No. 08-6261

IN THE
Supreme Court of the United States

JOHN ROBERTSON,
Petitioner,
v.
WYKENNA WATSON,
Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

The Petitioner in this case is John Robertson, who was the Appellant in the Court of Appeals and the Defendant-Respondent in the trial court. The Respondent is Wykenna Watson, who was the Appellee in the Court of Appeals and the Petitioner in the trial court.

In Respondent's view, the caption that Petitioner has given to the case in this Court, *John Robertson* v. *United States* ex rel. *Wykenna Watson*, does not accurately describe the parties to the proceeding. While the United States has appeared as an *amicus curiae* in the court of appeals and in this Court, it is not a party to this proceeding.

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STATEMENT

1. Civil Protection Orders In The District Of Columbia. Domestic violence is a serious and widespread problem. Each year, approximately 4.8 million women in the United States are the victims of domestic violence. U.S. Dep't of Justice, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* at iii (2000). Domestic violence accounts for nearly a fifth of all nonfatal violent crime against women, and for nearly a third of all murders of women in the United States. *See* U.S. Dep't of Justice, NCJ 197838, *Bureau of Justice Statistics Crime Data Brief: Intimate Partner Violence, 1993-2001* at 1 (2003).

Civil Protection Orders ("CPOs") are a primary legal tool used to protect victims of domestic violence. *See* D.C. Code Ann. § 16-1001 *et seq.*[1] The District of Columbia's CPO law, originally enacted by Congress in 1970, was the first in the Nation to authorize CPOs in domestic violence cases. *See* Pub. L. No. 91-358, 84 Stat. 473, 545-48. All 50 States now authorize their courts to issue CPOs to protect victims of domestic abuse. *See* Jeffrey R. Baker,

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[1] Unless otherwise noted, references to District of Columbia law and court rules are to the version in effect at the time of Petitioner's violation of the CPO and contempt conviction.

Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse, 11 J.L. & Fam. Stud. 35, 38 (2008).

In the District of Columbia, a court may issue a CPO if it finds, after notice and hearing, "that there is good cause to believe that the respondent has committed or is threatening an intrafamily offense." D.C. Code Ann. § 16-1005(c) (1999), Pet. Br. App. 7.[2] A CPO may include, among other provisions, directions to the respondent to "refrain from the conduct committed or threatened," "to keep the peace toward the family member," "to avoid the presence of the family member endangered," or "to refrain from entering or to vacate the dwelling unit of the complainant." *Id.*, Pet. Br. App. 7-8.

As originally enacted, the statute authorized the Corporation Counsel of the District of Columbia to petition for a CPO.[3] In 1982, the Council of the

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[2] The statute defines an "intrafamily offense" as any "act punishable as a criminal offense committed by an offender upon a person . . . to whom the offender is related by blood, legal custody, marriage, having a child in common, or with whom the offender shares or has shared a mutual residence;" or . . . "with whom the offender maintains or maintained a romantic relationship." D.C. Code Ann. § 16-1001(5) (1999), Pet. Br. App. 3-4.

[3] The Corporation Counsel is now known as the Attorney General of the District of Columbia. In this brief, we generally refer to the "D.C. Attorney General" rather than the "Corporation Counsel."

District of Columbia amended the law to expand the protection that it affords to victims of domestic abuse.[4] Among other changes, the 1982 amendments authorized victims of domestic violence to seek CPOs on their own initiative. Pet. App. A.vi-viii & n.2; *Green* v. *Green*, 642 A.2d 1275, 1279 n.7 (D.C. 1994). The amended law expressly provides that "[t]he institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter." D.C. Code Ann. § 16-1002(c), Pet. Br. App. 5.

The Council "determined that it was essential to strengthen the law regarding intrafamily offenses because '[e]xisting remedies have been shown to be inadequate in aiding victims in preventing further abuse.'" Pet. App. A.vii (quoting Report of the Council of the District of Columbia Committee on the Judiciary on Bill 4-195, The Proceeding Regarding Intrafamily Offenses Amendment Act of 1982, at 2 (May 12, 1982) ("D.C. Judiciary Comm. Report")). More than a decade of experience with the law had demonstrated that the D.C. Attorney General "was unable to meet the demand for the growing number

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[4] Congress created the D.C. Council in 1973 and delegated to it legislative authority over the District of Columbia. *See* District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act). Pub. L. No. 93-198, 87 Stat. 774 (Dec. 24, 1973).

of CPOs." *Green*, 642 A.2d at 1279 n.7. The amendment was supported by "virtually all commentators," including the U.S. Attorney and the D.C. Attorney General, and was intended to "facilitate the effectiveness of the civil protection remedy by not requiring all alleged victims to go through the already heavily burdened Office of the [D.C. Attorney General]." *Green*, 642 A.2d at 1279 (quoting D.C. Judiciary Comm. Report at 10).

Violations of a CPO "shall be punishable as contempt." D.C. Code § 16-1005(f), Pet. Br. App. 9. At the time of Robertson's attack, the maximum punishment for contempt was a $300 fine and six months imprisonment. D.C. Sup. Ct. Intrafamily R. 12(e) (1999), Pet. Br. App. 14.[5] A motion for contempt alleging a violation of a CPO must be "in writing," "supported by affidavit," and served upon the respondent. D.C. Sup. Ct. Intrafamily R. 7(c) & 12(b) (1999), Pet. Br. App. 11-12.[6] The respondent

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[5] Contempt is now punishable by a fine not exceeding $1,000, imprisonment for not more than 180 days, or both. D.C. Code Ann. § 16-1005(f) (2009). Violation of a CPO is also punishable as a misdemeanor. DC. Code Ann. § 16-1005(g) (1999), Pet. Br. App. 10.

[6] The current version of the rules provides: "A motion requesting that the court order a person to show cause why she/he should not be held in criminal contempt for violation of a temporary protection order or civil protection order may be filed by an individual, [the D.C. Attorney General] or an attorney (continued…)

has a right to counsel, and must be advised of this right. D.C. Sup. Ct. Intrafamily R. 12(c)(1), Pet. Br. App. 13. The judge may appoint counsel for the respondent, and may also "request that the [D.C. Attorney General] represent the petitioner." D.C. Sup. Ct. Intrafamily R. 12(c)(2), Pet. Br. App. 13. Both parties may present witnesses and other evidence, and the respondent may not be compelled to testify or give evidence. D.C. Sup. Ct. Intrafamily R. 12(c)(4), Pet. Br. App. 13.

In *Green*, the D.C. Attorney General's Office reported to the court of appeals that it "prosecute[d] less than 10 percent of the criminal contempt motions brought for violations of civil protection orders, and ha[d] only one counsel available for that duty." 642 A.2d at 1279 n.7 (quoting post-argument submission of the D.C. Attorney General). The D.C. Attorney General's Office stated that it "would be hard pressed to prosecute all of the contempt motions filed in D.C. Superior Court given the current limited state of [its] resources." *Id.* It explained that it was "unable to draw on the resources of the section that handles perhaps the most nearly analogous work, because the ten attorneys in that section handle approximately 1,000 abuse and neglect cases per month." *Id.* Moreover, the D.C. Attorney General stated that "volunteer

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appointed by the [c]ourt for that purpose." D.C. Sup. Ct. Domestic Violence R. 12(d) (2005), C.A. App. 95.

assistance efforts from other divisions" of the Office "could not possibly [provide the] additional resources needed to prosecute all contempt motions." *Id.* The court of appeals noted these statements by the D.C. Attorney General's Office in an opinion holding that D.C. law authorizes private parties to initiate criminal contempt proceedings for violation of a CPO. *See id.*

2. Robertson's First Attack On Ms. Watson And The Civil Protection Order. On March 27, 1999, Petitioner John Robertson attacked Respondent Wykenna Watson inside Ms. Watson's home. J.A. 12. Robertson "struck Ms. Watson . . . approximately 20 to 30 times" with a closed fist and "kicked [her] in the head several times while wearing heavy work shoes." *Id.* at 40. Robertson "also pulled out a pocket knife, blade approximately 4 inches long, and threatened to kill" Ms. Watson. *Id.* at 12; *see also* Pet. App. A.iii. Ms. Watson attempted to flee during the attack, but Robertson followed her and "continued to beat her with his fists and also kicked her repeatedly." J.A. 12.

Robertson's attack on Ms. Watson left her severely injured. She suffered "a broken bone in her nose, a hole in her sinus area, . . . a broken lip, numerous lacerations and bruises about her body, and "damage to one of her eyes." J.A. 40. As a result of damage to her retina, "Ms. Watson's vision was impaired." *Id.*

On March 29, 1999, two days after the attack, Ms. Watson filed a Petition and Affidavit for a CPO

in the Superior Court. J.A. 11-17. That same day, the court issued a temporary protection order. Pet. App. A.iii. On April 26, following a hearing, the court issued a CPO ordering Robertson not to assault, threaten, harass, or physically abuse Ms. Watson; to stay away from Ms. Watson's person, home, and workplace; and to avoid contacting her. Pet. App. A.iii-iv; J.A. 20-25. Ms. Watson was represented by the D.C. Attorney General's Office during this proceeding. Pet. App. A.iv.

3. Robertson's Second Attack On Ms. Watson And The Contempt Proceeding. On June 26, 1999 (and continuing into the early morning hours of June 27), Robertson attacked Ms. Watson a second time, in violation of the CPO. Robertson "harassed" Ms. Watson "by repeatedly cursing her" and "repeatedly demanding that [she] drop the criminal charges that were pending against him." Pet. App. A.iv-v. This verbal attack was accompanied by a vicious assault. After repeatedly punching Ms. Watson in the face and pushing her into a wall, Robertson threw industrial strength drain cleaner on her neck and face. J.A. 56-57. The drain cleaner caused lye burns, which resulted in Ms. Watson's hospitalization in an intensive care unit. *Id.*

On January 28, 2000, Ms. Watson, again represented by the D.C. Attorney General, filed a motion to adjudicate Robertson in criminal contempt for violating the CPO. Pet. App. A.iv; J.A. 56-60. Following a bench trial at which Ms. Watson and two other witnesses testified, the court found beyond a

reasonable doubt that Robertson had willfully violated the CPO. Pet. App. A.v.

