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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, Plaintiff, v. THOMAS E. PRICE, Secretary of Health and Human Services, *et al.* Defendants, and U.S. CONFERENCE OF CATHOLIC BISHOPS, Defendant-Intervenor.	Case No. 3:16-cv-3539-LB **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER** Date: April 20, 2017 Time: 9:30 a.m. Location: Courtroom C, 15th Floor Judge: Hon. Laurel Beeler

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INTRODUCTION

Defendants seek to transfer this lawsuit to the District of Columbia, even though Plaintiff and nearly all of its members are located here, and even though the unconstitutional activity is occurring partially in this district—*i.e.*, Defendants are funding a provider here that imposes religious restrictions on access to reproductive health care. Defendants cannot overcome the strong presumption supporting Plaintiff's choice of appropriate forum, particularly as Plaintiff has chosen its home forum. Defendants argue that this case should be transferred because individuals and documents identified in the parties' initial disclosures are located in the District of Columbia. Defendants fail to explain why the location of those things should be given significant weight, especially since the parties have agreed that this case will likely be resolved without a trial, the individuals identified in the initial disclosures are employed by the parties and can be compelled to testify if necessary, and documentary evidence can be easily exchanged electronically. Finally, transfer would not advance the interests of justice, and would in fact be inefficient: The Court has swiftly moved this case along, and has already familiarized itself with the background facts and relevant issues. Defendants' transfer motion should therefore be denied.

ARGUMENT

I. Defendants Fail to Establish That This Case Should Be Transferred to the District of Columbia.

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district court or division where it might have been brought . . . ." 28 U.S.C. § 1404(a). This Court has "broad discretion" to adjudicate motions to transfer venue. *Allstar Mktg. Grp., LLC v. Your Store Online, LLC*, 666 F. Supp. 2d 1109, 1130 (C.D. Cal. 2009). "District courts use a two step analysis to determine whether a transfer is proper." *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1098 (N.D. Cal. 2006). First, the court must "determine whether the case could have been brought in the forum to which the transfer is sought." *Id.* (citing *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985)).

"If venue would be appropriate in the transferee court, then the court must make an 'individualized, case-by-case consideration of convenience and fairness.'" *Id.* (quoting *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000)). The moving party bears the burden of showing that transfer is appropriate. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979); *see also, e.g.*, *Carolina Cas. Co. v. Data Broad. Corp.*, 158 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001).

A. Plaintiff's Choice of Its Home Forum Is Entitled to Great Weight.

Plaintiff does not dispute that this case could have been brought either here or in the District of Columbia. *See* 28 U.S.C. § 1391(e). Plaintiff chose to bring the lawsuit here. A plaintiff's choice of forum is entitled to great weight and "should rarely be disturbed," *Getz v. Boeing Co.*, 547 F. Supp. 2d 1080, 1082 (N.D. Cal. 2008) (citing *Sec. Investor Prot. Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985)). Accordingly, a "defendant 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 principle applies with particular force where, as here, "the plaintiff has chosen [its] home forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1985); *see also, e.g.*, *Ctr. for Biological Diversity v. Export-Import Bank of the U.S.*, No. 12-6325, 2013 WL 5273088 (N.D. Cal. Sept. 17, 2013) (denying the government's motion to transfer venue to the District of Columbia, even though the relevant decisionmaking occurred there, based on the plaintiffs' choice of their home forum).

Defendants argue that Plaintiff's choice of its home forum should receive little weight because "it is hardly in the interests of justice to permit an organization to select any forum in which at least one of its taxpayer members resides." Mot. to Transfer at 2–3, 6, ECF No. 62. But the ACLU of Northern California—a separate organization from the national American Civil Liberties Union, with its own membership, board of directors, and staff—is based here, and nearly all of its 150,000 members live here. *See* Am. Compl. ¶ 17, ECF No. 57; *see also, e.g.*, *Ctr. for Biological Diversity v. Lubchenco*, No. C-09-4087 EDL, 2009 WL 4545169, at *4 (N.D.

Cal. Nov. 30, 2009) ("Plaintiffs' choice of forum weighs heavily because California has an interest in this litigation involving Greenpeace, one of its residents."). Moreover, Plaintiff has alleged that the unconstitutional activity is occurring partially in this district—namely, taxpayer funds are granted to at least one organization in this district, Catholic Charities of Santa Clara County, that imposes religious restrictions on access to reproductive health care for unaccompanied immigrant minors in its charge. Am. Compl. ¶¶ 4, 27; *see also* Defs.' Ans. ¶ 27, ECF No. 60 (admitting that Catholic Charities of Santa Clara Country is among the organizations receiving unaccompanied immigrant minor program funds).

