

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
District of Columbia Court of Appeals**

**BRIEF OF *AMICUS CURIAE* NATIONAL
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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae the National Association of Criminal Defense Lawyers (“NACDL”) is a professional bar association that advances the mission of the nation’s criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL has more than 12,800 direct members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges. NACDL’s interest in this case is to ensure that criminal contempt actions are treated as “crimes in the ordinary sense” in accordance with Supreme Court precedent and that defendants in these actions are afforded all the rights and protections that flow from that treatment.

Given its purpose and focus, NACDL is vitally interested in the outcome of this case and in the proper interpretation and implementation of the procedures, rights and obligations in criminal contempt prosecutions for violations of civil protection orders specifically, and in all criminal contempt prosecutions more generally. Representing those who have been and will continue to be on the front lines of protecting criminal defendants’ rights, NACDL has a unique perspective that should prove

¹ The parties have consented to the filing of this brief. A letter of consent by each party is on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

helpful to the Court and may not be reflected in the parties' submissions.

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals' holding that a criminal contempt action is "properly brought in the name of a private person, here Ms. Watson, rather than in the name of the sovereign," (Cert. Pet. App. A. 15) is an unprecedented and unnecessary plunge into the uncharted and murky waters of private criminal prosecutions. Private criminal prosecutions were long ago left on the shores of England, which had nearly abandoned the practice at the time of the founding of the Republic. Private criminal prosecutions are contrary to the Constitution's basic conception of the criminal law, this Court's precedents, and more than two hundred years of practice in the colonies and states.

Private criminal prosecutions also are gravely offensive to due process and, if allowed, would result in reexamination of the applicability of numerous fundamental protections of the criminal process, including the power of the executive to pardon, the disclosure of exculpatory evidence mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and the Double Jeopardy Clause. If the Court were to allow private criminal prosecutions, the Court necessarily also would authorize complainants' private attorneys to serve as criminal prosecutors on behalf of their clients, an arrangement sufficiently threatening to actual and perceived fairness that this Court banned the practice in federal district courts in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S.

787 (1987). Many lower courts likewise have banned interested private prosecutors on ethical, constitutional, and other grounds. To take the next step and remove the sovereign from any control of a criminal action far exceeds the limits of fairness imposed by the Due Process Clause.

The Court of Appeals' radical departure from the Constitution not only was unjustifiable, it also was unnecessary. There are ample resources and many alternatives available to permit the sovereign to prosecute violations of civil protection orders and acts of domestic violence.

The Court of Appeals' decision must be reversed.

ARGUMENT

I. THE COURT OF APPEALS' DECISION DEPARTS FROM A CENTURY OF FEDERAL AND STATE AUTHORITY HOLDING THAT CRIMINAL CONTEMPT PROSECUTIONS ARE ACTIONS BROUGHT ON BEHALF OF THE SOVEREIGN, NOT PRIVATE PARTIES.

Petitioner Robertson's brief establishes the ancient pedigree of a "crime" as a public wrong prosecuted in the name of the sovereign and the Framers' reliance on that premise throughout the Constitution. For a century, this Court uniformly has applied that bedrock principle to criminal contempts. Time and again, this Court has treated a criminal contempt as "a crime in the ordinary sense." *United States v. Dixon*, 509 U.S. 688, 696 (1993) (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)).

Criminal contempts are crimes against the sovereign, even when:

1. the contempt proceeding is initiated by a private party, *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444-45 (1911) ("Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause."); *Gompers v. United States*, 233 U.S. 604, 610 (1914) ("These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech.");

2. the contempt arises from a violation of a court order in a civil dispute between private parties, *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988) ("The fact that the allegedly criminal conduct concerns a violation of a court order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States."); and

3. the contempt action is prosecuted by private counsel for a party rather than a public prosecutor, *Dixon*, 509 U.S. at 727 n.3 (White, J., concurring in the judgment in part and dissenting in part) ("That the contempt proceeding was brought and prosecuted by a private party . . . is immaterial."); *Young*, 481 U.S. at 804 ("Private attorneys appointed to prosecute a criminal contempt action

represent the United States, not the party that is the beneficiary of the court order allegedly violated.”).

State supreme courts agree that criminal contempts are crimes to be prosecuted in the name of the state. In *Denny v. State*, 182 N.E. 313, 321 (Ind. 1932), the court held “[t]hat the information for a criminal contempt should be entitled ‘State of Indiana v. the defendant’ and filed as an independent action and prosecuted by the state.” In *Peterson v. Peterson*, 153 N.W.2d 825, 830 (Minn. 1967), the court explained that “criminal contempts are offenses against the dignity of the state as a whole. . . . [;]criminal contempt is not a proceeding in the action out of which the alleged contempt arose, but is collateral to it” In *Leeman v. Vocelka*, 32 N.W.2d 274, 278 (Neb. 1948), the court held that criminal contempt “could only be prosecuted in the name of the State....” *Accord City of Lawton v. Barbee*, 782 P.2d 927, 930 (Okla. 1989) (prosecution for criminal contempt is criminal in nature and must be prosecuted in the name of the state); *State ex. rel. Koppers Co., Inc. v. International Union of Oil, Chem. and Atomic Workers*, 298 S.E. 2d 827, 829 (W. Va. 1982) (“A criminal contempt should be brought in the name of the State.”).

