TO BE PUBLISHED

Supreme Court of Kentucky

2023-SC-0196-OA

ARKK PROPERTIES, LLC; B.J. NOVELTY, INC.; THE CUE CLUB, LLC; HOME RUN, LLC; FEDERAL POST NO. 313, THE AMERICAN LEGION, DEPARTMENT OF KENTUCKY, INC.; MFPALMINVESTMENTS, LLC; VINCENT MILANO; TANYA MILANO; AND POM OF KENTUCKY, LLC — PETITIONERS

V.

ON SUPERVISORY WRIT
ARISING FROM FRANKLIN CIRCUIT COURT
CASE NO. 23-CI-00282

DANIEL J. CAMERON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY; M. KATHERINE BING, IN HER OFFICIAL CAPACITY AS INTERIM CLERK OF THE SUPREME COURT OF KENTUCKY; KATHRYN MARSHALL, IN HER OFFICIAL CAPACITY AS FRANKLIN CIRCUIT COURT CLERK; AND PHILLIP J. SHEPHERD, IN HIS OFFICIAL CAPACITY AS JUDGE OF THE FRANKLIN CIRCUIT COURT — RESPONDENTS

OPINION AND ORDER OF THE COURT BY CHIEF JUSTICE VANMETER

GRANTING SUPERVISORY WRIT

This original action comes before us on a Petition for Supervisory Writ under § 110(2)(a) of the Kentucky Constitution, which confers upon this Court the power to issue all writs as may be required to exercise control of the Court of Justice. The Petition follows the Franklin Circuit Court directive temporarily

staying its ruling on Defendants/Respondents'[1] motion for mandatory transfer of this case pursuant to Senate Bill ("S.B.")126,[2] pending further direction from this Court. In their Petition for Supervisory Writ, Plaintiffs/Petitioners[3] challenge the constitutionality of S.B. 126's amendment to KRS[4] 452.005, pursuant to which Respondents sought transfer of the case.[5] In essence, S.B. 126 grants a party or the intervening Attorney General in any action that challenges the constitutionality of a statute, executive order, administrative regulation, or administrative agency order, the unilateral authority, without a showing of cause, to transfer the case to another, arbitrarily-selected circuit court, thereby summarily divesting the circuit court in which the case was filed of any further jurisdiction over the case, including review of the propriety of the transfer request. The implementation of this transfer procedure mandates certain actions on the part of the Clerk of the Supreme Court and the Circuit Court Clerk.

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[1] Daniel Cameron, in his official capacity as Attorney General of the Commonwealth of Kentucky; M. Katherine Bing, in her official capacity as Interim Clerk of the Supreme Court of Kentucky; Kathryn Marshall, in her official capacity as Franklin Circuit Court Clerk; and Phillip Shepherd, in his official capacity as Judge of Franklin Circuit Court.

[2] Act of Mar. 29, 2023, ch. 131, 2023 Ky. Acts 774.

[3] Arkk Properties, LLC; B.J. Novelty, Inc.; The Cue Club, LLC; Home Run, LLC; Federal Post No. 313, The American Legion Department of Kentucky, Inc.; MFPALMINVESTMENTS, LLC; Vincent Milano; Tanya Milano; and Pom of Kentucky, LLC.

[4] Kentucky Revised Statutes.

[5] S.B. 126 was enacted during the 2023 Session of the General Assembly.

Upon thorough review of the parties' arguments and applicable law, this Court grants the Petition for Supervisory Writ. The issues presented fall within this Court's exclusive authority and jurisdiction as S.B. 126 commands actions to be taken by the Clerk of this Court, and circuit court clerks, both of whom are under the supervision of the Chief Justice and the Supreme Court. For the reasons discussed below, this Court holds that S.B. 126 is unconstitutional and declines to extend comity.

I. Facts and Procedural Background

In the underlying action in Franklin Circuit Court, Plaintiffs/Petitioners challenged the constitutionality of House Bill 594, which bans a certain form of electronic gaming machines. Act of Mar. 16, 2023, ch. 4, 2023 Ky. Acts 7. In response, the Attorney General, a named defendant, invoked the newly enacted provision of S.B. 126, seeking to transfer the case to another circuit court by way of a lottery selection conducted by the Clerk of the Kentucky Supreme Court. Plaintiffs/Petitioners objected, challenging the constitutionality of S.B. 126's mandatory transfer procedure, and amended their complaint to name the Clerk of the Kentucky Supreme Court and the Franklin Circuit Clerk, in their official capacities, as Defendants so as to place all necessary parties before the circuit court.

After full briefing by the parties, the Franklin Circuit Court held oral argument. In its order that followed, the circuit court expressed concern as to whether it was the appropriate judicial authority to rule on S.B. 126's new, mandatory prescription of duties imposed on the Clerk of the Supreme Court

and the Franklin Circuit Clerk, since questions concerning the validity of the legislation involve fundamental issues of practices and procedures before the courts, and operation of the Supreme Court itself. *See Ex Parte Farley*, 570 S.W.2d 617 (Ky. 1978) ("[T]he jurisdiction to hear and determine any cause that has as its ultimate objective a judgment declaring what this court must do or not do is vested exclusively with this court[]"). Accordingly, the circuit court temporarily stayed its ruling on Defendants/Respondents' motion to transfer, pending further review from this Court, should this Court exercise its jurisdiction to consider the matter. Petitioners have now sought a supervisory writ from this Court to prohibit transfer of the underlying action and a declaration that S.B. 126 is unconstitutional.

