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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

BRAD WEISENSTEIN, DAWN ELLIOT, *and* KENNY COOK, Plaintiffs, v. KWAME RAOUL, *in his official capacity as Illinois Attorney General*, Defendant.	Case No. 23-CH-0061 Hon. Judge Leah Captain

Plaintiffs' Response to Defendant's Motion to Dismiss Under Sections 2-615 and 2-619(a)(9)

This case brings several constitutional challenges to House Bill 3062 (2023), now codified as 735 ILCS 5/2-101.5, which purports to limit the venue where a plaintiff may bring an action "against the State or any of its officers, employees, or agents acting in an official capacity . . . seeking declaratory or injunctive relief against any State statute, rule, or executive order based on an alleged violation of the Constitution of the State of Illinois or the Constitution of the United States" to Cook and Sangamon counties.

Defendant seeks to dismiss Plaintiffs' constitutional challenges to HB 3062 both for lack of standing under Section 2-619(a)(9) and on their merits under Section 2-615. But Plaintiffs have standing as individuals who are barred from pursuing constitutional claims in their local circuit court, as taxpayers who are forced to fund the state's implementation of HB 3062, and as voters, who are disenfranchised because, unlike voters in Cook and Sangamon counties, they cannot vote for judges who decide constitutional cases. Further, because Section 2-101.5 is effectively a statute limiting jurisdiction, Plaintiffs have sufficiently alleged that Section 2-101.5 violates article VI, section 9 of the Illinois Constitution. Finally, Plaintiffs have sufficiently alleged that Section 2-101.5 violates their equal protection rights both as litigants and as voters.

Therefore, as set forth below, this Court should deny Defendant's motion.

Argument

I. Despite being labeled a statute limiting venue, HB 3062 limits subject-matter jurisdiction.

Defendant's motion assumes that HB 3062 is a venue-limiting statute like any other. *See* Def's Memo 2, 9–11, 13. It is not. Although it purports to restrict "[v]enue in actions asserting constitutional claims against the State," 735 ILCS 5/2-101.5, it effectively limits circuit courts' subject-matter jurisdiction. *See* Compl. ¶¶ 1, 5, 13, 26, 36, 38.

Article VI, section 9 of the Illinois Constitution provides:

> Circuit Courts shall have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office. Circuit Courts shall have such power to review administrative action as provided by law.

Thus, the General Assembly lacks constitutional authority to deprive any circuit courts of jurisdiction over any "justiciable matter[]," subject to the exceptions stated above.

Plaintiffs allege that HB 3062 is an attempt to restrict the subject-matter jurisdiction of circuit courts—except those in Cook and Sangamon counties—because it deprives the circuit courts of their ability to hear certain cases based entirely on their subject matter: i.e., the allegation of a constitutional claim against the State. *See* Compl. ¶¶ 35-40.

The State responds by arguing that HB 3062 simply permissibly amends the state's venue rules. *See* Def's Memo 9. But the General Assembly cannot accomplish what the constitution forbids by labeling a restriction a "venue" rule rather than a jurisdictional rule.

Until HB 3062 took effect, Illinois's venue statute—like the federal venue statute[1] and other state venue statutes—did not restrict venue to certain forums based on a case's subject matter. Rather, the venue statute was "designed to insure (*sic*) that [an] action will be brought *either* in a location convenient to the defendant, by providing for venue in the county of residence, or convenient to potential witnesses, by allowing for venue where the cause of action arose. *Baltimore & O. R. Co. v. Mosele*, 67 Ill. 2d 321, 328 (1977) (emphasis added); *accord* Def's Memo 2. Defendant admits that venue statutes—other than this one—set venue "in the location where certain events occurred." Def's Memo 2.

[1] The U.S. Constitution differs from the Illinois Constitution in that it authorizes the legislature to establish and determine the jurisdiction of lower courts, within the bounds of Article III. *See* U.S. Constitution Art. III, § 1. Congress has done so through statutes expressly establishing the federal courts' jurisdiction over various types of cases—*see* 28 U.S.C. §§ 1330, *et seq.*—and not through the venue statute, 28 U.S.C. § 1391.

