No. 08-6261

# In the Supreme Court of the United States

JOHN ROBERTSON, PETITIONER

*v.*

UNITED STATES, EX REL. WYKENNA WATSON

*ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE


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## QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment requires that the beneficiary of a civil protective order, when pursuing a private right of action under District of Columbia law for criminal contempt of the order, be understood to bring the action in the name and under the authority of the United States.

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

## INTEREST OF THE UNITED STATES

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

1. On March 29, 1999, respondent filed a petition for a civil protection order (CPO) in the Family Division of the Superior Court of the District of Columbia. She alleged that two days earlier, on March 27, 1999, petitioner, who was her former boyfriend, had assaulted her. On March 29, the court issued a temporary protection order. On April 26, 1999, the Office of the Attorney General for the District of Columbia (OAG) entered an appearance on behalf of respondent. After a hearing that day, the court issued a CPO, effective for one year, that

prohibited petitioner from assaulting, threatening, harassing or contacting respondent. Pet. App. A3-A4.

2. 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. Pet. App. A4. While those charges were pending, on June 26, 1999, petitioner allegedly violated the CPO by asking respondent to drop the criminal charges and verbally and physically abusing her. *Id.* at A4-A6. The USAO did not amend the complaint to add any charges stemming from the June 26 incident. On July 8, 1999, a grand jury indicted petitioner on one count of aggravated assault and two counts of assault with a deadly weapon for the March 27 incident. *Id.* at A4.

On July 20, 1999, petitioner entered into a plea agreement with the USAO to resolve the pending criminal charges. App., *infra*, 1a. The agreement was handwritten on a one-page standard plea agreement form that both the USAO and the OAG (then called the Office of Corporation Counsel) use in the Superior Court. Because the printed form is designed for use by both offices, it lists 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 through "District of Columbia" in the caption, so that it read only "United States vs. John Robertson." App., *infra*, 1a. The AUSA also crossed through "Assistant Corporation Counsel" in

his signature line, so that it read only "Assistant U.S. Attorney." *Ibid.* The AUSA wrote at the top of the form: "In exchange for Mr. Robertson's plea of guilty to Attempted Aggravated Assault, gov't agrees to" dismiss the remaining charges and "not pursue any charges concerning an incident on 6-26-99." *Ibid.* Petitioner, his counsel, and the AUSA signed the plea agreement, which was approved by the court that same day. *Ibid.*

3. On January 28, 2000, respondent, who was represented by OAG, filed a motion in the Family Division of the Superior Court to adjudicate petitioner in criminal contempt for violations of the CPO. Pet. App. A4. Respondent's motion was based on the June 26 incident. *Id.* at A4-A5. On May 11, 2000, after a two-day bench trial, the court found petitioner guilty on three counts of criminal contempt. *Id.* at A5-A6. The court sentenced petitioner to three consecutive 180-day terms of imprisonment, but suspended execution of one of those terms and instead imposed five years of probation. *Id.* at A6. The court also ordered petitioner to pay approximately $10,000 in restitution for medical expenses that respondent incurred as a result of the assault. *Ibid.* Petitioner appealed.

4. a. More than three years later, on November 13, 2003, petitioner filed a motion in the Criminal Division of the Superior Court to vacate his criminal contempt convictions. Pet. App. A6-A7. He claimed that the contempt proceeding had violated his plea agreement with the USAO and that his counsel had been ineffective for not so arguing. *Id.* at A7. Petitioner also filed a motion in the Court of Appeals for the District of Columbia to stay the briefing schedule in his direct appeal. On August 27, 2004, the trial court denied petitioner's motion to vacate. It held that "the plea agreement . . . is

binding only on the government and not on any party seeking to vindicate a right against [petitioner] arising from the events of June 26, 1999." *Ibid.* Petitioner appealed from that order, and the appeal was consolidated with the pending direct appeal from his criminal contempt convictions. *Id.* at A1-A2.

b. The court of appeals affirmed. Pet. App. A1-A25. Based on its precedent and the text and purposes of D.C. Code § 16-1005(f) (West Supp. 2009), the court read that provision to confer "a private right of action" on the holder of a CPO "to enforce the CPO through an intrafamily contempt proceeding." Pet. App. A13 (quoting *Green* v. *Green*, 642 A.2d 1275, 1280 n.7 (D.C. 1994)). It 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, ellipsis and citation 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.*

