IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

DARIN WHITTEN, LISA C. KAISER, WILLIAM D. KAISER, DOROTHY TAFT, and JARED KERWIN, Plaintiffs, v. ROCHESTER TOWNSHIP REPUBLICAN CENTRAL COMMITTEE; Rochester Township Republican Central Committeepersons THOMAS K. MUNROE, MARK C. WHITE, ANTHONY SAPUTO, MATTHEW BUTCHER, and DAVID ARMSTRONG, in their official capacities as Committeepersons for the Rochester Township Republican Central Committee; LYNN CHARD, in her official capacity as Clerk of Rochester Township; DON GRAY, in his official capacity as Clerk of Sangamon County, and DARRELL MAXHEIMER, Defendants.	No: 3:21-cv-03023-RM-TSH Honorable Richard Mills

PLAINTIFFS' REPLY TO DEFENDANT LYNN CHARD'S OBJECTION TO PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY OR PERMANENT INJUNCTION

I. DEFENDANT CHARD'S CITATIONS CONCERNING THE ROOKER-FELDMAN DOCTRINE DO NOT REFLECT THE CURRENT STATE OF THE LAW

Defendant Chard argues that Plaintiffs' Federal action is barred by the *Rooker-Feldman* Doctrine. However, the cases cited by Defendant do not reflect the current state of the law on the *Rooker-Feldman* Doctrine, as they are all rulings from before the Supreme Court's decision in

Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U. S. 280 (2005). In *Exxon Mobil*, the Supreme Court held that *Rooker-Feldman* has:

> sometimes been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U. S. C. § 1738.

Id at 283. The Court went on to hold that:

> The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.

Id at 284. In the present case, the Plaintiffs' state action was dismissed because the State Circuit Court determined that it did not have Subject-Matter jurisdiction over the claims. In this Federal action, the Plaintiffs are not challenging that judgment. They are not asking this District Court to determine whether Illinois Courts have subject matter jurisdiction over this action. Because of that, per the Supreme Court in *Exxon Mobil*, the *Rooker-Feldman* Doctrine does not bar this action.

In *Hukic v. Aurora Loan Services*, the 7th Circuit held that "In short, the doctrine prevents a party from effectively trying to appeal a state-court decision in a federal district or circuit court." 588 F.3d 420, 431 (7th Cir. 2009). The 7th Circuit held the *Rooker-Feldman* Doctrine did not apply to that case because "No one in this case is attempting to challenge the rulings in the state court foreclosure proceeding." *Id.*

The instant case is very similar to *Charchenko v. City of Stillwater*, 47 F.3d 981 (1995), where the state court had also dismissed the plaintiff's suit for lack of subject matter jurisdiction due to failure to pursue administrative remedies. The Court of Appeals held there that

the *Rooker-Feldman* doctrine did not bar the plaintiff from pursuing his Section 1983 suit in the U.S. District Court because pursuing that claim did not require the District Court to determine that the state court's decision that it had no subject matter jurisdiction was wrong. *id.* at 983. The Court of Appeals concluded:

> The district court has a basis for subject matter jurisdiction over Charchenko's Sec. 1983 suit which does not depend upon the Minnesota state court's jurisdiction. Section 1983 confers original federal jurisdiction with federal district courts. * * * * *
>
> The divestment of state court jurisdiction does not affect the other alternative available: the federal forum. Accordingly, *Rooker-Feldman* does not bar Charchenko's Sec. 1983 Suit.

id. at 984. The same is true instantly. The state court's determination that it lacked subject matter jurisdiction due to failure to exhaust administrative remedies, does not bar the Plaintiffs' suit pursuant to Sec. 1983. Accordingly, the *Rooker-Feldman* doctrine does not bar the instant suit.

