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*

REPLY BRIEF OF ATTORNEY GENERAL DANIEL CAMERON

VICTOR B. MADDOX (No. 43905)
Deputy Attorney General
MATTHEW F. KUHN (No. 94241)
Solicitor General
HEATHER L. BECKER (No. 94360)
Executive Director
ALEXANDER Y. MAGERA (No. 97708)
MICHAEL R. WAJDA (No. 99706)
Assistant Solicitors General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
Matt.Kuhn@ky.gov

Counsel for the Attorney General

CERTIFICATE OF SERVICE

I certify that a copy of this brief was served on August 4, 2023 by U.S. mail to: J. Guthrie True, Richard M. Guarnieri, True Guarnieri Ayer, LLP, 124 Clinton Street, Frankfort, Kentucky 40601 (also served via email); R. Kenyon Meyer, Dinsmore & Shohl LLP, 101 South Fifth Street, Suite 2500, Louisville, Kentucky 40202 (also served via email); M. Evan Buckley, Dinsmore & Shohl LLP, 100 West Main Street, Suite 900, Lexington, Kentucky 40507 (also served via email); Kelly Stephens, Clerk, Supreme Court of Kentucky, 700 Capital Avenue, Room 235, Frankfort, Kentucky 40601; Kathryn Marshall, Clerk, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601; and Hon. Phillip J. Shepherd, Circuit Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601.

Matthew F. K.

STATEMENT OF POINTS & AUTHORITIES

INTRODUCTION

This case got much easier after ARKK Properties filed its brief. It now admits that "the power to establish laws setting venue is a legislative power." Br.8. That of course is true. Kentucky courts have so held for more than a century. Because everyone agrees that establishing venue is the legislature's prerogative, ARKK Properties' separation-of-powers argument cannot succeed. Its equal-protection argument is no stronger. ARKK Properties admits that venue statutes "frequently" receive only rational-basis review, *id.* at 24, yet its fundamental-rights theory has no basis in precedent. And its long-shot attempt to remake Section 14 into a venue limitation rewrites the constitutional text with no supporting case law.

In sum, if this case warrants exercising this Court's supervisory-writ authority (a big if), the Court should hold that Senate Bill 126 is constitutional.

ARGUMENT

I. The Court should decline to exercise its supervisory-writ authority.

ARKK Properties does not even discuss the threshold question of whether the Court should exercise its supervisory-writ authority. It instead relegates the issue to a footnote. *Id.* at 4 n.11. And its brief confusingly includes record citations showing that it preserved each argument before the circuit court. *Id.* at 4, 22, 39, 47. ARKK Properties thus treats this matter like an ordinary appeal.

That could not be more wrong. No lower court has passed on SB 126's constitutionality. So it is irrelevant whether ARKK Properties preserved its arguments in circuit court. Make no mistake, ARKK Properties' ask of this Court is enormous: It wants the Court to bypass our three-level system of judicial review to declare a duly enacted statute unconstitutional. Such extraordinary relief demands equally extraordinary justifications. *See Abernathy v. Nicholson*, 899 S.W.2d 85, 88 (Ky. 1995). Every case in which this Court has granted Section 110(2)(a) relief has been singularly unprecedented. AGBr.4–5. A dispute about venue is comparatively humdrum. Indeed, this Court has repeatedly denied ordinary-writ petitions concerning venue because the issue can be reviewed after final judgment. *Id.* at 5 (collecting cases). The Court should follow that well-worn practice here.

II. SB 126 is in keeping with the separation of powers.

ARKK Properties gives away the game by admitting that "the power to establish laws setting venue of cases is a legislative power." Br.8. So everyone now agrees that, as this Court has held, venue is "a *statutory* mandatory as to which county or counties is the proper place for a claim to be heard." *Dollar Gen. Stores, Ltd. v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007) (emphasis added).

ARKK Properties says that SB 126 is still problematic because it gives a party "unchecked authority" to transfer a case. Br.1. As ARKK Properties sees it, if a party improperly files a SB 126 notice of transfer in a criminal matter, the

Court of Justice is powerless to correct venue.[1] That is wrong. Nothing in SB 126 prevents a party from doing *exactly what ARKK Properties did here*—filing a motion asking the initial circuit court to decline transfer. Mot. Decline Transfer (Ex. 1). Nothing in SB 126 prevents filing such a motion in the receiving circuit court. And nothing in SB 126 prevents an appellate court from correcting such a mistake after final judgment. Indeed, SB 126 repeatedly uses the phrase "may seek" to describe a party's ability to change venue. 2023 Ky. Acts, ch. 131, § 1(4)(a). In short, if a party improperly invokes SB 126, Kentucky's judiciary can, and should, sort that out.

