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In The
Supreme Court of the United States

JOHN ROBERTSON, PETITIONER,

v.

WYKENNA WATSON

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT AND OTHER DOMESTIC VIOLENCE ORGANIZATIONS, SCHOLARS, AND PROFESSIONALS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

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BRIEF FOR DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT AND OTHER DOMESTIC VIOLENCE ORGANIZATIONS, SCHOLARS, AND PROFESSIONALS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) and other domestic violence organizations, scholars, and professionals respectfully submit this brief as amici curiae in support of respondent.[1]

INTEREST OF AMICI CURIAE

Amici curiae consist of national, regional and local organizations dedicated to assisting victims of domestic violence and advancing law and policy to improve the legal system's response, as well as leading scholars, former prosecutors, and a former judge, all of whom have devoted much of their career to domestic violence legal work. Amici share a profound appreciation of the civil protection order system and

[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The identities and descriptions of the amici are in the appendix to this brief.

its vital importance for victims of abuse. Amici believe that to treat contempt enforcement actions as identical to criminal prosecutions would deprive victims of a critical avenue for taking control of their lives back from their abusive partners.

SUMMARY OF ARGUMENT

Although the question presented in this case addresses the narrow issue of in whose "name" and pursuant to whose "power" an action for criminal contempt "in a *congressionally* created court" may be brought, petitioner's brief can be read to present a far broader challenge to the civil protection order ("CPO") system and CPO private enforcement throughout the nation. While the Court should decline petitioner's invitation to stray beyond the question presented, amici submit this brief to demonstrate the importance of CPOs and their private enforcement in both the District of Columbia and elsewhere, and to discredit petitioner's hyperbolic claims that CPOs unleash a virtually unbounded private criminal code against those abusers who violate protection orders.

A.1. The CPO system is a critical component of the response to domestic violence. CPOs provide important legal intervention against continued abuse. CPOs also, by design, empower victims to counteract the subjugation imposed by the abuser and give victims an avenue they can control for the prevention of further abuse. Because CPOs combine legal intervention with victim empowerment, CPOs are considered by many experts to be the most effective legal remedy against domestic violence.

2. CPOs have little value, however, if they are not consistently enforced, and enforcement has long been, and to this day remains, the "Achilles heel" of the system. Although every State now provides

some means of enforcement, widespread under-enforcement causes batterers to flout protection orders with impunity.

3. Public enforcement cannot substitute for private criminal contempt proceedings to enforce violations of CPOs. Despite significant strides by the criminal justice system in responding to domestic violence, public enforcement is still erratic and inconsistent. Prosecutors are often reluctant to bring charges for CPO violations except in very limited circumstances. Law enforcement officers continue to treat many CPO violations as civil matters, despite the tragic lessons of cases such as *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), where, notwithstanding a mother's pleas to police to enforce her protection order, her children were abducted and murdered. And, even when law enforcement is inclined to intervene, both prosecutors and police often lack the resources to address the high volume of CPO violations.

Private criminal contempt actions allow victims to seek protection from further violations of their protection orders in the many instances when law enforcement does not. It provides an expedited response that the victim can control, and sometimes provides the only means for the victim to ensure her own safety. Eliminating a victim's right to enforce her own protection order would eviscerate the CPO remedy and would be a profound loss to victims of abuse.

4. This Court should decline to address petitioner's broad attacks on private criminal contempt enforcement, which exceed the narrow question presented, because petitioner explicitly waived the broader challenge below. On the narrow question actually presented—whether respondent could only pursue contempt "in the name and pursuant to the power of the United States"—it is clear that a regime in which a private party can seek criminal contempt sanctions for violations of a CPO, but only in the name and pursuant to the authority of the government, would be incapable of coherent implementation.

B.1. Although petitioner argues that he has "a right to be criminally prosecuted by the government," there is no such right, and in any event, criminal contempt is not identical to criminal prosecution. This Court has repeatedly held that contempt is sui generis, and while enforcement of a CPO through criminal contempt does vindicate the public interest in enforcement of court orders, the predominant interest vindicated is that of the private party whose civil order was violated. And petitioner cannot claim he was denied any of the full panoply of due process protections ordinarily required in a criminal contempt proceeding.

2. Petitioner's assertion that victims will bring vengeful or unsupported contempt proceedings is belied by the dynamics of domestic violence. Both amici's experience and the available evidence show that many victims are hesitant and ambivalent about

criminal contempt actions, and commonly prefer civil alternatives that are more favorable to the violator of the CPO.

Nor does this Court's ruling in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), require a disinterested prosecutor in this case. The concerns that animated *Young* are simply not present in the private enforcement of CPOs, where the domestic violence victim, rather than the abuser, is most often the party who lacks resources or litigation power. And, the financial and tactical conflicts of interest presented in *Young*, where monetary damages were sought, simply do not apply in CPO contempt proceedings where the victim primarily seeks to ensure her safety.

3. Finally, petitioner's so-called "right to be prosecuted by the State" cannot be reconciled with the traditional fairness concerns that undergird due process protections. Constitutional protections for criminal defendants are traditionally aimed at leveling the playing field for the defendant and limiting the use of power by the State. But requiring state prosecution of CPO enforcement actions would mean that violators like petitioner would be required to face the full prosecutorial power of the State, rather than the far more limited and constrained powers of private parties such as respondent.

ARGUMENT

THE CONSTITUTION DOES NOT PROHIBIT THE BENEFICIARY OF A CIVIL PROTECTION ORDER FROM ASKING A COURT TO FIND A VIOLATOR IN CRIMINAL CONTEMPT

A. Private Litigation To Enforce Civil Protection Orders Is A Necessary Means To Remedy And Prevent Violations Of Those Orders

In this case, petitioner violently attacked respondent, hitting and kicking her until her nose was broken, one of her eyes was severely injured, and she suffered bruises and lacerations all over her body. To prevent further abuse, respondent sought and obtained a CPO in her local trial court, which unconditionally ordered petitioner to stay away and not abuse her. Petitioner, however, again attacked respondent so viciously that she required hospitalization in an intensive care unit. For this violation of the court order, petitioner was ordered to pay restitution, spend approximately a year in jail, and given five years' probation.

As egregious as respondent's situation appears, it is far from exceptional. CPOs, which put the authority of a court behind an order directed personally to the abuser, provide a critical legal intervention, but only with meaningful enforcement. Where, as here, the restraining order does not itself stop the abuse, permitting—indeed encouraging—the victim to bring

her abuser back to court to enforce the order is essential.

1. The private civil protection order system is a critical component of the legal response to domestic violence

a. Until relatively recently in the history of this country, domestic violence was a private family matter. Police would not arrest, prosecutors would not prosecute, and courts would tell victims to go home and work it out. *See, e.g.*, Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy,* 2004 WISC. L. REV. 1657, 1663-1664 (2004) (detailing how, at every stage of the process, domestic violence was not a matter for the criminal justice system). Indeed, arrest avoidance was even an explicit national police policy. *See* Int'l Ass'n of Chiefs of Police, *Training Key #16: Handling Disturbance Calls* 94-95 (1968-1969) ("In dealing with family disputes the power of arrest should be exercised as a last resort."). This official inaction reinforced the abuser's perception that he was doing nothing wrong, which in turn contributed to the extremely high rates of recidivism associated with domestic violence. Andrew R. Klein, Nat'l Crim. Justice Reference Serv., *Practical Implications of Current Domestic Violence Research, Part I: Law Enforcement* 16 (Apr. 2008), *available at* http://www.tinyurl.com/kleinNCJRS (last visited Mar. 6, 2010) (reviewing multiple key studies and concluding that "arrest [and other police response] deters repeat reabuse").

b. CPOs were a powerful remedy invented to respond to the failure of the criminal justice system to afford any protection to victims. First invented in 1970 in the District of Columbia, CPOs soon were adopted by every State, and have since become an essential legal remedy for victims of abuse. *See* Sack, *supra*, at 1667; *Cruz-Foster v. Foster,* 597 A.2d 927, 931 (D.C. 1991) (the IntraFamily Offenses Act "was designed to counteract the abuse and exploitation of women and children" through establishment of a civil injunctive remedy).

In addition to providing a valuable legal intervention against abuse, the CPO system was deliberately designed to be accessible and empowering to victims. For many women, protection orders symbolize the retaking of power back from the abuser. In a study of Boston area courts, for example, women stated that their protection orders showed the abuser they "meant business"; "proved something to him and * * * to myself"; countered the abuser's belief that "he had power over me * * * [as] it got him to back off and realize that he couldn't treat me like he did"; and made them "feel less powerless, like there's something to do." James Ptacek, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE 165-166 (1999); *see also* Sally F. Goldfarb*, Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1508 (2008) ("Civil protection orders offer battered women a greater opportunity to exercise their autonomy

because [they] are initiated and directed by the victim for her own benefit.").

