No. 23-

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE THOMAS C. HORNE, IN HIS OFFICIAL CAPACITY AS STATE SUPERINTENDENT OF INSTRUCTION,

THOMAS C. HORNE, IN HIS OFFICIAL CAPACITY AS STATE SUPERINTENDENT OF INSTRUCTION,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

Respondent,

JANE DOE, BY HER NEXT FRIENDS AND PARENTS HELEN DOE AND JAMES DOE; MEGAN ROE, BY HER NEXT FRIENDS AND PARENTS, KATE ROE AND ROBERT ROE, LAURA TOENJES, IN HER OFFICAL CAPACITY AS SUPERINTENDENT OF THE KYRENE SCHOOL DISTRICT; KYRENE SCHOOL DISTRICT; THE GREGORY SCHOOL; ARIZONA INTERSCHOLASTIC ASSOCIATION, INC., SENATOR WARREN PETERSEN; AND REPRESENTATIVE BEN TOMA,

Real Parties in Interest.

On Petition for Writ of Mandamus to the United States District Court for the District of Arizona (No. 4:23-cv-00185-JGZ)

EMERGENCY PETITION FOR WRIT OF MANDAMUS UNDER CIRCUIT RULE 27-3 -- RELIEF NEEDED BY JULY 7, 2023

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3(a), I hereby certify that to avoid irreparable harm to petitioner Thomas C. Horne, in his capacity as State Superintendent of Instruction, relief is needed in less than 21 days' time.

1. Regarding Circuit Rule 27-3(a), Petitioner notified both the Clerk and counsel for Real Parties in Interest on Friday, June 16, 2023 of his intent to file this mandamus petition and emergency motion. The just-finalized petition and motion are being served simultaneously with filing both via the district court's CM/ECF system and via e-mail to counsel's below stated email addresses.

2. Regarding Circuit Rule 27-3(c)(i), counsel are as follows:

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3. Regarding Circuit Rule 27-3(c)(ii), the facts showing the existence and nature of the claimed emergency are that the District Court has scheduled a hearing

on Plaintiffs' Motion for Preliminary Injunction for July 10, 2023. If the District Court should have transferred the matter to the Phoenix Division, the Phoenix Division should conduct any hearing on Plaintiffs' request for preliminary injunction. Allowing the Tucson division to hold that hearing, and potentially decide whether to impose a preliminary injunction, and only thereafter transferring the matter to the Phoenix Division would be inefficient (requiring two District judges to learn the case, rather than one), wasteful of judicial and party resources, and would inject unnecessary and potentially prejudicial inconsistency into the litigation for no purpose. One Judge should manage this litigation. Thus, relief is required by July 7, 2023 (the Friday before the Monday, July 10, 2023 preliminary injunction hearing).

4. Regarding Circuit Rule 27-3(c)(iii), The Save Women's Sports Act (A.R.S. § 15-120.02, the "Act") was signed into law on March 30, 2022. Plaintiffs nevertheless chose not to file their complaint for more than a full year, until April 17, 2023. Plaintiffs have had more than a year since the passage of the Save Women's Sports Act to research clinical studies, interview and vet scientific experts, and prepare lay and expert declarations in support of their case. In the interest of fairness, Superintendent Horne requested that the District Court not schedule a hearing on the preliminary injunction before mid-August to permit Superintendent Horne a fraction of the year-long preparation time Plaintiffs had before filing the

lawsuit in order to identify and prepare his own expert witnesses. On June 12, 2023 the District Court denied Superintendent Horne's request and scheduled the Preliminary Injunction hearing for July 10, 2023. Superintendent Horne is filing this emergency motion within one court-week of the District Court setting the hearing.

5. Regarding Circuit Rule 27-3(c)(iv), Petitioner notified both the Clerk and counsel for Real Parties in Interest via email on Friday, June 16, 2023 of his intent to file this mandamus petition and emergency motion. Counsel for Petitioner also spoke on the telephone with 9th Circuit staff regarding Petitioner's intent the same day. The petition is being served simultaneously with filing both via the district court's CM/ECF system and via e-mail to counsel's below stated email addresses.

6. Regarding Circuit Rule 27-3(c)(v), Superintendent Horne filed with the District Court a Motion to Transfer on May 2, 2023. The District Court denied the Motion to Transfer on May 26, 2023. Petitioner filed a Motion for Reconsideration on June 2, 2023 which was denied the same day.

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RELIEF SOUGHT

By this Emergency Petition for Writ of Mandamus, Defendant Thomas C. Horne, in his capacity as State Superintendent of Public Instruction ("Superintendent Horne") respectfully requests that this Court (1) rule that the District Court's order denying the Motion to Transfer constituted error and an abuse of the District Court's discretion, (2) order that the District Court's order denying the Motion to Transfer be vacated, and (3) order the District Court to grant the Motion to Transfer.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Petition pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure. The Court may consider a petition for mandamus regarding a District Court order denying a motion for transfer under *Pacific Car & Foundry Co., v. Pence,* 403 F.2d 949, 951-52 (9th Cir. 1968) and *Commercial Lighting Products, Inc. v. United States District Court*, 537 f.2d 1078, 1079 (9th Cir. 1976). The orders at issue were entered on May 25, 2023 (denial of motion to transfer), June 2, 2023 (denial of motion for reconsideration), and June 12, 2023 (denying request to not schedule preliminary injunction hearing prior to mid-August 2023). This Petition is timely filed within 30 days of the first ruling and one court-week from the latter ruling.

ISSUE PRESENTED

1. Whether the District Court erred and abused its discretion in failing to follow this Court's holdings in *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (deferring to California statute for purposes of motion to transfer), *DePuy Synthes Sales, Inc. v. Howmedia Osteonics Corp.*, 28 F.4th 956, 966 (9th Cir. 2022) (affirming decision to apply state law rather than federal law in analyzing venue dispute), and *Doe 1 v. AOL LLC,* 552 F.3d 1077, 1083 (9th Cir. 2009) (reversing grant of transfer based on strong state policy), and not giving due consideration to Arizona state law, A.R.S. §§ 12-401.16, 12-822(B), providing for venue in the county in which the public official holds office for claims against an Arizona public official.

2. Whether the District Court erred and abused its discretion by denying the Motion to Transfer the suit to the Phoenix Division of the Arizona District Court where nearly all the parties and witnesses are located pursuant to 28 U.S.C. § 1404(a) & (b).

The text of 28 U.S.C. § 1404(a) & (b) follows:

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer."

FACTS NECESSARY TO UNDERSTAND THE ISSUE PRESENTED BY THE PETITION

In light of the increasing incidents of girls and women being unfairly forced to compete against natal boys and men, and in light of the safety risks posed by such competition, Arizona's Save Women's Sports Act (A.R.S. § 15-120.02, the "Act") was signed into law on March 30, 2022. In relevant part, the Act provides that athletic teams at public schools (and private schools whose teams compete against public school teams) shall designate each team or sport as a "males", "men" or "boys" team, or as a "females", "women" or "girls" team, or as a "coed" or "mixed" team. The Act provides that "[a]thletic teams or sports designated for 'females', 'women' or 'girls' may not be open to students of the male sex."

This suit consists of claims by two plaintiffs arguing that, as applied to them, the Act violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IX (20 U.S.C. § 1681 *et seq.*), the Americans with Disabilities Act (42 U.S.C. § 28101 *et seq.*), and Section 504 of the Rehabilitation Act (29 U.S.C. § 794).

Notwithstanding this Court's strong decisions in three cases deferring to state venue policies and statutes, and the fact that seven parties to the case are located in Phoenix, with only one fully participating party in Tucson, Plaintiffs, represented by a law firm in New York City, and by counsel at an organization in San Francisco (along with local counsel in Phoenix, not Tucson) chose to file this action in Tucson

in transparent attempt to increase the probability of having the case heard by a more favorable Judge. This is precisely the type of forum shopping that should not be tolerated by the Court.

