

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

JUROR NUMBER ONE,

NO. CIV. 2:11-397 WBS JFM

Plaintiff,

v.

ORDER DENYING TEMPORARY
RESTRAINING ORDER

STATE OF CALIFORNIA; HONORABLE
MICHAEL P. KENNY, Judge of the
Superior Court; FACEBOOK,
INC., a Delaware corporation
authorized to do business in
California; GEORGE CHRISTIAN;
TOMMY CORNELIUS, JR.; SAMUEL
KEMOKAI, JR.; DEMETRIUS
ROYSTER; XAVIER WHITFIELD,

Defendants.

_____ /

-----oo0oo-----

Plaintiff Juror Number One¹ was the jury foreperson in
a trial in Sacramento County Superior Court ("the criminal
trial") before the Honorable Michael P. Kenny. During the
criminal trial, plaintiff posted certain comments on his Facebook

¹ Plaintiff has filed a motion for leave to proceed under
a pseudonym. (Docket No. 4.)

1 page stating that he was "still" on jury duty. Once, he stated
2 that he was "bored" during the presentation of cell phone record
3 evidence. One of the other jurors in the criminal trial, Juror
4 Number Five, became "friends" with plaintiff on Facebook. The
5 jury reached a guilty verdict in the criminal trial on June 25,
6 2010. Afterward, Juror Number Five contacted defense counsel and
7 stated that plaintiff had posted "comments about the evidence
8 during trial" on his Facebook page. Judge Kenny held an
9 evidentiary hearing into the alleged juror misconduct. The
10 hearing started on September 17, 2010, and continued on October
11 1, 2010. Plaintiff testified at the hearing, but was not
12 appointed counsel.

13 After the hearing, counsel for the criminal defendants
14 issued a subpoena to Facebook, requesting copies of postings made
15 by plaintiff. Facebook, citing limitations on its ability to
16 disclose such information pursuant to the Stored Communications
17 Act, 18 U.S.C. §§ 2701-2712, moved to quash the subpoena and
18 argued that the criminal defendants could seek the information
19 directly from plaintiff. Counsel for the criminal defendants
20 then issued a subpoena to plaintiff, seeking the same
21 information. On February 4, 2011, Judge Kenny quashed the
22 subpoena on the basis that it was overbroad. Judge Kenny issued
23 an Order requiring plaintiff "within 10 days from the date of
24 this order . . . [to] execute a consent form sufficient to
25 satisfy the exception stated in Title 18, U.S.C. section 2702(b)
26 allowing Facebook to supply the postings made by Juror # 1 during
27 trial." (Compl. (Docket No. 2.) Ex. A at 3.)

28 On February 8, 2011, plaintiff filed a Petition for

1 Writ of Prohibition and Request for Immediate Stay with the
2 California Court of Appeal, Third Appellate District, to prevent
3 enforcement of the Order. That petition was denied on February
4 10, 2011. Plaintiff is currently seeking review of the Court of
5 Appeal's decision in the California Supreme Court, but "does not
6 believe the California Supreme Court will act quickly enough to
7 prevent violation of Plaintiff's rights if the February 4 Order
8 is enforced." (Id. ¶ 31.)

9 Plaintiff now moves this court for a temporary
10 restraining order and preliminary injunction to enjoin Judge
11 Kenny from enforcing the Order, to enjoin Facebook from
12 disclosing the postings, and to enjoin the criminal defendants
13 from undertaking any further efforts to obtain the postings.
14 Plaintiff argues that requiring a signed consent form would be a
15 violation of the Fourth Amendment right to privacy and Fifth
16 Amendment right against self-incrimination through 42 U.S.C. §
17 1983, and would also violate the Electronic Communications
18 Privacy Act, 18 U.S.C. § 2510, the California Constitution, and
19 various state statutes. The motion was filed today, February 14,
20 2011, which is the date on which plaintiff is required by the
21 Order to sign the consent form.

22 Younger v. Harris, 401 U.S. 37 (1971), governs the
23 abstention of federal courts when a state action seeks the same
24 relief on a federal constitutional question as that requested in
25 a federal action.² Polykoff v. Collins, 816 F.2d 1326, 1331-32

26
27 ² Although Younger originally applied to state criminal
28 noncriminal proceedings as well. Middlesex Cnty. Ethics Comm. v.

