UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

WILLIAM EVERETT WARINNER and JAMES C. MILLER, SR.,	)	No. 6:13CV1860-ORL-JA-DAB
Plaintiffs,	)	
vs.	)	
KEN DETZNER, in his official capacity as Secretary of State of the State of Florida,	)	(Loc. R. 3.01(h) - Dispositive Motion)
Defendant.	)	

THE LEGISLATIVE PARTIES' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS

The Florida House of Representatives and the Florida Senate (collectively, the "Legislative Parties"), submit this reply in support of their Motion to Dismiss or, in the Alternative, to Stay Proceedings (the "Motion to Dismiss or Stay").

Plaintiffs' opposition misstates or omits certain facts about the parties' actions in the related case pending before the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, styled *Romo, et al. v. Detzner, et al.*, Case No. 2012-CA-000412 (the "State Proceeding"). In that case, the Legislative Parties *opposed* two continuances supported by Plaintiff Warinner which postponed the trial date from August 2013 to May 2014, yet Plaintiffs now oppose abstention because of the possibility that the State Proceeding will not be resolved in time for the 2014 congressional elections. Plaintiffs also argue that this Court should not defer to the State Proceeding, but trial on that case will commence on May 19, and its outcome could significantly alter or render moot the federal questions raised here.

This Court should dismiss Plaintiffs' claim or defer its consideration until the State Proceeding concludes.

ARGUMENT

I. THE LEGISLATIVE PARTIES HAVE NOT CREATED DELAY IN THE STATE PROCEEDING AND INSTEAD OPPOSED CONTINUANCES SUPPORTED BY PLAINTIFF WARINNER

Plaintiffs' opposition is founded on a number of misstatements about the parties' positions in the State Proceeding in an attempt to persuade this Court that the Legislative Parties, rather than Plaintiff Warinner, created delay in that case. But the Legislative Parties have not caused "numerous delays" in the State Proceeding or "argued against a speedy resolution" of the case, as Plaintiffs assert (opp. at 2, 4). Rather, the Legislative Parties have repeatedly urged the trial court to establish a trial date, and opposed the plaintiffs' third and fourth motions to continue the trial date in the State Proceeding, which postponed trial from August 2013 to May 2014.[1] In their opposition to Plaintiff Warinner's motion to continue the August 2013 trial date, the Legislative Parties stated that "[a]fter sixteen months of litigation, the defendants and the taxpayers are entitled to a final resolution of this case" (Ex. A at 2). And in their opposition to the motion to continue indefinitely the January 2014 trial date, the Legislative Parties urged "the Court [to] specify a trial date and pretrial deadlines. A clear timetable is essential to incentivize all parties to proceed expeditiously. This case should not be permitted to linger without a definite plan for a final resolution" (Ex. B at 3).

Plaintiffs assert that "Plaintiff Warinner did not request th[is] latest trial continuance", which delayed trial from January until May (opp. at 5 n.1). That motion was filed on

[1] The Legislative Parties did not oppose the plaintiffs' second motion for continuance, which postponed trial from June 2013 to August 2013, but did not seek that continuance, either.

November 21—eight days before Plaintiff Warinner commenced this case—and the Legislative Parties filed an opposition four days later (Ex. C. at 1; Ex. B at 1). At the hearing on the motion, counsel for the moving plaintiffs advocated an indefinite continuance, stating that "it seemed to us the most reasonable course of action to wait until there was a decision from the [Florida] Supreme Court [on legislative privilege] before we reschedule the case for trial" (Ex. D at 5:7-11). Counsel for Plaintiff Warinner then "endorse[d]" the moving plaintiffs' request for an indefinite continuance of the trial date (Ex. D at 15:23-16:1). Counsel for the Legislative Parties, however, opposed the indefinite continuance, stating that "I frankly think they need to either pick January 6th as a trial date or a trial date that would not cause prejudice to the legislature" —that is, a trial date that did not conflict with the 60-day legislative session that began on March 3, 2014 (Ex. D. at 9:2-6).

