No: 12-15738

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Karla Vanessa Arcia, et al., *Plaintiffs-Appellants,* v. Florida Secretary of State, *Defendant-Appellee*.	Case No. 12-15738-EE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CIVIL ACTION NO. 12-CV-22282-ZLOCH

PLAINTIFFS-APPELLANTS' UNOPPOSED CONTINGENT MOTION FOR TRANSFER OF CONSIDERATION OF ATTORNEYS' FEES ON APPEAL TO THE DISTRICT COURT

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Circuit Rule 26.1-1, Appellants, Karla Vanessa Arcia, Melande Antoine, 1199SEIU United Healthcare Workers East, National Congress for Puerto Rican Rights, and Florida Immigrant Coalition, Inc. furnish a complete list of the following persons that have an interest in the outcome of this case:

Advancement Project – Attorneys for Appellants

Antoine, Melande – Appellant

Arcia, Karla Vanessa – Appellant

Cartagena, Juan – Attorney for Appellants

Carvin, Michael A. – Attorney for Appellee

Culliton-Gonzalez, Katherine – Attorney for Appellants

Davis, Ashley E. – Attorney for Appellee

De Leon, John – Attorney for Appellants

Detzner, Ken, Florida Secretary of State – Appellee

Fair Elections Legal Network – Attorneys for Appellants

Flanagan, Catherine M. – Attorney for Appellants

Florida Immigrant Coalition, Inc. – Appellant

Florida New Majority, Inc. – Appellant

Friedman, Joshua N. – Attorney for Appellants

Goldman, Marc A. – Attorney for Appellants

Gore, John M. – Attorney for Appellee

Hair, Penda – Attorney for Appellants

Hovland, Ben – Attorney for Appellants

Jenkins, Marina K. – Attorney for Appellants

Jenner & Block LLP – Attorneys for Appellants

Jones Day – Attorneys for Appellee

Kanter Cohen, Michelle – Attorney for Appellants

Kaplan, Lindsay Eyler – Attorney for Appellants

Katsas, Gregory G. – Attorney for Appellee

LatinoJustice PRLDEF – Attorneys for Appellants

Law Offices of Chavez & De Leon – Attorneys for Appellants

Masters, Lorelie S. – Attorney for Appellants

National Congress for Puerto Rican Rights – Appellant

Nkwonta, Uzoma – Attorney for Appellants

Nordby, Daniel E. – Attorney for Appellee

Perez, Jose – Attorney for Appellants

Postman, Warren D. – Attorney for Appellee

Project Vote – Attorneys for Appellants

Ramamurti, Bharat R. – Attorney for Appellants

Roberson-Young, Katherine – Attorney for Appellants

Rogers, Kristen M. – Attorney for Appellants

Sen, Diana – Attorney for Appellants

Veye Yo – Appellant

Zloch, The Honorable William J. – U.S. District Court Judge

1199SEIU United Healthcare Workers East – Appellant

CONTINGENT MOTION TO TRANSFER

Pursuant to 11th Cir. R. 39-2(d) and 42 U.S.C. § 1973gg-9(c), Plaintiffs-Appellants Arcia, *et al.* ("Plaintiffs"), file a contingent motion for this Court to transfer consideration of attorneys' fees on appeal to the district court in the event that it does not grant Plaintiffs' motion, filed on May 5, 2014, for an extension of time to file a fee petition. Plaintiffs principally file this motion to ensure they have complied with the terms of 11th Circuit Rule 39. In support of this motion, Plaintiffs state as follows:

1. On June 19, 2012, Plaintiffs Arcia, *et al.*, filed a complaint for declaratory and injunctive relief against Ken Detzner, in his official capacity as Florida Secretary of State, alleging that the Secretary's Program to Purge Alleged Non-Citizens from the voter rolls was inaccurately identifying many eligible voters as non-citizens and threatening to remove them from the voter rolls. Among their claims, Plaintiffs alleged that the program violated Section 8(c)(2)(A) of the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg-6(c)(2)(A), otherwise known as the "90 Day Provision," because it was a systematic removal program that continued within 90 days of a federal election. That Provision provides:

> A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the

> purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

2. As Plaintiffs later explained to this Court, the 90 Day Provision is designed to protect against the inevitable errors that occur from systematic removal programs by ensuring that such programs conclude more than 90 days from federal elections, thus permitting time to correct any errors.

3. As litigation proceeded, the parties settled portions of this matter, but not Plaintiffs' claim that the Secretary's program violated the 90 Day Provision. Based on that claim, Plaintiffs moved for a preliminary injunction on September 19, 2012; they also sought summary judgment. The district court denied Plaintiffs' motion on October 4, concluding that the 90 Day Provision did not apply to programs that aimed to remove non-citizens. The district court entered final judgment on October 29, 2012.

