COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2023-SC-0196-OA

ARKK PROPERTIES, LLC;
B.J. NOVELTY, INC.; THE CUE CLUB, LLC;
HOME RUN, LLC; MFPALMINVESTMENTS, LLC;
VINCENT MILANO; TANYA MILANO; and
POM OF KENTUCKY, LLC PETITIONERS

v.

DANIEL CAMERON, in his official capacity
as Attorney General of the Commonwealth
of Kentucky; KELLY STEPHENS, in her official capacity
as Clerk of the Supreme Court of Kentucky;
KATHRYN MARSHALL, in her official capacity
as Franklin Circuit Court Clerk; and
PHILLIP SHEPHERD, in his official capacity
as Judge of the Franklin Circuit Court RESPONDENTS

REPLY BRIEF FOR PETITIONERS

On Petition for Supervisory Writ from
Franklin Circuit Court
Action No. 23-CI-00282
Hon. Phillip Shepherd, Judge

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CERTIFICATE OF SERVICE

I certify that a true copy of this Reply Brief for Petitioners has been served pursuant to the Kentucky Rules of Appellate Procedure upon Hon. Victor B. Maddox, Hon. Matthew F. Kuhn, Hon. Alexander Y. Magera, Hon. Michael R. Wajda, Hon. Christopher L. Thacker, and Hon. Aaron J. Silletto, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, KY 40601, *Counsel for Respondent Attorney General*; Hon. Kelly Stephens, State Capitol, Room 235, 700 Capital Avenue, Frankfort, KY 40601, *Respondent*; Hon. Kathryn Marshall, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601, *Respondent*; and Hon. Phillip Shepherd, Judge, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601, *Respondent*, on this 4th day of August, 2023.

__*/s/* J. Guthrie True__
Counsel for Petitioners

This reply brief is filed pursuant to the Court's order. Its purpose is to reply to the arguments made by the respondent Attorney General in his opening brief. The issues to which this brief is directed include: (1) the Court should exercise its original jurisdiction under Kentucky Constitution § 110(2)(a); (2) there are various constitutional limitations on the legislature's power to enact laws concerning venue and change of venue; (3) Kentucky Constitution § 231 does not vest the legislature with plenary authority over venue; (4) SB 126 violates the separation of powers and should not be granted comity; (5) SB 126 burdens a fundamental right; (6) there is no rational basis for SB 126; and (7) Kentucky Constitution § 14 applies to claims challenging constitutional violations.

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ARGUMENT

I. The Court Should Exercise Its Original Jurisdiction

The Attorney General argues that the Court should not exercise its original jurisdiction under Kentucky Constitution § 110(2)(a) because this is nothing more than a challenge to the constitutionality of a venue transfer statute that should work its way through the normal appellate process. AG Brief at 4-6. The Attorney General ignores the constitutionally-significant point.

The reason the Court should exercise its original jurisdiction is because the legislature has invaded the province of the judiciary; it just so happens it has done so through a venue transfer statute. The venue transfer procedures set out in SB 126 require the Supreme Court Clerk and circuit court clerks to take action in aid of transfer to the total exclusion of the courts. This is a flagrant violation of this Court's exclusive authority "to exercise control of the Court of Justice" pursuant to § 110(2)(a) and directly implicates this Court's *exclusive* authority to decide legal issues concerning what the agencies and personnel under its control must do or not do. As *no other court* has jurisdiction to make that determination, *Ex Parte Farley*, 570 S.W.2d 617, 622 (Ky. 1978), *Ex Parte Auditor of Pub. Accts*., 609 S.W.2d 682, 683 (Ky. 1980), the petition is properly before this Court.

A venue transfer ruling by a trial court is the meat and potatoes of the normal appellate process. *See Romines v. Coleman,* ___ S.W.3d ___, 2023 WL 3113399, *4 (Ky. Apr. 27, 2023). A venue transfer statute that cuts the courts out of that process altogether is a special dish that can only be served up via supervisory writ.

Further, the Attorney General concedes that the application of the SB 126 amendment is not a single-case issue and impacts various cases in the Commonwealth. AG Brief at 6 fn. 1 (identifying cases where the Attorney General has filed SB 126 notices of transfer). The issue will

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continue to impact the Court's administration of justice and the handling of constitutional challenges until the Court decides the constitutionality of the amendment.

