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 THE DISTRICT OF COLUMBIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

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

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INTEREST OF AMICUS CURIAE

This case involves the constitutionality of statutes allowing the issuance of civil protection orders and enforcement through contempt proceedings. Congress originally enacted the statutory scheme at issue in its capacity as the supreme legislature for the District of Columbia. The Council of the District of Columbia later amended certain provisions, and the District of Columbia Court of Appeals interpreted that legislature's intent in the decision at issue. The local government of the District of Columbia has an interest in defending its local statutes and the authoritative interpretation of the highest local court, under which private parties may enforce the civil protection orders they obtain by prosecuting violators for criminal contempt.

The District of Columbia also has related interests in preventing domestic violence and in ensuring that court orders are obeyed. Petitioner's argument if accepted would limit how civil protection orders issued by local courts to prevent domestic violence may be enforced and, in some instances, whether they may be enforced effectively at all.

Petitioner's argument that the local legislature may not allow a private party to pursue criminal contempt in her own name also touches on the extent to which local officials, especially those accountable to the local populace, may make local governmental decisions under authority delegated by Congress. Home rule is of surpassing importance to the people of the District of Columbia and to their local government.

The District of Columbia supports respondent Wykenna Watson as amicus curiae. The Office of

the Attorney General for the District of Columbia represented her earlier in this case, as authorized by local court rule and statute. Super. Ct. Intrafamily R. 9(a)(2) (1987); D.C. Code § 16-1003(c) (1989 repl.); *see* D.C. Code § 16-1003(b) (2009 supp.). That office no longer represents her before this Court but continues to represent other individuals who similarly seek to obtain civil protection orders and enforce them in the District's local courts.

STATEMENT

1. Forty years ago, Congress made the District of Columbia (District) the first jurisdiction in the nation with a system for victims of domestic violence to obtain civil protection orders (CPOs). District of Columbia Court Reform and Criminal Procedure Act of 1970 (Court Reform Act), Pub. L. No. 91-358, § 131, 84 Stat. 473, 545–48; Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & Fam. Stud. 35, 38 (2008). Every state has since followed suit. *Id.*

As enacted by Congress, the scheme had two essential components. First, on a petition by the District's Corporation Counsel (now known as the Attorney General), the Superior Court of the District of Columbia could enter a temporary protection order or a CPO lasting up to a year when an "intrafamily offense" had been "committed or threatened." 84 Stat. at 546–47; D.C. Code §§ 16-1001(1), 16-1003, 16-1004, 16-1005 (1973). Such an order could direct the respondent "to refrain from the conduct committed or threatened and to keep the peace toward the family member," among other things. 84 Stat. at 547; D.C. Code § 16-1005(c) (1973).

Second, to ensure that CPOs were effective, Congress specified that "[v]iolation of any temporary or permanent order issued under this chapter . . . shall be punishable as contempt." 84 Stat. at 548; D.C. Code § 16-1005(f) (1973). Congress envisioned these procedures as "an alternative to criminal prosecution, which is often inappropriate in the resolution of family disputes, and to no official process at all." H.R. Rep. No. 91-907, at 161 (1970).

The Superior Court adopted Intrafamily Rules soon after Congress created the CPO scheme in 1970. Under these rules, the court could initiate contempt proceedings on a motion alleging violations of a CPO. Super. Ct. Intrafamily R. 9(c) (1971). The rules established that contempt "shall be punishable by a fine or penalty of not more than $300 or by imprisonment for not more than six months." *Id.* 9(d).

In 1973, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), Pub. L. No. 93-198, 87 Stat. 774 (1973). The "paramount purpose" of the Home Rule Act was to "grant to the inhabitants of the District of Columbia powers of local self-government." *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (quoting D.C. Code § 1-201.02(a) (2006 repl.)). Among other fundamental steps taken to promote that purpose, Congress created the Council of the District of Columbia (Council) and delegated it broad legislative authority. D.C. Code §§ 1-203.02, 1-204.01, 1-204.04 (2006 repl.). With certain carefully enumerated limitations, the Council has "legislative power" that "extend[s] to all rightful subjects of legislation within the District

consistent with the Constitution of the United States." *Id.*

The Council has in the ensuing decades repeatedly strengthened the CPO system Congress initially created. In particular, it has emphasized the independent right of victims of domestic violence to seek judicial assistance themselves.

In 1982, the Council authorized victims of domestic violence to seek CPOs on their own initiative. D.C. Law 4-144, 29 D.C. Reg. 3131 (1982); D.C. Code § 16-1003(a) (1989 repl.). It saw that "[v]iolence among family members [was] a growing national problem as well as a local phenomenon." Report of the Council of the District of Columbia Committee on the Judiciary on Bill 4-195, at 1 (May 12, 1982). The Council created "a private right of action" in order "(1) to promote a prompt resolution of an intrafamily offense problem; and (2) 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 Corporation Counsel." *Id.* at 10. That office, which Congress in 1970 had made the sole entity authorized to petition the Superior Court for CPOs, "was unable to meet the demand for the growing number of CPOs." *Id.* at 2; *Green v. Green*, 642 A.2d 1275, 1279 n.7 (D.C. 1994). The creation of a private right of action was thus appropriate to supplement "[e]xisting remedies" that were "inadequate in aiding victims in preventing further abuse." Report on Bill 4-195, at 2, 10. The Council also recognized that a party exercising this private right of action might act independently of any government prosecution: "The 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 chapter." D.C. Code § 16-1002(c) (1989 repl.).

