NO. 25-439

In the Supreme Court of the United States

KARL TOBIEN,

Petitioner,

v.

NATIONWIDE GENERAL INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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December 10, 2025 *Counsel for Respondent*

QUESTION PRESENTED

Section 1391(b) of Title 28 of the United States Code, the general venue statute, identifies the district courts in which a civil action may be properly brought.

The Question Presented is:

Whether the plaintiff who has selected a venue under 28 U.S.C. § 1391(b) must prove his choice is proper when the defendant challenges his selection under Federal Rule of Civil Procedure 12(b)(3).

CORPORATE DISCLOSURE STATEMENT

NATIONWIDE GENERAL INSURANCE COMPANY is an Ohio-domiciled stock insurance company and is a wholly owned subsidiary of Nationwide Mutual Insurance Company. No public company owns 10% or more of the Respondent or its parent company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TABLE OF AUTHORITIES – Continued

JUDICIAL RULES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the court of appeals (App.8a–24a) is reported at 133 F.4th 613. The district court's memorandum opinion and order dismissing Petitioner's lawsuit for improper venue (App.26a–33a) is unreported.

JURISDICTION

The court of appeals entered judgment on April 2, 2025 and denied a petition for rehearing on May 19, 2025. App.2a, 5a. Petitioner filed his Petition for a Writ of Certiorari on October 8, 2025, following two extensions by Justice Kavanaugh. Pet.30. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1391(b)

(b)Venue in general.—A civil action may be brought in—

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

INTRODUCTION

Plaintiffs have the "privilege" of selecting the venue in which to bring their lawsuit. *See Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 63 (2013); *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964). With this privilege comes the responsibility to select a proper venue. This responsibility is as old as the federal court system itself: the Judiciary Act of 1789 contained general venue rules, which evolved into 28 U.S.C. § 1391. 1 Stat. 73, 78 (1789).

The question of which party bears the burden of proving whether a plaintiff's chosen venue is proper is familiar to this Court. The Court has, on at least two occasions, denied petitions asking it to decide this question. *See Steen v. Murray*, 575 U.S. 997 (2015) (mem.); *Am. Dental Ass'n v. Myers*, 462 U.S. 1106 (1983) (mem.).

This Court's abstention has hardly vexed federal courts of appeals. Several circuits have not even suggested an answer to this question (and most of their respective district courts place the burden on plaintiffs). Of those circuits that have answered the question, most (again) have placed the burden on the plaintiff and just two have articulated a rationale for their decision—one of which is the opinion below. Thus, while a nominal conflict exists, it is shallow. It strains credulity to characterize it as divisive, much less as a longstanding conflict in search of resolution. *See* Pet.2. This alone is ample reason to deny the Petition.

Even if the Court believes this question merits an answer, this case is an ill-suited vehicle to resolve it. Neither party litigated the allocation of the burden

below. In both the district and appellate courts, they agreed an Eastern District of Kentucky decision placing the burden the defendant, Respondent, controlled. D. Ct. Dkt. #5 at 6 (citing *Long John Silver's, Inc. v. DIWA III, Inc.*, 650 F. Supp. 2d 612, 631 (E.D. Ky. 2009)); D. Ct. Dkt. #6 at 2–3 (same). Without notice or argument, the Sixth Circuit, for the first time in this case, assigned itself the "task" of determining who bears the burden of proof under § 1391. App.11a. After concluding "the plaintiff must show by a preponderance of the evidence that venue is proper," App.16a, the court held Petitioner failed to meet this standard and dismissed the case, reasoning that transfer to the proper venue (the Southern District of Ohio) would be futile because his claims would fail as a matter of Ohio law, App.23a. Because the Sixth Circuit addressed the allocation of the burden of proof *sua sponte*, this Court is without the benefit of a developed record below to inform its analysis.

Importantly, the allocation of the burden of proof is also inconsequential to the outcome of this case. The result is the same no matter where the burden lies because there are no facts to support Petitioner's chosen venue. All facts instead point to the other side of the Ohio River. A dog allegedly owned by an Ohio couple bit Petitioner in Ohio. Petitioner sued Respondent under the couple's homeowner's insurance policy, issued by Ohio-based Respondent, for the injuries he sustained in Ohio. Petitioner supported venue in Eastern Kentucky with nothing more than a "vague assertion," lacking any factual allegations or evidence, that Respondent's investigation and communications concerning his claim took place there. App.19a. Indeed, the Sixth Circuit held Petitioner "concedes he doesn't

actually know where the adjusters were located," App.20a, and what minimal attempt he made to obtain this information through the litigation was legally deficient, App.20a–21a. What was "outcome-determinative," then, was not the placement of the burden, Pet.3, but the conceded fact that Petitioner filed his lawsuit in the Eastern District of Kentucky without a factual basis to do so. The record confirms this: the district court and Sixth Circuit reached the same conclusion, even though they placed the burden of proof on different parties.

Ultimately, the Sixth Circuit's reasoning is sound. Plaintiffs have the burden to prove personal jurisdiction if challenged, and § 1391 makes venue largely a function of personal jurisdiction. App.13a–14a. To avoid competing burdens of proof on the same facts, a plaintiff should bear the burden to prove venue as part of the responsibility to choose a proper forum. App.13a. Assigning the burden to a defendant would be unworkable and unfair. Plaintiffs are not required to address venue in a complaint, so defendants would be left to prove a negative. This runs contrary to the primary purpose of the venue rules: "'to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial.'" App.20a (quoting *Atl. Marine Constr.*, 571 U.S. at 63 n.7).

