# No.14-1752

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**PAUL D. CEGLIA,**

***Plaintiff-Appellant,***

**-v-**

**ERIC H. HOLDER, JR., as Attorney General of the United States, PREENTINDER S. BHARARA, as U.S. Attorney for the Southern District of New York, JANIS M. ECHENBERG, as representative of the U.S. Attorney's Office for the Southern District of New York, CHRISTOPHER D. FRYE, as representative of the U.S. Attorney's Office for the Southern District of New York,**

***Defendants-Appellees.***

On Appeal from the United States District Court
for the Western District of New York

## REPLY BRIEF OF APPELLANT

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# APPELLANT'S REPLY BRIEF

## I. ARGUMENT

In their Combined Statement of the Case and Statement of Facts, defendants refer to "three separate but interrelated federal cases" which, according to them, are "critical to an understanding of this case." Defs. Br. 2. In fact, there are now *four* cases which are "critical," the latest of which was filed by Facebook and Mark Zuckerberg on October 20, 2014, against lawyers who had represented Ceglia in the underlying Facebook civil action[1]/ in the Western District of New York. The latest action alleges malicious prosecution and violations of New York Judiciary Law § 487. *Facebook, Inc. and Mark Elliot Zuckerberg v. DLA Piper LLP (US), et al.*, Supreme Court of the State of New York, County of New York, Index No. 653183/2014. As discussed below in response to defendants' brief, this is part of the fulfilment of threats, both express and implied, against Ceglia and *anyone*, including his counsel, who undertook, or now undertake, to represent him in his legal action against Zuckerberg and Facebook.

The pattern of squelched discovery in Ceglia's civil case against Zuckerberg and Facebook, the defendants' motion in that case for fraud on the court and

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[1] *Ceglia v. Mark Elliot Zuckerberg and Facebook, Inc.*, case no. 10-cv-569 in the Western District of New York and on appeal in this Court under case no. 14-1365, is referred to herein as "the Facebook civil action."

spoliation which were decided by considering the evidence most favorable to the *defendants,* followed by a legally baseless criminal prosecution (see *e.g., United States v. Pendergraft*, 297 F.3d 1198 (11th Cir. 2002) and 18 U.S.C. § 1001(b)), while the civil action was pending, in which the government threatened that Ceglia and his lawyers would be subjected to prosecution if they filed or mailed any more documents in the civil action, were procedural weapons employed to chill Ceglia's resort to the courts to resolve his dispute with Zuckerberg and Facebook, in violation of Ceglia's First Amendment right to petition. The objective, which was to force Ceglia to drop his civil action has failed. Now, consistent with the scorched earth campaign conducted by Facebook, Zuckerberg and their lawyers, they have sued Ceglia's lawyers for malicious prosecution and violations of the New York Judiciary Law, § 487.

Although these defendant/appellees state that their brief "address[es] only the issues on appeal in the Holder Action", they go well beyond just this case and discuss the initial civil suit by Ceglia against Zuckerberg and Facebook as well as the criminal case brought against Ceglia. Plaintiff will respond in like kind because (1) this Court has ordered that the appeal in *Ceglia v. Zuckerberg*, case no. 14-1365, will be argued in tandem with this appeal, and (2) the developments in the criminal case (*United States v. Ceglia,* case no. 1:12-cr-876) which are

referred to – and quoted – in defendants' brief bolster Ceglia's argument that the district court erred when it denied plaintiff's request for an injunction to halt his criminal prosecution and ordered the injunction case, or "Holder Action," dismissed because the Facebook civil action is a sham.

For the reasons which follow, it is *impossible* to conclude that Ceglia's civil action against Zuckerberg and Facebook is a sham (*i.e.,* objectively baseless) or that a cognizable crime was committed by him. Defendants failed to rebut these conclusions in their brief and they also failed to show that the other bases for issuing an injunction to halt the criminal prosecution were not met by Ceglia.