1 (9th Cir. 1987). "Abstention under Younger is required if (1)
2 there are pending state judicial proceedings, (2) the state
3 proceedings implicate important state interests, and (3) the
4 state proceedings provide an adequate opportunity to raise
5 federal questions." Id. at 1332 (citing Middlesex Cnty. Ethics
6 Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982)). The
7 "principles of equity, comity, and federalism . . . must restrain
8 a federal court when asked to enjoin a state court proceeding."
9 Mitchum v. Foster, 407 U.S. 225, 243 (1972).

10 Plaintiff concedes that the first two prongs of the
11 test are met. Judicial proceedings are clearly pending in state
12 court, and the fact that plaintiff is not a party to those
13 proceedings but is instead a juror subject to an order of the
14 court is inconsequential. See The News-Journal Corp. v. Foxman,
15 939 F.2d 1499, 1511 (11th Cir. 1991) (applying a Younger analysis
16 where a newspaper sought to overturn a state court's restrictive
17 order in a criminal case). Furthermore, plaintiff admits that
18 there is an important state interest in "preventing and
19 redressing juror misconduct." (Combined Mot. for TRO and Prelim.
20 Inj. (Docket No. 7) at 21:9-10.) See Lebbos v. Judges of Super.
21 Ct., Santa Clara Cnty., 883 F.2d 810, 814 (9th Cir. 1989) ("The
22 Supreme Court 'repeatedly has recognized that the States have
23 important interests in administering certain aspects of their
24 judicial systems.'" (citing Pennzoil Co. v. Texaco, Inc., 481
25 U.S. 1, 12-13 (1987)); People v. Tuggles, 179 Cal. App. 4th 339,
26 _____
27 Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) ("The policies
28 underlying Younger are fully applicable to noncriminal judicial
proceedings when important state interests are involved.").

1 379-80 (3d Dist. 2009) (exposing juror misconduct serves an
2 important public purpose).

3 Plaintiff argues that the state court proceedings do
4 not provide an adequate opportunity to raise federal questions
5 because he "does not believe the California Supreme Court will
6 act quickly enough." (Compl. ¶ 31.) First, it is not at all
7 clear to this court that the California Supreme Court will not
8 hear plaintiff's appeal. Plaintiff's attorney only speculates
9 that the Court will not hear the appeal based on phone calls with
10 some clerks at the California Supreme Court and the fact that the
11 Supreme Court has not yet acted on the case. Second, and more
12 importantly, when a federal plaintiff argues that Younger
13 abstention is inappropriate because the state court cannot hear
14 the constitutional claim within the limited time available, "the
15 burden on this point rests on the federal plaintiff to show 'that
16 state procedural law bar[s] presentation of [its] claims.'" Pennzoil,
17 481 U.S. at 14 (quoting Moore v. Sims, 442 U.S. 415,
18 432 (1979)) (second alteration in original). Here, plaintiff has
19 not shown that state law either procedurally or substantively
20 bars presentation of his claims to the California Supreme Court.


21 There is no indication that the California Supreme
22 Court cannot hear the case or that California law would bar a
23 decision on the federal issues. Thus, plaintiff has not met his
24 burden of proof of showing that the state court proceedings do
25 not provide an adequate opportunity to be heard.³

26
27 ³ Younger recognized narrow exceptions to its fundamental
28 rule of abstinence in the limited cases of a showing of bad faith
prosecution, harassment, or flagrant and patent violations of

1 Accordingly, the court will deny plaintiff's ex parte
2 motion for a temporary restraining order and preliminary
3 injunction on the ground of Younger abstention.

4 IT IS THEREFORE ORDERED that plaintiff's ex parte
5 motion for a temporary restraining order and preliminary
6 injunction be, and the same hereby is, DENIED.

7 DATE: February 14, 2011

8
9 

10 WILLIAM B. SHUBB
11 UNITED STATES DISTRICT JUDGE
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

27 _____
28 express constitutional prohibitions. Younger v. Harris, 401 U.S.
37, 53-54 (1971). Because these exceptions are not present in
this case, the court need not address them.