The only position the Legislative Parties ever took that even had the effect of delaying the State Proceeding was the assertion of legislative privilege to prevent unprecedented depositions of legislators and legislative staff regarding the legislative process. The First District Court of Appeal *agreed* with the Legislative Parties and quashed an order compelling such depositions. *Fla. House of Representatives v. Romo*, 113 So. 3d 117 (Fla. 1st DCA 2013). The plaintiffs then sought discretionary review in the Florida Supreme Court, arguing that no legislative privilege exists at all under Florida law and claiming that "there is no specific statute or constitutional provision creating a legislative privilege. That should be the end of the matter" (Ex. E at 13). The Florida Supreme Court rejected the plaintiffs' position, but found that the legislative privilege was qualified and ordered discovery to the extent that it does not encroach on the subjective "thoughts or

impressions" of a legislator or legislative staff member. *League of Women Voters v. Fla. House of Representatives*, __ So. 3d __, 38 Fla. L. Weekly S895 (Fla. 2013). Nonetheless, the Legislative Parties asserted the privilege in good faith and not for purposes of delay. The Florida Supreme Court itself acknowledged that "no precedent" existed for its extraordinary decision to compel the depositions of legislators regarding the legislative process. *Id*.

Plaintiffs' counsel testifies that at the January 3, 2014 scheduling hearing in the State Proceeding, "counsel for the Legislative Parties objected to a trial date as early as May 19, 2014, and argued against setting any trial date at all" (Devaney Decl. ¶ 5). But as the transcript demonstrates, counsel for the Legislative Parties objected to the proposed April 7 trial date only because it coincided with the legislative session, and would cause "material prejudice to the Legislature" because legislators and their staff would be unavailable during trial (Ex. F at 5:24-6:3). While opposing a trial date that conflicted with the legislative session, the Legislative Parties were agreeable to any trial date the Court specified, stating that "anytime after the [legislative] session when we can have access to our clients and to our staff I think is entirely up to the Court's discretion" (Ex. F at 10:13-16). Moreover, by blaming the Legislative Parties for the delay in the State Proceeding, Plaintiffs ignore that the Legislative Parties were prepared to go to trial this January—or last August (Ex. A at 2; Ex. B at 3). The primary cause of any undue delay in the State Proceeding is Plaintiffs' repeated requests for continuances.

II. THIS COURT SHOULD ABSTAIN FROM EXERCISING JURISDICTION UNDER THE *PULLMAN* AND *GERMANO* DOCTRINES

Plaintiffs agree that under the *Pullman* and *Germano* doctrines, "states, not federal courts, should have the primary responsibility for redistricting" (opp. at 7). Plaintiffs then

cite several cases for the proposition that a federal court may intervene when a state will not timely adopt a redistricting map. But the only case Plaintiffs cite where a court refused to defer to the state's own redistricting processes is *Branch v. Smith*, 538 U.S. 254, 262 (2003). And rather than support Plaintiffs' position, *Branch* confirms that deference is appropriate here. In *Branch*, the United States Supreme Court reaffirmed "'what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'" *Id*. at 261. The Court nonetheless found abstention inappropriate because the redistricting plan, which was subject to preclearance under Section 5 of the Voting Rights Act, "had not been precleared and had no prospect of being precleared in time for the 2002 election." *Id*. at 265. Because the state could not conduct an election using its redistricting plan without preclearance, the district court's intervention was warranted. *Id*. Here, by contrast, there is no dispute that the U.S. Department of Justice precleared the enacted plan in 2012.

Plaintiffs urge this Court not to abstain because "protection of the right to vote must take precedence over a state's interest in redistricting" (opp. at 9). But the case they cite, *Harman v. Forssenius*, 380 U.S. 528, 537 (1965), did not address redistricting at all, but rather a state's requirement that voters pay a poll tax to participate in federal elections. Plaintiffs also rely on the Eleventh Circuit's decision in *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000), which was not a redistricting case, but rather a case addressing a claim that the 2000 presidential election recount violated voters' due process rights. The only authorities Plaintiffs cite that actually address redistricting make clear that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body,

rather than of a federal court." *Branch*, 538 U.S. at 262; *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (same); *Badham v. U.S. Dist. Court*, 721 F.2d 1170, 1174 (9th Cir. 1983) ("Reapportionment, which is carried out by the states, is an area in which state courts are encouraged to require and formulate valid plans.").

Plaintiffs also state that the *Pullman* and *Germano* doctrines "do[] not require outright dismissal" (opp. at 6), but they do not dispute that under those doctrines dismissal is *permitted*, particularly when resolution of claims in state court would obviate the necessity of federal constitutional litigation. *See Romero v. Coldwell*, 455 F.2d 1163, 65-66 (5th Cir. 1972) (dismissing case without prejudice under the *Pullman* doctrine to allow the plaintiffs to pursue a state court action that "that might avoid [federal] constitutional adjudication."). That is precisely the case here, where, if Plaintiff Warinner successfully challenges the enacted congressional map, this Court's consideration the map's compliance with the equal protection clause may be rendered unnecessary.

