

A DEFENDANT’S GUIDE TO BURDEN-FREE LIVING: *TOBIEN* AND THE MOTION TO DISMISS FOR IMPROPER VENUE

Abstract: On April 2, 2025, in *Tobien v. Nationwide General Insurance Co.*, the U.S. Court of Appeals for the Sixth Circuit held that when a defendant moves to dismiss for improper venue, the plaintiff bears the burden of proving that venue is proper. In doing so, the Sixth Circuit joined a plurality of federal circuits that shift the burden to plaintiffs, departing from a minority of circuits that place the burden on the defendant. Although the Supreme Court declined to resolve the split, this Comment argues that the minority approach is correct. Defendants who challenge a plaintiff’s chosen venue should bear the burden of proof on their own motion because venue is a personal privilege that defendants may invoke to avoid the inconvenience of litigating in an improper forum.

INTRODUCTION

Venue is a protection of convenience afforded to defendants.¹ It has its roots in centuries-old English common law.² It was a critical concern at the founding of the United States that helped shape the federal judicial system.³ And it survives—and thrives—to this day, enshrined by Congress in a framework of statutes.⁴ Venue has stuck around because its importance is axiomatic: if you sue someone, you should do it in the right place.⁵

Right now in U.S. federal courts, venue is proper, *inter alia*, in any district where the defendant resides or where the events underlying the claim took place.⁶ When a defendant believes that venue is improper, they have a vehicle

¹ See Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1159 (2015) (explaining that limits on a plaintiff’s ability to hale a defendant into an inconvenient forum are fundamental to the American judicial system).

² See *id.* at 1162–63 (detailing an act passed by Parliament in 1285 that authorized judges to hold hearings where litigants actually lived).

³ See *id.* at 1165 (noting that at constitutional conventions, delegates often objected to a network of courts in which litigation would “carry me a thousand miles from home—from my family and business—to where, perhaps, it will be impossible for me to prove [my case]”) (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 526 (statement of Virginia delegate George Mason)).

⁴ See, e.g., 28 U.S.C. §§ 1391(b), 1404(a) (setting out the general venue rules and rules for transfer to another judicial district for convenience of parties).

⁵ See *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613, 618 (6th Cir. 2025), *cert. denied*, 2026 WL 135652 (2026) (explaining that there are particular forums where certain actions should be brought).

⁶ See 28 U.S.C. § 1391(b) (providing the present-day statutory framework for venue).

to challenge the suit: the motion to dismiss.⁷ But who bears the burden on that motion?⁸ Is it the plaintiff, who picked the venue and now must defend its propriety?⁹ Or is it the defendant, who brings the motion to attack it?¹⁰ What at first blush resembles a dry and perhaps arbitrary procedural question is the source of a circuit split that has lasted over fifty years.¹¹ Indeed, who bears the burden of proof on a motion to dismiss often decides the outcome of a lawsuit.¹²

This Comment proceeds in three parts.¹³ Part I outlines the history of venue protections, the modern general venue statute, and the procedural history of *Tobien v. Nationwide General Insurance Co.*, a recent Sixth Circuit decision that assigns the burden of proof as to venue to the plaintiff.¹⁴ Part II explores the reasons that federal courts of appeals have split on the burden of proof question.¹⁵ And Part III argues that the defendant should bear the burden of proof when they move to dismiss for improper venue.¹⁶

I. THE FACTUAL, LEGAL, AND PROCEDURAL BACKGROUND OF *TOBIEN V. NATIONWIDE GENERAL INSURANCE CO.*

In 2025, the United States Court of Appeals for the Sixth Circuit joined a plurality of federal circuits in holding that when a defendant moves to dismiss for improper venue, the burden shifts to the plaintiff, who must prove that venue is proper.¹⁷ Section A of this Part surveys the origins and purpose of venue, as well as how it is both akin to and distinct from personal jurisdiction.¹⁸ Sec-

⁷ See FED. R. CIV. P. 12(b) (laying out the defenses a litigant may assert on a motion to dismiss).

⁸ See *Tobien*, 133 F.4th at 618 (inquiring as a threshold matter as to who bears the burden on a motion to dismiss for improper venue).

⁹ See *infra* notes 72–84 and accompanying text.

¹⁰ See *infra* notes 84–94 and accompanying text.

¹¹ See *infra* notes 72–94 and accompanying text.

¹² See *Simon v. Ward*, 80 F. Supp. 2d 464, 466 (E.D. Pa. 2000) (declaring in the context of a Rule 12(b)(3) motion to dismiss that the burden of proof determination is often dispositive). *But see* *Catipovic v. Turley*, No. C 11-3074, 2012 WL 2089552, at *15 (N.D. Iowa June 8, 2012) (declining to assign the burden to either party because such a determination is unnecessary given the evidence in the record).

¹³ See *infra* notes 17–135 and accompanying text.

¹⁴ See *infra* notes 17–67 and accompanying text.

¹⁵ See *infra* notes 68–94 and accompanying text.

¹⁶ See *infra* notes 95–135 and accompanying text.

¹⁷ *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613, 619 (6th Cir. 2025). A plurality of circuit courts has adopted the same position. See, e.g., *Cordis Corp. v. Cardiac Pacemakers*, 599 F.2d 1085, 1086 (1st Cir. 1979) (noting plaintiff has burden to prove venue is proper); *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005) (same); *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004) (same); *Grantham v. Challenge-Cook Bros.*, 420 F.2d 1182, 1184 (7th Cir. 1969) (same). *But see*, e.g., *Myers v. Am. Dental Ass’n*, 695 F.2d 716, 724 (3d Cir. 1982) (finding defendant has burden to prove venue is improper); *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947) (same).

¹⁸ See *infra* notes 20–56 and accompanying text.

tion B examines the facts and procedural history of *Tobien v. Nationwide General Insurance Co.*¹⁹

A. Venue in Civil Actions in Federal Courts

Venue rules exist to ensure that cases are heard in the right place.²⁰ The doctrine of venue has its roots in twelfth-century common law, where jurors would decide cases based on their own personal knowledge of the facts at issue.²¹ Back then, venue existed primarily for the court's convenience: judges needed jurors who knew the facts, so they tried cases where those jurors lived.²² As the law evolved to include fact witnesses, the logistical imperative to try a case in the spot where the events actually occurred faded away.²³ Over time, venue rules morphed into a doctrine primarily concerned with the parties' convenience.²⁴

Early common law distinguished between two types of cases regarding venue: local cases, that implicated real property, and transitory cases, that encompassed everything else.²⁵ Historically, in local cases, venue was proper where the land at issue was located.²⁶ In transitory cases, English common law allowed plaintiffs to bring their claims nearly anywhere.²⁷

¹⁹ See *infra* notes 57–67 and accompanying text.

²⁰ See 17 MOORE'S FEDERAL PRACTICE § 110.01[1] (3d ed. 1997) (describing venue as a location convenient for the parties) [hereinafter MOORE'S]. Venue is not—and should not be confused with—subject matter and personal jurisdiction. *Id.* Subject matter jurisdiction is written into the Constitution and determines whether a federal court may hear a case. See U.S. CONST. art. III, § 2, cl. 1 (establishing the bases of jurisdiction for federal courts). Personal jurisdiction, which has roots in common law but likewise stems from the Constitution, concerns whether a court has sovereign authority to exercise power over a party. See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878) (holding that a court that attempts to bind a party over which it lacks personal jurisdiction violates that party's Fourteenth Amendment due process rights). Venue, by contrast, is generally understood to be a sub-constitutional doctrine governed by federal statute. MOORE'S, *supra* § 110.01[1].

