Civil No. 20-2142

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Spirit Lake Tribe, on its own behalf and on behalf of its members; Dion Jackson; Kara Longie; Kim Twinn; Terry Yellow Fat; Leslie Peltier; Clark Peltier; Standing Rock Sioux Tribe, on its own behalf and on behalf of its members; Richard Brakebill; Della Merrick; Elvis Norquay, on behalf of himself; Ray Norquay, on behalf of himself; Lucille Vivier, on behalf of herself,

Plaintiff – Appellees,

Dorothy Herman,

Plaintiff,

v.

Alvin Jaeger, in his official capacity as the North Dakota Secretary of State,

Defendant – Appellant,

United States of America,

Defendant – Interested Party.

BRIEF OF DEFENDANT-APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Two separate lawsuits brought by Native American voters – the Brakebill case and the Spirit Lake case – challenged various aspects of North Dakota's election laws. The cases were consolidated when the parties resolved both suits with a single consent decree. The consent decree includes a provision whereby the plaintiffs waive all rights to recover attorney's fees and costs. Carved from this waiver, however, was a pending motion for attorney's fees and costs related to a preliminary injunction obtained in the Brakebill case on August 1, 2016.

The Brakebill plaintiffs did not move for fees related to the August 2016 injunction until April 17, 2018. Secretary of State Jaeger opposed the motion and argued it should be denied as untimely pursuant to Rule 54 of the Federal Rules of Civil Procedure, which provides that a motion for fees must be brought within fourteen days after the entry of "any order from which an appeal lies," including an order granting a preliminary injunction. See 28 U.S.C. § 1292(a)(1). Following entry of the consent decree, the district court rejected Secretary Jaeger's argument that the fee request was untimely and awarded $452,983.76 in fees and costs for the first seven months of litigation in the Brakebill case. This appeal challenges that decision, as well as the district court's alternative conclusion that public policy and excusable neglect justified disregarding the untimeliness of the fee request.

Secretary Jaeger respectfully requests oral argument, and suggests that fifteen minutes would be sufficient to address the issues raised in this appeal.

CORPORATE DISCLOSURE STATEMENT

Appellant, Alvin Jaeger, is sued in his official capacity as the North Dakota Secretary of State. He is a government official, not a corporation, and therefore no corporate disclosure statement is required pursuant to Fed. R. App. P. 26.1 or 8th Cir. R. 26.1A.

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JURISDICTIONAL STATEMENT

The district court entered its order awarding fees and costs on May 7, 2020. Addendum at 1-12. The Clerk's Judgment awarding fees and costs in the amount of $452,983.76 was also entered on May 7, 2020. Appellant's App. at 244. Secretary Jaeger timely appealed the order and judgment on June 5, 2020. See Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction to review the order and judgment under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Whether the district court erred in concluding the Brakebill plaintiffs' motion for attorney fees was brought in a timely manner under Rule 54 of the Federal Rules of Civil Procedure.

Most apposite authority:

Fed. R. Civ. P. 54

Nat'l Basketball Ass'n v. Minnesota Prof'l Basketball, Ltd. P'ship, 56 F.3d 866 (8th Cir. 1995)

II. Whether public policy or excusable neglect justified the district court's disregard of the untimeliness of the fee request.

Most apposite authority:

Landgraf v. USI Film Products, 511 U.S. 244 (1994)

Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001)

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STATEMENT OF CASE

The Brakebill lawsuit challenged multiple aspects of North Dakota's election laws. It spanned two election cycles, with preliminary injunctions entered by the district court prior to both the 2016 and 2018 elections. The second preliminary injunction was the subject of litigation before this Court and the Supreme Court. Secretary Jaeger successfully prevented that injunction from impacting the 2018 general election. See Brakebill v. Jaeger, 905 F.3d 553, 561 (8th Cir. 2018) (Brakebill I) (granting a stay of the second injunction prior to the November 2018 general election); Brakebill v. Jaeger, 139 S. Ct. 10 (2018) (denying the plaintiffs' motion to vacate this Court's stay). Ultimately, this Court reversed the district court's second preliminary injunction order, concluding that the Brakebill plaintiffs were unlikely to succeed on the merits of their facial constitutional challenges to North Dakota's election laws and that a statewide injunction was inappropriate with respect to any potential as-applied challenges. See Brakebill v. Jaeger, 932 F.3d 671, 677-80 (8th Cir. 2019) (Brakebill II).

