No. 20-2142

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, DOROTHY HERMAN, DELLA MERRICK, ELVIS NORQUAY, RAY NORQUAY, and LUCILLE VIVIER

Plaintiffs-Appellees,

DOROTHY HERMAN,

Plaintiff,

v.

ALVIN JAEGER, in his official capacity as the North Dakota Secretary of State,

Defendant-Appellant.

On Appeal from U.S. District Court for the District of North Dakota, Nos. 1:16-cv-00008-DLH & 1:18-cv-00222-DLH

BRIEF OF PLAINTIFFS-APPELLEES

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SUMMARY OF THE CASE AND STATEMENT CONCERNING ORAL ARGUMENT

This dispute concerns the proper interpretation of Rule 54(d) of the Federal Rules of Civil Procedure: Does the grant of a preliminary injunction trigger the 14-day deadline to move for attorneys' fees?

Defendant-Appellant North Dakota Secretary of State Alvin Jaeger (the "Secretary") argues that such a motion must be made within 14 days after the preliminary injunction is granted, and therefore that Plaintiffs'-Appellees' motion was untimely. This interpretation is at odds with the Rule's plain language and the Notes of the Advisory Committee. The Secretary argues the Rule is "straightforward and unambiguous"; but the Rule has been in place for 27 years, and he cannot cite a single case in which a court has enforced his interpretation.

The U.S. District Court below, consistent with other U.S. district courts, correctly held that the grant of a preliminary injunction does not trigger the 14-day deadline or, in the alternative, that if the motion was untimely, an award of attorneys' fees nevertheless was justified by excusable neglect and public policy.

If this Court believes it would benefit from oral argument, Plaintiffs-Appellees agree that 15 minutes per side should suffice.

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STATEMENT OF THE CASE

Plaintiffs-Appellees (the "Brakebill Plaintiffs")[1] are citizens of North Dakota and members of the Turtle Mountain Band of Chippewa Indians. They initiated this suit on January 20, 2016, alleging that voter ID requirements enacted in North Dakota House Bills 1332 and 1333 ("HBs 1332 & 1333"), including the lack of a fail-safe option for voters who did not have and could not obtain a qualifying ID, violated the Voting Rights Act, 52 U.S.C. § 10301 ("VRA"), and provisions of both the United States Constitution and the North Dakota Constitution. App'x at 36. Their Complaint expressly sought "attorney fees and costs as allowed" under 42 U.S.C. § 1988 and the VRA, among other remedies. App'x at 79 ¶ 216.

On June 20, 2016, the Brakebill Plaintiffs moved for a preliminary injunction to enjoin enforcement of HBs 1332 & 1333 in the November 8, 2016, election. App'x at 83. The District Court found, *inter alia*, that

[1] This case is an appeal from an award of attorneys' fees to plaintiffs in Brakebill v. Jaeger, Case No. 1:16-cv-008 (D.N.D.), and all citations to the docket are to Brakebill unless otherwise indicated. On April 24, 2020, Brakebill was consolidated with Spirit Lake Tribe v. Jaeger, 1:18-cv-00222 (D.N.D.), with Spirit Lake designated as the lead case. Order Granting Mot Consolidate Cases at 2 (Dkt. 131).

HBs 1332 and 1333 had disenfranchised the Brakebill Plaintiffs and other Native American voters, that the requirements of HBs 1332 and 1333 were "excessively burdensome," that "the lack of any current 'fail-safe' provisions" violated the Equal Protection Clause of the Fourteenth Amendment, and that the Brakebill Plaintiffs were likely to succeed on the merits of their Fourteenth Amendment claim. App'x at 101-08. Accordingly, the District Court granted the motion on August 1, 2016, App'x at 86-114, and entered the injunction as modified by that court's order of September 20, 2016. App'x at 115-17.

Defendant-Appellant North Dakota Secretary of State Alvin Jaeger ("the Secretary") did not appeal the preliminary injunction. As a result, the 2016 election in North Dakota was conducted according to the terms of the preliminary injunction. In 2017, the Secretary supported North Dakota House Bill 1369 ("HB 1369"), which superseded HBs 1332 and 1333, and which "satisfied the district court's call for a "fail-safe" provision to protect voter's [sic] rights after North Dakota chose to remove self-authenticating affidavits from its unique non-registration election system." Secy's Br. at 3. HB 1369 was enacted on April 24, 2017, and became effective on July 1, 2017. For several additional months, the

Secretary took no action either with regard to the preliminary injunction, which remained in place, or on the merits of the lawsuit. Only after the Brakebill Plaintiffs amended their complaint to challenge HB 1369, 1st Am. Compl. (Dkt. 77), did the Secretary move to dissolve the preliminary injunction, which he argued was rendered moot by the enactment of HB 1369. App'x at 118; Secy's Mem. Supp. Mot. Dissolve Prelim. Inj. at 15 (Dkt. 81) (arguing that enactment of HB 1369, which provided a fail-safe for voters who did not have and could not obtain qualifying ID, "justif[ied] lifting the preliminary injunction"). The District Court granted the Secretary's motion and dissolved as moot the preliminary injunction, which had enjoined only "the now repealed [HBs 1332 & 1333]," while simultaneously entering a second preliminary injunction against HB 1369. App'x at 135.

The Secretary immediately appealed the second preliminary injunction, which had the effect of bifurcating the case. One part consisted of the original Complaint challenging HBs 1332 & 1333, and resulted in the first preliminary injunction; with the preliminary injunction dissolved, the only thing that remained unresolved was the Brakebill Plaintiffs' claim for attorneys' fees. The other part consisted of

the Amended Complaint challenging HB 1369; it, too, resulted in a preliminary injunction, which was the subject of the interlocutory appeal to this Court.[2]

On April 16, 2018, the Brakebill Plaintiffs moved to delay consideration of attorneys' fees for the first preliminary injunction until the case was resolved in its entirety. App'x at 136. On April 17, the District Court, in a text-only Order entered on the docket, denied that motion as "moot," citing Local Rule 54.1 "providing such motions are due within 14 days after entry of judgment." App'x at 140. That same day—14 days after the District Court dissolved the first preliminary injunction at moot, making them prevailing parties—the Brakebill Plaintiffs, "out of an abundance of caution and to preserve their rights," moved for an award of attorneys' fees. App'x at 141.

The Secretary argued to the District Court that the August 1, 2016, order granting the first preliminary injunction "was the triggering 'judgment' under the Rules of Civil Procedure for any request for fees and expenses arising from the court's preliminary injunction because that

[2] This Court stayed the second preliminary injunction pending appeal on the merits. Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018).

order was an appealable order and Rule 54(a) defines a 'judgment' as 'any order from which an appeal lies.'" Initial Resp. Opp. Mot for Attys' Fees at 1 (Dkt. 108).[3] The Secretary then filed a second response, which repeated the timeliness objection and further (1) argued that the Brakebill Plaintiffs were not prevailing parties, and (2) challenged the amount of fees and costs sought. Resp. Opp. Mot. Attys' Fees (Dkt. 113).[4] Neither brief cited a single case in which a court had held that granting a preliminary injunction triggered the 14-day deadline under Rule 54(d) to move for attorneys' fees.

The Brakebill Plaintiffs' reply brief identified two cases in which U.S. District Courts had rejected the argument made by the Secretary. Reply Supp. Mot. Attys' Fees at 2-4 (Dkt. 111). In the alternative, the Brakebill Plaintiffs argued that if their motion was untimely it was

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[3] The Secretary styled this as an "initial response" and asserted a right to file a subsequent objection to the Brakebill Plaintiffs' claimed fees and expenses. Id.