Based on that analysis, the court held that respondent's contempt proceeding against petitioner was not barred by his plea agreement, because that agreement bound only the USAO—not respondent or the OAG. Pet. App. A19-A20. In light of the handwritten changes to the plea agreement form, the court concluded, "no objectively reasonable person could understand that [petitioner's] plea agreement bound [respondent] * * * [or] the District." *Id.* at A20. The absence of a bar on respondent's action was confirmed, the court added, by

D.C. Code § 16-1002(c) (West 2001), which provides that "[t]he institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter." *Ibid.*; see Pet. App. A20 n.7.

## DISCUSSION

Whether the Constitution permits a private, interested party to maintain an action for criminal contempt in her own name and interest in order to redress violations of a CPO involves complex issues that might warrant this Court's attention in an appropriate case. Petitioner, however, as a matter of litigation strategy, has declined to press or develop critical aspects of those issues; the key statutory and constitutional questions are therefore presented only incompletely in this case. Even assuming that petitioner had thoroughly presented those questions, this case would remain an unsuitable vehicle for addressing them, because petitioner would not be entitled to relief in any event based on his particular plea agreement. Accordingly, the Court should deny the petition for a writ of certiorari.

### A. The Court Of Appeals' Decision Does Not Conflict With Any Decision Of This Court Or Another Court Of Appeals

1. While petitioner raises a due process question concerning the authority of a CPO beneficiary to institute a criminal contempt action in her own name, equally significant are the issues that petitioner either concedes or does not raise.

a. Section 16-1003 of the D.C. Code permits any victim of domestic violence to petition for a 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." D.C. Code § 16-1005(f) (West Supp. 2009). Section 16-1005(f) 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." *Ibid.*

In *Green* v. *Green*, 642 A.2d 1275 (D.C. 1994), the court 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 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 OAG was unable to effectively prosecute the growing incidences 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.

In this case, the court of appeals relied on *Green* to hold that respondent has a private right of action to enforce her CPO through a criminal contempt proceeding. Pet. App. A12-A16. Petitioner does not contest *Green* or its interpretation of Section 16-1005(f). Pet. 17 n.13. Petitioner thus recognizes that the court of appeals has construed District of Columbia law to confer a private right of action for criminal contempt on the holder of a CPO, and he does not ask this Court, as the ultimate

arbiter of District of Columbia law, to review that statutory holding. See *Whalen* v. *United States*, 445 U.S. 684, 687-688 (1980); cf. *Pernell* v. *Southall Realty*, 416 U.S. 363, 368-369 (1974) (discussing this Court's "longstanding practice of not overruling the courts of the District on local law matters save in exceptional situations where egregious error has been committed") (internal quotation marks and citation omitted).

b. Petitioner also does not argue that the Constitution requires criminal contempt to be prosecuted by a disinterested prosecutor. Pet. 17 n.13. It is a serious question whether the Due Process Clause of the Fifth Amendment permits the District of Columbia to confer a private right of action for criminal contempt on the interested beneficiary of a CPO. Compare *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 *People* v. *Calderone*, 573 N.Y.S.2d 1005, 1007 (Crim. Ct. 1991) ("[P]rivate prosecutions by interested parties or their attorneys present inherent conflicts of interest which violate defendants' due process rights.").

In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), this Court held that federal courts have "inherent authority to initiate contempt proceedings for disobedience to their orders," *id.* at 793, and to appoint private attorneys to prosecute a contempt action. *Id.* at 794-796. In an exercise of its "supervisory power," however, the Court ruled that "counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order." *Id.* at 790; see *id.* at 804

("A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.").

This case concerns private prosecution of criminal contempt pursuant to a District of Columbia statute rather than an exercise of the inherent authority of an Article III court, as was at issue in *Young*. The court of appeals in *Green* seemingly rejected a due process objection to the District of Columbia's statutory scheme, noting that *Young* was not a constitutional decision; reasoning that not all protections normally applicable to criminal prosecutions are required for certain criminal contempts; and observing that local law provides "adequate protections to alleged contemnors." 642 A.2d at 1280-1281. But the *Young* Court recognized that the exercise of power by interested prosecutors may raise due process issues, 481 U.S. at 808 & n.19, and private prosecutors enforcing CPOs presumably are interested parties.

