers to the “Commonwealth of Kentucky”, and while it has been common to refer to the Appellant as the “Commonwealth” throughout the briefing, it is the Jefferson County Office of the Commonwealth’s Attorney that is the actual, real party in interest. That is the government department that is prosecuting Ms. Peden, that possesses the sought criminal discovery file, and to whom the Trial Court’s order was directed.

The Commonwealth’s attorney system utilized in Kentucky is established by statute. Chapter 15, Title III of the Kentucky Revised Statutes establishes the Department of Law and sets forth the framework under which the Attorney General, the various Commonwealth’s attorneys, and the county attorneys operate. KRS 15.010 established the Attorney General as the head of the Department of Law and establishes its major organizational units. KRS 15.700 *et seq.* establishes a “unified and integrated prosecutor system” under which the Attorney General, the Commonwealth’s attorneys, and county attorneys are tasked with the shared administration of Kentucky’s criminal justice system.

Chapter 15 runs parallel to multiple other Chapters under Title III, in particular Chapter 12, that establish a great number of state agencies and departments. The Department of Environmental Protection (KRS 12.020(II)(2)(b)), the Department of

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<sup>13</sup> Commonwealth Brief, page 12.

Housing (KRS 12.020(II)(2)(h)), and the Personnel Cabinet (KRS 18A.015) are all established and organized by statute under Title III in the same manner as the Commonwealth's attorney's office. There is no law that awards the Department of Law some higher degree of sovereign immunity protection than any other state department or agency.

The Commonwealth's argument "entities, including state agencies, do not possess sovereign immunity" and instead possess "governmental immunity" is also somewhat of a misnomer, though, as noted by this Court in *Northern Kentucky Water District v. Carucci*, "[a]lthough the law of immunity is relatively simple in the abstract, its application has vexed the court of the Commonwealth for decades." 600 S.W.3d 240, 243 (Ky. 2019) (internal citations omitted).

Governmental immunity, derived from sovereign immunity, is the public policy that limits tort liability on a governmental agency. *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). The basic policy is that "courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy." *Id.* "Thus, a state agency is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function." *Id.*

*Id.*

As the Commonwealth explains, governmental immunity when it applies, is "functionally the same" as sovereign immunity.<sup>14</sup> *Furtula v. University of Kentucky*, 438 S.W.3d 303, 305 n.1 (Ky. 2014).

The difference between the two is that sovereign immunity is absolute and an inherent aspect of the state, whereas a state agency's immunity is qualified to the extent that its existence depends on whether the agency is performing a governmental or proprietary function. *See Yanero*, 65 S.W.3d at 519. However, to the extent that the agency is performing a governmental function, as a state

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<sup>14</sup> Commonwealth Brief, page 12

university does, its governmental immunity is functionally the same as sovereign immunity. *Id.* (“[A] state agency is entitled to immunity from ... liability to the extent that it is performing a governmental, as opposed to a proprietary, function.”). Because the immunities are similar, closely related, and indeed functionally the same as long as the entity is acting in a governmental capacity, the case law frequently uses the term “sovereign immunity” when discussing the immunity of state agencies. *See id.* (noting the terms are frequently used “interchangeably”).

*Id.*

In other words, the difference between governmental and sovereign immunity is a question of application, *i.e.*, does the protection of sovereign immunity apply to a given state agency or department? If applicable, it does not change the degree or scope of whatever protection is afforded by sovereign immunity. Thus, whether the Office of the Commonwealth’s Attorney is afforded sovereign immunity or governmental immunity makes no difference to the outcome of this case.<sup>15</sup> The bounds of the protection provided – protection from civil liability – is the same.

Sovereign immunity extends to “both actions in tort and contract.” *University of Louisville v. Rothstein*, 532 S.W.3d 644, 650 (Ky. 2017) quoting *University of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky.App. 1978). It does not extend to discovery requests made to government entities. State agencies, including prosecutors, are routinely required to produce documents to civil litigants in cases in which those state agents are not parties. If this Court were to adopt the Commonwealth’s proposed expansion of sovereign

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<sup>15</sup> In other contexts, other forms of immunity, namely prosecutorial immunity, might be available to the Commonwealth. The Commonwealth argues, and Alltrade agrees, that such immunity is not implicated in this case. *See* Commonwealth Brief, page 11. As explained in *Yanero*, the rationale underlying the immunity of prosecutors is “to protect their offices against the deterrent effect of a threat of suit alleging improper motives where there has been no more than a mistake or a disagreement on the part of the complaining party with the decision made.” 65 S.W.3d at 518. Such concerns are not implicated here.

immunity, where state courts cannot compel the Commonwealth to act in any manner whatsoever, the results would have far-reaching consequences.

