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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

PLAINTIFFS' OPPOSITION TO DEFENDANT HORNE'S MOTION TO TRANSFER

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INTRODUCTION

Plaintiffs Megan Roe and Jane Doe—one of whom resides in the Tucson area and one of whom resides in the Phoenix area—have chosen to litigate their claims against Defendants from both of those areas, as well as against a state official and statewide athletics association, in the Tucson Division. Defendant Horne, citing inapplicable state court venue laws, now moves to transfer the case to the Phoenix Division under 28 U.S.C. § 1404, which Defendant The Gregory School has already opposed. (Dkt. 27). Defendant Horne's motion fails to make the "strong showing of inconvenience to warrant upsetting the [Plaintiffs'] choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). The convenience of the parties, the convenience of the witnesses, and the interest of justice do not justify transfer here. Nor do the *Jones* factors. Accordingly, this Court should deny Defendant Horne's motion.

FACTUAL BACKGROUND

Plaintiff Megan Roe resides in Pima County, which is in the Tucson Division, and attends The Gregory School ("TGS") in Tucson. (Compl. ¶¶ 8, 15.) Plaintiff Jane Doe resides in Maricopa County, in Mesa, and will attend Kyrene Aprende Middle School beginning in July 2023 in Chandler. (*Id.* ¶¶ 7, 44.) Pursuant to Local Rule 5.1(a), which allows a plaintiff to choose between divisions when "the cause of action has arisen in more than one county," Plaintiffs filed suit in the Tucson Division of this Court on April 17, 2023. (Dkt. 1.)

Defendants are also located in both the Tucson and Phoenix areas. Defendant TGS is in Tucson (Compl. ¶ 12) and, contrary to Defendant Horne's assertion (Mot. at 2), is an active defendant in this suit as indicated in its opposition to this motion. (Dkt. 27.) Defendants the Kyrene School District and Laura Toenjes, in her official capacity as Superintendent of the Kyrene School District, are in Chandler. (*Id.* ¶¶ 10–11.) Those Defendants have not yet appeared in this case.

Defendants Thomas C. Horne and the Arizona Interscholastic Association, Inc. ("AIA"), while located in Maricopa County, exercise responsibilities and engage in

activities throughout Arizona, including in Tucson. Defendant Horne is the State Superintendent of Public Instruction charged with superintending schools and executing all education laws in every county of Arizona. (*Id.* ¶ 9.) Defendant AIA regulates and oversees interscholastic athletic competition throughout Arizona.[1] (*Id.* ¶ 13.)

ARGUMENT

The convenience of the parties, the convenience of the witnesses, the interest of justice, 28 U.S.C. § 1404(a), and each of the eight factors the Ninth Circuit laid out in *Jones v. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir. 2000), lead to one conclusion: this case should remain in Tucson.

Defendant Horne's motion fails to make the "strong showing of inconvenience" required to disturb Plaintiffs' choice of forum. *Decker Coal*, 805 F.2d at 843 (affirming denial of transfer motion); *see also Carranza-Contreras v. Ally Fin. Inc.*, 2019 WL 3766984, at *3 (D. Ariz. Aug. 9, 2019) (denying transfer motion where defendants failed to properly advance substantial justifications in favor of transfer). Defendant Horne fails to "justify by particular circumstances" that the Tucson Division is inappropriate. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979). He does not demonstrate that the convenience of the parties or witnesses would merit disturbing Plaintiffs' choice of forum, and he offers no additional arguments as to why the interest of justice dictates transfer. Because Plaintiffs' choice of forum should not be disturbed "unless the balance is strongly in favor of the defendant," the Court should deny Defendant Horne's motion. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

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[1] Defendant Horne also notes that the Arizona Legislature will move to intervene, which it did on May 1, 2023. (Dkt. 19.) Plaintiffs will oppose that motion. While the Court has not yet decided that motion, a proposed intervenor should not be permitted to disturb the Plaintiffs' choice of forum where venue is proper. In any event, proposed intervenor Senator Warren Petersen represents the 14th District, which includes part of Pima County and is more proximate to Tucson than to Phoenix.

A. The Convenience of the Parties Does Not Favor Transfer.

The burdens to the parties of litigating this case in Tucson are nothing more than the ordinary burdens of litigation. That some—but not all—Defendants may need to travel between Phoenix and Tucson for court appearances is insufficient for Defendant Horne to carry his "burden to justify by particular circumstances" that it would be especially inconvenient for the parties to litigate in Tucson. *Savage*, 611 F.2d at 279.