This case thus bears little resemblance to *Chesapeake Climate Action Network v. Export-Import Bank of the United States*, No. C 13-03532-WHA, 2013 WL 6057824 (N.D. Cal. Nov. 15, 2013), on which Defendants rely. There, "only two of the six plaintiffs [were] headquartered in this district," and the plaintiffs all "rel[ied] on their members on the East Coast . . . for standing." *Id.* at *2; *see also Kinney v. Takeuchi*, Case No. 3:16-cv-02018-LB, 2016 WL 4268673 (N.D. Cal. Aug. 15, 2016) (observing that the plaintiff resided in the Central District of California and that all the operative facts occurred there). It is hard to accuse Plaintiff of forum shopping based on its decision to file suit in its home district, where nearly all its members reside and pay their taxes, and where some of the alleged constitutional injuries take place. *Cf. Polaroid Corp. v. Casselman*, 213 F. Supp. 379 (S.D.N.Y. 1962) (observing that both parties' were based in Massachusetts, and that plaintiff merely "maintains a small sales office" in New York).

Defendants also argue that Plaintiff's choice of its home forum should be disregarded because, "any federal taxpayer or any organization with federal taxpayer members could sue" Defendants for violating the Establishment Clause. Mot. to Transfer at 6 (citing cases holding that a named plaintiff's choice of forum in a derivative or class action lawsuit is entitled to less weight). To be sure, taxpayers in other jurisdictions may *also* wish to challenge Defendants' actions. They would also be entitled to bring lawsuits in their home districts. Unlike the named plaintiffs in a derivative suit or class action, Plaintiff here does not have a fiduciary relationship with other potential plaintiffs, and their residences have no bearing on the weight entitled to

Plaintiff's choice of its home district. *Cf. Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 526 (1947) (stating that a derivative lawsuit "brings to the court more than an ordinary task of adjudication; it brings a task of administration; and what forum is appropriate for such a task may require consideration of its relation to the whole group of members and stockholders whom plaintiff volunteers to represent as well as to the nominal plaintiff himself").

The fact that Plaintiff challenges policy decisions made in the District of Columbia does not alter the calculus. Courts throughout the country routinely adjudicate similar challenges in plaintiffs' home fora. *See, e.g.*, *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474 (D. Mass. 2012), *vac'd as moot*, 705 F.3d 44 (1st Cir. 2013). Taken to their logical conclusion, Defendants' arguments would funnel a great number of these cases to the District of Columbia.

B. The Location of the Parties and Witnesses Does Not Support Transfer Under These Circumstances.

Defendants argue that the case should be transferred because most of the witnesses identified in the parties' initial disclosures reside in the District of Columbia, and most of the documents identified in the initial disclosures originated there. Mot. to Transfer at 4–5. The Ninth Circuit has held that "the location of the evidence and witnesses . . . . is no longer weighed heavily given the modern advances in communication and transportation." *Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998). But Defendants have not even established that litigation in this forum would impose a significant hardship.

First, Defendants have not identified any significant hardship to potential witnesses. Nor could they, given that Plaintiff's counsel is willing to conduct depositions at witnesses' convenience in the District of Columbia, and in light of the fact that this case is likely to be resolved on summary judgment. *See* Joint Case Management Statement at 7, ECF No. 35 ("If

necessary this case would be a bench trial, but the parties presently do not think that there is a high likelihood that there will be material facts in genuine dispute, and therefore believe that this case will most likely be resolved through summary judgment."). Under these circumstances, the witnesses' residence has no bearing on the motion to transfer. *See, e.g.*, *Lubchenko*, 2009 WL 4545169, at *3 ("There are no witnesses to consider since this case will be decided on the record on summary judgment, as the parties acknowledged at the hearing and in their briefs."); *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 12 (D.D.C. 2007) (holding that the convenience of the witnesses was "irrelevant" where the case would likely be resolved on summary judgment, based on the administrative record). Even if it becomes necessary for the parties to call witnesses to testify at trial, "[t]he Court . . . discounts any inconvenience to the parties' employees, whom the parties can compel to testify." *Getz*, 547 F. Supp. 2d at 1084 (citing *STX, Inc. v. Trik Stik, Inc.*, 7084 F. Supp. 1551, 1556 (N.D. Cal. 1988)). Here, all the individuals identified in the parties' initial disclosures are employed by either Defendants or USCCB, and can accordingly be compelled to testify at trial by the parties.[1]

Defendants similarly fail to establish that the location of the documentary evidence supports transfer. "If the motion [to transfer] is based on the location of records and documents, the movant must show particularly the location, difficulty of transportation, and the importance of such records." *Bohara v. Backus Hosp. Med. Benefit Plan*, 390 F. Supp. 2d 957, 963 (C.D. Cal. 2005). Here, Defendants state conclusorily that "[a]ll documents identified on plaintiff's and defendant's initial disclosures are from HHS's possession in Washington, D.C.," and that "USCCB identifies documents that originate either from HHS or USCCB." Mot. to Transfer at 5. But Defendants do not explain why this imposes any sort of hardship. To the contrary, "[g]iven