### A. The Continued Prosecution of Ceglia Violates His First Amendment Right to Petition the Courts

The government's allegations in Ceglia's criminal prosecution for mail and wire fraud are based on Ceglia's litigation activities in his civil suit against Zuckerberg and Facebook. As defendants relate, Ceglia moved to dismiss the criminal case on the grounds it is based solely on litigation activities and, assuming the allegations in the indictment to be true, a crime is not stated because Ceglia could not have had the necessary scheme or artifice to defraud because, according to Zuckerberg, in the Facebook civil litigation Zuckerberg was fully

aware that Ceglia's claims were based upon fabricated documents.[2]/

Ceglia asserts that in commencing the criminal action, the government deliberately deprived defendant of a fundamental constitutional right implicit in the First Amendment and substantive due process.

The Bill of Rights' essential guarantee is that any citizen exercising First Amendment rights cannot be prosecuted by the government for doing so. If, as here, a citizen can be forced to stand trial for having filed and pursued civil litigation – or, for that matter, having filed pleadings or declarations in response to a lawsuit – then there is no constitutional protection.

Ceglia has immunity from prosecution under the First Amendment, unless it is determined that the civil case is a sham and thereby falls within the sham litigation exception to immunity. In this case, before the courts could vitiate Ceglia's First Amendment immunity and permit the criminal prosecution to proceed against him, the district court in the Holder action was required to make a supportable finding that the Facebook litigation is a sham. This the district court

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[2] Of course, Ceglia disputes Zuckerberg's view because the documents upon which he sued are – and were shown to be – authentic. They can only be authentic or forged. If authentic, then obviously, wire fraud and mail fraud were not committed. If the documents were fabrications by Ceglia, as the government and Zuckerberg allege, a crime cannot have been committed because Zuckerberg and Facebook, cannot be defrauded by assertions of fact or documents which they know are false. *United States v. Pendergraft*, 297 F.3d at 1209.

categorically could not do based on the evidence in front of it.

The argument that "neither the First Amendment nor the *Noerr-Pennington* doctrine provided Ceglia with immunity" (Defs. Br.9), is incorrect as a matter of law.

The Supreme Court has stated: "We have recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights," *BE&K Construction Co. v. National Labor Relations Board*, 536 U.S. 516 (2002), and that "'the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.'" *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 at 510 (1972). Accordingly, the government cannot prosecute a citizen for petitioning nor can Congress enact legislation making it a crime.[3]/

The Supreme Court has held that litigants are immunized by the First Amendment's right to petition, although the immunity is not absolute. See, *Bill Johnson' s Restaurants, Inc. v. NLRB*, 461 U. S. 731, 743 (1983) ("[B]aseless litigation is not immunized by the First Amendment right to petition.").

[3] In fact, Congress made this clear when it granted statutory immunity for the alleged conduct with which Ceglia is charged. 18 U.S.C. ¶ 1001(b).

Under the First Amendment, Ceglia has immunity from criminal liability for litigation activities in the Facebook civil action. This exception to absolute immunity was first promulgated in the *Noerr-Pennington* line of cases.[4]/ "*Noerr-Pennington* is a label for a form of First Amendment protection; to say that one does not have *Noerr-Pennington* immunity is to conclude that one's petitioning activity is unprotected by the First Amendment. With respect to petitions brought in the courts, the Supreme Court has held that a lawsuit is unprotected only if it is a "sham," *i.e.*, it is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993). See also, *California Motor Transport*, 404 U.S. at 513.; *White v. Lee*, 227 F. 3d 1214 (9th Cir. 2000).

In order for the district court to conclude that the Facebook civil action is a sham, it had to find that the civil action is both objectively baseless and had an improper motive. "*PRE II* recognized the applicability of the first aspect of the breathing space principle when it defined the *Noerr-Pennington* doctrine's 'sham litigation' exception as requiring *both* objective baselessness and an improper

[4] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

motive." *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 934 (9th Cir. 2006) (emphasis in original) (citing *Professional Real Estate Investors v. Columbia Pictures Industries, Inc. [PRE II]*, 508 U.S. 49, at 60-61 (1993).

