DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 10-FM-890

IN RE Mr. K
Appellant

On Appeal from the Superior Court of the
District of Columbia
Family Division / Domestic Violence Unit

# BRIEF OF *AMICI CURIAE* DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (DV LEAP), ET AL IN SUPPORT OF APPELLEE
Arguing for Affirmance of the Decision Below

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Dated: November 21, 2011

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## STATEMENT OF INTEREST

Statements of Interest of Amici Curiae are contained in attached Appendix.

## SUMMARY OF THE ARGUMENT

Amici offer this brief in support of the position of the United States Attorney's Office, and argue that the prosecution of criminal contempt by a private beneficiary of a Civil Protection Order ("CPO") is both lawful and constitutional. While Amici recognize that this question arises in this case in context of the "plain error" rule, Brief of the U.S. Attorney's Office at pp. 12-14, Amici seek here simply to address the compelling public policies underlying - and the constitutionality of - the existing CPO schema under the D.C. IntraFamily Offenses Act.

*Amici* submit this brief on behalf of the thousands of victims of domestic violence we have represented, to urge the Court to continue to affirm the vital and irreplaceable role of private enforcement of CPOs. The CPO remedy was adopted by the legislature to respond to a history of governmental failure to protect victims of violence in the family. Private rights of action and initiation of enforcement were and remain the essential driving force in the CPO system.

The primary weakness of the CPO process is a failure of enforcement. Neither public prosecution nor judicially-initiated appointment of private disinterested counsel can adequately substitute for private enforcement. Lack of arrests for violations, delays in the criminal process, and the elimination of any control by abuse survivors over the legal process make "disinterested" prosecution a poor alternative to the rights the IntraFamily Offenses Act was designed to further. Elimination of privately initiated

enforcement actions will eviscerate the CPO remedy and the core purpose of the IntraFamily Offenses Act.

Appellant's suggestion that the Supreme Court has endorsed a constitutional *right* to a disinterested, or non-private, litigator of criminal contempt, is simply incorrect. The *Young* decision expressly declined to reach the constitutional question. *Young v. Vuitton et fils,* 481 U.S. 787, 809 (1987). While four Supreme Court Justices in *Robertson v. United States ex rel. Watson*, 130 S.Ct. 2184, 2188-89 (2010) (Roberts, Chief Justice, dissenting), signed a dissent from the dismissal of *certiorari* stating that a criminal contempt action must be brought on behalf of the sovereign even they did not suggest that a private litigant may not instigate and participate in such an action. *Robertson v. Watson*, 130 S.Ct. at 2189. And of course, this Court's ultimate decision in *Robertson II*, while adopting the Supreme Court dissenters' position that only the sovereign may prosecute a criminal contempt, for the fourth time *endorsed the right of the private litigant* to *bring the action,* "pursuant to the sovereign power" and "in the name" of the United States. *In re Robertson (II)*, 19 A. 3d 751, 755-56 (2011) (*Robertson II*).[2] This decision is consistent with that of numerous state courts who have wisely refused to apply the *Young* Court's federal prohibition on litigation by an interested litigant to state contempt proceedings, to state contempt proceedings, under either the Constitution or their supervisory authority.

[2] The *Robertson* Court referenced the victim's representation by the Office of the Attorney General ("OAG") but did not specify whether the ruling extends only to victims represented by that Office. Since the representation by the OAG is on behalf of the victim (and is certainly not on behalf of the United States), such a distinction seems implausible.

In revisiting this question yet again, the Court should bear in mind that, regardless of who litigates a contempt proceeding, accused criminal contemnors receive the full panoply of constitutional protections afforded criminal defendants, including (as in this case) the right to counsel, criminal burden of proof, protection against double jeopardy, etc. In contrast, private victims themselves often lack even representation. For all these reasons, defendants who face not the State, but a private litigant, in a criminal contempt proceeding, suffer no legally cognizable detriment. Permitting privately initiated enforcement to continue in the name of the State, with application of all due process protections going to the fairness of the proceeding, properly and constitutionally balances the private and public rights at stake.

There can be now question that criminal contempt proceedings are constitutionally held in civil courts, as indicated by the extensive line of criminal contempt cases in both the Supreme Court and this Court. Finally, Appellant received more than sufficient notice that this proceeding was one for criminal contempt.

## ARGUMENT

### I. PRIVATE ENFORCEMENT OF CPOs IS LAWFUL, CONSTITUTIONAL, and GOOD PUBLIC POLICY.

The vast majority of CPO violations are incurable by *civil* contempt, which the Supreme Court has defined as any penalty – including indefinite jail time - which can be *avoided* by the contemnor's compliance with the order. *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 635 n.7 (1988). Because most CPO violations are in the past, and cannot be cured by a coercive forward-looking order, most contempt proceedings to enforce CPO's *must necessarily*, under the Supreme Court's definition, be termed "criminal

contempts."[3] Therefore, if private litigants are prevented from bringing criminal contempt enforcement actions, they will be essentially prevented from enforcing their own CPOs.