For these reasons, this case offers no compelling reason for this Court to grant review, much less reverse. The Petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

This appeal arises from Petitioner's work-related injury in Ohio.

In May 2023, Petitioner drove to Loveland, Ohio on business as a door-to-door salesman. App.9a. A dog allegedly bit him while he was walking in a neighborhood. Believing the dog's owners were Respondent's insureds, Petitioner made a claim against the insureds' homeowner's policy, which Respondent denied.

Petitioner then brought a suit against Respondent in the Eastern District of Kentucky. App.9a–10a. He asserted claims under Kentucky law for violation of Kentucky's Unfair Claims Settlement Practices Act, common law bad faith, and punitive damages.[1] *Id.* He baldly alleged in his complaint that venue was appropriate in the Eastern District under § 1391(b)(2) because a substantial part of the events giving rise to his claims occurred there. App.17a. He provided no further allegations or elaboration.

The next day, Petitioner sued the insureds in the Southern District of Ohio, asserting only a premises-liability claim under Ohio law. D. Ct. Dkt. #5 at Ex. E. Again, he alleged venue was proper under § 1391(b)(2) because a substantial part of the events occurred in

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[1] The motivation for Petitioner to claim venue in Kentucky is obvious: Kentucky provides a statutory cause of action for third-party bad faith against an insurance carrier. Ky. Rev. Stat. §304.12-230; *Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000) (recognizing a statutory bad faith cause of action for third parties to an insurance contract). Ohio expressly bars third-party bad faith claims. *Grimberg v. Blackbird Baking Co.*, 208 N.E.3d 111, 119–20 (Ohio Ct. App. 2023).

Ohio. *Id.* Respondent defended the lawsuit and settled with Petitioner on its insureds' behalf. *See* App.9a.

B. Proceedings Below

The Petition concerns only the Kentucky matter. Respondent moved under Rule 12(b)(3) to dismiss the case for improper venue, or in the alternative to transfer it to Ohio. App.10a.

The parties agreed Respondent had the burden of proof on the motion. D. Ct. Dkt. #5 at 6; D. Ct. Dkt. #6 at 2–3. Respondent argued Petitioner's only alleged bases for venue—that he resides in Kentucky and Respondent generally conducts business there—were, even if taken as true, legally insufficient to establish venue under § 1391(b)(2). App.18a. In response, Respondent asserted for the first time that a "substantial portion" of Respondent's communications concerning the claim took place in Eastern Kentucky. App.20a. No factual assertions in his complaint supported this assertion, and he attached no affidavits or other evidence to support it. *Id.* At the end of his response, Petitioner tacked on a vague and general paragraph requesting leave to conduct discovery "as to his third-party bad faith claims, the communications between Defendant and Plaintiff, the investigation and evaluation of Plaintiff's claim for injuries against the [insureds'] homeowner's policy, and whether transfer to another venue is appropriate." D. Ct. Dkt. #6 at 4.

The district court granted Respondent's motion. App.26a. The court placed the burden on Respondent to prove its venue challenge. App.27a. It concluded there was no legal or factual basis to support Eastern Kentucky as a proper venue. App.29a. Acknowledging that Respondent's employees purportedly corresponded

with Petitioner while he was in Kentucky, the court found that was insufficient to make its district an appropriate venue. *Id.*

The district court also denied Petitioner's discovery request. App.29a. Because "so many facts" showed the events giving rise to Petitioner's claims occurred in Ohio, the court saw no realistic probability that discovery would uncover other facts supporting venue in Kentucky. *Id.*

Finally, the district court decided dismissal, rather than transfer, was appropriate. App.30a. Ohio's choice-of-law rules would apply after transfer, the court concluded, and those rules would direct the transferee court to apply Ohio law. *Id.* Dismissal was therefore inevitable because Ohio law does not permit third-party bad faith claims. *Id.*

Petitioner appealed, arguing the district court reached the wrong result on venue. App.10a. As a fallback position, he claimed the court should have transferred, rather than dismissed, his case. App.21a. He did not challenge the denial of his request to conduct discovery. *Id.*

The parties did not dispute on appeal that Respondent bore the burden of proof as to venue. As before, Respondent cited a district court case that put the burden on the defense. Resp. Court of Appeals Brief ("C.A. Br.") at 9. Petitioner argued nothing about the burden. *See generally* Pet. C.A. Br.

The Sixth Circuit addressed the burden issue *sua sponte*, without argument from the parties. App.11a. The court held its "first task" was to "determine who bears the burden of proof." *Id.* Noting a circuit split, the Sixth Circuit sided with the majority view, holding

that when a defendant challenges venue, the plaintiff bears the burden of showing his chosen venue is proper. App.13a.

The Sixth Circuit offered two rationales for its decision. First, it concluded requiring a plaintiff to prove venue when challenged is part of a plaintiff's "'obligation to institute the action in a permissible forum.'" App.13a (quoting *Freeman v. Fallin*, 254 F. Supp. 2d 52, 56 (D.D.C. 2003)).