Petitioner, however, has expressly declined to raise those issues or to challenge *Green* at any point in the proceedings. See Pet. 17 n.13 ("[Petitioner] never has challenged the *Green* court's holding that interested attorneys can stand in the courtroom well and physically prosecute [Section] § 16-1005(f) actions."); 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."). Accordingly, the due process issue that petitioner does raise—whether a private prosecutor in a contempt action in fact exercises governmental power—arises in an abstract and artificial context. Because this case does not present a key constitutional

issue that the Court should consider if it were to entertain a challenge to Section 16-1005(f)—*i.e.*, whether an interested private prosecutor may maintain a criminal contempt action—this case is a poor vehicle for this Court's review.

2. The claim that petitioner does raise is not controlled by this Court's precedents. Petitioner asserts (Pet. 16-27) that, under this Court's case law, the CPO holder must be deemed to represent the United States when prosecuting a criminal contempt. (He asserts that claim as a predicate to his argument that the plea agreement with the USAO bars respondent's contempt prosecution.) Contrary to petitioner's assertion, this Court has never considered whether a private prosecution for criminal contempt must be treated as an action brought in the name and interest of the authorizing sovereign.

a. Petitioner points (Pet. 14-15) to this Court's oft-repeated statement that "[c]riminal contempt is a crime in the ordinary sense." *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968); see *Young*, 481 U.S. at 799; *International Union, United Mine Workers* v. *Bagwell*, 512 U.S. 821, 826 (1994). But what the Court has meant by that statement is that the adjudication of criminal contempt must be attended by many of the same procedural protections for defendants that attend the adjudication of other crimes. See *Young*, 481 U.S. at 798-799. The Court has not meant that the prosecution of criminal contempt necessarily must be lodged in someone who acts for or represents the government. As the Court explained in *Young*,

> [t]he fact that we have come to regard criminal contempt as 'a crime in the ordinary sense,' does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which

> only the Executive Branch may engage. Our insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings.

*Id.* at 799-800 (internal quotation marks and citation omitted).

Petitioner correctly notes (Pet. 16-17 & n.12) that when private parties are appointed to prosecute criminal contempt pursuant to Federal Rule of Criminal Procedure 42(a)(2), they represent the United States as the appointing party. See, *e.g.*, *Young*, 481 U.S. at 804 ("Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated."); *United States* v. *Providence Journal Co.*, 485 U.S. 693, 700 (1988) ("Private attorneys appointed to prosecute a criminal contempt action represent the United States.") (internal quotation marks and emphasis omitted). But this Court has never addressed whose interests private parties represent when they prosecute criminal contempt as the result of a statutory private right of action rather than a judicial appointment.

b. Petitioner relies (Pet. 17-24) on *United States* v. *Dixon*, 509 U.S. 688 (1993), and *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911). Neither of those cases addresses whether a private prosecution for criminal contempt must be treated as an action brought in the name and interest of the authorizing sovereign.

i. In *Dixon*, this Court considered a pair of consolidated cases involving the permissibility of successive prosecutions under the Double Jeopardy Clause. In one of those cases, the defendant, Michael Foster, was found guilty of criminal contempt under Section 16-1005(f) for

violating two CPOs. *Dixon*, 509 U.S. at 693. That criminal contempt action was prosecuted by attorneys representing Foster's estranged wife and mother-in-law, the holders of the CPOs. *Id*. at 692. The USAO subsequently indicted Foster for the assaults and threatening conduct that had formed the basis for the contempt prosecution. *Id*. at 693. Foster claimed that the successive prosecution was barred by the Double Jeopardy Clause, *ibid*., and this Court agreed insofar as the contempt offenses and the substantive offenses contained the same elements under *Blockburger* v. *United States*, 284 U.S. 299 (1932). *Dixon*, 509 U.S. at 700-703.