The court found Robertson guilty on three of the five contempt allegations. The court found that he violated the CPO by throwing drain cleaner on Ms. Watson and by "harass[ing] Ms. Watson by making his request that she drop criminal charges and calling her names and . . . by pushing her into a wall." *Id.* The court rejected Robertson's claim of self-defense, finding that he did not throw the drain cleaner onto Ms. Watson until after she "was down on the ground bleeding badly," and he "had won the fight convincingly." *Id.* at v-vi. Noting that all parties "were cursing and behaving in . . . an abominable fashion," the court found Robertson not guilty of two additional alleged violations of the CPO. *Id.* at v.

The court sentenced Robertson to three consecutive 180-day jail terms, but suspended execution of one of the sentences in favor of five years of probation. *Id.* at vi. The court also ordered Robertson to pay $10,009.23 in restitution to repay medical expenses incurred by Ms. Watson. *Id.*

4. The Plea Agreement. On July 8, 1999, a grand jury indicted Robertson on charges arising out of his first attack on Ms. Watson. Robertson was charged with one count of aggravated assault and two counts of assault with a dangerous weapon. Pet. App. A.iv; J.A. 26-27.

On July 20, 1999, Robertson entered into a plea agreement with the United States Attorney's

Office in which he agreed to plead guilty to one count of felony attempted aggravated assault. J.A. 28-30. The plea agreement was signed by an Assistant United States Attorney. *Id.* at 30. The words "District of Columbia" (which appeared below the words "United States" on the pre-printed form) as well as the words "Assistant Corporation Counsel" (which appeared below the words "Assistant United States Attorney") were crossed out. Pet. App. A.xviii; J.A. 30. The plea agreement included a handwritten notation that 'In exchange for [Petitioner's] plea of guilty to Attem[pted] Aggravated Assault, the gov't agrees . . . not [to] pursue any charges concerning an incident on 6-26-99." Pet. App. A.xviii; J.A. 28. On November 15, 1999, the Superior Court sentenced Petitioner to imprisonment for one to three years. J.A. 53-55.

Robertson never raised the plea agreement as a defense to the criminal contempt proceedings. More than three years later, he filed a motion pursuant to D.C. Code § 23-110 seeking to vacate his criminal contempt convictions on the ground that they violated his plea agreement with the U. S. Attorney's Office. The Superior Court denied the motion. J.A. 89-93.

5. The Court Of Appeals' Decision. The District of Columbia Court of Appeals affirmed Robertson's contempt conviction and the denial of his Section 23-110 motion. Pet. App. A.i-xxiii. Robertson contended that his prosecution for criminal contempt breached his plea agreement because the United States, rather than Ms. Watson,

was "the true party in interest to the contempt proceeding." *Id.* at ix. The court noted that D.C. law grants "victims of intrafamily offenses a central role in the enforcement of the intrafamily offenses statute," and that the D.C. Attorney General "lacked the resources to meet the increasing demands for protection under the intrafamily offenses statute." Pet. App. A.xii, quoting *Green*, 642 A.2d at 1279-80 n.7.

The court concluded that "the unique statute governing intrafamily offenses, which authorizes an individual to file a motion to adjudicate criminal contempt against one who violates a CPO, does not contravene the general principle that criminal prosecutions are prosecuted in the name of the sovereign, the United States, or where statutes specify, the District of Columbia." Pet. App. A.xiv-xv. Accordingly, the court held that "under the intrafamily offense statute, a criminal contempt proceeding is properly brought in the name of a private person . . . rather than in the name of the sovereign." *Id.* at xv. The court noted that a similar statutory enforcement framework applies to child support orders in the District. *Id.*, citing D.C. Code § 46-225.02(a) (2005).

In interpreting the plea agreement, the court applied contract principles and looked to the language of the agreement to determine the parties' intent. Pet. App. A.xvii-xviii. The court noted that "[t]he District of Columbia, whose name appeared under that of the United States, was crossed out"; similarly, "[t]he words 'Assistant Corporation

Counsel,' which appeared under the words 'Assistant U.S. Attorney,' were crossed out." *Id.* at xviii. "[T]he pertinent handwritten narrative stated 'In exchange for Mr. Robert[son's] plea of guilty to Attem[pted] Aggravated Assault, the gov't agrees . . . not [to] pursue any charges concerning an incident on 6-26-99.'" *Id.* The court determined that "[t]he abbreviated word 'gov't' clearly referred to the United States, not Ms. Watson and certainly not the District of Columbia, since that name was deleted." *Id.* The court held that "no objectively reasonable person could understand that Mr. Robertson's plea agreement bound Ms. Watson and precluded her contempt proceeding against Mr. Robertson, or that the agreement bound the District, a distinct, separate governmental entity." *Id.* at xix.

The court found additional support for its conclusion in the language of D.C. Code § 16-1002(c), which provides that "[t]he institution of criminal charges by the United States Attorney shall . . . not affect the rights of the [CPO] complainant to seek any other relief under this subchapter." *Id.* at xix n.7. "[R]elief under this subchapter," the court noted, includes an adjudication of criminal contempt for violation of a CPO. *Id.*, citing D.C. Code § 16-1005(f).[7]

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[7] The court of appeals also rejected Petitioner's arguments that he received ineffective assistance of counsel, that he was (continued…)

SUMMARY OF THE ARGUMENT

1. No provision of the Constitution expressly requires that criminal contempt proceedings be brought "in the name of and pursuant to the power of the United States." Pet. Br. i. Petitioner nevertheless contends that: (i) the Constitution uses general terms, such as "crimes," that incorporate the common law understanding of crime, and (ii) the common law required all crimes, including contempt, to be prosecuted in the name of the sovereign. Petitioner is wrong on both counts.

a. When the Constitution uses common law terms, it does not incorporate every feature of the common law into the Constitution. *See Williams* v. *Florida*, 399 U.S. 78, 97-98 (1970) (holding that the Sixth Amendment right to trial by jury does not include the common law right to a 12-person jury). When the Framers intended to incorporate aspects of the common law of crime into the Constitution, they did so expressly. The Court's reasoning in *Williams*, which considered a specific common law right that is expressly included in the Constitution, applies with even greater force to general terms such as "crimes."

b. There was (and is) no settled common law understanding that criminal contempt proceedings must be brought in the name of the sovereign. The

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entitled to a jury trial, and that the trial court misapplied the law of self-defense. Pet. App. A at xix-xxiii.

authorities agree on two points. *First*, the practice of naming criminal contempt proceedings is not harmonious. Many courts expressly hold that criminal contempt proceedings need not be brought in the name of the sovereign. *Second*, the caption of a criminal contempt proceeding is a relatively unimportant matter, because it does not prejudice the alleged contemnor.

Petitioner's argument rests on an incorrect assertion that there are no relevant differences between criminal contempt proceedings and other criminal proceedings. The Framers would not have regarded a petty criminal contempt as a "crime" at all. *See Ex parte Burr*, 4 F. Cas. 791, 797 (C.C. D.C. 1823). Although the Court has extended a range of constitutional protections to non-summary criminal contempt proceedings, those proceedings differ from other criminal proceedings in a variety of ways: They arise from violation of a court order rather than a statute; they vindicate the authority of the court rather than punishing conduct proscribed by a general criminal law; they may be initiated by the court; there is no right to grand jury indictment; and they may be punished summarily if they occur in open court. Thus, while the Court has referred to criminal contempt as a "crime in the ordinary sense," it has explained that this statement describes the "criminal character of contempt prosecutions," and does not erase the differences between criminal contempt and other crimes. *See Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 799-800 (1987).

Contrary to Petitioner's assertion, this Court's decisions in *Gompers* and *Dixon* do not require a contrary conclusion. *Gompers* held that a criminal sentence is not an appropriate remedy for a civil contempt proceeding in equity. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 451-52 (1911). *Dixon* held that a criminal contempt conviction under D.C. Code § 16-1005(f) can trigger a Double Jeopardy bar to a subsequent prosecution based on the same incident. Neither decision holds that criminal contempt proceedings must be brought in the name of the sovereign.

c. Far from "construct[ing] an alternative universe . . . of a type never contemplated by the Framers," Pet. Br. 15, the District's CPO enforcement system would have been entirely familiar to the Framers. By long-established common law tradition, private persons and their counsel were authorized to prosecute criminal cases without the involvement of public prosecutors.

d. In the court below, Petitioner did not contend that criminal contempt prosecutions must be brought "pursuant to the power of the United States," and those words do not appear in the court of appeals' opinion. Even if Respondent was acting "pursuant to the power of the United States," she was not "the government" under any reasonable interpretation of the plea agreement. Respondent is neither a government employee nor the "government." *Cf. Richardson* v. *McKnight*, 521 U.S. 399 (1997) (distinguishing between private prison guards and government employees).

2. Petitioner's separation of powers and due process arguments were not properly raised in the courts below, and therefore should not be considered by this Court. Moreover, these arguments lack merit.

a. Petitioners' contention that the District's CPO system violates constitutional separation of powers principles is incorrect for two reasons.

First, separation of powers principles do not apply to the District of Columbia. The Constitution separates and divides powers among the three branches of the *federal* government. The Constitution assigns no powers concerning the District of Columbia to the Executive or Judicial Branches. Instead, it grants Congress power to "exercise exclusive Legislation in all Cases whatsoever." U.S. Const. Art. I § 8, cl. 17. The Court has recognized that this provision grants Congress "entire control over the [District] for every purpose of government." *Kendall* v. *United States ex rel. Stokes*, 37 U.S. 524, 618 (1838).

