No. 12-15738-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KARLA VANESSA ARCIA, ET AL.,

Plaintiffs-Appellants,

v.

FLORIDA SECRETARY OF STATE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (NO. 12-22282-CIV-ZLOCH)

APPELLEE'S RESPONSE TO APPELLANTS' MOTION FOR CLARIFICATION

Ashley E. Davis
Assistant General Counsel
Florida Department Of State
R.A. Gray Building
500 South Bronough Street, Suite 100
Tallahassee, FL 32399-0250
(850) 245-6536
Ashley.Davis@DOS.MyFlorida.com

Michael A. Carvin
Warren D. Postman
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879 3913
macarvin@jonesday.com

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Circuit Rule 26.1-1, I hereby certify that the Certificate of Interested Persons contained in Appellants' initial brief is, to the best of my knowledge, accurate and complete.

/s/ Michael A. Carvin

Michael A. Carvin

APPELLEE'S RESPONSE TO
APPELLANTS' JURISDICTIONAL QUESTION

On January 29, 2013, Plaintiffs-Appellants filed a Motion for Clarification ("Pls.Mot."), asking the Court to specify the due date for their reply brief. The Secretary hereby notes the following points in response:

1. Contrary to Appellants' assertion, the Secretary's response brief was originally due on January 22, 2013, not January 16, 2013. Plaintiffs filed their opening brief on December 17, 2012. Under Eleventh Circuit Rule 31-1(a), "[t]he appellee shall serve and file a brief within 30 days after service of the brief of the last Appellant." However, Federal Rule of Appellate Procedure 26(c) provides that

> [w]hen a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), *a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.* (Emphasis added).

Because Appellants' brief was delivered electronically on December 17, 2012, the Secretary's brief was due 33 days after that date, *i.e.*, January 19, 2013. Because January 19, 2013, was a Saturday, and because the Court was closed on Monday, January 21, 2013 , in observance of Martin Luther King Day, the Secretary's brief was due on January 22, 2013. *See* Fed. R. App. P. 26(a). Accordingly, it is incorrect to suggest that the Secretary took "additional time to file [his] brief" beyond the original due date, (Pls.Mot.3).

2. Moreover, although the Secretary agrees that the due date for his brief was postponed as a result of the Court's issuance of a jurisdictional question, neither the Court's rules generally, nor the provision specifically governing jurisdictional questions, forbids the early filing of a brief before it is due. *See* Eleventh Circuit Rule 31-1(d) Accordingly, there is no basis to suggest that the Secretary's brief was improperly filed.

3. Since Appellee's brief was properly filed, Appellants' reply brief, should they choose to file one, is due 14 days after service of that brief. First, the due date for an Appellant's reply brief is not tied to any independent briefing schedule but, rather, is expressly linked to the filing date of an Appellee's brief: "The appellant may serve and file a reply brief *within 14 days after service of the appellee's brief* . . . . " Fed. R. App. P. 31(a) (emphasis added). Moreover, the Court's rules do not provide that the issuance of a jurisdictional question by the Court suspends any due dates for an *Appellant's* briefs. Indeed, the Rule states that the "issuance of a jurisdictional question *does not stay the time for filing appellant's brief* otherwise provided by this rule." *See* Eleventh Circuit Rule 31-1(d) (emphasis added).

4. More generally, the text of Rule 31-1(d) also undercuts Appellants' claim that "[t]he purpose of the rule appears to be to enable parties to refrain from engaging in any further briefing until they receive further guidance from this

Court." Pls.Mot.3. Rather, Rule 31-1(d) is intended to save an *Appellee* from the unwarranted burden of filing a brief in a case in which there may be no jurisdiction. However, the rule, by its terms, does not seek to save an *Appellant* from the burden of filing an unnecessary brief. That makes sense since, after all, it is an Appellant's choice to file an appeal in the first place (and an Appellant can dismiss the appeal at any time). An Appellant is therefore in no position to complain of the burden of filing the briefing required by his own appeal. That is particularly true in this case because *both sides* have informed the Court in response to its inquiry that there is jurisdiction over the appeal, thus reducing any general concerns about filing a brief that will become unnecessary.

Dated: January 29, 2013

Respectfully submitted,

/s/ Michael A. Carvin

Michael A. Carvin
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879 3913
macarvin@jonesday.com

Ashley E. Davis
Assistant General Counsel
Florida Department Of State
R.A. Gray Building
500 South Bronough Street, Suite 100
Tallahassee, FL 32399-0250
(850) 245-6536
Ashley.Davis@DOS.MyFlorida.com

Counsel for Defendant-Appellee
Secretary of State Kenneth W. Detzner

CERTIFICATE OF SERVICE

I hereby certify that, on January 29, 2013, the foregoing response was filed with this Court and served on all parties by filing with the Court's CM/ECF system

/s/ Michael A. Carvin
Michael A. Carvin

Counsel for Secretary Detzner