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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

**Jane Doe, by her next friends and parents
Helen Doe and James Doe; and Megan Roe,
by her next friends and parents, Kate Roe
and Robert Roe,**

Plaintiffs,

v.

**Thomas C. Horne, in his official capacity as
State Superintendent of Public Instruction;
Laura Toenjes, in her official capacity as
Superintendent of the Kyrene School
District; Kyrene school District; the Gregory
School; and Arizona Interscholastic
Association, Inc.,**

Defendants.

Case No. 4:23-cv-00185-JGZ

**DEFENDANT HORNE'S MOTION TO
TRANSFER**

Defendant Thomas C. Horne in his official capacity as State Superintendent of Public Instructions ("Superintendent Horne") moves pursuant to 28 U.S.C. 1404(a) and (b) for transfer of this action to the Phoenix Division of the Arizona District Court.

FACTUAL BACKGROUND

Nearly all of the parties to the lawsuit are located in the Phoenix area.

- 1 • Plaintiff Jane Doe resides in Maricopa County, Arizona and attends school in the
- 2 Kyrene School District.
- 3 • Defendant Superintendent Horne resides in Maricopa County and the Arizona
- 4 Department of Education which Horne leads is headquartered in Phoenix.
- 5 • Defendant Laura Toenjes, Superintendent of the Kyrene School District executes
- 6 her official duties in Maricopa County.
- 7 • Defendant Kyrene School District is a public school district serving parts of
- 8 Maricopa County.
- 9 • Defendant Arizona Interscholastic Association, Inc. (“AIA”) is located in Phoenix.

10 Defendant The Gregory School is located in Tucson. But based on Superintendent Horne’s
11 understanding, The Gregory School is a nominal defendant only and does not intend to oppose or
12 take an active role in litigating against Plaintiffs’ lawsuit, meaning its location in Tucson is
13 irrelevant for purposes of this motion.

14 Moreover, Superintendent Horne understands and anticipates that the Arizona Legislature
15 will intervene in this lawsuit to defend the Statute. The Arizona Legislature is in Phoenix.

16 The only true party to this action with any relation to a Tucson venue is Plaintiff Megan
17 Roe who resides in Pima County. The other parties are all located in Maricopa County, proximate
18 to the Phoenix Division of the Arizona District Court.

19 Crucially, counsel for the parties are located in Phoenix. Even Plaintiffs are represented
20 by local counsel in Phoenix, as is counsel for Superintendent Horne. The result is that all of the
21 Arizona lawyers are located in Phoenix, none are located in Tucson. That makes an overwhelming
22 difference in the expense to the parties in litigating this case. “[S]ince Plaintiff, Plaintiff’s counsel,
23 and Defendant’s counsel reside in the Central District, it will be cheaper and more efficient for
24 both parties to litigate there.” *Park v. Dole Fresh Vegetables, Inc.*, 964 F.Supp.2d 1088, 1095
25 (N.D. Cal. 2013) (granting motion to transfer).

26 Neither The Gregory School nor the Kyrene School District have yet taken any action to
27 apply the Statute against Plaintiffs. The only events that have occurred about which Plaintiffs
28 complain are actions taken by the Legislature and Governor in Phoenix in adopting the Statute.

1 Moreover, if the Statute is applied against Plaintiffs, as discussed in the argument section, those
2 actions will occur at least as much in Maricopa County as in Pima County. The witnesses relevant
3 to this lawsuit are overwhelmingly located in Maricopa County. As further discussed below, the
4 convenience of the witnesses is a crucial factor the Courts consider. Similarly, the documents that
5 will be used in this lawsuit will primarily be records maintained in the Phoenix area.

6 Here are the reasons why Maricopa County is the most convenient forum:

- 7 • Location of the parties;
- 8 • Arizona statutes recognize the inconvenience of lawsuits against public officers in
9 counties in which the public officers do not reside;
- 10 • Location of witnesses;
- 11 • Location of documents and other evidence.

12 ARGUMENT

13 **A. DEFENDANT RESPECTFULLY REQUESTS TRANSFER TO THE 14 PHOENIX DIVISION FOR THE CONVENIENCE OF THE PARTIES AND 15 BASED ON THE FACTORS RELEVANT TO 28 U.S.C. 1404(a) & (b).**

16 Federal law provides a mechanism for a defendant like Superintendent Horne to request
17 transfer of an action to another division where the lawsuit might have otherwise been brought:

18 “For the convenience of parties and witnesses, in the interest of justice, a district
19 court may transfer any civil action to any other district or division where it might
20 have been brought . . .

21 Upon motion, . . . any action . . . may be transferred, in the discretion of the court,
22 from the division in which pending to any other division in the same district.”

23 28 U.S.C. 1404(a) & (b) (the “Transfer Statute”).

24 The Transfer Statute expressly recognizes that the convenience of the parties and witnesses
25 is a basis for transfer. And convenience is often the *primary* basis for ordering a transfer. “The
26 convenience of witnesses ‘is often the most important factor in resolving a motion to transfer.’”
27 *Airbus DS Optronics GmbH v. Nivisys, LLC*, 2015 WL 3439143, 4 (D. Ariz.) quoting *Park v. Dole*
28 *Fresh Vegetables, Inc.*, 964 F.Supp.2d 1088, 1095 (N.D. Cal. 2013).

