No. 23-1313

IN THE

Supreme Court of the United States

NATIN PAUL,

Petitioner,

v.

THE ROY F. AND JOANN COLE MITTE FOUNDATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, constitutional and statutory safeguards for suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.[1] This brief will address only the first Question Presented in the Petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition presents an important constitutional question that the Court has waited too long to answer. Twice the Court has stopped short of deciding whether the Constitution forbids a criminal contempt prosecution by a lawyer for the opposing party in civil litigation. In *Young v. U.S. ex rel. Louis Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), the Court imposed a disinterested prosecutor requirement under its supervisory power over the federal courts. And in

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[1] No persons or entities other than *amicus*, its members, or their counsel authored this brief, in whole or in part, or made a monetary contribution to this brief's preparation or submission. Under Supreme Court Rule 37.2, *amicus* provided timely notice of its intent to file an *amicus curiae* brief to counsel of record for all parties at least 10 days prior to the due date for the *amicus curiae* brief.

Robertson v. U.S. ex rel. Watson, 560 U.S. 272 (2010), the Court restated the due process question presented in the petition and ultimately dismissed the writ of certiorari as improvidently granted in light of the government's change of position.[2] Four justices joined in the Chief Justice's dissent from the dismissal, explaining why "[t]he terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government"—not a prosecution initiated by and serving the interests of a private party. 560 U.S. at 273.

Although both *Young* and *Robertson* sent strong messages disapproving of criminal contempt prosecutions by interested private parties, the decision below from the highest court of the Nation's second-most populous state splits with the vast majority of courts that have decided the due process question—including the federal circuit court of appeals with jurisdiction over Texas—and threatens to breathe life into the embers of a practice that is inconsistent with liberty and fundamental fairness for the reasons identified in *Young*. *See U.S. ex rel. SEC v. Carter*, 907 F.2d 484, 486 n.1 (5th Cir. 1990).

The prosecutor is "the citizen's primary adversary in a criminal proceeding, who is armed with expansive powers and wide-ranging discretion. Public confidence in the disinterested conduct of that official is essential." *Young*, 481 U.S. at 813. "[W]e must have

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[2] *See* Question Presented in Robertson v. U.S. ex rel. Watson, No. 08-6261, http://www.supremecourt.gov/qp08-06261qp.pdf; Brief for United States, 2010 WL 783166, *12 n.3, *21-23 (U.S. Mar. 8, 2010).

assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice. A prosecutor of a contempt action who represents the private beneficiary of the court order allegedly violated cannot provide such assurance, for such an attorney is required by the very standards of the profession to serve two masters." *Id.* at 814.

Young ended the practice of allowing private parties in civil cases to prosecute criminal contempt charges in federal court. Indeed, since *Young*, federal judges have also generally drawn the line at appointing lawyers from *government* civil enforcement agencies to prosecute criminal contempt charges arising from the civil litigation. *See e.g.*, *U.S. v. Vlahos*, 33 F.3d 758 (7th Cir. 1994); *U.S. ex rel. SEC v. Carter*, 907 F.2d 484 (5th Cir. 1990). But *Young* did not disallow prosecution by interested parties in state courts. Only a ruling on due process grounds can do that.

The Due Process Clause calls for "a realistic appraisal of psychological tendencies and human weakness," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), in weighing the effects of conflicting financial interests on the exercise of governmental power. For example, five members of the Court recently noted the relevance of the financial incentives for local law enforcement agencies to seize private property through civil forfeiture to the due process analysis. *Culley v. Marshall*, 601 U.S. 377, 393-403 (2024) (Gorsuch, J., concurring); *id.* at 403-15 (Sotomayor, J., dissenting); *cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989) ("[T]he Government has a pecuniary interest in forfeiture . . . . The sums of money that can be raised for law-enforcement

activities this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted.").

Criminal contempt is too potent a weapon to be entrusted to a private party that has a financial interest in civil litigation against the contempt defendant. Although the due process standards for prosecutors are not the same as they are for judges, the enormous power and discretion entrusted to a prosecutor in a criminal case requires confidence that the prosecutor is acting solely in the interest of the public, not a financially interested private party.