The Brakebill suit eventually concluded in the district court with a consent decree that changed ***none*** of North Dakota's election statutes, but contained provisions by which the Secretary agreed to assist the Brakebill plaintiffs (and the plaintiffs in the consolidated Spirit Lake case) in complying with North Dakota's election law requirements. Appellant's App. at 223-31. As part of the consent decree, all plaintiffs waived the right to claim attorney fees as prevailing parties. Id. at 226. But the Brakebill plaintiffs preserved the right to have the district court determine a pending-at-that-time motion for fees resulting from the first few months

of litigation that occurred prior to the entry of the first preliminary injunction on August 1, 2016. Id.

After the appealable order entered on August 1, 2016, the Brakebill plaintiffs did not file a request for fees within the fourteen-day deadline set forth in Rule 54 of the Federal Rules of Civil Procedure. Nor did they ask the district court for an order allowing them to bring their fee request at a later time, as permitted by Rule 54. Without notice of a fee request itself, or even notice that the Brakebill plaintiffs would seek court permission to bring a fee request at a later time (let alone a request that proved to be in excess of $1.132 million), Secretary Jaeger chose not to appeal the first preliminary injunction order. Despite his belief that the current election laws were constitutional, he pursued a legislative change that satisfied the district court's call for a "fail-safe" provision to protect voter's rights after North Dakota chose to remove self-authenticating affidavits from its unique non-registration election system.[1]

In 2017, the legislative assembly passed HB 1369 that contained a "fail-safe" for voters who tried to vote on election day without the necessary documents to establish eligibility to vote. See Addendum at 13-22. Instead of adopting the self-authenticating affidavits required by the district court's first injunction (the veracity of which could not be determined before votes had already been counted) North

[1] In the first appeal to this Court, Secretary Jaeger explained in detail why self-authenticating affidavits are incompatible with North Dakota's unique non-registration system, and why the state legislature chose to remove such affidavits from the state's election system after the 2012 general election (which included a United States Senate race decided by just 2,936 votes) in which thousands of unverifiable votes were cast through the use of self-authenticating affidavits. Those background facts are not directly relevant in this appeal, but can be found in Secretary Jaeger's principal brief in the first appeal, Civil No. 18-1725.

Dakota permits individuals who lack valid identification to mark a ballot that is set aside until the individual's qualifications as an elector can be verified. See N.D. Cent. Code § 16.1-01-04.1(5) (codifying HB 1369). This legislative change mooted the Brakebill plaintiffs' claim about North Dakota's decision to remove self-authenticating affidavits from its unique non-registration system. Based on the change in law, Secretary Jaeger later brought a motion to dissolve the first preliminary injunction. Appellant's App. at 118. In an order entered on April 3, 2018, the district court, in relevant part, granted Secretary Jaeger's request to dissolve the first preliminary injunction. Id. at 135.

Thirteen days later, on April 16, 2018, over a year-and-a-half after entry of the August 2016 preliminary injunction order, the Brakebill plaintiffs filed a motion for an extension of time to file a fee request related to that August 2016 order. See id. at 136-37. The request for a "two week extension until May 1, 2018 . . . related to the Plaintiffs' first Motion for Preliminary Injunction" reflects the Brakebill plaintiffs' belief that their fee request was not due until April 17, 2018; in other words, they believed the event that triggered Rule 54's fourteen-day deadline was the order *dissolving* the first preliminary injunction entered on April 3, 2018, not the order *granting* it on August 1, 2016. See id. at 141 (acknowledging the plaintiffs' understanding that Rule 54 defines a "judgment" as "any order from which an appeal lies," but referring to the district court order that "mooted the first injunction on April 3, 2018" as the order that triggered the deadline to file a fee request for the first preliminary injunction).

On the morning of April 17, 2018, the district court entered a text order finding

the request for an extension "moot," which normally indicates a court's belief that it cannot grant a party their requested relief. Id. at 15 (Dist. Ct. Doc. No. 106).[2] In this case, for example, finding the request for an extension "moot" would be consistent with the fact that Rule 54's deadline had long since passed as to the first preliminary injunction order.

That same day, on April 17, 2018, after their request for an extension was found "moot," the Brakebill plaintiffs filed a motion for attorney's fees and expenses related to the first preliminary injunction obtained in August 2016. Id. at 141-44. The Brakebill plaintiffs asked for $1.132 million in fees and expenses that they claimed they had incurred from litigation filed in January 2016, and which had consisted merely of (1) preparing the complaint, (2) defending against an initial motion to dismiss, and (3) requesting a preliminary injunction. Dist. Ct. Doc. No. 107-11 at 19. By April 2018, the time for Secretary Jaeger to appeal the first preliminary injunction had long expired; he could not undo his decision to forego that appeal.

