

No. 08-6261

**In The
Supreme Court of the United States**

—◆—
JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *EX REL.* WYKENNA WATSON,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia**

—◆—
**BRIEF OF *AMICUS CURIAE*
THE NATIONAL CRIME VICTIM LAW INSTITUTE
IN SUPPORT OF RESPONDENT**

—◆—
DOUGLAS E. BELOOF
(Counsel of Record)
NORTHWESTERN SCHOOL OF LAW
OF LEWIS & CLARK COLLEGE*
10015 SW Terwilliger Boulevard
Portland, OR 97219
(503) 768-6749
beloof@lclark.edu

MARGARET GARVIN
ALISON F. WILKINSON
NATIONAL CRIME VICTIM
LAW INSTITUTE
310 SW 4th Avenue,
Suite 540
Portland, OR 97204
(503) 768-6819

*The business address of
Professor Beloof is not meant
to imply an institutional
endorsement by the college.

Counsel for Amicus Curiae

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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INTEREST OF *AMICUS CURIAE*¹

NCVLI is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide. This case involves fundamental rights and interests of all crime victims, including the rights to access justice and to be actively involved in the judicial process.



SUMMARY OF THE ARGUMENT

Throughout history, victims have been active participants in the justice system. Even before the

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have been given at least 10 days notice of *amicus*' intention to file it.

notion of a public prosecutor existed, victims were bringing forward cases against their offenders, reflecting the commonly-held and common-sense notion that crime not only harms society, it harms the individual victim.

As the office of the public prosecutor began to rise, and through the time of the drafting and ratification of the Constitution, victims remained intimately involved in the prosecution of their offenders at both the federal and state levels. At the federal level, victims could initiate criminal proceedings, and were often included as “special counsel” to help prosecute cases. At the state level, victims continued to privately initiate and prosecute cases, a practice which is still seen today in many states.

This strong history of victim involvement in criminal proceedings reflects two underlying notions. First, given the prevalence of victim participation in the justice system, the drafters of the Constitution were no doubt aware of the practice. Thus, it cannot be said that the framers’ original intent was to ban private prosecution; the fact that the Constitution does not create such a ban underscores this point. Second, throughout the evolution of this country, the courts and the government have sought to ensure that victims maintain their voice in the criminal justice system, along with their ability to assert their private interests.

The historical imperative of giving victims a role in the justice system, and the ability to enforce their

private interests, is seen clearly when one looks at the history of contempt actions. In an even more fundamental way than with criminal proceedings generally, contempt proceedings are about the resolution of private interests between private parties. While one goal of the contempt proceeding is to vindicate the authority of the court, that goal is a corollary to the reason contempt proceedings are initiated in the first instance: to enforce an order obtained by a private party through private litigation.

It is because of the underlying private interests underscoring every contempt action that contempt proceedings have historically been treated differently than general criminal proceedings. Up until this Court's decision in *Young v. United States ex rel. Vuitton et Fils S.A. et al.*, 481 U.S. 787 (1987), many federal and state courts affirmed the underlying, interested victims' ability to vindicate their private interests by allowing them to proceed with contempt actions themselves, often styled in their own name and pursuant to their own authority. Indeed, in addition to Washington, D.C., many state courts continue this practice today, implicitly affirming the notion that criminal contempts are not like general criminal proceedings, but are instead *sui generis*, affecting victims differently and more personally.

Allowing interested, private victims to proceed with contempt actions in their own name is consistent not only with the strong history of recognizing victims' authority to vindicate private interests, but is also consistent with the current state of the law as a

result of the victims' rights movement. In the past 30 years, a landslide of victims' rights legislation, constitutional amendments, and jurisprudence has affirmed what history has long told us: victims do have a voice, and victims do have the right to give meaning to this voice. To take away victims' ability to bring criminal contempt proceedings in their own name, and pursuant to their own power, would offend history and the modern victims' rights movement.



ARGUMENT

I. Victims Have Historically Been Intimately Involved in Criminal Proceedings

At common law, and throughout early American history, it was well recognized that victims had a central, defining role in the criminal justice process. Although notions of private and public prosecution have evolved in the thousand-plus years since private prosecution began, one theme has remained constant: victims have a voice in the criminal justice system, and victims must be able to use that voice to vindicate their interests.

a. A Brief History of Private Prosecution at Common Law

The history of private prosecution goes back a thousand years to England's middle ages. Juan

Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. & Pub. Pol’y 357, 359 (1986). Although notions of prosecuting on behalf of the Crown began in the eleventh and twelfth centuries, at that time “most crime was not viewed as an act against the king, but rather as a wrong inflicted upon the victim.” *Id.*

A crime victim’s right to initiate and conduct criminal proceedings remained the norm in England well into the nineteenth century. *Id.* at 360. The rationale for this victim-centered approach to prosecution was that crime harms the victim as well as the state. 4 William Blackstone, Commentaries *5 (“In all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community.”). Although no longer the norm, private prosecution continues in England today. Cardenas, *supra*, at 365 (noting that approximately 3% of prosecutions in England continued to be private at time of writing).

b. A History of Private Prosecution in the Early Years of the Republic

As was true of much of English common law, the concept of private prosecution became part of early American jurisprudence. See *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 127-28 (1998) (Stevens, J. concurring in judgment) (“In past centuries in England, in the American Colonies, and in the United

States, private persons regularly prosecuted criminal cases.”); *see also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 801 (2000) (Stevens, J., dissenting) (noting that “private prosecutions were commonplace in the 19th century”).

