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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA,

Plaintiff,

v.

SYLVIA MATHEWS BURWELL, et al.,

Defendants.

Case No. [16-cv-03539-LB](#)

**ORDER DENYING THE
DEFENDANTS' MOTION TO
TRANSFER**

Re: ECF No. 62

INTRODUCTION & BACKGROUND

The ACLU of Northern California challenges federal grants to religious organizations for the care of unaccompanied immigrant minors and trafficking victims.¹ The ACLU claims that the Office of Refugee Resettlement (“ORR”) violates the Establishment Clause by its grants to religious groups that refuse to provide unaccompanied minors and trafficking victims with “information about, access to, or referrals for contraception and abortion” services.² To challenge these grants, the ACLU sued, in their official capacities, the Secretary of Health and Human

¹ See generally First Amended Compl. – ECF No. 57. Record citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents.

² Id. ¶¶ 4, 7, 56–69.

1 Services, the Acting Assistant Secretary of the Administration for Children and Families, and the
2 Director of ORR.³ The United States Conference of Catholic Bishops (“USCCB”) — an ORR
3 grantee that “issues subgrants to Catholic Charities” — intervened in the case.⁴

4 The government defendants now move to transfer the case to the District of Columbia.⁵ The
5 ACLU opposes the motion.⁶ The court denies the motion because the government has not
6 overcome the deference afforded to the ACLU’s choice of forum.

7
8 **GOVERNING LAW**

9 28 U.S.C. § 1404(a) states: “For the convenience of parties and witnesses, in the interest of
10 justice, a district court may transfer any civil action to any other district or division where it might
11 have been brought.” Although Congress drafted § 1404(a) in accordance with the doctrine of
12 forum non conveniens, it was intended to be a revision to rather than a codification of the common
13 law. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981); *Norwood v. Kirkpatrick*, 349 U.S. 29,
14 32 (1955). Thus, a § 1404(a) transfer is available “upon a lesser showing of inconvenience” than
15 that required for a forum non conveniens dismissal. *Norwood*, 349 U.S. at 32.

16 The burden is upon the moving party to show that transfer is appropriate. *Commodity Futures*
17 *Trading Comm’n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979); *see also Los Angeles Mem’l*
18 *Coliseum Comm’n v. Nat’l Football League*, 89 F.R.D. 497, 499 (C.D. Cal. 1981), *aff’d*, 726 F.2d
19 1381, 1399 (9th Cir. 1984). Nonetheless, the district court has broad discretion “to adjudicate
20 motions for transfer according to an ‘individualized, case-by-case consideration of convenience
21 and fairness.’” *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (quoting
22 *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)); *see Westinghouse Elec. Corp. v. Weigel*,
23 426 F.2d 1356, 1358 (9th Cir. 1970).

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26 ³ *Id.* ¶¶ 18–20.

27 ⁴ *See id.* ¶¶ 4, 26–27, 37, 59–69; Order re Intervention – ECF No. 58.

28 ⁵ Motion to Transfer – ECF No. 62.

⁶ Opposition – ECF No. 66.

1 An action may be transferred to another court if: (1) that court is one where the action might
2 have been brought; (2) the transfer serves the convenience of the parties; and (3) the transfer will
3 promote the interests of justice. *E & J Gallo Winery v. F. & P. S.p.A.*, 899 F. Supp. 465, 466 (E.D.
4 Cal. 1994) (citing 28 U.S.C. § 1404(a)). The Ninth Circuit has identified numerous additional
5 factors a court may consider in determining whether a change of venue should be granted under
6 § 1404(a):

7 (1) the location where the relevant agreements were negotiated and executed, (2)
8 the state that is most familiar with the governing law, (3) the plaintiff's choice of
9 forum, (4) the respective parties' contacts with the forum, (5) the contacts relating
10 to the plaintiff's cause of action in the chosen forum, (6) the differences in the
11 costs of litigation in the two forums, (7) the availability of compulsory process to
12 compel attendance of unwilling non-party witnesses, and (8) the ease of access to
13 sources of proof.

14 *Jones*, 211 F.3d at 498–99. Courts may also consider “the administrative difficulties flowing from
15 court congestion . . . [and] the ‘local interest in having localized controversies decided at home.’”
16 *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (quoting *Piper*
17 *Aircraft*, 454 U.S. at 241 n. 6).

