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

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 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 17th day of July, 2023.

__/s/ J. Guthrie True__
Counsel for Petitioners

INTRODUCTION

This is an original action filed under the authority of § 110(2)(a) of the Kentucky Constitution which confers upon this Court the power to issue all writs as may be required to exercise control of the Court of Justice. The petition challenges the constitutionality of Senate Bill 126 enacted during the 2023 Session of the General Assembly. SB 126 amended KRS 452.005 to create a procedure that grants a party or the intervening Attorney General, in any case challenging the constitutionality of a statute, executive order, administrative regulation or administrative agency order, the absolute and unconditional authority, without any required showing of cause, to compel transfer of the case to another arbitrarily selected circuit court. Further, in enacting the amendment the legislature has arrogated unto itself the authority to direct this Court's clerk, as well as the clerks of the circuit courts, to take certain actions to facilitate the peremptory venue transfer.

Petitioners seek a supervisory writ declaring the SB 126 amendment to KRS 452.005 unconstitutional for the reasons that it: (a) encroaches upon the powers of the judicial branch and violates the separation of powers doctrine contrary to Kentucky Constitution §§ 27 and 28; (b) violates equal protection under the law contrary to Kentucky Constitution §§ 1, 2 and 3; (c) violates due process of law contrary to Kentucky Constitution § 2; and (d) violates the right to free and open access to the courts and the right to petition the government for redress of grievances contrary to Kentucky Constitution §§ 14 and 1.

STATEMENT CONCERNING ORAL ARGUMENT

The Court has set this matter for oral argument on August 16, 2023.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Petitioners are owners, operators and players of a skill-based electronic video game known as Burning Barrel. Petitioners filed suit in the Franklin Circuit Court challenging the constitutionality of House Bill 594 enacted during the 2023 Session of the General Assembly.[1] HB 594 amended KRS 528.010 to make select skill games illegal. The Attorney General is authorized to seek criminal or civil remedies against skill games, their owners and operators, per KRS 528.100(3), as amended by HB 594, and thus, was named as the defendant in the underlying action.

Senate Bill 126, enacted during the 2023 Session of the General Assembly, amended KRS 452.005.[2] The SB 126 amendment creates an unconstitutional procedure that grants a party or the intervening Attorney General, in any case challenging the constitutionality of a statute, executive order, administrative regulation or administrative agency order, the unchecked authority, without any required showing of cause, to require transfer to another arbitrarily selected circuit court, depriving the original court authority to even review the transfer request and determine its propriety. The amendment authorizes a party or the intervening Attorney General to file a "notice of transfer" in the court where the case is pending; requires that the notice of transfer "be transmitted forthwith to the clerk of the Supreme Court"; and requires the Clerk of the Supreme Court to "direct the transfer of the action to a different Circuit Court chosen by the clerk of the Supreme Court through random selection."[3] Once the Clerk randomly selects the circuit court to which the action is to be transferred, the Clerk is to "notify the Circuit Court clerk of the county in which the action was originally filed of the selection" and the circuit court is required to

[1] *See* Complaint and Petition for Declaration of Rights and for Injunctive Relief, attached to the Petition for Supervisory Writ as Exhibit 2.
[2] *See* Senate Bill 126, attached hereto as Exhibit 1. SB 126 was enacted by a veto override.
[3] SB 126 does not state who shall transmit the notice to the Clerk of the Supreme Court, how the Clerk is to undertake the random selection, nor the time in which the Clerk is required to act.

"immediately transfer the action and the record of the action to the Circuit Court designated by the clerk of the Supreme Court."[4] The circuit court in which the action is filed—in this case, a circuit court having both jurisdiction and venue over the action—is deprived of any role in the transfer process, *including the fundamental role of determining whether there is cause to transfer a case otherwise within its jurisdiction to adjudicate*.

The peremptory venue transfer has other limiting criteria. It only applies to civil actions which seek declaratory or injunctive relief, and are brought against a state official or officer in his or her official capacity, including a public servant as defined in KRS 11A.010, or any body, subdivision, caucus, committee, or member of the General Assembly, the Legislative Research Commission, or any agency of the state as defined in KRS 11A.010. The amendment also contains time deadlines for filing the "notice of transfer." A plaintiff or defendant must file the notice no later than thirty days after the return of service on the defendant, although the amendment does not provide what the time limit is when there is more than one defendant. It requires the intervening Attorney General to file the notice no later than thirty days from intervention, regardless of when the Attorney General intervenes. Although SB 126 specifies these limiting criteria, it provides no mechanism for the court in which the action is pending to review the notice to ensure that it complies with the limiting criteria, nor does it specify any post-transfer remedy if the notice is non-compliant.

The legislative purpose for enacting SB 126 is an amorphous "concern of bias" in the bill's emergency clause:

> Whereas it is a critical government interest to provide litigants access to courts of this Commonwealth without any *concern of bias*, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming law.

[4] SB 126 does not set out the time or manner for any of these mandated tasks.

2023 Ky. Acts, ch.131, § 2 (emphasis added).

In the underlying action, the Attorney General invoked SB 126 immediately upon its passage and filed a notice of transfer seeking to transfer the action from the Franklin Circuit Court to another circuit court to be chosen by lottery.[5] The notice of transfer asserted that "the clerk of the Supreme Court *shall* direct the transfer . . . to a different Circuit Court chosen through random selection." (Emphasis added). The Attorney General sent a copy of the notice of transfer directly to the Clerk of the Supreme Court.[6]

SB 126 being unconstitutional, Petitioners filed a motion requesting the Franklin Circuit Court to decline transfer and to direct the Franklin Circuit Court Clerk not to transfer the case.[7] Petitioners also filed an amended complaint challenging the constitutionality of SB 126.[8] The amended complaint named the Clerk of the Supreme Court and Franklin Circuit Court Clerk as additional defendants.

After briefing on the constitutionality of SB 126,[9] the Franklin Circuit Court entered an order temporarily staying any ruling on the motion to decline transfer and directed the parties to file a petition in this Court pursuant to Kentucky Constitution § 110(2)(a) seeking a decision on the constitutionality of the amendment.[10] The Order observes that, because the SB 126 amendment commands action to be taken by the Clerk of the Supreme Court and circuit court clerks, who are

[5] *See* Notice of Transfer, attached to the Petition for Supervisory Writ as Exhibit 4.
[6] *See* Letter from Attorney General to Supreme Court Clerk Stephens, attached to the Petition for Supervisory Writ as Exhibit 5.
[7] *See* Plaintiffs' Motion to Decline Transfer of Case, attached to the Petition for Supervisory Writ as Exhibit 6.
[8] *See* Amended Complaint and Petition for Declaration of Rights and for Injunctive Relief, attached to the Petition for Supervisory Writ as Exhibit 7.
[9] *See* Memorandum of Law in Support of Plaintiffs' Motion to Decline Transfer of Case, and Attorney General Daniel Cameron's Response to the Plaintiffs' Motion to Decline Transfer of Case, attached to the Petition for Supervisory Writ as Exhibits 8 and 9, respectively.
[10] *See* Franklin Circuit Court Order, attached hereto as Exhibit 2.

under the supervision of the Chief Justice and the Supreme Court, this Court has the exclusive authority and jurisdiction to decide the constitutionality of SB 126 pursuant to § 110(2)(a).

Petitioners filed the petition herein and the Court has entered an order requiring the parties to brief the constitutional issues raised.[11]

ARGUMENT

I. SB 126 VIOLATES THE SEPARATION OF POWERS DOCTRINE UNDER KENTUCKY CONSTITUTION §§ 27 and 28

Issue Preservation: This issue was preserved by raising it in the trial court. *See* Memorandum of Law in Support of Plaintiffs' Motion to Decline Transfer of Case, attached to the Petition for Supervisory Writ as Exhibit 8.

Kentucky Constitution § 27 divides the powers of the government between the three branches of government and § 28 prohibits the incursion of one branch of the government into the powers and functions of the other branches. *Beshear v. Haydon Bridge Co.,* 416 S.W.3d 280, 295 (Ky. 2013) (quoting *Legislative Research Commission v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984)). "Not surprisingly, almost a century ago, Kentucky's then-highest court stated 'perhaps no state forming part of the . . . United States has a constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does . . . [the Kentucky] Constitution.'" *Id.* at 295 (quoting *Sibert v. Garrett*, 246 S.W. 455, 457 (1922)). "[T]he framers of Kentucky's constitution . . . were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government." *Elk Horn Coal Corp. v. Cheyenne Res., Inc.,* 163 S.W.3d 408, 422

[11] Because the Court ordered the parties to file briefs, Petitioners presume the Court intends to accept jurisdiction of the case and decide the merits of the constitutional challenges to SB 126. If the Court has not yet determined whether to accept jurisdiction of the case, Petitioners rely upon the arguments set out in their petition as to why the Court should do so and incorporate those arguments herein by reference.

(Ky. 2005), overruled on other grounds, *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557 (Ky. 2020) (quoting *Brown*, 664 S.W.2d at 911-12). Thus, "it has been our [predecessor's] view [and our view], in interpreting Sections 27 and 28, that the separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be 'strictly construed.'" *Id.* This means the "the legislative function cannot be so exercised as to interfere unreasonably with the functioning of the courts, and . . . any unconstitutional intrusion is per se unreasonable, unless it be determined by the court that it can and should be tolerated in a spirit of comity." *Ex Parte Auditor of Public Accounts*, 609 S.W.2d 682, 688 (Ky. 1980).

SB 126 constitutes an encroachment by the legislature on the constitutionally-conferred judicial powers of the Supreme Court, the Court of Justice, and the judicial branch of government in violation of §§ 27 and 28. No reason exists to extend comity to this invasion; the Court should declare the amendment unconstitutional.

A. SB 126 Directs the Court's Clerks to Act, Establishes Rules of Practice and Procedure, and Requires the Court of Justice to Expend Funds

The Chief Justice of the Supreme Court is the executive head of the Court of Justice and has the power to appoint such administrative assistants deemed necessary. Ky. Const. § 110(5)(b). The Supreme Court appoints its clerk. Ky. Const. § 114(1). The Supreme Court also has plenary power over the clerks of the circuit courts. *Combs v. Huff*, 858 S.W.2d 160, 161 (Ky. 1993).

Through passage of SB 126, the legislature has attempted to exercise control over the Clerk of the Supreme Court and the clerks of the circuit courts without any direction or oversight from this Court. Upon the filing of a "notice of transfer," the amendment mandates actions by the Court's clerks: "The notice *shall* be transmitted forthwith to the clerk of the Supreme Court who *shall* direct the transfer of the action to a different Circuit Court chosen by the clerk of the Supreme Court through random selection." 2023 Ky. Acts, ch.131, § 1(4)(b) (emphasis added). After the

random selection "the clerk of the Supreme Court *shall* notify the Circuit Court clerk of the county in which the action was originally filed of the selection and the Circuit Court *shall* immediately transfer the action and the record[.]" *Id.* at § 1(4)(c) (emphasis added). This process encroaches upon the constitutionally-conferred authority of the Supreme Court to exercise plenary power over its Clerk and the clerks of the circuit courts, and thus violates the separation of powers.

The power to promulgate rules of practice and procedure for the Court of Justice is a judicial power vested in the Supreme Court pursuant to Kentucky Constitution § 116. *Foster v. Overstreet*, 905 S.W.2d 504, 506 (Ky. 1995); *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984). The separation of powers prohibits the legislature from enacting a statute that infringes upon the Court's power to promulgate rules of practice and procedure. *Taylor v. Commonwealth*, 175 S.W.3d 68, 77 (Ky. 2005); *Elk Horn Coal*, 163 S.W.3d at 423.