State courts also agree that it matters not whether a criminal contempt proceeding arises from a civil action, is initiated by a private party, or is prosecuted by a private party’s counsel. It is still deemed to be one brought by the state. *See, e.g., Marcisz v. Marcisz*, 357 N.E.2d 477, 479-80 (Ill. 1976) (criminal contempt prosecution for violation of divorce decree was brought in the name of the

People); *Peterson*, 153 N.W.2d at 828-29 (criminal contempt is “conduct offensive to the dignity of the state as a whole” and is between the alleged contemnor and the State of Minnesota); *McDermott v. McDermott*, 602 N.W.2d 676, 679 (Neb. Ct. App. 1999) (criminal contempt action for violation of visitation order is brought “in the name of the State”); *Disabatino v. Salicete*, 671 A.2d 1344, 1352 (Del. 1996) (contempt action for violation of Family Court restraining order is “between the public and the defendant”) (internal quotation omitted); *Barbee*, 782 P.2d at 930 (holding that all criminal contempt actions “must be prosecuted in the name of the State”); *State ex rel. Anderson v. Daugherty*, 191 S.W. 974 (Tenn. 1916) (privately prosecuted criminal contempt action is “between the public and the accused”) (internal quotation omitted).

A few states allow a complainant’s counsel to serve as the prosecutor of a crime other than contempt, usually a misdemeanor. In those instances, the prosecutions likewise are deemed ones brought on behalf of the state. *See Cronan ex rel. State v. Cronan*, 774 A.2d 866, 880, 871 n.3 (R.I. 2001) (“Although they were privately employed [by the alleged victim of a domestic assault], the attorneys who prosecuted this case represented the state.”); *State v. Storm*, 661 A.2d 790, 793 (N.J. 1995); *State v. Riser*, 294 S.E.2d 461, 465 (W. Va. 1982); *State v. Westbrook*, 181 S.E.2d 572, 583 (N.C. 1971), *vacated on other grounds*, 408 U.S. 939 (1972) (mem.) (“The prosecuting attorney, whether the solicitor or privately employed counsel, represents the State.”); *Robinson v. State*, 68 So. 649, 654 (Fla. 1915); *State v. Valentine*, 864 A.2d 433, 434 (N.J.

Super. Ct. App. Div. 2005) (stating that a victim’s attorney who prosecuted the defendant for simple assault stemming from a domestic dispute “represented the State at trial”).

This universal treatment of criminal contempts as actions on behalf of the sovereign was the underpinning of this Court’s decision in *Dixon*, which addressed the identical statute under which Mr. Robertson was prosecuted—D.C. Code § 16–1005(f). In *Dixon*, this Court considered whether a successful prosecution of Michael Foster for criminal contempt under D.C. Code § 16-1005(f) for violating a CPO by assaulting the CPO holder raised a jeopardy bar to his subsequent prosecution for assault by the United States. The contempt prosecutor of Foster was the CPO holder’s private attorney, not the United States Attorney. In analyzing whether the double jeopardy bar applied to Foster’s subsequent prosecution, this Court proceeded with the unstated assumption that the United States was the true party-in-interest to Foster’s criminal contempt prosecution for the CPO violation, even though Ana Foster’s attorney served as the prosecutor. This Court stated that the offense of criminal contempt established by D.C. Code § 16-1005(f) “is a crime in the ordinary sense,” 509 U.S. at 696, and held it “obvious” that the § 16-1005(f) contempt action raised a jeopardy bar to the subsequent assault prosecution. *Id.* If this Court had not assumed that the private criminal contempt prosecution for CPO violations was brought on behalf of, and in the name of, the United States, the Court could not have held that Foster’s subsequent assault prosecution was barred. *See, e.g., Heath v.*

Alabama, 474 U.S. 82, 88 (1985) (double jeopardy bar does not generally apply when dual sovereigns prosecute the same conduct). *Dixon* is therefore flatly inconsistent with the Court of Appeals' holding that Robertson's prosecution under § 16-1005(f) was not brought on behalf of the United States but instead was a wholly private action by the CPO holder.

II. PRIVATE INTERESTED PROSECUTORS THREATEN THE ACTUAL AND PERCEIVED FAIRNESS OF CRIMINAL PROCEEDINGS. TO GO FURTHER, AND REMOVE ANY ROLE FOR THE SOVEREIGN, WOULD CLEARLY VIOLATE DUE PROCESS.

Although the constitutionality of private interested prosecutors is not expressly presented as an issue in this case, a ruling upholding private criminal prosecutions would *de facto* permit private attorneys for interested parties to conduct these private criminal prosecutions. Some courts, including this Court, have found that the use of private interested criminal prosecutors creates too great a risk of conflicts of interest and unfairness and have banned the practice on non-constitutional grounds. Others have found that the threat to criminal defendants' rights and to the public perception of justice is so great that the practice has been deemed a violation of due process.

