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Supreme Court of Kentucky

No. 2023-SC-0196

ARKK PROPERTIES, LLC, *et al.* — *Petitioners*

v. On Writ from Franklin Circuit Court
No. 23-CI-00282

DANIEL CAMERON, in his official capacity as Attorney General of the Commonwealth of Kentucky, *et al.* — *Respondents*

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CERTIFICATE OF SERVICE

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INTRODUCTION

This petition for a supervisory writ asks the Court to decide whether a duly enacted law is constitutional before any other Kentucky court weighs in. That law is Senate Bill 126, which provides for a change of venue in challenges to Kentucky law. Nothing about this case justifies short-circuiting Kentucky's three-level system of judicial review. The issue of SB 126's constitutionality will reach this Court in the ordinary course—likely sooner rather than later. In any event, SB 126 is perfectly constitutional. It is a straightforward exercise of the General Assembly's near-plenary authority to establish venue, including by providing a mechanism to change it.

STATEMENT CONCERNING ORAL ARGUMENT

The Court has scheduled oral argument for August 16, 2023. The Attorney General looks forward to addressing the Court at that time.

STATEMENT OF POINTS & AUTHORITIES

STATEMENT OF THE CASE

During its 2023 legislative session, the General Assembly passed two bills relevant to this matter. First, the legislature passed House Bill 594, which amends the definition of a prohibited "gambling device." 2023 Ky. Acts, ch. 4, § 1(7)(a). Several plaintiffs who allegedly own, operate, or use such gambling devices (together, AARK Properties) sued the Attorney General to challenge the constitutionality of HB 594. Compl. ¶¶ 4–7 (Ex. 1). They allege all manner of claims, including that HB 594 violates the Kentucky Constitution's protections for free speech, due process, equal protection, special legislation, contracts, takings, and the separation of powers. *Id.* ¶¶ 28–77.

This leads to the second bill relevant here. Senate Bill 126, which took effect shortly after ARKK Properties filed suit, allows for a change of venue upon request in a case that, as relevant here, challenges the constitutionality of a Kentucky statute. 2023 Ky. Acts, ch. 131, §§ 1(1)(a)1, 1(4). More specifically, SB 126 permits a plaintiff or defendant in such a suit to "seek a change of venue by filing a notice of transfer in the Circuit Court in which the action was originally filed." *Id.* § 1(4)(a). Once such a notice is filed, it "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." *Id.* § 1(4)(b).

The Attorney General filed a SB 126 notice of transfer in the underlying challenge to HB 594. Mar. 29, 2023 Notice (Ex. 2). In response, ARKK Properties claimed that SB 126 is unconstitutional. Am. Compl. ¶¶ 84–116 (Ex. 3). On ARKK Properties' motion to decline transfer of this case, the circuit court, Judge Phillip Shepherd, sua sponte determined that "the issues presented in this [m]otion should be decided by the Supreme Court under Section 110(2)(a) of the Kentucky Constitution." Apr. 17, 2023 Order at 10 (Ex. 4). The circuit court thus gave the parties a short time in which to file a supervisory-writ petition in this Court. ARKK Properties obliged by filing the present petition.

On June 14, 2023, the Court ordered the parties to file simultaneous briefs and scheduled oral argument. A week later, the Supreme Court Clerk notified the Attorney General that she "do[es] not plan to undertake a random selection of a new venue pursuant to your notice until [this] case is resolved or upon further order of the Supreme Court or other court of competent jurisdiction." June 21, 2023 Letter (Ex. 5). As a result, the underlying challenge to HB 594 remains pending in Franklin Circuit Court.

ARGUMENT

The Court should deny ARKK Properties' petition for two reasons. First, this venue dispute does not justify an extraordinary exercise of the Court's supervisory-writ authority. This Court has repeatedly turned away ordinary-writ petitions because a venue error can be corrected in the ordinary course in an appeal

from final judgment. Second, the Court should deny relief for the simple reason that SB 126 is constitutional. Venue transfer is a policy issue reserved almost exclusively to the General Assembly, and nothing in SB 126 crosses any constitutional line.

I. The Court should resolve the constitutionality of SB 126 in an appeal from final judgment.

No one disputes that Section 110(2)(a) of the Kentucky Constitution empowers this Court to issue a supervisory writ. But whether the Court should do so in a given case is another question entirely. A supervisory writ skips to the end of the judicial process. That process has three levels for a reason: it results in more deliberative decision-making that is more likely to be correct. A court of last resort naturally benefits from the thinking of lower courts. It also benefits from the parties sharpening their arguments before getting here. For these simple reasons, the Court should be loath to grant a supervisory writ.

This Court's case law bears out this hesitancy. Section 110(2)(a) does not "require[]" the Court "to do anything." *Abernathy v. Nicholson*, 899 S.W.2d 85, 88 (Ky. 1995). In fact, its language is "decidedly discretionary." *Id.* And the Court carefully guards that discretion. A supervisory writ is proper "only in well defined or compelling circumstances." *Id.* Even "interesting, complex, and novel legal issues of first impression" may not meet this high standard. *Ex parte Smith*, 664 S.W.3d 505, 508 (Ky. 2022). Importantly, if an issue falls short of this standard,

as almost all do, that does not mean the issue will never reach this Court. All it means is that the case raising the issue must follow the same route as any other lawsuit. *Abernathy*, 899 S.W.2d at 88–89.

For two reasons, the Court should decline to consider SB 126's constitutionality at this early juncture. First, which circuit court hears a case is nothing like the extraordinary circumstances that typically justify Section 110(2)(a) relief. Venue is an issue that is routinely reviewed by appellate courts on the back end following final judgment. And this Court has repeatedly rejected ordinary-writ requests about venue. Second, this Court's eventual review of SB 126 will benefit from allowing the underlying litigation, and other cases like it, to play out.

Cases in which this Court grants Section 110(2)(a) relief invariably involve novel circumstances. Most recently, the Court granted a supervisory writ early in the COVID-19 crisis because of the "need for a clear and consistent statewide public health policy." *Beshear v. Acree*, 615 S.W.3d 780, 797 (Ky. 2020). It granted Section 110(2)(a) relief when a party sought records from the Court of Justice related to the death penalty. *Ex parte Farley*, 570 S.W.2d 617, 620–21 (Ky. 1978). It granted a supervisory writ when the Auditor tried to "audit the books and accounts" of the Kentucky Bar Association. *Ex parte Auditor of Pub. Accts.*, 609 S.W.2d 682, 683 (Ky. 1980). And it granted Section 110(2)(a) relief because of "an *ex parte* culture among some [judges] and some members of the bar that appears completely inconsistent with the ethical execution of judicial duties."

Commonwealth v. Carman, 455 S.W.3d 916, 923 (Ky. 2015). These disputes all share one thing in common: they were very much unprecedented.

By comparison, a venue dispute is nothing new. The General Assembly has regulated venue, including by allowing for a change in venue, for longer than our Constitution has existed. KRS 452.010, previously Ky. Stat. 1094. This being so, the Court has become accustomed to deciding venue issues. It almost always does so through the ordinary appellate process. In fact, the Court has repeatedly rejected attempts to seek an ordinary writ to challenge a venue determination. *See, e.g.*, *Fritsch v. Caudill*, 146 S.W.3d 926, 930 (Ky. 2004) (denying ordinary writ regarding venue because if the petitioner is correct "the trial court or an appellate court will so recognize and relief in the nature of dismissal for improper venue will be granted"). In fact, in recently denying an ordinary writ, the Court unanimously reaffirmed that "[w]e have generally determined that a person aggrieved by a venue determination is confined to obtaining review only after a final judgment." *Romines v. Coleman*, --- S.W.3d ---, 2023 WL 3113399, at *4 (Ky. Apr. 27, 2023).

