Case No. 09-60272

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIAN MOORE,

Plaintiff – Appellant

versus

DELBERT HOSEMANN, In his official capacity as Mississippi Secretary of State,

Defendant – Appellee

On Appeal from the United States District Court
For the Southern District of Mississippi
The Honorable Tom S. Lee, Senior District Court Judge

BRIEF FOR APPELLANT, BRIAN MOORE

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Case No. 09-60272

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Stewart Alexander, Plaintiff

2. Mark R. Brown, Attorney for Plaintiffs/Appellant

3. Lisa L. Colonias, Attorney for Defendant/Appellee

4. Victor Fleitas, Attorney for Plaintiffs/Appellant

5. Delbert Hosemann, Defendant/Appellee

6. The Honorable Tom S. Lee, Senior District Judge

7. The Natural Law Party, Plaintiff

8. Harold E. Pizzetta, III, Attorney for Defendant/Appellee

9. The Honorable James C. Summer, Magistrate Judge

_____
Mark R. Brown
Attorney of Record for Appellant

Dated: _____

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Recommendation for Oral Argument

Appellant believes that oral argument would be helpful to the Court's understanding of the issues in this case. Appellant's argument under Article II of the United States Constitution is somewhat novel, and his argument under Rule 4(d) appears to be one of first impression in this Circuit.

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Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Southern District of Mississippi dismissing Appellant's Complaint, entered on March 10, 2009 (Dkt. # 24). *See* 28 U.S.C. § 1291. Appellant's Notice of Appeal was filed on April 9, 2009. (Dkt. # 27). The appeal includes the District Court's subsequently entered Order denying costs and attorney's fees under Rules 4(d) and 54 of the Federal Rules of Civil Procedure, entered on May 14, 2009. (Dkt. # 35). Appellant filed an Amended Notice of Appeal on June 1, 2009. (Dkt. # 36). *See* Fed. R. App. Pro. 4(a) (4).

Standard of Review

Because Appellant's Complaint was dismissed under Rule 12(b), the standard of review is *de novo.* Appellant's factual allegations are to be taken as true and all reasonable inferences are to be drawn in his favor. *See U.S. ex rel. Rafizadeh v. Continental Common, Inc.,* 533 F.3d 869, 872 (5th Cir. 2008).

Statement of the Issues

1. Whether Appellant's prospective constitutional challenge to Mississippi's election procedure and the Mississippi Secretary of State's actions seeking permanent declaratory relief was rendered moot by the November election.

2. Whether the Secretary's decision to close his office early on the final qualifying day for presidential candidates violated the First and Fourteenth Amendments.

3. Whether the Secretary possesses constitutional authority under Article II of the United States Constitution to regulate presidential elections.

4. Whether the Secretary is an individual within the meaning of Federal Rule of Civil Procedure 4(e) when sued by name under 42 U.S.C. § 1983 for prospective declaratory and injunctive relief.

5. Whether Appellant is entitled to costs and attorney's fees under Federal Rule of Civil Procedure 4(d) based on the Secretary's refusal to waive service of process.

Statement of the Case

A dozen election laws in Mississippi specifically include 5:00 PM deadlines for candidates' and parties' actions and/or filings. Section 23-15-853(2) of the Mississippi Code, for example, requires that congressional candidates "qualify with the Secretary of State by 5:00 p.m. not less than twenty (20) days previous to the date of the election." Section 23-15-839(2) states that "[i]n the event that no person shall have qualified by 5:00 p.m. sixty (60) days prior to the date of the election, the commissioners … shall certify that fact to the board of supervisors …." Section 23-15-213 states that "[c]andidates for county election commissioner

shall qualify by filing … 5:00 p.m. not less than sixty (60) days before the election ….”[1]

Mississippi’s Legislature, moreover, has enacted differences between presidential elections and elections for other offices. Section 23-15-637, for example, states that “[a]bsentee ballots received by mail, *excluding presidential ballots* … must be received by the registrar by 5:00 p.m. on the date preceding the election ….” (Emphasis added).

Consistent with § 23-15-637’s distinction, Mississippi’s Legislature has also decided that a 5:00 PM deadline is not appropriate for candidates qualifying for presidential elections. Section 23-15-785(2) of the Mississippi Code requires only that a recognized political party’s presidential candidate’s “qualifying papers” be delivered to the Secretary of State “not less than sixty (60) days previous to the day of the election.” For the 2008 election cycle, this meant that a recognized political

[1] *See also* Miss. Code § 23-15-361(1) (“petition [must be] filed with the clerk of the municipality no later than 5:00 p.m.”); § 23-15-309(1) (“All persons desiring to be candidates for the nomination in the primary elections shall first pay … at least sixty (60) days prior to the first primary election, no later than 5:00 p.m.”); § 23-15-359(3) (“[p]etitions for offices described in … this section … shall be filed … no later than 5:00 p. m.”); § 23-15-299(3) (“Assessments … must be paid by each candidate … by 5:00 p.m.”); § 23-15-721(3) (“ballots must be received by the registrar prior to 5:00 p.m.”); § 23-15-807(e) (campaign reports “shall be due in the appropriate office at 5:00 p.m.”).

party's candidate's qualifying papers were due by midnight on Friday, September 5, 2008. Complaint at ¶ 8 (Dkt. # 1).

Appellant, Brian Moore,[2] was the 2008 presidential candidate for the Socialist Party USA in Mississippi and across the country. Complaint at ¶ 1 (Dkt. # 1).[3] Together with his running mate, Stewart Alexander, Appellant sought to gain access to Mississippi's presidential ballot using the Natural Law Party of Mississippi's ballot line. *Id.* ¶ 2. The Natural Law Party nominated Moore as its presidential candidate in 2008 and authorized Appellant to qualify in Mississippi as its presidential candidate. *Id.*

Appellant attempted to deliver his qualifying papers to the Secretary, Appellee, on Friday, September 5, 2008, pursuant to § 23-15-785(2), but was refused entry to the Secretary's office. Unknown to the Appellant, the Secretary closed at 5:00 PM on that day. Because Appellant's qualifying papers arrived just

[2] The Plaintiffs in the District Court included Brian Moore, Stewart Alexander, and the Natural Law Party of Mississippi. Moore alone has appealed.

[3] Because the case was dismissed under Rule 12(b), Appellant's facts are taken as true, and all reasonable inferences are drawn in his favor. *See U.S. ex rel. Rafizadeh v. Continental Common, Inc.*, 533 F.3d 869, 872 (5th Cir. 2008) ("On review of dismissal, 'the allegations in the complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true.'").

moments after 5:00 PM, Appellee refused to open his Office to accept them. Appellant was thus denied access to Mississippi's ballot.

Appellant filed suit under 42 U.S.C. § 1983 on September 16, 2008 seeking preliminary injunctive relief ordering that his name be placed on the ballot, as well as permanent injunctive and declaratory relief invalidating the Secretary's actions. Appellee was sued by name in his official capacity for this prospective declaratory and injunctive relief. Complaint at ¶ 3. Appellant did not name the State of Mississippi as a defendant.

Appellant argued in the District Court that Appellee's 5:00 PM closure violated the First and Fourteenth Amendments to the United States Constitution.[4] Complaint at ¶¶ 20-22. Specifically, Appellant argued that the First and Fourteenth Amendments require that states afford candidates a reasonable procedure to qualify for the ballot. Closing early without prior notice is not consistent with this command.

In response to the Secretary's claim that he had the power to close at 5:00 PM, Appellant argued that the Secretary did not have the constitutional authority, consistent with Article II of the Constitution of the United States Constitution, to

[4] Appellant does not argue on appeal that the Secretary's agents' misrepresentations constitutionally estopped the Secretary from enforcing his 5:00 PM deadline (assuming it to be otherwise valid). Complaint at ¶¶ 33-35. Likewise, Appellant does not argue that Appellee's conduct was arbitrary and capricious in violation of Substantive Due Process. *See* Complaint at ¶¶ 29-32.

regulate presidential elections. Complaint at ¶¶ 23-25. Even if the Secretary's 5:00 PM deadline were made publicly known, the Secretary's lack of constitutional authority rendered it meaningless.

The District Court denied Appellant's motion for preliminary relief on September 29, 2008. *See* Order Denying Preliminary Injunction (Dkt. # 11). It concluded that the Secretary had the authority to close at 5:00 PM:

> this Court finds that Plaintiffs have failed to state a cause of action under the Fourteenth Amendment or Article II of the Constitution. … The authorities cited by Plaintiffs, namely Bush v. Gore, …, and Libertarian Party of Ohio v. Brunner, … provide, at best, that federal courts will review state actions that are a significant departure from, or go beyond a fair reading of, state election laws. In this matter, the Secretary of State's interpretation of state election law and his determination to close his office at the traditional time of 5:00 p.m. is reasonable and cannot be said to be inconsistent with the state's election statutes.

