

No. 21-1722

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

GERALD NOVAK and
ADAM WENZEL,
Plaintiffs - Appellants,

v.

WILLIAM L. FEDERSPIEL,
in his official and personal capacities,
Defendant - Appellee

On Appeal from the United States District Court
for the Eastern District of Michigan – Northern Division
Honorable Thomas L. Ludington, District Court Judge

APPELLANTS' BRIEF

PHILIP L. ELLISON (P74117)
OUTSIDE LEGAL COUNSEL PLC
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

CORPORATE DISCLOSURE STATEMENT

Appellants have no parent corporation and are not a publicly held corporation owning 10% or more of stock of a party. Fed. R. App. P. 26.1(a).

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STATEMENT IN REGARDS TO ORAL ARGUMENT

Appellants, by counsel, do not request oral argument unless this Court believes such would be of assistance to the assigned panel.

JURISDICTIONAL STATEMENT

The District Court has jurisdiction to entertain and hear this case pursuant to 28 U.S.C. § 1331 and § 1343 as this case involves federal questions under the United States Constitution and federal civil rights under 42 U.S.C. § 1983. The District Court also has supplemental jurisdiction for the state law claim(s) as well. See 28 U.S.C. § 1367.

This Court has jurisdiction on appeal pursuant to 28 U.S.C. § 1291 as the appealed lower court order was a stay based upon the *Colorado River* abstention doctrine and thereby constitutes an order immediately appealable as a final decision under the collateral order doctrine. *RSM Richter, Inc. v. Behr America, Inc.*, 729 F.3d 553, 556-557 (6th Cir. 2013). Such an order was entered on November 9, 2021. **Order RE 5, PageID #105-121**. Plaintiffs-Appellants timely appealed to this Court on November 12, 2021. **Notice of Appeal, RE 6, PageID #122**.

STATEMENT OF THE ISSUE(S) PRESENTED FOR REVIEW

- I. Did the District Court commit error when sua sponte issuing an indeterminate stay order pursuant to the *Colorado River* abstention doctrine?

Appellants' answer: Yes.

INTRODUCTION

“Judicial abstinence in the face of a grant of judicial power is *not* the norm.” *Gray v. Bush*, 628 F.3d 779, 783 (6th Cir. 2010) (emphasis added). The federal courts have a “strict duty to exercise the jurisdiction that is conferred upon them by Congress,” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), one that is “virtually unflagging,” *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988). Admittedly, however, that duty is not absolute. *Gray*, 628 F.3d at 783. Yes, in those rare cases where an abstention doctrine properly fits, a federal trial court may exercise it. However, this case is not one that fits. The District Court sua sponte issued an indeterminate stay without input, briefing, or oral argument from any party. In fact, it acted before Defendant’s counsel even made an appearance. Had the District Court sought proper input, it would have realized a stay of indeterminate duration premised on *Colorado River* abstention simply does not apply in these circumstances. Reversal is required.

FACTS / STATEMENT OF THE CASE

On October 23, 2017, deputies with the Saginaw County Sheriff’s Office entered the deer-hunting cabin-house decamped by one Benjamin

J. Heinrich in the rural part of middle Michigan.¹ Heinrich and his companion, “H”, had just had a heated dispute, referred to by the responding deputies as a “lover’s quarrel,” **Police Report, RE 2-2, PageID #47**, at which Heinrich had pulled a shotgun. ***Id.* at PageID #48**. The deputies arrested Heinrich at the scene and then seized the single small caliber firearm used, a New England .410 shotgun, seemingly as evidence. ***Id.*** The remaining 13 firearms from within the deer-hunting cabin-house were taken to the Sheriff’s Office for “safekeeping.” ***Id.*** None of those 13 firearms were involved in any way with domestic disturbance. Most critically, Heinrich owned none of the firearms. **Novak Dec., RE 2-6, PageID #63; Wenzel Dec., RE 2-7, PageID #65**. Essentially, he stole (or, at least, possessed without any permission) the New England .410 to commit the domestic assault. **Novak Dec., RE 2-6, PageID #63**. Before the deputies arrived, Heinrich had returned the New England .410 to the gun storage cabinet. **Police Report, RE 2-2, PageID #49**. It is unclear why the deputies then later assumed possession the 13 firearms for “safekeeping” when also

¹ As pled, the deer-hunting cabin-house is owned by Plaintiff Novak but long decamped by Benjamin J. Heinrich and his live-in companion. **Compl., RE 1, PageID #2**.

concurrently arresting Heinrich thereby totally removing him from the premises.