²¹ See William W. Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1, 16 (1949) (noting how, before the advent of the impartial jury, personal knowledge of jurors was necessary).

²² See Diane P. Wood, *Federal Venue: Locating the Place Where the Claim Arose*, 54 TEX. L. REV. 392, 393 (1976) (explaining that at old English common law, venue was a tool of convenience for courts). Venue ensured the court could summon not just the correct jurors, but also the actual physical apparatus of the court—its equipment and records—which were too unwieldy to haul all over England. See Blume, *supra* note 21, at 3 (explaining that the court had to move around from place to place).

²³ See Wood, *supra* note 22, at 393 (detailing how as the law progressed, so did the rationale for venue protections).

²⁴ See Blume, *supra* note 21, at 20 (noting that common law venue rules did not change when the witness replaced the juror as the raconteur of facts because it was still very convenient to try cases in the place where witnesses were likely to be).

²⁵ See 14D WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3802 (4th ed. 2025) (delineating the distinction at common law between local cases, that were tied to specific tracts of land, and transitory cases, that were not).

²⁶ See *id.* (noting that local venue was wherever the land at issue was located). The distinction between local and transitory cases made the journey across the Atlantic and embedded itself in Amer-

Not so in the United States.²⁸ Here, venue rules have largely been defined by statute since the beginning of the federal court system.²⁹ In the Judiciary Act of 1789, Congress provided for venue in the district where the defendant resided.³⁰ Over the next two centuries, Congress amended venue rules several times, expanding and restricting where plaintiffs could bring suit.³¹

Venue, in our modern system, is no historical anachronism.³² Although it may not be quite as vital to the success or failure of a claim as it was in the twelfth century, when litigants relied on jurors with personal knowledge of the

ican venue law, too. *See id.* (explaining that although the local action rule is of British origin, American common law retained the rule). For most of United States history, local cases involving real property were governed by common law venue rules and had to be brought in the district where the property was located. *Id.* Transitory cases had their venue rules set by statute. *Id.* In 2011, Congress eliminated the distinction when it passed the Federal Courts Jurisdiction and Venue Clarification Act of 2011, making all venue rules in the United States statutory. *Id.*

²⁷ *Id.*

²⁸ *See id.* (explaining that plaintiffs cannot bring their claims anywhere, only where venue is proper according to statute). Venue was so important to Americans at the founding that inhabitants of Kentucky threatened secession and an alliance with Spain if Congress did not set up a federal trial court within its boundaries. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 71 (1923) (laying out Kentucky's plan to potentially separate from the state of Virginia, and by extension the Union, to join Spain and allow the Spanish to freely navigate the Mississippi River).

²⁹ *See* Tobien v. Nationwide Gen. Ins. Co., 133 F.4th 613, 618 (6th Cir. 2025) (defining the statutory basis for venue). The statutory framework did not extend to local cases involving title or injury to land until 2011. WRIGHT & MILLER, *supra* note 25, § 3802.

³⁰ *See* WRIGHT & MILLER, *supra* note 25, § 3802 (noting that the Judiciary Act of 1789 allowed plaintiffs to lay venue in the defendant's district of residence). Until 1875, the Judiciary Act of 1789 limited subject matter jurisdiction in diversity jurisdiction cases, making the venue rules broader, not narrower, than its jurisdictional cousins. *Id.* From 1875 through the present, the opposite has been true: venue rules impose additional restrictions on litigants aside from jurisdiction. *Id.*

³¹ *See id.* (analyzing various modifications to the statutory framework of venue rules that Congress has made from the passage of the Judiciary Act of 1789 through the present). In 1966, Congress allowed for transactional venue, which let plaintiffs sue in the district wherein the events underlying the claim arose. *Id.* In 1990, Congress limited that venue provision further, and the language in the 1990 amendment survives to this day. *Id.* Transactional venue is distinct from residential venue, which corresponds to the district where the defendant resides. *Id.* From 1887 to 1990, in diversity jurisdiction cases only, venue was proper in the district where the plaintiff resided, too. *Id.* But Congress abolished residential venue in plaintiff's district because it allowed plaintiffs too much choice, burdened defendants with too great a potential inconvenience, and introduced a strange incongruity between federal question and diversity cases where plaintiffs had more venue choice in the latter than the former. *Id.* Oddly enough, it is possible Congress never even meant to allow for venue in the district of the plaintiff's residence in the first place, and that the provision was inserted by mistake in 1887 when the Senate rewrote the House's bill. *Id.*; *see also* 18 ANNALS OF CONG. 613, 2544-46, 2651, 2672, 2721 (1887) (establishing venue in the district where the plaintiff resided). Ironically, had Congress not seen fit to correct its mistake nearly 100 years later, Tobien would have never reached the Sixth Circuit: venue would have been proper in the Eastern District of Kentucky, where Karl Tobien brought suit, because he lives there. *See Tobien*, 133 F.4th at 621 (noting that the complaint alleges Karl Tobien is a Kentucky resident).

³² *See* Freeman v. Fallin, 254 F. Supp. 2d 52, 56 (D.D.C. 2003) (explaining that a case must be heard in its proper forum); *see also* Markowitz & Nash, *supra* note 1, at 1160 (explaining the litigant-protective nature of venue in contrast to the sovereign-constraining nature of personal jurisdiction).

facts, venue can still make or break a lawsuit.³³ And for good reason: as they stand today, the statutory rules that govern venue in the federal court system exist to stop plaintiffs from haling defendants into court in an inconvenient forum.³⁴

The present-day general venue statute, 28 U.S.C. § 1391(b), allows plaintiffs to sue in one of three places: (i) where a defendant resides; (ii) where a significant portion of the events giving rise to the claim took place; or (iii) if the other two options are unavailable, any forum in which a court has personal jurisdiction over the defendant.³⁵

This venue statute erects an additional shield of protection beyond the requirements of personal jurisdiction, which limits a court's power over parties.³⁶ Personal jurisdiction and venue grow out of separate historical doctrines and serve different modern-day functions in civil litigation.³⁷ Personal jurisdiction concerns sovereign authority.³⁸ To this day, the personal jurisdiction inquiry still focuses on the relationship between the forum—the sovereign—and the litigant.³⁹ A court cannot hear a case over a party unless that party has suffi-

³³ See *Freeman*, 254 F. Supp. 2d at 56 (explaining that a case cannot go forward without proper venue).

³⁴ See *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183–84 (1979) (holding that in almost all cases, the object of the venue statute is to prevent defendants from having to appear in inconvenient districts that might still theoretically have jurisdiction over them).