This longstanding practice demonstrates that a venue dispute differs in important respects from the unusual circumstances that usually justify a supervisory writ. In fact, as the circuit court noted, Kentucky's appellate courts have considered the constitutionality of venue statutes before. Apr. 17, 2023 Order at

7. In both identified instances, the court did so upon an appeal from final judgment. *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70, 71 (Ky. 1936); *Hummeldorf v. Hummeldorf*, 616 S.W.2d 794, 796 (Ky. App. 1981). That well-established route for challenging a venue determination counsels against issuing a supervisory writ here. *See Seadler v. Int'l Bhd. of Elec. Workers, Local 369*, 642 S.W.3d 712, 714 (Ky. 2022) (denying supervisory writ because there was another "proper procedural mechanism" to raise the issue).

If the Court declines to grant Section 110(2)(a) relief here, it would not say, or even imply, that SB 126 is constitutional. *See G.P. v. Bisig*, 655 S.W.3d 128, 132 (Ky. 2022) (holding that denying ordinary writ "is not to say" that "constitutional arguments are without merit"). Nor would it guarantee that it will never decide SB 126's constitutionality. All it would say to ARKK Properties is this: litigate your case. If the circuit court refuses to transfer the case, as seems likely in light of its order, the Attorney General's recourse is an appeal after final judgment. And if SB 126 were enforced, ARRK Properties' remedy is an eventual appeal. In either instance, this Court remains the final arbiter of the constitutionality of SB 126. Plus, another case challenging SB 126 may well make it to this Court in the meantime.[1]

[1] Besides the underlying matter, the Attorney General has filed a SB 126 notice of transfer in *Davis v. Commonwealth*, No. 23-CI-3628 (Jefferson Cir. Ct.), *Kentucky Education Association v. Link*, No. 23-CI-0343 (Franklin Cir. Ct.), and *Prominent Technologies, LLC v. Cameron*, No. 23-CI-2819 (Jefferson Cir. Ct.).

In addition, this Court's consideration of SB 126's constitutionality would benefit from allowing the issue to percolate through the courts. At this early juncture, SB 126 has been the law of Kentucky for less than four months. Everyone, the courts included, would benefit from taking a collective breath and allowing any issues regarding SB 126 to be fully litigated in the ordinary course. After all, no lower court has actually held that SB 126 is unconstitutional. And what the plaintiffs are requesting—an injunction prohibiting enforcement of SB 126—is no small thing. "[N]on-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Cameron v. Beshear*, 628 S.W.3d 61, 73 (Ky. 2021). These stakes weigh against skipping the first two levels of judicial review.

ARKK Properties' main reason for seeking Section 110(2)(a) relief (apart from the circuit court essentially telling it to) is that SB 126 directs the Supreme Court Clerk and the Franklin Circuit Court Clerk to undertake action to accomplish a change in venue. Writ 8–9. These obligations, ARKK Properties says, make this Court the "only forum in which the controversy can be heard and officially resolved." *Id.* at 9 (quoting *Ex parte Auditor of Pub. Accts.*, 609 S.W.2d at 683). But if mere statutory duties for clerks were reason enough for Section 110(2)(a) relief, every dispute about venue transfer would end up here on a supervisory writ. That's because Kentucky's longstanding venue-transfer statute also directs circuit clerks to take action to accomplish a venue change. KRS

452.060 ("[T]he circuit clerk shall make out a transcript of the orders pertaining to the case, which, together with the original papers, he shall, as soon as practicable, carry or send by some discreet person to the clerk of the court to which the action is removed."); KRS 452.080 (requiring the receiving circuit clerk to "note the action of record"). This makes sense, given a circuit clerk's essential role with respect to managing the docket. *See, e.g.*, CR 79.01. In fact, it is hard to imagine a venue-change law that would not need a clerk to implement the law in some way. So if the Court determines that this supervisory writ is proper, it will open the door to extraordinary relief whenever there is a venue-transfer dispute.

But the Court's ruling would not stop there. SB 126 is far from the only statute that directs a court clerk to do something. There are dozens of such statutes. *E.g.*, KRS 172.110 (making circuit clerk ex officio county law librarian); KRS 188.030 (instructing clerk to issue summons against nonresident motorists); KRS 311.606(3) (requiring clerks to report criminal convictions of licensed physicians); KRS 376.110(1) (clerk's duties on actions to enforce liens); KRS 416.580(1)(a) (circuit court or clerk appoints commissioners to assess value of property subject to eminent domain); KRS 422.320 (clerk maintains copies of medical records used in depositions); KRS 453.060(3) (clerk sends certain attorneys' fees to county law-library trustees); KRS 454.210(3)(b) (clerk issues summons of nonresidents). And there are several statutes in addition to SB 126 that direct the Supreme Court Clerk to take action. KRS 64.005 (all clerks collect fee

for taking or filing bond and deposit in state treasury); KRS 118A.045(2) (Supreme Court clerk certifies family-court divisions); KRS 431.218 (Supreme Court Clerk submits death-penalty mandate to proper officer). Thus, if Section 110(2)(a) relief is warranted here, the same is true for any case that concerns the many statutory responsibilities of court clerks. Make no mistake, to grant a supervisory writ here is to substantially broaden the circumstances in which the Court exercises such extraordinary power.

II. SB 126 is constitutional.

SB 126 is a lawful exercise of the General Assembly's broad power to establish venue, including by providing a mechanism to change venue. ARKK Properties' constitutional objections cannot overcome that simple fact. Before getting there, some background helps to frame the issue.

In Kentucky, all circuit courts are created equal. No one circuit court, including the Franklin Circuit Court in our capital, is superior to another. "Constitutionally speaking, Kentucky has but one circuit court and all circuit judges are members of that court and enjoy equal capacity to act throughout the state." *Baze v. Commonwealth*, 276 S.W.3d 761, 767 (Ky. 2008). In short, a circuit judge in Harlan or Henderson is just as empowered to decide any case, no matter the topic, as is a circuit judge in Louisville, Lexington, or Frankfort.

Although all circuit courts enjoy equal power, one circuit court in one county has long decided the lion's share of the constitutional challenges to state

law. That was because of how our previous venue statutes worked. *See Beshear v. Goodwood Brewing Co., LLC*, 635 S.W.3d 788, 794 (Ky. 2021). The list of recent landmark constitutional decisions decided in the first instance by the Franklin Circuit Court is too long to list. By way of example, Governor Beshear's challenge to the COVID-19 bills from the 2021 session started there. *Cameron*, 628 S.W.3d at 67. So did the dispute about the well-known pension-reform law. *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 77 (Ky. 2018). As did the paradigmatic case about the Attorney General's inability to unilaterally contract with outside counsel. *Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 784 (Ky. 2019). So too for the challenge to Kentucky's right-to-work law. *Zuckerman v. Bevin*, 565 S.W.3d 580, 586 (Ky. 2018). As well for the back-to-back challenges to Marsy's Law. *Ward v. Westerfield*, 653 S.W.3d 48, 50 (Ky. 2022); *Westerfield v. Ward*, 599 S.W.3d 738, 740 (Ky. 2019). And the Attorney General is currently defending at least a dozen Kentucky laws either before the Franklin Circuit Court or on appeal from a judgment of that court.

That so much constitutional litigation starts in the Franklin Circuit Court is not meant to criticize that court, the judges who serve on it, or their rulings. The point is that Kentucky's historical venue regime led to two circuit judges in a single county deciding landmark case after landmark case affecting Kentuckians from Pikeville to Paducah. Everyone agrees that SB 126 will change this dynamic. It will allow circuit judges from across the Commonwealth to hear these

statewide disputes. For example, various plaintiffs have challenged HB 594 in both Franklin Circuit Court and Jefferson Circuit Court. Under SB 126, those challenges could end up in circuit courts in, for example, Greenup, Pulaski, McCracken, or Shelby county. Viewed this way, the logic of SB 126 is hard to miss. The law ensures that statewide disputes have the chance to be heard in every corner of the Commonwealth. More to the point, because challenges to Kentucky law matter statewide, and because all circuit judges can hear these cases, it makes sense to have a venue law that facilitates *all* circuit judges in *all* parts of the Commonwealth deciding issues that affect *all* Kentuckians.

