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 U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

This case presents an ideal opportunity to resolve a long-standing, consequential, and recurring split over the operation of the federal courts. Nothing in Respondent's opposition seriously challenges that understanding.

Respondent acknowledges that a "conflict exists" over which party bears the burden of proving venue. BIO at 2. It concedes that the Third Circuit, which places that burden on the defendant, "directly conflict[s] with the decision below," which placed it on the plaintiff. *Id.* at 16. And it accepts that four other circuits—the Second, Fourth, Ninth, and Eleventh—also impose the burden on the plaintiff. *Id.* at 10. Respondent nonetheless insists there's no "genuine conflict" because, it claims, the Seventh and Eighth Circuits should not be grouped with the Third. *Id.* at 19. That assertion contradicts the court below, *see* App. 13a, 16a (identifying Seventh and Eighth Circuit cases imposing the burden on defendants), and leading treatises, 5B *Wright & Miller's Federal Practice & Procedure*, § 1352 (4th ed. 2025) (grouping Eighth and Third Circuits); 17 *Moore's Federal Practice*, § 110.01[5][c] (3d ed. 2025) (Seventh and Third Circuits). Moreover, even excluding those two courts, half a dozen circuits have weighed in and reached different conclusions on an important issue of federal law. If that isn't a genuine conflict, it would be hard to say what is.

Respondent also recognizes that venue in this case is consequential. As it notes, Petitioner has a claim for "third-party bad faith against an insurance carrier" in Kentucky but not Ohio. BIO at 5 n.1. There's nothing remarkable about that: A "plaintiff is the master of the complaint" and "gets to determine which substantive claims to bring against which defendants." *Royal Canin*

U.S.A., Inc. v. Wullschleger, 604 U.S. 22, 35 (2025) (internal quotation marks omitted). True, a defendant can contest venue. But Respondent doesn't dispute that improper venue is an affirmative defense, nor that such defenses generally "must be pleaded and proved by the defendant who seeks to benefit from them." *Cunningham v. Cornell Univ.*, 604 U.S. 693, 702 (2025).

That is especially so when an affirmative defense "turn[s] on facts one would expect to be in the [defendant's] possession." *Id.* at 705. On this point, Respondent states that "[t]he bad faith inquiry under Kentucky law" examines "whether, in the investigation, evaluation, and processing of the claim, the insurer acted unreasonably." BIO at 21 (quoting *Philadelphia Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649–50 (6th Cir. 2013) (cleaned up)). These facts—where an insurer investigated, evaluated, and processed a claim—are known to Nationwide. That's why it, and not Petitioner, should bear the venue burden.

Respondent's primary argument against review is that imposing the burden on defendants would "not afford Petitioner any relief" because the district court "applied the rule for which Petitioner now advocates and *still* concluded venue was improper." *Id.* at 24. But it is the Sixth Circuit's judgment, not the district court's, that is under review. And that court did not adopt the district court's reasoning. Instead, it grounded its decision on the question of "who bears the burden of proof" as to venue. App. 11a.

The *reason* the Sixth Circuit anchored its decision on the burden of proof is that, while the district court recited a rule stating that "the defendant has the burden of proving" improper venue, App. 27a, it did not follow that

rule in practice. The district court's reasoning makes that clear: "Nationwide," it declares, "processed Tobien's unsuccessful claim in Ohio where the company and its adjustors are purportedly located." App. 29a. How did the court know that? Respondent presented no evidence on the point, *see* App. 18a, and Petitioner sought, but was denied, discovery on the issue, *see* App. 20a. To grant Respondent's motion, then, the district court presumed as fact an unproven premise and faulted Petitioner for not producing "sufficient" evidence to rebut that presumption, App. 29a—i.e., exactly what would happen if a plaintiff, rather than a defendant, must prove venue.

Respondent's other arguments are equally unavailing. It tries to analogize venue to personal jurisdiction, but offers no rebuttal to Petitioner's argument that venue and personal jurisdiction serve different purposes, and that venue functions more like transfer and *forum non conveniens*. Pet. at 22–24. It references prior petitions, BIO at 2, but that only underscores that the question presented is recurring. Finally, it argues the question was not "pressed"—but admits that is of no moment because the question was "passed on" by the Sixth Circuit. *Id.* at 25.

