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.

REPLY BRIEF OF DEFENDANT-APPELLANT

Wayne Stenehjem
Attorney General
State of North Dakota

By: James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email jnicolai@nd.gov

Attorneys for Defendant-Appellant.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

LAW AND ARGUMENT

I. The fee request was untimely.

The appellees' two primary arguments on timeliness appear to be that a "holistic" reading of Rule 54 limits its application to final judgments, and that the triggering event for its fourteen-day deadline is a determination of prevailing party status. The appellees' "holistic" reading actually requires the Court to rewrite the Rule in a way that ignores its plain language, which clearly states one type of "judgment" that triggers the deadline is "any order from which an appeal lies." Fed. R. Civ. P. 54(a). And the view that prevailing party status must be conclusively determined before a party can make a fee request – or even before just a timely request to extend the deadline can be made that will give an adversary notice – has been implicitly rejected by this Court when considering Rule 54's "default rule" that requires fee requests to be filed within fourteen days of a "judgment" unless a court provides otherwise. The Court should reverse the district court's determination that the appellees' fee request was timely.

A. Appealable orders trigger Rule 54's deadline, not a determination of prevailing party status.

Appellees contend Rule 54(d)(2)(B)(ii) requires prevailing party status to be conclusively determined before a party can file a fee request so that the statute or rule entitling the requesting party to relief can be identified. See Appellees' Br. at 8-9, 15-19. Nothing in Rule 54, however, links the fourteen-day deadline to a determination of prevailing party status. Appellees could have satisfied Rule 54(d)(2)(B)(ii)'s requirement to specify the "statute, rule, or other grounds entitling

the movant to an award" by citing 42 U.S.C. § 1988, which was referred to in their Complaint's prayer for relief, the filing they now contend satisfied Rule 54's purpose of giving notice of the fee request to the Secretary. See Appellees' Br. at 10, 40.

In many instances the issue of prevailing party status is contested, and thus determined only as part of and after the fee request itself is filed. See, e.g., Rogers Grp., Inc. v. City of Fayetteville, Ark., 683 F.3d 903, 907-08 (8th Cir. 2012); St. Louis Effort for AIDS v. Lindley-Myers, 877 F.3d 1069, 1071 (8th Cir. 2017); Libertarian Party of Ark. v. Martin, 876 F.3d 948, 950 (8th Cir. 2017). The appellees' theory, taken to its logical conclusion, would preclude a party who has not yet been determined the prevailing party from complying with Rule 54(d)(2)(B)(ii) even after a final judgment because of an alleged inability *even at that time* to specify the statute, rule, or other ground entitling them to an award.

Rule 54's obligation to file a fee request within fourteen days is linked to "any order from which an appeal lies," Fed. R. Civ. P. 54(a), not to an event that ultimately determines prevailing party status. In Paris School District v. Harter, the plaintiff argued she should be excused from complying with the court's fourteen-day deadline for filing her fee request on the grounds that the request was not ripe until her fees and costs had been awarded in her underlying IDEA due process hearing "because only then would she be a 'prevailing party' entitled to fees for the [federal] district court litigation." 894 F.3d 885, 890 (8th Cir. 2018). This Court disagreed:

> Neither do we find merit in Harter's argument that her attorney reasonably, but mistakenly, thought "that her claim for attorney[ ] fees and costs incurred defending the hearing officer's decision and seeking fees and costs in the district court was not ripe" until fees and costs were awarded for the due process hearing, because only then would she be a

> "prevailing party" entitled to fees for the district court litigation. Appellant's Br. at 38. The district court's order unambiguously provided that Harter was the prevailing party in the district court review proceeding. Even assuming the order was ambiguous, the default rule is that motions requesting attorney fees must "be filed no later than 14 days after the entry of judgment." Fed. R. Civ. P. 54(d)(2)(B)(i). Here, the district court resolved the sole claim in the action and entered judgment in favor of Harter. Thus, her request for attorney fees for the district court litigation was ripe and would be due within fourteen days unless the court provided otherwise. Moreover, even if it were reasonable to think the request for attorney fees for the district court litigation was not yet ripe, the record reveals no effort on the part of Harter's attorney to validate the accuracy of that assumption with the court.