18 Generally, the court affords the plaintiff's choice of forum great weight. *Lou v. Belzberg*, 834
19 F.2d 730, 739 (9th Cir. 1987). But when judging the weight to be given to plaintiff's choice of
20 forum, consideration must be given to the respective parties' contact with the chosen forum. *Id.* “If
21 the operative facts have not occurred within the forum and the forum has no interest in the parties
22 or subject matter,” the plaintiff's choice “is entitled only minimal consideration.” *Id.*

23 ANALYSIS

24 The parties do not dispute that the case could have been brought in the District of Columbia.⁷
25 And, indeed, because the defendants are government officials sued in their official capacities, and
26 because a substantial part of the events (i.e. the decision-making process) took place in
27 Washington, D.C., the ACLU could have sued in the District of Columbia. See 28 U.S.C.
28 §§ 1391(e), 1404(a).

⁷ See Motion at 5; Opposition at 4.

1 The court next considers the remaining § 1404(a) factors. The court first considers the
2 ACLU’s choice of forum because the government’s burden shifts based on the weight given to
3 that choice. See *Chesapeake Climate Action Network v. Export-Import Bank, No. C 13-03532*
4 *WHA*, 2013 WL 6057824, at *2 (N.D. Cal. Nov. 15, 2013) (“As deference to a plaintiff’s choice
5 of forum decreases, a defendant’s burden to upset the plaintiff’s choice of forum also decreases.”).
6 The court then considers the convenience of the parties and witnesses, the location of the
7 evidence, and the interests of justice.

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9 **1. The ACLU of Northern California’s Choice of Forum**

10 Generally, “unless the balance of the § 1404(a) factors ‘is strongly in favor of the defendants,
11 the plaintiff’s choice of forum should rarely be disturbed.’” *Getz v. Boeing Co.*, 547 F. Supp. 2d
12 1080 (N.D. Cal. 2008) (quoting *Secs. Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1317
13 (9th Cir. 1985)); see also *Decker*, 805 F.2d at 843 (“[D]efendant must make a strong showing . . .
14 to warrant upsetting the plaintiff’s choice of forum.”). “This is especially true when a plaintiff
15 chooses to sue in its ‘home turf.’” *Natural Wellness Ctrs. of Am. v. J.R. Andorin Inc.*, No. 11-
16 04642 EDL, 2012 WL 216578, at *10 (N.D. Cal. Jan. 24, 2012).

17 But sometimes a plaintiff’s choice of forum is entitled to only minimal weight, “even if the
18 plaintiff is a resident of the forum.” *Chesapeake*, 2013 WL 6057824 at *2 (emphasis in original).
19 “[T]he deference accorded to a plaintiff’s chosen forum should be balanced against the extent of
20 both the defendant’s and plaintiff’s contacts with the chosen forum, including those relating to
21 plaintiff’s claims.” *Ctr. for Biological Diversity v. Export-Import Bank, No. C 12-6325 SBA*, 2013
22 WL 5273088, at *5 (N.D. Cal. Sept. 17, 2013) (citing *Pac. Car & Foundry v. Pence*, 403 F.2d 949
23 (9th Cir. 1968)). “If the operative facts have not occurred within the forum of original selection
24 and that forum has no particular interest in the parties or the subject matter, the plaintiff’s choice is
25 entitled only to minimal deference.” *Pac. Car & Foundry*, 403 F.2d at 954.

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1 The parties point to several instructive cases involving environmental challenges to
2 government action.⁸ See *Chesapeake*, 2013 WL 6057824; *Ctr. for Biological Diversity*, 2013 WL
3 5273088.

4 In *Center for Biological Diversity v. Export-Import Bank*, the plaintiffs’ decision to litigate in
5 the Northern District of California weighed against transfer. 2013 WL 5273088 at *5. There, three
6 environmental organizations challenged an Export-Import Bank loan to finance a natural gas
7 project in Australia’s Great Barrier Reef. *Id.* at *1–*2. The defendants — the United States
8 Export-Import Bank and its Chairman and President — moved to transfer the case to the District
9 of Columbia, where the Bank (a federal agency) is headquartered, and where the environmental-
10 review process took place. *Id.* at *1, *4. The defendants argued that the plaintiffs’ “choice of
11 forum [was] entitled to minimal deference because the operative facts giving rise to [the] action
12 occurred in Washington, D.C., and because this District ha[d] no particular interest in or
13 connection to [the] litigation.” *Id.* *5.