This logic cannot be lost on the Court. It in fact explains why its members are elected from regional judicial districts rather than statewide. *See* Ky. Const. § 117. Because this Court decides issues for all Kentuckians, the thinking goes, having a Justice from every region of our Commonwealth benefits judicial decision-making. If the composition of this Court is reasonable, so is SB 126's dispersal of constitutional challenges among circuit courts throughout the state.

But the logic behind SB 126 does not stop there. The law also neutralizes any possible advantage that a plaintiff can gain through venue selection. Before filing a lawsuit, any lawyer worth his or her salt will think about venue selection if the law allows the case to be filed in more than one venue. To be clear, if Kentucky law permits a lawyer to file suit in one of several venues, there is nothing wrong with a lawyer determining the best venue for his or her client. In fact,

doing so is generally part of the zealous advocacy expected of Kentucky lawyers.[2] SCR 3.130 pmbl. III; *see* Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 Neb. L. Rev. 79, 108 (1999) ("[E]xcept in those cases in which attorneys have acted outside of procedural and substantive law, attorneys should be assured that they are acting ethically when they abide by the law in selecting a forum.").

ARKK Properties likely engaged in this very thought exercise before filing its suit. Under KRS 452.005, ARKK Properties could have filed its challenge to HB 594 in any one of four counties: Franklin, Fayette, Kenton, or Boone.[3] *Compare* Compl. ¶¶ 9–16, *with* KRS 452.005(2). Yet of these options, ARKK Properties *chose* the Franklin Circuit Court. This of course is not to guarantee that the Franklin Circuit Court will give ARKK Properties a win at the end of the day. But it is to say that ARKK Properties preferred the Franklin Circuit Court over three other equally permissible venues for a reason. And that reason, whatever it was, explains SB 126.

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[2] Kentucky precedent suggests that a "wrongful and vexatious" venue-selection decision can create problems. *See Calhoun v. Lenahan*, 88 S.W.2d 288, 290 (Ky. 1935) (discussing a case in which a party sued in Minnesota for an injury that occurred in Kentucky).

[3] ARKK Properties purported to file its complaint in Franklin Circuit Court because the Attorney General's "official acts occur in Franklin County." Compl. ¶ 19. But when a Kentucky law is challenged as unconstitutional, venue is set by KRS 452.005. It is the more specific venue statute. *See Bevin v. Beshear*, 526 S.W.3d 89, 91 n.6 (Ky. 2017).

Viewed this way, SB 126 simply neutralizes whatever advantage a plaintiff gains through venue selection. *See* Lynn M. Lopuck & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 Duke L. J. 1405, 1464 (2000) (noting plaintiffs can use "venue privilege" to "choose the jurisdiction for the likelihood that its courts will rule in their favor"). The law allows a defendant one chance at the outset of the case to change venue to a neutrally selected location.[4] Although the General Assembly is not required to explain itself when passing laws, the emergency clause to SB 126 reflects this rationale. 2023 Ky. Acts, ch. 131, § 2. Put simply, whatever advantage a plaintiff challenging Kentucky law could previously gain by selecting among multiple venues is no more.

A. Venue is for the legislature to determine subject to two narrow exceptions.

Almost all of ARKK Properties' constitutional objections are answered by the simple fact that SB 126 is a lawful exercise of the General Assembly's legislative power to establish venue. The General Assembly's constitutional authority to regulate venue, which includes providing a mechanism for changing

[4] Below, some attention was paid to the fact that SB 126 also allows a plaintiff to change venue. 2023 Ky. Acts, ch. 131, § 1(4)(a). Kentucky's preexisting venue-transfer statute works the same way. KRS 452.010(2). SB 126's equal application to plaintiffs and defendants was likely done out of an abundance of caution given *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 421 (Ky. 2005), *overruled on other grounds by Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557 (Ky. 2020). And it is not hard to imagine a scenario in which Kentucky's venue statutes require a plaintiff to challenge Kentucky law in a venue in which the plaintiff would prefer not to litigate.

venue, is well-established and near-plenary. Indeed, for longer than our current Constitution has existed, the General Assembly has established a mechanism to change venue. The venue-change statute that predates SB 126, which remains on the books, traces in part all the way back to 1852. KRS 452.010, formerly Ky. Stat. § 1094.

Although SB 126 differs from that longstanding provision in some respects, the two laws are not altogether different. Both laws direct a court clerk to take action to effect a change of venue. 2023 Ky. Acts, ch. 131, § 1(4)(b)–(c); KRS 452.060; KRS 452.080. Both laws direct what form the relevant court filing shall take. 2023 Ky. Acts, ch. 131, § 1(4)(a) (requiring a "notice of transfer"); KRS 452.030 (requiring a "verified motion"). And both laws allow either a plaintiff or defendant to seek a venue change. 2023 Ky. Acts, ch. 131, § 1(4)(a); KRS 452.010(2). In fact, Kentucky's preexisting venue-transfer statute arguably goes further than SB 126 by establishing the standard a court is to apply, KRS 452.010(2), and requiring a hearing, KRS 452.030.

In light of the century-plus of history supporting KRS 452.010, it should come as no surprise that Kentucky courts have long recognized—over and over—that establishing venue and directing when it can be changed are tasks for the General Assembly. As this Court's predecessor held more than a century ago, "[t]he right to a change of venue is only bestowed by the statute, and the Legislature has authority to provide for the extent and manner of its exercise." *Heck*

v. Commonwealth, 174 S.W. 19, 20 (Ky. 1915); *see also Penman v. Commonwealth*, 133 S.W. 540, 543 (Ky. 1911) ("The only power the court has to grant a change of venue is conferred by the statute . . . ."). Or as the Court of Appeals held almost forty years ago, "[v]enue is purely a legislative matter," and "[f]or the judiciary to attempt to re-write the [venue-change] statute would be an unconstitutional usurpation of power and violative of Sections 27, 28, and 29 of our Constitution." *Blankenship v. Watson*, 672 S.W.2d 941, 944 (Ky. App. 1984), *overruled on other grounds by Dep't of Educ. v. Blevins*, 707 S.W.2d 782, 785 (Ky. 1986); *see also Copass v. Monroe Cnty. Med. Found., Inc.*, 900 S.W.2d 617, 619 (Ky. App. 1995) (reaffirming *Blankenship*'s holding that "venue is purely a legislative matter"). Justice Keller perfectly captured the applicable rule during her service on the Court of Appeals: "[B]ecause venue is a creature of statute, relief from [venue] difficulties lies with the legislature, not the courts." *O'Bannon v. Allen*, 337 S.W.3d 662, 666 (Ky. App. 2011).

The text of our Constitution shows why Kentucky courts have uniformly held for more than a century that venue is a legislative prerogative. In particular, Section 59(3) of the Constitution can only be read to say that the General Assembly possesses near-plenary authority to regulate venue. That section prohibits the General Assembly from "provid[ing] for changes of venue in civil or criminal causes" by "local or special acts." For this language to have meaning, it must be that the General Assembly can establish when venue can be changed as long as

the law does not violate Section 59(3). *See Commonwealth v. Bowman*, 100 S.W.2d 801, 802 (Ky. 1936) (recognizing Section 59(3)'s role with respect to the General Assembly's venue authority). Were the General Assembly without authority to regulate venue, Section 59(3) would be superfluous. *See Murphy v. Commonwealth*, 500 S.W.3d 827, 831 (Ky. 2016) (discussing surplusage canon).