Id.

Even though Harter did not directly address the fourteen-day deadline under Rule 54, the Court's reasoning and decision is significant for a number of reasons. First, the Court noted Harter would have been obligated to file her fee request under Rule 54's "default rule" when there is ambiguity about prevailing party status. See id. ("Even assuming the order was ambiguous, the default rule is that motions requesting attorney fees must 'be filed no later than 14 days after entry of judgment.'") (quoting Fed. R. Civ. P. 54(d)(2)(B)(i)). Second, Harter noted that Rule 54's default rule governs unless a party utilizes the Rule's mechanism that allows a party to request the court to change the deadline. See id. ("Thus, her request for attorney fees for the district court litigation was ripe and would be due within fourteen days *unless the court provided otherwise*.") (emphasis added). Finally, Harter discussed a party's failure to seek court clarification if it assumes the lack of a conclusive determination about prevailing party status will excuse it from complying with the deadline. See id. ("Moreover, even if it were reasonable to think

the request for attorney fees for the district court litigation was not yet ripe, the record reveals no effort on the part of Harter's attorney to validate the accuracy of that assumption with the court.").

Here, Rule 54's "default rule" applied, and the appellees have not advanced a persuasive argument why the "default rule" does not apply. Thus, here, as in Harter, "the request for attorney fees . . . was ripe [notwithstanding the lack of a conclusive determination of prevailing party status] unless the court provided otherwise." Harter, 894 F.3d at 890. In addition, a well-accepted maxim in the law is "that those who sleep on their rights, lose them." Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 820 (7th Cir. 1999); see also United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 275 (2010) (interpreting the Federal Rules of Civil Procedure (in that case, Rule 60(b)(4)) in a manner that "does not provide a license for litigants to sleep on their rights"). Here, as in Harter, the appellees should not be allowed to sleep on their rights where the record "reveals no effort on the part of [appellees'] attorney to validate the accuracy of that assumption [that they were excused from complying with the deadline] with the court." Harter, 894 F.3d at 890.

The appellees' fee request was untimely even under their own theory. Citing Rogers Group, the appellees contend they "became prevailing parties only when the District Court dissolved the first preliminary injunction as moot [on April 3, 2018]." Appellees' Br. at 17-18. But that is not the event that would have triggered prevailing party status under the rationale of Rogers Group. The two events that together triggered prevailing party status in Rogers Group were: (1) the preliminary injunction that operated as a judicially sanctioned change in the legal relationship of

the parties; and (2) the City's act of amending the challenged ordinance, that is, the act that mooted the plaintiffs' claims by preventing them from being addressed. 683 F.3d at 906, 908, 911; see also Martin, 876 F.3d at 951-52 (identifying (1) the district court's grant of declaratory relief as the event that materially altered the legal relationship between the parties; and (2) the statutory change in the law as the event that mooted the plaintiffs' claims, which two events together determined prevailing party status).

Similarly, here, the two events that together triggered prevailing party status were (1) the preliminary injunction entered in August 2016; and (2) the statutory change in the law when HB 1369 became effective on July 1, 2017. Thus, even under the appellees' flawed theory, their request for fees would have been due in mid-July 2017, not in April 2018 when they filed it.

Despite filing the fee request in April 2018, the appellees contend it was not due until a final judgment and they only filed it in April 2018 "out of an abundance of caution." Appellees' Br. at 44. Harter suggests that appellees should have exercised that "abundance of caution" in August 2016 if they assumed they were excused from complying with the deadline following an appealable order. At that time, an effort to validate their assumption with the court would still have served Rule 54's purpose of giving the Secretary notice of their fee request (and its amount) "before the time for appeal ha[d] elapsed." Fed. R. Civ. P. 54 Advisory Committee's Note (discussing 1993 Amendment).