### A. The Dominant Goal of the IntraFamily Offenses Act was the Creation of a Private Legal Remedy to End Abuse.

The IntraFamily Offenses Act (the "Act") was, in 1970, the very first state statute to create a civil injunctive remedy for victims of crimes within the family. The Act "was designed to counteract the abuse and exploitation of women and children" through establishment of a civil injunctive remedy. *Cruz-Foster v. Foster*, 597 A.2d 927, 931 (D.C. 1991). In 1982, after a decade of reliance on the then-Office of the Corporation Counsel for the District of Columbia (now the Office of the Attorney General) to bring Civil Protection Order ("CPO") actions on behalf of victims, the legislature recognized that "several critical weaknesses" in the original statute had emerged, requiring among other things, (1) a significant expansion of remedies that could be included in and parties that could be covered by a CPO, and (2) a private right of action for victims. *Report of the Council of the District of Columbia Committee on the Judiciary on Bill 4-195, the Proceedings Regarding Intrafamily Offenses Amendment Act of 1982*, at 2, 10 (May 12, 1982) ("*1982 Report*") ("[t]he creation of a private right of action is designed: (1) to promote a prompt resolution of an intrafamily offense problem; and (2) to facilitate the

[3] The "criminal contempt" label is misleading insofar as it implies that the prospect of incarceration is what entitles the accused to be treated as a criminal defendant. In fact, incarceration is not what makes the proceeding "criminal," as incarceration is routinely used in *civil* contempt (although without the procedural protections attached to criminal contempt). *See generally* David J. Harmer, *Limiting Incarceration for Civil Contempt in Child Custody cases*, 4 B.Y.U. J. Pub. L. 239 (1990).

effectiveness of the civil protection remedy" by not requiring all petitions to be brought by the over-burdened Corporation Counsel's office).

Civil protection orders were a brilliant and powerful new remedy for victims of abuse, which responded to the then-virtually complete failure of the criminal justice system to treat domestic violence as a crime and afford any protection to victims. *See* Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, Juvenile & Family Court Journal, 43:4 (1992) ("a new remedy was needed. One that would enjoin the perpetrator from future abuse . . . One that would advance the autonomy and independence of the battered woman from the abuser. Civil protection orders were this new remedy"). First invented in the District of Columbia, CPOs were eventually adopted by every state, and have since become an essential legal remedy for victims of abuse. *Id; see generally*, Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wisc. L. Rev. 1657, 1667 (2004).

The CPO process is driven by two core values: (1) the need for a process that is to some degree controlled by and empowering to the victim, and (2) the need to preserve the option of both private, civil and criminal justice responses to intrafamily abuse. For many women, protection orders symbolize the retaking of power back from the abuser. *See* James Ptacek, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE 146 (Northeastern University Press: 1999) (hereafter "Ptacek"). Women in Ptacek's study of Boston area courts stated that their protection orders showed the abuser they "meant business" (*id.* at 165); "proved something to him and . . . to myself"(*id.*); counter[ed] the abuser's belief that "he had power over me. . . it got him to back off and

realize that he couldn't treat me like he did" (*id.* at 166); and made them "feel less powerless, like there's something to do" (*id.*).

Here in D.C., the legislature's intent to strengthen legal responses to domestic violence by making both public and private avenues for protection was evident in the 1982 amendments to the Act which ensured *both* that private victims could file at their own behest (see above), *and* that the filing of a CPO would not preclude criminal prosecution. *1982 Report* at 9 (Sec. 16-1002 is adopted to "remove the current prohibition upon criminal prosecutions being brought against a family member if a civil protection order case . . . is already being litigated"). Consistent with the dual purposes of empowering victims by providing a private cause of action while also strengthening the State's criminal justice response, the legislature amended the Act in 1994 to specify that violations of CPOs are also punishable as a misdemeanor, *cf.* D.C. Code § 16-1005(g), *as well as* by the previously legislated contempt remedy. D.C. Code Sec. 16-1005(f).

There is no question that the D.C. Council intended the Act's private right of action to extend to contempt enforcement. The statute makes no distinction between private and public litigants, in its authorization for enforcement by contempt. *Cf.* D.C. Code Sec. 16-1005(f) ("Violation of any temporary or permanent order issued under this subchapter . . . shall be punishable as contempt").[4] Thus, this jurisdiction has long – and repeatedly - affirmed that the Act was intended to authorize criminal contempt

[4] Indeed, witnesses testifying regarding the 1982 amendments stated that "the same problems of administrative delay and dependence on prosecutorial discretion that limit a complainant's ability to petition for a CPO also limit her ability to have that CPO enforced." *IntraFamily Offenses Amendment Act of 1981: Hearings on Bill 4-195 Before a Public Roundtable of the Judiciary Committee of the D.C. City Council 28* (1981)(statement on behalf of the Women's Legal Defense Fund).

enforcement by the private beneficiary of the CPO. *Castellanos v. Novoa,* 127 Daily Wash. L. Rptr. 1192, 1194 (D.C. Super. Ct. July 9, 1987)(Alprin, J.)("it was the intention of the Council that the provisions of civil protection orders be enforceable by privately filed contempt motions"); *Green v. Green,* 642 A.2d 1276, 1280 n. 7 (1994) ("the Council intended that 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"). Finally and most recently, this Court affirmed in *Robertson II* that the law "allowed Ms. Watson, assisted by the OAG, to initiate a criminal contempt action involving an intrafamily offense in the name of the United States, for the purpose of enforcing a Superior Court CPO".[5] 19 A.3d at 755-56. It so held after reiterating approvingly, its prior declaration in *Green v. Green,* that the D.C. Council had