The Superior Court revised its rules after the Council established a private right of action. These revised rules made clear that the party that sought the CPO in the first instance could pursue enforcement through contempt. Super. Ct. Intrafamily R. 7(c), 12(c)(2), (4) (1987) (allowing motions for contempt, giving "[b]oth parties . . . the right to present sworn testimony of witnesses and other evidence in support of or in opposition to the motion" for contempt, and allowing the court to seek representation for the petitioner); *see id.* 9(a) (discussing representation of petitioners). Consistent with these rules and the Council's creation of a private right of action, the Superior Court recognized in 1989 that a private party could herself initiate and prosecute a criminal contempt action for violation of a CPO. *Castellanos v. Novoa*, 117 Wash. L. Rep. 1189 (D.C. Super. Ct. 1989).

The Council in later years continued to reinforce and expand the protections afforded under the CPO system. In 1990, the Council saw that, despite its efforts, domestic violence was "steadily increasing in the United States and the District of Columbia." Report of the Council of the District of Columbia Committee on the Judiciary on Bill 8-192, at 2 (May 16, 1990). One problem was that police officers treated domestic violence differently from other violent crimes and were "reluctant to intervene beyond mediation/conflict resolution and referral." *Id.* Based on studies showing "that mandatory arrest laws and regulations are the most effective deterrent

to domestic violence," the Council enacted a provision requiring arrest by an officer with probable cause to believe an intrafamily offense had occurred. *Id.* at 2–3; D.C. Law 8-261, 37 D.C. Reg. 5001 (1990); D.C. Code § 16-1031 (1997 repl.).

In 1994, the District of Columbia Court of Appeals rejected the argument that a criminal contemnor had "a 'fundamental' constitutional right to a public prosecutor" that was violated "when the trial judge permitted [the CPO holder's] counsel to participate in the intrafamily contempt proceedings." *Green*, 642 A.2d at 1278, 1280–81. Based on the Council's decision in 1982 to allow individuals themselves to petition for CPOs and the recognition that government lawyers lacked the resources to take all necessary actions to protect such individuals, the court held that the statutes permitted "the beneficiary of a CPO . . . to enforce that order through an intrafamily contempt proceeding." *Id.* at 1279 & n.7; *see also id.* at 1278 (citing relevant court rules).

Later in 1994, the Council expanded the class of intrafamily offenses subject to the CPO scheme. With "domestic violence continu[ing] to be one of the most formidable social and legal problems at both the local and national levels," the Council recognized that "victims of domestic violence in a significant social relationship" deserve protection even "if they are not actually living with their attacker." Report of the Council of the District of Columbia Committee on the Judiciary on Bill 10-477, at 1–2, 3 (Oct. 12, 1994). The Council thus included within the definition of "intrafamily offense" those criminal offenses committed against one "with whom the offender maintains or maintained a romantic relationship."

D.C. Law 10-237, 42 D.C. Reg. 36 (1994); D.C. Code § 16-1001(5)(B) (1997 repl.). The Council also added, as a companion to the existing contempt provision, a provision making the violation of a CPO "a misdemeanor . . . punish[able] by a fine not exceeding $1,000 or by imprisonment for not more than 180 days, or both." D.C. Code § 16-1005(g) (1997 repl.); *see* Report on Bill 10-477, at 2, 5.

In 1996, the Superior Court created a dedicated Domestic Violence Unit. *Robinson v. United States* 769 A.2d 747, 750–54 (D.C. 2001). That unit adopted new rules in 2000 similar to the Superior Court's earlier Intrafamily Rules. These rules continue to recognize the rights of those seeking CPOs to secure private representation and to move in their private capacity for criminal contempt when CPOs are violated. Super. Ct. Domestic Violence R. 7(e), 9(a), 12(d), (e) (2000); *see id.* 8(b) (referring to "privately prosecuted criminal contempt actions").

In 2002, the Council further strengthened the enforcement of CPOs. It joined other jurisdictions that had adopted a "uniform mechanism for the interstate enforcement of domestic violence protection orders." Report of the Council of the District of Columbia Committee on the Judiciary on Bill 14-212, at 1 (Oct. 29, 2002); D.C. Law 14-296, 50 D.C. Reg. 320 (2002); D.C. Code §§ 16-1041 to 16-1048 (2009 supp.). It amended existing law to include the violation of "foreign protection order[s]" as cause for seeking contempt. D.C. Code § 16-1005(f), (g) (2009 supp.). It also guaranteed that the District's enforcement mechanisms generally would be available to those holding orders from other jurisdictions, and further that contempt enforcement of foreign orders

was permissible even where the foreign jurisdiction's own courts would "not recognize the standing of a protected individual to seek enforcement." D.C. Code § 16-1042(a), (b) (2009 supp.).

In later years, the Council continued taking steps to improve the District's legislative response to domestic violence. D.C. Law 16-306, § 206, 53 D.C. Reg. 8610, 8626 (2006); D.C. Law 16-204, 53 D.C. Reg. 9059 (2006). Most recently, in 2008, the Council revised the law to close certain "loopholes" and establish that minors too could seek CPOs. Report of the Council of the District of Columbia Committee on the Judiciary on Bill 17-55, at 1–2 (Nov. 25, 2008); D.C. Law 17-368, 56 D.C. Reg. 1338 (2008); D.C. Code §§ 16-1001 to 16-1006 (2009 supp.). The Council did not amend the provision relating to enforcement by contempt but did recognize, with apparent approval, the decision under review in this case: "The Court affirmed that private petitioners may bring contempt cases for CPO violations." Report on Bill 17-55, at 4.

2. In March 1999, respondent Wykenna Watson filed a petition for a CPO in the Superior Court. J.A. 11–17. She alleged that on March 27 she had been brutally assaulted by her former boyfriend, petitioner John Robertson. J.A. 12, 40. After a hearing, the Superior Court issued a CPO prohibiting Mr. Robertson from, *inter alia*, assaulting, threatening, harassing, abusing, or contacting her. J.A. 20–25. The United States Attorney's Office separately charged him with serious crimes in connection with the events of March 27. J.A. 26–27.