Kentucky case law contains numerous discussions of discovery requests to non-party government agencies. Very recently, the Kentucky Court of Appeals held, in *Parish v. Petter*, that “a party to litigation may seek public records from a nonparty public agency through discovery requests, including a notice to take deposition and subpoena.” 608 S.W.3d 638, 642 (Ky.App. 2020). The non-party government agency in that case, the Lexington-Fayette Urban County Government, enjoys sovereign immunity protections like the Commonwealth. See *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 132-33 (Ky. 2004) (“This immunity flows from the Commonwealth’s inherent immunity by virtue of a Kentucky county’s status as an arm or political subdivision of the Commonwealth.”).<sup>16</sup> In *Parish*, the Court explained that the processes for obtaining discovery outlined by the Civil Rules created a valid avenue for seeking discovery from public agencies.

The Eastern District of Kentucky held in *Williams v. Sandel*, that absolute immunity protects a prosecutor from suit, but was not implicated when the prosecutors were not defendants in the litigation and the civil litigant was seeking investigatory materials. No. CV 08-04-DLB, 2010 WL 11538240, at \*3 (E.D. Ky. Feb. 12, 2010).<sup>17</sup> The prosecutors in *Williams* further argued that the Open Records Act did not allow for the discovery of the

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<sup>16</sup> In fact, under the Commonwealth’s formulation of sovereign immunity, whereby governmental immunity is a weaker form of immunity than the more direct form of sovereign immunity, Lexington-Fayette Urban County Government enjoys the stronger, more direct form as a county government. See Commonwealth Brief, page 12 (“Third, counties and governments formed by statute possess sovereign immunity. *Jefferson County Public Schools v. Tudor ex rel. J.T.*, 664 S.W.3d 600, 604 (Ky. 2023).”)

<sup>17</sup> Unpublished Opinions attached collectively as Exhibit 9.

prosecutorial files. The court agreed that “the prosecutorial files are ordinarily not subject to Kentucky's Open Records Act. But that is a far cry from holding that such records are never discoverable in a civil case.” The Court went on to state that:

Prosecutorial files have been subject to discovery via court order in a variety of contexts, such as during post-conviction proceedings in which a Brady violation or other misconduct is alleged, or when a court is examining the validity of a plea agreement that includes a release or waiver of a civil rights action or claim. *See, e.g., Cone v. Bell*, 129 S. Ct. 1769 (2009)(habeas petitioner discovered evidence to support Brady claim); *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936 (1999); *Town of Newton v. Rumery*, 480 U.S. 386, 107 S. Ct. 1187 (1987)(plea agreement conditioned on release of civil rights claim).

Similarly, prosecutors are not immune from being deposed upon a showing of relevance and need. *See e.g., Cady v. Arenac County*, 574 F.3d 334 (6th Cir. 2009)(reference to deposition of assistant prosecutor in evaluating civil rights claim). “We are aware of no rule that generally exempts prosecutors from the normal obligations of responding as witnesses if they have information material to a civil proceeding.” *Brummett v. Camble*, 946 F.2d 1178, 1185 (5th Cir. 1991).

*Id.* at \*4.

The Supreme Court of Kentucky has specifically held that nonparty prosecutors must produce discovery documents when served with a subpoena or discovery order. In *O’Connell v. Cowan*, 332 S.W.3d 34 (Ky. 2010), the Kentucky Supreme Court found that, pursuant to a discovery order, the production of over 5,000 pages of documents in the prosecutor’s file pertaining to the criminal charges of the plaintiff in a subsequent civil suit were discoverable. Indeed, when determining whether to order the prosecutor to appear for a deposition, the Court favored the production of the prosecutorial file over deposing the prosecutor, stating that, “disclosure of the prosecutorial file is not only a good alternative means [to a deposition] but may be more complete and accurate. The recordations of the criminal investigation may stand the test of time better than the individual attorney’s memory of the case.” *Id.* at 44.

In *O'Connell*, the issue was whether the Jefferson County Attorney could be compelled to produce her opinion work product and appear for a deposition. *Id.* The Court found that “it has been held that that Fed.R.Civ.P. 26(b)(3) provides no work product protection for a prosecutor's files when that prosecutor is not a party to the subsequent civil litigation.” *O'Connell* at 40. In reaching its decision, the Court never mentioned the idea that the prosecutor’s file was protected by sovereign immunity or that the civil court “lacked the power” to order discovery. Instead, the court reasoned that the “trial court has the ultimate discretion in discoverability” but must consider the compelling need for opinion work product and conduct an in camera review of the material before permitting discovery of opinion work product. *Id.* at 44-45.

Here, there is no risk that work product might be disclosed. The criminal discovery file being sought is the file produced according to RCr 7.24. Notably, RCr 7.24(2) excludes from the required production any “work product” or privileged information. (“This provision authorizes pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the commonwealth in connection with the investigation or prosecution of the case...”).

Regarding Kentucky’s Open Records Act, discussed by the court in *Williams*, above, and discussed at some length in the Commonwealth’s Brief,<sup>18</sup> the argument is not that the Open Records Act creates a waiver of sovereign immunity,<sup>19</sup> but that the entire body of Kentucky’s case law and statutes contemplates an entirely different understanding of what sovereign immunity prohibits than what the Commonwealth proposes.

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<sup>18</sup> Commonwealth Brief, page 25 n.9.

<sup>19</sup> Though that would certainly be the “overwhelming implication” of the Act if this Court were to adopt the Commonwealth’s arguments regarding sovereign immunity.