[5] DC's rule is consistent with that of several other states. *See, e.g., Wilson v. Wilson* , 984 S.W. 2d 898, 903 (Tenn. 1998)(allowing husband's attorney to prosecute criminal contempt charge against wife for violation of restraining order and stating that the trial court provides a gatekeeper function that protects defendant, that requiring disinterested prosecution would impose "tremendous fiscal and administrative burdens" on the State, that the district attorney's office could not be expected to meet the burden, and that the result of such a requirement would be that "many citizens would be deprived of the benefits to which they already have been adjudged entitled… and many state court orders would remain unenforced"); *Olmstead v. Olmstead*, 284 S.W.2d 27, 28 (Ark. 2008); *Eichorn v. Kelley*, 111 P.3d 544 (Colo. Ct. App. 2004)(rejecting *Young,* and holding that court's inherent power to enforce its own orders is different from prosecution of "criminal conduct" and that private litigants are necessary to bring the violations to the court's attention); *In re Marriage of Betts,* 558 N.E. 2d 404 (Ill.App.Ct. 1990)(declining to follow *Young*); *State ex rel. O'Brien v. Moreland,* 778 S.W. 2d 400 (Mo.Ct.App. 1989)(same); *Del Dotto v. Olsen,* 628 N.E.2d 1156, 1158 (Ill. App. Ct. 1993)("the private litigant who brings the facts of [the] contempt . . . before the court performs a valuable service to the court"); *Katz v. Commonwealth,* 399 N.E.2d 1055, 1060 (Mass. 1979)("private parties to a civil litigation hae the right to press both the civil and criminal aspects of the case"). *But cf. Rogowicz v. O'Connell,* 786 A.2d 841 (N.H. 2001)(prohibiting private prosecution of criminal contempt); *Trecost v. Trecost,* 502 S.E. 2d 445 (W. Va. 1998)(same); *DSS ex rel. Montero v. Montero,* 758 P. 2d 690 (Haw.Ct. App. 1988)(same); *Peterson v. Peterson,* 153 N.W. 2d 825 (Minn. 1967)(same).

determined "that the beneficiary of a CPO should be permitted to enforce that order through an intrafamily contempt proceeding." 19 A.3d at 260, quoting *Green v. Green,* 642 A.2d 1275, 1279 (D.C. 1994).

**B. Enforcement is the Critical Weakness of the CPO System**

CPOs are only as good as their enforcement, yet they are notoriously under-enforced. Despite the significant advance in legal protections for victims of abuse which CPOs represented, enforcement remains the "Achilles heel" of the CPO process. U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, Peter Finn & Sarah Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* (1990) at 49 (hereafter "Finn & Colson"). Studies and reports around the country have repeatedly documented the scant enforcement of these orders, including "considerable anecdotal evidence… that some batterers flout civil protection orders with impunity." *Id*. *See also* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders,* 56 Ohio St. L. J. 1153, 1194 (1995)("lack of enforcement is still cited as the principal weakness of protection orders")(hereafter "Zlotnick"); *Developments in the Law – Legal Responses to Domestic Violence,* 106 Harv. L. Rev. 1498, 1512 (1993)(enforcement by the criminal justice system has "received inadequate emphasis in many jurisdictions").

Research has consistently shown that CPOs are violated approximately half the time. See, e.g., T.K. Logan et al, *The Kentucky Civil Protection Order Study: A Rural and Urban Multiple Perspective Study of Protection Order Violation Consequences, Responses, and Costs* 97 (2009) (finding that during the six-month follow-up period after women obtained a protective order, half reported a violation of the protective

order)(hereafter "*Kentucky Civil Protection Order Study*"); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?* 29 Cardozo L. Rev. 1487, 1512 (2008) (citing a Colorado study that found sixty percent of women who obtained orders reported re-abuse during the following year and a Massachusetts study that found forty-nine percent of offenders re-abused their victims within two years). In a recent, in-depth study of CPO enforcement**,** the majority of recipients of protection orders indicated that the orders' effectiveness depended entirely on the perpetrator's fear of legal repercussions. The study concluded, "if protective orders are violated without consequences, this fear would be eliminated." *Kentucky Civil Protection Order Study*, *supra* at 156.

**1. Arrest and Prosecution for CPO Violations are Rare**

Unfortunately, police and prosecutors frequently refuse to enforce violations of CPOs, particular if the violations are not independent crimes, on the mistaken belief that such violations are "minor' and not worthy of the criminal justice system's attention.

**Police**

Research and reports of police response to CPO violations paint a disturbing picture that the State's historically ambivalent responses to violence in the family continues today. In a rare national empirical study of protection orders and their enforcement, leading researchers Kinports & Fischer found that more than four-fifths of the respondents reported that police respond "slowly or ineffectively" to reports of violations; 41.3 % of respondents characterized the failure of police response as a "significant or very serious problem." Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the*

*Reform Statutes*, 2 Tex. J. Women & the Law 163, 223-224 (1993)(hereafter "Kinports & Fischer"). Even when police did respond, they often refused to arrest respondents. *Id.* A more recent study in the Boston area also reported a widespread reluctance of police to arrest for restraining order violations. Ptacek, 162 (detailing anecdotes of police failures to respond to violations).

Local data indicate that the police in the District of Columbia are no better, and may be worse than the national norm: According to court statistics, DC police *made arrests for CPO violations in only 14% of CPO's* in 2006 *and 9%* in 2005.[6] Given that the rate of violations around the country is in the range of 60%, *cf.* Ptacek, *supra* at 163, and that most petitioners call the police for violations of concern, *id.* at 161, it is highly likely that this extremely low rate of arrests reflects police "triaging" and declining to arrest for many CPO violations.

Under the current system, when the police fail to arrest, as lawyers and advocates for victims, *Amici* always advise our clients that they are not dependent on police response; they can file their own motion for contempt, and seek to have the violator held accountable and the order enforced. In this respect, the ability to achieve legal relief *without* being dependent on the criminal justice system to take action is a major benefit of the CPO system, as it was intended to be. *See also Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005)(despite police's failure to arrest, respondent's violation of the order

[6] D.C. police presented the U.S. Attorney's Office only *225* CPO violations in 2006 and *194* in 2005. E-mails from Kelly Higashi, Chief, SA/DV Unit, USAO, to Joan Meier, George Washington University Law School (Feb. 23, 2007, 18:41:24 and 20:07:48) (on file with author). The total number of CPOs awarded by the court was 1641 in 2006 and 2053 in 2005. Telephone conversation between Kelly Higashi and Joan Meier (February 22, 2007).

was still subject to contempt of court). However, if victims cannot pursue the contempt litigation, their ability to ensure their CPOs are enforced will be eliminated.