Plaintiffs-Appellants Gerald Novak and Adam Wenzel are the owners of the firearms. **Novak Dec., RE 2-6, PageID #63; Wenzel Dec., RE 2-7, PageID #65.** They did not authorize, condone, bless, have any part of, or contribute in any way to the events or interactions between Heinrich and H. **Novak Dec., RE 2-6, PageID #63.** The firearms were merely stored at Plaintiff Novak's deer-hunting cabin-house; they were never given to, put in possession of, or provided to Heinrich in any way.

Thereafter, Heinrich pled guilty to and was sentenced to probation for domestic violence. **Docket Sheet, RE 2-4, PageID #57-59.** He has since, however, complied with all the terms of his probation and has been fully discharged from the state criminal justice system as of January 2019. **State Court Probation Discharge Order, RE 2-3, PageID #56;** see also **Docket Sheet, RE 2-4, PageID #57-59.**

Plaintiffs, as victims themselves who have no criminal records of any type, have long wanted their firearms back. **Novak Dec., RE 2-6, PageID #63; Wenzel Dec., RE 2-7, PageID #65.** Some are family heirlooms. **Novak Dec., RE 2-6, PageID #63.** In early 2019, they sought

the return of the firearms. In February 2019, Detective Jeffrey Kruszka confirmed Plaintiffs' desire for the return of their private property via an email dated February 22, 2019, but the response, on behalf of Defendant, was "too bad." **Emails, RE 2-5, PageID #60-61.** According to Detective Kruszka, "the longer we keep the guns, the better." *Id.*

Plaintiffs each aver, under oath, that each respectively own their respective firearms. **Novak Dec., RE 2-6, PageID #63; Wenzel Dec., RE 2-7, PageID #65.** Admittedly, there are no existing ownership papers from the date of their original purchases. *Id.* Notwithstanding, Defendant Sheriff William Federspiel's law enforcement agency has current possession of the firearms at the county building, **Sheriff's Office Property Room Records, RE 2-8, PageID# 67-80,** and lacks any ownership interest of any sort as to these firearms. Under Michigan law, an owner of property that is no longer the subject to any criminal proceedings and has not been otherwise forfeited "is entitled to the return of the property unless there is a lawful reason to deny him its return." *People v. Washington*, 351 N.W.2d 577, 580 (Mich. App. Ct. 1984). Here, there is no lawful reason not to return the firearms.

Two different prior lawsuits were filed in the state court to seek the

firearms' return when the Sheriff's Office flat refused to give them back. The cases were premised on a replevin-style claim known in Michigan as claim-and-delivery. M.C.L. § 600.2920. The first action, brought in the Saginaw County Circuit Court against the "Saginaw County Sheriff's Office," was dismissed without prejudice² for lack of jurisdiction, finding that the state "district court" was the appropriate place to file such a replevin action. **State Circuit Court Opinion and Order, RE 2-9, PageID #81-90.**³ So, a second case was brought against the "Saginaw County Sheriff's Office" in that second court captioned as *Novak v. Saginaw Cnty. Sheriff's Office*, but it too was dismissed for both the Saginaw County Sheriff's Office not being "an entity subject to suit" and government immunity.⁴ **State District Court Order, RE 2-10, PageID**

² Under Michigan law, "the inclusion of the term 'without prejudice' in a judgment of dismissal ordinarily indicates the absence of a decision on the merits, and leaves the parties free to litigate the matter in a subsequent action, as though the dismissed action had not been commenced." *Thomas v. Mich. Employment Security Comm'n*, 398 N.W.2d 514, 516 (Mich. Ct. App. 1986).

³ The Michigan Manual (2021-2022), "The Judicial Branch," 539-540, available at <http://www.legislature.mi.gov/documents/2021-2022/michiganmanual/2021-MM-Chapter5.pdf> (explaining the differences between circuit and district courts).

⁴ Such a ruling is a bit odd. If an entity is not capable of being sued, it is unclear why it would also have immunity.

#91. It was long the position of Saginaw County Sheriff's Office in these state-level cases that the "correct" person to sue was Sheriff Federspiel himself. This case has done that very thing. **Compl., RE 1.** Plaintiffs have since appealed the state district court's decision back to the circuit court sitting as an appellate court. A different judge has been assigned to the appeal.