The importance of empowering victims to stop abuse flows directly from the central dynamic of domestic violence, which is more than simply an outburst of violence. Domestic violence is at its essence the *use* of violence to subordinate and control another person. Evan Stark, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 5 (2007). The harm of domestic violence is far more than just the violence—it is the systematic stripping of power and autonomy from the victim. *Ibid.* ("[B]attering [is the] * * * interweaving [of] repeated physical abuse with * * * intimidation, isolation, and control. * * * [T]he primary harm abusive men inflict * * * [is] the deprivation of rights and resources that are critical to personhood and citizenship."). CPOs offer a critical opportunity to enlist the legal system to disrupt the abuser's pattern of subordination and domination. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform,* 23 YALE L. & POL'Y REV. 93, 120 (2005) (CPOs empower victims by giving them control in what is otherwise a "powerless situation"); Goldfarb, *supra*, at 1515 (to many women, "obtaining a protection order is 'its own reward,'" "empowering" because it allows them to "stand[ ] up to the abuser"); Tamara L. Kuennen, "*No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 49 (2007) (domestic violence victims seek CPOs for safety, "to

have control in their lives," and to enlist the law in acting as a "loudspeaker" for their insistence that abuse is prohibited).

Thus, amici and other domestic violence lawyers and advocates across the country rely on CPOs as the primary means by which victims of domestic violence can exert legal power against violent abusers.

2. Enforcement is the "Achilles heel" of the civil protection order system

Despite the significant advancement in legal protections for abuse victims that CPOs have provided, the "Achilles heel" of the CPO process has long been, and to this day remains, enforcement. Peter Finn & Sarah Colson, U.S. Dep't of Justice, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* 49 (1990) ("an order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security").

a. CPOs have proven surprisingly effective in some respects.[2] But there is "considerable anecdotal

[2] *See* Ptacek, *supra*, at 164 (recipients describing many benefits of CPOs). A National Center for State Courts study of three states found that 92.7% of respondents who obtained a CPO stated that they felt better and 80.5% stated that they felt safer. Susan L. Keilitz et al., Nat'l Center for State Courts Research Report, *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* 38 (1997), *available at* http://tinyurl.com/NCSCStudy (last visited Mar. 6, 2010). And a recent Kentucky study found that even among the 50% of
(Continued on following page)

evidence * * * that some batterers flout civil protection orders with impunity." Finn & Colson, *supra*, at 49; s*ee also* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders,* 56 OHIO ST. L.J. 1153, 1194 (1995) ("lack of enforcement is still cited as the principal weakness of protection orders"). Indeed, research into CPO compliance has consistently shown that CPOs are violated approximately half the time. *See, e.g.*, Kentucky Civil Protection Order Violation Study, *supra* note 2, at 97 (finding that during the six-month follow-up period after women obtained a protective order, half reported a violation of the protective order); Goldfarb, *supra*, at 1512 (citing a Colorado study that found sixty percent of women who obtained orders reported re-abuse during the following year and a Massachusetts study that found forty-nine percent of offenders re-abused their victims within two years).

It is of no moment that some violations might *appear* innocuous—e.g., telephone calls, stay-away violations, verbal threats, and child visitation violations. *See, e.g.*, Kentucky Civil Protection Order

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protection order recipients that experienced violations, most said the abuse and their fear decreased. TK Logan et al., *The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, and Costs* [hereinafter Kentucky Civil Protection Order Violation Study] at 97-98 (2009), *available at* http://www.tinyurl.com/kentuckystudy (last visited Mar. 6, 2010).

Violation Study, *supra*, at 99; Ptacek, *supra*, at 163-164*;* Goldfarb, *supra*, at 1512. The significance of these purportedly "harmless" violations cannot be overlooked. First, harassment commonly escalates if ignored, and even so-called "minor" abuse is often the prelude to lethal violence. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 859 (1993) ("Social science research reveals that threats and harassment, left unchecked, frequently escalate to greater violence."). Second, the failure to respond to "minor" violations sends a clear message that the order need not be obeyed, which increases the likelihood of "major" violations in the future. *See* Goldfarb, *supra*, at 1516 (lack of enforcement may be "largely responsible for * * * high rates of non-compliance with protection orders"). Third, while some violations may appear unthreatening to the outside observer, in context of a history of abuse and terror, they are not. Rather, they almost always represent continued determination to control and intimidate the victim; even innocuous acts, such as sending a birthday card, can thus be terrorizing. Lynn Hecht Schafran, *Why Empirical Data Must Inform Practice,* in VIOLENCE AGAINST WOMEN: LAW AND LITIGATION 1-1, 1-57 (Frazee, Noel & Brenneke eds., 1997) (sending roses can be a message of intimidation and ownership to a victim who has made her desire for no contact clear).

b. When CPO violations occur, every State provides some means of enforcement, whether by

privately- or judicially-initiated contempt proceedings or state prosecution for violation of a protection order.

While a court always possesses the "inherent authority" to hold a party before it in contempt of the court's orders, *Young*, 481 U.S. at 801, the procedures for bringing contempt actions differ among jurisdictions. Thirty-eight States and the District of Columbia have expressly specified avenues for public and/or private enforcement of a CPO by contempt, which can result in jail time. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1860 (2002).[3] In at least 14 States, as in the District of Columbia, courts or statutes have specifically upheld the right of private litigants to initiate contempt actions privately.[4] In Texas, for example, the private party may

[3] These contempt actions, by necessity, are almost always criminal contempts. Because only sanctions which allow the contemnor to "purge" the contempt can be denominated civil contempt, *Hicks ex rel. Feiock v. Feiock,* 485 U.S. 624, 635 n.7 (1988), civil contempt is rarely applicable. The vast majority of CPO violations are neither purgeable nor remediable; they are past violations that require consequences to be imposed. Imposition of yet another "coercive" order (or agreement) is pointless when a violator has already ignored a formal court order.

[4] *See Olmstead v. Olmstead*, 284 S.W.3d 27, 28 (Ark. 2008); *Eichhorn v. Kelley*, 111 P.3d 544, 548 (Colo. Ct. App. 2004); *Gordon v. State*, 960 So.2d 31, 39 (Fla. Dist. Ct. App. 2007); *Gay v. Gay*, 485 S.E.2d 187, 188 (Ga. 1997); *In re Marriage of Betts*, 558 N.E.2d 404, 425 (Ill. App. Ct. 1990); *Long v. Hutchins*, 926 So.2d 556, 567 (La. 2006) (Brown, C.J., concurring); *Furtado v. Furtado*, 402 N.E.2d 1024, 1034 (Mass. 1980); *DeGeorge v. Warheit*, 741 N.W.2d 384, 392-393 (Mich. Ct. App. 2007); *State ex*

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file an enforcement motion with the state district court including the specific provision of the order sought to be enforced, the time, place, and manner of the violator's alleged violation, and the request for relief sought. Tex. Fam. Code Ann. § 157.002. And in other States, the process can vary by county.[5]

More recently, all 50 States have adopted a crime of "protection order violations," which enables prosecutors to treat such violations as a distinct crime. Epstein, *Procedural Justice*, *supra*, at 1860.

c. Despite this additional avenue for state enforcement, the "most serious limitation of civil protection orders" continues to be "widespread lack of enforcement." Finn & Colson, *supra*, at 3; *see also*

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rel. O'Brien v. Moreland, 778 S.W.2d 400, 405-407 (Mo. Ct. App. 1989); *Wilson v. Wilson*, 984 S.W.2d 898, 903-904 (Tenn. 1998), cert. denied, 528 U.S. 822 (1999); *Chen v. Stewart*, 123 P.3d 416, 423 (Utah 2005); Alaska R. Civ. P. 90(b); N.Y. CLS Family Ct. Act § 846 (2010); 23 Pa. Cons. Stat. § 6113.1. Amici are aware of another five states—Iowa, Maryland, Oklahoma, South Carolina and Utah—that use private criminal contempt to enforce CPOs, pursuant to general statutory contempt provisions or courts' inherent authority. *See* Battered Women's Justice Project, Survey of Statutes and Domestic Violence Advocates (2010), *available at* www.tinyurl.com/FLinterestedprosecutor (last visited Mar. 6, 2010).

[5] For instance, several Pennsylvania counties permit private criminal contempts. In one, the court rules specify that "[t]he unavailability of plaintiff's counsel shall not be grounds for the dismissal of the contempt action." Rules of Ct., Warren-Forest Ct. of Common Pleas, Thirty Seventh Jud. Dist. of Penn., R. L1903.6 (2005).