ARGUMENT

I. THE PETITION PRESENTS AN IMPORTANT DUE PROCESS QUESTION THAT DIVIDES STATE COURTS.

The ruling below opens the door to criminal contempt prosecutions in state court by financially interested adverse private parties in civil litigation. The fact that neither of the state appellate courts below explained its decision—not even to respond to a dissent by four justices—makes the need for this Court's review more, not less, necessary. If a criminal contempt prosecution by an interested private party is so accepted that a state court sees no need to address challenges to it, then this Court should go beyond just sending signals of disapproval as it did in *Young* and *Robertson*.[3] It should grant review and decide the due

[3] The Mitte Foundation's response to the Texas Supreme Court petition asserts that in Texas, prosecution by the opposing party of criminal contempt charges arising from civil litigation is routine, citing Tex. R. Civ. P. 692. Real Party in Interest's Brief

process question, lest the comparatively idiosyncratic proceeding in this case become the norm in state courts.[4]

Most courts have taken the hint since *Young*. Indeed, federal judges have not only stopped appointing interested private parties to prosecute criminal contempt charges, they have also generally declined to allow government lawyers from civil enforcement agencies to participate in contempt prosecutions arising from civil litigation. *See U.S. v. Vlahos*, 33 F.3d 758, 760 (7th Cir. 1994) (reversing the appointment of private counsel after the district court agreed to disqualify an attorney alleged to have been acting as the "puppet" of the FTC, and admonishing the lead prosecutor that "the FTC . . . is not your client."); *U.S. ex rel. SEC v. Carter*, 907 F.2d 484, 485 (5th Cir. 1990) (reversing contempt conviction on the *sua sponte* ground "the district court erred in appointing as special prosecutors in the contempt

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on the Merits, pp. 27-31. The Mitte Foundation's brief represents: "[t]hat is the procedure followed in this case and in virtually every Texas case in which a civil litigant is found to be in contempt of court for violating a court order or prevarication." *Id.* at 28. Indeed, the brief asserts, "[t]he principle that a party may seek criminal contempt of its adversary is so entrenched in Texas law that it is not directly addressed in later cases." *Id.* at 29.

[4] Although there is no decision on the due process issue from the state courts of last resort in Florida and Michigan, the prevailing practice in those states seems similar to Texas. *In re Contempt of Henry*, 765 N.W.2d 44 (Mich. Ct. App. 2009); *Gordon v. State*, 960 So.2d 31 (Fla. Dist. Ct. App. 2007). The Michigan Court of Appeals has adhered to this position even after *Robertson. Ferranti v. Electrical Resources Co.*, 948 N.W.2d 596, 604 (Mich. Ct. App. 2019).

action the Securities and Exchange Commission attorneys.").

Only review by this Court can correct the lower court's constitutional error. Even though the Fifth Circuit in *Carter* reaffirmed its holding that "the appointment of a private party's attorney to serve as a special prosecutor in a criminal contempt action that stems from violation of an injunction entered on behalf of the private party violates the due process rights of the criminal contempt defendant," *id.* at 486 n.1, the federal courts in Texas, lacking established law from this Court, cannot grant habeas corpus relief to petitioner. *See* 28 U.S.C. § 2254(d)(1).

After *Young*, a handful of state courts reached the issue, with a majority generally disapproving the prosecution of criminal contempt by an interested private party. Pet. 9-10. Then, after *Robertson,* the District of Columbia Court of Appeals overturned its prior authority allowing criminal contempt prosecutions by interested private parties.[5] *See In re Jackson*, 51 A.3d 529, 541 (D.C. 2012) (requiring a