Plaintiffs filed the action in the Tucson Division of the Arizona District Court on April 17, 2023. Superintendent Horne, who resides in and conducts his official duties from his state office in Phoenix, filed a motion to transfer the action to the Phoenix Division of the Arizona District Court on May 2, 2023 (the "Motion to Transfer"). *See* Appendix at APP4. The Motion to Transfer was opposed by Plaintiffs on May 11, 2023 [APP5] and by Defendant The Gregory School on May 8, 2023. APP6. Superintendent Horne replied on May 23, 2023. APP7.

The District Court denied the Motion to Transfer on May 26, 2023. APP1. Superintendent Horne requested reconsideration on June 2, 2023. APP8. The District Court denied Superintendent Horne's Motion for Reconsideration on June 2, 2023. APP3.

In his response to Plaintiffs' Motion for Preliminary Injunction, Superintendent Horne had requested that no hearing be scheduled before mid-August so that he would have a fraction of the time that Plaintiffs had to identify expert witnesses and prepare expert declarations prior to the hearing, and he renewed that request in a supplement to his Response to Plaintiffs' Motion for Preliminary Injunction filed June 7, 2023. APP9. On June 12, 2023, the District Court denied

Superintendent Horne's request that the preliminary injunction hearing not be scheduled prior to mid-August, 2023 (to permit Superintendent Horne additional time to obtain and submit expert declarations) and instead scheduled the preliminary injunction to proceed on July 10, 2023. APP3 (as noted in Dkt .80, "This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry.").

STANDARD OF REVIEW

Denial of a motion to transfer is reviewed for an abuse of discretion. *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, 28 F.4th 956, 958 (9th Cir. 2022); *United States v. Sherwood*, 98 F.3d 402, 410 (9th Cir. 1996).

REASONS WHY THE WRIT SHOULD ISSUE

I. The District Court Erred And Abused Its Discretion In Failing To Give Appropriate Weight To Ninth Circuit Precedent And In Failing To Give Appropriate Weight To Arizona's Strong Public Policy Enacted In Statutes Setting Venue For Suits Against Arizona's Public Officials.

The District Court acknowledged, but failed to follow, Ninth Circuit precedent that expressly recognizes, respects, and grants significant weight to a state's strong public policy interest, as codified in statute, in protecting the state's residents, and here, an elected official subject to frequent lawsuits, from inconvenient venues. This Court deferred to a California state venue law holding that it "expresses a strong public policy of the State of California to protect California franchisees from the expense, inconvenience, and possible prejudice in litigating in a non-California venue." *Jones*, 211 F.3d at 498 (deferring to California statute for purposes of motion to transfer). The Court recognized that state public policy is "at least as significant a factor" as a forum selection clause. *Id.*

Similarly, this Court held that California's strong public policy against waiver of class-action remedies (as enacted in the California Consumers Legal Remedies Act) overrides even extremely-potent venue considerations such as a forum-selection clause. *Doe 1*, at 1083 (reversing grant of transfer based on strong state policy: "California has declared 'by judicial decision' the same AOL forum selection clause at issue here contravenes a strong public policy of California—as applied to California residents who brought claims under California statutory consumer law in

California state court."). This Court examines strong state policies related to venue decisions as part of the analysis into the "interest of justice" as required for making a transfer decision:

> "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 § 925 as part of its transfer analysis."

DePuy Synthes Sales, Inc., 28 F.4th at 966 (affirming decision to apply state law rather than federal law in analyzing venue dispute) (citations omitted). *See also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brough, whether declared by statute or by judicial decision.").

The District Court thus seriously erred and abused its discretion in overlooking or failing to properly weigh the effect of two Arizona 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., A.R.S § 12-822(B) (the "Arizona-Venue-Policy Statutes"). Those statutes clearly reflect Arizona's strong public policy regarding venue for suits against Arizona's public officials.

Whether considered as relevant to the "interest of justice," or relevant to the convenience of the parties (or both), as held by this Court, the District Court should have given those Arizona-Venue-Policy Statutes significant weight in the transfer analysis. That is because public officials, unlike others, are subject to being repeatedly sued in their official capacity during their tenure. Because public officials are subject to more lawsuits based on their public service, the State of Arizona has enacted special venue provisions requiring that public officials be sued in a venue that is convenient to the public official: "Actions against public officers shall be brought in the county in which the officer, or one of several officers, holds office." A.R.S. § 12-401.16.

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

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

The statute under which Plaintiffs claim Tucson is the appropriate venue is prefaced by the following words: "Except as otherwise provided by law". 28 U.S.C. § 1391(a). The two Arizona-Venue-Policy Statutes cited above are certainly "law" that "provides" for venue in Maricopa County for cases filed in state court. While these statutes may not be dispositive in deciding whether to transfer a Federal lawsuit, they are powerful evidence that Arizona has considered the specific question of convenience to the State and to its public officers, and has determined that suits against the State and public officers are unreasonably inconvenient when filed outside of the county in which the officer resides.

Superintendent Horne therefore asked the District Court to grant due respect to Arizona's own strong public policy, specifically the Arizona-Venue-Policy Statutes regarding venue for suits against Arizona and its public officers. *Jones*, 211 F.3d at 498; *Doe 1*, 552 F.3d at 1083; *DePuy Synthes Sales, Inc.*, 28 F.4th at 966). But the District Court entirely overlooked A.R.S. § 12-822(B) and did not acknowledge or address that statute. The District Court did mention A.R.S. § 12-401.16 and even stated 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." APP1 (*quoting Jones*, 211 F.3d at 498). *See also id.* at 4:25-27 ("It is true that the Ninth

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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.

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*). While the Court mentioned that particular statute, the Court did not provide any explanation or analysis of the weight that it afforded to 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.

Arizona's strong policy preferences with regard to venue for lawsuits against its public officials are worthy of more respect than the District Court afforded them and Defendant Horne respectfully contends that the District Court's ruling was clearly erroneous as a matter of law based on the holdings in *Jones*, 211 F.3d at 498-99; *Doe 1*, 552 F.3d at 1083; and *DePuy Synthes Sales, Inc..*, 28 F.4th at 566.

II. All The Relevant Events Have Occurred In Phoenix And Nearly All The Parties And Witnesses Reside Or Operate Near Phoenix.

The Save Women's Sport Act was enacted in Phoenix via actions taken at the legislature and at the Governor's office. All of the actions at issue to date have occurred in Phoenix, and none have occurred in Tucson.

Moreover, nearly all of the parties and potential witnesses to the lawsuit are located in the Phoenix/Maricopa County area.

- Plaintiff Jane Doe resides in Maricopa County, Arizona and attends school in the Kyrene School District;

- Defendant Superintendent Horne resides in Maricopa County and the Arizona Department of Education which Horne leads is headquartered in Phoenix;
- Defendant Laura Toenjes, Superintendent of the Kyrene School District executes her official duties in Maricopa County;
- Defendant Kyrene School District is a public school district serving parts of Maricopa County;
- Defendant Arizona Interscholastic Association, Inc. ("AIA") is located in Phoenix;
- Defendant Senator Warren Peterson, President of the Arizona State Senate resides in and represents constituents in Maricopa County; and
- Defendant Representative Ben Toma, Speaker of the Arizona House of Representatives, resides in and represents constituents in Maricopa County.

Seven of the parties to this litigation are located in Maricopa County.

The Gregory School is the only defendant located in Tucson. But The Gregory School has stated that it will not litigate the validity of the Act (and is instead seeking dismissal on the basis that The Gregory School does not receive public moneys and is therefore not subject to this lawsuit). The Gregory School will not argue that the Act complies with the Equal Protection Clause, Title IX, the

Americans with Disabilities Act, or the Rehabilitation Act. The Gregory School does not intend to litigate the fundamental questions in the lawsuit. The Gregory School is also likely to be dismissed from the lawsuit entirely leaving no defendant in the Tucson area.

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

Neither The Gregory School nor the Kyrene School District have yet taken any action to apply the Statute against Plaintiffs. The only events that have occurred about which Plaintiffs complain are actions taken by the Legislature and Governor—in Phoenix—by adopting the Statute. Moreover, if the Statute is applied against Plaintiffs, as discussed below, those actions will occur primarily in Maricopa County as opposed to Pima County. The parties and the witnesses relevant to this lawsuit are overwhelmingly located in Maricopa County. As further discussed below, the convenience of the witnesses is a crucial factor the Courts consider. Similarly, the documents that will be used in this lawsuit will primarily be records maintained in the Phoenix area.