B. Rule 54's deadline applies not just to final judgments, but also to "any order from which an appeal lies."

Latching on to a single reference to a "final judgment" in Rule 54's Advisory Committee Notes, appellees contend the Rule's fourteen-day deadline applies *only* to final judgments. See Appellees Br. at 13 & 14 n.6. The solitary statement in the Advisory Committee notes that indicates "[s]ubparagraph (B) provides a deadline for motions for attorney fees—14 days after final judgment," is certainly true, but does not mean the fourteen day deadline applies *only* in that instance. Rule 54 itself says the word "judgment" "as used in these rules includes . . . any order from which an appeal lies." Fed. R. Civ. P. 54(a).[1] The appellees' interpretation rewrites the Rule in a way that ignores its plain meaning, and gives no effect to the phrase "any order from which an appeal lies." Courts must read Rule 54 in a way that gives meaning to every phrase, not in a way that "contort[s] its text." Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 406 (2010); see also Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning[.]"). If the advisory committee note is

[1] The appellees go so far as to suggest that Rule 54(a)'s definition of "judgment" does not apply to Rule 54(d)(2)(B)(i). See Appellees' Br. at 20 ("First, the Secretary wrongly suggests that Rule 54(d)(2)(B)(i)'s use of the word 'judgment' necessarily invokes Rule 54(a)'s definition of 'judgment' as 'any order from which an appeal lies.'"). This argument flies in the face of authority cited by the appellees themselves. See id. at 14-15 (citing Winchell v. Lortscher, 377 F.2d 247, 252 (8th Cir. 1967)). Rule 54(a) sets forth a definition of judgment "as used in *these* rules," which necessarily includes a subsection of Rule 54 itself. See Winchell, 377 F.2d at 252-53 (indicating that when "rules that are directly applicable" to the rule under examination, "[i]t is necessary to examine each of [them] in order to determine" the proper interpretation).

inconsistent with the Rule itself, the plain language of the Rule must govern. See United States v. Carey, 120 F.3d 509, 512 (4th Cir. 1997) ("But the Advisory Committee Note is not the law; the rule is. Accordingly, if the Advisory Committee Note can be read in two ways, we must read it, if we consult it at all, in a manner that makes it consistent with the language of the rule itself, and if the rule and the note conflict, the rule must govern.").

In addition, other comments in the advisory committee notes clearly contemplate fee requests filed during the course of an action, before it has reached a final judgment. See Fed. R. Civ. P. 54 Advisory Committee's Note (discussing 1993 Amendment) (referencing options for the district court that include deferring a ruling on a fee request until a later time or directing a new period for filing the request). The advisory committee notes also clearly state the purpose of including appealable orders within the meaning of the Rule – to give an adversary notice of a request and its amount before the time for an appeal has elapsed. Id.

If Rule 54 was only meant to apply to final judgments, the rule could have simply stated that and that alone: "a judgment as used in these rules means a final judgment." There would have been no need to include decrees or orders from which an appeal lies. There also would have been no need to mention items that were excluded from the word "judgment," such as "recitals of pleadings, a master's report, or a record of prior proceedings." Fed. R. Civ. P. 54(a). Listing specific exceptions is generally indicative of an inclusive definition, not an exclusive one. See, e.g., United Air Lines, Inc. v. Mahin, 410 U.S. 623, 625 (1973) ("Some exceptions from this inclusive definition were made."). Rule 54 could have, but did not, list

appealable orders granting preliminary injunctions among the exceptions to the word "judgment."

C. Requesting a court to revise the deadline is not make-work motion practice; it fulfills the purpose of giving notice of a fee request to an adversary contemplating an appeal.

Appellees contend the Secretary's interpretation of Rule 54 is absurd and would lead to "a flurry of make-work motion practice" that would burden the courts and add expense to the litigation. Appellees' Br. at 10, 36. But requesting a "court order provid[ing] otherwise" to extend the deadline is explicitly contemplated by the Rule itself, and thus not an absurd reading of it. Significantly, what the appellees call "make-work motion practice" serves an important purpose. Including "any order from which an appeal lies" as a judgment that triggers Rule 54's deadline is intended "to assure that the opposing party is informed of the claim before the time for appeal has elapsed." Fed. R. Civ. P. 54 Advisory Committee's Note (discussing 1993 Amendment). In the absence of the fee request itself, a timely request to extend the deadline would also give an adversary notice that a fee request is forthcoming before the time to appeal has expired, and a chance to request disclosure of the request's fair estimate as a condition of extending the deadline.