> This definition overprotects baseless petitions so as to ensure citizens may enjoy the right of access to the courts without fear of prosecution. *BE&K* made this breathing room protection explicit. Recognizing that under *New York Times* and *Gertz*, false statements are not wholly unprotected by the First Amendment, the Court observed that baseless litigation might also require protection in some circumstances. *BE&K*, 536 U.S. at 531. Accordingly, the Court noted, 'we have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own.' *Id.*

*Sosa, supra* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

In *BE&K*, the Supreme Court added that, "[w]e also held that [the government] may not decide that a suit is baseless by making credibility determinations when genuine issues of material fact...exist." *BE&K Constr.*, 536 U.S. at 527. Neither can the government, as it did here, unilaterally strip away a citizen's immunity by obtaining an indictment which alleges fraud based on litigation activity. See, e.g., *United States v. Pendergraft*, 297 F.3d at 1208 (all courts which have considered whether serving litigation documents can constitute mail fraud have rejected this possibility).

To be sure, in the criminal case from which the defendants have liberally quoted in their brief, the defendant prosecutors conceded that "while it is true that parties who maintain civil suits generally are entitled to immunity for doing so under the *Noerr-Pennington* doctrine of immunity, to be so cloaked the litigation must not be a 'sham'." *United States v. Ceglia*, 1:12-cr-876 (Doc. 38, p. 27). Consequently, this Court must determine whether the underlying Facebook civil action can be considered a sham in view of the evidence that was before the district court.

### B. The Government's Evidence in the Criminal Case and Ceglia's Evidence in the District Court *Prove* that Ceglia's Facebook Litigation Is Not a Sham Because It Is Not Objectively Baseless

Plaintiff Ceglia has maintained that the Facebook civil litigation cannot be found to be objectively baseless – or a sham – because there exist triable issues of fact. In the criminal case, Judge Carter stated, "You [Ceglia] have experts who say one thing about that contract. The government has experts who will say something else. You say this is a triable issue of fact. I agree, it is a triable issue of fact[.]" Hearing Transcript (Doc. 94) (10-23-14) T.15:1-5. The judge in the criminal case acknowledged that the underlying civil litigation, presenting as it does a triable issue of fact as to the authenticity of the contract upon which Ceglia sued, is not objectively baseless or a sham.

It is accurate that the judge in the criminal case has not dismissed the indictment, but the extensive comments quoted in defendants' brief at pp.10-13, make clear that the court is far less certain of the validity of defendants' arguments than are defendants themselves:

- "in those cases [relied upon by the government] the defendants' schemes to defraud at least initially included the mailing or transmission of fraudulent documents in a *nonlitigation* context." Defs. Br. 11 (emphasis added.)

- "Ceglia argues that he could have no 'intent to deceive' when Zuckerberg was aware of Ceglia's misrepresentations and could not possibly be deceived by them. Ceglia supports this proposition with *Norton v. United States*, 92 F.2d 753 (9th Cir. 1937) and *Pendergraft* [*supra*] out of the Eleventh Circuit. While those cases are interesting *and persuasive*, they are not binding on this Court." *Id* at 11-12 (emphasis added).

- "the government suggests that Ceglia intended to deceive the judge and jury in his allegedly fraudulent action. I haven't found any cases sustaining a mail and wire fraud conviction for attempting to deceive a judge or a jury." *Id.* at 12.