This Court, in a line of decisions beginning with *Berger v. United States*, 295 U.S. 78 (1935), has recognized that prosecutors, as "servant[s] of the

law,” play a unique and critical role in the nation’s administration of criminal justice. *Id.* at 88. In *Berger*, the Court emphasized that the obligation of prosecutors is not to win cases but to “govern impartially” and to see “that justice shall be done.” *Id.* Prosecutors are public officials who serve the public interest. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). And, because they wield the substantial resources of the State to investigate and prosecute individuals, this Court requires assurance that “those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.” *Young*, 481 U.S. at 814. See also *Cheney v. United States Dist. Court for Dist. of Columbia*, 542 U.S. 367, 386 (2004) (noting that the decision to prosecute a criminal case is made by a publicly accountable prosecutor under an ethical obligation to serve the cause of justice). Ethics rules likewise impose special obligations on prosecutors as “ministers of justice.” See Model Rules of Professional Conduct R. 3.8; *id.* at Comment [1] (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”). A prosecutor’s ethical duties include “specific obligations to see that the defendant is accorded procedural justice,” such as the duty to disclose evidence that negates the guilt of the accused or mitigates his punishment. *Id.*

The obligation of an attorney representing a private party is not, however, to do justice. She is ethically required to zealously represent her client and to make the client’s interests paramount, within the bounds of the law. See *Young*, 481 U.S. at 807.

See also Model Rules of Professional Conduct, Preamble [9]; Rule 1.2.

In *Young*, this Court placed clear limits on the appointment of private prosecutors in criminal contempt actions. The Court held that counsel for a party that is the beneficiary of a court order may not be appointed to undertake a criminal contempt prosecution for alleged violations of that order. 481 U.S. at 809. With unmistakable clarity, the Court noted that private attorneys appointed to prosecute a criminal contempt action “represent the United States, not the party that is the beneficiary of the court order allegedly violated,” are “appointed solely to pursue the public interest in vindication of the court’s authority,” and “should be as disinterested as a public prosecutor who undertakes such a prosecution.” *Id.* at 804. Observing that the Government’s interest is in the dispassionate assessment of the propriety of a charge for criminal contempt—while a private party’s interest is in obtaining the benefits of the court order—the Court noted that these interests may be at odds, creating an unacceptable risk of a conflict of interest. *Id.* at 805-06. Because of this conflict and the clear opportunity for interested private counsel to base prosecutorial decisions on the client’s best interests rather than the public’s, this Court, exercising its supervisory authority, barred lower federal courts

from appointing interested counsel to prosecute criminal contempt actions. *Id.* at 809.²

Like this Court in *Young*, state courts have recognized the clear ethical conflict, as well as the resulting danger to defendants, when interested private counsel are appointed to prosecute criminal contempt actions. In *Rogowicz v. O'Connell*, 786 A.2d 841, 844 (N.H. 2001), the Supreme Court of New Hampshire reversed the conviction of a defendant for criminal contempt arising from his violation of a civil protective order. Following the reasoning of *Young*, the court held that interested private counsel cannot prosecute criminal contempt actions in the courts of New Hampshire. The court found the inherent conflict between a prosecutor's duty to pursue justice on behalf of the public and a private prosecutor's duty of loyalty to her client created an intolerable risk to the rights of the criminal defendant. *See id.*

Other state courts also have adopted the reasoning of *Young*. *See Disabatino*, 671 A.2d at 1352-53 (state courts of Delaware cannot appoint interested party's counsel to prosecute criminal contempt arising from Family Court proceeding or other civil litigation); *Dept. of Soc. Services v. Montero*, 758 P.2d 690, 693 (1988) (counsel for beneficiary of court order may not prosecute criminal contempt action).

² In a concurring opinion, Justice Blackmun stated that he "would hold that the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." *Young*, 481 U.S. at 814-15.

The Supreme Court of West Virginia went further, finding a violation of due process when criminal contempt charges were prosecuted by private lawyers representing a party that had obtained an underlying civil injunction. *International Union of Oil, Chem. & Atomic Workers*, 298 S.E.2d at 832. The court reasoned that “the apparent conflict of interest and pressure of ‘wearing two hats’ militates against permitting a party’s private counsel to prosecute a criminal contempt charge stemming from a civil suit,” noting that “[j]ustice is better served by avoiding appearances of impropriety and of inherent conflicts of interest, presented when a private party’s counsel in a civil suit is permitted to prosecute a criminal contempt against an opposing party.” *Id.* at 830-31. *See also Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969) (criminal contempt prosecution of labor union and officials by counsel for beneficiary of injunction violated due process).

Some states, citing the principles of *Young*, have eliminated their practice of allowing counsel for complainants to serve as private prosecutors of minor criminal offenses.³ The Appellate Division of New York recently held that an attorney retained by a complainant cannot serve as a private prosecutor. *See In the Matter of Sedore*, 56 A.D. 3d 60 (2d Dept. 2008). The court found that differences between a prosecutor’s ethical duties to the public and a private

³ Many states abolished this practice long ago. *See, e.g., Commonwealth v. Gibbs*, 70 Mass. (4 Gray) 146, 147 (1855); *Biemel v. State*, 37 N.W.2d 244, 247 (Wis. 1888).

prosecutor's ethical duties to his client (the complainant) create an intolerable conflict of interest. *Id.* at 67. The court further elaborated:

At bottom, the prosecution of a criminal offense is a public function, not a private one ... "The idea that the criminal law, unlike other branches of the law such as contracts and property, is designed to vindicate public rather than private interests is now firmly established. The participation of a responsible public officer in the decision to prosecute and in the prosecution of charges gives greater assurance that the rights of the accused will be respected...The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions that are not consonant with our traditions of justice." (ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Commentary, Standard 3-21 (3d ed. 1993)). Prosecution of a criminal complaint by an attorney retained by the complaining witness is simply inconsistent with these principles.