Second, it concluded that because plaintiffs bear the burden on personal-jurisdiction challenges, they should, for consistency's sake, also bear the burden on venue. As the Sixth Circuit noted, this Court has explained that venue and personal jurisdiction are a defendant's "'personal privileges.'" App.13a (quoting *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979)). Additionally, they "often turn on the same facts," as multiple parts of § 1391 make venue a function of personal jurisdiction. App.13a–14a. In some cases, then, a Rule 12(b)(3) venue challenge would be "the substantial equivalent" of a Rule 12(b)(2) personal-jurisdiction challenge. App.14a. "It wouldn't make sense" to use conflicting burdens on often-identical issues. *Id.*

Acknowledging that a divided Third Circuit panel held otherwise, the Sixth Circuit disagreed. App.15a. The Third Circuit's primary rationale was that defendants bear the burden to prove affirmative defenses, and improper venue is an affirmative defense. *Id.* But as the Sixth Circuit noted, the Third Circuit does not follow its own reasoning; it assigns plaintiffs the burden when defendants assert lack of personal jurisdiction. *Id.* Further, the court noted, the Third Circuit failed to differentiate between *substantive*

defenses (like those in Rule 8(c)) and *dilatory* defenses (like those in Rule 12(b)). App.15a. Defendants must prove the former, while plaintiffs must disprove the latter. App.16a. As the court explained, rebutting a dilatory defense is part of a plaintiff's burden of showing their case is properly before the court. *Id.*

Despite flipping the burden to Respondent, the Sixth Circuit reached the same result as the district court. The Sixth Circuit concluded no factual basis existed to support the conclusion that a substantial part of the events underlying Petitioner's claims took place in Kentucky. App.19a–20a. Petitioner's "correspondence with the insurance company from his home in Kentucky, and the general fact that he lives in Kentucky, aren't 'events or omissions giving rise to'" his Ohio bad faith claims. App.19a (quoting § 1391(b)(2)). The location from which Petitioner purportedly communicated with Respondent "has nothing to do with (a) either the dog attack that led [Petitioner] to submit an insurance claim or (b) [Respondent]'s actions in denying the claim in (allegedly) bad faith." *Id.* "Without more," the court concluded, the mere allegation of economic harm to the plaintiff is insufficient to establish venue under § 1391(b)(2). App.19a–20a. Otherwise, venue would always be proper where a plaintiff resides or is headquartered—an outcome Congress rejected through its 1990 amendments to § 1391. App.20a. If Petitioner's venue theory were correct, the Sixth Circuit observed, "a plaintiff could make venue proper in any of the 50 states simply by traveling there and sending letters to the insurance company from that state." *Id.* Congress did not intend to allow "plaintiffs to manipulate the venue rules in that way," given they exist "primarily to 'protect the

defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial.'" *Id.* (quoting *Atl. Marine Constr.*, 571 U.S. at 63 n.7).

The Sixth Circuit further held the district court did not abuse its discretion by dismissing Petitioner's action in lieu of transfer. It agreed that, even if transferred, Ohio law would apply, and Petitioner had no claims to assert under Ohio law. App.21a–24a.

The Sixth Circuit summarily denied Petitioner's petition for rehearing *en banc*. App.3a. Petitioner now seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT SPLIT IS OVERSTATED

1. The majority of federal courts of appeals, including the Sixth Circuit below, allocate to a plaintiff the burden of proving venue is proper under § 1391 when a defendant moves to dismiss for improper venue. Petitioner and the Sixth Circuit below recognize this majority rule but identify different circuits as comprising the majority. Petitioner identifies the Second, Fourth, Ninth, and Eleventh Circuits in the majority. *See* Pet.15–20. The Sixth Circuit identifies the First, Second, and Fourth Circuits in the majority. App.13a.

In contrast, Petitioner identifies the Third, Seventh, and Eighth Circuits as comprising the minority of federal courts of appeals that allocate to the defendant the burden of proving venue is improper under § 1391 on a motion to dismiss. Pet.12–15. The Sixth Circuit places only the Third and Eighth Circuits in the minority, identifying Seventh Circuit precedent adopting both views. App.13a.

2. The circuit split on which Petitioner relies to entice this Court to grant review is overstated. Both Petitioner and opinion below overstate the split by including cases decided under special venue statutes and failing to distinguish them. These authorities cannot create a split with the opinion below because only the general venue statute, § 1391, applies here. Cases under special venue statutes do not and cannot, as a matter of law, answer the question Petitioner presents to this Court.

Petitioner recognizes this distinction but unduly limits its application. He distinguishes and excludes from his circuit-split analysis cases decided under the special venue statute governing patent cases. He does so on the grounds that this statute exclusively controls venue in patent cases and is distinguishable from § 1391 because of its "intentional narrowness." Pet.6–7, 12. He does not, however, apply this reasoning to non-patent cases decided under other special venue statutes.

Cases decided under non-patent special venue statutes are also distinguishable and cannot add to a circuit split on the question presented. In *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193 (2000), this Court construed the venue provisions of the Federal Arbitration Act. It addressed whether a motion to confirm an arbitration award could be filed in the district court where the arbitration award was made or instead in any district proper under the general venue statute. *See id.* at 195–97. The respondent argued for a restrictive construction with "citations of cases construing other special venue provisions." *Id.* at 204. The Court rejected these cases as "beside the point" because "the authority of these cases is not that special venue statutes are deemed to

be restrictive; they simply show that analysis of special venue statutes must be specific to the statute." *Id.* (emphasis added).

