NO. 19-_____

In the Supreme Court of the United States

STEVE COOLEY and BRENTFORD FERREIRA,

Petitioners,

v.

NATIONAL ABORTION FEDERATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

How can a state court criminal defendant enjoy his Sixth Amendment right to effective counsel when his state court criminal counsel have been held in contempt and sanctioned $200,000 by a federal district court for using the evidence produced in the criminal case, which is subject to a preliminary injunction in a related civil federal district court case?

More specifically, in a civil case against David Daleiden, the District Court entered a preliminary injunction barring the use of certain videos. Subsequently, a state criminal action was filed against Mr. Daleiden. As part of their defense of Mr. Daleiden, Petitioners—who are criminal defense counsel—posted some of the videos to combat the attorney general's attack on Mr. Daleiden in a public campaign. The District Court held Petitioners in contempt and issued a nearly $200,000 sanction. The Ninth Circuit denied appellate review until final judgment is entered.

The questions presented are:

1. Whether, under *Nye v. United States*, 313 U.S. 33 (1941), appellate jurisdiction exists for non-party Petitioners held in contempt that are ordered to pay immediate sanctions.

2. Whether the *Younger* Abstention Doctrine must apply to these non-party criminal defense attorneys/ petitioners so then can provide effective assistance to their client without being held in contempt in a sovereign court that has no jurisdiction over them.

3. Whether the "fair ground of doubt" standard applies to Petitioners' belief that a civil preliminary

injunction did not apply to them when they disclosed information covered by the injunction in countering a massive public trial by the California State Attorney General that disclosed similar information covered by the same injunction.

PARTIES TO THE PROCEEDINGS

Petitioners

Steve Cooley
Brentford Ferreira

Respondent and Plaintiff-Appellee Below

National Abortion Federal

Respondents and Defendants Below

David Daleiden
Center for Medical Progress

LIST OF PROCEEDINGS BELOW

United States Court of Appeals for the Ninth Circuit

No. 17-16622

National Abortion Federation, Plaintiff-Appellee, v. *Center for Medical Progress; Biomax Procurement Services, LLC; David Daleiden, Aka Robert Daoud Sarkis; Troy Newman*, Defendants, and *Steve Cooley; Brentford J. Ferreira*, Respondents-Appellants.

Decision Date: June 5, 2019

Date of Rehearing Denial: July 19, 2019

United States Court of Appeals for the Ninth Circuit

No. 17-16862

National Abortion Federation, Plaintiff-Appellee, v. *Center for Medical Progress; David Daleiden, a/k/a Robert Daoud Sarkis, Defendants-Appellants, and Biomax Procurement Services, LLC; Troy Newman*, Defendants.

Decision Date: June 5, 2019

Date of Rehearing Denial: July 19, 2019

Order of the United States District Court for the Northern District of California

D.C. No. 3:15-cv-03522

National Abortion Federation, Plaintiff, v. *Center for Medical Progress, et al.*, Defendants.

Date of Order of Civil Contempt: July 17, 2017

Date of Order Setting Amount of Civil Sanctions: August 31, 2017

RELATED CASE

Superior Court of the State of California for the County of San Francisco

Case No. 2502505

The People of the State of California, Plaintiff v. *David Robert Daleiden and Sandra Susan*, Defendants

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JURISDICTION

The judgment of the court of appeals was entered on June 5, 2019. (App.1a). A timely filed petition for rehearing was denied on July 19, 2019. (App.125a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND PROCEDURAL RULES INVOLVED

U.S. Const. amend. V

> The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person . . . shall be deprived of life, liberty, or property, without due process of law."

U.S. Const. amend. VI

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Fed. R. Civ. P. 65

Federal Rules of Civil Procedure, Rule 65, provided in pertinent part:

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

INTRODUCTION

This case concerns fundamental questions about the rapidly expanding use of civil contempt in United States courts. Today, any litigant can initiate civil contempt proceedings. Once underway, the initiator obtains the benefit of subjecting his opponent to amorphous standards that vary inter circuit, intra circuit, state to state, court to court, and can even vary in a particular case. The initiator's often successful contempt goal may be, under the mantle of "equity," to deprive

their opponent of Constitutional and other rights otherwise guaranteed by law.

The disarray in the application of civil contempt standards is arguably greater than the situation that led this Court to issue its landmark decision in *Crawford v. Washington*, 541 U.S. 36 (2004), replacing the unworkable standards in *Ohio v. Roberts*, 448 U.S. 56 (1980). In civil contempt there are no identifiable guidelines from this Court as to the length of time a contemnor may be incarcerated for civil contempt, a maximum fine the contemnor may be subjected to, and critically, what rights, including review rights, the potential contemnor is entitled to.