This fact distinguishes ARKK Properties' favored out-of-state case. The law there allowed a state official to unilaterally decide whether his case meets a statutory standard without judicial review. *Farmer v. Christian*, 152 S.E. 382, 384–85 (Va. 1930). SB 126, by contrast, enables a litigant to file a notice of transfer, but it does not oust the judiciary from reviewing whether the lawsuit fits within SB 126's terms.

ARKK Properties next objects to the lack of specificity in SB 126. The law, ARKK Properties complains, "does not state who shall transmit the notice to the Clerk of the Supreme Court, how the Clerk is to undertake the random

[1] ARKK Properties does not contend that the Attorney General improperly invoked SB 126 in the underlying challenge to HB 594. So ARKK Properties is merely speculating about as-applied issues.

selection, nor the time in which the Clerk is required to act." Br.1 n.3. In raising these procedural concerns, ARKK Properties makes the Attorney General's case for him. By not specifying such details, SB 126 respects the separation of powers—it gives the judicial branch space to exercise its rulemaking authority.

This reality leads a larger point. Although setting venue is for the General Assembly, venue inevitably affects the courts. So the fact that SB 126 involves circuit clerks and the Supreme Court Clerk is a natural consequence of the fact that establishing venue lies with the General Assembly. As such, ARKK Properties' objections to the clerks' involvement in SB 126 is really a back-door argument that the General Assembly lacks the power to regulate venue.

ARKK Properties counters by distinguishing between substance and procedure—between setting venue and establishing the procedure for changing venue. *Id.* at 8. Its point seems to be that the General Assembly can establish venue for constitutional challenges, but SB 126 purportedly oversteps by directing how to implement the law. But remember, ARKK Properties simultaneously criticizes SB 126 for providing too few procedural details. *Id.* at 1 n.3, 2 n.4. Which one is it? In any event, that a venue-change law merely touches on procedure does not make it unconstitutional. For over a century, the rule has been 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 v. Commonwealth*, 174 S.W. 19, 20 (Ky. 1915) (emphasis added). For this reason,

Kentucky's preexisting venue-change statute has long affected procedure. KRS 452.030 (requiring a "verified motion" and hearing); KRS 452.060 (directing initial circuit clerk to act); KRS 452.080 (directing receiving circuit clerk to act). And Kentucky courts dutifully follow these laws. *Rand, McNally & Co. v. Turner*, 94 S.W. 643, 644 (Ky. 1906) ("The [venue-change] petition filed by appellant in this case was not verified, and for this reason, if no other, the application should have been denied.").

ARKK Properties responds by citing *O'Bryan v. Commonwealth*, 634 S.W.2d 153 (Ky. 1982). But that decision enforced a venue-change statute that regulated procedure far more directly than SB 126—it directed how a court should conduct in-court proceedings. *O'Bryan* reasoned that "in the further event of a motion for a change of venue, a hearing should be held. The statute dealing with the procedure for change of venue *mandates it.*" *Id.* at 157 (emphasis added). *O'Bryan*, it is true, enforced this statute as a matter of comity because the Court had not "superseded" the law with a rule. *Id.* at 158. But here again, ARKK Properties is making the Attorney General's case for him. By leaving the procedure of enforcing SB 126 to the judiciary, the law respects what *O'Bryan* called this "Court's paramount rule-making authority." *See id.*

O'Bryan devastates ARKK Properties' position. Even if SB 126 goes too far in specifying procedure (it does not), *O'Bryan* teaches that the law should be upheld on comity grounds "[u]ntil th[e] statute is superseded by this Court." *See*

id.; *accord Whitler v. Commonwealth*, 810 S.W.2d 505, 508 (Ky. 1991). It follows that the absence of a judicial rule implementing SB 126 fully answers ARKK Properties' separation-of-powers argument. And this Court has held that non-action on the rulemaking front counts as "tacit approval of the efficacy of the statute." *Commonwealth v. Reneer*, 734 S.W.2d 794, 796 (Ky. 1987).