So too is the analysis here. Cases allocating the burden on a motion to dismiss for improper venue under special venue statutes do not inform the allocation of the burden under § 1391. They neither support nor conflict with the decision below because their analysis is inherently specific to the special venue statutes. Petitioner regards the patent venue statute as the lone, distinguishable "exception," Pet.6, but this Court treats the patent venue statute similarly to other special venue statutes in holding that each statute must be analyzed independently, *Cortez*, 529 U.S. at 204.

3. It is for this reason the Seventh Circuit cannot be said to have adopted the minority view on the question presented. No Seventh Circuit decision allocates the burden of proof on a motion to dismiss for improper venue under § 1391.

Petitioner and the opinion below inaccurately identify *In re Peachtree Lane Associates*, 150 F.3d 788 (7th Cir. 1998), as evidence that the Seventh Circuit has adopted the minority view. *Peachtree Lane* is a Chapter 11 bankruptcy reorganization proceeding filed in the Northern District of Illinois. *Id.* at 792. Defendants moved to dismiss or alternatively transfer the proceeding, arguing venue was improper under a venue statute applicable to bankruptcy proceedings, 28 U.S.C. § 1408. *Id.* at 792–93.

The Seventh Circuit allocated the burden to the defendants. *Id.* But because this burden allocation flows from the special venue statute governing bankruptcy

actions, it does not and cannot apply to cases under the general venue statute. *Cortez*, 529 U.S. at 204.

The rationale in *Peachtree Lane* reinforces this conclusion. The Seventh Circuit based its decision to allocate the burden to defendants on a bankruptcy rule under which the district where a Chapter 11 bankruptcy petition is pending is presumptively the proper venue for related proceedings. *Id.* at 792–93 ("Because Peachtree filed its Chapter 11 bankruptcy in the Northern District of Illinois, venue in that district is presumed to be proper, and the party challenging venue bears the burden of establishing . . . that the case was incorrectly venued."); *see Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981) ("The word 'presumption' properly used refers . . . to a device for allocating the production burden.").

Because *Peachtree Lane* is decided under a special venue statute and relies on a presumption idiosyncratic to bankruptcy cases, it does not control the allocation of the burden in non-bankruptcy cases under the general venue statute. Accordingly, *Peachtree Lane* does not place the Seventh Circuit in the minority of a circuit split on the question presented.

District courts in the Seventh Circuit agree. *MB Fin. Bank, N.A. v. Walker*, 741 F. Supp. 2d 912, 916 (N.D. Ill. 2010) ("[*Peachtree Lane*] has never been cited in this district for this proposition outside of the Bankruptcy context."). These courts instead routinely rely on *Grantham v. Challenge-Cook Bros.*, 420 F.2d 1182, 1184 (7th Cir. 1969), to allocate this burden to plaintiffs. *Walker*, 741 F. Supp. 2d at 915 (collecting cases holding "that once venue is challenged, the plaintiff bears the burden of establishing it filed its case in the proper district").

Petitioner sidesteps *Grantham*, a patent venue case, by arguing it was superseded by *In re ZTE (USA) Inc.*, 890 F.3d 1008 (Fed. Cir. 2018). Pet.15. There, the Federal Circuit adopted a uniform national rule for patent venue. Petitioner argues this leaves *Peachtree Lane* as the governing precedential decision in the Seventh Circuit in non-patent cases. *Id.* at 1013.

This argument fails for two reasons. First, neither *Peachtree Lane* nor *Grantham* are salient to the question presented here because both deal with special venue statutes. *Cortez*, 529 U.S. at 204. Second, even assuming special venue statute cases are relevant, the Seventh Circuit cannot fairly be placed in the minority because it has more recently followed *Grantham*'s burden allocation in a non-patent case. *See Int'l Travelers Cheque Co. v. BankAmerica Corp.*, 660 F.2d 215, 222 (7th Cir. 1981) ("Plaintiff has the burden of establishing proper venue." (quoting *Grantham*, 420 F.2d at 1184)). District courts continue to cite this rule post-*ZTE*. *Honest Abe Roofing Franchise, Inc. v. Lesjon Holdings, LLC*, 705 F. Supp. 3d 872, 875 (S.D. Ind. 2023) ("When a defendant challenges venue, the plaintiff bears the burden of establishing proper venue." (indirectly citing *Int'l Travelers Cheque Co.*)).

For these reasons, there is no reasonable reading of Seventh Circuit law under which the circuit has adopted the minority view as the prevailing law of the circuit.

4. Nor has the Eighth Circuit held a defendant bears the burden on a motion to dismiss for improper venue under § 1391. Petitioner and the opinion below inaccurately identify *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947), as evidence that the

Eight Circuit has adopted the minority view on the question presented.

Orshek reversed the dismissal of an action for improper venue under the Miller Act, 40 U.S.C. § 270b(b). The court allocated to the defendants the burden and set forth its reasoning for this allocation in a single sentence: "As the motion [to dismiss for improper venue] was interposed by the defendants the burden of proof was upon them . . . . " *Id.*

Orshek is distinguishable because it was decided under a special venue statute, not § 1391. *Cortez*, 529 U.S. at 204. Its persuasive value is also limited because the court there does not rely on venue-specific considerations in allocating the burden. *Orshek* states a general rule regarding allocation of the burden on a motion to dismiss without appearing to consider whether a specific rule should apply to a motion to dismiss for improper venue. 164 F.2d at 742. Rote adherence to the general rule that the movant bears the burden does not place the circuit in the minority here because the court neither addresses the allocation of the burden under § 1391 nor voices disagreement with the principles animating the Sixth Circuit's decision below.