Mr. Robertson proceeded to violate the CPO. On June 26, he demanded that Ms. Watson "drop" the

pending criminal charges and pushed her into a wall. Pet. App. A, at iv–v. On June 27, he threw industrial-strength drain cleaner on her, causing lye burns that required her hospitalization and extensive reconstructive surgeries. *Id.* at v–vi; J.A. 72.

In July 1999, Mr. Robertson and an Assistant United States Attorney entered a plea agreement to resolve the pending criminal charges relating to the March 27 incident. J.A. 28–30. It was handwritten on a standard form that both the United States Attorney's Office and the Office of the Corporation Counsel used in the Superior Court. *Id.* Because the Assistant United States Attorney was acting only on behalf of his own office, the signatories struck the words "District of Columbia" in the caption on the pre-printed form (leaving the caption as "United States vs. John Robertson") and the words "Assistant Corporation Counsel" below the signature line (leaving the words "Assistant U.S. Attorney"). *Id.* at 28, 30. Mr. Robertson agreed to plead guilty to attempted aggravated assault. *Id.* at 28. The "gov't" agreed to dismiss other charges and "not pursue any charges concerning an incident on 6-26-99." *Id.*

Ms. Watson separately filed her own motion to adjudicate criminal contempt in January 2000. J.A. 56–60. The motion was based on Mr. Robertson's actions on both June 26 and June 27, 1999. *Id.*

After trial in May 2000, the Superior Court found Mr. Robertson guilty on three counts of criminal contempt. Pet. App. A, at v–vi; J.A. 63–65. He was sentenced in June 2000 to three terms of 180 days in jail, one of which was suspended, and five years of probation. J.A. 63. He was also ordered to pay $10,009.23 in restitution for Ms. Watson's exten-

sive medical bills. J.A. 64. He appealed. Pet. App. A, at vi.

More than three years later, in November 2003, Mr. Robertson moved the Superior Court under D.C. Code § 23-110 (2001) to vacate his criminal contempt convictions. Pet. App. A, at vi. He argued that these convictions violated his plea agreement with the United States Attorney's Office and that his trial counsel had been ineffective in not so arguing. *Id.*

The Superior Court denied the motion. J.A. 89–93. It held "that the plea agreement . . . is binding only on the government and not on any party seeking to vindicate a right against [Mr. Robertson]." J.A. 92. He appealed from that order, and the appeal was consolidated with the pending direct appeal from his criminal conviction. Pet. App. A, at ii.

The District of Columbia Court of Appeals unanimously affirmed. Based on its precedent and the statutory language and purposes, the court read local law to confer "a private right of action to enforce the CPO through an intrafamily contempt proceeding." *Id.* at xii–xv. It rejected Mr. Robertson's argument "that such an action could only be brought 'in the name of the relevant sovereign, . . . the United States," rather than "in the name and interest of [Ms.] Watson." *Id.* at xiv. Because the United States was not a party to the contempt proceeding, the court held that the United States Attorney's Office's plea agreement did not affect the validity of the contempt convictions. *Id.* at xvii–xix.

SUMMARY OF ARGUMENT

1. The District of Columbia agrees with respondent that the Constitution allowed her to bring this

criminal contempt proceeding in her own name. Petitioner does not ask this Court to interpret District law. In any event, it would be improper under established principles of deference to disturb the reading of local law by the District of Columbia Court of Appeals.

This Court's practice is to defer to interpretations of District law by the District's courts save where "egregious error" has been committed. That practice is not only deeply embedded in precedent but also supported by the clear intent of Congress, which intended the District's local court system to be treated like a state court system in relevant respects. As this Court has held, deference is thus appropriate even where, for instance, deciding an issue of District law anew might avoid the need to decide a difficult constitutional question.

Far from constituting the egregious error that might warrant this Court's independent interpretation of District law, the reading adopted by the court below is well-supported. In decisions dating back more than two decades, the District's courts have recognized that the Council intended victims of domestic violence to have control over the CPO process themselves. The purposes underlying the legislative decision to give victims a private right of action to obtain CPOs are served by recognition of their ability to seek criminal contempt themselves for violation of those CPOs.

2. No separation-of-powers issue is properly presented because this case has to do with governance of the District, not of the nation. This Court has repeatedly recognized that Congress has plenary authority over the District and need not follow consti-

tutional separation-of-powers principles applicable to the national government when deciding how to structure the District's government. Indeed, Congress has often departed from the tripartite scheme of our national government in designing local government, with this Court's repeated approval.

Because constitutional separation-of-powers principles do not apply of their own force in the District, these principles could be relevant only to the extent Congress has incorporated them in the statutes under which the District's local government functions. This Court should not, however, decide any statutory issue, for multiple reasons. First, the statutory issues go to fundamental, contested, and complex questions regarding governance in the District but petitioner adverts to them only in a single, largely conclusory footnote. Second, petitioner did not raise any separation-of-powers issue — whether constitutional or statutory — in the lower courts. And third, because his separation-of-powers argument is in reality a statutory rather than constitutional argument, it is not fairly included in the question presented in this Court. Resolution of any statutory issue should await a case in which the issue has been properly presented in the courts below and in this Court.

If the Court nonetheless reaches the issue, it should conclude that Congress did not incorporate relevant constitutional separation-of-powers principles into the statutes by which it structured local government in the District. The District government critically departs from the national model with regard to prosecution of crimes. The Mayor holds the executive power of the District, but public prosecut-

ing duties in the District have long been shared by the District and the United States.