Defendant Horne serves the entire State of Arizona, including Tucson, and Defendant AIA regulates and oversees athletic competition throughout Arizona, including in Tucson. Thus, Tucson is not a uniquely or prohibitively inconvenient forum for these defendants. *See Bay Cnty. Democratic Party v. Land*, 340 F. Supp. 2d 802, 809 (E.D. Mich. 2004) ("An argument premised on inconvenience is difficult to accept when the defendants routinely conduct business around the state.").[2]

Defendant Horne supports his argument in large part with inapplicable state law provisions (A.R.S. §§ 12-401.16; 12-822(B)) that require litigants in state courts to bring suit in the county in which the defendant officer holds office and/or to bring suit against the state in Maricopa County. (Mot. at 3–5.) Tellingly, Defendant Horne himself acknowledges that these statutes "may not be controlling in deciding whether to transfer a Federal lawsuit." (Mot. at 4.) They are not; his argument should be rejected. *See, e.g.*, *Deep Wilcox Oil & Gas LLC v. Tex. Energy Acquisitions, LP*, 2018 WL 3660042, at *3 n.2 (D. Ariz. Aug. 2, 2018) (rejecting plaintiff's argument that venue was proper under A.R.S. § 12-401 because it was a "state statute" and thus "lack[ed] merit in the context of a federal court action").[3]

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[2] Defendant Horne's reference to the location of counsel is "immaterial as the location of counsel is entitled to little consideration." *Carranza-Contreras*, 2019 WL 3766984, at *2 (internal quotations omitted). Moreover, his statement that all the Arizona lawyers in this case are in Phoenix is incorrect. (Mot. at 2.)

[3] Indeed, Plaintiffs are unaware of a single case in which a federal court has transferred a case from Tucson to Phoenix based on either of these state statutes.

In contrast to Defendants, Plaintiffs are individual minors, appearing in this case through their parents, and an evidentiary hearing or trial could pose a considerable burden to them and their families, with whom they would need to travel. Their reasoned decision that the Tucson Division poses the least burden to them under the circumstances should be afforded considerable weight. *See D.T. v. Christ*, 552 F. Supp. 3d 888, 901 (D. Ariz. 2021) (denying motion for transfer from Tucson to Phoenix where it would be burdensome for plaintiffs who are transgender children located in Tucson to appear in Phoenix because it would disrupt their schooling and treatment for gender dysphoria). Indeed, transferring this case to Phoenix would merely shift the inconvenience from some Defendants to some Plaintiffs, which "does not generally justify the intradistrict transfer of a case." *Carranza-Contreras*, 2019 WL 3766984, at *2 (internal quotations and citations omitted) (denying transfer motion from Tucson to Phoenix); *see also D.T.*, 552 F. Supp. 3d at 901 (same). Further, as is explained in detail in TGS's opposition, it is more convenient for TGS to defend itself in Tucson than in Phoenix. (Dkt. 27.)

B. The Convenience of Witnesses Does Not Favor Transfer.

Defendant Horne asserts without explanation that "witnesses relevant to this lawsuit are overwhelmingly located in Maricopa County." (Mot. at 3.) This, too, is insufficient; "[o]rdinarily, if the transfer is for the convenience of witnesses, defendant must name the witnesses it wishes to call, the anticipated areas of their testimony and its relevance, and the reasons why the present forum would present a hardship to them." *Carranza-Contreras*, 2019 WL 3766984, at *3 (internal quotations omitted). Defendant Horne does not name specific witnesses that he believes are in Maricopa County, let alone any specific reason why those witnesses would be burdened by the litigation proceeding in Tucson beyond "an inference that the distance between Phoenix and Tucson would be burdensome." *Id.* This is inadequate. *Id.* at 2–3 (denying motion to transfer based on convenience of witnesses where defendants merely argued that "[m]ost of the witnesses in this case also reside in Phoenix").

On the other hand, *all* the potential fact witnesses regarding Megan Roe and the hardship that Arizona Revised Statutes § 15-120.02 (the "Ban") would impose upon her are likely in Tucson. The same is true with regards to TGS.

C. None of the *Jones* Factors Favor Transfer.

None of the eight factors identified by the Ninth Circuit that the district court may consider in determining whether a transfer is warranted supports a transfer to the Phoenix Division. *Jones*, 211 F.3d at 498–99. On the contrary, the first and second factors are either irrelevant or neutral and none of the remaining six favors transfer.

