APPENDIX

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13843

D.C. Docket No. 9:08-cv-80736-KAM

In re: COURTNEY WILD,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

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(April 15, 2021)

Before WILLIAM PRYOR, Chief Judge, and WILSON, MARTIN, JILL PRYOR, NEWSOM, BRANCH, LUCK, LAGOA, BRASHER, TJOFLAT, and HULL, Circuit Judges.*

NEWSOM, Circuit Judge, delivered the opinion of the Court, in which WILLIAM PRYOR, Chief Judge, and WILSON, LAGOA, BRASHER, and TJOFLAT, Circuit Judges, joined, and in which in LUCK, Circuit Judge, joined as to Parts IB, II, III, IVA, IVB1-3a, IVC, IVD1, and V.

* Judges Tjoflat and Hull were members of the en banc Court that heard oral argument in this case, both having elected to participate in this decision pursuant to 28 U.S.C. § 46(c)(1). Judges Jordan, Rosenbaum, and Grant are recused.

WILLIAM PRYOR, Chief Judge, filed a concurring opinion, in which NEWSOM, LAGOA, and TJOFLAT, Circuit Judges, joined.

NEWSOM, Circuit Judge, filed a concurring opinion.

TJOFLAT, Circuit Judge, filed a concurring opinion, in which WILLIAM PRYOR, Chief Judge, and WILSON, NEWSOM, and LAGOA, Circuit Judges, joined.

BRANCH, Circuit Judge, filed a dissenting opinion, in which MARTIN, JILL PRYOR, and HULL, Circuit Judges, joined.

HULL, Circuit Judge, filed a dissenting opinion.

NEWSOM, Circuit Judge:

This petition for writ of mandamus arises under the Crime Victims' Rights Act, 18 U.S.C. § 3771. Petitioner Courtney Wild is one of more than 30 women who, according to allegations that we have no reason to doubt and therefore accept as true in deciding this case, were victimized by notorious sex trafficker and child abuser Jeffrey Epstein. In her mandamus petition, Ms. Wild asserts that when federal prosecutors secretly negotiated and executed a non-prosecution agreement with Epstein in 2007, they violated her rights under the CVRA—in particular, her rights to confer with and to be treated fairly by the government's lawyers.

We have the profoundest sympathy for Ms. Wild and others like her, who suffered unspeakable horror at Epstein's hands, only to be left in the dark—and, so it seems, affirmatively misled—by government attorneys. Even so, we find ourselves constrained to deny Ms. Wild's petition. While the CVRA permits a

crime victim like Ms. Wild to "mov[e]" for relief within the context of a preexisting proceeding—and, more generally, to pursue administrative remedies—it does not authorize a victim to seek judicial enforcement of her CVRA rights in a freestanding civil action. Because the government never filed charges against Epstein, there was no preexisting proceeding in which Ms. Wild could have moved for relief under the CVRA, and the Act does not sanction her stand-alone suit.

I

A

The facts underlying this case, as we understand them, are beyond scandalous—they tell a tale of national disgrace.

Over the course of eight years, between 1999 and 2007, well-heeled and well-connected financier Jeffrey Epstein and multiple coconspirators sexually abused more than 30 young girls, including Ms. Wild, in Palm Beach, Florida and elsewhere in the United States and abroad. Epstein paid his employees to find girls and deliver them to him—some not yet even 15 years old. Once Epstein had the girls, he either sexually abused them himself, gave them over to be abused by others, or both. Epstein, in turn, paid bounties to some of his victims to recruit others into his ring.

Following a tip in 2005, the Palm Beach Police Department and the FBI conducted a two-year investigation of Epstein's conduct. After developing

substantial incriminating evidence, the FBI referred the matter to the United States Attorney's Office for the Southern District of Florida. Beginning in January 2007, and over the course of the ensuing eight months, Epstein's defense team engaged in extensive negotiations with government lawyers in an effort to avoid indictment. At the same time, prosecutors were corresponding with Epstein's known victims. As early as March 2007, they sent letters advising each one that "as a victim and/or witness of a federal offense, you have a number of rights." The letters, which the government distributed over the course of about six months, went on to enumerate the eight CVRA rights then in force—including, as particularly relevant here, "[t]he reasonable right to confer with the attorney for the [Government] in the case" and "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."