14 But the defendants did not satisfy their burden. *Id.* Instead, the Northern District of California
15 had a particular interest in the litigation because (1) the plaintiff organizations were incorporated
16 in California, (2) “each ha[d] an office in th[e] district,” and (3) each had “members that reside[d]
17 in the district who [were] concerned about the potential impacts from the Project, including
18 impacts on endangered and threatened species and the climate.” *Id.* Some members had “specific
19 plans to travel to Australia” and were “concerned that the Project [would] harm their recreational
20 and aesthetic interests.” *Id.* The plaintiffs’ choice of forum was thus entitled to deference.

21 In contrast, in *Chesapeake*, this factor weighed in favor of transferring venue. 2013 WL
22 6057824 at *2. As in *Center for Biological Diversity*, the *Chesapeake* plaintiffs were non-profit
23 environmental groups challenging the Export-Import Bank’s decision to finance a development
24 project. *Id.* at *1. The plaintiffs asserted that the Bank’s decision, which would facilitate the export
25 of Appalachian coal through facilities in Maryland and Virginia and “to clients in China, Japan,
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28 ⁸ See Motion to Transfer at 7; Opposition at 4–5.

1 South Korea, and elsewhere,” would cause “significant adverse effects on human health and the
2 environment.” Id.

3 In giving little deference to the plaintiffs’ choice of forum, the court noted that “none of the
4 operative facts arose in this district” — the Bank’s decisionmaking regarding the loan guarantee
5 took place in Washington, D.C. — and distinguished Center for Biological Diversity on two
6 grounds. Id. at *2. First, the Center plaintiffs “rel[ie]d on their members who lived in this district
7 and claimed harm to their recreational and aesthetic interests for organizational standing.” Id.
8 (internal quotations omitted). But in Chesapeake, the plaintiffs “rel[ie]d on their members on the
9 East Coast who face harm to their health, property, and aesthetic and recreational interests.” Id.
10 (internal quotations omitted). Second, “in Center for Biological Diversity, all of the plaintiff
11 organizations were headquartered in this district,” but in Chesapeake, “only two of the six
12 plaintiffs” were headquartered here. Id. The plaintiffs’ choice thus received little deference. Id.

13 The case here is more similar to Center for Biological Diversity than it is to Chesapeake. First,
14 like Center for Biological Diversity, the ACLU of Northern California (the sole plaintiff) is based
15 in this district: it “is a state affiliate of the national American Civil Liberties Union and is
16 domiciled in the State of California, with its principal place of business in San Francisco.”⁹
17 Second, the ACLU brings the case on behalf of its members, “nearly all of” whom live here,¹⁰ and
18 thus relies on (at least predominantly) local-member association, not (as in Chesapeake) members
19 suffering injury across the country. And third, the ACLU alleges that the impact of the
20 Establishment Clause violation — federal funds financing religious organizations that refuse to
21 provide contraceptive and abortion-related services — is occurring in this district. It asserts that
22 USCCB “issues subgrants to Catholic Charities and other organizations around the country” that
23 provide services to unaccompanied minors, including to Catholic Charities of Santa Clara County
24 (located in San Jose).¹¹ Thus, like Center for Biological Diversity, (1) the ACLU (the sole

26 ⁹ FAC ¶ 17.

27 ¹⁰ Opposition at 4.

28 ¹¹ FAC ¶¶ 4, 27.

1 plaintiff) is domiciled in California, (2) it has its principal place of business in San Francisco, and
 2 (3) its members are located here and the impact is local. The ACLU’s choice of forum is thus
 3 entitled to deference.