Id. at 2-3 (citations omitted).[5]

The District Court on March 10, 2009, dismissed Appellant's action on mootness grounds. *See* Memorandum Opinion and Order (Dkt. # 24). It recognized that Appellant sought declaratory relief as well as preliminary and permanent injunctions, *id.* at 5, but still concluded the controversy was moot: "there is no longer any controversy between parties having adverse interests of

[5] The Plaintiffs' interlocutory appeal seeking emergency relief was denied on September 29, 2008. *See* Dkt. # 12. The interlocutory appeal was thereafter voluntarily dismissed and the Plaintiffs returned to the District Court to pursue permanent declaratory relief. *See* Dkt. # 19.

sufficient immediacy and reality to warrant the requested relief." *Id.* In regard to the "capable of repetition, yet evading review" exception, the District Court concluded that "there is no 'reasonable expectation' or 'demonstrated probability' that these plaintiffs, or any prospective Natural Law Party candidates for president and vice-president, will again miss what they now know to be the 5:00 p.m. deadline for filing their qualifying papers." *Id.* at 7. The District Court added:

> even if the proper focus were not necessarily limited to whether these particular plaintiffs will be subject to the same action again, … it does not seem reasonably likely that other prospective presidential/vice-presidential candidates will fail to timely file their qualifying papers before the Secretary of State's office closes at 5:00 p.m. on the date of the qualifying deadline.

Id. at 8 (footnotes omitted).[6]

Appellant filed his Notice of Appeal on April 9, 2009. *See* Dkt. # 27. On that same day, Appellant moved the District Court to award costs and attorney's fees. *See* Dkt. # 26. The District Court on May 14, 2009, denied the request. *See* Dkt. # 35. Appellant on June 1, 2009, amended his Notice of Appeal to include this Order. *See* Dkt. # 36.

[6] The District Court added a footnote: "the court notes that plaintiffs' problem arose because they missed the deadline, not because they were unaware of the deadline. Plaintiffs knew the office closed at 5:00 p.m. and simply failed to get there in time." *Id.* at 8 n.3. Appellant contests this factual finding. *See* Complaint ¶ 13.

Statement of Facts

Appellant was the 2008 presidential candidate for the Socialist Party USA in Mississippi and across the country. Complaint at ¶ 1 (Dkt. # 1). Appellant sought to gain access to Mississippi's presidential ballot using the Natural Law Party's ballot line. *Id.* ¶ 2. The Natural Law Party duly nominated Appellant as its 2008 presidential candidate. *Id.*

Mississippi law requires that presidential candidates' "qualifying papers" be delivered to the Secretary of State "not less than sixty (60) days previous to the day of the election." *Id.* ¶ 7; Miss Code § 23-15-785(2). For 2008, this meant that presidential candidates' qualifying papers were due on Friday, September 5, 2008. Complaint at ¶ 8.

Section 23-15-785(2) of the Mississippi Code does not include a specific time-of-day as part of its deadline for delivery. Complaint at ¶ 9. It does not require that qualifying papers be delivered by 5:00 PM. or by the "close of the business day." Nor does Mississippi law generally require that presidential candidates deliver paperwork by 5:00 PM or during "business hours." The Secretary has not published any announcement that presidential candidates must file by 5:00 PM. Complaint at ¶ 16.

Appellant attempted to file his qualifying papers with Appellee on Friday, September 5, 2008, shortly after 5:00 PM. *Id.* ¶ 10. Personnel at the Secretary's

Office represented to Appellant earlier that day that Mississippi law did not require that qualifying papers be filed by any specific time on September 5, 2008. *Id.* ¶ 13. Still, the Secretary's Office closed at 5:00 PM on September 5, 2008 and refused to accept Appellant's qualifying papers. *Id.* ¶ 14. Because Appellant did not timely file his papers, according to the Secretary, he was excluded from Mississippi's 2008 presidential ballot. *Id.* ¶ 15.

Summary of Argument

1. Appellant's Complaint is not moot. It is "capable of repetition, yet evading review." The Supreme Court and this Court have recognized on several occasions that challenges to election laws are not mooted by intervening elections. Future challenges to the Secretary's executive deadline are likely, and the case is not moot.

2. Mississippi's Secretary of State violated the Constitution by closing his office early on the qualifying day established by the Mississippi Legislature. Candidates for President have First and Fourteenth Amendment rights to access the ballot. States must provide a reasonable access procedure. Closing early on the qualifying day is not constitutionally reasonable. The Secretary does not have the constitutional authority under Article II of the United States Constitution to fix deadlines, let alone a deadline that is inconsistent with the Legislature's.

3. Appellee is subject to service under Rule 4(e) when sued in his official capacity for prospective declaratory and injunctive relief under 42 U.S.C. § 1983. Because he is subject to Rule 4(e), he is also subject to Rule 4(d), which places on him a duty to avoid unnecessary costs by waiving service. Appellant properly requested that the Secretary waive service. He refused. Once served, he was rendered liable for costs and attorney's fees under Rule 4(d).

Argument

I. Appellant's Complaint is "Capable of Repetition, Yet Evading Review."

Actions that are "capable of repetition, yet evading review" are not mooted by a plaintiff's loss of a personal stake in the merits of the controversy. *See, e.g., Moore v. Ogilvie*, 394 U.S. 814 (1969) (holding that election challenge was capable of repetition yet evading review). This Court has routinely applied this exception to election challenges. In *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006), for example, this Court stated that a "[c]ontroversy surrounding election laws … is one of the paradigmatic circumstances in which the Supreme Court has found that full litigation can never be completed before the precise controversy (a particular election) has run its course." (Footnote and citation omitted). The Court accordingly held that a challenge to campaign finance regulations was not mooted by an intervening election.

Carmouche relied on a long line of Supreme Court cases that have applied the "capable of repetition, yet evading review" exception to election challenges. *See, e.g., Norman v. Reed*, 502 U.S. 279 (1992) (holding that challenge was not moot); *Meyer v. Grant*, 486 U.S. 414 (1988) (holding that challenge was not moot); *Storer v. Brown*, 415 U.S. 724 (1974) (holding that an "as applied" was not mooted by an election); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (holding that an election challenge was not mooted by an intervening election); *Brown v. Chote*, 411 U.S. 452 (1973) (same); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (same).[7]

In order to avail itself of the "capable of repetition, yet evading review" exception, a plaintiff must satisfy three requirements: First, the plaintiff must prove that he originally had standing, *i.e.*, an extant injury, when the case was filed. *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE & PROCEDURE § 2.13 (2001). Second, the plaintiff must show that the injury is one that qualifies under the exception. *Id.* Election challenges routinely

[7] This Court's sister Circuits have also routinely concluded that intervening elections do not moot constitutional challenges to election laws, including ballot restrictions. *See, e.g., Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) ("Legal disputes involving election laws almost always take more time to resolve than the election cycle permits.").

qualify under this exception. Third, a plaintiff must establish a "reasonable expectation" that the complained-of governmental conduct will recur in the future.

The "reasonable expectation" of recurrence need not rise to the level of certainty needed to establish standing in the first instance. In *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), for example, the court observed that the repetition requirement for the "capable of repetition yet evading review" exception is "somewhat relaxed" and is "easily satisfie[d]" in election cases. *See Honig v. Doe*, 484 U.S. 305 (1988).

Moreover, in an election challenge a plaintiff need not establish that a particular controversy—in all of its nuances and specifics—is likely to happen again. The Supreme Court in *Federal Election Commission v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2663 (2007), recently rejected this notion, as it has done on several occasions. There, the Federal Election Commission (FEC) argued that a challenge to campaign finance limitations spelled out in the Bipartisan Campaign Reform Act (BCRA), which had been applied to an issue-advocacy group (Wisconsin Right to Life (WRTL)) during a prior election, was moot because of the intervening election. The FEC further argued that the constitutional challenge could not be saved by the "capable of repetition, yet evading review" exception because it was not likely that the same challenge would arise again. The Supreme Court disagreed:

> We have recognized that the "'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *Storer v. Brown,* 415 U.S. 724, 737 n. 8 (1974). Requiring repetition of every "legally relevant" characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges. History repeats itself, but not at the level of specificity demanded by the FEC.