By May 2007, government lawyers had completed both an 82-page prosecution memo and a 53-page draft indictment alleging that Epstein had committed numerous federal sex crimes. In July, Epstein's lawyers sent a detailed letter to prosecutors arguing that, in fact, Epstein hadn't broken any federal laws. By mid-September, the sides had exchanged multiple drafts of what would become an infamous non-prosecution agreement (NPA). Pursuant to their eventual agreement, Epstein would plead guilty in Florida court to two state prostitution offenses, and, in exchange, he and any coconspirators (at least four of whom have

since been identified) would receive immunity from federal prosecution.[1] In June 2008, Epstein pleaded guilty to the state crimes as agreed and was sentenced to 18 months' imprisonment, 12 months' home confinement, and lifetime sex-offender status.

The district court found that "[f]rom the time the FBI began investigating Epstein until September 24, 2007"—when the government formally executed the NPA with Epstein—federal prosecutors "never conferred with the victims about a[n] NPA or told the victims that such an agreement was under consideration." *Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1208 (S.D. Fla. 2019). Worse, it appears that prosecutors worked hand-in-hand with Epstein's lawyers—or at the very least acceded to their requests—to keep the NPA's existence and terms hidden from victims. The NPA itself provided that "[t]he parties anticipate that this agreement will not be made part of any public record" and, further, that "[i]f the United States receives a Freedom of Information Act request or any compulsory process commanding the disclosure of the agreement, it will provide notice to Epstein before making that disclosure." Moreover, at approximately the

[1] The NPA also contained several provisions concerning Epstein's victims. The government, for instance, agreed to provide a list of known victims to Epstein and, "in consultation with and subject to the good faith approval of Epstein's counsel," to "select an attorney representative" for the victims, to be "paid for by Epstein." Epstein waived his right to contest liability or damages "up to an [agreed] amount" in a victim's civil suit, "so long as the identified individual elect[ed] to proceed exclusively under 18 U.S.C. § 2255, and agree[d] to waive any other claim for damages." An odd set-up—and one that, it seems to us, was likely calculated to quickly and quietly resolve as many victim suits as possible.

same time that the sides concluded the NPA, they began negotiating about what prosecutors could (and couldn't) tell victims about the agreement. Seemingly in deference to Epstein's lawyers' repeated requests, the government held off—for nearly an entire year—on notifying Epstein's victims of the NPA's existence.

And to be clear, the government's efforts appear to have graduated from passive nondisclosure to (or at least close to) active misrepresentation. In January 2008, for example, approximately four months after finalizing and executing the NPA, the government sent a letter to Ms. Wild stating that Epstein's case was "currently under investigation," explaining that "[t]his can be a lengthy process," and "request[ing her] continued patience while [it] conduct[ed] a thorough investigation." The government sent a similar letter to another victim in May 2008, some *eight* months after inking the NPA.[2]

If secrecy was the goal, it seems to have been achieved—there is no indication that any of Epstein's victims were informed about the NPA or his state charges until after he pleaded guilty. On the day that Epstein entered his guilty plea in June 2008, some (but by no means all) victims were notified that the federal investigation of Epstein had concluded. But it wasn't until July 2008—during the

[2] The government has contended that these letters were technically accurate because the already-signed NPA remained under review by senior members of the Department of Justice.

course of this litigation—that Ms. Wild learned of the NPA's existence, and until August 2008 that she finally obtained a copy of the agreement.

We are doubtlessly omitting many of the sad details of this shameful story. For our purposes, we needn't discuss the particulars of Epstein's crimes, or the fact that the national media essentially ignored for nearly a decade the jailing of a prominent financier for sex crimes against young girls.[3] Today, the public facts of the case are well known—Epstein was eventually indicted on federal sex-trafficking charges in the Southern District of New York, and in August 2019, while awaiting trial, he was found dead in his jail cell of an apparent suicide.