³⁵ See 28 U.S.C. § 1391(b) (providing the statutory framework for venue). The third option, allowing for venue anywhere a court has personal jurisdiction over the defendant when first two options are unavailable, is a fallback provision, and cases within its ambit are rare. WRIGHT & MILLER, *supra* note 25, § 3806.1. Note that § 1391(b) is the general venue statute. *Id.* There are a multitude of supplemental venue statutes that set forth specific venue rules for certain types of lawsuits. See, e.g., *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 567 (1942) (“[T]he general venue provision . . . is, of course, not applicable to patent infringement proceedings.”). For example, patent cases operate under a distinct venue framework, 28 U.S.C. § 1400(b), and Congress has allowed expanded venue options in suits against federal officials. 28 U.S.C. § 1391(e)(1).

³⁶ See WRIGHT & MILLER, *supra* note 25, § 3801 (noting that venue is a supplemental protection provided by statute on top of constitutional and statutory jurisdictional protections). The additional protections of venue, beyond those provided by subject matter and personal jurisdiction requirements, are a personal privilege of the defendant. *Id.* § 3802. Still, venue is holistic in nature: its requirements consider the needs and interests of all parties—the idea being that the district where the events that underlie the lawsuit took place is, in fact, the correct district in which the case should be heard. *Id.*

³⁷ See *Olberding v. Ill. Cent. R.R. Co.*, 346 U.S. 338, 340 (1953) (explaining that venue does not limit a court's power, as does jurisdiction, but is rather a doctrine of convenience); see also Markowitz & Nash, *supra* note 1, at 1160 (“The sometimes fine distinction between the two and the common practical effect of both doctrines have resulted in profound confusion regarding the boundaries between venue and personal jurisdiction.”).

³⁸ See Markowitz & Nash, *supra* note 1, at 1161 (outlining that personal jurisdiction, ever since its advent, has limited state sovereign power and protected litigants against overreaching courts).

³⁹ See *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724 n.7 (3d Cir. 1982) (noting that jurisdiction is about power and whether a court has the authority to adjudicate a case).

cient minimum contacts with the forum.⁴⁰ At its core, personal jurisdiction is about power.⁴¹ Venue, instead, is a matter of locality.⁴² It ensures that a party is not dragged before an *inconvenient* court—a court that may have power over the party—but is not the correct court in which to litigate a dispute.⁴³ Not power, but prudence.⁴⁴

Under the statutory venue framework and Federal Rules of Civil Procedure, defendants have two mechanisms to challenge a plaintiff's chosen venue.⁴⁵ The first is a transfer under 28 U.S.C. § 1404(a).⁴⁶ Under that statute, a defendant may move to transfer their case from a district where venue is *already proper* to another district where venue is also proper, ostensibly because that other forum is substantially more convenient for them.⁴⁷ Authority is clear that on a § 1404(a) motion, the defendant bears the burden of proof.⁴⁸

⁴⁰ See *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 351–52 (2021) (referencing the minimum contacts inquiry developed in a long line of personal jurisdiction cases that focus on the party's relationship to the forum seeking to exercise power over them).

⁴¹ See *Myers*, 695 F.2d at 724 n.7 (explaining that without personal jurisdiction, a court may not properly exercise authority over a party).

⁴² See *id.* (explaining that venue is about convenience).

⁴³ See 77 AM. JUR. 2d *Venue* § 2 (2025) (“Venue, unlike subject matter and personal jurisdiction, focuses largely on geographical nexus related to the appropriate county in which an action may proceed.”).

⁴⁴ See *id.* (explaining that venue is about convenience, not about a court's actual authority to hear a case); see also Rosa S. Felibert, *Shopping on Thin Ice: Venue Limits on ICE Detention Transfers to Prevent Forum Shopping*, 65 B.C. L. REV. 1099, 1123–24 (2024) (summarizing how venue and personal jurisdiction are closely related but grounded in fundamentally different concepts).

⁴⁵ 28 U.S.C. §§ 1404(a), 1406(a); FED. R. CIV. P. 12(b)(3).

⁴⁶ 28 U.S.C. § 1404(a).

⁴⁷ See *id.* (allowing upon motion, inter alia, transfer of a case for the convenience of the parties and witnesses, and the interests of justice); see also WRIGHT & MILLER, *supra* note 25, § 3841 (explaining the § 1404(a) transfer mechanism and how it works). This is not a routine occurrence. *Id.* But when the defendant moves for transfer and the statutory factors—convenience of parties, convenience of witnesses, and interests of justice—weigh in favor of an alternative proper district, the court may make the transfer. *Id.* This statutory provision arises from the common law doctrine of *forum non conveniens*, under which a district where venue was laid correctly could dismiss a case so that the plaintiff could re-file in a venue that was theoretically better. See *Forum Non Conveniens*, BLACK'S LAW DICTIONARY (12th ed. 2024) (allowing a court to transfer a case to a different venue in an exercise of its discretion). Congress intended for the § 1404(a) provision to streamline that process by simply allowing for transfer of the action. WRIGHT & MILLER, *supra* note 25, § 3841.

⁴⁸ See, e.g., *Means v. U.S. Conf. of Cath. Bishops*, 836 F.3d 643, 652 n.7 (6th Cir. 2016) (placing burden on defendants to prove that transfer to an alternative better venue was proper); *In re Clarke*, 94 F.4th 502, 508 (5th Cir. 2024) (moving party must show good cause that a transfer makes sense for parties and witnesses, as well as being in the interests of justice); *Neil Bros. Ltd. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 327 (E.D.N.Y. 2006) (assigning the burden of proof by clear and convincing evidence to the movant); *Cosmetic Warriors Ltd. v. Abrahamson*, 723 F. Supp. 2d 1102, 1105 (D. Minn. 2010) (giving movants a “heavy burden” to force a transfer); *Vass v. Volvo Trucks N. Am., Inc.*, 304 F. Supp. 2d 851, 857 (S.D.W. Va. 2004) (holding that movant, who will likely be the defendant, has the burden of proof).

The second way a defendant may challenge venue is by filing a motion to dismiss under Rule 12(b)(3) of the Federal Rules of Civil Procedure.⁴⁹ At that point, the court may decide the motion on the pleadings, hold an evidentiary hearing, or permit limited discovery on the narrow question of venue.⁵⁰ If the court decides that the plaintiff's chosen forum is improper, it may dismiss the case or transfer it to a proper district under § 1406(a).⁵¹ This statutory provision allows a court-initiated transfer from a district where venue is improper to one where it is.⁵² Courts take this action to avoid outright dismissal in response to a successful Rule 12(b)(3) motion to dismiss for lack of venue.⁵³

It is unclear, however, who bears the burden of proving venue on a Rule 12(b)(3) motion to dismiss.⁵⁴ The circuit courts have divided over that very question for more than fifty years.⁵⁵ Now, after decades of division among its own district courts, the Sixth Circuit has entered the fray in *Tobien*.⁵⁶

⁴⁹ FED. R. CIV. P. 12(b)(3). Although the court can dismiss the case, it sometimes does not. WRIGHT & MILLER, *supra* note 25, § 1352. Under § 1406(a), the judge may transfer the case to a district in which venue is proper. *Id.*

⁵⁰ See *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613, 621 (6th Cir. 2025) (explaining the options a federal district court judge has when considering a Rule 12(b)(3) motion to dismiss). The same is true of Rule 12(b)(2) motions to dismiss for lack of personal jurisdiction: the judge can decide the motion on the papers, hold a hearing, or permit limited jurisdictional discovery. See *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991) (reversing dismissal for lack of personal jurisdiction because trial judge adopted statements of fact in affidavit as true).