- "Ceglia's argument as to the right to petition the courts is a little more concerning. Both sides seem to agree the *Noerr-Pennington* doctrine shields litigation activity in a commercial context where the litigation is, *in fact*, a sham and that Ceglia is not entitled to immunity as a result. .... It does appear to me that if *Noerr-Pennington* immunity is something I have to determine, it would be more appropriately raised at the end of trial once all the evidence is in. It's inappropriate for me to make factual determinations about the government's evidence at this early stage." *Id.* at 12-13 (emphasis added).

The court thought the law upon which Ceglia relies to be "persuasive," but "not binding." Further, the judge was more concerned about *Noerr-Pennington* and Ceglia's right to sue without being subjected to prosecution. He plans to rule on whether the Facebook *civil action* is a sham because it is objectively baseless *after the criminal trial* concludes. What could be more chilling of the right to petition than the prospect of facing a criminal trial and a 20 year sentence before the constitutional right is vindicated?

That issue should not be deferred until the conclusion of the criminal trial. The fundamental right to access the courts is too important to be held hostage in this way. "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (and cases cited).

The evidence before the criminal court – even without reference to the substantial evidence before the court in the Facebook action – *requires* the conclusion that the Facebook civil action is *not* a sham.

- the government's expert, John W. Cawley, III, was unable to opine whether the contract proferred by Ceglia (the so-called Work for Hire Contract) is authentic. The best he could say is: 1) "no conclusive determination could be made as to whether or not the documents were altered" (A-335) and 2) "there are indications these pages *may* have come from multiple sources." A-340 (emphasis added).

This is a far cry from the facts needed to show that plaintiff's underlying action is "objectively baseless."

On the other hand, in the Holder action, Ceglia produced reports by two distinguished forensic document examiners, both of whom concluded the Work for Hire Contract is authentic.

Katherine Koppenhaver opined: "Based upon the comparisons made between Page 1 and Page 2 of the Work for Hire Contract, *it is my opinion to a reasonable degree of scientific certainty that the Work for Hire Contract is an unaltered document which does not contain substitutions*." *Id.* (emphasis added). She then explained that her "opinion is stated with the highest degree of confidence, at the 'identification' level, meaning a definite conclusion of identity." (A-360-361, ¶ 9). Joan Winkelman, also a board certified forensic document examiner, submitted her report as well. (A-373-401). She opined, "Based upon my examination and comparison of the two page Work for Hire agreement and the three page Kato-Street Fax document, both available in image form, *it is my opinion given to a reasonable degree of professional certainty*, that the similarities and differences identified in the two documents support the conclusion that *the Work for Hire agreement is authentic*. This opinion is stated at the highly probable level of certainty due to the fact that the documents were available to me

only in image form." *Id.* (emphases added).

Although these reports are discussed in much greater detail in plaintiff's opening brief at pp.25-30, they are *completely ignored* in defendants' opposition brief, except for an oblique comment in a footnote that they were filed in the district court. Defs. Br.9 n.7. Defendants do not dispute them, nor do they defend the meaningless reports by the government's Cawley. The Koppenhaver and Winkelman reports are ignored because they show beyond peradventure that Ceglia's Facebook action is not objectively baseless and a sham. Cawley's report is not mentioned by defendants because it, too, supports plaintiff's argument that the Facebook civil action is not a sham.

Based on this evidence, the district court in the Holder action was foreclosed from finding the Facebook civil action to be sham litigation. The court should have enjoined the criminal prosecution on the ground plaintiff is immune from prosecution for asserting his First Amendment right to petition the courts.

### C. The Western District of New York Was the Proper Venue to File the Holder Action

The criminal prosecution was meant to interfere with the Western District's exercise of jurisdiction in the Facebook civil action. The Facebook action was filed first. The Holder case was not, therefore, an attempt to interfere with the

proceeding in the Southern District of New York. Rather it was meant to stop the government's interference with the civil case in the Western District of New York. Defendants' assertions that the Holder action was brought to interfere with the criminal case is diametrically opposed to the facts.

