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No. 08-6261

In the Supreme Court of the United States

JOHN ROBERTSON, PETITIONER

v.

UNITED STATES, EX REL. WYKENNA WATSON

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING 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 THE UNITED STATES

The Court's order granting certiorari limited the question to "[w]hether 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." 130 S. Ct. 1011 (2009). The United States has an interest in the proper resolution of that question. In addition, the judgment of conviction at issue in this case remanded petitioner to the custody of the Attorney General of the United States or his authorized representative. See D.C. Code § 24-201.26 (2001). The United States thus has an interest in the validity of that judgment.[1]

[1] The United States believes this case falls within the scope of 28 U.S.C. 518(a), which provides that unless "the Attorney General in a

STATEMENT

Following a bench trial in the Superior Court of the District of Columbia, petitioner was convicted of three counts of criminal contempt, in violation of D.C. Code § 16-1005(f) (2001). The court sentenced petitioner to three consecutive 180-day terms of imprisonment, with one of those terms suspended in favor of five years of probation. The District of Columbia Court of Appeals affirmed. J.A. 63-65; Pet. App. A1-A25.

1. Section 16-1003 of the D.C. Code permits any victim of domestic violence to petition for a civil protection order (CPO) in family court, and Section 16-1005(f) provides that any violation of a temporary or permanent CPO issued by that court "shall be punishable as contempt." Section 16-1005(g) further provides that "[u]pon conviction," such criminal contempt "shall be punished by a fine not exceeding $1,000 or imprisonment for not more than 180 days, or both."

In *Green* v. *Green*, 642 A.2d 1275 (1994), the District of Columbia Court of Appeals interpreted Section 16-1005(f) to "reflect a determination by the Council [of the District of Columbia] that the beneficiary of a CPO should be permitted to enforce that order through

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particular case directs otherwise," the Solicitor General is to conduct and argue all cases in this Court "in which the United States is interested." *Ibid.*; see *United States* v. *Providence Journal Co.*, 485 U.S. 693, 700 (1988). In order to ensure that the Court has the benefit of the arguments in support of a purely private right of action in a case such as this, the Solicitor General has authorized private counsel for respondent to appear on her behalf in this Court. Accordingly, the Solicitor General files this brief on behalf of the United States as amicus curiae. The United States followed the same course in *Young* v. *United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787 (1987). See U.S. Amicus Br. at 2 n.1, *Young*, *supra* (No. 08-1329).

an intrafamily contempt proceeding." *Id.* at 1279. According to the court, when the Council amended the District's intrafamily offenses statute in 1982, the Council created a private right of action to obtain a CPO because the Office of the Attorney General for the District of Columbia (OAG) (then called the Office of the Corporation Counsel)[2] was unable to effectively prosecute incidents of domestic violence. *Id.* at 1279 n.7. The court then observed that OAG had professed a similar inability to effectively prosecute criminal contempt motions for violations of CPOs. *Ibid.* Based on that observation, "as well as the procedural scheme established for enforcing CPOs," the court concluded that "[the] considerations supporting a private right of action to seek a CPO apply equally to a private right of action to enforce the CPO through an intrafamily contempt proceeding." *Id.* at 1280 n.7.

The District of Columbia rules governing domestic violence proceedings thus provide that a "motion requesting that the court order a person to show cause why she/he should not be held in criminal contempt for violation of a temporary protection order or civil protection order may be filed by an individual, [OAG] or an attorney appointed by the Court for that purpose." D.C. Super. Ct. Domestic Violence Unit R. 12(d).

2. On March 27, 1999, petitioner argued with respondent, his girlfriend. J.A. 40. The argument escalated, and petitioner hit respondent several times in the face and chest. J.A. 42-46. Respondent sustained serious injuries as a result of the incident. J.A. 51, 76.

On March 29, 1999, respondent filed a petition for a CPO in the Family Division of the Superior Court of the

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[2] This brief will refer to this office as OAG.

District of Columbia. J.A. 11-17. She alleged that petitioner had assaulted her during the March 27 incident, and she requested an order prohibiting respondent from abusing, threatening, harassing, or contacting her. J.A. 12-13. The court issued a temporary protection order that day. Pet. App. A3. On April 26, 1999, the OAG entered an appearance on behalf of respondent. J.A. 18. Following a hearing, the court that day issued a CPO ordering petitioner to stay at least 100 feet away from respondent's person, home, and workplace, and prohibiting petitioner from assaulting, threatening, harassing, physically abusing, or contacting respondent. J.A. 20. The CPO stated that any failure to comply "is punishable as criminal contempt." J.A. 25 (capitalization and emphasis omitted).

3. At the same time that respondent pursued a CPO, the United States Attorney's Office for the District of Columbia (USAO) independently pursued criminal charges stemming from the March 27 incident. On March 29, 1999, petitioner was charged by complaint in the Criminal Division of the Superior Court of the District of Columbia. J.A. 9. While those charges were pending, on June 26, 1999 (and continuing into the early morning hours of June 27), petitioner violated the CPO by trying to get respondent to drop the criminal charges and by throwing drain-cleaning acid on her face. Pet. App. A4-A5; J.A. 76-77. The acid caused serious injuries, and respondent was taken to the hospital. *Ibid.*

The USAO did not amend the complaint to add any charges related to the June incident. On July 8, 1999, a grand jury indicted petitioner on one count of aggravated assault and two counts of assault with a dangerous weapon for the March incident. J.A. 26-27. On July 28, 1999, petitioner entered into a plea agreement with the

USAO to resolve the pending criminal charges. J.A. 28-30; see U.S. Petition-Stage Br. App 1a. The agreement was hand-written on a one-page standard plea agreement form that both the USAO and the OAG use in the Superior Court. Because the printed form is designed for use by both offices, it lists both the "United States" and the "District of Columbia" in the case caption. *Ibid*. It also includes a signature line at the bottom for an "Assistant U.S. Attorney or [an] Assistant Corporation Counsel." *Ibid*.