KRS 61.878, specifically contemplates the production of prosecutorial files pursuant to order of a court within the confines of civil discovery. “The following public records are excluded from the application of KRS 61.870 to 61.884 and **shall be subject to inspection only upon order of a court of competent jurisdiction**, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery.” KRS 61.878(1) (emphasis added). The Commonwealth argues that KRS 61.878 limits inspection to orders from a court of “competent jurisdiction” (and Alltrade does not dispute that sovereign immunity is a jurisdictional question), but under the Commonwealth’s proposed expansion of sovereign immunity, *no court* would be competent to order the production of prosecutorial files. The Commonwealth’s arguments would render the provisions of KRS 61.878 that allow a court to authorize the inspection of prosecutorial files entirely superfluous.

Such an abrogation of the Open Records Act might be an unfortunate necessity if those provisions were unconstitutional. However, the Commonwealth argues that Kentucky’s Constitution *is not* the source of sovereign immunity, but merely an attestation to sovereign immunity’s existence.<sup>20</sup> Alltrade does not dispute this characterization, but notes that Section 231 of the Kentucky Constitution empowers the legislature to direct the application of sovereign immunity protections. Clearly the legislature, in enacting the Open Records Act, intended prosecutorial files to be discoverable by civil litigants upon order of a competent court.<sup>21</sup> As is clear from the cases and statutes cited above, an

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<sup>20</sup> Commonwealth Brief, page 6.

<sup>21</sup> It is also clear that the Kentucky legislature intended the Circuit Courts to be the courts of “competent jurisdiction.” KRS 61.882(1) (“The Circuit Court of the county where the

adoption of the Commonwealth’s arguments by this Court would not be an embrace of the status quo or a formal recognition of what has always been the law in Kentucky – it would be a drastic expansion of the doctrine of sovereign immunity in conflict with hundreds of years of precedent and practice.

In support of that expansion, the Commonwealth cites to two Kentucky cases in particular, neither of which hold that a government entity cannot be compelled to produce non-party discovery. First, the Commonwealth discusses *Meinhart v. Louisville Metro Government*, 627 S.W.3d 824 (Ky. 2021). In *Meinhart*, this Court addressed whether a police officer was entitled to qualified official immunity in making the decision to engage in a pursuit that ended in a fatal motor vehicle accident. *Id.* at 827. Importantly, the issue was whether sovereign immunity protected the police officer from a personal injury suit, not from discovery requests in a matter wholly unrelated to the officer’s liability. True, this Court did explain that immunity protects not merely from liability, but also the burdens of defending an action including “broad-reaching discovery.” *Id.* at 836. In this discussion, this Court cited to *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009), which case in turn cited to *Lexington–Fayette Urban County Government v. Smolic*, *supra*, at 135 (“Immunity from suit includes protection against the cost of trial and the burdens of broad-reaching discovery that are peculiarly disruptive of effective government.”).

Tracing this principle to *Smolic* is important. As stated above, this Court decided in *Smolic* that the Lexington-Fayette Urban County Government was immune from suit

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public agency has its principal place of business or the Circuit Court of the county where the public record is maintained shall have jurisdiction to enforce the provisions of KRS 61.870 to 61.884, by injunction or other appropriate order on application of any person.”)

by virtue of “inherent sovereign immunity,” that is, the same immunity claimed by the Commonwealth. *Id.* at 136. Also cited above, the Court of Appeals held in *Parish v. Petter*, that parties in civil litigation could seek discovery from a nonparty public agency – specifically, the Lexington-Fayette Urban County Government.

The idea that *Meinhart* stands for the proposition that *any* discovery request (or *any action whatsoever*) to a government agency is barred by sovereign immunity is undercut even further by the second case cited by the Commonwealth. In *Commonwealth v. Kentucky Retirement Systems, supra*, the Commonwealth attempted to avoid suit in a declaratory judgment action by way of sovereign immunity. *Id.* at 836 (“The Commonwealth’s sole contention is that the ‘Commonwealth’ may not be sued in this action because it has sovereign immunity.”). That argument was rejected. “Sovereign immunity is founded on the notion that the resources of the state, its income and property, cannot be compelled as recompense for state action that harms a plaintiff through the ordinary suit-at-law process.” *Id.* This Court specifically rejected the argument that, by virtue of sovereign immunity, the Commonwealth cannot be compelled to act in any manner whatsoever:

We do not have a government that is beyond scrutiny. If sovereign immunity can be used to prevent the state, through its agencies, from being required to act in accordance with the law, then lawlessness results. This review is qualitatively different from requiring the state to pay out the people’s resources as damages for state injury to a plaintiff.

*Id.* at 839.