Prior to the American Revolution, “the crime victim was the key decisionmaker in the criminal justice system.” Cardenas, *supra*, at 366. In early American history, there was neither an organized police force nor a public prosecution office as they exist today. *Id.* Accordingly, “the crime victim was largely on his own if he desired to arrest and prosecute.” *Id.*

At and after the time of the drafting of the Constitution, private prosecutions were maintained in the American colonies and states. Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. Davis L. Rev. 411, 422 (2009) (“Under the system of private prosecution prominent in the United States from the colonial era well into the nineteenth century, private lawyers regularly pressed private victims’ cases before the grand jury and at trial.”). *See also* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 486 (2005) (“[The] practice of private prosecution extended well into the nineteenth century.”); Steven J. Twist, *The Crime Victims’ Rights Amendment and Two Good and Perfect Things*, 1999 Utah L. Rev. 369, 370-71 (“Private prosecutions . . . were the norm in the American justice

system at the time of the colonial revolution and the drafting of the Constitution.”).

When the office of the public prosecutor began to rise in early America, private prosecution remained in many states. As one author stated:

Contemporaneous sources confirm the relative insignificance of public prosecutors in the colonial criminal system. Only five of the first thirteen constitutions mention a state attorney general, and only Connecticut mentions the local prosecutor. Secondary references are similarly rare. Finally, the earliest judicial decision voicing disapproval of private prosecution did not appear until 1849. No decision affirming public prosecutors' virtually unreviewable discretion appeared before 1883.

Stephanie A. J. Dangel, Note: *Is Prosecution a Core Executive Function?: Morrison v. Olson and the Framers' Intent*, 99 Yale L. J. 1069, 1072 (1990). See also Beloof & Cassell, *supra*, at 485 n.10 (“[T]he officers of the public prosecutor’s office are few, and the initiative in prosecutions is not always theirs.”) (quoting Alexis de Tocqueville, *Democracy in America*, 96 (Anchor Books ed. 1969)).

Even in federal courts, where the right to privately prosecute was curtailed, in part, by virtue of the Judiciary Act of 1789, private individuals could initiate private prosecutions, present evidence of crimes directly to the grand jury, bring evidence of crimes before magistrates and, upon the magistrate’s

approval, obtain a bench warrant for the defendant's arrest. Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 292-93 (1989) (describing, that in federal courts, “[w]ithout any involvement from the district attorneys, . . . grand juries issued presentments of crimes and judges ordered suspects arrested, pending trial”). See also Dangel, *supra*, at 1083 (noting that “[f]ederal departments and local officers routinely resorted to hiring private attorneys as ‘special counsel’ to prosecute government cases”).

c. Contemporary Jurisprudence Continues to Support Private Prosecution

i. Private Prosecution of Misdemeanors Remains Generally Accepted Today

The common law practice of private prosecution continues today in many jurisdictions. See, e.g., *State v. Cockrell*, 309 P.2d 316, 320 (Mont. 1957) (allowing appointment of private attorney as special prosecutor in criminal matter); *State v. Wyner*, 142 N.Y.S.2d 393, 395-96 (N.Y. Co. Ct. 1955) (allowing village attorney, rather than district attorney, to prosecute a vehicle and traffic law crime); *State v. Ray*, 143 N.E.2d 484, 485 (Ohio Ct. App. 1956) (allowing appointment of private prosecutor in criminal matter, and noting “[a]t common law, criminal prosecutions were generally carried on by individuals interested in the punishment of the accused, and not by the public. . . . [I]t is common knowledge that the common-law

practice still prevails, to some extent at least, in inferior courts”); *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 877 (R.I. 2001) (allowing private prosecution of misdemeanor assault case when attorney general declined to prosecute the case); *Bartell v. State*, 82 N.W. 142, 143 (Wis. 1900) (allowing private prosecution of assault and battery case).

In allowing private prosecutions, courts often consider the burden that would be placed on the government if it were required to prosecute every case. As one New York court stated, “If it were intended that every time a rabbit be snared or a frog speared after dark that the heavy artillery of the offices of the Attorney General or the district attorney be wheeled into action, then the said Legislature was flying in the face of common sense and upsetting a century-old institution.” *People v. Black*, 282 N.Y.S. 197, 201 (N.Y. Co. Ct. 1935). *See also People v. Citadel Mgmt. Co., Inc.*, 355 N.Y.S.2d 976, 982 (N.Y. Crim. Ct. 1974) (upholding prosecution that was instituted by private counsel in criminal landlord-tenant dispute and noting: “A holding that the District Attorney must be physically present at all such trials would work a great injustice to the spirit of the law, on persons who feel themselves aggrieved but might otherwise have no other recourse, and would revolutionize a procedure with the sanction of a long tradition and which today has the force of law”).