⁵¹ 28 U.S.C. § 1406(a).

⁵² See WRIGHT & MILLER, *supra* note 25, § 3827 (distinguishing between the venue transfer provisions).

⁵³ See *Darby v. U.S. Dep't of Energy*, 231 F. Supp. 2d 274, 277 (D.D.C. 2002) (explaining that § 1406(a) transfer is often the preferred vehicle for handling Rule 12(b)(3) motions to dismiss that might otherwise be successful).

⁵⁴ See *infra* note 55 and accompanying text.

⁵⁵ Compare *Cordis Corp. v. Cardiac Pacemakers*, 599 F.2d 1085, 1086 (1st Cir. 1979) (burden on plaintiff), and *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005) (same), and *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004) (same), and *Grantham v. Challenge-Cook Bros.*, 420 F.2d 1182, 1184 (7th Cir. 1969) (same), with *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982) (burden on defendant), and *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947) (same). The special venue rules in patent cases are not included in this split; the Federal Circuit has ruled that under the patent venue scheme articulated in § 1400(b), the plaintiff bears the burden of proof. See *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1013 (Fed. Cir. 2018) (“[I]t is appropriate for us to adopt a uniform national rule to address the propriety of patent-specific venue.”); *supra* note 35 and accompanying text.

⁵⁶ See *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613, 619 (6th Cir. 2025) (joining the plurality of circuits that assign the burden of proof on a motion to dismiss for improper venue to the plaintiff). Even among its own district courts, the Sixth Circuit had been divided on the burden of proof question before *Tobien*. Compare *Audi AG & Volkswagen of Am., Inc. v. Izumi*, 204 F. Supp. 2d 1014, 1017 (E.D. Mich. 2002) (plaintiff has burden to prove venue is proper), with *Long John Silver's, Inc. v. DIWA III, Inc.*, 650 F. Supp. 2d 612, 631 (E.D. Ky. 2009) (defendant has burden to prove venue is improper), *overruled by Tobien*, 133 F.4th at 619.

B. Factual and Procedural History of Tobien v. Nationwide General Insurance Co.

The plaintiff, Karl Tobien, was a door-to-door telecommunications salesman residing in Boone County, Kentucky.⁵⁷ On May 18, 2023, Tobien walked up a driveway in Loveland, Ohio, owned by Kenneth and Anita Kern.⁵⁸ There, a German Shepherd bit him, and Tobien claimed that the dog belonged to the Kerns.⁵⁹

Subsequently, Tobien filed an insurance claim with the Kerns' homeowner's insurance provider, Nationwide General Insurance Company.⁶⁰ After an investigation, Nationwide denied Tobien's claims because he could not prove that the dog belonged to the Kerns.⁶¹ Tobien then filed suit, bringing third-party bad-faith claims arising out of Kentucky state law against Nationwide in the United States District Court for the Eastern District of Kentucky.⁶²

Nationwide filed a pre-answer motion to dismiss under Federal Rule of Civil Procedure 12(b)(3), alleging that by suing in Kentucky, Tobien had picked an improper venue.⁶³ Tobien responded that venue was proper in the Eastern District of Kentucky because Nationwide conducted business in the district and sent correspondence regarding his claim to his address in the district.⁶⁴ The district court disagreed, holding that Nationwide was based in Ohio, the injury to Tobien occurred in Ohio, and his claim was processed in Ohio.⁶⁵ On June 7,

⁵⁷ *Tobien*, 133 F.4th at 621. It might be nigh on impossible to describe the facts of this case in more entertaining fashion than Judge Thapar does in his opinion in *Tobien*. See *id.* (“[Tobien] couldn’t have expected what awaited him at the end of a cul-de-sac in the serene hamlet of Loveland, Ohio.”).

⁵⁸ Brief of Defendant-Appellee at 3, *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613 (6th Cir. 2025) (No. 24-5575), 2024 WL 4171796, at *3.

⁵⁹ *Id.* Six days after he was bitten, on May 24, 2023, a criminal complaint was filed against Anita Kern alleging a breach of OHIO REV. CODE ANN. § 955.22(C), a failure to keep her dog under reasonable control off-premises. *Id.* at *3. Kern pleaded not guilty, and as the incident took place on-premises, the criminal matter was dismissed on August 23, 2023. *Id.* at *3–4.

⁶⁰ Corrected Brief of Plaintiff-Appellant at 8, *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613 (2025) (No. 24-5575), 2024 WL 4093078, at *8.

⁶¹ *Id.*

⁶² *Tobien*, 133 F.4th at 617. Kentucky allows third parties to sue an insurer when it is legally obligated to pay a claim but refuses to do so—a cause of action for which many states do not provide. See generally *Mosley v. Arch Specialty Ins. Co.*, 626 S.W.3d 579, 584 (Ky. 2021) (explaining third-party bad faith claims in Kentucky). Tobien also sued the Kerns in the United States District Court for the Southern District of Ohio for injuries arising from the dog bite, and the parties later agreed to a dismissal. *Tobien*, 133 F.4th at 617.

⁶³ Brief of Defendant-Appellee at 5, *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613 (2025) (No. 24-5575), 2024 WL 4171796, at *5.

⁶⁴ See *Tobien v. Nationwide Gen. Ins. Co.*, No. CV 2:24-042, 2024 WL 4793819, at *1 (E.D. Ky. June 7, 2024), *aff’d*, 133 F.4th 613 (6th Cir. 2025) (laying out plaintiff’s argument).

⁶⁵ *Id.*

2024, the district court granted the motion and dismissed the case with prejudice due to improper venue.⁶⁶

On appeal, the Sixth Circuit affirmed the district court's decision that the Eastern District of Kentucky was an improper venue for Tobien's suit, and the Supreme Court subsequently declined to consider the case.⁶⁷

II. CONFLICTING APPROACHES TO ASSIGNING THE BURDEN OF PROOF

In 2025, in *Tobien*, the Sixth Circuit joined a plurality of federal circuits in holding that on a Rule 12(b)(3) motion to dismiss for improper venue, the plaintiff bears the burden of proving that their chosen forum is proper.⁶⁸ Critically, there is ample authority that on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the burden of proving jurisdiction shifts to the non-movant, the plaintiff.⁶⁹ Accordingly, Section A of this Part analyzes the Sixth Circuit's reasoning in *Tobien*, which analogizes venue to personal jurisdiction.⁷⁰ Section B discusses the minority view, as articulated by the Third Circuit, which distinguishes venue from personal jurisdiction and leaves the burden with the movant, the defendant.⁷¹

⁶⁶ *Id.* The district court noted in its decision that it would have ordinarily transferred the case to a district where venue is proper. *Id.* But as Ohio law creates no cause of action for third-party bad-faith claims against an insurance company, the district court dismissed the case, as it would have been dead on arrival in the Southern District of Ohio. *Id.*

⁶⁷ *Tobien*, 133 F.4th at 623.