Kentucky Civil Protection Order Violation Study, *supra*, at 114 ("strong enforcement, especially for stalking victims, seemed to be lacking in this study"); Zlotnick, *supra*, at 1194 ("lack of enforcement is still cited as the principal weakness of protection orders"); *Developments in the Law—Legal Responses to Domestic Violence,* 106 HARV. L. REV. 1498, 1511-1512 (1993) (enforcement by the criminal justice system has "received inadequate emphasis in many jurisdictions"). In a recent, in-depth study of CPO enforcement, the majority of protection order recipients indicated that the order's effectiveness was based on the perpetrator's fear of legal repercussions. The study concluded, "if protective orders are violated without consequences this fear would be eliminated." Kentucky Civil Protection Order Violation Study, *supra*, at 156.

3. Public enforcement is not an effective alternative to private criminal contempt proceedings

It is not true that CPOs can be effectively enforced with only the "wide variety of options" that prosecutors possess. *See* NACDL Br. 26 n.22. As discussed below, criminal enforcement of CPOs provides no substitute for private contempt enforcement. Not only do police and prosecutors lack the institutional capacity and, sometimes, the will to prosecute most CPO violations, private contempt enforcement is critical to effectuate the core purposes of a CPO: providing prompt intervention and giving the victim control.

a. Public enforcement is not reliable

Although the criminal justice system has made significant strides in its response to domestic violence, Sack, *supra*, at 1668-1678, it cannot be said (as petitioner's amicus contends, NACDL Br. 20-26) that the system has overcome its past legacy of neglect and acquiescence in this "private" crime. In particular, even though it is a crime in almost every State to violate a CPO, police response and public prosecution of such violations is still erratic and varies greatly by jurisdiction.

Thus, in a national study, more than 80% of those surveyed reported that police respond "slowly or ineffectively" to reports of protection order violations; 41.3% characterized the failure of police response as a "significant or very serious problem." Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes,* 2 TEX. J. WOMEN & L. 163, 223-224 (1993). And when police do respond, they often refuse to make an arrest. *Id.* at 224. A more recent Boston study also reported the widespread reluctance of police to arrest for restraining order violations. Ptacek, *supra*, at 162 (detailing anecdotes of police failures to respond to violations). And, in 2009, the Kentucky Civil Protection Order Violation Study found that only 27.9% of reported CPO violations resulted in arrests. Kentucky Civil Protection Order Violation Study, *supra*, at 104.

Prosecutors also are often reluctant to respond to protection order violations. The national study cited above found that "[a]lmost three-fourths (70.9%) of [those surveyed] reported that prosecutors refuse to prosecute violations except in very limited circumstances." Kinports & Fischer, *supra*, at 228. This is consistent with amici's experience: In many States and counties, amici have found the local district attorneys to be reluctant or unable to prosecute CPO violations. This is true even in jurisdictions where the prosecution of domestic violence itself has improved. *See* Margaret M. Barry, *Protective Order Enforcement: Another Pirouette,* 6 HASTINGS WOMEN'S L.J. 339, 356 (1995) (commenting that even after criminalization of protection order violations, prosecutors were not prosecuting the new crime).[6]

b. Law enforcement views protection orders as civil matters

Although discouraging, reluctance on the part of many state prosecutors to prosecute violations of CPOs is hardly surprising. *See*, *e.g.*, *Gordon*, 960 So. 2d at 39 ("Although an indirect criminal contempt proceeding in a family law case is vitally important to the parties, such a case often has little interest to a professional prosecutor"). This reluctance stems in large part from the fact that—regardless of the

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[6] Where, as in the District of Columbia, only an arrest can initiate a prosecution, the lack of prosecution sometimes stems from a failure of police response. *See* pp. 12-13, 16-17 *supra*.

denomination of a contempt as "criminal"—the enforcement of a *civil* order shares few similarities with traditional crimes, procedures, and punishments. As one former domestic violence prosecutor has pointed out, "the criminal justice system will resist the complete criminalization of civil protection order violations. * * * Despite the wishes of * * * advocates, domestic violence does not behave like an 'ordinary' crime and prosecutors and police have legitimate grievances about being forced to treat it as such." Zlotnick, *supra*, at 1209-1210 (1995).

This is especially true where the violations do not involve physical contact or obvious physical violence. Ptacek, *supra*, at 163-164; Goldfarb, *supra*, at 1512. In such cases, it has been amici's experience that prosecutors often believe that it will be difficult to convince a judge or a jury that unwanted telephone calls or stay-away violations, although technically a crime for violating the order itself, should subject a defendant to a criminal conviction. As such, it is perhaps unsurprising that law enforcement generally views such violations as minor, inconvenient offenses, rather than real crimes requiring priority intervention.

But this trivialization of such protection order violations can sometimes be tragically mistaken. In domestic violence cases, purportedly less-serious violations of protection orders are often harbingers of severe or even lethal abuse. For example, in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), the police ignored a mother's repeated pleas to enforce

her protection order, and when the respondent took the children without permission in violation of the protection order, the children were then murdered. *Id.* at 751-754.[7] That case is not unique. *See, e.g.*, *Campbell v. Campbell,* 682 A.2d 272, 273 (N.J. Super. Ct. Law Div. 1996) (after police failed to arrest respondent who violated stay-away provision and merely escorted him from the premises, he returned and shot the victim); *Mastroianni v. County of Suffolk,* 91 N.Y.2d 198, 201-202 (N.Y. 1997) (victim stabbed to death after police failed to arrest husband—despite knowing he was visiting neighbors next door—after he violated order by entering her home and removing her furniture).

c. Law enforcement lacks the necessary resources

Police and prosecutors also lack the resources to address the high volume of CPO violations. *See, e.g.*, *Wilson v. Wilson*, 984 S.W.2d 898, 903 (Tenn. 1998) ("[d]istrict attorneys already have a heavy caseload" and "it is unrealistic to expect [them] to prosecute contempt actions arising from alleged violations of civil court orders"), cert. denied, 528 U.S. 822 (1999); *State ex rel. O'Brien v. Moreland*, 778 S.W.2d 400, 406 (Mo. Ct. App. 1989) (same). Indeed, as respondent and the District of Columbia have explained, it was

[7] This Court's ruling that there is no federal constitutional remedy against the police in *Castle Rock* underscores the extreme difficulty of ensuring that police respond to these violations.

precisely the inability of the District of Columbia government to handle all CPO litigation that caused the legislature and courts to expressly endorse a private right of action both for filing protection orders and enforcing them through criminal contempts. *See* Resp. Br. 3-6; *Green v. Green,* 642 A.2d 1275, 1279-1280 (D.C. 1994). States today face the same—or worse—resource problems. Letter from Tiffany Carr, President & CEO, Florida Coalition Against Domestic Violence (Mar. 1, 2010), *available at* http://www.tinyurl.com/floridacoalition (last visited Mar. 6, 2010) ("recent severe funding cuts have resulted in [the loss of] * * * dedicated domestic violence units, and * * * [prosecutors in] contempt proceedings for injunction violations has decreased dramatically"); Letter from Laurie Schipper, Executive Director, Iowa Coalition Against Domestic Violence, at 2 (Feb. 25, 2010), *available at* http://www.tinyurl.com/iowacoalition (last visited Mar. 6, 2010) ("There are simply too many criminal contempt cases every year for county prosecutors to effectively handle alone[;] * * * county prosecutors' offices are small and underfunded[;] * * * [w]ithout independent enforcement by protected parties, many [CPO] violations would slip through the cracks unremedied.").

Thus, when police fail to make arrests for protection order violations, amici's District of Columbia lawyers regularly advise victims that they need not be dependent on the police; they can file their own motion for contempt, and seek to have the violator

held accountable and the court's order enforced. Indeed, this Court recommended the same. *Castle Rock,* 545 U.S. at 760 (noting that victim could have brought respondent back to court for contempt, even if police did not arrest). In this respect, a victim's ability to achieve legal relief *without* being dependent on the criminal justice system to take action is a significant (and intended) benefit of the CPO system. If private enforcement is undermined or eliminated, the assurance that CPOs will be enforced will disappear.

d. Private enforcement is critical to the effectiveness of protection orders

Even if public prosecution were fully available, the elimination of the right to enforce their own protection orders would be a profound loss to victims of abuse. Private criminal contempt empowers battered women by giving them choice and some control over the process. *See* Zlotnick, *supra*, at 1198. If enforcement is exclusively controlled by the State, the empowerment and control a CPO provides will be eviscerated. *See generally,* Elizabeth M. Schneider, BATTERED WOMEN AND FEMINIST LAWMAKING, 184-188 (2000) (describing loss of autonomy for battered women when relying on the State).

i. For instance, victims in private litigation may decide what violations to litigate (e.g., sexual abuse), what witnesses to offer (e.g., children or other relatives), and what remedies to request (e.g., jail sentence or not). Indeed, victims frequently seek to

withdraw their contempt motions in exchange for a modification of their CPO.[8] Victims can control none of these decisions, many of which may actually benefit the individual who violated the CPO, in a state-controlled prosecution.