As a corollary to this rationale, a New Jersey federal district court, relying on state law, more recently found the private prosecution of a

misdemeanor assault charge to be appropriate because, among other reasons, the charges would likely not be prosecuted otherwise. *State v. Kinder*, 701 F. Supp. 486, 489 (D. N.J. 1988). While the same court departed from this reasoning in a subsequent case, *Kinder* was not overturned. See *State v. Imperiale*, 773 F. Supp. 747, 755 (D. N.J. 1991) (finding that it was not a *per se* violation of defendant's fair trial rights to allow a private, interested prosecutor to prosecute, but finding the circumstances of the particular case violated defendant's fair trial rights) (vacated and remanded in part due to change in factual record on motion for reconsideration).

Remnants of the historical rationale for private prosecution – that crime harms the victim as well as the state – can also be seen in certain jurisdictions' statutes on adultery. In these statutes, the victim – not the state – must commence the action. See, e.g., Ariz. Rev. Stat. Ann. § 13-1408(B) (“No prosecution for adultery shall be commenced except upon complaint of the husband or wife.”); Mich. Comp. Laws Ann. § 750.31 (“No prosecution for adultery . . . shall be commenced, but on the complaint of the husband or wife. . . .”); Okla. Stat. Ann. tit. 21, § 871 (“Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife. . . .”).

ii. Even at the Felony Level, Victims Retain Means to Challenge a Prosecutor's Decision Not to Prosecute

While case law and statutes generally limit private prosecution to misdemeanor matters, even at the felony level, victims often have the power to challenge the prosecutor's decision not to bring charges. For instance, in many states, the victim can report the crime directly to the grand jury. This is allowed at common law in some states, and in other states, this common law has been codified. *See, e.g.*, Okla. Const. art. II, § 18 (allowing initiation of grand jury proceedings by petition of qualified electors of the county); Colo. Rev. Stat. § 16-5-204(4)(1) (providing statutory authority for a private individual to appear before a grand jury); Me. Rev. Stat. Ann. tit. 15, § 1256 (allowing a private individual to offer evidence to the grand jury upon the discretion of the court); *State ex rel. Miller v. Smith*, 285 S.E.2d 500, 507 (W. Va. 1981) (finding "an individual citizen-complainant has a [state] constitutional right to appear before a grand jury to present evidence of an alleged offense"). In others jurisdictions, victims can challenge a prosecutor's decision via judicial review. *See, e.g.*, *Commonwealth v. Benz*, 565 A.2d 764, 767 (Pa. 1989) (ordering charges to be filed in a homicide case on motion of victim's mother); *State ex rel. Williams v. Fiedler*, 698 N.W.2d 294, 301 (Wis. Ct. App. 2005) (allowing private individual to commence a "John Doe" proceeding pursuant to Wisconsin statute).

It is clear that private prosecution was firmly entrenched in the United States at the time of the drafting and adoption of the Constitution, and continues to be part of American jurisprudence today. Thus, it cannot be said that the framers' original intent was to ban private prosecution, particularly given that the text of the Constitution does not limit the practice. Rather, this history of victim involvement shows the intention of the government and the courts to keep victim participation firmly entrenched in the criminal justice system, and to allow victims to vindicate their interests.

II. Private, Interested Parties Have Historically Been, and Continue to Be, Intimately Involved in the Prosecution of Criminal Contempt

Recognition that private prosecutions have historical grounding, and that victims have had a strong voice in the criminal justice process, serves as a useful backdrop to understanding private prosecutions in criminal contempt proceedings. Victim participation in criminal contempt proceedings – both historically and today – has, however, been treated differently than victim involvement in criminal proceedings generally. Accordingly, a brief history of victim involvement in contempt proceedings follows.

a. Historically, Contempt Proceedings Have Been Viewed Differently than Criminal Proceedings

While there is a long history of victim involvement in contempt proceedings, it is important to distinguish victims' involvement in criminal proceedings generally from their involvement in contempt proceedings specifically.

Historically, the United States has treated criminal contempt proceedings differently than criminal proceedings. *See, e.g., In re Debs*, 158 U.S. 564, 596 (1895) (declining to extend right to jury trial to defendant in criminal contempt proceeding, and noting that “[a] court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to”) (*abrogated by Bloom v. Illinois*, 391 U.S. 194 (1968)).