Secretary Jaeger opposed the fee request on the grounds that it was untimely, invoking the plain and unambiguous language of Rule 54. See Dist. Ct. Doc. Nos. 108, 113. In defending their request, the Brakebill plaintiffs again took the position that the event that triggered their fourteen-day deadline was the April 2018 order *dissolving* the first injunction (an order not appealable by Secretary Jaeger on that

[2] Significantly, the Brakebill plaintiffs' extension request had alternatively asked for "an order extending the time to determine fees and costs until the conclusion of the case." Appellant's App. at 136. The district court's text order did not distinguish between the alternative extension requests, and simply found the entire request "moot." Id. at 15 (Dist. Ct. Doc. No. 106).

ground) rather than the August 2016 order *granting* the first injunction (an order Secretary Jaeger certainly may have appealed had he been given notice the plaintiffs would claim over $1.132 million in fees and expenses resulting from it). Appellant's App. at 141-42; see also Dist. Ct. Doc. No. 107-11 at 5 ("Because the first preliminary injunction was mooted [by the district court's order of April 3, 2018], as the prevailing party, Plaintiffs respectfully move the Court for an award of attorneys' fees and costs as related to the first preliminary injunction."); Dist. Ct. Doc. No. 111 at 5 ("Thus, Plaintiffs could not have made their Motion until after this Court's Order of April 3, 2018.").

The fee request, and the issue of its timeliness, remained pending before the district court through the remainder of the litigation. The fee request was still pending when the parties resolved both the Brakebill case and a second lawsuit that had been filed prior to the November 2018 general election – the Spirit Lake case – with a single consent decree. Appellant's App. at 223-31. All plaintiffs waived their right to claim attorney's fees in the consent decree, but carved from this general waiver was the right to have the district court address the pending fee request related to the Brakebill plaintiffs' first preliminary injunction order. Id. at 226.

On May 7, 2020, the district court entered an order addressing the fee request. Addendum at 1-12. As to the issue of timeliness, the district court found that the plaintiffs' motion was timely, stating it "would be illogical to require a motion for attorney's fees to be filed before a final judgment is entered." Id. at 8. In reaching this conclusion, the district court referenced "two Courts in the Eighth Circuit Court of Appeals [that] have addressed this issue and rejected the idea that Rule 54 requires

a motion for attorney's fees to be filed 14 days after the filing of an appealable order." Id. at 6-7 (citing Planned Parenthood Minn., N.D. v. Daugaard, 946 F. Supp. 2d 913 (D.S.D. 2013), and Consol. Paving, Inc. v. Cty. of Peoria, Ill., No. 10-CV-1045, 2013 WL 916212 (C.D. Ill. Mar. 8, 2013)).

Alternatively, the district court determined that "even if the motion were arguably considered to be untimely, the Court finds that public policy and 'excusable neglect' provide a basis for reaching the same result." Id. at 8. Ultimately, the district court reduced the amount of fees and expenses requested by the Brakebill plaintiffs by 60% and awarded $452,983.76. Id. at 12. This timely appeal followed.

SUMMARY OF ARGUMENT

The event that triggers an obligation to file a fee request under Rule 54 of the Federal Rules of Civil Procedure is "any order from which an appeal lies." Fed. R. Civ. P. 54(a). By its express terms, the Rule applies to more than just "final" judgments. The obligation to request fees within fourteen days of an appealable order is a mandatory one. See id. 54(d)(2)(B) ("[T]he motion *must* . . . be filed no later than 14 days after entry" of the order) (emphasis added). The purpose of the deadline "is to assure that the opposing party is informed of the claim before the time for appeal has elapsed." Id. Advisory Committee's Note (discussing 1993 Amendment). The district court's August 1, 2016, order granting a preliminary injunction was an appealable order. 28 U.S.C. § 1292(a)(1).

The language of Rule 54, as well as Section 1292(a)(1), is straightforward and unambiguous. Neither this Court, nor the Supreme Court, has ever held that a party who obtains an appealable preliminary injunction order is excused from complying

with Rule 54's mandatory deadline on the ground that a fee request at that time is premature. In fact, there are multiple instances under the law where parties must take action to preserve an inchoate right. The Advisory Committee's notes about the purpose of Rule 54's deadline show that a fee request's potential prematurity was contemplated in the overall structure of the Rule.

For instance, Rule 54 allows a party to ask for permission to file a motion for fees at a later time. See Fed. R. Civ. P. 54(d)(2)(B) (providing that the deadline can be changed if "a court order provides otherwise"). But the Brakebill plaintiffs did not file a timely request for fees within fourteen days of the August 1, 2016, order. Nor did they utilize Rule 54's savings clause and timely request a court order permitting them to file the request at a later date. Instead, the Brakebill plaintiffs unilaterally determined that the triggering event for their fee request was an order entered on April 3, 2018. The April 2018 order dissolved the August 2016 preliminary injunction in Secretary Jaeger's favor, and thus was not appealable by him on that ground.