More fundamentally, the victim's ability to take charge of a legal intervention sends an important corrective message to the abuser, whose purpose and modus operandi is to subordinate and control the victim. *See* Stark, *supra*, at 5. The ability to initiate and prosecute her own legal action is a powerful re-assertion of autonomy. Ptacek, *supra*, at 165 ("Many of the women stressed that by taking [CPO] action, they had forced a shift in the balance of power."). Thus, the typical dynamic of abuse is profoundly disrupted when the system performs its "loud-speaker" role on the victim's behalf. *See* Kuennen, *supra*, at 49.

Criminal prosecutions (or litigation "on behalf of" the State), by contrast, are not in the victim's control, and are sometimes decidedly in conflict with their needs or desires.[9] In immigrant and minority

[8] In fact, in the vast majority of motions for contempt in the District of Columbia, victims withdraw, dismiss, or otherwise resolve their motion prior to the court ruling on the issue of contempt. *See* http://www.tinyurl.com/DCcontempt (last visited Mar. 6, 2010).

[9] Subpoenaing and even incarcerating victims who are reluctant to testify has become more common in the wake of the Supreme Court's shift in confrontation clause jurisprudence. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA.

(Continued on following page)

communities, state-controlled criminal prosecutions can be especially problematic. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 17-18 (1999).[10] But for many victims, a criminal trial which they neither choose nor control is an ordeal that, rather than empowering the victim, can cause "re-victimization * * * [that] can thwart the survivor's efforts to regain control over her life and move past the abusive experience." *Id.* at 17.

ii. Moreover, in stark contrast to the delayed criminal process, "contempt is faster and faster is better." Zlotnick, *supra*, at 1199. The CPO system was created to provide a speedy response to abuse. *See Green,* 642 A.2d at 1279 (statutory procedures are designed "to expedite the application and if necessary, the enforcement of CPOs"). Because any delay in the enforcement of a CPO can lead to potentially tragic results, rapid response is critical. "[D]eterrence is generally more potent when a quick punishment follows an infraction." Zlotnick, *supra*, at 1201-1202;

L. REV. 747, 749 (2005) (*Crawford v. Washington* devastated domestic violence prosecutions and increased prosecutors' coercion of victims to testify).

[10] The risk of deportation of the abuser is a deterrent to seeking legal protection for some immigrant victims. Epstein, *Effective Intervention*, *supra*, at 17. For the African-American community, racial tension between the community and the police makes reliance on the criminal justice system even more undesirable. *Id*. at 17-18.

Klein & Orloff, *supra*, at 1126 (private initiation of contempt actions allows victims "to obtain swift enforcement of civil protection orders and thereby secure their immediate safety"). Indeed, faced with such violations, courts have recognized that speed is necessary to prevent potentially fatal escalation. *See, e.g.*, *Synder v. Synder*, 629 A.2d 977, 981 (Pa. Super. Ct. 1993) ("The Emergency nature of the judicial process [in contempt actions] * * * requires th[e] Court act swiftly to prevent continued abuse and deal with contempt situations in an expeditious manner lest the violation giving rise to the contempt become a criminal action for homicide." (citation omitted)).

A private contempt enforcement action is ordinarily concluded within a month after it is commenced; criminal misdemeanor prosecutions for contempt violations can take up to 12 months. *See* Zlotnick, *supra*, at 1199-1203, 1209 n.248.

iii. Finally, CPO enforcement is eviscerated when a prosecutor waives the State's own right to enforce that order, as happened in this case. Here, the lengthy prosecution of petitioner for his initial violent acts against respondent was not resolved until *after* he viciously assaulted her again (in violation of the CPO she obtained after the first attack). Pet. App. A.iv-v; J.A. 26-30, 56-60, 72. At that point, a plea bargain between petitioner and the United States Attorney's Office waived the *government's* right to prosecute petitioner for his second attack when it resolved the first. J.A. 28-30. Had the victim retained no independent right to enforce her CPO, all

enforcement of the order would have been entirely abandoned.[11] These kinds of trade-offs are inevitable when a State prosecutor, rather than the victim, resolves a violation of the victim's *civil* protection order.

4. Private enforcement of civil protection orders "in the name and pursuant to the power of the United States" is not a viable solution

a. Notwithstanding the narrow question presented, petitioner's opening brief makes clear that he is challenging more than "in whose name" and "in whose power" the prosecution for criminal contempt can occur. Pet. Br. 45-46, 53-59; NACDL Br. 8-20. Petitioner has instead raised the far broader question of whether a private party may *ever* use criminal contempt proceedings. Not only is petitioner wrong on the merits, his broadened argument is significant (and fatal), because as respondent makes clear, petitioner expressly waived that issue below. Resp. Br. 44-45, 51 n.18.

b. On the narrow question actually presented, however, a regime allowing a private party to seek criminal contempt sanctions for violations of a CPO, but only in the name and pursuant to the authority of

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[11] Double jeopardy protections attach regardless of whether the private victim or the government prosecutes a criminal contempt. *United States v. Dixon*, 509 U.S. 688, 696 (1993).

the government, would be incapable of coherent implementation.

First, it is unclear whether and to what extent a private party who was required to prosecute "in the name and pursuant to the power of the United States" would be subject to the duties and responsibility of a state prosecutor. These obligations include, among others, the disclosure of exculpatory and impeachment evidence and information, *see Brady v. Maryland,* 373 U.S. 83, 86 (1963); the requirement to ensure the accused has been apprised of the right to, and had adequate opportunity to obtain counsel, *see* Am. Bar Ass'n Model of Prof'l Conduct R. 3.8(b); the necessity to refrain from making extrajudicial comments that may harm the defendant, *see id*. at R. 3.8(f); and the overarching obligation to be "a minister of justice," *id.* at R. 3.8 cmt. 1. This confusion concerning the applicable procedures would be compounded by the fact that many litigants seeking to enforce their CPOs proceed pro se, while abusers such as petitioner are automatically appointed counsel. D.C. Super. Ct. Dom. Viol. R. 12(e)(2).

Second, the continued assertion by petitioner and his amicus that a private *interested* litigant can, at her own initiative, file and litigate a criminal contempt action, but only *on the United States's behalf* is a legal fiction that fails of its own incoherence. If the private litigant acts "in the name" and "pursuant to the power" of the United States, it is difficult to see how a private litigant could direct the litigation, be represented by her own lawyer, and assume neither

the powers nor obligations of the State, yet somehow represent and bind the State, while the State retains no control over the litigation.[12] Alternatively, if the private litigant's decisions and conduct were subject to the control of the United States, then the legal fiction is nothing more than a thinly disguised repudiation of privately prosecuted criminal contempt actions.

c. Nor is the appointment of a disinterested private prosecutor a viable solution. It is clear that States and courts have "[n]o such funds" for the appointment of disinterested prosecutors. *State ex rel. O'Brien v. Moreland,* 778 S.W.2d 400, 407 (Mo. Ct. App. 1989); *Wilson*, 984 S.W.2d at 903 ("unlike the federal system, there is no fund in Tennessee from which to compensate private counsel appointed to prosecute criminal contempt actions"); *cf. Musidor, B.V. v. Great American Screen*, 658 F.2d 60, 65 (2d Cir. 1981) ("There is no [federal] fund out of which to pay other [disinterested] counsel)."); Joan Meier, *The Right to a Disinterested Prosecutor of Criminal*

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[12] In *Green v. Green,* the District of Columbia Court of Appeals expressly held that the private-contempt plaintiff maintained a normal attorney-client privilege and was subject to the court rules governing private litigants, *not* those governing public prosecutors. 142 A.2d at 1282. While asserting below that he was not seeking reversal of *Green,* petitioner never explained how, even with these procedures, a private litigant could be "standing in the shoes" of the United States. Petition for Reh'g 1.

Contempt: Unpacking Public and Private Interests, 70 WASH. U. L. Q. 85, 90 n.26 (1992).

Even if such funds did exist, however, such an approach would not lead to the effective enforcement of CPOs. The imposition of a "disinterested" prosecutor rather than an attorney for the victim would result in all the limitations described above. Moreover, a "private" but "disinterested" lawyer could not provide the critical role of a victim's attorney, including legal counseling, advocacy support and empowerment, and safety planning. Without this kind of advocacy and support accompanying their enforcement, CPOs' potential to provide a transformative legal intervention for victims of abuse is greatly reduced.[13]

[13] In fact, in some States, presumably to avoid reliance on an "interested prosecutor," judges act as both the prosecutor and the decision maker *themselves*. Battered Women's Justice Project, Survey of Statutes and Domestic Violence Advocates at 1 (Florida) (2010), *available at* www.tinyurl.com/FLinterested prosecutor (last visited Mar. 6, 2010). Such a practice is, in amici's view, far more troubling and likely to compromise fairness to the defendant, than is private criminal contempt litigation. Cf. *Young,* 481 U.S. at 820 (Scalia, J., concurring) (fearing that allowing judges whose order was violated to initiate contempt proceedings could create "the most tyrannical licentiousness") (citation omitted); Meier, *supra*, at 113-115 & nn.125-137 (discussing the lack of impartiality when judges themselves initiate contempt cases even where the underlying order was unconstitutional, and the executive declined to prosecute).

