No. 08-6261

In The
Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *ex rel.* WYKENNA WATSON,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF

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SUMMARY OF ARGUMENT

The Constitution forbids prosecution of a criminal contempt in a purely private right of action where a private person, representing her own interests, decides whether and what charges to prosecute independent of any discretion exercised by a United States prosecutor or a District of Columbia judge. The United States as amicus curiae now agrees that the Constitution presupposes that all criminal prosecutions in congressionally created courts, including prosecutions for criminal contempt, are exercises of sovereign power to punish for the commission of public wrongs. Respondent contends that a purely private right of action is constitutional but fails to rebut Petitioner's arguments that under our Constitution a crime is a public wrong, criminal contempt actions are between the public and the defendant, and deviations from traditional constitutional protections in criminal contempt actions can be justified solely by the doctrine of necessity.

The lower court found, and Respondent acknowledges, that John Robertson was in fact prosecuted in a private action where Wykenna Watson alone, in furtherance of her own interests, invoked the court's power to punish for criminal contempt. Because a criminal punishment cannot be imposed in an action between private parties, and because Ms. Watson lacked the authority to commence or conduct this prosecution on her own behalf – a prosecution that the public prosecutor representing the United States

had chosen not to pursue – Robertson's sentences for criminal contempt must be set aside. Moreover, this Court should decline the United States' invitation to recharacterize the prosecution as one on behalf of the United States, because the government's proposal contradicts its own account of the facts in the lower court and fails to accord deference to the lower court's well-supported factual findings as well as its interpretation of District of Columbia law.

If this Court deems Ms. Watson to represent the United States, it must conclude that the prosecution of Mr. Robertson should have been barred by his plea agreement. The promise by the United States Attorney for the District of Columbia that the "gov't" would not pursue any charges relating to the events at issue bound the United States, through any counsel, from bringing a prosecution for such events in the District of Columbia courts.

ARGUMENT

BECAUSE THE CONSTITUTION REQUIRES THAT ALL PROSECUTIONS FOR CRIMINAL CONTEMPT IN CONGRESSIONALLY CREATED COURTS BE CONDUCTED ON BEHALF OF THE UNITED STATES PURSUANT TO ITS SOVEREIGN POWER, PETITIONER'S SENTENCES FOR CRIMINAL CONTEMPT MUST BE VACATED.

A. THE CONSTITUTION REQUIRES THAT CRIMINAL CONTEMPT PROSECUTIONS IN CONGRESSIONALLY CREATED COURTS BE PURSUED ON BEHALF OF THE GOVERNMENT AND PURSUANT TO ITS SOVEREIGN POWER.

The holding of the District of Columbia Court of Appeals that Petitioner's prosecution for criminal contempt was constitutionally "conducted as a private action brought in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity," Cert. Pet. App. A.14, ran afoul of the fundamental constitutional proposition that criminal actions must be prosecuted in the name of the sovereign and pursuant to its power, and that criminal contempt, like any crime, is a "public wrong." Pet. Br. 11-12. The text and history of the Constitution and this Court's constitutional jurisprudence demonstrate that, "at root, there are two parties to a criminal action in our system: the government and 'the individual whom [it] seek[s] to

punish.'" *Id.* at 11 (quoting *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 469 (1826)). The United States has now registered its wholesale agreement with Petitioner's constitutional analysis on this fundamental point. Pet. Br. 14-46; U.S. Br. 12-21.

Respondent focuses on the question whether criminal *contempt* prosecutions need be brought on behalf of the sovereign and offers little to counter Petitioner's claim that crimes are public wrongs which only the sovereign may constitutionally prosecute. *See* Resp. Br. 38 (characterizing the argument as "beside the point"). She relies on *Williams v. Florida*, 399 U.S. 78 (1970), to contend that even if criminal actions were understood to be exercises of sovereign power at common law, it "does not follow" that the Framers incorporated this feature of the common law into the Constitution. Resp. Br. 18-22. But the conception of crime as a public wrong is not a "historical accident," *Williams*, 399 U.S. at 89, as this Court characterized the twelve-person jury at issue in *Williams*, nor can the principle that a criminal proceeding must be an exercise of sovereign power be dismissed as an "incidental" feature of our legal system. *Id.* at 91. To the contrary, "the principle that criminal prosecution represents the exercise of sovereign power was 'indispensible' to the common law's understanding of crimes as a public offense." U.S. Br. 13 n.4. Because *Williams* is inapposite, Respondent fails to rebut Petitioner's claim that the Framers' understanding of the prosecution of crime as

a sovereign function was incorporated into the Constitution.