II. The Constitutional Limitations Upon The Legislature's Power To Enact Laws Concerning Venue Are Not Limited To Sections 59(3) And 11

The Attorney General contends that there are only two constitutional limitations upon the legislature's power to enact laws establishing venue and change of venue—the prohibition in § 59(3) against enacting a special law providing for change of venue in a particular case, and the requirement of § 11 that a general law for a change of venue in a criminal case must be to the most convenient county in which a fair trial can be had. AG Brief at 13-17.

Such a circumscribed view of the protections afforded by the Constitution to the citizens, and to the co-equal branches of government, is both startling and erroneous. While §§ 59(3) and 11 do, in fact, place limits on the power of the legislature to enact laws concerning venue and change of venue, that power is also limited by other sections of the Constitution. A venue transfer statute cannot encroach upon the exclusive rule-making powers of the Court in violation of the separation of powers, *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 157-58 (Ky. 1982), *Whitler v. Commonwealth*, 810 S.W.2d 505, 508 (Ky. 1991), and a venue statute cannot violate individual constitutional rights, *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70, 72 (Ky. 1936) (venue statute violated right of equal protection under the Fourteenth Amendment), *Hummeldorf v. Hummeldorf*, 616 S.W.2d 794, 797 (Ky. App. 1981) (venue statute violated equal protection under the Fourteenth Amendment and the prohibition against the arbitrary exercise of governmental power under Kentucky Constitution § 2).

Granted, while our Constitution places specific limits on the legislature's authority over venue in §§ 59(3) and 11, the legislature, by means of a venue statute, may not invade the province of a co-equal branch of government in violation of §§ 27 and 28, or ignore our citizens' right to

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equal protection provided by §§ 1, 2 and 3, or burden our citizens by wielding arbitrary power in violation of § 2, or deprive the citizenry of the right to free and open access to the courts and to petition the government for redress of grievances under §§ 14 and 1. Our Constitution would be rendered a toothless tiger if such a constricted view of its protections were adopted.

III. Section 231 Does Not Vest The Legislature With Plenary Authority Over Venue

By suggesting that § 231 gives the legislature "near-plenary" authority over venue in suits against the Commonwealth, AG Brief at 16-18, the Attorney General offers a new and radically expansive interpretation of § 231—one that is at odds with this Court's long-standing jurisprudence.

This Court has held numerous times that § 231—which must be interpreted in conjunction with its sister provision, § 230—is a constitutionalizing of the common law doctrine of sovereign immunity and, as such, provides the legislature with the power to decide when and how the state can be sued ***for money damages***. *Kentucky Center for the Arts Corp. v. Berns,* 801 S.W.2d 327, 329 (Ky. 1990); *Foley Const. Co. v. Ward*, 375 S.W.2d 392, 393 (Ky. 1963); *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009). Section 231 has no application to declaratory judgment actions against the state that do not implicate money "drawn from the State Treasury," Ky. Const. § 230. *See Commonwealth v. Ky. Ret. Sys.,* 396 S.W.3d 833, 838-840 (Ky. 2013); *see also Univ. of Ky. v. Moore*, 599 S.W.3d 798, 810 (Ky. 2019); *Beshear v. Haydon Bridge Co.,* 416 S.W.3d 280, 286-88 (Ky. 2013).

The Attorney General's preferred case, *H.E. Cummins & Sons Const. Co. v. Tpk. Auth.*, 562 S.W.2d 651 (Ky. App. 1977), does not hold otherwise. That case involved a claim for damages on a contract with the Turnpike Authority and held the Authority was a state agency entitled to sovereign immunity and, therefore, could only be sued for breach of contract monetary damages

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under the Contract Claims Act—the precursor to the Model Procurement Code and a limited waiver of sovereign immunity by the legislature pursuant to § 231. *Id.* at 652-53. Moreover, the Attorney General incorrectly argues that *Kovachevich v. Univ. of Louisville,* 597 S.W.2d 621 (Ky. App. 1980), "reaffirms" the Attorney General's strained interpretation of *H.E. Cummins*, because it held only that Kovachevich's suit was barred by limitations pursuant to the MPC. *Id.* at 622. Neither case holds that § 231 applies to non-monetary damage actions like the declaratory judgment action here.

But even if § 231 were given such an expanded (and new) interpretation, the legislature must still set venue in a manner that avoids violating individual constitutional rights. Pursuant to § 26, any general powers conferred upon the legislature by the Constitution, such as the general power conferred under § 231, are subordinate to the individual constitutional rights granted to the people by the Bill of Rights which "shall forever remain inviolate." *Commonwealth ex rel. Tinder v. Werner*, 280 S.W.2d 214, 216 (Ky. 1955); *City of Louisville v. Kuhn*, 145 S.W.2d 851, 853 (Ky. 1940). Therefore, even under the Attorney General's novel interpretation of § 231, the legislature's power to set venue is subordinate to the individual constitutional rights of Petitioners.