A declaratory judgment suit, like any suit, might include discovery requests, depositions, and other necessary “actions.” If these necessary actions do not trigger sovereign immunity within a declaratory judgment action, there is no reason they would trigger such under the

even more minimal burdens of a non-party discovery request. As is discussed above, because a declaratory judgment suit does not implicate the liability (*i.e.*, monetary damages) of the Commonwealth, sovereign immunity did not apply in *Kentucky Retirement Systems* and for the same reason, should not apply here.<sup>22</sup>

The Commonwealth’s argument that their “broad definition of a suit for sovereign immunity purposes” was understood in the same way by the Founders is likewise unsupported.<sup>23</sup> Nowhere in any of the Federalist Papers, speeches by John Marshall, or Supreme Court cases cited by the Commonwealth is sovereign immunities applicability to a discovery order, like that in this case, discussed. Nowhere in *Franchise Tax Board of California v. Hyatt* is it discussed that the Founders belief that “sovereign immunity prevented States from being amenable to process in any court without their consent” encompassed nonparty discovery orders, like the Commonwealth suggests. *See* 139 S.Ct. 1485 (*Hyatt* concerns a suit by Nevada taxpayers against the Franchise Tax Board of California for intentional torts and bad-faith and the discussion of the historical

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<sup>22</sup> The Commonwealth implicates the potentiality of “contempt” twice in their Brief, pages 17 and 25. Presumably, the implication is that the Commonwealth might refuse to comply with a non-party discovery order, thus forcing the trial court to hold them in contempt and impose more severe burdens than the *de minimus* burdens of complying with a discovery request. First, this argument is also refuted by *Kentucky Retirement Systems*. A trial court would be empowered with all the strength of contempt (and more) in enforcing a declaratory judgment action, and yet such does not trigger sovereign immunity. Second, contempt would only be applicable if the Commonwealth refused to comply with the subject discovery order. Presumably the Commonwealth is *not* making the tyrannical argument that they might confer upon themselves the protection of sovereign immunity by purposefully refusing otherwise valid court orders. Finally, contempt has not been issued in this case, and thus questions regarding the interplay of contempt and sovereign immunity are merely speculative.

<sup>23</sup> Commonwealth Brief, pages 14-15.

understanding of sovereign immunity therein relates to the ability of citizens of one state to sue another *in tort*.)

Likewise in *Ex parte Ayers*, the United States Supreme Court addressed whether a federal court had jurisdiction to enjoin attorneys from bringing a suit against certain Virginia taxpayers for delinquent taxes owed under bond coupons, since the state was the real party in interest and thus subject to sovereign immunity protections. 8 S.Ct. 164 (1887). Nowhere in that case is the holding or implication that sovereign immunity prohibits a state court discovery order to a prosecutorial office.

By adopting the Commonwealth’s proposed expansion of the doctrine of sovereign immunity, this Court would foreclose all non-party discovery to state agencies. Sovereign immunity applies not just to the Commonwealth’s Attorney’s office, but state universities and hospitals,<sup>24</sup> school boards,<sup>25</sup> and even zoos.<sup>26</sup> There is no rationale or basis to expand sovereign immunity to immunize state agencies from non-party discovery requests.

**c. The federal authority on which the Commonwealth relies is both distinguishable and inconsistent.**

The Commonwealth’s essential argument is that “sovereign immunity applies whenever a litigant asks a court to restrain the Commonwealth from acting or to compel it to act.” Because this rule appears nowhere in Kentucky case law, the Commonwealth cites a handful of federal circuit court opinions, none of which address the exact scenario presented in this case. As is discussed, these cases either apply a different form of immunity (*e.g.*, Native American tribal immunity), rely on different concepts than immunity (*e.g.*, the Supremacy Clause), or are outliers in the sea of extra-jurisdictional

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<sup>24</sup> KRS 49.070

<sup>25</sup> *See Yanero, supra.*

<sup>26</sup> *See Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010).

cases that address whether a government agency is amenable to non-party discovery requests. These cases could be ignored altogether because, as the United States Supreme Court has explained, state sovereign immunity in state courts is entirely within the control of the state judiciary. To the extent the Commonwealth argues these cases support their position, however, they are worth addressing.

Among the few cases cited by the Commonwealth are *Bonnett v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155 (10<sup>th</sup> Cir. 2014) and *Alltell Communications, LLC v. DeJordy*, 675 F.3d 1100 (8<sup>th</sup> Cir. 2012). Both cases concern federal *tribal* immunity, a doctrine entirely different than Kentucky state sovereign immunity. Both cases address federal immunity in the context of tribal sovereignty, the Administrative Procedure Act, 5 U.S.C. § 702, and the Eleventh Amendment. The entire body of reasoning espoused in those cases is completely inapplicable because those cases discuss immunity from entirely different sources in an entirely different context.

Federal courts have consistently distinguished tribal and state sovereign immunity. For example, in *Allen v. Woodford*, a state agency appealed to these same tribal sovereign immunity arguments for the proposition that a subpoena could not be served upon the state. 544 F.Supp.2d 1074, 1079 (E.D. Cal. 2008). While not cited by the Commonwealth, like *Bonnett* and *Alltell*, the Ninth Circuit has also held that *tribal* immunity prevents enforcement of a subpoena on a Native American tribe under the Eleventh Amendment. *United States v. James*, 980 F.2d 1314 (9th Cir.1992). The *Allen* court addresses these arguments at length.