[4] In this appeal, the Secretary appeals only with respect to timeliness. Consequently, he has waived any argument that the Brakebill Plaintiffs were not prevailing parties entitled to an award of fees, or that the awarded fees were excessive. Chay-Velasquez v. Ashcroft, 367 F.3d 751, 756 (8th Cir. 2004) (argument not raised in opening brief is waived).

excusable neglect, because the Secretary had not been prejudiced, and because no published decision in the District of North Dakota had adopted the Secretary's interpretation. Id. at 5-6. The Brakebill Plaintiffs even pointed out that North Dakota's Attorney General, who represents the Secretary in this case, had not made this argument previously when he could have. Id. (citing MKB Management Corp. v. Burdick, No. 1:13-cv-071 (D.N.D.)).

The District Court found in favor of the Brakebill Plaintiffs. Secy's Addendum at 1-12. First, it opined that the Brakebill Plaintiffs' motion—far from being untimely—actually had been "premature" because the Rules "permit the filing of a motion for attorney's fees until 14 days after final judgment is entered." Secy's Addendum at 4. The District Court noted that the Secretary "cite[d] no case law to support this novel interpretation of Rule 54," Secy's Addendum at 6, and found persuasive two district court orders that had rejected the same argument. Secy's Addendum at 6-7 (citing Planned Parenthood of Minnesota, North Dakota, South Dakota v. Daugaard, 946 F. Supp. 2d 913 (D.S.D. 2013), Consolidated Paving, Inc. v. City of Peoria, No. 10-CV-1045, 2013 WL 916212 (C.D. Ill. Mar. 8, 2013)). The District Court reasoned:

> It would be illogical to require a motion for attorney's fees to be filed before a final judgment is entered. The Court's reading of Rule 54 and the Local Rules is that such motions are required within 14 days after the entry of a judgment at the conclusion of the case. The Court finds the Plaintiffs' motion to be timely. Further, 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.

Secy's Addendum at 8.

The Secretary timely appealed to this Court.

SUMMARY OF THE ARGUMENT

The District Court correctly held that a motion for award of attorneys' fees, pursuant to Federal Rule of Civil Procedure 54, is not untimely if made "within 14 days after the entry of a final judgment at the conclusion of the case." Secy's Addendum at 8. The Rule provides that such a motion "must . . . be filed no later than 14 days after the entry of judgment." Fed. R. Civ. P. 54(d)(2)(B)(i). The District Court's holding is consistent with the Advisory Committee Notes, which explain that the deadline is "14 days after *final* judgment." Fed. R. Civ. P. 54 advisory committee's note to 1993 amendment (emphasis added).

The District Court's holding also is consistent with a holistic reading of Rule 54(d)(2)(B) which, in addition to setting a deadline in subsection (i), also requires a moving party to "specify the judgment and the statute, rule, or other grounds entitling the movant to the award." Fed. R. Civ. P. 54(d)(2)(B)(ii). When a plaintiff brings a claim that allows recovery of attorneys' fees by a "prevailing party," winning a preliminary injunction by itself usually will not satisfy that requirement, because if that plaintiff later loses on the merits then they never were a prevailing party. Sole v. Wyner, 551 U.S. 74, 86 (2007) (holding that a preliminary injunction that is reversed or undone at final judgment does not trigger prevailing party status).

A preliminary injunction *can* entitle a party to prevailing party status if, as in this case, the defendant moots the case after the preliminary injunction but before final judgment. See Rogers Grp., Inc. v. City of Fayetteville, 683 F.3d 903 (8th Cir. 2012) (holding that preliminary injunction satisfied prevailing party status requirements because the defendant later repealed the challenged ordinance after the injunction but before final judgment). But the plaintiff isn't a prevailing party entitled to such an award until the District Court dissolves the

injunction as moot. Only then can a plaintiff satisfy the subsection (ii) requirement that she set forth why she is entitled to an award of fees.

The District Court's holding also is consistent with case law in this Circuit and elsewhere interpreting the Rule 54(d)(2)(B)(i) deadline. See Planned Parenthood, 946 F. Supp. 2d 913; Consolidated Paving, 2013 WL 916212. The Secretary—still unable to cite a case in which a court has enforced his interpretation—instead falls back on inapposite analogies. These arguments are not persuasive, especially when compared to cases deciding the very question presented to this Court.

In addition, the District Court's holding was consistent with legal practice in this Circuit—including in other cases defended by the North Dakota Attorney General—in which parties who win a preliminary injunction move for attorneys' fees only sometime after they become "prevailing parties," usually at the conclusion of the case.

The Secretary argues that, because Rule 54(a) defines "judgment" to include "any order from which an appeal lies," a motion for fees arising from an appealable order must be filed within 14 days after that order is granted. See generally Secy's Br. This interpretation fails to account for how Rule 54(b) treats successive "judgments," or for the Advisory

Committee's express reference to "final judgment." And despite the Secretary's claim that his interpretation is "straightforward and unambiguous," he still fails to cite a single court that has enforced his interpretation, and he is dismissive of those courts that have rejected his theory, saying they "simply ignored the plain language of Rule 54." Secy's Br. at 7, 17. Furthermore, any attempt to enforce the Secretary's interpretation of Rule 54 would lead to absurd results—a flurry of make-work motion practice that would only burden the courts.

In addition, the District Court correctly held that even if the Brakebill Plaintiffs' motion was untimely, the award of attorneys' fees was warranted by excusable neglect. The Secretary was on notice that the Brakebill Plaintiffs would seek an award of attorneys' fees, and nothing in the record supports the Secretary's suggestion that, if confronted with an attorneys' fees motion, he might have conducted this litigation differently. Furthermore, any delay was not the result of "ignorance or carelessness," as the Secretary suggests. Secy's Br. at 20 (quoting Noah v. Bond Cold Storage, 408 F.3d 1043, 1045 (8th Cir. 2005)). Rather, it was consistent with a holistic reading of the Rule, with the case

law at the time the preliminary injunction was granted, and with practice in this Circuit and elsewhere.

Finally, the District Court correctly held that even if the Brakebill Plaintiffs' motion was untimely, the award of attorneys' fees was warranted by public policy. Statutory fee-shifting provisions exist to encourage private vindication of civil rights, as the Brakebill Plaintiffs did here. The Secretary first defended an unconstitutional statute until its enforcement was enjoined; the 2016 election was conducted in accordance with the preliminary injunction; and then, rather than continue to defend the statute on the merits, the Secretary supported superseding legislation that remedied the specific flaw—the lack of a "fail-safe" for voters who did not have and could not obtain a qualifying ID—that was at the crux of the Brakebill Plaintiffs' Complaint and the District Court's injunction. Public policy compels an award to the Brakebill Plaintiffs for their vindication of their voting rights, and those of thousands of other North Dakotans.

ARGUMENT

I. This Court should affirm the District Court's holding that the Brakebill Plaintiffs' motion for attorneys' fees was timely.

This appeal concerns two competing interpretations of Rule 54(d)(2)(B)(i) of the Federal Rules of Civil Procedure. "This court reviews de novo the district court's interpretation of the Federal Rules of Civil Procedure." United States ex rel. Kraxberger v. Kansas City Power and Light Co., 756 F.3d 1075, 1082 (8th Cir. 2014) (citing Kuelbs v. Hill, 615 F.3d 1037, 1041 (8th Cir. 2010)).

There is no dispute that, under Rule 54, a motion for attorneys' fees "must . . . be filed no later than 14 days after the entry of judgment." Fed. R. Civ. P. 54(d)(2)(B)(i).[5] The District Court properly concluded that "such motions are required within 14 days after the entry of final judgment at the conclusion of the case." Secy's Addendum at 8.

[5] Likewise, there is no dispute that the Local Rules provide the same deadline. L.R. 54.1(A)(1) (motion for award of costs must be filed "no later than fourteen (14) days after entry of judgment."); L.R. 54.1(B)(1) (same deadline for motion for award of attorneys' fees). Consequently, references in this Brief to Rule 54(d)(2)(B)(i) are intended to encompass the identical Local Rule.