In this case, the Assistant United States Attorney (AUSA) handling the matter crossed out "District of Columbia" in the caption, so that it read only "United States vs. John Robertson." J.A. 28. The AUSA also crossed out "Assistant Corporation Counsel" in the signature line, so that it read only "Assistant U.S. Attorney." J.A. 30. The AUSA wrote at the top of the form: "In exchange for Mr. Robertson's plea of guilty to attempt[ed] aggravated assault, the gov't agrees to" dismiss the remaining charges and "[n]ot pursue any charges concerning an incident on 6-26-99." J.A. 28 (capitalization omitted). Petitioner, his counsel, and the AUSA signed the plea agreement. J.A. 30. The court accepted petitioner's plea, J.A. 30, 46, and sentenced petitioner to one to three years' imprisonment. J.A. 53.

4. On January 28, 2000, respondent, represented by OAG, filed a motion pursuant to Section 16-1005(f) in the Family Division of the Superior Court seeking to have petitioner adjudicated guilty of criminal contempt for violations of the CPO. J.A. 59. The motion was captioned as *Watson* v. *Robertson*, IF No. 785-99, the same name and case number as respondent's initial petition for a CPO. J.A. 11, 59. Respondent also filed an affidavit alleging five specific actions by respondent that vio-

lated the CPO, J.A. 56-57, and a separate motion to modify and extend the CPO, J.A. 61-62. The violations alleged arose out of the June 26 incident. J.A. 56-57.

On May 10-11, 2000, the court held a bench trial to adjudicate the criminal contempt charges and to resolve the motion to modify and extend the CPO. J.A. 2, Pet. App. A5. The court found petitioner guilty on three counts of criminal contempt. J.A. 2, 63. The court entered a Judgment and Commitment/Probation Order, sentencing petitioner to three consecutive 180-day terms of imprisonment, but suspending execution of one of those terms and instead imposing five years of probation. J.A. 63-65. The court also ordered petitioner to pay approximately $10,000 in restitution for medical expenses that respondent incurred as a result of the assault. J.A. 64. Although the pleadings in the case were styled *Watson* v. *Robertson*, see, *e.g.*, J.A. 59, the form Judgment listed both the United States of America and the District of Columbia (but not respondent) as plaintiffs, and petitioner as defendant. J.A. 63. Petitioner appealed from the judgment of criminal contempt under the caption *Robertson* v. *Watson*. J.A. 3, 4.

5. a. More than three years later (while his direct appeal was still pending), in November 2003, petitioner moved the Superior Court pursuant to D.C. Code § 23-110 (2001) to vacate his criminal contempt convictions. Pet. App. A6; J.A. 3. In that motion, petitioner contended for the first time that the contempt proceeding had violated his plea agreement with the USAO and that his counsel had been ineffective in failing to raise that claim. Pet. App. A6-A7. On August 27, 2004, the trial court denied petitioner's motion to vacate. J.A. 89-93. Petitioner appealed from that order, and the appeal was consolidated with the pending direct appeal from his

criminal contempt convictions (in which he had not made a claim pertaining to his plea agreement). J.A. 4.

b. The court of appeals affirmed. Pet. App. A1-A25. Relying on its earlier precedent, the court read Section 16-1005(f) to confer "a private right of action" on the holder of a CPO "to enforce the CPO through an intrafamily contempt proceeding." *Id.* at A13 (quoting *Green*, 642 A.2d at 1280 n.7). The court rejected petitioner's submission that the contempt proceeding could "only be brought in the name of the relevant sovereign, the United States." *Id*. at A15 (internal quotation marks and ellipsis omitted). The court reasoned that conferring such a private right of action "does not contravene the general principle that criminal prosecutions are prosecuted in the name of the sovereign," because of "the special nature of criminal contempt." *Ibid*. Unlike other criminal prosecutions, the court explained, criminal contempt enforces judicial orders rather than general criminal laws. *Ibid*.

The court further held that petitioner's plea agreement did not bar the contempt proceeding because that agreement bound only the USAO—not respondent or OAG. Pet. App. A19-A20. In light of the handwritten changes to the plea agreement form, the court found, "no objectively reasonable person could understand that [petitioner's] plea agreement bound [respondent] * * * [or] the District." *Id*. at A20. The court added that D.C. Code § 16-1002(c) (2001), which provided that "[t]he institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter," confirmed the absence of a bar on respondent's action. *Ibid*.; see Pet. App. A20 n.7.

SUMMARY OF ARGUMENT

The Constitution presupposes that the real party in interest in any criminal prosecution is the sovereign. That principle, however, is of no help to petitioner in this case because nothing in the Constitution requires that a criminal contempt be prosecuted *in the name of* the sovereign. And, equally important, nothing in petitioner's plea agreement with the United States Attorney's Office barred an intrafamily contempt proceeding initiated by respondent. Accordingly, the judgment should be affirmed.

A. The Constitution's use of terms such as "crime," "offense," and "criminal prosecution" must be understood in light of their common law heritage. At common law, a crime was a public wrong, and the sovereign was "the proper prosecutor for every public offence." 4 William Blackstone, *Commentaries* *2. Although England relied on a system of largely private prosecution in its criminal proceedings, private prosecutors were understood to be acting on behalf of the King. The American colonies and States moved away from England's practice of private prosecution and toward the concentration of prosecutorial authority in the hands of public officials, who by definition exercise governmental power. Even where privately conducted criminal proceedings continued to exist, the sovereign was understood to be the real party in all criminal prosecutions.