### D. The District Court Had Subject Matter Jurisdiction to Hear the Holder Action

Defendants raise for the first time in a footnote whether the district court had jurisdiction over plaintiff's action, suggesting that sovereign immunity bars the claim. Defs. Br.19-20 n.8. The cases cited by the defendants are either inapposite or their holdings misrepresented.

*United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) is completely inapposite. That case involved evidentiary rulings, not jurisdiction. An exception to sovereign immunity applies to equitable actions of an officer of the United States which are "not within the officer's statutory powers or, if within those powers, *only if the powers, or their exercise in the particular case, are constitutionally void*." *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949) (emphasis added).

Although *Larson* was quoted by defendants, the quote omitted the words emphasized above. The law on this point has been long and well-settled that

Ceglia's claim was within the district court's jurisdiction and not barred by sovereign immunity. For a comprehensive exposé, see *Goltra v. Weeks*, 271 U.S. 536, 544-45 (1926) ("The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.") (citations and internal quotation marks omitted).

**E. Defendants Admit That The Allegations in the Amended Complaint Must be Taken as True and, Because They State a Cause of Action, the Complaint Should Not Have Been Dismissed**

Defendants state that the factual allegations in the First Amended Complaint ("FAC") (A-315-329) were required to be taken as true on their Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), and also on this appeal which is reviewed *de novo*. Further, all reasonable inferences to be drawn from the complaint are to be construed in the light most favorable to the plaintiff. *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010). Defs. Br.16.

They are correct, of course, and that rule applies to all factual allegations, including those relating to the relationship between the Gibson Dunn firm and the U.S. Attorney's office. They include:

> 20. The indictment brought in the Southern District of New York contains no allegations of prohibited conduct attributable to Plaintiff other than that Plaintiff filed and pursued the Civil Action in the Western District of New York. However, in an extrajudicial comment made to the public media, U.S. Attorney Preetinder S.

Bharara stated that the criminal conduct attributable to Plaintiff was "dressing up a fraud as a lawsuit." (See, NEW YORK TIMES article, Man Claiming Facebook Ownership Arrested on Fraud Charges, by Peter Lattman, October 26, 2012, 2:44 p.m.).

21. In the Government's opposition to Plaintiff's motion to change venue, the Government amplified its position by stating that every future filing made in the [Facebook] Civil Action would be subject to criminal prosecution on the same basis as the charges brought in the Indictment.

25. The law firm, Gibson, Dunn & Crutcher, LLP ("Gibson Dunn"), which represents the Civil Defendants [Zuckerberg and Facebook], has assigned that case to two of the firm's lawyers, both of whom are former federal prosecutors in the Southern District of New York. Equally troubling is the well known fact that Gibson Dunn partners have been and continue to be active and substantial financial political contributors to the current federal administration ("the Administration") in which Defendant Holder serves as Attorney General.

26. Further, the current U.S. Attorney for the Southern District of New York, Defendant Preetinder Bharara, was employed as an attorney at Gibson Dunn for four years prior to his political appointment as U.S. Attorney by the current Administration. ....

27. The Civil Defendants [Zuckerberg and Facebook] are widely known to be active, substantial and influential political contributors to the Administration.

28. If Plaintiff prevails against the Civil Defendants in the Civil Action, it will have a substantial adverse effect upon those who control Facebook, Inc. and Mark Zuckerberg, the Civil Defendants.

A-319-321.

These facts must be accepted as true. They beg the question why the prosecution of plaintiff was commenced in the Southern District of New York when the events alleged in the indictment had no substantial relation to that district. The Facebook civil action was litigated in the Western District of New York, yet, the U.S. Attorney for that district did not seek to charge Ceglia criminally. The clear and reasonable inference is that the prosecution was brought in the Southern District because that is where Gibson Dunn's attorneys and the U.S. Attorney, Preetinder Bharara, are located. The prosecution is alleged to have been brought in bad faith, *i.e.*, for the purpose of chilling Ceglia and his lawyers' pursuit of the Facebook civil action. A-326-327 ¶¶ 52-55. Defendants do not deny these facts; instead, they assert that the law does not support plaintiff's request to enjoin the bad faith prosecution.