If the Court gets to comity, ARKK Properties never grapples with the key reason it applies. Comity is most appropriate when a law operates in the "gray area" between the legislative and judicial departments. *See Ex parte Auditor of Pub. Accts.*, 609 S.W.2d 682, 688 (Ky. 1980). A law regulating venue cannot be understood any other way, given that venue is a legislative prerogative that inevitably affects the courts.

ARKK Properties asserts that affording comity to SB 126 will "interfere with the orderly functioning of the courts." Br.20–21. The standard here is not just interference, but *unreasonable* interference. *Taylor v. Commonwealth*, 175 S.W.3d 68, 77 (Ky. 2005). Because SB 126 leaves so much leeway to the judiciary, any implementation concerns can be addressed by the Court. *See Fugett v. Commonwealth*, 250 S.W.3d 604, 611 (Ky. 2008) ("As the statute grants broader discretion to the court, we cannot say it hampers or unreasonably interferences with the administration of justice."). Even still, SB 126 does not require that much of the courts. Yes, the Supreme Court Clerk will need to do random venue draws. But

Microsoft Excel can accomplish that task with ease.[2] In addition, the Supreme Court Clerk and circuit clerks are already well-versed in coordinating on docket matters.[3] And if a party improperly invokes SB 126, nothing in the law prevents the courts from correcting that mistake in the ordinary course.

ARKK Properties offers several extreme hypotheticals in which SB 126 allegedly will invite "judge and forum-shopping." Br.21–22. But none of those things happened below. And the Court can address any such issues on an as-applied basis (if they ever arise). *See Reneer*, 734 S.W.2d at 798 ("We reserve the right to consider any abuses or injustices alleged to be caused by [the statute] when presented by a proper case, but until such time as we do, we decline to hold [the statute] unconstitutional, and we accept its provisions for the time being under the principle of comity.").

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[2] https://www.extendoffice.com/documents/excel/4487-excel-generate-random-number-from-list.html. Of course, SB 126 leaves to the judiciary how best to accomplish random venue selections.

[3] ARKK Properties argues that SB 126 is inconsistent with the civil rules. Br.5–6. Any tension, however, can be resolved through rulemaking. In any event, CR 79.05(1) allows a circuit clerk to release the official record of a case upon "court order." A transfer directive from the Supreme Court Clerk under SB 126 counts as such. 2023 Ky. Acts, ch. 131, § 1(4)(c). In addition, CR 79.05(1) allows sending the official record to another county without a court order. The other rule ARKK Properties cites empowers a circuit court to remand a circuit clerk's action "upon cause shown." CR 77.03. This rule affirms that a circuit court can reject a notice of transfer in a case that does not meet the strictures of SB 126.

ARKK Properties lastly argues that SB 126 is just a recusal statute. Br.13. This Court has extended comity to such a statute before. *Foster v. Overstreet*, 905 S.W.2d 504, 506–07 (Ky. 1995). SB 126, however, has no bearing on whether a judge can ethically decide a case. As written, the law concerns the "where" of judicial decision-making, not the "who." The law simply ensures that constitutional challenges, which matter statewide, are more likely to be heard in all corners of the Commonwealth. ARKK Properties responds by referring to SB 126's emergency clause, which mentions a "concern of bias." 2023 Ky. Acts, ch. 131, § 2. That accompanying statement does not change how SB 126 operates. And its mention of "bias" refers to the General Assembly's desire to eliminate any prospect of strategic venue selection in constitutional challenges.

This case illustrates well the rationale for tamping down strategic venue selection. As the Attorney General has explained, ARKK Properties chose to file its lawsuit in Franklin Circuit Court over three other equally proper venues. AGBr.11–13. And ARKK Properties' litigation conduct since then demonstrates its belief that its preferred venue is worth keeping. It has gone so far as to file a supervisory writ at the direction of the circuit judge just to keep its case in Franklin Circuit Court. In sum, the extraordinary steps undertaken by ARKK Properties simply to keep its case in Franklin Circuit Court show the logic of SB 126.

Understood this way, SB 126 levels the playing field with respect to venue selection in constitutional challenges.[4]

III. SB 126 does not pose equal-protection problems.

ARKK Properties admits that venue statutes "frequently" receive only rational-basis review. Br.24. Its argument that SB 126 is somehow different fails. Rational-basis review applies to "equal protection claims which do not involve a suspect class or interfere with fundamental rights." *Bloyer v. Commonwealth*, 647 S.W.3d 219, 226 (Ky. 2022). And SB 126 involves neither a suspect class nor fundamental rights.