II. Supervisory Writ Standard

Under § 110 of the Kentucky Constitution, the Supreme Court "shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or *as may be required to exercise control of the Court of Justice*." KY. CONST. § 110 (2)(a) (emphasis added). This section confers original jurisdiction upon this Court in limited circumstances, including the grant of a "supervisory" writ. *See Seadler v. Int'l Bhd. of Elec. Workers, Loc.* 369, 642 S.W.3d 712, 713-14 (Ky. 2022) (supervisory writs under § 110(2)(a) seek to address a broader concern such as the Court's control over the functioning and operation of the courts) (citing *Commonwealth v. Carman*, 455 S.W.3d 916, 923 (Ky. 2015)).

Granting the extraordinary request of a supervisory writ should be carefully invoked "only in well-defined or compelling circumstances." *Seadler*, 642 S.W.3d at 714 (citing *Abernathy v. Nicholson*, 899 S.W.2d 85, 88 (Ky. 1995)); *see also Ky. Jud. Conduct Comm'n v. Woods*, 25 S.W.3d 470, 472 (Ky. 2000) ("the deciding factor in taking an original action under § 110(2)(a) is not whether this Court could exercise jurisdiction, but whether it *should*"). An example of a compelling circumstance justifying the exercise of our original jurisdiction is "in cases where no other court has power to proceed." *Carman*, 455 S.W.3d at 923 (citing *Abernathy*, 899 S.W.2d at 88). This case presents such circumstances since this Court has exclusive jurisdiction over the agencies and personnel under its control. *See Ex Parte Farley*, 570 S.W.2d at 622 (as the Commonwealth's highest court, Supreme Court has constitutionally-derived authority to "exercise control of the Court of Justice[]").

The Attorney General argues that we should decline to exercise our power under Section 110 and address this issue by way of our normal appellate process. *See, e.g., Fritsch v. Caudill*, 146 S.W.3d 926, 929-30 (Ky. 2004) (holding that venue determinations, even if erroneous, are not a basis for extraordinary relief, and are subject to appellate review). While we recognize some merit to this argument, we also note, as presented by the Attorney General, that he has filed Notice of Transfer in multiple cases.[6] Thus, we appropriately exercise our supervisory writ power. The Franklin Circuit Court

[6] Notice of Transfer, *Ky. Educ. Ass'n v Link*, No. 23-CI-0343 (Franklin Circ. Ct.); Notice of Transfer, *Davis v. Commonwealth*, No. 23-CI-3628 (Jefferson Circ. Ct.).

was correct in recognizing the issues at hand and deferring to this Court for review.

III. Analysis

S.B. 126 creates a new mechanism for automatic transfer of an action challenging the constitutionality of a statute, administrative regulation, or executive order, which, while originally filed in the proper venue, would be arbitrarily transferred without any showing of bias, or judicial review of the transfer request. When a party files a "Notice of Transfer" with the circuit clerk of the county in which the case was originally filed, S.B. 126 imposes a mandatory duty on the Clerk of this Court to – by lottery – re-assign a different court to hear the case and for the record of the case to be transferred by the circuit clerk. This process is constitutionally infirm, as violating the separation of powers doctrine of the Kentucky Constitution.

A. S.B. 126 violates the separation of powers doctrine contrary to §§ 27, 28, 109, 110 and 116 of the Kentucky Constitution.

Kentucky Constitution §§ 27 and 28 set forth the separation of powers doctrine that is fundamental to the Commonwealth's tripartite system of government: no branch of government may encroach upon the inherent powers granted to any other branch. *See Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984) (stating as "well settled law in the state of Kentucky that one branch of Kentucky's tripartite government may not encroach upon the inherent powers granted to any other branch[]"). "The doctrine of the separation of powers was adopted . . . to preclude the exercise of arbitrary power. The purpose was . . . to save the people from autocracy." *Commonwealth ex rel. Beshear v. Bevin*,

575 S.W.3d 673, 683 (Ky. 2019) (quoting *Fletcher v. Commonwealth*, 163 S.W.3d 852, 863 (Ky. 2005)). Under this doctrine "the legislative function cannot be so exercised as to interfere unreasonably with the functioning of the courts, and . . . any unconstitutional intrusion is per se unreasonable, unless it be determined by the court that it can and should be tolerated in a spirit of comity." *Ex parte Auditor of Pub. Accts.*, 609 S.W.2d 682, 688 (Ky. 1980). "[A]ny statute subject to the scrutiny of Sections 27–28 of the Kentucky Constitution should be judged by a strict construction of those time-tested provisions." *Legis. Rsch. Comm'n v. Brown*, 664 S.W.2d 907, 914 (Ky. 1984).

Section 109 of the Kentucky Constitution states, "[t]he judicial power of the Commonwealth shall be vested exclusively in one Court of Justice[.]" Section 116 provides, "[t]he Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, . . . and rules of practice and procedure for the Court of Justice." Thus, this Court's rule-making power is derived from, and firmly rooted within, the Constitution.

S.B. 126 dishonors the principle of separation of powers by: granting unchecked power to a litigant to remove a judge from a case under the guise of a "transfer," thereby circumventing our well-established judicial recusal process; divesting the circuit court of its inherent jurisdiction and authority to decide when and if a case should be transferred to another venue; invading this Court's rule-making authority by permitting a "Notice of Transfer" pleading not authorized by Kentucky's Rules of Civil Procedure; and exercising control over

the Court's clerks by directing them to take certain action for implementation of S.B. 126.

While adopted as "AN ACT related to venue and declaring an emergency," S.B. 126 actually concerns judicial recusal. The Legislature, in the Act's emergency declaration, stated its purpose is "to provide litigants access to courts of this Commonwealth without any concern of bias[,]" S.B. 126 § 2, but it operates to vest a certain class of litigants with the unfettered right to forum shop, without having to show any bias on the part of the presiding judge, or just cause for removal. As noted by the Franklin Circuit Court in its order, "if the purpose is to address the issue of alleged 'bias', then the subject matter of the legislation is judicial recusal, not venue. . . . By drawing the alternate judge by lot, the chances of bias are not minimized, they are multiplied."