In the face of the transparent attempt to chill Ceglia's litigation of the then-pending Facebook civil action by charging him criminally and threatening him and his lawyers with further prosecution if they filed more papers in that case, plaintiff filed the Holder action in the Western District of New York seeking, *inter alia*, to enjoin the criminal prosecution under the court's inherent authority to abate the interference with its jurisdiction and in aid of the court's jurisdiction under 28 U.S.C. § 1651.

Taking the allegations in the FAC as true and affording plaintiff all favorable inferences should have led the district court to deny the defendants' Rule 12(b)(6) motion to dismiss. Instead, the court awaited the Report and Recommendation by the magistrate in the Facebook civil action, adopted it without addressing plaintiff's objections or conducting the required *de novo* review. Having done so, the district court declared the Facebook civil action to be a sham and held that Ceglia had an adequate remedy at law in the criminal case, presumably by being forced into the crucible of a legally baseless prosecution for wire and mail fraud.[5]/

As discussed below, defendants did not adequately address the irreparable harm Ceglia faces and will continue to face in defending himself in the prosecution in the Southern District of New York.

**F. The Defendants Cannot Show That The Requisites For a Preliminary Injunction Were Not Met**

Defendants' main argument continues to be based on the false assumption that the abstention doctrine in *Younger v. Harris*, 401 U.S. 37 (1971) which typically bars federal courts from enjoining state courts is applicable to plaintiff's

[5] The error inherent in the court's dismissal of the Facebook civil action is laid out in detail in the plaintiff's briefs in the related appeal, *Ceglia v. Zuckerberg,* case no. 14-1365, which this Court has ordered to be heard in tandem with this appeal.

request for an injunction in the Holder action. Defs. Br17. But *Younger* has not "been applied similarly to federal courts asked to enjoin federal criminal prosecutions," as defendants blanketly claim. *Id.* at 18.

First, if a prosecution is not brought in good faith, it is subject to being enjoined. See, *Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987) ("all citizens must submit to a criminal prosecution brought in good faith").

Plaintiff alleged – and the court was required to accept the inference – that the prosecution in the Southern District of New York resulted from improper collusion between Zuckerberg and Facebook's civil lawyers and lawyers in the office of the U.S. Attorney for the Southern District of New York, as discussed above. This inference is further supported by the timing of Ceglia's arrest and indictment which occurred in the midst – and during the most critical part – of the Facebook civil action, that is, while Zuckerberg and Facebook were pursuing a motion to dismiss for fraud on the court and for spoliation.[6]/

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[6] On March 26, 2012, Zuckerberg and Facebook filed their motions to dismiss the Facebook civil action. While the motions were under consideration by the district court in the Western District, Ceglia was arrested and a criminal complaint was filed against him in the Southern District. On November 26, 2012, he was indicted in the Southern District for mail and wire fraud for his litigation activities in the Facebook case in the Western District, based on the electronic filing and service by mail of an amended complaint and other litigation documents. SA-4, 5.

Defendants do not deny – as plaintiff argued in the district court and in his opening brief (Pl. Br.7 (A-288-291 T. 14:23-17:24) – that the indictment is both a threat to plaintiff and a shot across his counsel's bow that further legal work in support of plaintiff's Facebook case (including, presumably, the filing of briefs in this and the related appeal) are likely to result in wire and mail fraud charges against all of them.[7]/

Under the relatively strict abstention doctrine of *Younger,* a federal court is not foreclosed from enjoining even a state criminal proceeding if doing so is necessary to prevent a deprivation of federal rights:

> Appellants argue that the District Court was precluded from exercising jurisdiction in this case by the principles of equitable restraint enunciated in *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger* the Court recognized that principles of judicial economy, as well as proper state-federal relations, preclude federal courts from exercising equitable jurisdiction to enjoin ongoing state prosecutions. *Id.*, at 43. However, when a genuine threat of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged *deprivation of federal rights*. See *Steffel v. Thompson*, 415 U.S. 452 (1974); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-931 (1975).