The first factor—the place where agreements were negotiated and executed—"is not relevant to the case at hand, since the parties did not negotiate any agreements." *See Renfrow v. BDP Innovative Chems. Co.*, 2014 WL 7146792, at *5 (D. Ariz. Dec. 15, 2014). The second factor—the state that is most familiar with the governing law—is likewise irrelevant. Because both the Phoenix and Tucson Divisions are in the District of Arizona, the familiarity with governing law need not be considered. *See, e.g.*, *Bowling v. Westport Ins. Corp.*, 2015 WL 13203369, at *9 (D. Ariz. Oct. 19, 2015) (finding this factor "immaterial" when considering transfer from Tucson to Phoenix).

The third *Jones* factor—Plaintiffs' choice of forum—weighs heavily in favor of Plaintiffs, who have both chosen to litigate in Tucson. Their choice must be afforded substantial deference especially where, as here, Plaintiff Megan Roe resides and attends school in Tucson. *See, e.g.*, *D.T.*, 552 F. Supp. 3d at 901 (declining to transfer case from Tucson to Phoenix where plaintiffs were in school in Tucson). The fact that one Plaintiff resides in Maricopa County "does not undermine the weight to be given plaintiffs' choice of forum." *See Lax v. Toyota Motor Corp.*, 65 F. Supp. 3d 772, 778–79 (N.D. Cal. 2014) (denying transfer motion even though only one named plaintiff lived in the original district as opposed to two in the proposed transferee district).

The fourth and fifth *Jones* factors—which look at the respective parties' contacts with the forum and the contacts related to the plaintiffs' cause of action in the forum—do not favor transfer. Both Plaintiff Megan Roe and Defendant TGS have significant contacts

within the Tucson Division. Defendants Horne and the AIA both serve residents of the entire state, including in Tucson. Plaintiff Megan Roe's injury will be felt in Tucson, which should be accorded greater weight than where any decisions regarding the Ban were made. *See Bowling*, 2015 WL 13203369, at *10 (analyzing the fifth *Jones* factor and finding that venue was "more appropriate" where plaintiffs were injured than where decision making occurred).[4]

Defendant Horne's arguments relating to the sixth, seventh, and eighth *Jones* factors—the cost of litigation, availability to compel attendance of unwilling party witnesses, and ease of access to sources of proof—similarly fail. Defendant Horne repeats (incorrectly) that "all the active litigants except one are located in Maricopa County" and that "substantially more of the relevant witnesses and documents are located in the vicinity of Phoenix." (Mot. at 6.) He also asserts (irrelevantly and misleadingly) that counsel are located in Maricopa County. (*Id.* at 2, 6.) Defendant Horne offers no further reason why litigating in Phoenix would "be less expensive overall," or any indication that there would be unwilling witnesses outside the subpoena power of the Tucson Division. (*Id*. at 6.) As Defendant TGS noted, "realistically: there is very little difference in the cost of litigation between these two venues in 2023," given the amount of litigation that is now done remotely, and the Phoenix witnesses will be deposed in Phoenix. (Dkt. 27 at 5.) Moreover, discovery is likely to be primarily electronic, and thus "discovery costs should be about the same in either forum." *Magedson v. Whitney Info. Network, Inc.*, 2009 WL 113477, at *5

[4] Plaintiffs dispute Defendant Horne's assertion that their contacts in Phoenix are "at least as great, and apparently greater than" those in Tucson. (Mot. at 5.) However, even if the contacts in Phoenix were "at least as great," that would not warrant transfer because transfer is inappropriate where venue is equally proper. *See Lynn v. Becton Dickinson & Co.*, 2022 WL 610819, at *6 (S.D. Ohio Mar. 2, 2022) (denying transfer motion when defendant failed to show that it would be a "*more* convenient forum"); *Van Dusen v. Barrack*, 376 U.S. 612, 645–46 (1964) ("Section 1404(a) provides for transfer to a more convenient forum, not a forum likely to prove equally convenient or inconvenient.").

(D. Ariz. Jan. 16, 2009) (noting "recent advances in electronic communication and document production").

CONCLUSION

For the reasons stated above, the Court should deny Defendant Horne's motion to transfer.

Respectfully submitted this 11th day of May, 2023.

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