IV. <u>SB 126 Violates The Separation Of Powers</u>

A venue statute that sets out the judicial procedures to be used by the courts in effectuating a transfer of venue violates the separation of powers. *See O'Bryan v. Commonwealth*, 634 S.W.2d 153, 1558 (Ky. 1982) ("Until this [change-of-venue statute] is superseded by this Court, under the Court's paramount rule-making authority, it stands . . . under the principles of comity"); *Whitler v. Commonwealth*, 810 S.W.2d 505, 508 (Ky. 1991) (same). But SB 126 goes well beyond KRS 452.220, the criminal change-of-venue statute at issue in *O'Bryan* and *Whitler*, in its offense to the separation of powers and the Court's inherent rule-making authority. *Unlike* the SB 126

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amendment, KRS 452.220, first, requires a verified factual basis for a change of venue, KRS 452.220(1), (2), and then, provides for a hearing and adjudication by the trial court as to the propriety of the requested relief, KRS 452.220(3) ("Applications under this section shall be made and determined in open court, and the court shall hear all witnesses produced by either party and determine from the evidence whether the defendant is entitled to a change of venue."). A similar procedure is called for in the civil change-of-venue statute. *See* KRS 452.030 (requiring a "verified motion" stating "reasons and grounds" for the change, "a hearing for the presentation of evidence and arguments," and a decision "within the sound discretion of the court"). Even transfer of a civil case based on improper venue requires a motion and a determination by the court that venue is, in fact, improper. *See* KRS 452.105.

The Court has, thus far, extended comity to these statutes, which simply supply sensible criteria for venue change and transfer motions *but* acknowledge the court's vital role in adjudicating such motions. It should not extend the same courtesy to the amendment to KRS 452.005 enacted by SB 126. The amendment flatly *ignores* the court's role in adjudicating venue transfers and vests total control over the venue transfer process in the parties, and even worse, compels this Court's clerk to participate in this unconstitutional process.

The Attorney General cites several statutes that require the court's clerks to take some action, suggesting that SB 126 is therefore not unique, does not offend the separation of powers, and does not merit a supervisory writ. AG Brief at 8-9. But the cited statutes address purely administrative functions (such as being the county law librarian or collecting and dispensing certain fees) or actions *in aid of* the court's jurisdiction (such as issuing summons, lien notices, or appointing warning orders or valuation commissioners) or actions necessitated by the *court's judgment* (such as reporting convictions or issuing the mandate affirming a death sentence). None

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of the cited statutes direct the clerks to take actions that would aid in *avoidance* of the court's adjudicative role.

The Attorney General attempts to explain away the amendment's encroachment upon the Court's exclusive rule-making authority, asserting that it "operates at the intersection of the legislative power and the judicial power" and further contending the legislature long ago enacted general venue transfer statutes establishing procedures similar to those in the amendment. AG Brief at 23-25. The Attorney General is wrong on both counts.

First, the SB 126 amendment does not sit harmlessly at the intersection of the legislative and judicial powers, it runs the red light. It is far worse than a statute that sets out tolerably inoffensive criteria to be used by the courts in executing their exclusive adjudicative role; it prevents the courts from carrying out their adjudicative role altogether. As the Supreme Court of Virginia so eloquently stated nearly a century ago in *Farmer v. Christian*, 152 S.E. 382, 385 (Va. 1930), regarding a venue transfer statute similar to SB 126: "As the courts must obey the statutes (within the legislative power) which define their jurisdiction, and the general laws which establish and regulate the rights of litigants, so the General Assembly must, under the Bill of Rights, respect the judicial power and not seek to enter the court room." SB 126 removes the court entirely from the transfer determination in a vital class of cases and strong-arms the Court's clerks into a co-conspirator role in that unconstitutional process. In short, the legislature has entered the courtroom and usurped the authority of the co-equal Court of Justice.