ARKK Properties does not press a suspect-class argument. Br.25. Indeed, litigants pressing constitutional challenges are nothing like the suspect classes of "race, alienage, and ancestry." *See Zuckerman v. Bevin*, 565 S.W.3d 580, 595 (Ky. 2018). After all, KRS Chapter 452 draws distinction after distinction among classes of litigants. AGBr.28 (collecting examples).

ARKK Properties pins its hopes on SB 126 implicating a fundamental right. Br.25–28. But ARKK Properties' admission that "the power to establish

[4] ARKK Properties suggests that SB 126 is necessarily a recusal statute because the constitutionality of a statute is a legal question always decided by a judge. Br.13. But the General Assembly regularly sets venue in Franklin Circuit Court for non-jury matters. KRS 45A.245(1); KRS 278.410(1).

laws setting venue is a legislative power" undercuts any suggestion that the Kentucky Constitution gives a litigant a fundamental right to a preferred venue. *See* Br.8. Plus, ARKK Properties concedes that venue statutes that affect "social, economic, or business rights" implicate only rational-basis review. *Id.* at 24. Yet that is exactly what ARKK Properties alleges here: that HB 594 "has completely outlawed [its] otherwise lawful business." *Id.* at 27. So its own brief establishes why rational-basis review applies. *Beshear v. Acree*, 615 S.W.3d 780, 816 (Ky. 2020) ("[W]hen economic and business rights are involved, rather than fundamental rights, substantive due process requires that a statute be rationally related to a legitimate state objective." (citation omitted)).

ARKK Properties seems to believe that the alleged fundamental right implicated by SB 126 is a litigant's "ability to assert constitutional challenges to government action." Br.27. The only case it cites in this respect dealt with a statute that closed the courthouse doors to litigants for a months-long period, not one that regulated venue. *Commonwealth v. Claycomb*, 566 S.W.3d 202, 204–05 (Ky. 2018). Indeed, the word venue appears *nowhere* in the decision. As a result, ARKK Properties has no case law to support the notion that a litigant has a fundamental right to challenge government action in a preferred venue. *See Beshear*, 615 S.W.3d at 816 ("Although they advance a 'fundamental right' argument that would dictate strict scrutiny analysis, they offer no precedent.").

ARKK Properties counters that it lacks "timely access to the courts to seek injunctive relief." Br.27. That is not a serious argument. The same week ARKK Properties made this assertion, it sought a temporary injunction against enforcement of HB 594 in Franklin Circuit Court. TI Mot. (Ex. 2). As this conduct shows, SB 126 does not prevent a plaintiff from immediately seeking in circuit court whatever relief he or she deems necessary. AGBr.22–23. And if a case is transferred, the receiving circuit court is fully empowered to take whatever action it deems necessary. This is no different than Kentucky's historical venue-change regime. KRS 452.080.

ARKK Properties complains that SB 126 could require transfer to a venue "potentially hundreds of miles away." Br.27. It, however, cites no applicable case law explaining why such a transfer implicates a fundamental right.[5] Indeed, Kentucky's historical venue regime "typically required" litigants challenging government action to travel to Franklin County, *Beshear v. Goodwood Brewing Co., LLC*, 635 S.W.3d 788, 794 (Ky. 2021), which is a trek for many Kentuckians. And any litigant must be prepared to make a trip (or two) to Frankfort for an appellate argument. In any event, ARKK Properties' concerns about travel fall flat, given that one of the plaintiffs below is a Wyoming company and that a SB 126 transfer

[5] In this respect, ARKK Properties cites *Morris v. Commonwealth*, 208 S.W.2d 58 (Ky. 1948). But *Morris* is a criminal case, *id.* at 59, and Section 11 of the Constitution imposes a convenience limitation on only criminal cases, AGBr.16.

could lead to the underlying case being heard in Fayette, Boone, or Kenton county, each of which is home to one or more of the plaintiffs. AGBr. Ex.1 ¶¶ 9–14. Even setting all that aside, if a SB 126 transfer creates compelling convenience concerns, a litigant could seek transfer based on the equitable doctrine of forum non conveniens. *See Dollar Gen. Stores*, 237 S.W.3d at 166.