A. The District Court's interpretation is consistent with the Notes of the Advisory Committee and with a holistic reading of Rule 54(d)(2)(B).

1. The Advisory Committee Notes on Rule 54(d)(2)(B) repeatedly refer to "final judgment" as the event triggering the 14-day deadline.

This Court routinely looks to the Notes of the Advisory Committee when interpreting the Federal Rules of Civil Procedure. See, e.g., Security Nat'l Bank of Sioux City v. Day, 800 F.3d 936, 942 (8th Cir. 2015) (referring to advisory committee notes in interpreting subsections of Rule 30); Mathieu v. Gopher News Co., 273 F.3d 769, 776 (8th Cir. 2001) ("Interpretation of Rule 50(b) is set out by the Advisory Committee.").

The Advisory Committee, explaining the newly added Rule 54(d)(2)(B), described the "deadline for motions for attorneys' fees" as "14 days after *final judgment*." Fed. R. Civ. P. 54 advisory committee's note to 1993 amendment (emphasis added). The Advisory Committee further wrote filing such a motion "does not affect the *finality* . . . of a judgment," and noted that the "revised Rule 58 provides a mechanism by which prior to appeal the court can suspend the *finality* to resolve a motion for fees."

Id.[6] These comments make perfect sense if, as the District Court held, "such motions are required within 14 days after the entry of a final judgment at the conclusion of the case." Secy's Addendum at 8.

Thus, the District Court's holding that Rule 54 requires a motion for attorneys' fees "within 14 days after the entry of final judgment at the conclusion of the case," Secy's Addendum at 8, is entirely consistent with the Advisory Committee's explanation of the Rule.

2. A holistic reading of Rule 54 supports the District Court's holding.

The deadline in Rule 54(d)(2)(B)(i) "does not stand in isolation but functions concurrently with all other Federal Rules of Civil Procedure." Winchell v. Lortscher, 377 F.2d 247, 252 (8th Cir. 1967) (interpreting Rule 73(a) with reference to Rules 5(b) and 77(d)). Thus, when other

[6] The Secretary criticizes the District Court for referring to "final judgment" when "[t]he word 'final' is notably absent from Local Rule 54.1." Secy's Br. at 18. Yet the Secretary fails to recognize that the word "final" is notably present in the Notes of the Advisory Committee and, therefore, a critical interpretive tool both for Rule 54, and for the Local Rule that uses the same language. See also Fed. R. Civ. P. 54 advisory committee's note to 1993 amendment ("In many nonjury cases the court will want to consider attorneys' fee issues immediately after rendering its *judgment on the merits of the case*" (emphasis added); "Prompt filing affords an opportunity for the court to resolve fee disputes *shortly after trial*, while the services performed are freshly in mind." (emphasis added)).

rules "are directly applicable" to the rule under examination, "[i]t is necessary to examine each of these in order to determine" the proper interpretation of the rule under examination. Id. at 252-53.

Reading Rule 54(d)(2)(B)(i) in conjunction with other directly applicable rules—in particular, Rules 54(d)(2)(B)(ii) and Rule 54(b)—confirms not only that the District Court properly interpreted the Rule, but that the Brakebill Plaintiffs *could not* have moved for attorneys' fees upon entry of the first preliminary injunction.

a. Rule 54(d)(2)(B) does more than merely establish the deadline for such a motion, see Fed. R. Civ. P. 54(d)(2)(B)(i), it also requires that the movant "specify the judgment and the statute, rule, or other grounds entitling the movant to the award." Fed. R. Civ. P. 54(d)(2)(B)(ii). In other words, a party must be entitled to an award of attorneys' fees in order to properly make such a motion.

In order to be entitled to an award of attorneys' fees, the Brakebill Plaintiffs first had to qualify as prevailing parties. "In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser." Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S.

596, 602 (2001) (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975)). However, Congress has authorized the award of attorneys' fees to a "prevailing party" in most civil rights litigation, see 42 U.S.C. § 1988(b), including voting rights litigation. 52 U.S.C. § 10310(e) ("In any action proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.").

A plaintiff is a prevailing party if it "succeed[s] on any significant issue in the litigation which achieves some of the benefit the part[y] sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)). In a case where there is no final determination on the merits, in order to achieve prevailing party status a party must (1) receive "judicially sanctioned" relief, and (2) demonstrate a "material alteration of the legal relationship of the parties." Buckhannon, 532 U.S. at 604-05. The grant of an injunction "will usually satisfy that test" and convey prevailing party status. Lefemine v. Wideman, 568 U.S. 1, 4 (2012).

However, the Brakebill Plaintiffs did not immediately become prevailing parties upon the District Court's grant of the preliminary injunction. This Court "ha[s] recognized that a preliminary injunction can *in some instances* carry the judicial imprimatur required by Buckhannon to convey prevailing party status." Rogers Grp., Inc. v. City of Fayetteville, 683 F.3d 903, 909-910 (8th Cir. 2012) (quoting Advantage Media L.L.C. v. City of Hopkins, 511 F.3d 833, 836 (8th Cir. 2008)) (emphasis added).[7] However, a party that wins a preliminary injunction,

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[7] The Secretary's invocation of Buckhannon is, at best, a *non sequitur*. See Secy's Br. at 22. Buckhannon sets the standard for whether a plaintiff is a prevailing party. 532 U.S. at 604-05. Here, the Secretary has waived any argument that the Brakebill Plaintiffs were not prevailing parties. See supra p. 5 & n. 4.

Moreover, this case has nothing to do with the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about *a voluntary change in the defendant's conduct*," even though the plaintiff had won no court-ordered relief. Buckhannon, 532 U.S. at 602 (emphasis added). In this case, the Brakebill Plaintiffs obtained court-ordered relief: a preliminary injunction that controlled the 2016 election and remained in place until it was dissolved because the Secretary had rendered it moot. While that injunction was in place, the Secretary pushed HB 1369, which fixed a specific flaw identified by the District Court: the lack of a fail-safe for voters who did not have and could not obtain a qualifying ID. And the Secretary's action was by no means "voluntary." Even he concedes that he "pursued a legislative change *that satisfied the district court's call for a 'fail-safe' provision to protect voter's* [sic] *rights* after North Dakota chose to remove self-authenticating

but later fails to win a permanent injunction on the merits, "is not a prevailing party, . . . for her initial victory was ephemeral." Sole, 551 U.S. at 86.[8] The Brakebill Plaintiffs became prevailing parties only when the District Court dissolved the first preliminary injunction as moot, foreclosing any opportunity for the Brakebill Plaintiffs to win a permanent injunction on the merits.

Thus, a holistic reading of Rule 54(d)(2)(B) shows that the Brakebill Plaintiffs could not have moved for attorneys' fees in August 2016, because such a motion must set forth why the movant is entitled to such an award, and the Brakebill Plaintiffs were not yet entitled to an award of attorneys' fees. The Brakebill Plaintiffs became prevailing parties entitled to an award of attorneys' fees on April 3, 2018, when the District Court dissolved the first preliminary injunction because it had been mooted by the Secretary's conduct. As the District Court correctly concluded, Rule 54 allows a motion for attorneys' fees so long as it is made

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affidavits from its unique non-registration election system." Secy's Br. at 3 (emphasis added).

[8] In fact, the Court in Sole stated that the "tentative character" of a preliminary injunction "would have made a fee request at the initial stage premature." Id. at 84.