The Attorney General's reliance on Kentucky's longstanding general venue transfer statutes doesn't alter this reality. The general venue transfer statutes have been recognized to violate the separation of powers and have only been tolerated through comity. *See O'Bryan,* 634 S.W.2d at 157-58; *Whitler*, 810 S.W.2d at 508. And the Attorney General offers a weak case for

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applying comity to SB 126, suggesting that "a change of venue inevitably requires the judiciary's participation" and that it "leaves the particulars of effectuating" the amendment "to the Court of Justice." AG Brief at 28. It does neither. To the contrary, it completely *removes* the courts from "participation" in the transfer process, giving that power over to the parties, and *requires* the Supreme Court Clerk to act based on the whim of the parties rather than an order of the Court. It leaves the courts no adjudicative role whatsoever.

In no way does SB 126 image a "statutorily acceptable substitute for current judicially mandated procedures"; rather, it is an intolerable interference with the "orderly functioning of the courts." *Taylor v. Commonwealth*, 175 S.W.3d 68, 77 (Ky. 2005).

V. SB 126 Burdens A Fundamental Right

Relying on *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020), the Attorney General argues against applying strict scrutiny to SB 126, contending it does not adversely impact a fundamental right. AG Brief at 29-30. In *Beshear*, the Court declined to apply strict scrutiny to a claim that the Governor's executive orders during the Covid-19 pandemic violated the plaintiff business operators' constitutional rights to acquire and protect property rights under Kentucky Constitution § 1. *Beshear* held that rational basis was the proper test because the Governor's orders regulated only commercial property rights. 615 S.W.3d at 816.

But SB 126 does not affect the Petitioners' commercial property rights; *it affects their right (and the right of any litigant) to assert a claim that governmental action violates their constitutional rights*—whether property rights or personal rights. Kentucky's courts have previously recognized the distinction between a venue statute that affects only social, economic, or commercial rights where rational basis applies, *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d

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70, 72 (Ky. 1936), and a venue statute that affects fundamental rights where heightened scrutiny applies, *Hummeldorf v. Hummeldorf,* 616 S.W.2d 794 (Ky. App. 1981).

The Attorney General further contends that no constitutional right is at stake because there is no fundamental constitutional right to sue in a preferred venue. AG Brief at 29-30. Petitioners make no such claim. KRS 452.005 directs Petitioners to the venue where they *must* sue—and where they did sue. SB 126 then operates to interfere with and burden Petitioners' right to pursue their properly-filed constitutional challenge suit. Strict scrutiny analysis is triggered because SB 126 imposes a substantial burden by directly or indirectly interfering with (delaying) a constitutional-challenge plaintiff's assertion of constitutional rights. That is all that is required for strict scrutiny to apply. *See Special Programs, Inc. v. Courter*, 923 F. Supp. 851, 855-56 (E.D. Va. 1996) (construing *Police Dep't of City of Chicago v. Mosley,* 408 U.S. 92 (1972), *Plyler v. Doe,* 457 U.S. 202 (1982), and *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), to require "strict scrutiny [application] to all legislative distinctions which impinge upon a fundamental right."). "The trilogy of *Mosely, Plyler* and *Austin* demonstrates that it is mere impingement upon, not impermissible interference with, the exercise of a fundamental right that triggers strict scrutiny." *See Special Programs*, 923 F.Supp. at 855-56. Contrary to the Attorney General's contention, there is no requirement that the SB 126 amendment itself violate fundamental constitutional rights—it need only impinge upon the exercise of fundamental rights.

Finally, the Attorney General's reliance on *Commonweath v. Howard*, 969 S.W.2d 700 (Ky. 1998), for the argument against "second-order effects to implicate fundamental rights," AG Brief at 32, is inapposite. *Howard* concluded there is no fundamental constitutional right to drive an automobile. *Id.* at 702. Nothing could be more fundamental, however, than the citizens' right to unencumbered access to the courts to adjudicate the constitutionality of government actions.

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VI. There Is No Rational Basis For SB 126

The Attorney General admits there is no rational connection between the legislature's stated "concern of bias" and the chosen remedy, peremptory transfer, *to wit*: "SB 126's transfer mechanism in no way depends on a party's concerns about judicial bias. Under SB 126, a party could believe the circuit judge is as fairminded as they come yet still file a notice of transfer." AG Brief at 20. To compensate, the Attorney General conjures a sort of potpourri of rational bases for SB 126, claiming it "neutralizes whatever advantage a plaintiff can secure from selecting venue when filing suit," *id.* at 21, and that it "preserv[es] the integrity of the judiciary" by "leveling the playing field between plaintiffs and defendants as to venue selection," thus negating the advantage of "strategic venue selection," *id.* at 37, 38; *see id.* at 13 (describing SB 126 as "neutraliz[ing]" plaintiffs' "advantage" from "venue selection"). But a plaintiff must file a constitutional challenge in the venue required by the recently-enacted KRS 452.005.[1] There's little "strategic" about that. And what's more, the Attorney General fails to explain how that selection—even if presumed to be "strategic"—equates to "bias" in the selected venue.[2] And although the Attorney General is adamant that SB 126 is unrelated to "judicial bias," he fails to explain how a *venue* can be biased in a non-jury constitutional challenge suit.

