

July 27, 2021

Via Hand Delivery

Rep. Jackie Speier  
U.S. House of Representatives  
155 Bovet Rd., Ste. 780  
San Mateo, CA 94402

Re: Free Speech issue

Dear Rep. Speier,

I am a lawyer in San Mateo. I am experiencing an injustice in the State and Federal courts, in that I have been enjoined by an unconstitutional "gag order" in State court, which the Federal court has indicated it will decline to review on jurisdictional grounds. I apparently have no remedy due to the case law in this area, which has skewed in favor of the government at the expense of private citizens whose rights are violated. Based on my experience in this scenario, I am proposing a revision to 28 U.S.C. sec. 1251(b) in order to expressly permit non-monetary relief by a citizen against his own State on a Federal constitutional right, and for this type of claim to be within the original jurisdiction of the Supreme Court.

Essentially, I was going to post the video from a deposition on my legal website with editorial and commentary about the evidence. There is nothing illegal or unethical about doing this, and in fact, this would be a privileged publication under State law (Civil Code sec. 47(d)). I also hold the copyright on the video, which I took with my own equipment pursuant to a valid notice of deposition. The other party filed an application for a protective order restricting the distribution of the video, simply because she finds the footage embarrassing (though the stated reason was to prevent the parties' minor children from viewing the video, which is outside my control). Her counsel also unlawfully threatened to complain to the State Bar of California, despite that I am not doing anything illegal or unethical.

In any case, the attached injunction was filed against me and my client in State court. I have no clear right to appeal in State court, as this appears to be a temporary restraining order pending the hearing of the matter in September, and TRO's are not expressly appealable under the law. In other words, I am without a remedy and my Freedom of Speech is actively being violated. So I resorted to Federal court in order to challenge the order on constitutional grounds. The Federal judge was no

help, and he appears to be trying to avoid deciding the issue, as indicated in the attached order denying my request to enjoin enforcement of the State court order. While there may be valid concerns concerning Federalism and the State and Federal spheres of influence, I have past experience with this particular judge, Judge Jeffrey White. He has a clear bias in favor of the government and will use any possible technicality to avoid granting relief. This is inconsistent with the purpose of going to Federal court in a First Amendment case; Federal court is supposed to preserve constitutional freedoms when State officials violate a person's rights. See, e.g., 28 U.S.C. sec. 1343(a) (Federal courts have original jurisdiction to redress violations of Federal rights by State actors). Instead of finding jurisdiction under 1343(a), Judge White appears likely to dismiss my case on Eleventh Amendment grounds.

From the Founding of the United States until the early 20th century, it was understood that citizens could sue their own States in Federal court. The Eleventh Amendment, by its own terms, does not prohibit a citizen from suing *his own* State in order to assert Federal rights; it only expressly prohibits a citizen from suing *another* State. This makes sense. Only in the latter half of the 20th century was it held, and not legislated, that a citizen could not sue his own State on a Federal Question. There is an excellent Harvard Law Review article on this subject, which is outside the scope of this letter. To summarize, it is *at least* clear that a plaintiff can sue State *officials* to enjoin enforcement of a law or order that is unconstitutional. Here, I sued the Superior Court, which is of course the entity that would enforce its own order by jailing me for contempt, and I sought a temporary restraining order against the Presiding Judge of the Superior Court. Judge White doesn't see it that way.

Congress has published a helpful web page on the Eleventh Amendment outlining the conflict in authority in this area:

[https://constitution.congress.gov/browse/essay/amdt11\\_1\\_3\\_2\\_3/](https://constitution.congress.gov/browse/essay/amdt11_1_3_2_3/)

I'm not sure who wrote that, but it appears to be an official Congressional publication, and is very informative.

In any case, I find it unfortunate and frankly distressing that I cannot even access the Federal courts to redress this violation of my constitutional rights. I literally have no remedy except appealing the eventual order in State court, which will take a minimum of two years and probably result in a decision my favor. By then, there will be no need to exercise my Freedom of Speech because everyone will have moved on from what is now a very important issue for them. In other words, the government is preventing me from speaking on an important issue, and this is an unlawful prior restraint on my Freedom of Speech.

The Supreme Court currently has original jurisdiction over certain disputes, including those involving individuals such as

ambassadors, consuls, and ministers (28 U.S.C. sec. 1251(b)(1)). Because the Supreme Court would be the most appropriate forum to resolve the constitutionality of State court orders, I am proposing the addition of 28 U.S.C. sec. 1251(b)(4), so the revised statute would read:

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

(4) All actions or proceedings by a citizen against his or her State contending that a State court order violates the Constitution of the United States.

I think the Supreme Court would be the best arbiter of whether a State court order violates the Constitution. Currently, the process of challenging such an order is years long and requires appealing to the highest court of a State, and then petitioning the Supreme Court for review. Justice delayed is justice denied, and my proposed revision to the jurisdictional statute would drastically increase the efficiency in hearing such cases while preserving State court review.