III. Mandamus Is Appropriate For The Erroneous Denial Of A Motion To Transfer Because A Post-Judgment Appeal Cannot Remedy The Error.

A party may challenge the denial of a motion to transfer by petitioning for a writ of mandamus. *Pacific Car & Foundry Co.,* at 951-52 ("This court, in line with the rule in most other circuits, will, however, review on mandamus clearly erroneous orders entered under § 1404(a)."); *Commercial Lighting Products, Inc.*, 537 F.2d at 1079 (issuing writ of mandamus and vacating transfer order: "Mandamus will lie to review a clearly erroneous transfer order entered under section 1404(a)."). Mandamus is appropriate for the erroneous denial of motion to transfer because a post-judgment appeal cannot remedy the error:

> [E]rror in denying change of venue cannot be effectively remedied on appeal from final judgment. The purpose of the rule [permitting transfer] is to avoid the disruption, expense, and inconvenience parties and witnesses must suffer by having the trial in an improper forum. To require litigants to await final judgment for relief serves to defeat the very purpose of the venue rule by requiring them to submit to the disadvantages from which the rule is designed to relieve them.

Pacific Car & Foundry Co., at 952.

The Ninth Circuit considers five factors when assessing whether mandamus relief is appropriate:

> (1) whether the petitioner has other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order makes an 'oft-repeated error,' or 'manifests a persistent disregard of the federal rules'; and (5) whether

> the district court's order raises new and important problems, or legal issues of first impression.

In re Van Dusen, 654 F.3d 838, 841 (9th Cir. 2011) (*quoting Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)). "All of the factors need not be present to issue the writ . . ." but the petitioner must demonstrate a clear error of law. *In re United States*, 791 F.3d 945, 955 (9th Cir. 2015). As explained in the paragraph above, the first two factors are already established with regard to motions to transfer under *Pacific Car & Foundry Co.*, 403 F.2d at 951-52 and *Commercial Lighting Products, Inc.*, 537 F.2d at 1079. The remainder of this Petition demonstrates that the District Court's order is clearly erroneous as a matter of law under the Ninth Circuit's standard for granting a motion to transfer under 28 U.S.C. § 1404.

IV. The Relevant Factors Should Require Transfer Of The Action To The Phoenix Division.

In determining whether to transfer a case under 28 U.S.C. § 1404(a) & (b), the Court has announced the following relevant factors for consideration: "(1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of

proof." *Jones,* 211 F.3d at 498-99. These factors overwhelmingly indicate transfer to the Phoenix Division is warranted.

First, not every case is a contract case. Accordingly, the first factor has repeatedly been interpreted—not as being limited to the location a contract was negotiated or executed—but as also applying to the location of the relevant events in non-contract cases. Courts have interpreted factor one to include "the location where the relevant [**events took place**]" regardless of whether the case involves a contract or not. *Barrera v. United States,* 2011 WL 13047392, 1 (D. Ariz. Nov. 23, 2011) (brackets in original, replacing *Jones'* phrase "the location where the relevant agreements were negotiated and executed.") (Emphasis added). *See also Grabham v. American Airlines, Inc.,* 2019 WL 316213, *1-2 (D. Ariz. Jan. 24, 2019) (defining and analyzing the first factor as "Location of Relevant Events" in non-contract action).[3] In this case, the actions about which Plaintiffs complain have thus far all occurred in Maricopa County (because the Act was passed in Phoenix, and as the

[3] *See also Bowling v. Westport Ins. Corp.,* 2015 WL 13203369, *9 (D. Ariz. Oct. 19, 2015) (applying the first factor not exclusively as the location where an agreement was negotiated or executed—but as the location of the events relevant to that case: "Defendants argue that venue is proper in the Phoenix Division because all claims decisions for Glen Bowlings workers' compensation claim were made in Maricopa County. (Doc 4 at 2). Plaintiffs contend that Glen Bowling was working and injured in Tucson and received all of this workers' compensation benefits and medical treatment in Tucson, where Mr. Bowling resides. (Doc. 23 at 4). The Court finds that even if Defendants made decisions about Glen Bowling's workers' compensation claim in Maricopa County, the injury that Mr. Bowling suffered due to Defendants' alleged bad faith occurred in Tucson.").

Statute has not yet been applied to the Plaintiffs). If the Act is subsequently applied against Plaintiffs those actions will occur in Maricopa County as much as in Tucson. The District Court erroneously ignored the first factor by limiting it to the location of the execution of contracts. APP1 ("The first . . . factor [is] irrelevant because there is not contract at issue . . .").

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

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

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

Fifth, Plaintiff Jane Doe's contacts relating to the plaintiffs' cause of action in Phoenix are at least as great as Plaintiffs Megan Roe's contacts with Tucson. And the defendants' contacts are overwhelmingly related to Phoenix over Tucson. This factor favors transfer to the Phoenix Division.

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

Seventh, the availability of compulsory process is equally available in both venues, so that factor is neutral.

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

Five of the eight factors favor transfer to Phoenix, two factors are neutral, and only one factor cuts against transfer to Phoenix. As noted in section I *supra*, the convenience of a Phoenix venue is powerfully bolstered by Arizona statutes that expressly seek to protect public officers from the inconvenience of being sued outside of Maricopa County. Based on all of these considerations, Superintendent Horne respectfully requests the Court to issue the writ of mandamus.

IV. The District Court Erred And Abused Its Discretion In Failing To Consider The Location Of The Parties And That There Is No Defendant In Tucson Defending The Save Women's Sports Act.

The District Court erred and abused its discretion by failing to grant any weight to the fact that many more parties are located in Maricopa County than in Tucson. The District 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 ignored 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*, at 498 (affording significant weight to convenience of the parties). *See also e.g.*, *Amazon.com v. Cendant Corp.*, 404 F.Supp.2d 1256, (W.D. Wash. 2005) (granting

motion to transfer based in part on location of parties); *Ezieme v. Ward Int'l Trading, Inc.*, 2009 WL 2818394, at *11 (C.D. Cal. Aug. 31, 2009) (same); *Johnson v. Law*, 19 F.Supp.3d 1004, 1011 (S.D. Cal. 2014) (same); *Carolina Cas. Co. v. Data Broadcasting Corp.*, 158 F.Supp.2d 1044, 1048-49 (N.D. Cal. 2001) (same); *Williams v. County of Kern*, 2013 WL 6200214, * 2 (N.D. Cal. Nov. 27, 2013)(same); *Adachi v. Carlyle/Galaxy San Pedro L.P.*, 595 F.Supp.2d 1147, 1151 (S.D. Cal. 2009) (same); *Park v. Dole Fresh Vegetables, Inc.*, 964 F.Supp.2d 1088, 1095 (N.D. Cal. 2013) (same).

The District Court also erred and abused its discretion in failing to acknowledge or give any consideration to The Gregory School's limited, and likely short-lived, participation in this lawsuit. Defendant Horne explained that The Gregory School has stated it will only litigate that it is not subject to Plaintiffs' claims because The Gregory School does not receive federal funds. APP3; APP6. Defendant Horne also explained that The Gregory School is likely to succeed on that basis, meaning The Gregory School is unlikely to be a party to the lawsuit for very long.

But the District Court disregarded these matters and erred by ruling as if The Gregory School were a full-fledged party that will be involved in litigating the primary issue in the case (which is incorrect) and as if The Gregory School 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.

The District Court made a clear error and abused its discretion by overlooking the fact that seven of the parties in this case are located in or near Phoenix, while only one fully participating party is located in or near Tucson.

V. The District Court Erred And Abused Its Discretion In Failing To Consider That There Are More Witnesses In Maricopa County Than In Tucson.