Indeed, no other statute that limits venue does so solely on the subject matter of a plaintiff's claims. And Defendant points to none. Defendant asserts that some venue statutes set venue in specific counties, Def's Memo 2 (citing the Illinois Vehicle Code, 625 ILCS 5/18c-2401(1), the Illinois Banking Act, 205 ILCS 5/48(10), and the Corporate Fiduciary Act, 205 ILCS 620/5-8), but that is misleading. Those statutes' venue rules, like all traditional venue rules, are based on *where the relevant events occurred*: Illinois administrative hearings take place in state agencies located in Cook and Sangamon counties, so judicial review of administrative decisions is proper in those counties. Defendant ignores, for example, that Section 5/18c-2401(1) of the Illinois Vehicle Code simply concerns venue in "[a]ctions for judicial review" of agency decisions, while the next section, 625 ILCS 5/18c-2402(2), provides that "[a]ctions to enforce this Chapter, Commission regulations and orders, other than suits for criminal misdemeanor penalties, may be brought in the circuit courts of *any county* in which any part of the subject matter is located, or any part of the violation(s) occurred" (emphasis added).

Further, article VI, section 9 of the Illinois Constitution specifically authorizes the General Assembly to define the circuit courts' "power to review administrative action." Thus, the Illinois Supreme Court has recognized that "the legislature may explicitly vest original jurisdiction in an administrative agency when it enacts a comprehensive statutory scheme that creates rights and duties that have no counterpart in common law or equity. *J&J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 119870, ¶ 23. So even if some statutes effectively limit circuit courts' jurisdiction to hear administrative matters through a venue rule, they do so pursuant to article VI, section 9's express exception to its general rule that circuit courts "shall have original jurisdiction of *all* justiciable matters" (emphasis added).

True, HB 3062's "venue" rule differs from a jurisdictional rule in that it is waivable: the state may elect not to remove a case to Cook or Sangamon County, as the state has done here. But that simply means that the Attorney General has unfettered discretion to determine whether circuit courts will exercise jurisdiction over constitutional cases—effectively delegating a power that the General Assembly has no power to exercise in the first place.

Thus, despite its label as a venue statute, HB 3062 is truly a jurisdictional statute, and Plaintiffs have alleged a viable claim challenging it on that basis.

II. Plaintiffs have standing to challenge HB 3062 as unconstitutional.

Plaintiffs have standing to bring their claims because HB 3062 injures them in three ways: as individuals who are barred from pursuing constitutional claims in their local circuit court; as taxpayers who are forced to fund the state's implementation of HB 3062; and as voters, who are disenfranchised because, unlike voters in Cook and Sangamon counties, they cannot vote for judges who decide constitutional cases.

A. HB 3062 injures Plaintiffs because it bars them from pursuing constitutional claims in their local circuit court.

"The purpose of the doctrine of standing is to ensure that courts are deciding actual, specific controversies, and not abstract questions or moot issues." *In re Marriage of Rodriguez*, 131 Ill. 2d 273, 280 (1989). Standing is "not meant to preclude a valid controversy from being litigated." *Id*. The Illinois Supreme Court "has defined standing as requiring some injury in fact to a legally recognized interest." *Id*. (internal quotes omitted). Standing is defendant's burden to prove. *Lebron v. Gottlieb Mem. Hosp*., 237 Ill. 2d 217, 252 (2010).

Defendant asserts that Plaintiffs lack an injury that would give them standing to challenge HB 3062 because "the Attorney General has not sought to transfer venue in this case pursuant to section 101.5, and the time for doing so has now expired." Def's Memo 6. But "[a] party's standing to sue must be determined as of the time the suit is filed." *U.S. Bank Trust N.A. v. Lopez*, 2018 IL App (2d) 160967, 18. "[A] party either has standing at the time the suit is brought or it does not." *Kildeer v. Lake Zurich*, 167 Ill. App. 3d 783, 786 (2d Dist. 1988). Thus, Defendant's decision not to seek to transfer venue in this case cannot affect Plaintiffs' standing.

And at the time Plaintiffs filed their complaint, they were injured by the requirement that they must file a constitutional challenge in Cook or Sangamon counties set forth in 735 ILCS 5/2-101.5. This point Defendant effectively concedes by acknowledging that to have standing one would have to intend to bring a constitutional challenge. Def's Memo 6. Plaintiffs *have* brought a constitutional challenge: this one. Defendant's decision not to seek to transfer venue in this case cannot affect Plaintiffs' standing.

Thus, on this basis alone, this Court should deny Defendant's Section 2-619(a)(9) motion to dismiss.