Before adopting appellees' view that the Secretary's interpretation is absurd and would lead to make-work motion practice, the Court should consider the consequences of adopting the appellees' view. The Secretary must be mindful of protecting the public fisc from costs arising out of litigation. If government officials cannot count upon the Rule's plain language as entitling them to notice of a fee request before the time to appeal a preliminary injunction order has expired, they

will be forced to adopt the scorched-earth strategy of appealing every injunction to avoid being subsequently blindsided by an untimely request that exposes the State's taxpayers to undisclosed claims for fees in unknown amounts. Instead of the "make-work" motion practice in district court that is expressly contemplated by the Rule, appellate courts would be burdened by more than "make-work" appeals that would add significant expense to the litigation. Thus, appellees' interpretation would frustrate the important public policy recognized in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, intended to encourage public officials to improve the law even when they believe a challenged statute/their conduct is constitutional. 532 U.S. 598, 608 (2001).

Thus, the choice is between motion practice in the district court actually contemplated by Rule 54, intended to give an adversary notice before the time for appeal has elapsed on an appealable order, or countless protective appeals filed by government officials because the Rule is construed in a manner inconsistent with its plain and ambiguous language.

D. Rule 54's reference to "entry" of judgment includes the "entry" of a final appealable order.

Appellees also contend the reference to "entry of judgment" in Rule 54(d)(2)(B)(i) carries some special significance attached only to a "final judgment." See Appellees' Br. at 20 ("[T]he Rule 54(d)(2)(B)(i) deadline is not triggered by just any Rule 54(a) 'judgment', but rather by 'entry of judgment,' which the Advisory Committee Notes refer to as a 'final judgment.'"). But when the relevant part of Rule 54(a)'s definition is plugged into that phrase, it reads the "entry of any order from

which an appeal lies," indicating the appealable preliminary injunction order in this case was the type of judgment that triggered the deadline. There is no special significance attached to using the word "entry" when referring to a final judgment as opposed to an order. In fact, Rule 79 expressly specifies that both "orders" and "judgments" are "[i]tems to be entered" in the docket. Fed. R. Civ. P. 79(a)(2)(C); see also id. at 79(a)(3) ("Each entry must briefly show the nature of the paper filed or writ issued . . . and the substance of the date of entry of each order and judgment.").

Other Rules of Civil Procedure likewise refer to the "entry" of both orders and judgments. See, e.g., Fed. R. App. P. 4(a)(1)(A) (referring to the "entry of the judgment or order appealed from"); Fed. R. Civ. P. 60(c)(1) ("A motion under Rule 60(b) must be made . . . no more than a year after the entry of the judgment or order[.]"); Fed. R. Civ. P. 77(d)(1) ("Immediately after entering an order or judgment, the clerk must serve notice of the entry . . ."). Similarly, the advisory committee notes under several different Rules of Civil Procedure refer to the "entry" of both orders and judgments. See, e.g., Fed. R. Civ. P. 26 Advisory Committee Notes (discussing 2000 Amendment) ("This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order."); Fed. R. Civ. P. 53 Advisory Committee Notes (discussing 2003 Amendment) ("Subdivision (b)(3) permits entry of the order appointing a master . . ."); Fed. R. Civ. P. 58 Advisory Committee Notes (discussing 1993 Amendment) ("To accomplish this result [delaying finality of a judgment until a fee dispute is decided] requires entry of an order by the district court before the time a notice of

appeal becomes effective for appellate purposes."); Fed. R. Civ. P. 72 Advisory Committee Notes (discussing 1991 Amendment) ("The rule as promulgated in 1983 required objections to the magistrate's handling of nondispositive matters to be served and filed with 10 days after entry of the order").