⁶⁸ *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613, 619 (6th Cir. 2025). It is not just the federal courts that disagree as to who should bear the burden of proof on a Rule 12(b)(3) motion to dismiss for improper venue. *See* *Simon v. Ward*, 80 F. Supp. 2d 464, 467 (E.D. Pa. 2000) (noting that scholarly authorities are split on this question). Indeed, the disagreement "rages" not just in courtrooms, but in classrooms. *Id.* Two major commentaries, *Wright & Miller's Federal Practice and Procedure* and *Moore's Federal Practice*, take opposite positions, each claiming their view is "better" or "correct." Compare *WRIGHT & MILLER*, *supra* note 25, § 3826 ("[T]he weight of judicial authority appears to be that when the defendant has made a proper objection, the burden is on the plaintiff to establish that the chosen district is the proper venue."), with *MOORE'S*, *supra* note 20, § 110.01[5][c] ("It makes good sense to require a defendant who seeks dismissal of an action because of this personal privilege [venue] to establish the privilege.").

⁶⁹ *See, e.g., Peters Broad. Eng'g, Inc. v. 24 Cap., LLC*, 40 F.4th 432, 437 (6th Cir. 2022) (holding that when defendant challenges personal jurisdiction, plaintiff bears the initial burden of proof before the burden shifts back to the defendant); *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 257 (3d Cir. 1998) (holding that plaintiff bears the burden of proving jurisdiction is proper by a preponderance of the evidence); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (same); *Johnson v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008) (same); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 56–57 (D.C. Cir. 2017) (explaining that plaintiffs failed to "make a *prima facie* showing of the pertinent jurisdictional facts") (quoting *First Chi. Int'l v. United Exch. Co., Ltd.*, 836 F.2d 1375 (D.C. Cir. 1988)).

⁷⁰ *See infra* notes 72–84 and accompanying text.

⁷¹ *See infra* notes 84–94 and accompanying text.

*A. The Plurality Approach: Venue as Personal
Jurisdiction's Fraternal Twin*

Many decisions adopting the plurality position on the venue burden of proof issue treat the matter as perfunctory, devoting little more than a sentence or two to an issue that has divided the circuits for over half a century.⁷² Not so in *Tobien*.⁷³ Despite its status as a latecomer to the plurality, the Sixth Circuit in *Tobien* lays out the most comprehensive explanation on record for why the plaintiff ought to carry the burden of proof on a motion to dismiss for improper venue.⁷⁴

First, the Sixth Circuit holds that because plaintiff picks the venue, they should have to defend their own choice.⁷⁵

Second, the Sixth Circuit finds that because the burden shifts to the plaintiff on motions to dismiss for lack of personal jurisdiction, the burden ought to shift with respect to venue, too.⁷⁶ Both venue and personal jurisdiction are questions of law unrelated to the merits of a case.⁷⁷ Both are personal privileges held by defendants.⁷⁸ And both hinge on a nearly identical factual nexus.⁷⁹

⁷² See, e.g., *Cordis Corp. v. Cardiac Pacemakers*, 599 F.2d 1085, 1086 (1st Cir. 1979) (devoting but one sentence to the burden issue); *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005) (citing personal jurisdiction cases that apply the burden to the plaintiff without any reasoning as to why those cases are applicable in the venue context); *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004) (providing no rationale as to why plaintiff bears the burden when defendant challenges venue); *Grantham v. Challenge-Cook Bros.*, 420 F.2d 1182, 1184 (7th Cir. 1969) (analyzing the venue issue based on the facts presented by plaintiff without stating outright that they bear the burden or providing any rationale).

⁷³ See *Tobien*, 133 F.4th at 618–21 (laying out a two-and-a-half-page case for the plurality position, that the plaintiff should bear the burden of proof).

⁷⁴ See *id.* (making a multi-pronged argument for the plurality position).

⁷⁵ *Id.* “That makes sense.” *Id.* “[I]t is the plaintiff’s obligation to institute the action in a permissible forum.” *Id.* (quoting *Freeman v. Fallin*, 254 F. Supp. 2d 52, 56 (D.D.C. 2003)). But does it make sense? Just because the plaintiff is obligated to do something correctly does not mean they automatically bear the burden if challenged by defendant. *Marcure v. Lynn*, 992 F.3d 625, 631 (7th Cir. 2021) (noting that all circuit courts assign the burden of proof on Rule 12(b)(6) motions to the movant, the defendant). Indeed, the defendant often bears the burden on motions to dismiss, such as Rule 12(b)(6) motions to dismiss for failure to state a claim. *Id.*

⁷⁶ *Tobien*, 133 F.4th at 619 (citing *Peters Broad. Eng’g, Inc. v. 24 Cap., LLC*, 40 F.4th 432, 437 (6th Cir. 2022)).

⁷⁷ *Id.*

⁷⁸ *Id.* (quoting *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979)).

⁷⁹ *Tobien*, 133 F.4th at 619. For instance, § 1391(b)(1), which provides for venue in the defendant’s district of residence, may well turn on the same facts a personal jurisdiction inquiry into the defendant’s domicile. See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (“Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state’s jurisdiction for purposes of a personal judgment.”). Similarly, § 1391(b)(2), which provides for venue in the district where the events underlying the claim took place, may well turn on the same facts as a personal jurisdiction inquiry into a defendant corporation’s minimum contacts. See, e.g., *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358–59 (2021) (explaining the minimum contacts rationale underlying specific jurisdiction).

Third, the Sixth Circuit notes that the fallback provision of the venue statute, § 1391(b)(3), allows for venue anywhere the court has personal jurisdiction.⁸⁰ In such cases, a motion to dismiss for improper venue would turn on an identical question as a motion to dismiss for lack of personal jurisdiction.⁸¹ Applying different burdens of proof to decide identical motions, the Sixth Circuit explains, would be best avoided.⁸²

For those reasons, the Sixth Circuit joined the plurality of circuits and held that the burden must lie with the plaintiff.⁸³

B. The Minority Approach: Venue as a Doctrine of Defendant Convenience

The cases espousing the minority view are sparse in their reasoning, too.⁸⁴ But in *Myers v. American Dental Association*, the Third Circuit explained why the defendant ought to bear the burden of proof on an improper venue motion.⁸⁵ First, the Third Circuit reasons that the defendant carries the burden simply because they are the movant.⁸⁶ Second, because venue is distinct from personal jurisdiction, the Third Circuit concludes that the burden should not shift to the plaintiff.⁸⁷ This is the essence of the disagreement between the circuits: if venue is like personal jurisdiction, it should receive the same treatment.⁸⁸ In *Myers*, however, the Third Circuit holds that it does not.⁸⁹

⁸⁰ *Tobien*, 133 F.4th at 620. The fallback provision is a fallback—not an alternative. WRIGHT & MILLER, *supra* note 25, § 3806.1. For a plaintiff to activate it, there must be no district where venue can be properly laid under § 1391(b)(1) or (b)(2). *Id.* As a result, the fallback provision spawns cases only very rarely, when the events underlying the claim arose outside of the United States. *Id.*

⁸¹ *Tobien*, 133 F.4th at 620.

⁸² *Id.*

⁸³ *Id.* at 619. By coming down on the plurality's side, the Sixth Circuit resolved a split of authority within its own district courts. *Id.* Compare Audi AG & Volkswagen of Am., Inc. v. Izumi, 204 F. Supp. 2d 1014, 1017 (E.D. Mich. 2002) (plaintiff has burden to prove venue is proper), with Long John Silver's, Inc. v. DIWA III, Inc., 650 F. Supp. 2d 612, 631 (E.D. Ky. 2009) (defendant has burden to prove venue is improper), *overruled by Tobien*, 133 F.4th at 619.