B. Plaintiffs have standing as taxpayers.

"It has long been the rule in Illinois that . . . taxpayers have a right to enjoin the misuse of public funds"—i.e., that "[t]he misuse of [public) funds for illegal or unconstitutional purposes is a damage which entitles [taxpayers] to sue." *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160 (1956). The use of public funds to administer an unconstitutional ordinance is a "misuse of public funds" that taxpayers have standing to challenge. *See Snow v. Dixon*, 66 Ill. 2d 443, 449–52 (1977) (taxpayer had standing to enjoin use of public resources to collect illegal tax); *Krebs v. Thompson*, 387 Ill. 471, 473 (1944) (taxpayer had standing to challenge licensing law for professional engineers because state used public funds to administer it); *Crusius v. Ill. Gaming Bd.*, 348 Ill. App. 3d 44, 51 (1st Dist. 2004) (taxpayer had standing to challenge statute regarding gambling licenses because state used public funds to administer it). The misuse of public funds injures taxpayers because they are the funds' "equitable owners" and will, by definition, be "liab[le] to replenish" State treasury funds after they are spent. *Barco* 10 Ill. 2d at 160.

Here, Plaintiffs pay Illinois state income taxes. Compl. ¶¶ 9–11. Defendant asserts that "Section 101.5 does not cause the State to expend additional public revenues of any kind." Def's Memo 8. But that assertion is not credible. The

Attorney General obviously expends general revenue funds to defend cases, including this one defending the constitutionality of Section 2-101.5. That is sufficient for taxpayer standing. Defendant's argument that plaintiffs must allege that the state must expend *more* public funds than it otherwise would in defending constitutional challenges has no merit. The Illinois Supreme Court[2] has repeatedly held that taxpayers have standing to challenge the use of public funds to administer an unconstitutional statute even if it generates a "profit" for the government. For example, in *Snow*, the Court held that taxpayers had standing to challenge the use of public funds to collect an illegal tax even though the tax allegedly only cost a "de minimis" amount to collect but generated millions in revenue. 66 Ill. 2d at 450–51; *see also Krebs*, 387 Ill. at 474–76 (taxpayer had standing regardless of whether fees statute generated would "result in a net profit to the State").

Thus, Plaintiffs have standing as taxpayers to challenge the use of general revenue funds to implement Section 2-101.5.

C. Plaintiffs have standing as voters.

Plaintiffs have standing as voters to bring Count II of their Complaint, which alleges that Section 2-101.5 of the Code of Civil Procedure discriminates against Illinois voters who do not reside in Sangamon County or Cook County by allowing only residents of Sangamon and Cook counties—and not voters in any other Illinois

[2] Defendant relies on no Supreme Court cases to explain why Plaintiffs do not have standing. Defendant primarily relies on *Mendez v. City of Chicago*, 2023 IL App (1st) 211513, a First District Court of Appeals case. But even if Defendant's assertions relying on *Mendez* are correct, this Court is not bound by a First District case that is contrary to Illinois Supreme Court precedent.

county—to vote for or against circuit court judges and district appellate court justices who will hear claims against the state alleging that a law, rule, or executive order is unconstitutional. Compl. ¶¶ 44, 46.

Defendant mischaracterizes this claim by asserting that "Plaintiffs' argument . . . rest[s] on the view that they have the right . . . to vote for public officials with specific duties." Def's Memo 6. But Plaintiffs allege the equal protection clause forbids the state from enacting a law that gives some voters, but not others, the ability to vote for government officials who will effect statewide policy—in this case, decisions about whether state laws are constitutional—based solely on the voters' geographic location. Section 2-101.5 ensures that only voters in Cook and Sangamon counties can choose which state officials will decide constitutional issues.

A hypothetical illustrates the point: Surely the state could not enact a law providing that only legislators from Cook and Sangamon counties may vote to enact legislation that imposes or repeals state taxes. In that case, like this one, voters in counties outside of Cook and Sangamon counties would be disenfranchised; they could not vote for legislators who determine tax policy, while voters in Cook and Sangamon counties could vote for legislators who decide tax policy.

Along the same lines, the Illinois Supreme Court held that a law allowing only parents and teachers of a local school, and not members of the community, to vote for certain elected members of the local school council violated equal protection. *Fumarolo v. Chicago Bd. of Educ.*, 142 Ill. 2d 54, 93–94 (1990).

Like the voters in that case, Plaintiffs have standing to allege their equal protection claims in this case.

III. Plaintiffs have sufficiently alleged that Section 2-101.5 violates the article VI, section 9 of the Illinois Constitution.

Defendant asserts that Plaintiffs have failed to sufficiently state a claim that Section 2-101.5 violates article VI, section 9 of the Illinois Constitution because that provision "does not limit the General Assembly's authority to determine where and under what conditions civil actions may be maintained." Def's Memo 10. According to Defendant, a "statute setting venue in a particular location or county, like section 101.5," does not violate article VI, section 9. Def's Memo 10.