Finally, this Court routinely refers to the "entry" of orders, not just to the "entry" of final judgments. See, e.g., In re Rutledge, 956 F.3d 1018, 1025 (8th Cir. 2020) ("We first consider whether the State is entitled to mandamus relief concerning the district court's entry of the order granting the TRO."); United States Sec. & Exch. Comm'n v. Quan, 870 F.3d 754, 757 (8th Cir. 2017) ("After the entry of an order for disgorgement, the receiver was responsible . . ."); Ameren Corp. v. Fed. Commc'ns Comm'n, 865 F.3d 1009, 1014 n.3 (8th Cir. 2017) ("This claim is time-barred . . . in light of Petitioners' failure to challenge that determination within sixty days of the entry of the April 2011 order."); Miller v. Baker Implement Co., 439 F.3d 407, 414 (8th Cir. 2006) ("Similarly, a Rule 60(b)(2) motion based on the discovery of new evidence must show . . . that the movant exercised diligence to obtain the evidence before entry of the order[.]").

Rule 54(d)(2)(B)(i)'s reference to "entry" does not support an interpretation of the deadline as applying only to a "final judgment." On the contrary, the plain language of the Rule supports the Secretary's view that the deadline applies to the "entry" of "any order from which an appeal lies," including an order granting a preliminary injunction.

E. None of appellees' other arguments regarding timeliness are persuasive either.

Some of the arguments advanced by appellees on the issue of timeliness were already adequately addressed by the Secretary in his principal brief, and will not be repeated here. None of the additional miscellaneous arguments advanced by the appellees are persuasive. For example, appellees repeatedly emphasize that there is very little caselaw on this issue of first impression now before the Court. See Appellees' Br. at 9, 10, 26, 32, 41-42 n.16. The Secretary is unaware of any legal principle that indicates a paucity of caselaw is a consideration in the Court's interpretation of the language of a rule. Nor is the Secretary aware of any cases that hold that a party raising an issue of first impression is foreordained to lose because they cannot already cite a controlling decision.

Equally unpersuasive is the appellees' reference to cases where the issue now before this Court was never raised or decided. See Appellees' Br. at 32-35. "Appellate courts generally do not reach out to decide issues not raised[.]" Cone v. Bell, 556 U.S. 449, 482 (2009); see also Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); Church v. Missouri, 913 F.3d 736, 745 (8th Cir. 2019) (quoting Cooper Industries).

In addition, the appellees' reference to a settlement of fees in MKB Management Corp. v. Burdick, No. 1:13-cv-71 (D. N.D.), is irrelevant. The Secretary was not a party to that case, and is not bound by decisions a different state

official made in a different case. There can be many reasons (including political ones) where a particular state agency or official may choose to advance – or decline to advance – a particular interest or argument in any particular case. The Secretary is entitled to a decision in this case interpreting the plain language of Rule 54, and an answer to the question whether he was entitled to notice of a fee request linked to an appealable preliminary injunction order before his time for appealing it had expired.

II. Neglect is not excusable when an adversary suffers prejudice.

Appellees contend the Secretary was not prejudiced by their failure to comply with Rule 54's deadline because he had sufficient notice of their intent to seek fees from their complaint's general prayer for relief. See Appellees' Br. at 40-41. The appellees also contend the Secretary has not shown that he actually relied upon the absence of a fee request when he decided not to appeal the first preliminary injunction through "affidavits, documents, or other evidence." Id. at 41.

The suggestion that notice of a fee request in excess of $1.132 million arising from seven months of litigation would not have been considered by the Secretary when he was contemplating an appeal of the first preliminary injunction order defies common sense. More significantly, detrimental reliance is not among the factors the Supreme Court requires when analyzing excusable neglect, prejudice is. See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993). In addition, Rule 54's deadline tied to appealable orders is not intended just to give an adversary notice that a fee request will be made, but also its *amount*. See Fed. R. Civ. P. 54(d)(2)(B)(iii) (requiring, at a minimum, a fair estimate of the amount

sought). The complaint's general prayer for relief could not have put the Secretary on notice that the appellees would, just seven months into the litigation, claim fees in excess of $1.132 million for filing a complaint, resisting a motion to dismiss, and moving for a preliminary injunction.

