IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

WILLIAM EVERETT WARINNER and JAMES C. MILLER, SR.,

Plaintiffs,

v.

KEN DETZNER, in his official capacity as Secretary of State of the State of Florida,

Defendant.

No. 6:13-cv-01860-JA-DAB

PLAINTIFFS' OPPOSITION TO LEGISLATIVE PARTIES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS

Plaintiffs William Everett Warinner and James C. Miller, Sr. ("Plaintiffs") submit this Memorandum of Law in Opposition to Motion of the Intervenors, the Florida House of Representative and the Florida Senate ("Legislative Parties"), to Dismiss, or in the Alternative, to Stay the Proceedings ("Motion to Dismiss or Stay"). In view of the many delays encountered in the Florida state court to remedy the unconstitutional redistricting plan at issue in this case, it is unrealistic to presume that Florida's legislative or judicial branches can and will produce a timely congressional district map that does not infringe Plaintiffs' constitutional rights. This Court should therefore deny Legislative Parties' Motion to Dismiss or Stay.

I. Introduction

Legislative Parties ask this Court to dismiss or stay this case because of the pending state court litigation regarding the Florida Legislature's 2012 congressional redistricting plan. In so doing, they fail to acknowledge the significant possibility that the state court litigation will not be resolved in time to affect the 2014 congressional elections. Indeed, the Defendants in the state court litigation have repeatedly argued that, no matter what decision that court reaches on the

merits, it should not impose a remedy that would affect the 2014 elections. Moreover, it is the Legislative Parties' actions in that litigation that have brought things to this point, leaving the state court with very little time to act. There, they have caused significant discovery delays, refusing to produce relevant documents and mapdrawers for deposition until ordered by the Florida Supreme Court, and argued against a speedy resolution; indeed, in that case, they have even asserted that the U.S. Constitution strips the state court of subject matter jurisdiction to provide a remedy at all.

As a result, it is likely that the state court may be unable to "adopt a constitutional plan within ample time to be utilized in the upcoming election," *Growe v. Emison*, 507 U.S. 25, 35 (1993) (internal quotation marks and citation omitted). Plaintiffs cannot afford to sit idly by while yet another congressional election is held based on invalid district lines. Under these circumstances, deferral is inappropriate. *Id*. Accordingly, Plaintiffs respectfully request that this Court deny the Motion to Dismiss or Stay, and consider the merits of this case as and when they are briefed by the parties.

II. Background

On February 9, 2012, the Florida Legislature passed legislation establishing Florida's 27 Congressional Districts ("CDs") ("2012 Congressional Plan"). This redistricting plan was signed into law on February 16, 2012. First Amended Compl. (Dkt. #22) ¶ 13. The 2012 Congressional Plan included the bizarrely-shaped CD 5, which is one of the most non-compact districts in the country. It winds a serpentine route from North to Central Florida, reaching out to capture pockets of African-American voters along the way. *Id.* ¶ 36. The Florida Legislature has publicly attempted to justify this blatant racial gerrymander by claiming it is a result of that body's effort to comply with the Voting Rights Act's prohibition on "retrogression" or the

Florida Constitution's prohibition on "diminishment," both of which are understood to protect the ability of minority groups to elect candidates of their choice. *Id.* ¶¶ 51-57. CD 5's predecessor district had a Black Voting Age Population ("BVAP") of 49.9%, and African-American voters were consistently able to elect their candidates of choice despite not having a majority of the voting age population. *Id.* ¶ 27. The 2012 Congressional Plan needlessly increased the BVAP in CD 5 to 50.1%. *Id.* ¶ 25. This increase was accomplished in part by moving significant numbers of African-American voters into CD 5 from CD 7 and replacing them in that district with an approximately 80% white population. *Id.* ¶ 28.

By increasing CD 5's BVAP beyond what was demonstrably necessary to protect the ability of African-American voters to elect candidates of their choice, the Legislature engaged in a practice known as "packing," which seeks to diminish the political influence of a minority group by shunting minority voters into as few districts as possible, thereby diluting their influence in neighboring districts. *Id.* ¶ 24. Racial packing subordinates traditional redistricting principles to considerations of race, and violates the U.S. Constitution's prohibition on racial gerrymandering as established by *Shaw v. Reno*, 509 U.S. 630 (1993). Under *Shaw* and its progeny, the Court must apply strict scrutiny when a state uses race as its predominant purpose in making a reapportionment decision, and that decision is an unconstitutional racial gerrymander unless demonstrated to be narrowly tailored to serve a compelling government interest.