B. Private Criminal Contempt Proceedings Do Not Infringe Rights Of Those Who Violate Protection Orders

Petitioner contends that he has a "right to be [criminally] prosecuted by the government," Pet. Br. 58, and that prosecution by a private citizen violates due process, Pet. Br. 47-60.

As respondent explains, however, the Constitution provides no guarantee of public prosecution in criminal contempt proceedings, and due process has not been offended in this case. Resp. Br. 58-63. And, as amici explain below, there is no truth to petitioner's hyperbolic claim that CPOs and their enforcement create some sort of abusive "private 'criminal code'" of virtually "unbounded" scope. Pet. Br. 52. To the contrary, CPOs and their enforcement through private contempt proceedings are replete with all applicable procedural protections that this Court requires to ensure "fundamental fairness." *Lassiter v. Department of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 24-25 (1981) (discussing the general precepts of "fundamental fairness.").

Indeed, petitioner's argument travels on well-trodden ground and has been repeatedly rejected. In addition to being repeatedly rebuffed by the District of Columbia courts, *see* Pet. App. A.xiv-xv; *Green*, 642 A.2d at 1280-81, numerous other state courts have also considered, and rejected, challenges to the private criminal contempt enforcement of protection (or other) orders. *See, e.g.*, *Olmstead v. Olmstead,* 284

S.W.3d 27, 28 (Ark. 2008); *Eichhorn*, 111 P.3d at 548 (Colorado); *Gordon*, 960 So.2d at 39 (Florida); *In re Marriage of Betts*, 558 N.E.2d at 425 (Illinois); *DeGeorge*, 741 N.W.2d at 392-393 (Michigan); *Moreland*, 778 S.W.2d at 405-407 (Missouri); *Wilson*, 984 S.W.2d at 903-904 (Tennessee). This Court should not overthrow these reasoned judgments and the state legislative mandates, particularly in a case in which petitioner never afforded the court below the opportunity to fully consider the issues he now presses.

1. Criminal contempt is not identical to an ordinary criminal prosecution and requires no more than the due process protections that were provided in this case

At bottom, petitioner complains that he has the right to be prosecuted by someone not seeking to vindicate her personal rights. Pet. Br. 57 ("due process concerns are minimized by the fact that control of the prosecution rests with the government"). While amici acknowledge that the neutrality of the prosecutor may be an important value in an actual criminal prosecution, even there it has never been elevated to the status of a due process right. Moreover, criminal contempt, while possessing certain criminal law characteristics and requiring greater due process protections than civil contempt, has never been treated as a crime in all respects.

a. This Court has repeatedly held that contempt proceedings "are sui generis—neither civil actions nor

prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions." *Myers v. United States*, 264 U.S. 95, 103 (1924); *see also Frank v. United States,* 395 U.S. 147, 152 (1969); *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 441 (1911). Indeed, this Court in *Young* underscored the unique nature of contempt by holding that a court's fundamental need to "vindicate its own authority" trumps the power of the executive branch to exercise prosecutorial discretion which is "essential" to disinterested justice for ordinary crimes. *Young*, 481 U.S. at 796, 801, 813-814. Thus, although criminal contempt proceedings require that the individual being held in contempt be afforded numerous due process protections designed to ensure a fair trial—all of which petitioner was afforded here—the Court has never held that such proceedings are intrinsically the same as an ordinary criminal prosecution.

b. Violations of CPOs, like violations of any civil order, are fundamentally different from ordinary crimes. Unlike in the ordinary criminal context, the individual victim's interest in ensuring her own civil order is enforced predominates over any public interest. Meier, *supra*, at 127 ("While a criminal prosecution upholds laws that society has determined are essential to a civil society, a contempt proceeding enforces an order that never would have become 'law' but for the individual efforts of private citizens on

behalf of their own particular interests."); *Gordon*, 960 So.2d at 39 ("Although the public has an interest in an order entered in a family law or domestic relations case, this interest is far outweighed by the interest of the party seeking the enforcement or protection of the order."). Of course, the party's personal interest in enforcement is also consistent with "the public interest in vindication of the court's authority." *Young*, 481 U.S. at 804. Indeed, courts depend upon the beneficiary of the order to bring a violation of that order to their attention. *See, e.g.*, *Eichhorn*, 111 P.3d at 548 (recognizing that when non-compliance occurs outside the direct hearing of the court, private litigants are needed to bring violations to the court's attention).

For this reason, criminal contempt has more in common with civil contempt than with an ordinary criminal prosecution. Unlike an ordinary criminal prosecution, contempt, at bottom, is the means employed by a court to ensure compliance with that court's civil order. Although criminal contempt contains punitive elements, so too does civil contempt when it uses harsh sanctions to coerce compliance. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-304 (1947) (explaining that a civil contempt sanction can "coerce the defendant into compliance with the court's order"). Civil contempt can thus involve substantial jail time. *See, e.g.*, *Shillitani v. United States*, 384 U.S. 364, 370 n.6 (1966) (classifying as civil contempt, and upholding "a determinate [two-year] sentence which includes a purge clause").

c. These similarities between criminal and civil contempt do not change the accused's entitlement to the full panoply of due process protections in any criminal contempt proceeding. Indeed, this Court and the District of Columbia have appropriately assured accused criminal contemnors of all the key procedural protections normally afforded criminal defendants, including the right to defense counsel, *Cooke v. United States*, 267 U.S. 517, 537 (1925); the proof beyond a reasonable doubt standard, *Gompers*, 221 U.S. at 444; trial by jury for serious contempt actions, *Bloom v. Illinois*, 391 U.S. 194, 198 (1968); and protection against double jeopardy, *United States v. Dixon,* 509 U.S. 688, 696 (1993); *see also In re Wiggins,* 359 A.2d 579, 581 (D.C. 1976) (recognizing foregoing due process protections and the right to confront the witnesses against him); D.C. Super. Ct. Dom. Viol. R. 9(b) (strict evidentiary requirements, right to present and rebut evidence); *id.* at R. 12(d), (notice); *id.* at R. 12(e) (right to counsel and appointment of counsel for defendant; right against compulsion to testify or give evidence); and 13(a) (right to appeal). But, especially given all these procedural protections to ensure fairness, the identity of the moving party raises no valid due process concerns. *See* Resp. Br. 58-63; *see also* 13 C.J.S. *Contempt* § 82 (1917) ("[I]t is a matter of no importance who institutes the proceedings for contempt, since the alleged contemnor is not prejudiced in his defense by the particular mode in which the facts are brought to the attention of the court").

2. The assumption that private contempt proceedings will be vengeful or abusive is inconsistent with the dynamics of domestic violence

a. Petitioner suggests that private prosecutors can be expected to seek only vengeance, whereas public prosecutors will weigh the "public interest" and disinterestedly "do justice." Pet. Br. 58-59. But this notion of private vengeance does not comport with the empirical evidence and amici's extensive experience.

In fact, it is well known that domestic violence victims are typically markedly ambivalent about prosecution, and are far less likely than a prosecutor to seek harsh sanctions. *See* pp. 22-23 *supra;* Tom Lininger, *Prosecuting Batterers After* Crawford*,* 91 VA. L. REV. 747, 768 (2005) (battered women are more likely to avoid participation in criminal trials or recant their accusations than any other crime victims). Victims of abuse are easily intimidated or worn down by the process; many ultimately withdraw from the legal process. Barry, *supra* at 354-356 (describing one such case); p. 23 n.8 *supra* (District of Columbia data on withdrawal of contempt motions). There is no reason to believe that, when the victim is represented, the private lawyer will attempt to abuse the judicial process in contempt proceedings. *Wilson,* 984 S.W.2d at 904 (a private lawyer does not "detract from the integrity of the judicial process" because "a litigant's private attorney is no less likely to seek justice and no more likely to be influenced by improper

motives than a public prosecutor or a disinterested private attorney").

And, as discussed above (*see* pp. 22-24 *supra*), many battered women's goals—often including avoidance of criminal trials and a preference for civil alternatives—are surely preferable to a defendant, but are not available to a prosecutor who is limited to seeking criminal sanctions. Meier, *supra*, at 110 ("The assumption that * * * private prosecutors are overzealous, singleminded, and inflexible[ ] is distorted at best. * * * Injured parties have a wide array of needs and desires * * * . * * * [P]rivate parties are in fact *more* likely to seek flexible resolutions of their disputes than are public prosecutors.").