Simply put, Section 1983 cases are not always just about the fees, even when there is a prayer for fees in the complaint. Independently-funded advocacy groups are willing to forego fees to obtain a change in the law that they believe advances the interests of their clients. In this very case, despite their complaint's prayer for fees, the appellees were ultimately willing to waive fees to obtain the consent decree. Although the consent decree itself did not result in a change in the law, the appellees touted it as a victory for their clients. See https://campaignlegal.org/press-releases/secretary-state-agrees-settle-voter-id-lawsuits-entering-consent-decree-north-dakota (last visited October 1, 2020).

The general prayer for relief in the complaint did not put the Secretary on notice that the appellees would ultimately seek fees, let alone seek fees linked to the first preliminary injunction, let alone seek fees in an amount of over $1.132 million just seven months into the litigation. When is a public official supposed to predict that fees will be an issue and when they will not, or accurately estimate the amount that may be claimed? Rule 54 does not contain an exception that says the fourteen day deadline is inapplicable whenever there is a general prayer for attorney fees in a complaint.

The Secretary was prejudiced by the absence of notice of a fee request before his time to appeal the first preliminary injunction had expired. When an adversary

suffers prejudice, neglect is not excusable. The district court abused its discretion when it failed to consider the Secretary's prejudice, and instead concluded the untimeliness of the fee request could be disregarded based on excusable neglect.

III. Public policy should not favor parties who fail to follow the rules at the expense of their adversaries.

The appellees suggest that public policy favors an award of fees based on the "centrality of the right to vote in our system of government." Appellees' Br. at 49. Whether the district court's first preliminary injunction protected the centrality of the right to vote is debatable, at the least. North Dakota's prior practice of using self-authenticating affidavits in conjunction with a non-registration system permitted votes to count in an election without the State first verifying whether individuals possessed the basic qualifications to vote. The State was left to rely upon post-election attempts to verify those qualifications. Vote dilution claims could have been raised by qualified electors who challenged the State's reliance upon ineffective post-election verification measures when there was no post-election means to separate out ballots of unqualified individuals. See Anderson v. United States, 417 U.S. 211, 226 (1974) (discussing the right to have a vote be "given full value and effect, without being diluted or distorted by the casting of fraudulent [or otherwise invalid] ballots").

In 2012, in the aftermath of a close United States Senate race decided by just 2,936 votes out of the 321,144 total votes cast, election officials had difficulty subsequently verifying the 10,519 votes that were cast using self-authenticating affidavits. Based on these concerns, the 2013 Legislature eliminated the self-

authenticating affidavits from North Dakota's non-registration system. At that time, more than 97% of the voters listed in the Central Voter File (CVF) had a valid driver's license or non-driver's ID issued by the Department of Transportation (DOT) required for voting under North Dakota's non-registration system. To alleviate the minimal burden that might be imposed upon less than 3% of the known electorate, a free non-driver's ID would be issued to anyone who wanted one for voting. [2]

The district court's first preliminary injunction re-introduced the incompatible use of self-authenticating affidavits into North Dakota's non-registration system. The resulting effect on the 2016 election mirrored the problems present in the 2012 election. Of the 16,215 ballots cast by self-authenticating affidavits, and despite extensive post-election efforts to verify the qualifications of those affiants, there were 3,682 ballots cast by affiants whose qualifications as electors the Secretary was unable to verify. See Brakebill Dist. Ct. Doc. No. 81-55 at ¶ 33. In other words, there is strong evidence to suggest that the first preliminary injunction itself violated voters' constitutional rights by having the votes of qualified voters diluted by the presence of unverifiable votes cast in that election. See Anderson, 417 U.S. at 226.

The district court based its first preliminary injunction on the flawed view that the number of individuals who did not possess valid IDs, without more, justified the re-introduction of self-authenticating affidavits into North Dakota's non-registration

[2] This issue was discussed at length in the Secretary's briefing in the first appeal to this Court. See Civil No. 18-1725; see also Brakebill Dist. Ct. Doc. No. 81-55 at ¶¶ 10-45.

system. In reversing the district court's second preliminary injunction, this Court noted that flaw that was also present in the district court's second preliminary injunction, and correctly held the proper focus was on whether the State imposed a significant burden on those individuals' ability to obtain the relevant documents to vote. See Brakebill v. Jaeger, 932 F.3d 671, 679 (8th Cir. 2019) ("And for the relatively small percentage of eligible voters who lack both a qualifying identification and certain underlying documents, the [district court's] findings (and the dissent) do not address how many voters attempted to acquire them but were unable to do so with reasonable effort. That is the relevant question for assessing whether a voter is substantially burdened") (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 198-99 (2008); Frank v. Walker, 768 F.3d 744, 746-48 (7th Cir. 2014)).

