WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW
The Wilenchik & Bartness Building
2810 North Third Street Phoenix, Arizona 85004

Telephone: 602-606-2810 Facsimile: 602-606-2811

Dennis I. Wilenchik, #005350
Karl Worthington, #018703
admin@wb-law.com

Maria Syms, Bar No. 023019
Director of Legal Services
Arizona Department of Education
1535 W Jefferson, BIN #50
Phoenix, AZ 85007
602-542-5240
Maria.Syms@azed.gov

Attorneys for Defendant Thomas C. Horne

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

MOTION FOR RECONSIDERATION

Defendant Thomas C. Horne, in his official capacity as State Superintendent of Public Instruction ("Defendant Horne"), respectfully requests pursuant to LRCiv 7.2(g) that the Court reconsider its order dated May 26, 2023 denying Defendant Horne's Motion to Transfer (the "Order").

Local Rule 7.2(g) requires a movant to both (1) "point out with specificity the matters that the movant believes were overlooked or misapprehended by the court", but also requires the movant to (2) "not . . . repeat any argument made by the movant in support of . . . the motion that resulted in the Order."[1] Defendant Horne respectfully contends that the Court made manifest errors by overlooking or misapprehending. several matters central to the Motion to Transfer.

First, the Court overlooked the fact that many more parties are located in Phoenix than in Tucson. The Court never even acknowledged that fact, let alone explained how that fact impacted its decision. But the location of the parties is a crucially-important consideration in deciding whether to transfer a case and cannot be overlooked in that analysis. *See* 28 U.S.C. 1404(a) ("For **the convenience of the parties** . . . a district court may transfer any civil action . . ") (emphasis added); *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (affording significant weight to convenience of the parties). Thus, the Court made a manifest error by overlooking the fact that at least five, and potentially seven of the parties in this case are located in or near Phoenix, while only two parties are located in or near Phoenix. Although Defendant Horne presented the matter clearly, the Court also overlooked the fact that the location of the parties is also a strong indication of the location of the witnesses to this lawsuit, meaning that it is nearly certain that more witnesses are located in the Phoenix area than in Tucson. "The convenience of witnesses 'is often the most important factor in resolving a motion to transfer." *Airbus DS GmbH v. Nivisys,*

[1] The Rule thus appears to be self-contradictory unless it is read to mean that a movant may "point out" its prior arguments that were overlooked or misapprehended without thereby also "repeat[ing]" any of those arguments. Horne will comply with the rule by pointing out with specificity the matters that were overlooked or misapprehended by the Court.

LLC, 2015 WL 3439143, *4 (D. Ariz.) *quoting Park v. Dole Fresh Vegetables, Inc.*, 964 F.Supp.2d 1088, 1095 (N.D. Cal. 2013). [2]

Second, Defendant Horne respectfully contends that the Court erred in overlooking the fact that one of the Tucson-based parties, The Gregory School, ("TGS") does not intend to engage at all in the central dispute at issue in this lawsuit, i.e., whether the Save Women's Sports Act (A.R.S. § 15-120.02) is valid and enforceable. Defendant Horne explained that TGS has stated it will only litigate that it is not subject to Plaintiffs' claims because TGS does not receive federal funds. Defendant Horne also explained that TGS is likely to succeed on that basis, meaning TGS is unlikely to be a party to the lawsuit for very long. But the Court entirely overlooked these matters and erred in ruling as if TGS were a full-fledged party that will be involved in litigating the primary issue in the case (which is incorrect) and as if TGS will remain in the case. Relatedly, the Court overlooked the fact that there is only one party in Tucson that intends to litigate the primary issue, while there are multiple parties in Phoenix that intend to litigate the primary issue.

Third, Defendant Horne respectfully contends that the Court erred in overlooking or misapprehending the effect of two Arizona statutes (the "Arizona-Venue-Policy Statutes") requiring suits against public officials to be filed in the county in which they hold office (i.e., A.R.S. § 12-401.16), and requiring suits against the state to be filed in Maricopa County (i.e.,