Moreover, even in privately initiated contempt proceedings, courts—not the parties—control whether the proceeding goes forward, which allegations to adjudicate, and any punishment. In the District of Columbia, the court even supervises and restricts discovery under the court rules. D.C. Super. Ct. Dom. Viol. R. 8 (providing that all discovery in privately prosecuted criminal contempt proceedings must be approved by the Court); *id.* at R. 14 (prior judicial authorization is required before any subpoena requested by an unrepresented private party may issue). Other jurisdictions provide similar procedural protections for the parties. In Tennessee, for example, the court plays a gatekeeping role to such proceedings, so that a private contempt proceeding cannot proceed until the judge reviews the application of the private party following an order to show

cause. Tenn. R. Crim. P. 42(b). And, as in any legal proceeding, sanctions are available against an attorney who files a frivolous criminal contempt application. *Wilson*, 984 S.W.2d at 904.

b. The concerns that animated this Court's decision in *Young* are not present in the enforcement of CPOs. *Young* involved a complex commercial dispute between two businesses where one party was granted the full investigative powers of the United States Attorney "to employ the full machinery of the state in scrutinizing any given individual." *Young*, 481 U.S. at 805-806, 814. Amici agree that in that context—where a well-financed corporation has obtained the power to conduct broad-ranging prosecutorial power including wiretaps, plea bargaining, and the ability to grant immunity to one civil adversary while continuing its civil litigation against another—private prosecution of criminal contempt is troubling.

The CPO enforcement context, however, is not comparable. In these cases, as courts have recognized, the balance of power favors the accused, not the movant. Victims seeking to enforce CPOs are not appointed "special prosecutors" and possess none of the powers of the State. *See Wilson,* 984 S.W.2d at 904 ("private attorneys prosecuting criminal contempt in Tennessee are not ordinarily clothed with all the powers of a public prosecutor"). Indeed, it has been amici's experience that victims often even lack representation altogether, while those who violated the CPO are automatically appointed counsel. Thus,

the District of Columbia Gender Bias Task Force, as well as the District of Columbia Superior Court, have "expressed concern over the inherent imbalance in CPO contempt hearings," in recognition of the common phenomenon of pro se CPO movants litigating against represented CPO violators. Barry, *supra*, at 354 n.53.[14]

Finally, the kinds of "financial and tactical conflicts of interest" presented in *Young* simply do not arise in CPO contempt proceedings. *Green*, 642 A.2d at 1279. These proceedings are aimed at ensuring safety and minimizing ongoing friction, but involve no damage awards. Accordingly, state courts have repeatedly concluded that CPO contempt proceedings do "not present the potential for discovery abuses and financial conflicts of interest the *Young* Court addressed." *Id.* at 1279-1280; *see also Gordon*, 960 So.2d at 40 ("Criminal contempt proceedings in a family case are typically directed at offensive conduct, without the pecuniary aspect of the trademark infringement proceedings at issue in [*Young*].").

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[14] *See* D.C. Super. Ct. Dom. Viol. R. 8(b) & cmt. (noting that court approval of discovery in privately prosecuted cases is intended to protect private prosecutors from being "overburden[ed]" by (universally represented) CPO violator's discovery requests).

3. State prosecution of criminal contempt proceedings does not provide any cognizable benefit to the accused

Petitioner's urging that only the State should be permitted to enforce CPO violations puts him at odds with the traditional fairness concerns underlying due process protections for defendants. Such protections ordinarily seek to level the playing field by constraining state power and enhancing defendants' procedural rights vis-à-vis the State. But here, petitioner's so-called "right" would require that the "full machinery of the State," instead of the minimal powers of a private litigant, be brought to bear against him.[15] Given that accused contemnors already receive all procedural protections that ensure the fairness of the process, the only conceivable benefit to a defendant of prosecution by the State rather than a private litigant would be the possibility that the State will be less likely to bring an enforcement action at all (as in this case). This interest—in the non-enforcement of civil court orders—is not a valid one, and surely does not rise to the level of a due process right. *See* Meier, *supra*, at 112-113 (*Young's* permitting courts to initiate contempt proceedings when prosecutors decline

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[15] This effect would be even more pronounced in the many jurisdictions like the District of Columbia that maintain a no-drop policy—i.e., prohibiting dismissal of the action at the request of the victim—for prosecution of domestic violence.

demonstrates that there is no cognizable individual right to prosecutorial discretion).

CONCLUSION

For the foregoing reasons, and those in respondent's brief, the Court should affirm the judgment.

Respectfully submitted,

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APPENDIX A

National and District of Columbia Organizations

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP provides a stronger voice for justice by fighting to overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court. DV LEAP is committed to ensuring that the Supreme Court understands the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has previously co-authored amicus briefs to the United States Supreme Court in *Town of Castle Rock, Colo. v. Gonzalez*; *Davis v. Washington*; *Hammon v. Indiana*; *Giles v. California; United States v. Hayes*; *and Abbott v. Abbott*. DV LEAP is a partnership of the George Washington University Law School and a network of participating law firms.

The **Battered Women's Justice Project – Domestic Abuse Intervention Programs, Inc., Duluth, MN ("BWJP")** is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice

system response to domestic violence. The BWJP promotes systemic change within community organizations and governmental agencies engaged in the civil and criminal legal response to domestic violence, in order to hold these institutions accountable for the safety and security of battered women and their children. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems to respond effectively to the needs of battered women and to fashion safe outcomes that hold batterers accountable. Civil protection orders, and the ability of battered women to seek their own enforcement for violations of such, represent a powerful response to the ongoing and terroristic nature of domestic violence. Whether due to poor response by law enforcement, indifference by prosecutors or simply lack of resources, battered women must often rely on their own efforts to enforce CPO provisions and ensure their safety. A decision in this case that eliminates that ability of private enforcement of CPOs by petitioners essentially eviscerates the promises of protections created by the process, resulting in a hollow remedy for thousands of battered women and their children.

Legal Momentum is the nation's oldest legal defense and education fund dedicated to advancing the rights of all women and girls and ending violence against women. Founded in 1970 as NOW Legal Defense and Education Fund, Legal Momentum was instrumental in drafting and passing the Violence Against Women Act in 1994 and its subsequent reauthorizations which seek to redress the historical inadequacy of the justice system's response to domestic violence. Legal Momentum also represents victims of domestic violence who suffer housing and employment discrimination related to the violence. The organization has participated in numerous *amicus curiae* briefs to the Supreme Court in cases supporting the rights of victims of domestic violence, sexual assault and other forms of gender-motivated violence, including *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006); *Giles v. California*, 128 S. Ct. 2678 (2008); and *Abbott v. Abbott*, No. 08-645 (S. Ct., argued Jan. 12, 2010).

The **National Network to End Domestic Violence, Inc. (NNEDV)** is a non-profit organization incorporated in the District of Columbia in 1995. The mission of NNEDV is to create a social, political, and economic environment in which violence against women no longer exists. A network of state domestic violence coalitions, representing over 2,000 member programs nationally, NNEDV serves as the voice of battered women and their children and those who provide direct services to them. NNEDV has a long history of working at the local, state, and national

levels to promote a strong criminal justice response to domestic violence, including reducing homicides by removing firearms from convicted batterers. NNEDV was instrumental to Congressional enactment and implementation of the Violence Against Women Acts of 1994, 2000, and 2005, and co-chairs the current national Violence Against Women Act reauthorization efforts. NNEDV also provides technical assistance, training, and public education to advocates, professionals, and individuals who encounter battered women in their work and communities. NNEDV has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, and other justice system personnel on the importance of effective enforcement of protection orders in order to keep victims of domestic violence and their children safe from abuse.

Domestic Violence Report (DVR) is a multidisciplinary newsletter that is widely distributed throughout the nation to 2,000 domestic violence programs and advocates, judges, lawyers, therapists, doctors, clergy, academics, police, probation officers and others interested in ending domestic violence. Since October of 1995, it has published every two months and covers all of the many aspects of domestic violence, and is primarily concerned with promoting the safety of domestic violence victims and the children in homes where domestic violence occurs.

The newsletter editors and contributors and advisory board, who include lawyers, healthcare providers, criminologists, police, academics, researchers and

battered women's advocates, work with and train judges, health care providers, law enforcement, policy-makers, and domestic violence service providers throughout the nation and assist them in creating and drafting appropriate responses for domestic violence. DVR is very concerned with the effectiveness and enforceability of protection orders, which are a critical element of an effective legal response to domestic violence.