Civil Rule 79.05 provides that the circuit court clerk for each county shall maintain the record of each action filed in that circuit court. The rule further provides that, except when transmitted to an appellate court or withdrawn by an attorney pursuant to the appellate rules, "no record shall be removed from the office of the circuit clerk unless by court order." The circuit clerk is required to follow this rule. *See Augenstein v. Deutsche Bank Nat'l Trust Co.*, 647 S.W.3d 857, 864 (Ky. App. 2021). SB 126 requires the circuit clerk in the county where an action is filed to transfer the case and record to the circuit court selected by the Supreme Court Clerk without a court order. This contradicts Civil Rule 79.05 and, therefore, encroaches upon the exclusive constitutional power of the Supreme Court to adopt rules of practice and procedure for the Court of Justice.

Civil Rule 77.03 provides that the circuit court has the power to suspend, alter or rescind any action of the circuit clerk upon cause shown. But SB 126 requires the circuit clerk to take

certain actions with no oversight by the circuit court and then mandates that the circuit court act—"the Circuit Court *shall* immediately transfer the action." 2023 Ky. Acts, ch.131, § 1(4)(c) (emphasis added). This contradicts Civil Rule 77.03 and, again, encroaches upon the constitutional authority of the Supreme Court to adopt rules of practice and procedure.

And generally, the Civil Rules set out the various forms of pleadings and papers that a party is authorized to file in a civil action. *See* CR 3.01, 7.01, 7.02, 15.01, 22, 30, 31, 33, 34, 36, 41, 43, 45, 53. The Civil Rules do not authorize the filing of a "notice of transfer" as provided by SB 126.

Although SB 126 does not provide guidance as to how the Clerk of the Supreme Court is to perform the "random selection" of venue, it requires that the selection be done in a manner that guarantees the new venue is selected randomly. To undertake this process, the Clerk must expend funds on either software or a physical mechanism by which to perform the required lottery. However, the "Court of Justice is an independent branch of state government and not subject to interference in the management and use of its budget by the General Assembly." *Martin v. Admin. Office of the Courts*, 107 S.W.3d 212, 214-15 (Ky. 2003). "The authority and responsibility of determining the necessity and propriety of expenditures from the judicial budget rests solely with the judicial branch and is not subject to executive or legislative regulations." *Id.* The General Assembly cannot require the Court of Justice to expend its funds on random-selection software or even lottery balls. Because SB 126 necessarily mandates such expenditures, it violates the separation of powers.

B. Establishing the Procedure for Transfer of Venue is a Judicial Power

The judicial power of the Commonwealth is vested exclusively in the Court of Justice pursuant to § 109 of the Kentucky Constitution. As noted, the power to promulgate rules of practice and procedure for the Court of Justice is a judicial power vested in this Court pursuant to § 116, *Foster*, 905 S.W.2d at 506, *Smothers*, 672 S.W.2d at 64, and separation of powers prohibits the

legislature from enacting a statute that infringes upon the Court's power to promulgate rules of practice and procedure, *Taylor,* 175 S.W.3d at 77, *Elk Horn Coal,* 163 S.W.3d at 423. As this Court has stated: "We alone are the final arbiters of our rules of 'practice and procedure.'" *Glenn v. Commonwealth*, 436 S.W.3d 186, 188 (Ky. 2013).

Although the power to establish laws setting venue of cases is a legislative power, *Davis v. Wingate*, 437 S.W.3d 720, 725 (Ky. 2014), *Copass v. Monroe Cnty. Med. Found., Inc*., 900 S.W.2d 617, 619 (Ky. App. 1995), the power to establish the *procedures* used by litigants and trial courts regarding the transfer of venue is a judicial power vested exclusively in the Supreme Court. *See O'Bryan v. Commonwealth*, 634 S.W.2d 153, 158 (Ky. 1982) (holding KRS 452.220, which established a hearing procedure for change of venue motions in criminal cases, was only enforceable based on the principle of comity because of the Supreme Court's "paramount rule-making authority").[12] This Court has unambiguously held that "control over . . . inherent judicial power[s], . . ., is exclusively within the constitutional realm of the courts. *Smothers*, 672 S.W.2d at 64.

The procedure for accomplishing the transfer of cases—deciding when transfer is merited and to what alternative venue—is within this Court's exclusive, inherent judicial rule-making power. SB 126 encroaches upon that power, and thus, violates the separation of powers.

C. SB 126 Divests the Circuit Court of its Inherent Authority to Adjudicate a Request for Transfer of Venue

Trial courts are vested with "inherent" powers to do that which is reasonably necessary for the administration of justice within the scope of their jurisdiction as to cases pending before them. *Smothers*, 672 S.W.2d at 64; *Ky. Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455, 458 (Ky.

[12] The Court upheld the statute under the principle of comity. *Id. See also Whitler v. Commonwealth*, 810 S.W.2d 505, 508 (Ky. 1991) (reaffirming KRS 452.220 on comity grounds). For the reasons set forth in Argument I.E., *infra.*, the Court should *not* extend comity to SB 126.

2004); *Commonwealth ex rel. Atty. Gen. v. Furste*, 157 S.W.2d 59, 61 (Ky. 1941). "[T]he grant of judicial [rule-making] power to the courts by the constitution carries with it, as a necessary incident, the right to make that power effective in the administration of justice." *Craft v. Commonwealth*, 343 S.W.2d 150, 151 (Ky. 1961). When a statute infringes upon the inherent judicial power of the trial court to do that which is reasonably necessary for the administration of justice, it violates the separation of powers and cannot be tolerated. *Id*. at 151-52 (citing *Burton v. Mayer*, 118 S.W.2d 547, 549 (Ky. 1938)). This inherent judicial power certainly includes the authority for a trial court to adjudicate whether a case pending before it should be transferred.

In *Smothers*, the legislature enacted a statute that prohibited a trial court from entering a restraining order or injunction in any pending litigation challenging the Alcohol Beverage Control Board's revocation of an alcohol beverage license. The Supreme Court held that the statute violated the separation of powers:

> [W]e now adopt the language framework of 28 Am. Jur.2d, Injunctions, Section 15, and once and for all make clear that *a court, once having obtained jurisdiction of a cause of action, has, as an incidental to its constitutional grant of power, inherent power to do all things reasonably necessary to the administration of justice in the case before it. . . .*
>
> The control over this inherent judicial power, . . ., is exclusively within the constitutional realm of the courts. As such, *it is not within the purview of the legislature to grant or deny the power nor is it within the purview of the legislature to shape or fashion circumstances under which this inherently judicial power may be or may not be granted or denied.*

Id. at 64 (emphasis added). This "inherent judicial power" applies to transfer of venue as logically as to injunctions. SB 126 deprives the circuit courts of this inherent power.

Farmer v. Christian, 152 S.E. 382 (Va. 1930), is similar and instructive. There a Virginia statute provided that officers enforcing the state's prohibition laws were entitled to a peremptory transfer of venue in any case where they were charged with a crime related to enforcement of such

laws. Any charged officer simply filed an affidavit declaring they could not obtain a fair trial in the county where charged and the case was automatically transferred. The Supreme Court of Virginia found the statute unconstitutional on numerous grounds, including separation of powers under the Virginia Constitution:

> There is nothing more obnoxious to lovers of justice than that any man should be a judge in his own case. This statute conflicts with that principle. Who should be empowered to say that the local prejudice against any prohibition officer charged with crime is so great that he cannot obtain a fair trial before a jury of the vicinage? Can there be any fair qualification of the assertion that certainly the person so charged should not be permitted to determine this important question, and so thereby to impede and delay the administration of the criminal law and add to the criminal expenses of the Commonwealth? Every other person charged with a crime who believes that his rights are jeopardized, because of local prejudice against him, must submit such a question to the trial judge. Other accused persons must establish the fact of local prejudice by witnesses, and are only entitled to a change of venire, or to a change of venue after showing that such local prejudice against them in fact exists. Not so as to prohibition officers, if this statute be valid, because the person charged with the crime himself determines the judicial question as to whether or not the local prejudice exists. He is only required to make an affidavit, and the statute undertakes imperatively to require the trial judge to change the venue.
>
> Courts have been reluctant, perhaps too timid, in enforcing the Bill of Rights, section 5, requiring that the legislative, executive and judicial department of the State shall be separate and distinct. The question in any particular case as to whether there is (a) local prejudice which will prevent a fair trial, as well as (b) the question whether or not the alleged crime was committed by an officer charged with the enforcement of the prohibition laws of the State, are both judicial questions. Because they are judicial, as distinguished from legislative, questions they cannot be decided by the General Assembly, but must be decided by a court. They are not within the legislative power because they depend upon the determination of the facts from the evidence in each case. 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, either to decide particular issues or to permit persons accused of crime to decide strictly judicial questions.

Id. at 385.

Certain conditions precedent must exist to qualify for a reflexive transfer under KRS 452.005, as amended by SB 126. The action must challenge the constitutionality of a statute,

executive order, administrative regulation, or agency order; it must seek declaratory or injunctive relief; and it must be against a state officer, state agency, or the General Assembly or its analogues. KRS 452.005(1) (2023). But by directing that the notice of transfer "*shall* be transmitted forthwith to the clerk of the Supreme Court who *shall* direct the transfer of the action to a different Circuit Court," KRS 452.005(4)(b) (2023) (emphasis added), the statute deprives the circuit court of even the modest authority to determine if these conditions precedent to transfer have been satisfied. Moreover, the statute is silent as to the authority of the new circuit court to return the case to the court of origin if these conditions are not met. *Cf. Diemer v. Com., Transp. Cabinet, Dep't of Highways*, 786 S.W.2d 861, 863-64 (Ky. 1990) (Court cannot "add additional words" to statute "to give constitutionally permissible meaning"). It is hard to conceive of a more blatant interference with—in fact, complete deprivation of—the inherent judicial authority of a court to oversee a pending case and do that which is reasonably necessary for the administration of justice within the scope of its jurisdiction.

But more significantly, with SB 126 the legislature has "enter[ed] the court room" and empowered litigants to "decide strictly judicial questions," *Farmer*, 152 S.E. at 385—whether the circumstances merit a transfer, and if so, to what venue. Although the plain language of Section 2 of SB 126 provides that the amendment was enacted to address the legislature's amorphous "concern of bias," the amendment does not require any showing of "bias"—either in the venue or by the presiding judge. It does not even require an allegation of "bias." What's more, it divests any court—the court of original venue or the court of transfer venue—of any power to evaluate for the existence of "bias." As in *Farmer*, SB 126 allows the litigants to decide that "strictly judicial question." This is, plain and simple, an unconstitutional encroachment by the legislature upon the

exclusive authority of this Court to promulgate rules and procedures to be used by courts regarding the transfer of venue.

SB 126 usurps control from the presiding judge and gives it over to the litigants. If this intrusion is countenanced, the line separating the judicial from the legislative role may be forever obliterated.

D. SB 126 Grants Litigants Unchecked Power to Remove a Judge Under the Guise of "Transfer"

At bottom, SB 126 confers upon litigants the peremptory power to remove a judge under the guise of a venue transfer. This unconstitutional legislative intent is clear from the plain language of the amendment.

The foremost objective in the interpretation of a statute is to determine the legislature's intent. *Pearce v. Univ. of Louisville,* 448 S.W.3d 746, 749 (Ky. 2014). Legislative intent is divined from the language of the statute, the legislative history, the statute's title, preamble or subject matter, or some other authoritative source. *Commonwealth v. Howard*, 969 S.W.2d 700, 705 (Ky. 1998) (citing *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1985)). The language used by the legislature within the four corners of the statute is the best evidence of its intent. *Nichols v. Zurich Am. Ins. Co*., 630 S.W.3d 683, 692 (Ky. 2021) ("discern that [legislative] intent, if at all possible, simply from the language the General Assembly chose"); *Ballinger v. Commonwealth*, 459 S.W.3d 349, 355 (Ky. 2015) (look to legislative history only when "the legislative intent is not perfectly apparent from the statute alone"). In deducing the intent of the legislature from the language it used within the statute, courts are to give the plain and unambiguous words of the statute their plain and ordinary meaning. *Pearce,* 448 S.W.3d at 749. A bill's emergency clause is evidence of legislative intent. *Ficke v. Bd. of Trs.*, 90 S.W.2d 66, 67 (Ky. 1936).