Not wanting to wait longer given the hoop-jumping the state courts have put Plaintiffs through, Plaintiffs brought a federal action with several constitutional claims and a similar replevin-styled claim for the long-term and prejudicial non-return of their firearms against Sheriff William Federspiel. After filing suit, Plaintiffs moved for a preliminary injunction or alternatively for summary judgment. **Motion, RE 2.** While a copy of both the lawsuit and the motion were provided to Sheriff Federspiel, he did not take action on the filings by accepting them. So, Plaintiffs' counsel sought issuance of a summons and to formally serve the same. **Docket Entry, 09/29/2021.** Service was sought to be effectuated but has been made difficult by restricted public access to county buildings due to COVID-19.

Then, the federal District Court sua sponte issued a sixteen-page

opinion opting to stay this case pursuant to the *Colorado River* abstention doctrine. **Order RE 5, PageID #105-121.** This order was entered without any input, briefing, or oral argument from any party. Plaintiffs appealed on November 12, 2021. **Notice of Appeal, RE 6, PageID #122.** Sheriff Federspiel, by his counsel, filed an appearance on November 12, 2021. **Appearance, RE 9, PageID #126.**

SUMMARY OF ARGUMENT

The outcome of the state court litigation resulted in a decision that the “Saginaw County Sheriff’s Office” is not a party cognizable to be sued under Michigan law, despite prior Michigan case law recognizing the same. So, Plaintiffs have filed a separate federal lawsuit directly against the county sheriff in both his official and personal capacities seeking like-kind relief and even greatly relief for the violations of Plaintiffs’ constitutional rights for the ongoing non-return of their firearms contrary to law. The District Court wrongfully abstained. “The mere pendency of a state-court case concerning the same subject matter as a federal case is not reason enough to abstain.” *RSM Richter*, 729 F.3d at 557. Thusly, the District Court could not simply abstain when lacking the requisite “clearest of justifications” to support abstention. *Id.* (citing

Rouse v. DaimlerChrysler Corp., 300 F.3d 711, 715 (6th Cir. 2002)).

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to abstain using the *Colorado River* doctrine. *Id.*

ARGUMENT

I. The *Colorado River* doctrine has its place; just not here.

The *Colorado River* abstention doctrine is premised on “considerations of judicial economy and federal-state comity.” *Romine v. CompuServe Corp.*, 160 F.3d 337, 339 (6th Cir. 1998). Under this abstention doctrine, “a federal district court may abstain from exercising its subject matter jurisdiction due to the existence of a concurrent state court proceeding, based on ‘considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.’” *RLR Investments, LLC v. City of Pigeon Forge*, 4 F.4th 380, 405 (6th Cir. 2021) (quoting *PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 206 (6th Cir. 2001)). But such abstention is disfavored as such a decision “effectively end[s] the litigation in federal court.” *RSM Richter*, 729 F.3d at 556. Thusly, abstention is “extraordinary,” and only to be invoked in “narrowly limited special circumstances” upon only the “clearest of justifications.” *Mason v.*

Lockwood, Andrews & Newnam, PC, 842 F.3d 383, 394 (6th Cir. 2016) (internal citations omitted).

There is a two step analysis when applying *Colorado River* abstention. First, it must be determined whether the state and federal proceedings are, in fact, “actually parallel.” *Romine*, 160 F.3d at 339. If they *are not*, the district court should not abstain. E.g. *Healthcare Co. v. Upward Mobility, Inc.*, 784 Fed. App’x 390, 393 (6th Cir. 2019). If they *are* parallel, an eight-factor test is used to determine whether abstention is merited. *Id.* (citing *Romine*, 160 F.3d at 340-341).

II. The two cases are not “actually parallel.”

This appeal is an easy one because this case and the state court case pointed to by the federal trial court are not actually parallel—as this case and *Novak v. Saginaw Cnty. Sheriff’s Office* involve totally different party-defendants. The lower court correctly recognized as much (but then thereafter erred). **Opinion, RE 5, PageID #111** (“Notably, the parties in the two proceedings are not identical. Plaintiffs named the Saginaw County Sheriff’s Department (sic, “Saginaw County Sheriff’s Office”) as a defendant in the state courts but not in this Court.”). The last merits order of the operative state court is that the “Saginaw County Sheriff’s

Office” is not a party cognizable to be sued under Michigan law (despite prior Michigan case law clearly recognizing the same) in Michigan’s courts. **State District Court Order, RE 2-10, PageID #91**; see e.g. *Krug v. Ingham Cnty. Sheriff’s Office*, 691 N.W.2d 50 (Mich. Ct. App. 2004). This Court must respect that determination, no matter its personal disagreement, until changed by Michigan’s courts.