[2] The Court erroneously stated that "Defendant Horne does not explain why ease of access to sources of proof is greater in Phoenix than in Tucson when the parties reside in both Pima and Maricopa Counties, potential witnesses are likely to reside in both Phoenix and Tucson . . ." *See* Order at 4:18-20. The Court thus overlooked that, as Defendant Horne explained, "if five of seven parties are located in or near Phoenix, and only two parties are located in Tucson, it is nearly certain that the majority of witnesses will also be located in or near Phoenix. Indeed, and dispositively on this point, Plaintiffs do not even argue an equal or greater number of parties or witnesses will be found in Tucson than Phoenix (nor can they make that baseless argument) . . . Defendant Horne, and the Arizona Department of Education which he heads, are located in Phoenix as are the largest percentage of employees of the Department who are potential witnesses; Defendant Toenjes and the Kyrene School District which she heads are located in the Phoenix area as are the employees of Kyrene School District who are potential witnesses; Defendant AIA is headquartered in Phoenix as are the officers and employees of AIA who are potential witnesses; Plaintiffs Jane Doe lives in Phoenix and would suffer the hardship that travel to Tucson would impose." *See* 05-23-23 Reply In Support of Motion to Transfer at 5:7-164:21-25.

A.R.S § 12-822(B). The Court entirely overlooked A.R.S. §. 12-822(B) and did not acknowledge or address that statute. The Court did acknowledge A.R.S. § 12-401.16, and acknowledged that "[t]he relevant public policy of the forum state, if any, may also be a factor to determine if transfer is in the interest of justice." 05-26-23 Order at 3:1-3 (*quoting Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). *See also id.* at 4:25-27 ("It is true that the Ninth Circuit has recognized that public policy of a state venue law may be relevant to the consideration of whether transferring venue is in the interest of justice.") (*citing Jones*). But while the Court did not overlook that particular statute, neither did the Court provide any explanation or analysis of the weight that it afforded to the either of the Arizona-Venue-Policy Statutes, or how it compared the weight of the Statutes against the weight afforded to the other transfer factors. Respectfully, Arizona's strong policy preferences with regard to venue for lawsuits against its public officials are worthy of more respect than the Court afforded them and Defendant Horne respectfully contends that the Court misapprehended the holding in *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000) (deferring to California statute passed to protect California franchisees from the inconvenience of litigation in a non-California venue: "We conclude and hold that § 20040.5 expresses a strong public policy of the State of California to protect California franchisees from the expense, inconvenience, and possible prejudice of litigating in a non-California venue.").

> "That § 1404(a), rather than state law, controls the enforcement inquiry does not imply that state law is necessarily irrelevant as one of the multiple factors to consider under § 1404(a). Indeed, the statutory text requires consideration of 'the interest of justice,' which, in this circuit, includes the 'relevant public policy of the forum state.' . . . We discern no error in the district court's consideration of [the California venue statute] as part of its transfer analysis."

DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp, 28 F.4th 956, 963-964, 966 (9th Cir. 2022) (deciding to apply state venue law regarding forum selection over federal law regarding forum selection). *See also Doe 1 v. AOL LLC,* 552 F.3d 1077, 1083-84 (9th Cir. 2009) (deferring to California policy preference as expressed in a California state-court decision in analyzing whether venue was improper: argument in favor of transfer "violated California public policy on two grounds") (*citing America Online Inc., v. Superios Court of Alameda County (Mendoza)*. 90 Cal.App.4th 1, 108 Al.Rptr.2d 699 (2001) as source of strong public policy in California).

Defendant Horne therefore requests the Court reconsider and grant the Motion to Transfer.

RESPECTFULLY SUBMITTED on June 2, 2023.

WILENCHIK & BARTNESS, P.C.

/s/ Dennis I. Wilenchik
Dennis I. Wilenchik, Esq.
Karl Worthington, Esq.
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, Arizona 85004
admin@wb-law.com
Attorneys for Defendant Thomas C. Horne

/s/ Maria Syms, Esq.
Director of Legal Services
Arizona Department of Education
1535 W Jefferson, BIN #50
Phoenix, Arizoa 85007
Maria.Syms@azed.gov
Attorneys for Defendant Thomas C. Horne

CERTIFICATE OF SERVICE

I hereby certify that on June 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 registrants.

By:/s/ Hilary Myers

UNITED STATES DISTRICT COURT

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Defendants.

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ORDER GRANTING MOTION TO RECONSIDER

Pursuant to Defendant Thomas C. Horne's Motion to Reconsider and for good cause shown,

IT IS HEREBY ORDERED:

Granting Defendant Thomas C. Horne's Motion to Reconsider.

ELECTRONICALLY DATED and SIGNED.