Petitioner incorrectly relies on statutes that limit the Council's ability to affect the prosecutorial authority of the United States. But those statutes are about relations between the two governments in the District, not the separation of powers within the local government. Moreover, there are two public prosecutors under District law. There is thus no reason to apply constitutional separation-of-powers principles regarding a legislature's ability to diminish the presumptive prosecutorial authority of a co-equal, unitary executive.

Furthermore, the relevant statutes do not track, or purport to track, constitutional separation-of-powers principles. Their history and text show instead that these statutes are meant to do specific things unconnected with separation-of-powers principles: D.C. Code § 23-101 sets a default rule allocating prosecutorial authority to either the United States or the District where the legislature has not identified a prosecutor, while D.C. Code § 1-206.02(a)(8) prevents the Council from divesting the United States Attorney of authority to prosecute any crime that he had exclusive authority to prosecute when the Home Rule Act was enacted. Neither provision gives petitioner a basis to argue that constitutional separation-of-powers principles apply here.

ARGUMENT

I. THE CONSTITUTION AND THE LAW OF THE DISTRICT OF COLUMBIA ALLOWED RESPONDENT TO BRING THIS CRIMINAL CONTEMPT ACTION IN HER OWN NAME.

The District of Columbia agrees with respondent that the Constitution allowed her to bring this criminal contempt proceeding in her own name. Petitioner does not directly challenge the lower court's holding that District law also allowed her to do so. Pet. App. A, at xii–xv. Even if he had done so, it would be improper under well-established principles of deference for this Court to disturb this reading of local law by the District of Columbia Court of Appeals.

Long before the Court Reform Act restructured the local judiciary in 1970, this Court adopted a practice of deferring to interpretations of District law by the District's courts. This longstanding practice is to refrain from "interfer[ing] with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed." *Fisher v. United States*, 328 U.S. 463, 476 (1946); *see, e.g.*, *Griffin v. United States*, 336 U.S. 704, 712–18 (1949); *District of Columbia v. Pace*, 320 U.S. 698, 702 (1944); *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935).

That practice became all the more appropriate with the Court Reform Act. "One of [Congress's] primary purposes . . . was to restructure the District's court system so that 'the District will have a court system comparable to those of the states and other large municipalities.'" *Pernell v. Southall Realty*, 416 U.S. 363, 367 (1974) (quoting H.R. Rep. No.

91-907, at 23). "This new structure plainly contemplates that the decisions of the District of Columbia Court of Appeals on matters of local law . . . will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law." *Id.* at 368. Thus, the principle that the Court should not "overrul[e] the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed'" is both "long embedded in practice and now supported by the clear intent of Congress." *Id.* at 369 (quoting *Fisher*, 328 U.S. at 476); *see Palmore v. United States*, 411 U.S. 389, 409–10 (1973); *Key v. Doyle*, 434 U.S. 59, 64, 67–68 (1977).[1]

Pernell is particularly instructive. That case involved "whether the Seventh Amendment guarantees the right to trial by jury in an action brought in the District of Columbia." 416 U.S. at 363. The Court was "met at the outset by the suggestion" that it could "interpret the relevant statutes as providing for a right to jury trial," eliminating any need to decide the constitutional issue. *Id.* at 365. The Court

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[1] For similar reasons, this Court should decline to exercise supervisory power over the District of Columbia Court of Appeals in the same manner it does over Article III courts. In particular, it should not exercise supervisory power to overrule that court's resolution of an issue with no effect outside the District. *See Gay v. United States*, 411 U.S. 974, 975–76 (1973) (Douglas, J., dissenting from the denial of certiorari) (suggesting that the Court should apply supervisory power over a decision of the District of Columbia Court of Appeals that "has an impact not confined to the Potomac's shores" (quoting *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 556 (1965)).

recognized "the 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the (constitutional) question may be avoided.'" *Id.* That principle does not allow the Court to resolve an issue of state law in order to avoid a federal constitutional issue. *Id.* at 368. The Court in *Pernell* thus declined to apply the principle of constitutional avoidance given the deference due to the District of Columbia Court of Appeals, which would be treated as a state court for this purpose, and the absence of any "obvious error" by that court. *Id.* at 365–69.[2]

Far from being obvious error, the local courts' reading of District law is well-supported. In holding that private parties themselves could prosecute criminal contempt actions, the Superior Court in 1989 and then the District of Columbia Court of Appeals in 1994 and in the decision under review prop-

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[2] Deference may be unnecessary when a constitutional issue "cannot be separated entirely" from an interpretive issue under District law. *Whalen v. United States*, 445 U.S. 684, 688 (1980); *cf. Kent v. United States*, 383 U.S. 541, 557–63 & n.27 (1966); *District of Columbia v. Little*, 339 U.S. 1, 4 n.1 (1950). That is not the case here. Petitioner does not even raise any statutory issue regarding the lower court's reasoning, let alone assert that this Court need resolve one to reach his discrete constitutional arguments. Moreover, given his exclusive focus on constitutional issues and the correspondingly limited scope of the question presented, it would be more appropriate to dismiss the writ of certiorari as improvidently granted than to decide issues of District law. *See, e.g.*, *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 356 n.1 (2001); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 28 (1993) (per curiam).

erly relied on the Council's intent to allow victims of domestic violence to have control over the CPO process themselves. Pet. App. xii–xiii, xv; *Green*, 642 A.2d at 1279 & n.7; *Castellanos*, 117 Wash. L. Rep. at 1194.