B

In July 2008, Ms. Wild brought suit in the United States District Court for the Southern District of Florida, styling her initial pleading—which she filed *ex parte*, without naming a defendant—an "Emergency Victim's Petition for Enforcement of Crime Victim's Rights Act." As the district court explained, "because no criminal case was pending" at the time—no federal charges having been filed against Epstein or anyone else—Ms. Wild "filed [her] petition as a new matter . . . which the Clerk of Court docketed as a civil action" against the United

[3] *Cf.* David Folkenflik, *A Dead Cat, A Lawyer's Call And A 5-Figure Donation: How Media Fell Short on Epstein*, National Public Radio (Aug. 22, 2019, 6:06 PM), https://www.npr.org/2019/08/22/753390385/a-dead-cat-a-lawyers-call-and-a-5-figure-donation-how-media-fell-short-on-epstei.

States. *Does v. United States*, 817 F. Supp. 2d 1337, 1341 n.4 (S.D. Fla. 2011). Ms. Wild alleged that she was a "crime victim" within the meaning of the CVRA and that by keeping her in the dark about their dealings with Epstein, federal prosecutors had violated her rights under the Act—in particular, her rights "to confer with the attorney for the Government in the case," 18 U.S.C. § 3771(a)(5), and "to be treated with fairness and with respect for [her] dignity and privacy," *id.* § 3771(a)(8).[4] She asked the court to "order the United States Attorney to comply with the provisions of the CVRA . . . ."

Over the course of the ensuing decade, the district court issued a number of significant rulings. For our purposes, three of the court's orders are particularly important.

Initially, in 2011 the district court "addresse[d] the threshold issue whether the CVRA attaches before the government brings formal charges against the defendant." *Does*, 817 F. Supp. 2d at 1341. The court held that "it does because the statutory language clearly contemplates pre-charge proceedings." *Id.* Having made that determination, the district court "defer[red]" ruling on the question whether federal prosecutors had violated the Act until the parties could conduct additional discovery. *Id.* at 1343.

[4] A second petitioner joined the suit shortly after it was filed. For simplicity's sake, we will refer to the present action as "Ms. Wild's" suit.

Following another eight years of litigation, the district court issued a pair of rulings that prompted the mandamus petition now before us. In February 2019, the court found that the government had infringed Ms. Wild's CVRA rights. *See Doe 1*, 359 F. Supp. 3d at 1222. In particular, the court held that federal prosecutors violated the Act by "enter[ing] into a[n] NPA with Epstein without conferring with [Ms. Wild] during its negotiation and signing." *Id*. at 1218. "Had [Ms. Wild] been informed about the Government's intention to forego [sic] federal prosecution of Epstein in deference to him pleading guilty to state charges," the district court emphasized, she "could have conferred with the attorney for the Government and provided input." *Id*. The court concluded that it was precisely "this type of communication between prosecutors and victims that was intended by the passage of the CVRA." *Id*. at 1219.

Having found CVRA violations, the court directed the parties—which by then included Epstein as an intervenor—to address "the issue of what remedy, if any, should be applied." *Id*. at 1222. In response, Ms. Wild proposed multiple remedies, including: (1) rescission of the NPA; (2) an injunction against further CVRA violations; (3) an order scheduling a victim-impact hearing and a meeting between victims and Alexander Acosta, the former United States Attorney for the Southern District of Florida; (4) discovery of certain grand-jury materials, records regarding prosecutors' decision to enter into the NPA, and files concerning law-

enforcement authorities' investigation of Epstein; (5) mandatory CVRA training for employees of the Southern District's United States Attorney's office; and (6) sanctions, attorneys' fees, and restitution. In August 2019, while the court was considering the parties' briefing regarding remedies, Epstein died of an apparent suicide; his death prompted another round of briefing on the issue of mootness.