4 This conclusion does not change because the ACLU is an organization suing on behalf of its
 5 taxpaying members. The government argues that the ACLU’s member-based taxpayer standing
 6 means that anyone — in any district — could bring this case and, “where there are hundreds of
 7 potential plaintiffs . . . all of whom could with equal show of right go into their many home courts,
 8 the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is
 9 considerably weakened.”¹² *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

10 But the cases the government relies on are contextually distinguishable. For example, *Koster*
 11 was a shareholder’s derivative action, and the Court focused on the “complexities and unique
 12 features of” those suits to reach its conclusion. See *id.* at 522–26. It was because of those unique
 13 features — including the fiduciary relationship between named plaintiffs and corporations’
 14 shareholders; named plaintiffs’ (sometimes) questionable ability or motive to litigate the case; and
 15 the court’s administrative duties to protect absentee shareholders and to facilitate the action — that
 16 the Court gave little weight to the named plaintiff’s decision to litigate at home. *Id.* And similar
 17 concerns apply in the other contexts raised by the government. See *Seely v. Cumberland*, No. 10-
 18 CV-2019-LHK, 2010 WL 5300923, at *3 (N.D. Cal. Dec. 20, 2010) (applying *Koster* to a qui tam
 19 plaintiff’s patent mis-marking claim and transferring venue); *San Francisco Tech., Inc. v. Glad*
 20 *Prods. Co.*, No. 10-CV-00966 JF (PVT), 2010 WL 2943537, at *7 (N.D. Cal. July 26, 2010)
 21 (noting that, in addition to “substantial persuasive authority supporting Defendants’ position that a
 22 plaintiff’s choice of forum is entitled to less weight in a qui tam action,” the Supreme Court’s
 23 reasoning in *Koster* “is arguably applicable” in the qui tam context); see also *Johns v. Panera*
 24 *Bread Co.*, No. 08-1071 SC, 2008 WL 2811827, at *2 (N.D. Cal. July 21, 2008) (“Plaintiff’s
 25 decision to seek to represent a nationwide class substantially undercuts this defence.”); *Hoefler v.*
 26 *U.S. Dep’t of Commerce*, No. C 00-091 VRW, 2000 WL 890862, at *2 (N.D. Cal. June 28, 2000)

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 28 ¹² Motion at 7; Reply – ECF No. 67 at 2–3.

1 (affording little deference to “a plaintiff’s choice of forum in a[n] action brought on behalf of a
2 nationwide class” where “[t]he members of the purported class are numerous and are located
3 throughout the nation”).

4 Each of these contexts — derivative suits, class actions, and qui tam cases — involve
5 individual plaintiffs suing on behalf of (or in the place of) other potential plaintiffs located in
6 forums across the country. But here, this division of the ACLU is a Northern California-based
7 organization suing on behalf of its members, “nearly all of” whom are located here, too.¹³ The
8 absentee plaintiffs — the ACLU’s members — thus have the same home forum. That the ACLU
9 relies on its members’ federal taxpayer status does not change this outcome: even though
10 taxpayers in other forums could conceivably bring the case too, the ACLU of Northern California
11 brings it only on behalf of its members located predominantly in this district. This may be
12 different from a situation where, for example, the national ACLU sued on behalf of its members
13 located throughout the nation. In that context, the ACLU would indeed be suing on behalf of many
14 potential plaintiffs throughout the country, “all of whom could with equal show of right go into
15 their many home courts.” *Koster*, 330 U.S. at 524. But that is not the situation here, and the ACLU
16 of Northern California’s choice of forum is entitled to deference.

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18 **2. Other Factors**

19 Because the ACLU’s choice of forum is entitled to deference, the government must make a
20 “strong showing” that the conveniences and the interests of justice favor transfer. See *Ctr. for*
21 *Biological Diversity v. Lubchenco*, No. C-09-4087 EDL, 2009 WL 4545169, at *4 (N.D. Cal. Nov.
22 30, 2009); cf. *Chesapeake*, 2013 WL 6057824 at *2 (“As deference to a plaintiff’s choice of forum
23 decreases, a defendant’s burden to upset the plaintiff’s choice of forum also decreases.”).

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28 ¹³ See Opposition at 4.

1 **2.1 Convenience of the Parties**

2 The parties do not directly address their own conveniences. The ACLU is based in this district,
3 but the defendants (and USCCB) are based in Washington, D.C.¹⁴ Without more information
4 regarding their respective burdens of litigating here versus the District of Columbia, the court
5 cannot tell if this factor weighs in favor of transfer. But, presumably, the parties “will face
6 increased litigation expenses and inconvenience if the case proceeds in their nonpreferred forum,”
7 and because “transfer is not appropriate if it simply shifts the inconvenience from one party to
8 another,” this factor is neutral in the transfer analysis. See *Ctr. for Biological Diversity v. Export-*
9 *Import Bank*, No. C 12-6325 SBA, 2013 WL 5273088, at *6 (N.D. Cal. Sept. 17, 2013).