This federal case now follows with claims pled against a specific party that *unquestionably* can be sued—Sheriff William Federspiel in his personal and official capacities. See **Compl., RE 1, PageID #1**.⁵ Because Michigan courts will not allow *any* claims against “Saginaw County Sheriff’s Office,” federal courts will authorize a different action with both federal (28 U.S.C. § 1343) claims and supplemental state law claims (28 U.S.C. § 1367) against Sheriff William Federspiel in his various

⁵ Claims made against a person in his official capacity is a claim against the government he serves. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Claims against Sheriff Federspiel in his personal capacity create personal liability if he directly ordered the same or implicitly authorized the unconstitutional conduct. See *Everson v. Leis*, 556 F.3d 484, 495 (6th Cir. 2009) (a defendant can be liable where he participated, condoned, encouraged, or knowingly acquiesced in alleged misconduct). This is also not the first time that Sheriff Federspiel’s law enforcement agency, which he commands and administers, refuses to return property belonging to citizens. See *Ostipow v. Federspiel*, 824 Fed. App’x 336 (6th Cir. 2020).

capacities, and thus, the two suits are not parallel under *Colorado River*.

The District Court attempted to get around lack of parallelism by suggesting that “parallelism for *Colorado River* abstention purposes does not require the parties in the state and federal proceedings to be the same” citing the unpublished case of *Preferred Care of Del., Inc. v. VanArsdale*, 676 Fed. App’x 388, 394 (6th Cir. 2017). At an ethereal level, the broad of language of *VanArsdale* suggests that case-versus-case exactitude is not required under *Colorado River*. However, *VanArsdale* cites to *Romine* and in *Romine*, there was a pending state class action case and pending federal class action case with the exact same class of plaintiffs—the only difference was the respective named plaintiff class representative in the case captions. *Romine*, 160 F.3d at 340. In such unique circumstances, this Court correctly concluded that such differences are were not enough to not make the cases “‘parallel’ for the purposes of the *Colorado River* abstention doctrine.”

Here, the state versus federal cases for *Novak* are postured differently and with different party-defendants. And when read against the admonishment of U.S. Supreme Court and Circuit precedent that invocation of abstention is “extraordinary” and only invoked in “narrowly

limited special circumstances” upon only the “clearest of justifications,” *Mason*, 842 F.3d at 394, the broad ethereal brush used by the District Court was clearly in error. The rule in *Romine* should not be expanded like done in *VanArsdale* but be limited to extraordinary circumstances like *Romine* presented and not an invitation to federal trial courts to unclog their dockets by giving state courts a first crack. This is so because “the mere pendency of a state-court case concerning the same subject matter as a federal case is not reason enough to abstain.” *RSM Richter*, 729 F.3d at 557. That is exactly what the District Court erroneously did here.

“If a state court action and a federal action are truly parallel, resolution of the state court action will also resolve *all issues* in the federal action.” *InterMed Resources TN LLC v Green Earth Technologies LLC*, 2021 U.S. Dist. LEXIS 77620, at *6-7 (M.D. Tenn. 2021) (citing *Wright v. Linebarger Googan Blair & Sampson, LLP*, 782 F. Supp. 2d 593, 603 (W.D. Tenn. 2011)) (emphasis in original). On the other hand, “[c]ases are not considered parallel if there is an issue that would not be resolved by the state court upon the completion of the state court action.” *Id.* (citing *Walker v. Cedar Fair, L.P.*, 2021 U.S. Dist. LEXIS 31643 (N.D.

Ohio 2021); *Kopacz v. Hopkinsville Surface & Storm Water Util.*, 714 F. Supp. 2d 682, 688 (W.D. Ky. 2010)); see also 17A MOORE’S FEDERAL PRACTICE §122.06(1) (Matthew Bender 3d ed.) (“The critical determination is whether the non-federal litigation will dispose of all claims raised in the federal court action.”). “Generally, courts agree that suits are not parallel when the remedies sought and the legal theories advanced differ.” *Id.* (cleaned up). Here, remedies sought and the legal theories advanced are unquestionably different.⁶

In addition, it is further worth noting that Section 1983

⁶ Claims for constitutional damages cannot be pursued against the Saginaw County Sheriff’s Office, *Hughson v. Cnty. of Antrim*, 707 F. Supp. 304, 306 (W.D. Mich. 1988), but must be pursued against an government actor named in his or her official and/or personal capacities, which is what this case does and the state court case cannot. If the Saginaw County Circuit Court affirms the Saginaw County 70th District Court’s finding that “the Saginaw County Sheriff’s Office is not a legal entity subject to suit, **State District Court Order, RE 2-10, PageID #91**, then this suit has clear path forward. Yet, even if the Saginaw County Circuit Court reverses the decision of the Saginaw County 70th District Court and finds that a replevin-styled claim and delivery action can be brought in a Michigan court against a cognizable entity known as the Saginaw County Sheriff’s Office, this lawsuit has additional claims against a different party defendant for monetary and/or nominal damages for taking and not return their firearms for years. See **Compl., RE 1, PageID #6-13**. At best, it would only moot Count II. The remaining claims alleging violations of the federal constitution, including violations of the Fourth Amendment, a Fifth Amendment takings, procedural due process, and substantive due process, remain unaffected.