127 S. Ct. at 2663 (citations omitted).

So long as there is a reasonable expectation that a similar controversy will recur, an election challenge is not mooted by an intervening election. This is true whether the challenge is facial or as-applied. Consequently, Appellant need not prove an expectation that he might miss the Secretary's 5:00 PM deadline by only a handful of minutes. Specificity like this is not required. The questions here are whether the Secretary has the authority to regulate presidential elections by setting deadlines, and whether future candidates in Mississippi might be disadvantaged by this deadline. If there is any question about the validity of the deadline, the controversy is capable of repetition, yet evading review.

The reason is simple: resolving the matter now saves judicial time and avoids repetitive litigation. The Supreme Court explained in a footnote in *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (which was cited with approval in *Wisconsin Right to Life*):

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. … The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Resolving the validity of the deadline in the present case, rather than waiting for another case to be filed in 2012 or 2016, makes perfect sense. It will assist everyone who is involved with Mississippi's electoral system. Moreover, resolving the matter now will avoid the future rush to judgment that often accompanies election challenges filed in the weeks or days that run up to elections.

Carmouche, 449 F.3d at 662, moreover, stated that "despite the Supreme Court's reminder that there must be a 'reasonable expectation that the same complaining party would be subject to the same action again,' the Court does not always focus on whether a particular plaintiff is likely to incur the same injury." Instead, in the context of elections, the *Carmouche* Court observed, it is enough that "other individuals" in the political process might challenge the law in the future. The Court in *Carmouche* specifically quoted footnote 8 in *Storer v. Brown* for this proposition. It further relied on *Dunn v. Blumstein,* 405 U.S. 330, 333 n. 2 (1972), which stated that "[a]lthough [the plaintiff] now can vote, the problem to voters posed by the Tennessee residence requirements is 'capable of repetition, yet

evading review.'" *Storer* and *Dunn* established that the same party need not be subject to the future risk. It is enough that others might encounter the same problem.

Applying this logic, this Court in *Carmouche*, 449 F.3d at 662, concluded that "even if it were doubtful that the [plaintiff] would again attempt to engage in election-related speech in Louisiana, precedent suggests that this case is not moot, because other individuals certainly will be affected by the continuing existence of the [challenged laws]."

The District Court below questioned the continuing validity of *Carmouche*:

> In two cases since Center for Individual Freedom v. Carmouche, 449 F.3d 655, 662 (5th Cir. 2006), was decided, the Supreme Court has reiterated that the party seeking to establish the "capable of repetition yet evading review" exception must establish that "there is a reasonable expectation that the same complaining party will be subject to the same action again." See Federal Election Com 'n v. Wisconsin Right To Life, Inc., 127 S. Ct. 2652, 2663 (2007), and Davis v. Federal Election Com'n, 128 S. Ct. 2759, 2770 (2008).

Memorandum Opinion and Order at 8 n.2 (Dkt. #24). In neither *Wisconsin Right to Life* nor *Davis*, however, was the question about *who* might be adversely affected specifically raised. *Wisconsin Right to Life*, moreover, specifically cited *Storer*'s footnote 8, which was relied on in *Carmouche* to support the proposition that potential future challenges by other parties is sufficient.

Kucinich v. Texas Democratic Party, 563 F.3d 161, 164-65 (5th Cir. 2009), recently steadfastly stood by *Carmouche*. In *Kucinich*, this Court concluded that a

challenge to a Texas election law was "capable of repetition, yet evading review" even though the plaintiff (Kucinich) could not claim that he would run again:

> although Kucinich's counsel, when pressed at oral argument, could not state whether his client has an intention to run for President in the future and declined to express a belief that Kucinich will again be subject to the party's oath requirement, we are unwilling to dismiss the case as moot when "the issues properly presented, and their effects [ ], will persist as the [restrictions] are applied in future elections."

563 F.3d at 164-65 (some citations omitted). *Kucinich* makes clear that not only is *Carmouche* sound, Appellant's challenge is capable of repetition yet evading review.

II. Mississippi Violated the First and Fourteenth Amendments.

In dismissing the Complaint, the District Court assumed that the Secretary's 5:00 PM deadline represents a valid exercise of executive authority. Its Order denying preliminary relief stated that only "a significant departure from, or go[ing] beyond a fair reading of, state election laws," would violate Article II. Order Denying Preliminary Injunction at 2 (Dkt. # 11). "In this matter, the Secretary of State's interpretation of state election law and his determination to close his office at the traditional time of 5:00 p.m. is reasonable and cannot be said to be inconsistent with the state's election statutes." *Id.* at 2-3.

The District Court reiterated its conclusion that the Secretary's deadline was valid in its final judgment, stating:

> even if the proper focus were not necessarily limited to whether these particular plaintiffs will be subject to the same action again, in the court's opinion, it does not seem reasonably likely that other prospective presidential/vice-presidential candidates will fail to timely file their qualifying papers before the Secretary of State's office closes at 5:00 p.m. on the date of the qualifying deadline.

Id. at 8. A footnote attached to this passage stated: "In this vein, the court notes that plaintiffs' problem arose because they missed the deadline, not because they were unaware of the deadline. Plaintiffs knew the office closed at 5:00 p.m. and simply failed to get there in time." *Id.* at 8 n.3. The District Court's final judgment turned, in part, on its conclusion that the Secretary's deadline was lawful.

Even if the District Court reached no conclusion about the validity of a 5:00 PM deadline, Appellant's constitutional argument merits discussion to assist the Court in resolving whether it is "capable of repetition, yet evading review."

Mississippi's Legislature established that presidential candidates' qualifying papers must be submitted sixty days before the general election. The Legislature did not say "by 5:00 PM, sixty days before the election," as it has done in a dozen or more other statutes. Midnight marks the filing deadline; not 5:00 PM.

Mississippi's legislatively-adopted qualifying procedure and sixty-day-prior deadline comply with the Constitution of the United States. However, the Secretary's unilateral decision to abbreviate the qualifying period by closing at 5:00 PM violates the First and Fourteenth Amendments. Mississippi cannot close

its offices on the day qualifying papers are due. The United States District Court for the Middle District of Louisiana recognized this constitutional fact in *Libertarian Party v. Dardenne*, No. 08-582 (M.D. La. 2008), after Hurricane Gustav closed Louisiana's Secretary of State's office on the day qualifying papers were due.[8] This does not afford candidates a "reasonable opportunity" to gain ballot access required by the First and Fourteenth Amendments.

The present case is no different from one where a state sets a deadline for candidates' qualifying papers and then shutters its doors on the day they are due. This is a denial of candidates' and voters' First and Fourteenth Amendment rights to participate in the political process. *See Williams v. Rhodes*, 393 U.S. 23 (1968) (ordering that George Wallace's name be included on Ohio's ballot). After all, courts have routinely invalidated "early" filing deadlines for candidates and parties. *See, e.g., Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579 (6th Cir. 2006) (invalidating Ohio's early filing deadline for minor political parties). Providing a deadline, and then not abiding by it, is *a fortiori* invalid.

[8] This Court stayed the Middle District of Louisiana's preliminary relief in *Dardenne* placing Bob Barr's name on Louisiana's ballot, *see Libertarian Party v. Dardenne,* 294 Fed. Appx. 142 (5th Cir. 2008), but did not disagree with this basic proposition stated in the District Court's Order. The District Court thereafter dismissed the controversy on mootness grounds. That determination is presently is on appeal before this Court.

McCarthy v. Briscoe, 429 U.S. 1317 (1976), illustrates the point. Eugene McCarthy sought ballot access as an independent presidential candidate in Texas, only to be turned away by Texas officials. Texas law prohibited independent candidates from running for office. The Supreme Court agreed with the District Court that Texas's ban in independent candidacies "clearly" violated the Constitution; according to the Court, it was "was constitutionally invalid for failure to provide independents a reasonable procedure for gaining ballot access …." *Id.* at 1319. *See also Anderson v. Celebrezze*, 460 U.S. 780 (1992) (declaring Ohio's early deadline unconstitutional).

The constitutional rule is clear; states can regulate ballots, and can impose deadlines that are not too early, but absolutely must afford independents and minor political party candidates "a reasonable procedure for gaining ballot access." *McCarthy v. Briscoe*, 429 U.S. 1317, 1319 (1976). Although the procedure prescribed by Mississippi's Legislature is reasonable, the Secretary's closing his office in the middle of the qualification day cut Appellant's promised qualifying time by seven hours. This is a violation of the First and Fourteenth Amendments.