In the absence of a timely fee request related to the August 2016 appealable order, Secretary Jaeger had no notice of a fee request, or its amount (over $1.132 million) arising from the limited proceedings that occurred in the first seven months of litigation. In the absence of such notice, Secretary Jaeger sought a legislative revision to North Dakota's election laws in lieu of appealing the first preliminary injunction. The decision to revise the election laws, rather than appeal the injunction, mooted the Brakebill plaintiffs' claims under the prior law and materially altered the parties' legal relationship. Secretary Jaeger was therefore prejudiced by

the Brakebill plaintiffs' subsequent untimely motion for fees.

Parties, like Secretary Jaeger, who are on the losing side of a preliminary injunction order have a right to rely upon the express language of Rule 54, the Rule's commentary, and the straightforward statutory provisions of 28 U.S.C. § 1292. Together those provisions set forth a mandatory fourteen-day deadline for a fee request following the entry of an appealable preliminary injunction order. The purpose of the deadline is to give an adversary notice of a fee request before his time to appeal has expired. The Brakebill plaintiffs' dual failure to file a fee request within the deadline or to timely ask for permission to file the request at a later date, coupled with the subsequent untimely motion for fees brought over a year-and-a-half later, prejudiced Secretary Jaeger. Secretary Jaeger invoked the mandatory deadline when the Brakebill plaintiffs filed an untimely fee request. The district court was thus obligated to apply this mandatory deadline. See, e.g., Eberhart v. United States, 546 U.S. 12, 19 (2005) ("These claim-processing rules thus assure relief to a party properly raising them[.]").

Finally, there is no evidence of excusable neglect in the record to justify the district court's disregard of Rule 54's mandatory deadline. Indeed, the record reflects the Brakebill plaintiffs' understanding that Rule 54's deadline is triggered by "any order from which an appeal lies." Their unilateral and incorrect determination that they were excused from complying with this deadline based on its prematurity does not constitute excusable neglect. And contrary to the district court's observation that public policy excused the failure to comply with the mandatory deadline, public policy and "[e]lementary considerations of fairness"

support a party's right to rely upon the express language of Rule 54, its accompanying commentary, and conform his conduct accordingly. See Landgraf v. USI Film Products, 511 U.S. 244, 265–66 (1994). In addition, the district court's misinterpretation of Rule 54 contravenes the same public policy considerations that led the Supreme Court to reject a "catalyst theory" for recovery of fees because it discourages government entities from improving the law even when their challenged conduct may not violate the law.

Accordingly, this Court should conclude that the fee request was untimely, reverse the district court, and vacate the judgment awarding fees and costs.

ARGUMENT

I. Standards of Review.

This Court reviews the district court's interpretation of the Federal Rules of Civil Procedure de novo. Kuelbs v. Hill, 615 F.3d 1037, 1041 (8th Cir. 2010). A district court's determination of excusable neglect is reviewed for an abuse of discretion. United States v. Boesen, 599 F.3d 874, 879 (8th Cir. 2010). Questions of public policy are reviewed de novo. St. Paul Fire & Marine Ins. Co. v. F.D.I.C., 968 F.2d 695, 702 (8th Cir. 1992).

II. The fee request was untimely under Rule 54 of the Federal Rules of Civil Procedure.

Rule 54(d)(2) of the Federal Rules of Civil Procedure provides that a motion for attorney's fees and related nontaxable expenses "***must*** . . be filed no later than 14 days after the entry of judgment[.]" (Emphasis added). Rule 54(a) clearly defines a "judgment" as "any order from which an appeal lies." The order granting a preliminary judgment entered on August 1, 2016, was appealable. See 28 U.S.C. §

1292(a) ("[T]he courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts . . . granting . . . injunctions[.]").

The fact that orders granting preliminary injunctions are considered judgments for purposes of Rule 54 because they are appealable is beyond debate in this Court and others. "Federal Rule of Civil Procedure 54(a) . . . defines 'judgment' for use in the Federal Rules as 'a decree and any order from which an appeal lies. This definition encompasses interlocutory rulings that are appealable as of right, like preliminary injunctions, in addition to final judgments on the merits." Nat'l Basketball Ass'n v. Minnesota Prof'l Basketball, Ltd. P'ship, 56 F.3d 866, 872 (8th Cir. 1995) (citing 17 Charles A. Wright et al., Federal Practice and Procedure § 4426, at 550 (2d ed. 1988)); see also Credit Suisse First Bos. Corp. v. Grunwald, 400 F.3d 1119, 1124 n.6 (9th Cir. 2005); Malhan v. Sec'y United States Dep't of State, 938 F.3d 453, 459 (3d Cir. 2019); Coventry Capital US LLC v. EEA Life Settlements, Inc., 357 F. Supp. 3d 294, 297 (S.D.N.Y. 2019); Teal v. Coffee Cty. Bank, Nos. 4:13-CV-19, 4:13-CV-51, 2013 WL 12043473, at *1 (E.D. Tenn. Oct. 3, 2013).