"within 14 days after the entry of final judgment at the conclusion of the case." Secy's Addendum at 8. The Brakebill Plaintiffs' motion—made within 14 days after they became prevailing parties, and more than two years before final judgment at the conclusion of the case—was timely.

b. The Rule 54(d)(2)(B)(i) deadline also must be interpreted consistent with Rule 54(b), which governs a court's treatment of a case that may have more than one judgment. The Brakebill Plaintiffs' Complaint asserted five claims, alleging violations of Section 2 of the Voting Rights Act (Count One challenged the voter ID requirement, and Count Two the lack of a fail-safe), the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution (Count Three), and the North Dakota Constitution (Count Four alleges an equal protection violation, and Count Five an unconstitutional voter qualification). App'x at 73-79. In granting the preliminary injunction the District Court ruled only with regard to Count Three, finding that HBs 1332 and 1333 violated the Brakebill Plaintiffs' rights to equal protection. App'x at 106-07. Thus, even though the grant of the preliminary injunction was a "judgment" for purposes of Rule 54(a), the District Court could not "direct an entry of final judgment" unless it "expressly determin[ed] that there

[was] no just reason for delay." Fed. R. Civ. P. 54(b). No party asked the District Court to make that finding, and it never did make that finding.

Rule 54(b) is relevant for two reasons. 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." Secy's Br. at 4, 7, 10-11. In fact, Rule 54(a) contains the Rules' most expansive use of the word "judgment"; other rules are more limited. Rule 54(b) demonstrates that not all judgments are created equal—a partial judgment may well constitute "judgment" for purposes of Rule 54(a), and yet fall short of "final judgment" under Rule 54(b) unless "the court expressly determines that there is no just reason for delay." This is a critical distinction, because the 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 "final judgment." See supra Part I.A.1. Thus, reading the Rule 54(d)(2)(B)(i) deadline in conjunction with Rule 54(b) supports the District Court's holding that the deadline is triggered by "the entry of final judgment at the conclusion of the case." Secy's Addendum at 8.

B. The District Court's holding was consistent with other district courts, including one in this Circuit, that have decided this issue.

The District Court cited two decisions, including one from a district court within this Circuit,[9] in which a district court rejected the same argument the Secretary makes here: Planned Parenthood, 946 F. Supp. 2d 913, and Consolidated Paving, 2013 WL 916212.

1. In Planned Parenthood, the plaintiffs sued to enjoin enforcement of a South Dakota statute they alleged unconstitutionally limited access to abortion services. 946 F. Supp. 2d at 916-17. In June 2011, the district court granted the plaintiffs a preliminary injunction against four provisions of the statute. Id. at 917. An amendment to the statute that "removed the language that was at issue in the preliminary injunction" was enacted in March 2012 and took effect in July 2012. Id. Consequently, the parties stipulated that the preliminary injunction should be dissolved in part. Id. In August 2012, after they became prevailing parties, the plaintiffs moved for attorneys' fees with regard to those issues mooted by the new statutory language. Id. The defendants

[9] The District Court mistakenly described both cases as within the Eighth Circuit.

argued, *inter alia*, that the motion was untimely because it was not made with 14 days after the court granted the preliminary injunction. Id. at 921-22.

The court disagreed. It first observed that "under the Rogers Group analysis plaintiffs did not become a 'prevailing party' until after the South Dakota Legislature enacted the Amended Act and it went into effect." Id. at 922. Next it observed that "litigation on the other issues continues and a final judgment has not been issued." Id. Consequently, the court held that "[t]he traditional judgment needed for a triggering event for filing a motion for attorney's fees has not occurred. Therefore, plaintiffs' motion is timely or good cause exists for any delay in filing the motion for attorneys' fees." Id. at 922.

2. In Consolidated Paving, the plaintiffs sued to enjoin an ordinance governing the use of paving materials. 2013 WL 916212 at *1. The district court granted a preliminary injunction in April 2010. Id. Five months later, the county amended the ordinance; and on August 24, 2012, the court granted the county's motion to dissolve the preliminary injunction and to dismiss the case, both on the grounds of mootness. Id. at *1-2. On August 30, 2012, six days after the case was dismissed,

making the plaintiffs prevailing parties, the plaintiffs moved for attorneys' fees, and the defendant objected *inter alia* that the motion was untimely because it was not made within 14 days after the preliminary injunction was granted.

Here again, the district court disagreed, writing:

> A logical reading of Rule 54, and the implications of attorneys' fees precedent, lead to the conclusion that Plaintiffs' Petition was not untimely. . . . Though Defendant's reading may not be frivolous, good sense dictates that it cannot be the correct meaning. . . . "It simply makes little sense to require the submission of petitions for attorney's fees before the legal work is done."

Id. (quoting Smith v. Vill. of Maywood, 970 F.2d 397, 399-400 (7th Cir. 1992)).

Against these two clear decisions, the Secretary offers only Cathedral Art Metal Co. v. Divinity Boutique, LLC, No. 1:18-cv-00141-WSD, 2018 WL 2356181 (N.D. Ga.). For reasons explained in Part I.C.2, infra, that case offers no real counterweight to Planned Parenthood and Consolidated Paving. The weight of existing case law supports affirming the District Court.

C. The Secretary's interpretation of Rule 54(d)(2)(B)(i) relies on selective readings of both the Rule and the Advisory Committee Notes, is inconsistent with both case law and legal practice, and would lead to absurd results.

The Secretary's argument is straightforward enough, even if it is misguided and contrary to existing case law: according to the Secretary, an order granting a preliminary injunction starts the clock, because (1) the phrase "entry of judgment" in Rule 54(d)(2)(B)(i) simply means "entry of" whatever constitutes judgment; (2) Rule 54(a) defines "judgment" to include "any order from which an appeal lies"; and 28 U.S.C. § 1292(a)(1) provides that the Courts of Appeal have jurisdiction to hear appeals from interlocutory orders granting injunctions. Secy's Br. at 4, 7, 9, 10-11. "Together," the Secretary argues, "those provisions set forth a mandatory fourteen-day deadline for a fee request following the entry of an appealable preliminary injunction order." Id. at 9. The Secretary insists such an interpretation is "plain and unambiguous." Id. at 5, 23.

Except that it isn't.

1. The Secretary cherry picks from the Advisory Committee Notes to emphasize only one of the Rule's intended purposes, while ignoring the plain language of the Notes. According to the Secretary, "[t]he purpose of the deadline 'is to assure that the opposing party is informed of the

claim before the time for appeal has elapsed.'" Secy's Br. at 7 (quoting Fed. R. Civ. P. 54 advisory committee's notes on 1993 amendment) (emphasis added). The quotation is accurate, so far as it goes.

But what the Secretary repeatedly calls "the purpose" of the Rule, Secy's Br. at 7, 8, 9, 18, 22, see also id. at 12 ("the specific purpose of the deadline"), the Advisory Committee instead described that merely as "[o]ne purpose" of the Rule. Fed. R. Civ. P. 54 advisory committee's note to 1993 amendment) (quoted in Secy's Br. at 11). Another goal was to "afford an opportunity for the court to resolve fee disputes *shortly after trial*, while the services performed are freshly in mind." Id. A third goal, consistent with Rule 54's overarching goal of avoiding "piecemeal disposal of litigation," see Fed. R. Civ. P. 54 advisory committee's note to 1946 amendment, was to "enable[] 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 the same time as review *on the merits of the case*." Fed. R. Civ. P. 54 advisory committee's note to 1993 amendment (emphasis added). The Notes commenting on these other goals both expressly invoke conditions at the end of a case that are not present upon the grant of a preliminary injunction.

The Secretary's interpretation also fails to account for Rule 54(d)(2)(B)(ii). The Secretary argues that the Brakebill Plaintiffs "unilaterally determined that the triggering event for their fee request was an order entered on April 3, 2018." Secy's Br. at 8. Not so. Rather, as demonstrated in Part I.A.2.a, supra, subsection (ii) requires that a movant to demonstrate legal entitlement to an award of attorneys' fees, and before April 3, 2018, the Brakebill Plaintiffs *could not* make such a showing because they were not yet entitled to an award of fees.