Consistent with the historical understanding of criminal prosecution as an exercise of sovereign authority, this Court's criminal procedure jurisprudence presupposes that the party adverse to the criminal defendant represents the government. This Court has marked the commencement of a criminal case, for purposes of the Sixth Amendment right to counsel, as "the point at

which the government has committed itself to prosecute." *Rothgery* v. *Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (internal quotation marks and citation omitted). And the obligations that the Court has held the Due Process Clause to impose on prosecutors as critical to a defendant's right to a fair trial—including the requirement that the prosecutor provide defendants with material exculpatory evidence, see *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963)—could be effective only if prosecutors were understood to be exercising sovereign power (because the Due Process Clause has no application to private action).

The foundational premise that the prosecution of criminal offenses is an exercise of sovereign power holds true in criminal contempt proceedings. The Court, to be sure, has called contempt "an offense *sui generis*" and has interpreted the Constitution to permit greater procedural flexibility in contempt proceedings than in other criminal cases. *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966). But the Court also has called contempt "a crime in the ordinary sense," *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968), and, in the context of a federal court contempt, has held that "[t]he fact that the allegedly criminal conduct concerns the violation of a court order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States." *United States* v. *Providence Journal Co.*, 485 U.S. 693, 700 (1988). The Court's understanding of the nature of criminal contempt is consistent with its treatment at common law as a public offense whose prosecution was an exercise of sovereign power.

Yet the Constitution does not require that a prosecution for criminal contempt be brought in the name of the

government (as contrasted to being deemed an exercise of sovereign power). This Court has made clear that "[h]ow a case is captioned is of no significance" when determining whom the parties in a criminal contempt proceeding must be understood to represent. *Providence Journal*, 485 U.S. at 708 n.11. Likewise, at common law no consistent practice governed case captions in criminal contempt proceedings. Although captioning all criminal contempt proceedings in the name of the relevant sovereign would promote transparency, there is no constitutional requirement that this occur.

B. The exercise of the sovereign's prosecutorial authority by private individuals may raise constitutional questions, but none is presented in this case. Although a legislatively created right of criminal prosecution by private individuals in Article III courts would raise serious separation of powers concerns, it does not in District of Columbia courts because of the District's unique status. The Constitution grants broad authority over the District to Congress. U.S. Const. Art. I, § 8, Cl. 17. Accordingly, the provisions Congress adopts for the government of the District are not subject to the same separation of powers constraints that limit its powers at the national level. See *Palmore* v. *United States*, 411 U.S. 389, 397 (1973). Congress may therefore delegate prosecutorial powers in the District to individuals outside the Executive Branch, including employees of the congressionally created D.C. government or private individuals. In neither case does the delegation infringe on the constitutional prerogatives of the Executive Branch.

Private prosecutions by interested parties (such as respondent) also have the potential to raise due process questions. In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), the Court relied on its

supervisory authority over Article III courts to hold that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." *Id.* at 809. Since *Young*, state courts have divided on whether the Due Process Clause includes a similar prohibition. Petitioner, however, has expressly disavowed this claim, so it is not before the Court. Likewise, petitioner did not argue below that his criminal prosecution by respondent violated due process because respondent was insufficiently controlled or supervised by a public official. As a result, the record before the Court includes no explanation from the court of appeals on what authority (if any) D.C. judges have to terminate or otherwise oversee privately conducted intrafamily contempt proceedings in the District. Neither does it include any analysis from that court of the significance of respondent's representation by OAG attorneys.

C. The one argument that petitioner did belatedly press below was that his plea agreement barred the criminal contempt prosecution. The court of appeals correctly rejected that claim. A plea agreement made by one United States Attorney's Office does not normally bind any other agency or entity acting on behalf of the United States. Petitioner's plea agreement, by its terms, binds only the United States Attorney's Office for the District of Columbia, and respondent is not part of that office.

That conclusion is reinforced by a D.C. statute providing that criminal charges pursued by the Office of the United States Attorney "shall not affect the rights of [a protective order recipient] to seek any other relief" under D.C. law. D.C. Code § 16-1002(c) (2001). At the time of petitioner's plea, the D.C. Court of Appeals had

identified the right to bring criminal contempt actions as an available form of "relief" for private beneficiaries of protective orders. Petitioner was thus on notice as a matter of D.C. law that his agreement with the Office of the United States Attorney would not bar a privately initiated criminal contempt proceeding.

ARGUMENT

THE PROSECUTION OF PETITIONER WAS AN EXERCISE OF SOVEREIGN POWER, BUT HE IS NOT ENTITLED TO RELIEF UNDER THE CONSTITUTION OR HIS PLEA AGREEMENT

A. All Criminal Prosecutions, Including For Contempt, Must Be Understood As Exercises of Sovereign Power Although They Need Not Be Styled As Such

Both the common law background of the Constitution and assumptions embedded in this Court's criminal procedure decisions lead to the conclusion that criminal prosecutions must be understood as exercises of sovereign power. Although criminal contempt proceedings are for some purposes *sui generis* and thus permit procedural flexibility unavailable in regular criminal cases, prosecution of criminal contempt (whether or not conducted by a government employee) must also be understood as an exercise of sovereign power.[3] Nonetheless,

[3] As the government argued in its petition-stage brief (Br. 9), we do not believe this Court's precedents directly control the question presented in this case. In light of the absence of direct authority from this Court and the D.C. Court of Appeals' binding local precedent in *Green* v. *Green*, 642 A.2d 1275, 1280 n.7 (1994), which granted recipients of CPOs a "private right of action" to pursue criminal contempt charges, the United States took the position below that "criminal contempt prosecutions under § 16-1005(f) may lawfully be conducted as private actions." Gov't. C.A. Br. 9. Although the United States no longer be-

the Constitution does not require that they be captioned as such.