The recusal procedure for a judge, including the substantive grounds for such, is a judicial power constitutionally vested in the Supreme Court pursuant to §§ 109 and 116 of the Kentucky Constitution. *See Foster v. Overstreet*, 905 S.W.2d 504, 506 (Ky. 1995) ("Section 109 provides that judicial power shall vest in the Supreme Court, and Section 116 empowers the Supreme Court to make all rules of practice and procedure[]"). Any encroachment by the legislative branch on that judicial power is an unconstitutional violation of separation of powers unless this Court elects to grant comity to the legislature and uphold the statute. *Id.* "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." *Id.* (quoting *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 577 (Ky. 1995)).

A circuit court with jurisdiction over a case is vested with "inherent" authority to administer justice, including deciding whether a case should be transferred to another venue, or if judicial recusal is warranted. *See* KY. CONST. § 112(5) (circuit court has "original jurisdiction of all justiciable causes not vested in some other court[]"). KRS 452.010 provides for the transfer of venue for a fair and impartial trial.[7] A ruling on change of venue is a matter within the circuit court's discretion and will not be disturbed on appeal unless an abuse of that discretion is shown. *Pierce v. Crisp*, 267 Ky. 420, 102 S.W.2d 386, 388 (1937). KRS 26A.015 and SCR[8] 4.300 set forth the grounds for judicial disqualification. Disqualification motions are subject to *de novo* review, thereby providing further protection from potential bias. *Abbott, Inc. v. Guirguis*, 626 S.W.3d 475, 484 (Ky. 2021).

S.B. 126 divests the circuit court of its inherent power to administer justice in a case and strips the appellate courts of judicial review of a disqualification motion or change of venue ruling. "[T]he grant of judicial [rule-making] power to the courts by the constitution carries with it, as a necessary

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[7] KRS 452.010(2) provides,

> A party to any civil action triable by a jury in a Circuit Court may have a change of venue when it appears that, because of the undue influence of his adversary or the odium that attends the party applying or his cause of action or defense, or because of the circumstances or nature of the case he cannot have a fair and impartial trial in the county.

[8] Kentucky Rules of the Supreme Court.

incident, the right to make that power effective in the administration of justice." *Smothers*, 672 S.W.2d at 64 (quoting *Craft v. Commonwealth*, 343 S.W.2d 150, 151 (Ky. 1961)). "This Court has historically recognized constitutional limitations upon the power of the legislature to interfere with or to inhibit the performance of constitutionally granted and inherently provided judicial functions." *Smothers*, 672 S.W.2d at 64. The *Smothers* court interpreted §§ 27 and 28 of the Kentucky Constitution as terminating the power of the legislature to dictate rulings and policy over the practice and procedure of the case after a lawsuit has been filed. *See id.* at 65 (reiterating that "a court, once having obtained jurisdiction of a cause of action, has, as incidental to its general jurisdiction, inherent power to do all things reasonably necessary to the administration of justice in the case before it[]"). In *Gaines v. Gaines' Ex'r*, 48 Ky. (9 B. Mon.) 295, 302 (1848), our predecessor court expounded on the distinction between legislative and judicial power, stating the legislature is "to pass laws as a rule of action and of right for the community at large, or for particular classes, or for individuals under certain circumstances, to be defined by law." *Id.* at 302. By contrast, "[i]t is the province of the judicial power to administer these laws, by applying them to the facts in individual cases, for the ascertainment of the right and the redress or repression of the wrong." *Id.*

While the Attorney General argues that the legislature's authority over matters of venue is plenary, statutes dealing with venue must comport with constitutional requirements, like all other statutes, and must respect the separation of powers doctrine. S.B. 126's robotic transfer process violates this

doctrine by usurping the circuit court's role in determining whether recusal or change of venue are necessitated and halts any appeal of that ruling.

In addition, S.B. 126's authorization of the filing of a "Notice of Transfer" pleading invades this Court's § 116 exclusive authority to adopt rules of practice and procedure and is a clear violation of the separation of powers doctrine. *See, e.g., Elk Horn Coal Corp. v. Cheyenne Res. Inc.*, 163 S.W.3d 408, 423 (Ky. 2005) (striking down as unconstitutional a statute that deters discretionary review motions by assessing unsuccessful appellants a ten percent penalty on any superseded money judgment), *overruled on other grounds by Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557 (Ky. 2020); *O'Bryan*, 892 S.W.2d at 578 (invalidating a statute that authorized introduction of evidence of collateral source payments at trial).

S.B. 126 also invades this Court's authority over the rules and practices of the courts by mandating certain action be taken by the Clerk of this Court and circuit courts across the Commonwealth. The Clerk of the Supreme Court is a constitutional office, KY. CONST. § 114, is appointed by and serves at the pleasure of the Supreme Court, and is required to "perform such duties as the Supreme Court may assign[.]" KRS 21A.030(3). The Supreme Court also has plenary power over the circuit court clerks "who are subject to the administrative control of the Chief Justice." KRS 30A.010(2); *Combs v. Huff*, 858 S.W.2d 160, 161 (Ky. 1993). Again, this Court possesses the exclusive power to prescribe rules governing practice and procedure for the Court of Justice, including the circuit courts. KY. CONST. § 116.

These rules include CR[9] 79.05, which requires that the circuit court clerk for each county keep the original record of any action filed in its court, with no original record to be removed except by court order, by transfer to an appellate court, or withdrawn by an attorney under RAP[10] 26(D). S.B. 126 seeks to exert unconstitutional control over the Clerk of the Supreme Court and the circuit court clerks by requiring, after the filing of a Notice of Transfer, the Clerk of this Court "direct the transfer of the action" to a different circuit court, randomly-chosen by the Clerk, and to then notify the circuit court clerk in the county in which the action was originally filed that the venue has changed and that the record should be transferred accordingly.[11] This directive contradicts CR 79.05 and encroaches on the judicial branch's constitutional authority to adopt rules of practice and procedure for the Court of Justice.