The threshold issue is whether issuance and required compliance with a third-party subpoena by State custodians of records in an action in which the State is not a party constitutes “any suit in law or equity, commenced or prosecuted against one of the United States” within the meaning of the Eleventh Amendment. *In State of*

*Missouri v. Fiske*, 290 U.S. 18, 26–27, 54 S.Ct. 18, 78 L.Ed. 145 (1933), the Supreme Court quoted Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 407, 408, 51 L.Ed. 257 (1821):

What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of justice. The remedy for every species of wrong is, says Judge Blackstone, ‘the being put in possession of that right whereof the party injured is deprived.’ ‘The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be ‘the lawful demand of one’s right.’ Or, as Bracton and Fleta express it, in the words of Justinian, ‘*jus prosequendi in judicio quod alicui debetur.*’ Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

To commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptance of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same.

In *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), the Supreme Court held, in the context of sovereign immunity:

The general rule is that a suit is against the sovereign if ‘the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,’ *Land v. Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 ... (1947), or if the effect of the judgment would be ‘to restrain the Government from acting, or to compel it to act.’ *Larson v. Domestic & Foreign Corp.*, ... 337 U.S. at 704, 69 S.Ct. 1457 ...; *Ex parte New York*, 256 U.S. 490, 502, 41 S.Ct. 588, 65 L.Ed. 1057 ... (1921).

The Supreme Court in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 n. 11, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), cited *Dugan v. Rank* in the context of the Eleventh Amendment.

It is recognized that the immunity of a state arises “only when the state government (including state agencies, not its political subdivision), is sued.” Rotunda and Nowak, *Treatise on Constitutional Law* (4th ed.2007), § 2.12(x), p. 210–11. There is no suit in law or equity against the state in this case; nor have the moving parties provided legal authorities that a discovery request under the Federal Rules of Civil Procedure in a federal civil rights action in which the state is not sued, constitutes “a suit” or “suing” the state within the meaning of the Eleventh Amendment.

Based on these principles, the Eleventh Amendment does not apply to preclude discovery from a State agency, which can only be obtained through the State's custodians of records or from other employees having custody and control of the information or documents sought. Neither the State, nor any of its employees to whom subpoenas have been directed to obtain the information sought, that have been found essential to the prosecution of the Plaintiff's case, are parties, nor has any relief in law or equity been sought against them or the State. No judgment will be issued in this action against the State that could have any conceivable effect on the State treasury; the State custodians are only subpoenaed to produce documents for use in the prosecution of this federal civil rights action. The Non-Parties' assertion that they must comply with the subpoenas in their official capacities as custodians of record is irrelevant; no judgment or other relief of any kind is sought against them in this litigation.

*Allen* at 1078-79.

*In United States v. University of Massachusetts, Worcester*, the defendant, a nonparty state agency, cited to the same two appellate cases discussing tribal immunity – *Bonnett* and *Alltel* – as the Commonwealth in this case. 167 F.Supp.3d 221, 224 (D. Mass. 2016). These cases were “from the Eighth and Tenth Circuits, in which the courts held that nonparty subpoenas were ‘suits’ for purposes of tribal immunity.” *Id.* at 224. The court in *UMass* found that, “the holdings of these cases do not apply to the case at hand, because *UMass* is asserting state sovereign immunity,” and held that nonparty discovery does not constitute a “suit.” *Id.* Consequently, like *Allen* and *UMass*, neither federal nor tribal sovereign immunity applies in the instant case, and the lower court’s order does not constitute a “suit” for purposes of immunity.

The *Bonnett* opinion itself discusses how both it and the *Alltell* opinion from the Eighth Circuit are of limited application outside the tribal immunity context. *Bonnett* at 1160-61. As acknowledged by the *Bonnett* court, the Eighth Circuit has held that

subpoenas to non-party, non-tribal government entities *are* enforceable. *See In re Missouri Department of Natural Resources*, 105 F.3d 434, 436 (8<sup>th</sup> Cir.).<sup>27</sup>

Likewise, the Commonwealth cites to *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4<sup>th</sup> Cir. 1989), which held that the EPA (a federal agency) could quash a subpoena from a *state court* action to which the agency was not a party. However, what the Commonwealth fails to point out is that *Downie* concerns a subpoena served upon a *federal agency* by a *state court*, and a state court cannot compel a federal agency to comply with a subpoena because it violates the spirit and letter of the Supremacy Clause. As the *Downie* court held, “the principle of federal supremacy reinforces the protection of sovereign immunity in the case at bar. The assertion of state court authority to override the EPA’s *Touhy* regulations clearly violates the Constitution’s Supremacy Clause.” *Downie* at 71.