1. Crime is a breach of public norms, and its prosecution is a sovereign function

As this Court has explained, the "purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant." *Standefer* v. *United States*, 447 U.S. 10, 25 (1980) (quoting *United States* v. *Standefer*, 610 F.2d 1076, 1093 (3d Cir. 1979) (en banc)). Both elements of the Court's observation about criminal proceedings—the traditional understanding that they vindicate the public interest and the need to ensure that they safeguard defendants' rights—presuppose that prosecution is an inherently sovereign function.

a. The Constitution makes a number of references to "crimes," "offence[s]," and "criminal prosecutions." See Pet. Br. at 14 n.9. Although the Constitution itself does not define these terms, their meaning is illuminated by common law traditions at the time the Constitution was drafted and ratified. See *Crawford* v. *Washington*, 541 U.S. 36, 42-50 (2004) (interpreting constitutional provisions in light of common law understandings and assumptions).[4]

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lieves the contempt prosecution at issue can be understood as a purely "private action[]," its ultimate position is the same now as it was before: Petitioner is not entitled to relief on his claim that the plea agreement barred his prosecution. Compare *id.* at 26-36 with Section C, *infra*.

[4] Respondent contends that the Constitution's terms capture only the "indispensable" components of the common law. Resp. Br. 19-20 (quoting *Williams* v. *Florida*, 399 U.S. 78, 100 (1970)). As shown below,

As petitioner demonstrates (Br. 14-35), the Constitution's common-law background suggests that the Framers understood a "crime" as an injury to the public, and a criminal prosecution as a response taken on the public's behalf. See, *e.g.*, 4 William Blackstone, *Commentaries* *2 (the sovereign is "in all cases the proper prosecutor for every public offence"). According to Blackstone, crimes, or public wrongs, are distinguished from civil actions, or private wrongs, in that civil injuries "are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals" while crimes "are a breach and violation of the public rights and duties due to the whole community, considered as a community." *Id.* at *5.

Thus, even though England had a long history of privately initiated criminal prosecution, see Resp. Br. 40, those privately conducted actions were understood as exercises of the King's power. That is shown by the authority of the attorney general of England (who initiated his own prosecutions only "in cases of special importance to the Crown") to file "a writ of *nolle prosequi*" to dismiss any privately initiated prosecution. Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, *in* 3 *Encyclopedia of Crime & Justice* 1242 (Joshua Dressler ed., 2d ed. 2002). "[H]is decisions in such matters were treated by the courts as entirely within his discretion." *Ibid.*

American practice began departing early from the English tradition of private prosecution in favor of a system of public prosecution conducted by public officials. In the federal system in particular, the idea that

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the principle that criminal prosecution represents the exercise of sovereign power was "indispensable" to the common law's understanding of crime as a public offense.

a criminal prosecution is an action on behalf of the public was reflected in the decision to give prosecutorial authority to public officials alone. In 1789, Congress granted to the district attorneys exclusive authority to "prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92. Accordingly, from the beginning of the federal judicial system, public officials—the Attorney General and the United States Attorneys (and their predecessors)—prosecuted federal crimes. See National Comm'n on Law Observance & Enforcement, *Report on Prosecution* 7-9 (1931).

The colonies and early states also largely abandoned the English tradition of private prosecution and instead put prosecutorial authority in the hands of public officials. *See* Roscoe Pound, *Criminal Justice in America* 108 (1930). To be sure, the trend was not complete at the time of independence; privately conducted prosecutions continued into the nineteenth century (and, in some very limited contexts, still exist). Resp. Br. 40-41. Throughout this period, however, prosecutions in the States were generally understood to be actions on behalf of the sovereign, whether or not they were conducted by one of the sovereign's employees. See Pet. Br. 19-20, 26 n.12; *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892) ("Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that State.").[5]

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[5] See also *State* v. *Westbrook*, 181 S.E.2d 572, 583 (N.C. 1971) (the prosecuting attorney, whether public or private, "represents the state"), *vacated in part on other grounds*, 408 U.S. 939 (1972); *Cronan ex rel. State* v. *Cronan*, 774 A.2d 866, 877 (R.I. 2001) ("[A]ttorneys conducting private prosecutions stand in the shoes of the state."); Andrew

b. Much of the Court's criminal procedure jurisprudence rests on the premise that the criminal defendant is prosecuted by a state actor. For example, the Court has tied the attachment of the Sixth Amendment right to counsel to "the point at which 'the government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society.'" *Rothgery* v. *Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

Similarly, the Court's understanding of the due process protections available to criminal defendants reflects an understanding of the prosecutor as a state actor, fulfilling a "duty on the part of the government." *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995). The Court has interpreted the Due Process Clause to impose on prosecutors various obligations thought integral to the defendant's ability to receive a fair trial. See, *e.g.*, *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) (prosecutor must disclose favorable material evidence to defendant); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (prosecutor may not procure conviction through testimony he knows to be false). The Court has also recognized constraints on prosecutorial discretion flowing from due process principles. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he equal protection component of the Due Process Clause of the Fifth Amendment" prohibits prosecutors from making decisions based on "an unjustifiable standard such as race, religion, or other arbitrary

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Sidman, *The Outmoded Concept of Private Prosecution*, 25 Am. U. L. Rev. 754, 774 (1976) ("[T]he privately retained attorney becomes, in effect, a temporary public prosecutor.") (footnote omitted).

classification.") (internal quotation marks and citation omitted).