4. After the district court entered final judgment against them on October 29, 2012, Plaintiffs filed a notice of appeal on November 1, 2012.[1] After full briefing and oral argument, this Court rendered its decision on April 1, 2014,

[1] Plaintiffs also had filed an earlier notice of appeal of the district court's denial of a preliminary injunction and summary judgment and then filed a motion seeking emergency relief. Plaintiffs voluntarily dismissed that notice of appeal after this Court found emergency relief was unnecessary.

reversing the district court and holding Defendant's 2012 systematic removal program was unlawful, because it proceeded within 90 days of federal elections. The Court stated that it was remanding the case to the district court "with instructions to enter an order (1) declaring that Secretary Detzner's actions here were in violation of the 90 Day Provision of the NVRA and (2) granting such further relief as the needs and interests of justice require." *Arcia*, 2014 WL 1284907, at *10.

5. This Court has yet to issue its mandate implementing its decision, but assuming the mandate is consistent with the Court's April 1 decision, Plaintiffs will be prevailing parties entitled to reasonable attorneys' fees. The NVRA's fee-shifting provision provides, "the court may allow the prevailing party (other than the United States) reasonable attorney fees, including litigation expenses, and costs." 42 U.S.C. § 1973gg-9(c). Courts have recognized that the NVRA's language is nearly identical to that in other federal civil rights statutes (*e.g.*, 42 U.S.C. § 1973l(e); 42 U.S.C. § 1988(b)), and they construe the language of each of these statutes similarly. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *see also Nat'l Coal. for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272, 1276 (N.D. Fla. 2001). Under that standard, Plaintiffs will be the prevailing parties, because their lawsuit has changed the legal relationship between the

parties. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009).

6. Of course, it does not make sense for the parties to litigate questions about attorneys' fees before this Court has issued its mandate. And the docket now states that the mandate has been withheld pursuant to court instructions. But under 11th Circuit Rule 39-2, when there has been no petition for rehearing, parties seeking attorneys' fees must generally either file a motion seeking such fees within 14 days (Rule 39-2(a)) or file a motion to transfer consideration of those fees to the district court (Rule 39-2(d)).

7. As a result, Plaintiffs yesterday (May 5, 2014) filed a consensual motion for an extension of time to file a fee petition. But because there is no guarantee that the Court will grant that motion, Plaintiffs are here filing a contingent motion for transfer in the event their extension motion is denied, thus relying on Rule 39-2(d) to ensure compliance with the timing requirement.[2]

[2] Plaintiffs believe it is probable that even in the absence of any motion, they would ultimately be able to seek appellate fees in this district court under Rule 39-2(e), which permits this "[w]hen a reversal on appeal . . . results in a remand to the district court for trial or further proceedings . . . ." But Plaintiffs are filing this motion to make certain they are not later barred from seeking fees related to their appeal.

8. Plaintiffs understand that this Court may prefer that issues regarding appellate fees initially be raised in this Court, but feel the need to file this contingent transfer motion to ensure compliance with Rule 39.

9. Plaintiffs' counsel has conferred with Defendant's counsel about a transfer motion. Defendant does not oppose transfer of fee questions to the district court.

WHEREFORE, Plaintiffs-Appellants Karla V. Arcia, *et al.*, bring this contingent motion for this Court to transfer consideration of attorneys' fees on appeal to the district court pursuant to 11th Cir. R. 39-2(d) in the event that it does not grant an extension of time for Plaintiffs-Appellants to file a fee petition in this Court.

Dated: May 6, 2014

Respectfully submitted,

/s/ Marc A. Goldman

Marc A. Goldman
Lindsay Eyler Kaplan
Marina K. Jenkins
JENNER & BLOCK, LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001-4412
(202) 639-6000
(202) 639-6066 (fax)
mgoldman@jenner.com
lkaplan@jenner.com
mjenkins@jenner.com

Catherine M. Flanagan
Michelle Kanter Cohen
PROJECT VOTE
805 15th St. N.W., Suite 250
Washington, DC 20005
(202) 546-4173
(202) 733-4762 (fax)
cflanagan@projectvote.org
mkantercohen@projectvote.org

John De Leon
Florida Bar No. 650390
LAW OFFICES OF CHAVEZ & DE LEON
5975 Sunset Drive, Suite 605
South Miami, FL 33143
(305) 740-5347
(305) 740-5348 (fax)
jdeleon@chavez-deleon.com

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of May 2014, a true and correct copy of the foregoing Contingent Motion for Transfer of Consideration of Attorneys' Fees was served on all counsel of record via CM/ECF.

Washington, D.C.
May 6, 2014

By: /s/ Marc A. Goldman

JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Telephone: 202 639-6000
Fax: 202 639-6066

Attorneys for Plaintiffs-Appellants