In discussing the *Downie* decision, the court in *Charleston Waterkeeper v. Frontier Logistics, L.P.*, distinguished federal sovereign immunity from state sovereign immunity. 488 F. Supp.3d 240 (D.S.C. 2020). “While the Fourth Circuit has held that the doctrine of federal sovereign immunity protects non-party federal agencies from enforcement of state subpoenas, the court premised that conclusion upon the principle of federal supremacy, which is inapplicable in the context of state sovereign immunity.” *Id.* at 249; *see also*, *Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774 (9<sup>th</sup> Cir. 1994) (“The *Downie* court held that the doctrine of sovereign immunity precludes the state court... from

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<sup>27</sup> “MDNR has not shown how production of these documents infringes on the State of Missouri’s autonomy or threatens its treasury. Governmental units are subject to the same discovery rules as other persons and entities having contact with the federal courts. *United States v. Procter & Gamble*, 356 U.S. 677, 681, 78 S.Ct. 983, 985–86, 2 L.Ed.2d 1077 (1958). There is simply no authority for the position that the Eleventh Amendment shields government entities from discovery in federal court.”

compelling Downie, an EPA investigator, to testify contrary to his agency's instructions. The limitations on a state court's subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause.”). Thus, the *Downie* holding only applies to state court subpoenas served upon *federal officials* and *federal agencies* who are not parties to a suit. It does not stand for the proposition that a *state* prosecutor should be afforded immunity to state court subpoenas because there is no implication of the Supremacy Clause in the state sovereign immunity context.

The Commonwealth also cites the Fifth Circuit decision in *Russell v. Jones*, 49 F.4th 507 (5<sup>th</sup> Cir. 2022). Alltrade agrees with the Commonwealth that this case, of all the federal cases cited by the Commonwealth, is the most on-point, but only because the other cases, discussed above, rely on drastically different principles of law. But, *Russell* is also distinguishable. The *Russell* case concerns a *federal* court subpoena served upon a *state* agency (state judges). The case at hand does not implicate the federalism principles or the Eleventh Amendment case law upon which the Fifth Circuit decides *Russell v. Jones*. In reaching its conclusion, the *Russell* Court also relies on the same decisions cited by the Commonwealth – *Bonnett* and *Alltell*. See *Id.* at 517-18. These decisions have no bearing on the state sovereign immunity issues in this case.

The *Russell* Court is also plainly wrong in its reasoning. It explains:

[O]ur sister circuits begin to disagree about the application of federal sovereign immunity to third-party subpoena proceedings in *federal court*. But—crucially—the disagreement is not about whether sovereign immunity applies to subpoenas *at all*, but rather whether sovereign immunity applies to subpoenas *in federal court*. Put differently, our sister circuits agree that where a sovereign is otherwise entitled to immunity, that immunity extends to third-party subpoenas.

*Id.* at 517 (emphasis original). This is simply untrue. In fact, multiple federal courts that have addressed the issue have held that immunity does not extend to third-party subpoenas.

*See In re Missouri, supra* (8<sup>th</sup> Cir.) (vacating an order to quash subpoena to government agency because government failed to “show how production... infringes on the State of Missouri’s autonomy or threatens its treasury.”); *Barnes v. Black*, 544 F.3d 807, 812 (7<sup>th</sup> Cir.2008) (“[A]n order commanding a state official who is not a party to a case between private persons to produce documents in the state’s possession during the discovery phase of the case” does not violate the Eleventh Amendment “because [it does] not compromise state sovereignty to a significant degree”). This has also been the prevailing view among the lower federal courts.

In *Gomez v. City of Nashua, N.H.*, 126 F.R.D. 432 (D.N.H. 1989), the civil litigant to a parallel criminal proceeding requested that the Office of the Attorney General provide him with the office’s investigative file pursuant to state law. The Attorney General’s office refused to produce the full file, so the civil litigant issued a subpoena to the Assistant Attorney General, seeking his appearance for a deposition and asking him to bring all relevant documents related to the investigation. *Id.* at 433. In resisting the subpoena, the Attorney General argued that the doctrine of absolute immunity as set forth in the case of *Imbler v. Pachtman*, 424 U.S. 409 (1976), serves to immunize prosecutors from the discovery process. *Id.* The court found that while sovereign immunity “immunizes a prosecutor from civil liability, the immunity does not extend to preclude his participation in the discovery process in litigation to which he is not a party.” *Id.* at 433.

Other federal courts have held similarly to *Gomez*. *See also, Sullivan v. Stefanik*, 605 F. Supp. 258, 259–60 (N.D. Ill. 1985) (Although the prosecutor was immune from civil liability, he was not immune from being deposed.); *Sinclair v. Lauderdale Cty., Tenn.* No. 2:14-CV-02908-SHM, 2015 WL 1393423, at \*4 (W.D. Tenn. Mar. 24, 2015) (Prosecutorial

immunity did not bar civil litigant from deposing a prosecutor who prosecuted parallel criminal proceeding); *Callahan v. Unified Gov't of Wyandotte Cty./Kansas City Kan.*, No. 11-2621, 2013 WL 2151579, at \*2 (D. Kan. May 16, 2013) (“There is no question that a non-party who is immune from suit can be compelled to provide discovery. For example, states are immune from suits by citizens in federal court under the Eleventh Amendment, yet federal courts regularly order state agencies to produce relevant documents in cases where the state is not a party.”); *Karunyan v. Maricopa, Cty. of*, No. CV-10-00198-PHX-ROS, 2015 WL 13747126, at \*2 (D. Ariz. Feb. 3, 2015) (“The prosecutor’s primary argument against plaintiffs’ discovery requests was based on absolute immunity afforded to prosecutors when performing prosecutorial activities. According to the prosecutors, a natural outgrowth of that immunity is that they cannot be deposed, or required to produce any documents, regarding any aspects of the prosecution of the civil litigant. This allegedly extends even when, as here, the prosecutors are not parties. The prosecutors are incorrect.”).<sup>28</sup>