Respondent makes the more narrow assertion that there existed no settled view in the common law that criminal *contempt* actions must be brought pursuant to sovereign power. Resp. Br. 23-32. Without addressing the wealth of authority cited by Petitioner, Pet. Br. 36-39, she suggests that early cases holding that the jury trial right does not attach in criminal contempt cases demonstrate that the Framers did not view contempt as a "crime" for constitutional purposes. Resp. Br. 23-24. But as this Court stated in *Bloom v. Illinois*, 391 U.S. 194, 198 n.2 (1968), the history of the applicability of jury trials to criminal contempt is not "sufficiently simple or unambiguous" to rest a constitutional decision solely on historical grounds. And even if the history were unambiguous, the historical status of jury trials for criminal contempt does not undermine pervasive evidence that the Framers understood criminal contempts to be crimes and public wrongs. *See, e.g., Gompers v. United States*, 233 U.S. 604, 610 (1914) ("If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech."); *Bloom*, 391 U.S. at 201 n.3 (citing cases).

Respondent also asserts that the Framers would not have viewed the criminal contempt here as a "crime" because it was a petty offense. Resp. Br. 24. But Petitioner's claim is not that a jury trial right should have attached, but that contempt is a "crime

in the ordinary sense." *See Taylor v. Hayes*, 418 U.S. 488, 495 (1974) ("[P]etty contempt *like other petty criminal offenses* may be tried without a jury.") (emphasis added). This Court's conception of criminal contempt as a "separate public action brought on behalf of the government" is "consistent with the status of criminal contempt at common law." U.S. Br. 19-20. Respondent offers no persuasive authority to the contrary.

As a tactical matter, Respondent bifurcates the question presented, discussing pleading requirements and the styling of captions as if they captured the essence of Petitioner's claim that criminal contempt actions can only be constitutionally brought "in the name" of the sovereign, and insisting that the question of in whose "power" the action was brought was never raised. Resp. Br. 23, 43. But Petitioner's claim has never been one of titles.[1] By framing the question presented as whether the criminal contempt action could be brought "in the name and pursuant to the power of" a private individual, Petitioner incorporated language used below to identify who had the interest in the case and the power to control it. The United States described the proceeding as a "private right of action," which conferred upon the litigant the "right to conduct" the action "in his or her own name and interest." U.S. C.A. Br. 10. Respondent Watson

[1] The cases Respondent cites regarding the technical requirements of titling are therefore inapposite. Resp. Br. 28.

referred to a "private right of action," contending that she was the "party-in-interest" to the proceeding. Appellee C.A. Br. 17. Petitioner used similar terms. Appellant C.A. Post-Arg. Br. 9 ("Under our law, criminal prosecutions are an exercise of sovereign power. Thus, even when the complainant or his or her privately retained counsel pursue them, criminal prosecutions are and always have been maintained 'in the name of' the particular sovereign at issue."). When the lower court concluded that the case was brought as a "private right of action," prosecuted "in the name of Ms. Watson," not the sovereign, it clearly issued a ruling about in whose interest the case was brought and who had the power to control it. Cert. Pet. App. A.12, A.17.

By focusing on technical pleading issues, Respondent avoids confronting the essence of the lower court's ruling and the issue presented.[2] For instance, while Respondent cites commentator Stewart Rapalje for the proposition that whether a criminal contempt proceeding is "brought in the name

[2] Even cases Respondent cites reference the principle that criminal contempt proceedings are brought to vindicate the public's interest. *See, e.g.*, *In re Crumpacker*, 431 N.E.2d 91, 95 (Ind. 1982) ("The cause was certainly initiated for the public's interest and prosecuted by an arm of state government."); *Manderscheid v. Dist. 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.").

of the sovereign" is a "comparatively unimportant matter," about which the practice was "not harmonious," Resp. Br. 31, 28, she draws her quotations from the section of his treatise titled "Entitling the Proceeding." *See* Stewart Rapalje, *A Treatise on Contempt* § 95 (1884). As to the fundamental question of in whose interest a criminal contempt action is brought, Rapalje was clear: "the state alone is interested" although the private party may "receive[ ] an incidental advantage." *Id.* at § 21.

Petitioner takes no issue with Respondent's claim that the question of titling is a "comparatively unimportant matter" and not a "constitutional requirement." Resp. Br. 31-32. [3] Because Petitioner never claimed that titling in his case produced constitutional error, Respondent gains no ground by demonstrating otherwise.

Nor does Respondent gain any ground by her reference to the history of private prosecutions in this country. Resp. Br. 38-42. In his opening brief, Petitioner clarified that the "critical understanding that all criminal prosecutions were brought on behalf of the sovereign was in no sense compromised" by the acknowledged practice of private prosecutions, because in England as in America, all such prosecutions were brought in the name of and pursuant to the power of

[3] The United States also makes the uncontroversial point that the styling of a case is not a "matter subject to constitutional requirements." U.S. Br. 22.

the sovereign. Pet. Br. 25.[4] The United States makes precisely the same point. U.S. Br. 14-15. Petitioner has challenged neither the authority of a court to appoint a private prosecutor to represent the sovereign in a criminal contempt action – the authority approved in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) – nor the constitutionality of a prosecution in which an interested party assumes the role of the private prosecutor – the issue left unresolved in *Young*. Pet. Supp. Br. 10.[5] Rather,