**Prosecutors**

On the prosecution front, while states have made significant strides in prosecuting domestic violence itself, nationally, prosecutorial responses to protection order violations are still rare. The national 1993 study cited above found that "[a]lmost three-fourths (70.9%) of respondents reported that prosecutors refuse to prosecute violations except in very limited circumstance." Kinports & Fischer, *supra* at 228. In another study, it was found that only 17% of protective order violators were arraigned, and only 6% were convicted of the violations. Adams & Powell, *Tragedies of Domestic Violence: A Qualitative Analysis of Civil Restraining Orders in Massachusetts*, Office of the Commissioner of Probation, Massachusetts Trial Court, pp. 15-17 (1995). *See also* Finn & Colson, *supra* at 49 ("For enforcement to work, the courts need to monitor compliance, victims must report violations, and, most of all, police, prosecutors, and judges should respond sternly to violations that are reported. These conditions were not in place in most of the jurisdictions examined for this report").

While in the District of Columbia, the U.S. Attorney's Office has been dedicated to domestic violence prosecutions and enforcement; it is also true that the prosecutor's office can only prosecute cases presented to them by police. As described above, that number of cases is, simply, tiny. In any event, it is unrealistic to expect a busy prosecutor's office to be willing and able to prosecute a substantially increased number of

order violations.[7] At root, the criminal contempt label does not change the fact that non-criminal violations of a *civil* order are simply never going to be viewed as a "crime" worthy of prosecution like other crimes. As one former USAO domestic violence prosecutor has pointed out:

> the criminal justice system will resist the complete criminalization of civil protection order violations. . . . Despite the wishes of . . . advocates, domestic violence does not behave like an 'ordinary' crime and prosecutors and police have legitimate grievances about being forced to treat it as such.

Zlotnick, 56 Ohio St. L. J. at 1209-1210 (1995). *See also Gordon v. State*, 960 So. 2d 31, 39 (Fla. Dist. Ct. App. 2007) ("Although an indirect criminal contempt proceeding in a family law case is vitally important to the parties, such a case often has little interest to a professional prosecutor").

In short, the criminal justice system is not likely to treat violations of civil orders, especially non-physically violent ones, as crimes, regardless of their technical status under the CPO statute. *See Kentucky Civil Protection Order Study*, *supra* at 99; Goldfarb, *supra* at 1512. When the violations consist of phone calls, verbal harassment and the like, which do not constitute independent criminal behavior, prosecutors not unreasonably believe that it will be difficult to convince a judge or a jury that such conduct should subject a defendant to a traditional criminal conviction. Law enforcement thus generally views such violations as minor "law violations" rather than "real crimes" requiring criminal justice response.

[7] On information and belief, since this Court's latest *Robertson* decision, the U.S. Attorneys' Office has declined to prosecute the majority of privately filed contempts that have been referred to it by certain judges who are reluctant to entertain privately filed CPO contempts. Telephone conversation between Leah Maloney and Janese Bechtol Office of Attorney General, (November 9, 2011).

Unfortunately, this common attitude can be spectacularly wrong in domestic violence cases, where seemingly minor order violations are often preludes to severe or even lethal attacks. *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 751-54 (police failed to respond to respondent's unconsented removal of children in violation of protection order which allowed the parties to *agree* to a mid-week dinner visit, resulting in abuser's murder of the parties' three girls); *Campbell v. Campbell*, 682 A.2d 272, 273 (N.J. Super. 1996) (after police failed to arrest respondent who violated stay-away provision and merely escorted him from the premises, he returned and shot the victim); *Mastroianni v. County of Suffolk*, 91 N.Y.2d 198, 201-02 (Supreme Court, Nassau Ct. 1997) (victim stabbed to death after police failed to arrest husband after he violated order by entering her home and removing her furniture – despite knowing he was visiting neighbors next door).

**2. There is no Available Cadre of Disinterested Prosecutors.**

Although the Supreme Court in *Young* speculated that, where the Executive declines to prosecute a contempt, disinterested private prosecutors could be appointed by federal courts, *Young*, 481 U.S. at 806 n.17, this may have been a case of wishful thinking: Neither state nor federal courts have found any fund to support appointment of "disinterested prosecutors." *See State ex rel. O'Brien v. Moreland*, 778 S.W. 2d 400, 407 (Mo.Ct. App. 1989) ("No such funds are appropriated to State courts"); *Musidor, B.V. v. Great American Screen*, 658 F.2d 60, 65 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982) ("There is no [federal] fund out of which to pay other [disinterested] counsel"); *see generally*, Joan Meier, *The Right to a Disinterested Prosecutor of Criminal*

*Contempt: Unpacking Public and Private Interests*, 70 Wash. U. Quarterly 85, 90 (1992).

It is also unlikely that such cases will attract *pro bono* counsel. *Pro bono* lawyers are already in short supply for CPOs themselves, as well as a wide array of other public interest or legal service causes of action. *See, e.g.*, D.C. Task Force on Family Law Representation, *Access to Family Law Representation in the District of Columbia* (Fall 1992 p. 12) (finding that the majority of people who seek legal assistance from legal service providers are not receiving it). Legal service and *pro bono* providers can be expected to prioritize devoting their scarce pro bono resources to representing low income or other deserving individuals, over an amorphous "sovereign."[8]

### C. Requiring all Criminal Contempts to be Prosecuted by a Public or Disinterested Prosecutor Would Profoundly Undermine the CPO Process.

Even if we could be confident that police would arrest when violations occur, and the public prosecutor would handle even minor CPO violations, the elimination of private contempt enforcement would still cripple the CPO process in several ways.