III. THIS COURT SHOULD ABSTAIN FROM EXERCISING JURISDICTION UNDER THE *COLORADO RIVER* DOCTRINE

Plaintiffs claim that the *Colorado River* doctrine does not apply because this case does not involve "substantially the same parties and substantially the same issues" as the State Proceeding (opp. 13). But all the parties in this case are also involved in the State Proceeding except for Plaintiff Miller, who was added almost two months after Plaintiff Warinner brought his original complaint. And there is no question that, although this case is filed under federal law and the State Proceeding involves state law, Plaintiffs raise the same issues and seek the same relief here as in that case (Motion to Dismiss or Stay at 2-3). Plaintiffs in the State Proceeding claim that District 5 "unnecessarily packs more African

Americans into the District than is necessary to protect the minority group's ability to elect its preferred candidate" (Motion to Dismiss or Stay, Ex. A at 6) and request that the state court "[i]ssue a permanent injunction and judgment . . . enjoin[ing] Defendants from calling, holding, supervising or certifying any further elections using Congressional District[] 5" (*id.* at 14). Here, Plaintiffs allege that in the congressional plan "African-American voters are unnecessarily packed into Congressional District 5" and seek "a permanent injunction enforcing or giving any effect to the boundaries of Congressional District 5" and "an injunction barring Defendants from conducting any elections for the United States House of Representatives based on Congressional District 5" (Compl. ¶ 25, p. 11).

Plaintiffs also assert that the six factors the Eleventh Circuit described in *Jackson-Platts v. General Electric Capital Corp.*, 727 F.3d 1127, 1140 (11th Cir. 2013) weigh against abstention (opp. at 14-15).[2] Plaintiffs claim that the second factor, the convenience of the forum, weighs against abstention because "there are no allegations that a federal forum is inconvenient" (opp. at 14). The focus of the second factor, however, is "primarily on the physical proximity of the federal forum to the evidence and witnesses." *Jackson-Platts*, 727 F.3d at 1141. As the Secretary of State explained in his Motion to Dismiss Amended Complaint or, Alternatively, to Transfer Venue, none of the parties to this proceeding reside in the Middle District, nor are the relevant documents located in this district (DE 28 at 7 n.4).

[2] The six 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.

Instead, the Defendants and the public records related to the drawing of District 5 are located in Tallahassee, where the State Proceeding is ongoing.

Plaintiffs do not dispute that the third factor, regarding the relative progress of the two actions, weighs in favor of abstention (opp. at 15). But Plaintiffs claim that the fourth factor, regarding risk of piecemeal litigation, does not warrant abstention because it only involves "[r]un of the mill piecemeal litigation" (opp. at 15). This case, however, is far from "run of the mill" litigation; it concerns the map under which Florida's citizens will vote for their representatives in the United States House of Representatives. The interests of the voters as well as candidates for Congress would be jeopardized by conflicting judgments resulting from Plaintiffs' pursuit of challenges to the plan in multiple forums.

Finally, Plaintiffs asserts that the sixth *Jackson-Platts* factor does not favor abstention because of "delays" in the State Proceeding. But, as described above, any delay was created by Plaintiff Warinner and the other plaintiffs in that case, not the Legislative Parties. Nonetheless, the state court will soon hear Plaintiff Warinner's constitutional challenge to the enacted plan, as trial is scheduled for May 19. Because the State Proceeding involves substantially the same parties and issues as this case, abstention is appropriate.

IV. THIS COURT SHOULD ABSTAIN FROM EXERCISING JURISDICTION UNDER THE *YOUNGER* DOCTRINE

Plaintiffs claim that the Supreme Court "has clearly and emphatically limited *Younger* abstention to criminal or quasi-criminal proceedings" (opp. at 11). The Supreme Court recently stated, however, that the *Younger* doctrine also applies to "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns v. Jacobs*, 134 S. Ct. 584, 588 (2013). Plaintiffs

claim that this exception applies "only to judicial proceedings that implicate the power of state courts to enforce their own orders" (opp. at 12). But they cite no authority for that proposition, and then suggest that *Younger* does not apply when a state court reviews the validity of a legislative enactment (*id.*).