In 1982, the Council gave victims of domestic violence a "private right of action" to seek CPOs on their own behalf, where before only the Office of the Corporation Counsel could do so. Report on Bill 4-195, at 2, 10; *see supra* pages 4–5. The District's courts have correctly perceived that the Council's purposes are served by allowing victims to enforce those CPOs in their own names through the contempt remedy set forth in D.C. Code § 16-1005(f). Pet. App. xii–xiii, xv; *Green*, 642 A.2d at 1279 & n.7. The Superior Court reasoned:

> It would have been quite illogical for the Council to attempt to correct a problem in its effort to control domestic violence by granting petitioners a private right to obtain civil protection orders without also intending to permit the same petitioners to enforce the provisions of those orders privately by utilization of the only enforcement mechanism contained in the statute.

Castellanos, 117 Wash L. Rep. at 1194. Indeed, at the same time it conferred a private right of action, the Council expressly decreed 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 chapter." D.C. Code § 16-1002(c) (1989 repl.).[3]

The Council acted in part because government lawyers — in particular, lawyers from the Office of the Corporation Counsel — lacked the resources in 1982 to take all appropriate measures to protect victims' interests. Report on Bill 4-195, at 2, 10; *see* Pet. App. xii–xiii; *Green*, 642 A.2d at 1279 n.7; *Castellanos*, 117 Wash. L. Rep. at 1194. Although the proper interpretation of District law does not depend on what actually has transpired since then, subsequent events confirm that enforcement resources are still wanting even with the possibility of government involvement in prosecution of criminal contempt.

In 1992, the District's courts examined then-current practices in CPO cases. The resulting report detailed how CPOs "are considered one of the most effective means of preventing domestic violence" but how the promise of the District's CPO system was not being fully realized because of many litigants' *pro se* status, victims' failure to use "statutory protections . . . to the full extent possible," and in particular "a lack of effective enforcement of CPOs by use of the contempt power." District of Columbia

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[3] The District's courts have also relied upon court rules in deciding that private parties who have won CPOs should be able themselves to prosecute criminal contempt. Pet. App. xiii & n.5; *Green*, 679 A.2d at 1279; *see* Super. Ct. Intrafamily R. 7(c), 9(a), 12(c) (1987). Later court rules and later legislative history further support the repeated judicial conclusions that District law allows private parties to bring criminal contempt actions in their own names. *See supra* pages 5–8.

Courts, *Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts* 142 (May 1992). The report revealed that there were few motions for contempt relative to the number of requests for CPOs and that only a small percentage of motions for contempt led to incarceration. *Id.* at 152–53. The report suggested that judges make greater efforts to appoint attorneys from the Office of the Corporation Counsel or other attorneys (especially pro bono attorneys) to represent private petitioners. *Id.* at 154, 163. That the courts saw a need for increased representation of private parties in pursuing criminal contempt shows that government prosecution of criminal contempt — either by the United States Attorney on behalf of the United States or by the Office of the Corporation Counsel on behalf of the CPO holders — was not meeting enforcement needs.

The Office of the Attorney General (as it is now known) has not had the resources since that report was written to represent close to all those who seek contempt sanctions for violation of CPOs, nor is there any organized program for appointment of *pro bono* attorneys for this purpose. Statistics on file at the Superior Court show a great continuing need in the District for both CPOs and contempt enforcement. Over the last five years, the court has issued an annual average of 1796 CPOs (including orders issued after adjudication, consent orders, and default orders) and received an annual average of 274 motions for contempt (including motions for both civil and criminal contempt). Just as in 1982, when the Council provided private parties with a private right of action, there remains a vital role for private prose-

cution of criminal contempt in combating domestic violence in the District.

II. NO SEPARATION-OF-POWERS ISSUE IS PROPERLY BEFORE THIS COURT.

A. There is no constitutional separation-of-powers issue because separation-of-powers principles applicable to the national government under the Constitution do not apply as to governance of the District, over which Congress has plenary authority.

There is no constitutional issue regarding the separation of powers in the District. The Constitution empowers Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States." U.S. Const. art. I, § 8, cl.17. "The power is plenary." *Palmore*, 411 U.S. at 397.

Exercising this authority, Congress need not follow constitutional separation-of-powers principles applicable to the national government when deciding how to structure local government in the District. As this Court established long ago, "Congress has the entire control over the district for every purpose of government . . . ." *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838). "Congress' 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." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) (plurality op.).

Congress has adopted many different forms of local government for the District since its establish-

ment in 1801, sometimes departing dramatically from the tripartite scheme of our national government. *See generally* Staff of the House Committee on the District of Columbia, 101st Cong., *Governance of the Nation's Capital: A Summary History of the Forms and Powers of Local Government for the District of Columbia, 1790 to 1973* (Comm. Print 1990). For example, beginning in 1874 and lasting for nearly a century, a board of commissioners with three members appointed by the President governed the District. *Id.* at 43–50; Act of June 20, 1874, ch. 337, 18 Stat. 116. This Court has repeatedly upheld such decisions by Congress to deviate from the national separation-of-powers model. *E.g.*, *Palmore*, 411 U.S. at 397–98, 407–10 (upholding Congress's decision to create a local court system for the District that exercises power under Article I and is not subject to Article III's tenure and salary provisions); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442–44 (1923) (upholding Congress's decision to allow local courts in the District to exercise legislative authority that Article III courts could not exercise).

In this respect, Congress's authority over the District resembles its authority over the territories:

> It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories, of a *quasi* state government, with executive, legislative, and judicial

> officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to this form.

Binns v. United States, 194 U.S. 486, 491 (1904).

Of particular relevance here, this Court has held that Congress need not leave prosecution in federal enclaves solely to the federal executive branch. In *Snow v. United States*, 85 U.S. 317 (1873), the Court considered whether the then-territory of Utah could grant authority to prosecute crimes under territorial laws to local executive officers elected by the territorial legislature, rather than "[t]he attorney appointed by the President for the Territory . . . to attend to the business of the General Government." *Id.* at 320–21. This Court held that the territorial legislature could do so, as the arrangement was consistent with the organic act Congress had passed for the territory and "the entire matter is subject to the control and regulation of Congress." *Id.* at 321–22.