As for rational-basis review, SB 126 easily satisfies it.[6] As the House Speaker and Senate President explain in their amicus brief, SB 126 "reflect[s] the General Assembly's intent to disperse constitutional litigation throughout all the judicial circuits in the Commonwealth." Leg.Br.3. Nothing could be more sensible, given that constitutional challenges are statewide disputes that every circuit judge can resolve.[7] AGBr.9–11, 34. In addition, SB 126 is rationally related to making strategic venue selection a thing of the past in constitutional challenges. *Id.* at 11–13, 33–34. As explained above, ARKK Properties' full-court press to keep its case in Franklin Circuit Court shows that the legislature acted rationally by eliminating strategic venue selection in constitutional challenges.

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[6] The same rational-basis analysis applies to ARKK Properties' Section 2 claim. AGBr.36–37.

[7] ARKK Properties implies that the Court cannot consider this rational basis because the legislature provided a different justification for SB 126 in the emergency clause. Br.35. But to say that the law should take immediate effect for one reason does not mean that the legislature did not have other reasons for passing the law. And under rational-basis review, the Court simply asks "if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification." *Zuckerman*, 565 S.W.3d at 596 (emphasis added) (citation omitted).

IV. SB 126 does not violate Section 14.

ARKK Properties' Section 14 argument is mostly a rehash of its fundamental-rights argument. Several quick points in reply.

ARKK Properties still cannot identify a Section 14 case related to venue. To be sure, it cites several venue cases, Br.47–48, but those cases dealt with forum non conveniens, not Section 14.[8] *Carter v. Netherton*, 302 S.W.2d 382, 383–84 (Ky. 1957); *Roos v. Ky. Educ. Ass'n*, 580 S.W.2d 508, 508–09 (Ky. App. 1979). The bottom line is that Section 14 is unconcerned with venue. It directs only that "[a]ll courts shall be open" and generally protects a "remedy by due course of law, and right and justice administered without sale, denial or delay." Ky. Const. § 14. Nothing in that text conveys a venue limitation.

ARKK Properties' only response is to cite *Claycomb*—a case that did not mention venue. Br.48–49. True, *Claycomb* generally prohibits "imposing mandatory delays in the adjudication of common-law claims." 566 S.W.3d at 215. But not all delays are constitutionally problematic, given that "delays are inherent in every adjudicatory proceeding." *Id.* at 213. What Section 14 prohibits is the "usurpation of a [plaintiff's] freedom to access the adjudicatory method of his or her own choosing at the time of his or her choosing." *Id.* (emphasis omitted). SB

[8] ARKK Properties also cites *Perch v. Verisys Corporation*, but that case concerned a federal venue statute. No. 3:21-cv-767, 2022 WL 4588421, at *4–6 (W.D. Ky. Sept. 29, 2022).

126 does not even approach, much less cross, that line. Unlike the plaintiffs in *Claycomb*, ARKK Properties was free to file its lawsuit at the time of its own choosing. And after filing suit, nothing in SB 126 prevented ARKK Properties from immediately seeking (and if proper, receiving) redress in circuit court. *See* Ex. 2 (seeking such relief).

Without citing any applicable Kentucky case law, ARKK Properties briefly adverts to Section 1(6) of the Kentucky Constitution, which protects the right of "applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance." That text makes no mention of venue. And being able to "apply[]" for redress simply does not guarantee a right to a preferred forum. ARKK Properties' favored case is an Illinois one that considered a statute providing that a class of litigation must be filed in a single county. But that case recognized that "standing alone, requiring venue to be in a particular county does not necessarily infringe upon plaintiffs' right of access to the courts." *Williams v. Ill. State Scholarship Comm'n*, 563 N.E.2d 465, 482 (Ill. 1990). The Illinois court found the statute unconstitutional only because of a host of additional factors not present here. *Id.* at 482–83.

CONCLUSION

AARK Properties' petition for a supervisory writ should be denied. If the Court reaches SB 126's constitutionality, the Court should uphold the law.

Respectfully submitted,

VICTOR B. MADDOX (No. 43095)
Deputy Attorney General
MATTHEW F. KUHN (No. 94241)
Solicitor General
HEATHER L. BECKER (No. 94360)
Executive Director
ALEXANDER Y. MAGERA (No. 97708)
MICHAEL R. WAJDA (No. 99706)
Assistant Solicitors General

Office of Kentucky Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
Matt.Kuhn@ky.gov

Counsel for the Attorney General

WORD-COUNT CERTIFICATE

This brief complies with the 3,500 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 3,474 words.

Matthew F. Kuhn

Counsel for the Attorney General