Id. at 68.

Other states have severely limited interested private prosecutions, not only due to the ethical issues presented but also due to "the dangers they

pose both to the rights of criminal defendants and to the sound administration of justice.” *State v. Martineau*, 808 A.2d 51, 53 (N.H. 2002) (limiting interested party prosecutors to criminal offenses which cannot be punished by imprisonment). See also *Meister v. People*, 31 Mich. 99, 106 (Mich. 1875) (criminal prosecution should not be entrusted to those who may be tempted to use it for private ends); *Flege v. State*, 142 N.W. 276, 277 (Neb. 1913) (appointment of private prosecutor not in interest of impartial trial); *Waldron v. Tuttle*, 4 N.H. 149, 151 (N.H. 1827) (emphasizing that prosecutions by private counsel “are often commenced in very doubtful cases and for the most trivial offences and are not infrequently found to originate in private quarrels and to be carried on to vex and harass an opponent.”)

Other states historically have allowed private parties to employ counsel to assist public prosecutors. Even in those cases, however, when a public prosecutor serves as co-counsel, courts have found violations of state or federal constitutional due process protections. In *Cantrell v. Virginia*, 329 S.E.2d 22 (Va. 1985), a private attorney assisting the public prosecutor in a murder prosecution also represented the victim’s parents who were seeking to have custody of the defendant’s child transferred to them as grandparents. The Supreme Court of Virginia noted that the likelihood of conflict between a lawyer’s duty to represent the interests of a civil client and his duty, as a prosecutor, to administer the criminal law impartially in the interests of justice, rises to the level of an “overwhelming probability.” *Id.* at 26. The court found a violation

of the defendant's state constitutional due process rights and *per se* reversible error because "a private prosecutor having a civil interest in the case so infects the prosecution with the possibility that private vengeance has been substituted for impartial application of the criminal law, that prejudice to the defendant need not be shown." *Id.* See also *State v. Eldridge*, 951 S.W.2d 775, 782 (Tenn. App. 1997) ("We have no hesitation in concluding that the participation by special prosecutors who represent the victim in a civil matter arising from the same incident giving rise to the criminal prosecution is a violation of the defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as the Law of the Land provision in Article I, Section 8 of the Tennessee Constitution.").

In *State v. Harrington*, the Supreme Court of Missouri banned all participation by private prosecutors: "the practice of allowing *private* prosecutors, employed by *private* persons, to participate in the prosecution of criminal defendants, is inherently and fundamentally unfair." 534 S.W.2d 44, 48 (Mo. 1976) (emphasis in original). The court found "intolerable" the entry of an interested private prosecutor—who owes a complete duty of loyalty to his client—into prosecutorial decisions such as whether to indict and prosecute, what evidence to submit, whether to engage in plea bargain negotiations, and what punishment to recommend to the court. *See id.* at 50.

The federal courts, considering state prisoners' federal habeas corpus petitions, have found federal

due process violations “when a private prosecutor...effectively control[s] crucial prosecutorial decisions,” such as “whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant.” *East v. Scott*, 55 F.3d 996, 1000 (5th Cir. 1995) (quoting *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1989)). See also *Webber v. Scott*, 390 F.3d 1169, 1176 (10th Cir. 2004).

Commentators have urged that it is finally time to end the anachronistic practice of allowing interested private prosecutors to participate in criminal trials, and to apply the same rules to prosecutors that prohibit biased or improperly-influenced judges, juries and defense attorneys. See, e.g., Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 Cap. Def. J. 279 (2001); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 557-58 (1994); Patricia Moran, Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Civil Procedure*, 54 Fordham L. Rev. 1141, 1149 (1986); Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 Am. U. L. Rev. 754 (1975). The ABA’s Standards of Criminal Justice also disapprove of the use of private prosecutors. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Commentary, Standard 3-21 [3d ed. 1993] (“The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline.”)

The grave risks to fairness posed by interested private prosecutors may well be enough to ban the practice as violative of the Due Process Clause. The private criminal action created by the Court of Appeals in this case pushes farther into the realm of unfairness and conflicts of interest. Deeming the sovereign the real party at least allows a public prosecutor to be substituted as the prosecutor. *See, e.g., Cronan*, 774 A.2d at 875. Replacement of an interested private prosecutor by the public prosecutor may become necessary in a particular case to secure the fundamental goal of a criminal prosecution—to do justice—and to take practical steps to achieve that goal. Those steps include taking actions to avoid the double jeopardy impact of a criminal contempt prosecution⁴, moving to dismiss frivolous and vindictive prosecutions, plea bargaining, securing cooperation in the prosecution of others, and more generally exercising prosecutorial discretion. These options would no longer be available in the private criminal action for contempt created by the Court of Appeals. The CPO holder would exercise complete control, including the right to exclude the public prosecutor.