There is ample evidence that CD 5 is an unconstitutional gerrymander. There are numerous public statements indicating that race was the predominant factor in drawing CD 5. First Amended Compl. ¶¶ 51-58. CD 5 also fails basic redistricting criteria, as it is not at all compact, *id.* ¶¶ 34-44, and fails to make use of existing political or geographical boundaries, *id.*

¶¶ 45-50. The Florida Senate failed to consider any evidence other than the racial composition of the district in evaluating the effect of the redistricting plan on minority voting rights. *Id.* ¶¶ 31-33. By purposefully increasing the BVAP in CD 5 above and beyond what was demonstrably necessary to protect minority voting rights, the Florida Legislature clearly failed to narrowly tailor its use of race.

Because the 2012 Congressional Plan also violated new provisions in the Florida Constitution that prohibit political gerrymandering and favoring incumbents, a group of plaintiffs (including one of the Plaintiffs in this action) brought suit in state court under Article III, Section 20 of the Florida Constitution, alleging, among other things, that the 2012 Congressional Plan is the product of unlawful partisan intent. *Romo v. Detzner*, No. 2012-CA-00412; *League of Women Voters v. Detzner*, No. 2012-CA-00490 (the "Romo Litigation"). Those cases have been consolidated in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida. Plaintiff Warinner and his co-plaintiffs in the Romo Litigation pursued an expedited schedule, but were met with numerous delays, largely caused by Legislative Parties' and political consultants' repeated refusals to produce evidence. First Amended Compl. ¶¶ 17-18. These delays eventually required a ruling from the Florida Supreme Court, which held that legislators had "no unbending right . . . to prevent the discovery of relevant evidence necessary to vindicate the explicit state constitutional prohibition" against racial and political gerrymandering. *League of Women Voters. v. Fla. House of Reps*., Nos. SC13-949, SC13-951, 2013 WL 6570903, at *1 (Fla. Dec. 13, 2013).

After all the delays the plaintiffs in the Romo Litigation have encountered, trial is currently set for May 19, 2014. First Amended Compl. ¶ 20.[1] This trial date runs the risk of

[1] Legislative Parties inaccurately represent that there have been "four continuances of trial at the *plaintiffs*' request (including Plaintiff Warinner)," Mot. to Dismiss or Stay (Dkt. #32) at 3. In fact, Plaintiff Warinner and his co-

simply being too late to implement a valid, constitutional redistricting plan in time for the 2014 congressional elections. The state court has made no assurances that it will be willing to extend the congressional filing deadline, which is currently May 2, 2014. First Amended Compl. ¶ 21. Indeed, Defendant Secretary of State explicitly "object[ed] to any trial date that affects the 2014 election." Devaney Decl., Ex. 4 at 7. Even if the state court were to resolve the case in a timely manner, in the event of a ruling adverse to the plaintiffs on their state constitutional claim, it would be near impossible at that point for the parties to begin anew in this Court and obtain a resolution in time for the 2014 election cycle. Because of the uncertainty regarding whether the state court will act in time to affect the upcoming elections, Plaintiffs filed suit in this Court seeking federal relief under the Equal Protection Clause of the Fourteenth Amendment. *Id*. ¶¶ 65-69. Having already been forced to participate in one election under an unconstitutional congressional map, Plaintiffs seek to ensure that they are not required to endure further violence to their fundamental right to select their representatives under a constitutional apportionment plan if the state court does not or is unable to act in time to effectuate a remedy for the upcoming elections.

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plaintiffs in the Romo Litigation originally sought an expedited trial date to take place before the 2012 congressional election cycle, *see* Decl. of John M. Devaney (Feb. 28, 2014) ("Devaney Decl."), Ex. 1, which Legislative Parties opposed. Two months prior to the originally scheduled February 2013 trial date, plaintiffs and defendants (including Legislative Parties) jointly moved for a trial continuance "given a number of outstanding discovery issues." *See* Devaney Decl., Ex. 2 at 1. Subsequent continuances sought by plaintiffs resulted from a protracted discovery battle caused by Legislative Parties' refusal to provide evidence the Florida Supreme Court ultimately ruled they were compelled to produce. Plaintiff Warinner did not request the latest trial continuance; once it was imposed, Plaintiff Warinner and his co-plaintiffs requested a trial date of April 7, 2014. *See* Devaney Decl., Ex. 3. The state court imposed a later trial date to accommodate the 2014 legislative session.

