

No. _____

In the
Supreme Court of the United States

STEVE COOLEY AND BRENTFORD FERREIRA,
Petitioners,

v.

NATIONAL ABORTION FEDERATION,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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May 18, 2023

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QUESTIONS PRESENTED

The constitutional issue addressed here is whether the District Court can punish two criminal attorneys for contempt and sanction them \$200,000 for using evidence in defense of their client in a state court criminal trial that the District Court has enjoined the use of.

More specifically, in a civil case against David Daleiden, the Federal District Court entered a preliminary injunction barring the use of certain videos. Subsequently, a California state criminal action was filed against Mr. Daleiden. As part of their defense of Mr. Daleiden, Petitioners—whom 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 due process is violated when a contempt citation/directive did not clearly indicate whether Petitioners were to show cause for civil or criminal contempt?
2. Whether the *Younger* Abstention Doctrine must apply to these non-party criminal defense attorneys/petitioners so they 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 and Appellants below

- Steve Cooley
- Brentford Ferreira

Respondent and Plaintiff-Appellee below

- National Abortion Federal

CORPORATE DISCLOSURE STATEMENT

Not applicable to Petitioners because they are individuals. Not applicable to non-profits because they are non-profit organizations.

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit
No. 21-15953

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

Date of Final Opinion: August 9, 2022

Date of Rehearing Denial: December 19, 2022

United States District Court for the Northern District
of California

No. 3:15-cv-3522-WHO

National Abortion Federation (NAF), *Plaintiff*, v. The
Center for Medical Progress, Biomax Procurement
Services LLC, David Daleiden (AKA “Robert Sarkis”),
and Troy Newman, *Defendants*.

Date of Final Judgment: February 1, 2022

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OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Ninth Circuit is included herein as App.1a. The order denying rehearing en banc is attached as App.72a.



JURISDICTION

The judgment of the Ninth Circuit was entered on August 9, 2022. App.1a. A petition for rehearing was denied on December 19, 2022. App.72a. The Court granted an extension to file through May 18, 2023. Sup. Ct. No. 22A806. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISIONS AND JUDICIAL 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.”

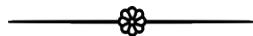
U.S. Const., amend. VI

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(d)(2)

(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. This case comprehensively satisfies all the traditional criteria for granting review. Specifically, the Ninth Circuit's determination that being informed (for the first time) on the night before the contempt hearings that the district court is only considering civil contempt (not criminal) fails to comport with due process under the procedural safeguards.

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*, 139 S.Ct. 1795 (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 OF THE CASE

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.

Hailing from the Magna Carta's "law of the land" provision, due process has been the corner stone of American jurisprudence. The panel decision undermines the integrity of 100 years of decisions concerning due process. Due process requires, at a minimum, notice and an opportunity to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). The district court's OSC failed to provide adequate notice.

The panel decision recognized that Appellants were not notified of the type of contempt until the evening of the hearing. Slip.Op. at 6 ("Shortly before the hearing, they were informed that the district judge was only considering civil sanctions.") Yet, surprisingly, the panel found that "Cooley and Ferreira received adequate notice":

They were apprised of the possibility of civil sanctions in late May, and the contempt hearing was held in mid-July. They had approximately six weeks to prepare. Shortly before the hearing, they were informed that the district judge was only considering civil sanctions.

...

[T]hey were not entitled to procedural safeguards beyond notice and an opportunity to

be heard. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994).

The panel decision is contradictory on its face; Petitioners did not have six weeks to prepare because they did not know what they were preparing for until the night before the hearing. Petitioners did not receive the procedural safeguards provided for by this Court. The panel decision, as such, erred in finding that due process was satisfied and Petitioners received adequate notice.

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 at p. 340. 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*, 139 S.Ct. 1795 (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*, 139 S.Ct. 1795 (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, Petitioner requests the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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