2. Rule 54(d) has been in place for some 27 years, and the Secretary now has briefed this issue three times in the past two years—yet he still cannot cite a single case in which a U.S. District Court or Circuit Court has enforced his "plain and unambiguous" interpretation of the Rule 54(d) deadline. Secy's Br. at 5, 23.[10] The closest the Secretary gets to finding support in the case law is Cathedral Art Metal, in which the plaintiff first won a preliminary injunction, then 14 days later moved for

[10] Should the Secretary finally cite such a case—for the first time—in his reply brief, the Brakebill Plaintiffs would request leave to file a brief sur-reply.

an extension of time to move for attorneys' fees, which motion the court granted. 2018 WL 2356181.[11]

But even in Cathedral Art Metal, it is not clear that any party or the court actually believed the extension of time was necessary. The court granted the plaintiff a preliminary injunction on January 26, 2018. Id. at *1. Five days later the defendants filed a notice of appeal to the Eleventh Circuit, and on February 8, 2018, they moved the district court for reconsideration of the preliminary injunction order or, in the alternative, for a stay until the Eleventh Circuit resolved the appeal. (Cathedral Art Metal Dkts. 43, 48). The plaintiff, uncertain what its deadline was to file an attorneys' fees motion, told the court that it had found no Eleventh Circuit precedent on point, and that some courts had "interpreted Rule 54 to *not* require an attorneys' fees petition to be filed within fourteen days of a preliminary injunction order." Pl's Mot. Stay

[11] In citing this case, the Secretary says that "there is no reason the Brakebill plaintiffs" should not have moved to extend the deadline to move for attorneys' fees just as Cathedral Art Metal did. Secy's Br. at 15. But Cathedral Art Metal could not have served as an example for the Brakebill Plaintiffs because the order the Secretary cites was issued on May 28, 2018—two weeks after the attorneys' fees motion in this case was fully briefed, and almost two years after the District Court in this case granted the first preliminary injunction.

Attys' Fee Deadline at 2 & n.1 (Cathedral Art Metal Dkt. 49) (citing Consolidated Paving, 2013 WL 916212 at *2). Thus, "out of an abundance of caution," the plaintiff asked the court to toll its deadline to move for attorneys' fees until the pending motion for reconsideration and appeal were resolved. Id. at 3.

The defendants did not object; they merely argued that any attorneys' fees motion made before the appeal was resolved would be premature. Defs' Opp. Mot Stay Attys' Fees Deadline (Cathedral Art Metal Dkt. 60).

With no party arguing that the motion was actually due, the court observed that "[t]he parties agree that any motion for attorneys' fees should not be filed until at least 14 days after issuance of an opinion by the U.S. Court of Appeals for the Eleventh Circuit resolves Defendants' appeal of the Court's preliminary injunction order," and granted the motion. Cathedral Art Metal, 2018 WL 2356181 at *5. This is hardly a ringing endorsement of the Secretary's theory, much less an on-point precedent.[12]

[12] In addition, the motion to extend the deadline did not serve the notice function that the Secretary argues is so critical to Rule 54(d)(2)(B). The Secretary never expressly cites to Rule 54(d)(2)(B)(iii) and its

2. The other cases the Secretary cites to fare even worse. In Bauknight v. Monroe County, 446 F.3d 1327 (11th Cir. 2006) (discussed in Secy's Br. at 13-14), the court held that a defendant reasonably removed to federal court a suit that included a federal question, even though that federal question was not ripe. 446 F.3d at 1331-32. But the critical factor was not the defendant's deadline to remove, but rather the plaintiff's failure to employ a procedural mechanism that allows a state-court plaintiff with an unripe federal claim to reserve that claim for subsequent federal litigation. Id. at 1330-32. Rule 54(d) has no equivalent mechanism that allows a party who is not yet entitled to an award of attorneys' fees to move for such an award.

In In re Farmland Indus., Inc., 318 B.R. 159 (Bankr. W.D. Mo. 2004), the question was whether one creditor, American United Life Insurance Company ("AULIC"), had timely made its claim. Id. at 161.

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requirement that a motion for award of attorneys' fees "state the amount sought or a fair estimate of it," but he cites to corresponding language in the Notes of the Advisory Committee, and suggests that this information is part of the notice that a party must have in order to determine whether it should appeal the preliminary injunction. Secy's Br. at 12, 15-16; see also id. at 3, 6, 8, 17, 20-21 (suggesting the Secretary might have conducted litigation differently had he known the amount of the Brakebill Plaintiffs' fee request). The Cathedral Art Metal plaintiffs made no such showing.

AULIC had issued a life insurance policy to the debtor; but the debtor gave notice in 2001 that it intended to terminate the policy, and a 2002 termination agreement specified that the debtor agreed to indemnify AULIC. Id. The deadline to file claims was January 10, 2003. Id. at 162 n.4. AULIC made its claim on May 27, 2004, arguing that its claim was timely because it was "a 'late-rising claim'" triggered by a February 2004 court order that AULIC argued entitled it to indemnification. Id. at 162. The court rejected that argument, holding that the termination agreement itself, and not the later court order, created AULIC's "right to payment, albeit contingent." Id. at 165. The Secretary quotes a passage on that same page stating that even such a contingent right constitutes a "claim" subject to the deadline. Secy's Br. at 14.

That is where the analogy to this case fails. The Farmland court held that AULIC's right to payment arose from the 2002 termination agreement, executed before the claims deadline. For the analogy to hold, the Brakebill Plaintiffs would have had to have been entitled to an award of attorneys' fees upon entry of the first preliminary injunction. They were not. As Sole makes clear, the District Court's grant of a preliminary injunction in August 2016 did not give the Brakebill Plaintiffs a

"contingent" right to attorneys' fees—the Brakebill Plaintiffs' victory at that point was still "ephemeral" and entitled them to nothing. 551 U.S. at 86. Such a right manifested only on April 3, 2018, when the District Court dissolved the preliminary injunction because the Secretary had rendered it moot.

Equally inapposite is North Dakota's action before this Court in North Dakota v. United States Environmental Protection Agency. No. 15-2552 (8th Cir. July 17, 2015) (Pet. for Rev.). North Dakota and other states brought an Administrative Procedure Act challenge to a regulation promulgated by multiple federal agencies. Id. at 1-2. The petitioners believed that the district courts had jurisdiction to review the final rule, but the agencies had opined that the rule was subject to direct review in the circuit courts. Id. at 2. Other circuit courts had held that, in such a circumstance, a party bringing an action in district court should also protectively petition for review in circuit court. Am. Paper Inst., Inc. v. U.S. EPA, 882 F.2d 287, 288 (7th Cir. 1989); Inv. Co. Inst. v. Bd. of Gov. of Fed. Reserve Sys., 551 F.2d 1270, 1280 (D.C. Cir. 1977). Thus, the petitioners filed their petition in his Court "out of an abundance of

caution to preserve their right to challenge the final rule in the Circuit Courts, consistent with established practice." Pet. for Rev. at 2.

That case is inapposite for two reasons. First, the right to challenge the final rule was fully vested—the only question was the appropriate venue. In this case, because the grant of the preliminary injunction did not *yet* make the Brakebill Plaintiffs "prevailing parties" when it was entered, they could not yet make a motion that satisfied the Rule 54(d)(2)(B)(ii) requirement that they specify grounds entitling them to an award of attorneys' fees. In other words, the Brakebill Plaintiffs at that time still had no right to make such a motion. Second, the deadline in Rule 54(d) is not a jurisdictional rule; thus, failure to meet the deadline is not necessarily fatal in the same way that failing to timely petition for review in a circuit court would be. Finally, the Secretary can point to no equivalent court guidance advising parties who win a preliminary injunction to move prematurely for attorneys' fees.