III. Argument

A. The Court Should Not Dismiss or Defer to the Florida State Court Given the Imminent Threat of an Unconstitutional Election.

Legislative Parties request a stay under the principles established in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and *Scott v. Germano*, 381 U.S. 407 (1965).[2] In doing so, they misread the doctrine as requiring a federal court to abdicate entirely in the face of any redistricting dispute. The Supreme Court has been very explicit that this is not the case. Rather, the appropriateness of a deferral is closely tied to the progress of the state court. Here, there have been numerous delays over the course of two years and a trial date set after the congressional filing deadline. Plaintiffs are reasonably concerned that the state court will not be in a position to vindicate Plaintiffs' voting rights in time for the 2014 congressional election. Deferral is therefore inappropriate in this case.

1. *Germano* and *Pullman* Standard

As an initial matter, neither *Germano* nor *Pullman* provide a basis for dismissal of the present action. The Supreme Court has warned that although *Pullman* is commonly described as an "abstention" doctrine, it is a form of "deferral," which does not require outright dismissal. *Growe*, 507 U.S. at 32 n.1. *Pullman* and *Germano* merely dictate that federal courts should not "prematurely" invade the space of state courts. *Id.* ("*Pullman* deferral recognizes that federal courts should not prematurely resolve the constitutionality of a state statute, just as *Germano* deferral recognizes that federal courts should not prematurely involve themselves in redistricting."). Indeed, within the redistricting context, the Supreme Court has emphasized that "*Germano* requires deferral, not abstention." *Id.* at 37.

[2] Although Legislative Parties address *Germano* and *Pullman* separately, *Germano* and its progeny developed out of the *Pullman* doctrine and both lines of cases reflect the same concerns. *See Benavidez v. Eu*, 34 F.3d 825, 832 (9th Cir. 1994) (describing *Germano* as "a subset of *Pullman* abstention, which applies when state redistricting may obviate the need for a federal determination of the propriety of state districting"). Therefore, this Response considers them together.

Both doctrines generally recognize that, in the first instance, states, not federal courts, should have primary responsibility for redistricting. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975). For this reason, the Court has directed federal courts to "stay[] [their] hand[s]" when a state is actively working toward a proper redistricting plan with sufficient time to implement it. *Germano*, 381 U.S. at 409. In *Germano*, for example, the Illinois Supreme Court "held the composition of the Illinois Senate invalid." *Id.* at 408. The state court then allowed the legislature to redraw the map with the caveat that the state court would take "such affirmative action as may be necessary to insure that the 1966 election is pursuant to a constitutionally valid plan." *Id.* (internal quotation marks and citation omitted). When the district court interfered, refusing to vacate its own order on the redistricting at issue, the Court reversed. *Id.* at 409. Similarly, in *Growe*, the state court was developing a redistricting plan with time to implement for the election year, and the Supreme Court held that the federal court should have deferred to that plan. 507 U.S. at 37.

Germano and *Growe* explicitly strive to balance the principles of comity and federalism, on one hand, with the federal courts' duty to protect fundamental constitutional rights on the other. This balance recognizes a point at which federal courts must take action. In *Germano*, the Court directed the federal district court to "retain jurisdiction of the case and in the event a valid reapportionment plan for the State Senate is not timely adopted it may enter such orders as it deems appropriate." 381 U.S. at 409. *Growe* commented that "[o]f course the District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries." 507 U.S. at 36-37. The cases make clear that a federal court should consider a redistricting case where it appears the state court is unable to "adopt a constitutional plan within

ample time to be utilized in the upcoming election." *Id.* at 35 (internal quotation marks and alterations omitted).

Other federal courts have acknowledged this balance. In *Badham v. U.S. Dist. Court*, 721 F.2d 1170, 1174 (9th Cir. 1983), for example, the district court announced that the group challenging a redistricting "could return to the federal court if they were unable to obtain a sufficiently swift adjudication of state claims in the state courts." The *Badham* court held that "before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote," commenting that, "[a]lthough we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote." *Id.* at 1173. The Eleventh Circuit has endorsed this view, noting that although federal courts should generally play a "limited role" in a state's electoral process, "we must take into account the nature of the controversy and the importance of the right allegedly impaired. Our cases have held that voting rights cases are particularly inappropriate for abstention." *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000) (citations omitted) (refusing to abstain under *Pullman*).