Although Superintendent Horne presented the matter clearly, the District Court also failed to grant any weight to the fact that the location of the parties is also a strong indication of the location of the witnesses to this lawsuit. 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, LLC,* 2015 WL 3439143, *4 (D. Ariz. May 28, 2015) (*quoting Park,* 964 F.Supp.2d at 1095).[4]

[4] 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 . . ." APP1. The Court 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 . . . 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 location of the witnesses is an important factor in considering the convenience of a venue. Indeed, "[t]he convenience of witnesses 'is often the most important factor in resolving a motion to transfer.'" *Airbus DS Optronics GmbH*, at *4 (*quoting Park.*, 964 F.Supp.2d at 1095). The District Court erred and abused its discretion in failing to assign sufficient weight to the location of the witnesses in denying the Motion to Transfer.

CONCLUSION

It is respectfully requested that this Court, by July 7, 2023 or earlier, issue a writ of mandamus (1) vacating the District Court's order denying Superintendent Horne's Motion to Transfer, (2) directing the District Court to grant the Motion to Transfer.

RESPECTFULLY SUBMITTED this 20th day of June, 2023.

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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; Plaintiff Jane Doe lives in Phoenix and would suffer the hardship that travel to Tucson would impose." APP6.

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 23-

I am the attorney or self-represented party.

This brief contains 4,934 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: *s/ Karl M. Worthington*

Date: June 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on June 20, 2023.

I further certify that on June 20, 2023, the foregoing Petition will by filed in the underlying proceeding in the United States District Court for the District of Arizona in compliance with Federal Rule of Appellate Procedure 21(a)(1), and that all parties to the proceeding will be served with that Petition through the district court's CM/ECF system. In addition, a courtesy copy of the foregoing has been provided via email to the following counsel for Plaintiffs and other real parties in interest:

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United States Court of Appeals for the Ninth Circuit No. 23-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Thomas Charles Horne, in His Official Capacity as
State Superintendent of Instruction,

Petitioner,

vs.

United States District Court
For the District of Arizona,

Respondent,

Jane Doe, by her next friends and parents Helen Doe and James Doe; Megan Roe, by her next friends and parents, Kate Roe and Robert Roe, Laura Toenjes, in her official capacity as Superintendent of the Kyrene School District; Kyrene School District; The Gregory School; Arizona Interscholastic Association, Inc., Senator Warren Petersen; and Representative Ben Toma,

Real Parties in Interest.

On Petition for Writ of Mandamus to the
United States District Court for the District of Arizona
(No. 4:23-cv-00185-JGZ)

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APP5	05-11-23	Plaintiffs' Opposition to Defendant Horne's Motion to Transfer (Docket 34)
APP6	05-08-23	Defendant The Gregory School's Response in Opposition to Defendant Thomas C. Horne's Motion to Transfer Venue (Docket 37)
APP7	05-23-23	Reply in Support of Motion to Transfer (Docket 47)
APP8	06-02-23	Motion for Reconsideration (Docket 67)
APP9	06-07-23	Third Supplement to Defendant Horne's Response to Plaintiffs' Motion for a Preliminary Injunction (Docket 72)

Respectfully Submitted June 20, 2023.

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CERTIFICATE OF SERVICE

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I further certify that on June 20, 2023, the foregoing Petition will by filed in the underlying proceeding in the United States District Court for the District of Arizona in compliance with Federal Rule of Appellate Procedure 21(a)(1), and that all parties to the proceeding will be served with that Petition through the district court's CM/ECF system. In addition, a courtesy copy of the foregoing has been provided via email to the following counsel for Plaintiffs and other real parties in interest:

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APPENDIX 1

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Helen Doe, et al.,

Plaintiffs,

v.

Thomas C Horne, et al.,

Defendants.

No. CV-23-00185-TUC-JGZ

ORDER

Pending before the Court is Defendant Horne's Motion to Transfer this case to the Phoenix Division of the District of Arizona. (Doc. 21.) Plaintiffs and Defendant The Gregory School oppose transfer. (Docs. 27, 34.) Defendant Horne filed a Reply. (Doc. 47.) For the following reasons, the Court will deny the Motion.

BACKGROUND

On April 17, 2023, Plaintiffs Megan Roe and Jane Doe filed suit against Thomas C. Horne, Arizona's State Superintendent of Public Instruction, The Gregory School (TGS), Arizona Interscholastic Association, Inc. (AIA), the Kyrene School District, and Laura Toenjes, the Superintendent of Kyrene School District, seeking declaratory and injunctive relief. (Docs. 1, 2.) Plaintiffs allege that A.R.S. § 15-120.02, which prohibits transgender girls from participating in an athletic team or sport designated for "females," "women," or "girls," violates the Equal Protection Clause of the Fourteenth Amendment, Title IX, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act.

(*Id.* ¶ 3–5.)

Megan Roe is a fifteen year-old girl who resides in Pima County and attends TGS, a private middle and high school located in Tucson, Arizona. (Doc. 1 ¶¶ 12, 56.) Megan intends to try out for the girls' volleyball team at TGS in the fall, but Section 15-120.02 prohibits her from participating because she is transgender. (*Id.* ¶¶ 63–64.) Jane Doe is an eleven year-old girl who will attend Kyrene Aprende Middle School in Chandler, Arizona in July 2023 and intends to try out for the girls' soccer, cross-country, and basketball teams. (*Id.* ¶¶ 44, 49–50.) Under Section 15-120.02, Jane cannot participate in the girls' teams because she is transgender. (*Id.* ¶ 54.)

On May 2, 2023, Defendant Horne filed the present Motion to Transfer, requesting that the Court transfer this case to the Phoenix Division because "Maricopa County is the most convenient forum." (Doc 21 at 3.) Plaintiffs, who chose the Tucson Division of this Court as the forum for their suit, oppose the motion. Plaintiffs argue that the convenience of the parties, the convenience of the witnesses, and the interests of justice do not justify transfer. (Doc. 34 at 4.) TGS also opposes transfer and asserts Phoenix is not more convenient, for the parties or potential witnesses, than Tucson.[1] (Doc. 27 at 6.)

DISCUSSION

Under 28 U.S.C. § 1404(a), a party may move for transfer, and a district court has discretion to transfer, any civil action to any other district or division where it might have been brought, for "the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). To determine whether the convenience of the parties, the convenience of the witnesses, and the interests of justice favor transfer, the court may consider the following factors: (1) the location where the relevant agreements were negotiated and executed; (2) the state that is most familiar with the governing law; (3) the plaintiff's choice of forum; (4) the respective parties' contacts with the forum; (5) the contacts relating to the plaintiff' cause of action in the chosen forum; (6) the differences in the costs of litigation in the two forums; (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses; and (8) the ease of access to sources of

[1] Defendants Laura Toenjes and the Kyrene School District have not appeared in this matter. Defendant AIA has appeared but did not respond to the Motion to Transfer.

proof. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000). The relevant public policy of the forum state, if any, may also be a factor to determine if transfer is in the interest of justice. *Id.* at 499 n.2. A party moving to transfer venue must "make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). This showing requires a demonstration that the alternate forum is *more* convenient, "not a forum likely to prove equally convenient or inconvenient." *Van Dusen v. Barrack*, 376 U.S. 612, 645–46 (1964).

The Court concludes that the factors do not weigh in favor of transferring venue to the Phoenix Division. The first, second, and seventh *Jones* factors are irrelevant because there is no agreement at issue, the Tucson and Phoenix Divisions are equally familiar with Arizona law, and a district judge in Tucson has the same power to issue subpoenas as a district judge in Phoenix.

As to the third factor, Plaintiffs have chosen the Tucson Division as their forum, which weighs against transfer, and Plaintiff Megan Roe resides and attends school in Tucson. *See Warfield v. Gardner*, 346 F. Supp. 2d 1033, 1044 (D. Ariz. 2004) (plaintiff's choice of home forum is to be given substantial deference). While Jane Doe resides in Maricopa County and will attend school in Chandler, this fact "does not undermine the weight to be given plaintiffs' choice of forum." *Lax v. Toyota Motor Corp.*, 65 F. Supp. 3 772, 778–79 (N.D. Cal. 2014).

The fourth and fifth *Jones* factors similarly do not weigh in favor of transfer, because Megan Roe and Defendant TGS have significant contacts within the Tucson Division, and Defendants Horne and AIA serve residents of the entire state of Arizona, which includes both the Tucson and Phoenix divisions.