This case is not merely about a deposition video. The case concerns an important right that the State court violated, and that it may continue to violate with impunity because the doors to Federal court are closed to me. If I, as a lawyer with fifteen years of experience and nineteen trials, cannot even assert my rights on jurisdictional grounds, I feel really bad for regular citizens whose rights are violated worse than mine. Thank you for your consideration.

Sincerely,

*Andrew G. Watters*

Andrew G. Watters, Esq.

ATTORNEY OR PARTY WITHOUT ATTORNEY: NAME: Lawrence S. Viola, Esq. FIRM NAME: VIOLA LAW FIRM, P.C. STREET ADDRESS: 441 First Avenue/P.O. Box 1290 CITY: San Mateo TELEPHONE NO.: (650) 343-6400 E-MAIL ADDRESS: lviola@violaw.com ATTORNEY FOR (name): Petitioner, Jennifer Acosta	STATE BAR NO.: SBN 130335  STATE: CA ZIP CODE: 94401 FAX NO.: (650) 342-6854	<b>FOR COURT USE ONLY</b>  Electronically <b>FILED</b> By Superior Court of California, County of San Mateo ON 07/21/2021 By /s/ Krill, Becky Deputy Clerk
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Mateo</b> STREET ADDRESS: 400 County Center MAILING ADDRESS: Hall of Justice and Records CITY AND ZIP CODE: Redwood City, CA 94063 BRANCH NAME: Southern Branch		RECEIVED  JUL 21 2021
PETITIONER: Jennifer Acosta RESPONDENT: Eric Acosta OTHER PARENT/PARTY:		
<b>TEMPORARY EMERGENCY (EX PARTE) ORDERS</b> <input type="checkbox"/> Child Custody <input type="checkbox"/> Visitation (Parenting Time) <input type="checkbox"/> Property Control <input checked="" type="checkbox"/> Other (specify): Enjoin the dissemination of Petitioner's videotaped deposition		CASE NUMBER: 20FAM01243-A

1. TO (name(s)): ERIC ACOSTA  
 Petitioner     Respondent     Other Parent/Party     Other (specify):

A court hearing will be held on the Request for Order (form FL-300) served with this order, as follows:

a. Date: <u>9/7/2021</u>	Time: <u>9 am</u>	<input checked="" type="checkbox"/> Dept.: <u>14</u>	<input type="checkbox"/> Room:
b. Address of court <input checked="" type="checkbox"/> same as noted above <input type="checkbox"/> other (specify):			

2. Findings: Temporary emergency (ex parte) orders are needed to: (a) help prevent an immediate loss or irreparable harm to a party or to children in the case, (b) help prevent immediate loss or damage to property subject to disposition in the case, or (c) set or change procedures for a hearing or trial.

COURT ORDERS: The following temporary emergency orders expire on the date and time of the hearing scheduled in (1), unless extended by court order:

3.  CHILD CUSTODY

		Temporary physical custody, care, and control to:		
a. <u>Child's name</u>	<u>Date of Birth</u>	Petitioner	Respondent	Other Party/Parent
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Continued on Attachment 3(a)

b.  Visitation (Parenting Time) The temporary orders for physical custody, care, and control of the minor children in (3) are subject to the other party's or parties' rights of visitation (parenting time) as follows (specify):

See Attachment 3(b)

**THIS IS A COURT ORDER.**

**TEMPORARY EMERGENCY (EX PARTE) ORDERS**

PETITIONER: Jennifer Acosta RESPONDENT: Eric Acosta OTHER PARENT/PARTY:	CASE NUMBER: 20FAM01243-A
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3.  **CHILD CUSTODY (continued)**

c. **Travel restrictions**

- (1) The party or parties with temporary physical custody, care, and control of minor children **must not remove the minor children from the state of California unless the court allows it after a noticed hearing.**
- (2)  Petitioner  Respondent  Other Parent/Party must not remove their minor children (*specify*):
  - (a)  from the state of California.
  - (b)  from the following counties (*specify*):
  - (c)  other (*specify*):

d.  **Child abduction prevention orders** are attached (see form FL-341(B)).

- e. (1) **Jurisdiction:** This court has jurisdiction to make child custody orders in this case under the Uniform Child Custody Jurisdiction and Enforcement Act (part 3 of the California Family Code, commencing with section 3400).
- (2) **Notice and opportunity to be heard:** The responding party was given notice and an opportunity to be heard as provided by the laws of the State of California.
- (3) **Country of habitual residence:** The country of habitual residence of the child or children is (*specify*):
  - The United States of America  Other (*specify*):
- (4) **If you violate this order, you may be subject to civil or criminal penalties, or both.**

4.  **PROPERTY CONTROL**

a.  Petitioner  Respondent  Other Parent/Party is given exclusive temporary use, possession, and control of the following property that the parties  own or are buying  lease or rent

b.  Petitioner  Respondent  Other Parent/Party is ordered to make the following payments on the liens and encumbrances coming due while the order is in effect:

Pay to:	For:	Amount: \$	Due date:
Pay to:	For:	Amount: \$	Due date:
Pay to:	For:	Amount: \$	Due date:
Pay to:	For:	Amount: \$	Due date:

5.  All other existing orders, not in conflict with these temporary emergency orders, remain in full force and effect.

6.  **OTHER ORDERS** (*specify*):  Additional orders are listed in Attachment 6.  
 Respondent and his attorney are enjoined from disseminating Petitioner's videotaped deposition, which includes any posting of the deposition or any portion thereof on the internet.