This is because contempts were viewed as “neither wholly civil nor altogether criminal.” *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 441 (1911). *See also Myers v. United States*, 264 U.S. 95, 103, 104-05 (1924) (stating that contempt proceedings are “sui generis – neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms” and noting that it is “certain” that “since the foundation of our government proceedings to punish such offenses have been regarded as sui generis and not ‘criminal prosecutions’ within the Sixth Amendment or common understanding”). It was not until

the 1960s, with evolving notions of due process, that the Court called contempt “a crime in the ordinary sense.” *Bloom*, 391 U.S. at 201.²

b. A Criminal Contempt Proceeding Should Not be Considered a “Crime in the Ordinary Sense,” but Rather a *Sui Generis* Proceeding, Meant to Protect and Enforce Private Orders Between Individual Parties

Although this Court has stated that criminal contempt is a “crime in the ordinary sense,” *Bloom*, 391 U.S. at 201, a comparison of the treatment of criminal contempts to civil contempts reveals that criminal contempt – like civil contempt – should be treated as distinct from “ordinary” crimes. Were the Court to treat criminal contempts as *sui generis*, and more similar to civil contempts than to “ordinary” crimes, there is no question that they would be properly styled in the name of the person bringing forward the action. *See Gompers*, 221 U.S. at 444-45 (“Proceedings for civil contempt are between the

² Despite this linguistic classification, the current state of criminal contempt law still fails to extend all protections of criminal proceedings to criminal contempts. *See, e.g., Green v. United States*, 356 U.S. 165, 185 (1958) (finding criminal contemnor has no right to grand jury indictment); *Myers*, 264 U.S. at 104-105 (finding venue provisions of the Sixth Amendment to be inapplicable to criminal contempt proceedings). Thus, criminal contempt is still not completely adjudged a crime in the ordinary sense.

original parties, and are instituted and tried as part of the main cause.”).

Bloom first set forth the Court’s rationales for treatment of criminal contempt as a “crime in the ordinary sense.” 391 U.S. at 201. These rationales were: (1) convictions for criminal contempt have the same impact on defendants as ordinary criminal convictions; and (2) the role of criminal contempt is the same as ordinary criminal law in that they both serve to protect “the institutions of our government and enforcement of their mandates.” *Id.*

Upon scrutiny, however, these rationales fail to adequately explain why criminal contempts should be considered crimes in the “ordinary sense.” The failure of these rationales can be seen most clearly when comparing criminal and civil contempt proceedings. First, convictions for civil contempt have the same impact on defendants as criminal contempts and criminal convictions; in fact, they sometimes have even greater impact. *See, e.g.,* Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 Va. L. Rev. 1025, 1063 (1993) (“It is obvious that many ‘civil’ contempt sanctions impact the contemnor more severely than many ‘criminal’ ones.”); *In re Papadakis*, 613 F. Supp. 109, 109 (S.D.N.Y. 1985) (noting civil contemnor had previously been held in prison for ten years upon continued refusal to turn government informant).

Second, and more importantly, the rationale that criminal contempts serve to protect “the institutions of our governments and enforcement of their

mandates” ignores a second key goal of any contempt proceeding – to enforce the underlying, violated court order. *Bloom*, 391 U.S. at 201. It is in this sense most strongly that contempts are distinct from criminal proceedings, whether termed “civil” or “criminal,” for contempt proceedings are meant to enforce specific orders between individual, private parties. While the corollary of this is that the authority of the court is maintained, at its core, the issue is fundamentally private. As one scholar noted: “While a criminal proceeding is brought on behalf of the entire community to enforce fundamental community *mores*, a contempt proceeding is brought to enforce an order obtained through private litigation for the benefit of an individual private party.” Joan Meier, *The “Right” to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U. L. Q. 85, 127 (1992).

Case law also reflects this notion that criminal contempt proceedings, unlike criminal proceedings generally, are, at their core, private. *See, e.g., Gordon v. State*, 960 So. 2d 31, 39 (Fla. Dist. Ct. App. 2007) (*rehearing denied*, 967 So. 2d 357 (Fla. Dist. Ct. App. 2007)) (allowing criminal contempt to proceed through private interested individual, and noting that “[a]lthough the public has an interest in an order entered in a family law or domestic violence case, this interest is far outweighed by the interest of the party seeking the enforcement or protection of the order”); *Long v. Hutchins*, 926 So. 2d 556, 561 (La. Ct. App. 2005) (Brown, C.J., dissenting) (*rev’d*, 926 So. 2d 556

(La. Ct. App. 2006)) (“[C]ontempts are fundamentally matters of private interest in a way that criminal prosecutions by the state are not. . . .”). *See generally Young v. United States ex rel. Vuitton et Fils S.A. et al.*, 481 U.S. 787, 800 (1987) (noting that a criminal contempt is not “conduct proscribed as harmful by the general criminal laws” – it is “conduct that violates specific duties imposed by the court itself, arising directly from the parties’ participation in judicial proceedings”); *Hicks v. Feiock*, 485 U.S. 624, 639 (1988) (“[A]s often is true when court orders are violated, these charges were part of an ongoing battle to force respondent to conform his conduct to the terms of those orders, and of future orders as well.”).³

