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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

H. NICOLE YOUNG,  
Plaintiff,

No. C-10-03594-DMR

**ORDER DISMISSING COMPLAINT  
WITHOUT PREJUDICE**

v.

ARNOLD SCHWARZENEGGER, et al.  
Defendants.

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On August 16, 2010, Plaintiff H. Nicole Young filed a Complaint and an Application to Proceed *In Forma Pauperis* before this Court. See Docket Nos. 1 and 2. Plaintiff subsequently consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). On November 12, 2010, this Court granted Plaintiff’s Application to Proceed *In Forma Pauperis* but dismissed Plaintiff’s Complaint without prejudice, with leave to amend (“November 12 Order”). On December 13, 2010, Plaintiff filed an amended Complaint. Docket No. 9. Based on grounds of abstention as explained below, Plaintiff’s amended Complaint is DISMISSED without prejudice and without leave to amend.<sup>1</sup>

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<sup>1</sup> The Court does not require the consent of Defendants in order to dismiss this Complaint because Defendants have not been served and therefore are not parties within the meaning of 28 U.S.C. § 636(c). See *Ornelas v. De Frantz*, No. C 00-1067 JCS (PR), 2000 WL 973684, at \*2 n.2 (N.D. Cal. June 29, 2000) (citing *Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir. 1995) (magistrate judge had jurisdiction to dismiss prisoner’s civil rights action without consent of defendants because defendants had not been served and thus were not parties)).

1 **I. REVIEW UNDER 28 U.S.C. § 1915(e)**

2 Under 28 U.S.C. § 1915, a federal court must engage in a preliminary screening of cases in  
3 which a party is proceeding *in forma pauperis* and dismiss a complaint prior to service if it is  
4 frivolous or fails to state a claim upon which relief can be granted. *See* 28 U.S.C. § 1915(e)(2)(B);  
5 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc). Where a *pro se* plaintiff is  
6 proceeding *in forma pauperis*, dismissal without leave to amend is appropriate only if it is clear that  
7 no amendment can cure the defect. *See Franklin v. Murphy*, 745 F.2d 1221, 1228 n.9 (9th Cir.  
8 1984) (citations omitted).

9  
10 **II. DISCUSSION**

11 This action is rooted in a child custody dispute between Plaintiff, the mother of two children,  
12 and their father. As in her original Complaint, Plaintiff’s amended Complaint reasserts federal  
13 constitutional violations of due process and equal protection, as well as a claim under 42 U.S.C. §  
14 1983, arising from the underlying child custody decisions of the state family court. Plaintiff  
15 maintains that the Governor of California, the state Attorney General, and the San Francisco Chief  
16 of Police, in their official capacities, have violated her constitutional rights by enforcing the “best  
17 interests of the child” standard as codified in California Family Code (“Family Code”) §§ 3010-  
18 3022.

19 Two main distinctions exist between Plaintiff’s original and amended Complaints. First, in  
20 her amended Complaint, Plaintiff adds another defendant, Rosalinda Ponce, in her official capacity  
21 as Deputy Clerk of San Francisco County Superior Court. Second, Plaintiff clarifies that she is not  
22 claiming injury based on the prior deprivation of 50% custody of her children – which, as this Court  
23 explained in its November 12 Order, did not establish an injury in fact under Article III because  
24 Plaintiff appears to currently enjoy the custody arrangement she seeks. Instead, Plaintiff attempts to  
25 proceed on the assertion that the mere existence and enforcement of the Family Code’s “best  
26 interests of the child” standard – apart from how the family court actually decided the custody  
27 dispute in her particular case – invade her alleged constitutional right as a separated parent to make  
28 decisions regarding the care and custody of her children, free of “government intervention” in the

1 first instance. In this regard, Plaintiff clarifies that the underlying child custody proceedings in state  
2 superior court commenced before her federal suit was initiated and are ongoing, with the latest in a  
3 series of hearings on her custody and visitation rights already set by the state court (for January 5,  
4 2011) when Plaintiff filed her amended Complaint in December 2010. Plaintiff seeks a declaratory  
5 judgment that the Family Code sections at issue are unconstitutional, as well as injunctive relief to  
6 prohibit their enforcement.