First, in contrast to the unwieldy, often delayed criminal process, "contempt is faster and faster is better." Zlotnick, 56 Ohio St. L. J. at 1199. The CPO system was

[8] While *pro bono* representation is sometimes available for victims of abuse seeking contempt enforcement, *Amici* can attest that *pro bono* lawyers are already very difficult to find. If the representation were on behalf of the court or the U.S. Attorney's Office, rather than on behalf of a sympathetic victim of abuse, with all due respect, it is likely that it would attract even fewer volunteers. E-mail from Karen Cunningham, then-Legal Director, WEAVE, to Joan Meier, George Washington University Law School (Feb. 20, 2007, 11:55 a.m.) (describing how few *pro bono* attorneys take contempts)(on file with author). *See also Musidor, BV v Great American Screen*, 658 F.2d 60, 65 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982) ("There is no fund out of which to pay other counsel . . . This is not the kind of case for which legal aid societies or public defenders are available").

created to provide a speedy response to abuse. *See Green v. Green*, 642 A.2d 1275, 1279 (D.C. 1994)(statutory procedures are designed "to expedite the application and if necessary, the enforcement of CPOs"); Scott Harshbarger and Jay Winsten, *Report on Domestic Violence: A Commitment to Action*, 28 New Eng. L. Rev. 313, 327 (1993)(Mass. Attorney General Report recommends expedition of domestic violence cases). Even after a CPO has been entered, once a violation occurs, a rapid response is still critical. "[D]eterrence is generally more potent when a quick punishment follows an infraction." Zlotnick, 56 Ohio St. L. J. at 1201-1202. It is well established that delays inherent in the criminal prosecution process often subject victims to further abuse, and often result in dismissals, as victims and witnesses disappear or become demoralized by the lack of resolution and stress of the process. *Id.* at 1210. Moreover, delay often wears down witnesses, or causes loss of memory and witness attrition, making cases harder to prosecute. *Id*. In contrast to the misdemeanor prosecution process, which can take easily from 3 to 12 months,[9] a private contempt enforcement action is ordinarily begun and concluded within a month.

Second, allowing only disinterested appointed lawyers to bring the action would be both destructive and problematic. It would remove her power to control whether or when a proceeding is brought to enforce her private civil order. Zlotnick, 56 Ohio St. L. J. at 1198 (private contempt enforcement empowers battered women by giving them choice and some control over the process). A disinterested prosecutor, by definition is not guided by the victim's wishes, nor accountable to her in any respect. Indeed,

[9] Zlotnick, 56 Ohio St. L. J. at note 248, noting that "[s]ome misdemeanor cases in the District of Columbia can take up to a year to go to trial")(citation omitted).

traditional criminal prosecutions even sometimes treat the victim as an adversary.[10] As Professor Deborah Epstein has noted, ""[s]uch re-victimization can thwart the survivor's efforts to regain control over her life and move past the abusive experience." Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J. L. & Feminism 3 at 17 (1999).[11]

Given these potentially grave conflicts, a "disinterested" attorney's role is difficult even to conceptualize: To whom would such a "disinterested" attorney be answerable? Would they need to take direction from the U.S. Attorney's Office (which might have already declined the prosecution)? If not, would they take guidance from the victim, and if so, to what extent? Would they be required to implement the prosecutor's office's policies regarding, e.g., no-drop prosecution, or to report potential criminal violations by the victim? Would the victim's wishes regarding which allegations to pursue, what evidence to offer (e.g., children's testimony) etc, be subject to countermand by this "disinterested" attorney - in a proceeding which she herself initiated in order to enforce her own civil order?[12] What if the victim sought to *withdraw* her contempt

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[10] Subpoenaing and even incarcerating victims who are reluctant to testify has become unfortunately more necessary in the wake of the Supreme Court's new restrictions on use of reliable hearsay in criminal prosecutions. *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. R. 747, 749 (2005)(*Crawford v. Washington* devastated domestic violence prosecutions and increased prosecutors' coercion of victims to testify); Casey G. Gwinn & Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 313 (1993)(prosecutors too frequently use subpoenas to force victims' testimony).

[11] The risk of deportation of the abuser is a deterrent to some immigrant victims. *Id.* Epstein further notes that for the African American community, reliance on the criminal justice system is also problematic due to racial tension between the community and the police and reluctance to involve the police. *Id*. at 17-18 (citations omitted).

[12] While under such a regime a victim would be stripped of representation or legal guidance, the defendant, in contrast, would receive the full panoply of constitutional

action – would the appointed attorney be free to reject her wishes – and on what grounds?

The loss for a victim exceeds merely the legal challenge of proceeding on her own in such litigation with one lawyer against her, and another who is not answerable to her, however. The loss of her own representative and advocate in the proceeding would also mean the loss of the profound role that victims' lawyers in such cases provide, including tailored and responsive legal counseling, advocacy and support in various systems, safety planning and risk assessment, and the general empowerment that having ones own legal advocate within the court process provides. Without this kind of advocacy and support accompanying their enforcement, CPOs' potential to provide a transformative legal intervention for victims of abuse would be greatly reduced.

For all these reasons, stripping private victims of the right to enforce their own orders would be a major blow to the CPO system and to the victims. Public prosecution is unlikely to occur, due to the low priority given to non-violent CPO violations, and it is also unavoidably slow. Appointment of private "disinterested" prosecutors is unrealistic; and to require the victim *not* to have representation or advocacy on her own behalf in such cases would both undermine the effectiveness of any such action and potentially revictimize the victim. The net effect will be to undermine the effectiveness of the CPO system.