Defendant Horne asserts that the sixth and eighth *Jones* factors favor transfer to the Phoenix Division because the majority of potential witnesses, counsel for the parties, and relevant documents are located "in the vicinity of Phoenix" and thus "it will be less expensive overall" and easier to access sources of proof if the litigation is in Phoenix. (Doc. 21 at 6.) Defendant TGS contests Horne's assertion that the Phoenix Division will

be a less expensive forum because "every attorney in this matter has, for the past three years, become accustomed to litigating remotely. . . . To the extent that discovery is conducted in-person, the venue for the case makes no difference—Phoenix witnesses will be deposed in Phoenix and Tucson witnesses will be deposed in Tucson, just as they would in any other case." (Doc. 27 at 5.) Further, because discovery is likely to be primarily electronic, discovery costs should be about the same in either the Phoenix Division or the Tucson Division. The Court agrees and finds that the sixth factor does not weigh in favor of transfer. *See Magedson v. Whitney Info. Network, Inc.*, 2009 WL 113477, at *5 (D. Ariz. Jan. 16, 2009) (concluding in 2009 that discovery costs should be about the same in Florida or Arizona given recent advances in electronic communication and document production). Defendant Horne does not specify how potential witnesses based in Phoenix, Maricopa County, or elsewhere who would be significantly inconvenienced by or unable to travel to Tucson as opposed to Phoenix. And the location of counsel is immaterial to the consideration of a motion to transfer venue. *See Carranza-Contreras v. Ally Fin. Inc.*, 2019 WL 3766984, at *2 (D. Ariz. Aug. 9. 2019).[2]

As to the eighth factor, TGS maintains that any discovery it finds necessary will occur in Tucson, such that "ease of access" is better in the Tucson Division. (*Id.*) 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, and any documentation is likely to be electronic. The eighth factor does not weigh in favor of transfer.

Defendant Horne asserts that the convenience of public official defendants should overcome the Plaintiffs' choice of forum because public officials are subject to repeated suit and A.R.S. § 12-401.16 requires actions against public officers to be brought in the county of the officeholder. (Doc. 21 at 4.) 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. *See Jones*, 211 F.3d at 498–99 (considering

[2] Regardless, at least two attorneys appearing in this matter reside in Tucson.

public policy declared by California statute, which voided any forum selection clause in a franchise agreement limiting venue to a non-California forum, as one factor in finding California was a more appropriate forum than Pennsylvania). Defendant Horne asserts that the public policy of Section 12-401.16 is to ensure public officials "may only be sued, in a state-court lawsuit, in a venue that is convenient to the public official." (Doc. 47 at 2.) In this federal court action, the Court must consider the convenience of the parties, as well as the witnesses, to determine if transferring venue is appropriate and in the interest of justice. Taking Arizona's public policy into account, the Court finds that Defendant Horne has not shown that the Phoenix Division is a more convenient forum than the Tucson Division.

On the other hand, the Phoenix Division would be more inconvenient than the Tucson Division for Plaintiffs. As Plaintiffs state: "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." (Doc. 34 at 7.) Plaintiffs have elected to bring their case in the Tucson Division because it "poses the least burden to them under the circumstances." (*Id.*) Generally, shifting the burden of inconvenience from some Defendants to some Plaintiffs does not justify the intradistrict transfer of a case. *See Carranza-Contreras*, 2019 WL 3766984, at *2. In light of Plaintiffs' choice of the Tucson Division as the forum for their suit and Defendant Horne's failure to demonstrate that the Phoenix Division is a more convenient forum for the parties or witnesses, the Court finds that transferring venue is not in the interest of justice.

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CONCLUSION

For the foregoing reasons,

IT IS ORDERED that Defendant Horne's Motion to Transfer (Doc. 21) is **DENIED**.

Dated this 25th day of May, 2023.

Honorable Jennifer G. Zipps
United States District Judge

APPENDIX 2

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Helen Doe, et al.,

Plaintiffs,

v.

Thomas C Horne, et al.,

Defendants.

No. CV-23-00185-TUC-JGZ

ORDER

Pending before the Court is Defendant Horne's Motion for Reconsideration. (Doc. 67.) Pursuant to Local Rule of Civil Procedure 7.2(g), Defendant Horne requests that the Court reconsider its May 26, 2023 Order, (Doc. 52), denying Defendant Horne's Motion to Transfer.

"The Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence." LRCiv 7.2(g)(1). No motion for reconsideration of an Order may repeat any oral or written argument made by the movant in support of or in opposition to the motion that resulted in the Order. *Id.*

A court may construe a motion to reconsider brought under its local rules as a motion filed pursuant to either Federal Rule of Civil Procedure 59(e) or 60(b). *See Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441-42 (9th Cir. 1991). It is within the Court's discretion to grant or deny a motion for reconsideration filed under Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. *School Dist. No. J, Multnomah County v.*

ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). Reconsideration is appropriate under Rule 59(e) "if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Id.* at 1263. "Rule 60(b) 'provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief.'" *Id.* (quoting *Fuller*, 950 F.2d at 1442); *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

Motions for reconsideration should be granted only in rare circumstances. *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). A mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. ilton otels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988).

The Court has reviewed Defendant Horne's Motion to Transfer, the Court's May 26, 2023 Order, and the Motion for Reconsideration. The Court finds no basis to reconsider its decision. Thus, the Court will deny the motion.

Accordingly,

IT IS ORDERED that Defendant Horne's Motion for Reconsideration (Doc. 67) is **DENIED**.

Dated this 2nd day of June, 2023.

Honorable Jennifer G. Zipps
United States District Judge

APPENDIX 3

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

Hilary Myers

From: azddb_responses@azd.uscourts.gov
Sent: Wednesday, June 14, 2023 7:36 AM
To: azddb_nefs@azd.uscourts.gov
Subject: Activity in Case 4:23-cv-00185-JGZ Doe et al v. Horne et al Order on Motion to Continue

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U.S. District Court

DISTRICT OF ARIZONA

Notice of Electronic Filing

The following transaction was entered on 6/14/2023 at 7:36 AM MST and filed on 6/12/2023

Case Name: Doe et al v. Horne et al
Case Number: 4:23-cv-00185-JGZ
Filer:
Document Number: 80(No document attached)

Docket Text:

MINUTE ENTRY for proceedings held before Judge Jennifer G Zipps: Scheduling Conference held on 6/12/2023.Parties heard regarding rescheduling of the motion hearing for preliminary injunction. Parties agree the hearing should last no more than 3 hours. For reasons set forth on the record, the Amended Motion to Reschedule Hearing by Defendant Horne [66] is granted. The motion hearing on Plaintiffs' Motion for Preliminary Injunction [3] is reset for July 10, 2023 at 1:30 p.m. in Courtroom 5D, 405 West Congress Street, Tucson, Arizona 85701 before the Honorable Jennifer G. Zipps. Additionally, the Court will hear argument on the Defendant Gregory School's Motion to Dismiss [37] at the July 10 hearing. 90 minutes will be allocated to Plaintiffs and 90 minutes will be allocated to Defendants and Intervenors.

In light of the parties' decision to present declarations in lieu of witness testimony, each party is directed to submit a statement identifying the documentary exhibits and declarations that the party intends to rely on for purposes of the hearing by close of business on June 29, 2023. If those documents are already in the record, they need not be re-filed but the party must specifically identify where each document may be found. Any exhibit or declaration that is not yet in the record must be filed on or before June 29, 2023. Proposed findings of fact and conclusions of law are due on or before July 5, 2023. Parties are relieved of the obligation to submit a joint pre-hearing statement.

APPEARANCES: Telephonic appearance by Colin Matthew Proksel, Justin R. Rassi, and

Rachel Berg for Plaintiffs; Karl McKay Worthington and Maria Syms for Defendant Horne; David Calvin Potts for defendant Gregory School; Kristian Eric Nelson and Greg Clifton for defendant Arizona Interscholastic Association Incorporated; Dean John Sauer and Justin D. Smith for Intervenors. (Court Reporter Aaron LaDuke.) Hearing held 2:04 pm to 2:36 pm. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (SVC)

4:23-cv-00185-JGZ Notice has been electronically mailed to:

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APPENDIX 4

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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.