7 Plaintiff's amendments do not mitigate against the concern raised by the Court in its  
8 November 12 Order regarding the applicability of *Younger* abstention to this case. In fact,  
9 Plaintiff's amended Complaint further demonstrates that such abstention is required, and this Court  
10 need not decide whether Plaintiff has met Article III standing requirements, nor is it appropriate to  
11 reach the merits of her claims. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) (a  
12 district court does not overstep Article III limits when it abstains under *Younger* without deciding  
13 whether the parties present a case or controversy under Article III); *Sinochem Int'l Co. v. Malaysia*  
14 *Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (federal court has leeway to choose among threshold  
15 grounds, including *Younger* abstention, for denying audience to a case on the merits).

16 In *Younger v. Harris*, the Supreme Court held that federal courts should not enjoin pending  
17 state criminal proceedings except under extraordinary circumstances. 401 U.S. 37, 49, 53 (1971).  
18 What has become known as the *Younger* abstention doctrine has since been extended to civil  
19 actions. *See Gilbertson v. Albright*, 381 F.3d 965, 971-72 (9th Cir. 2004) (en banc). In *Younger*, the  
20 Supreme Court "espouse[d] a strong federal policy against federal-court interference with pending  
21 state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Comm. v.*  
22 *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). This is because "interference with a state  
23 judicial proceeding prevents the state not only from effectuating its substantive policies, but also  
24 from continuing to perform the separate function of providing a forum competent to vindicate any  
25 constitutional objections interposed against those policies." *Huffman v. Pursue, Ltd.*, 420 U.S. 592,  
26 604 (1975). Therefore, federal courts should refrain from exercising jurisdiction in actions for  
27 injunctive or declaratory relief that would interfere with pending state judicial proceedings. *See*  
28 *Gilbertson*, 381 F.3d at 975, 978.

1 In the Ninth Circuit, *Younger* abstention prevents a court from exercising jurisdiction when  
2 three criteria are met: (1) there are ongoing state judicial proceedings; (2) an important state interest  
3 is involved; and (3) there is an adequate opportunity to raise the federal question at issue in the state  
4 proceedings. *H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000). A court may  
5 consider *sua sponte* whether *Younger* abstention should be invoked. *See id.* (citations omitted).  
6 Indeed, “[w]hen the case is one in which the *Younger* doctrine applies, the case must be dismissed.”  
7 *Id.* (citation omitted).

8 The Court addresses below each factor considered in the *Younger* abstention analysis.

9 **A. Ongoing state judicial proceedings**

10 For purposes of *Younger* abstention, the question is not whether the state judicial  
11 proceedings are still ongoing, but whether they were underway before initiation of the federal action.  
12 *See Gilbertson*, 381 F.3d at 969 n.4 (citing *Kitchens v. Bowen*, 825 F.2d 1337, 1341 (9th Cir. 1987));  
13 *Columbia Basin Apartment Ass’n v. City of Pasco*, 268 F.3d 791, 801 (9th Cir. 2001) (finding state  
14 proceeding was ongoing where state court suit was pending at the time federal suit was filed).  
15 Moreover, the proceedings are deemed ongoing until state appellate review is completed.  
16 *Gilbertson*, 381 F.3d at 969 n.4 (citation omitted). *See also Huffman*, 420 U.S. at 608 (“a necessary  
17 concomitant of *Younger* is that a party...must exhaust his state appellate remedies before seeking  
18 relief in the District Court” unless one of the exceptions to *Younger* applies).

19 Significantly, Plaintiff clarifies in her amended Complaint that her custody and visitation  
20 rights are still being determined in state superior court:

21 “...although the dissolution of the marriage eventually became final on October 31,  
22 2004, custody issues involving two children that resulted from the marriage is  
23 ongoing because, as per Cal. Fam. Code §§ 3010-3022, *all* questions of custody of  
24 minor children involved in a dissolution of marriage are ongoing until the children  
25 reach 18. The children’s father therefore can, and has, repeatedly filed motions  
26 requesting that Plaintiff’s constitutionally protected rights of ‘an equal custody  
27 share of the children’ be denied for any number of reasons. The latest such filing  
28 [in San Francisco County Superior Court] was in January of 2010, and a hearing  
that will determine Plaintiff’s custody and visitation rights (the 4th such hearing  
resulting from this one motion and the 54th such hearing since July 3, 2003) is set  
for January 5, 2011.”

Docket No. 9 (Amended Complaint ¶ 9 at 3:15-24) (emphasis in original).