## II. TRIAL COURTS HAVE THE AUTHORITY TO ADJUDICATE CRIMINAL CONTEMPT ARISING IN A CIVIL MATTER.

Appellant also argues that "a trial court does not have authority or power to impose criminal conviction in a civil matter." Appellant's Brief at 14. This is patently

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protections, including the right to counsel, criminal burden of poof, protection against double jeopardy, right to notice, to present witnesses, to confront the witnesses against him, jury trial, etc. *In re Wiggins*, 359 A.2d 579, 581 (D.C. 1976).

incorrect, and flies in the face of the Intrafamily Offenses Act itself. D.C. Code § 16-1005(f)(2001) ("Violation of any temporary or final order . . . shall be punishable as contempt. Upon conviction, criminal contempt shall be punished by a fine not exceeding $1,000 or imprisonment for not more than 180 days, or both"). Moreover, the history of Supreme Court and this Court's adoptions of procedural rights in criminal contempt adjudications in civil courts underscores the obvious fact, that criminal contempts may be – and are routinely - litigated by civil trial courts in the context of civil proceedings.

**A. All Courts Have Power to Enforce Their Own Orders.**

It is axiomatic that courts must have the power to enforce their orders to ensure the efficacy of the judicial system. The Supreme Court announced in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911), that power to punish for contempt, "is a necessary and integral part of the independence of the judiciary." This power is not dependent on the nature of the underlying action, whether civil or criminal, because contempt proceedings are "exertions of the power inherent in all courts." *See Myers v. United States*, 264 U.S. 95, 103 (1924) (upholding conviction for criminal contempt punished by a fine and imprisonment where the defendants disobeyed a civil injunction granted through the Clayton Act).

The inherent power of courts to pursue criminal contempt to enforce their orders has been recognized repeatedly by this court. *See e.g. Fields v. United States*, 783 A.2d 1260, 1264 (D.C. 2002) (affirming the use of criminal contempt in a civil proceeding); *Brooks v. United States*, 686 A.2d 214 (D.C. 1996) (affirming the use of criminal contempt arising out of a civil matter); *In re Wiggins*, 359 A.2d 579, 581 (D.C. 1976) (upholding conviction for criminal contempt for violation of court orders providing

conditions to Defendant's release). *See also In re Brown*, 454 F.2d 999, 1006 (D.C. Cir. 1971) ("the foundation for the criminal contempt power is the need to protect the judicial process form willful impositions").

Contempt proceedings are not considered wholly criminal or civil. Instead, "since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis.* *Myers,* 264 U.S. at 103; *see also Gompers.*, 221 U.S. at 441 ("contempts are neither wholly civil nor altogether criminal"); *Frank v. United States,* 395 U.S. 147, 151-52 n.5 (applying the concept that contempt is sui generis to find that penalties authorized by Congress for petty offenses may be imposed in federal criminal contempt cases without a jury trial) (1969). While the Supreme Court has pronounced criminal contempt a "crime in the ordinary sense," *Bloom v. Illinois,* 391 U.S. 194, 201 (1968), it has also continued to recognize that procedurally contempt is necessarily unique. *Young,* 481 U.S. at 825 (while only the Executive may constitutionally decide whether to prosecute a crime, the decision to enforce a court's order by criminal contempt is not controlled by the Executive, but by the court).[13]

This Court has also recognized the *sui generis* nature of criminal contempt: "[C]riminal contempts are criminal contempts; some of the procedural and substantive law applied to criminal contempts is as though they were crimes; and some of it is not." *Warring v. Huff,* 122 F.2d 641, 641(D.C. 1941) (finding the Indeterminate Sentence Act

[13] While the dissenting Justices in, *Robertson,*130 S.Ct. at 2189, reiterated that criminal contempt is a "crime in the ordinary sense," the opinion actually focuses on an uncontroversial principle – that *crimes* should not be privately prosecuted – and scarcely mentions the differences between contempt and criminal prosecutions, nor does it indicate why the "terrifying force of the criminal justice system" *Robertson* 130 S.Ct. at 2184, – i.e., incarceration, is of no concern in *civil contempt* proceedings which regularly result in incarceration. *See* Harmer, *supra* n. 2.

inapplicable to criminal contempt). *See also Seals v. United States*, 844 A.2d 349, 350 (D.C. 2004) (upholding the proportionality of a 36 month sentence for criminal contempt by citing the unique function of contempt to vindicate the authority of the court); *In re Wiggins*, 359 A.2d at 580 (noting that "a criminal contempt proceeding is not a criminal prosecution . . .").

### B. The Supreme Court and This Court Have Long Affirmed the Use of Criminal Contempt In Civil Actions.

Appellant incorrectly claims that *Gompers* forbids the use of criminal contempt in civil actions. Appellant's Brief at 14. In fact, this is the opposite of the truth: The *Gompers* Court held that because the sentence for contempt was wholly punitive, "a proceeding instituted and tried as criminal contempt" was required. *See Gompers* 221 U.S. at 444.. The problem was not the civil court, but the "variance between the procedure adopted and the punishment imposed." *See id.* at 449. Precisely because the criminal contempt was *not* prosecuted in a criminal court, procedures imported from the criminal realm were required. *Id.* at 446.

It is precisely because it is already understood and accepted that criminal contempt proceedings routinely occur within a civil court context, that the Supreme Court – and this Court – have incorporated due process rights from the criminal realm into adjudications of criminal contempt. *See United States v. Dixon*, 509 U.S. 688, 696 (1993) (securing protection against double jeopardy); *Bloom v. Illinois*, 391 U.S. 194, 198 (1968) (incorporating trial by jury for serious criminal contempts); *Cooke v. United States*, 267 U.S. 517, 537 (1925) (securing right to defense counsel); *Gompers* 221 U.S. at 444 (providing for proof beyond a reasonable doubt standard). *See also In re Wiggins*, 329 A.2d 579, 581 (D.C. 1976) (recognizing foregoing due process protections and

defendant's right to confront the witnesses against him); D.C. Super. Ct. Dom. Viol. R. 9(b) (strict evidentiary requirements, right to present and rebut evidence); *id.* at R. 12(d) (notice); *id.* at R. 12(e) (right to counsel and appointment of counsel for defendant; right against compulsion to testify or give evidence); and 13(a) (right to appeal).