Petitioner argues (Pet. 19) that Foster's criminal contempt prosecution must have been brought on behalf of the United States, because double jeopardy bars only successive prosecutions by the same sovereign. See *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985). As petitioner recognizes, however, whether an action is brought on behalf of a sovereign depends on "the ultimate source of the power" under which the prosecution was taken, not the identity of the prosecutor. Pet. 19 (quoting *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978)); cf. *Heath*, 474 U.S. at 88 ("In applying the dual sovereignty doctrine, then, the crucial determination is * * * whether the two entities draw their authority to punish the offender from distinct sources of power."). In this case, as in *Dixon*, "the ultimate source of the power" for a criminal contempt prosecution under Section 16-1005(f) is Article I of the Constitution. But that does not answer the question of whether, when the District of Columbia legislature acts pursuant to that power and creates a private cause of action for criminal contempt, a party who subsequently invokes that statutory cause of action represents her own interests or those of the Uni-

ted States. Application of the double jeopardy bar did not depend on resolution of that question, and *Dixon* did not decide it. Cf. *Dixon*, 509 U.S. at 692 ("[T]he United States was not represented at trial.").[1]

ii. In *Gompers*, a group of labor officials were enjoined from boycotting a stove manufacturer. 221 U.S. at 436. The company subsequently brought a contempt proceeding, alleging that the officials had published statements in violation of the injunction. *Ibid.* After the officials were found guilty of contempt, they were sentenced to terms of imprisonment ranging from six to twelve months. *Id.* at 435. The officials then claimed that their prison sentences were criminal sanctions that had been improperly imposed in a civil contempt proceeding. This Court agreed. It recognized that both civil and criminal contempt proceedings could result in imprisonment, *id.* at 441-443; but it held that because the officials' imprisonment had been imposed as a punitive rather than a remedial measure, "it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt," *id.* at 444.

Petitioner points (Pet. 23) to this Court's statement in *Gompers* that "proceedings at law for criminal contempt are between the public and the defendant." 221 U.S. at 445. That statement, however, was intended

[1] Petitioner places (Pet. 19 n.15) undue weight on Justice White's assertion in *Dixon* that it was "immaterial" that Foster's "contempt proceeding was brought and prosecuted by a private party," because "private attorneys appointed to prosecute a criminal contempt action represent the United States." 509 U.S. at 727 n.3 (concurring in the judgment in part and dissenting in part) (brackets omitted). That assertion, which in any event did not command a majority of the Court, does not bear on whether a private party represents the government when she institutes a criminal contempt proceeding pursuant to a statutory right of action rather than a judicial appointment.

to distinguish criminal contempt proceedings instituted to vindicate the authority of the court from civil contempts that "are between the original parties, and are instituted and tried as part of the main cause." *Ibid.* The reason for drawing the distinction was that the contempt proceedings at issue in *Gompers* were a continuation of the parties' original equity proceeding, *id.* at 445-450, and thus should have been dismissed when the underlying action settled, *id.* at 451, rather than proceeding to the imposition of criminal punishment. Contrary to petitioner's assertion, the Court in *Gompers* did not hold that there is "no such thing as a criminal contempt prosecution maintained in the name of a private person." Pet. 24. The Court did not have before it any statute purporting to create a private right of action for criminal contempt.

3. Petitioner asserts in passing that "private individuals cannot, consistent with due process, bring criminal actions in their own name." Pet. 21. While petitioner does not contend that due process requires a disinterested prosecutor, see p. 8, *supra*, he relies on *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), for the proposition that due process requires a prosecutor who acts in the name and interest of the sovereign. That case, however, dealt not with due process but with standing. In *Linda R.S.*, a single mother brought suit on equal protection grounds when the local district attorney declined to prosecute the child's alleged father for nonpayment of child support. *Id.* at 615-616. This Court held that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *id.* at 619, and therefore affirmed dismissal of the plaintiff's action for want of standing. This Court had no occasion to consider whether, consistent with due process, a leg-

islature may permit a private party to undertake a proceeding for criminal contempt in her own name and interest.

Petitioner does not otherwise develop any argument that the District of Columbia's creation of a statutory private right of action for criminal contempt violates the Due Process Clause of the Fifth Amendment or separation-of-powers principles. He does not cite any decision of any court finding such a constitutional violation. Nor does he discuss this Court's precedents addressing when nominally private conduct can constitute government action for constitutional purposes. See, *e.g.*, *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) ("We have treated a nominally private entity as a state actor * * * when it has been delegated a public function by the State."); *Georgia* v. *McCollum*, 505 U.S. 42, 51 (1992); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 627-628 (1991). Petitioner does not develop any argument that the prosecution of criminal contempt is the sort of public function that constitutes governmental action even when performed by private parties.