Break the Cycle is an innovative national nonprofit organization whose mission is to engage, educate, and empower youth to build lives and communities free from domestic and dating violence. Break the Cycle achieves this mission through national efforts to affect public policy, legal systems and support systems through training, technical assistance and advocacy. Further, Break the Cycle works directly with young people in the District of Columbia, ages 12 to 24, providing them with preventive education, free legal services, advocacy and support. Break the Cycle envisions a world in which young people are empowered with the rights, knowledge and tools to achieve healthy, nonviolent relationships and homes.

Break the Cycle's early intervention legal services offer sensitive, confidential and free legal advice, counsel and representation to young people who are experiencing abuse in their relationships or homes in protective order cases and related family law matters. Our 15 years of experience providing legal support to young victims of domestic abuse guide our support of this brief. Through our direct legal services, we

understand the importance of protection orders as a critical tool in protecting the safety of the victim and providing justice. The issuance of the order demonstrates a judicial finding that the victim is at risk for continuing abuse and, also, demonstrates the support of the judiciary for the rights of the victim to live free from violence. However, the order of protection is useless in protecting life and health if it is not given respect and enforced by the justice system. Unfortunately, law enforcement and prosecution resources are often limited, leading to delayed or absent prosecutions of some protection order violations. This sends a message to both the abuser and the victim that the protection order lacks the full conviction and support of the government and can leave victims at even greater risk of violence than existed prior to issuance of the protection order. It is essential that victims be permitted to bring protection order violation to the court for swift adjudication of the abuser's contempt. A decision in this case that eliminates that ability of private enforcement of CPOs by petitioners essentially eviscerates the promises of protections created by the protection order process. As such, we join in this amicus (www.breakthecycle.org).

The **District of Columbia Coalition Against Domestic Violence (DCCADV)**, founded in 1986 and incorporated in the District of Columbia, is a nonprofit organization serving as the professional association for the District's domestic violence service providers and is the primary representative of battered women and their children in the public policy arena.

Members of DCCADV share the goal of ending domestic violence through community education, outreach, public policy development, and services for survivors. DCCADV is extremely interested in assuring that the judicial system adequately protects the rights of domestic violence victims, including furthering victims' rights and abilities to seek enforcement of their own CPOs.

Women Empowered Against Violence (WEAVE) is a non-profit organization in Washington, DC that works closely with adult and teen survivors of relationship violence and abuse, providing an innovative range of legal, counseling, economic and educational services that lead survivors to utilize their inner and community resources, achieve safety for themselves and their children, and live empowered lives. Through our legal services program, WEAVE has assisted thousands of domestic violence survivors seeking to protect themselves by obtaining Civil Protection Orders (CPOs) and contempt enforcement of those orders against their abusers.

Scholars and Judge

Elizabeth M. Schneider is Rose L. Hoffer Professor of Law at Brooklyn Law School and a national and international scholar and expert on domestic violence and the law. She is the author of the prize-winning book Battered Women and Feminist Lawmaking (Yale University Press, 2000), coauthor of Domestic Violence and the Law: Theory and

Practice (Foundation Press. 2d. 2008 (with Cheryl Hanna, Judith G. Greenberg and Clare Dalton), one of the leading law school casebooks on domestic violence, and has written many articles on the subject. She has been teaching Domestic Violence and the Law for close to twenty years and also teaches courses on civil procedure, federal civil litigation, and women and the law. She has trained many judges and lawyers in this country and around the world on legal issues involving domestic violence. She is deeply concerned with the questions presented in this case and the need for enforcement of civil protective orders to protect battered women, and the importance of retaining an avenue for private enforcement of protective orders.

David M. Zlotnick is a Professor of Law and Associate Dean for Academic Affairs at Roger Williams University School of Law. He has taught Criminal Law & Criminal Procedure for over fifteen years on several law faculties (Roger Williams, Washington College of Law, and Stetson University). His scholarship encompasses domestic violence, constitutional law, and sentencing. Before entering the academy, he was a federal prosecutor in Washington, D.C., and argued *Foster v. United States*, 598 A.2d 724 (1991) before the D.C. Court of Appeals, the domestic violence case in *United States v. Dixon*, 509 U.S. 688 (1993), which was the last time that this Court had to confront central issues arising out of the enforcement of civil protection orders.

Marjory D. Fields, is a retired New York State Family Court Judge and Supreme Court Justice. She presided in cases of spouse and intimate partner violence and abuse and child abuse and neglect for 16 years. Prior to becoming a judge, Fields was the managing attorney of the matrimonial law unit at Brooklyn Legal Services Corporation B for 15 years, where she and her team represented 1500 abused low income wives a year in divorce and child custody proceedings. Fields traveled throughout the United States training Legal Services lawyers to marshal evidence for domestic violence divorce cases. She testified before Congress and State Legislatures in support of stronger legal remedies and protection for abused women and their children. She drafted new laws enacted in most States. From 1979 to 1989, Fields was co-Chair of the New York Governor's Commission on Domestic Violence, working to improve laws and government policy to provide protection for domestic violence victims and their children. Fields retired from the Court in August 2002 and returned to work for improved protection for victims of domestic violence. She has seen first-hand over 38 years the need for private remedies for victims of domestic violence, whose protection order enforcement cases are often overlooked or rejected by government prosecutors.

Regional and Local Programs

The **California Partnership to End Domestic Violence (CPEDV)** is the federally recognized state

domestic violence coalition for California, with over 150 member organizations and individuals across the entire state. Like other Domestic Violence Coalitions throughout the United States and territories, CPEDV is rooted in the battered women's movement and the values that define this movement, including working toward social justice, self-determination, and ending the oppression of women. As the unified voice for California's domestic violence agencies, CPEDV provides statewide leadership on public policy, offers training and technical assistance to domestic violence service providers and promotes public awareness through community outreach efforts. The California Partnership to End Domestic Violence promotes the collective voice of a diverse coalition of organizations and individuals, working to eliminate all forms of domestic violence. As an advocate for social change, we advance our mission by shaping public policy, increasing community awareness and strengthening our members' capacity to work toward our common goal of advancing the safety and healing of victims, survivors and their families.

CPEDV's mission and work are focused on protecting the safety of domestic violence victims and their children and holding batterers accountable. Civil protection orders, and the ability of battered women to seek their own enforcement for violations of such, represent a powerful response to the ongoing and terroristic nature of domestic violence. Whether due to poor response by law enforcement, indifference by prosecutors or simply lack of resources, battered

women must often rely on their own efforts to enforce CPO provisions and ensure their safety. A decision in this case that eliminates that ability of private enforcement of CPOs by petitioners essentially eviscerates the promises of protections created by the process, resulting in a hollow remedy for thousands of battered women and their children. Accordingly, CPEDV has a compelling interest in this case and joins the amicus curiae brief filed by the Domestic Violence legal Empowerment and Appeals Project (DV LEAP) et al.

The **Florida Coalition Against Domestic Violence (FCADV)** serves as the statewide membership association representing Florida's 42 certified domestic violence centers. In 2004, the Governor and Florida Legislature designated FCADV in statute as the organization responsible for administering state and federal funding earmarked for domestic violence core services. In this role, FCADV serves as the entity responsible for ensuring quality of services for domestic violence survivors and their children. FCADV also serves as the primary representative of survivors of domestic violence and their children in the public policy arena. FCADV's 42 certified domestic violence center members, more than half of which are dual-certified sexual violence programs, share the goal of ending domestic, sexual, and dating violence and stalking through community education, public policy, and services for survivors and their children. Through its Legal Clearinghouse Program, FCADV contracts with legal services attorneys statewide to

represent survivors in seeking civil injunctions for protection, a key component in protecting survivors and their children. It is critical, however, that survivors have the option of private enforcement of these injunctions because a lack of resources often prevents state prosecution of violations. Without such enforcement, batterers are not held accountable, increasing the danger to survivors and their children who have accessed the court system for protection.

The **Kansas Coalition Against Sexual and Domestic Violence (KCSDV)** is a non-profit organization incorporated in 1988. Its member programs are domestic violence and sexual assault programs located in large and small communities across the state that work with victims directly. KCSDV has extensive expertise on the physical, sexual, emotional and economic dangers women and their families face on a daily basis as the result of domestic violence, sexual assault and stalking. The organization's Protection Order Project, in existence since 2006, focuses on training, issuance and enforcement of protection orders in Kansas. Protection orders are an important tool for ending and intervening in sexual assault, domestic violence and stalking. In 2008, victims filed for over 12,400 protection from abuse and protection from stalking orders in Kansas. KCSDV has published the Kansas Protection Order Manual, a pocket card for law enforcement on enforcement of Kansas protection orders, an on-line Guided Interview for victims (www.kcsdv.org/pfa.html), and has responded to hundreds of technical assistance calls on protection

orders from victims, advocates, law enforcement officers, prosecutors, judicial branch staff, and other professionals from across the state. The enforcement of protection orders is a seminal issue for the safety of victims and accountability of perpetrators of domestic violence, sexual assault and stalking.