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[9] Kentucky Rules of Civil Procedure.

[10] Kentucky Rules of Appellate Procedure.

[11] S.B. 126 does not specify who shall transmit notice to the Clerk of the Supreme Court, which circuit courts are to be included in the lottery selection for re-assignment, how the Clerk is to undertake such a random selection, or the time period in which the Clerk is to act. As a practical matter, for implementation of S.B. 126, the Clerk of the Supreme Court inevitably will expend time and resources to perform the required lottery. This expenditure exemplifies yet another way in which the act trespasses on the judicial branch. This Court has held that "[t]he Court of Justice is an independent branch of state government and not subject to interference in the management and use of its budget by the General Assembly." *Martin v. Admin. Off. of Cts.*, 107 S.W.3d 212, 214 (Ky. 2003) (citing KY. CONST. §§ 27 and 28). "The authority and responsibility of determining the necessity and propriety of expenditures from the judicial budget rests solely with the judicial branch and is not subject to executive or legislative regulations." *Id.*

S.B. 126 also contravenes CR 77.03, which confers authority on the court to suspend, alter or rescind any action of the circuit court clerk upon cause shown. S.B. 126 hampers court oversight of its clerks, including the processing of the transfer request and any appellate review of a transfer ruling. In this way, S.B. 126's commands infringe upon the plenary power of this Court to oversee the Court of Justice and adopt rules of practice and procedure for its operation.

The Attorney General asserts that the legislature possesses unfettered authority to determine all rules and policy regarding constitutional issues under § 231 of the Kentucky Constitution, entitled "Suits against the Commonwealth" which states: "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." However, this section does not include actions for declaratory relief which challenge the constitutionality of a statute, administrative regulation, or executive order. *See, e.g., Greene v. Louisville & Interurban R.R. Co.*, 244 U.S. 499, 506 (1917) ("a suit to restrain a state officer from executing an unconstitutional statute, in violation of plaintiff's rights and to his irreparable damage, is not a suit against the state[]"); *Commonwealth v. Ky. Ret. Sys.*, 396 S.W.3d 833, 838-39 (Ky. 2013) (suits for declaratory relief that do not involve monetary damages do not implicate sovereign immunity under §§ 230 and 231 of the Kentucky Constitution).

Thus, the legislative branch's § 231 power does not save S.B. 126. As previously noted by this Court,

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

Ky. Ret. Sys., 396 S.W.3d at 839.

For the above reasons, S.B. 126 violates the separation of powers doctrine. Because of this constitutional infirmity, we do not address Plaintiffs'/Petitioners' equal protection or due process argument

B. S.B. 126 is not extended comity.

Although we determine S.B. 126 is unconstitutional as violative of Sections 27, 28, 109, 110 and 116 of the Kentucky Constitution, we address whether to extend comity to the Act. "'Comity,' by definition, means judicial adoption of a rule unconstitutionally enacted by the legislature 'not as a matter of obligation, but out of deference and respect.'" *O'Bryan*, 892 S.W.2d at 577 (quoting *Black's Law Dictionary,* "Judicial Comity," 5th Ed., p. 242 (1979)). Under principles of comity, this Court may choose to adopt an unconstitutional statute that violates the separation of powers doctrine, out of deference to the legislature as a co-equal branch of government, not out of obligation. *O'Bryan*, 892 S.W.2d at 577.

> The general rule is that any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional. However, the rule is subject to the qualification that the legislature may put reasonable restrictions upon constitutional functions of the courts, provided that such restrictions do not defeat or materially impair the exercise of those functions.

Arnett v. Meade, 462 S.W.2d 940, 946 (Ky. 1971).

In *Foster v. Overstreet*, 905 S.W.2d 504, 507 (Ky. 1995), we explained that the test we use in determining whether to extend comity to the legislature is that "[a] statute must pass the test of a 'statutorily acceptable' substitute for current judicially mandated procedures." We hold that S.B. 126 is not a statutorily acceptable substitute for our judicially created policies and procedures; rather, it is contrary to, and inconsistent with, our existing court rules and unreasonably interferes with the orderly functioning of the courts.[12] Thus, we decline to extend comity to S.B. 126.

This Court understands the stated goal of the legislature in enacting S.B. 126 is to provide litigants in cases involving constitutional challenges the ability to appear in front of unbiased judges. To be clear, this Court has long-acquiesced in a statutory procedure for removing a judge with bias from hearing a case. Specifically, KRS 26A.015 requires disqualification of a judge who has a personal bias or prejudice. KRS 26A.020 provides a process for a litigant to request immediate review of any claim of violation of a judge's impartiality by the Chief Justice of the Kentucky Supreme Court.[13]

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[12] In *Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990), *overruled on other grounds by Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky. 2001), and *Gaines v. Commonwealth*, 728 S.W.2d 525 (Ky. 1987), we held two statutes unconstitutional and declined to extend comity due to constitutional infirmities of lack of due process and right of confrontation.

[13] The KRS Chapter 26A process is in addition to the more direct and simple method of a litigant merely filing a motion with the trial court to recuse. In other words, KRS 26A.020 is a "'statutorily acceptable' substitute for current judicially mandated procedures." *Foster*, 905 S.W.2d at 507; *see also Abbott, Inc.,* 626 S.W.3d at

Additionally, SCR 4.300, Canon 2 of our Supreme Court Rules requires judges to perform the duties of their office impartially and free of personal conflict. Further, to address any concern that important constitutional challenges have review by judges from across our Commonwealth, the ultimate oversight of the Court of Justice, including the rules regarding venue and bias, fall to an appellate bench, both Supreme Court and Court of Appeals, that by design, represent communities from Pike to Fulton Counties and everywhere in-between. *See* KY. CONST. §§ 110(4), 111(1) (requiring Supreme Court justices and Court of Appeals judges to be elected by districts). Requiring random redistribution of cases, without cause, does not add to this process.