The emergency clause of SB 126 expressly provides that the purpose of the amendment is "to provide litigants access to courts of this Commonwealth without any concern of bias." 2023 Ky. Acts, ch.131, § 2. Because challenges to the constitutionality of a statute, executive order, administrative regulation, or administrative agency order are *questions of law* to be decided by the presiding judge and not by a jury, *Teco/Perry Cnty. Coal v. Feltner*, 582 S.W.3d 42, 45 (Ky. 2019), the legislature's stated "concern of bias" necessarily relates to concern of bias by the presiding judge. It therefore follows that peremptory transfer of venue is a pretext for recusal—plain and simple. A venue cannot be biased, particularly in non-jury proceedings; only a judge can be biased.

The procedures and substantive bases for recusal, like the power to establish procedures for the transfer of venue, are judicial powers constitutionally vested in the Supreme Court pursuant to §§ 109 and 116. *See Foster v. Overstreet*, 905 S.W.2d 504, 506 (Ky. 1995). In extending comity to KRS 26A.020 in *Foster*, the Court expressly provided that it retained the right to refine its position. *Id.* at 507. Since then, the Court has applied its own rules on judicial recusal, SCR 4.300, not the legislature's enactments, in deciding recusal cases. *See Dean v. Bondurant*, 193 S.W.3d 744 (Ky. 2006); *Alred v. Commonwealth, Judicial Conduct Comm'n*, 395 S.W.3d 417 (Ky. 2012); *Presbyterian Church (USA) v. Edwards*, 594 S.W.3d 199 (Ky. 2018); *In re Judicial Ethics Opinion JE-101*, 626 S.W.3d 641 (Ky. 2021); *Abbott, Inc. v. Guirguis*, 626 S.W.3d 475 (Ky. 2021). Clearly, both the *procedures* employed by courts in deciding whether a judge should be recused, as well as the *substantive bases* for recusal, are judicial powers exclusively vested in the Supreme Court. SB 126 infringes upon those powers.

But SB 126 goes deeper in its offense to judicial prerogative to determine the procedure and substantive bases for recusal by granting parties and the intervening Attorney General an *absolute and unconditional power* to transfer a properly-venued case and thereby recuse the judge,

based on whim and without any showing of cause. Courts in other jurisdictions have held that statutes providing litigants with such peremptory power violate the separation of powers.

In *Daigh v. Schaffer*, 73 P.2d 927 (Cal. App. 1937), the California Court of Appeals held a statute granting litigants the arbitrary right to file a notice of recusal, without any required showing of reason or judicial review, constituted a violation of separation of powers and an encroachment by the legislature upon the judicial powers of the courts under the California Constitution. *Id.* at 933-34. A year later, in *Austin v. Lambert*, 77 P.2d 849 (Cal. 1938), the Supreme Court of California took up the same issue and reached the same conclusion—holding the same statute unconstitutional. The Court adopted the reasoning of the Court of Appeals in *Daigh*, stating:

> [T]o put in the hands of a litigant uncontrolled power to dislodge without reason or for an undisclosed reason, an admittedly qualified judge from the trial of a case in which forsooth the only real objection to him might be that he would be fair and impartial in the trial of the case would be to characterize the statute not as a regulation but as a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department. The well recognized limitations on legislative regulations of such matters in other jurisdictions, both state and federal, were available when [the statute] was enacted. In none of them is the arbitrary method of administering the remedy adopted in enacting the statute under attack approved or countenanced. It must therefore be held to be an unwarranted and unlawful interference with the constitutional and orderly processes of the courts.

Id. at 853.

In *State ex rel. Clover Valley Lumber Co. v. Sixth Judicial District Court*, 83 P.2d 1031 (Nev. 1938), the Nevada Supreme Court held unconstitutional on separation of powers grounds a similar statute, which authorized a litigant to arbitrarily recuse a judge from a pending case by simply filing a request for change of judge without any reason. *Id.* at 1034. The same court later held a more recent, but similar, statute unconstitutional in *Johnson v. Goldman*, 575 P.2d 929, 930 (Nev. 1978).

In *State ex rel. Bushman v. Vandenberg*, 280 P.2d 344 (Or. 1955), the Supreme Court of Oregon held yet another automatic-recusal statute unconstitutional as violating the separation of powers, stating:

> But here we are not dealing with a statute prescribing the procedure for getting rid of a judge disqualified for bias or prejudice. The legislature has now invested litigants and their attorneys with the power to remove duly appointed or elected and qualified judges from the bench in particular cases at will—for good cause, bad cause, or no cause at all.
> . . .
>
> With due regard to the deference due from the court to an act of the legislative assembly and having in mind the presumption of validity of such an act always to be indulged, we are nevertheless of the opinion that the statute here in question contravenes the principle of the separation of powers as declared in Art. III, § 1 of the constitution of this state and is unconstitutional and void.

Id. at 348-50.

In *People v. Superior Court*, 54 Cal. App.4th 407, 62 Cal. Rptr.2d 721 (1997), another California judge recusal statute was held unconstitutional as violating separation of powers. The statute provided for the peremptory recusal of a retired judge assigned to a criminal case by the prosecutor and defendant filing a joint stipulation declaring the judge not capable or qualified to hear and try the case. The court held that the legislature had given the parties the unfettered veto power over the Chief Justice's constitutional power to assign a judge and that "the Legislature may not exercise its power so as to interfere with the independence of the judiciary." 54 Cal. App.4th at 412.

Finally, in *McCulley v. State (The Judges' Cases)*, 53 S.W. 134 (Tenn. 1899), in a ringing endorsement of the separation of powers, the court rejected the notion that the Tennessee Constitution vested the legislature with the unrestrained authority to remove a judge from office for no reason, *to wit:*

> Again, if the power of removal conferred by this section is arbitrary and unlimited a judge might be removed on account of his religion, his politics, his race, or because he had declared unconstitutional a particular enactment of the legislature. Such a construction would be monstrous and wholly abhorrent to fundamental ideas of justice and judicial independence. The design of the framers of the constitution was to create three departments—executive, legislative, and judicial—which should be co-ordinate and wholly independent in the exercise of their appropriate functions. . . . It has been said that, of all the contrivances of human wisdom, this invention of an independent judiciary affords the surest guaranty and the amplest safeguard to personal liberty and the rights of individuals.
>
> If the legislature has such power as is contended for in the construction of this clause of the constitution, the judiciary would no longer be an independent and co-ordinate branch of the government, but a mere servile dependency.

Id. at 138-39.

The legislature cannot arrogate unto itself judicial authority, nor can it give it over to the parties. Although camouflaged by the cover of "venue," the SB 126 amendment creates a procedure that gives litigants unlimited power to recuse a judge with jurisdiction over a case for no reason. That violates the robust separation of powers principles firmly embedded in the Kentucky Constitution.

E. The Court Should Not Extend Comity to SB 126

The Court sometimes tolerates a statute that violates the separation of powers based upon the principle of comity. Comity is the judicial adoption of an unconstitutional statute "not as a matter of obligation, but out of deference and respect" for the legislature as a co-equal branch of the government. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 577 (Ky. 1995); *Foster v. Overstreet*, 905 S.W.2d 504, 506-07 (Ky. 1995). The decision whether to give life through comity to a statute that violates the separation of powers doctrine is one of institutional policy reserved for the Supreme Court. *O'Bryan,* 892 S.W.2d at 577.

For the Court to extend comity to an unconstitutional statute, it must find the statute is a "statutorily acceptable substitute for current judicially mandated procedures" or that it can be

"tolerated in a spirit of comity" because it does not unreasonably interfere with the "orderly functioning of the courts." *Taylor v. Commonwealth*, 175 S.W.3d 68, 77 (Ky. 2005). As this Court's predecessor stated many years ago: "The general rule is that any legislation that *hampers* judicial action or *interferes* with the discharge of judicial functions is unconstitutional. However, the rule is subject to the qualification that the legislature may put *reasonable* restrictions upon constitutional functions of the courts, provided that such restrictions do not *defeat* or *materially* impair the exercise of those functions." *Arnett v. Meade*, 462 S.W.2d 940, 946 (Ky. 1971) (emphasis original); *see also Foster v. Overstreet*, 905 S.W.2d at 506 (same). The Court should not extend comity to the SB 126 amendment; it is not a statutorily acceptable substitute for current judicially mandated procedures; it is an *un*reasonable restriction that interferes with the orderly functioning of the courts.

1. <u>SB 126 is not consistent with judicially mandated procedures</u>

In cases where unconstitutional statutes are not consistent with existing judicially-mandated procedures, this Court has declined to extend comity. *See, e.g., Gaines v. Commonwealth*, 728 S.W.2d 525, 527 (Ky. 1987) (declined comity to statute that allowed admission of out-of-court statements of child victims; statute contrary to established court rules and procedures relating to competency of children to testify and contrary to established evidentiary rules relating to admission of hearsay); *Drumm v. Commonwealth*, 783 S.W.2d 380, 382 (Ky. 1990) (same); *Turner v. Kentucky Bar Ass'n*, 980 S.W.2d 560, 563 (Ky. 1998) (declined comity to statute allowing non-attorneys to represent injured workers in workers' compensation cases; statute contrary to established court rules that only licensed attorneys can practice law). Only when unconstitutional statutes are deemed consistent with existing judicially-mandated procedures has the Court extended comity. *See, e.g., Glenn v. Commonwealth*, 436 S.W.3d 186, 188 (Ky. 2013)

(comity extended to statute providing that the number of peremptory strikes in *voir dire* examination of petit jurors shall be prescribed by the Supreme Court; statute consistent with court rule); *Craft v. Commonwealth*, 483 S.W.3d 837, 840 (Ky. 2016) (same); *Greene v. Boyd*, 603 S.W.3d 231, 238 (Ky. 2020) (stated in *dicta* that statute providing Friend of the Court investigative reports are admissible in custody proceedings is likely unconstitutional as infringing exclusive rule-making power of the Court; extended comity because statute not inconsistent with existing court rules); *Fugett v. Commonwealth*, 250 S.W.3d 604, 611 (Ky. 2008) (comity extended to statute providing that trial court may summons prospective juror who did not return juror qualification form; statute not inconsistent with existing administrative rules of the Court); *Foster v. Overstreet*, 905 S.W.2d at 507 (comity extended to statute providing procedure for party to file affidavit with Chief Justice challenging impartiality of trial judge; statute not inconsistent with existing court rules with similar procedures to challenge impartiality of trial judge); *Abbott, Inc. v. Guirguis*, 626 S.W.3d 475, 481 n.10 (Ky. 2021) (same); *A.W. v. Commonwealth*, 163 S.W.3d 4, 7 (Ky. 2005) (comity extended to statute giving court in juvenile proceedings contempt power for failure of juvenile to follow the court's order; statute not inconsistent with inherent contempt powers of the court); *Nance v. Ky. Admin. Off. of the Cts*., 336 S.W.3d 70, 73 (Ky. 2011) (stating in *dicta* that statute providing that Chief Justice may delegate supervision of AOC personnel to Director of AOC would likely be upheld on comity grounds since it allows Chief Justice to delegate power possessed under the Constitution).