As a fallback, the Attorney General lauds that SB 126 "ensures that all circuit judges hear statewide disputes about the constitutionality of Kentucky law."[3] AG Brief at 37. But the Attorney

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[1] When this statute was enacted in 2021, an emergency was declared because "protecting the constitutional rights of the citizens of Kentucky is of utmost importance." 2021 Ky. Acts, ch.2, § 4. Unless that emergency justification was pretext, plaintiffs filing where they reside must be important to protecting their constitutional rights, not a "strategic advantage."

[2] If the rational basis for SB 126 is to avoid "strategic venue selection"—which can only be engaged in by plaintiffs—why does it give plaintiffs the right to file a "notice of transfer"? *See also* n.1, *supra.*

[3] SB 126 has the perverse effect of allowing the Attorney General, at its whim, to use SB 126 to prevent *certain* judges from hearing constitutional challenges, which belies any notion that SB 126 is meant to allow *all* judges to hear constitutional challenges.

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General fails to explain how this statutory process is rationally related to providing litigants access to courts without "concern of bias."

The Attorney General attempts to rationalize the irrational. This amendment "is so arbitrary and capricious as to be hostile, oppressive and utterly devoid of rational basis." *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet,* 689 S.W.2d 14, 19 (Ky. 1985).

VII. <u>Section 14 Applies To Claims Of Constitutional Violations By The Government</u>

The Attorney General limits the open courts protection in Kentucky Constitution § 14 to claims for death, personal injury, or property damage. AG Brief at 40. That narrow take on the open courts provision is unsupported.

This Court addressed the broad scope of § 14's open courts mandate in *Commonwealth v. Claycomb,* 566 S.W.3d 202 (Ky. 2018), holding that it protects "'[t]he right of every individual in society to access a system of justice to redress wrongs,'" describing such protection as "'basic and fundamental to our common law heritage.'" *Id*. at 210 (quoting *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995)). The Court went on to observe that one of the "branches" springing from § 14's historical "roote" is the right of access to the courts for the protection of individuals' rights from official acts of oppression. *Id*. at 211. Significantly, this Court's predecessor has held that a lawsuit claiming a government agency violated the plaintiff's constitutional rights by arbitrarily and capriciously revoking his optometry license is a type of claim protected by § 14. *See Kendall v. Beiling*, 175 S.W.2d 489, 491 (Ky. 1943).

The Attorney General further asserts that, even if § 14 applies to lawsuits asserting constitutional claims, it does not apply to a statute that regulates venue. AG Brief at 40. *Claycomb* answers that question too. The protection afforded by § 14 encompasses "both the substance of the law and the procedures through which courts appl[y] that law." 566 S.W.3d at 212. Consequently,

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SB 126 cannot pass muster under § 14 on the suggestion that it merely establishes procedures for transfer of venue which may cause delay but does not bar the filing of constitutional-challenge cases.[4] As *Claycomb* recognized, "Section 14 plainly proscribes delay." *Id.* at 215-16. SB 126 creates delay, and that delay violates § 14.

CONCLUSION

For all the reasons set out herein, and those set forth in Petitioners' opening brief, Petitioners respectfully request that the Court enter a supervisory writ declaring the SB 126 amendment to KRS 452.005 unconstitutional.

Respectfully submitted,

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[4] Section 14 also prohibits post-filing interference with continued access to the courts. *See Lee v. George,* 369 S.W.3d 29, 36-38 (Ky. 2012) (Noble, J., concurring) (addressing § 14 concerns with a requirement that Appellant post a bond before filing future pleadings in a *pending* case); *Violett v. Grise*, 664 S.W.3d 481, 484-85 (Ky. 2022) (citing *Lee* concurrence and expressing § 14 concerns with deprivation of the right to appeal a *pending* case).

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CERTIFICATE AS TO WORD COUNT

Pursuant to RAP 15, the undersigned certifies that this document complies with the 3,500-word limit of RAP 31(G)(3) because, excluding the parts of the document exempted by RAP 15(D) and 31(G)(5), this document contains 3,499 words as set forth in the word count of the word-processing system used to prepare the document.

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