The General Assembly's prerogative to establish venue is also recognized by Section 11. That section provides that "[t]he General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial may be obtained." Ky. Const. § 11. Section 11 thus imposes a convenience limitation on the General Assembly's power to allow a venue change in criminal matters.[5] But that convenience limitation applies only in criminal prosecutions. Section 11 thus connotes that the General Assembly has a freer hand in allowing venue changes in civil actions. For those actions, the General Assembly can allow a venue change without regard to the parties' convenience. *See id.*

Although Sections 11 and 59(3) fully confirm the General Assembly's prerogative to create a mechanism for changing venue, this case implicates one other

[5] Section 11 is the successor to Article II, Section 38 of the 1850 Constitution, which stated that "[t]he General Assembly shall not change the venue in any criminal or penal prosecution, but shall provide for same by general law."

aspect of the Constitution. Section 231 provides that "[t]he General Assembly may, by law, direct in what manner and *in what courts* suits may be brought against the Commonwealth." (emphasis added). The "in what courts" language of Section 231 plainly directs that the General Assembly gets to establish venue in suits "against the Commonwealth." And a constitutional challenge to state law in which a state official is an official-capacity defendant can only be understood as a suit against the Commonwealth. *See Commonwealth v. Ky. Ret. Sys.*, 396 S.W.3d 833, 838 (Ky. 2013) (holding that for a lawsuit involving "the constitutionality of a statute," it is "indisputable that the interest at issue is a state issue, not just an agency issue"); *see also Lewis v. Clarke*, 581 U.S. 155, 162 (2017). This is especially true when, as here, the official-capacity defendant is the Attorney General, who is uniquely empowered to speak for the Commonwealth in court. KRS 15.020(1), (3); *Commonwealth ex rel. Beshear v. Commonwealth Off. of Governor ex rel. Bevin*, 498 S.W.3d 355, 362–63 (Ky. 2016).

Section 231, it is true, is often implicated in the context of sovereign immunity. But its text is not so limited. And its text is what controls. *Commonwealth v. Claycomb*, 566 S.W.3d 202, 215 (Ky. 2018). Section 231 does not say that the General Assembly decides venue only when sovereign immunity applies; it says that the General Assembly decides venue in suits against the Commonwealth—full stop. Indeed, in an opinion that has not been questioned in the nearly fifty

years since, the Court of Appeals squarely held that Section 231 grants the General Assembly venue power without regard to whether sovereign immunity applies. *See H. E. Cummins & Sons Constr. Co. v. Turnpike Auth.*, 562 S.W.2d 651, 653 (Ky. 1977) ("Without regard to the question of sovereign immunity, the legislature has the express power to enact legislation fixing venue and limitations for all actions . . . brought against an agency of the Commonwealth."); *see also Kovachevich v. Univ. of Louisville*, 597 S.W.2d 621, 622 (Ky. App. 1980) (reaffirming *H. E. Cummins*). On top of that, this Court's predecessor recognized that Section 231 informs the General Assembly's authority to establish venue even when a lawsuit "was authorized by a resolution of the General Assembly."[6] *Bowman*, 100 S.W.2d at 801–02.

* * *

So to summarize: Setting venue is for the General Assembly. This includes establishing a mechanism for changing venue. Case after case has so held for more than a century. The General Assembly's authority in this respect traces to

[6] Like the circuit court, ARKK Properties discounts the applicability of Section 231. Writ 40–42; Apr. 17, 2023 Order at 4–6. In their view, Section 231 only applies when sovereign immunity is implicated. As explained above, the Attorney General disagrees based on the plain text of Section 231 and precedent interpreting it. This point, however, is ultimately academic given that Sections 11 and 59(3) amply justify SB 126.

Sections 11, 59(3), and 231 of the Constitution and is near plenary. These provisions impose only two limitations on the General Assembly's venue power: (i) in criminal cases only, a venue change requires a consideration of "convenien[ce]"; and (ii) the General Assembly must provide for a venue change by a general law. Absent those two limitations, the power to establish and change venue is left exclusively to the General Assembly. ARKK Properties does not even suggest that SB 126 transgresses either of these two lines. For this reason alone, SB 126 is constitutional.

B. SB 126 operates safely within the separation of powers.

Against this backdrop, ARKK Properties' separation-of-powers argument falls apart. No doubt, Kentucky's separation of powers is robust. *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922). But as explained above, the Constitution expressly places establishing venue and providing a mechanism for changing it in the General Assembly's bucket. In fact, for the Court to second-guess the legislature's venue statutes itself violates the separation of powers. *See Copass*, 900 S.W.2d at 619 (holding that the "judiciary may not rewrite the [venue] statutes"); *O'Bannon*, 337 S.W.3d at 666 ("[B]ecause venue is a creature of statute, relief from [venue] difficulties lies with the legislature, not the courts.").

1. ARKK Properties' many attempts to get around this simple fact come up short. It first argues that "in reality" SB 126 is a "judge-recusal statute." Writ

11. But SB 126's text is the "reality" that matters. And by its text, SB 126 expressly regulates venue, not judicial bias.

In Kentucky, a judge must recuse if his or her "impartiality might reasonably be questioned." *Abbott, Inc. v. Guirguis*, 626 S.W.3d 475, 482 (Ky. 2021). This is an objective standard that requires a moving party to provide "an affidavit setting forth [his or her] factual allegations." *Id.* at 484. SB 126 in no way relates to that objective standard, nor does it require submission of an affidavit explaining why the party filed a notice of transfer. Instead, SB 126 simply gives plaintiffs and defendants an unqualified right to file a notice of transfer of venue at the outset of a case. 2023 Ky. Acts, ch. 131, § 1(4)(a). Thus, SB 126's transfer mechanism in no way depends on a party's concerns about judicial bias. Under SB 126, a party could believe the circuit judge is as fairminded as they come yet still file a notice of transfer.

Indeed, in the proceedings below, the Attorney General's counsel stated that the Attorney General has not asserted that Judge Shepherd should recuse from the challenge to HB 594. VR 4/11/2023 11:14:22. And in another case, the Attorney General filed a notice of transfer after Judge Shepherd recused from the matter. May 30, 2023 Order at 5, *Ky. Educ. Ass'n v. Link*, No. 23-CI-0343 (Franklin Cir. Ct.) (Ex. 6); May 31, 2023 Notice, *Ky. Educ. Ass'n v. Link*, No. 23-CI-0343 (Franklin Cir. Ct.) (Ex. 7). This illustrates that SB 126 is about venue,

not specific judges. Put simply, SB 126 is about the "where" of judicial decision-making, while a recusal statute concerns the "who."

To be sure, SB 126's emergency clause notes the "critical government interest [in] provid[ing] litigants access to courts of this Commonwealth without any concern of bias." 2023 Ky. Acts, ch. 131, § 2. But the fact that these concerns prompted the General Assembly to include an emergency clause does not make SB 126 a recusal statute. As noted above, concerns of judicial bias are statutorily irrelevant to a party's ability to seek transfer. In any event, any bias concern underlying SB 126 is not judge-specific, as recusal rules are. SB 126 neutralizes whatever advantage a plaintiff can secure from selecting the venue when filing suit. SB 126 simply levels the playing field between plaintiffs and defendants when it comes to venue selection.[7]

2. Next, ARKK Properties says that SB 126 violates the separation of powers because it allegedly "divests" circuit courts of jurisdiction. Writ 14–16. But venue and jurisdiction are distinct. *See Fritsch*, 146 S.W.3d at 927 ("[W]hile the concept of venue is important, it does not reach the fundamental level of jurisdiction, a concept whereby the authority of the court to act is at issue.").