Second, even if constitutional separation-of-powers principles applied, they would not invalidate the District's law. This Court has expressly rejected the argument that "any prosecution of contempt must . . . be considered an execution of the criminal law in which only the Executive Branch may engage." *Young*, 481 U.S. at 799-800. The power to prosecute violation of a court's order does not "eradicate fundamental separation-of-powers

boundaries" because it reaches only the parties to court orders, not the "entire population." *Id.* at 800 n.10. Here, the power at issue applies only to CPO orders, not all court orders.

b. Petitioner incorrectly asserts that he has a due process right to be prosecuted by the government rather than a private prosecutor. In *Young*, the Court held that courts have inherent authority to initiate criminal contempt proceedings. Petitioner has expressly declined to raise the question whether the Constitution prohibits a private, interested prosecutor from prosecuting a criminal contempt action. Accordingly, this Court should not decide that question. Multiple characteristics of the District's CPO contempt system support a determination that the system is constitutional. *First*, a decade of experience with the CPO system demonstrated that other approaches to ensuring the effectiveness of CPOs in domestic violence cases are inadequate. *Second*, contempt of a CPO order is a petty offense, and thus is entitled to a lesser degree of constitutional protection. *Third*, alleged contemnors receive fundamental constitutional protections, including notice, the right to counsel, the right to present evidence, and the right not to incriminate oneself. *Fourth*, the private party does not exercise a "wide-ranging discretion," because the court exercises substantial control over the proceeding.

ARGUMENT

Petitioner asks this Court to decide whether the Constitution requires actions for criminal contempt in a "congressionally created court" to be "brought in the name and pursuant to the power of the United States." Pet. Br. i. That question arises in a specific legal and factual context: Petitioner contends that his criminal contempt conviction for violating the CPO breached his plea agreement with the U.S. Attorney's Office, which provided that "the gov't agrees to . . . not pursue any charges concerning an incident on 6-26-99." J.A. 28. As explained below, there is no settled common law understanding, let alone a constitutional requirement, that criminal contempt proceedings be brought "in the name of the United States." Accordingly, the contempt proceeding in this case did not violate Petitioner's plea agreement. Petitioner's additional arguments that the contempt proceeding violated constitutional separation-of-powers and due process requirements were not properly raised in the courts below and lack merit.

I. The Constitution Does Not Require That Contempt Be Prosecuted In The Name And Power Of The Sovereign.

The Constitution does not expressly provide that criminal contempts must be prosecuted in the name and pursuant to the power of the sovereign. Petitioner does not contend otherwise. Instead, he argues that "[t]he many references in the Constitution to crimes, offenses, criminal cases, and

criminal prosecutions reflect settled common-law principles and definitions entirely familiar to the framing generation." Pet. Br. 14-15. According to Petitioner, "settled common law principles" familiar to the Framers required that all crimes, including criminal contempts, be prosecuted in the name of the sovereign, and these common law principles were incorporated into the Constitution through the use of terms such as "crimes." *Id.*

Petitioner is wrong on both counts. There was (and is) no "settled" common law principle that criminal contempt proceedings must be brought in the name of the sovereign. Even if such a requirement had existed, it would not have been incorporated into the Constitution through the use of general terms such as "crimes."

A. The Constitution Does Not Mandate That Contempt Proceedings Adhere To Common Law Practice And Procedure.

This Court has observed that the "language of the Constitution . . . could not be understood without reference to the . . . common law, the principles and history of which were familiarly known to the Framers of the Constitution." *Schick* v. *United States*, 195 U.S. 65, 69 (1904). It does not follow from this observation, however, that the use of general terms such as "crimes" incorporates into the Constitution the entire common law of crimes. To the contrary, the Court has held that even when the Framers expressly included specific common law

rights in the Constitution, they did not incorporate all the common law features of those rights.

In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court considered whether the Sixth Amendment right to a jury trial "necessarily requires trial by exactly 12 persons." *Id.* at 86. The Court acknowledged that "at common law the jury did indeed consist of 12," and also recognized that in earlier decisions the Court had suggested in *dicta* that this aspect of the common law was incorporated into the Sixth Amendment. *Id.* at 91 (collecting citations). The Court nevertheless held that the Sixth Amendment right to a jury trial does not incorporate the common law right to a 12-person jury.

"Noticeably absent" from the Court's earlier decisions "was any discussion of the essential step in the argument: namely, that every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a 'jury.'" *Id.* at 91. The Court noted that "where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect." *Id.* at 97. Because the Framers never suggested that they expected a jury to have 12 members, "there [was] absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." *Id.* at 99. The Court concluded that a 12-person jury "cannot be regarded

as an indispensable component of the Sixth Amendment," and therefore is not constitutionally required. *Id.* at 100.[8]

The Court's reasoning in *Williams* applies with even greater force to this case. *Williams* considered a specific common law right that is expressly included in the Constitution. In contrast, Petitioner's argument is based on the Framers' use of general terms such as "crimes." When Congress wanted to include in the Bill of Rights a particular feature of the common law of "crime," it used express language. *See, e.g.*, *Klopfer* v. *North Carolina*, 386 U.S. 213, 223-26 (1967) (noting the Framer's familiarity with the long common law history of the right to a speedy trial); William Blackstone, 4 Commentaries on the Laws of England *302-06 (1769) ("*Commentaries*") (describing the role of the grand jury in English common-law indictments); *id.* at *335 (recognizing "the universal maxim of the common law of England, that no man is to be

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[8] The Court has followed the same approach in interpreting the Seventh Amendment right to a jury trial. *See, e.g.*, *Colgrove* v. *Battin*, 413 U.S. 149, 155-56 n.10 (1973). The Seventh Amendment does not "bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791." *Galloway* v. *United States*, 319 U.S. 372, 390 (1943). Instead, "[n]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice." *In re Peterson*, 253 U.S. 300, 309-310 (1920).

brought into jeopardy of his life more than once for the same offence"). Had the Constitution's use of the term "crime" incorporated the entirety of the common law understanding of "crime," there would have been no reason to include these protections separately.[9]

In *Williams*, the Court explained that its "holding does no more than leave these considerations to Congress and the States." *Id.* at 103. The same principle applies in this case. The Council of the District of Columbia, exercising power delegated to it by Congress,[10] adopted a law that

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[9] The Sixth Amendment demonstrates that the Framers did not understand that they were incorporating all aspects of the common law terms used in the Constitution. Article III provides that "[t]he Trial of all crimes shall be by Jury." U.S. Const. Art III. In response to criticism regarding Article III's failure "to preserve the common-law right to be tried by a 'jury of the vicinage,'" Madison explained that "the omission was deliberate" and that "[i]t must . . . be left to the discretion of the legislature to modify it according to circumstances." *Williams*, 399 U.S. at 93 & n.3 (quoting 3 M. Farrand, Records of the Federal Convention 332 (1911)). Madison's view that the issue should be left to Congress did not prevail, and the Sixth Amendment was adopted to provide a right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI.

[10] The Constitution authorizes Congress to "exercise exclusive Legislation in *all* Cases whatsoever" for the District of Columbia. U.S. Const. art. I, § 8, cl. 17. (emphasis added). When considering the constitutionality of laws enacted by the (continued…)

addresses the serious problem of domestic violence. D.C. Code §§ 16-1001 to 1005. In its original form, the law did not permit private individuals to file a petition for a civil protection order or to seek enforcement of such an order. D.C. Code § 16-1003(a) (1971); Pub. L. No. 91-358, 84 Stat. 473, 546 (July 29, 1970). More than a decade of experience demonstrated that exclusive reliance on public prosecutors was "inadequate in aiding victims in preventing further abuse." *Green*, 642 A.2d at 1279 n.7 (quoting D.C. Judiciary Comm. Report at 2).

The Council's amendment authorizing victims of domestic violence to seek CPOs was supported by the U.S. Attorney, the D.C. Attorney General, and "virtually all commentators." *Green*, 642 A.2d at 1279 n.7 (quoting D.C. Judiciary Comm. Report at 10). The amended law reflects "a determination by the Council that the beneficiary of a CPO should be permitted to enforce that order through an intrafamily contempt proceeding." *Green*, 642 A.2d at 1279; *see also* D.C. Sup. Ct. Domestic Violence R. 12(d) (2005), C.A. App. 95. The use of general terms such as "crimes" in the Constitution does not prohibit legislatures from adopting such innovative measures to deal with serious social problems.

Council pursuant to authority delegated by Congress, the Court analyzes the law as though it "had been passed directly by Congress." *Welch* v. *Cook*, 97 U.S. 541, 542 (1878).

B. There Is No Constitutional Requirement That Contempt Be Prosecuted In The Name Of The Sovereign.

There is no settled common law understanding, let alone a constitutional requirement, that criminal contempt proceedings must be brought in the name of the sovereign. Petitioner's argument to the contrary rests on an erroneous assertion that there are no relevant differences between criminal contempt and other criminal proceedings.

1. Contempts Were Not Viewed As "Crimes" By The Framers, And Still Differ From Other Crimes In Important Respects.

Relying on this Court's statement that "[c]riminal contempt is a crime in the ordinary sense," Petitioner contends that there is no relevant distinction between criminal contempt and other crimes. *See, e.g.*, Pet. Br. 36 (quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)). In fact, there are a number of important differences between contempt proceedings and other criminal proceedings, as this Court has recognized.

a. As an initial matter, the Framers would not have understood contempt to be a "crime." As Chief Judge Cranch (this Court's reporter from 1801-1815) explained, "cases of contempt of court have never been considered as crimes within the meaning and intention of the second section of the third article of

the constitution of the United States; nor have attachments for contempt ever been considered as criminal prosecutions within the sixth amendment." *Ex parte Burr*, 4 F. Cas. 791, 797 (C.C. D.C. 1823).