1           Therefore, Plaintiff’s amended Complaint reveals that the state custody proceedings she  
2 finds objectionable were underway as of at least January 2010, and were ongoing when Plaintiff first  
3 filed her federal suit in August 2010 – with the most recent custody hearing set and pending when  
4 Plaintiff filed her amended Complaint in December 2010. Essentially, Plaintiff seeks “wholesale  
5 federal intervention into an ongoing state domestic dispute,” which is “not the proper business of the  
6 federal judiciary.” *See Gordon*, 203 F.3d at 613-14. Indeed, by seeking a declaratory judgment that  
7 the Family Code sections at issue are unconstitutional and an injunction against their enforcement –  
8 in favor of child custody decisions free of any “government interference” – Plaintiff seeks much  
9 more than a “federal injunction directing the future course of the state litigation” found  
10 impermissible by the Ninth Circuit. *See id.* at 612-14 (*Younger* abstention found appropriate where  
11 plaintiff sought, *inter alia*, to enjoin superior court from further “interfering with” custody of child  
12 “without following specified procedures”). She in fact desires that the federal judiciary put a  
13 summary *end* to pending and future state child custody proceedings, as well as terminate all state  
14 involvement in child custody decisions altogether (absent a criminal conviction of one of the  
15 parents) – for her and for all parents who are separating. Such is not the proper role of this Court.  
16 *See generally, L.H. v. Jamieson*, 643 F.2d 1351, 1354 (9th Cir. 1981) (recognizing “wholly  
17 disruptive consequences associated with enjoining a state judicial proceeding or enjoining further  
18 enforcement of a state statute”).

19       **B. Important state interest**

20           The Ninth Circuit has recognized the state’s important interest in the area of family relations,  
21 including domestic disputes over child custody. *See Gordon*, 203 F.3d at 613 (finding important  
22 state interests were implicated, and *Younger* abstention appropriate, where child custody  
23 proceedings were ongoing); *see also Moore v. Sims*, 442 U.S. 415, 435 (1979) (“[f]amily relations  
24 are a traditional area of state concern”). Child custody proceedings “implicate the important, indeed  
25 compelling, [s]tate interest in protecting the welfare and best interests of children involved in  
26 custody disputes.” *Zoe v. Family Court Servs. of Alameda County*, No. C 96-2588 CW, 1998 WL  
27 292036, at \*3 (N.D. Cal. March 26, 1998). Furthermore, a state has a “vital interest in protecting  
28 ‘the authority of the judicial system, so that its orders and judgments are not rendered nugatory.’”

1 *Gordon*, 203 F.3d at 613 (citing *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977)). The Ninth Circuit  
2 has emphasized that “[t]his is a particularly appropriate admonition in the field of domestic relations,  
3 over which federal courts have no general jurisdiction...and in which the state courts have a special  
4 expertise and experience.” *Gordon*, 203 F.3d at 613 (citations omitted).

5 Accordingly, the Ninth Circuit has applied *Younger* abstention to a private child custody  
6 dispute between parents, where the custody proceedings in state superior court were ongoing and  
7 one of the parents then filed a federal complaint. See *Gordon*, 203 F.3d at 611-13 (raising *Younger*  
8 abstention *sua sponte* and holding that “[t]his is precisely the type of case suited to *Younger*  
9 abstention”) (citing *Mann v. Conlin*, 22 F.3d 100, 106 (6th Cir. 1994) (*Younger* abstention  
10 appropriate in § 1983 action alleging, *inter alia*, that a state court judge violated plaintiff’s due  
11 process rights during custody battle with ex-husband)); accord *Lazaridis v. Wehmer*, 591 F.3d 666,  
12 670-72 (3d Cir. 2010) (per curiam) (finding *Younger* abstention required dismissal of constitutional  
13 claim arising from underlying child custody dispute between private parties). District courts in this  
14 circuit have followed suit. See, e.g., *Caetano v. Santa Clara County*, No. C-02-1191 PJH, 2002 WL  
15 1677723, at \*5-6 (N.D. Cal. July 19, 2002) (noting that *Younger* abstention would govern case  
16 where federal complaint arose out of private child custody dispute between husband and wife, to the  
17 extent state child custody proceedings may be ongoing, and plaintiff husband who was allegedly  
18 deprived of custody of his children by the state superior court sought to enjoin such proceedings);  
19 *Lundy v. Colmenero*, No. 08-CV-1153 JM (CAB), 2008 WL 3546739, at \*4 (S.D. Cal. Aug. 13,  
20 2008) (discussing *Younger* and commenting that court must abstain if child custody case was still  
21 pending in state court, where underlying custody dispute was between private parties); *Watts v. State*  
22 *of Montana*, No. CV-06-44-BU-SEH, 2007 WL 1295843, at \*4-5 (D. Mont. May 1, 2007) (*Younger*  
23 abstention appropriate where plaintiff’s federal suit arose out of child custody dispute with ex-  
24 husband and it appeared custody proceedings in state court were still pending). Moreover, the  
25 Supreme Court denied *certiorari* in a case decided by the Fourth Circuit involving just such a  
26 situation. See *Etlin v. Robb*, 458 U.S. 1112, 1112-13, 1115 (1982) (White, J., dissenting from denial  
27 of *certiorari*, joined by Brennan, J.) (noting that Fourth Circuit’s *per curiam* opinion affirmed  
28 district court’s dismissal based on *Younger* abstention where federal case alleging constitutional