Another reason we decline to extend comity to S.B. 126 is that little reason seems to support it. As noted, S.B. 126 only applies to actions involving a claim for declaratory or injunctive relief. In other words, actions that typically involve pure questions of law, may be relatively quickly appealed,[14] and are subject to our de novo review. The ultimate final word on constitutionality in such matters is, of course, this Court, and we afford no deference to the legal conclusions of the trial court or the Court of Appeals. We are hard pressed to discern the point of a "venue statute" involving this Court's

480-84 (discussing procedure to be used when a litigant files a motion for recusal of a trial judge).

[14] Good examples of expedited appellate review are *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021) and *Beshear v Acree*, 615 S.W.3d 780 (Ky. 2020). Both cases addressed constitutional issues arising from the Covid pandemic and were decided by this Court within approximately 5 months of the filing of complaints in the circuit courts.

Clerk in an unconstitutional exercise, when the underlying dispute is ultimately resolved here, regardless of whether the initial or transferred circuit court is Fayette, Fleming, Floyd, Franklin or Fulton.

The Attorney General has failed to show that S.B. 126 was enacted out of absolute necessity or was even necessary at all. As discussed above, legal mechanisms exist by which a change of venue or judicial recusal can be achieved; both processes address the concern of bias that S.B. 126 seeks to redress and apply to all litigants. Moreover, S.B. 126's allowance of a peremptory, unchecked veto power, by a party or intervening Attorney General, over a judge with jurisdiction over a case, without a showing of bias and the subsequent arbitrary selection of an alternate judge fails to address the bias the Act supposedly is aimed at curing.

IV. Conclusion

We conclude that S.B. 126 is an unconstitutional encroachment by the legislative branch of government on the constitutionally conferred judicial powers of this Court and is not to be extended comity.

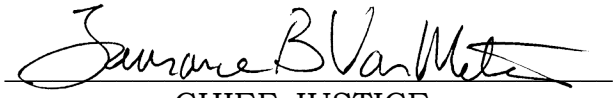
V. Order

This Court grants the Petitioners' request for the issuance of a supervisory writ and orders that, in cases across the Commonwealth, the Supreme Court Clerk and all circuit court clerks presented with a "Notice of Transfer" filed pursuant to S.B. 126 shall refrain from undertaking any of the duties imposed thereby. This Court further remands this matter to the

Franklin Circuit Court for denial of the Respondents' request to transfer pursuant to S.B. 126.

All sitting. Bisig, Keller, Lambert, Nickell, and Thompson, JJ., concur. Conley, J., dissents by separate opinion.

ENTERED: October 26, 2023



CHIEF JUSTICE

CONLEY, J., DISSENTING BY SEPARATE OPINION:

Respectfully, I dissent. S.B. 126 on its face violates neither due process of law nor the equal protection of laws, nor is it arbitrary. I do agree S.B. 126 violates separation of powers by conferring upon the Clerk of the Supreme Court a power to randomly select a new venue when the statute is invoked. The Clerk is a constitutional officer who is subject to our authority alone. Ky. Const. § 114. But comity can be extended if this conferral of power is understood, with only a little imagination, as a grant of authority by the General Assembly to this Court to craft rules regulating transfers of venue for the applicable class of cases.

I. Prolegomenon

When our forefathers ratified the first constitution, they created an order of government—"The powers of government shall be divided into three distinct departments . . . [and] No person, or collection of persons, being of one of those departments, shall exercise any power belonging to either of the others . . . ."

Ky. Const. art. I, §§ 1 and 2 (1792); Ky. Const. §§ 27 and 28 (1891). To the judiciary, the People gave "neither FORCE nor WILL but merely judgment . . . ." Alexander Hamilton, Federalist No. 78, 464 (Rossiter, Clinton ed., 1961). We render judgment as to law and judgment as to equity; hither to shall we come but no further. The wisdom of a law and its prudence, its efficiency and its expediency are beyond our cognizance. Let a statute be withal unwise in its purpose; imprudent in the timing of its passage; inefficient in its execution; and inexpedient in attaining its desired end; if it does not violate a constitutional provision, it *must* stand. If this Court is from time to time compelled to check the unconstitutional advances of an encroaching executive or legislature, we must also remember that we preserve our independence best by remaining true to our own calling.

II. Venue Considered

Venue is a curious concept in our jurisprudence. Generally, venue relates to the "proper place for the claim to be heard," *Dollar Gen. Stores, Ltd. v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007), while jurisdiction relates to the "power of courts to adjudicate . . . ." *Id.* But there are certain actions which, by operation of statute, "are so localized with respect to their subject matter that only the court of a particular county has jurisdiction." *Smith v. Wells*, 112 S.W.2d 49, 53 (Ky. 1937) (internal quotation omitted). We have also observed that "our statutes and this Court's rules place geographical boundaries on a court's power to hear a case." *Baze v. Commonwealth*, 276 S.W.3d 761, 767 (Ky. 2008). Consequently, though jurisdiction and venue are distinct concepts,

"both territorial defects and improper subject matter operate to strip a court of jurisdiction to hear a case." *Id.* Thus, venue is not jurisdictional except when it is.