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[4] Even the cases Respondent cites acknowledge the public nature of criminal contempt prosecutions. *See, e.g., Tonkin v. Michael*, 349 F. Supp. 78, 81 (D.V.I. 1972) ("public prosecutor must supervise the actual conduct of the case"); *Katz v. Commonwealth*, 399 N.E.2d 1055, 1060 (Mass. 1979) (Commonwealth "is the adverse party"); *State v. Martineau*, 808 A.2d 51, 54 (N.H. 2002) (public prosecutor may *nol pros* private prosecutions over objection of private prosecutors); *State v. Storm*, 661 A.2d 790, 793 (N.J. 1995) (statute permits private lawyer to prosecute actions '"for and on behalf of the State or the municipality'") (citation and emphasis omitted); *People ex rel. Allen v. Citadel Mgmt. Co., Inc.*, 355 N.Y.S.2d 976, 979 (N.Y. Crim. Ct. 1974) (when defendant "'has committed a crime against the people of the state, it is for the people of the state to say by whom they shall be represented on his trial'") (citation omitted); *Olsen v. Koppy*, 593 N.W.2d 762, 765 (N.D. 1999) (court may appoint private counsel to represent interests of the state).

[5] For this reason, many of the concerns raised by the non-governmental amici supporting Respondent are not implicated. Although amici portend that a ruling in Petitioner's favor will mean that many civil protection order ("CPO") violations will go unaddressed, *e.g.*, DV Leap *et al.* Br. 11; Family Law Judges Br. 17, Petitioner never has suggested that a CPO beneficiary lacks the ability to bring such violations to a court's attention or to request that the court issue an order to show cause. Similarly,

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Petitioner has challenged the constitutionality of his prosecution in a "private right of action" that Ms. Watson conducted as the true party in interest.

Ultimately, Respondent's claim that a private party may constitutionally pursue a criminal contempt action in federal court rests on her general assertion that "contempt is different." She enumerates "differences" between criminal contempt and traditional crimes and suggests, without explanation, that the right of a private party to prosecute a criminal action on her own behalf should be added to the list. Resp. Br. 26-27. But the procedural differences Respondent identifies have each been countenanced by this Court as necessary deviations from traditional criminal procedure requirements to accommodate a

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while amici assert that public prosecutors have been unable or unwilling to prosecute CPO violations, *e.g.*, DV Leap *et al.* Br. 17; NCVLI Br. 20, a ruling that all criminal contempt prosecutions in congressionally created courts must be maintained in the name and power of the United States would not preclude interested CPO holders or their counsel from representing the United States in such prosecutions. And, although the amici's concerns of underenforcement are not implicated in this case, Petitioner notes that the majority of the studies amici cite in support of their "underenforcement" argument are a decade or more outdated. *See, e.g.,* DV Leap *et al.* Br. 11-22 (citing studies primarily from the 1990s). As amicus in support of Petitioner outlines, recent developments have increased resources for public prosecution of domestic violence. NACDL Br. 20-27. This shift illustrates the corrective function of the democratic process: When the public disagrees with the executive's enforcement priorities, it elects more responsive government officials.

court's need to vindicate its dignity or authority.[6] Respondent makes no attempt to tie the exceptional notion that a criminal contempt can constitutionally be prosecuted in a federal court by a private party on her own behalf to the firmly rooted doctrine of necessity, nor to explain how such a private right of action is consistent with the peculiarly public nature of contempt. *See* Pet. Br. 46-51.

Finally, Respondent has no adequate response to Petitioner's argument that a criminal contempt action in which the power to prosecute is shifted entirely out of the hands of the government into the hands of a private party who has no obligation to ensure "that justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935), does not comport with

[6] *See Young*, 481 U.S. at 801 ("While a court has the authority to initiate a prosecution for criminal contempt . . . the rationale for the appointment authority is necessity."); *Pounders v. Watson*, 521 U.S. 982, 988 (1977) ("immediate punishment is essential to prevent 'demoralization of the court's authority' before the public") (citation omitted); *Green v. United States*, 356 U.S. 165, 183 n.14 (1958) (relying on "general statements of the nature of the contempt power and its indispensability to federal courts" in concluding that the grand jury right is inapplicable), *overruled in part by Bloom*, 391 U.S. at 208; *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (while traditional crimes can only be defined by statute, common law power to punish for contempt "cannot be dispensed with in a Court, because [it is] necessary to the exercise of all others").

the Due Process Clause.[7] The United States acknowledges the problem, by noting that due process "obligations thought integral to the defendant's ability to receive a fair trial" constrain only governmental actors. U.S. Br. 16.[8] Ms. Watson responds with

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[7] Respondent is wrong to contend, Resp. Br. 59-60, that Petitioner did not present a due process argument to the lower court. *See* Appellant C.A. Br. 23 ("Indeed, the notion that a private person – in her capacity as a private person – could impose a criminal punishment on another person is an anathema to our modern notions of due process."); Appellant C.A. Post-Arg. Br. 20 n.12. (citing Due Process Clause).