Chief Judge Cranch observed that many of the Framers were members of the First Congress, which enacted the Judiciary Act of 1789. *Id.* That Act authorized the courts of the United States "to punish by fine and imprisonment, at the discretion of the said courts, all contempts of authority in any cause or hearing before the same." *Id.*; Judiciary Act of 1789, § 17, 1 Stat. 73, 83. Had the Framers believed that terms such as "crimes" in the Constitution applied to contempts, they would not have violated the constitutional command that "Trial of all Crimes . . . shall be by Jury", U.S. Const. art. III § 2, by authorizing summary punishment of contempt.

There is a second reason why the Framers would not have regarded the contempt in this case as a "crime": It was a petty criminal offense, subject to a maximum sentence of six months' imprisonment. *See* D.C. Sup. Ct. Intrafamily R. 12(e) (1999), Pet. Br. App. 14. In *Schick* v. *United States*, the Court looked to the common law to interpret the term "crime" in the Sixth Amendment. 195 U.S. 65 (1904). The Court adopted Blackstone's definition of "crime," noting that under the common law "'the word "crimes" is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of "misdemeanors" only.'" *Id.* at 69-70 (quoting 4 *Commentaries* at *5).

Because the Sixth Amendment guaranteed only a right to trial in "criminal" cases, the Court held that, "in the light of the popular understanding of the meaning of the word 'crimes,' as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses." *Id.* at 70.

b. This Court adhered to the Framers' understanding of contempt until well into the twentieth century. *See, e.g.*, *Green* v. *United States*, 356 U.S. 165, 186-87 (1958); *see also id.* at 189-92 (Frankfurter, J., concurring) (collecting cases). The Court observed that contempt is "an offense *sui generis*." *E.g.*, *Frank* v. *United States*, 395 U.S. 147, 151 n.5 (1969) (quoting *Cheff* v. *Schnackenberg*, 384 U.S. 373, 379-80 (1966)). "Contempts are neither wholly civil nor altogether criminal." *Gompers* v. *Buck's Stove & Range*, 221 U.S. 418, 441 (1911). "'[I]t may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.'" *Id.* (quoting *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 329 (1904). Even criminal contempt "proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 (1987).

In *Bloom* v. *Illinois,* the Court held that criminal contempt is a crime for purposes of the jury trial provisions of the Constitution, and in the course

of its opinion observed that criminal contempt is "a crime in the ordinary sense." 391 U.S. at 201. As the Court later explained this "insistence on the criminal character of contempt prosecutions" was "intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings," not to suggest that there are no distinctions between criminal contempt and other crimes. *Young*, 481 U.S. at 800. This Court's decisions have recognized that contempt proceedings, including criminal contempt proceedings, differ from ordinary criminal proceedings in important ways:

- Contempts committed in open court may be punished summarily, without "a hearing, counsel, and the opportunity to call witnesses." *Pounders* v. *Watson*, 521 U.S. 982, 988 (1977); *see also In re Oliver*, 333 U.S. 257, 275 (1948); *Cooke* v. *United States*, 267 U.S. 517, 534-35 (1925).

- Criminal contempt proceedings may be initiated by the court on its own motion. *Young*, 481 U.S. at 800-01.

- There is no right to a grand jury indictment in contempt cases. *Green*, 356 U.S. at 184.

- Although "[f]ederal crimes are defined by Congress, not the courts," *United States* v. *Lanier*, 520 U.S. 259, 267 n.6 (1997), contempt is defined

by the content of the court's order, not by a statute.[11]

- For contempts, unlike other crimes, there may be no "statutory limitation of the amount of a fine or the length of a prison sentence which may be imposed for their commission." *Green ,* 356 U.S. at 187.

In short, the Court's statement that contempt is a "crime in the ordinary sense" does not eliminate all differences between contempt and other crimes, and does not require that criminal contempt proceedings be identical in all respects to other criminal proceedings.

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[11] Section 401 of Title 18, U.S. Code defines contempt in terms of the "[p]ower" "of the court" to "punish by fine or imprisonment, or both, at its discretion," contempt of its authority such as "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." 18 U.S.C. § 401. Section 402 of Title 18, which prescribes certain procedures for contempts that consist of violating a court order where the act also violates a criminal statute, expressly recognizes that "all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." *Id.* § 402.

2. The Common Law Did Not Require That Criminal Contempt Proceedings Be Brought In The Name Of The Sovereign.

Although Petitioner purports to base his argument on "settled common law principles," there was (and is) no settled common law principle requiring criminal contempt proceedings to be brought in the name of the sovereign. To the contrary, the practice has long been described as "not harmonious." Stewart Rapalje, A Treatise on Contempt § 95 (1884); *see also Gompers*, 221 U.S. at 446 ("the practice has hitherto been . . . unsettled.").

Many courts have expressly held that there is no requirement that criminal contempt proceedings be brought in the name of the sovereign. For example, the Illinois Supreme Court has held that "[c]riminal contempt proceedings do not have to be brought in the name of the People." *In re Marriage of Rodriguez*, 545 N.E.2d 731, 734 (Ill. 1989). Similarly, the Indiana Supreme Court has determined that, so long as "'[i]t was clear to all, including the Respondent, that this was a criminal contempt proceeding . . . it [was] unnecessary that the State actually be named.'" *In re Crumpacker*, 431 N.E.2d 91, 95 (Ind. 1982). Likewise, the California Supreme Court has concluded that criminal contempt cases "are not . . . required to be brought in the name of the people of the state, nor prosecuted by their authority." *Bridges* v. *Sup. Ct. of Los Angeles County*, 94 P.2d 983, 989 (Cal. 1939),

rev'd on other grounds sub nom, Bridges v. *California*, 314 U.S. 252 (1941). The Pennsylvania Supreme Court has explained that "in most cases of a violation of a court order, the criminal contempt is really initiated or prosecuted by the aggrieved party; the contempt is not prosecuted in the name of the People and the State's Attorney is not even notified or aware of the proceedings." *Commonwealth* v. *Allen*, 486 A.2d 363, 369 (Pa. 1984) (citation omitted), *overruled on other grounds, Commonwealth* v. *Yerby*, 679 A.2d 217, 221 (Pa. 1996); *see also 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."); *In re Contempt of Potter*, 301 N.W.2d 560, 561 (Neb. 1981) (affirming contempt conviction over objection that "[t]he prosecution for contempt should have been brought in the name of the State and prosecuted by the county attorney"); *Freeman* v. *Huron*, 66 N.W. 928, 928 (S.D. 1896) ("[T]here is no settled doctrine with reference to the proper method of framing the title to" criminal contempt proceedings), *abrogated on other grounds*, *Sazama* v. *State ex rel. Muilenberg*, 729 N.W.2d 335 (S.D. 2007); *Manderscheid* v. *District Court of Plymouth Co.*, 28 N.W. 551, 552 (Iowa 1886) ("[I]t was proper to conduct the proceedings for contempt under the titles of the respective equity cases, for it was against the judicial authority exercised in those cases that the alleged acts of contempt were committed."), *aff'd sub nom. Eilenbecker* v. *District Court*, 134 U.S. 31 (1890). *But see State ex rel. Koppers Co.* v. *Int'l Union of Oil,*

Chem. & Atomic Workers, 298 S.E.2d 827, 829 (W. Va. 1982) ("A criminal contempt should be brought in the name of the State.").[12]

The same absence of any settled rule is reflected in this Court's cases, which has heard non-habeas criminal contempt cases titled in at least seven different ways:

- "*Smith* v. *Jones*," (*e.g.*, *Sandefur* v. *Canoe Creek Coal Co.* (consolidated with *Michaelson* v. *United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*), 266 U.S. 42 (1924); *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324 (1904));

- "*In re Jones*" (*e.g.*, *In re Murchison*, 349 U.S. 133 (1955));

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[12] Although the traditional understanding is that "[i]n its origin, *all* legal contempt will be found to consist in an offense more or less direct against the Sovereign himself as the fountain-head of law and justice," James Francis Oswald, Contempt of Court, Committal, and Attachment, and Arrest Upon Civil Process 1 (2d ed. 1895) (emphasis added), *civil* contempt cases are typically—but not always—brought in the name of the parties to the underlying case. *See, e.g., Gompers*, 221 U.S. at 445 (civil contempts are ordinarily entitled "as a part of the main cause"); *Eddens* v. *Eddens*, 50 S.E.2d 397, 403 n.2 (Va. 1948) ("[C]ivil contempt proceedings are usually prosecuted in the names of the parties."). *But cf. Hansen* v. *Harris*, 28 P.2d 649, 656 (Or. 1933) ("proceedings for a civil contempt should be conducted in the name of the state of Oregon, *ex rel.* the prosecuting party.").

- "*City* v. *Jones*" (*e.g.*, *Eaton* v. *Tulsa*, 415 U.S. 697 (1974));

- "*State (or United States) ex rel. Smith* v. *Jones*" (*e.g.*, *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987); *Michaelson* v. *United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42 (1924));

- *"Judge* v. *Jones"* (*e.g.*, *Taylor* v. *Hayes*, 494 S.W.2d 737 (Ky. 1973), *rev'd* 418 U.S. 488 (1974); *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Ungar* v. *Sarafite*, 376 U.S. 575 (1964));

- "*Court* v. *Jones*" (*e.g., Eilenbecker* v. *District Court*, 134 U.S. 31 (1890)); and

- "State (or United States) v. Jones" (e.g., *Bloom* v. *Illinois*, 391 U.S. 194 (1968); *United States* v. *Barnett*, 376 U.S. 681 (1964)).