The same is true in the District given the scope of Congress's authority over it. *See District of Columbia v. John R. Thompson Co.*, 347 U.S. 100, 106–07 (1953) ("The power of Congress to grant self-government to the District of Columbia . . . would seem to be as great as its authority to do so in the case of territories."). Thus, Congress has long empowered the local government of the District to prosecute crimes in its own name. *See id.* at 112–13; *infra* pages 27–29. Whatever the particular form of local government in place at a time, the District's prosecutors have derived power from Congress and Article I of the Constitution, not the federal executive branch and Article II. *See Metropolitan R.R. Co.*

v. District of Columbia, 132 U.S. 1, 8–9 (1889); *Barnes v. District of Columbia*, 91 U.S. 540, 545–46 (1875). The suggestion that only the federal executive branch may prosecute crimes in the District is thus both contrary to this Court's precedent and ahistorical.[4]

That suggestion also makes no sense given the source of constitutional separation-of-powers principles. They derive, of course, from the particular provisions in the Constitution that empower and constrain the branches of the national government. Such provisions do not by their terms apply to the relationships between branches of other governments. The Court has thus "held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen*, 445 U.S. at 689 n.4; *see, e.g.*, *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). The same must be true for Congress as to the District, over which it has "all the legislative powers which a state may exercise over its affairs" absent any specific constitutional limitation. *Berman v. Parker*, 348 U.S. 26, 31 (1954).[5]

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[4] Petitioner quotes *Metropolitan Railroad Co.* and *Snow* to assert that, technically, there should be no "crimes against the District," only crimes against the United States. Pet. Br. 56 n.23. As the *Snow* Court explained, the practice of allowing territories to prosecute in their own names "exhibits somewhat of an anomaly" because "there is no sovereignty in a Territory of the United States but that of the United States," but the practice is nonetheless lawful. 85 U.S. at 321–22.

[5] Constitutional limitations on Congress's national authority do not necessarily apply when Congress legislates for the District. *See Loughboro v. Blake*, 18 U.S. (5 Wheat.) 317, 318

B. Given petitioner's failure to present and preserve the issue properly, the Court should not consider whether Congress has incorporated constitutional separation-of-powers principles into the statutes under which the District's local government functions.

Because constitutional separation-of-powers principles do not apply of their own force in the District, these principles could be relevant only to the extent Congress has incorporated them in the statutes under which the District's local government functions. Petitioner effectively concedes as much but barely discusses those statutes, devoting only a single, largely conclusory footnote to explaining why constitutional separation-of-powers principles apply here. Pet. Br. 55 n.23.

This Court should not decide such important statutory issues without proper briefing. The statutory issues go to fundamental questions regarding governance in the District, and in particular the power of the locally accountable Council to control who prosecutes local crimes in the District. The scope of

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(1820). For example, before the Sixteenth Amendment was ratified, this Court enforced the Article I limitation on Congress's power to impose a "Capitation, or other direct, Tax." U.S. Const. art. I, § 9, cl.4; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). Nonetheless, the Court held that the limitation did not apply to a real estate tax enacted by Congress limited to the District. *Gibbons v. District of Columbia*, 116 U.S. 404, 407–08 (1886).

that power remains hotly contested in the District's local courts.[6]

Petitioner also failed to preserve any separation-of-powers argument — whether constitutional or statutory — in the lower courts, or even earlier in this Court. The first time he presented any argument on this point was in his brief on the merits. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see supra* pages 14–16.

Nor would consideration of any statutory issue be appropriate without proper preservation. Especially given Congress's intention to make the District's courts the equivalent of state courts on such issues, *see supra* pages 14–16, this Court should not rush ahead to decide issues that were not presented or considered there. Even before the Court Reform Act, this Court explained:

> There are cogent reasons why this Court should not undertake to decide questions of local law without the aid of some expression of the views of judges of the local courts who are familiar with the intricacies and trends of local law and practice. We do not ordinarily decide such questions without that aid

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[6] In *In re Crawley*, 978 A.2d 608 (D.C. 2009), the District of Columbia Court of Appeals held that the Council could not assign the District rather than the United States authority to prosecute a particular newly enacted crime. *Id.* at 609. A petition for rehearing en banc is pending.

> where they may conveniently be decided in the first instance by the court whose special function it is to resolve questions of the local law of the jurisdiction over which it presides.

Busby v. Electric Util. Employees Union, 323 U.S. 72, 74–75 (1944) (per curiam).

On a related note, because petitioner's separation-of-powers argument is in reality a statutory rather than constitutional argument, it is not fairly included in the question presented in this Court. That question is limited to constitutional issues. "A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.'" *Izumi*, 510 U.S. at 31–32 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992)) (internal quotation marks omitted).

C. In any event, relevant statutes do not incorporate constitutional separation-of-powers principles regarding executive authority to prosecute crimes or criminal contempt.

If the Court nonetheless reaches the issue, it should conclude that Congress did not incorporate relevant constitutional separation-of-powers principles into the statutes by which it structured local government in the District. The Mayor holds the executive authority of the District under D.C. Code § 1-204.22 (2009 supp.), but that authority does not include authority to prosecute all local crimes. Public prosecuting duties in the District have long been shared by the District and the United States.

Petitioner suggests nonetheless that the statutes defining the Council's authority incorporate relevant

constitutional separation-of-powers principles, apparently because those statutes limit the Council's ability to affect the prosecutorial authority of the United States. Pet. Br. 55 n.23. This suggestion fails at the outset for two reasons. First, the relevant statutes — D.C. Code § 23-101 (2001) and § 1-206.02(a)(8) (2006 repl.) — are about relations *between* the two governments in the District, not the separation of powers *within* the local government. Second, despite petitioner's attempt to diminish the District's prosecutorial authority, it is plain that there are two public prosecutors under District law, both *de jure* and *de facto*. There is thus no reason to apply constitutional separation-of-powers principles regarding a legislature's ability to diminish the presumptive prosecutorial authority of a co-equal, unitary executive.