³ Treating civil and criminal contempt proceedings as entirely separate, with criminal contempt proceedings being treated like ordinary criminal proceedings, has caused great confusion among courts and scholars alike. *See, e.g., Hicks v. Feiock*, 485 U.S. at 631 (noting that in contempt cases, “the ‘civil’ and ‘criminal’ labels of the law have become increasingly blurred”); *Hubbard v. Fleet Mortgage Co.*, 810 F.2d 778, 781 (8th Cir. 1987) (per curiam) (“There is considerable confusion in the courts over the distinction between civil and criminal contempt. . . .”); Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. Cin. L. Rev. 677, 681-84 (1981) (noting difficulties in classifying civil versus criminal contempts). Indeed, in many instances, a proceeding goes forward as a civil proceeding, only to be later determined to be criminal. *See, e.g., Hicks*, 485 U.S. at 640-41 (finding that the lower court’s terming of the contempt proceeding as “quasi-criminal” may be in error, and remanding for further proceedings); *Hubbard*, 810 F.2d at 781 (“[T]he Supreme Court has said that the words used by the lower court to describe the contempt are not determinative”). Taking the criminal contempt

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c. Case Law Reflects the Historical Distinctions Between Prosecution of Contempts and Criminal Prosecutions

It is perhaps because of the strong underlying private interest in criminal contempt proceedings that there is such a robust history of private prosecution of these actions. And, unlike with “ordinary” criminal proceedings, it is perhaps also for this reason that criminal contempt proceedings are so often prosecuted in the name of the private litigant.

Prior to the Court’s decision in *Young*, many Circuits allowed private, interested parties to prosecute criminal contempt actions. *See, e.g., United States ex rel. Vuitton et fils S.A. v. Klayminc*, 780 F.2d 179, 183-84 (2d Cir. 1985) (allowing prosecution of criminal contempt by private, interested attorneys) (*rev’d, Young*, 481 U.S. at 814); *Richmond Black Police Officers Ass’n v. City of Richmond*, 548 F.2d 123, 129 (4th Cir. 1977) (overturning criminal contempt conviction on due process grounds, but finding no impropriety in practice of holding contempt proceeding on basis of complaining party’s motion, with case styled in name of private party); *Rogers v. Webster*, 776 F.2d 607, 609-10, 612 (6th Cir. 1985) (*per curiam*) (vacating and remanding contempt order on Fifth Amendment grounds, but finding no

proceeding outside the classification of a “crime in the ordinary sense,” and rooting it back in its historical place as a *sui generis* proceeding, would serve to ameliorate this confusion, and would avoid secondary harm to the victim. *See* Section II.d, *infra*.

impropriety in having private counsel for civil litigant to underlying suit bring forward criminal and civil contempt motions, with case styled in name of private party) (*contra Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698, 704 (6th Cir. 1985) (finding private interested counsel could not conduct criminal contempt proceedings)); *Hubbard v. Fleet Mortgage Co.*, 810 F.2d 778, 781 (8th Cir. 1987) (*per curiam*) (finding no impropriety in having private counsel to underlying suit litigate “dual” civil/criminal contempt motions, with case styled in name of private party); *see generally United States v. Crawford Enters., Inc.*, 643 F. Supp. 370, 380 (S.D. Tex. 1986) (finding it “entirely proper” for a private attorney involved in the underlying civil action to prosecute criminal contempt proceeding) (*aff'd in part, dismissed in part, Petroleos Mexicanos v. Crawford Enter., Inc.*, 826 F.2d 392, 399 n.12 (5th Cir. 1987) (but noting it lacked jurisdiction over the criminal contempt proceeding); Dudley, *supra*, at 1058-59 (noting that *Young* called into question the “widespread” practice of allowing civil litigants to prosecute criminal contempts).

In state courts, both before and after *Young*, private, interested prosecution is fairly common, and, reflecting the underlying fundamental private interest of the litigant, is often styled in the name of the private litigant rather than the government. *See, e.g., In re Marriage of Rodriguez*, 545 N.E.2d 731, 734 (Ill. 1989) (“Criminal contempt proceedings do not have to be brought in the name of the People. A private party has standing to prosecute these actions”); *McDougall*

v. Sheridan, 128 P. 954, 963 (Idaho 1913) (“[I]n a proceeding for contempt, it is not necessary to name the state as plaintiff.”); *see generally Webber v. Webber*, 706 P.2d 329, 329 (Alaska Ct. App. 1985) (finding no fault in interested private party initiating criminal contempt action, with case styled in name of private party); *Eichorn v. Kelley*, 111 P.3d 544, 548 (Colo. Ct. App. 2005) (allowing private interested contempt prosecution, with case styled in name of private party); *DeGeorge v. Warheit*, 741 N.W.2d 384, 392 (Mich. Ct. App. 2007) (same); *Wilson v. Wilson*, 984 S.W.2d 898, 903 (Tenn. 1998) (same); *Gordon v. State*, 960 So. 2d 31, 40 (Fla. Dist. Ct. App. 2007) (allowing private, interested contempt prosecution).

d. Allowing Private, Interested Prosecutions of Criminal Contempts is in Line with Sound Public Policy

Jurisdictions that allow private, interested prosecution of criminal contempts often base their reasoning on the fact that the interested party is in the best position to know of the contempt and bring it to the attention of the court. *See, e.g., Eichorn*, 111 P.3d at 548 (noting that it is “proper for an aggrieved party who knows of the noncompliance to bring the matter to the attention of the court by initiating contempt proceedings and seeking sanctions. Indeed, this is the most common process”); *DeGeorge*, 741 N.W.2d at 392 (stating that it is “manifest” that Michigan statutes “contemplate that a private party . . . may initiate and prosecute a motion to hold an

opposing party in criminal contempt” since the private party is in the best position to observe the contempt).