[7] If the Court nevertheless concludes that SB 126 looks too much like a judicial-recusal statute, for the reasons explained below, the law should be upheld under comity principles. *See Guirguis*, 626 S.W.3d at 481 n.10 (noting that the Court upheld a recusal statute "on comity principles" in *Foster v. Overstreet*, 905 S.W.2d 504, 506–07 (Ky. 1995)).

Indeed, "there are fundamental distinctions between the concepts of jurisdiction and venue, the former relating to the power of courts to adjudicate and the latter relating to the proper place for the claim to be heard." *Dollar Gen. Stores, Ltd. v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007). And under SB 126, at all times a circuit court has jurisdiction to do whatever it deems necessary. This reflects the notion that "Kentucky has but one circuit court and all circuit judges . . . enjoy equal capacity to act throughout the state." *Baze*, 276 S.W.3d at 767.

Contrast this venue paradigm with ARKK Properties' favored case. In *Smothers v. Lewis*, the challenged law prohibited courts from interfering with the revocation of an alcohol-beverage license during an appeal. 672 S.W.2d 62, 63 (Ky. 1984). That statute, *Smothers* held, "directly locks horns with the constitutionally inherent injunction power of the courts." *Id.* at 65. SB 126 does no such thing. For example, to this day, if Judge Shepherd decided to enter a temporary injunction against the enforcement of HB 594, he could do so (assuming the law and facts support such relief). And as soon as this case is transferred, the receiving circuit court can pick up wherever Judge Shepherd left off. The bottom line is that at no point during the transfer process is a circuit court without jurisdiction to immediately grant whatever relief it deems necessary.[8]

[8] If the Court finds that SB 126 is contrary to *Smothers*, Kentucky's longstanding venue-transfer provision is problematic too. *See* KRS 452.090 ("The court to which the action is removed shall have the same power as to its trial and final disposition as the court from which it was removed.").

In fact, recent experience bears this out. As noted above, the Attorney General has filed a SB 126 notice of transfer in several cases in addition to the underlying one. In *Davis v. Commonwealth*, No. 23-CI-3628 (Jefferson Cir. Ct.), the Attorney General filed a notice of transfer on June 26, 2023. June 26, 2023 Notice (Ex. 8). Yet at this point, the Supreme Court Clerk has not taken the statutory steps to transfer the matter, which means that the case is still pending in Jefferson Circuit Court. As such, even after the Attorney General filed his notice of transfer, that court granted a temporary injunction against enforcement of the law challenged there. July 3, 2023 Order, *Davis v. Commonwealth*, No. 23-CI-3628 (Jefferson Cir. Ct.) (Ex. 9). And that circuit court clearly had jurisdiction to do so. This sequence of events demonstrates that SB 126 is not about jurisdiction. It only concerns venue.

3. ARKK Properties' final objection under the separation of powers is that SB 126 allegedly encroaches on the judicial power by prescribing the filing of a notice of transfer and requiring the Supreme Court Clerk and initial circuit clerk to take action. Writ 16–18. But Kentucky's venue-change statutes have done analogous things for decades. For example, KRS 452.030 states that an "[a]pplication for a change of venue shall be made by verified motion" and requires the court to have a hearing on the motion. And KRS 452.060 directs the initial circuit clerk in his or her duties upon a change of venue, while KRS 452.080 directs the actions of the receiving circuit clerk. So Kentucky law has

long established the form for seeking a venue change and directed the actions of both the transferring and receiving circuit clerk.

These longstanding statutes, which ARKK Properties' arguments logically call into question, recognize that the General Assembly's authority to provide for a change in venue necessarily entails some involvement in the procedural mechanism of accomplishing that change. That is to say, because courts and circuit clerks must necessarily participate in effecting a change of venue, the General Assembly's constitutional power to provide for a change in venue will always touch in some measure on courts and circuit clerks. More to the point, it is hard to conceive of a venue-change statute that does not in some way affect circuit clerks and court filings. Thus, the involvement of courts and clerks is a feature, not a bug, of venue-change provisions.

To be clear, nothing said here minimizes the judicial power. The reality, however, is that a law like SB 126 necessarily operates at the intersection of the legislative power and the judicial power. Venue is for the legislature, but venue inevitably affects the courts. That SB 126 operates at the boundary between two branches of government is why the law leaves many details to the Court of Justice to spell out. For example, ARKK Properties complains that "SB 126 does not state which circuit courts are to be included by the Clerk of the Supreme Court in making the random selection, nor how the Clerk is to undertake the random selection, nor the time period in which the Clerk is required to act." Writ 4 n.5.

But this lack of details is by design. It is a recognition—indeed, an affirmation—of the judicial power. By not specifying these details, SB 126 intentionally respects the ability of the Court of Justice to fill them in.

This notion is not new in the venue context. For example, although Kentucky has long had venue statutes, Kentucky's rules of civil procedure help to implement them. For example, CR 12.02 directs that a motion for "improper venue" "shall be made before pleading if a further pleading is permitted." And CR 12.08(1) directs when a defense of "improper venue" can be waived. These civil rules demonstrate that effectuating venue statutes necessarily requires the joint participation of both the legislature and the judiciary. SB 126 is no different. That SB 126 affects the Court of Justice is not evidence of its unconstitutionality. That trait is a feature of any venue-transfer statute.

The Attorney General acknowledges that SB 126's involving the Supreme Court Clerk in the venue-transfer process through a "random selection" is an innovation in Kentucky venue law. But SB 126 is not the first statute to direct the Supreme Court Clerk to take action. *Supra* at 8–9 (collecting other such statutes). And SB 126 does not require that much of the Supreme Court Clerk—only that she undertake a "random selection" to "direct the transfer of the action to a different Circuit Court." 2023 Ky. Acts, ch. 131, § 1(4)(b)–(c). This modest requirement is not that different from the roles long played by circuit clerks in venue transfer. KRS 452.060; KRS 452.080. At bottom, the General Assembly

simply wanted someone above reproach to establish and implement a uniform, statewide system for venue transfer. If the General Assembly had selected someone outside of the Court of Justice for the job, that undoubtedly would have drawn constitutional objections. Faced with this choice, the General Assembly reasonably selected the Supreme Court Clerk while ensuring the Court of Justice retained the authority to fill in the particulars. In so doing, the General Assembly did its level best to accomplish its policy goal while simultaneously respecting the coequal judicial power.

SB 126, the Court will recall, is not the only recent change to Kentucky's venue laws. In 2021, the General Assembly passed House Bill 3, which is the statute that SB 126 amended. The introduced version of HB 3 provides a helpful contrast to SB 126. As drafted, that bill initially created a venue-change provision for constitutional challenges that required the Chief Justice to implement a complex statutory process to select three judges to initially hear the case. 2021 House Bill 3, § 1(2)–(4), https://perma.cc/DQ9S-J9KC. Kentucky's previous Chief Justice testified forcefully before a legislative committee that 2021 HB 3 as proposed was "Rube Goldberg's effort at judicial reform" and creates a "convoluted, complicated, [and] imponderable process." Testimony Regarding 2021 House Bill 3, Senate Judiciary Committee, at 7:35–48 (Jan. 8, 2021), https://perma.cc/425K-JBTK.

That insight explains why the General Assembly wrote SB 126 the way it did. By leaving many of the details for the Court of Justice, SB 126 does not create a "convoluted, complicated, [and] imponderable process." Instead, it allows the Court of Justice to create a workable internal process to accomplish venue changes under SB 126. As a result, SB 126's lack of details is an unmistakable nod to the Court of Justice. It is part of the healthy give and take between two coequal branches of government about a topic that necessarily implicates both branches.[9]

If the Court nevertheless concludes that SB 126 intrudes on the judicial power in some respect, the proper remedy is to accord comity to it. Comity is the "judicial adoption of a rule unconstitutionally enacted by the legislature not as a matter of obligation, but out of deference and respect." *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 577 (Ky. 1995) (cleaned up). For a statute to receive comity, it must be a "statutorily acceptable substitute for current judicially mandated procedures" or 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) (citations omitted).