The only judgment in the Plaintiffs' state court case was that Illinois Courts did not have subject-matter jurisdiction over the claims. The Plaintiffs are not challenging or seeking to appeal that determination in Federal Court. Therefore, the *Rooker-Feldman* Doctrine does not apply. Further, since no state court has ruled on the merits of this case, this action is not barred by claims or issue preclusion. Plaintiffs have the right to pursue the claims in this case in Federal Court as they allege violations of Federal Constitutional rights, pursuant to 18 U.S.C. Sec. 1983. Therefore, this Court has Subject-Matter jurisdiction over this action.

II. THIS COURT SHOULD NOT DISMISS THIS ACTION UNDER THE *COLORADO RIVER* ABSTENTION DOCTRINE

This Court should not abstain from or dismiss this case under the *Colorado River* doctrine because it does not meet the high threshold required by the doctrine. "In deciding whether to

stay proceedings under *Colorado River*, district courts must be mindful of their 'virtually unflagging obligation ... to exercise the jurisdiction given to them,' abstaining from the exercise of jurisdiction only when abstention is justified by 'exceptional circumstances [and] the clearest of justifications ... under *Colorado River*.'" *Cramblett v. Midwest Sperm Bank, LLC*, 230 F.Supp.3d 865, 869 (N.D. Ill. 2017) (citations omitted). In the present action, there is neither the exceptional circumstances nor the clearest of justifications that would compel this court from adhering to its "virtually unflagging obligation" to exercise its Federal jurisdiction.

The first part of the *Colorado River* analysis is determining whether the State and Federal actions are parallel. *Freed v. J.P. Morgan Chase Bank, N.A.,* 756 F.3d 1013, 1018 (7th Cir. 2014). "For a state court case to be parallel to a federal court case under the Colorado River doctrine, there must be 'a substantial likelihood that the state litigation will dispose of all claims presented in the federal case.'" *Id*. In the present case, the State and Federal actions are not parallel because it is unlikely the state litigation will dispose of all the claims presented in the Federal case.

Plaintiffs have appealed the State Court's dismissal for lack of subject matter jurisdiction to the Illinois Appellate Court. However, the Defendants would not agree to the Plaintiffs' motion to expedite the appellate proceedings and, as a result, the motion to expedite was denied. Defendant Chard asserted that the Appellate Court issued orders and set a schedule for the matter. (Def. Chard Objection at 8) But the only Order entered by the Appellate Court is the one denying the motion to expedite, and the only schedule it set was for the Circuit Clerk to file the record by March 12, 2021. Pursuant to Illinois Supreme Court Rule 343, this means the Plaintiffs would have 35 days to file their Appellants' brief and the Defendants would have 35 days after that to file their Appellee's brief. The March 12 date is by itself after Early Voting is

scheduled to begin on February 25, and even if the Appellants filed their brief on the day the record was transmitted, the Appellees' brief would not be due until after the April 6, 2021 election.

Further, the Appellate proceedings concern whether the Circuit Court had subject matter jurisdiction, and a favorable ruling to the Appellants would result in the case being remanded to the Circuit Court to proceed on the merits. Therefore, the state court proceedings will not provide the Plaintiffs with any relief before voting starts for the April 6, 2021 election, unless the Appellate Court reverses its decision denying the motion to expedite. Even then, there would likely be not relief until after the February 25th start of early voting. Thus, the state case will not dispose of the Federal claims, which seek to give Plaintiff Whitten the fair shot to be the Republican nominee for Road Commissioner that was denied to him at the illegal and unfair caucus in violation his and the other Plaintiffs' constitutional rights. Therefore, the proceedings are not parallel, and the *Colorado River* abstention doctrine does not apply to this case.

Even if the proceedings were parallel, the ten *Colorado River* factors weigh against dismissing the action. The 10 factors are: 1) whether the state has assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which jurisdiction was obtained by the concurrent forums; 5) the source of governing law, state or federal; 6) the adequacy of state-court action to protect the federal plaintiff's rights; 7) the relative progress of state and federal proceedings; 8) the presence or absence of concurrent jurisdiction; 9) the availability of removal; 10) the vexatious or contrived nature of the federal claim. *Id.*

Factor 1 does not apply to this action as it does not involve property.