This case, in sum, squarely presents a pure legal issue that has long divided the federal courts. The Court should grant review and reverse.

I. THE COURTS OF APPEALS ARE DEEPLY SPLIT.

1. Respondent concedes a "conflict" exists among the lower courts but tries to downplay it by claiming that "[c]ases decided under non-patent special venue statutes"

"cannot add to a circuit split on the question presented." BIO at 2, 11. Not so.

"[A]s a general matter, courts have interpreted special venue provisions to supplement, rather than preempt, general venue statutes." *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1409 (9th Cir. 1989) (citing 15 *Wright & Miller's Federal Practice & Procedure*, § 3818 (1976)). Accordingly, when a party brings a claim under a law with a special venue provision, venue is proper so long as the case satisfies either the special *or* general venue statute. In *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193, 195 (2000), for example, this Court ruled that the Federal Arbitration Act's venue provisions were "permissive." A party may challenge an arbitration award "either where the award was made or in any district proper under the general venue statute." *Id.*

This understanding refutes Respondent's central argument. After all, it would make little sense for one party to bear the burden under a special venue statute and a different party to bear the burden under the general venue statute, when both statutes address the same question: whether a particular federal district court is an appropriate venue for the case.

Consistent with this reasoning, courts that have decided the burden question in special venue cases have applied the same rule in general venue cases, and vice versa. *See Myers v. Am. Dental Ass'n*, 695 F.2d 716, 725–26 (3d Cir. 1982) ("[T]he burden is upon the movant . . . to show that venue is improper under any permissible theory."); *Bartholomew v. Va. Chiropractors Ass'n, Inc.*, 612 F.2d 812, 816 (4th Cir. 1979) ("[T]he burden is upon plaintiff to establish venue" for special venue statute);

Mitrano v. Hawes, 377 F.3d 402, 405 (4th Cir. 2004) (general venue).

To be sure, a few special venue statutes are "restrictive." *Cortez Byrd*, 529 U.S. at 204. The venue provisions in the patent statute, National Bank Act, and Title VII provide the exclusive means for laying venue in such cases. *Id.* But these situations arise only where there are "contrary restrictive indications" in the statute itself. *Pure Oil Co. v. Suarez*, 384 U.S. 202, 205 (1966). Even then, courts tend to apply a single rule across general, permissive, and restrictive venue statutes. *See, e.g., Pinson v. Rumsfeld*, 192 F. App'x 811, 817 (11th Cir. 2006) (Title VII).

Against this framework, patent cases are "unique." *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1012 (Fed. Cir. 2018). On top of being restrictive, patent venue is structurally different, with all venue questions "governed by Federal Circuit law," rather than the law of the circuit where a case is filed. *Id.* Consequently, there cannot be a circuit split over patent venue. There can be—and there is—a split in non-patent cases.

2. Next, Respondent argues that "[b]oth Petitioner and opinion below" got it wrong in characterizing the Eighth and Seventh Circuits as imposing the venue burden on the defendant. BIO at 11.

On the Eighth Circuit, though, Respondent concedes that in *United States v. Orshek*, 164 F.2d 741 (8th Cir. 1947), "[t]he court allocated to the defendants the burden" of proving venue. *Id.* at 15. It claims *Cohen v. Newsweek, Inc.*, 312 F.2d 76, 78 (8th Cir. 1963), stated—"in dicta," "without mentioning *Orshek*"—that "the burden of establishing facts to support" venue should rest with the plaintiff. *Id.* But dictum is "not precedential,"

and a later panel decision "cannot overrule an earlier" one. *Passmore v. Astrue*, 533 F.3d 658, 660–61 (8th Cir. 2008). Thus, even under Respondent's telling, *Orshek* continues to control.

As to the Seventh Circuit, Respondent notes that *Grantham v. Challenge-Cook Bros.*, 420 F.2d 1182 (7th Cir. 1969), imposed the venue burden on the plaintiff, BIO at 13, but acknowledges *Grantham* is "a patent venue case," *id.* at 14.

Still, it insists *International Travelers Cheque Co. v. BankAmerica Corp.*, 660 F.2d 215 (7th Cir. 1981), "followed *Grantham*'s burden allocation in a non-patent case." *Id.* It did not. *International Travelers* examined whether a defendant had "waived its venue rights." 660 F.2d at 217. It held that "[t]he party relying on a waiver theory"—there, the plaintiff—"has a heavy burden of establishing specific facts to show" waiver, referencing *Grantham* as additional support for the point. *Id.* at 222 (citing 420 F.2d at 1184).