[9] The Supreme Court Clerk's involvement under SB 126 is also part of this back and forth. In his legislative testimony about 2021 HB 3, Chief Justice Minton raised concerns about the statute directing him to act. Testimony, *supra*, at 12:40–13:40. The General Assembly listened by instead involving the Supreme Court Clerk in the venue-transfer process. 2023 Ky. Acts, ch. 131, § 1(4)(b)–(c).

SB 126 is a textbook instance in which comity is appropriate. Although the General Assembly's law-making prerogative grants it broad power over venue, to accomplish a change in venue inevitably requires the judiciary's participation in some respects. SB 126 thus operates in the "gray area" between the legislative and judicial departments. *Ex parte Auditor of Pub. Accts.*, 609 S.W.2d at 688. At this border, "[t]he policy of this [C]ourt is not to contest the propriety of legislation in this area to which we can accede through a wholesome comity." *Id.* After all, this Court "hold[s] the General Assembly in the highest respect, and much prefer[s] cooperation over conflict." *Id.* Because SB 126 goes out of its way to respect the separation of powers and leaves the particulars of effectuating SB 126 to the Court of Justice, the Court should grant comity to the law if it goes too far in any respect.

C. SB 126 respects equal protection.

ARKK Properties' equal-protection argument fares no better. KRS Chapter 452 is filled with venue-related distinctions. For example, a claim about a will must be brought in the county in which the will "ought, according to law, to be recorded." KRS 452.410. A claim against a bank or insurance company may be brought in the county in which its "principal office or place of business is situated." KRS 452.445. A claim against the Kentucky Board of Education must be brought in Franklin County. KRS 452.430. And a divorce claim must be brought in the county in which the husband or wife "usually resides." KRS 452.470.

As a matter of equal protection, the General Assembly can draw all these venue-related lines because under rational-basis review it has "great latitude" to pass legislation even if it "may appear to affect similarly situated people differently." *See Commonwealth ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621, 624 (Ky. 2005). Venue-related distinctions "should be affirmed" unless the classification "is so arbitrary and capricious as to be hostile, oppressive and utterly devoid of rational basis." *See Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet*, 689 S.W.2d 14, 19 (Ky. 1985). ARKK Properties cannot make that high showing.

1. Although some equal-protection claims warrant strict scrutiny, ARKK Properties' claim is not one of them. Strict scrutiny applies in only two circumstances. First, it applies when the government distinguishes based on a "suspect classification, such as race, alienage or ancestry." *Woodall*, 607 S.W.3d at 564. Although ARKK Properties alleges that SB 126 "singles out a class of litigants," it does not claim that the law involves a suspect classification. Writ 18. And with good reason. Plaintiffs raising constitutional challenges to state law are not a suspect class. *See Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (listing relevant factors to being a suspect class).

Second, strict scrutiny applies when a classification "adversely impacts a fundamental right or liberty explicitly or implicitly protected by the Constitution." *Acree*, 615 S.W.3d at 815–16. ARKK Properties says that SB 126 fits this bill. But a litigant does not have a fundamental constitutional right to file suit in

a particular venue. No provision in our Constitution comes close to suggesting as much. In fact, as noted above, the Constitution leaves venue selection and venue transfer to the General Assembly, with only two narrow exceptions. Ky. Const. §§ 11, 59(3), 231.

This Court's *Acree* decision underscores why strict scrutiny does not apply here. The litigants there claimed a "fundamental right of acquiring and protecting property guaranteed under Section 1 of the Kentucky Constitution." *Acree*, 615 S.W.3d at 816. Section 1, of course, explicitly protects the right of "acquiring and protecting property." Ky. Const. § 1. But even this was not enough to make the right fundamental. The Court said that property rights "have never been regarded as fundamental rights" requiring strict-scrutiny analysis. *Acree*, 615 S.W.3d at 816. The Court noted that Kentucky courts "have always upheld restrictions on property rights that are reasonable." *Id.* at 816–17.

The same is true for venue. Kentucky's pre-SB 126 venue-transfer statute traces in part back to 1852. KRS 452.010, formerly Ky. Stat. § 1094. And Kentucky courts have long recognized that "[t]he right to a change of venue is only bestowed by the statute, and the Legislature has authority to provide for the extent and manner of its exercise." *Heck*, 174 S.W. at 20. Venue is "purely a legislative matter," and "the judiciary may not rewrite the [venue] statutes." *Copass*, 900 S.W.2d at 619 (citing *Blankenship*, 672 S.W.2d at 944). Although the Kentucky Constitution places two modest guardrails on the General Assembly's venue

powers, Ky. Const. §§ 11, 59(3), these limitations do not suggest a fundamental right for plaintiffs to challenge Kentucky law only in their preferred forum. And Section 231 reiterates that setting venue in cases against the Commonwealth is the General Assembly's prerogative.

Perhaps recognizing (correctly) that there is not a fundamental right to challenge Kentucky law in a certain venue, ARKK Properties falls back on a bootstrapping theory of fundamental rights. It suggests that the fundamental right burdened by SB 126 is whatever underlying constitutional right a lawsuit invokes. Writ 21. For example, if a SB 126 transfer occurs in a lawsuit in which a litigant claims that a statute violates his or her due-process rights, SB 126 allegedly burdens the same due-process rights as the challenged statute. But that is just another way of claiming that there is a fundamental right to a certain venue in constitutional challenges. In any event, there is no authority for the novel proposition that every fundamental constitutional right comes with a concomitant right to sue in a preferred venue. No provision of our Constitution so states. And no Kentucky decision so holds. What this Court said in *Acree* is thus equally true here: "Although [the parties] advance a 'fundamental right' argument that would dictate strict scrutiny analysis, they offer *no precedent*." 615 S.W.3d at 816 (emphasis added). There is no Kentucky authority to support ARKK Properties' bootstrapping theory.

Plus, this Court has already rejected an attempt to use second-order effects to implicate fundamental rights. In *Commonwealth v. Howard*, the defendant brought an equal-protection challenge to a law making it a crime for "anyone under the age of twenty-one to drive with a blood alcohol content of 0.02 percent or higher." 969 S.W.2d 700, 702 (Ky. 1998). The Court found that the statute merited only rational-basis review. Even though the statute prevented the defendant from driving a motor vehicle, the Court "reject[ed] the idea that statutes relating to motor vehicles necessarily implement the fundamental right to travel." *Id.* Of course, not being able to drive necessarily makes travel more difficult. But this follow-on effect was not enough for the fundamental right to travel to be "unduly prejudiced." *Id.* at 703. So too here. Just as the "legitimately regulated" ability to drive does not burden the fundamental right to travel, *id.* at 702, neither does a venue change implicate whatever underlying constitutional right a plaintiff challenging Kentucky law invokes.

The circuit court's favored case law is not to the contrary. As noted, the circuit court cited two cases in which Kentucky courts have found venue statutes unconstitutional. Apr. 17, 2023 Order at 7. The first case involved different venue rules for in-state and out-of-state defendants. *Mattox*, 90 S.W.2d at 72–73. SB 126 makes no such distinction. In any event, *Mattox* applied rational-basis review. *See id.* (noting that the Equal Protection Clause allows a classification

"having a reasonable relation to the subject of the particular legislation" and favorably citing a case for the proposition that "the special classification and discriminatory treatment of foreign corporations are without reasonable basis"). And in the second case, the statute permitted a married couple to file for divorce only "in the home county of the wife." *Hummeldorf*, 616 S.W.2d at 795. That gender distinction warranted intermediate scrutiny. *Id.* at 796 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)); *see also Acree*, 615 S.W.3d at 816 ("Intermediate scrutiny, seldomly used, is generally used for discrimination based on gender or illegitimacy."). SB 126 does not make this distinction either.