Electronically  
**SIGNED**

By /s/ Holt, Rachel

Date: 07/21/2021

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

**THIS IS A COURT ORDER.**

**TEMPORARY EMERGENCY (EX PARTE) ORDERS**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANDREW G. WATTERS,  
Plaintiff,  
v.  
SUPERIOR COURT OF CALIFORNIA  
FOR THE COUNTY OF SAN MATEO,  
Defendant.

Case No. [21-cv-05601-JSW](#)

**ORDER DENYING APPLICATION  
FOR TEMPORARY RESTRAINING  
ORDER**

Re: Dkt. No. 3

United States District Court  
Northern District of California

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This matter comes before the Court upon consideration of Plaintiff’s application for a temporary restraining order (“TRO”). Having considered Plaintiff’s application, the Court DENIES the motion for the reasons set forth herein.

Plaintiff is an attorney who represents a client involved in divorce and domestic violence proceedings (the “state court litigation”). During the course the state court litigation, he deposed his client’s estranged wife and recorded that deposition. Prior to the deposition, the parties agreed that the deponent would file an application for a protective order to prevent dissemination of the video by July 9, 2021. (*See* Plaintiff’s Declaration (“Plaintiff’s Decl.”) ¶ 9, Ex. A.) Deponent did not file an application until July 21, 2021, and the judge presiding over the matter granted the application on the same day. (Compl. ¶¶ 10-11.)<sup>1</sup> Plaintiff planned to post the deposition to his website and “offer commentary and editorial about the deposition and” the state court litigation. (*Id.* ¶ 10; Plaintiff’s Decl., ¶ 8.) Plaintiff alleges “[t]he order must be declared void and its enforcement must be enjoined.” (Compl. ¶ 12.)

On July 21, 2021, Plaintiff filed the complaint and the application for a TRO, alleging the

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<sup>1</sup> The state court’s order is attached to the Complaint.

1 order blocking him from posting the deposition amounts to a prior restraint and violates his rights  
2 to free speech under the Federal and State Constitutions.

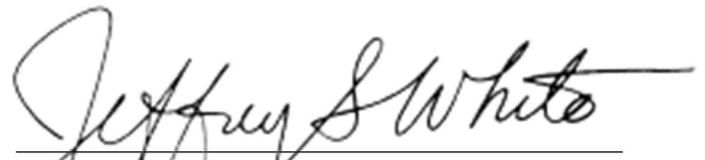
3 Preliminary injunctive relief, whether in the form of a temporary restraining order or a  
4 preliminary injunction, is an “extraordinary and drastic remedy” that is never awarded as of right.  
5 *Munaf v. Geren*, 553 U.S. 674, 689-690 (2008) (internal citations omitted). In order to obtain such  
6 relief, Plaintiff must establish: (1) he is likely to succeed on the merits; (2) he is likely to suffer  
7 irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor;  
8 and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7,  
9 20 (2008). In *Alliance for the Wild Rockies v. Cottrell*, the Ninth Circuit held that the “serious  
10 questions” sliding scale approach survives *Winter*. 632 F.3d 1127, 1134-35 (9th Cir. 2011). Thus,  
11 a court may grant a TRO if a plaintiff demonstrates that there are serious questions going to the  
12 merits and a hardship balance that tips sharply in its favor, so long as the plaintiff also shows that  
13 there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at  
14 1135.

15 Plaintiff has sued the Superior Court of the State of California for the County of San  
16 Mateo. However, “a suit against the Superior Court is a suit against the State, barred by the  
17 eleventh amendment.” *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103,  
18 1110 (9th Cir.1987); *see also Torres v. Voltz*, No. 19-cv-3874-LB, 2019 WL 3345972, at \*4 (N.D.  
19 Cal. July 25, 2019). For that reason, the Court concludes Plaintiff has neither demonstrated a  
20 likelihood of success on the merits nor serious questions going to the merits of his claims, and the  
21 Court DENIES the application.

22 If Plaintiff renews his request, he shall be prepared to address why, in light of the fact that  
23 he is precluded by the state court order from disseminating the video, his claim would not be  
24 subject to dismissal under the *Rooker-Feldman* doctrine.

25 **IT IS SO ORDERED.**

26 Dated: July 22, 2021

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28 JEFFREY S. WHITE  
United States District Judge  
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