- Plaintiff Jane Doe resides in Maricopa County, Arizona and attends school in the Kyrene School District.
- Defendant Superintendent Horne resides in Maricopa County and the Arizona Department of Education which Horne leads is headquartered in Phoenix.
- Defendant Laura Toenjes, Superintendent of the Kyrene School District executes her official duties in Maricopa County.
- Defendant Kyrene School District is a public school district serving parts of Maricopa County.
- Defendant Arizona Interscholastic Association, Inc. ("AIA") is located in Phoenix.

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

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

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

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

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

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

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

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

ARGUMENT

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

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

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . .
>
> Upon motion, . . . any action . . . may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district."

28 U.S.C. 1404(a) & (b) (the "Transfer Statute").

The Transfer Statute expressly recognizes that the convenience of the parties and witnesses is a basis for transfer. And convenience is often the *primary* basis for ordering a transfer. "The convenience of witnesses 'is often the most important factor in resolving a motion to transfer.'" *Airbus DS Optronics GmbH v. Nivisys, LLC*, 2015 WL 3439143, 4 (D. Ariz.) *quoting Park v. Dole 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

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

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

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

---

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

Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000) (deferring to California statute passed to protect California franchisees from the inconvenience of litigating in 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.")

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

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

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

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

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

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

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

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

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

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

RESPECTFULLY SUBMITTED on May 2, 2023.

WILENCHIK & BARTNESS, P.C.

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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

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** **ORDER GRANTING STIPULATED MOTION FOR EXTENSION AND BRIEFING SCHEDULE ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND ANSWER/RESPONSE TO COMPLAINT**

For good cause shown, the Stipulated Motion for Extension and Briefing Schedule on Plaintiffs' Motion for Preliminary Injunction and Answers/Responses to Complaint is **GRANTED.**

The following schedule shall apply:

- May 18, 2023: Defendant's response to Preliminary Injunction Motion;
- May 18, 2023: Defendant's response to Complaint (motion or answer);
- June 1, 2023: Plaintiffs' reply in support of Preliminary Injunction Motion;
- June 1, 2023: Plaintiffs' response to motion filed by Defendant on May 18;

- June 8, 2023: Defendant's reply to any opposition filed on June 1, 2023.

IT IS SO ORDERED.

APPENDIX 5

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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. ecause 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).

///

///

[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( )) 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 an) 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. ecause 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. oth 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 an 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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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,

Plaintiff,

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.

No. 4:23-cv-00185-JGZ

D d T Gr r S
R O D d
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Tr r

Defendant The Gregory School (TGS) hereby responds in opposition to Defendant Thomas C. Horne s Motion to Transfer Venue. TGS and two of its attorneys are physically located in Tucson, as are Plaintiffs Megan Roe, Kate Roe, and Robert Roe. And while Superintendent Horne characterizes TGS as a nominal defendant, TGS has legal

defenses to Plaintiffs claims (related to the inapplicability of Title IX and the Rehabilitation Act to TGS due to its lack of federal financial assistance) that it intends to make. This, coupled with Plaintiffs choice of forum, tips the scales against transfer, and TGS respectfully requests that Superintendent Horne s Motion to Transfer Venue be denied.

I RELE ANT FACTUAL BACKGROUND

Defendant TGS is a private school located in Tucson, Arizona. *See* Complaint (Doc. 1) at ¶ 12. Plaintiff Megan Roe is a student at TGS. *See* Complaint (Doc. 1) at ¶ 56. Megan alleges that TGS violated Title IX, the Rehabilitation Act, and the Americans With Disabilities Act by not permitting her to participate in interscholastic sports. *See* Complaint (Doc. 1) at ¶¶ 74 85.

Megan alleges and TGS agrees that Megan s teammates, coaches, and The Gregory School have been highly supportive of her transgender identity and would welcome her participation on the girls volleyball team and that b ut for the an, The Gregory School would permit Megan to play on the girls volleyball team. *See* Complaint (Doc. 1) at ¶¶ 61, 64.

However, while making Title IX and Rehabilitation Act claims against TGS, Megan alleged that TGS receives federal financial assistance. *See* Complaint (Doc. 1) at ¶ 13. This is not true TGS has consciously chosen to forgo federal financial assistance and a contrary ruling would materially harm TGS by opening it up to a host of new requirements and liabilities. As a result, while TGS will not defend the constitutionality of A.R.S. § 15-120.02, it will defend the claims against it on the basis that it does not receive federal financial assistance. It is not, per Supervisor Horne s characterization, a nominal defendant.

II LEGAL ARGUMENT

The reason why this case should not be transferred is simple: Phoenix isn t more convenient than Tucson.

A R L S d rd

Under 28 U.S.C. § 1404(a), f or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented. Similarly, under § 1404(b), u pon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district.

Intradistrict transfers pursuant to 28 U.S.C. § 1404(b) are discretionary transfers subject to the same analysis as under 28 U.S.C. § 1404(a) but are judged by a less rigorous standard. *Cheval Farm LLC v. Chalon*, Case No. CV-10-01327-PHX-ROS, 2011 WL 13047301, at *2 (D. Ariz. Jan. 19, 2011) (quoting *Edwards v. Sanyo Mfg. Corp.*, Case No. 3:05CV00293 WRW, 2007 WL 641412, at *1 (E.D.Ark. Feb. 27, 2007)).

Whether under § 1404(a) or § 1404(b), then, in considering whether to transfer this case, the court may consider (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff s choice of forum, (4) the respective parties contacts with the forum, (5) the contacts relating to the plaintiff s cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 99 (D. Ariz. 2000). However, in determining whether to transfer a case, there is a strong presumption in favor

of plaintiff s choice of forums. *Ghere i v. Bush*, 352 F.3d 1278, 1303 (9th Cir. 2003), *vacated on other grounds*, 542 U.S. 952 (2004).

B T r d r T d r d

These factors weigh pretty evenly between Phoenix and Tucson. The first factor where the relevant agreements were negotiated and executed does not have any relevance outside of the contractual context.

The second factor is a wash, as the Phoenix and Tucson Districts are equally familiar with the governing law.

The third factor significantly favors Tucson, as it is Plaintiffs chosen forum.

The fourth factor slightly favors Tucson. This case has two plaintiffs Jane Doe, who resides in Maricopa County and attends the Kyrene School District, and Megan Roe, who resides in Pima County and attends TGS.

Superintendent Horne asserts that TGS is a nominal defendant. This is not so as explained above, while TGS would, but for A.R.S. § 15-120.02, permit Megan to play on the girls volleyball team, it does not receive federal financial assistance as alleged in ¶ 12 of the Complaint. As a result, it is not subject to Title IX or the Rehabilitation Act, and intends to move to dismiss the claims against it. In the event that motion is unsuccessful, discovery will be necessary on the federal financial assistance issue. TGS, then, is not a nominal defendant it is a defendant that intends to actively defend the claims against it on that basis. The same does not appear to be true of Kyrene School District, which would, under Supervisor Horne s characterization, be a nominal defendant. Given that the school actively defending the claims against it is located in Tucson, the ties to Tucson are necessarily stronger than the ties to Phoenix, though the participation of Supervisor Horne and the AIA at least makes it close.

The fifth factor is even. Plaintiff Megan Roe is a Pima County resident who asserts claims against a Pima County school. Those contacts arise entirely in Pima County.

And while Supervisor Horne and the AIA may reside in Maricopa County, the threatened enforcement A.R.S. § 15-120.02 against a Pima County school is, by definition, a contact with Pima County. Admittedly, there are similar contacts with Maricopa County (related to Jane Doe s claims against Kyrene School District), but that only brings the two venues level.