In September 2019, having considered the parties' briefing and the impact of Epstein's death, the district court dismissed Ms. Wild's suit, denying each of her requested remedies. *See Doe 1 v. United States*, 411 F. Supp. 3d 1321 (S.D. Fla. 2019). In its order, the district court made a number of rulings. First, it held that Epstein's death mooted any claim regarding the NPA's continuing validity, as he was no longer subject to prosecution. *See id*. at 1326. Relatedly, the court concluded that it lacked jurisdiction to consider Ms. Wild's claim regarding the validity of the NPA as it applied to Epstein's coconspirators; any opinion regarding that issue, the court determined, would be merely advisory because the coconspirators—as non-parties to the suit—couldn't be estopped from asserting the NPA's validity at any future prosecution. *See id*. at 1326–27. Second, the court denied Ms. Wild's request for an injunction on the ground that she had failed to show "continuing, present adverse effects" or any "real and immediate" threat of future CVRA violations. *Id*. at 1328. Third, the court rejected Ms. Wild's requests for a victim-impact hearing and a meeting with Acosta on the grounds that it

lacked jurisdiction over Acosta, that she had already had the opportunity to participate in an Epstein-related hearing in New York, that the Epstein prosecution had concluded, and that the government had already agreed to confer with victims concerning any ongoing investigation of Epstein's coconspirators. *See id*. at 1328–29. Fourth, the court denied Ms. Wild's discovery requests for grand-jury materials and investigative files. *See id*. at 1329–30. Fifth, the court declined to order "educational remedies," as the government had already agreed to implement CVRA training for employees of the Southern District's United States Attorney's office. *Id*. at 1330. And finally, the court rejected Ms. Wild's request for sanctions, fees, and restitution. *See id*. at 1330–31.

Seeking review of the district court's order refusing every remedy that she had sought, Ms. Wild filed—as the CVRA directs—a petition for writ of mandamus with this Court. *See* 18 U.S.C. § 3771(d)(3) (stating that "[i]f the district court denies the relief sought," a victim "may petition the court of appeals for a writ of mandamus"). The government filed a "brief in response" in which it not only opposed Ms. Wild's arguments on the merits, but also raised several threshold arguments concerning the scope of the CVRA and the circumstances in which rights under the Act are judicially enforceable.[5]

[5] Although the CVRA instructs the court of appeals to "take up and decide" any mandamus petition "forthwith within 72 hours," the Act also authorizes parties to stipulate, as they did here, to "a different time period for consideration." 18 U.S.C. § 3771(d)(3).

A divided panel of this Court denied Ms. Wild's mandamus petition, holding "that the CVRA does not apply before the commencement of criminal proceedings—and thus, on the facts of this case, does not provide [Ms. Wild] any judicially enforceable rights." *In re Wild*, 955 F.3d 1196, 1220 (11th Cir. 2020), *reh'g en banc granted, opinion vacated*, 967 F.3d 1285 (11th Cir. 2020).

A majority of the active judges of this Circuit voted to rehear the case en banc, and we directed the parties to address two questions: (1) Whether the CVRA creates rights that attach and apply before the formal commencement of criminal proceedings; and (2) Whether, even assuming that it does so, the CVRA further creates a private right of action, such that any pre-charge right is judicially enforceable in a freestanding lawsuit.

In response to those questions, Ms. Wild contends that her rights "to confer with the attorney for the Government in the case," 18 U.S.C. § 3771(a)(5), and "to be treated with fairness," *id*. § 3771(a)(8), attached even before the commencement of—and as it turns out, in the absence of—any criminal proceedings against Epstein and, further, that the CVRA authorized her to seek judicial enforcement of those rights in a stand-alone civil action. The government disputes both propositions.[6]

[6] In its en banc brief, the government also (for the first time) contested our jurisdiction to consider Ms. Wild's mandamus petition. The 2015 version of the CVRA—which was in effect at the time Ms. Wild sought review in this Court—provides that a crime victim may file a

We conclude that we needn't decide whether, in the abstract, the rights to confer and to be treated with fairness might attach prior to the formal commencement of criminal proceedings or whether, if they do, they might be enforceable through, say, political or administrative channels. Nor, for that matter, need we even decide whether, if the rights to confer and to be treated fairly apply pre-charge, a victim could later seek to vindicate them during the course of an ongoing criminal prosecution.[7] Here, the only issue we have to confront is whether the CVRA authorizes Ms. Wild to file a freestanding civil suit seeking