Given the complexity and importance of those constitutional issues, this Court should await a properly developed challenge to Section 16-1005(f). The majority of States allow private parties to prosecute criminal contempt. See Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U. L.Q. 85, 103-104 & n.89 (1992). But the circumstances in which States allow such prosecutions vary widely. *Id.* at 104-107. Because any decision addressing the constitutionality of a statutory private right of action for criminal contempt could apply broadly to many States' laws, the Court should

await a case that fully presents the relevant statutory and constitutional questions. For example, a decision that addressed whether private parties may serve as contempt prosecutors in their own names and not as governmental representatives, without addressing whether interested private parties may do so at all, could result in an abstract or limited decision that has little relevance to many actual statutory schemes. Further review of petitioner's claims is therefore not warranted in the context of this case.

### B. This Case Is An Unsuitable Vehicle In Any Event For Examining The Issues Raised By Private Prosecution Of Criminal Contempt

Even assuming that the Due Process Clause required respondent to represent the United States when prosecuting the criminal contempt action at issue, petitioner still would not be entitled to relief on the facts of this case. For that reason, this case is an unsuitable vehicle for examining any constitutional issues raised by prosecution of criminal contempt by the holders of CPOs. Cf. *Rescue Army* v. *Municipal Ct.*, 331 U.S. 549, 569 (1947) ("[C]onstitutional issues affecting legislation will not be determined * * * if the record presents some other ground upon which the case may be disposed of.").

1. Even if respondent were thought to represent the United States when prosecuting petitioner for criminal contempt, that still would not have violated the plea agreement that is at the center of petitioner's claim. See Pet. 30 ("In a criminal contempt action maintained in the United States' name and power, an alleged contemnor is entitled to the benefit of bargained-for promises made by government lawyers."); see also Pet. 2, 5, 31 (relying on plea agreement as ultimate source of re-

lief). That agreement was solely between petitioner and the United States Attorney's Office for the District of Columbia. The AUSA handling petitioner's case crossed through "District of Columbia" in the caption of the agreement, so that it read only "United States vs. John Robertson." App. *infra*, 1a. The AUSA also crossed through "Assistant Corporation Counsel" in his signature line, so that it read only "Assistant U.S. Attorney." *Ibid.* The AUSA then wrote at the top of the form: "In exchange for Mr. Robertson's plea of guilty to Attempted Aggravated Assault, gov't agrees to" dismiss the remaining charges and "not pursue any charges concerning an incident on 6-26-99." *Ibid.*

As the court of appeals recognized, in context "the abbreviated word 'gov't' clearly referred to the United States, not [respondent], and certainly not the District of Columbia since that name was deleted." Pet. App. A20. By crossing through "the District of Columbia" and "Assistant Corporation Counsel," the AUSA made clear that the plea agreement covered only the USAO, and not the District of Columbia itself or its Office of the Attorney General. Indeed, in the context of federal plea agreements, "within the 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) (plea agreement by one United States Attorney, 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"). Even under an approach that construes plea agreements by one United States Attorney's Office to cover other such offices, and requires restrictions on the scope of such an agreement to appear on its face, see *United States* v. *Gebbie*, 294 F.3d 540, 550 (3d Cir. 2002); see also *United States* v. *Johnston*, 199 F.3d 1015, 1020 (9th Cir. 1999) (discussing *United States* v. *Harvey*, 791 F.2d 294, 303 (4th Cir. 1986)), cert. denied, 530 U.S. 1207 (2000), the agreement in this case evinces an intent to limit its scope to the United States Attorney's Office in question. Certainly, no logic justifies construing the agreement to cover a private prosecutor in a contempt action who, at the time of the agreement, was understood by local law to pursue such claims in her own right. The court of appeals therefore correctly concluded that "no objectively reasonable person could understand that [petitioner's] plea agreement bound [respondent] and precluded her contempt proceeding * * * , or that the agreement bound the District, a distinct, separate governmental entity." Pet. App. A20.