Factor 2 favors Plaintiffs as the Central District of Illinois is not inconvenient to the parties.

Factor 3, on avoiding piecemeal litigation, favors Plaintiffs, because as noted above, the Appellate process in state court would stretch beyond the election, so the Federal Court resolution of the issue will be decisive for this case. A ruling on the merits by this Federal Court would also prevent any further proceedings in State Court due to *res judicata,* so there would be no piecemeal litigation

Factor 4 favors Plaintiffs because the state court determined it had no subject matter jurisdiction over the action so this court would be the first to obtain subject matter jurisdiction. To the extent the state court obtained personal jurisdiction over the parties, it involved only one court appearance attended only by attorneys for the 2 governmental defendants and the attorney for the Defendant, who purportedly won the caucus nomination, Darrell Maxheimer

Factor 5 favors Plaintiffs because this action raises Federal claims seeking redress of violations of Constitutional rights under color of state law pursuant to Section 1983, so the source of governing law is federal.

Factor 6 favors Plaintiffs, because as stated above, the state Appellate Court is not taking this matter on an expedited basis and therefore would not resolve the matter until after the April 6 election when it would be moot. Therefore, the state-court action is completely inadequate to protect the Plaintiffs' federal rights.

Factor 7 favors Plaintiffs because the state claim made no progress in that the state trial-level court determined it did not have subject matter jurisdiction. Due to the Defendants' refusal to agree to expedite the appeal, it is going along the normal appeals schedule, meaning no relief can be had prior to the start of early voting or even prior to the April 6th election.

Factor 8 favors Plaintiffs because the state court said it has no jurisdiction over the claims, so there is no concurrent jurisdiction; only the Federal Court has jurisdiction.

Factor 9 is the only one that favors Defendants because they could have sought removal to Federal court due to the Federal claim.

Factor 10 favors Plaintiffs because the action is not vexatious or contrived, but rather is Plaintiffs seeking protection of their rights protected by the Federal constitution in an expeditious manner so that they can receive said relief before the election. Therefore, the *Colorado River* factors weigh against dismissal, and this Court must exercise its jurisdiction in this action.

III. THE ROCHESTER TOWNSHIP REPUBLICAN COMMITTEE AND THE COMMITTEEPERSONS WERE ACTING UNDER COLOR OF STATE LAW

In Defendant Chard's attempt to argue that the Defendant Rochester Township Republican Committee and the Committeepersons were not acting under color of state law, she cites a case that is not good law, *Cook Cty. Republican Party v. Bd. Of Election Commissioners for the City of Chicago*, 198 F. Supp. 3d 886 (N.D. Ill. 2016). The order in that case was fully vacated by the 7th Circuit for lack of subject matter jurisdiction. *Cook Cnty. Republican Party v. Sapone*, 870 F.3d 709 (7th Cir. 2017) and therefore cannot be cited in this action.

The actual law is that the Defendant Committee and Committeepersons were acting under color of state law. The Illinois Supreme Court, in addressing the role of party committeepersons in filling legislative vacancies to the Illinois General Assembly, held that the statute that authorizes party committees to fill vacancies "does itself impose a set of duties on political party committees that arguably confer indicia of public agency on them when they are performing

their duties under the statute." *Kluk v. Lang,* 531 N.E.2d 790, 799 (Ill. 1988). Further, the Court explained:

> And though political party committees may be private entities in many contexts, the extensive responsibility given them by the Election Code in connection with appointments to legislative vacancies, pursuant to a constitutional mandate to preserve the political party affiliation of the former incumbent as to the successor legislator, takes them at least as far from private status in that context as was the Veterans Assistance Commission that recommended allocation of county funds in *Makowicz*. It remains only for them to carry out their responsibility in scrupulous compliance with the statute. In addition, the Election Code elsewhere clearly implies that the party committees in their appointment capacity are to be considered public agencies. *Id.* at 801.