Because the scope of standards applicable in civil contempt proceedings affects fundamental rights due a potential contemnor, under the Fifth and Sixth Amendments, the Court's review is critical.

Indeed, this Court struggled with the distinction between civil and criminal contempt as early as 1911. Although *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911) continues to be the most influential case, the court has revisited this complex issue on several occasions. *See, e.g., Hicks v. Feiock*, 485 U.S. 624 (1988); *Shillitani v. United States*, 384 U.S. 364 (1966); *United States v. United Mine Workers*, 330 U.S. 258 (1947).

Review is necessary to reconcile the Ninth Circuit's decision with several of this Court's decisions. Indeed, the Ninth Circuit's decision recognizes that the jurisdictional analysis with respect to Petitioners is "a little more complicated" but failed to address Supreme Court precedent and many exceptional issues. (App.7a).

This case comprehensively satisfies all the traditional criteria for granting review. Specifically, the Ninth Circuit's determination that there is no appellate jurisdiction for non-party Petitioners held in contempt that are ordered to pay immediate sanctions conflicts the Court's decision in *Nye v. United States*, 313 U.S. 33 (1941).

In sharp contrast to *Nye*, where this Court affirmed the Court of Appeals' appellate jurisdiction to hear a contempt citation on a similar set of facts, the Ninth Circuit dismissed the appeal from a contempt order without addressing the threshold issue of whether the contempt was criminal or civil in nature in order to determine appellate jurisdiction.

In addition, the constitutional issue addressed in the underlying order concerns the District Court's power to punish contempt, which has historically been categorized as "matters of grave importance." *Nye*, 313 U.S. 33 at p. 340. By denying non-parties appellate review of the contempt order imposed, Appellants are entirely restricted in representation of their client in state court criminal proceedings that have no bearing on the civil action and the District Court's preliminary injunction.

Another important issue is that the *Younger* Abstention Doctrine must apply if these non-party criminal defense attorneys are to provide effective assistance to their client. Should the contempt citation remain, Appellants are entirely hamstrung in effectively representing their client.

Finally, review is necessary to address the "fair ground of doubt" standard for contempt, recently clarified in *Taggart v. Lorenzen*, 587 U.S. __, 139 S.Ct.

1795 (June 3, 2019). There, this Court explained that civil contempt "should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." *Id.*, citing *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618.

The questions presented raise legal and practical issues of surpassing importance, and its correct disposition is essential the Sixth Amendment's core of effective assistance of counsel. Because this case presents an optimal vehicle for resolving this significant issue of constitutional law, the petition should be granted.

STATEMENT

The National Abortion Federation (NAF) conducts annual meetings of its members and invited guests which are not open to the public. All meeting attendees must sign confidentiality agreements before obtaining meeting materials and access to the meeting areas.

In order to facilitate an undercover investigation of NAF members and obtain an invitation to attend NAF's 2014 and 2015 annual meetings, the individual defendants represented themselves as principals of a company, BioMax Procurement Services LLC ("BioMax"), an actual entity formed to purportedly engage in fetal tissue research. Mr. Daleiden—as a BioMax representative using an alias—signed a separate "Exhibit Agreements" as well for both annual meetings in which he acknowledged, among other things, that all written, oral, or visual information disclosed at

the meetings "is confidential and should not be disclosed to any other individual or third parties" absent written permission from NAF. However, the "Exhibit Agreements" expressly allowed exhibitors to engage in photography at their exhibits. (App.3a-4a).

The individual defendants and several investigators they hired to pose as BioMax representatives also signed "Confidentiality Agreements" that prohibited: (1) "video, audio, photographic, or other recordings of the meetings or discussions at this conference"; (2) use of any "information distributed or otherwise made available at this conference by NAF or any conference participants . . . in any manner inconsistent with" the purpose of enhancing "the quality and safety of services provided by" meeting participants; and (3) disclosure of any such information "to third parties without first obtaining NAF's express written consent."

The defendants made video recordings and then made some of the recordings public. After the release of the recordings, NAF members alleged that incidents of harassment and violence against abortion providers increased. Coincidentally a mentally unstable individual perpetrated an armed attack at the clinic of one of the video subjects that resulted in three deaths.