But as explained in Section I above, Section 2-101.5 is really a jurisdictional statute. And Defendant concedes that article VI, section 9 prohibits the General Assembly from depriving a court of jurisdiction. Def's Memo 10. "Article VI is clear that, except in the area of administrative review, the jurisdiction of the circuit court flows from the constitution. Ill. Const. 1970, art. VI, § 9. The General Assembly, of course, has no power to enact legislation that would contravene article VI." *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 335 (2002). But Section 2-101.5 *does* seek to contravene article VI by limiting the jurisdiction of circuit courts outside of Cook and Sangamon counties on claims alleging violations of the Illinois Constitution, and effectively provides that the circuit courts in Cook and Sangamon counties have special jurisdiction over constitutional matters.

Because Section 2-101.5 affects jurisdiction, Plaintiffs have sufficiently alleged a claim that it violates article VI, section 9 of the Illinois Constitution.

IV. Plaintiffs have sufficiently alleged that Section 2-101.5 violates the equal protection clause in article I, section 2 of the Illinois Constitution.

The Equal Protection Clause of the Illinois Constitution "prohibit[s] the government from according different treatment to persons who have been placed by a statute into different classes on the basis of criteria wholly unrelated to the purpose of the legislation." *Jacobson v. Department of Pub. Aid*, 171 Ill. 2d 314, 322 (1996). That's exactly what Section 2-101.5 does. It places Illinois residents and voters into two categories—those who live in Sangamon and Cook counties and those who do not—and discriminates against residents of Illinois outside of Sangamon and Cook counties, both as potential litigants in constitutional claims against the state and as voters in judicial elections. *See* Compl. ¶ 44. It violates Plaintiffs' equal protection rights as litigants in constitutional cases because it permits residents of Sangamon and Cook counties to file claims against the state alleging constitutional violations in their local circuit courts, while depriving residents of every other Illinois county the ability to file constitutional claims in their local circuit courts. Compl. ¶ 45. And it violates Plaintiffs' equal protection rights as voters in judicial elections because it permits residents of Sangamon and Cook counties to vote for or against circuit court judges and district court of appeals justices who will hear constitutional claims, while depriving residents of other Illinois counties from voting for or against circuit court judges and district court of appeals justices who will hear constitutional claims. Compl. ¶ 46.

Strict scrutiny applies to a statute challenged on equal protection grounds if the classification adversely impacts a fundamental right protected by the Illinois Constitution. *Jacobson*, 171 Ill. 2d at 323. In this case, strict scrutiny applies because Section 2-101.5 always adversely impacts a fundamental right protected by the Illinois Constitution because it applies to all constitutional claims.

Defendant asserts that Section 2-101.5 "does not implicate the equal protection clause at all, for the basic reason that it does not discriminate against individuals in the first place." Def's Memo 13. According to Defendant, the fact that Section 2-101.5 "operate[s] to channel certain kinds of cases toward certain counties and away from others . . . is simply an ordinary facet of civil litigation." Def's Memo 13. But, as explained in Section I, Section 2-101.5 is not really a venue statute; it's jurisdictional. And it cannot, consistent with equal protection principles, limit—based solely on geography—a litigant's ability to bring constitutional cases in their local circuit courts, forcing them to file such claims in circuit courts in only two counties. Nor can it, under the equal protection clause, give some residents, based entirely on geography, the ability to vote for or against judges that have authority to decide constitutional questions, while depriving other residents of the same ability.

This case is not like Defendant's hypothetical where the General Assembly enacts legislation establishing new judgeships for certain counties but not others. Def's Memo 13. To be analogous, the General Assembly would have to establish new judgeships where only those new judges were able to hear cases setting forth certain claims, while also only permitting some residents, and not others, to vote for or against candidates for those judgeships. This case is not about the number of judges in some counties versus others, like in *Bridges v. State Bd. of Elections*, 2022 IL App (4th) 220169; this case is about giving some courts (and voters of those judges) power that other courts (and voters) do not have.

Defendant also asserts that strict scrutiny does not apply in this case because Section 2-101.5 does not impair Plaintiffs' right to bring constitutional claims at all; they can still bring such claims in Cook or Sangamon County. Def's Memo 14. But Section 2-101.5 *does* adversely affect Plaintiffs' fundamental rights because it allows the State to cherry-pick the courts in which Plaintiffs may seek to vindicate their fundamental rights.