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mandamus petition in the "court of appeals," which it defines as "the United States court of appeals for the judicial district in which a defendant is being prosecuted." 18 U.S.C. § 3771(e)(1)(A). According to the government, that means that a victim may seek mandamus relief only if (and while) a criminal defendant "is being prosecuted." Because that's not the case here, the argument goes, we lack jurisdiction even to entertain Wild's petition. We disagree for three reasons. First, § 3771(e)(1)(A) is more properly understood as a venue provision than a jurisdictional provision—it specifies *in which* "court of appeals" a victim should file. *Cf. United States v. Ross*, 963 F.3d 1056, 1063 (11th Cir. 2020) (en banc) (noting "the Supreme Court's directive that courts should avoid 'jurisdictionalizing' issues" that are more properly framed in other terms). Second, the government's position would render the CVRA internally inconsistent. By its terms, the Act clearly applies in the context of habeas corpus proceedings. *See* 18 U.S.C. § 3771(b)(2). But, of course, no one "is being prosecuted" in a habeas proceeding. So the government's position would imply that there is no mandamus jurisdiction to address a violation that occurs during a habeas proceeding, which the Act plainly covers. Finally, the government's position defies common sense. If Ms. Wild had sought mandamus relief in 2014, there would undoubtedly have been no bar to our review—there being no restrictive definition of "court of appeals" at that time. But, the government asserts, with the passage of the 2015 amendment—which all agree was meant to *enhance* victims' rights—that jurisdiction somehow evaporated. That seems exceedingly unlikely.

[7] This was the posture in which the "attachment" issue arose in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), on which our dissenting colleagues rely. *See* Branch Dissenting Op. at 118. Because the question we answer is different from the one presented in *Dean*, our decision creates no circuit split, as our dissenting colleagues imply.

judicial enforcement of her rights under the CVRA in the absence of any underlying proceeding.[8] For reasons we'll explain, we hold that it does not.[9]

Before jumping into the merits, we begin with an introductory summary of the CVRA's key provisions.

II

The CVRA is a compact statute, occupying but one section (and only three pages) of the United States Code. *See* 18 U.S.C. § 3771. The entire Act comprises just six subsections, the pertinent portions of which we will outline briefly.

The CVRA opens, in subsection (a), with a catalogue of "rights" that federal law guarantees to "crime victims." (The Act separately defines the term "crime victim" to mean "a person directly and proximately harmed as a result of the commission of a Federal offense." *Id*. § 3771(e)(2)(A).) The version of the CVRA

[8] The CVRA (as amended in 2015) provides that this Court "shall apply ordinary standards of appellate review" to the issues presented in a mandamus petition under the Act. 18 U.S.C. § 3771(d)(3). Because the issues presented here are questions of law, we review them de novo. *See, e.g.*, *De Sandoval v. U.S. Att'y Gen.*, 440 F.3d 1276, 1278 (11th Cir. 2006).

[9] Our dissenting colleagues accuse us of "blithely" "skip[ping] over" the first of the two questions specified in our briefing order in favor of the second. *See* Hull Dissenting Op. at 157; *see also* Branch Dissenting Op. at 111. With respect, our path results from a shared conviction that courts should decide cases narrowly wherever possible. Our charge here is simply to resolve the parties' dispute, not to answer questions that don't (and can't) affect the outcome. *Cf. District of Columbia v. Wesby*, 138 S. Ct. 577, 589 n.7 (2018) (encouraging courts addressing qualified-immunity cases to bypass the merits of the logically antecedent constitutional question in favor of the logically subsequent "clearly established law" question). Because we don't need to address the first, "attachment" question, we won't do so and, accordingly, won't engage our dissenting colleagues' extended analyses of the issues that it presents. *See* Branch Dissenting Op. at 111–120; Hull Dissenting Op. at 157–164.

in effect during the events in question here—between 2006 and 2008—stated as follows:

> **(a) Rights of crime victims.**—A crime victim has the following rights:
>
> **(1)** The right to be reasonably protected from the accused.
>
> **(2)** The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> **(3)** The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> **(4)** The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> **(5)** The reasonable right to confer with the attorney for the Government in the case.
>
> **(6)** The right to full and timely restitution as provided in law.
>
> **(7)** The right to proceedings free from unreasonable delay.
>
> **(8)** The right to be treated with fairness and with respect for the victim's dignity and privacy.