The Due Process Clause is a limitation on government authority; it does not apply to private actors acting on their own. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (noting "the essential dichotomy" in the Due Process Clause "between deprivation by the State, subject to scrutiny under its provisions, and private conduct" against which it "offers no shield"). Accordingly, this Court's understanding of the Constitution's "basic 'fair trial' guarantee," *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002), can be universally effective only if a criminal prosecutor—whether or not a government employee—is understood to be exercising governmental power.[6] Indeed, this Court has described the prosecutor as "a quintessential state actor." *Georgia* v. *McCollum*, 505 U.S. 42, 50 (1992).

2. Prosecution of criminal contempt is also an exercise of sovereign power

The government is the true party in interest in a prosecution for criminal contempt, just as it is for the prosecution of ordinary crimes. Criminal contempt has been described as *sui generis* for certain purposes, and the Constitution affords greater procedural flexibility in criminal contempt proceedings than it does in ordinary criminal cases. Nonetheless, prosecution of criminal contempt, just like prosecution for ordinary crimes, is an exercise of sovereign, not private, power.

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[6] When private individuals undertake an action, such as prosecution, that is "traditionally associated with sovereignty," they are deemed state actors exercising sovereign power and thus become subject to constitutional constraints. *Jackson*, 419 U.S. at 352-353.

a. In light of the unique function of contempt, this Court has declined to interpret the Constitution to require criminal contempt proceedings to be conducted in precisely the same way as ordinary criminal prosecutions. See *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966) (describing criminal contempt as "an offense *sui generis*"); Resp. Br. 23-27. The purpose underlying criminal contempt—the vindication of the court's authority—is not co-extensive with the general purpose of substantive criminal statutes. See *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987).

Principally because of that difference, the procedures governing prosecution of criminal contempt vary in several respects from the procedures used to prosecute ordinary crimes. For example, criminal contempt, unlike any other offense punishable by death or imprisonment in excess of one year, does not have to be prosecuted by an indictment. See *Green* v. *United States*, 356 U.S. 165, 184-185 (1958), overruled in part on other grounds by *Bloom* v. *Illinois*, 391 U.S. 194 (1968). In addition, contempts committed in the court's presence may be punished summarily, without the normal due process requirements applicable to ordinary crimes. *Pounders* v. *Watson*, 521 U.S. 982, 987-988 (1997) (per curiam); see Fed. R. Crim. P. 42(b).[7]

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[7] As respondent points out (Br. 23-26), this Court held prior to *Bloom*, 391 U.S. 194, that a contempt was not a "crime" for purposes of the Constitution's jury trial right. *Bloom*, however, questioned the historical basis for that now repudiated view. See 391 U.S. at 198 n.2. In any event, even the earlier cases finding no jury trial right did not question the fundamental premise that a criminal contempt proceeding involved an exercise of sovereign power.

b. Nonetheless, the Court has also described criminal contempt as a "crime in the ordinary sense," *Bloom*, 391 U.S. at 201, and has extended a variety of constitutional protections applicable in ordinary criminal cases to nonsummary criminal contempt proceedings. See *e.g.*, *United States* v. *Dixon*, 509 U.S. 688, 696 (1993) (double jeopardy); *Hicks ex rel. Feiock* v. *Feiock*, 485 U.S. 624, 632 (1988) (proof beyond a reasonable doubt); *Cooke* v. *United States*, 267 U.S. 517, 537 (1925) (notice of charges, assistance of counsel, and compulsory process); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (privilege against self-incrimination and presumption of innocence); see also *Bloom*, 391 U.S. at 201-202 (jury trial for nonpetty contempt).

As these holdings suggest, this Court has generally conceived of criminal contempts in the same essential way it has ordinary crimes—as offenses against the sovereign. See *e.g.*, *United States* v. *Providence Journal Co.*, 485 U.S. 693, 700 (1988) ("The fact that the allegedly criminal conduct concerns the violation of a court order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States."); *Ex parte Grossman*, 267 U.S. 87, 115 (1925) (President could pardon individual convicted of criminal contempt because it was an "offense[] against the United States").

Indeed, the Court has often distinguished civil from criminal contempt by noting that criminal contempt is typically a separate public action brought on behalf of the government, while a civil contempt is generally a part of the original private suit. See *Gompers*, 221 U.S. at 445 (while civil contempts are "between the original parties," "proceedings at law for criminal contempt are between the public and the defendant"); *Bessette* v. *W.B.*

Conkey Co., 194 U.S. 324, 328 (1904) (private individuals are the "parties chiefly in interest" in civil contempt; "the government, the courts, and the people are interested in the[] prosecution" of criminal contempt, "and private parties have little, if any, interest" in such proceedings) (quoting *In re Nevitt*, 117 F. 448, 458 (8th Cir. 1902)).