To the contrary, courts have applied the *Younger* doctrine to preclude challenges to a state statute when a party had a full and fair opportunity to litigate the claim in state court. *See S.C. Ass'n of School Adm'rs v. Disabato*, 460 Fed. App'x 239, 240 (4th Cir. 2012) (finding, where a party challenged the constitutionality of a state statute in both state and federal court, that "the district court did not abuse its discretion in determining that abstention in favor of the earlier-filed state suit was appropriate under *Younger*"); *Lazaridis v. Wehmer*, 591 F.3d 666, 670 (3d Cir. 2010) (finding that *Younger* abstention applied as "[i]t is clear that the Delaware state courts presented an adequate forum in which [plaintiff] could pursue his claims regarding the constitutionality of Delaware statutes."). Indeed, in *Younger*, the Supreme Court abstained from hearing a plaintiff's claim challenging the constitutionality of a state, concluding that a sufficient state forum existed for the plaintiff to raise his constitutional argument. *See Younger v. Harris*, 401 U.S. 37, 53–54 (1971).

Plaintiffs also claim that the *Younger* doctrine should not apply because Plaintiff Miller, who joined this case almost two months after it was filed, is not a party to the State Proceeding (opp. at 12). But courts have applied the *Younger* doctrine even when there are parties to the federal proceeding who are not part of the parallel state proceeding. *See S.P. ex rel. Parks v. Native Vill. of Minto*, 443 Fed. App'x 264, 265-66 (9th Cir. 2011) ("Although the federal and state cases involve different parties and initially appear to implicate different

issues, the federal questions presented in this case are unquestionably intertwined with the questions posed in the state case. . . . [A] decision on the merits by a federal court . . . would prevent the state court from reaching different legal conclusions. Thus, the district court's decision to abstain under *Younger* was appropriate."); *Liberty Mut. Ins. Co. v. Hurlbut*, No. 08 Civ. 7192(DC), 2009 WL 604430, at *5 (S.D.N.Y. Mar. 9, 2009) ("Different parties and different issues among the two actions [ ] do not preclude abstention."); *Contreras v. City of Chicago*, No. 94 C 4201, 1994 WL 700263, at *4 n.3 (N.D. Ill. 1994 Dec. 13, 1994) ("[A]lthough plaintiffs have argued that [some] plaintiffs are not parties to the state proceedings, they have completely failed to address whether, under state procedural rules[,] they might join in the pending actions. . . . *Younger* abstention cannot be avoided, if otherwise appropriate, simply because there are different parties involved.").

Plaintiffs' reliance on the particular facts of *Benavidez v. Eu*, 34 F.3d 825 (9th Cir. 1994) is misplaced. There, the court denied a request to apply the *Younger* doctrine to plaintiffs in a parallel federal proceeding where "[t]hey were not parties in the state proceeding [because] the California Supreme Court peremptorily denied all applications for intervention." *Id*. at 831. Thus, the plaintiffs bringing the federal action "simply had no opportunity to litigate their claims, never mind a 'full and fair' opportunity." *Id*. Here, by contrast, Plaintiff Warinner is a party to the State Proceeding, and nothing precluded Plaintiff Miller from joining the State Proceeding to challenge the congressional plan.

CONCLUSION

For the reasons stated, this Court should dismiss Plaintiffs' Amended Complaint or, in the alternative, stay the proceedings pending the resolution of the State Proceeding.

Respectfully submitted,

/s/ Raoul G. Cantero
Raoul G. Cantero
Florida Bar No. 552356
White & Case LLP
Southeast Financial Center
200 S. Biscayne Blvd., Suite 4900
Miami, Florida 33131-2352
Telephone: 305-371-2700
Facsimile: 305-358-5744
E-mail: rcantero@whitecase.com

George T. Levesque
Florida Bar No. 555541
General Counsel, The Florida Senate
305 Senate Office Building
404 South Monroe Street
Tallahassee, Florida 32399-1100
Telephone: (850) 487-5237
E-mail: levesque.george@flsenate.gov

Counsel for the Florida Senate

/s/ George N. Meros, Jr.
Charles T. Wells
Florida Bar No. 086265
George N. Meros, Jr.
Florida Bar No. 263321
Andy Bardos
Florida Bar No. 822671
Gray Robinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone: (850) 577-9090
E-mail: Charles.Wells@gray-robinson.com
E-mail: George.Meros@gray-robinson.com
E-mail: Andy.Bardos@gray-robinson.com

Daniel E. Nordby
Florida Bar No. 14588
General Counsel, The Florida House of Representatives
422 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300
Telephone: 850-717-5500
E-mail: daniel.nordby@myfloridahouse.gov

Counsel for the Florida House of Representatives

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 18th day of March, 2014, and thereby served upon all counsel of record.

By: */s/ Raoul G. Cantero*
Raoul G. Cantero