⁸⁴ See, e.g., *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947) (assigning burden of proof to moving defendants). Despite its decision in 1947, some district courts within the Eighth Circuit have contravened *Orshek* without so much as mentioning it. See, e.g., *Bruner v. Republic Acceptance Corp.*, 191 F. Supp. 200, 203 (E.D. Ark. 1961) (assigning plaintiff burden of proof when defendant challenges venue); *Pfeiffer v. Int'l Acad. of Biomagnetic Med.*, 521 F. Supp. 1331, 1336 (W.D. Mo. 1981) (same); *Davis v. Advantage Int'l, Inc.*, 818 F. Supp. 1285, 1286 (E.D. Mo. 1993) (same).

⁸⁵ See *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982) (holding that defendant bears the burden on their own motion to dismiss for improper venue).

⁸⁶ See *id.* (holding that defendant bears the burden on their own motion to dismiss for improper venue); *Orshek*, 164 F.2d at 742 (handing defendant the burden of proof with no explanation other than that they are the movant).

⁸⁷ *Myers*, 695 F.2d at 724.

⁸⁸ See *Tobien*, 133 F.4th at 619 (analogizing venue and personal jurisdiction to determine where the burden of proof lies on a motion to dismiss for improper venue).

⁸⁹ *Myers*, 695 F.2d at 724. The two are not the same: "[t]he former connotes the power to decide a case upon the merits; the latter connotes locality—the place where the suit should be heard." *Id.* at 724 n.7.

The Third Circuit's logic in differentiating the two concepts to assign the burden of proof is as follows: a federal court must have personal jurisdiction over the parties before it can render a binding judgment on the merits.⁹⁰ Because federal courts have limited jurisdiction, they presume a *lack* of personal jurisdiction over parties until proven otherwise.⁹¹ Venue, on the other hand, is presumed to be proper unless challenged—which is why a complaint must always assert a jurisdictional statement but need not address venue.⁹² That presumption remains sufficient unless the defendant invokes their statutory venue protections in a Rule 12(b)(3) motion.⁹³ In that circumstance, says the Third Circuit, the defendant should bear the burden on their own motion.⁹⁴

III. *TOBIEN'S* BURDEN-SHIFTING FRAMEWORK IS WRONG

Courts should treat a Rule 12(b)(3) motion to dismiss as the affirmative defense that it is and place the burden of proof on the defendant.⁹⁵ Section A of this Part raises a new argument in favor of the minority position: comparing the § 1404(a) motion to transfer venue, which assigns the burden to the defendant, to a Rule 12(b)(3) motion to dismiss for lack of venue.⁹⁶ Section B distinguishes venue and personal jurisdiction, which *Tobien* treats as alike when assigning the burden of proof.⁹⁷ Section C rebuts the Sixth Circuit's finding in *Tobien* that the fallback provision of the venue statute compels courts to assign the same burden of proof to motions challenging personal jurisdiction and venue.⁹⁸

⁹⁰ See *id.* at 724 (noting the bedrock principle there can be no judgment without jurisdiction); see also *Pennoyer v. Neff*, 95 U.S. 714, 723–24 (1878) (holding, in keeping with common law tradition, that a court cannot adjudicate a dispute between parties unless it can exercise sovereign authority—jurisdiction—over those parties).

⁹¹ See *Myers*, 695 F.2d at 724 (maintaining that federal courts must have jurisdiction over a party for a suit to go forward, and they do not presume to have that jurisdiction; thus, a party seeking to sue must assert that they have jurisdiction over the parties).

⁹² See *id.* (noting that plaintiffs must allege jurisdiction, but not venue, in a complaint). Indeed, Rule 8 of the *Federal Rules of Civil Procedure* requires a plaintiff to make a “short and plain statement” of jurisdiction within their complaint. FED. R. CIV. P. 8(a)(1). It makes no such requirement for venue, leaving defendant’s choice to challenge venue entirely within their discretion. See WRIGHT & MILLER, *supra* note 25, § 3801 (explaining that the defendant’s decision to file a Rule 12(b)(3) motion to dismiss for improper venue is a personal privilege).

⁹³ FED. R. CIV. P. 12(b)(3).

⁹⁴ See *Myers*, 695 F.2d at 724 (leaving the burden with the defendant on the Rule 12(b)(3) motion).

⁹⁵ See *id.* (placing the burden on the defendant); *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947) (holding that defendant bears the burden); see also *infra* notes 96–135 and accompanying text.

⁹⁶ See *infra* notes 99–113 and accompanying text.

⁹⁷ See *infra* notes 114–124 and accompanying text.

⁹⁸ See *infra* notes 125–135 and accompanying text.

*A. Section 1404(a) Transfer Underlines Venue as a
Doctrine of Convenience*

There is a legitimate policy rationale for leaving the burden with defendants: they are best positioned to possess facts about their own residence when venue is asserted under § 1391(b)(1), or to contest where the events underlying the claim took place when venue is asserted under § 1391(b)(2).⁹⁹ If a defendant thinks they should not have to litigate in the plaintiff's chosen forum, they are best positioned to argue *why*.¹⁰⁰

Consider the § 1404(a) motion to transfer from one proper forum to another: authority is clear that on a § 1404(a) motion, the movant bears the burden of proof.¹⁰¹ On a transfer motion, the movant is likely to be the defendant, because the plaintiff chose the forum when they sued.¹⁰² In such a situation, the defendant invokes a privilege of convenience.¹⁰³ The plaintiff picked the forum, but the defendant does not like it, so the defendant must make a showing as to why it ought to change.¹⁰⁴ That same logic supports the minority position on motions to dismiss.¹⁰⁵ On a Rule 12(b)(3) motion, too, the plaintiff picked the forum, but the defendant claims it is inconvenient, so the defendant must make a showing as to why it ought to change.¹⁰⁶ The similarities between

⁹⁹ See *Brigdon v. Slater*, 100 F. Supp. 2d 1162, 1164 (W.D. Mo. 2000) (assigning venue burden of proof to the defendant on their own motion and noting that such an assignment makes sense because they control the records at issue).

¹⁰⁰ See *id.* (noting that defendant is the party in possession of relevant venue facts).

¹⁰¹ See, e.g., *Means v. U.S. Conf. of Cath. Bishops*, 836 F.3d 643, 652 n.7 (6th Cir. 2016) (placing burden on defendants to prove that transfer to an alternative better venue was proper); *In re Clarke*, 94 F.4th 502, 508 (5th Cir. 2024) (assigning moving party the burden to show good cause that a transfer makes sense for parties and witnesses, as well as being in the interests of justice); *Neil Bros. Ltd. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 327 (E.D.N.Y. 2006) (holding that movant has the burden of proof by clear and convincing evidence); *Cosmetic Warriors Ltd. v. Abrahamson*, 723 F. Supp. 2d 1102, 1105 (D. Minn. 2010) (assigning movants a "heavy burden" to force a transfer); *Vass v. Volvo Trucks N. Am., Inc.*, 304 F. Supp. 2d 851, 857 (S.D.W. Va. 2004) (finding that movant, who will likely be the defendant, has the burden of proof).