[5] In an unpublished opinion, the Kentucky Court of Appeals rejected a due process challenge to a 7-day criminal contempt sentence imposed on a mother in a domestic relations child custody case for violating the visitation schedule. *Caffee v. Waters*, No. 2020-CA-0102-MR, 2021 WL 298739 (Ky. Ct. App. Jan. 29, 2021). The father sought imposition of a contempt sentence, and when the mother did not appear, the court issued a bench warrant and imposed a 7-day sentence for criminal contempt. It is unclear from the opinion whether the mother's due process challenge to the contempt conviction was directed to prosecution by an interested party (the father) or to the perception that the trial court itself was acting as prosecutor. Unpublished opinions do not establish binding Kentucky precedent. Ky. R. App. P. 40(D).

disinterested prosecutor to satisfy due process); *In re Taylor,* 73 A.3d 85, 89 (D.C. 2013) (noting change in "the decisional law"); *id.* at 97–99 (finding plain error). That makes the decision below an outlier among highest state courts, but an important one because it comes from such a populous state and because it suggests that some courts have misinterpreted this Court's reluctance to resolve the constitutional question as a determination that the due process question is not substantial. The Court's failure to grant review now in a case in which the due process issue is squarely presented might be taken (albeit mistakenly) as an indication that criminal contempt prosecutions by interested parties *are* constitutionally permissible in state court.

The split among the federal courts of appeals and state courts of last resort on the due process question presented does not fully capture the continuing divergence in practice among the states, as the due process concerns raised by interested party criminal contempt prosecution are often not fully litigated. Some courts have reached the same result as *Young* on the basis of state supervisory power without reaching constitutional issues. *See, e.g.*, *Rogowicz v. O'Connell*, 786 A.2d 841, 844 (N.H. 2001); *Dep't of Soc. Servs., ex rel. Montero v. Montero*, 758 P.2d 690, 693–94 (Haw. Ct. App. 1988). In other states, courts have rejected a supervisory power rule without considering a due process argument. *See, e.g. Cronan ex rel. State v. Cronan*, 774 A.2d 866, 877 (R.I. 2001); *Eichhorn v. Kelley*, 111 P.3d 544, 548 (Colo. App. 2004); *Gordon v. State*, 960 So. 2d 31, 40 (Fla. Dist. Ct. App. 2007). Because these issues often arise in cases in which the parties have limited resources to devote to constitutional issues that may reach an appellate

court only after the contempt sentence has been served, further percolation in state courts is unlikely either to sharpen the debate or lead to consensus. Without guidance from this Court, even courts that have not aligned themselves with the court below on the due process question are likely to continue to allow the prosecution of criminal contempts by interested private parties without confronting the due process problems such prosecutions present.

II. THE DUE PROCESS CLAUSE FORBIDS CRIMINAL PROSECUTION BY A LAWYER WITH A PROFESSIONAL DUTY TO AN ADVERSE PARTY IN CIVIL LITIGATION.

This Court has long commended "a realistic appraisal of psychological tendencies and human weakness" in applying the Due Process Clause to conflicting interests. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The Court held that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation," *id.* at 58, based on its judgment that, in general, the risk of prejudgment in an adjudicative proceeding from involvement in the investigation of state licensing violations was not high enough to warrant automatic disqualification. This Court's decision in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 877-880 (2009), focused on the influence of financial incentives on judicial impartiality. The adverse party in civil litigation seeking a monetary recovery has the kind of direct "financial interest in the outcome of the case," *id.* at 890, that even the *Caperton* dissent deemed disqualifying—especially when, as in this case, the criminal contempt prosecution is to enforce an order

intended to facilitate collection of a monetary award. Although the standards of impartiality are not the same for prosecutors as they are for judges, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980), the Court has long recognized that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-250.

"Where a private prosecutor appointed by a District Court also represents an interested party, the possibility that his prosecutorial judgment will be compromised is significant." *Young*, 481 U.S. at 826 (Powell, J., concurring in part and dissenting in part); *see also id.* at 814-15 (Blackmun, J., concurring on the ground "that the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process."). Unlike the "prospect of institutional gain as a result of zealous enforcement efforts," at issue in *Marshall*, 446 U.S. at 250, which the Court deemed "exceptionally remote" as a potential source of bias in the exercise of civil enforcement power, *id.*, a private party stands to gain directly from wielding prosecutorial authority to enforce an order entered for its benefit.