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<sup>28</sup> See also *Ali v. Carnegie Inst. of Washington*, 306 F.R.D. 20, 30 n. 8 (D.D.C.2014) (noting hypothetically that the Eleventh Amendment would “not completely shield [the University of Massachusetts] from certain non-party discovery requests” if it were not joined as a party); *Arista Records LLC v. Does 1–14*, No. 7:08CV00205, 2008 WL 5350246, at \*1–\*3 (W.D.Va. Dec. 22, 2008) (nonparty state university's motion to quash subpoenas was denied on the grounds that the doctrine of sovereign immunity did not apply to third-party subpoena requests); *Laxalt v. McClatchy*, 109 F.R.D. 632, 634 (D.Nev.1986) (affirming magistrate's denial of nonparty state agency's motion to dismiss discovery subpoena and notice of deposition; rejecting agency's argument for Eleventh Amendment immunity); *Allen v. Woodford*, 544 F. Supp. 2d 1074, 1078–79 (E.D. Cal. 2008) (“There is no suit in law or equity against the state in this case; nor have the moving parties provided legal authorities that a discovery request under the Federal Rules of Civil Procedure in a federal civil rights action in which the state is not sued, constitutes “a suit” or “suing” the state within the meaning of the Eleventh Amendment.”); *Charleston Waterkeeper*, 488 F. Supp. 3d at 250-51 (“The principle that underlies the doctrine of state sovereign immunity is federalism, which courts have found is not undermined when a federal court enforces a subpoena against a state agency. As such, the court finds that state sovereign immunity

There is simply no legal support for the proposition that sovereign immunity insulates Kentucky state agencies from non-party discovery. There is no support for this proposition under Kentucky law and the federal cases cited by the Commonwealth are inapposite.

**2. Kentucky’s Rules of Civil Procedure allow non-party discovery requests, regardless of whether other parties might possess the sought discovery.**

The Commonwealth next argues that the Trial Court abused its discretion by compelling discovery from a nonparty when another party possessed the materials. There is simply no rule or authority that limits the ability of a court in that manner.

Kentucky law states that pursuant to CR 45, a subpoena *duces tecum* may be used to compel a non-party witness to produce nonprivileged books, papers, documents, or tangible things that constitute or contain matters within the scope of discovery. *Primm v. Isaac*, 127 S.W.3d 630, 634 (Ky. 2004); CR 26.02. “Generally, control of discovery is a matter of judicial discretion.” *Id.*; see also, *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796 (Ky. 2000); *Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722 (Ky. 1997). “Trial courts do enjoy great leeway and discretion in entering and enforcing discovery orders.” *S. Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921, 932 (Ky. 2013). A trial court “has broad discretion in addressing a violation of its order[s]” regarding discovery, and this Court reviews the trial court's determination of the appropriate sanction for abuse of that

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does not apply to plaintiffs’ subpoena.”); *United States v. Juv. Male 1*, 431 F. Supp. 2d 1012, 1016 (D. Ariz. 2006) (holding in a proceeding to enforce a subpoena *duces tecum* issued under Rule 17(b) and (c) of the Federal Rules of Criminal Procedure that “sovereign immunity from suit [lacks] any application to the enforcement of a federal subpoena on the custodian of records of a state or federal agency”).

discretion. *Turner v. Andrew*, 413 S.W.3d 272, 279 (Ky. 2013), *citing*, *Wilson v. Commonwealth*, 381 S.W.3d 180, 191 (Ky. 2012).

Here, the trial court below granted Alltrade's motion to compel the criminal discovery file from Peden. This prompted Peden's public defender to file a motion to stay pursuant to CR 26.03. Among the remedies provided in CR 26.03 is the trial court's ability to order discovery "by a method of discovery other than that selected by the party seeking discovery." CR 26.03(1)(c). Alltrade sought the criminal discovery file directly from Peden. Peden's criminal attorney refused to turn them over. In compliance with the court's authority granted by Kentucky's Rules of Civil Procedure, the trial judge ordered that discovery of the documents be had by alternative means, namely by ordering the Commonwealth to produce the documents. Thus, it was within the discretion of the trial court to order the Commonwealth to produce the documents pursuant to CR 26.03.

The Commonwealth cites *Primm v. Issac*, 127 S.W.3d 630, 638 (Ky. 2004), for the proposition that discovery should not be required of nonparties when the parties are capable of providing the same documents or information. However, *Primm* does not discuss whether nonparties should be required to produce discovery when parties have the same documents. Instead, the issue in *Primm* was whether an expert could be compelled to disclose his tax returns and billing documents when the same information could be sought through written or oral depositions. *Id.* The *Primm* court held that, "[i]t is unreasonable to compel experts to produce financial documents prior to any attempt to obtain the information through a less intrusive, burdensome, and costly means." *Id.* at 639. Thus, the ultimate issue in *Primm* was whether the discovery was "intrusive, burdensome, and/or costly" to the expert.