KCSDV respectfully submits this statement of interest to assist the Court and join in the brief being submitted by domestic violence organizations and advocates across the nation.

The **Kentucky Domestic Violence Association** is a nonprofit organization founded in 1981 and incorporated in the State of Kentucky. It is dedicated to advocating for safety and justice for battered women and their children, and provides comprehensive services to families through fifteen shelter programs located across the state. The Kentucky Domestic Violence Association is extremely concerned about preserving the right of victims to enforce civil protective orders on their own behalf. A recent research study has shown that 65% of protective orders are successful in preventing further acts of abuse. However, in those cases where the respondent violates the order, the ability of battered women to seek their own enforcement for such violations represents a powerful response to the ongoing and terroristic nature of domestic violence. For a variety of possible reasons, whether due to poor response by law enforcement, indifference by prosecutors or simply lack of resources, battered women must often rely on their own efforts to enforce CPO provisions and ensure their

safety. A decision in this case that eliminates that ability of private enforcement of CPOs by petitioners essentially eviscerates the promises of protections created by the process, resulting in a hollow remedy for thousands of battered women and their children, making them reliant on the state to take action. To most fully protect victims and their children from further acts of abuse, the preservation of the ability of petitioners to pursue enforcement of their orders on their own is critical.

We therefore join the *amicus* brief submitted by Domestic Violence Legal Empowerment and Appeals Project on behalf of Respondent, Wykenna Watson.

Legal Services of Eastern Missouri, Inc. (LSEM) provides high quality civil legal assistance and equal access to justice for income eligible people living in 21 counties of Eastern Missouri, including St. Louis. LSEM joins many other agencies and institutions working to build coordinated community responses to domestic violence. LSEM provides no-cost legal services to domestic violence survivors in a broad array of family law and civil cases. In addition, LSEM provides educational trainings and presentations to survivors, advocates for domestic violence survivors, attorneys, students, and community members. In 1956, LSEM was incorporated as a non-profit corporation. Over 25 years ago, LSEM committed to representing survivors of family violence. Every year, LSEM receives thousands of requests for assistance.

LSEM is extremely concerned about the case of *Robertson v. Watson* because the United States Supreme Court's decision will have significant implications for survivors of domestic violence in Missouri and throughout the nation. Missouri's Order of Protection laws permit survivors of interpersonal violence to file motions to hold abusers in contempt of court if the abuser violates the terms of the protection order. In addition, Missouri courts decide indirect criminal contempt actions brought against offenders who have failed to attend batterer intervention programs. When criminal penalties are at issue, Missouri courts ensure that the criminal contempt defendants receive the due process protections that other criminal defendants receive. The effectiveness of protection orders depends largely on how well they are enforced by the judiciary. Without the ability to enforce the order through contempt proceedings, survivors will not obtain adequate protection from abusive non-compliant offenders. Many times, there would be no adequate remedy for violations of protection orders unless the survivors could seek to enforce the orders through private action. Offenders may routinely violate orders if they believe they will not be held accountable. Eliminating survivors' ability to litigate contempt proceedings would weaken the protection order process and would threaten the safety of survivors of domestic violence.

Legal Voice (formerly known as the Northwest Women's Law Center) is a regional non-profit public interest organization based in Seattle that works to

advance the legal rights of all women through litigation, legislation, education, and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country and is currently involved in numerous legislative and litigation efforts. Legal Voice has been a regional leader in combating all forms of violence against women, with an emphasis on domestic violence. Legal Voice has long advocated for efforts to create and improve civil protection orders for domestic violence survivors, and has a strong interest in this case because it concerns the ability of survivors to ensure effective enforcement of civil protection orders against their abusers.

The **Legal Aid Foundation of Los Angeles (LAFLA)** has been the frontline law firm for poor and low income people in Los Angeles, California, since 1929. The lawyers of LAFLA's Family Law Unit provide direct legal assistance in civil cases involving domestic violence/intimate partner abuse, child abduction and concealment and sexual assault. Family Law Unit staff members offer access to the community through courthouse-based walk-in clinics, representation in state court at the trial and appellate level and through community education and outreach. Within the last five years, LAFLA's Family Law Unit lawyers have successfully obtained three state appellate court decisions that reversed improper trial court orders that harmed abuse survivors and put their children at risk. In addition to the provision

of direct legal services, LAFLA attorneys effect systemic change by serving on local, state and national committees and organizations, by serving as trainers on topics dealing with domestic violence/ intimate partner abuse, and by providing comment to law makers seeking our expertise on issues impacted by proposed legislation and rule changes.

The **Pennsylvania Coalition Against Domestic Violence ("PCADV")** is a private non-profit organization working at the state and national levels to eliminate domestic violence, secure justice for victims, enhance safety for families and communities, and create lasting systems and social change. The first domestic violence coalition in the nation, PCADV was established in 1976 when a handful of grassroots women's groups in the state joined together to lobby for legal protections and to develop a network of services for victims of domestic violence. The Coalition has grown to a membership of 61 organizations across Pennsylvania consisting of shelters, hotlines, counseling programs, safe home networks, legal and medical advocacy projects, and transitional housing projects for victims of abuse and their children. Over the past three decades, these programs have offered safety and refuge to close to 2 million victims and their children from every corner of the commonwealth.

Batterers characteristically exert power and control over their victims. A protection order is one step by a victim to regain power and autonomy. Pennsylvania's Protection From Abuse Act (Act) is a vanguard

measure for the advance protection of victims of domestic violence. Enforcement and prosecution of protection order violations varies from county to county in Pennsylvania and is left to each of the sixty-seven elected district attorneys to determine whether to prosecute. The Act provides a victim with a protection order with the authority to file a private criminal complaint against the defendant for a non-economic violation of any provision of the protection order. If a protection order is violated the private criminal contempt provides a way for the victim to enforce their own order and obtain the full scope of protections the law has afforded them. Such a provision supports a victim's empowerment and self-esteem by returning some measure of control to the victim. Without the private criminal contempt mechanism for enforcement, the full promise of the law goes unfulfilled for victims.

Sanctuary for Families is the largest non-profit agency in New York State dedicated exclusively to serving victims of domestic violence and sex trafficking and their children. Sanctuary served more than 10,000 victims last year with shelter, counseling and legal advice and representation in a wide range of family law matters, including orders of protection, custody, divorce and visitation. Sanctuary's lawyers and clients rely heavily on the safety and peace of mind that such orders provide and are deeply concerned about the dangers the victims would face if the orders could not be enforced by the litigants without the involvement of the overburdened public

prosecutors' offices. For that reason, we respectfully join others in signing on to the amicus brief herein on behalf of the respondent.

Southeast Tennessee Legal Services is a non-profit organization created more than three decades ago to meet the legal needs of those unable to afford an attorney in Hamilton County, Tennessee. We now have a long and successful history of collaboration with all of the domestic violence service providers in the ten (10) counties of Southeast Tennessee where we also administer a STOP grant. We serve as the volunteer training site for interns from the University of Tennessee Legal Assistant Studies Program and Chattanooga State Community College, both located in Chattanooga. Southeast Tennessee Legal Services provides civil legal services to victims of violence in Hamilton, Bradley, Polk, Meigs, McMinn and other counties through legal advice and representation, including orders for temporary relief, child custody disputes and support, spousal support, and equitable property division; including negotiations, trials, legal briefs, and (in appropriate cases) appeals to higher courts in divorce proceedings. We also provide advice, representation and referral concerning housing, employment or other matters arising out of domestic violence and necessary to aid the safety of the victim as well as publication of brochures providing general legal guidance to victims of domestic violence, guiding them through the entire legal terrain they are likely to encounter as they attempt to escape their abusers and seek safety.

The Women's Law Project (WLP) is a non-profit public interest legal center dedicated to improving the legal and economic status of women through litigation, public policy development, public education and individual counseling. With offices in Philadelphia and Pittsburgh, Pennsylvania, WLP engages in extensive advocacy challenging gender discrimination in employment, education, insurance, and in family matters relating to custody, support, domestic violence and divorce. Assisting women who are victims of domestic violence, in particular, has been a major focus of both WLP's telephone counseling service, which handles thousands of inquiries a year, and policy advocacy, which includes efforts to improve the domestic violence response of Philadelphia's city government, law enforcement entities, and courts. Following a two year study, the WLP published *Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community* (April 2003), setting forth its findings regarding the many challenges domestic violence victims face when they seek protection orders in the Philadelphia court system. WLP actively pursues advocacy to address the challenges identified in its report. WLP is committed to ending violence against women and to improving the response of the legal system to victims of domestic violence.