1 violations arose from underlying child custody dispute between private parties; dissenting on basis  
2 that Supreme Court has not ultimately resolved whether *Younger* applies to civil litigation between  
3 private parties in which the state is not directly involved).

4 In sum, the Court finds that California has an important and indeed compelling interest in the  
5 child custody issues and proceedings implicated here.

6 **C. Adequate opportunity to raise federal question in state proceedings**

7 Under *Younger*, only an “*opportunity* to present... federal claims in the state proceedings” is  
8 required. *Juidice*, 430 U.S. at 337 (emphasis added). A federal plaintiff “cannot escape *Younger*  
9 abstention by failing to assert...remedies in a timely manner [in state court].” *See Pennzoil Co. v.*  
10 *Texaco, Inc.*, 481 U.S. 1, 16 n.16 (1987) (citation omitted). The “relevant question is whether [the  
11 plaintiff] *could have* presented those claims to the state court.” *Kitchens*, 825 F.2d at 1342 (internal  
12 quotation and citation omitted) (emphasis in original). Even the fact that the state supreme court has  
13 previously rejected an identical constitutional challenge on its merits does not mean the state courts  
14 have deprived a plaintiff of the opportunity to make the constitutional argument. *See Dubinka v.*  
15 *Judges of the Superior Court*, 23 F.3d 218, 224-25 (9th Cir. 1994).

16 Furthermore, “[m]inimal respect for... state processes...precludes any *presumption* that the  
17 state courts will not safeguard federal constitutional rights.” *Middlesex*, 457 U.S. at 431 (emphasis  
18 in original). Thus, *Younger* abstention applies “even if the constitutionality of the pending  
19 proceedings is at the heart of [p]laintiff[s] claim.” *Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613,  
20 619 (9th Cir. 2003). In this regard, the Supreme Court has noted that it was “unwilling to conclude  
21 that state processes are unequal to the task of...deciding the constitutional questions that may arise in  
22 child-welfare litigation.” *Moore*, 442 U.S. at 435 (*Younger* abstention appropriate in civil action  
23 brought to challenge constitutionality of Texas child abuse statutes). “Accordingly, when a litigant  
24 has not attempted to present his federal claims in related state-court proceedings, a federal court  
25 should assume that state procedures will afford an adequate remedy, in the absence of unambiguous  
26 authority to the contrary.” *Pennzoil*, 481 U.S. at 15.

27 The Supreme Court has announced that the burden rests on the federal plaintiff to  
28 demonstrate that “state procedural law barred presentation” of the federal claims. *See id.* at 14

1 (citations omitted); *see also Moore*, 442 U.S. at 425-26 (*Younger* abstention appropriate “unless  
2 state law clearly bars the interposition of the constitutional claims”). The Ninth Circuit has adopted  
3 this rule. *See Dubinka*, 23 F.3d at 225 (plaintiff must show procedural bar to raising federal claims  
4 in state action to avoid *Younger*; opportunity to raise constitutional claims in state court existed  
5 because there was no such bar). The fact that state court judicial review is discretionary does not  
6 amount to a procedural bar against presentation of federal claims. *See Hirsh v. Justices of Supreme*  
7 *Court of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995).