This Court thus has similarly upheld criminal contempt actions arising out of civil matters. *See e.g. Murphy v. Okeke*, 951 A.2d 783, 793 (D.C. 2008) (affirming the civil trial court's finding of criminal contempt for violation of a Temporary Protection Order); *In re Warner*, 905 A.2d 233, 241 (D.C. 2006)(upholding criminal contempt remedy for failure to comply with court order to pay child support); *In re Vance*, 697 A.2d 42, 46 (D.C. 1997) (upholding criminal contempt judgment during an action to enforce a CPO). And, most recently in the *Robertson II* decision, when faced with a direct challenge to private litigation of criminal contempts of CPOs, this court once again reaffirmed the use of criminal contempt in civil actions. *In re Robertson (II)*, 19 A.3d at 759-61.

The dissenting Supreme Court Justices in *Robertson* 130 S.Ct. at 2189, while critical of the idea of private prosecution of crimes, also did not question the power of civil courts to pursue – in some way - criminal contempt in civil matters. Indeed, the dissent focused specifically on *who* may bring such an action, while acknowledging the D.C. statute's codification of criminal contempt for violations of civil protection orders. *Id.* at 2185, 2189. And two of the four dissenting Justices (Justice Sotomayor, joined by Justice Kennedy) specifically stated that they did not intend to "consider more generally the legitimacy of existing regimes for the enforcement of restraining orders." *Id*. at 2184.

Thus, there can be no question that, whatever a court's position on who may litigate a criminal contempt, such proceedings are universally recognized as taking place

within civil trial courts. Any other rule would effectively remove courts' contempt enforcement power altogether, contrary to this Court's repeated suggestions that courts may not be precluded "from vindicating [their own] authority." *In re Robertson (II),* 19 A.3d at 761 (citations omitted).

### C. The Defendant Received Proper Notice of The Nature of the Criminal Contempt Charge.

The Appellant contends that the caption of the motion for contempt and its contents were insufficient notice of the criminal contempt action. Appellant's Brief at 16-17. However, the record is clear that Appellant received adequate notice of the possibility of criminal contempt charges and the nature of those charges. During the original CPO hearing, the court informed Appellant, "If you fail to comply with this order, it will be a criminal offense subjecting you to a penalty of up to 180 days in jail and/or a fine of $1,000." Appellant App. page D. In the contempt hearing on June 30, 2010, the trial Judge himself found that the pleadings gave proper notice, and stated that the fact that the proceeding was a criminal contempt "was made very clear at the outset by this court and through the pleadings" filed by the Respondent. Appellant App. page J.

Appellant incorrectly claims that the caption of the case failed to identify the criminal nature of the action against him. Appellant Brief at 16-17. But the D.C. Superior Court rule regarding contempt specifically states that notice of criminal contempt actions can be sufficient when given, "orally by the judge," Super. Ct. Crim. R. 42(b), and is not defective if the case caption does not reference the State. *See In re Robertson (II),* 19 A.3d at 760; *Smith v. United States*, 677 A.2d 1022, 1029 (D.C.1996) (finding adequate notice of criminal contempt through a holistic review of the motion for contempt and history of the action). This is consistent with this jurisdiction's broad rule

that the caption of a case is not a dispositive test of the adequacy of notice; instead it should be viewed in context of the content of the motion and the pleadings. *See Backo v. Local 281, United Broth. of Carpenters & Joiners of Am.*, 438 F.2d 176, 180 (2d Cir. 1970) (finding that Defendants were on notice of criminal contempt proceedings through the content of the injunction order and that this notice was not rendered inadequate because the caption named only Union 'et al.'); *See also Adkins v. Safeway Stores, Inc.*, 968 F.2d 1317, 1319 (D.C. Cir. 1992) (finding that caption in the notice of appeal should be read in context of the entire appeal); In *Milanovich v. Costa Crociere, S.P.A.*, 938 F.2d 297, 298 (D.C.Cir.1991) (holding that the appeal caption naming an appellant as "et ux" did not render the notice of appeal defective because of the context of the action).

In this case, notice of the criminal nature of the contempt proceeding was amply accomplished by the Judge's announcements and supported by the pleadings. Here, the caption on the criminal contempt motions read, "Mr. D vs. Mr. K" followed by the title "Motion to Adjudicate Criminal/Civil Contempt". The content of the motion referenced the CPO issued to the Appellant and alleged specific violations of the CPO. R. at 22, 44. A holistic reading of the caption and motion provided adequate notice of the criminal nature of the pending action.[14] Therefore, the lower court correctly found that Appellant

[14] The question of whether the Appellant received adequate notice of the criminal nature of the action is distinct from the question of whether the Appellant received sufficient notice of the particular allegations in the June 7, 2010 Motion for Contempt. Appellant's Brief at 18. In addition, here, the latter question is moot because the Appellant waived his right to notice of the allegations by agreeing to resolve the allegations in the June 7, 2010 Motion for Contempt at the June 30, 2010 trial. At the commencement of the trial, the court read the contempt charges, including the allegations in the June 7th Motion. (6/30/10 (10-6652) Tr. 2-3). The court then asked Appellant's counsel if she was ready for the trial on all issues and counsel responded, "I think we can handle everything today." (6/30/10 (10-6652) Tr. 4). This constitutes waiver of the notice requirement of reasonable time to prepare a defense. D.C. Super. Ct. R. Crim. P. 42(b).

had sufficient notice of the nature of the criminal contempt action through the oral pronouncements by the judge during the CPO hearing and the pleadings.

## CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

By: _____

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November 21, 2011

## APPENDIX
## INTERESTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Appellee, and urge the court to affirm the decision below.

**The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by one of the nation's leading domestic violence lawyers and clinical law professors to further the civil rights of battered women and children by making appellate litigation possible. DV LEAP's mission is to provide expert appellate advocacy for battered women and children and to establish strong precedents affirming the rights of victims of abuse. Systematic and sophisticated appellate litigation is critically needed to protect the legal rights of and provide safety and justice for victims of domestic violence. DV LEAP fills this vacuum for victims of abuse by providing *pro bono* appeals, training and strategic assistance to lawyers and courts. While DV LEAP prioritizes cases from the District of Columbia, it also accepts cases of substantial importance from other states. DV LEAP also organizes and spearheads the domestic violence community's advocacy in Supreme Court domestic violence litigation. DV LEAP is a partnership of the George Washington University Law School and a network of participating law firms.

**Ayuda** is the District of Columbia's leading source of multilingual legal and social assistance for low-income Latinos and foreign-born persons in immigration, human trafficking, domestic violence, and family law. For over 30 years, immigrants in the greater D.C. area have turned to Ayuda ("help" in Spanish) for legal representation and advice to protect their rights and address their grievances. In fact, Ayuda is the only

agency that serves low-income immigrant clients on a walk-in basis in the entire metro area. While Ayuda has a history of serving the Latino community, it also represents a substantial number of individuals form Africa, Asia, and Eastern Europe. Ayuda has also successfully designed educational materials and conducted many training events with legal and law enforcement professionals and has worked successfully in partnership with a variety of community organizations.

**Survivors and Advocates for Empowerment (SAFE), Inc.** provides crisis intervention and advocacy services to over 5,000 domestic violence victims each year in the DC Metro Area. Our mission is to ensure the safety and self-determination of domestic violence survivors in Washington, DC through emergency services, court advocacy and system reform. Focusing on victim safety from the moment an incident occurs, SAFE provides the necessary support for victims of domestic violence so that they may use the Court system as well as government and private social services to rebuild their lives. SAFE, Inc. assists nearly 4,000 victims each year writing pro se petitions for Civil Protection Orders and assisting them with pro se court appearances. SAFE works closely with these victims to help them enforce their orders through police and the criminal contempt process. Through our 24-hour Response Line and Court-based services, we provide valuable legal information as well as tangible crisis services in order to help survivors break the cycle of violence, reduce the likelihood of future abuse, and decrease the risk of homicide. SAFE also works collaboratively with police, prosecutors, other non-profit organizations, and the DC Superior Court to ensure a coordinated response to domestic violence.

**D.C. Volunteer Lawyers Project** (DCVLP) is a nonprofit legal services organization, which has pioneered an innovative program to recruit, train, and support volunteer lawyers to represent domestic violence victims in the Superior Court of the District of Columbia. DCVLP volunteer lawyers represent victims in petitions to obtain Civil Protection Orders, as well as custody, child support, divorce and immigration matters. Started just three years ago, the DCVLP has already mobilized over 500 volunteer lawyers to help hundreds of domestic violence victims escape abusive relationships and achieve safety and stability.

**Washington Empowered Against Violence (WEAVE)** is a non-profit organization in Washington, DC that works closely with adult and teen survivors of relationship violence and abuse, providing an innovative range of legal, counseling, economic and educational services that lead survivors to utilize their inner and community resources, achieve safety for themselves and their children, and live empowered lives. Through our legal services program, WEAVE has assisted thousands of battered women seeking to protect themselves by obtaining Civil Protection Orders (CPOs) and contempt enforcement of those Orders against their abusers.

**Catherine Klein, Professor of Law, Catholic University School of Law, Columbus Community Legal Clinics** Catherine F. Klein is Professor of Law at the Catholic University of America and Director of Columbus Community Legal Services, the law school's live-client clinical program. She is also Co-Director of the Families and the Law Clinic at Catholic University, one of the first law school clinical programs in the United States designed to address the issue of domestic violence through individual representation, community outreach and education and legislative advocacy. Professor

Klein has published numerous articles and organized many workshops and trainings on the legal responses to domestic violence. Professor Klein received her J.D. from the University of Cincinnati College of Law and a B.A. from Northwestern University, with a degree in philosophy. She was elected to the Order of the Coif and Phi Beta Kappa.

**Laurie Kohn, Professor of Clinical Law, George Washington University Law School** Laurie S. Kohn is a professor at George Washington Law School where she directs the Family Justice Litigation Clinic. She is the co-author of *Litigating Protection Order Cases: A Practice Manual,* which is the premier litigation resource for attorneys representing domestic violence victims in D.C. Superior Court and is now in its 6th printing. She is the co-chair of the D.C. Superior Court's Domestic Violence Unit Task Force, a member of the Court's Domestic Violence Unit Rules Committee, and a member of the Court's Family Court Training Committee.

**Lisa Vollendorf Martin** is a faculty member at the Columbus School of Law at the Catholic University of America, where she co-teaches the Families and the Law Clinic, one of the first law school clinical programs in the United States designed to address the issue of domestic violence through individual representation, community outreach and education, and legislative advocacy. Professor Martin also publishes articles, conducts trainings and workshops, and advocates for law and policy reform regarding domestic violence. Professor Martin received a J.D. from the Georgetown University Law Center and a B.A. from the College of William and Mary.

## CERTIFICATE OF SERVICE

I, Joan S. Meier, hereby certify that I have caused to have served a copy of the foregoing Motion of Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) et al for Leave to File Brief as Amici Curiae, on counsel for Appellant and the U.S. Attorney's Office, by placing it in the first class mail, postage prepaid, on or before 5:00 p.m. November 21, 2001 to:

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