The sixth factor favors Tucson. Realistically: there is very little difference in the cost of litigation between these two venues in 2023. TGS expects that every attorney in this matter has, for the past three years, become accustomed to litigating remotely, conducting depositions and arguing motions through Zoom or Teams. To the extent that discovery is conducted in-person, the venue for the case makes no difference Phoenix witnesses will be deposed in Phoenix and Tucson witnesses will be deposed in Tucson, just as they would in any other case. Even if there is in-person oral argument on some of the motions in this case, that will be a relatively limited excursion for Phoenix attorneys, and out-of-state counsel will have to travel regardless.

From TGS s perspective, though, its discovery (if necessary) will occur in Tucson, it is located in Tucson, and two of its three attorneys reside in Tucson.[1] As a result, to TGS, Tucson is the more efficient venue.

The seventh factor is even. TGS does not expect a significant number of unwilling non-party witnesses it cannot envision who that might be and a subpoena issued by an Arizona District Judge in Tucson is valid in Phoenix anyway, so long as the place of compliance is within 100 miles of where the person resides, is employed, or regularly transacts business. Fed. R. Civ. P. 45(c).

The eighth factor slightly favors Tucson. With respect to TGS, its discovery, should it prove necessary, will be in Tucson, so the ease of access is better in that venue.

[1] Though Jones, Skelton Hochuli s office is in Phoenix, one of the attorneys working on this matter resides in Tucson.

It does not know what other discovery is contemplated, so, from its perspective, Tucson is the better venue.

In short: most of these factors are relatively even. TGS believes that the discovery relevant to the claims against it (should those claims survive a motion to dismiss) will be in Pima County, as will any other discovery relevant to Megan Roe s specific claim. Still, the venue for the case only really matters for oral argument and trial, and, for those purposes, Tucson is a more convenient venue for TGS. Given that it is also Plaintiffs choice of venue and there is a strong presumption in favor of plaintiff s choice of forum TGS believes this case should remain in Tucson.

III CONCLUSION

For the reasons stated above, TGS requests that Defendant Thomas C. Horne s Motion to Transfer Venue be denied.

DATED this 8th day of May, 2023.

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CERTIFICATE OF SER ICE

I hereby certify that on this 8th day of May, 2023, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing; and served on counsel of record via the Court s CM/ECF system.

s/ S. Coffey

APPENDIX 7

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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** **REPLY IN SUPPORT OF MOTION TO TRANSFER**

I. THE NINTH CIRCUIT DEFERS TO STATE STATUTE ON VENUE.

The Ninth Circuit expressly recognizes, respects, and defers to state statutes that seek to protect their residents from inconvenient venues. Deferring to a California state venue statute, the Court held "that § 20040.5 expresses a strong public policy of the State of California to protect California franchisees from the expense, inconvenience, and possible prejudice in litigating in a non-California venue" (deferring to California statute for purposes of motion to transfer) *Jones v. GNC Franchising, Inc.,* 211 F.3d 495, 498 (9th Cir. 2000). This same Ninth Circuit holding would not change for Arizona. ecause public officials are subject to being sued based on their public service, Arizona codified its strong policy that public officials may only be sued, in a state-court lawsuit, in a venue that is convenient to the public official: "Actions against public officers **shall** be brought in the county in which the officer, or one of several officers, holds office." A.R.S. § 12-401.16 (emphasis added).

II. COMMON SENSE AND FAIRNESS REQUIRE TRANSFER OF THIS MATTER TO THE PHOENIX DIVISION.

Only Plaintiffs and The Gregory School ("TGS") responded to the Motion to Transfer. The other four or six defendants (AIA, Toenjes, Kyrene School District, and potential interveners the Legislative Leaders) do not oppose the Motion. That fact alone speaks volumes in favor of transferring the matter to the Phoenix Division.

And even Plaintiffs and TGS do not dispute the key facts demonstrating the basis for the requested transfer. Neither Plaintiffs nor TGS dispute that:

- Defendants Horne, Toenjes, Kyrene School District, AIA, and potential interveners the Legislative Leaders either reside in and/or are headquartered much closer to the Phoenix Division than the Tucson Division;
- Plaintiff Jane Doe, whose interests are as worthy of consideration as Plaintiff Megan Roe, resides in Maricopa County;

- Seven[1] of the parties reside in and/or are headquartered near Phoenix, and only two parties reside in and/or are headquartered in Tucson. Plaintiffs and TGS speak anecdotally and without any actual numbers.

Nevertheless, Plaintiffs and TGS insist in imposing unwarranted inconvenience and expense on all the other parties to this lawsuit without any basis. Common sense and fairness require transfer of this matter to the Phoenix Division.

A. TGS Is a Nominal Defendant.

This is a major case of substantial import concerning whether biological boys can compete against girls. TGS is a nominal defendant, taking the side of the Plaintiff. It is not defending, nor does it appear that it will act as a Plaintiff. It is being a little bit narcissistic and elevating the obscure and unimportant question of whether it receives tax monies. If there is a judgment for the Plaintiffs, TGS will comply, because that is TGS's opinion. In view of that, the Plaintiffs would have no reason to contest it. This case is about whether biological boys should compete with girls in sports, not whether TGS receives tax money. TGS is a nominal, defendant.

TGS will not be party to the overwhelming dispute at issue in this lawsuit—the legality and enforceability of the Act. ecause TGS chooses not to engage with the primary issues in the lawsuit, TGS's role in this lawsuit is minimal. It will not be taking discovery or filing briefs related to the primary issues in the lawsuit. In short, it is not sensible to base a decision regarding transfer on the convenience of a single, minimal party to the lawsuit while ignoring the convenience of multiple, much-more-central, parties to the lawsuit.

B. The Convenience of the Parties Favors Transfer.

Plaintiffs first argue "the convenience of the parties does not favor transfer." *See* Plaintiffs' Opposition to Defendant Horne's Motion to Transfer ("Plaintiffs' Response") at 3:1. Plaintiffs' argument defies common sense. Plaintiffs concede that substantially more parties would be

[1] The number of Phoenix-based parties should be seven because the Legislative Leaders should be permitted to intervene. That is because the legislature should have a right to defend its own statute and because the Attorney General has ignored her duty to defend and refused to fund the defense of the Act, thereby unfairly hamstringing Defendant Horne's ability to fully and fairly defend the Act.

required to travel to Tucson (if the case were not transferred) than would be required to travel to Phoenix (if the case were transferred). *See* Plaintiffs' Response at 3:3-6. And, although Plaintiffs determinedly ignore the math, seven parties is more than two parties.

Plaintiffs never even attempt to explain why the convenience of one minimal defendant and one plaintiff outweighs the convenience of six other defendants and one other plaintiff.

The failure to even attempt to provide such an explanation is understandable because Plaintiffs' position regarding the convenience of the parties defies reason. Indeed, Plaintiffs argue that it would be burdensome for Plaintiff Megan Roe and her parents to travel to Phoenix. *See* Plaintiffs' Response at 4:1-3. ut, of course, the same is true for Plaintiff Jane Doe and four or six Defendants having to travel to Tucson. And, again, seven is greater than two.

Plaintiffs' only argument regarding the convenience of the parties is that Defendant Horne and AIA have state-wide authority. ut that is irrelevant to the question of the convenience of a venue for litigation. AIA and Horne reside and/or are headquartered in Phoenix. They live and operate in Phoenix. That is the reason a Phoenix venue is more appropriate. The state statute requires that venue be in Phoenix and the Ninth Circuit respects such state statutes.

C. <u>The Convenience of the Witnesses Favors Transfer</u>.

"The convenience of witnesses 'is often the most important factor in resolving a motion to transfer.'" *Air us DS ptronics Gm , v. Nivisys, LLC,* 2015 WL 3439143, *4 (D. Ariz.) *uoting ark v. Dole Fresh Vegeta les, Inc.,* 964 F.Supp.2d 1088, 1095, (N.D. Cal. 2013). In defiance of the facts, Plaintiffs also argue—contrary to common sense—that the convenience of the witnesses does not favor transfer. *See* Plaintiffs' Response at 4:15. But if five of seven of the parties are located in or near Phoenix, and only two parties are located in Tucson, it is nearly certain that the majority of the witnesses in this lawsuit 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). Plaintiffs having failed to even attempt to rebut Horne's argument about the convenience of parties or witnesses, it is respectfully requested that Plaintiffs should not prevail on that point.