That conclusion is especially appropriate in view of D.C. Code § 16-1002(c) (West 2001). At the time petitioner signed his plea agreement, 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." Section 16-1002(c) thus placed petitioner and his counsel on notice that the USAO's institution of criminal charges (and its subse-

quent resolution of those charges in a plea agreement) did not affect respondent's right to seek her own relief by instituting a criminal contempt proceeding.[2] In light of both the specific terms of the plea agreement at issue and the legal backdrop for that agreement, petitioner could not reasonably have believed that the agreement precluded respondent from instituting a proceeding against him for criminal contempt under Section 16-1005(f).

2. Petitioner did not contend at any point during his trial for criminal contempt in the Family Division of the Superior Court that the proceeding violated his earlier plea agreement. Rather, while his direct appeal from the criminal contempt convictions was pending before the court of appeals, petitioner filed a motion in the Criminal Division of the Superior Court to vacate those convictions pursuant to D.C. Code § 23-110(a) (West 2001). Pet. App. A6-A7. When that motion was denied, petitioner appealed, and the court of appeals consolidated petitioner's direct and collateral appeals. *Id.* at A1-A2.

With respect to petitioner's direct appeal, his failure to timely raise the claim means that it is reviewed for plain error. See D.C. Super. Ct. R. Crim. P. 52(b); *Green* v. *United States*, 948 A.2d 554, 559 (D.C. 2008).

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[2] Since the time that petitioner signed his plea agreement, Section 16-1002(c) has been amended. See D.C. Code § 16-1002 (West Supp. 2009). In its present form, Section 16-1002 continues to provide that the holder of a CPO "has a right to seek relief," including by instituting a criminal contempt action. According to Section 16-1002, that 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." *Ibid.*

An error constitutes reversible plain error only if the defendant can show that (1) there was an error, (2) the error was obvious, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Ibid.* A case requiring those additional showings would be an unsuitable vehicle for addressing the underlying legal question—*i.e.*, the permissibility of a statutory private right of action for criminal contempt. Petitioner does not attempt to explain how he could show obvious error, given the absence of any decision from this Court or any court of appeals invalidating a statutory private right of action for criminal contempt.

With respect to petitioner's collateral appeal, petitioner would be entitled to relief only upon a demonstration of cause for his failure to timely raise the claim and prejudice as a result of that failure. See, *e.g.*, *Head* v. *United States*, 489 A.2d 450, 451 (D.C. 1985) ("Where a defendant has failed to raise an available challenge to his conviction on direct appeal, he may not raise that issue on collateral attack unless he shows both cause for his failure to do so and prejudice as a result of his failure."). Just as petitioner does not attempt to demonstrate plain error, he does not attempt to demonstrate justifiable cause. In those circumstances, this case does not present an appropriate opportunity for considering the difficult issues raised by purely private prosecution of criminal contempt by the holders of CPOs.

3. Finally, even assuming that respondent's criminal contempt prosecution both breached the plea agreement and rose to the level of plain error, it is not clear that petitioner seeks an appropriate remedy for the breach. Petitioner recognizes that "specific performance is no longer available," but argues for "a remedy approximat-

ing specific performance: a reversal of [his] convictions for criminal contempt." Pet. C.A. Br. 36. Specific performance is generally disfavored, however, when it would undermine third-party interests, see Restatement (Second) of Contracts § 364 (1981), such as respondent's interest in protecting her personal safety and security by pursuing an action for criminal contempt under D.C. Code § 16-1005(f) (West Supp. 2009). Accordingly, the more appropriate remedy might be rescission—*i.e.*, withdrawal of petitioner's guilty plea to attempted aggravated assault. See *Puckett* v. *United States*, 129 S. Ct. 1423, 1430 (2009) (citing 26 Richard A. Lord, *Williston on Contracts* § 68.1 (4th ed. 2003)). To the extent that such relief would not aid petitioner (because he has served the sentence imposed for his assault conviction), that is because petitioner waited three years before claiming a breach of the plea agreement. In any event, petitioner does not defend his choice of remedy before this Court, and the need to resolve that question as a predicate to relief provides an additional reason why further review of petitioner's claims is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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