2. SB 126 easily satisfies rational-basis review. Under this deferential standard, "a law must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Crutchfield*, 157 S.W.3d at 624. Courts "will not invalidate on equal protection grounds" a law that they "simply deem unwise or unartfully drawn." *Id.* That's because laws are "accorded a strong presumption of validity." *Zuckerman*, 565 S.W.3d at 596 (citation omitted).

There are several good reasons to treat constitutional challenges differently than other cases. Take first the General Assembly's interest, expressed in SB 126's emergency clause, of "provid[ing] litigants access to courts of this Commonwealth without any concern of bias." 2023 Ky. Acts, ch. 131, § 2. As explained above, SB 126 neutralizes whatever advantage a plaintiff can achieve

through strategic venue selection. Because "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government," *Cameron*, 628 S.W.3d at 73, it makes good sense to ensure that plaintiffs in constitutional challenges can gain no advantage—real or perceived—through venue selection. Indeed, ARKK Properties admits that "preserving the integrity and objectivity of the judicial system and ensuring judges are unbiased is a compelling government interest." Writ 22. Under rational-basis review, that interest is enough to end the inquiry.

But that's not all. SB 126 also allows circuit judges from across the Commonwealth to weigh in on issues of statewide importance. Because constitutional challenges affects all Kentuckians in a way that other actions generally do not, it is reasonable to ensure that judges across Kentucky hear these important cases. As noted above, this same rationale underlies the composition of this Court, which is made up of seven Justices from different regions of the Commonwealth. This justification likewise supports upholding SB 126 under rational-basis review.

ARKK Properties' concerns about under- or over-inclusiveness are both wrong and irrelevant. For one thing, SB 126 is narrowly drawn to focus on only constitutional challenges. 2023 Ky. Acts, ch. 131, § 1(1)(a). Even so, the General Assembly "must necessarily engage in a process of line drawing." *Woodall*, 607 S.W.3d at 564 (citation omitted). Indeed, "classifying persons" will "inevitably

require[] that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Teco/Perry Cnty. Coal v. Feltner*, 582 S.W.3d 42, 48 (Ky. 2019) (citation omitted). That "the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id.* (citation omitted).

ARKK Properties' contrary arguments are pure policy disagreements. It claims that SB 126 is "not necessary" because there is no "evidence of an actual problem." Writ 24. But the General Assembly has no burden of proof under rational-basis review. *Zuckerman*, 565 S.W.3d at 596. ARKK Properties also questions the wisdom of requiring litigants to travel to a different county for court hearings.[10] Writ 33. And ARKK Properties claims that SB 126 worsens "both judge and forum-shopping." *Id.* at 32. All these policy points can be reasonably debated, but neither ARKK Properties nor this Court gets to resolve them.

The General Assembly is "the policy-making body for the Commonwealth." *Cameron*, 628 S.W.3d at 73. This Court "is imbued neither with policy-making nor police powers." *Tractor Supply v. Wells*, 647 S.W.3d 192, 195 (Ky. 2022). And courts cannot substitute their own views of public policy in place of

[10] The Attorney General's office notes that, in its experience, constitutional challenges usually (though not always) raise only issues of law that can be briefed and decided with only a few hearings. Thus, ARKK Properties' travel concerns are overstated. All the more so because several plaintiffs below are not residents of Franklin County. Ex. 1 ¶¶ 9–14, 16. In addition, as noted below, Kentucky's previous venue regime could also require substantial travel. *Infra* at 41–42.

the legislature's. *Robinson v. Commonwealth*, 212 S.W.3d 100, 106 (Ky. 2006). So it is the General Assembly's role to set venue-related policy for the Commonwealth.

The cases ARKK Properties cites are not to the contrary. For starters, only one case was decided by a Kentucky court. In addition, the law struck down in each case treated litigants differently based on where the litigant lived or was headquartered. *See Mattox*, 90 S.W.2d at 73 (invalidating venue statute treating resident and nonresident defendants differently); *Forsgren v. Gilloz*, 110 F. Supp. 647, 656 (W.D. Ark. 1953) (same); *Davis v. Union Pac. R.R. Co.*, 937 P.2d 27, 34 (Mont. 1997) (same); *Fireman's Fund Ins. Co. v. McDaniel*, 327 S.W.2d 358, 369 (Tex. Civ. App. 1959) (same). SB 126 contains no such distinction. The only other case ARKK Properties cites involved a venue statute requiring all challenges to be filed in a specific county—exactly the situation that SB 126 prevents. *Williams v. Ill. State Scholarship Comm'n*, 563 N.E.2d 465, 473 (Ill. 1990).

D. SB 126 provides due process and is not arbitrary.

ARKK Properties next alleges that SB 126 is so arbitrary that it violates Kentucky's due-process protection. Writ 28–29. For a law to be arbitrary, there must be "no rational connection" between it and the General Assembly's purpose. *City of Louisville v. McDonald*, 470 S.W.2d 173, 178 (Ky. 1971). Even if the rational connection is "fairly debatable," the law survives. *Id.* In other words, the

law must simply be "rationally related to a legitimate state objective." *Commonwealth v. Louisville Atlantis Cmty./Adapt, Inc.*, 971 S.W.2d 810, 816 (Ky. App. 1997).

SB 126 readily clears this low hurdle. Remember, ARKK Properties admits that preserving the integrity of the judiciary is a compelling government interest—a more stringent standard than a legitimate interest. Writ 22. SB 126 reasonably pursues that end by leveling the playing field between plaintiffs and defendants as to venue selection. And SB 126 rationally ensures that all circuit judges hear statewide disputes about the constitutionality of Kentucky law.

ARKK Properties suggests that SB 126 is arbitrary because another statute purportedly allowed it to file this matter in Franklin Circuit Court. Writ 30. But as noted above, the more specific statute—KRS 452.005—gave ARKK Properties its choice of several venues in which to file. And ARKK Properties' choice of venue illustrates the equalizing rationale of SB 126. Even still, if a statute is the reason that ARKK Properties believed it had to file in Franklin Circuit Court, another statute can say that its challenge should be heard in another circuit court. As noted above, existing laws already draw many venue distinctions among different kinds of cases. By determining the proper venue for constitutional challenges, SB 126 sits comfortably alongside these other venue-selection statutes. ARKK Properties cannot explain what would happen to the other venue-selection statutes in KRS Chapter 452 if drawing such lines is arbitrary.

ARKK Properties takes issue with the fact that the randomly selected circuit court may lack "any reasonable connection to the parties or the cause of action." Writ 31. But that is not true, given that challenges to Kentucky law affect all Kentuckians. So every challenge to Kentucky law is naturally connected to every Kentucky county. In any event, ARKK Properties confuses the inquiry. The Court must simply ask whether SB 126 is completely disconnected from any legitimate purpose. And indeed, the neutral relationship between litigants and the venue is exactly why SB 126 is reasonable: it ensures that litigants cannot benefit from strategic venue selection. It also provides that a neutral individual—the Supreme Court Clerk—randomly chooses a neutral venue. And it ensures that circuit courts across the Commonwealth have the opportunity to weigh in on important statewide issues. Far from being arbitrary, SB 126's reforms are the definition of reasonable.

E. SB 126 addresses only venue, not jurisdiction.

ARKK Properties next claims that SB 126 divests circuit courts of jurisdiction. Writ 34. But as noted above, Kentucky's courts have long recognized that venue and jurisdiction "are not the same." *Britton v. Davis*, 103 S.W.2d 665, 667 (Ky. 1937). Venue concerns "the county in which the action may or must be brought." *Id.* And jurisdiction is "the power to hear and determine the cause." *Id.* In other words, jurisdiction is the power "to adjudicate" whereas venue is "the proper place for the claim to be heard." *Baze*, 276 S.W.3d at 766 (citation

omitted). And SB 126 says nothing about *whether* the circuit court has the power to decide cases (jurisdiction), only *where* the action must be heard (venue).