3. The Secretary's interpretation flies in the face of actual litigation practice. In fact, practice in this Circuit seems to confirm that no one interprets Rule 54 the way the Secretary does.

Take, for example, Rogers Group, Inc. v. City of Fayetteville, No. 5:09-cv-05246-JLH (W.D. Ark. 2011), which unfolded almost exactly like the case at bar. After the city enacted an ordinance to regulate the operation of rock quarries, the plaintiff sued, arguing that the city had no authority under state law to enact the ordinance. Rogers Grp. v. City of Fayetteville, 2009 WL 10675041 at *1 (W.D. Ark. Nov. 30, 2009). The district court granted a preliminary injunction on November 30, 2009. Id. at *4. The city appealed, but this Court affirmed the preliminary injunction. Rogers Grp. v. City of Fayetteville, 629 F.3d 784 (8th Cir. 2010). In the meantime, both parties had moved for summary judgment. Pl's Mot. Partial Summ. J, Def's Cross Mot. Summ. J. (Rogers Grp. Dkts. 34, 50).

However, on March 23, 2011, the city notified the district court that it had repealed the challenged ordinance. Def's Notice (Rogers Grp. Dkt. 73). Consequently, the district court denied both summary judgment motions as moot, and dismissed the case. Rogers Grp. v. City of Fayetteville, 2011 WL 13187120 (W.D. Ark. Mar. 31, 2011). The plaintiffs moved for attorneys' fees on April 14, 2011—14 days after they became prevailing parties. Pl's Mot Attys' Fees (Rogers Grp. Dkt. 76).

The district court granted that motion, and the appeal from that order became the leading case in this Circuit (cited in the Secretary's Brief at 17) for the question of whether the grant of a preliminary injunction, later mooted by a defendant's unilateral action, confers prevailing party status on a plaintiff. Rogers Grp., 683 F.3d 903. But at no point did any party, or any court, suggest that the plaintiff's motion for attorneys' fees—which came some 15 months after the order granting the preliminary injunction—was untimely.

In fact, *during the pendency of this case*, the Secretary's own counsel, the North Dakota Attorney General, agreed to pay $245,000.00 in attorneys' fees in a case quite similar to this one. In MKB Management Corp. v. Burdick, No. 1:13-cv-071 (D.N.D.), the plaintiffs challenged a North Dakota abortion statute, and sought a preliminary injunction against its enforcement. Compl. and Mot. Prelim. Inj. (MKB Dkts. 1, 3). The court granted a preliminary injunction on July 22, 2013. MKB Management Corp. v. Burdick, 954 F. Supp. 2d 900 (D.N.D. 2013). Following the plaintiffs' motion for summary judgment, the court permanently enjoined enforcement of the statute. MKB Management Corp. v. Burdick, 16 F. Supp. 3d 1059 (D.N.D. 2014). Only after summary

judgment did the parties enter the first of two stipulations to extend the time to file attorneys' fees motions. Stip. Extend Time (MKB Dkt. 112), 2d Stip. Extend Time (MKB Dkt. 125). In April 2016—three months after the Brakebill Plaintiffs initiated the present case, and two months before the Brakebill Plaintiffs moved for a preliminary injunction—the State ultimately agreed to pay $245,000.00 in attorneys' fees. Stip. Settlement of Attys' Fees and Order Adopting Stip. Settlement of Attys' Fees (MKB Dkts. 127, 128). The record in MKB shows no evidence that the defendants, represented by the North Dakota Attorney General, ever argued that the plaintiffs were not entitled to attorneys' fees arising from their preliminary injunction.

4. The Secretary wrongly suggests that the District Court contradicted itself when it first denied as "moot" the Brakebill Plaintiffs' motion to extend the time to move for attorneys' fees, then later described as "premature" their subsequent motion for attorneys' fees. Secy's Br. at 19 n.3. The precise legal import of the Secretary's argument is unclear. It appears the Secretary is arguing that, when the District Court by text-only order denied the motion to extend as moot, what the District Court *meant* was that the motion was untimely.

The Brakebill Plaintiffs agree that "moot" is not a synonym for "premature"—but neither is "moot" a synonym for "untimely." Rather than searching for meaning in the District Court's text-only order, the Brakebill Plaintiffs trust that the District Court knew what it meant when, in the order on appeal before this Court, it wrote that such a motion was due "14 days after the final judgment is entered." Secy's Addendum at 4.

5. Finally, absurd results would follow should this Court (or any court) actually enforce the Secretary's interpretation of the Rule 54(d)(2)(B)(i)—a flurry of meaningless make-work motion practice that would add expense to the litigation and tax the limited time of district courts.

Every order granting a preliminary injunction would be followed within 14 days by additional motion practice. The party that won the preliminary injunction would protectively move for an award of attorneys' fees. Of course, no district court could yet grant such a motion, because as yet there would be no prevailing party. See Dupuy v. Samuels, 423 F.3d 714, 723 (7th Cir. 2005) (district court's award of attorneys' fees "was premature" when made after grant of preliminary

injunction but before final resolution on the merits). But the motion would be made, as the Secretary puts it, "to preserve an inchoate right." Secy's Br. at 8. To satisfy Rule 54(d)(2)(B)(iii), the movant would compile or estimate the fees sought.[13] The other party would oppose, likely on the grounds that the movant is not a prevailing party and therefore not entitled to such an award. The district court might deny the motion without prejudice, or hold the motion in abeyance—in either case rendering the entire exercise a waste of time.

Or, as the Secretary suggests, a party that wins a preliminary injunction might "request[] a court order excusing them from complying with the deadline," Secy's Br. at 15, presumably pursuant to Rule 6(b). But, as Cathedral Art Metal demonstrated, such a motion would not necessarily serve the full notice function that a proper Rule 54(d) motion would. See supra n. 12.

Either way, the Secretary's vision of the Rule would require a great deal of extra work, while doing absolutely nothing to resolve any claim for attorneys' fees. If anyone would welcome the Secretary's

[13] It is still unclear how the moving would satisfy the Rule 54(d)(2)(B)(ii) requirement that she "specify the judgment and the statute, rule, or other grounds entitling the movant to the award."

interpretation, it would be the legal malpractice bar—which would quickly scour the dockets for any party that paid attorneys' fees for work performed seeking a preliminary injunction, and whose counsel failed to advise them about this "plain and unambiguous" application of Rule 54. Secy's Br. at 5, 23.

This Court should affirm the District Court's holding that a Rule 54 motion for award of attorneys' fees is due "within 14 days after the entry of a final judgment at the conclusion of a case." Secy's Addendum at 8.

II. Even if the Brakebill Plaintiffs' motion for attorneys' fees was untimely, this Court should affirm the District Court's finding that the award was justified by excusable neglect and public policy.

A. The District Court did not abuse its discretion in finding excusable neglect.

Under the Federal Rules of Civil Procedure, "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). The Brakebill Plaintiffs made such a motion, App'x at 136-39; and the District Court, in granting their subsequent motion for attorneys' fees, held that

"even if the motion were arguably considered to be untimely, . . . public policy and 'excusable neglect' provide a basis for reaching the same result," i.e., granting the motion. Secy's Addendum at 8.

Rule 6 gives the district court "discretion to admit or exclude materials" submitted after the deadline for submitting them has passed. Huggins v. FedEx Ground Package Sys., Inc., 592 F.3d 853, 856 (8th Cir. 2010). This Court "review[s] a district court's grant of a motion for extension of time . . . for abuse of discretion," Treasurer, Trustees of Drury Industries, Inc. Health Care Plan and Trust v. Goding, 692 F.3d 888, 892 (8th Cir. 2012) (motion for extension of time to file notice of appeal), and "consider[s] four factors in determining whether excusable neglect or good cause for an extension exists: (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (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." Id. at 893 (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993)). The Secretary

invokes only the first of these factors,[14] and his argument is not persuasive.