Rule 54's mandatory fourteen-day deadline – tied directly to all appealable orders – serves an important purpose. It gives the party contemplating an appeal the right to have notice of a potential request for fees (and its amount) before the time for appeal has expired. See Fed. R. Civ. P. 54 Advisory Committee's Note (discussing 1993 Amendment) ("One purpose of this provision [i.e., the 14 day deadline] is to assure that the opposing party is informed of the claim before the time for appeal has elapsed."). The deadline "also enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of

a dispute over fees to proceed at that same as review on the merits of the case." Id.

Moreover:

> The rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees. This material must of course be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. ***What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees, and the amount of such fees (or a fair estimate)*** [before the time for appeal has elapsed].

Id. (emphasis added).

The language of Rule 54 is straightforward and unambiguous, even without the accompanying advisory committee notes explaining the specific purpose of the deadline. But in the district court, the Brakebill plaintiffs unilaterally decided that the Supreme Court's decision in Sole v. Wyner, and an observation made there that a fee request immediately following the grant of a preliminary injunction is "premature," 551 U.S. 74, 84 (2007), permitted them to disregard the mandatory obligation to give their adversary notice that they would be claiming fees tied to an appealable order. Sole, however, did not involve an interpretation of Rule 54. Neither did Sole hold that a party is excused from complying with Rule 54's deadline on the grounds that a fee request may not be fully ripe for consideration at the time the Rule requires the motion to be filed. The Brakebill plaintiffs are not, on their own, entitled to extrapolate Sole's observation into a holding that abrogates Rule 54's express deadline, only a court can do that. Neither the Supreme Court, nor the Eighth Circuit, has ever done so.

Sole's observation about the prematurity of a fee request following a preliminary injunction order can be reconciled with Rule 54's unambiguous deadline. If the plaintiffs had complied with Rule 54 and preserved their right to

make a fee request, the district court could have simply held the motion in abeyance and reserved ruling on the motion until the fee request was ripe. See Fed. R. Civ. P. 54 Advisory Committee's Note (discussing 1993 Amendment) (setting forth the multiple options a district court can take following a timely motion for fees, including (1) ruling on the claim, (2) deferring a ruling, (3) denying the motion without prejudice, or (4) directing a new period for filing under subdivision (d)(2)(B)). The multiple options set forth in the Advisory Committee notes contemplate situations where a court might have before it a premature claim; hence options that include waiting to rule on the claim. A losing party is nevertheless entitled to notice of a potential fee request (and its amount) whenever there is an appealable order, so it can make an informed decision on whether to appeal, regardless of any potential prematurity.

Litigants are frequently required to comply with deadlines set forth in rules or statutes in order to preserve future rights that may not be ripe. For example, in Bauknight v. Monroe County, Fla., 446 F.3d 1327 (11th Cir. 2006), Monroe County removed a state court action to federal court within the time period required by the removal statutes on the grounds that the action involved federal questions under 28 U.S.C. §§ 1441 and 1443. The plaintiffs filed a motion to remand the case claiming the removal was improper because the federal questions (their federal takings claims) "were not ripe because they had not exhausted their state court remedies as required by Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)." 446 F.3d at 1328. The plaintiffs further argued that they were entitled to an award of fees and costs because the County's

action in removing the case before the federal questions were ripe was objectively unreasonable. The Eleventh Circuit disagreed, holding that the County's removal of the suit within § 1446(b)'s thirty-day deadline in an effort to *preserve* its right to a federal forum was reasonable despite the fact that the federal questions the County sought to remove were not yet ripe. Id. at 1331-32.

Under the bankruptcy rules, a creditor must file a timely proof of claim prior to the claims bar date to preserve its rights against a debtor even though the creditor's claim is "contingent, unliquidated and unmatured" when the rules require the proof of claim to be filed. In re Farmland Indus., Inc., 318 B.R. 159, 165 (Bankr. W.D. Mo. 2004). "The term 'claim' is broad enough to encompass an unliquidated, contingent right to payment under a prepetition indemnification agreement executed by the debtor, even though the triggering contingency does not occur until *after* the filing of the petition under the Bankruptcy Code." Id.