In *Makowicz*, the Illinois Supreme Court said about the Veterans Assistance Commission that "it is obvious that in any event the Commission is not a private body or group." *Makowicz v. Macon County*, 399 N.E.2d 1302, 1304 (Ill. 1980). Therefore, Committeepersons in their role of filling legislative vacancies do fill a public function and act under color of state law.

The Illinois Appellate Court made the same finding in the role of Committeepersons in running Township Caucuses. "While we recognize that committeemen are party, not public, officers, the same principles apply because the committeeman here is exercising a specific public function authorized by statute. See *Kluk v. Lang*" *Lenehan v. Twp. Officers Electoral Bd. of Schaumburg Tw*p., 988 N.E.2d 1003, 1017, 370 Ill.Dec. 647, 661 (Ill. App. 2013). Therefore, the Defendant Committee and Committeeperson, in running the caucus were carrying out a public function mandated by the Illinois Township Code and funded by the Township. (*See* 60 ILCS 1/45-45) They were therefore acting under color of state law.

IV. GRANTING PLAINTIFFS TEMPORARY RELIEF IS PROPER

In her last argument Defendant Chard argues that this Court should deny the Plaintiffs' request for a Temporary Restraining Order (and presumably a Preliminary Injunction) because that is what they asked for in their complaint. Defendant Chard is incorrect and the case she

cites is inapposite. She cites *Alpha School Bus Co. v. Wagner,* 2004 WL 42299 *5 (N.D. Ill. 2004), which is a Report and Recommendation of a Magistrate.

That case was a dispute between a school bus company and its former employee, who went to a competitor company and was accused of breaching his fiduciary duty to the plaintiff. The Magistrate recommended denying a preliminary injunction because the plaintiff could not establish that money damages were not adequate or that it would suffer any irreparable harm if the injunction was not granted. *id.*

While the magistrate's Report and Recommendation did have the quote cited by Defendant Chard, preliminary injunctions routinely are the last step and the ultimate relief in election cases involving preliminary injunctions. In *Libertarian Pary Of Illinois v. J.B. Pritzker,* 455 F.Supp.3d 738 (N.D. IL No. 20-cv-2112 April 23, 2020) (modified May 15, 2020) (affm'd U.S.C.A. 7th Cir. No. 20-1961) the U.S. District Court granted a preliminary injunction reducing the required number of signatures and easing other ballot access restrictions due to the COVID-19 pandemic. This relief was for persons seeking to be independent and new party candidates in the November 2020 election. In that case the preliminary injunction relief was the ultimate relief, as the November election has come and gone and the docket in the case shows no further or "ultimate" relief was sought by the plaintiffs or given by the Court.

CONCLUSION

For all the reasons set forth above, the Plaintiffs respectfully request that this Court:

A. Assume original jurisdiction over this matter;

B. Issue a temporary restraining order, followed by preliminary and permanent injunctions, against Defendants and all those acting in concert, a) enjoining the Rochester Township

Clerk and Sangamon County Clerk from certifying Darrell Maxheimer as the Republican Candidate for Rochester Township Road Commissioner at the April 6, 2021 Election or printing his name on said ballot as a candidate for said office; and b) ordering the Rochester Township Republican Central Committee to hold a second Republican Caucus for the purpose of nominating a candidate for Road Commissioner that complies with the U.S. and Illinois Constitutions and the Illinois Township Code, or in the alternative, a revote for 1 or 2 hours on a week-day evening, where voters could come to the Township Hall and cast a secret paper ballot containing the names of Maxheimer and Whitten for the Republican nomination for Road Commissioner.

C. Order Defendants to pay to Plaintiffs their costs and reasonable attorneys' fees under 42 U.S.C. § 1988(b);

D. Grant such other relief as this Court deems appropriate.

Respectfully submitted this 27th day of January, 2021.

/s/ DARRIN WHITTEN, ET AL.,

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