The act of transferring venue has always been a judicial function under Kentucky law. *See generally Shearer v. Clay*, 11 Ky. 260, 262-63 (1822). Regardless of the *statutory criteria authorizing* change of venue, the *judicial procedure for executing* change of venue has been and remains the filing of a motion seeking transfer for some stated substantive reason, consideration

by the presiding court of the substantive merits of the motion (*i.e.*, whether the motion satisfies the statutory criteria), and entry of an order granting or denying transfer that is subject to appellate review. *See Abbott v. Chesley*, 413 S.W.3d 589, 606 (Ky. 2013) (recognizing that consideration of venue transfer is an "adjudicative responsibility" of the court where the case is pending); *Miller v. Watts*, 436 S.W.2d 515, 518 (Ky. 1969) ("[T]he matter of granting change of venue lies within the sound judicial discretion of the trial court. The exercise of that discretion will not be disturbed on appeal unless the facts clearly indicate an abuse of it.").

The SB 126 process is not consistent with these long-standing judicially-mandated procedures. There is no requirement that a motion be filed setting out the substantive basis for the requested transfer; there is no requirement that the presiding court consider the substantive merits of the motion; there is no means to challenge the transfer on appeal—there is not even an order from which to appeal. SB 126 is not entitled to comity.

Likewise, the act of recusing a judge for bias has always been a judicial function under Kentucky law. *Foster v. Overstreet*, 905 S.W.2d at 507. In *Foster*, this Court extended comity to KRS 26A.020(1) because the statute is consistent with existing judicially-mandated procedures for recusal. The statute requires the party to file an affidavit with factual support for recusal and review of the substantive merits by the Chief Justice, with the party seeking the recusal also having traditional rights of appeal.[13] SB 126 is not consistent with these long-standing recusal procedures. There is no requirement for a pleading setting out "bias" justifying recusal; there is no requirement

[13] There may not be a right to appeal the recusal decision of the Chief Justice made pursuant to KRS 26A.020(1). *See Augenstein v. Deutsch Bank Nat'l Trust Co.*, 647 S.W.3d 857, 865 (Ky. App. 2021) ("Presumably, we would also lack the authority to review a decision solely by the Chief Justice as no legal precedent provides that authority."). There is a right to appeal a recusal ruling made pursuant to KRS 26A.015, however. *Id.*

of judicial review of the alleged "bias"; there is no means to appeal the recusal (venue transfer) ruling because there is no court order to appeal. SB 126 should not be afforded comity.

2. <u>SB 126 interferes with the orderly functioning of the courts</u>

The Court has also declined to extend comity in cases where unconstitutional statutes interfere with the orderly functioning of the courts. *See, e.g., O'Bryan,* 892 S.W.2d at 577 (refusing comity to statute allowing evidence of collateral source payments); *Ex Parte Farley*, 570 S.W.2d 617, 624 (Ky. 1978) (refusing comity to open records statute requiring judicial branch agencies to provide documents); *Ex Parte Auditor of Pub. Accts*., 609 S.W.2d 682, 688 (Ky. 1980) (refusing comity to statute authorizing State Auditor to audit the accounts of judicial branch agencies); *Gaines v. Commonwealth,* 728 S.W.2d 525, 527 (Ky. 1987) (refusing comity to statute allowing child's tape-recorded interview to be played at trial; statute ignored the historical and important judicial requirement that witnesses undertake a solemn obligation to tell the truth).

The Court has extended comity only when an unconstitutional statute does not unreasonably interfere with the orderly functioning of the courts. *See, e.g., Taylor v. Commonwealth*, 175 S.W.3d 68, 77 (Ky. 2005) (extending comity to statute providing death-row inmates DNA testing of existing evidence; statute furthers the interest of justice and the orderly functioning of the courts by providing additional protections to those sentenced to death); *Jones v. Com., Admin. Off. of the Cts.*, 171 S.W.3d 53, 56 (Ky. 2005) (extending comity to statute providing for appeal to circuit court of personnel orders of the Administrative Office of the Courts; procedure does not interfere with the orderly functioning of the courts because Supreme Court does not have resources to hear personnel appeals and will ultimately have power to review on appeal); *Commonwealth v. Reneer*, 734 S.W.2d 794, 797-97 (Ky. 1987) (extending comity to statute setting out bifurcated guilt and sentencing phases of trial in felony cases; procedures do not interfere with

the orderly functioning of the courts and actually provide for better-informed sentencing by the jury); *Horn by Horn v. Commonwealth*, 916 S.W.2d 173, 176 (Ky. 1995) (extending comity to statute providing for limited waiver of sovereign immunity and allowing negligence claims against judicial branch agencies; statute does not interfere with core powers of the judicial branch to manage its own affairs on purely judicial matters such as rule-making, appointments of personnel, admissions to the bar, disciplinary actions, and administration of Kentucky Bar Association); *Greene v. Commonwealth*, 349 S.W.3d 892, 905 (Ky. 2011) (same).

In contrast to the typical circumstances where the Court extends comity, SB 126 represents a significant—even extreme—interference with the orderly functioning of the courts. It strips away entirely the courts' historical role in the transfer process in a select category of vitally important cases—those involving constitutional challenges to legislative and executive action. It permits litigants in this cadre of cases to disqualify the venue, and its presiding judge, based on *un*pled concern for *un*demonstrated "bias." It allows no judicial oversight by either the original or transfer court, even of the statutory prerequisites of the "notice of transfer." It prevents appellate review by eliminating the exercise of judicial judgment—the only thing reviewable.

SB 126 also invites both judge and forum-shopping; so, it promotes abuse of the Court of Justice. It allows any party, including a plaintiff, to compel transfer up to thirty days "after the return of service on the defendant." 2023 Ky. Acts, ch.131, § 1(4)(a). It allows the Attorney General to do so up to thirty days "from intervention," *id.*, regardless when in the process that occurs. Consequently, if a plaintiff's early motion practice—such as a motion for a restraining order or injunction—is not successful, or if an unpopular judge is drawn, the plaintiff can file a notice of transfer and prevent the original court from hearing the case. Likewise, if a defendant receives an unfavorable early ruling, the defendant can file a notice of transfer and, without risk of

recourse, move the case to another court. And the Attorney General can intervene at the eleventh hour and force a transfer. This legislatively created invitation to abuse violates the orderly administration of the Court of Justice. *See Steward v. Kentuckiana Med. Ctr., LLC*, 604 S.W.3d 264, 270 (Ky. App. 2019) (citing *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33, 41 (Ky. 2004) ("Forum shopping is clearly against the public policy of Kentucky.").

For all these reasons, the SB 126 amendment unreasonably interferes with the orderly functioning of the courts. The Court should not extend comity to the amendment.

II. SB 126 VIOLATES THE RIGHT OF EQUAL PROTECTION UNDER KENTUCKY CONSTITUTION §§ 1, 2 AND 3

Issue Preservation: This issue was preserved by raising it in the trial court. *See* Memorandum of Law in Support of Plaintiffs' Motion to Decline Transfer of Case, attached to the Petition for Supervisory Writ as Exhibit 8.

The SB 126 amendment treats a certain class of persons differently from others who are similarly-situated. The amendment singles out a class of litigants—those asserting claims challenging the constitutionality of a statute, executive order, administrative regulation, or administrative agency order—and imposes upon them a special venue transfer rule that does not apply to any other litigant in any other type of case. As such, the amendment denies constitutional litigants equal protection under the law in violation of Kentucky Constitution §§ 1, 2 and 3.

Sections 1, 2 and 3 prevent the legislative, executive, and judicial branches of government from exercising their power arbitrarily and require that the government treat all similarly-situated persons equally. *Zuckerman v. Bevin*, 565 S.W.3d 580, 594 (Ky. 2018). The essential goal of equal protection is to "[k]eep governmental decision makers from treating differently persons who are in all relevant respects alike." *Commonwealth Nat. Res. & Env't Prot. Cabinet v. Kentec Coal Co.*, 177 S.W.3d 718, 725 (Ky. 2005) (quoting *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003)).

Equal protection proscribes legislation creating different rules applicable to only some similarly-situated persons. *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 465 (Ky. 2011).[14] However, because nearly all legislation differentiates in some manner between classes of persons, a statute that creates different rules applicable to different classes of persons is not unconstitutional *per se*; rather, such legislation is subjected to differing levels of scrutiny depending upon the type of classification made within the legislation and the nature of the personal interests affected: strict scrutiny, intermediate scrutiny, or rational basis scrutiny. *Id.*; *Teco/Perry Cnty. Coal v. Feltner*, 582 S.W.3d 42, 46 (Ky. 2019); *Zuckerman*, 565 S.W.3d at 595.

The most stringent level, strict scrutiny, applies when the legislation impinges upon a fundamental right, or when the legislation affects a suspect classification such as race, alienage, or national origin. *Beshear v. Acree*, 615 S.W.3d 780, 815-16 (Ky. 2020); *Zuckerman*, 565 S.W.3d at 595. Under the "strict scrutiny" test, a statute that creates different rules for different classes of persons is constitutional only if the government proves that the statute's differentiation "furthers a compelling governmental interest" and the specific terms of the statute are "narrowly tailored" to further that interest. *Beshear*, 615 S.W.3d at 816; *Zuckerman*, 565 S.W.3d at 595.[15] "Strict scrutiny" applies here because the SB 126 amendment impinges upon the fundamental rights of the class of litigants asserting constitutional challenges to legislative or executive actions. The

[14] Like any other statute, a venue statute cannot violate the constitutional right of equal protection. *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70, 72 (Ky. 1936); *Hummeldorf v. Hummeldorf*, 616 S.W.2d 794, 797 (Ky. App. 1981).

[15] The second level of judicial scrutiny is "intermediate scrutiny" which is used if the legislation applies to a quasi-suspect class such as gender or illegitimacy. Under the "intermediate scrutiny" test, a statute that creates different rules for different classes of persons is constitutional only if the government proves such separate legislative classifications serve important governmental objectives and are substantially related to the achievement of those objectives. *Beshear*, 615 S.W.3d at 816; *Zuckerman*, 565 S.W.3d at 595. The third level of judicial scrutiny is "rational basis" scrutiny which is used in those cases that are not subject to "strict scrutiny" or "intermediate scrutiny," such as where the legislation affects social, economic, or business rights. Under "rational basis" a statute that creates different rules for different classes of persons is constitutional unless the challenger can prove that the statutory classification is not "rationally related" to a legitimate government purpose. *Beshear*, 615 S.W.3d at 816; *Zuckerman*, 565 S.W.3d at 595.

amendment fails strict scrutiny because it is not narrowly tailored to further a compelling governmental interest.

Because venue statutes often affect only social, economic, or business rights, not fundamental constitutional rights or suspect or quasi-suspect classifications of persons, cases analyzing venue statutes on equal protection grounds frequently apply the rational basis test. *See Burlington N. R. Co. v. Ford*, 504 U.S. 648, 651 (1992) ("Because the Montana venue rules neither deprive Burlington of a fundamental right nor classify along suspect lines like race or religion, they do not deny equal protection to Burlington unless they fail in rationally furthering legitimate state ends."); *Saint-Gobain Calmar, Inc. v. Nat'l Prod. Corp*., 230 F. Supp. 2d 655, 658 (E.D. Pa. 2002) (holding the rational basis test applied to equal protection challenge to venue statute because the statute did not involve a classification involving fundamental rights or a suspect class); *Nitsos v. Emp. Appeal Bd*., 820 N.W.2d 158 (Iowa App. 2012) ("Because this case does not involve a fundamental right or suspect class, any classification by the venue statute need only have a rational basis."); *Kenyon v. Kansas Power & Light Co*., 836 P.2d 1193, 1197 (Kan. App. 1992) (applying rational basis where "Plaintiff has failed to explain why the [venue] statute deserves a 'heightened scrutiny'").