Id. § 3771(a).

Subsection (b), titled "Rights afforded," focuses specifically on courts' responsibilities under the Act. Subsection (b)(1) states that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." *Id.*

§ 3771(b)(1). Subsection (b)(2) pertains to "Federal habeas corpus proceeding[s]" and provides that the "court shall ensure" that the victim is afforded a more limited set of rights. *Id*. § 3771(b)(2).

Subsection (c), titled "Best efforts to accord rights," imposes obligations on *non*-judicial actors. One of its constituent clauses—which Ms. Wild calls the "coverage" provision—states as follows:

> Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

Id. § 3771(c)(1).

Subsection (d) addresses "Enforcement and limitations." It opens by stating that either the crime victim, her authorized representative, or the government "may assert the rights described in subsection (a)." 18 U.S.C. § 3771(d)(1). The balance of subsection (d) prescribes exactly how, when, and where those rights may be asserted, as well as the limitations on judicial enforcement. In that connection, several of subsection (d)(3)'s provisions are particularly relevant here. First, and most obviously given its title—"Motion for relief and writ of mandamus"—subsection (d)(3) gives victims a "motion" remedy in the district court and a mandamus remedy in the court of appeals. With respect to the former, subsection (d)(3) states that "[t]he district court shall take up and decide any motion asserting

a victim's right forthwith." *Id*. § 3771(d)(3). And with respect to the latter, it provides that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." *Id*. Another of subsection (d)(3)'s provisions—which Ms. Wild calls the "venue" provision—states that "[t]he rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." *Id.* § 3771(d)(3).

Subsection (d)(6), titled "No cause of action," also contains two pertinent provisions. First, it states that "[n]othing in this chapter shall be construed to authorize a cause of action for damages." *Id.* § 3771(d)(6). Second, and separately, it emphasizes that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.*

Finally, subsection (f) instructs the Attorney General to "promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations" concerning those victims. *Id.* § 3771(f)(1). (We've already introduced subsection (e), which defines the term "crime victim.") Subsection (f) specifies that the regulations "shall"—among other things—(1) "designate an administrative authority within the Department of Justice

to receive and investigate complaints relating to the provision or violation of the rights of a crime victim," (2) "contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims," and (3) "provide that the Attorney General" or his designee "shall be the final arbiter of the complaint" and that "there shall be no judicial review" of his decision. *Id*. § 3771(f)(2).

Pursuant to subsection (f)'s directive, the Attorney General adopted administrative-enforcement regulations, which are codified at 28 C.F.R. § 45.10. The regulations establish "Victims' Rights Ombudsman" and "point of contact" offices within the Department of Justice and create a detailed administrative "[c]omplaint process." 28 C.F.R. § 45.10(b)–(c). They require an alleged victim's complaint to include, among other information, "[t]he district court case number" and "[t]he name of the defendant in the case." *Id*. § 45.10(c)(2)(iii)–(iv). Upon receipt of a complaint, the designated point of contact "shall investigate the allegation(s) . . . within a reasonable period of time" and then "report the results of the investigation to" the Ombudsman, who, in turn, may conduct any "further investigation" that he deems warranted. *Id*. § 45.10(c)(4)–(6). If the Ombudsman determines that a victim's rights have been violated, he "shall require" the offending employee "to undergo training on victims' rights," and if the

Ombudsman finds a willful violation, he "shall recommend" to the offending employee's superior an additional "range of disciplinary sanctions." *Id.* § 45.10(d)–(e). As required by statute, the regulations provide that the Ombudsman's decision is final and that "[a] complainant may not seek judicial review of the [Ombudsman's] determination regarding the complaint." *Id.* § 45.10(c)(8).