Indeed, when an election deadline is approaching, the Supreme Court has held that the right to vote outweighs other considerations and has repeatedly counseled against deferral in these circumstances. In one such case, the Supreme Court upheld a district court's injunction of a state court redistricting plan on the basis that the state court could not meet its deadline for the upcoming election. *Branch v. Smith*, 538 U.S. 254, 265 (2003). In another case, which required the Court to decide the legality of a state statute concerning poll taxes, the Court rejected an argument that *Pullman* deferral was necessary in part because "the nature of the constitutional

deprivation alleged and the probable consequences of abstaining" weighed heavily in favor of the federal court deciding its merits. *Harman v. Forssenius*, 380 U.S. 528, 537 (1965). At a certain point, protection of the right to vote must take precedence over a state's interest in redistricting.

2. *Germano* and *Pullman* Deferral Is Not Appropriate Under the Circumstances of This Case.

Unlike the circumstances presented in *Germano* and *Growe*, the Romo Litigation in Florida state court is not even set for a trial on the 2012 Congressional Plan until May 19, 2014—which is *after* the congressional filing deadline. While Legislative Parties ask this Court to step back and give the state court time to consider the issues, Defendant Secretary of State has consistently expressed his goal to avoid any "re-drawing of the districts affecting the 2014 election," Devaney Decl., Ex. 4 at 2, and Legislative Parties have similarly argued that the Romo Litigation cannot be resolved in time for the 2014 election cycle, Devaney Decl. ¶ 5. Indeed, counsel for Legislative Parties objected to a trial date as early as May 2014 and argued that the state court should not set a trial date at all. Devaney Decl. ¶ 5. Additionally, not only have Legislative Parties caused discovery delays necessitating numerous extensions in the state court proceeding, which now threaten to defer any remedial action for yet another election, they have consistently taken the position that the state court lacks jurisdiction to even impose a remedy in the event it finds the 2012 Congressional Plan unconstitutional. *See, e.g.*, Devaney Decl., Ex. 5 at 3 (Legislative Defendants' Amended Answer and Affirmative Defenses to Romo Plaintiffs' Second Amended Complaint (July 26, 2013) (asserting affirmative defense that state court "lacks subject matter jurisdiction to provide a remedy under Article I, Section 4 of the United States Constitution")). Legislative Parties cannot have it both ways, objecting in state

court to imposition of a remedy that would affect the 2014 election while claiming in this Court that a state resolution is preferable.

Plaintiffs should not be forced to endure another unconstitutional election. "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." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). "In a redistricting case . . . the courts' failure to act before the next election forces voters to vote in an election which may be constitutionally defective. . . . Thus, a delayed decision in such a case 'strike[s] at the heart of representative government.'" *Badham*, 721 F.2d at 1173 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

In *Branch*, the federal court deferred its consideration of a redistricting dispute until January 7 of an election year, which the court determined to be an appropriate point to intercede. 538 U.S. at 259. That case involved the need for extra time to obtain preclearance of the redistricting map, which Florida is not obligated to do. Yet the timeline here is functionally similar—it is simply too late to presume the state can and will remedy the 2012 Congressional Plan. In this circumstance, this Court should not shutter its doors and wait until it is too late to afford relief. Rather, Plaintiffs should be allowed to submit briefing on the merits so that the Court is in a position to step in whenever it determines doing so would be appropriate.

B. Abstention Is Not Appropriate in This Case.

Legislative Parties also make the argument that this Court should abstain altogether and dismiss this case under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), or *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Neither of these doctrines is applicable to a redistricting case—a genre of cases for which, as discussed above, there is an

entirely separate deferral doctrine—and they are particularly inappropriate for this one, in which one of the Plaintiffs is not even a party to the Florida state case.

In making their argument for abstention, Legislative Parties studiously ignore the Supreme Court's repeated warning that abstention is the "'exception, not the rule.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 593 (2013) (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984)). Their argument relies almost entirely upon the pendency of the Romo Litigation in state court, even as they acknowledge the general rule that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in federal court," as "federal courts have a virtually unflagging obligation to exercise their jurisdiction," *Jackson-Platts v. Gen. Elec. Capital Corp.*, 727 F.3d 1127, 1140 (11th Cir. 2013) (internal quotation marks and citation omitted). Abstention is simply inappropriate in this case, and Legislative Parties' request on this issue should be denied.