[8] The United States notes that criminal contempt prosecutions by private parties *on behalf of the sovereign* may present due process concerns that are not present in this case. U.S. Br. at 23-29. Petitioner agrees that such issues are not raised (save any due process claim based upon *Santobello v. New York*, 404 U.S. 257 (1971)), as he has challenged the constitutionality of a criminal contempt proceeding brought *on behalf of a private party*. As to Petitioner's argument that a criminal contempt prosecution in a federal court unmoored from the doctrine of necessity raises separation of powers concerns, Pet. Br. 51-55, the United States and Respondent contend that the constitutional separation of powers doctrine does not apply in the District of Columbia, while conceding there may be a comparable statutory right. U.S. Br. 25-27; Resp. Br. 52-54. This Court has never decided the question, *see Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 266 (1991) (referring to the "unsettled question whether the District of Columbia acts as a State or as an agent of the Federal Government for separation-of-powers purposes"), and neither Respondent nor the United States address Petitioner's argument that *Springer v. Philippine Islands*, 277 U.S. 189 (1928), applied a constitutional separation of powers analysis in comparable circumstances. *See also Metro. Washington Airports Auth.*, 501 U.S. at 274 (using *Springer* in constitutional analysis).

the counter-factual assertion that the government had "control" in this case because her lawyer at the time was a District of Columbia Assistant Attorney General ("AAG"), and because the trial court had discretion to decide whether to "grant the motion to issue a show-cause order" and to "select[ ] . . . the issues to be tried." Resp. Br. at 60-61. As Petitioner demonstrates in detail later in this brief, *see infra* pp. 20-25, neither the AAG nor the court exercised control over the decision whether to prosecute Mr. Robertson or what charges to file. The AAG acted solely as the attorney for Ms. Watson, and this case did not involve a request for – or the issuance of – an order to show cause. Thus, Respondent is wrong to suggest that these proceedings varied only slightly from those in *Young*.[9]

B. PETITIONER'S SENTENCES FOR CRIMINAL CONTEMPT MUST BE SET ASIDE BECAUSE THEY WERE IMPOSED IN AN UNCONSTITUTIONAL PRIVATE CRIMINAL ACTION.

1. This Court's Decision in *Gompers v. Buck's Stove & Range Co.* Requires that Mr. Robertson's Sentences Be Set Aside.

Petitioner argued in his opening brief that because his criminal punishment was imposed in

[9] Respondent's characterization of *Young* is also inaccurate, Resp. Br. 26, 61, as the contempt proceeding in *Young* commenced upon motion of a party, not on the court's "own motion" as Respondent suggests. *Young*, 481 U.S. at 792.

litigation between private parties, *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911), requires that his sentence be set aside. Pet. Br. 40-41; *see also id.* at 45 (arguing that contempt prosecution against Michael Foster in *United States v. Dixon* would be "void" under *Gompers*, and not a bar to subsequent jeopardy, given lower court's interpretation of the statute). Indeed, the grounds for setting aside Petitioner's sentences are more compelling than in *Gompers* because Ms. Watson invoked the judicial power solely through an unconstitutional private right of action. *See Young*, 481 U.S. at 815 (Scalia, J., concurring) (contempt convictions resulting from appointment of private prosecutor that exceeded judicial power of the United States are void, where "we cannot know whether petitioners would have been prosecuted had the matter been referred to a proper prosecuting authority"); *cf. Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (litigant has a "cause of action" if she is "a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court").

Unlike Respondent, the United States offers no response to this argument, suggesting that the holding of the lower court that the prosecution was conducted as a private right of action was "not necessary" to the court's ruling, which it characterizes as solely resolving a plea breach claim. U.S. Br. 29. But Petitioner argued to the lower court that "there is no such thing in our legal system as a criminal action maintained 'in the name of' a private person," and

that such an action is "foreclosed by binding decisional law and is completely lacking in historical pedigree." Appellant C.A. Post-Arg. Br. 2. When the lower court decided the case, it cited and responded to Petitioner's claim. Cert. Pet. App. A.10 (quoting Robertson's argument). The structure of the lower court opinion makes this clear: it first held that D.C. Code § 16-1005(f) authorizes a private right of action for criminal contempt, Cert. Pet. App. A.12-13, then found that this case was in fact prosecuted by Ms. Watson in her own name and interest pursuant to that statute, *id.* at A.14, and then concluded that such a prosecution is lawful and constitutional, *id.* at A.14-15 (relying on Justice Blackmun's dissent in *United States v. Dixon*, 509 U.S. 688 (1993), and language from *In re Debs*, 158 U.S. 564, 596 (1895)). Only after resolving these issues did the court turn to the plea breach claim, which, given the rulings the court had already made, became an easy question: Ms. Watson, as the party to the contempt proceeding, was not bound by a plea agreement executed by the United States. *Id.* at A.17. Because the lower court found that the proceeding was a private right of action – and denied the plea breach claim wholly on that basis – it needed to address Petitioner's claim that such an action was unconstitutional and entirely foreign to "our legal system" in order to resolve the case.