A civil lawsuit was filed. On February 5, 2016, the District Court issued the following preliminary injunction:

> Pending a final judgment, defendants and those individuals who gained access to NAF's 2014 and 2015 Annual Meetings using aliases and acting with defendant CMP . . . are restrained and enjoined:

(1) publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings;

(2) publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

(3) publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF annual meetings. (App.25a).

On April 5, 2016, the California Attorney General served a search warrant at the home of David Daleiden and seized, among other things, the same videos that are the subject of the Federal Preliminary Injunction. More search warrants were issued. All of them served under seal. Two days later, Petitioners were contacted by Daleiden in connection with the search of his home and any possible criminal investigation. (App.26a).

On May 3, 2017, at the same time that the criminal complaint was filed and arraignment held, Petitioners filed a demurrer to the charges. Appellants provided the Superior Court and the Attorney General with both a YouTube link to video footage and a flash drive containing the videos referenced in the complaint. (App.26a).

The intention was not to violate the Court's Preliminary Injunction, but to defend their client's right to due process and to effective assistance of counsel as well as to demonstrate to the Superior Court their position that the videos themselves disproved there was a violation of any alleged victim's right to privacy.

Petitioners were of the good faith belief that the Federal Preliminary Injunction did not extend to them as counsel for Mr. Daleiden in the criminal state court matter. Indeed, based upon a reading of the actual order on page 42 of the Preliminary Injunction, they concluded that they were not within the scope of people enjoined.

This belief was bolstered when, on May 16, 2017, a thumb drive containing the evidentiary videos in support of the state criminal complaint was sent to Petitioners by the Attorney General. While the flash drive was password protected, it was provided to Appellants without any protective order.

On May 25, 2017, having put the videos into the public by virtue of the filing of the demurrer and not receiving a protective order from the Attorney General as to the videos themselves, Petitioners posted the videos along with a statement about the case and the names of the people in the videos on the website of Steve Cooley and Associates as part of an ongoing case log in response to the Attorney General's press release on this case.

Petitioners were very upset with what they perceived as an attempt by the Attorney General to prejudice their client in the court of public opinion, rather than trying the case in a court of law. They honestly believed that the federal civil injunction did not govern their actions in a state criminal case.

On July 17, 2017, the District Court found Petitioners in contempt of the preliminary injunction. (App. 24a).

Without any opportunity to "cure" the contempt, the District Court issued "civil" sanctions in the amount of $195,359.04. (App.11a).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A DIRECT, INTOLERABLE CONFLICT WITH THIS COURT'S DECISION

At the outset, the Ninth Circuit decision recognized that the jurisdictional issue in this case is not straightforward. (App.7a). ("The jurisdictional analysis as to Cooley and Ferreira is a little more complicated . . . ."). The Ninth Circuit's determination that there is no appellate jurisdiction for non-party appellants held in contempt that are ordered to pay immediate sanctions conflicts with this Court's decision in *Nye v. United States*, 313 U.S. 33 (1941).

Nye concerned an appeal by non-parties ("strangers" to the case) of a contempt citation. The Court began its analysis by addressing the threshold issue of whether the contempt was civil or criminal:

> We are met at the threshold with a question as to the jurisdiction of the Circuit Court of Appeals over the appeal. The government concedes that if this was a case of civil contempt, the notice of appeal was effective under Rule 73 of the Rules of Civil Procedure. It argues, however, that the contempt was criminal—in which case the appeal was not timely if the Criminal Appeals Rules govern, and not made in the proper form if § 8(c) of the

> Act of February 13, 1925 (43 Stat. 936, 940, 45 Stat. 54, 28 U.S.C. § 230) is applicable. *Id.* at 41-42.

From that threshold question, the Court moved on to address jurisdiction and decide the contempt on the merits. Likewise, here, the Ninth Circuit was faced with the threshold issue of deciding whether the contempt was civil or criminal. Under *Nye*, the Ninth Circuit would have to concede jurisdiction. As civil contempt, the matter is immediately appealable because it concerned non-parties with immediate sanctions. As criminal, it is immediately appealable as well. *See Koninklijke Philips Elect. v. Kxd Technology*, 539 F.3d 1039, 1042 (9th Cir. 2008).

The Ninth Circuit, as such, erred in dismissing the appeal from a contempt order without addressing the threshold issue of whether the contempt was criminal or civil in nature in order to determine appellate jurisdiction. (App.1a).

The Ninth Circuit's congruence of interest analysis is not applicable and is contrary to its own opinion in *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 877 F.2d 787, 788, 790 (9th Cir. 1989). Citing *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 747 F.2d 1303, 1305 (9th Cir. 1984), the Ninth Circuit held that the contempt was not appealable because there is such a "congruence of interests" between a party (Daleiden) and non-party (Appellants). That is not true.