However, as recognized by the Kentucky Court of Appeals in *Hummeldorf v. Hummeldorf,* 616 S.W.2d 794 (Ky. App. 1981), when a venue statute affects a fundamental constitutional right or a suspect or quasi-suspect classification of persons, rational basis is not the proper test; instead, the equal protection analysis requires the appropriate heightened level of scrutiny. *Id*. at 796. In *Hummeldorf*, the court applied intermediate scrutiny because the venue statute involved a gender-based classification. *Id*. *See also Davis v. Union Pac. R. Co.,* 937 P.2d 27, 36 (Mont. 1997) (Trieweiler, J. concurring) (injured railroad worker's right to choose venue under Federal

Employers Liability Act is a fundamental right requiring application of strict scrutiny test in equal protection challenge to Montana venue statute).

A. The Amendment Impinges Upon Fundamental Rights of Select Litigants

"Strict scrutiny" applies here because SB 126 impinges upon the *fundamental rights* of the class of litigants asserting constitutional challenges to legislative or executive actions. At the least, it unduly burdens the constitutional right of such litigants to undelayed access to the courts as provided in Kentucky Constitution § 14.[16] The amendment fails strict scrutiny because it is not narrowly tailored to further a compelling governmental interest.

In *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973), the Supreme Court held that a right is deemed to be fundamental for purposes of strict scrutiny analysis if it is one that is "explicitly or implicitly guaranteed by the Constitution."[17] Kentucky courts have, likewise, recognized that a fundamental right for purposes of strict scrutiny analysis means a constitutional right. *Beshear*, 615 S.W.3d at 815-16 ("Strict scrutiny applies to a statute challenged on equal protection grounds if the classification used adversely impacts a fundamental right or liberty explicitly or implicitly protected by the Constitution.").

A statute impinges upon a fundamental constitutional right when it interferes with or burdens the ability of a person in the exercise of the right, or when it penalizes a person for the exercise of the right. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); *Connelly v. Steel Valley Sch. Dist*., 706 F.3d 209, 213 (3d Cir. 2013); *Special Programs, Inc. v. Courter*, 923 F. Supp. 851, 855-56 (E.D. Va. 1996).

[16] Argument IV, *infra.*, addresses a separate argument based on § 14.

[17] Petitioners' equal protection claim is under the Kentucky Constitution. The equal protection analyses under the Kentucky Constitution and the United States Constitution are the same; therefore, cases interpreting equal protection under the United States Constitution are informative. *Zuckerman*, 565 S.W.3d at 597; *Commonwealth v. Howard*, 969 S.W.2d 700, 704 (Ky. 1998); *Delta Air Lines, Inc. v. Com., Revenue Cabinet*, 689 S.W.2d 14, 18 (Ky.1985).

A statute imposes a substantial burden on a person's ability to exercise their constitutional rights if it directly or indirectly interferes with the person's exercise of such rights. *Hamilton Cnty. Educ. Ass'n v. Hamilton Cnty. Bd. of Educ.*, 822 F.3d 831, 840 (6th Cir. 2016); *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010). Thus, strict scrutiny analysis is triggered if the challenged statute is deemed to impose a substantial burden upon a person's exercise of their constitutional rights by either directly or indirectly interfering with the exercise of such rights. A showing of a substantial burden is all that is required. There is no requirement that the challenged statute rise to the level of violating such constitutional rights and it makes no difference whether the burden or interference, in and of itself, violates a fundamental constitutional right. *Special Programs, Inc. v. Courter*, 923 F.Supp. at 855-56; *In re Ohio Execution Protocol Litig.*, 868 F. Supp. 2d 625, 639 (S.D. Ohio 2012).

An important factor in determining whether the burden that is placed upon a class of persons under a challenged statute rises to the level of being a substantial burden upon the ability to exercise constitutional rights is whether the effect of the statute results in the class being "burdened in any way greater than the burden to the general population." *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749, 754 (M.D. Tenn. 2015). In *Hargett*, the court declined to apply the strict scrutiny test to an equal protection challenge to Tennessee's voter ID statute because the burden upon the plaintiffs of obtaining a government-issued ID did not rise to the level of a substantial burden upon their constitutional right to vote; obtaining a government-issued photo ID, which involves the minor inconvenience of gathering the required documents, making a trip to the government office and posing for a photograph, is not significantly different from the usual burdens of in-person voting. *Id.* (citing *Crawford v. Marion Cnty Election Bd.*, 553 U.S. 181 (2008)).

Contrariwise, the burden that SB 126 places upon (only) litigants challenging the constitutionality of legislative or executive action is substantial. It burdens such plaintiffs with the prospect that their lawsuit—filed in the county of their residence pursuant to the dictates of KRS 452.005(2)(a)—will be arbitrarily transferred to another county having no connection to them—potentially hundreds of miles away—without any showing of cause for transfer and no judicial oversight. Consequently, it uniquely, and substantially, burdens such litigants' ability to assert constitutional challenges to government actions. Among other impediments, it interferes with constitutional litigants' access to the courts for redress, in part by delaying access to the courts in violation of Kentucky Constitution § 14. "Section 14, originally written and adopted in 1792, does not proscribe the creation of 'undue' or 'unreasonable' delay on a Kentuckian's access to due course of law; *Section 14 plainly proscribes delay*." *Commonwealth v. Claycomb*, 566 S.W.3d 202, 215-16 (Ky. 2018) (emphasis).

This case is a textbook example of this undue burden in action. House Bill 594 has completely outlawed Petitioners' otherwise lawful business. As of June 29, 2023, HB 594's effective date, Petitioners were out of business. And because SB 126 has been invoked, Petitioners have had no timely access to the courts to seek injunctive relief. Even without this added layer of litigation concerning the constitutionality of SB 126, by suffering the invocation of the SB 126 mandatory transfer burden, Petitioners' access to a court, with venue, for injunctive relief would have been unconstitutionally delayed.

Only constitutional litigants are subjected to this unreasonable burden. Other litigants are only subject to change of venue upon a finding of cause: "[W]hen it appears that, because of the undue influence of his adversary or the odium that attends the party applying or his cause of action or defense, or because of the circumstances or nature of the case he cannot have a fair and impartial

trial in the county." KRS 452.010(2). Even then, the county to which the case is transferred must have a geographical nexus to the litigants: "A change of venue shall be made to the Circuit Court of the adjacent county most convenient to the parties, their witnesses and their attorneys." KRS 452.050. A similar statute applies to criminal cases. KRS 452.210.

This Court takes these logical prerequisites to transfer—good cause and a sensible alternative venue—seriously. In *Morris v. Commonwealth*, 208 S.W.2d 58 (Ky. 1948), the Court reversed a criminal conviction where a case was transferred from Wayne County to Fayette County. The Court noted that the venue transfer statute was clear and mandatory, and held: "In this case there are twenty-two counties nearer Wayne than Fayette, and in order to travel to Fayette from Wayne it is necessary to pass through the counties of Lincoln, Garrard, and Jessamine, each and all of which are nearer, and obviously more convenient to persons traveling from, Wayne. It is apparent that the Wayne Circuit Court erred in transferring the case to Fayette County." *Id*. at 60. Even in cases where more than one court has venue, the doctrine of *forum non conveniens* requires the exercise of judicial discretion and, if circumstances warrant, transfer to another venue that is more convenient to the litigants. *Dollar Gen. Stores, Ltd. v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007).

At the risk of elevating "common sense" to a judicial maxim, it makes no sense to expose constitutional litigants—who are already tasked with taking on a government opponent—to the unique burden of transfer of their case to an arbitrarily-selected venue, possibly hours away and inconvenient to all parties and their witnesses, based on the legislature's—not the parties'—generic "concern of bias." At a minimum, this burden violates § 14. Because SB 126 impinges upon the fundamental constitutional rights of Petitioners, and other constitutional-challenge plaintiffs, application of the strict scrutiny test is proper.

B. The SB 126 Amendment Fails Strict Scrutiny

Strict scrutiny analysis requires a two-step inquiry. First, the examining court must determine if the legislature had a compelling governmental interest in enacting the statute. If so, it must then determine whether the terms of the statute are narrowly tailored to further the governmental interest. *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 953 (Ky. 1995).

As already noted, the governmental interest supposedly motivating SB 126 is clear from its text: "[I]t is a critical governmental interest to provide litigants access to courts of this Commonwealth *without any concern of bias*[.]" 2023 Ky. Acts, ch.131, § 2 (emphasis added). Providing litigants access to unbiased courts is a legitimate governmental interest. *McDonald v. Ethics Comm. of the Kentucky Judiciary*, 3 S.W.3d 740, 745 (Ky. 1999); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991). But SB 126 is not narrowly tailored to further this ostensible governmental interest.

The requirement that the specific terms of a statute be "narrowly tailored" to the compelling governmental interest means just that: the specific means chosen by the legislature to accomplish the governmental interest as set out in the statute must be the narrowest and least restrictive means available. *Gingerich v. Commonwealth*, 382 S.W.3d 835, 842 (Ky. 2012). The means chosen cannot merely be relevant to the governmental interest. Only the most exact connection between the governmental interest and the means chosen to accomplish that interest will survive strict scrutiny analysis. *Kitchen v. Herbert*, 755 F.3d 1193, 1218-19 (10th Cir. 2014).

Whether or not a statute meets this stringent tailoring is determined based upon a consideration of various factors of relatedness between the specific terms of the statute and the

stated governmental interest.[18] A statute is narrowly tailored to further a governmental interest only if it: (1) is one that actually advances the governmental interest (is "absolutely necessary"); (2) does not sweep too broadly (is not "overinclusive"); (3) does not leave activities bearing on the governmental interest unregulated (is not "underinclusive"); and (4) could be replaced by no other statute that could advance the governmental interest as well (is the "least-restrictive alternative"). *Champion v. Commonwealth*, 520 S.W.3d 331, 338-39 (Ky. 2017). Furthermore, there is a presumption that the challenged statute is *un*constitutional, and the government bears the burden of proving that the statute survives strict scrutiny analysis under all these factors. *Id.* at 338; *see also Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) ("[I]t is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."). The Attorney General cannot prove that SB 126 clears any of these constitutional hurdles.

1. <u>The SB 126 amendment is not necessary</u>

"If government wishes to restrain an individual right in effort to remedy a societal problem, we do not presume the problem exists; the governing body must prove and justify that the behavior in question actually harms society." *Champion*, 520 S.W.3d at 338-39. That is, the government must prove that the legislation is necessary. *See 281 Care Comm. v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014) ("The county attorneys claim that § 211B.06 is indeed 'actually necessary' to preserve fair and honest elections in Minnesota. They do so, however, without confirming that there is an actual, serious threat of individuals disseminating knowingly false statements

[18] The cases cited here which discuss the "narrowly tailored" element of the strict scrutiny test include cases applying the test to both equal protection and First Amendment claims. These cases are interchangeable as the relevant factors to be considered are the same under either constitutional provision. *Special Programs, Inc. v. Courter*, 923 F.Supp. 851 (E.D. Va. 1996) (applying "narrowly tailored" factors to equal protection claim); *Fernandez v. St. Louis Cnty., Missouri*, 538 F. Supp. 3d 888, 899 (E.D. Mo. 2021) (applying "narrowly tailored" factors to First Amendment claim).

concerning ballot initiatives."). If a statute is already in place which furthers the governmental purpose of the challenged statute, but does not impinge upon fundamental constitutional rights, then the challenged statute fails the narrowly tailored requirement because it is not "actually necessary." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1196 (9th Cir. 2018) ("Even assuming Idaho has a compelling interest in regulating property rights and protecting its farm industry, criminalizing access to property by misrepresentation is not 'actually necessary' to protect those rights. If, as Idaho argues, its real concern is trespass, then Idaho already has a prohibition against trespass that does not implicate speech in any way.").