In the litigation addressed by the Supreme Court in National Ass'n of Manufacturers v. Department of Defense, __ U.S. __, 138 S.Ct. 617 (2018), North Dakota and other states had to file a protective petition in the Eighth Circuit to comply with the 120-day deadline in 33 U.S.C. § 1369(b) in order to preserve the potential right to pursue a claim in the circuit courts in the event jurisdiction was found lacking in the district courts. See State of North Dakota, et al. v. United States Envtl. Prot. Agency, et al., No. 15-2552 (8th Cir. July 17, 2015).

These are just three examples among many where the law may require a party to comply with a deadline to preserve a premature or future inchoate right. Similarly, there is no reason the plaintiffs could not have complied with Rule 54's mandatory

deadline to preserve their right to claim fees, and thereby satisfy the Rule's important purpose of giving Secretary Jaeger notice of a potential fee claim before his time for appeal expired.

The mandatory nature of the deadline – given its important purpose of providing notice to an adversary contemplating an appeal – is further supported by the fact that the Rule provides a mechanism to address potentially premature fee requests. The Rule allows a party to ask a court to excuse it from complying with the deadline. See Fed. R. Civ. P. 54(d)(2)(B) (emphasizing the mandatory nature of the deadline unless a "court order provides otherwise"). Other parties have availed themselves of this mechanism, and there is no reason the Brakebill plaintiffs should not have done so. See Cathedral Art Metal Co. v. Divinity Boutique, LLC, No. 1:18-CV-141-WSD, 2018 WL 2356181, at *4 (N.D. Ga. May 24, 2018) (involving a plaintiff's motion to stay the deadline to file a fee request following the issuance of a preliminary injunction, and a district court entering an order directing a new period for filing under subdivision (d)(2)(B)).

If plaintiffs had requested a court order excusing them from complying with the deadline, Secretary Jaeger would at least have been "alert[ed] . . . that there is a claim for fees" before the time for appeal expired. Fed. R. Civ. P. 54 Advisory Committee's Note (discussing 1993 Amendment). In turn, he could have requested the district court, at a minimum, to require the plaintiffs to disclose "the amount of such fees (or a fair estimate)" because the "rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees," but clearly contemplates an adversary having notice of a specific fee request prior to the

time for appeal elapsing. Id.

The Brakebill plaintiffs did neither of the things required to fulfill the notice provisions/purpose of Rule 54. They did not file a request for fees within the fourteen-day deadline. Nor did they request a court order permitting otherwise.

Parties on the losing end of a preliminary injunction order have a right to rely upon the fact that Sole does not address Rule 54's mandatory deadline, and that neither the Supreme Court nor the Eighth Circuit have extended Sole's observation about prematurity into an actual holding that abrogates Rule 54's express provisions. The Brakebill plaintiffs were not permitted to unilaterally eviscerate the important notice-related purpose of the Rule clearly set out in the Advisory Committee's notes, and thereby deprive Secretary Jaeger of the notice contemplated by the Rule. See Landgraf, 511 U.S. at 265–66 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. . . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.").

In the absence of a timely request for fees, Secretary Jaeger pursued a legislative change by which he sought to improve North Dakota's election laws in lieu of appealing the district court's preliminary injunction order, despite his belief that the existing laws were constitutional. In the district court, the Brakebill plaintiffs correctly observed that the decision to revise the election laws, rather than appeal the court's preliminary injunction order, mooted the plaintiffs' claim

regarding self-authenticating affidavits under the prior law and materially altered the parties' legal relationship. See, e.g., Rogers Grp., Inc. v. City of Fayetteville, Ark., 683 F.3d 903, 910-11 (8th Cir. 2012). But that is precisely why Secretary Jaeger was prejudiced by the untimely fee request, and the district court's subsequent disregard of Rule 54's express requirements. Because the choice employed by Secretary Jaeger materially altered the legal relationship between the parties, he may have pursued a different strategy had he been given timely notice of a fee request for over $1.132 million. He could not undo his decision when the Brakebill plaintiffs finally gave untimely notice of a fee request over a year-and-a-half-later.

The district court relied upon two district court decisions that "rejected the idea that Rule 54 requires a motion for attorney's fees to be filed 14 days after the filing of an appealable order." Addendum at 7. Yet that is exactly what Rule 54 requires, and the logical reasons for the deadline are laid out in the Advisory Committee notes. District courts are bound to follow the Rules of Civil Procedure, just as are parties, even to the point where the Supreme Court will exercise its supervisory power to issue a writ of mandamus if "a district judge display[s] a persistent disregard of the Rules of Civil Procedure promulgated by this Court." Will v. United States, 389 U.S. 90, 96 (1967); see also La Buy v. Howes Leather Co., 352 U.S. 249, 251, 259-60 (1957) (affirming a circuit court's issuance of a writ of mandamus to correct a district judge's misapplication of Rule 53(b) of the Federal Rules of Civil Procedure).