"The Government's interest is in dispassionate assessment of the propriety of criminal charges for affronts to the Judiciary. The private party's interest is in obtaining the benefits of the court's order." *Young*, 481 U.S. at 805. Those interests may be incongruent when the prosecutor is tempted to pursue "a tenuously supported prosecution … [that] promises financial or legal rewards for the private client," or "to abandon a meritorious prosecution if a settlement

providing benefits to the private client is conditioned on a recommendation against criminal charges." *Id.*

Prosecutors exercise virtually unreviewable discretion in countless ways throughout a criminal case, including the decision whether to file charges, what charges and how many to pursue, what position to take at sentencing, and even what exculpatory information to disclose. *See In re Taylor*, 73 A.3d at 101-03. Courts defer to those prosecutorial judgments on the premise that the prosecutor is acting in the public interest. "Public confidence in the [prosecutor's] disinterested conduct . . . is essential" precisely because the prosecutor "is armed with expansive powers and wide-ranging discretion." *Young*, 481 U.S. at 813.

"The concern that representation of other clients may compromise the prosecutor's pursuit of the Government's interest rests on recognition that a prosecutor would owe an ethical duty to those other clients." *Young*, 487 U.S. at 804. The prosecutor's duty to disclose exculpatory information can present an acute conflict that undermines confidence in a prosecution by a lawyer for an interested party. That ethical predicament for private prosecutors has sharpened since the Court discussed it in *Young*. *See* 481 U.S. at 803-04. Under the current Model Rules of Professional Conduct, prosecutors have an ethical duty to disclose "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Model Rules of Pro. Conduct R. 3.8(d) (Am. Bar Ass'n 2024); *see* Tex. R. Prof'l Cond. 3.09(d). The disclosure obligation is not limited to unprivileged information. *Compare* Model R. 3.8(d) (requiring disclosure of "all unprivileged

mitigating information known to the prosecutor" in connection with sentencing). A private lawyer prosecuting a contempt charge may have developed information that is exculpatory in the criminal contempt case while representing the private client in the underlying civil litigation. Yet the lawyer generally would be prohibited from disclosing confidential information absent informed consent from a private party who is actively adverse to the defendant. See Model Rules of Pro. Conduct R. 1.6(d) (Am. Bar Ass'n 2024); Tex. R. Prof'l Cond. 1.05. Moreover, private prosecutors seldom have experience or training in recognizing exculpatory information that must be disclosed under Rule 3.8 or *Brady v. Maryland*, 373 U.S. 83 (1963). Nor are private prosecutors subject to internal office supervision, file audits, and other practices that responsible public prosecutors implement to ensure compliance with disclosure obligations.

The *Young* Court quoted the Fifth Circuit's decision forbidding contempt prosecution by an interested party later reaffirmed in *Carter*: "'Indeed, it is the highest claim on the most noble advocate which causes the problem—fidelity, unquestioned, continuing fidelity to the client.'" 481 U.S. at 804 (quoting *B'hood of Locomotive Firemen & Enginemen v. U.S.*, 411 F.2d 312, 319 (5th Cir. 1969)). A conflicting duty to the client in the civil litigation erases any presumption that the prosecutor is acting solely in the public interest. The prosecutor's vast powers and the devastating impact of a prosecutorial decision require "assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice. A prosecutor of a contempt action who represents the private

beneficiary of a court order allegedly violated cannot provide such assurance, for such an attorney is required by the very standards of the profession to serve two masters." 481 U.S. at 814.[6]

III. CRIMINAL CONTEMPT IS A "CRIME IN THE ORDINARY SENSE," SUBJECT TO THE SAME DUE PROCESS STANDARDS AS OTHER CRIMES.

The lower courts may have mistakenly concluded that the Due Process clause offers less protection in a criminal contempt case than it does in other criminal prosecutions. Even the Texas Supreme Court dissent referred to contempt as "quasi-criminal." Pet. App. 7a.[7] A number of states require governmental