Even assuming *Orshek* controls the allocation of the burden on a motion to dismiss for improper venue generally, the Eighth Circuit would likely distinguish or overrule *Orshek* today. In *Cohen v. Newsweek, Inc.*, 312 F.2d 76 (8th Cir. 1963), without mentioning *Orshek*, the Eighth Circuit countenanced the allocation to the plaintiff of "the burden of establishing facts to support his claim to venue," albeit in dicta. *Id.* at 78. Even more recently, in *Steen v. Murray*, 770 F.3d 698, 702 (8th Cir. 2014), the Eighth Circuit implicitly

affirmed the allocation of this burden to plaintiffs. *See Steen v. Murray*, 955 F. Supp. 2d 1030, 1033 (D. Neb. 2013), *aff'd*, 770 F.3d 698 (8th Cir. 2014) ("The [Southern District of Iowa] determined that . . . Plaintiffs failed to meet their burden of establishing venue in Iowa.").

District courts in the Eighth Circuit do not consistently regard *Orshek* as controlling with which party the burden lies in these circumstances. *See* App.16a. Among reported decisions, nearly as many courts cite *Cohen* to allocate the burden to the plaintiff as cite *Orshek* to allocate the burden to the defendant. *E.g.*, *Fed. Trade Comm'n v. BINT Operations LLC*, 595 F. Supp. 3d 740, 754 (E.D. Ark. 2022) ("Once a defendant raises the issue of proper venue by motion, the burden of proof is on the plaintiff to sustain venue." (citing *Cohen*, 313 F.2d at 78)); *Rare Breed Triggers, LLC v. Garland*, 639 F. Supp. 3d 903, 907 (D.N.D. 2022) (same); *Beckley v. Auto Profit Masters, L.L.C.*, 266 F. Supp. 2d 1001, 1003 (S.D. Iowa 2003) (same).

For these reasons, the Eighth Circuit has neither adopted the minority view nor established a controlling circuit-wide precedent on the question presented. This Court should not prematurely undertake to resolve a purported inter-circuit split when the Eighth Circuit, one of the few circuits Petitioner claims to be in the minority, has not yet resolved a clear intra-circuit split on this question.

5. Petitioner's attempt to allege a "robust" split among federal courts of appeals on the question presented therefore fails. Pet.28. The Third Circuit is the only circuit with precedential case law directly conflicting with the decision below.

In *Myers v. American Dental Association*, 695 F.2d 716 (3d Cir. 1982), a divided Third Circuit panel reversed in part the denial of a motion to dismiss an antitrust case for improper venue under the general venue statute, § 1391(b), and the Clayton Act venue statute, 15 U.S.C. § 22. 695 F.2d at 718. In examining the allocation of the burden, the Third Circuit distinguished venue from jurisdiction, observing that plaintiffs bear the burden to establish personal jurisdiction because federal courts are presumed to lack jurisdiction until proven otherwise. *Id.* at 724. The court reasoned that this distinction limited the force of any analogy between venue and personal jurisdiction, as plaintiffs were not required to plead allegations supporting venue. *Id.* Because improper venue is "not an attack on jurisdiction but only an affirmative dilatory defense," *Myers* held the defendant asserting improper venue "has the burden of proving the affirmative defense asserted by it." *Id.* (citing *Orshek*, 164 F.2d at 742).

6. *Myers* and the decision below are the only published federal circuit court decisions that substantively examine which party bears the burden of proof on a motion to dismiss for improper venue under § 1391. This is hardly a split, much less a "robust" one.

Even so, *Myers* is not analogous to the decision below because it was decided under the 1976 version of § 1391. Subsequent amendments to the statute have shifted the ground on which *Myers* was decided. After *Myers* held venue was not sufficiently analogous to personal jurisdiction to warrant identical allocations of the burden of proof, Congress amended § 1391 to explicitly link venue to personal jurisdiction. Consequently, while *Myers* and the decision below ostensibly

answer the same question, the opinions largely talk past each other.

Besides reasoning that the defendant should bear the burden because improper venue is an affirmative defense, *Myers* focuses on distinguishing contrary authority the dissent cites. Specifically, the majority dismisses the analogy drawn in these cases between personal jurisdiction and venue as either "confus[ing] jurisdiction with venue" or unreasoned. *Id.* at 724–25; *see id.* at 725 (dismissing *Wright & Miller* as unreasoned).

Myers' criticisms are generally inapposite to the opinion below. The Sixth Circuit grounds its analysis in textual elements of § 1391 that were incorporated by amendment after *Myers* was decided.

For example, the Sixth Circuit reasons personal jurisdiction and venue are analogous because they often turn on identical facts about the defendant's residence. App.14a. Section 1391 defines residency for venue purposes as turning on the same inquiry as personal jurisdiction: where the defendant "is domiciled." *Id.* (citing *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358–59 (2021)). Because Congress did not amend § 1391(c) to define residency in terms of the person's domicile until after *Myers* was decided, the *Myers* court could not have considered this argument.