The focus in *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.* and other cases referencing a "congruence of interests" is when the non-party attorney is counsel of record in <u>that</u> litigation.

See id., at 1305-06 (9th Cir. 1984) (order of contempt imposing sanctions against state attorney general representing state in ongoing proceedings not immediately appealable by attorney general because state ultimately responsible for paying sanctions at issue and attorney general is not merely state's attorney, but also the official responsible for initiating and directing course of litigation).

That is not the case here. Petitioners were not counsel of record, they did not initiate or direct the civil litigation, and did not share the same "congruence of interests" in the civil action; they are defense counsel in a sovereign criminal case brought by a separate sovereign. The same "congruence of interests" that exists when a party is represented by the same attorney in the same action is not present here.

Accordingly, the Contempt and Sanctions Orders against Petitioners is final and appealable despite lack of a final judgment in the underlying action.

II. THE *YOUNGER* ABSTENTION DOCTRINE MUST APPLY IF THESE NON-PARTY CRIMINAL DEFENSE ATTORNEYS ARE TO PROVIDE EFFECTIVE ASSISTANCE TO THEIR CLIENT

The constitutional issue addressed in the underlying order concerns the District Court's power to punish contempt, which has historically been categorized as "matters of grave importance." *Nye*, 313 U.S. 33, 41. By denying non-parties appellate review of the contempt order imposed, Petitioners are entirely restricted in representation of their client in state court criminal proceedings that have no bearing on the civil action and the District Court's preliminary injunction.

Accordingly, *Younger* abstention must apply in order for the non-party criminal attorneys to be able to represent their client. Directly on point is *Hicks v. Miranda*, 422 U.S. 332 (1975), superseded by statute on another ground:

> The District Court committed error in reaching the merits of this case despite the appellants' insistence that it be dismissed under *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971). When they filed their federal complaint, no state criminal proceedings were pending against appellees by name; but two employees of the theater had been charged and four copies of "Deep Throat" belonging to appellees had been seized, were being held, and had been declared to be obscene and seizable by the Superior Court. Appellees had a substantial stake in the state proceedings, so much so that they sought federal relief, demanding that the state statute be declared void and their films be returned to them. Obviously, their interests and those of their employees were intertwined; and, as we have pointed out, the federal action sought to interfere with the pending state prosecution. [*Id.* at pp. 348-349]

Likewise, here, no criminal case was pending against Mr. Daleiden at the time the District Court entered its injunction. Yet the District Court still went ahead and issued a contempt order against the defense lawyers who were defending Mr. Daleiden in the criminal case and should have left any decision

regarding protective orders in the state criminal case to the state criminal judge.

Abstention was, therefore, required under *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971).

III. THE "FAIR GROUND OF DOUBT" STANDARD FOR CONTEMPT, RECENTLY CLARIFIED IN *TAGGART V. LORENZEN*, 587 U.S.__ (JUNE 3, 2019), PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE

Very recently, the Supreme Court discussed the importance of the "fair ground of doubt" in regards to violating a court order. *Taggart v. Lorenzen*, 587 U.S. __ (June 3, 2019) ("civil contempt should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct.").

Likewise, here, Petitioners acted properly and under an objectively reasonable belief that the injunction does not apply to them. On May 3, 2017, at the same time that the criminal complaint was filed and arraignment held, Petitioners filed a demurrer to the charges. Petitioners provided the Superior Court and the Attorney General with both a YouTube link to video footage and a flash drive containing the videos referenced in the complaint.

The intention was not to violate the Court's Preliminary Injunction, but to defend their client's right to due process and to effective assistance of counsel as well as to demonstrate to the Superior Court their position that the videos themselves disproved there was a violation of any alleged victim's right to privacy.

Petitioners were of the belief that the Federal Preliminary Injunction did not extend to them as counsel for Mr. Daleiden in the criminal state court matter. Indeed, based upon a reading of the actual order on page 42 of the Preliminary Injunction, they concluded that they were not within the scope of people enjoined.

This belief was bolstered when, on May 16, 2017, a thumb drive containing the evidentiary videos in support of the state criminal complaint was sent to Appellants by the Attorney General. While the flash drive was password protected, it was provided to Appellants without any protective order.

Accordingly, the Ninth Circuit's decision is in conflict with *Taggart*'s "fair standard of doubt" decision.

CONCLUSION

For the above and foregoing reasons, Petitioners request the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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