¹⁰² See *Vass*, 304 F. Supp. 2d at 857 (emphasizing that the movant on a § 1404(a) transfer motion is usually the defendant).

¹⁰³ 28 U.S.C. § 1404(a).

¹⁰⁴ See *Reese v. CNH Am., LLC*, 574 F.3d 315, 320 (6th Cir. 2009) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.") (quoting *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 612 (6th Cir. 1984)).

¹⁰⁵ *Contra* *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613, 618 n.2 (6th Cir. 2025) (holding that defendant bears the burden to show a transfer is warranted under § 1404(a) but concluding that this was not analogous because "that logic only works when the plaintiff's chosen venue is proper in the first place"). But the motion for transfer under § 1404(a) and the motion to dismiss both invoke privileges of convenience. See *Means*, 836 F.3d at 651 (explaining that the transfer motion turns on the convenience of the parties); *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 951 (1st Cir. 1984) (noting in the motion to dismiss context that venue is a privilege of defendant convenience).

¹⁰⁶ Cf. *Means*, 836 F.3d at 652 n.7 (assigning burden in transfer motion context to defendants); *Reese*, 574 F.3d at 320 (same); *In re Clarke*, 94 F.4th at 508 (same); *Neil Bros.*, 425 F. Supp. 2d at 327 (same); *Cosmetic Warriors*, 723 F. Supp. 2d at 1105 (same); *Vass*, 304 F. Supp. 2d at 857 (same).

the two procedural vehicles are underscored by the fact that a successful motion to dismiss often achieves the same result as a successful § 1404(a) motion: not dismissal, but transfer.¹⁰⁷

The Sixth Circuit in *Tobien* attempts to deal with this argument in a footnote, drawing a line between § 1404(a) transfers and motions to dismiss by assigning the burden to the defendant in the former and the plaintiff in the latter.¹⁰⁸ But it makes far more sense to treat the two provisions as alike, not as dissimilar, given that both address the same problem—a defendant looking for new courthouse digs.¹⁰⁹

After all, treating the two provisions as alike and leaving the burden with the defendant on motions to dismiss respects the informational asymmetry between the parties.¹¹⁰ The defendant is best positioned to possess facts about their own district of residence, and is often best positioned to contest where the events underlying the lawsuit took place.¹¹¹ Ultimately, this asymmetry reflects the purpose of the venue scheme itself: to afford defendants a privilege of convenience.¹¹² Defendants should therefore bear the burden when contesting plaintiff's choice of forum—regardless of whether they are seeking to move from a proper forum to a better one, an improper forum to a proper one, or an improper forum to dismissal altogether.¹¹³

¹⁰⁷ See *Darby v. U.S. Dep't of Energy*, 231 F. Supp. 2d 274, 277 (D.D.C. 2002) (finding that when a motion to dismiss for improper venue might otherwise be successful, pursuant to 28 U.S.C. § 1406(a), the interests of justice typically require courts to transfer cases to their proper judicial district instead of opting for outright dismissal); see also *Tobien v. Nationwide Gen. Ins. Co.*, No. CV 2:24-042-DCR, 2024 WL 4793819, *2 (E.D. Ky. June 7, 2024), *aff'd*, 133 F.4th 613 (6th Cir. 2025) (exploring the possibility of transfer before concluding ultimately that *Tobien's* state law claims would fail if governed by state law in Ohio, which would have been the proper federal judicial district in which the case could be heard).

¹⁰⁸ See *Tobien*, 133 F.4th at 618 n.2 (arguing that the § 1404(a) provision cannot be analogized to the motion to dismiss).

¹⁰⁹ See *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982) (assigning burden to defendants on a Rule 12(b)(3) motion because it is a procedural affirmative defense); cf. *Means*, 836 F.3d at 652 n.7 (assigning burden in transfer motion context to defendants).

¹¹⁰ See *Brigdon v. Slater*, 100 F. Supp. 2d 1162, 1164 (W.D. Mo. 2000) (assigning venue burden of proof to the defendant on their own motion because defendant is in possession of records that indicate where the events underlying the suit took place).

¹¹¹ See *id.* (noting that defendant is the party in possession of relevant venue facts).

¹¹² See *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167–68 (1939) (reiterating that the Supreme Court has always held venue to be a matter of litigant convenience, not of judicial power).

¹¹³ See *supra* note 106 and accompanying text; see also *Myers*, 695 F.2d at 724 (holding that defendant bears the burden on a motion to dismiss for improper venue); *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947) (same).

B. Venue Is Not Analogous to Personal Jurisdiction

Venue is not, and has never been, an analog to personal jurisdiction.¹¹⁴ Still, the Sixth Circuit and the other circuits in the plurality say otherwise.¹¹⁵ They link venue to its so-called twin, personal jurisdiction, to assign the burden of proof to the plaintiff.¹¹⁶ But it does not follow that courts should assign the burden of proof to the plaintiff on a Rule 12(b)(3) motion to dismiss for lack of venue simply because courts do so on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.¹¹⁷

Venue is both sub-constitutional and sub-jurisdictional: it concerns not whether a court can hear a case, but whether it is the right court to do so.¹¹⁸ Personal jurisdiction, on the other hand, concerns a party's substantive rights under the Due Process Clause of the Fourteenth Amendment.¹¹⁹ Authority establishing that the plaintiff bears the burden of proof on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction should not be applied in the venue context as though the two concepts are interchangeable; they are not.¹²⁰ A motion to dismiss for lack of personal jurisdiction challenges a court's power to hear a case at all, which justifies placing the burden on the plaintiff.¹²¹ A motion to dismiss for improper venue, by contrast, challenges the fairness and

¹¹⁴ See *Wheatley v. Phillips*, 228 F. Supp. 439, 440 (W.D.N.C. 1964) ("The distinction between jurisdiction and venue is of hornbook importance and cannot be overemphasized."); Markowitz & Nash, *supra* note 1, at 1160 ("[P]ersonal jurisdiction also acts to protect litigants but, unlike venue, it does not purport to guard against an uneven playing field between parties. Rather, personal jurisdiction protects litigants against the unfairness of being subject to the authority of a sovereign with which they have insufficient connections."); see also *supra* notes 36–44 and accompanying text (explaining the history of and differences between personal jurisdiction and venue).

¹¹⁵ See *supra* notes 75–83 and accompanying text.

¹¹⁶ See *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613, 619 (6th Cir. 2025) ("[T]his same burden-shifting framework applies to motions to dismiss for lack of personal jurisdiction."). But see *Simon v. Ward*, 80 F. Supp. 2d 464, 467 (E.D. Pa. 2000) ("Venue is not the identical (or even fraternal) twin of jurisdiction; rather it is an affirmative defense and a privilege held by defendants, which exists for the benefit of defendants.").

¹¹⁷ See *Myers*, 695 F.2d at 724 (emphasizing that it is a mistake to apply personal jurisdiction rules to venue issues simply because they are similar procedural doctrines with defendant-protective functions).

¹¹⁸ See *State ex rel. Kan. City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. 2009) (explaining that venue is sub-jurisdictional and is the doctrine that guides which of the courts of jurisdiction is an appropriate forum for trial).