Without notice of a fee request tied to the first preliminary injunction, the Secretary sought a legislative change that would improve North Dakota's election system by providing for the additional option of permitting voters who appeared on the day of an election without a valid ID to cast a set-aside ballot. The path the Secretary chose was consistent with the public policy identified by the Supreme Court in Buckhannon, to seek improvements in the law without fear of exposure to fee requests even when a public official believes the existing law/the State's conduct may not be illegal. Buckhannon, 532 U.S. at 608.

Rule 54 was intended to give the Secretary notice of the fee request before his time to appeal the first preliminary injunction had expired. In the absence of a fee request, he sought a legislative change instead of appealing. The Secretary was

prejudiced by the absence of notice of a timely fee request precisely because he cannot go back in time and appeal the first preliminary injunction. He cannot now ask the Court to determine whether North Dakota's law would have been constitutional even without the additional option of permitting voters to cast a set-aside ballot.

The appellees' suggestion that the public policy behind the right to vote supports awarding them fees, despite their failure to file a timely fee request, presents an inquiry at too high a level of generality. The Secretary posits that the real inquiry is whether the general public policy behind awarding fees under 42 U.S.C. § 1988 outweighs a plaintiff's failure to follow the Rules of Civil Procedure when that failure occurs at the expense and prejudice of an adversary. Here, the general policy behind awarding fees conflicts with the public policy the Secretary advanced in seeking an improvement in North Dakota's election laws, without notice of a timely fee request. The general policy of awarding fees in this case also conflicts with another public policy identified by the Supreme Court, avoiding an interpretation of fee-shifting statutes that will have "a second litigation of significant dimension.'" Buckhannon, 532 U.S. at 609. Similarly, as a matter of public policy the courts should avoid an interpretation of the rules relevant to fee-shifting statutes, like Rule 54, that is contrary to their plain and unambiguous terms and will spawn litigation of significant dimension over fees. Public officials should not have to appeal every preliminary injunction to protect themselves against undisclosed fee requests in unknown amounts instead of seeking to improve the law.

The Secretary respectfully suggests the issue of public policy in this case boils down to this: whether the courts should support a public official who sought to improve the law, or award fees under 42 U.S.C. § 1988 even when a plaintiff fails to follow a rule clearly intended to give its adversary notice of a fee request before his time to appeal has expired.

CONCLUSION

Secretary Jaeger respectfully requests that this Court reverse the district court's decision that the appellees filed a timely fee request under Rule 54. The Secretary further requests that this Court determine the untimely request was not the result of excusable neglect because the Secretary was prejudiced by its untimeliness. Finally, the Secretary requests that this Court determine the untimely nature of the request should not be excused based on public policy.

Dated this 2nd day of October, 2020.

Wayne Stenehjem
Attorney General
State of North Dakota

By: /s/ James E. Nicolai
James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email jnicolai@nd.gov

Attorneys for Defendant-Appellant.

CERTIFICATE OF COMPLIANCE

Civil No. 20-2142

The undersigned certifies pursuant to Fed. R. App. P. 32(g) and 8th Cir. R. 28(A) that the text of the Reply Brief of Defendant–Appellant (excluding the table of contents and table of authorities) contains 5,413 words.

This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365-word processing software in Times New Roman-14 point font. The Reply Brief of Defendant–Appellant has been scanned for viruses and is virus-free.

Dated this 2nd day of October, 2020.

Wayne Stenehjem
Attorney General
State of North Dakota

By: /s/ James E. Nicolai
James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email jnicolai@nd.gov

Attorneys for Defendant-Appellant.