What is not in doubt is that "venue derives from a statutory mandate as to which county or counties is the proper place for a claim to be heard." *Smith*, 237 S.W.3d at 166. It is a legislative matter and the only limitation that exists upon the General Assembly in legislating upon this topic must be found in the constitution itself. Section 59 of the constitution provides that the General Assembly shall not pass local or special legislation upon "changes of venue in civil or criminal causes." The positive implication being that if the General Assembly cannot pass local or special legislation, it must be able to pass general legislation. Section 59 is the constitutional provision providing the legislative power to fix venue. "The 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).

There has been a venue statute since at least 1852. The current venue statutes contain at least two dozen individual provisions on a variety of topics. KRS 452.400 – KRS 452.650. We have previously held a venue statute unconstitutional where it violated the Fourteenth Amendment's Equal Protection Clause. *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70, 73 (Ky. 1936). In that case, the civil code provided that in cases for damages to person or property, in-state resident defendants could only be sued in either their county of residence or in the county which the injury occurred. *Id.* at 71. But

for the same kind of action, out-of-state resident defendants could be sued in the county where the plaintiff resided or the county in which the injury occurred. *Id.* We held "so much of the statute as permits the plaintiff to elect to institute action in the county of his or its residence, the injury not occurring therein, is invalid." *Id.* at 73.

In the case of *Hummeldorf v. Hummeldorf*, the Court of Appeals ruled the divorce venue statute unconstitutional because it favored the residence of the wife in such cases. 616 S.W.2d 794, 796 (Ky. App. 1981). Noting that the statute had remained virtually unchanged since 1852, the Court of Appeals held that such a rule made sense in an era where women and wives' "legal, social and economic position was one of powerlessness." *Id.* But in the modern era such a rule could no longer suffice. *Id.* It also noted that in 1972, the substantive law of divorce was equalized between husbands and wives, thus, "the [venue] procedure provided should neither favor nor disfavor either party. We see no reason for continuing to give a resident wife the home court advantage in divorce actions." *Id.* at 797. The Court of Appeals also held that the statute violated Section 2 of Kentucky's constitution denying arbitrary power. *Id.*

Another case ought to be mentioned. KRS 452.220 prescribes the manner in which an application for a change of venue shall be made in criminal actions. Subsection 3 states, "Applications under this section shall be made and determined in open court, and the court shall hear all witnesses produced by either party and determine from the evidence whether the

defendant is entitled to a change of venue." In *O'Bryan v. Commonwealth*, this Court summarily and without analysis, stated, "[u]ntil this statute is superseded by this Court, under the Court's paramount rule-making authority, it stands as enacted by the General Assembly under the principles of comity . . . ." 634 S.W.2d 153, 158 (Ky. 1982). Caution must be had in our understanding of this holding as it specifically pertains only to the legislature requiring a hearing in open court, with the production of witnesses and taking of evidence. That the General Assembly is constitutionally required to provide for a change of venue in criminal cases is not in doubt. Ky. Const. § 11; *Commonwealth v. Davidson*, 15 S.W. 53 (Ky. 1891) (interpreting Ky. Const. Art II, § 38 (1850) but which is now covered by Sections 11 and 59 of the current constitution).

It is clear then that the General Assembly has the constitutional authority to pass general legislation fixing venue and providing for changes of venue. The courts of Kentucky have struck down particular venue provisions in the past when they contravene either the federal or state constitution, but we have also upheld provisions based on comity where the Court had not exercised its own rule-making authority; but this ruling did not assert that venue statues in general were granted comity, only the singular provision regarding a particular procedure.

S.B. 126 provides

> the venue for any civil action that challenges the constitutionality of a Kentucky statute, executive order, administrative regulation, or order of any cabinet, program cabinet, or department . . . [and] includes a claim for declaratory judgment or injunctive relief; and

> is brought individually, jointly, or severally against any state official or state officer in his or her official capacity, including any public servant . . . any body, subdivision, caucus, committee, or member of the General Assembly, or the Legislative Research Commission; or an agency of the state . . . shall be as provided in this section.

KRS 452.005(1)(a)-(c). It then proceeds to declare,

> Any plaintiff or defendant to a civil action under subsection (1) of this section may seek a change of venue by filing a notice of transfer in the Circuit Court in which the action was originally filed no later than thirty (30) days after the return of service on the defendant. The Attorney General, as an intervening defendant, may seek a change of venue no later than thirty (30) days from intervention.
>
> The notice shall be transmitted forthwith to the clerk of the Supreme Court who shall direct the transfer of the action to a different Circuit Court chosen by the clerk of the Supreme Court through random selection.
>
> After randomly selecting the Circuit Court to which the action shall be transferred, the clerk of the Supreme Court shall notify the Circuit Court clerk of the county in which the action was originally filed of the selection and the Circuit Court shall immediately transfer the action and the record of the action to the Circuit Court designated by the clerk of the Supreme Court.

Id. at (4)(a)-(c). Thus, we must understand this statute not as pertaining to judicial recusal, but as to venue. That is what the General Assembly has declared its purpose to be, and dispositively, what the text of S.B. 126 actually addresses. "We 'ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed.'" *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005).

The fact that the General Assembly has made a special note of its desire to combat potential bias does not transform the statute's purpose. "In most instances, the purpose of statutorily specified venue is to protect the *defendant*

against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183-84 (1979). To protect the defendant generally "is the clear purpose of Kentucky's venue statutes . . . ." *Winkler v. Germann*, 329 S.W.3d 349, 352 (Ky. App. 2010). To eliminate unfairness, i.e., bias, is a legitimate purpose of venue statues. That venue statutes traditionally focus on the actual or potential bias as it manifests in the community of the county does not mean the legislature can only ever combat that particular kind of bias through regulating venue. Where does the constitution contain such a limitation? By defining the class of cases to include only declaratory actions or injunctive relief, the General Assembly was clearly aiming at cases that would involve a question of law, thus would not concern the community and potential jurors but the judge. If the General Assembly believes that a party may reap an unfair advantage from the plaintiff's choice of venue, in that the presiding judge in that venue may potentially be sympathetic to their constitutional arguments, I see no reason, constitutionally, why venue would not be an appropriate method to address that issue.