Here, compelling the Commonwealth to produce the criminal discovery file is not intrusive, burdensome, or costly. Producing the documents is not intrusive to the Commonwealth as they have historically been placed in the court record which would allow interested parties to inspect the documents. It is not costly or burdensome as the Commonwealth is already required to produce these documents in every case and has *already produced the criminal discovery file in this case*.

The Commonwealth explains that there are vast amounts of electronically stored data in the criminal discovery file, and specifically references body camera footage.<sup>29</sup> But again, this information has already been produced by the Commonwealth once. We live in a world where large amounts of data can easily be shared. Hundreds of gigabytes of data can be copied to a disk or flash drive – as has presumably been done at least once in the criminal case – in a matter of minutes. File sharing websites, such as Dropbox, Google Drive, or Sharefile, allow parties to quickly share huge amounts of data for cheap and are commonly utilized by virtually every office in every industry in the world. The relatively small burden of producing already-compiled information is simply not enough to warrant against its production when such information is important and directly relevant to a wrongful death suit where millions of dollars in damages are being claimed.

The Commonwealth asserts they are “not advancing a bright-line rule that a court can never compel a nonparty to produce discovery when a party already possess the materials.”<sup>30</sup> But if that is not the rule they are advancing, what is their argument? They propose a rule where a nonparty “cannot *unnecessarily* be compelled.”<sup>31</sup> In other words,

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<sup>29</sup> Commonwealth Brief, page 26.

<sup>30</sup> Commonwealth Brief, page 38.

<sup>31</sup> Id. (Emphasis original)

the Commonwealth is proposing a rule by which discovery *can* be sought from nonparties, but the trial court would have the discretion to prevent such discovery in certain circumstances. Is not that already the rule in Kentucky? Is that not exactly what happened in this case? The Trial Court, in its discretion, ordered the Commonwealth to produce relevant information. The Commonwealth was given ample opportunities to assert their objections to this Order and did so, filing multiple briefs in opposition and being heard on the issue by the Trial Court at oral argument. The Commonwealth *cannot* argue that they were denied adequate process on this issue.

It appears that the Commonwealth is attempting to shift the burden of persuasion from non-parties objection to a subpoena or discovery orders to the party seeking discovery or issuing the subpoena. Under the Commonwealth's proposed rule, every time a party issues a subpoena or otherwise sought discovery from a non-party they would (1) need to determine whether any of the parties to the civil action already possessed the sought discovery, and (2) the trial court would then need to make a determination on the issue "necessity" (whatever that might mean). Such a system would be unworkable for several reasons.

First, whether a party possesses certain information is not always easily discernable. Every personal injury practitioner in this state knows that when you make a discovery request to an injured party for medical records, the records in that party's possession may or may not be complete. For that reason, personal injury attorneys on both sides of the case will request medical records straight from the source – the medical provider – to ensure that they obtain a complete, accurate, and certified copy of the medical records.<sup>32</sup>

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<sup>32</sup> The certification might also be relevant for evidentiary and authentication reasons.

Second, litigants do not and should not have to rely on the word of their party opponents in determining whether they have complete copies of a certain record. In a case involving allegation of texting and driving, a litigant might ask the driver for a copy of their text messages or might ask the driver during deposition if they were on their phone. They might also subpoena the phone service provider to verify the information they are being provided by their party opponent is accurate.

Third, forcing the proponent of the sought discovery to prove such discovery is “necessary” before obtaining that discovery is an unworkable standard. Often, a party does not know what information might be contained in sought discovery until that discovery is obtained. It is for this reason that the scope of discovery is broad and includes all information “reasonably calculated to lead to the discovery of admissible evidence.” CR 26.02. The process of establishing “necessity” would be equally unworkable. Would the trial court need to hold a hearing on necessity every time a party issued a nonparty subpoena? Would nonparties be given notice and be required to attend that hearing? In a typical and ordinary car accident case, parties might issue multiple dozens of subpoenas *duces tecum* to medical providers, employers, government transportation agencies, and police and accident investigators. The trial court system could not sustain the burden of determining “necessity” each time a non-party is issued such a subpoena. Rather, the burden is on the party opposing the subpoena to move to modify or quash subpoenas is “unreasonable and oppressive.” CR 45.02.

Our trial court system already has an established system in place for addressing the concerns expressed by the Commonwealth. There is no need to change the law or place limitations on discovery beyond what our Civil Rules provide. The Trial Court *did not*

abuse its discretion when ordering the Commonwealth, a non-party entity indisputably in possession of relevant and discoverable information, to produce that information. Accordingly, the Opinion of the lower court should be affirmed.

**CONCLUSION**

Based on the forgoing, Appellee Alltrade Service Solutions, LLC, by counsel, respectfully requests that the Court of Appeals Opinion, finding that the Commonwealth is not protected from compliance with non-party discovery orders by sovereign immunity, be affirmed.

Respectfully submitted,

*/s/ Ryan D. Nafziger*

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