With that primer, we proceed to address Ms. Wild's case.[10]

III

As already noted, Ms. Wild initiated this litigation by filing, *ex parte*, a document styled an "Emergency Victim's Petition for Enforcement of Crime

[10] Before considering the merits of Ms. Wild's petition, we must briefly address a front-end procedural issue. Ms. Wild contends that the government waived any argument that the CVRA doesn't provide for pre-charge judicial enforcement here when it failed to file a "cross-appeal" from the district court's 2011 order, which (as already explained) held "as a matter of law [that] the CVRA can apply before formal charges are filed." *Does*, 817 F. Supp. 2d at 1343. We reject Ms. Wild's waiver argument. It's true that in the usual case, the government's failure to cross-appeal the district court's adverse 2011 order might well have precluded our review of that decision. *See Greenlaw v. United States*, 554 U.S. 237, 244–45 (2008). This, though, isn't the usual case. Ms. Wild didn't file an "appeal"; rather, as the CVRA requires, she filed a petition for writ of mandamus. *See* 18 U.S.C. § 3771(d)(3); *see also* 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3932 (3d ed. 2019) (explaining that a mandamus petition is "an original application to the court of appeals"). The question before us, therefore, isn't whether to affirm or reverse the district court's orders, but rather whether to grant or deny Ms. Wild's mandamus petition—and the government is entitled to raise any argument it likes in support of its position that we should deny. And while the CVRA (as amended in 2015 to resolve a then-existing circuit split) directs us to "apply ordinary standards of appellate review" in deciding the mandamus petition, *see* 18 U.S.C. § 3771(d)(3)—rather than the heightened "clear usurpation of power or abuse of discretion" standard that typically applies in the mandamus context, *In re Loudermilch*, 158 F.3d 1143, 1145 (11th Cir. 1998)—it doesn't direct us to employ the *rules of procedure* that would apply if this were a typical appeal.

Victim's Rights Act." As the district court explained, "because no criminal case was pending" at the time, Ms. Wild "filed [her] petition as a new matter," which the court clerk "docketed as a civil action" against the United States. *Does*, 817 F. Supp. 2d at 1341 n.4. A threshold—and we find dispositive—question is whether the CVRA authorized Ms. Wild to file what was, in essence, a freestanding lawsuit, before the commencement of (and in the absence of) any preexisting criminal proceeding.

In determining whether any federal statute empowers a would-be plaintiff to file suit to vindicate her rights, our lodestar is *Alexander v. Sandoval*, in which the Supreme Court (reversing an erroneous decision of ours) unequivocally "swor[e] off" its old "habit of venturing beyond Congress's intent" to liberally "imply" private rights of action in favor of a rigorous attention to statutory text and structure. 532 U.S. 275, 287 (2001). "Like substantive federal law itself," the Court explained there, "private rights of action to enforce federal law must be created by Congress." *Id.* at 286. Accordingly, the Court emphasized, "[t]he judicial task" is straightforward: A reviewing court must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right *but also a private remedy*." *Id.* (emphasis added). In making the latter determination, the Supreme Court said, "[s]tatutory intent . . . is determinative." *Id*. Absent a clear expression of congressional intent to authorize

a would-be plaintiff to sue, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87. Moreover, a reviewing court may not plumb a statute's supposed purposes and policies in search of the requisite intent to create a cause of action; rather, the inquiry both begins and ends with a careful examination of the statute's language. *Id.* at 288. Finally—and as it turns out importantly here—the Supreme Court observed that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id*. at 290.[11]

In the two decades since *Sandoval* was decided, we have faithfully heeded the Supreme Court's directives and have demanded clear evidence of congressional intent as a prerequisite to a private right of action. *See, e.g.*, *Love v. Delta Air Lines*, 310 F.3d 1347, 1358–59 (11th Cir. 2002) (conducting *Sandoval* analysis of Air Carrier Access Act); *see also, e.g.*, *Bellitto v. Snipes*, 935 F.3d 1192, 1202–03 (11th Cir. 2019) (Help America Vote Act); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1296–97 (11th Cir. 2015) (Indian Gaming

[11] Our dissenting colleagues come perilously close to saying that "rights-creating" language is a sufficient basis for recognizing a private right of action. *See* Branch Dissenting Op. at 124–128; Hull Dissenting Op. at 174–75. That is incorrect, at least under *Sandoval*. To be sure, such language is a *necessary* condition to a cause of action's existence, but it's not *sufficient*. To the contrary, as the *Sandoval* Court clarified—and as we have emphasized here in text—"[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create *not just a private right but also a private remedy*." 532 U.S. at 286 (emphasis added).