¹¹⁹ See 77 AM. JUR. 2D *Venue* § 2 (2025), *supra* note 43 ("Venue issues, unlike those involving personal and subject matter jurisdiction, do not result in the enlargement or impairment of substantive rights and thus is a matter that goes to process rather than substantive rights.").

¹²⁰ See *Myers*, 695 F.2d at 724 (emphasizing that personal jurisdiction cases cannot just serve as binding in venue cases merely because they are similar concepts).

¹²¹ See *Long John Silver's, Inc. v. DIWA III, Inc.*, 650 F. Supp. 2d 612, 631 (E.D. Ky. 2009) (noting that plaintiff always bears the burden of proof on a motion to dismiss for lack of personal jurisdiction because such a motion challenges the power of their chosen forum court to even consider the case); see also *supra* note 69 and accompanying text.

convenience of the chosen forum, which justifies placing the burden on the defendant.¹²²

Fundamentally, the protections conferred by the general venue statute (and § 1404(a), for that matter) are waivable privileges that Congress, in keeping with common law tradition, has bestowed upon defendants in civil cases.¹²³ When defendants opt to exercise that privilege through a Rule 12(b)(3) motion, they bear the responsibility of establishing that venue is indeed improper.¹²⁴

C. The Sixth Circuit's Fallback Provision Finding Is Not Dispositive

Finally, there is the Sixth Circuit's finding in *Tobien* that the fallback provision of the venue statute compels courts to recognize venue and personal jurisdiction as analogous.¹²⁵ Nevertheless, the fallback provision applies only in the rare set of cases in which no forum satisfies § 1391(b)(1) or (b)(2)—when both the events giving rise to the claim occurred outside the United States and the defendant does not reside in any U.S. district.¹²⁶ The Sixth Circuit claims that the burden on a motion to dismiss for lack of venue must lie with the plaintiff because, when the plaintiff relies on the fallback provision, a defendant's venue challenge would mirror a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.¹²⁷ In the Sixth Circuit's view, it would make little sense to decide two identical motions using two different burdens.¹²⁸

What the Sixth Circuit is doing here is a kind of statutory interpretation, drawing on canons against superfluity and absurdity to eliminate any internal inconsistency.¹²⁹ But allowing a single internal inconsistency—present only in

¹²² See *Myers*, 695 F.2d at 724 (holding that as venue is a privilege of convenience, the burden lies with the party invoking it: the defendant).

¹²³ See *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (“[Venue] [b]eing a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.”).

¹²⁴ See, e.g., *Myers*, 695 F.2d at 724 (assigning defendants the burden on a motion to dismiss for lack of venue); see also *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947) (same).

¹²⁵ *Tobien v. Nationwide Gen. Ins. Co.*, 133 F.4th 613, 620 (6th Cir. 2025).

¹²⁶ See *WRIGHT & MILLER*, *supra* note 25, § 3806.1 (“The grant of fallback venue is so broad precisely because the class of cases to which it applies is so narrow. For example, fallback venue is never available if any substantial part of the claim being asserted arose anywhere in the United States.”).

¹²⁷ *Tobien*, 133 F.4th at 620.

¹²⁸ *Id.*

¹²⁹ See generally Lindsay DeFrancesco, *Yates v. United States: Floundering About in the Choppy Waters of Statutory Interpretation*, 75 MD. L. REV. 620, 626–28, 653 (2016) (explaining both the statutory canon against absurdity, based on which courts can disregard pieces of a statute that would produce an absurd and unintended result, as well as the statutory canon against surplusage—or superfluity—which “stipulates that a statute should not be read in a manner that renders other parts of the statute superfluous”). The canon against absurdity is highly disfavored. See Jim Huang, *Rationalizing Absurdity*, 133 YALE L.J. 2381, 2381 (2024) (“[T]he absurdity canon has been all but abandoned by modern textualists.”). The canon against surplusage, although not out of favor, is not some blanket rule. See *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) (“Surplusage does not always produce

very rare cases whose underlying events transpire outside the United States—to dictate the burden-allocation rule for all federal venue challenges allows the tail to wag the dog.¹³⁰ The fallback provision exists to catch those uncommon cases that would otherwise fall through the cracks.¹³¹ The fact that Congress ensured that venue would exist *somewhere* whenever a federal court has personal jurisdiction does not imply that the two concepts are identical.¹³² To the contrary, by writing the fallback provision into the statute, Congress effectively posits that there are cases that can and should be heard by federal courts despite there being no convenient venue—underscoring its nature as a less-than-fundamental doctrine of convenience.¹³³

Courts should therefore reject *Tobien*'s burden-shifting framework: the Rule 12(b)(3) motion to dismiss is more like the § 1404(a) transfer motion than the personal jurisdiction motion, and it should be treated as such.¹³⁴ If a defendant wants out, they should have to prove why.¹³⁵

CONCLUSION

In 2025, in *Tobien v. Nationwide General Insurance Co.*, the Sixth Circuit joined a plurality of circuits in holding that the plaintiff carries the burden of proof when the defendant moves to dismiss for improper venue. But the minority of circuits are correct: the defendant should bear the burden of proof on their own motion. First, the statutory framework governing venue protections confirms that venue is a waivable privilege of convenience that defendants may invoke. All circuits agree that the movant has the burden of proof on a transfer from one proper forum to another, and so a defendant moving to dismiss or transfer out of an improper forum should, too. Second, the plurality's view that motions to dismiss for lack of personal jurisdiction and venue should be treated alike glosses over key historical and doctrinal differences between

ambiguity and our preference for avoiding surplusage constructions is not absolute.”). Here, *Tobien* isn't really applying either of these canons directly, but the venue statute is silent as to the burden issue, and they are using textual provisions to construe a result that eliminates any statutory friction, which is a kind of combination of those canons. 133 F.4th at 620.

¹³⁰ Cf. *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982) (holding that as the Rule 12(b)(3) motion is a procedural affirmative defense raised by defendants to avoid suit in a particular venue, they should bear the burden).

¹³¹ See *supra* note 126 and accompanying text.

¹³² See *WRIGHT & MILLER, supra* note 25, § 3806.1 (“Section 1391(b)(3) does not constitute a grant personal of jurisdiction. Personal jurisdiction over each defendant must be assessed separately and satisfied, as in any case. If there is personal jurisdiction over the defendant, venue should present no problem, because the fallback venue provision will be satisfied.”).

¹³³ See *id.* (“Such cases are rare.”); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (explaining that venue is a privilege of convenience).

¹³⁴ See, e.g., *Myers*, 695 F.2d at 724 (defendant should bear the burden on a motion to dismiss for lack of venue).

¹³⁵ See *supra* notes 95–134 and accompanying text.

the two concepts. Personal jurisdiction concerns a court's sovereign power to adjudicate; venue, by contrast, is a doctrine of convenience. Third, the finding in *Tobien* that the fallback provision of the venue statute mandates identical burden allocation for venue and personal jurisdiction motions allows a tiny fraction of all federal cases to dictate procedure in all the others. For those reasons, the Supreme Court should eventually resolve this circuit split by placing the burden of proof on defendants who move to dismiss for improper venue.

BENNETT G. DEMSKY