⁴ In *Dixon*, Justice White expressed the hope that the potential for a double jeopardy bar arising from a CPO criminal contempt action would facilitate “cooperation between the government and parties bringing contempt proceedings.” *See* 509 U.S. at 730 (White, J.). However, if a private party is deemed the real party in interest, the United States Attorney or any other public prosecutor would face obstacles in preventing the bar if the private party refused to stay or dismiss “her” action.

Another risk to fairness posed by the Court of Appeals' newly minted cause of action is the unknown that lies ahead. When a prosecution is brought on behalf of the sovereign, even if brought by an interested private prosecutor, the rules are clear. By contrast, in a new world of private criminal actions, the rules are anything but clear. Does *Brady v. Maryland* and its progeny apply if the criminal contempt action is prosecuted on behalf of a private individual, rather than the State? Do private attorneys representing private parties in these private criminal actions have the absolute immunity enjoyed by public prosecutors from civil liability to acquitted criminal defendants? See, e.g., *State (Haas Complainant) v. Rollins*, 533 A.2d 331 (N.H. 1987) (private prosecutors do not have absolute prosecutorial immunity). Can a defendant still seek clemency or a pardon from the executive if he was not prosecuted in the name of the sovereign? See *Ex Parte Grossman*, 267 U.S. 87, 121 (1925) (holding that Article II pardon power extends to criminal, but not civil, contempt convictions imposed in federal courts). Will all of the other rights afforded criminal contempt defendants, including the privilege not to testify and to proof beyond a reasonable doubt, now be in play as creative, zealous private attorneys for CPO holders or other complainants litigate this new cause of action? How are vindictive or malicious prosecutions systematically prevented if there is no government oversight or prosecutorial discretion? Affirming the Court of Appeals' opinion will create a host of uncertainties for the litigants, courts, and legislatures of those jurisdictions that waded into the uncharted waters of private criminal actions. If the

enforcement of a CPO through criminal contempt is not undertaken in the name of the sovereign, carefully constructed rights, obligations, and rules of criminal practice are susceptible to challenge and re-litigation.

Emotionally charged CPO criminal contempt actions present an especially high risk of prosecutions that are meritless or intended to advance collateral objectives. Professor Mary M. Cheh, now a Councilmember on the District of Columbia's legislative body, addressed a District of Columbia trial court decision permitting the use of interested private prosecutors in CPO criminal contempt actions, expressing serious reservations about the practice:

[T]here remains the concern that lies at the heart of disinterestedness: a doubt whether the case would have been brought at all, and whether it was brought to gain advantage in collateral matters. These concerns are real and not adequately accounted for by a rule that simply declares CPO contempt to be different from other contempt....A victim in a CPO enforcement can have one or more conflicts, ranging from spite and vindictiveness to seeking an advantage in related litigation involving divorce, child custody, or award of alimony and child support.

Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding

and Transcending the Criminal-Civil Law Distinction, 42 Hastings L.J. 1325, 1409-11 (1991)

Because the private criminal action offends the Due Process Clause, this Court should not permit its use.

III. PRIVATIZING CRIMINAL CONTEMPT IS AN UNNECESSARY RESPONSE TO DOMESTIC VIOLENCE AND IS CONTRARY TO THE PRINCIPLE THAT SUCH CRIMES ARE OFFENSES AGAINST THE STATE.

Although such a radical departure from the Constitution can never be justified, the Court of Appeals' creation of a private criminal action was also unnecessary. There are ample resources and alternatives available for prosecutions by the sovereign of domestic violence offenses, including violations of civil protection orders.

A. Privatizing Criminal Contempt Is Not Crucial to Domestic Violence Enforcement.

During the past 30 years virtually all U.S. jurisdictions have enacted strong and significant legislation to protect women from violence.⁵ One of

⁵ See, e.g., Elizabeth M. Schneider, *Domestic Violence Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 Fam. L.Q. 353, 353-4 (2008) ("It is safe to say that in no aspect of family law has there been more dramatic change than in the law of domestic violence. Fifty years ago, domestic violence was not even recognized as a subject of study or as a legal problem—it was simply invisible

the most far-reaching legislative initiatives has been the Violence Against Women Act (“VAWA”),⁶ passed by Congress in 1994. VAWA was the nation’s first attempt at a multi-pronged legal response to violence against women, and the law “remains both a practical tool for dealing with violence against women and a symbol of national commitment to eradicate the problem.”⁷ Indeed, “[s]ince the passage of VAWA, there has been a paradigm shift in how the issue of violence against women is addressed in communities throughout the nation.”⁸

In testimony before the Senate Judiciary Committee, domestic violence expert Karen Tronsgard-Scott summarized some of the remarkable advances in protecting women from violence since VAWA’s passage:

VAWA has unquestionably improved the national response to domestic violence. Since VAWA passed in 1994,

.... Today, intimate violence is recognized as a serious harm—a harm within intimate relationships that has an impact on every aspect of the law”).

⁶ Pub. L. No. 103-322, 108 Stat. 1902 (1994). VAWA was reauthorized in 2000 and 2005.

⁷ Sally F. Goldfarb, *The Legal Response to Violence Against Women in the United States of America: Recent Reforms and Continuing Challenges*, 1 (July 30, 2008) (Paper Presented to the United Nations Expert Group Meeting on Good Practices in Legislation on Violence Against Women, Vienna, Austria).