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11 **2.2 Convenience of the Witnesses and Location of the Evidence**

12 “The convenience of witnesses is often the most important factor in deciding whether to
13 transfer an action.” *Getz*, 547 F. Supp. 2d at 1083 (citing *Bunker v. Union Pac. R.R. Co.*, No. C
14 05-04059 JSW, 2006 WL 193856, at *2 (N.D. Cal. Jan. 23, 2006)). But courts “discount[] any
15 inconvenience to the parties’ employees, whom the parties can compel to testify.” *Id.* at 1084
16 (citing *STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551, 1556 (N.D. Cal. 1998)). And, the location of
17 the witnesses and other evidence is no longer weighed so heavily “given the modern advances in
18 communication and transportation.” *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th
19 Cir. 1998); see also *Chesapeake*, 2013 WL 6057824 at *3 (“[T]echnological advances in
20 document storage and retrieval mitigate the burdens of transporting documents, if any, from the
21 District of Columbia to this district.”).

22 Here, the government argues that the parties’ witnesses are all located in Washington, D.C.¹⁵
23 For example, in its supplemental initial disclosures, the ACLU identified nine potential witnesses,
24 each based in Washington.¹⁶ The government similarly identified ten Washington-based witnesses

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27 ¹⁴ See FAC ¶¶ 17–20.

28 ¹⁵ Motion at 5–6.

¹⁶ See ACLU’s Supp. Initial Disclosures – ECF No. 62-1 at 12–13.

1 (five of whom were also identified by the ACLU).¹⁷ USCCB’s witnesses are also located in
2 Washington.¹⁸ And many of the documents on which the parties intend to rely are located in
3 Washington, either with HHS or USCCB.¹⁹

4 The witnesses and the documentary evidence thus appear located primarily in Washington,
5 D.C. But each witness is an employee of either HHS or USCCB that can be compelled to testify.
6 The ACLU’s “counsel is willing to conduct deposition at witnesses’ convenience in the District of
7 Colombia,”²⁰ and the case is likely to be resolved without trial at summary judgment.²¹ In light of
8 these circumstances and the ease of storing and retrieving electronic documents (the government
9 even hyperlinks to several of the documents in its initial disclosures²²), the location of the
10 witnesses and documents weighs only slightly in favor of transfer.

11 12 **2.3 The Interests of Justice**

13 The court next considers the interests of justice. “A district court hearing a motion to transfer
14 must also consider public-interest factors such as relative degrees of court congestion, local
15 interest in deciding local controversies, potential conflicts of laws, and other interests of justice.”
16 *Chesapeake*, 2013 WL 6057824 at *3.

17 First, “[a]s to court congestion, courts in this district consider the ‘median time from filing to
18 disposition or trial.’” *Id.* (quoting *Ctr. for Food Safety v. Vilsack*, No. C 11-00831 JSW, 2011 WL
19 996343, at *8 (N.D. Cal. Mar. 17, 2011)); see also *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325,
20 1337 (9th Cir. 1984) (“The real issue is not whether a dismissal [for forum non conveniens] will
21 reduce a court’s congestion, but whether a trial may be speedier in another court because of its less

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23 ¹⁷ Defendants’ Supp. Initial Disclosures – ECF No. 62-1 at 3–4.

24 ¹⁸ USCCB’s Initial Disclosures – ECF No. 62-1 at 18–19.

25 ¹⁹ See Motion 6; Defendants’ Supp. Initial Disclosures at 4–7; USCCB’s Initial Disclosures at 19–20.

26 ²⁰ Opposition at 6.

27 ²¹ See Joint Case Management Statement – ECF No. 35 at 7 (“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.”).

28 ²² See Defendants’ Initial Disclosures at 5–7.

CONCLUSION

The court denies the government's motion to transfer venue to the District of Columbia.

IT IS SO ORDERED.

Dated: April 28, 2017



LAUREL BEELER
United States Magistrate Judge

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