Plaintiffs, without ever alleging that the same number or more parties or witnesses will be found in Tucson, and without identifying any of those witnesses, simply say "*all* the potential fact witnesses regarding Megan Roe and the hardship that Arizona Revised Statutes § 15-120.02 (the ' an') would impose upon her are likely in Tucson. The same is true with regards to TGS." *See* Plaintiffs' Response at 5:1-3. ut the same can be said of the other parties to this litigation with regard to Phoenix as the more convenient forum for witnesses.

- 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;
- Plaintiff Jane Doe lives in Phoenix and would suffer the hardship that travel to Tucson would impose.

ecause the most important factor—the convenience of the parties and witnesses—overwhelmingly favors Phoenix as the venue for this action, it is respectfully requested that the Court grant the Motion to Transfer.

D. The *Jones* Factors Favor Transfer.

Six of the eight Jones factors favor Horne, while just one factor (plaintiff's choice of forum) favors Plaintiffs. One factor (familiarity with governing law) is neutral. TGS admits that two factors are at least "even," as compared to six factors favoring a change in venue.

Plaintiffs and TGS both contend that the first *Jones* factor ("Factor One") does not apply because this is not a contract case. The Arizona District has repeatedly interpreted Factor One—not as being limited to contract cases—but as "the location where the relevant [events took place]". *Barrera v. nited States,* 2011 WL 13047392, 1 (D. Ariz.) (brackets in original, replacing *Jones'* phrase "agreements were negotiated and executed."). Similarly, the District of Arizona

has repeatedly interpreted Factor One to apply to non-contract actions. *Gra ham v. American Airlines, Inc.,* 2019 WL 316213, *1-2 (D. Ariz.) (analyzing Factor One as "Location of Relevant Events" in non-contract action).[2] Factor One should not be ignored. The relevant events that have thus far occurred—i.e., the debate, passage, and enactment of the Save Women's Sports Act—have all occurred in the Phoenix area. And the largest portion of relevant events yet to occur—i.e., enforcement of the Act—will occur in Maricopa County, which has a larger population than Pima County (meaning there is a higher likelihood of impact in Maricopa County). Moreover, Plaintiff Jane Doe resides in Maricopa County, so as concerns the relevant events impacting these Plaintiffs, at least as many of those events will occur in the Phoenix area as in Tucson. Factor One thus cuts in favor of transfer.

The parties agree that factor two—venue most familiar with the governing law—is neutral and favors neither venue.

Factor three—plaintiffs' choice of venue—favors Plaintiffs, but is overwhelmed by the other factors.

The fourth and fifth *Jones* factors, are similar to Factor One and focus on the parties' contacts with the forum and the relevant events. Those factors favor transfer for the same reason that Factor One favors transfer—i.e., the majority of the parties and witnesses are located in the Phoenix area and the relevant events have a greater relationship to the Phoenix area than to Tucson.

The sixth factor is the "differences in the costs of litigation in the two forums." ecause five or seven of the parties are located in Maricopa County, and only two parties are located in Pima County, it will necessarily be more expensive (as well as more inconvenient) to litigate this

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[2] *Bowling v. Westport Ins. Corp.,* 2015 WL 13203369, *9 (D. Ariz.) (applying Factor One as location of the relevant events: "Defendants argue that venue is proper in the Phoenix Division because all claims decisions for Glen Bowlings workers' compensation claim were made in Maricopa County. (Doc 4 at 2). Plaintiffs contend that Glen owling was working and injured in Tucson and received all of this workers' compensation benefits and medical treatment in Tucson, where Mr. owling resides. (Doc. 23 at 4). The Court finds that even if Defendants made decisions about Glen Bowling's workers' compensation claim in Maricopa County, the injury that Mr. owling suffered due to Defendants' alleged bad faith occurred in Tucson.").

matter in Tucson, requiring many more Phoenix-based parties and witnesses to travel to Tuscon than the number of Tucson-based parties and witnesses to travel to Phoenix. Again, by seven to two.

The seventh and eighth *Jones* factor also relates to the location of witnesses and evidence, and those factors also favors Phoenix as the appropriate venue. ecause six of the eight *Jones* factors favor transfer, it is respectfully requested that the Court grant the Motion to Transfer.

E. TGS Role in this Litigation is More Limited than Other Defendants.

TGS's motion to dismiss is likely to succeed and TGS is likely to no longer be a party to this case beyond its early stages. TGS is unlikely to even be present as a party for much of this litigation, and its location in Tucson therefore is less important than the location of other parties. Should the seven Phoenix parties repeatedly drive to Tucson because of TGS's desire to litigate its taxes

CONCLUSION

It is respectfully requested that the Court grant the Motion to Transfer.

RESPECTFULLY SUBMITTED on May 23, 2023.

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CERTIFICATE OF SERVICE

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By s ilary Myers

APPENDIX 8

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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** **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. ut 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." *Air us DS Gm 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.) *uoting ark v. Dole Fresh Vegeta les, 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. ut 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.,

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[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( ). The Court entirely overlooked A.R.S. §. 12-822( ) 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 (*uoting 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*). ut 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."

De uy Synthes Sales, Inc. v. owmedica steonics 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 v. A L 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 nline 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.

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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 ilary Myers

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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** **ORDER GRANTING MOTION TO RECONSIDER**

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

IT IS HERE ORDERED:

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

ELECTRONICALLY DATED and SIGNED.

APPENDIX 9

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Plaintiffs,

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

THIRD SUPPLEMENT TO DEFENDANT HORNE'S RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Superintendent Horne respectfully submits this Third Supplement in opposition to Plaintiffs' Motion for Preliminary Injunction requesting the Court to grant Superintendent Horne's request to continue the hearing on the Preliminary Injunction to mid-August. Plaintiffs have had more than a year since the passage of the Save Women's Sports Act to research clinical studies, interview and vet scientific experts, and prepare lay and expert declarations in support of their case. In the interest of fairness, Superintendent Horne is merely asking for a brief continuance to have a few extra weeks to have the smallest fraction of the year-long prep time Plaintiffs had before filing the lawsuit.

The Court initially scheduled the hearing for June 26, 2023, with the joint pre-hearing statement to be submitted on June 16, 2023, giving Defendant Horne just a few weeks to prepare since the filing of the Plaintiffs' Complaint and accompanying expert and layman declarations. Defendant Horne's counsel is scheduled to be in trial on June 26, 2023 and the Court thus set a conference to reschedule the hearing. Superintendent Horne therefore renews his request that the Preliminary Injunction hearing not be scheduled before mid-August 2023 to allow him sufficient time to fairly identify clinical studies and expert witnesses. This will give witnesses sufficient time to fairly examine and assess the declarations of Plaintiffs' expert witnesses, conduct any necessary research and other preparation, and draft their own declarations for the Court's consideration.

The Save Women's Sports Act (A.R.S. § 15-120.02, the "Act") was signed into law on March 30, 2022. Plaintiffs nevertheless chose not to file their request for more than a full year, until April 17, 2023. The delay was a strategic choice meant to disadvantage all Defendants and proposed intervenors by limiting the time to respond. This unfair strategy is further evidenced by Plaintiffs (1) filing the litigation in a forum that is inconvenient to every party that intends to defend the Act, (2) opposing Superintendent Horne's Motion to Transfer, (3) failing to sue the entity that passed the law (i.e., the Arizona Legislature), and (4) opposing the intervention of the true Defendants in this case, (i.e., the Legislative Leaders). Plaintiffs' delay in filing their lawsuit indicates Plaintiffs are seeking every strategic advantage to impair and hamstring a fair defense of the Save Women's Sports Act.

Superintendent Horne is working diligently to identify and prepare expert reports for the Preliminary Injunction hearing and will continue to do so. Superintendent Horne merely seeks a fair opportunity to present a defense that is balanced against the extensive preparation Plaintiffs did prior to filing the lawsuit.

RESPECTFULLY SUBMITTED on June 7, 2023.

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CERTIFICATE OF SERVICE

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By:/s/ Hilary Myers