There is no evidence of an actual problem of "bias" within the judicial system—much less a problem of bias singularly related to constitutional claims against state action—that required enactment of SB 126. And there already exist more than adequate legal mechanisms available to litigants who feel subjected to judicial bias. *See* KRS 26A.015 and SCR 4.300 (judicial disqualification statute and rule).[19] Statutes are also in place allowing for transfer of actions. *See* KRS 452.010 to 452.110 (transfer of venue for fair and impartial trial). Thus, the SB 126 amendment to KRS 452.005 is not "actually necessary."

2. <u>The SB 126 amendment is overinclusive</u>

A statute is overinclusive if it sweeps within its protection persons who are outside the class of persons the governmental interest intends to protect. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989); *Conchatta Inc. v. Miller*, 458 F.3d 258, 267-68 (3d Cir. 2006). A statute is also overinclusive if it affects more activity than is necessary to further the governmental interest. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-23 (1991). This Court has frequently found that statutes fail the "narrowly tailored"

[19] Making this point even more compelling, disqualification motions are now reviewed under a stringent *de novo* standard. *Abbott, Inc. v. Guirguis*, 626 S.W.3d 475 (Ky. 2021).

requirement of the strict scrutiny test due to overinclusiveness. *See, e.g., Champion*, 520 S.W.3d at 339 (ordinance prohibiting panhandling overinclusive because the governmental purpose of the ordinance was traffic safety, but the ordinance also prohibited other forms of money solicitation conduct that fell outside the governmental interest of traffic safety); *Blue Movies, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 317 S.W.3d 23, 32-33 (Ky. 2010) (ordinance that prohibited all forms of touching by erotic dancers in strip clubs was overinclusive because the governmental purpose was to combat prostitution and the spread of sexually transmitted disease, but the ordinance also prohibited other forms of benign, nonsexual touching); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991) (judicial canon that prohibited judicial candidates from discussing their views on any disputed legal or political issue overinclusive because the governmental purpose was to ensure impartiality of judges, but the canon also prohibited candidates from expressing their general views on legal or political issues).

The SB 126 amendment is overinclusive. It provides for the transfer of *any* case where a party has challenged the constitutionality of a statute, executive order, administrative regulation, or administrative agency order, regardless of whether there is any evidence that the litigant invoking the venue transfer procedure has any legitimate "concern of bias." Moreover, its overinclusive transfer "remedy" simply defies logic; a *venue* cannot be biased to a constitutional claim tried before the court.

3. <u>The SB 126 amendment is underinclusive</u>

A statute is underinclusive when it regulates or affects only part of the problem that the governmental interest seeks to remedy by enactment of the statute. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *Wagner v. City of Garfield Heights*, 675 Fed. Appx. 599, 606-07 (6th Cir. 2017) (ordinance limiting size of political signs, while not limiting size of non-political signs, was

underinclusive to governmental interest of aesthetics and traffic safety). This Court has held statutes unconstitutional because they are underinclusive. *See, e.g., Champion*, 520 S.W.3d at 339 (panhandling ordinance with governmental purpose of traffic safety underinclusive because it did not prohibit other activities which present a similar threat to traffic safety); *Flying J Travel Plaza v. Com., Transp. Cabinet, Dep't of Highways*, 928 S.W.2d 344, 349 (Ky. 1996) (statute with governmental purpose of highway safety and aesthetics underinclusive where it prohibited display on highway billboards of information such as the price of products sold, but did not prohibit display of other information presenting equal safety threat).

The problem the SB 126 amendment purportedly seeks to remedy is litigants being subjected to bias. But the amendment applies only to cases where a party has challenged the constitutionality of legislative or executive action. It does not apply to any other kind of case. Surely any legitimate "concern of bias" by the legislature would not be exclusive to constitutional challenges. The amendment is "underinclusive" and unconstitutional.

4. <u>The SB 126 amendment is not the least restrictive means available</u>

If there is an alternative means for the government to accomplish its governmental interest without impinging upon fundamental constitutional rights, the legislature must use that alternative. *Champion*, 520 S.W.3d at 339; *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (statute is not narrowly tailored to a governmental interest if its burden upon a fundamental constitutional right "could be avoided by a more carefully drafted statute"). Kentucky already has in place statutes and court rules that provide *all litigants*—not just constitutional litigants—a way to challenge judicial bias

or seek a venue change.[20] The SB 126 amendment is not the "least restrictive means" to accomplish its stated governmental interest.

In short, SB 126 fails strict scrutiny and is unconstitutional.

C. SB 126 is Unconstitutional Even Under the Rational Basis Test

Even if the SB 126 amendment did not affect fundamental rights, it would still fail the "rational basis" test, and thus, violate the right of equal protection in Kentucky Constitution § 3. Even under this less stringent level of scrutiny, the legislature must still have a "rational basis" for enacting a statute that differentiates between different classes of persons. *Zuckerman v. Bevin*, 565 S.W.3d 580, 595 (Ky. 2018). Although the legislature has the right to make classifications based upon natural and reasonable distinctions, equal protection prohibits the legislature from creating classifications that are arbitrary and without any reasonable basis inherent in the objects of those classifications. *Id*. at 596. A statutory classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without such basis." *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 469 (Ky. 2011) (quoting *McCoughlin v. State of Fla*., 379 U.S. 184, 190 (1964)). "Arbitrary and irrational discrimination violates the Equal Protection Clause even under the rational-basis standard of review." *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 414 (Ky. 2005) (quoting *Lindsey v. Normet*, 405 U.S. 56, 79 (1972)).

The "rational basis" test requires a two-step inquiry. *Com. ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621, 625 (Ky. 2005). First, the governmental interest for enacting the statute creating the classification is identified. Second, the examining court determines whether a rational basis

[20] The procedure for recusal of a judge based upon a claim of bias is set out in KRS 26A.015, 26A.020 and SCR 4.300. The procedure for transfer of venue based upon a claim the party cannot obtain a fair trial is set out in KRS 452.010 to 452.110 for civil cases and KRS 452.210 to 452.330 for criminal cases.

exists for the legislature to believe that the classification created would further the governmental interest. *Id*.

1. <u>The governmental interest underlying SB 126 is undefined "bias"</u>

Determining the governmental interest of the legislature in enacting a statute can sometimes be difficult in that the legislature is not required to articulate its reasons and often does not. However, when the legislature has made contemporaneous declarations as to the governmental interest, those declarations should be accepted as the governmental interest in undertaking the "rational basis" analysis. *Crutchfield,* 157 S.W.3d at 624.

Federal cases, likewise, have held that the legislature's expressly-stated purpose for enacting a statute *is* the governmental purpose to be used when undertaking a rational basis analysis of an equal protection challenge to the statute. *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 461 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'")[21]; *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 13 (1st Cir. 2007) ("The words of a legislative body itself, written or spoken contemporaneously with the passage of a statute, are usually the most authoritative guide to legislative purpose."); *Star Sci. Inc. v. Beales*, 278 F.3d 339, 350 (4th Cir. 2002) (rejecting argument that the court should ignore the statute's expressly articulated purpose in favor of an unexpressed inferred purpose); *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp*., 21 F.3d 237, 240 (8th Cir. 1994) ("Under rational basis review, we accept 'at face value contemporaneous declarations of the [governmental] purposes, or in the

[21] This holding is consistent with Kentucky law. In undertaking a "rational basis" analysis of an administrative regulation in *Motor Vehicle Comm'n v. Hertz Corp*., 767 S.W.2d 1 (Ky. App. 1989), the Court of Appeals held that the administrative agency's stated purpose for a regulation as set out in the regulatory impact statement was pretext and not the true purpose of the regulation. *Id*. at 3.

absence thereof, rationales constructed after the fact, unless 'an examination of the circumstances forces [us] to conclude that they could not have been a goal of the [classification].'"). Thus, when legislators speak to their purpose, courts take them at their word.

In SB 126, the legislature spoke loud and clear: "[I]t is a critical governmental interest to provide litigants access to courts of this Commonwealth *without any concern of bias*[.]" 2023 Ky. Acts, ch.131, § 2 (emphasis added).

2. <u>There is no rational basis for the legislature to believe that SB 126 would further the governmental interest of eliminating "concern of bias"</u>

Although the "rational basis" standard is more lenient than strict scrutiny, this Court has frequently found that statutes violate equal protection under this test. The Court has even applied the rational basis test to find a venue statute violates equal protection. *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70, 73 (Ky. 1936) (striking down as unconstitutional venue statute that required property damage claims against residents of the state to be filed in the county where the defendant resides or the county where the injury occurred, but allowing identical claims against nonresidents to be filed in the county where the plaintiff resides or the county where the injury occurred). A sampling of this Court's rational basis holdings is instructive.

In *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 472 (Ky. 2011), a workers' compensation statute provided more stringent procedural rules and evidentiary presumptions for coal workers' pneumoconiosis claims, with less stringent rules for non-coal worker pneumoconiosis claims. The Court held such statutory classification was not rationally related to the governmental purpose of the statute—cost savings for employers—because application of the same stringent rules to non-coal worker claims would likewise be a cost savings for those employers. In *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 43 (Ky. 2009), a workers' compensation statute that created two classes of workers, based solely on the degree of discrepancy

between the worker's and employer's evidence, was held not rationally related to the governmental purpose of the workers' compensation statutes—to provide social welfare for injured workers. In *Commonwealth Nat. Res. & Env't Prot. Protection Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718, 726 (Ky. 2005), a statute that allowed individual coal mine operators to prosecute administrative appeals of administrative penalties without prepaying the penalties, but required corporate mine operators to prepay penalties in order to prosecute appeals, was held not rationally related to the governmental purpose of the statute—to facilitate the payment of fines. In *D.F. v. Codell*, 127 S.W.3d 571, 577-78 (Ky. 2003), a statute providing for the suspension of driver's licenses of high schoolers who dropped out or were academically deficient, that only applied in school districts with an alternative education program for students with learning disabilities, was held not rationally related to its governmental purpose—to deter students from dropping out of school and encouraging academic proficiency. Likewise, in *Parker v. Webster Cnty. Coal, LLC*, 529 S.W.3d 759 (Ky. 2017), the legislature enacted a workers' compensation statute that terminated the income benefits of injured workers once they qualified for Social Security benefits, but arbitrarily excluded injured workers, like teachers, who were not part of the Social Security system. The Court held the classification was arbitrary and did not further the governmental purpose of the statute—to prevent the duplication of workers' compensation benefits with old age retirement benefits—because it did not prevent the duplication of benefits as to those injured workers, like teachers, who received old age retirement benefits outside of the Social Security system, *to wit*:

> There is no rational basis for treating all other workers in the Commonwealth differently than teachers. Both sets of workers will qualify for retirement benefits and both have contributed, in part, to their "retirement plans." However, while teachers will receive all of the workers' compensation income benefits to which they are entitled, nearly every other worker in the Commonwealth will not. This disparate treatment does not accomplish the goals posited as the rational bases for

> KRS 342.730(4). The statute does prevent duplication of benefits, but only for non-teachers because, while nearly every other worker is foreclosed from receiving "duplicate benefits," teachers are not.

Id. at 768. And in *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408 (Ky. 2005), the legislature enacted a statute imposing a ten percent appeal penalty for unsuccessful appellants in second level appeals that only applied to unsuccessful appellants who had superseded a money judgment against them. The statute arbitrarily excluded from the appeal penalty other categories of unsuccessful second level appellants such as unsuccessful plaintiff-appellants, unsuccessful defendant-appellants that did not supersede the money judgment, and unsuccessful appellant-defendants that had non-money judgments against them. The Court held that the statute's classification did not rationally relate to its governmental purpose—to discourage frivolous appeals—since it arbitrarily applied to only a small number of appellants—those with money judgments against them that superseded the judgment. *Id.* at 421.