Respondent, who identifies herself as the only party to this proceeding and has consistently asserted that she brought this case as a private right of

action,[10] addresses Petitioner's *Gompers* claim on its merits. First, she characterizes *Gompers* as a case involving the deprivation of procedural rights and suggests that this case is distinguishable because Petitioner had notice of the criminal nature of the contempt action and was not required to testify. Resp. Br. 34. But the Court's decision to vacate the sentence in *Gompers* did not rest on a determination that Gompers was denied the benefit of procedural safeguards. The *Gompers* Court looked to the procedures employed solely in an attempt to define the *type of proceeding* involved in the case, after Buck's Stove & Range Company argued that the Court could not consider the record because the proceeding had been in equity. *See Gompers*, 221 U.S. at 444 ("The question as to the character of such proceeding has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or on appeal."). Once the Court concluded that the proceeding had been in equity, the Court observed that there had been a "departure – a variance – between the procedure adopted and the punishment imposed." *Id.* at 449. This result, the Court said, was "as fundamentally erroneous as if in an action of 'A v. B, for assault and battery,' the

[10] Resp. Cert. Opp. ii ("List of Parties"); *id.* at 9 ("private right to pursue criminal contempt"); *id.* at 12 ("essential facts" include "authority to prosecute in . . . her own interest"); Resp. Br. ii ("Parties to the Proceeding"); *id.* at 43 (Respondent authorized by District law "to initiate the proceeding on her own").

judgment entered had been that the defendant be confined in prison for twelve months," *id.*, and it was in light of this *variance* that the Court ultimately determined that "it would be necessary to set aside the order of imprisonment." *Id.*[11] Respondent's suggestion that *Gompers* turned on whether procedural rights were afforded finds no support in the Court's opinion.

Second, Respondent notes that *Gompers* was decided before the merger of law and equity and cites *United States v. United Mine Workers of Am.*, 330 U.S. 258, 299 (1947), for the proposition that after the merger of law and equity, this Court "had no difficulty sustaining criminal contempt convictions brought in the same proceeding as a civil contempt." Resp. Br. 33. This characterization of *United Mine Workers* is misleading, however, because the claim there *was* of procedural unfairness, *not* that the punishment must be set aside because it was imposed in a civil proceeding. *See United Mine Workers*, 330 U.S. at 295 ("The defendants have pressed upon us the procedural aspects of their trial and allege error so prejudicial as to require reversal of the judgments for civil and criminal contempt"). Furthermore, because the United States *was the party* in both the civil and criminal action involved, *id.* at 300, the Court was not

[11] Petitioner stated that the *Gompers* Court determined that the contempt "proceeding" at issue was criminal, Pet. Br. 40, when in fact the Court determined that the "punishment" was criminal. Resp. Br. 32-33. This error affects Petitioner's analysis in no material respect.

presented with a claim that criminal punishment was imposed in a contempt litigation between private parties. While *Gompers* was decided prior to the merging of law and equity, the holding in the case – that a criminal punishment imposed in an action between private parties must be set aside – has in no sense been eroded.

2. This Court Should Decline the Invitation of the United States To Recharacterize the Proceeding as a Public Action on Behalf of the Sovereign, Because the Lower Court Found as a Matter of Fact and Local Law that the Prosecution Was Initiated and Controlled by a Private Person Acting on Her Own Behalf and the Record Supports that Determination.

Instead of addressing the question of what remedy is appropriate when a criminal punishment is imposed in a proceeding that was *not* brought pursuant to the power of the sovereign, the United States suggests that this Court avoid the remedy issue by recharacterizing the proceeding below as one that was. U.S. Br. 21 ("[T]he court of appeals erred on this abstract question of characterization. The criminal contempt prosecution here, like any other, was an exercise of sovereign power.").[12] But the lower

[12] Now asserting that this is a case "in which the United States is interested" within the meaning of 28 U.S.C. § 518(a), "the Solicitor General has authorized private counsel for

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court held, *as a factual matter*, that "[t]he criminal contempt prosecution in [this] case *was conducted* as a private action brought in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity." Cert. Pet. App. A.14 (emphasis added) (quotation omitted). Indeed, the United States made this precise argument to the court below, acknowledging its factual nature: "The criminal contempt proceeding in the present case was *in fact* conducted as a private action, in the name and interest of Watson." U.S. C.A. Br. 4 (emphasis added). Whether or not it is appropriate for the United States to switch course at this point, *cf. New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), the government now offers this Court no basis to reject the factual findings