The opinion below further reasons that because "the questions of venue and personal jurisdiction are identical" under § 1391(b)(3), a "12(b)(3) motion contesting fallback venue under § 1391(b)(3) is thus the substantial equivalent of a motion to dismiss for lack of personal jurisdiction." App.14a. So, "[i]t wouldn't

make sense for courts to use different burdens of proof in evaluating these motions." *Id.* The *Myers* court could not have considered this argument either. The 1976 statute neither contained a provision equivalent to § 1391(b)(3) nor any reference to "personal jurisdiction."

Myers and the decision below are thus ships passing in the night. Amendments to the general venue statute since *Myers* belie not only its reasoning but also the existence of a genuine conflict among federal courts of appeals.

7. Because no federal court of appeals has held under the modern general venue statute that the defendant bears the burden to prove venue is improper on a motion to dismiss, Petitioner's alleged "robust" circuit split is illusory.

Not only have few (if any) circuits genuinely adopted the minority view, but numerous others have yet to weigh in. Neither Petitioner nor the decision below identify any authority on the question presented from the Fifth or Tenth Circuits. And the Seventh and Eighth Circuits have not established a position. Nor has the First Circuit. *See Cordis Corp. v. Cardiac Pacemakers*, 599 F.2d 1085, 1086 (1st Cir. 1979) (allocating burden of proving proper venue under special patent venue statute).

The Court should not expend its limited resources in addressing this issue until a genuine, well-established conflict among federal circuits has emerged. The Sixth Circuit's decision below, by substantively analyzing competing views on this issue under the modern general venue statute, has effectively posited the question for other circuits. But unless and until the

other circuits concretely adopt conflicting analysis, this Court's review is premature.

II. This Case is Ill Suited for this Court's Review

1. The Court has declined to address this burden question at least twice. First, the defendants in *Myers* sought certiorari, arguing the Third Circuit's opinion ignored this Court's decision in *Leroy* and created a circuit split. Reply Brief, *Am. Dental Ass'n v. Myers*, 462 U.S. 1106 (1983) (mem.) (No. 82-1508), 1983 WL 962499, at *2–3. The Court denied the petition. More recently, the plaintiff in *Steen* asked the Court to do what Petitioner asks here: overrule the majority position by placing the burden on defendants. Petition for Writ of Certiorari, *Steen v. Murray*, 575 U.S. 997 (2015) (mem.) (No. 14-908), 2015 WL 349828, at *27–30. The Court turned away that request as well.

As it stands, then, this Court has considered and declined invitations for review from both sides. The Petition offers no good reason for the Court to now address the issue. Instead, now that the opinion below has provided reasons why *Myers* was wrong, the Court should allow lower courts (including the Third Circuit, which was divided in *Myers*) time to consider the two decisions.

2. Shifting the burden back to Respondent will not change the result here. Petitioner quotes *Lavine v. Milne*, 424 U.S. 577, 585 (1976), to contend that "[w]here the burden lies on a given issue is . . . rarely without consequence and frequently may be dispositive." Pet.27. The record conclusively demonstrates the allocation of the burden here is without any consequence. The district court and the Sixth Circuit

placed the burden to opposite parties and reached the same outcome.

Petitioner argues the allocation of the burden was dispositive because Respondent "produced no evidence to establish that venue in the Eastern District of Kentucky was improper." Pet.29. He is mistaken. Respondent's motion to dismiss incorporated the allegations Petitioner pled in his complaint and five exhibits. D. Ct. Dkt. #5. Respondent proved (for purposes of the motion) that it was an Ohio company, that it had issued the insurance policy (under which Petitioner filed a third-party claim) to Ohio residents covering their Ohio home, and that the alleged tortious actions and injury to Petitioner giving rise to his third-party claim to Respondent occurred on the insureds' Ohio property.

Respondent's evidence thus directly established a substantial part of the events giving rise to Petitioner's claims occurred in Ohio, or facts supporting a reasonable inference of the same. "The bad faith inquiry [under Kentucky law] essentially probes whether, in the investigation, evaluation, and processing of the claim, the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable." *Philadelphia Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649–50 (6th Cir. 2013) (internal quotations omitted). Whether Respondent acted in bad faith ultimately turns on whether it "lacked a reasonable basis in fact or law for contesting coverage." *Id.* at 650. And the factual basis for Respondent's decision derives exclusively from events that occurred in Ohio.

Petitioner, for the first time before the Sixth Circuit, focused on the location of Respondent's adjusters.

App.20a. The events giving rise to his claims, however, begin with and include the events underlying the third-party insurance claim he filed with Respondent. *See First of Mich. Corp. v. Bramlet*, 141 F.3d 260, 264 (6th Cir. 1998) (holding substantial events are not limited to "the single occurrence which directly gave rise to the plaintiffs' action"); *Uffner v. La Reunion Francaise, S.A.*, 244 F.3d 38, 42 (1st Cir. 2001) (concluding sinking of yacht was substantial part of events giving rise to insurance bad faith action for venue purposes even though claim did not concern how, when, or why accident occurred).

Critically, Respondent's evidence was unopposed below. Petitioner produced no affidavit or other evidence showing any underlying events occurred in Kentucky or supporting a reasonable inference that they had. App.19a. Though his complaint alleges a substantial part of the events and omissions giving rise to his claims occurred in the Eastern District of Kentucky, legal conclusions unaccompanied by well-pled supporting factual allegations are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009).