SB 126's stated governmental purpose—"to provide litigants access to courts of this Commonwealth without any concern of bias"—does not apply to all litigants in all cases, much like the penalty provision in *Elk Horn Coal* and the arbitrary classifications stricken in the other cited cases. And, as in the cited cases, the remedy—peremptory venue transfer—is not rationally related to the stated governmental interest—"concern of bias." A *venue* can't be biased, particularly in a non-jury proceeding where a constitutional challenge to a statute, executive order, administrative regulation, or administrative agency order is asserted. And, of course, a statute intended to escape bias that requires no proof of bias cannot possibly be rationally related to "concern of bias." The amendment's stated "governmental purpose" is nothing more than counter-intuitive legislative pretext. SB 126 violates equal protection even under rational basis scrutiny.

III. SB 126 VIOLATES DUE PROCESS OF LAW UNDER KENTUCKY CONSTITUTION § 2

Issue Preservation: This issue was preserved by raising it in the trial court. *See* Memorandum of Law in Support of Plaintiffs' Motion to Decline Transfer of Case, attached to the Petition for Supervisory Writ as Exhibit 8.

SB 126 empowers a party or the intervening Attorney General, in any case challenging the constitutionality of a statute or governmental action, with unchecked power to summarily divest the circuit court in which the case was filed of further jurisdiction and requires transfer to another circuit court chosen by lottery. Although it was purportedly enacted out of "concern of bias," it grants this absolute authority without any required showing of bias—venue or judicial bias—and it compels transfer to an arbitrarily selected alternative venue having no rational connection to the parties, all without judicial review or oversight. Consequently, SB 126 is arbitrary in violation of Kentucky Constitution § 2.

A. Section 2 Prohibits Statutes that Grant Arbitrary Power

Our Constitution prohibits the arbitrary exercise of power by the government: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. § 2. To pass constitutional muster under § 2, a statute must be rationally related to a legitimate governmental purpose. *Lost Mountain Mining v. Fields*, 918 S.W.2d 232, 233 (Ky. App. 1996).

To test whether a statute is unconstitutionally arbitrary, the examining court first determines whether the statute has a legitimate governmental purpose. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 548 (Ky. 2000) (citing *Moore v. Ward*, 377 S.W.2d 881, 883 (Ky. 1964)); *Allen v. Ky. Horse Racing Auth.*, 136 S.W.3d 54, 61 (Ky. App. 2004); *Buford v. Commonwealth*, 942 S.W.2d 909, 911 (Ky. App. 1997). SB 126 unambiguously states its

purported governmental purpose: "to provide litigants access to courts of this Commonwealth without any concern of bias[.]" 2023 Ky. Acts, ch.131, § 2.

If the statute has a legitimate governmental purpose, the court then determines whether the specific provisions of the statute are rationally related to that purpose. *Beshear v. Acree*, 615 S.W.3d 780, 816 (Ky. 2020) (citing *Stephens v. State Farm Mut. Auto. Ins. Co*., 894 S.W.2d 624, 627 (Ky. 1995)). There must be a rational connection between the particulars of the statute and the governmental purpose for which it was enacted. *Conrad v. Lexington-Fayette Urb. Cnty. Gov't*, 659 S.W.2d 190, 196 (Ky. 1983). Stated more simply, the § 2 rational-basis analysis requires that there be a "reasonable fit" between the legitimate governmental purpose of the statute and "the means chosen [by the legislature] to advance that purpose." *Moffitt v. Commonwealth*, 360 S.W.3d 247, 254 (Ky. App. 2012) (citing *Reno v. Flores*, 507 U.S. 292, 305 (1993)). The means chosen by the legislature to advance the purpose of the statute cannot be "wholly irrelevant" to the purpose of the statute. *Edwards v. Louisville Ladder*, 957 S.W.2d 290, 295 (Ky. App. 1997) (citing *Estridge v. Stovall*, 704 S.W.2d 653, 655 (Ky. App. 1985)). Additionally, the statute should go no further than is reasonable and necessary to fairly advance its legitimate governmental purpose. *Moore*, 377 S.W.2d at 883. If the statute goes beyond its reasonable and legitimate governmental purpose, it will be deemed to be arbitrary and unconstitutional. *Kenton & Campbell Benev. Burial Ass'n v. Goodpaster*, 200 S.W.2d 120, 124 (Ky. 1946).

Numerous times this Court has held a statute or executive order violated the rational basis test under § 2 because there was no rational relationship between the governmental purpose of the enactment and the means chosen to advance that purpose. In *Beshear v. Acree*, the Governor promulgated an executive order with the governmental purpose of preventing the spread of Covid-19. One provision of the order prohibited people living in the same household from sitting within

six feet of one another at sporting events. The Court held there was no rational relationship between the governmental purpose—preventing the spread of Covid-19—and the means chosen to advance that purpose—prohibiting persons *who live in the same household* from sitting within six feet of one another *at sporting events.* 615 S.W.3d at 825.

In *United Dry Forces v. Lewis*, 619 S.W.2d 489 (Ky. 1981), the legislature had passed a local option statute for the stated purpose "to improve the economy of the affected areas." *Id.* at 493. One section of the statute, however, required a local option election solely upon written petition signed by at least 33% of the persons voting in the last general election without any finding of "economic problems" in the precinct that may be remedied by alcohol sales. *Id.* The Court held there was no rational relationship between the governmental purpose of alleviating economic distress through the sale of alcohol and the means chosen by the legislature, a petition signed by 33% of general election voters. The Court severed and struck that section of the statute because it "makes no reference to economic problems. It simply allows—without any basis, without any reason—the voters in a precinct to request an election. Such a provision does not have a reasonable relationship to the purpose of the statute, it has *no* relationship thereto." *Id*. (emphasis original).

In *Adams, Inc. v. Louisville & Jefferson Cnty. Bd. of Health*, 439 S.W.2d 586 (Ky. 1969), the Court held an ordinance that required lifeguards as well as shower facilities and separate gender-based entrances at all public and private swimming pools in the city was not rationally related to the governmental purpose of the ordinance—to protect the health and safety of the city's inhabitants—because it did not consider the variety of different swimming pools in the community. The Court observed, "while all swimming pools may present some common health hazards which would reasonably require the same regulatory safeguards, in certain areas the dissimilarity in prevailing conditions would make the application of a single standard inappropriate, unrealistic

and unreasonable." *Id*. at 592. Given the nature of apartment complex swimming pools, the Court found the requirement of a lifeguard and pool attendant at all times, as well as shower facilities and separate gender-based entrances, to be arbitrary and unreasonable. *Id*. at 590. *See also McGuffey v. Hall*, 557 S.W.2d 401 (Ky. 1977) (statute requiring all medical care providers to join government-created medical malpractice insurance fund not rationally related to governmental purpose of lowering cost of medical malpractice insurance); *City of Louisville v. Kuhn*, 145 S.W.2d 851, 856 (Ky. 1940) (ordinance that dictated hours barbershops could be open for business not rationally related to the governmental interest in regulating the conduct of businesses for the health and safety of the public); *Ware v. Ammon*, 278 S.W. 593, 595 (Ky. 1925) (statute that prohibited any business from advertising as a dry-cleaning business without first obtaining license from the state fire marshal not rationally related to governmental purpose of protecting health and safety of the public from the dangers posed by the presence of flammable, volatile substances used in dry cleaning).

This Court has also found statutes affecting the rights of litigants to fail the rational basis test. In *Commonwealth Nat. Res. & Env't Prot. Cabinet v. Kentec Coal Co*., 177 S.W.3d 718, 727 (Ky. 2005), the Court held a mining statute that required *corporate* permittees that received monetary assessments for failure to comply with statutory reclamation requirements to prepay the assessment as a condition precedent to an administrative hearing challenging the assessment, while not requiring prepayment of assessments imposed against *individual* permittees, violated the due process guarantee of § 2 of the Constitution as being arbitrary and without a rational basis. The Court reached a similar result in *Elk Horn Coal Corp. v. Cheyenne Res., Inc.,* 163 S.W.3d 408 (Ky. 2005), overruled on other grounds, *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557 (Ky. 2020). That case involved a challenge to the constitutionality of KRS 26A.300 which

authorized the trial court to assess additional damages of 10% of the judgment amount against a litigant who was unsuccessful in a second step appeal, such as an unsuccessful petition for discretionary review to the Supreme Court. Although deciding on equal protection rather that due process grounds,[22] the Court employed a rational-basis analysis and held the statute unconstitutional because there was no rational relationship between its purpose—discouraging frivolous appeals—and the means chosen by the legislature—a 10% penalty. The statute, in actuality, arbitrarily deterred appeals with merit instead of deterring appeals lacking merit. 163 S.W.3d at 418-21.

B. SB 126 is not Rationally Related to its Stated Purpose

SB 126 is arbitrary and unconstitutional under § 2 because the amendment to KRS 452.005 is not rationally related to the governmental interest of "provid[ing] litigants access to courts of this Commonwealth without concern of bias[.]" 2023 Ky. Acts, ch.131, § 2. There is no rational relationship between the particulars of the statute and the governmental purpose of combating "bias." There is no "fit" of means to purpose. The feared harm—bias—is not addressed by the remedy prescribed—empowering a litigant or intervening Attorney General to peremptorily transfer the case to an arbitrarily-selected venue without any showing that the original venue poses any "concern of bias." This is particularly so since the amendment only applies to a select class of cases—constitutional challenges to legislative or executive agency action—that are non-jury matters immune to "venue bias." The amendment is like the statute voided in *Lewis* that permitted a local option vote upon petition of 33% of general election voters without any showing of "economic problems" that may be alleviated by alcohol sales. 619 S.W.2d at 493.

[22] Kentucky Constitution § 2 is broad enough to embrace the traditional concepts of both due process of law and equal protection of the law. *Bd. of Educ. of Ashland v. Jayne*, 812 S.W.2d 129, 131 (Ky. 1991).

The underlying action highlights the nonsensical nature of the SB 126 amendment. First, the case is filed in the venue where the legislature has directed it should be filed. KRS 452.480 provides that a transitory action, such as the underlying action challenging the constitutionality of House Bill 594, may be brought in the county where the defendant resides or is summoned. In the underlying action that is Franklin County. KRS 452.005(2) provides that an action challenging the constitutionality of a statute shall be filed in the county where any plaintiff resides. In the underlying action that, again, is Franklin County. That section also authorizes out-of-state plaintiffs to sue in Franklin County, creating a third reason why the Franklin Circuit Court is the right venue for the underlying action. Consequently, but for the amendment, venue in the underlying case is proper in Franklin County.

Now for the critical question: If a case, such as the underlying action, presenting a constitutional challenge to a statute is filed in the proper venue, how does transfer of the case from that proper venue *without any showing of venue bias* to some other arbitrarily chosen venue advance the stated purpose of eliminating "concern of bias"? The answer: It doesn't. The means chosen by the legislature to address the governmental purpose of eliminating "concern of bias" is irrational.

It gets worse. The amendment provides for the selection of an alternative venue by lottery presumably from among Kentucky's 57 circuits covering 120 counties, without any consideration of whether the randomly selected circuit court has any reasonable connection to the parties or the cause of action and ignoring that the randomly selected court may be hundreds of miles away. Courts have recognized that judicial decisions based on coin tosses or dart throws or some other arbitrary process, violate due process. *See Foley v. Beshear*, 462 S.W.3d 389 (Ky. 2015) (recognizing that "decisions so random and arbitrary as to resemble the flip of a coin" violate due

process) (citing *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) (discussing due process implications of "scheme whereby a state official flipped a coin" to make decision)). A statute that uproots proper venue and subjects the non-moving parties to a venue-by-lottery for the claimed purpose of eliminating "concern of bias," all without any required showing of bias, amounts to "coin toss" venue selection and violates § 2.