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respondent *to appear on her behalf*" and argue "in support of a purely private right of action." U.S. Br. 1-2 n.1 (emphasis added). Provision of this consent cannot be deemed the "same course" the government followed in *Young*, as the government asserts. *Id.* In *Young*, 481 U.S. 787, the government authorized the private prosecutor to represent the United States, not a private party such as Ms. Watson; the private prosecutor claimed to represent the United States, unlike Respondent's counsel here; and the private prosecutor's argument was not inconsistent with the claim that he represented the United States, as Respondent's defense of a private right of action is here. *See* U.S. Amicus Br. at 2 n.1, *Young*, 481 U.S. 787 (No. 08-1329). Certainly 28 U.S.C. § 518 does not require the Solicitor General to give an attorney consent to represent a *private party* before this Court. The awkward letter of consent provided by the Solicitor General exposes the flaw in the United States' claim that this Court can effectively recharacterize the proceeding as one brought on behalf of the United States.

of two lower courts.[13] *Graver Tank & Mfg. Co., Inc. v. Linde Air Prods., Co.*, 336 U.S. 271, 275 (1949).

The court of appeals also held, a matter of local law, that D.C. Code § 16-1005(f) authorized this prosecution to be litigated as a private right of action. Cert. Pet. App. A.12-13. As the District of Columbia demonstrates, this Court usually defers to the District of Columbia Court of Appeals on matters of local law. D.C. Br. 14-20 (citing *Pernell v. Southall Realty*, 416 U.S. 363, 368-69 (1974)). The "recharacterization" suggested by the United States requires this Court to reach beyond the question presented to disturb not only the factual findings of the court below, but its legal conclusion on a matter of local law as well. This Court should decline to do so.

Moreover, the lower court was correct to conclude that this case was brought by Ms. Watson in her own name and interest, as neither a public prosecutor nor the trial judge initiated the prosecution or believed itself authorized to interfere with Ms. Watson's exercise of the broad discretion traditionally exercised by a public prosecutor. As to initiation, Ms. Watson commenced this action by filing a "Motion to Adjudicate Criminal Contempt," supported by an affidavit that listed five alleged violations of the civil

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[13] The trial court found that Ms. Watson "was pursuing [the contempt charges] with the [Office of the Attorney General] as her counsel." J.A. 92; *see also* Tr. 5/10/2000 95 ("[T]his case is . . . not brought in the name of the United States[;] it could be but it's not . . . .").

protection order. J.A. 56-60. The motion was filed pursuant to D.C. Super. Ct. Intra-Fam. R. 7(c),[14] which contemplated the prompting of a ministerial act – the issuance by the clerk of a notice of a hearing – as opposed to the issuance of a show cause order by the judge.[15] The trial judge never issued an order to show cause; rather, she treated Ms. Watson's affidavit outlining five counts of contempt as the charging document in the case. *See* Tr. 5/10/2000 3-5 (when parties appear for trial, court proceeds immediately to opening statements); Tr. 5/11/2000 33-36 (trial court renders verdict on "separate counts" alleged in Ms. Watson's affidavit). She thus exercised no discretionary control over the initiation of the action or the selection of the charges.

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[14] "When a motion for contempt is filed alleging violation of a civil protection order or temporary protection order, the Intrafamily Clerk shall issue a notice of hearing and order directing appearance." Pet. Br. App. 11.

[15] The Respondent quotes from the rule as revised in 2000, after the trial in this case, which provides for the issuance of an order to show cause. *See* Resp. Br. 4-5 n.6. The revised court rules reflect the public nature of criminal contempt actions in a number of respects beyond the change in the manner of initiation of the proceedings: they establish separate discovery rules for CPO proceedings and criminal contempt proceedings, D.C. Sup. Ct. Dom. Viol. R. 8; Appellant C.A. App. 89-92, and they now define criminal contempt as "a violation of the law, a public wrong which is punishable by fine or imprisonment or both." D.C. Sup. Ct. Dom. Viol. R. 12(a); Appellant C.A. App. 95. The United States quotes this definition from the revised Rule 12 in its brief, although it was not in effect at the time of Mr. Robertson's prosecution. U.S. Br. 20 n.8.

Certainly no public prosecutor initiated the proceeding here, as the AAG was representing Ms. Watson[16] and the Office of the United States Attorney had already made an informed decision not to bring charges. An Assistant United States Attorney ("AUSA") interviewed Ms. Watson and Vallace Player (the individual at whose house the charged incidents occurred) regarding the events at issue. Pet. Br. 53-54. As the trial testimony revealed, the versions of the two women differed dramatically: Ms. Watson claimed that Mr. Robertson was the aggressor in the fight that preceded the throwing of the lye, although she acknowledged that she brought the Draino bottle to the scene and uncapped it herself. Tr. 5/10/2000 24-25. She denied getting a knife from the kitchen and threatening Mr. Robertson with it immediately prior to his throwing the lye. *Id.* at 77-79. Ms. Player, who was ultimately credited by the trial judge, Tr. 5/11/2000 35, described Ms. Watson as the initiator of the conflict, noted that Ms. Watson uncapped the lye and threatened Mr. Robertson with it, and testified that Ms. Watson ran towards Mr. Robertson with a knife, threatening, "I'm going to kill you, you're dead," before Mr. Robertson threw the lye. Tr. 5/10/2000 127-28, 135-36. Having gathered information from both women, the AUSA decided that the interests of the United States were best served by extending Mr. Robertson a plea offer to the March incident, coupled with an agreement not to prosecute the events in

[16] Tr. 5/10/2000 98 ("I'm acting as her attorney.").