Additionally, courts recognize the fundamental private interests at stake in a contempt proceeding – the enforcement of a private order – and seek to ensure that the victim is not deprived of her court-ordered protections. *See, e.g., Wilson*, 984 S.W.2d at 903 (noting that if private parties were not able to prosecute, it would cause many citizens to be “deprived of the benefits to which they already have been adjudged entitled by state courts and many state court orders would remain unenforced”). *See generally Meier, supra*, at 90 (asserting that without private interested enforcement of civil orders, “such orders will be virtually unenforceable and will become largely ineffective”).

Both of these rationales are based on the same underlying concern: that failing to allow private interested parties to prosecute contempt orders would lead to the underlying orders remaining unenforced, thereby rendering them meaningless. For a victim to go through the emotional and often dangerous⁴

⁴ Women are at a particularly high risk of abuse when trying to leave the abuser. *See, e.g., Molly J. Walker Wilson, An Evolutionary Perspective on Male Domestic Violence: Practical and Policy Implications*, 32 *Am. J. Crim. L.* 291, 308 (2005) (“The evidence that women are at a particularly high risk of violence of homicide when they are posed to leave or recently have left a relationship is overwhelming.”).

process of securing a protective order against an offender, only to be told upon violation of that order that it is unenforceable, would likely leave the victim feeling as though the entire ordeal had been futile and lead to secondary victimization by the system. *See, e.g.*, Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 Utah L. Rev. 479, 496-97 (noting that secondary victimization can occur when victims feel they are not given a meaningful role in the justice process). This secondary harm occurs because the victim "perceives that the 'system's resources are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands.'" *Id.* at 497 (quoting Task Force on the Victims of Crime and Violence, *Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psychologist 107, 109 (1985)).

The effects of secondary harm upon a victim are very real. Social scientists researching secondary victimization have long found that victims' experiences in the criminal justice process can affect their recovery and psychological well-being. *See, e.g.*, Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 22-25 (1987) (describing victims' further victimization by the criminal justice system); *see also* Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Social Justice Research 313, 314 (2002) (noting that

“secondary victimization” by the criminal justice system can negatively influence victims’ “self-esteem, faith in the future, trust in the legal system, and faith in a just world”).

Congress, in floor debates during the enactment of the Crime Victims’ Rights Act, 18 U.S.C. § 3771, also noted the secondary victimization that can occur as a result of the criminal justice system. 150 Cong. Rec. S10910, S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). (“Too often victims of crime experience a secondary victimization at the hands of the criminal justice system.”). Thus, allowing victims to enforce the underlying protection orders in criminal contempt proceedings can help ameliorate or avoid the sometimes crushing effects of re-victimization.

In summary, historically, private prosecution by a victim in criminal contempt proceedings was both accepted and deeply rooted in an understanding of victims’ underlying private rights in the contempt action. This history is supported both by present-day jurisprudence and by strong modern public policy. The historical, case-specific, and public policy rationales for continuing to allow victims to vindicate their underlying private rights become even more compelling when viewed in light of the victims’ rights movement.

III. The History of Victim Participation is in Line with the Victims' Rights Movement

This strong history of private participation in the criminal justice system generally, and in contempt proceedings specifically, is in conformity with the current trend of the law resulting from the victims' rights movement, which emphasizes the importance of victim voice, and a victim's ability to vindicate private interests.

Although, as discussed above, private prosecution has always been a part of criminal prosecution in this country, the victim's role in criminal justice proceedings has not always been as strong as it is today. Victim involvement in the criminal justice system is generally thought to have reached its nadir in the 1970s – right around the time of this Court's decision in *Bloom*. During the 1970s, two distinct events occurred. First, Congress adopted the Federal Rules of Evidence; and second, this Court issued its opinion in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

a. The Nadir of Victim Participation in the United States

In 1975, Congress enacted the Federal Rules of Evidence, which were subsequently adopted by more than four-fifths of the states. *Beloof & Cassell, supra*, at 498. Rule 615 of the Federal Rules of Evidence provided, in part, that “[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. . . .” *Id.*

(quoting Fed. R. Evid. 615). The Rule also gave three limited exceptions to this general rule, none of which cleanly encompassed the victim-witness of a crime. *Id.* As a result, victims were routinely identified as witnesses and not allowed in the courtroom. *Id.* Thus, for all practical purposes, the majority of victims were completely excluded from the courtroom – a far cry from victims’ strong historical involvement in prosecutions.

Also in the 1970s, this Court decided the case *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). In *Linda R.S.*, the victim attempted to compel a Texas county prosecutor to charge the defendant for criminal non-support. *Id.* at 615-16. The Court found that the victim lacked standing to do so, and further noted in oft-quoted *dicta* (including in the Petitioner’s brief before the Court in this matter) that “in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.”⁵ *Id.* at 619.