The convenience of the parties becomes a much more significant factor when public
officials are sued. That is because public officials, unlike others, are subject to being repeatedly

1 sued in their official capacity during their tenure. Because public officials are subject to more
 2 lawsuits based on their public service, the State of Arizona has enacted special venue provisions
 3 requiring that public officials be sued in a venue that is convenient to the public official. Thus,
 4 Arizona has elevated the convenience requirement reflected in The Statute to a strict limit on
 5 venue: “**Actions against public officers shall be brought in the county in which the officer, or**
 6 **one of several officers, holds office.**” A.R.S. § 12-401.16 (emphasis added).

7 Arizona has also adopted a related statute applicable to all actions against the State: “In an
 8 action against this state upon written demand of the attorney general, made at or before the time
 9 of answering, served upon the opposing party and filed with the court where the action is pending,
 10 **the place of trial of any such action shall be changed to Maricopa county.**” A.R.S § 12-822(B)
 11 (emphasis added).^{1 2}

12 The statute under which Plaintiffs claim Tucson is the appropriate venue (because a
 13 defendant resides there) is prefaced by the following words: “Except as otherwise provided by
 14 law”. 28 U.S.C. § 1391(a). The two Arizona statutes cited above are certainly “law” that
 15 “provides” for venue in Maricopa County for cases filed in state court. While these statutes may
 16 not be controlling in deciding whether to transfer a Federal lawsuit, they are powerful evidence
 17 that Arizona has considered the specific question of convenience to the State and to its public
 18 officers, and has determined that suits against the State and public officers are unreasonably
 19 inconvenient when filed outside of the county in which the officer resides. Superintendent Horne
 20 therefore requests that the Court recognize and grant due respect to Arizona’s own considered
 21 determination regarding the convenience due to the State and its public officers. *Cf. Jones v. GNC*

22 _____
 23 ¹ While most of the 19 provisions of A.R.S. § 401 are *permissive* regarding the location of a
 24 lawsuit outside the county in which the person resides (e.g., “[p]ersons who have contracted a
 25 debt or obligation in one county and thereafter remove to another county *may* be sued in either
 26 county”) A.R.S. § 401.4 (emphasis added), both A.R.S. § 12-401.16 and A.R.S. 12-822(B) are
 27 mandatory, stating that a state-court lawsuit *must* be brought in Maricopa County (under the
 28 instant facts of this case).

² The attorney general will not be litigating this case and the decision that otherwise would have
 been hers under A.R.S § 12-822(B)—to require that venue for the action be changed to Maricopa
 County—falls to the head of the agency that will be defending itself without the Attorney
 General’s assistance, i.e., Department of Education via its Superintendent.

1 *Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (deferring to California statute passed to
2 protect California franchisees from the inconvenience of litigating in non-California venue: “We
3 conclude and hold that § 20040.5 expresses a strong public policy of the State of California to
4 protect California franchisees from the expense, inconvenience, and possible prejudice of
5 litigating in a non-California venue.”)

6 In making its determination whether to transfer this case to the Phoenix Division, the Court
7 should consider the following factors announced by the Ninth Circuit: “(1) the location where the
8 relevant agreements were negotiated and executed, (2) the state that is most familiar with the
9 governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the
10 forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the
11 differences in the costs of litigation in the two forums, (7) the availability of compulsory process
12 to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of
13 proof.” *Jones v. GNC Franchising, Inc.*, 211 F.3d at 498-99. These factors overwhelmingly
14 indicate transfer to the Phoenix Division is warranted for the convenience of the witnesses and
15 parties as well as discovery.

16 First, the actions about which Plaintiffs complain have thus far all occurred in Maricopa
17 County (as the Statute has not yet been applied to the Plaintiffs) and if the Statute is subsequently
18 applied against Plaintiffs those actions will occur in Maricopa County more than in Tucson.

19 Second, both Divisions are equally familiar with the governing law and that factor does not
20 favor either venue.

21 Third, Plaintiffs chose Tucson as their forum, but that factor is overwhelmed by the other
22 factors.

23 Fourth, the only active party having any contact with Tucson is Plaintiff Megan Roe. All
24 of the other active parties have greater contacts with the Phoenix area. This factor cuts strongly
25 in favor of transfer.

26 Fifth, Plaintiffs' contacts relating to the plaintiffs' cause of action in Phoenix are at least
27 as great, and apparently greater than, their contacts with Tucson. This factor favors transfer to the
28 Phoenix Division.

1 Sixth, because all the active litigants except one are located in Maricopa County, as are the
2 majority of the witnesses, and counsel for the parties, it will be less expensive overall for the
3 litigation to occur in Phoenix. This factor also favors transfer.

4 Seventh, because substantially more of the relevant witnesses and documents are located
5 in the vicinity of Phoenix than in the vicinity of Tucson, this factor strongly favors transfer to
6 Phoenix.

7 Eighth, the ease of access to sources of proof is greater in Phoenix than in Tucson due to
8 the location of the witnesses, parties, and documents.

9 Thus, six of the eight factors favor transfer to Phoenix, one factor is neutral, and only one
10 factor cuts against transfer to Phoenix. As noted, considerations of the convenience of a Phoenix
11 venue are powerfully bolstered by Arizona statutes that expressly seek to protect public officers
12 from the inconvenience of being sued outside of Maricopa County. Based on all of these
13 considerations, Superintendent Horne respectfully requests the Court to transfer the lawsuit to the
14 Phoenix Division.

15 **RESPECTFULLY SUBMITTED** on May 2, 2023.

16 **WILENCHIK & BARTNESS, P.C.**

17 /s/ Dennis I. Wilenchik

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrant:

By: /s/ Alice Nossett