

TESTIMONY OF TOM FITZGERALD, DIRECTOR  
KENTUCKY RESOURCES COUNCIL  
REGARDING HOUSE BILL 3 SCS 2

Mr. Chairman, members of the Committee, Chief Justice Minton, Representative Massey:

Thank you for the opportunity to testify today in opposition to House Bill 3

Let me start by expressing my appreciation to you, Mr. Chairman, and to Rep. Massey and President Stivers for taking time to consider my concerns, and for the opportunity to vet the committee substitutes to the bill and its potential impacts.

After the last meeting of the committee, in which it seemed that there was a paucity of data on constitutional challenges to state laws and executive orders, I inquired of the Office of the Attorney General as to how many notices it had received concerning such claims, since as you are probably aware, KRS 418.075 requires such notices to that office. In response, they sent me data from January through August 2020.

Apparently, 2020 is the first year in which such information has been collected and reported. I reviewed and collated data from January through August of 2020, in order to determine what types of claims were being asserted and in which Judicial District.

What I found convinces me that there is no need for this bill, and that the unintended consequences of this bill greatly outweigh any perceived benefit.

In your packets, you will find the collated data. I have sent staff the actual reports from which I made these collations.

The information collated from the Monthly Reports compiled in the Office of the Attorney General reflecting the number of notices of constitutional claims received by that office in civil actions pursuant to KRS 418.075, and the Judicial

Circuit and Court in which such claims were asserted, reflected that the number of cases during this period involving constitutional claims made were 261.

The number of cases asserting those claims that were heard in Franklin Circuit Court were 2. **99.3%** of constitutional claims were heard elsewhere.

Of the civil actions filed that named a state agency or state official, there were 9 in total; and only 2, or roughly 22% were heard in Franklin Circuit Court.

When you add in the 2020 COVID challenges filed on Boone and Scott Circuit Courts, that number declines even further to 18% of the constitutional challenges filed against state officials or agencies being heard in Franklin Circuit Court.

I'm left to wonder why are we considering a proposal that would depart from standard rules concerning venue, which place venue in the Judicial District where the defendant resides or the injury arose, and provide that in this small subset of cases, the Plaintiff's location defines venue for constitutional challenges involving state officials or agencies and laws, executive orders, and regulations?

Kentucky Constitution Section 59 prohibits the passing of local or special acts, including acts "to regulate the jurisdiction, or the practice, of the circuits of the courts of justice;" and "to provide for changes of venue in civil or criminal causes." The singling out of constitutional challenges against state officials and the General Assembly and LRC is special legislation in my estimation, since it does not make a rational distinction for this subset of cases.

Nor does it standardize or make more robust the consideration of constitutional challenges, since it singles out constitutional challenges against state officials and the General Assembly, while allowing the numerous constitutional challenges that are raised in litigation between private parties, and those involving local governmental bodies, to continue to be litigated as they have for decades in the many circuits in the commonwealth. Even among constitutional challenges involving state officials or the General Assembly, the bill treats cases in a disparate manner. If a complaint raises a constitutional challenge against a state official, it is required by the SCS2 to be filed with the Plaintiff resides.

Yet many constitutional challenges, *particularly involving a statute, regulation, or executive order as applied* is involved, are not necessarily raised in the complaint, but may be raised as a defense to action *by* a state official. The bill does not change the venue for those cases, so that even cases involving constitutional issues against state officials raised as a defense, they would continue to be heard under traditional venue provisions. There is no rational basis I can imagine for such a distinction.

The Franklin Circuit Court heard roughly 1/5<sup>th</sup> of the constitutional challenges in 2020 levied against the Commonwealth and its agencies. During the prior committee hearing, a number of legislators mentioned that they had not had much experience practicing constitutional matters before the Franklin Circuit Court.

I have such experience, and I can tell you, based on 41 years of civil practice involving numerous constitutional issues before state and federal courts in the Commonwealth, including many cases in the Franklin Circuit Court, that there is great value in the familiarity of the Franklin Circuit Court Judges with complex constitutional and administrative issues, which benefits all parties to regulatory and constitutional litigation, that would be lost under this SCS. I have won some and lost a lot more in those 41 years, but have profound respect for that Court, from Henry Meigs and Squire Williams to Ray Corns to Roger Crittenden to Bill Graham, to the current Judges.

Mr. Chairman, I understand and appreciate that there is some inherent friction among the branches of government in this Commonwealth. The facial challenges to laws, constitutional amendments, and executive orders, are often spirited, and present significant issues related to the powers entrusted to each branch by our Constitution's "hard" separation of powers. I would encourage you, though, to express whatever frustration you may feel in ways other than creating a solution to a problem that does not exist and inviting constitutional challenge to this carve-out of venue.

Thank you, Mr. Chairman, members of the Committee, Justice Minton, and Representative Massey, for indulging my concerns.