Moreover, the history and text of those statutes demonstrates that they do not track constitutional separation-of-powers principles. In 1901, Congress passed a comprehensive code of law for the District, including a detailed criminal code. Act of Mar. 3, 1901 (1901 Code), ch. 854, 31 Stat. 1189. Congress also left some municipal ordinances and regulations in place. *Id.* § 1640, 31 Stat. at 1436. Section 932 of the 1901 Code specified who would prosecute offenses under the new code and pre-existing law:

> Prosecutions for violations of all police or municipal ordinances or regulations and for violation of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Co-

> lumbia and by the city solicitor or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants.

Id. § 932, 31 Stat. at 1340–41.[7]

Congress understood Section 932 to establish only a default rule to assign prosecutorial authority where the criminal ordinance, regulation, or statute at issue did not itself make the assignment clear. Both in the 1901 Code itself and through the ensuing decades, Congress repeatedly assigned prosecutorial authority without following that default rule — for instance, in statutes explicitly giving the District authority to prosecute where the permissible penalty included both imprisonment and a fine, rather than only one or the other.[8] Indeed, Congress amended

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[7] As this provision implies, the District's commissioners in 1901 had power to issue "usual and reasonable police regulations," one of many powers the Council holds today. Act of Jan. 26, 1887, ch. 49, 24 Stat. 368; D.C. Code § 1-303.01 (2006 repl.). Furthermore, District law at the time included municipal ordinances passed by earlier local governments, including the cities of Washington and Georgetown before their abolishment as separate entities. Act of Feb. 21, 1871, ch. LXII, § 40, 16 Stat. 419, 428. Prosecution in the name of the District thus has long historical roots. *See, e.g.*, *District of Columbia v. Herlihy*, 8 D.C. (1 MacArth.) 466 (D.C. 1874).

[8] *E.g.*, 1901 Code, §§ 684–85, 31 Stat. at 1298. By 1968, Congress had directed the District to prosecute at least thirty-nine offenses where the default rule would have indicated otherwise. *District of Columbia v. Grimes*, 404 F.2d 1337, 1340–41 (D.C. Cir. 1968).

the statute in 1968 to give the District authority to prosecute offenses relating to disorderly conduct and lewd acts in order to overturn a court decision that had applied the default rule. Act of July 30, 1968, Pub. L. No. 90-441, 82 Stat. 460; *see* S. Rep. No. 90-1360 (1968); D.C. Code § 23-101(b).

In 1970, Congress enacted the current successor to Section 932. Court Reform Act, § 210(a), 84 Stat. at 604–05. D.C. Code § 23-101 directs some crimes to be prosecuted by the District and others by the United States, but also makes plain that it continues to set only a default rule for allocating prosecutorial authority where it is not otherwise specified. Subsection (a) states that the District should prosecute crimes with certain characteristics "except as otherwise provided in [the] ordinance, regulation, or statute [at issue], or in this section." Subsection (c) in turn states that the United States prosecutes other crimes "except as otherwise provided by law."

Petitioner's apparent belief that D.C. Code § 23-101 is a separation-of-powers statute (Pet. Br. 55 n.23) is thus mistaken. From long before the creation of the current District government, it has addressed only whether the United States or the District should prosecute a crime where the legislature has not identified a prosecutor. The statute has nothing to do with relations between branches either within the federal government or within the District government.

That petitioner's reliance on the statute is misplaced is particularly clear given that it contemplates that the District's local government — not just Congress — may allocate prosecutorial authority without following the default rule. The statute sim-

ply does not support petitioner's contrary reading. Pet. Br. 55 n.23; *cf. District of Columbia v. Sullivan*, 436 A.2d 364, 368 (D.C. 1981) (rejecting an argument similar to petitioner's argument). His reading is inconsistent with the statute's references to "ordinance[s]" and "regulation[s]" that "otherwise provide[]." D.C. Code § 23-101(a), (c). The District's local government sometimes enacts law through ordinances and regulations, but Congress itself enacts law for the District only by legislation. *See supra* page 28, note 7; D.C. Code § 1-206.01 (2006 repl.). The necessary conclusion is that Congress in 1970 recognized that the District could assign prosecutorial authority without adhering to the default rule.

Moreover, just three years later, in passing the Home Rule Act, Congress made clear its intent to delegate broad legislative power to the Council given its purpose of "grant[ing] to the inhabitants of the District of Columbia powers of local self-government." D.C. Code §§ 1-201.02(a), 1-203.02, 1-204.04. Absent application of any explicit limitation in the Home Rule Act, the Council has the same authority that Congress itself had under D.C. Code § 23-101 to "otherwise provide[]." The only potentially relevant limitation in the Home Rule Act bars the Council from "[e]nact[ing] any act or regulation . . . relating to the duties or powers of the United States Attorney." D.C. Code § 1-206.02(a)(8).[9]

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[9] Petitioner also cites D.C. Code § 1-206.02(a)(3) (2006 repl.), which limits what the Council can do "concern[ing] the functions . . . of the United States." Pet. Br. 56 n.23. The District of Columbia Court of Appeals has held, however, that this

Petitioner incorrectly reads that provision to prevent the Council from "affect[ing] the power or prosecutorial authority of the United States" in any way. Pet. Br. 56 n.23. Even if that were true, the statute would not incorporate any constitutional separation-of-powers principle for two reasons. First, again, the statute is again about relations between governments, not within a government. Second, the Constitution does not require "a hermetic sealing off of the three branches of Government." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). Whether the Council could allow private parties rather than the United States to prosecute criminal contempt thus may pose an issue of statutory interpretation, but not an issue involving constitutional separation-of-powers principles.