In addition to agreeing that there is no settled practice, the authorities agree that whether a criminal proceeding is brought in the name of the sovereign is a "comparatively unimportant matter." Rapalje*, supra,* § 95; *see also*, *e.g.*, *Hughes* v. *Territory*, 85 P. 1058, 1060 (Ariz. 1906) ("[T]he matter of the title of the petition or of the proceedings is unimportant, and not one that affects the jurisdiction of the court."); 13 Cor. Jur., Contempt, § 82, p. 60 (1917) ("[I]t is a matter of no importance who institutes the proceedings for contempt, since the alleged contemner is not

prejudiced in his defense by the particular mode in which the facts are brought to the attention of the court."). Consequently, even if there were a settled common law understanding that criminal contempt proceedings must be bought in the name of the sovereign, it would not be the type of "indispensable component" of the common law that could be implicitly incorporated into the Constitution through the use of generalized terms such as "crimes." *See Williams* v. *Florida*, 399 U.S. at 100. In fact, however, there is not even an established common law requirement—let alone a constitutional requirement—that criminal contempt proceedings be brought in name of the sovereign.

3. This Court's Decisions Do Not Dictate A Different Result

Contrary to Petitioner's contention, the court of appeals' decision in this case is not in conflict with this Court's decisions in *Gompers* and *Dixon*.

a. *Gompers* involved a judgment of contempt for violating an order enjoining a boycott of Buck's Stove & Range Company. 221 U.S. at 435-36. The three defendants were required to testify at the contempt proceeding and were sentenced to a determinate term of imprisonment. *Id.* at 435, 447-48. Petitioner's discussion of *Gompers* proceeds from the faulty premise that the Court "determined that the contempt proceeding at issue was criminal." Pet. Br. 40. To the contrary, the Court held, "this was a proceeding in equity for *civil contempt* where the

only remedial relief possible was a fine payable to the complainant." 221 U.S. at 451 (emphasis added).

In reaching this conclusion, the Court relied in part on the style of the case (*Bucks Stove & Range Co.* v. *Gompers*). The Court noted that "[t]his is not a mere matter of form," because "every citizen, however unlearned in the law, by mere inspection of the papers in contempt proceedings ought to be able to see . . . whether it sought to benefit the complainant or vindicate the court's authority." 221 U.S. at 446. The court expressly stated, however. that "the practice has hitherto been so unsettled" with regard to naming the state "that we do not now treat it as controlling." *Id.* Moreover, while noting that one proper style for a criminal case would have been "*United States* v. *Gompers*," the Court noted that forms such as "*In re Samuel Gompers*" were also appropriate. *Id.* The Court discussed the style of case only as a factor in deciding whether the proceeding was civil or criminal in nature. The Court did not hold that naming the sovereign is required by the Constitution.

Moreover, *Gompers* was decided before the merger of law and equity, and the Court's concern that a criminal sentence could not be entered in a civil proceeding depended on "whether this was a proceeding in equity or at law." 221 U.S. at 441. Ater the merger of law and equity in 1937, the Court had no difficulty sustaining criminal contempt convictions brought in the same proceeding as a civil contempt, stating, "Common sense would recognize that conduct can amount to both civil and criminal

contempt. . . . Disposing of both aspects of the contempt in a single proceeding would seem at least a convenient practice." *United States* v. *United Mine Workers of America*, 330 U.S. 258, 299 (1947). "[A] mingling of civil and criminal contempt proceedings must . . . be shown to result in substantial prejudice before a reversal will be required. *Id.* at 299-300. "That the contempt proceeding carried the number and name of the equity suit does not alter this conclusion." *Id.* at 300.

Contrary to Petitioner's assertion (Pet. Br. 41), this case is not "indistinguishable from *Gompers*." Unlike *Gompers*, it was clear from Respondent's initial motion—entitled "Motion to Adjudicate Criminal Contempt"—that this was a criminal contempt proceeding. J.A. 59-60. Unlike the defendants in *Gompers*, Petitioner was not made a witness to the proceeding, nor was he required to testify. *Cf.* 221 U.S. at 447-48. Because this case was clearly a criminal contempt proceeding from beginning to end, the Court's decision in *Gompers* to set aside criminal sentences imposed in a civil proceeding does not establish that Petitioner's sentence should be set aside here.[13]

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[13] In *Hicks* v. *Feiock*, which concerned a contempt proceeding for failure to comply with a child support order, the Court concluded that the nature of the relief imposed is "dispositive" of whether the contempt is civil or criminal. 485 U.S. 624, 637 (1988). The Court did not consider it relevant that the case was (continued…)

b. Petitioner also misconstrues this Court's decision in *Dixon* v. *United States*. In *Dixon*, the Court held that a criminal contempt conviction could pose a Double Jeopardy bar to a subsequent criminal prosecution based on the same incident. 509 U.S. 688, 696 (1993). *Dixon* was consolidated with another case, *Foster* v. *United States*, which involved a criminal prosecution that occurred subsequent to a criminal contempt conviction under the D.C. Code § 16-1005(f), the statutory provision at issue in this case. *See id.* at 692.

Petitioner asserts that two aspects of the *Foster* case require a finding that the United States was the "true party" that prosecuted his contempt action. *First*, Petitioner contends that "Mr. Foster's case could not have been correctly decided if . . . D.C. Code § 16-1005(f) authorizes a private right of action" because "'[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties,'" Pet. Br. 44 (quoting *United States* v. *Halper*, 490 U.S. 435, 451 (1989)). *Second*, Petitioner asserts that this Court effectively held that the United States was the true party in interest because "the United States and Michael Foster were the only parties to" the *Foster* case in this Court. Pet. Br. 45. Petitioner is incorrect on both points.

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brought by the district attorney "acting on behalf of" a private party. *Id.* at 624.

Petitioner's reliance on *Halper* is misplaced. When read in context, the language quoted by Petitioner is clearly referring to *civil* suits between private litigants. 490 U.S. at 450 ("Nothing in today's opinion precludes a private party from filing a *civil suit* seeking damages for conduct that previously was the subject of criminal prosecution and punishment.") (emphasis added). The Court discussed civil suits between private litigants to distinguish those suits from the civil suit brought by the government, which triggered the Double Jeopardy Clause. *Id.* This distinction was rendered meaningless by the subsequent overruling of *Halper*. *See Hudson* v. *United States*, 522 U.S. 93, 100 (1997) (overruling *Halper*, 490 U.S. at 435).

Second, it is not surprising that "the United States and Michael Foster were the only parties" to the *Foster* case (Pet. Br. 45), because it was the subsequent criminal case against Mr. Foster—not the earlier criminal contempt case—that was decided by this Court. *See* 509 U.S. at 693-94. The criminal case was brought and litigated in the name of the United States at all levels. *See Foster* v. *United States* (consolidated with *United States* v. *Dixon*), 598 A.2d 724, 727-28 (D.C. 1991) ("[T]he United States Attorney's Office filed a complaint charging Foster with a single count of assault with intent to kill while armed."). The earlier contempt proceeding, in contrast, was initiated by Mr. Foster's wife, Ana Foster, who "filed three separate motions to have her husband held in contempt for numerous violations of the CPO." 509 U.S. at 692. This Court did not hold

that the United States was the "true party" to the criminal contempt proceeding. Instead, the Court stated that "Ana Foster and her mother prosecuted the action," and that "the United States was not represented at trial." *Id.*

Dixon's application of the Double Jeopardy Clause does not establish that a contempt prosecution under D.C. Code § 16-1005(f) must be prosecuted in the name of the United States. This Court has recognized that the Double Jeopardy Clause can apply even "where successive cases are brought by *nominally different prosecuting entities*." *United States* v. *Wheeler*, 435 U.S. 313, 318 (1978) (emphasis added). Nor is there any reason to think that, notwithstanding *Wheeler*, the Supreme Court assumed that the United States was a party to Foster's contempt proceeding. The lower court decision in *Dixon* expressly stated that "[t]he United States was not a party" to the contempt proceeding. *United States* v. *Dixon*, 598 A.2d 724, 726 (D.C. 1991) (en banc). The court of appeals held that the Double Jeopardy Clause applied—even though the United States was not a party—because "the identity of the prosecuting party in the contempt proceeding is irrelevant to the double jeopardy issue." *Id.* at 732.[14]

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[14] In *United States* v. *Providence Journal Co.*, 485 U.S. 693 (1988), the Court concluded that a criminal contempt prosecution was "a suit 'in which the United States is interested,' within the meaning of [28 U.S.C.] § 518(a), (continued…)

C. Private Prosecutions Were Well Established At The Time Of The Founding.

Petitioner devotes a large portion of his brief to arguing that the common-law definition of a crime is a "public wrong," and that the Constitution requires that all criminal proceedings be brought in the name of the sovereign. Pet. Br. 14-35. As explained above, this argument is beside the point. There was (and is) no settled common law understanding that criminal contempts must be brought in the name of the sovereign. And even if there were such a requirement, it would not have been incorporated into the Constitution by the word "crimes." We nevertheless briefly address Petitioner's description of criminal prosecutions at the time of the Founding because it is both incomplete and misleading.

1. In England and in America at the time of the Founding, prosecutions by victims of crime and

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regardless of who is appointed by the district court to prosecute the action." *Id.* at 707-708. Unlike *Providence Journal*, in which "the action was initiated in vindication of the 'judicial Power of the United States,'" *id.* at 700 (quoting U.S. Const., art. III), this case arose in the District of Columbia Superior Court, which is part of "a wholly separate court system designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area." *Palmore* v. *United States*, 411 U.S. 389, 408 (1973).

their families were the rule, not the exception. As Petitioner conceded in the court below, even outside the contempt context, "there is a long tradition in our legal system of private person serving as prosecutors to criminal actions." C.A. Post-Argument Br. at 4. *See id.* at 4-5 ("[T]hroughout much of the common law's history, private person served as the prosecutors to virtually all criminal actions."; "[T]he public prosecutor system . . . is a fairly new phenomenon in the common law legal tradition."; "[T]he common law did not frown on the practice of having aggrieved persons serve as private prosecutors."; "Quite the contrary, having the putative victim of a crime (or his or her representative) serve as the prosecuting attorney was the norm.")