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[7] As if to emphasize their threat, Zuckerberg and Facebook have, as stated above at p.1, recently filed a civil action against some of Ceglia's lawyers in the Facebook case for malicious prosecution and violations of the New York Judiciary Act, including DLA Piper LLP (US), Christopher P. Hall, John Allcock, Robert W. Brownlie, Gerard A. Trippitelli, Paul Argentieri & Associates, Paul A. Argentieri, Lippes Mathias Wexler, Friedman, LLP, Dennis C. Vacco, Kevin J. Cross, Milberg LLP, Sanford P. Dumain and Jennifer L. Young.

*Wooley v. Maynard*, 430 U.S. 705, 709-710 (1977) (emphasis added).

Much like the plaintiff in *Maynard*, Ceglia now finds himself placed "between the Scylla" of pursuing the Facebook civil litigation and "the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in another criminal proceeding." *Id.* (citation and bracket omitted).

Federal injunctions have been upheld to restrain even state criminal proceedings "where the threatened prosecution chilled exercise of First Amendment rights." *Deaver v. Seymour*, 822 F.2d at 69 (citing *Wooley v. Maynard, supra*; *Doran v. Salem Inn, Inc., supra*; *Dombrowski v. Pfister*, *supra*, *Steffel v. Thompson, supra*). And although "[w]e have recently recognized that *while the* Younger *line of cases constricts federal intervention in state prosecutions, it does not necessarily control a petition for a federal civil injunction to restrain an ongoing federal criminal proceeding*. *Id.* (citing *Juluke v. Hodel*, 811 F.2d 1553, 1556-57 (D.C. Cir. 1987) (emphasis added).

Although in *Deaver*, the D.C. Circuit could not point to a case where a federal court enjoined a federal prosecutor's "*investigation or presentment of an indictment*" (*Id.* (emphasis added)), that eventuality was not foreclosed. For example, in *Miranda v. Gonzales*, 173 Fed. Appx. 840 (D.C. Cir. 2006) (a case

upon which defendants rely), the Court of Appeals said:

> As the district court pointed out, however, injunctive relief is not appropriate unless the party seeking it can demonstrate that his First Amendment interests are either threatened or in fact being impaired at the time relief is sought.

*Id.* at 842 (citation, internal quotation marks and brackets omitted).

**G. Defendants Fail to Address Ceglia's Argument That His Criminal Prosecution is Irreparable Harm That Will Not Be Vitiated By Either an Acquittal or a Reversal on Appeal After Conviction**

Plaintiff has made a compelling showing that prosecuting him in the midst – and because – of his pursuit of civil litigation protected by the First Amendment's petition clause is the type of serious constitutional violation for which there can be no adequate remedy at law. The cases cited by plaintiff in his opening brief in support of his argument that he has suffered and will continue to suffer irreparable harm (Pl. Br. 50) are completely ignored by defendants because there is no effective rebuttal to be made to them.

Plaintiff argued: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "[W]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Brewer v. West Irondequoit Cent. School Dist.*, 212 F.3d 738, 744 (2d Cir. 2000) (citations and internal quotation marks omitted). Moreover, a criminal

prosecution that inhibits the full exercise of First Amendment freedoms causes irreparable harm: "The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases." *Dombrowski v. Pfister,* 380 U.S. at 486.

Plaintiff's exercise of his First Amendment right to petition the courts continues to be irreparably harmed.

### H. Defendants Do Not Challenge the Other Bases for the Issuance of the Injunction

Defendants do not challenge the showing made in the district court for the issuance of an injunction.