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[6] Indeed, Virginia, which permits private counsel to participate in prosecuting misdemeanor offenses, does not allow prosecution by the lawyer for an interested party in a related civil case. *Price v. Commonwealth*, 849 S.E.2d 140, 144 (Va. Ct. App. 2020) (reversing assault and battery convictions when trial court "allow[ed] an attorney to serve as a private prosecutor in Mary Price's trial for assault and battery when that attorney simultaneously represented the victim in a civil case against Price," and concluding that "the simultaneous representation created a conflict of interest in violation of Price's due process rights….").

[7] The dissent cites *Ex parte Sanchez*, 703 S.W.2d 955, 957 (Tex. 1986) for that characterization. *Sanchez* in turn cites a pre-*Bloom* decision, *Ex Parte Cardwell*, 416 S.W.2d 382, 384 (Tex. 1967). *See also In re Kozinn,* No. 03-23-00748-CV, 2024 WL 2855077, at *3 (Tex. Ct. App. June 6, 2024) ("Contempt proceedings are quasi-criminal in nature" after concluding that the fine imposed in a domestic relations case was criminal contempt); *Ex parte Phillips*, No. 12-23-00148-CV, 2023 WL 4681173, at *4 (Tex. Ct. App. July 21, 2023) (same for imprisonment).

prosecution of criminal contempt as a matter of state law because, as recognized by the *Robertson* dissent, every criminal prosecution is an exercise of sovereign power. However, a Colorado appellate court declined to follow those decisions on the theory that "contempt resulting in punitive sanctions is not a criminal offense in Colorado." *Eichhorn v. Kelley*, 111 P.3d 544, 549 (Colo. App. 2004). The misclassification of criminal contempt as something other than a "crime in the ordinary sense" may therefore play a crucial rule in states that have not squarely confronted the due process argument made in this case.

But treating criminal contempt as only quasi-criminal defies over four decades of precedent. In *Bloom v. Illinois*, 391 U.S. 194, 201 (1968), this Court held the right to jury trial applies to criminal contempt as a "crime in the ordinary sense." Later, in *United States v. Dixon*, 509 U.S. 688 (1993), the Court applied the Double Jeopardy clause to bar re-prosecution for the same offense as criminal contempt and as a statutory crime. This Court has held that "constitutional protections for criminal defendants other than the double jeopardy provision apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions." *Id.* at 696.

The line between criminal contempt to punish a violation of a court order and civil contempt to coerce compliance with an order by means of fines or imprisonment is clearer now than it once was. In *Hicks v. Feiock*, 485 U.S. 624 (1988), the Court distinguished coercive imprisonment as civil contempt from punishment as criminal contempt. *UMW v. Bagwell*, 512 U.S. 821 (1994), likewise distinguished fines imposed to coerce compliance from punitive fines.

But despite this Court's efforts, blurriness seems to persist in state courts considering whether the authority of a party to enforce a court order through contempt includes the authority to prosecute criminal contempt charges. As the facts of this case illustrate, a contempt proceeding can morph from a request for coercive civil sanctions to criminal contempt without anyone stopping to acknowledge that a criminal contempt prosecution is a crime in the ordinary sense that is subject to the same constitutional protections as other criminal prosecutions and invokes the same public interest and state authority.

In this case, the trial court forged ahead with criminal contempt after beginning *civil* contempt proceedings on respondent's motion. *See* Pet. 5, Pet. App. 19a. In shifting from civil to criminal contempt, the trial court elided the constitutional differences between coercing compliance with an order and punishing a "crime in the ordinary sense," including the crucial difference between the role of a lawyer seeking to benefit a private client and a prosecutor acting in the public interest. "Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another." *Robertson*, 560 U.S. at 278 (Roberts, C. J., dissenting). Review is warranted because, as in *Robertson*, "[t]he ruling below is a startling repudiation of that basic understanding." *Id.*

CONCLUSION

The petition should be granted.

July 8, 2024

Respectfully submitted,

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