jurisprudence mandates that abstention-by-other-name is not appropriate when constitutional claims are made. First, a “federal remedy” pursuant to Section 1983 “is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.” *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Misusing *Colorado River* runs headlong and fatally into the prohibition of requiring state court exhaustion. Plaintiffs are exercising their rights to seek federal remedies against Defendant Sheriff Federspiel regardless of any state law remedy that might or might exist against the Saginaw County Sheriff’s Office—a different legal entity. It would defeat the purpose of § 1983 “if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court.” *McNeese v. Bd. of Ed. for Comm. Unit Sch. Dist.*, 373 U.S. 668, 672 (1963).

Secondly, Plaintiffs are also making a takings claim. “A property owner has a [federal] constitutional claim for just compensation at the time of the taking” and “may bring constitutional claims under § 1983 ‘without first bringing any sort of state lawsuit, *even when state court actions addressing the underlying behavior are available.*’” *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2172-2173 (2019) (emphasis added). *Colorado*

River is not a free pass to avoid the tough takings decision by allowing state courts to find a lesser path for a wronged public citizen.

Because the two cases—this one and *Novak v. Saginaw Cnty. Sheriff's Office*—are not parallel or even similar enough like the circumstances in *Romine*, this District Court committed error when sua sponte staying this federal case against a state official when a separate state court case already concluded that a claim against a local state law enforcement agency is not a cognizable party to hale into state court.

CONCLUSION

If someone steals a gold coin and stashes it in a bank's safety-deposit box, the victim should be able sue the bank (as the possessor) in replevin to get the coin back and later separately sue the thief for the damages caused by the theft. Unfortunately, when state courts— due to a legal technicality—preclude suit against the bank, the victim should then assert a second replevin claim plus the damages claims against the thief. A determination that Michigan law would not allow a replevin action against the bank does not forgive and wash away the available remedies and award of damages against the thief. Moreover, a pending appellate challenge about the bank's lack of obligation to return the coin

does not warrant a stay of the thief's case, even if a reversal as to the bank moots the replevin claim against the thief. Substantial damages still exist. The victim is entitled to just and speedy civil justice.

This is essentially what has happened here. This lawsuit seeks both the return of the firearms and an award of damages that has resulted from the ongoing non-return of the firearms to Plaintiffs after the state courts would not make cognizable a claim against the specific separate entity that stored for safekeeping the firearms and won't return them. A federal trial court's stay to see what essentially shakes out first in the state courts is an improper use of abstention under *Colorado River*.

RELIEF REQUESTED

This Court is requested to vacate and reverse the District Court's sua sponte stay order under the *Colorado River* abstention doctrine and remand for further proceedings.

Date: December 27, 2021

s/ Philip L. Ellison _____
PHILIP L. ELLISON
OUTSIDE LEGAL COUNSEL PLC
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a)(7)(C) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of the Sixth Circuit Rule 32(a)(7)(B).

This brief has been prepared in proportional typeface using Century School Book 14-point font. The relevant portion of the brief, including headers and footnotes, contains 3,597 words according to the Word Count feature in the Microsoft Word program, being less than 13,000 words.

The undersigned understands that a material misrepresentation in completing this certificate or circumvention of the type-volume limitations may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

Date: December 27, 2021

s/ Philip L. Ellison
PHILIP L. ELLISON
OUTSIDE LEGAL COUNSEL PLC

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of and a copy of such filing to counsel of record at their email address(es) of record.

Date: December 27, 2021

s/ Philip L. Ellison
PHILIP L. ELLISON
OUTSIDE LEGAL COUNSEL PLC

Attorney for Appellants

**DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS**

RE.	PageID Range	Description of the Document
1	#1-14	Complaint
2-2	#47-55	Police report
2-3	#56	State Court Probation Discharge Order
2-4	#57-59	Docket Sheet
2-5	#60-62	Emails
2-6	#63-64	Novak Declaration
2-7	#65-66	Wenzel Declaration
2-8	#67-80	Sheriff's Office Property Room Records
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5	#105-121	Order
6	#122	Notice of Appeal
9	#126-127	Appearance