Even more, the amendment arbitrarily and without any legitimate governmental purpose treats constitutional litigants differently from other litigants, thus violating § 2. Only in cases raising a constitutional challenge to governmental action can litigants be summarily evicted from an otherwise proper statutory venue and compelled to submit to a random venue with no opportunity to be heard or required showing of bias or cause. Non-constitutional challengers, on the other hand, are afforded the protection of the general change-of-venue and disqualification statutes. The legislature can only single out constitutional litigants for such treatment if there is a legitimate governmental purpose *and* the statute satisfies that purpose. *See Kentec Coal Co.*, 177 S.W.3d at 724-25. That is not the case with SB 126.

SB 126 even works against the laudable aspects of KRS 452.005. For instance, KRS 452.005(7) provides that the purpose of the statute is to ensure that constitutional challenges to government action "be given priority and prosecuted in an expeditious manner." The amendment's mandatory transfer defeats this objective. Transfer, even in the normal course, promotes delay. But in the case of the amendment, it promotes repeated delays. Once a case is transferred to another county based on the initial "notice of transfer," a different party could then invoke the transfer mandate and the action would have to be transferred yet again—and possibly again, and again, and again, depending upon the number of parties in the case and the timing of service or intervention. Similarly, under KRS 452.005(2), a plaintiff "shall" file a constitutional challenge in the county

where the plaintiff resides. But per the amendment, the action could be transferred from the county where the plaintiff resides to another county hundreds of miles away from the plaintiff's residence or place of business.[23] A plaintiff-resident of Fulton County could end up with her case transferred 425 miles and seven hours away to Greenup County. There is nothing prioritizing or expeditious about a party having to travel several hundred miles taking several hours, potentially numerous times, to litigate a case. This process is arbitrary and irrational.

Finally, we address the elephant in the courtroom. The *stated purpose* of SB 126—to serve a "government interest to provide litigants access to courts of this Commonwealth without any concern of bias"—is pretext for its *actual purpose*: a poorly disguised legislative effort to transfer cases from the Franklin Circuit Court based on grievances with that court's prior rulings.

Pretext cannot supply a legitimate governmental interest for legislation. In *Motor Vehicle Comm'n v. Hertz Corp*., 767 S.W.2d 1 (Ky. App. 1989), automobile rental companies challenged a Kentucky Motor Vehicle Commission regulation that regulated the sale of vehicles by established motor vehicle dealers that occur at temporary or off-site locations as being arbitrary and without a rational basis.[24] The Court of Appeals held the regulation unconstitutional because it was "merely a pretext for the real purpose," *to wit*:

> We must agree with the conclusion of the trial court that the Commission had no legitimate basis for promulgating the regulation in question. The purported purpose of preventing fraud was merely a pretext for the real purpose of eliminating unwanted competition. . . . [T]he illegitimate anti-competitive purpose rendered the regulation arbitrary and an unjustified interference with the free flow of commerce in violation of Section 2 of the Kentucky Constitution.

Id. at 3.

[23] Ironically, the case could be transferred from the county where the plaintiff resides to Franklin County, the very circuit court the amendment was designed to avoid.

[24] The same rational-basis constitutional analysis applies to both statutes and administrative regulations. *Allen v. Ky. Horse Racing Auth*., 136 S.W.3d 54, 61 (Ky. App. 2004).

For the many reasons noted, SB 126 does not rationally relate to the stated governmental interest of "concern of bias." Consequently, the Court should hold the amendment to be unconstitutional in violation of § 2 of the Kentucky Constitution.

IV. SB 126 OBSTRUCTS FREE AND OPEN ACCESS TO AND THE RIGHT TO PETITION THE COURTS UNDER KENTUCKY CONSTITUTION §§ 14 AND 1

Issue Preservation: This issue was preserved by raising it in the trial court. *See* Memorandum of Law in Support of Plaintiffs' Motion to Decline Transfer of Case, attached to the Petition for Supervisory Writ as Exhibit 8.

Kentucky Constitution § 14 provides that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." SB 126 infringes on this right by denying litigants access to the appropriate forum to challenge the constitutionality of laws and conduct of the government causing injury.

"The most widespread and important . . . provision [of the bills of rights] is probably the guarantee of a right of access to the courts to obtain a remedy for injury." *Commonwealth v. Claycomb*, 566 S.W.3d 202, 210 (Ky. 2018). As part of the Bill of Rights, this right "'shall remain inviolate; and all laws contrary thereto, or contrary to this constitution, shall be void.'" *Id.* at 208 (quoting *Ludwig v. Johnson*, 49 S.W.2d 347, 351 (Ky. 1932)). Thus, § 14 "'prohibits the legislature from invading the province of the judiciary and . . . the prohibition of section 14 applies to the legislative branch of the government as well as to the judicial.'" *Id.* (quoting *Commonwealth ex rel. Tinder v. Werner*, 280 S.W.2d 214, 216 (Ky. 1955)).

A plaintiff's "choice of forum should not be disturbed except for weighty reasons." *Carter v. Netherton*, 302 S.W.2d 382, 384 (Ky. 1957); *Roos v. Ky. Educ. Ass'n*, 580 S.W.2d 508, 509 (Ky. App. 1979) ("We locate in this record nothing creating the strong balance in favor of

defendant which is required to deprive plaintiff of his choice of forum"). This is especially true where the plaintiff resides in the chosen forum. *Perch v. Verisys Corp.*, No. 3:21-CV-00767-GNS, 2022 WL 4588421, *6 (W.D. Ky. Sep. 29, 2022) (citing 15 Wright & Miller, *Federal Practice and Procedure* § 3849 (rev. 4th ed. Aug. 2019 update)).

SB 126 offends both principles: it erects a barrier to the courts in general and arbitrarily forces the plaintiff from its chosen—and statutorily prescribed—forum, subjecting it to a venue selected by lottery potentially hundreds of miles and hours away, and for no required reason. The amendment seeks to insulate the government from challenges to its unconstitutional actions, as well as the General Assembly from challenges to its unconstitutional enactments, by limiting litigants' access to the appropriate circuit court and forcing the Commonwealth's citizens to incur unnecessary costs and arbitrarily imposed burdens to access the courts. This effectively prevents the average citizen—who is already punching well above her weight against the government—from bringing such actions. And even if brought, the SB 126 amendment unreasonably delays the case as venue can be changed thirty days after service or thirty days after the Attorney General decides to intervene, whenever that may be. 2023 Ky. Acts, ch.131, § 1(4)(a). And this can occur multiple times, depending on the number of parties named, delaying certainty as to what circuit court will ultimately decide the case and when. And what's more, the statute provides no appellate remedy for this abuse-prone process.

In the underlying action, the Petitioners are challenging the constitutionality of a statute that would destroy their businesses, violate their First Amendment rights, and interfere with their property rights. The Kentucky Constitution guarantees them a right of access to redress their injury. *Claycomb*, 566 S.W.3d at 210. "Section 14, originally written and adopted in 1792, does not proscribe the creation of 'undue' or 'unreasonable' delay on a Kentuckian's access to due

course of law; *Section 14 plainly proscribes delay*." *Id.* at 215-16 (emphasis added). SB 126 creates delay, and that delay violates § 14 of the Kentucky Constitution.

SB 126 also violates the right to petition the government for redress of grievances under Kentucky Constitution § 1. The right to petition the government "for redress of grievances" under § 1 is identical to the right to petition the government for redress of grievances set out in the First Amendment to the United States Constitution. When a constitutional right under the Kentucky Constitution is similar to a constitutional right under the United States Constitution, Kentucky's courts have not hesitated to rely upon cases interpreting the similar federal right. *See Commonwealth v. Reed*, 647 S.W.3d 237, 243 (Ky. 2022) (relying upon federal cases interpreting the Fourth Amendment when interpreting § 10 of the Kentucky Constitution).

The constitutional right to petition the government for redress of grievances includes the right of access to the courts. *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427 (8th Cir. 1986) (citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). An individual's constitutional right of access to the courts cannot be chilled by government action. 780 F.2d at 1427-28. A statute that forces a litigant into a venue that has been arbitrarily chosen and has no nexus to the litigant or the facts underlying the action has been held to be a denial of the constitutional right of access to the courts. *See Williams v. Illinois State Scholarship Comm'n*, 563 N.E.2d 465, 474 (Ill. 1990).

When government action implicates the constitutional right of access to the courts, the government action is subject to "strict scrutiny." *Lyon v. Vande Krol*, 940 F. Supp. 1433, 1438 (S.D. Iowa 1996). The application of this stringent standard to SB 126 is addressed in Argument II, *supra*. For all the reasons previously articulated, the specific provisions of SB 126 are not

narrowly tailored to the (pretextual) governmental interest of providing litigants access to courts without "concern of bias."

V. SECTION 231 OF THE KENTUCKY CONSTITUTION DOES NOT SAVE THE CONSTITUTIONALITY OF SB 126

The Attorney General has argued below that SB 126 is not unconstitutional because § 231 of the Kentucky Constitution confers upon the General Assembly the complete and unfettered right to determine the manner in which suits may be brought against the Commonwealth. As observed by the Franklin Circuit Court, the Attorney General misapplies § 231. *See* Exhibit 2 at 5 ("While the argument of the Attorney General has a superficial appeal, an examination of the case law demonstrates that it is simply wrong and ignores the well-established meaning of the term 'Suits against the Commonwealth.'").

This Court has held that § 231 is a constitutionalizing of the common law doctrine of sovereign immunity. When read in conjunction with § 230, its sister provision, § 231 provides that the General Assembly has the constitutional power to decide when and how the state can be sued for *money damages*. The Court made this clear in *Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1990), *to wit:*

> But our Court has recognized this provision as constitutionally protecting sovereign immunity in "suits against the Commonwealth" because otherwise it has no meaning. From its genesis in the First Constitution of 1792, Article VIII, § 4, to the Fourth Constitution of 1891 (the present Constitution), the pronouncement has followed immediately in sequence a proviso that "no money shall be drawn from the state treasury but in consequence of appropriations made by law." The "Debates, Kentucky Convention 1849," pp. 628–30, confirm the tie-in between §§ 230 and 231 of the present Constitution. These two sections recognize the existence at common law of sovereign immunity and authorize the General Assembly, by general act, to establish a method for adjusting claims against the state government as an alternative to private, special legislation. The purpose of the second section in the sequence (now § 231) is to make it possible for the General Assembly to provide a formula to pay claims by general law from the state treasury without violating the first section. Without § 231, a statute permitting judgments against the

> Commonwealth to be paid out of the state treasury would violate the previous section.

Id. at 329. This has long been the law. *See Foley Const. Co. v. Ward*, 375 S.W.2d 392, 393 (Ky. 1963) ("Kentucky Constitution Section 230 complements Section 231. It contains prohibitions against withdrawal of money from the State Treasury. . . . [B]oth sections are intended to promote an orderly system for the disposition of public money."). And this is still the interpretation of § 231. *See Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009).

But even more, § 231 does not apply to declaratory judgment actions, particularly those claiming that action by the government is unconstitutional, like the underlying case here. *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).

Finally, all sections of Kentucky's constitution are to be interpreted, if possible, in harmony with one another. *Rooks v. Univ. of Louisville*, 574 S.W.2d 923, 925 (Ky. App. 1978); *see also Poole Truck Line, Inc. v. Transp. Cabinet/Dep't of Highways*, 892 S.W.2d 611, 614-15 (Ky. App. 1995). To expand § 231 in the manner suggested by the Attorney General, would put it in glaring conflict with the many other constitutional rights asserted here. The Attorney General's argument was properly rejected by the Franklin Circuit Court and it should likewise be rejected by this Court.

CONCLUSION

For all the reasons set out herein, 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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CERTIFICATE AS TO WORD COUNT

Pursuant to RAP 15, the undersigned certifies that this document complies with the 17,500-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 17,392 words as set forth in the word count of the word-processing system used to prepare the document.

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