In his brief to this Court, Petitioner barely acknowledges this history. Instead, he argues that the only common law analogue to the criminal contempt proceeding in this case is the "appeal of felony," which Petitioner describes as a "private action[ ] grounded in notions of personal vengeance, historically settled through the decidedly personal and vengeful mechanism of 'trial by battle.'" Pet. Br. 21. *see also Hurtado* v. *California*, 110 U.S. 516, 526 (1884) (discussing appeal of murder). In fact, the criminal contempt prosecution in this case was closely analogous to ordinary criminal prosecutions at the time of the Founding. *See Steele Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 127-28 (1998) (Stevens, J., concurring) ("[I]n England, in the American Colonies, and in the United States,

private persons regularly prosecuted criminal cases."); *United States* v. *Marion*, 404 U.S. 307, 329 n.2 (1971) (Douglas, J., concurring), citing and quoting 1 J. Stephen, *History of the Criminal Law of England* 493 (1883).

In England, private citizens initiated and conducted most criminal prosecutions, *See* 4 *Commentaries* at *303; Douglas Hay, *Controlling the English Prosecutor*, 21 Osgoode L.J. 165, 168-70 (1983). Because the right of a private individual to bring an indictment was regarded as a protection against potential Executive abuse of the criminal process, "[i]t was almost inconceivable that the Attorney-General should act as the protector of the ordinary citizen from oppressive prosecution." *Id*. at 171. In the 19th century, Parliament twice rejected proposals to establish a system of public prosecutors. *See id*. at 174. When it finally created a public prosecutors' office in 1879, Parliament carefully preserved the rights of private prosecutors. *See* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. & Pub. Pol'y 357, 361-62 (1986).

Private prosecutions were also common in America at the time of the Founding. *See* Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 9 (2007); Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800-1850* 1-2 (1989). By 1900, courts of last resort in 15 states had affirmatively sanctioned privately funded prosecutions. Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-*

Century United States, 39 Am. J. Legal Hist. 43, 49 (1995).

As Petitioner acknowledged in the court of appeals, a number of States "still have vibrant practices of private prosecutions of less serious statutory and general common law criminal offenses." Pet. C.A. Post-Argument Br. at 10 n.6. In New York, for example, "it has long been common practice for the complainant to conduct the prosecution in certain cases, generally involving violations." *People ex rel. Allen* v. *Citadel Mgmt. Co.,* 355 N.Y.S.2d 976, 978 (N.Y.C. Crim. Ct. 1974). In Pennsylvania, private criminal complaints act as a "check on the office where the district attorney has overlooked a matter or is not diligently pursuing a matter." *In re Hickson*, 765 A.2d 372, 380 (Pa. Super. 2000) (holding that only interested prosecutors have standing to bring a private criminal complaint), *aff'd*, 821 A.2d 1238. Other states likewise allow private criminal prosecutions under certain circumstances.[15]

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[15] *See, e.g.*, *State* v. *Martineau*, 808 A.2d 51, 53 (N.H. 2002) ("[P]rivate prosecutions continue to exist as a matter of New Hampshire common law" for petty offenses not involving jail time.); *Olsen* v. *Koppy*, 593 N.W.2d 762, 767 (N.D. 1999) (where the state attorney is neglectful, the trial court has discretion "to appoint a private attorney in criminal proceedings"); *State* v. *Storm*, 661 A.2d 790 (N.J. 1995) (allowing private prosecutions by disinterested parties); *Katz* v. *Commonwealth*, 399 N.E.2d 1055, 1060 (Mass. 1979) (noting in landlord-tenant contempt (continued…)

This history shows that the criminal contempt prosection in this case does not inhabit "an alternative universe" of "prosecutions of a type never contemplated by the Framers." Pet. Br. at 15. To the contrary, Respondent's role in the proceeding would have been entirely familiar to, and accepted by, the Framers.

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case that "[p]rivate parties to civil litigation have the right 'to press both the civil and criminal aspects of the case'"; "a private citizen may prosecute a purely criminal complaint in the Housing Court, as in a District Court."); *Tonkin* v. *Michael*, 349 F.Supp. 78, 82 (D.V.I. 1972) (court may appoint private prosecutor where the Attorney General fails to appear to prosecute a complaint). Even where purely private prosecutions are not available, many states allow a substantial role for private prosecutors in criminal proceedings. *See, e.g.*, *Veteto* v. *State*, 8 S.W.3d 805, 817 (Tex. Ct. App. 2000) (district court did not abuse discretion in permitting counsel retained by the victim's family, to present the prosecution's opening statement and examine half of the witnesses), *overruled on other grounds*, *State* v. *Cook*, 248 S.W.3d 172 (Tex. Crim. App. 2008); *State* v. *Crouch*, 445 S.E.2d 213, 219 (W. Va. 1994) (where public prosecutor did not attend a hearing, a private prosecutor retained by the victim's family could conduct the hearing "in order to ensure that the case would be prosecuted vigorously"); *State* v. *Addis*, 186 S.E.2d 415, 417 (S.C. 1972) ("If [a private prosecutor] participates in the trial of a case and does only what a solicitor should do, the defendant has no right to complain.").

D. This Case Does Not Turn On Whether Criminal Contempt Prosecutions Must Be Brought "Pursuant To The Power Of" The United States.

Although Petitioner framed the question presented to include the abstract issue of whether a contempt prosecution must be brought "pursuant to the power of the United States," that issue was not raised or decided in the courts below. Because the issue has not been litigated, it is not clear what Petitioner means by the phrase "pursuant to the power of the United States." In one sense, the contempt proceeding undoubtedly was conducted pursuant to the power of the United States. Ms. Watson was authorized to initiate the proceeding by a District of Columbia statute and court rules; the case was adjudicated by the District's courts; and Congress established the D.C. Council and courts. But if Petitioner refers to "power" only in this sense, then the term is meaningless because every proceeding in federal court is brought pursuant to the power of the United States. In another sense, the contempt proceeding was not conducted "pursuant to the power of the United States," because District of Columbia law authorized Respondent to initiate the proceeding on her own.

Ultimately, the question whether the criminal contempt proceeding was brought "pursuant to the power of the United States" is relevant only if it establishes Petitioner's underlying claim that Ms. Watson was the "government" as that term was used

in the plea agreement. Because Ms. Watson cannot be considered the "government" under any reasonable interpretation of the plea agreement, this case does not turn on whether Ms. Watson was acting "pursuant to the power of the United States."

1. The Court Should Not Reach The Issue Of Whether Respondent Exercised The "Power" Of The United States.

"Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Penn. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 213 (1998) (internal quotation marks and citations omitted). The question whether the contempt proceeding was "pursuant to the power of the United States" was not raised or decided below, and therefore should not be considered here.

The question before the court of appeals was whether Robertson's plea agreement barred his contempt prosecution because it promised that the "gov't" would not pursue charges. Pet. App. A.xi, xviii. The court first held that "a criminal contempt proceeding is properly brought in the name of a private person, here Ms. Watson, rather than in the name of the sovereign." *Id.* at xv. The court then applied principles of contract law to conclude that "[t]he abbreviated word 'gov't' clearly referred to the United States, not Ms. Watson, and certainly not the District of Columbia . . .". *Id.* at xviii. Because the contempt was brought in the name of Ms. Watson, "no objectively reasonable person could understand that Mr. Robertson's plea agreement bound Ms.

Watson and precluded her contempt proceeding against Mr. Robertson." *Id.* at xix.

The court of appeals did not consider whether Robertson's contempt proceeding was conducted pursuant to the "power" of Ms. Watson or the United States. Indeed, the term "power" appears nowhere in the court of appeals' decision. The court of appeals did not address the "power" issue because Robertson argued only that the proceeding was "in the name" of the United States. *See id.* at ix-x (Robertson contended that "the action against him 'was maintained in the name of the relevant sovereign, . . . the United States'; and that 'there is no such thing in our legal system as a criminal action maintained 'in the name of a private person.'"); *id.* at xiv (Robertson "asserts that such an action could only be brought 'in the name of the relevant sovereign, . . . the United States."); *id.* at xviii ("Mr. Robertson starts from the faulty assumption that the criminal proceeding against him was brought in the name of the United States.").

2. The Plea Agreement Did Not Bar The Contempt Proceeding Regardless Of Whose Power Was Exercised.

Even if the Court considers the "power" issue, it must do so in the context of the claim for relief presented by Robertson. Whether a criminal contempt proceeding is brought "pursuant to the power of the United States" is relevant only if it establishes that the plea agreement barred the contempt prosecution. *See Black* v. *Cutter Labs.*, 351

U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions").[16] If a private party can exercise government power without becoming the "gov't," as that term is used in the plea agreement, then the court of appeals correctly decided Robertson's claim.

a. This Court's cases involving private prisons demonstrate that Ms. Watson would not become the "government" even if she were prosecuting Robertson pursuant to the power of the United States. Maintaining a prison is unquestionably an important government function. Indeed, this Court has explained that "[o]ne of the primary functions of government . . . is the preservation of societal order through enforcement of the criminal law, *and the maintenance of penal institutions is an essential part of that task*." *Yeskey*, 524 U.S. at 209 (internal quotation marks and citations omitted) (emphasis added).