1. Abstention Under *Younger* Is Inappropriate.

As Legislative Parties concede, the Supreme Court has clearly and emphatically limited *Younger* abstention to criminal or quasi-criminal proceedings. In *Sprint Communications*, 134 S. Ct. at 588, 591, the Court warned that "[d]ivorced from [a] quasi-criminal context," *Younger* would extend to "virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest. That result is irreconcilable with our dominant instruction that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the exception, not the rule." *Id.* at 593 (internal quotation marks and citations omitted).

Without much in the way of explanation, Legislative Parties nonetheless assert that a redistricting case would fit within the narrow range of cases to which *Younger* applies because it

is in furtherance of the "state courts' ability to perform judicial functions." Mot. to Dismiss or Stay at 11 (quoting *Sprint Commc'ns*, 134 S. Ct. at 586). In doing so, Legislative Parties would stretch an exception to swallow the rule. The Supreme Court has applied this exception only to judicial proceedings that implicate the power of state courts to *enforce* their own orders—not create new rulings. For example, a district court cannot enjoin a state court contempt proceeding. *Juidice v. Vail*, 430 U.S. 327, 338-39 (1977). Nor can a federal court enjoin the requirement for the posting of bond pending appeal. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987). Both of these situations constitute "challenges to the processes by which the State compels compliance with the judgments of its courts." *Id.* at 13-14.

The Court has explicitly declined to expand *Younger* to situations in which a state court would perform the basic function of weighing the legality of a legislative action. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) ("[I]t has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action."). Yet that is precisely what the Florida state court is called upon to do as it reviews the 2012 Congressional Plan. The fact that a federal case may "for practical purposes pre-empt[], a future—or, as in the present circumstances, even a pending—state-court action" does not make a case appropriate for *Younger* abstention. *Id.* at 373.

Even if *Younger* abstention applied to a broader class of civil cases, it would not apply to the circumstances of this case. Legislative Parties cite *Benavidez v. Eu*, 34 F.3d 825 (9th Cir. 1994), a rare case considering *Younger* abstention in this context, but do not discuss it, and for good reason. In that case, the Ninth Circuit reversed a district court's dismissal of intervenors because they did not participate in the state case. *Id.* at 831. In so holding, the court also

concluded that "consideration of abstention principles in the special context of voting rights cases confirms our conclusion that the district court erred if it dismissed the intervenors based on abstention," *id.* at 832, and noted that "[t]he application of such abstentions is indeed contrary to the federal courts' traditional role in safeguarding voting rights," *id.* at 833. For the same reasons, *Younger* abstention is simply inapplicable in this case. One of the Plaintiffs is not involved in the Florida state court proceeding at all, and this case implicates the fundamental right to vote. Therefore, even if *Younger* could conceivably apply more broadly than the Supreme Court has applied it in the past, it is clearly inapplicable under these circumstances.

2. Abstention Under Colorado River Is Inappropriate.

Finally, Legislative Parties point to the extremely narrow abstention doctrine established in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), which held that where abstention is inappropriate under other doctrines, in "exceptional circumstances" and in the interest of judicial efficiency, a federal court may abstain. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983). As the Eleventh Circuit has acknowledged, "while abstention as a general matter is rare, *Colorado River* abstention is particularly rare, permissible in fewer circumstances than are the other abstention doctrines." *Jackson-Platts*, 727 F.3d at 1140 (internal quotation marks and citation omitted). The Supreme Court has warned that this form of abstention should be narrowly construed. In the ordinary case, "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River*, 424 U.S. at 817.

As an initial matter, this case is not appropriate for *Colorado River* abstention because it is not a "parallel proceeding." *Colorado River* requires, as a threshold matter, for the state and federal cases to involve "substantially the same parties and substantially the same issues."

Ambrosia Coal & Constr. Co. v. Pages Morales, 368 F.3d 1320, 1330 (11th Cir. 2004). Here, one of the Plaintiffs is not involved in any way with the state proceeding, and, while the state court case involves solely issues of state constitutional law, the federal case raises a claim under the U.S. Constitution that has not been raised in the state proceeding.[3] The Eleventh Circuit has noted that "[t]here is no clear test for deciding whether two cases contain substantially similar parties and issues. But . . . the balance in these situations begins tilted heavily in favor of the exercise of the court's jurisdiction." *Acosta v. James A. Gustino, P.A.*, 478 F. App'x 620, 622 (11th Cir. 2012). For this reason, "if there is any substantial doubt about whether two cases are parallel the court should not abstain." *Id.*