The Court's understanding of the nature of criminal contempt is consistent with the status of criminal contempt at common law. See, *e.g.*, Ronald L. Goldfarb, *The Contempt Power* 58 (1963) ("Reference again to the historical nature of the contempt power indicates that in any event, contempt of any kind or classification could historically only be a governmental power to be used essentially for governmental purposes, any private aspects notwithstanding. This is incontrovertible fact and history."); Wilbur Larremore, *Constitutional Regulation of Contempt of Court*, 13 Harv. L. Rev. 615, 622 (1900) ("Contempt is, of course, a *public* offence, but it is a special kind of public offence. It is, like any infraction of law, an offence against the whole people, but, in addition and more important, it is an offence against the dignity and a defiance of the authority of the court.").[8]

The D.C. Court of Appeals in this case held that the criminal contempt prosecution was properly characterized as "a private right of action brought in the * * * interest of [respondent], not as a public action brought in the * * * interest of the United States or any other governmental entity." Pet. App. A15. It is not clear whether in making that statement the court of appeals

[8] Indeed, the D.C. court rule that governed the intrafamily contempt proceedings at issue here describes criminal contempt as "a violation of the law, a public wrong which is punishable by fine or imprisonment or both." D.C. Super. Ct. Domestic Violence Unit R. 12(a).

was addressing the same question now before this Court. See Resp. Br. 43. Assuming it was, the court of appeals erred on this abstract question of characterization. The criminal contempt prosecution here, like any other, was an exercise of sovereign power. As explained below (Section C, *infra*), however, the D.C. Court of Appeals' failure to recognize the true character of the prosecution does not require reversal.

3. The Constitution does not require a criminal prosecution to be brought in the name of the sovereign

Although the sovereign is the real party in interest in any criminal contempt prosecution, the Constitution does not require that the case be brought in the government's "name." See Resp. Br. at 28-32. Proceeding in the name of the government promotes transparency and helps to ensure that the defendant receives adequate notice that the proceedings are criminal in nature. See *McCann* v. *New York Stock Exch.*, 80 F.2d 211, 214-215 (2d Cir. 1935), cert. denied, 299 U.S. 603 (1936); see also *Gompers*, 221 U.S. at 446.[9] The Constitution, however, is not concerned with technical rules governing pleading captions.

This Court's decision in *Providence Journal* confirms the immateriality of the way parties are listed in the case caption of a criminal contempt proceeding. There, the Court held that a privately conducted contempt prosecution in an Article III court was a case in which the United States was "interested" for purposes of a statutory requirement that the Solicitor General appear

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[9] The use of respondent's name in the case caption of this proceeding would not have misled petitioner into thinking it was civil. Respondent initiated the proceeding by filing a "Motion to Adjudicate *Criminal* Contempt." J.A. 59-60 (emphasis added).

(or authorize someone else to appear) in this Court in all such cases. 485 U.S. at 707-708; see note 1, *supra*. In reaching that conclusion, the Court noted that

> [h]ow a case is captioned is of no significance to our holding. As we have previously observed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." Thus, even if the case had not been recaptioned by the special prosecutor upon the filing of a petition in this Court to reflect the "adversary nature of the proceeding," we would have been required to determine whether this was a case "in which the United States is interested." A criminal contempt prosecution in federal court, however styled, is such a case.

Id. at 708 n.11 (citations omitted).

Likewise, in determining whether a contempt is criminal, this Court has indicated that what matters is the "substance of the proceeding and the character of the relief," rather than the label that the state or the parties have placed on the action. *Feiock*, 485 U.S. at 631. The Court has treated the styling of the case as among the indicators of whether a contempt proceeding is at bottom criminal or civil, but not as a matter subject to constitutional requirements. See *id.* at 638-639; *Nye* v. *United States*, 313 U.S. 33, 42 (1941) ("While the proceedings in the District Court were entitled [as in the private action] and the United States was not a party until the appeal, those circumstances though relevant are not conclusive as to the nature of the contempt.") (citation omitted). The Court has thus reviewed criminal contempts under a variety of captions, including formulations that make no reference to any sovereign. See

Resp. Br. 30-31; see also *Gompers*, 221 U.S. at 446 (criminal contempt proceedings can be properly captioned "In re" followed by name of defendant).

The Court's focus on substance over form is consistent with the common law tradition, which yielded no consistent answer on how to style criminal contempt proceedings. At common law, "the better practice" was "to institute an independent action [for criminal contempt] in the name of the state" even when it was conducted by private counsel. James L. High, *A Treatise on the Law of Injunctions* § 1449, at 1460 (4th ed. 1905). But "it [was] not error to entitle the proceedings in the civil case." *Ibid.*; see Stewart Rapalje, *A Treatise on Contempt* § 95, at 124 (1890) ("The decisions upon [the] comparatively unimportant matter [of how to name criminal contempt proceedings] are not harmonious.").

B. Criminal Contempt Prosecutions By Private Parties On Behalf Of The Sovereign May Raise Constitutional Questions, But None Is Presented Here

To say that a prosecution for criminal contempt in a congressionally created court must be understood as an exercise of sovereign power (even if not taken in the sovereign's name) is not to end the inquiry. As this Court has recognized, private parties may "represent the United States" as criminal contempt prosecutors under certain circumstances. *Young*, 481 U.S. at 804. Thus, a prosecutor acting pursuant to the power of the sovereign does not in all cases have to be the sovereign's employee. When the prosecutor is not a public employee, however, separation of powers and due process questions can arise. Those constitutional concerns may well prevent a private person from representing the United States in

a criminal contempt proceeding. But they are not presented in this case.

1. Congress has plenary authority over the District of Columbia and thus may delegate prosecutorial authority there to individuals outside the Executive Branch

a. The Constitution "sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986) (quoting *INS* v. *Chadha*, 462 U.S. 919, 951 (1983)). A primary constitutional responsibility of the Executive Branch is to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. That responsibility has long been understood to encompass the responsibility for initiating and prosecuting criminal cases. *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974).

In *Young*, however, the Court held that the prosecution of criminal contempt in Article III courts need not "be considered an execution of the criminal law in which only the Executive Branch may engage." 481 U.S. at 799-800. The Court based this conclusion on "the longstanding acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function" and on the Judiciary's "need for an independent means of self-protection." *Id.* at 795, 796.