⁵ Interestingly, under Texas law, the victim was not precluded from initiating private prosecution – she merely chose the wrong procedural mechanism for accomplishing enforcement. Rather than seeking to compel the prosecutor to move forward with the litigation, the victim could have directly approached a grand jury to charge the defendant. As Professor Beloof notes, “the seminal Texas case of *Hott v. Yarbrough* opined: ‘Equally clear is the right of any one who may consider himself aggrieved by the actual or supposed commission of a crime to call the matter to the attention of the grand jury for investigation and action.’” Douglas E. Beloof, *Weighing Crime*

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Despite the stark language of *Linda R.S.*, the Court also noted that “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” *Id.* at 617 n.3. This footnote was a key impetus to the victims’ rights movement.

b. The Beginnings of the Victims’ Rights Movement

Just as *Linda R.S.* and Rule 615 were marking the height of the victim-exclusion model of the American criminal justice system, a grass-roots movement emerged with the goal of protecting and enforcing victims’ rights. Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years after the President’s Task Force on Victims of Crime*, 25 New Eng. J. on Crim. & Civ. Confinement 21, 32-33 (1999). The movement was greatly helped by the issuance, in 1982, of the *President’s Task Force on Victims of Crime, Final Report* (1982), available at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf>. The Task Force concluded that, with this recent trend of exclusion and poor treatment of victims, the criminal justice system had “lost the balance that had been the cornerstone of its wisdom.”

Victims’ Interests in Judicially Crafted Criminal Procedure, 56 Cath. U. L. Rev. 1135, 1142 (2007) (quoting *Hott v. Yarbrough*, 245 S.W. 676, 678-79 (Tex. Comm’n App. 1922)).

Id. at 16. The Final Report set forth 68 recommendations for improving treatment of crime victims, including a proposal to amend the Sixth Amendment to the United States Constitution to ensure victims “in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.” *Id.* at 114.

c. The State of Victim Involvement Today

Although there has been no federal Constitutional amendment as envisioned by the Task Force, the victims’ rights movement has been hugely successful in advancing victims’ rights through federal and state legislation, state constitutional amendments, and case law. For instance, at the federal level, Federal Rule of Evidence 615, which previously excluded victims as a matter of right at the request of either party, now contains a fourth exception that allows victims to be present. *See* Fed. R. Evid. 615(4) (allowing “a person authorized by statute to be present”) *combined with* Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510 (allowing victims to be present at trial).

Additionally, in 2004, Congress passed the Crime Victims’ Rights Act, 18 U.S.C. § 3771 (CVRA). The CVRA provides victims of federal offenses with eight rights (including the right to attend proceedings); provides explicit standing for individual victims to assert rights in trial courts; and provides individual

victims the ability to seek rapid and mandatory appellate review if a trial court denies a right. The CVRA's explicit provision of trial and appellate standing marks a fundamental shift to recognize individual victims as legitimate participants in the system with legal rights. As Judge Kozinski recognized, writing for the panel, the CVRA rejects the assumption "that crime victims should behave like good Victorian children – seen but not heard." *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1013 (9th Cir. 2006).

At the state level, over 30 states have amended their constitutions to afford victims rights,⁶ and every state has passed statutes affording such rights.⁷

⁶ See, e.g., Ala. Const. Amend. art. I, § 6.01; Alaska Const. art. I, § 24; Ariz. Const. art. 2, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Conn. Const. art. I, § 8; Fla. Const. art. I, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; Ind. Const. art. 1, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. I, § 25; Md. Const. Decl. of Rights, art. 47; Mich. Const. art. I, § 24; Miss. Const. art. 3, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. 1, § 8; N.J. Const. art. I, ¶ 22; N.M. Const. art. II, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; Or. Const. art. I, § 42; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24(A); Tenn. Const. art. I, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. I, § 35; Wis. Const. art. I, § 9m.

⁷ See, e.g., Ala. Code §§ 15-23-60 to -84; Alaska Stat. § 12.61.010; Ariz. Rev. Stat. Ann. §§ 13-4401 to -4439; Ark. Code Ann. §§ 16-90-1101 to -1115; Cal. Penal Code §§ 679, 1102.6; Colo. Rev. Stat. § 24-4.1-302.5; Conn. Gen. Stat. Ann. § 54-203; Del. Code Ann. §§ 11-9401 to -9419; Fla. Stat. Ann. § 960.001; Ga. Code Ann. §§ 17-17-1 to -15; Haw. Rev. Stat. Ann. § 801D-1; Idaho Code § 19-5306; 725 Ill. Comp. Stat. Ann. 120/2; Ind. Code

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In addition to legislation, courts around the country – including this Court – have recognized the importance of victims’ voice in the criminal justice system. For instance, in *Morris v. Slappy*, the Court, in finding that a continuance to obtain defendant’s counsel of choice was properly denied, stated that “in the administration of justice, courts may not ignore the concerns of victims.” 461 U.S. 1, 14 (1983). In *Payne v. Tennessee*, the Court, in affirming a victim’s right to give a victim impact statement, also affirmed that “[j]ustice, though due to the accused, is due to the accuser also. . . . We are to keep the balance true.” 501 U.S. 808, 827 (1991) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)). See also *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (Kennedy, J.)