Petitioner's sole asserted connection between his lawsuit and his chosen venue is that he "received all correspondence related to his claim and the investigation of his claim at his home" in Kentucky. App.28a. It is well established a plaintiff's residence is insufficient as a matter of law to support venue. App.19a–20a (citing authorities). "Otherwise, venue would almost always be proper at the place of a plaintiff's headquarters or residence, an option that Congress removed from [section 1391] in 1990." App.20a (quoting *Alltech, Inc. v. Carter*, No. 5:08-CV-00325, 2010 WL 988987, at *3 (E.D. Ky. Mar. 15, 2010)). Indeed, as the opinion

below observes, this would operate directly contrary to the purpose of § 1391: to protect the defendant from being haled into court in an unfair or inconvenient venue. *Id.* (quoting *Atl. Marine Constr.*, 571 U.S. at 63 n.7).

The decision to grant Respondent's Rule 12(b)(3) motion therefore stands unless this Court also holds that Respondent failed to prove by a preponderance of the evidence that venue in the Eastern District of Kentucky is improper.

The preponderance of the evidence standard measures "how convincing the evidence in favor of a fact must be *in comparison with the evidence against it* before that fact may be found." *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (emphasis added). It "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371–72 (1970 (Harlan, J., concurring)).

Respondent presented evidence sufficient to establish a greater-than-not likelihood that a substantial part of the events giving rise to Petitioner's claims did *not* occur in the Eastern District of Kentucky. Each connection Respondent proved between Petitioner's claims and Ohio necessarily reduced the likelihood that a substantial part of the underlying events could have occurred in Kentucky. Given the myriad connections to Ohio and the lack of any evidence supporting a reasonable inference of any connection to Kentucky, the district court held "[t]here simply is too

narrow a nexus between this district and the events that allegedly transpired for venue to be proper [here]." App.29a.

The district court did not err. It placed the burden on Respondent, App.27a, and concluded Respondent proved by a preponderance of the evidence that venue was improper. Petitioner, as the plaintiff, was entitled to have factual allegations in his complaint accepted as true, and to the benefit of every reasonable inference therefrom. *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 181 (2024). He was further entitled to have any factual conflicts created by the evidence resolved in his favor. *Audi AG & Volkswagen of Am., Inc. v. Izumi*, 204 F. Supp. 2d 1014, 1017 (E.D. Mich. 2002). Yet even with the benefit of these principles, Petitioner still could not demonstrate venue was proper in the Eastern District of Kentucky. The facts he alleged were insufficient as a matter of law. App.28a–29a. He did not introduce evidence showing the adjusters were located in the Eastern District of Kentucky, or even create a conflict with Respondent's evidence. And his request for venue discovery was legally insufficient, a conclusion he does not challenge and cannot redo in the district court. App.21a, 29a; *Dixon v. Ashcroft*, 392 F.3d 212, 217 (6th Cir. 2004).

Reversing the allocation of the burden back to Respondent would therefore not afford Petitioner any relief. This Court would be left to reinstate the district court's order, which applied the rule for which Petitioner now advocates and *still* concluded venue was improper.[2]

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[2] Even if transferred to an Ohio federal district court, Petitioner's bad faith claims would certainly fail because Ohio law does not

Reversing the district court's order would establish a precedent under which a defendant must present *overwhelming* evidence to prove improper venue, even when a plaintiff makes no showing whatsoever.

3. Neither party substantively argued the burden issue in the Sixth Circuit. *See generally* Pet. C.A. Br., Resp. C.A. Br. If the Court grants the Petition, it will be the first court to hear argument from the parties on the question presented. In the district court, both parties cited (in passing) the same Kentucky district court decision assigning the burden to the defense. D. Ct. Dkt. #5 at 6; D. Ct. Dkt. #6 at 2–3. The district court relied on this unchallenged citation in its decision. App.27a. The Sixth Circuit's decision to address the question was purely gratuitous.

The "traditional rule" of this Court precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). While this does not *preclude* a grant of certiorari here, a grant of certiorari is discretionary, and "there is much to be said for a rule . . . limiting review to questions pressed by the litigants below." *Id.* at 42 n.7. In particular, "if a question is not disputed by the parties, the 'adversary process' is compromised." *Id.* And it "is compromised *more* when the lower court believes it is confronting a question of first impression, for it is in those circumstances that the need for an adversary presentation is most acute." *Id.*

Stated differently, this Court is a court "of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709,

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permit a third-party claimant to bring a bad faith action against a tortfeasor's insurance company. *Grimberg*, 208 N.E.3d at 120.

718 n.7 (2005), and this principle "carries even greater force where the argument at issue was never pressed below," *Daimler AG v. Bauman*, 571 U.S. 117, 146–47, (2014) (Sotomayor, J., concurring). The Court ordinarily waits for a case where the question presented has been through "the crucible of adversarial testing," which can "yield insights (or reveal pitfalls)" that aid the Court's analysis. *Maslenjak v. United States*, 582 U.S. 335, 354, (2017) (Gorsuch, J., concurring in part and concurring in judgment). Because granting review would require the Court to "pass on arguments that lower courts have not addressed," *Bauman*, 571 U.S. at 146, this case is a substandard vehicle for the Court to answer the question presented.

4. The breadth of Petitioner's question presented exceeds the scope of the decisions below. Petitioner asks the Court to decide which party has the burden on an improper-venue challenge in any "non-patent case." Pet. i. Nowhere below was this broad issue decided.