June. *See* J.A. 50-51; Tr. 4/4/2000 8 (AAG states, "I spoke with the prosecutor at the time that it did not go forward . . . . What they did tell me is that based on witness testimony, they were not going forward with the case"). Thus, the United States certainly did not initiate any charges against Mr. Robertson for this incident; indeed it expressly promised not to do so.[17]

Nor did any public prosecutor view herself as authorized to interfere with Ms. Watson's exercise of discretion in conducting the litigation. The United States Attorney's Office was entirely uninvolved, and the AAG made clear that she was acting solely as Ms. Watson's lawyer. *See* Tr. 5/10/2000 3-4 (statement of

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[17] It would be entirely speculative to conclude that the judge would have pursued a judicially initiated contempt on these facts, where an AUSA had conducted an investigation, declined to pursue the case, and bargained away the right to do so. The judge might also have been influenced by the fact that the events began as a consensual get-together, Tr. 5/10/2000 15, that Ms. Watson returned to the house – where Mr. Robertson was sleeping – later in the evening and prior to the fight with the lye, Tr. 5/11/2000 34, and that despite the stay-away order, Ms. Watson attempted to visit Mr. Robertson in prison after he was sentenced in the felony case, Tr. 5/11/2000 40-41. As a policy matter, the inevitably fluid nature of relationships in the domestic violence context counsels against providing a CPO beneficiary with a private right of action for criminal contempt. *But see* DV Leap Br. 22-23, 35 (citing the fact that CPO beneficiaries might bargain away their right to pursue a contempt prosecution in exchange for civil relief, as well as their "ambivalen[ce]" and the fact that they are "easily intimidated or worn down," as *benefits* of private criminal contempt actions).

AAG, "this is not the [District] Government prosecuting, this is us representing her and it's her case. If she chose to dismiss this case, the [District] Government couldn't continue without her."); J.A. 93 (finding by trial court that this was not a prosecution "controlled by the government"). The judge's role in the proceeding was purely adjudicatory: she considered the counts in Ms. Watson's affidavit as if they were counts in an information and rendered a verdict upon them. Given that the United States played no role in initiating or conducting these proceedings, this Court cannot conclude – contrary to the factual findings of the courts below – that this was a prosecution brought on behalf of the United States. Indeed, this Court need only look to the proceeding before *this* Court – where Respondent's counsel indicates that he represents Ms. Watson, Resp. Br. ii – to see that this is a case that, as a matter of fact, has been and is currently being litigated by a private party on her own behalf, despite the United States' recent attempt to suggest otherwise.

Finally, the United States is wrong to assert that the fact that Ms. Watson represented her own interests and exercised the power to initiate the prosecution on her own behalf has no real bearing on the case, and that Petitioner's concerns flow only to how the prosecution is "characterized" and not how it was "actually conducted." U.S. Br. 28. The United States' suggestion that the case would look exactly the same even if it were recharacterized as a sovereign prosecution overlooks the fundamental point

that if the prosecutorial authority had been limited to a governmental entity authorized to commence the prosecution, it is highly likely that this prosecution would never have happened at all.

C. THE PLEA AGREEMENT BETWEEN THE UNITED STATES AND PETITIONER WOULD HAVE BARRED A PROSECUTION IN WHICH MS. WATSON REPRESENTED THE UNITED STATES.

If this Court determines that the proceeding was on behalf of the United States, it must hold that the prosecution was barred by the plea agreement. The lower court said that the abbreviated word "gov't" on the plea form "clearly referred to the *United States*, not Ms. Watson," and rejected Petitioner's plea claim by noting that he "starts from the faulty assumption that the criminal contempt proceeding against him was brought in the name of the United States." Cert. Pet. App. A.18-19 (emphasis added). And the United States contended in the lower court that if the proceeding had been a judicially initiated contempt action "conducted in the name of the United States even when . . . privately prosecuted," it would "tend to think that the plea agreement in this case could reasonably be interpreted as a promise that no such prosecution would occur." U.S. C.A. Br. 31. Now the government – and Respondent – contend that the plea agreement must be read more narrowly, binding only the "Office of the United States Attorney for the District of Columbia." U.S. Br. 29-31; Resp. Br. 48-49.

The plea agreement cannot reasonably be interpreted in this fashion.