III. The Secretary's Creation of a New Deadline Violates Article II.

The Secretary's 5:00 PM deadline for presidential candidates' qualifying papers in the present case falls outside his assigned powers. Only the State Legislature can create deadlines for presidential elections, and the Legislature did

not prescribe 5:00 PM as the deadline for presidential candidates filing under § 23-15-785(2).

This issue was specifically addressed in *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008), where Ohio's Secretary of State attempted to enact a filing deadline for minor-party presidential candidates in Ohio. She deemed her action necessary because Ohio's legislatively enacted deadline was deemed invalid by the Sixth Circuit in 2006. Because the Ohio legislature had yet to enact a new deadline, the Secretary simply created one. The District Court invalidated her effort:

> Plaintiffs correctly contend that only the legislative branch has the authority, under Articles I and II of the United States Constitution, to prescribe the manner of electing candidates for federal office. … As to members of the Electoral College who determine the President, Article II, Section 1 states: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.

Id. at 1011. The court correctly concluded that "[t]hese constitutional provisions provide for *no role* on the part of the executive branch of state government as to the election of President or members of the House of Representatives." *Id.* (emphasis added).

The Court in *Brunner* relied on *Bush v. Gore*, 531 U.S. 98 (2000), where the Supreme Court ruled that Florida's method of counting votes for President violated the Equal Protection Clause of the federal Constitution. In the lead-up to that

decision, the Supreme Court in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), first addressed whether the Florida Supreme Court's interpretation of Florida's election laws strayed beyond what Article II, § 1 allowed. "As a general rule," it unanimously stated, "this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Id.* at 76. Because it was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2," *id.* at 78, the Court vacated the Florida Supreme Court's interpretation of Florida's election code and remanded for further proceedings. *Id.*.

When the case returned to the Supreme Court, the Chief Justice, joined by Justices Scalia and Thomas, concurred in the result, but added another reason for striking down the Florida Supreme Court's scheme. The Chief Justice concluded that the Florida Supreme Court violated Article II, § 1 by deviating from the directions of the Florida legislature: "[in] a Presidential election, the clearly expressed intent of the legislature must prevail." *Id.* at 120. Because the meaning

of Article II presented a federal question, the Chief Justice found that he did not have to defer to the Florida Supreme Court's interpretation of state law. *Id*.[9]

Justice Stevens (joined by Justice Ginsburg) agreed with this analysis in the context of congressional elections and popular initiatives in *California Democratic Party v. Jones*, 530 U.S. 567, 602 (2000) (Stevens, J., dissenting). There, the Supreme Court majority invalidated California's adoption of a "blanket primary" under the First Amendment. While Justice Stevens disagreed with the majority over its application of the First Amendment, he agreed that the law was likely invalid. This was so, he argued, because the blanket primary—which was also applied to congressional elections—was adopted by popular initiative, rather than by the California legislature: "Although this distinction is not relevant with respect to elections for state offices, it is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives." *Id.* at 602.[10]

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[9] The Chief Justice relied on *McPherson v. Blacker*, 146 U.S. 1 (1892), which "explained that Art. II, § 1, cl.2, 'convey[s] the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." 531 U.S. at 113.

[10] A similar issue arose in *Lance v. Coffman*, 127 S. Ct. 1194 (2007), where a state court drew Colorado's congressional districts in the absence of a legislative plan. Not long after the state court's action, the legislature passed a new plan, which was duly challenged before the Colorado Supreme Court. Those favoring the judicial

Justice Stevens balked at the suggestion that Art. 1, § 4 necessarily receives the State's Legislature as created by the State's Constitution, which in California "provides that '[t]he legislative power of this State is vested in the California Legislature …, but the people reserve to themselves the powers of initiative and referendum.'" *Id.* at 602-03. "The vicissitudes of state nomenclature," he responded, "do not necessarily control the meaning of the Federal Constitution." *Id.* at 603. "California's classification of voter-approved initiatives as an exercise of legislative power," Justice Stevens explained, "would not render such initiatives the act of the California Legislature within the meaning of the Elections Clause." *Id.*.[11]

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plan argued that Colorado's constitution prohibited a mid-census apportionment. Those who supported the legislative plan argued that Art. I, § 4 of the federal Constitution precluded a state court from drawing districts for congressional elections. The Colorado Supreme Court ruled in favor of the judicial plan in *People ex rel. Salazar v. Davidson,* 79 P.3d 1221, 1231 (Col. 2003) (en banc). Specifically, it found that judicial apportionment did not offend the Elections Clause of Art. I, § 4 of the United States Constitution. *Id.* at 1231. Following the dismissal of a collateral challenge filed by voters in federal court, the Supreme Court took up *Lance v. Coffman*, 127 S.Ct. 1194 (2007), to address which apportionment plan was valid. It was prevented from reaching the merits of the Elections Clause question by the plaintiffs' lack of standing. I*d.* at 1198. The Colorado Supreme Court's conclusion does not support the Secretary's action here. It instead stands only for the proposition that state *courts* have the authority to interpret state law and fix remedies for its violation.

[11] Justice Stevens did not decide the issue because it was not raised by the parties. *Id.*

Justice Stevens further noted that "the United States House of Representatives has determined in an analogous context that the Elections Clause's specific reference to 'the Legislature' is not so broad as to encompass the general 'legislative power of this State.'" *Id*. He cited to *Baldwin v. Trowbridge,* 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866),[12] which reported that the Elections Clause "power is conferred upon the *legislature.* But what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine,* as known in the political history of the country? The [C]ommittee [of Elections for the U.S. House of Representatives] have adopted the latter construction."

In *Baldwin*, the Michigan legislature during the Civil War passed a law that allowed its soldiers to cast ballots for congressional candidates and its presidential electors even though the soldiers were not present in Michigan. In those days, there were no absentee ballots, and in fact the Michigan Constitution required actual presence. One congressional candidate (Trowbridge) won the election if the soldiers' votes were counted. The other (Baldwin) would have won if they were

[12] *Baldwin* can also be found in CHESTER H. ROWELL, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS 1789-1901, 200-01 (1901).

excluded. The House Committee of Elections ruled that the votes were proper; the Michigan Constitution was not controlling. Rather, the Michigan legislature had the sole power to regulate federal elections. The full House agreed by a vote of 108 to 30, and Trowbridge was seated.[13]

Although Justice Stevens did not decide the issue (because it was not fully raised by the parties), the Supreme Court has resolved the matter in a slightly different context. In *Hawke v. Smith*, 253 U.S. 221 (1920), the Supreme Court rejected Ohio's claim that the ratification of a proposed federal Constitutional amendment by the Ohio legislature was subject to a popular referendum process applied to all other laws. Article V of the United States Constitution provides that amendments proposed by the Congress can either be ratified by state conventions or legislatures: "The method of ratification is left to the choice of Congress." *Id.* at 226. Regardless, the Court observed in *Hawke,* "[b]oth methods of ratification, by Legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people." *Id.* at 226-27. The Court specifically rejected the claim that "the federal Constitution requires ratification by the legislative action of the states through the

[13] The same issue arose in *In re Opinion of Justices*, 45 N.H. 595 (1864). There, the New Hampshire high court ruled that the Legislature had the sole power to regulate federal elections and was not bound by the state constitution.

medium provided at the time of the proposed approval of an amendment." *Id.* at 229. "This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment." *Id.* Thus, ratification must be by a State's legislature, and the legislature alone. It cannot be by referendum and cannot be delegated to an agency.

Whether this logic applies to Articles I and II as well as Article V was answered by the *Hawke* Court's use of the Seventeenth Amendment to support its conclusion. As explained in *Hawke*, *see* 253 U.S. at 228, the Seventeenth Amendment—which provides for the popular election of Senators—was necessary for the very reason that Article I, § 3 required that a State's Senators be "chosen by the Legislature thereof …." U.S. Const., art. I, § 3, cl. 1. Because the Constitution delegated to the states' legislatures the power of selecting Senators, the legislatures could not delegate this power to the people. A Constitutional Amendment was necessary to achieve this result. And just as the State's legislature cannot delegate its power to regulate federal elections directly to the people,[14] it cannot delegate this power to an executive agency like the Secretary of State.[15]

[14] In *State of Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916), the Court sustained Ohio's application of its referendum mechanism to a legislatively drawn congressional districting plan. In contrast to *Hawke* and the present case, however, Congress there had expressly authorized the application of referenda mechanisms

History and precedent thus reveal that the court's conclusion in *Libertarian Party of Ohio v. Brunner* is correct—state administrative officials cannot regulate federal elections. Both the Supreme Court's conservative block of Justices, including then-Chief Justice Rehnquist and Justices Scalia and Thomas, and its liberal block, including Justices Stevens and Ginsburg, agree on this proposition. Consequently, the Secretary of State in the present controversy had no authority to alter the Mississippi Legislature's deadline for presidential candidates. The Secretary of State has no power to extend it, and he has no power to shorten it. His 5:00 PM deadline therefore violates the Constitution and has no force.