⁸ Press Release, U.S., Dept. of Justice, Office of Public Affairs, *Justice Department Commemorates Fifteen Years of the Violence Against Women Act*, 1 (Sept. 14, 2009) (“DOJ VAWA Press Release”).

states have passed more than 660 laws to combat domestic violence, sexual assault and stalking. More victims report domestic violence to the police....The rate of non-fatal intimate partner violence against women has decreased by 63%. Remarkably, the number of individuals killed by an intimate partner has decreased 24% for women and 48% for men.

Prior to VAWA, most police officers were not adequately trained to handle incidents of domestic and sexual violence and would routinely fail to make arrests or collect appropriate evidence VAWA has helped to change this⁹

Tronsgard-Scott concluded that VAWA “is working,” explaining that “[s]ervice providers, law enforcement officers, prosecutors, judges, and others in the continuum of services are coordinating their efforts to ensure that victims and their families are independent and safe.”¹⁰

⁹ Karen Tronsgard-Scott, Director of the Vermont Network Against Domestic and Sexual Violence, Testimony Before the Senate Judiciary Committee, 2009 WLNR 11110754 at *3 (June 10, 2009). (“Tronsgard-Scott Senate Testimony”).

¹⁰ *Id.* at *5. *See also* U.S. Dept. of Justice, Office on Violence Against Women, 2006 Biennial Report to Congress on the Effectiveness of Grant Programs Under the Violence Against Women Act (2006).

Only a few months ago President Barack Obama commemorated the fifteenth anniversary of VAWA's passage, issuing a proclamation praising "[t]his landmark achievement" and recognizing the nation's "great strides towards addressing this global epidemic" of violence against women.¹¹ President Obama emphasized that:

[VAWA] directed all 50 States to recognize and enforce protection orders issued by other jurisdictions, and it created new Federal domestic violence crimes. The law also authorized hundreds of millions of dollars to communities and created a national domestic violence hotline [I]t ushered in a new era of responsibility in the fight to end violence against women. In the 15 years since VAWA became law, our Nation's response to domestic violence, dating violence, sexual assault, and stalking has strengthened. Communities recognize the special needs of victims [D]edicated units of law enforcement officers and specialized prosecutors have grown more numerous than ever before. Most importantly, victims are more likely to have a place to turn for help—for emergency shelter and crisis

¹¹ Barack Obama, Presidential Proclamation, Fifteenth Anniversary of the Violence Against Women Act, 1 (Sept. 14, 2009) ("Obama Proclamation"), at 1.

services, and also for legal assistance
¹²

In fact, Presidents from both sides of the aisle have praised “our progress” and the “success of the VAWA,” concluding that “[w]ith increased awareness, strengthened prevention, and communities united in common cause, we are making the reduction of domestic violence a reality”¹³ Much of this progress can be attributed to the

¹² *Id.* at 1. The President was not alone in his praise of the significant resources dedicated to the cause and the “great strides” that have been made. *See, e.g.*, Vice President Joseph Biden, quoted in DOJ VAWA Press Release, *supra* note 8 (praising the “tremendous progress” in combating violence against women since 1994); Attorney General Eric Holder, quoted in *id.* at 1 (“The Violence Against Women Act forever changed the way this nation meets our responsibility to survivors of domestic violence and sexual assault.”); Catherine Pierce, Acting Director of the Office on Violence Against Women, 1994-2009: Commemorating 15 Years of the Violence Against Women Act, *available at* www.ovw.usdoj.gov/director-vawa15msg.htm (last visited Feb. 2, 2010) (“I encourage you to reflect on where we were before, before the VAWA, and where we are now Practitioners in the criminal justice system better understand the complex responses needed to address domestic violence, sexual assault, dating violence, and stalking.”); Sen. Patrick Leahy, Testimony Before the Senate Judiciary Committee, 2005 WLNR 11348702 at *2 (July 19, 2005) (“Our Nation has made remarkable progress over the past 25 years in recognizing that domestic violence and sexual assault are crimes. We have responded with better laws, social support and coordinated community responses.”).

¹³ Proclamation, No. 7230, 64 Fed. Reg. 54, 197 (Sept. 30, 1999) (President William J. Clinton) (“Clinton Proclamation”) (“We can take heart in our progress Americans have united in the crusade against domestic violence.”); *see also* Proclamation, No. 7938, 70 Fed. Reg. 58285 (Sept. 30, 2005)

“historic levels of funding for the Violence Against Women programs at the Department of Justice....”¹⁴ Indeed, when VAWA was enacted it authorized \$1.62 billion in federal monies to support a wide range of initiatives, including training police, prosecutors and judges.¹⁵

VAWA also focused specifically on improving the nationwide use of civil protection orders. Today, the CPO has been recognized as “a major innovation in the states’ legal response to domestic violence” and has “been authorized by statute in every statute and [is] now the most frequently used legal remedy for domestic violence.”¹⁶ Just three years after VAWA was passed, the U.S. Department of Justice (“DOJ”) created the National Center for Full Faith and Credit (“NCFCC”) “to respond to the mandate in VAWA that States and tribes enforce protection orders issued by other jurisdictions.”¹⁷ Since 2005, NCFCC has trained more than 5,300 judges and law enforcement officers under this program.¹⁸

(President George W. Bush) (“Bush Proclamation”) (“We are making progress in the fight against violence in the home. Over the past decade, the domestic violence rate has declined by an estimated 59 percent.”).