But this rationale—that a party "who seeks to benefit from" a defense must "plead[] and prove[]" it—favors Petitioner, not Respondent. *Cunningham*, 604 U.S. at 702. And in any event, whether a party has waived its venue rights is distinct from which party bears the burden of proving venue. *International Travelers* tackled the former question. *In re Peachtree Lane Associates*, 150 F.3d 788, 792 (7th Cir. 1998), addressed the latter, imposed the burden on the defendant, and remains the law of the circuit.[1]

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[1] Respondent's characterization of *Peachtree Lane* as "rel[ying] on a presumption idiosyncratic to bankruptcy" is not well taken. BIO at 13. Venue there was proper under 28 U.S.C. § 1408(1). 150 F.3d

3. Finally, after conceding that *Myers v. American Dental Association*, 695 F.2d 716 (3d Cir. 1982), "directly conflict[s] with the decision below," Respondent questions whether the Third Circuit would follow the same rule today given "amendments to the general venue statute." BIO at 16, 19. There is no need to speculate. The court has repeatedly applied *Myers*, *see Post Acute Medical, LLC v. LeBlanc*, 826 F. App'x 163, 166 (3d Cir. 2020), doing so just last year, *Resol. Mgmt. Consultants, Inc. v. Design One Bldg. Sys. Inc.*, 2024 WL 4471728, at *5 (3d Cir. Oct. 11, 2024).

II. THE DECISION BELOW IS INCORRECT.

On the merits, Respondent's brief is silent on nearly every argument made in the petition.

1. Respondent does not contest that "venue is an affirmative defense," App. 15a; that defendants generally bear the burden of proving affirmative defenses, *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008); and that the panel's distinction between substantive and dilatory defenses is illusory, Pet. at 21. Nor does it dispute that the purpose of venue—accommodating "the convenience of [the] litigants," *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939)—dovetails with the purpose of transfer and *forum non conveniens*, both of which fall upon the defendant to prove. *See* Pet. at 22. And Respondent admits that "[v]enue is a creature of statute,"

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at 792. Because that provision mirrors parts of the general venue statute, leading commentators often look to the general venue statute "to resolve disputes under section 1408(1)." 1 *Collier's Bankruptcy Practice Guide* ¶¶ 17.03[1][c] & [2][c] (Richard Levin & Henry J. Sommer, eds., 2025).

BIO at 28, whereas personal jurisdiction is a constitutional prerequisite.

2. The weakness of Respondent's position is reinforced by the argument it does make: That "[t]he burden allocation on a motion to dismiss for lack of personal jurisdiction is instructive here because under [28 U.S.C.] § 1391(b)(3), the questions of venue and personal jurisdiction are identical." *Id.* at 27 (cleaned up).

But everyone "agree[s]" that § 1391(b)(3) is "off the table" here because this isn't a § 1391(b)(3) case. App. 17a–18a n.3. Indeed, very few cases are § 1391(b)(3) cases. That provision is "designed to deal with the problem of where venue should lie when the significant events giving rise to the claim arise outside the United States." 17 *Moore's Federal Practice* § 110.02[2][d] (3d ed. 2025). Section 1391(b)(3) "cases are rare." 14D *Wright & Miller's Federal Practice & Procedure*, § 3806.1 (4th ed. 2025). And Respondent's attempt to tie venue to personal jurisdiction through this seldom-used provision—especially when venue functions like transfer in the typical case—is unpersuasive.

3. Petitioner alleges venue is proper in the Eastern District of Kentucky because "a substantial part of the events and omissions giving rise to the claims stated herein occurred in this district." App. 17a. Though Petitioner was injured in Ohio and Respondent is headquartered there, BIO at 3, that doesn't end the analysis, because "venue can be appropriate in more than one district," so "long as a 'substantial part' of the underlying events [takes] place in [the] district[]," *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 356 (2d Cir. 2005).