Although maintaining a prison may qualify as "state action"—and therefore require the private prison company and its employees to comply with any constitutional provisions that are applicable to the State—the Court's decisions demonstrate that the private entities remain distinct from the

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[16] Here, to the extent the Court considers whether the contempt prosecution was brought "pursuant to the power of the United States," it will be reviewing a statement that does *not* appear in the lower court's opinion.

"government." In *Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997), this Court held that private prison guards, unlike government prison guards, are not entitled to qualified immunity under 42 U.S.C. § 1983.[17] The Court distinguished between private and public prison guards—even though they perform identical functions—because the policy reasons for granting qualified immunity to government employees do not apply to employees for private for-profit corporations. *Richardson*, 521 U.S. at 407-12. The Court explained that the private prison guards "resemble [employees] of other private firms and *differ from government employees*." *Id.* at 410 (emphasis added); *cf. Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001) (prisoner has a *Bivens* action against government prison guards, but not against corporation running a private prison).

b. Even if Ms. Watson were exercising the "power of the United States," the plea agreement cannot reasonably be interpreted to prevent her from initiating a contempt proceeding. As the court of appeals explained, the term "gov't" must be given a reasonable interpretation based on the language of the plea agreement. Pet. App. A.xviii. The agreement cannot be reasonably interpreted to include every entity—both public and private—that

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[17] The Court assumed without deciding that the prison guards acted "under color of state law" and therefore were subject to suit under § 1983. *Richardson*, 521 U.S. at 413.

acts "pursuant to the power of the United States" within the meaning of "gov't."

The text of the agreement demonstrates that the term "gov't" was intended to have a narrow meaning. The names of the District of Columbia and the Assistant Corporation Counsel are crossed out, *id.*, which establishes that "gov't" was not intended to include the entire government, or even all public prosecutors. Because the D.C. Attorney General's Office prosecutes crimes "pursuant to the power of the United States" (in the sense that it derives its authority from Congress), the agreement cannot be reasonably interpreted to include all entities exercising the prosecutorial power of the United States.

When the term "gov't" is interpreted in light of the entire agreement, it is clear that it refers only to the U.S. Attorney's Office for the District of Columbia. The agreement states that the "gov't" agrees to: (i) "dismiss the charges"; (ii) "not pursue any charges concerning an incident on 6-26-99"; and (iii) "reserve[] step-back and allocution." J.A. 28-29. Only the U.S. Attorney's Office for the District of Columbia, not the entire "gov't," had the authority to carry out parts (i) and (iii) of the agreement. Because "gov't" referred to the U.S. Attorney's Office for two of the three items, it should be given the same limited meaning with respect to the agreement not to pursue charges.

Moreover, an objectively reasonable defendant would not interpret the plea agreement to prevent a

contempt proceeding because he would be aware that the U.S. Attorney could not agree that such charges would not be pursued. The D.C. Code provides that "'[t]he institution of criminal charges by the United States Attorney shall . . . not affect the rights of the [CPO] complainant to seek any other relief under this subchapter,'" and the relief available under "this subchapter" includes "a contempt adjudication under § 16-1005(f)." Pet. App. A.xix. Moreover, the D.C. Attorney General is authorized to pursue a contempt proceeding on behalf of the individual. D.C. Super Ct. Intrafamily R. 9(a)(2); D.C. Code § 16-1003(c) (1989 repl.); *see* D.C. Code § 16-1003(b) (2009 supp.). It is unreasonable to interpret the plea agreement in a way that contravenes a statute.

Finally, federal courts of appeals often are required to determine the meaning of "government" in a plea agreement, and these cases do not hold that every entity, including private parties, are the "government" if they act pursuant to the power of the Unites States. To the contrary, courts frequently adopt narrow interpretations that do not bind even the entire federal government. *See, e.g., United States* v. *Camacho-Bordes*, 94 F.3d 1168, 1175 (8th Cir. 1996) (INS not bound by plea agreement made on behalf of "the government" by the U.S. Attorney). Other courts would narrowly interpret the plea agreement at issue here because, by striking District of Columbia, the agreement was intended to apply only to the U.S. Attorney's Office for the District of Columbia. *See, e.g.*, *United States* v. *Gebbie*, 294 F.3d 540, 550 (3d Cir. 2002).

In short, whether or not Ms. Watson was acting "pursuant to the power of the United States," she was not "the government" for purposes of Petitioner's plea agreement.

II. The District of Columbia Law Regulates Contempt Proceedings In A Constitutionally Permissible Manner.

Petitioner contends that the District of Columbia law violates constitutional separation-of-powers principles because it divests the Executive Branch of control over criminal contempt proceedings. Pet. Br. 54-56. Similarly, Petitioner contends that the law violates the Due Process Clause because it deprives him of the "right to be prosecuted by the government." *Id.* at 56-58. These constitutional issues were not properly presented to the courts below, and therefore they should not be considered by this Court. In any event, Petitioner's constitutional arguments lack merit. The District of Columbia law *cannot* violate constitutional separation-of-powers principles because those principles do not apply to the District. Moreover, even if constitutional separation-of-powers principles applied, the District of Columbia law would not violate them. Petitioner's due process argument is similarly flawed. Contrary to Petitioner's assertion,

the Due Process Clause does not provide a right to be prosecuted by the government.[18]

A. The District of Columbia Law Does Not Violate Constitutional Separation-of-Powers Principles.

Petitioner contends that the decision to prosecute is a core executive power, and therefore "divest[ing] the Executive of its constitutional function in this matter disrupts the constitutional allocation of power among the three branches of government." Pet. Br. 55-56. This argument fails for

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[18] Petitioner frames the arguments in terms of the "doctrine of necessity" and the "principle of restraint" (Pet Br. 46-58), but those principles relate to a court's inherent contempt power. *See, e.g.*, *Young*, 481 U.S. at 801. This Court has never suggested that a legislature's power to regulate contempt proceedings is limited by those principles. Moreover, Petitioner's "doctrine of necessity" and "principle of restraint" framework adds nothing to the constitutional analysis. According to Petitioner, the "doctrine of necessity" and "principle of restraint" are designed to minimize the contempt power's intrusion on separation-of-powers and due process principles. Pet. Br. 46-50. Absent a constitutional violation, these principles do not come into play. Thus, Petitioner's "doctrine of necessity" and "principle of restraint" arguments necessarily fail for the same reasons that his separation-of-powers and due process arguments fail—including because they were not raised below.

two reasons. *First*, the law cannot violate constitutional separation-of-powers principles because those principles do not apply to the District of Columbia. *Second*, even if constitutional separation-of-powers principles applied, the District of Columbia law does not violate them.

1. The separation-of-powers principles governing the relationship between the different branches of the federal government arise from the structure of the Constitution. *See INS* v. *Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers."). Because the first three Articles of the U.S. Constitution divide power only among the branches of the federal government, the separation-of-powers principles inherent in the structure of the Constitution apply only to the federal government.

Nothing about the structure of the Constitution suggests that the Framers intended to impose separation-of-power principles on the District of Columbia.[19] With respect to the District of

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[19] Likewise, it is well-settled that the separation-of-powers principles found in the federal Constitution do not apply to the States. *See Mayor of Philadelphia* v. *Educ. Equality League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental powers."); *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers (continued…)

Columbia, the Constitution grants no powers to the executive and judicial branches. In contrast, Congress is granted the power to "exercise exclusive Legislation in all Cases whatsoever" for the District of Columbia. U.S. Const. art. I, § 8, cl. 17.

This Court has long recognized that "Congress has the entire control over the [District of Columbia] for every purpose of government." *Kendall* v. *United States ex rel. Stokes*, 37 U.S. 524, 698 (1838). Congress's powers over the District of Columbia therefore "are obviously different in kind from the other broad powers conferred on Congress: Congress's power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative." *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 75-76 (1982) (plurality) (emphasis in original); *see also Palmore* v. *United States*, 411 U.S. 389, 397-98 (1973) ("It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8.").

The District of Columbia's history illustrates the absence of any constitutional separation-of-

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of a State shall be kept altogether distinct and separate . . . is for the determination of the State.").

powers requirement. For nearly a century (from 1874 to 1973), the District was governed by a three-member commission that exercised both legislative and executive powers. The commissioners, who were appointed by the President, were "at one and the same time city mayor, city treasurer, board of alderman, and common council, subject only to the Congress. They [were] executives administering the various laws of Congress; [and] legislatives promulgating and enacting ordinances of every conceivable kind and character." District of Columbia Appropriation Bill, Hr'g Before the House Comm. on Appropriations, (Jan. 5, 1916); *see generally* Staff of the House Committee on the District of Columbia, 101st Cong., 2d Sess., Governance of the Nation's Capital: A Summary of the Forms and Powers of Local Government for the District of Columbia, 1790 to 1973, at 39-40 (Comm. Print 1990).[20]

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[20] Petitioner addresses the issue of whether constitutional separation-of-powers apply to the District of Columbia only in a footnote. Pet. Br. 55 n.23. Neither Petitioner nor the cases he cites suggest that The Constitution imposes separation-of-powers principles on the District of Columbia. The fact that Congress has implemented a form of separation of powers principles for the current District of Columbia government, District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (Dec. 24, 1973), does not suggest that these principles are constitutionally mandated. In any event, the Home Rule Act's incorporation of separation-of-powers principles is irrelevant to this case. Petitioner has never challenged the (continued…)

2. Even if constitutional separation-of-powers principles applied, they would not invalidate the District of Columbia law. Petitioner bases his separation-of-powers argument on this Court's characterization of the prosecutorial power as a "core executive constitutional function," Pet Br. 54 (quoting *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996)), and on his view that the Executive Branch has "*exclusive* authority and *absolute* discretion to decide whether and how to prosecute a case," Pet. Br. 48 (emphasis added). Neither factor suggests that separation-of-powers principles prohibit a private party from prosecuting contempt in his or her own name.[21]

District of Columbia law on the ground that its enactment exceeded the D.C. Council's authority under the Home Rule Act. Nor is the scope of the D.C. Council's legislative authority fairly included in the question before the Court, which is limited to whether the *Constitution*, not an Act of Congress, prevents a contempt prosecution in the name and power of a private person.