Moreover, there are no "exceptional circumstances" in this case that would counsel in favor of abstention. "[D]ismissal is warranted in light of a concurrent state court action only when a balancing of relevant factors, 'heavily weighted in favor of the exercise of jurisdiction,' shows the case to be exceptional." *First Franklin Fin. Corp. v. McCollum*, 144 F.3d 1362, 1364 (11th Cir. 1998) (quoting *Moses H. Cone*, 460 U.S. at 16). Those factors are:

> (1) the order in which the courts assumed jurisdiction over property; (2) the relative inconvenience of the fora; (3) the order in which jurisdiction was obtained and the relative progress of the two actions; (4) the desire to avoid piecemeal litigation; (5) whether federal law provides the rule of decision; and (6) whether the state court will adequately protect the rights of all parties.

Jackson-Platts, 727 F.3d at 1141 (internal quotation marks and citation omitted). Courts must "apply these factors flexibly and pragmatically, not mechanically." *Id.*

There is no question that the first two factors do not apply, since this case does not involve property and there are no allegations that a federal forum is inconvenient. Because

[3] Legislative Parties' suggestion that Plaintiff Warinner was somehow required to raise his equal protection claim in state court fails to recognized that "plaintiffs are free to litigate in any court with jurisdiction." *Johnson v. De Grandy*, 512 U.S. 997, 1005 (1994).

neither of these factors is involved, they "cut[] against abstention." *Id.* The fifth factor, whether federal law provides the rule of decision, also weighs heavily against abstention, as this case deals with a federal constitutional challenge to CD 5.

Although Legislative Parties attempt to rely on the fourth factor—potential for piecemeal litigation—their argument here overreaches. The potential for inconsistent decisions is a risk any time a federal and state court exercise jurisdiction over the same issue, but the Supreme Court has been explicit that a concurrent state proceeding will not usually be grounds for abstention. *Colorado River*, 424 U.S. at 817. For this reason, "[r]un of the mill piecemeal litigation will not do: this factor 'does not favor abstention unless the circumstances enveloping those cases will likely lead to piecemeal litigation that is abnormally excessive or deleterious.'" *Jackson-Platts*, 727 F.3d at 1142 (quoting *Ambrosia Coal*, 368 F.3d at 1333). In *Colorado River*, for example, the federal government sued roughly 1,000 water users, which the Court recognized produced a serious risk of "additional litigation through permitting inconsistent dispositions of property." 424 U.S. at 819 ("Indeed, we have recognized that actions seeking the allocation of water . . . are best conducted in unified proceedings."). No such "abnormally excessive" piecemeal litigation would result from a federal judgment in this case.

Nor does the sixth factor counsel in favor of abstention. Indeed, Plaintiffs filed suit in this court precisely because the delays in the Romo Litigation create the strong possibility that the state court may not "adequately protect the rights" of Plaintiffs to vote in a constitutional district in 2014. *Jackson-Platts*, 727 F.3d at 1141.

Thus, Legislative Parties are left to argue that this Court should abstain simply because the state case is further advanced. Undoubtedly more progress has been made in the state case, since it is currently set for trial, but that factor alone can hardly make this case so "exceptional"

that it justifies abstention. As the Court has warned, a court's task "is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice . . . to justify the *surrender* of that jurisdiction." *Moses H. Cone*, 460 U.S. at 25-26. The relative progress of a state case is not sufficient for this incredible abdication of power, particularly here, where despite that progress there remains a significant risk that the state court litigation will not be resolved in time for the 2014 congressional elections. None of the factors listed above outweighs Plaintiffs' compelling interest in preserving the sanctity of their right to vote, and the doors of this Court must remain open to ensure that Plaintiffs are not forced to vote again under unconstitutional district lines.

IV. Conclusion

For all of the foregoing reasons, Plaintiffs request that this Court deny Legislative Parties' Motion to Dismiss Or, in the Alternative, to Stay Proceedings, and allow the case to proceed and the parties to file motions requesting relief, to be considered and decided by the Court as and when it sees fit.

DATED this 28th day of February, 2014.

____/s/_____
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**Pro hac vice*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed in the Court's CM/ECF System this 28th day of February, 2014 and served electronically to Ashley Davis @ Ashley.Davis@DOS.MyFlorida.com and J. Andrew Atkinson @ JAndrew.Atkinson@DOS.MyFlorida.com.

___/s/_____
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