As Respondent recognizes, "[t]he bad faith inquiry [under Kentucky law] essentially probes whether, in the

investigation, evaluation, and processing of the claim, the insurer acted unreasonably." BIO at 21 (quoting *Philadelphia Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649–50, 732 (6th Cir. 2013)). In other words, Petitioner may bring a bad-faith claim if "the investigation, evaluation, and processing of [his] claim" occurred in Kentucky. *Id.* Those facts—where Respondent investigated Petitioner's claim, where Respondent evaluated it, and where Respondent processed it—are obviously known to Respondent. Requiring it to prove improper venue does not therefore mean Respondent must "[p]rove" some impossible "negative." BIO at 29. It simply asks Respondent to produce facts already in its possession, to benefit from the affirmative defense it has asserted.

III. THIS CASE IS AN EXCELLENT VEHICLE.

Finally, Respondent argues that this case is "ill-suited for this Court's review" because "the Sixth Circuit's decision to address the question was purely gratuitous," *id.* at 20, 25.

That would be news to the Sixth Circuit, which treated the burden issue as its "first task," and the more than half dozen courts that have since cited and applied the panel's rule. *See* App. 11a; *Alghooneh v. U.S. Dep't of State.*, 2025 WL 3079363, at *2 (E.D. Mich. Nov. 4, 2025) ("Plaintiffs fail to carry their burden of showing venue is proper."); *Corman v. Relax Saunas*, 2025 WL 2371897, at *1 (N.D. Ohio Aug. 15, 2025).

It also overreads the district court's decision. While the district court stated that the defendant "has the burden of proving" venue, App. 27a, it did not hold

Nationwide to that burden when it found that "Nationwide processed Tobien's unsuccessful claim in Ohio where the company and its adjustors are purportedly located," App. 29a. That's because Respondent marshalled no evidence on this point in its motion to dismiss. Its motion included five exhibits. Three—a summons, magistrate decision, and judgment—are from a dangerous dog action brought by the State of Ohio. *See* D. Ct. Dkt. 5 at Ex. A–C. None discuss insurance or mention Nationwide. The fourth document is Petitioner's complaint against the dog owner. Again, no mention of insurance. *Id.* at Ex. E. The fifth document is a one-page email providing notice of suit. *Id.* at Ex. D. Tellingly, Respondent's brief in opposition is silent about the location of its adjustors or where Petitioner's claim was investigated and processed.

Under these circumstances, the district court would have been justified in granting Respondent's motion to dismiss only if it placed the burden of proof on Petitioner and required him, rather than Respondent, to produce evidence of venue. That is why the Sixth Circuit described the burden issue as its "first task," and why it, like the district court, faulted Tobien for failing to provide "factual allegations," "affidavits," or "other evidence" to support his "assertion[s]" of venue. App. 11a, 19a. Respondent's effort to reanimate the district court's flawed decision does not save the Sixth Circuit's judgment from review.

Respondent's remaining arguments are easily dismissed. It states that the "'traditional rule' of this Court precludes a grant of certiorari when 'the question presented was not pressed or passed upon below.'" BIO at 25 (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). But that rule operates "in the disjunctive," 504

U.S. at 41, and this Court regularly grants review so long as an issue is passed upon—including in *Williams* itself, *id.* at 43; *see also Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530–31 (2002). As Respondent admits, that box is checked here: The Sixth Circuit passed on the question, doing so in a precedential opinion that other courts have since followed. BIO at 25.

That other petitions have presented the same issue reinforces the persistent and recurring nature of the split. *Id.* at 2. A closer look into these petitions, moreover, illustrates why this case is an ideal vehicle.

Both *American Dental Association v. Myers* and *Steen v. Murray* submitted three questions for review. Cert. Pet. at i, *Am. Dental Ass'n v. Myers*, 462 U.S. 1106 (1983) (No. 82-1508); Cert. Pet. at i, *Steen v. Murray*, 575 U.S. 997 (2015) (No. 14-908). *Myers* was filed over four decades ago, and the split—as the panel notes—has deepened considerably since. App. 13a. The petitioners in *Steen*, meanwhile, admitted that it was "not entirely clear" that the court of appeals had decided the burden question. *Steen* Pet. at 29.

None of those circumstances are present here. This case presents a single question for this Court's consideration. The Sixth Circuit made clear it was deciding that question: It described the issue as its "first task," outlined the relevant split, came down on one side of the split, and dismissed Petitioner's case as a result. App. 11a–13a. The petition cleanly poses an important and recurring federal question ripe for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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