In fact, properly read, D.C. Code § 1-206.02(a)(8) neither tracks separation-of-powers principles nor divests the Council completely of authority to affect the prosecutorial activities of the United States. Instead, it merely prevents the Council from shifting authority for prosecuting any crime that the United States Attorney had exclusive authority to prosecute when the Home Rule Act was enacted in 1973.

At that time, defining the United States Attorney's "duties" and "powers," and thus the scope of

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limitation pertains only to functions "that are national in scope," not "performance of a local function by federal officials." *District of Columbia v. Greater Wash. Cent. Labor Council, AFL-CIO*, 442 A.2d 110, 115–16 (D.C. 1982). That reading is supported by the statutory text and legislative history, and this Court should defer to it. *Id.*; *see supra* pages 14–16.

the limitation in D.C. Code § 1-206.02(a)(8), necessarily required looking crime-by-crime to see whether he had been assigned prosecutorial authority. Nothing in the Home Rule Act purported to transform the default rule in D.C. Code § 23-101 into a universal one. Indeed, given Congress's purpose of promoting home rule, it is implausible to think that the Home Rule Act *lessened* the District's preexisting authority to assign prosecutorial authority in at least some circumstances. *See supra* pages 29–30. Thus, as the United States explained before the lower court in this case, the Council could "otherwise provide[]" within the meaning of D.C. Code § 23-101 by allowing private parties to prosecute criminal contempt, given that it was "well settled that courts have inherent authority to appoint prosecutors other than the United States Attorney to prosecute criminal contempt." U.S. C.A. Br. 21 & n.9.

The legislative history of the Home Rule Act confirms that D.C. Code § 1-206.02(a)(8) does not limit the Council's authority to allocate authority to prosecute crimes that the United States Attorney did not have exclusive authority to prosecute at the time. When that provision was added, the bill that became the Home Rule Act would have prohibited the Council from ever amending Titles 22, 23, and 24 of the D.C. Code, and thus from enacting new crimes or affecting criminal procedure. Staff of the House Committee on the District of Columbia, *Home Rule for the District of Columbia 1973–1974: Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act* (Home Rule Legislative History) 2084, 2117,

2317–18 (Comm. Print 1974). The provision preventing the Council from enacting legislation with respect to the United States Attorney's duties or powers accordingly referred to duties or powers under the criminal law as it existed at the time. Rep. Diggs, who was the Chairman of the House Committee on the District of Columbia, stated that the provision would "prohibit Council from *changing* functions or duties" of the United States Attorney. *Id.* at ii, 2084 (emphasis added). Rep. Harsha similarly stated that he was "convince[d] . . . that under this bill all *present* functions undertaken by the U.S. Attorney would remain in that office." *Id.* at 2151 (emphasis added); *see id.* at 2152 (similar statement by Rep. Adams).

The Conference Committee crucially changed the bill such that the Council was prohibited from amending Titles 22, 23, and 24 only for two years. *Id.* at 2983, 3013; D.C. Code § 1-206.02(a)(9) (2006 repl.); *see McIntosh v. Washington*, 395 A.2d 744, 750–51 (D.C. 1978). After that, as Rep. Diggs stated, "it seems appropriate and consistent with the principle of self-determination, that the Council be given the authority to make whatever subsequent modifications in the criminal code as are deemed necessary." Home Rule Legislative History 3041–42.

The text of what became D.C. Code § 1-206.02(a)(8) did not change when the Conference Committee decided to allow the Council to legislate regarding substantive criminal law and criminal procedure. That provision was designed to address crimes that the United States Attorney then had the exclusive "dut[y]" and "power[]"to prosecute. If Congress had intended to change the scope of the provi-

sion to limit the Council's ability to assign prosecutorial authority over other crimes, Congress would have altered the provision's language. That is especially clear given that Congress explicitly allowed the Council to amend the criminal code, and thus at minimum to create new crimes for the United States to prosecute, without any indication that Congress feared the Council might thereby run afoul of D.C. Code § 1-206.02(a)(8). Petitioner's suggestion that the Council cannot affect the prosecutorial authority of the United States in any way because of D.C. Code §§ 1-206.02(a)(8) and 23-101 is thus incorrect.

Indeed, petitioner presents no meaningful analysis of these statutes and cites only one case in which the Court interpreted statutes by reference to constitutional separation-of-powers principles. Pet. Br. 55 n.23. That case is readily distinguishable. In *Springer v. Philippine Islands*, 277 U.S. 189 (1928), the Court considered whether the Philippine legislature could appoint its own officers to a board that would control an executive function. *Id.* at 197–200. The Court concluded that certain separation-of-powers principles akin to those found in the Constitution inhered in the organic act of the Philippine government because it established a tripartite system like that of the national government. *Id.* at 200–01, 205–06. The Court did not hold, however, that Congress necessarily must incorporate *all* constitutional separation-of-powers principles whenever it incorporates *any* such principles by statute.

This case is unlike *Springer* in that there are specifically applicable statutes making it improper to resort to general notions of what the branches in a tripartite scheme generally are empowered to do. To

be sure, "Congress has established a government for the District of Columbia that incorporates constitutional notions of separation of powers." Pet. Br. 55 n.23; *see Wilson v. Kelly*, 615 A.2d 229, 231–32 (D.C. 1992). But it has not incorporated them as relevant here.

CONCLUSION

This Court should affirm the judgment of the District of Columbia Court of Appeals.

Respectfully submitted,

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