8 In this case, state procedural law does not bar assertion of Plaintiff’s constitutional claims in  
9 the state court proceedings. Plaintiff may appeal the state court’s custody orders in the state  
10 appellate courts, where she can challenge not only the merits of the custody orders but also raise her  
11 constitutional claims. *See Gordon*, 203 F.3d at 613 (plaintiffs involved in child custody proceeding  
12 before California superior court had adequate forum in which to pursue their federal claims; due  
13 process issues had in fact been raised in state appellate courts; and plaintiffs could appeal through  
14 state appellate courts after final judgment); *Zoe*, 1998 WL 292036, at \*4 (finding all three *Younger*  
15 requirements were met where plaintiff’s constitutional claim arose during course of ongoing child  
16 custody dispute in state court; noting that plaintiff has the right to appeal the state court’s custody  
17 orders under California Code of Civil Procedure § 904.1). Thus, Plaintiff has an adequate  
18 opportunity to present her federal constitutional claims in California state courts. *See, e.g., Enrique*  
19 *M. v. Angelina V.*, 174 Cal. App. 4th 1148, 1153-57 (2009) (federal constitutional questions  
20 considered on appeal of trial court order relating to underlying child custody dispute, where father  
21 asserted his fundamental right to parent his child required application of strict scrutiny standard to  
22 dispute). Plaintiff’s apparent choice not to avail herself of such an opportunity does not mean she is  
23 not afforded one.

24 In her amended Complaint, Plaintiff relies heavily on *Troxel v. Granville*, 530 U.S. 57, 66  
25 (2000) (Supreme Court has “recognized the fundamental right of parents to make decisions  
26 concerning the care, custody, and control of their children”). The Court notes that *Troxel* does not  
27 involve an issue of *Younger* abstention. The procedural history of *Troxel* indicates that the child  
28 visitation laws at issue in that case were first considered by the state appellate court and state

1 supreme court, before a federal forum was sought. *See Troxel*, 530 U.S. at 60-63. Thus, *Troxel* was  
2 not a case where a party to a family law dispute pursued declaratory or injunctive relief in federal  
3 court that would have interfered with ongoing state proceedings, as Plaintiff seeks to do here.

4 **D. No exception to *Younger* applies**

5 A court should not abstain based on *Younger* if the court finds that the state proceeding is  
6 motivated by a desire to harass or is conducted in bad faith, or that other extraordinary  
7 circumstances exist. *Baffert*, 332 F.3d at 621. A court may also exercise jurisdiction even when the  
8 criteria for *Younger* abstention are met where the challenged statute is “flagrantly and patently  
9 violative of express constitutional prohibitions in every clause, sentence and paragraph, and in  
10 whether manner and against whomever an effort might be made to apply it.” *Huffman*, 420 U.S. at  
11 611. The latter exception to *Younger* abstention is “very narrow.” *Dubinka*, 23 F.3d at 225 (noting  
12 that in the *Younger* case itself, this narrow exception did not apply even though the challenged  
13 statute under which the federal plaintiff was indicted had been effectively invalidated the previous  
14 year in a Supreme Court decision). Indeed, the Supreme Court has “unequivocally held that facial  
15 invalidity of a statute is not itself an exceptional circumstance justifying federal interference” with  
16 ongoing state judicial proceedings. *See Huffman*, 420 U.S. at 602 (discussing applicability of  
17 *Younger* abstention to pending state criminal proceedings).

18 Notwithstanding Plaintiff’s belief that she possesses a legitimate challenge to the  
19 constitutionality of the Family Code, the Court does not find that the underlying child custody  
20 proceedings were motivated by a desire to harass Plaintiff or have been conducted in bad faith, or  
21 that other extraordinary circumstances are present. Nor does the Court find that the Family Code  
22 sections at issue are so “flagrantly and patently” unconstitutional as to invoke federal jurisdiction.  
23 Abstention is therefore appropriate.

24  
25 **III. CONCLUSION**

26 For the foregoing reasons, the Court abstains based on *Younger*. Plaintiff’s Complaint is  
27 DISMISSED without prejudice and without leave to amend. The Court does not reach the question  
28

1 under 28 U.S.C. § 1915 of whether Plaintiff has stated claims upon which relief may be granted.

2 The Clerk of the Court shall close the file.

3 IT IS SO ORDERED.

4 Dated: January 18, 2011

  
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DONNA M. RYU  
United States Magistrate Judge

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