¹⁴ Bush Proclamation, *supra* note 13.

¹⁵ See, e.g., Goldfarb, *supra* note 7, at 2, 14 (also noting that “[t]he outpouring of federal funds triggered by VAWA has had enormous positive impact”).

¹⁶ Goldfarb, *supra* note 7, at 5.

¹⁷ Catherine Pierce, Director of the Office for Victims of Crime, U.S. Dept. of Justice, Testimony before the Senate Judiciary Committee, 2009 WLNR 11110728 at *4 (June 10, 2009) (“Pierce Senate Testimony”).

¹⁸ *Id.* Moreover, in 2005 VAWA funding supported the

The U.S. Department of Justice reports that its efforts to promote the use and enforcement of CPOs are working.¹⁹ Indeed, protective orders have thus been “among the most effective legal remedies for domestic violence”²⁰ in jurisdictions *without* a private action for criminal contempt. Even though the nature of CPOs—as well as their enforcement—can and do vary across the nation,²¹ other jurisdictions have helped make CPOs one of the “most effective legal remedies for domestic violence” *without* resorting to constitutionally infirm legislation such as private criminal contempt actions.²²

creation and distribution of nearly 8,000 copies of “A Guide for Effective Issuance—Enforcement of Protective Orders,” which was developed “to give communities and professionals the tools and strategies to strengthen the effectiveness of protection orders.” *Id.* VAWA funding has also financed “Project Passport,” a program designed “to encourage courts to issue uniform protection orders and thereby enhance nationwide enforcement.” *Id.*

¹⁹ DOJ VAWA Press Release, *supra*, at 1 (Sept. 14, 2009). *See also* Tronsgard-Scott Senate Testimony, *supra* note 9, at *4 (“[t]he data shows that these grants are working”).

²⁰ Goldfarb, *supra* note 7, at 6.

²¹ *See, e.g.*, Richard A. Leiter, Family Law, 50 State Statutory Surveys (2007), *available on Westlaw at* 0080 SURVEYS 19.

²² Prosecutors in other jurisdictions often possess a wide variety of options for enforcing violations of protective orders. According to the U.S. Department of Justice: “Criminal sanctions are the most common mechanism used to enforce protective orders. The violator may be charged with a felony, a misdemeanor, or contempt of court; however, in most states, felony treatment is reserved for repeat violations or aggravated offenses. In some states a combination of these options may

Finally, even if the impressive advances described above had not occurred, privatizing criminal contempt still could not be justified as a method for combating domestic violence. As a plurality of this Court recently explained: “Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State’s arsenal.”²³

apply Protective order violations can also provide the basis for several other related penalties, such as bail forfeiture; bail, pretrial release, or probation revocation; imposition of supervision; and incarceration Several states have created additional sanctions for violation of protective orders. Counseling may be ordered in some states” See Office for Victims of Crime, U.S. Dept. of Justice, Enforcement of Protective Orders, Legal Series Bulletin #4, 2 (Jan. 2002) (citing numerous state statutes authorizing a variety of enforcement options for CPOs). In addition, more than 200 domestic violence courts have proliferated over the past two decades in the United States, providing specialized fora dedicated to addressing violence against women and other domestic violence matters. See, e.g., Samantha Moore, Two Decades of Specialized Domestic Violence Courts, Center for Court Innovation (Nov. 2009), at 2. Moreover, the Crime Victims’ Rights Act of 2004, 18 U.S.C. § 3771, ensures that in most cases crime victims are not excluded from any public court proceeding and that such victims have a right to be reasonably protected from the accused.

²³ *Giles v. California*, 128 S. Ct. 2678, 2693 (2008) (Scalia, J., plurality opinion).

B. Privatizing Criminal Contempt Contradicts the Objective of Domestic Violence Law to Recognize Domestic Violence as a Crime Against the State and Not Merely a Private Dispute between Individuals.

One of the most significant features of Federal, state and local domestic violence laws is that these offenses are crimes against the State. Domestic violence advocates,²⁴ legislators,²⁵ courts,²⁶ and

²⁴ See, e.g., Anthony C. Thomson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 New Eng. J. on Crim. & Civ. Confinement 119, 158-59 (2009) (“shelter activists began to ‘push the criminal justice system to treat domestic violence as a crime against the state and as a matter of public concern rather than as a private, family matter’”) (internal citation omitted).