The District Court here felt that the Secretary's deadline was valid because it did not mark "a significant departure from, or go beyond a fair reading of, state election laws." Order Denying Preliminary Relief at 2-3 (Dkt. # 11). "[T]he

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to congressional districting plans. Because Congress has the power under Art. I, § 4 to draw rules for electing federal representatives, Congress's action legitimated what otherwise would have been deemed unconstitutional under Art. I, § 4. There is no suggestion in the present case that Congress has authorized a delegation of regulatory power over federal elections to the Ohio Secretary of State.

[15] In *Smiley v. Holm,* 285 U.S. 355 (1932), the Supreme Court ruled that Art. I, § 4's reference to "Legislature" assumes the basic legislative processes spelled out by the state's fundamental charter. Hence, bicameralism in Ohio is required for the "Legislature" to act, and Ohio's gubernatorial veto can be constitutionally applied to the Legislature's proposed manner of electing federal representatives. Bicameralism and Presentment, after all, are fundamental aspects of legislative action. This is a far cry, however, from holding that the Legislature can delegate all of its authority to the Governor or some other executive agent.

Secretary of State's interpretation of state election law and his determination to close his office at the traditional time of 5:00 p.m. is reasonable and cannot be said to be inconsistent with the state's election statutes." *Id.*

The question under Article II, however, is not whether an interpretation of legislation is "reasonable," a "significant departure," or a "fair reading." The question under Article II is one of authority. Does the Secretary have the authority to interpret the meaning of legislation? If he does not, it cannot matter whether his interpretation is reasonable or fair.

Here, Article II delegates power to the Mississippi Legislature. The Supreme Court's precedents cast serious doubt on whether this authority can be delegated by the Legislature. But even if it can, Appellee has not cited a single statute in Mississippi purporting to delegate the Legislature's authority over presidential elections to the Secretary. In the absence of a proper, clear and specific delegation, Appellee cannot claim the power to regulate presidential elections in this manner.

Even if the Legislature has delegated authority to Appellee to "fill in the blanks"—which itself would raise serious problems under Article II—the Secretary here has not filled in anything that is missing. Contrary to many election laws in Mississippi, the Legislature simply did not see fit to restrict the presidential qualifying period to 5:00 PM. At just about every level short of presidential

elections, the Mississippi Legislature chose a 5:00 PM deadline. That it did not for presidential elections, and that it has distinguished presidential elections in other statutes, *see, e.g.,* § 23-15-637 (stating that "[a]bsentee ballots received by mail, *excluding presidential ballots* … must be received by the registrar by 5:00 p.m. on the date preceding the election …") (emphasis added), can only mean that it made a conscious choice not to include this sort of deadline for presidential elections.

This case is no different from that in *Brunner.* There, the Secretary of State argued that it had been delegated power to interpret election laws. The *Brunner* court disagreed: "the Directive issued by the Secretary of State does not interpret provisions of legislation or resolve factual disputes arising under Ohio law. Instead, the Directive establishes a new structure for minor party ballot access, a structure not approved by the Ohio legislature." 567 F. Supp.2d at 1012. "Even if the Ohio General Assembly could delegate its authority to a member of the executive branch," the court observed, "there is no evidence that the state legislature has specifically delegated its authority to Defendant to direct the manner in which the state of Ohio votes for … electors to vote for President." *Id.* "Absent an express delegation of legislative authority, this Court cannot assume that the Ohio General Assembly intended to vest the Secretary of State with the legislative authority conferred in … Article II, Section 1." *Id.* Further, the *Brunner* court found insufficient a general delegation in Ohio law that authorized

the Secretary to "[i]ssue instructions by directives and advisories … to members of the boards as to the proper methods of conducting elections … [and] [p]repare rules and instructions for the conduct of elections." *Id.*

The Secretary's deadline in the present case is not an "interpretation" or "fair reading" of the Legislature's statute at all. It is a statutory amendment. It is new law. And like the executive action in *Brunner,* it falls beyond the constitutional authority of the Secretary.

IV. The District Court Erroneously Denied Plaintiffs' Application for Costs and Attorney's Fees Under Rule 4.

Federal Rule of Civil Procedure 4(d)(2) provides that "an individual … that is subject to service under subdivision (e) … and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons." That Rule continues: "If a defendant … fails to comply with a request for waiver made by a plaintiff …, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown."

The goal of Rule 4(d), "as stated by the Advisory Committee, is simple: to 'eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel.'" 4A C. WRIGHT & A MILLER, FEDERAL PRACTICE AND PROCEDURE § 1092.1. "Both the old and the present

versions operate to provide plaintiffs with a *relatively simple process* for asking defendants to waive formal service of process, and to impose upon defendants 'a duty to avoid unnecessary costs of serving the summons.'" *Id*. (emphasis added).

Rule 4(d)(5) states that "[t]he costs to be imposed on a defendant under paragraph (2) for failure to comply … shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service."

Appellant in the instant case attempted to obtain a waiver from the Secretary using a Form prepared by the Administrative Office of the Courts. *See* Attachment 1 to Plaintiffs' Motion for Costs and Attorney's Fees (Dkt. # 26). The Form—which explicitly described the consequences of failing to waive—was sent to Harold Pizzetta, Appellee's attorney, using first-class mail on September 15, 2008. *See id*. (Attachment 2). Included with the Form was an extra copy for the Secretary's records, a copy of the Complaint, and a self-addressed, stamped envelope so that the Defendant could return the Waiver Form (free of cost) to counsel for the Plaintiffs. *Id.* (Attachment 4) (Declaration of Mark R. Brown).

Appellant's attorney followed up with an e-mail inquiry to Defense counsel about the Waiver Request. On September 24, 2008, Defense counsel responded by e-mail and stated that the Secretary would not waive service. *Id.* Defense counsel

explained in this e-mail that he did not believe that Rule 4(d) applied to the Secretary, because Rule 4(e) (upon which Rule 4(d)'s application is predicated) does not (he claimed) apply. Instead, Defense counsel insisted that the Appellant serve the Secretary under Rule 4(j). Defense counsel said nothing about Appellant's technical compliance with Rule 4(d); nor did he complain that the Waiver Request, which was addressed to the Secretary, was sent to him. Appellant's counsel inquired whether Defense counsel had any legal authority for his refusal, but Defense counsel did not reply. Appellant duly served the Secretary on January 9, 2009.

Because Appellant complied with the conditions precedent spelled out in Rule 4(d), and because the Secretary refused to waive service, Appellant is entitled to recover his costs and attorney's fees under Rule 4(d). The District Court erroneously rejected Appellant's Motion. It simply stated that the Motion was patently without merit for the reasons proffered by the Secretary. *See* Dkt. # 35.

As explained fully below, none of the Secretary's arguments is persuasive. Indeed, except for its claim that Rule 4(d) simply does not apply to official-capacity actions seeking prospective relief, the Secretary's "kitchen sink" claims are themselves without merit. *See* The Secretary of State's Opposition to Plaintiffs' Motion for Costs and Attorney's Fees Under Rule 4(d) (hereinafter "Defendant's Response") (Dkt. # 31).

The Secretary made no less than six arguments against the Appellant's motion for costs and attorney's fees—including a charge that Appellant with "no excuse" filed too late, three alleged technical deficiencies in the Waiver Request, a good cause defense, and its principal claim that Rule 4(d) does not apply.[16] Appellant's request was "frivolous" and suffered "multiple failures to follow Rule 4(d)." *Id*. at 2. These flaws "certainly provided the Secretary of State with 'good cause' under Rule 4(d)(2) to justify the refusal to waive service …" *Id*. If nothing else, because the Secretary's lawyer had "prevailed on every contested matter" in the case, *id*. at 8-9, an award under Rule 4(d) was improper.