House Bill 3062 was passed by the General Assembly and signed by the governor entirely on partisan lines, purportedly to prevent "forum shopping,"[3] after a number of lawsuits filed throughout Illinois challenged the governor's COVID-19 mitigation orders, a law that would end cash bail, and a law banning "assault-style" weapons and large-capacity magazines.[4] *See* Def's Memo 2 (citing *Rowe v. Raoul*, 2023 IL

[3] Defendant asserts that the purpose of HB 3062 is that constitutional cases "should be consolidated in Sangamon and Cook County in the first instance, rather than scattered across the State . . . to ensure the efficient adjudication of constitutional cases with statewide significance." Def's Memo 16, 3. But HB 3062 applies to *all* constitutional cases, regardless of whether there are one or many concurrent cases alleging that a particular law, rule, or order is unconstitutional, and regardless of whether those cases bring facial or as applied claims.

[4] *See* Hancock, Peter, *New State Law Limits Venue for Illinois Constitutional Lawsuits to Sangamon, Cook Counties*, WTTW, June 7, 2023, https://news.wttw.com/2023/06/07/new-state-law-limits-venue-illinois-constitutional-lawsuits-sangamon-cook-counties.

129248 (bail reform) and *Accuracy Firearms, LLC v. Pritzker*, 2023 IL App (5th) 230035 (firearms ban)). But HB 3062 allows and encourages forum shopping *by the state* by allowing the government, in its discretion, to remove constitutional cases to Cook or Sangamon County. Indeed, as Defendant's motion shows the state is able to "forum shop" when any plaintiff files a constitutional challenge outside of Cook and Sangamon counties, like Plaintiffs did here, by asserting the power to decide whether to seek to transfer venue to Cook or Sangamon counties after the complaint is filed. *See* Def's Memo 6 ("the Attorney General has not sought to transfer venue in this case pursuant to section 101.5"). Thus, the state can generally force plaintiffs to file constitutional claims against it in Cook or Sangamon counties, but if any plaintiff files such a case outside of those counties, the state can then strategically decide whether to seek to transfer venue in the case based on whether it believes doing so will benefit its defense.

As the purported purpose of HB 3062 was to prevent plaintiffs from "forum shopping," Defendant must implicitly acknowledge that the state's use of "forum shopping" adversely affects Plaintiffs' ability to adjudicate constitutional claims.

This problem is further exacerbated by the fact that judges are elected in Illinois. Thus, elected officials and political parties now have a more potent way to ensure their legislative and executive acts are found constitutional: Rather than having to fund judicial candidates likely to agree that their actions are constitutional in every county across the state, these officials and political parties can concentrate their campaign funds to judicial candidates only in Cook or

Sangamon counties. Clearly, this also could adversely affect Plaintiffs' ability to adjudicate constitutional claims.

Finally, Defendant asserts that Section 2-101.5 does not infringe on Plaintiffs' "fundamental right to participate in an election on equal footing as other voters" because Plaintiffs still can vote for or against circuit and appellate court judges in elections. Def's Memo 15. But Plaintiffs do not assert that Section 2-101.5 deprives them from the ability to vote for or against judges in elections. Rather, Plaintiffs assert that Section 2-101.5 violates their equal protection rights because it allows voters in Cook and Sangamon counties to vote for or against judges that will decide constitutional cases, while depriving voters in every other county in Illinois from voting for or against judges that will decide constitutional cases. *See Fumarolo*, 142 Ill. 2d at 93–94 (finding a statute that provided "a substantial bias in favor of certain voters and denied or substantially restricted the weight of the vote of others" violated equal protection).

Defendant's arguments asserting that this Court must dismiss Plaintiffs' equal protection claims mischaracterize those claims. This Court should deny Defendant's motion to dismiss pursuant to Section 2-615.

Conclusion

Plaintiffs have standing to allege that Section 2-101.5 violates article VI, section 9, and article I, section 2 of the Illinois Constitution. Further, Plaintiffs have sufficiently alleged claims under these sections. Therefore, this Court should deny Defendant's motion to dismiss.

Dated: December 13, 2023

Respectfully submitted,

Brad Weisenstein, Dawn Elliot,
and Kenny Cook

By: /s/ Jeffrey M. Schwab
One of their Attorneys

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Certificate of Service

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

I, the undersigned, an attorney, certify that on December 13, 2023, I electronically filed the foregoing Plaintiffs' Response to Defendant's Motion to Dismiss Under Sections 2-615 and 2-619(a)(9) and served a copy of this Response on Defendant's counsel of record by the Court's Electronic Filing System and electronic mail to Alex Hemmer, Deputy Solicitor General, at alex.hemmer@ilag.gov.

/s/ Jeffrey M. Schwab