It confuses venue for jurisdiction to say that SB 126 limits the Franklin Circuit Court's "constitutionally-conferred jurisdiction." Writ 35. As mentioned, Kentucky "has but one circuit court." *Baze*, 276 S.W.3d at 767. And "all circuit judges are members of that court" with "equal capacity to act throughout the state." *Id.* Indeed, the declaratory-judgment statute ARKK cites speaks only of a court "having general jurisdiction." KRS 418.040. It does not say that the Franklin Circuit Court must decide each declaratory-judgment action. Under SB 126, the circuit court will still rule on any constitutional challenge before it.

ARKK Properties asserts that SB 126 is a "jurisdiction-divesting statute" masquerading as a venue statute. Writ 36. But this claim only confirms that ARKK has mistaken venue for jurisdiction. Consider the mine-run cases in which venue is transferred. In such instances, ARKK Properties admits that transfer "do[es] not divest the circuit court of jurisdiction." *Id.* ARKK Properties' real complaint, then, is that it disagrees with SB 126. But setting public policy "is the domain of the General Assembly." *Bryant v. Louisville Metro Hous. Auth.*, 568 S.W.3d 839, 849 (Ky. 2019) (citation omitted).

F. SB 126 preserves free and open access to the courts.

ARKK Properties' final contention is that SB 126 denies litigants access "to the appropriate forum" in violation of Section 14 of the Kentucky Constitution. Writ 37. There are at least two flawed assumptions built into this assertion. ARKK Properties first assumes that Section 14 applies to constitutional challenges to state law. But that is in tension with this Court's precedent. *See Fireman's Fund Ins. Co. v. Gov't Emps. Ins. Co.*, 635 S.W.2d 475, 477 (Ky. 1982) ("Aside from the mention of defamation in Sec. 14, [Sections 14 and 54] expressly apply only to actions for death, personal injuries, or property damage."), *overruled on other grounds by Perkins v. Ne. Log Homes*, 808 S.W.2d 809, 816 (Ky. 1991); *see also Claycomb*, 566 S.W.3d at 210.

Second, ARKK Properties assumes that Section 14 regulates venue. That cannot be right. Section 14 says nothing about the forum in which parties must litigate. It simply says that "[a]ll courts shall be open, and every person for an injury done to 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." Ky. Const. § 14. This text contains no hint that Section 14 is concerned with venue. And none of the Section 14 cases ARKK Properties cites deal with venue. Writ 37–39. In addition, to read Section 14's general language to impose limitations on venue would impermissibly abrogate the broad grant of venue authority in Sections 11, 59(3), and 231. *See Wood v. Bd. of Educ. of Danville*, 412

S.W.2d 877, 879 (Ky. 1967) (instructing that "different sections of the Constitution shall be construed as a whole so as to harmonize the various provisions and not to produce a conflict between them").

ARKK Properties complains that a venue change under SB 126 could require a plaintiff to travel "potentially hundreds of miles and hours away" to litigate his or her case. Writ 38. But that is an as-applied issue at best that ARKK Properties cannot press with a straight face, given that one of the plaintiffs below is a *Wyoming company*. Compl. ¶ 9. In fact, transfer in this case under SB 126 could lead to the matter being heard in Fayette, Kenton, or Boone county, each of which is home to a plaintiff or plaintiffs. *Id.* ¶¶ 10–14, 16. If the convenience of the parties matters from a constitutional perspective, this writ is not the posture in which to litigate the issue. Even still, Section 11 of the Constitution conveys that the General Assembly need not consider the convenience of the litigants when allowing for a venue change in civil litigation.

ARKK Properties' travel concerns also cannot overcome the realities of litigating a case to its conclusion. Even before SB 126, a plaintiff challenging Kentucky law had to be prepared to travel to Frankfort for oral argument before this Court or the Court of Appeals. Kentucky's capital city of course is "potentially hundreds of miles and hours away" from places in the Commonwealth. Yet under ARKK Properties' logic, a trip to Frankfort for an appellate argument could create Section 14 concerns.

ARKK Properties also overlooks that Kentucky's historical venue regime required meaningful travel for many Kentuckians if they desired to challenge the constitutionality of a Kentucky law. Prior to 2021, constitutional challenges "were typically required to be brought in Franklin Circuit Court." *Goodwood Brewing Co.*, 635 S.W.3d at 794 (citing KRS 452.405). So under that previous scheme, many Kentuckians had to travel great distances simply to prosecute his or her case in Franklin County. As a result, from a travel perspective, SB 126 is not the sea change that ARKK Properties suggests.

All this goes to show that Section 14 does not regulate venue. It addresses "statutes limiting or barring *access* to the courts, not the countless pressures that might otherwise constrain the decision to sue." *Boykins v. Hous. Auth. of Louisville*, 842 S.W.2d 527, 530 (Ky. 1992) (emphasis added). More to the point, Section 14 mandates that the government "provide courts open to all for appropriate judicial remedy." *Id.* SB 126 does not limit or bar litigants from court. Nor does the law alter the elements of a constitutional claim. It simply provides that some litigants will have to press their case in a different venue than where they filed. SB 126 in no way affects litigants' "right to a day in court."[11] *See id.* (quoting *Ludwig v. Johnson*, 49 S.W.2d 347, 351 (Ky. 1932)).

[11] For the same reason, SB 126 does not violate ARKK Properties' Section 1 right to petition the government for redress. Writ 39. Before and after SB 126, the courthouse doors are equally open to constitutional challenges to state law.

ARKK Properties tries to analogize SB 126 to the law struck down in *Claycomb*. Writ 39. That law violated Section 14 because it delayed a litigant's right to file suit unless the opposing party consented. *Claycomb*, 566 S.W.3d at 213 ("Chapter 216C is in contravention of Section 14 because *no adjudication whatsoever* takes place . . . unless a valid agreement has been made to arbitrate or bypass the panel process."). But under SB 126, a plaintiff can file suit whenever he or she wants. The plaintiff need not wait for an opposing party to consent. And at all times after filing suit, a circuit court can grant the plaintiff any relief to which he or she is entitled.

ARKK Properties is simply wrong that SB 126 "seeks to insulate the government from challenges." Writ 38. Again, SB 126 deals only with venue, not jurisdiction. It provides for transfer, not dismissal. The courthouse doors remain open to any plaintiff pressing a constitutional challenge. But now plaintiffs are more similarly situated to defendants with respect to venue, with neither able to strategically select a preferred venue. And now circuit judges across the Commonwealth will weigh in on important statewide issues.

ARKK Properties raises a hypothetical in which parties request repeated transfers under SB 126, "delaying certainty as to what circuit court will ultimately decide the case and when." Writ 38–39. But here, the Court is confronted with a single notice of transfer filed by the Attorney General. Kentucky courts "have no authority to adjudicate hypothetical or purely advisory questions." *W.B. v.*

Cabinet for Health & Fam. Servs., 388 S.W.3d 108, 116 n.6 (Ky. 2012). If a multiple-transfer case arises, the parties there would be free to pursue an as-applied challenge to SB 126. ARKK Properties' hypothetical edge-case is no reason to declare SB 126 unconstitutional in every case.

CONCLUSION

AARK Properties' petition for a supervisory writ should be denied. If the Court considers SB 126's constitutionality, the Court should uphold the law as a permissible exercise of the General Assembly's authority to establish venue.

Respectfully submitted,

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WORD-COUNT CERTIFICATE

This brief complies with the 17,500 word limit set by the Court's June 14, 2023 order because, excluding the parts of the response exempted by RAP 15(D), RAP 32(A)(1), and RAP 60(F), this response includes 11,106 words.

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