A. The Secretary's Rule 54(d)(2)(B) Claim.

The Secretary charged that Appellant's Waiver Request was time-barred by Rule 54(d)(2)(B), which prescribes that attorney's fees requests be submitted within fourteen days of judgment. "There is no excuse for the delay," the Secretary

[16] The Secretary also complained that the "Plaintiffs have shown a rare level of hubris," Response in Opposition to Motion at 1 (Dkt. # 31), in even daring to request costs and fees, because Appellant was "recycling [his] argument from another case …." *Id.* He further expressed what can only be described as outrage that Appellant's attorney's fees totaled $1,035.00. Attorney's fees under Rule 4, however, quite often dwarf the actual expenses incurred in perfecting service of process. *See Double "S" Truck Line, Inc. v. Frozen Food Express*, 171 F.R.D. 251, 253-54 (D. Minn. 1997) (awarding costs calculated at $77.51; attorney's fees totaled $1,200.00); *Davilla v. Thinline Collections LLC*, 230 F.R.D. 601 (N.D. Cal. 2005) (court awarded $900.00 in attorney's fees and $170.28 in costs).

argued, "and no rule that authorizes the filing of this motion well after the entry of a final judgment." *See* Defendant's Response to Motion at 8.

Rule 54(d)(2)(E), however, states that Rule 54(d)(2)(B) does not apply to requests for expenses and attorney's fees for violations of the Federal Rules of Civil Procedure. Rule 4(d)(2)(E) expressly states that "subparagraphs (A) – (D) do not apply to claims for fees and expenses as sanctions for violating *these rules* …." (Emphasis added). Appellant's claim was for fees and expenses incurred by reason of Defendant's failure to waive service under "these rules"—specifically Rule 4. Rule 54(d)(2)(B) and its fourteen-day window therefore quite clearly do not apply. *See, e.g., Miller v. Credit Collection Services,* 200 F.R.D. 379, 382 n.5 (S.D. Ohio 2000) (noting that Rule 54(d)(2)(B) does not apply to claims to attorney's fees as sanctions under Rule 11); *see generally* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2679 (explaining that the fourteen-day window does not apply to fee awards for violations of the Federal Rules of Civil Procedure).

Contrary to the Secretary's claim, there is no Rule that establishes a limitations period for expenses and fees under Rule 4. The Southern District of Mississippi's Local Rule 54.2 may apply; it states: "In all civil actions in which costs are allowed, pursuant to 28 U.S.C. § 1920, in the final judgment as defined in Federal Rule of Civil Procedure 54(a), the prevailing party to whom costs are awarded shall serve the bill of costs not later than thirty days after entry of

judgment." If it applies, Appellant complied with it, as Appellant's Motion was filed within thirty days of the final judgment.

Prior to the adoption of Rule 54's fourteen-day window for attorney's fees, the Supreme Court in *White v. New Hampshire Department of Employment*, 455 U.S. 445, 455 (1982), ruled that time limitations were to be set by local courts. Because there is no general Rule dictating a time limitation, it would seem that the local rule ought to apply.

To the extent national practices are relevant, it is not uncommon for parties to seek costs and fees thirty days (or more) after judgment. Indeed, in *White* the fee request was tendered over four months after the judgment. Wright & Miller have observed that "[s]everal courts, in the absence of a controlling local rule, have held that costs need not be awarded until the appellate process is complete and the case remanded to the district court for entry of the final judgment." C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2679. It can hardly be claimed that Appellant's post-judgment filing was "late" with "no excuse."

B. The Secretary's Technical Challenges.

1. Asking Too Soon

The Secretary complained that Appellant asked for a Waiver too soon. He did not wait to mail the Waiver Request until after the Complaint was actually received and filed in the Clerk's Office. Appellant mailed the Waiver Request to

the Secretary on September 15, 2008, while the Complaint was still in transit to the Clerk's Office. [17] The Complaint was received and filed in the Clerk's Office on September 16, 2008. According to the Secretary, this somehow violated Rule 4(d). The Secretary, however, cited absolutely no authority for this strange proposition; nor does the language of Rule 4(d) support it.

In any event, even assuming that some sort of rigid temporal ordering is demanded by Rule 4(d) in terms of using the U.S. Mail, the Secretary here received the Waiver Request after the Complaint was filed on September 16, 2008—at least he does not claim to the contrary. Even under the Secretary's strained logic, Appellant's mailing the Waiver Request one day before the Clerk received and filed the Complaint presents no problem. The Complaint was filed, after all, before the Secretary received the Waiver Request.

2. Communicating Through Counsel

The Secretary argued that the Waiver Request was defective because it was directed via U.S. Mail to the Secretary's lawyer and not to the Secretary himself. Defendant's Response to Motion at 2. Never mind that the Waiver Request was

[17] Appellant was forced to file the Complaint conventionally with the Clerk, rather than electronically, because Appellant's counsel was not yet admitted to the United States District Court for the Southern District of Mississippi and had no electronic filing privileges. Appellant did not secure local counsel until after the Complaint was filed on September 16, 2008. *See* Dkt. # 1.

expressly addressed to the Secretary. The fact that it was sent to the Secretary's lawyer rendered it invalid. The Secretary offered no support for this proposition, either.

Appellant sent the Waiver Request to the Secretary's lawyer, of course, because of the attorney-client relationship. Appellant's counsel, in anticipation of the preliminary injunction hearing, discovered that the Secretary was represented by counsel. Armed with this knowledge and his ethical obligations, Appellant's counsel directed the Waiver inquiry to the Secretary's lawyer.[18]

The Waiver Request was addressed to the Secretary, with his name typed on the Form. The Secretary did not claim that he did not receive it—which is all that is required by Rule 4(d). Rule 4(d), after all, speaks in terms of "notice;" it does not require that a plaintiff mail anything to any particular address. The Advisory Committee's Notes to the 1993 Amendment to Rule 4(d) make this clear:

> Paragraph (2)(B) permits the use of alternatives to the United States mails in sending the Notice and Request. While private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties.

[18] *Powell v. Carey Intern, Inc*., 548 F. Supp.2d 1351, 1357 & n.6 (S.D. Fla. 2008),endorses this approach; "*when opposing counsel is known prior to filing suit*, it would behoove counsel to promote the spirit and letter of Rule 1 of the Federal Rules of Civil Procedure by seeking to waive formal service before incurring service fees." (Emphasis added).

Appellant could have faxed the Waiver Request to the Secretary. He could have hand-delivered it. He could have given it to a courier for special delivery. He could have, as he did here, given it to Defendant's lawyer. The question is simply whether the Secretary received it and was put on "notice." *See also* C. WRIGHT & A. MILLER, 4A FEDERAL PRACTICE AND PROCEDURE § 1092.1 ("it probably is not necessary that the documents be mailed to the defendant's residence; any address at which the defendant will receive mail promptly may be used by the plaintiff."). Because the Secretary does not deny that he received the Waiver Request and accompanying materials, he cannot complain that they passed through his lawyer's hands first.

3. Demanding Two Warnings

The Secretary further complained that he did not receive two written warnings about the consequences of not waiving service. Defendant's Response to Motion at 2. Rule 4(d)(1)(D) directs a plaintiff to "inform the defendant, using the text prescribed in Form 5, of the consequences of waiving and not waiving service." Appellant failed to meet this burden, the Secretary argued, because Appellant did not include an additional document—on top of the Waiver Form—"containing the 'text prescribed in Form 5.'"

The Rule, however, does not say that a plaintiff must send two written warnings. Nor does it say that the warning has to be on a document distinct from

the Waiver Request. It simply directs the plaintiff to "inform the defendant, using the text prescribed in Form 5, of the consequences of waiving and not waiving service." There is nothing in the Rule that precludes this information from being conveyed to the Defendant in the Waiver Request itself.

Appellant's Waiver Request clearly explained the "consequences of waiving and not waiving service." It stated:

> **Duty to Avoid Unnecessary Costs of Service of Summons**
>
> Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of summons, fails to do so will be required to bear the costs of such service unless good cause be shown for its failure to sign and return the waiver.
>
> It is not good cause for a failure to waive service that a party believes the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.
>
> A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against the defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

See Plaintiffs' Motion for Costs and Attorney's Fees (Attachment 1) (Dkt. # 26). Further, the Waiver Request Form, which was printed by the Administrative Office of the Courts, specifically advised "Delbert Hosemann" that he retained "all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons," *id.,* and that "a judgment may be entered against [him] … if an answer or motion under Rule 12 is not served upon [Mark R. Brown, Plaintiff's attorney] within 60 days after September 15, 2008, or within 90 days after that date if the request was sent outside the United States." *Id.*

The Secretary additional document incorporating the language in Form 5 would not have added any information. Form 5 states:

> **Why are you getting this?**
>
> A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.
>
> This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within <give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States> from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Fed. R. Civ. P. (Form 5).