In both decisions cited by the district court, the district court judges simply ignored the plain language of Rule 54 providing that the fourteen-day deadline

applies to "any order from which an appeal lies," and adopted an approach inconsistent with the express provisions of Rule 54, with little explanation and no consideration of the purpose behind the deadline – an adversary's right to notice of a fee request before the time for appeal has expired. See Daugaard, 946 F. Supp. 2d at 922; Consolidated Paving, 2013 WL 916212, at *2. Neither decision is persuasive, or controlling, in this case.

The district court also suggested that the "local rules . . . permit the filing of a motion for attorney's fees until 14 days after *final* judgment is entered." Addendum at 4 (emphasis added). Incorrect. The Local Rule referenced by the district court was Rule 54.1. See id. (where the district court referred to its "citing the local rules" in its text order entered on April 17, 2018; Appellant's App. at 15 (Dist. Ct. Doc. No. 106) (same text order referencing "D.N.D. Civ. L.R. 54.1"). The word "final" is notably absent from Local Rule 54.1. On the contrary, the local rule merely states that a "party seeking an award of costs must serve and file a motion for costs no later than fourteen (14) days after entry of judgment," not after a "final" judgment. Addendum at 23. And Rule 54 unequivocally defines a judgment "as used in these rules [to be] any order from which an appeal lies." Fed. R. Civ. P. 54(a).

Significantly, "[a] local rule must be consistent with" the federal rules themselves. Fed. R. Civ. P. 83. "Fed.R.Civ.P. 83 . . . provides that the district courts may promulgate procedural rules so long as they are not inconsistent with the Federal Rules of Civil Procedure and do not create or affect substantive rights." Hawes v. Club Ecuestre El Comandante, 535 F.2d 140, 143 (1st Cir. 1976); see also Porter v.

Fox, 99 F.3d 271, 274 (8th Cir. 1996) (concluding that a local rule that "do[es] not comply with the Federal Rules . . . cannot stand"); Holloway v. Lockhart, 813 F.2d 874, 880 (8th Cir. 1987) (noting that both Fed. R. Civ. P. 83 and 28 U.S.C. § 2071 "expressly state that local rules may not conflict with the Federal Rules of Civil Procedure" and thus holding invalid a local rule that conflicted with Rule 34(b) of the Federal Rules of Civil Procedure).

In other words, the "court order provid[ing] otherwise" contemplated by Rule 54 would be an order entered in a specific case tailored to the specific circumstances involved therein, not a standing local rule that impermissibly and permanently contravenes Rule 54 itself.[3]

III. Neither public policy nor excusable neglect justified the district court's disregard of the untimely nature of the fee request.

The district court abused its discretion when it concluded that excusable neglect justified the Brakebill plaintiffs' untimely fee request. For starters, the district court did not analyze any of the relevant factors before it reached this conclusion in summary fashion. The four factors it should have considered are: (1) the danger of prejudice to Secretary Jaeger; (2) the length of the delay and its

[3] The district court also stated the Brakebill plaintiffs "[m]isconstru[ed] the Court's order" that cited Local Rule 54.1 by moving for an award of fees on April 17, 2018, instead of waiting until entry of a final judgment. Addendum at 4. But the district court clearly stated the request for an extension was "moot," not premature (and the request alternatively asked for an extension until entry of final judgment in any event). Mootness and prematurity are essentially opposites. An issue is moot when the operative event has already occurred, not when it has not yet occurred. See, e.g., Hernandez v. Holder, 760 F.3d 855, 862 (8th Cir. 2014) ("An issue is moot when it becomes 'impossible for a court to grant any effectual relief whatever to the prevailing party.'") (quoting Chafin v. Chafin, 568 U.S. 165, 172 (2013)). Indeed, the district court's ultimate determination that the fee request was timely clearly conflicts with its initial determination that the extension request was already "moot," i.e., that the court could not grant any effectual relief to the plaintiffs.

potential impact on the case; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993).

Excusable neglect "does not include ignorance or carelessness on the part of an attorney." Noah v. Bond Cold Storage, 408 F.3d 1043, 1045 (8th Cir. 2005) (citing Hunt v. City of Minneapolis, 203 F.3d 524, 528 n. 3 (8th Cir. 2000); Hoffman v. Celebrezze, 405 F.2d 833, 835 (8th Cir. 1969)). "Neither a mistake of law nor the failure to follow the clear dictates of a court rule constitutes excusable neglect." Id. (citing Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 404 (8th Cir. 2000)). Here, the dictates of Rule 54 could not be more clear. In fact, counsel for the Brakebill plaintiffs acknowledged their understanding of the requirements of the Rule when they filed their request for an extension. See Appellant's App. at 141 (acknowledging an understanding that Rule 54 defines a "judgment" as "any order from which an appeal lies"). Counsel simply made a unilateral determination that a fee request's potential prematurity excuses a party's obligation to give their adversary proper notice in compliance with the dictates of Rule 54, notwithstanding the lack of a controlling court opinion holding so. This does not constitute excusable neglect.