As stated, defendants rely mostly on the *Younger* doctrine or some variant to argue that the injunction should not have issued. As shown above, that argument is inapplicable to the facts of this case. They also make no attempt to rebut the dispositive effect of *Noerr-Pennington* immunity, *United States v. Pendergraft*, *supra* and 18 U.S.C. § 1001(b), other than to say they were raised before Judge Carter in the criminal case (Defs. Br. 20-21) and he deferred (with some evident reluctance) dismissing the indictment until "the end of trial once all the evidence is in." Defs. Br.12-13. Thus, defendants appear to argue that although Ceglia's First Amendment rights may be violated, their vindication must await the result of a legally baseless prosecution. This is the harm the courts have

held to be irreparable and defendants' failure to address it is not excused by resorting to *Younger*. [8]/

**I. The Litigation Process in Which Ceglia Engaged in the Lower Courts Was Fundamentally Unfair and Unjustifiably Deferential to Zuckerberg, Facebook and the Defendants in This Case**

In this case, plaintiff was denied relevant discovery. Ceglia requested leave to depose Zuckerberg to help establish a likelihood of success and also to probe Zuckerberg's involvement in the defendants' bringing of the criminal case. This request was denied. A-258-260. Had plaintiff been afforded that modest discovery, the district court would not have been able to merely adopt the fatally flawed Report and Recommendation by the magistrate in the Facebook civil case and declare the case to have been "a sham." SA-12. That led him to dismiss the Holder action.

Similarly, in the Facebook action, Ceglia was denied critical discovery. He was denied Zuckerberg's deposition, access to his computers, and

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[8] Contrary to defendants' assertion that plaintiff has waived his Seventh Amendment argument for a jury trial (Defs. Br.9 n.6), that argument is preserved in the appeal that will be argued in tandem with this one (*Ceglia v. Zuckerberg*, case no. 14-1365). This case is an injunction case in which a jury trial was not demanded. However, by unconstitutionally chilling his First Amendment right to petition, defendants, of necessity, impaired his right to a jury trial in the Facebook civil case. The Seventh Amendment was not identified as an independent issue in this appeal.

relevant emails, even though Ceglia showed that Zuckerberg had deleted relevant emails and emails between him and Ceglia were absent from his Harvard email account for the critical period from April 28, 2003 (when they signed a contract) until June 2003. By contrast, Zuckerberg and Facebook were given access to all of Ceglia's electronic media and the original Work for Hire Contract which, the documentary and video evidence irrefutably shows was spoliated by defendants' experts, although the magistrate erroneously blamed Ceglia. See plaintiff's opening Brief at pp.70-73 and his Reply Brief at p.22 in the related case, *Ceglia v. Zuckerberg*, case no. 14-1365.

The prejudicial proceedings in the district court in the Facebook civil action, the initiation of the criminal prosecution, and the prejudicial proceedings in the Holder action conspired to deny plaintiff the basic procedural due process rights that are routinely afforded litigants in federal courts today and was instead reminiscent in several respects of an English Star Chamber. [9]/

## CONCLUSION

On the basis of the foregoing arguments and those in his opening brief, plaintiff respectfully requests that this Court reverse the District Court's Order that

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[9] The Star Chamber was an English court having broad civil and criminal jurisdiction at the king's discretion and noted for its secretive, arbitrary, and oppressive procedures, including compulsory self-incrimination, inquisitorial investigation, and the absence of juries. It was abolished in 1641 because of its abuses of power. Black's Law Dictionary, p. 1442 (8th ed.).

dismissed his case and denied plaintiff a preliminary injunction, and that this Court order that an injunction issue permanently enjoining the defendants from proceeding with the prosecution of plaintiff for mail and wire fraud in the Southern District of New York.

Respectfully submitted,

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Dated: December 16, 2014
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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,805 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Word Perfect X7 in New Roman, 14 point font size.

Dated: December 16, 2014

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