If Congress by statute were to confer authority on private individuals or entities (outside the Executive or Judicial Branches) to prosecute contempts in Article III courts, neither the tradition of judicial control over con-

tempt proceedings nor the interest in judicial self-protection that the Court invoked in *Young* would be present. Such a novel scheme would thus raise serious separation of powers concerns.

b. Contrary to petitioner's contention (Br. 53-55), however, those concerns are not implicated in this case because of the unique constitutional status of the District of Columbia.

The Constitution authorizes 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. Acting pursuant to this authority, Congress may "exercise all the police and regulatory powers [in the District of Columbia] which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore* v. *United States*, 411 U.S. 389, 397 (1973); see *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 619 (1838) ("Congress has the entire control over the [District of Columbia] for every purpose of government."); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) (plurality opinion) ("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.") (second emphasis added).

Congress delegated a portion of its plenary authority over the District to the D.C. government. See District of Columbia Home Rule Act (D.C. Home Rule Act), Pub. L. No. 93-198, 87 Stat. 774. As part of that delegation, Congress provided that "the legislative power granted to the District by this Act is vested in and shall be exercised by the [D.C.] Council," *Id.* § 404(a), 87 Stat. 787;

see D.C. Code § 1-227 (1992). When the D.C. Council acts "within that authority" delegated by Congress, this Court analyzes the constitutional limits on that action "as if that act * * * had been passed directly by Congress" in its administration of District affairs. *Welch* v. *Cook*, 97 U.S. 541, 542 (1879).

Accordingly, decisions made by the D.C. Council within the scope of its delegated authority are treated as exercises of Congress's "entire control" over the District for constitutional purposes. *Kendall*, 37 U.S. (12 Pet.) at 619.[10] In this case, the D.C. Court of Appeals in *Green* understood the Council to have granted private individuals the power to prosecute intrafamily contempts in District of Columbia courts. In other instances, Congress

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[10] Congress has granted the D.C. Office of Attorney General the power to conduct certain prosecutions, while specifying that "[a]ll other criminal prosecutions shall be conducted in the name of the United States by the United States attorney for the District of Columbia or his assistants, except as otherwise provided by law." See District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, § 210(a), 84 Stat. 605 (D.C. Code § 23-101(c) (2001)); see also D.C. Home Rule Act, § 602(a)(8), 87 Stat. 813 (D.C. Code § 1-206.02(a)(8) (2001)) (D.C. Council may not "enact any act or regulation relating to * * * the duties or powers of the United States Attorney * * * for the District of Columbia."). Petitioner did not argue below and does not argue now that the D.C. Council's decision (as inferred by the D.C. Court of Appeals in *Green*) to permit private individuals to prosecute intrafamily contempts was in excess of the Council's delegated authority as established by these statutes. See Pet. Br. 55-56 n.23. Nor did petitioner argue below that permitting private parties to prosecute in the District violates a D.C.-specific principle of separation of powers derived from the Congressional home rule statutes. See *ibid.*; see also *Whalen* v. *United States*, 445 U.S. 684, 687 (1980) (This Court typically defers to D.C. Court of Appeals on "matters of exclusively local concern," including the meaning of "Acts of Congress applicable only within the District of Columbia.").

itself has expressly delegated prosecutorial authority to the D.C. Office of Attorney General. See, *e.g.*, D.C. Code § 23-101(a) (2001). Neither the private contempt prosecutors nor the attorneys in OAG are federal Executive Branch officials. But that is immaterial because both exercise a portion of *Congress*'s "Executive * * * powers" in the District. *Northern Pipeline*, 458 U.S. at 76 (plurality opinion). In short, the location of this case removes any separation of powers issue.

2. Petitioner has not preserved a due process challenge based on respondent's personal interest or the absence of public control over her actions

In *Young*, the Court relied on its supervisory authority over Article III courts to hold that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." 481 U.S. at 809. Justice Blackmun would have gone "further" and held that "the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." *Id.* at 814-815 (Blackmun, J., concurring).

Since *Young*, state courts have reached different conclusions on the question whether there is a due process right to a disinterested prosecutor. Compare, *e.g.*, *Wilson* v. *Wilson*, 984 S.W.2d 898, 903-904 (Tenn. 1998) ("We hold that Due Process does not mandate adoption of a rule which automatically disqualifies a litigant's private counsel from prosecuting a contempt action."), cert. denied, 528 U.S. 822 (1999), with, *e.g.*, *People* v. *Calderone*, 573 N.Y.S.2d 1005, 1007 (N.Y. City Crim. Ct. 1991) ("[P]rivate prosecutions by interested parties or their

attorneys present inherent conflicts of interest which violate defendants' due process rights.").

Petitioner does not raise this due process claim in his brief, however, and he has affirmatively disavowed it previously.[11] It is accordingly not before the Court.

Likewise, petitioner never argued below that the D.C. scheme violated due process because of an absence of effective governmental control over the private prosecutor. See generally Patricia Moran, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Fordham L. Rev. 1141, 1152-1155 (1986) (States that permit private participation in criminal prosecutions typically require some degree of oversight by the district attorney). Indeed, petitioner "never has challenged the *Green* court's holding" that the private party or his lawyer "can stand in the courtroom well and physically prosecute [Section] § 16-1005(f) actions." Pet. 17 n.13. Petitioner's entire argument has rested on how his contempt prosecution should be *characterized*, not on how it was actually conducted.