The district court's decision gave the question of burden as much consideration as the parties—none. The Sixth Circuit raised the question of which party should bear the burden *sua sponte* and did not resolve which party bears the burden on a venue challenge in any non-patent case. Rather, the court made clear its opinion was not addressing any specialized venue statute. App.11a n.1.

Accordingly, even under the most capacious readings of the decisions below, neither the Sixth Circuit nor the district court ever reached the question Petitioner now presents for review.

III. THE SIXTH CIRCUIT'S DECISION IS CORRECT

1. The Sixth Circuit's decision is well grounded in the rationale that the burdens for venue and personal jurisdiction should match. The fact that improper venue constitutes an affirmative defense does not "provide a straightforward answer to the question presented." Pet.20. "[A] lack of personal jurisdiction is [also] a waivable affirmative defense," *Ford Motor Co.*, 592 U.S. at 378 n.1 (Gorsuch, J., concurring), and "it has been uniformly held in the lower federal courts that," when the defendant challenges personal jurisdiction, "the burden of making a prima facie showing of the existence of personal jurisdiction falls on the plaintiff," 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Civil* § 1067.6 (4th ed.).

The burden allocation on a motion to dismiss for lack of personal jurisdiction is instructive here because under § 1391(b)(3), "the questions of venue and personal jurisdiction are *identical*." App.14a (emphasis added). This is neither coincidental nor accidental: Congress explicitly linked venue with personal jurisdiction when it amended § 1391 to provide for venue in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." § 1391(b)(3) (2011) (amending 28 U.S.C. § 1391 (2002)).

The venue inquiry under § 1391(b)(1) also merges into personal jurisdiction. Congress reinforced the link between venue and personal jurisdiction by defining "[r]esidency" under the general venue statute as where a natural person is "domiciled," § 1391(c)(1), or where a corporate defendant is "subject to the court's personal jurisdiction with respect to the civil action in

question," § 1391(c)(2). A defendant's domicile is also pivotal to whether the court has personal jurisdiction. *See Ford Motor Co.*, 592 U.S. at 358–59 ("In what we have called the 'paradigm' case, an individual is subject to general [personal] jurisdiction in her place of domicile." (citation omitted)).

Because the venue inquiries under § 1391(b)(1) and (3) merge into the personal jurisdiction inquiry, conflicting placement of the burden of proof on venue and personal jurisdiction would engender incongruity in the law. It "wouldn't make sense." App.14a. This presents more than an academic concern: when a defendant bearing the burden on venue simultaneously challenges personal jurisdiction and venue under § 1391(b)(1) or (3), the allocation of the burden should be consistent.

Venue is a creature of statute, meaning congressional intent is paramount. *See Atl. Marine Constr.*, 571 U.S. at 57 (construing § 1391(b) according to congressional intent); *Leroy*, 443 U.S. at 185 (same). Independent of whether venue and personal jurisdiction are sufficiently analogous in the abstract to compel an identical allocation of the burden, § 1391 demonstrates clear congressional intent for venue and personal jurisdiction to be adjudicated similarly. For this reason, and to avoid inconsistent and even conflicting allocations, the Sixth Circuit below correctly held the plaintiff bears the burden of proving proper venue on a motion to dismiss.

2. Allocating the burden to a defendant also creates an unworkable standard. This rule would be impracticable and unduly burdensome for defendants, especially when venue is asserted under § 1391(b)(2).

Venue may be proper under § 1391(b)(2) in more than one district. *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 356 (2d Cir. 2005) (joining "several other circuits in holding that the civil venue statute permits venue in multiple districts as long as 'a substantial part' of the underlying events took place in those districts"). Putting the burden on defendants would therefore require them to disprove that any substantial part of the case took place in the district where the plaintiff chose to file.

Proving a negative "is a challenge in any context," *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring), and this is no exception. Plaintiffs are not required to allege facts supporting their chosen venue, *Myers*, 695 F.2d at 724; App.15a (citing *Myers*, 695 F.2d at 724), so defendants bearing the burden to prove that venue is improper have no target at which to aim. Without knowing why, the plaintiff elected to file in the district, the defendant must prove a broad, negative proposition: that a substantial part of the events giving rise to the plaintiff's claim *did not occur* in the district.

This is not susceptible to direct proof. This means the defendant must prove a sufficient quantum of underlying events occurred elsewhere, in order to permit an inference that a claim has no substantial connection to the present venue. In contrast, when the burden is allocated to the plaintiff, the plaintiff must prove only a narrower, affirmative proposition: that events satisfying § 1391(b)(2) occurred in the district. For this reason, the burden is substantially more demanding when allocated to the defendant.

Petitioner proves the point. He argues Respondent could "disprove" venue under § 1391(b)(2) by presenting evidence of where its adjusters and agents reviewed and decided his insurance claim. Pet.27–28. Respondent proved all salient events underlying the insurance claim occurred in Ohio, and no facts support an inference that any adjusters or agents acted on his claim in Kentucky. Petitioner apparently envisions a rule requiring Respondent to affirmatively prove the location of *every* underlying event and witness in order to *disprove* his chosen venue. As he argued below, in the absence of evidence from Respondent to the contrary, the court should "assume that the claim was processed in Kentucky." Pet. C.A. Br. 13. Petitioner's vision of the law is untenable. Courts may not and should not assume facts that are neither supported by evidence nor even alleged.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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