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[1] Indeed, Defendants have failed to meet even the basic requirement to "identify, typically by affidavit, the key witnesses to be called, state their residence, and provide at least a general summary of what their testimony will cover." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. Juris. § 3851 (4th ed.), *see also, e.g.*, *Allstar Mktg. Grp.*, 666 F. Supp. 2d at 1132–33. Instead, Defendants' motion refers offhandedly to the individuals identified in the parties' initial disclosures, who may or may not be called as witnesses, and provides no description of their proposed testimony.

technological advances in document storage and retrieval, transporting documents between districts does not generally create a burden." *Brackett v. Hilton Hotels Corp.*, 619 F. Supp. 2d 810, 820 (N.D. Cal. 2008); *see also, e.g.*, *Dickerson v. Novartis Corp.*, 315 F.R.D. 18, 30 (S.D.N.Y. 2016) (holding that although "the majority of relevant documents are likely to be located [at defendant's] headquarters" in proposed transferee district, "this factor is entitled to relatively little weight in the modern era of faxing, scanning, and emailing documents" (citation and internal quotation marks omitted)). Moreover, Plaintiff has already received a volume of relevant documents obtained through Freedom of Information Act requests, and the parties are engaged in discussions to minimize discovery through stipulation. Joint Case Management Statement at 4. Defendants have therefore failed to establish that litigation in this forum would result in any significant inconvenience.

C. Transfer Will Not Facilitate Timely Adjudication of this Dispute.

Finally, Defendants argue that transfer is in the interest of justice because "the District of Columbia has per-judge dockets that are a fraction of those in this judicial District." Mot. to Transfer at 7. But "the Ninth Circuit has explained that '[t]he real issue is not whether a dismissal will reduce a court's congestion but whether a trial may be speedier in another court because of its less crowded docket." *Peregrine Semiconductor Corp. v. RF Micro Devices, Inc.*, No. 12cv911-IEG (WMC), 2012 WL 2068728, at *9 (S.D. Cal. June 8, 2012) (alteration in original) (quoting *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984)).[2] Accordingly, "if this Court is to consider congestion the focus should be the median time from the filing to trial" or disposition. *Wellens v. Daiichi Sankyo Co.*, No. C 13-00581 CW, 2013 WL 3242294, at *5 (N.D. Cal. June 25, 2013). As Defendants themselves note, "the relevant figures

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[2] *See also* 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. Juris. § 3854 (4th ed.) ("There are decisions in which the courts sound as though they are ordering transfer simply to reduce congestion on the local docket. By itself, this is not an appropriate factor on a motion to transfer under Section 1404(a). But what is relevant, and undoubtedly what the courts have in mind in writing opinions that give significant weight to this element, is that getting to trial may be speedier in another district because of its less crowded docket." (footnotes omitted)).

for the District of Columbia and the Northern District of California are not meaningfully different" on these metrics. Mot. to Transfer at 7 n.3; *see also* United States District Courts – National Judicial Caseload Profile (Dec. 31, 2016) at 2, 66 (for the year ending in Dec. 31, 2016, the median time from filing to trial in civil cases is 44.3 months in the District of Columbia versus 31.2 months in the Northern District of California; median time from filing to disposition in civil cases is 7.8 months in the District of Columbia versus 7.3 months in the Northern District of California).[3]

Averages aside, there is no reason to believe that transfer will facilitate either a speedier resolution of this case or the efficient use of judicial resources. The Court has already approved a typically paced discovery schedule. The Court accepted the parties' proposed December 7, 2017, hearing date for dispositive motions. *See* Joint Case Management Statement at 7; Case-Management and Pretrial Order at 2, ECF No. 41. And the Court has calendared a bench trial—which, as discussed above, will likely prove unnecessary—to commence on March 26, 2018, just one week after the parties' proposed trial date. *See* Case-Management and Pretrial Order at 2. Moreover, it "would not serve the interests of judicial economy to transfer this case," given that the Court "is already familiar with the background of the case" based on its resolutions of Defendants' Motion to Dismiss and USCCB's Motion to Intervene. *Kremen v. Cohen*, No. 5:11-CV-05411-LHK, 2012 WL 44999, at *11 (N.D. Cal. Jan. 7, 2012); *see also, e.g.*, *Madani v. Shell Oil Co.*, No. C07-04296 MJJ, 2008 WL 268986, at *2 (N.D. Cal. Jan. 30, 2008) ("Judicial resources are conserved when an action is adjudicated by a court that has already committed judicial resources to the contested issues and is familiar with the facts of the case." (citation and internal quotation marks omitted)).

[3] *Available at* http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2016.pdf.

CONCLUSION

For the foregoing reasons, Defendants' transfer motion should be denied.

Dated: March 23, 2017

Respectfully submitted,

By: /s/ Brigitte Amiri
Brigitte Amiri*

Attorney for Plaintiff

* Appearing *pro hac vice*