The United States' current assertion that, "[b]y crossing out 'the District of Columbia' and 'Assistant Corporation Counsel,' the AUSA made clear that the plea agreement with petitioner covered only the United States Attorney's Office," U.S. Br. 30, rests on a factual assumption unsupported by the record – that it was the AUSA who crossed out the words – and suggests a clarity of intention that is not present. *See United States v. Gebbie*, 294 F.3d 540, 551-52 (3d Cir. 2002) (ambiguities in plea agreements must be construed against the government) (citing cases). The United States and Respondent highlight modifications on a dual-purpose "plea form" – designed for use both in criminal cases in Superior Court prosecuted by the United States Attorney as well as traffic and related offenses prosecuted by the Office of the Attorney General[18] – that merely conform the caption and the

[18] In the District of Columbia, prosecutions for violations of police and municipal ordinances and similar offenses are "conducted in the name of the District of Columbia by the [Attorney General] for the District of Columbia," and all other criminal prosecutions are "conducted in the name of the United States by the United States attorney for the District of Columbia." D.C. Code § 23-101. Criminal contempt actions are therefore conducted in the name of the United States and prosecuted – unless a private prosecutor is involved – by the United States Attorney. *See* U.S. C.A. Br. 19-20. Only Congress, not the Council of the District of Columbia, has the authority to alter this allocation of prosecutorial authority. *See In re Crawley*, 978 A.2d 608, 613-14, 620 (D.C. 2009).

signature line to the particular proceeding involved but say nothing about whether the plea agreement binds only certain representatives of the United States. This case does not present the question whether the word "government" in a case brought pursuant to the sovereign power of the United States includes all offices of United States Attorneys.[19] Rather, given that the plea agreement and the subsequent prosecution occurred in the same jurisdiction, the word "gov't" in this plea agreement which was signed by an Assistant United States Attorney for the District of Columbia must be interpreted, at a minimum, to bar anyone acting on behalf of the United States in the District of Columbia courts from prosecuting the dismissed charges – just as the

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[19] Nonetheless, many courts have answered this question in the affirmative – indeed, some quite eloquently: "At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government." *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972) (en banc); *see also Gebbie*, 294 F.3d at 550 ("United States Attorneys should not be viewed as sovereigns of autonomous fiefdoms."); *United States v. Van Thournout*, 100 F.3d 590, 594 (8th Cir. 1996) ("Absent an express limitation, any promises made by an Assistant United States Attorney in one district will bind an Assistant United States Attorney in another district.") (citing cases). One of the few circuits to hold otherwise has demonstrated discomfort with its position. *See United States v. Annabi*, 771 F.2d 670, 672 (2d Cir. 1985) (noting that, "[a]s an original proposition," an agreement that "the Government" will dismiss charges "might be thought to bar the United States from reprosecuting the dismissed charges in any judicial district," but observing that "the law has evolved to the contrary").

United States stated below it "tended to think."[20] The District of Columbia Court of Appeals has held that the signing of a conditional plea agreement by a private prosecutor in a criminal contempt action must be given effect, rejecting an argument by the United States Attorney for the District of Columbia that the private prosecutor could not give the consent of "the government" to the plea. *See In re Peak*, 759 A.2d 612, 616-617 (D.C. 2000). If a private prosecutor acting on behalf of the United States in District of Columbia courts has the authority to execute a binding plea agreement, it has the concomitant responsibility to abide by such agreements that have been duly executed by the United States through its attorneys.[21]

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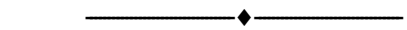
[20] D.C. Code § 16-1002(c) does not inform the interpretation of this plea agreement. This provision, which stated that, "[t]he institution of criminal charges by the United States Attorney shall . . . not affect the rights of the [CPO] complainant to seek any other relief under this subchapter," Pet. Br. App. 5, was designed to modify a statutory scheme that initially provided for *either* traditional criminal prosecution *or* civil proceedings designed to secure protection orders, but not both. *See* Report of the Council of the District of Columbia Committee on the Judiciary on Bill 4-195, Proceedings Regarding the "Intra-family Offenses Amendment Act of 1982" at 3 (May 12, 1982) (statutory change designed to "authoriz[e] civil protection cases to coexist legally along side criminal prosecutions"). Prior to the modification, the statute had provided that once a civil protection hearing commenced, "no criminal charge may be filed." *Id.* at 4.

[21] The existence of the local case, *Green v. Green*, 642 A.2d 1275 (D.C. 1994), in which the court of appeals addressed the constitutional issue reserved in *Young*, does not change this analysis. Because the *Green* court rested its holding on the

(Continued on following page)

If this proceeding was brought by Ms. Watson on behalf of the United States, the plea agreement barred this prosecution.



CONCLUSION

The judgment of the District of Columbia Court of Appeals must be reversed.

Respectfully submitted,

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decreased "potential for . . . conflicts of interest," it evidenced its acceptance of the *Young* Court's characterization of a private prosecutor as representing the United States. *Id.* at 1279-80. A reasonable person, in a post-*Green* world, would have believed that a promise by the United States not to prosecute a certain charge would encompass *all* prosecutions brought by the United States – certainly all those brought in the District of Columbia – even if privately prosecuted, because "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States." *Young*, 481 U.S. at 804.