There is absolutely no suggestion that the Secretary misunderstood or was prejudiced in any way by the warning Appellant provided. Wright and Miller observe that "a failure to follow the form may not invalidate the defendant's acknowledgment if the defendant effectively is put on notice of those consequences." C. WRIGHT & A. MILLER, 4A FEDERAL PRACTICE AND PROCEDURE § 1092.1. They cite *Trevino v. D.H. Kim Enterprises, Inc*., 168 F.R.D. 181 (D. Md. 1996), where the plaintiffs failed to follow Rule 4(d) in two ways: they did not use the official form, and they did not allow the defendant sufficient time to return the waiver. Still, the court found that "they did inform Defendant of the

consequences of compliance, i.e., that Defendant must answer the Complaint within 20 days, and of non-compliance, i.e., that Defendant might be assessed the costs of obtaining service in another manner." *Id*. at 181-82. Thus, the court stated that it was "satisfied that this technical violation of Rule 4(d)(2)(D) does not render Defendant's acknowledgment of service invalid." *Id*. at 181-82.

Federal Rule of Civil Procedure 1 states: "These rules … shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 8(f) states: "All pleadings shall be so construed as to do substantial justice." The Supreme Court in *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986), noted that Federal Rules should be interpreted and applied with these ends in mind:

> Justice Black reminded us, more than 30 years ago, in connection with an order adopting revised Rules of this Court, that the 'principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts.' Order adopting revised rules of S.Ct. of U.S. Mon. April 12, 1954.

Rule 4(d) was designed to reduce costs by placing a burden on defendants to waive service. This end cannot be accomplished if defendants are allowed to successfully plead mindless technicalities.

Defendants should waive service. They should not be allowed to trumpet form over substance by complaining that "the Request was sent too soon," "it was sent to my lawyer," and "I did not get a separate piece of paper." Arguments like

these do not serve the purpose behind Rule 4(d). They only add to the costs and attorneys' time that Rule 4(d) was designed to obviate.

C. Rule 4(j) Does Not Control.

The Secretary argued in the District Court that Rule 4(d) does not apply to Mississippi's Secretary of State because Rule 4(j) does. Appellant concedes that this, unlike the Secretary's alleged technical deficiencies and fourteen-day-defense, has some support; albeit not published.

The Secretary started its argument with the Supreme Court's decision in *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989). Defendant's Response to Motion at 4. *Will*, the Secretary insisted, solves the matter. It makes clear that an action against a state official in his official capacity is an action against the state. *See id.* Rule 4(j) therefore applies, which means that Rule 4(d) is not applicable. The contrary cases cited by Appellant represent the "minority view," Defendant's Response to Motion at 4, and have been overturned by *Will.*

The Secretary's selective quotation from *Will*, however, conveniently omitted the accompanying footnote 10 that distinguished actions for prospective declaratory and injunctive relief from those for damages. *Will* involved an action for *damages* under § 1983 filed in state court. Had it been filed in federal court, it would have been barred by the Eleventh Amendment. The Supreme Court in *Will* ruled that the same result applies in state court. It reached this conclusion by

interpreting § 1983 to not authorize suits against states. As explained in detail below, a suit is against a state if it is filed either against the state by name, or if it seeks money damages from a state official in his official capacity. It was in this latter context that *Will* held that an official-capacity suit is really one against the state.

This holding has no application to an official-capacity action filed against state officials seeking prospective declaratory and injunctive relief. The Supreme Court in *Will* made this clear in footnote 10: "Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief *are not treated as actions against the State*.'" *Id.* at 71 n.10 (quoting and citing *Kentucky v. Graham,* 473 U.S. 159, 167 n. 14 (1985), and *Ex parte Young*, 209 U.S. 123, 159-60 (1908)) (emphasis added). They are not treated as suits against states, because as *Ex parte Young*, 209 U.S. 123 (1908), makes clear, the Eleventh Amendment would prohibit them if they were.

1. Suits Against States Are Improper Under § 1983.

Suits against States by name are improper under § 1983. In *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989), the Supreme Court stated that "[s]ection 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy

against a State for alleged deprivations of civil liberties." Indeed, suits against States in federal courts are prohibited by the Eleventh Amendment. The Supreme Court in *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996), stated that "[t]he Eleventh Amendment … serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."

2. Suits Against State Officials in Their Official Capacities for Damages Are Against States and are Therefore Improper Under § 1983.

Section 1983 official-capacity actions against state officials seeking money damages are deemed to be suits against States, and thus cannot proceed under § 1983. This was the language in *Will* relied upon by the Secretary in the District Court. *See Will,* 491 U.S. at 66; *Lapides v. Board of Regents,* 535 U.S. 613, 617 (2002) (reaffirming *Will*'s holding that suits against state officials in their official capacities for money damages are suits against States). It is for this reason that official-capacity actions seeking damages are improper under § 1983, *see Will,* and are barred from federal court by the Eleventh Amendment. *See, e.g., Edelman v. Jordan,* 415 U.S. 651 (1974). They are improper under § 1983 because these suits for damages are necessarily against States; and States are not "persons" within the meaning of § 1983. *See Will,* 491 U.S. at 66; *Lapides,* 535 U.S. at 617.

3. Suits Against State Officials in Their Official Capacities for Prospective Declaratory and Injunctive Relief Are Not Against States.

In contrast to a suit against a state official in his official capacity seeking damages, the Court in *Will* reiterated in footnote 10 that a suit for prospective declaratory and injunctive relief is not one against a state: "Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief *are not treated as actions against the State*.'" *Id.* at 71 n.10 (quoting and citing *Kentucky v. Graham,* 473 U.S. 159, 167 n. 14 (1985), and *Ex parte Young,* 209 U.S. 123, 159-60 (1908)) (emphasis added). Thus, a suit against a state official in his official capacity for prospective declaratory and injunctive relief is proper under § 1983 and can even proceed in federal court notwithstanding the Eleventh Amendment. *Ex parte Young,* 209 U.S. 123, 159-60 (1908). Indeed, it is precisely because § 1983 suits against state officials in their official capacities for prospective injunctive relief are not against States that they are allowed to proceed at all under § 1983 in federal court. *See Ex parte Young,* 209 U.S. 123 (1908). If these suits were judged to be against the State, they would be barred from federal court. *Id*.

This Court has recognized this distinction on numerous occasions. In *Mayfield v. Texas Department of Corrections*, 529 F.3d 599, 604 (5th Cir. 2008),

for example, the Court affirmed a District Court's dismissal of § 1983 official-capacity claims seeking damages because they were under *Will* suits against a state agency: "In reaching its conclusion as to the application of sovereign immunity, the district court held that all of Mayfield's claims against the [state agency] and the employees of the TDCJ charged in their official capacities were barred by the Eleventh Amendment." It noted, however, that "sovereign immunity is subject to an established exception when it comes to the ability of state officers to invoke its protections. 'Under *Ex Parte Young,* a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law.'" 529 F.3d at 604 (quoting *McCarthy ex rel. Travis v. Hawkins,* 381 F.3d 407, 412 (5th Cir. 2004)). These claims can proceed because they are not against States. *Id*.[19]

D. Federal Rule 4(e) Applies to State Officials Sued for Prospective Relief in Their Official Capacities.

Contrary to the Secretary's position in the District Court, the majority rule—judged by published opinions—is that Rule 4(e), which governs individual service,

[19] Sister Circuits have also recognized this distinction. In *Scott v. Taylor*, 405 F.3d 1251, 1255 (11th Cir. 2005), for example, the Eleventh Circuit observed that "[t]he exception … is derived from *Ex parte Young,* which held that official capacity suits for prospective relief to enjoin state officials from enforcing unconstitutional acts are not deemed to be suits against the state and thus are not barred by the Eleventh Amendment." (Footnote and citation omitted).

applies to official-capacity suits for prospective declaratory and injunctive relief against state officials. The First Circuit in *Echevarria-Gonzalez v. Gonzalez-Chapel,* 849 F.2d 24, 28-30 (1st Cir. 1988), ruled that official-capacity claims against state officials seeking prospective relief are governed by the Rule applicable to individual service, at that time Rule 4(d) of the Federal Rules of Civil Procedure.[20] The Court explained: "Although we imagine that in most or all cases where a state officer is sued in his official capacity, the state has a major interest in the outcome, the officer remains the actual party to the action. A state officer is often sued in his official capacity because the Eleventh Amendment forbids a direct action against the state. *See Ex Parte Young*." *Id.* at 29 (citation omitted). Further, the Court observed, "[t]he very wording of Rule 4(d)(6) implies a self-contained limitation, namely, that it applies to situations where the state or other governmental entity is "subject to suit." *Id.*[21] "If the Eleventh Amendment bars an action against the state, then the latter is not 'subject to suit' pursuant to Rule 4(d)(6), and thus the rule is inapplicable." *Id.* (citing C. WRIGHT & A. MILLER, 4A FEDERAL PRACTICE & PROCEDURE § 1110 (1987)). The Court thus concluded:

[20] In 1988, individual service was codified in Rule 4(d). Today's equivalent is Rule 4(e).