In his merits brief, petitioner for the first time suggests that "because the government was entirely uninvolved in conducting the prosecution, the manner of prosecution raises due process concerns as well." Pet. Br. 51. Respondent counters that, to the extent some degree of governmental supervision over a private prosecutor is constitutionally required, it was provided here by the superior court, which "exercised substantial control over the proceeding." Resp. Br. 60-61. In addition,

[11] See, *e.g.*, Pet. C.A. Reply Br. 4 & n.3 ("[Petitioner] in no way challenges the *Green* holding" that "interested CPO holders can serve as private prosecutors in [Section] § 16-1005(f) criminal contempt actions."); see also Resp. Br. 62 (citing additional examples).

the government was not "entirely uninvolved" in the prosecution (Pet. Br. 51); attorneys from OAG represented respondent.

This Court does not typically decide questions that were neither raised nor passed on below. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 213 (1998); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). It would be particularly inappropriate to do so in this case because petitioner's waiver of this claim means that the D.C. Court of Appeals never had an opportunity to answer key questions about the nature and degree of judicial and OAG oversight over private contempt prosecutors in the District.

C. The Criminal Contempt Prosecution Did Not Violate Petitioner's Plea Agreement With The United States Attorney's Office

The D.C. Court of Appeals' affirmance of petitioner's contempt conviction was correct, notwithstanding its apparent failure to recognize that his prosecution, like all those in congressionally created courts, was conducted pursuant to the power of the United States. Indeed, it was not necessary for the court of appeals to characterize the prosecution (as either governmental or private) to resolve the only claim petitioner raised below, which was that his plea agreement barred the contempt prosecution. That claims fails regardless because the agreement bound only the Office of the United States Attorney for the District of Columbia, not any

other individual or entity, including respondent, exercising governmental power.[12]

As the D.C. Court of Appeals stated, a "plea agreement is a contract," and "[a]s a consequence, courts will look to principles of contract law to determine whether the plea agreement has been breached." Pet. App. A19 (quoting *United States* v. *Jones*, 58 F.3d 688, 691 (D.C. Cir.), cert. denied, 516 U.S. 970 (1995)).

The plea agreement in this case was solely between petitioner and the United States Attorney's Office for the District of Columbia. The AUSA handling petitioner's case crossed out "District of Columbia" in the caption of the agreement, so that it read only "United States vs. John Robertson." J.A. 28. The AUSA also crossed out "Assistant Corporation Counsel" in the signature line, so that it read only "Assistant U.S. Attorney." J.A. 30. The AUSA then wrote at the top of the form: "In exchange for Mr. Robertson's plea of guilty to Attempt[ed] Aggravated assault, the gov't agrees to" dismiss the remaining charges and "[n]ot pursue any charges concerning an incident on 6-26-99." J.A. 28.

In the context of this plea agreement, the word "gov't" referred only to the Office of the United States Attorney for the District of Columbia. The standardized plea agreement could be used to bind two entities—the United States Attorney's Office for the District of Columbia, the Office of the D.C. Attorney General, or both. By 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. Indeed, "within the

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[12] As the government noted in its amicus brief at the petition stage (at 18-19), petitioner's claim is subject to particularly stringent review because he did not properly preserve it in the Superior Court.

criminal justice system throughout the country, the term 'the government' is widely used and understood to refer to the 'prosecution' or 'the United States Attorney.'" *United States* v. *Rourke*, 74 F.3d 802, 807 (7th Cir.), cert. denied, 517 U.S. 1215 (1996).

A plea agreement made by one United States Attorney's Office does not normally bind any other agency or entity acting on behalf of the United States. See, *e.g.*, *United States* v. *Camacho-Bordes*, 94 F.3d 1168, 1175 (8th Cir. 1996) (plea agreement by United States Attorney, on behalf of "the Government," did not bind the INS); *United States* v. *Annabi*, 771 F.2d 670, 672 (2d Cir. 1985) (per curiam) (plea agreement by one United States Attorney's Office, on behalf of "the Government," did not bind another United States Attorney's Office, "unless it affirmatively appears that the agreement contemplates a broader restriction").

When other courts have interpreted plea agreements with one United States Attorney's Office to cover other such offices, they have done so because no language in the agreement at issue indicated that it was intended to be limited. See *United States* v. *Gebbie*, 294 F.3d 540, 550 (3d Cir. 2002); *United States* v. *Harvey*, 791 F.2d 294, 301-302 (4th Cir. 1986). Even under that approach, petitioner's claim would fail given that the agreement here evinces an intent to limit its scope to the United States Attorney's Office for the District of Columbia. The plea agreement could not reasonably be construed to cover a contempt prosecution by a private person—even one understood to be acting on behalf of the government—because she was not part of that office.

If any doubt remained on this question, it would be settled by D.C. Code § 16-1002(c) (2001). See Pet. App. A20 n.7. At the time petitioner signed his plea agree-

ment, Section 16-1002(c) provided that "[t]he institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter."[13] The D.C. Court of Appeals in *Green* had held that one form of "relief under this subchapter" was the right to initiate criminal contempt proceedings for CPO violations. Petitioner was thus on notice that his plea agreement with the United States Attorney's Office could not bar the subsequent contempt prosecution initiated by respondent.

[13] Section 16-1002(c) was subsequently amended and now provides in pertinent part: "A petitioner has a right to seek relief under this subchapter. This right does not depend on the decision of the Attorney General, the United States Attorney for the District of Columbia, or a prosecuting attorney in any jurisdiction to initiate or not to initiate a criminal or delinquency case or on the pendency or termination of a criminal or delinquency case involving the same parties or issues." D.C. Code § 16-2002 (Supp. 2009).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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