More significantly, the district court never addressed the prejudice the untimely fee request had on Secretary Jaeger. Despite his belief that the current laws were constitutional, Secretary Jaeger chose to improve the law by seeking a legislative change. Had he been given timely notice of a fee request of over $1.132

million, he clearly would have chosen a different path and appealed the first preliminary injunction. Given this clear prejudice to Secretary Jaeger, the district court abused its discretion when it disregarded the untimely nature of the fee request based on excusable neglect.

Secretary Jaeger invoked the mandatory deadline set forth in Rule 54 immediately when the Brakebill plaintiffs filed their untimely request. See Dist. Ct. Doc. No. 108. A party who invokes a mandatory deadline should be assured the relief it guarantees. Eberhart, 546 U.S. at 19. In United States v. Foster, 623 F.3d 605 (8th Cir. 2010), this Court addressed whether excusable neglect justified a criminal defendant's failure to meet a mandatory but non-jurisdictional deadline for filing a motion for a new trial. Id. at 608 (citing Eberhart, 546 U.S. at 13, 19). Because the government invoked the deadline in response to the motion, this Court held the district court correctly rejected the defendant's argument that his delay should be excused for neglect. Id. This Court should similarly conclude that excusable neglect did not justify the district court's disregard of Rule 54's mandatory deadline in this case.

The district court also failed to engage in any analysis when it determined in conclusory fashion that public policy permitted it to disregard the untimeliness of the fee request at Secretary Jaeger's expense. To the contrary, the district court's disregard of the mandatory deadline violated important public policies. Secretary Jaeger had a right to rely upon the clear mandate in Rule 54 that entitled him to notice of a fee request within fourteen days of the August 1, 2016, order. The Advisory Committee's notes show the committee contemplated the potential

prematurity of fee requests, but did not exempt preliminary injunction orders from the Rule's requirements, instead providing a mechanism that allowed a party to request a court order excusing it from the deadline, and giving the courts options to defer a ruling.

Given the Rule's clear mandate, and the absence of any controlling court decision exempting preliminary injunction orders from its application, parties like Secretary Jaeger should be entitled to rely upon the law and conform their conduct accordingly pursuant to "[e]lementary considerations of fairness." Landgraf, 511 U.S. at 265. It would be unfair to change the rules midstream at Secretary Jaeger's expense, and expose the State of North Dakota to a judgment approaching a half million dollars when the purpose of Rule 54's deadline was to give Secretary Jaeger notice before his time to appeal the first preliminary injunction order had expired.

In addition, similar to the position taken by the petitioners in Buckhannon, the district court's approach contravenes public policy by "discount[ing] the disincentive that the 'catalyst theory' may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal." Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 608 (2001). In the absence of notice of a timely request for fees, Secretary Jaeger chose to improve North Dakota's election system notwithstanding his belief that the existing statutory system was already constitutional.

The Supreme Court has stated that "[a] request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The Court has "accordingly avoided an interpretation of the fee-shifting statutes that

would have 'spawn[ed] a second litigation of significant dimension.'" Buckhannon, 532 U.S. at 609 (quoting Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791 (1989)). Similarly, as a matter of public policy the courts should avoid an interpretation of Rule 54 that is contrary to its plain and unambiguous terms that will spawn litigation of significant dimension over fees. Yet that is exactly what is occurring here. Secretary Jaeger was entitled to rely upon Rule 54's mandatory provisions, and conduct himself accordingly, without facing a second wave of litigation of significant dimension over fees when blindsided by a large and untimely request made over a year-and-a-half late.

CONCLUSION

Appellant Secretary Jaeger respectfully requests the Court to apply Rule 54's plain and unambiguous language to conclude that that Brakebill plaintiffs' fee request was untimely, and reverse the district court's order and judgment awarding fees.

Date this 14th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

Civil No. 20-2142

The undersigned certifies pursuant to Fed. R. App. P. 32(g) that the text of Brief of Defendant-Appellant contains 6,629 words.

This request has been prepared in a proportionally spaced typeface using Word 2016 word processing software in Times New Roman 14 point font and has also been scanned for viruses and is virus free.

Dated this 14th day of August, 2020.

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