1. The Secretary was not prejudiced by the timing of the Brakebill Plaintiffs' motion. the Secretary claims that "[h]ad 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." Secy's Br. at 19-20. But this claim is belied by the record.

Notwithstanding his claims to the contrary, the Secretary had sufficient notice of the Brakebill Plaintiffs' intent to seek attorneys' fees. The Complaint, in its Prayer for Relief, expressly asks for an award of "attorney fees and costs as allowed and required by law, including, but not limited to, 42 U.S.C. § 1988, 52 U.S.C. § 10310, and the Private Attorney General Doctrine." App'x at 79 ¶ 216. The Complaint itself is meticulously detailed, see generally App'x at 36-80, and the Brakebill Plaintiffs' Motion for Preliminary Injunction was accompanied by multiple declarations from experts evincing independent research in

[14] Because he did not argue in his opening brief with respect to any of the other three factors, the Secretary has waived such arguments. Chay-Velasquez, 367 F.3d at 756.

support of the Brakebill Plaintiffs' claims.[15] These put the Secretary on notice that the Brakebill Plaintiffs would seek an award of attorneys' fees, and that—considering both the attorney time required for such detailed work, and the cost of employing such experts—those fees could be substantial.

Moreover, the Brakebill Plaintiffs' request for attorneys' fees in their Complaint is the *only* indication in the record of either parties' actual intent. The Secretary claims that he might have appealed the preliminary injunction had he known that the Brakebill Plaintiffs would seek attorneys' fees. Secy's Br. at 6, 19-20, 22. But these claims are not supported by affidavits, documents, or other evidence that the Secretary actually considered the absence of a motion for attorneys' fees when he decided not to appeal the preliminary injunction.[16] The Secretary's

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[15] See Decl. of Matthew A. Barreto, Ph.D. (Dkt. 44-1); Decl. of Dr. Daniel McCool, Ph.D. (Dkt. 44-2); Decl. of Gerald R. Webster, Ph.D., and supporting exhibits (Dkts. 44-3, 44-4, 44-5, 44-6); Decl. of Michael C. Herron, Ph.D. (Dkt. 44-7); and Decl. of Gabriel R. Sanchez, Ph.D. (Dkt. 44-8).

[16] In addition, it is unreasonable to believe the absence of a fee application actually influenced the Secretary's decision not to appeal. First, his counsel, the North Dakota Attorney General, had recently settled a claim for attorneys' fees that did not comport with Secretary's interpretation. See infra p. 34-35. Second, the Secretary *still* cannot identify a single case where a district court has enforced his

hypothetical assertions are not evidence—they are merely unsworn statements of counsel, and "'statements of counsel are not evidence' and do not create issues of fact." Exeter Bancorp., Inc. v. Kemper Secs. Grp., Inc., 58 F.3d 1306, 1312 n.5 (8th Cir. 1995) (quoting United States v. Fetlow, 21 F.3d 243, 248 (8th Cir. 1994)) (alteration in Exeter omitted).

Thus, the record shows that the Secretary was on notice from Day One that the Brakebill Plaintiffs would seek attorneys' fees, and the record contains no evidence that the Secretary actually was prejudiced.

2. The other factors all support an award of attorneys' fees. First, even if the Brakebill Plaintiffs' motion was untimely, it was reasonably so. The Brakebill Plaintiffs moved for attorneys' fees 14 days after becoming the prevailing party, and long before final judgment was entered. Although the Secretary decries a motion that he calls "over a year-and-a-half late," Secy's Br. at 23, the Brakebill Plaintiffs' actions were in line with other similar cases. In Consolidated Paving, the

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interpretation of Rule 54(d)(2)(B)(i). Assuming the Secretary would have researched the question before making such a weighty decision, it strains credulity to think he would have chosen to forgo an appeal based solely on his belief that he could persuade the courts to, for the first time, interpret a 27-year-old Rule in a manner contrary to existing case law and prevailing legal practice.

plaintiff moved for attorneys' fees more than 28 months after it was granted a preliminary injunction, but within 14 days of becoming the prevailing party. See supra Part I.B.2. In Rogers Group, the plaintiff moved for attorneys' fees more than 17 months after it was granted the preliminary injunction, within 14 days after becoming the prevailing party. See supra Part I.C.3. In Planned Parenthood, the plaintiff moved for attorneys' fees approximately 14 months after it was granted a preliminary injunction, but within 14 days after becoming the prevailing party. See supra Part I.B.1. In light of these decisions, the Brakebill Plaintiffs' motion made 14 days after becoming the prevailing party was not untimely, was not unreasonably late, even coming 19 months after the District Court granted the first preliminary injunction.

Second, the Brakebill Plaintiffs had a reasonable cause for moving when they did. As explained above, the Brakebill Plaintiffs were not prevailing parties until the District Court dissolved the preliminary injunction as moot, and Rule 54(d)(2)(B)(ii) requires a movant to demonstrate that it is entitled to an award of fees. See supra Part I.A.2.a. Thus, the Brakebill Plaintiffs could not have made such a motion within 14 days after the District Court granted the preliminary injunction while

still complying with subsection (ii). In the alternative, even if the Brakebill Plaintiffs could have made such a premature motion, the standard practice—as evidenced by even the North Dakota Attorney General's past practice—was that only a prevailing party entitled to attorneys' fees would move for such an award.

Third, the Brakebill Plaintiffs acted in good faith. They believed, consistent with existing case law, that their motion for attorneys' fees was due 14 days after final judgment at the conclusion of the case—in this case, the settlement effected by the District Court's approval of the consent decree, App'x at 223-31, on April 27, 2020.[17] Nevertheless, the Brakebill Plaintiffs "out of an abundance of caution and to preserve their rights" moved for an award of attorneys' fees 14 days after they became prevailing parties.

[17] The Secretary spuriously suggests that the Brakebill Plaintiffs "acknowledged" in their motion that they understood Rule 54 to mean what Appellant now argues it means." Secy's Br. at 20. Not so. The Brakebill Plaintiffs quoted Rule 54(a) in their motion, App'x at 141, and then explained their understanding that the earliest triggering event was the order dissolving the preliminary injunction as moot, which made them prevailing parties. App'x at 141-21. The Secretary even recognizes this distinction earlier in his brief. Secy's Br. at 4.

3. The secretary wrongly suggests that a court can never set aside the Rule 54(d) deadline on the basis of excusable neglect, calling the deadline "mandatory," Secy's Br. at 9, 21, and asserting that once the Secretary invoked the deadline "[t]he district court was thus obligated to apply this mandatory deadline." Id. at 9 (citing Eberhart v. United States, 546 U.S. 12, 19 (2005)).

However, the rule governing deadline extensions provides a list of rules whose deadlines cannot be extended, and Rule 54 is not on it. Fed. R. Civ. P. 6(b)(2) ("A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (3), and 60(b).").

In addition, the case law the Secretary cites is inapposite. Both Eberhart and United States v. Foster, 623 F.3d 605 (8th Cir. 2010), are criminal appeals addressing motions for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. When Eberhart was decided, those rules expressly limited a court's capacity to extend Rule 33 deadlines. Fed. R. Crim. P. 45(b)(2) (2004) ("The court may not extend the time to take any action under Rule[] . . . 33 . . . except as stated in th[at] rule[].").[18]

[18] The same year that Eberhart was decided, the Federal Rules of Criminal Procedure were amended to allow for extension by motion of

The Federal Rules of Civil Procedure place no such limitation on extensions of the Rule 54(d) deadline—as evidenced by the Secretary's citation to a case in which the court did precisely that. Secy's Br. at 15 (citing Cathedral Art Metal, 2018 WL 2356181 at *4); see also Fed. R. Civ. P. 6(b)(2).