This brings us to the nature of bias at issue. I know this is a sensitive topic, but we must recognize reality if we are to reach a correct decision. Judicial elections in Kentucky are non-*partisan*. Ky. Const. § 117; SCR Canon 4. But as much as we jurists and lawyers would like constitutional questions to be pure matters of the "science of law," the fact is the constitution is a *political* document. Its interpretation and application are inherently political. We cannot

escape this reality much as we might wish to click our heels and make it go away. In that regard,

> [i]t is important to bear in mind that 'section two of our Constitution does not rule out policy choices which must be made by government. Many times these choices are in reality political actions and if they are not otherwise in conflict with constitutional principles they do not violate section two as being arbitrary.'

City of Lebanon v. Goodin, 436 S.W.3d 505, 519 (Ky. 2014) (quoting *White v. Danville,* 465 S.W.2d 67, 69–70 (Ky. 1971). The General Assembly has determined that cases involving constitutional challenges to an act of government (hence partaking of the political), seeking declaratory or injunctive relief, and against a government actor, should not be subject to the potential bias a judge may have for a constitutional argument *arising from the plaintiff's choice of venue*. There is no requirement for actual bias, thus no need that the trial judge make such a determination. Actual bias is not the target, potential bias is. Actual bias is irrelevant. Therefore, the fact that the number of potential judges is increased by a random selection does not result in an increase in the potential for bias, because the "mischief" to be ameliorated is the potential bias arising from the plaintiff's choice in venue.

S.B. 126 eliminates this potential for bias arising from the plaintiff's choice of venue by providing for random selection by the Clerk of the Supreme Court. The statute does not prescribe the manner by which this selection will occur, nor does it define random. The Petitioners have made much of the fact that, at its widest possible interpretation, the Clerk could select a venue from any of the other 119 counties in Kentucky, thereby potentially forcing a lawsuit

filed in Paducah to be litigated in Pikeville. That extreme interpretation is not at all compelled by the text. Nor do I think, in the exercise of comity, it could not be reasonably tempered. We could quite easily direct the Clerk to limit her random selection to counties that share a contiguous border with the county the action was originally filed in. This limits the scope of the randomness. The manner of selection can be by drawing lots, i.e., names out of a hat. That certainly sounds undignified but drawing lots has a long and venerable tradition in politics and government. *See* Plato, *Laws, in* Complete Works 1318, 1433 (Cooper, John M., ed., 1997); Aristotle, *Politics, in* The Basic Works of Aristotle 1114, 1230 (McKeon, Richard, ed., 2001). Chance is random and, by definition, unbiased. The scope of randomness can increase or decrease, between 2 counties to 119 counties, but in any event each county will stand equal in relation to the other thus, no bias.

S.B. 126 is not perfect and is somewhat awkwardly crafted. For example, the statute provides the plaintiff can also invoke the right to automatic change of venue. KRS 452.005(4)(a). At first, one wonders why the plaintiff would be given such a right if the potential bias arises from its choice of venue. But the answer is that the General Assembly has also provided that the plaintiff shall file a claim, meeting the requirements of KRS 452.005(1), in its county of residence, or if multiple plaintiffs, then in any county which one of the plaintiff's resides. KRS 452.005(2)(a). Or, if the plaintiff is out-of-state, it must file in Franklin Circuit Court. KRS 452.005(2)(b). A lawsuit has to be filed somewhere and the General Assembly has fixed it in this particular class of

cases as the plaintiff's county of residence or Franklin County. That explains why the plaintiff may also invoke the automatic notice of transfer because their choice of venue has been constrained; the General Assembly took away with one hand but gave with the other. The potential bias arises from the plaintiff's choice of venue, but the plaintiff is entitled, by the statute, to invoke an automatic transfer of venue because S.B. 126 erects a party-neutral scheme of venue selection for the class of cases it defined. The Court mentions that S.B. 126 is a form of forum-shopping, but how can that be so if the ultimate forum is unknown and chosen at random by the Clerk?

At this point, I will pass over the issues of arbitrariness, equal protection, and due process because the Court has not mentioned them. The Court has not held S.B. 126 violates any of these constitutional provisions, and I only briefly note that for various reasons I do not consider S.B. 126 to violate these rules either. *See Cincinnati St. Ry. Co. v. Snell*, 193 U.S. 30, 36-7 (1904); *Burlington N. R. Co. v. Ford*, 504 U.S. 648, 651 (1992); *Goodin*, 436 S.W.3d at 519.

Nonetheless, prior to considering the issue of comity, it must be kept in mind that the General Assembly has the constitutional power to regulate venue. Ky. Const. § 59. As the Supreme Court of the United States recognizes, there are "warring interests" when it comes to deciding venue. *Burlington*, 504 U.S. at 651. The purpose behind the General Assembly's power to regulate venue is to adjust those warring interests. *Id.* The General Assembly has decided to adjust the warring interests involved in venue for cases involving

constitutional claims against a state actor and involving a declaratory action or injunctive relief (usually questions of law), by creating a party-neutral approach. As stated, an action has to be filed somewhere so the statute prescribes the plaintiff file in his county of residence or in Franklin County if not a Kentucky resident. But then it gives both the defendant and plaintiff, one or the other, thirty days after return of service on the defendant to invoke the right to automatic transfer. KRS 452.005(4)(a). The Attorney General may invoke the same right within thirty days after he has intervened in the lawsuit. *Id.*

III. Comity

Comity is a tricky issue. There are serious questions regarding the constitutional separation of powers involved with comity. If understood in its most literal sense, it is quite simply a doctrine that the Court will sanction an unconstitutional violation of separation of powers simply because it wants to. Obviously, such a doctrine would itself be unconstitutional and arbitrary. Thankfully, comity is a much more restricted doctrine.