[21] Petitioner also contends that a criminal contempt action titled in the name of a private party violates the President's Pardon Power by defining a crime that is not "'an offense against the United States.'" Pet Br. 55 n.22. But this Court has already held that the pardon power extends to criminal contempts involving Article III courts. *Ex Parte Grossman*, 267 U.S. 87, 112-13 (1925). In *Grossman*, the Court held that "the words 'for offences against the United States' were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the (continued…)

Petitioner's position is flatly contradicted by *Young*. In *Young*, the Court expressly rejected the argument that "any prosecution of contempt must . . . be considered an execution of the law in which only the Executive Branch may engage." 481 U.S. at 799-800. A court's power to appoint a private contempt prosecutor cannot be "wielded to eradicate fundamental separation-of-powers boundaries" because the court's power reached only the people who have come before it, and not the "entire population." *Id.* at 800 n.10. If divesting the executive of the power to initiate all types of contempt proceedings does not violate separation-of-powers principles, then the power at issue here—which applies only to contempt proceedings arising from violations of Civil Protection Orders—also does not "eradicate fundamental separation-of-powers boundaries." *Id.*

Even outside the contempt context, the Executive Branch does not have exclusive authority

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United States as distinguished from offenses against the States." *Id.* at 113. "That which violates the dignity and authority of federal courts . . . violates a law of the United States, and so must be an offense against the United States." *Id.* at 115 (citation omitted). The same principle can be extended to acts that violate the dignity and authority of courts of the District of Columbia, which were created by Congress. It does not follow, however, that criminal prosecutions may not be brought in the name of the District of Columbia or a private person.

and absolute discretion in deciding whether and how to prosecute. The Grand Jury Clause deprives the executive of absolute discretion to prosecute a case. *See, e.g.*, *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) ("Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution"); *Davis* v. *United States*, 411 U.S. 233, 253 (1973) (Marshall, J., dissenting) ("When it fulfills its proper function, the grand jury is a central institution of our democracy, restraining the discretion of prosecutors to institute criminal proceedings.").

Congress also places limitations on the Executive Branch's discretion to decide whether to prosecute. For some offenses, Congress has dictated that particular officials within the Executive Branch should decide whether to prosecute a case. *See, e.g.*, 18 U.S.C. § 1119(c)(1) (2006) ("No prosecution may be instituted against any person under this section except upon the written approval of the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, which function of approving prosecutions may not be delegated."). Congress has even prescribed rules for how the decision should be made: "No prosecution shall be approved under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return." *Id.* § 1119(c)(2); *see also id.* § 2332(d).

Nor does the Executive Branch have exclusive authority and absolute discretion to decide how a case is prosecuted. Rules of evidence and procedure, adopted and enforced by Congress and the courts, constrain a prosecutor's discretion. This discretion is also limited by rules requiring the government to produce documents, statements, and other evidence to the defense. *See, e.g.*, *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Jencks* v. *United States*, 353 U.S. 657 (1957); *see also Palermo* v. *United States*, 360 U.S. 343, 345 (1959) (recognizing both Congress's right to enact rules for criminal trials and the Court's "power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts").[22]

B. The District of Columbia Law Does Not Violate The Due Process Clause.

1. For the reasons explained in Part I of this brief, there is no due process requirement that a criminal contempt proceeding be brought "in the

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[22] Petitioner (at 48) relies on *Confiscation Cases*, 74 U.S. 454 (1868), to support his assertion that the Executive Branch's discretion is absolute. Those cases refute his position. In *Confiscation Cases*, the Court expressly recognized Congress's ability to limit a prosecutor's discretion: "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, . . . *except in cases where it is otherwise provided in some act of Congress*." *Id.* at 457 (emphasis added).

name of" the government. Petitioner received notice of the criminal nature of the proceeding and the nature of the charges, and was afforded numerous procedural rights, including a right to counsel, a right not to incriminate himself, a right to present evidence, and a right not to be convicted except upon proof beyond a reasonable doubt.

In this Court, petitioner asserts a due process "right to be prosecuted by the government. " Pet. Br. 58. The Due Process Clause provides such a right, according to Petitioner, because "prosecutorial discretion, in the hands of a public prosecutor, serves the critical function of filtering out insubstantial legal claims." *Id.* Moreover, public prosecutors "are publicly accountable" and "serve the cause of justice." *Id.* (internal quotation marks and citations omitted).

In the proceedings below, Petitioner did not challenge Ms. Watson's participation in the contempt proceeding. Instead, he argued only that the contempt proceeding was properly brought in the name of the United States, and therefore was barred by his plea agreement. *See* Pet. App. A.ix-x (Petitioner contended that "the action against him 'was maintained in the name of the relevant sovereign, . . . the United States'"). Similarly, the question presented in this Court does not ask whether private contempt prosecutions are constitutional, but only whether they can proceed in the name and power of the individual, as opposed to the name and power of the government. Pet. Br. A.i. Because Petitioner's alleged due process right to a prosecution by the government was neither

presented to nor decided by the lower courts, and because it is not fairly included in the question presented, the Court should not reach the issue. *See, e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992).

In any event, Petitioner has no Due Process right to a public prosecutor. This Court has never held that the fundamental rights of the accused in criminal contempt cases include a "right to be prosecuted by the government." Pet. Br. 58. To the contrary, in *Young*, the Court held that "it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders." 481 U.S. at 793. The courts' inherent authority "necessarily encompasses the ability to appoint a private attorney to prosecute the contempt." *Id.*[23]

Petitioner's assertion (at 59) that his contempt proceeding was "in no sense" controlled by the government is incorrect. Respondent was represented by the D.C. Attorney General. In addition, the trial court exercised substantial control over the proceeding. Rather than authorizing private individuals to file formal criminal charges, D.C. law authorizes them to file "a motion for

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[23] The asserted "right to be prosecuted by the government" is also contrary to the many state court decisions permitting private prosecutions. *See* pages 39-42 & n.15 *supra* (citing and discussing cases).

contempt and proceeding through counsel, or pro se, with a contempt hearing in the Family Division." *Green*, 642 A.2d at 1278 (citing D.C. Sup. Ct. Intrafamily R. 7(c) & 12). Given that the court could initiate a criminal contempt proceeding on its own motion, there can be no constitutional objection to allowing a private party to file a motion requesting that the court initiate contempt proceedings and bringing to the court's attention alleged violations of its order. The court also retains discretionary control over many aspects of the criminal contempt proceeding, including: (i) whether to grant the motion to issue a show-cause order (ii) selection of the issues to be tried and the evidence to be considered; (iv) whether a conviction is warranted (because violation of a CPO is a petty offense tried to the court rather than a jury), and (v) the appropriate punishment (subject to statutory limits). Thus, many decisions that are made by a prosecutor in a typical criminal case are subject to substantial judicial oversight and control in criminal contempt proceedings for violations of a CPO.

Moreover, this Court has never held that a contempt prosecution must be "controlled by[] the Executive Branch or the government." Pet. Br. 59. To the contrary, in *Young*, the Court rejected the view that a criminal contempt proceeding is "execution of the criminal law in which only the Executive Branch may engage." 481 U.S. at 800 (citation omitted). To give a public prosecutor the right to overrule a court's decision to initiate contempt proceedings would vitiate *Young*, which

contemplated that the Court could appoint a private prosecutor even if the public prosecutor declined or even opposed the prosecution. 481 U.S. at 801 (court may appoint a private prosecutor if a "request [to] the appropriate prosecuting authority to prosecute contempt actions . . . is denied."). Such a result would also undermine the court's independence, because the contempt power is "a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." *Gompers*, 221 U.S. at 450.

2. Petitioner does not contend that the Due Process Clause requires that a private prosecutor in a contempt proceeding be disinterested. To the contrary, he expressly "declined to raise . . . the question . . . whether the Due Process Clause prohibits a private, interested party from prosecuting a criminal contempt action on behalf of the sovereign." Pet. Supp. Cert. Br. 10. In the lower courts, Petitioner did not simply "decline[] to raise the issue", *id.*, he vehemently disavowed it. *See, e.g.*, Pet. C.A. Post-Argument Br. 3 n.3 (The assertion that "Robertson is asking this Court to hold that there is a constitutional right to a disinterested prosecutor for contempt . . . is just wrong."). Accordingly, the Court should not consider this question.

Moreover, the characteristics of criminal contempt under D.C.'s civil protection order system do not implicate the concerns about prosecutions by interested parties articulated by this Court in *Young*.

Contempts are petty offenses punishable by a maximum of 180 days incarceration and a $1,000 fine. D.C. Code Ann. § 16-1005(f), Pet. Br. App. 10. Respondents nevertheless receive substantial constitutional protections, including notice of the charges and the criminal nature of the proceeding, the right to counsel, the opportunity to present evidence, and protection against compelled self-incrimination. *See* D.C. Intrafamily R. 13(e). In addition, a private party prosecuting such a contempt does not wield "expansive powers" nor exercise a "wide-ranging discretion." *Young*, 481 U.S. at 813-14. The contempt proceeding is largely in the hands of the court, and thus does not present "a myriad of occasions for the exercise of discretion." *Id.* at 812-13. And while the domestic violence victim has an interest in obtaining a conviction, any danger of a vindictive prosecution is counterbalanced by the court's control over the proceedings. In addition, unlike a public prosecutor, a private party likely is not protected by absolute or even qualified immunity for her actions. *Cf. Richardson*, 521 U.S. at 412 (private prison guards not entitled to qualified immunity).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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