

Case Nos. 13-15263, 13-15267

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN DOE, *et al.*,

PLAINTIFFS-APPELLEES,

v.

DAPHNE PHUNG, *et al.*,

INTERVENORS-APPELLANTS,

and

KAMALA D. HARRIS, Attorney General of the State of California,

DEFENDANT-APPELLANT.

On Appeal from the United States District Court
for the Northern District of California
No. 3:12-cv-05713-THE
The Honorable Thelton E. Henderson, Judge

Plaintiffs-Appellees' motion to transfer consideration of fees on appeal to the district court or, in the alternative, for an extension of time to file for attorneys' fees on appeal (Ninth Circuit Rules 39-1.6(a) & 39-1.8)

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Counsel for Plaintiffs-Appellees JOHN DOE, et al.

In this civil-rights case, Defendant and Defendant-Intervenors appealed the district court's grant of a preliminary injunction. This Court affirmed in full. *Doe v. Harris*, 772 F.3d 563, 568 (9th Cir. 2014). Plaintiffs plan to move for attorneys' fees on appeal under 42 U.S.C. § 1988 because they successfully defended the injunction. *See Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1285 (9th Cir. 2004); *Larez v. City of Los Angeles*, 946 F.2d 630, 649 (9th Cir. 1991). Under Ninth Circuit Rule 39-1.6(a), a fees motion would be due in this Court on January 6, 2015, 14 days after the deadline for filing a petition for rehearing. *See* Order granting Defendant's and Intervenors' motions for extension of time until December 23, 2014, to request rehearing *en banc* (Dec. 1, 2014, E.C.F. No. 44).

Plaintiffs ask this Court to transfer consideration of attorneys' fees to the district court under Ninth Circuit Rule 39-1.8. Transfer is particularly appropriate in this preliminary-injunction appeal because the case will have to return to the district court for further proceedings anyway, proceedings that will likely include a request by Plaintiffs for attorneys' fees for their work in the trial court. Transferring Plaintiffs' motion for appellate fees to that court will allow the parties to resolve or litigate the question of fees for trial and appellate work together.

Plaintiffs have attempted to contact counsel for Defendant and Intervenors about this matter but, in part because of the holidays, have not been able to discuss it with them.

See Declaration of Michael T. Risher¹ ¶ 2-5. Specifically, after Plaintiffs learned that no request for rehearing *en banc* had been filed on December 23, they emailed all counsel on the Monday after the Christmas holiday – late in the afternoon of December 29 – asking them to stipulate to transfer consideration of fees on appeal to the district court. *See id.* ¶ 2. In the morning of December 30, Plaintiffs called opposing counsel and learned that counsel for the Defendant is in depositions and that counsel for Intervenors are on vacation. *See id.* ¶ 3-4. Plaintiffs are filing this motion now because lead counsel’s office will be closed on December 31 and January 1, and they wish to give the Court sufficient time to consider the motion before the January 6, 2015 deadline for filing a fees motion in this Court. *See id.* ¶ 6.

For these reasons, Plaintiffs-Appellees respectfully ask this Court to transfer consideration of fees on appeal to the district court or under Ninth Circuit Rule 39-1.8. In the alternative, Plaintiffs request a two-week extension to file a motion for attorneys’ fees in this Court under Rule 39-1.6(a), on account of the holidays and counsel’s vacations. *See* Risher Dec. ¶ 6.

DATED: December 30, 2014

Respectfully submitted,

By: /s/ Michael T. Risher
Michael T. Risher
Linda Lye
AMERICAN CIVIL LIBERTIES
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¹ To be more precise, the Declaration of Michael T. Risher in support Plaintiffs-Appellee’s motion to transfer consideration of fees on appeal to the district court or, in the alternative, for an extension of time to file for attorneys’ fees on appeal.

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*Counsel for Plaintiffs-Appellees JOHN
DOE, et al., on behalf of themselves and
others similarly situated*

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Declaration of Michael T. Risher in support of Plaintiffs-Appellees' motion to transfer consideration of fees on appeal to the district court or, in the alternative, for an extension of time to file for attorneys' fees on appeal

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Counsel for Plaintiffs-Appellees JOHN DOE, et al.

I, Michael T. Risher, declare as follows:

1. I am a Senior Staff Attorney with the American Civil Liberties Union Foundation of Northern California and counsel for Plaintiffs-Appellees in this action.

The following facts are based on my own personal knowledge.

2. On December 29, at 5:17 p.m., I sent an email to counsel for Defendant and Intervenor asking them to stipulate to having the question of Plaintiffs' entitlement to, and the amount of, fees, transferred to the district court.

3. On December 30, at 10:48 a.m., I called the office of Deputy Attorney General Robert Wilson, counsel for Defendant-Appellant, and learned that he is in depositions today; his assistant did not know whether he would be returning to the office. I left a message asking him to call me about this matter.

4. On December 30, at 10:56 a.m., I called the office of Margaret Prinzing and James Harrison, counsel for Intervenor, and learned that they are both on vacation.

5. I have yet to hear back from counsel for Defendant or Intervenor.

6. I was on vacation December 22-25. My office was closed December 24-25 and will be closed on December 31 and January 1. I am reliably informed and do believe that the other two lawyers from my office working on this matter – Ms. Lye and Mr. Conley – have been out of the office since December 23 and are not scheduled to return until January 5.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 30th day of December, 2014 in San Francisco, California.

/s/ Michael T. Risher

Michael T. Risher