²⁵ See, e.g., Law Enforcement Response to Domestic Violence Act, Stats. 1984, ch. 1609 (California) §§ 13700-13731 (purpose of the act is “to address domestic violence as a serious crime against society and to assure the victims of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide”); Prevention of Domestic Violence Act of 1991, N.J. Stat. Ann. § 2C:25-18 (2010) (New Jersey) (“The legislature finds and declares that domestic violence is a serious crime against society It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.”); Domestic Violence Act, Wash. Rev. Code § 10.99.010 (2009) (Washington State) (act is designed to “recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse”); Domestic Violence Prevention Act, R.I. Gen. Laws § 12-29-1(a) (2009) (Rhode Island) (purpose of act “is to recognize the importance of domestic violence as a serious crime against society and to assure victims of domestic violence the maximum protection

commentators²⁷ have all appropriately recognized

from abuse which the law and those who enforce the law can provide”); Domestic Violence Crime Prevention Act, Idaho Code Ann. § 39-6302 (2009) (Idaho) (“The purpose of this act is to address domestic violence as a serious crime against society and to assure the victims of domestic violence the protection from abuse which the law and those who enforce the law can provide.”).

²⁶ See, e.g., *Crespo v. Crespo*, 972 A.2d 1169, 1176 (N.J. Super. Ct. App. Div. 2009) (“we recognize [] the strong societal interest in protecting persons victimized by domestic violence”); *Danny v. Laidlaw Transit Services, Inc.*, 193 P.3d 128, 132 (Wa. 2008) (recognizing the Washington State legislature’s intent that domestic violence be treated as a “crime against society”); *State v. Russell*, 890 A.2d 453, 461 (R.I. 2006) (recognizing the Rhode Island legislature’s intent that domestic violence is “a serious crime against society”); *People v. Jungers*, 25 Cal. Rptr. 3d 873, 878 (Cal. Ct. App. 2005) (finding that “[t]he elimination of domestic violence is a compelling state interest” and quoting the legislature’s intent that domestic violence is “a serious crime against society”); *Commonwealth v. Hatfield*, 593 A.2d 1275, 1276 (Pa. Super. Ct. 1991) (“The case law is thus consistent in memorializing the recognition that domestic violence is no less a crime against society because the victim is married to the perpetrator.”); Adam J. MacLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 Berkeley J. Crim. L. 31, 52-53 (2008) (“Testifying in front of the Family Justice Subcommittee of the Oregon House Judiciary Committee, Stephen Herrell, an Oregon Circuit Court judge offered the manifestly Blackstonian argument that domestic violence is not merely a domestic affair but also a crime against the State.”) (internal citations omitted).

²⁷ See, e.g., Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of “Domestic Violence Context”*, 13 Lewis & Clark L. Rev. 711, 712-13 (2009) (“As part of the historic movement to treat domestic violence as a crime, prosecutors in the 1970s began changing the way these cases were handled. No longer were victims routinely permitted to ‘drop charges.’ Domestic violence was now a crime ‘against the state’ and, accordingly,

that violence against women is a crime against society and the State. The Sixth Circuit has explained that “[o]ne reason why our society has taken so long to accept domestic violence as a crime against society is the fact that it typically does not occur in public places among strangers, but in the privacy of one’s own home among intimate partners.” *United States v. Page*, 167 F.3d 325, 329 (6th Cir. 1999) (citing Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act after Lopez*, 96 Colum. L. Rev. 1876, 1886 & n.38 (1996)). Not only do increasing numbers of people and jurisdictions currently view domestic violence as a crime against the State, but protective orders themselves are now viewed to “convey *society’s* message that abusive behavior will not be tolerated.”²⁸

Holding that a criminal contempt prosecution for violation of a CPO is undertaken on behalf of, and in

decisions regarding charging and case outcomes were as a matter of course made by prosecutors—not by victims.”) (internal citations omitted); Jennifer R. Hagan, *Can We Lose the Battle and Still Win the War? The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DePaul L. Rev. 919, 978 (2001) (“for domestic violence to be treated as a serious crime it must be treated the same as any other crime against the state”); Machaela M. Hctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 Cal. L. Rev. 643 (1997).

²⁸ Carolyn V. Williams, *Not Everyone Will “Get It” Until We Do It: Advocating for an Indefinite Order of Protection in Arizona*, 40 Ariz. St. L.J. 371, 388 (2008) (emphasis added) (internal citations omitted).

the name of, the sovereign rather than an individual has tangible and symbolic benefits for holders of domestic violence CPO's. Defining these criminal contempt actions as private causes of action returns to the same private paradigm deemed so problematic by domestic violence advocates.

The public's perception of CPO criminal contempt prosecutions likewise is advanced by prosecutions brought by the sovereign:

It is true, of course, that CPO contempt enforcement involves "crimes" that can be classified as petty, that CPO enforcement will be rendered largely ineffective without some measure of victim enforcement, and that the legislature primarily was interested in creating a CPO regime as a plan of protection for victims and not to protect the integrity of court orders per se. Yet a CPO contempt enforcement remains a criminal prosecution and as such implicates not only justice for a victim and fairness to the accused, but also society's interest in an objective, fair, and reliable process of guilt adjudication. As Justice Brennan noted in *Young*, "What is at stake is the public perception of the integrity of our criminal justice system."

Cheh, 42 Hastings L.J. at 1410 (internal citation and footnote omitted).

If the Court of Appeals' opinion is allowed to stand, it not only will abrogate centuries of settled law enshrined in the Constitution, it also will adversely affect defendants, public prosecutors, the courts and domestic violence CPO holders, as well as public perception of the criminal justice system. *Amicus curiae* therefore respectfully request that the Court of Appeals' decision be reversed.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's Brief, the judgment of the District of Columbia Court of Appeals should be reversed.

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