In *Ex Parte Farley*, the Court held that "the custody and control of the records generated by the courts in the course of their work are inseparable from the judicial function itself, and are not subject to statutory regulation." 570 S.W.2d 617, 624 (Ky. 1978). Nonetheless, as to the application of the Open Records Act to the judiciary, we held

> It is not our disposition to be jealous or hypertechnical over the boundaries that separate our domain from that of the legislature . . . We respect the legislative branch, and in the name of comity and common sense are glad to accept without cavil the application of its statutes pertaining to judicial matters . . . .

Id. Ex Parte Auditor took a significant step in the right direction by limiting the application of the doctrine to the "gray area in which a line between the legislative prerogatives of the General Assembly and the rule-making authority of the courts is not easy to draw." *Ex Parte Auditor of Pub. Accts.*, 609 S.W.2d 682, 688 (Ky. 1980).

> The correct principle, as we view it, is that the legislative function cannot be so exercised as to interfere unreasonably with the functioning of the courts, and that any unconstitutional intrusion is per se unreasonable, unless it be determined by the court that it can and should be tolerated in a spirit of comity.

Id. "The policy of this court is not to contest the propriety of legislation in this area to which we can accede through a wholesome comity." *Id*.

In *Foster v. Overstreet*, we extended comity to KRS 26A.020, governing the appointment of a special judge where the original trial judge was alleged to be impartial and thus could not provide a fair trial or rule fairly on a motion to transfer venue. 905 S.W.2d 504, 506 (1995). In that case, we held that the General Assembly may put "*reasonable* restrictions upon constitutional functions of the courts, provided that such restrictions do not *defeat* or *materially impair* the exercise of those functions." *Id.* (quoting *Arnett v. Meade*, 462 S.W.2d 940, 946 (Ky. 1971).

Once again, the General Assembly's constitutional authority to regulate venue must take precedence. Courts have been involved with making decisions about the propriety of a transfer of venue not because of any constitutional provision, nor because of any inherent power in the judiciary, but because that

is what the venue statutes have hitherto called for. KRS 452.030. S.B. 126 differs because it does not involve a prior judicial determination regarding the propriety of transferring venue. But since the legislature has determined that no judicial determination is necessary, it does not amount to an interference with the judiciary to not provide for it. And this cannot be understood as impairing the power of the circuit court because "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*, 276 S.W.3d at 767. If the General Assembly has provided for a change of venue, it has not prevented the circuit court from adjudicating the rights of the parties before it, giving them complete relief, or deprived it of jurisdiction to do so. It has merely provided a party-neutral approach to selecting the venue in which that jurisdiction will be exercised, those rights adjudicated, and complete relief obtained. This is in striking contrast to *Smothers v. Lewis*, where the General Assembly had sought to limit the power of the courts to issue injunctions. 672 S.W.2d 62, 65 (Ky. 1984). Issuing injunctions is an inherently judicial power. *Id.* Venue is not an inherent power of the courts. Ky. Const. § 59; *Heck*, 174 S.W. at 20.

The statute is unconstitutional because it confers the power to randomly select the new venue upon the Clerk of the Supreme Court. The Clerk serves at the pleasure of the Court, and her powers and functions are dictated by the Court. Ky. Const. § 114. But this is a gray area because, while the legislature can regulate venue, it is the judiciary that must effectuate the transfer of venue when called for. Venue necessarily arises only in the judicial context thus it is

an area of law that requires the judiciary and legislature to work together. Hitherto it has been the trial courts to make this determination and for the vast majority of cases it remains so. KRS 452.030. S.B. 126 is not a sea-change in the venue statutes. The General Assembly has simply shifted the decision from the trial judges to the Clerk in the applicable class of cases. We can certainly exercise comity in this regard. In the first place, it is hard to characterize a grant of power as a restriction. But in any case, there is no showing whatsoever that the Clerk will have her other functions defeated or materially impaired by exercising this power. Moreover, because the Clerk serves at our pleasure and direction, and because S.B. 126 leaves some room for the Court to fill in, we can very simply craft an Administrative Order or even a Civil Rule that would make known the process by which the scope of the randomness could be reduced and the manner of selection by drawing lots. There's even a statutory basis to craft a rule to do so. KRS 452.050 (directing transfers of venue to adjacent county most convenient to parties). Because this is a gray area where the judiciary and legislature must work together, but nonetheless the legislature's constitutional authority to regulate venue prevails, I believe comity should be granted to S.B. 126 at this point in time. It may prove unworkable but that is a conclusion that can only be reached after having given the statutory scheme a fair opportunity first.

IV. Conclusion

I have endeavored to explain my reasons for why I believe S.B. 126 can and should be upheld on its face. I do not consider myself bound to this opinion should a meritorious case be brought in an as-applied challenge. S.B.

126 is new and it is different from what the judiciary is used to. I deem it unwise, imprudent, inefficient, and inexpedient. But I cannot say it is unconstitutional.

The General Assembly has a constitutional power to regulate venue, and in adjusting the warring interests involved in venue determinations it cannot be frozen in amber because of judicial discomfort with the unfamiliar. The General Assembly must be allowed to experiment in an area that it clearly has authority to act. As one of Kentucky's greatest legal sons once said, "[t]his Court has the power to prevent an experiment . . . [b]ut, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting).

I would order the Clerk of the Supreme Court to comply with the notice of transfer after the proper scope of randomness and manner of lots has been determined by this Court, with a view that such determinations will eventually be enumerated in an Administrative Order or Civil Rule.

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