Foster, too, concerned Criminal Rule 33 (after the 2005 amendments), but it did not hold that a party's mere invocation of a deadline barred a court from extending that deadline for excusable neglect. Rather, this Court held simply that "the government preserved the issue here by raising it in response to Mr. Foster's motion," and that the district court had not abused its discretion "by finding no excusable neglect for the delay." Foster, 623 F.3d at 608. Here, the District Court first held that the Brakebill Plaintiffs' motion was not untimely, then in the alternative found that excusable neglect *did* warrant an award of attorneys' fees notwithstanding any delay. In any case, the Secretary fails to demonstrate why the Civil Rule 54(d) deadline should be enforced

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Rule 33 deadlines. Fed. R. Crim. P. 45 advisory committee's notes to 2005 amendment.

in the same manner as the Criminal Rule 33 deadline, which the Eberhart Court described as "rigid." 546 U.S. at 13.

4. Finally, the very notion of fairness that the Secretary leans so heavily upon weighs strongly in favor of affirming the District Court's finding of excusable neglect. The Secretary, quoting Landgraf v. USI Film Products, 511 U.S. 244 (1994), argues that "'[e]lementary considerations of fairness' support a party's right to rely on the express language of Rule 54, its accompanying commentary, and conform his conduct accordingly." Secy's Br. at 9-10 (quoting Landgraf, 511 U.S. at 265) (alteration in Secy's Br.). Those four words do, in fact, appear in Landgraf—but the surrounding text actually supports the District Court's finding of excusable neglect:

> As Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. 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. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.

511 U.S. at 265 (internal footnote, quotation and citation omitted).

In this case, the Secretary effectively asks this Court to adopt a new interpretation of the Rule 54(d) deadline, and to retroactively apply that new deadline to the Brakebill Plaintiffs. Never mind that "the express language of Rule 54 [and] its accompanying commentary," Secy's Br. at 10, as well as existing case law when the preliminary injunction was granted, actually support the District Court's holding, and undermine the Secretary's interpretation. See supra Part I.A-B.

A party seeking to determine "what the law is and to confirm their conduct accordingly" in August 2016, at the time the Secretary argues the attorneys' fees motion was due, would have found Planned Parenthood and Consolidated Paving, and would have concluded that "[t]he traditional judgment needed for a triggering event for filing a motion for attorney's [*sic*] fees ha[d] not occurred." Planned Parenthood, 946 F. Supp. 2d at 922. The Secretary offers no case law to the contrary; even the slim reed of Cathedral Art Metal has no value here, as it was not yet on the books. Thus, "[e]lementary considerations of fairness" compel a finding that, even if the Secretary has the better interpretation of Rule 54(d)(2)(B)(i), the Brakebill Plaintiffs' conduct was consistent with "what the law [was]" at that time. Landgraf, 511 U.S. at 265.

The Brakebill Plaintiffs moved for attorneys' fees when they did *not* because of "ignorance or carelessness," as the secretary suggests. Secy's Br. at 20 (quoting Noah, 408 F.3d at 1045). Rather, their motion was consistent with a reasonable reading of Rule 54 and the Advisory Committee Notes, *and* with all of the case law before this Court, *and* with practice in this Circuit. Consequently, this Court should affirm the District Court's finding of excusable neglect.

B. This Court should affirm the District Court's finding that public policy warranted an award of attorneys' fees.

This Court reviews questions of public policy *de novo*. St. Paul Fire & Marine Ins. Co. v. F.D.I.C., 968 F.2d 695, 702 (8th Cir. 1992).

There is no question that public policy favors allowing all eligible citizens to vote, subject to those requirements necessary for a fair and orderly election. The District Court recognized the centrality of the right to vote in our system of government. App'x at 108-09 (citing Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.")). And the

District Court's order explains perfectly why an award of attorneys' fees was appropriate in this case.

Before HBs 1332 and 1333 were enacted, voters could vote if a poll worker recognized them, or with an ID, or by taking advantage of various fail-safes. App'x at 87. When North Dakota enacted HB 1332, "the new law . . . did away with North Dakota's voucher and affidavit 'fail-safe' mechanism." App'x at 88. In fact, after HB 1333 was enacted, North Dakota was the only state in the nation with an ID requirement that provided no fail-safes. App'x at 89. Meanwhile, "[t]he undisputed evidence in the record clearly demonstrate[d] there [we]re likely thousands of eligible voters in North Dakota who lack[ed] a qualifying ID," and "some of those voters w[ould] simply be unable to obtain the necessary ID, no matter how hard they tr[ied]." App'x at 110. That this lack of a fail-safe—which already had disenfranchised the Brakebill Plaintiffs and likely thousands of others, and would continue to do so unless enjoined—was crucial to the District Court's finding HBs 1332 and 1333 unconstitutional. App'x at 106 ("Further, the Court finds the lack of any current 'fail-safe' provisions in the North Dakota Century Code to

be unacceptable and violative of the Equal Protection Clause of the 14th Amendment.").

The Brakebill Plaintiffs brought this problem to light with their litigation. The District Court granted a preliminary injunction, and the Secretary chose not to appeal. And, as the Secretary trumpeted to the District Court:

> In response to [the District] Court's August 2016 Order requiring a 'fail-safe,' the North Dakota legislature passed House Bill 1369 during the 2017 legislative session. House Bill 1369 . . . in relevant part, adopts a set aside ballot 'fail-safe' for voters who do not possess a valid ID when appearing to vote.

Secy's Mem. Supp. Mot Dissolve Prelim. Inj. at 14 (Dkt. 81); see also Secy's Br. at 3 (in promoting HB 1369, the Secretary "pursued a legislative change that satisfied the district court's call for a 'fail-safe provision to protect voter's [sic] rights after North Dakota chose to remove self-authenticating affidavits from its unique non-registration election system."). In other words, as a result of the Brakebill Plaintiffs' litigation, "likely thousands of eligible voters in North Dakota who lack[ed] a qualifying ID" were allowed to vote in 2016, and the following year the North Dakota Legislature enacted a fail-safe into law. Public policy should—public policy *must*—encourage such efforts.

The Secretary argues that public policy must favor Rule 54's "clear mandate"—and never mind that, in 27 years since Rule 54 was amended, the Secretary can't cite a single case enforcing his interpretation, while at least two district courts (one in this Circuit) have expressly rejected it. But the Brakebill Plaintiffs identified an unconstitutional shortcoming in HBs 1332 and 1333—the lack of a "fail-safe" for voters who did not have and could not obtain a qualifying ID—which the District Court enjoined so as to protect the voting rights of the Brakebill Plaintiffs and thousands of others; they gave notice in their Complaint that they would seek attorneys' fees; and the Secretary should have known that he might be liable for those fees when he chose to moot out the preliminary injunction by pursuing superseding legislation that included a remedy for that specific constitutional shortcoming. The Secretary's baseless assertions cannot diminish the significant contributions that the Brakebill Plaintiffs' lawsuit made to voting rights and public policy in North Dakota.

This Court should affirm the District Court's finding that public policy warranted an award of attorneys' fees.

CONCLUSION

For the reasons articulated above, Plaintiffs-Appellees the Brakebill Plaintiffs respectfully request that this Court **AFFIRM** the District Court's judgment of attorneys' fees and costs.

Dated this 14th Day of September 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Fed. R. App. P. 32(g) that the text of the Brief of Plaintiffs-Appellants contains 11,069 words.

This brief was prepared in 14-point Century Schoolbook, a proportionately spaced typeface, using Microsoft Word 2016. This brief also has been scanned for viruses, and is virus free.

DATED: September 14, 2020

s/ Daniel David Lewerenz
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CERTIFICATE OF SERVICE

I hereby certify that, on September 14, 2020, I electronically the foregoing document with the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

DATED: September 14, 2020

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