[21] That language is now contained in Rule 4(j).

> The action is against an individual, albeit in his official capacity, and not against the state. Although the state … has a great interest in the outcome, it will be the individual Secretary of Agriculture who in an official capacity is going to be bound by the judgment, and who can be held in contempt if a court order is disobeyed. To be sure, service upon the Secretary under Rule 4(d)(1) invites the risk that he will not properly advise the state's legal officers of the pending action, but that seems an improbable oversight where the public officer is sued in an official capacity. We therefore hold that service upon a state officer in his official capacity is sufficient if made pursuant to Rule 4(d)(1).[22]

Id. 29-30.

The First Circuit reiterated this conclusion in *Caisse v. DuBois,* 346 F.3d 213, 216 (1st Cir. 2003), where it stated that "service of process for public employees sued in their official capacities is governed by the rule applicable to serving individuals." The Court in *Caisse*, 346 F.3d at 216, expressly ruled that "to serve the defendants in either an individual or official capacity, Caisse had to comply with Fed. R. Civ. P. 4(e) providing for service of process on individuals.[23]

As *Echevarria-Gonzalez* and *Caisse* make clear, the Secretary here was properly served under Rule 4(e). Indeed, as explained by the First Circuit, because

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[22] Rule 4(d)(1) is now codified in Rule 4(e). *See Caisse v. DuBois,* 346 F.3d 213, 216 (1st Cir. 2003).

[23] The Second Circuit also seems to be leaning in this direction. *See Stoianoff v. Commissioner of Motor Vehicles*, 208 F.3d 204 (2d Cir. 2000) (Table) (2000WL287720) ("service here may be effected pursuant to Rule 4(e), which provides for service upon individuals generally. *See, e.g., Echevarria-Gonzalez* (holding that service on state officer in his official capacity is sufficient if made pursuant to predecessor to Rule 4(e)).").

Rule 4(j) requires that a governmental entity be "subject to suit," Rule 4(j) may not even apply to an official capacity action (for either prospective relief or damages) under § 1983. Appellant, however, does not make that argument here. Instead, Appellant simply asserts that Rule 4(e) is applicable to the Secretary, when sued under § 1983 for prospective declaratory and injunctive relief. And because Rule 4(e) applies, so does the duty to waive service under Rule 4(d). Rule 4(d)(2) states that "[a]n individual … that is subject to service under subdivision (e) … has a duty to avoid unnecessary costs of serving the summons."

This was the holding in *Marcello v. Maine*, 238 F.R.D. 113 (D. Me 2006), which involved a § 1983 action against a state judge in his official capacity. The Court there observed that under *Caisse* the judge was subject to service of process under Rule 4(e); "Because Judge Anderson … [was] subject to service under Rule 4(e), Rule 4(d) is applicable to [him]." *Id.* at 115. The Court accordingly ordered the judge to pay the costs of service that he could have so easily avoided.

This same conclusion has been was reached in the context of municipal officials, even though municipal officials would seem to have a better argument that Rule 4(j) applies (since municipalities can be sued under § 1983). In *Whatley v. District of Columbia*, 188 F.R.D. 1 (D.D.C. 1999), the court stated that "defendants are on notice that municipal government employees are subject to Rule 4(d)(2) of the Federal Rules of Civil Procedure when sued in both their

individual and official capacities ….". Likewise, in *Mosley v. Douglas County Correctional Center*, 192 F.R.D. 282, 283-84 (D. Neb. 2000), the court made this same statement that municipal employees are subject to Rule 4(d) when sued in their official capacities. The wealth of published authority thus has it that governmental employees sued in their official capacities for prospective injunctive relief are subject to service under Rule 4(e) and are subject to the waiver duty found in Rule 4(d).[24]

The Secretary relied on four unreported opinions, *Mack v. Fox*, 2008 WL 4832995 (M.D.N.C. 2008), *Randall v. Crist*, 2005 WL 5979678 (N.D. Fla. 2005), *Richfield v. California*, 1995 WL 374325 (N.D. Cal. 1995), and *Libertarian Party v. Dardenne*, 2009 WL 790149 (M.D. La. 2009), to contradict these holdings. The first three cases cited, however, merely state that Rule 4(j) can be applied to official-capacity claims. They do not preclude application of Rule 4(e). Only the *Dardenne* opinion states that Rule 4(j) must be used in official-capacity actions against state officers seeking prospective relief.[25]

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[24] Both the *Whatley* and *Mosley* courts found good cause to excuse the officials' refusals based on the lack of clear authority. But those cases were handed down in 1999 and 2000, respectively, and the courts instructed the officials that in the future they would be held to the duty found in Rule 4(d). Appellee here can hardly claim the same kind of legal surprise relied on in those cases, handed down a decade ago.

[25] *Dardenne* is presently on appeal before this Court.

The Secretary also cited a handful of reported decisions to support his position. However, not one of these cases says what the Secretary claims it says. *Gaynor v. Martin*, 77 F. Supp. 2d 272 (D. Conn. 1999), is inapposite because it involved an official capacity claim under Title VII. Unlike § 1983, states can be sued under Title VII, and Rule 4(j) is applicable to a Title VII case against a state. *Banerjee v. Roberts*, 641 F. Supp. 1093 (D.Conn. 1986), involved plaintiffs who conceded that Rule 4(j) should have been used.

Mendoza v. City of Miami, 483 F.2d 430, 431 (5th Cir. 1973), offers absolutely no support. In a *very brief* opinion involving a suit against municipal (not state) officials (long before the waiver of service rule was put in place), this Court simply stated a truism: "The City of Miami and the City of Miami Civil Service Board were properly dismissed from the suit due to improper service of process: wives are not authorized to receive service for the respective chief executive officers in their official capacities." (Citing Fed. R. Civ. P. 4(d)(6) (now Rule 4(j))). The opinion does not say anything at all about whether state officials sued in their official capacities for prospective relief can be served under Rule 4(e), let alone whether Rule 4(d) applies.

The Secretary further relied on *Cupe v. Lantz*, 470 F. Supp.2d 136 (D. Conn. 2007), which involved claims against state officials for damages in their official

capacities. These damage claims were clearly claims against the State under § 1983—and thus improper—as made clear by the Supreme Court's holding in *Will.*

Lastly, the Secretary cited *Chapman v. New York State Division for Youth*, 227 F.R.D. 175 (N.D.N.Y. 2005), which involved a complicated multi-count complaint against New York officials under various federal statutes, including § 1983. The plaintiffs sought damages and injunctive relief against several defendants in both their personal and "professional" capacities. Defense counsel waived service, but the plaintiffs insisted that an additional waiver was needed because the defendants were sued in two capacities. When the defendants refused, the plaintiffs served them and sought almost $10,000 in fees and costs under Rule 4(d). The court understandably denied the request. The defendants, after all, had already waived service.

Appellant concedes that there is language in *Chapman* supporting the Secretary's argument. However, it is not clear that the court's conclusion was meant to apply to the plaintiffs' injunctive claims as well as their damage claims. To the extent it supports the Secretary's argument, however, it is the only reported decision that does so.

The most that can made of the Secretary's "majority" rule is that it is supported by one unreported District Court opinion (that is presently pending on appeal in this Court) and perhaps one reported case. This is a far cry from what

most reasonable people would call a majority rule—especially when at least five reported decisions from various courts across the country have expressly reached a contrary conclusion. If there is presently a majority rule, it would seem to be that service on state officials acting in their official capacities—in actions seeking prospective declaratory and injunctive relief—is proper under Rule 4(e) in cases filed under § 1983. Hence, the duty to waive found in Rule 4(d) also applies.

Conclusion

For the foregoing reasons, the final judgment entered by the District Court should be REVERSED, its Order denying expenses and attorney's fees under Rule 4(d) should be REVERSED, and the case should be REMANDED for further proceedings.

Respectfully submitted,

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