Ann. § 33-14-10-3; Iowa Code Ann. §§ 915.1-100; Kan. Stat. Ann. § 74-7333; Ky. Rev. Stat. Ann. § 421.500; La. Rev. Stat. Ann. § 46:1842; Me. Rev. Stat. Ann. tit. 15, § 6101; Md. Code Ann. § 27-760; Mass. Ann. Laws ch. 258B, §§ 1-13; Mich. Comp. Laws Ann. §§ 28.1287(751)-(911); Minn. Stat. Ann. §§ 611A.01 to -.78; Miss. Code Ann. §§ 99-43-1 to -49; Mo. Ann. Stat. § 595.209; Mont. Code Ann. §§ 46-24-101 to -213; Neb. Rev. Stat. Ann. §§ 81-1848 to -1850; Nev. Rev. Stat. Ann. §§ 178.569 to -5698; N.H. Rev. Stat. Ann. § 21-M:8-k; N.J. Stat. Ann. § 52:4B-36; N.M. Stat. Ann. § 31-26-2; N.Y. Exec. Law § 640-49; N.C. Gen. Stat. § 15A-825; N.D. Cent. Code § 12.1-34-02; Ohio Rev. Code Ann. § 2930.01; Okla. Stat. Ann. tit. 19, § 215.33; Or. Rev. Stat. § 147.410 *et seq.*; R.I. Gen. Laws § 12-28-2; S.C. Code Ann. §§ 16-3-1110 to -1505; S.D. Codified Laws §§ 23A-28C-1 to -5; Tenn. Code Ann. § 40-38-102; Tex. Crim. P. Code Ann. §§ 56.01, .09; Utah Code Ann. § 77-37-1; Vt. Stat. Ann. tit. 13, § 5303; Va. Code Ann. § 19.2-11.01; Wash. Rev. Code Ann. §§ 7.69.010, .030; W. Va. Code § 61-11A-1; Wis. Stat. Ann. § 950.01; Wyo. Stat. Ann. § 1-40-203.

(recognizing that not only the state, but victims, too, have an interest in finality of judgments for, “[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out”). See generally Beloof, *Judicially Crafted Criminal Procedure*, *supra*, at 1152-54 (discussing these cases in the context of victims’ rights and observing that crime victim interests are now impacting judicially crafted criminal procedure).

d. The Victims’ Rights Movement Has Successfully Reinforced the Desirability of Victim Participation in the Criminal Justice System Through Law Reform in All Jurisdictions

It is against this backdrop of expanding victims’ rights that one should consider the need for continued victim participation in the criminal justice system generally, and contempt proceedings specifically.

Victims’ involvement in private prosecution, like victims’ rights under the victims’ rights movement, is meant to assure that victims have a voice in the criminal justice system and power to vindicate private interests. As with criminal contempt proceedings, a victim’s right to participate need not be tied to the state. Victims’ rights legislation reflects a desire not to wed victims to the state, often including rights that are independent of the prosecutor. For instance, a majority of states allow a victim to make a statement at sentencing, without interference from the

state. See Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, Appendix I (2003). Additionally, victims may independently assert their right to restitution, absent state involvement. See *Melissa J. v. Superior Court*, 237 Cal. Rptr. 5, 6-7 (Cal. Ct. App. 1987) (allowing victim to petition court for relief directly when her restitution award was terminated, without notice).



CONCLUSION

While evolving notions of due process have amended, in part, the historical status of criminal contempt proceedings, the rise of victims' rights in federal law and the fifty states, and the rise of victim interests in judicially crafted criminal procedure, strongly counsels that due process should not move further in the direction of victim exclusion. As this Court recognized, "justice, though due to the accused, is due to the accuser also. . . . We are to keep the balance true." *Payne*, 501 U.S. at 827 (citing *Snyder*, 291 U.S. at 122). Thus, both an originalist interpretation, and evolving due process notions, recommend against further denigration of victim participation. Accordingly, criminal contempt proceedings should continue to be allowed to be brought in the name of,

and pursuant to the power of, the private person who has been affected by the underlying contempt.

Respectfully submitted,

DOUGLAS E. BELOOF

(Counsel of Record)

NORTHWESTERN SCHOOL OF LAW

OF LEWIS & CLARK COLLEGE*

10015 SW Terwilliger Boulevard

Portland, OR 97219

(503) 768-6749

beloof@lclark.edu

MARGARET GARVIN

ALISON F. WILKINSON

NATIONAL CRIME VICTIM LAW INSTITUTE

310 SW 4th Avenue, Suite 540

Portland, OR 97204

(503) 768-6819

Counsel for Amicus Curiae

*The business address of Professor Beloof is not meant to imply an institutional endorsement by the college.