Regulatory Act); *DirecTV, Inc. v. Treworgy*, 373 F.3d 1124, 1129 (11th Cir. 2004) (Wiretap Act); *McDonald v. S. Farm Bureau Life Ins. Co.*, 291 F.3d 718, 723 (11th Cir. 2002) (Federal Insurance Contributions Act).

So the question here, all must agree, is whether in enacting the CVRA Congress clearly and affirmatively manifested its intent—as reflected in the Act's text and structure—to create a private right of action by which a crime victim can (as Ms. Wild did here) initiate a freestanding lawsuit to enforce her rights before the formal commencement of any criminal proceeding.

IV

To answer that question, we naturally train our focus on the provisions of the CVRA that prescribe—and circumscribe—judicial involvement and enforcement. Doing so, we find no clear evidence that Congress intended to authorize crime victims to seek judicial enforcement of CVRA rights prior to the commencement of criminal proceedings.

Only two provisions of the Act speak directly to the issue of judicial enforcement—§ 3771(b) and § 3771(d). Neither, we conclude, indicates that CVRA-protected rights are judicially enforceable outside the confines of an existing proceeding, let alone that the Act creates a private right of action to enforce those rights before the commencement of criminal proceedings. And the evidence from the remainder of the CVRA—in particular from § 3771(f), which

prescribes and details a mechanism for *administrative* enforcement—confirms our conclusion that Congress didn't clearly manifest its intent to authorize crime victims to file stand-alone civil actions.

A

First up is § 3771(b), which is titled "Rights afforded." To the extent that § 3771(b) bears on the question before us, it strongly indicates that the CVRA does *not* authorize judicial enforcement outside the context of a preexisting proceeding.

Subsection (b)(1) states that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." Separately, subsection (b)(2) states that "[i]n a Federal habeas corpus proceeding arising out of a State conviction"—*i.e.*, a proceeding under 28 U.S.C. § 2254—"the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a)."

Section 3771(b) is the only provision of the CVRA that expressly directs the judiciary, in particular, to "ensure" that victims' rights are protected, and it contains *no* suggestion that the Act provides for judicial enforcement of crime victims' rights outside the confines of a preexisting "proceeding." Quite the contrary, subsection (b) indicates that courts' responsibilities to enforce victims' rights (as distinct from the responsibilities of other government actors) arise only in the context of the "proceeding[s]" pending before them.

B

Far more important to our inquiry is § 3771(d), on which Ms. Wild principally relies. Subsection (d) is titled "Enforcement and limitations," and it prescribes the logistics and limits of judicial enforcement of victims' CVRA rights.

1

As evidence that the CVRA creates a private right of action, Ms. Wild points to § 3771(d)(1), which provides, in relevant part, that "[t]he crime victim . . . may assert the rights described in subsection (a)." *See* Oral Arg. at 58:05. But Ms. Wild needs more than just a mechanism for "assert[ing]" her rights in court. Given the manner in which she sought to assert those rights here—again, in what she styled an "Emergency Victim's Petition," which she filed "as a new matter" in the district court, outside the context of any preexisting criminal prosecution, *see Does*, 817 F. Supp. 2d at 1341 n.4—she must demonstrate that the CVRA creates a mechanism for vindicating her rights in a stand-alone civil action.

We hold that subsection (d) does not create a private right of action by which a victim can initiate a freestanding lawsuit, wholly unconnected to any preexisting criminal prosecution and untethered to any proceeding that came before it. That is so for several reasons, which we will examine in detail before turning to Ms. Wild's counterarguments.

2

Perhaps most compellingly, subsection (d)(3) specifies that a crime victim's vehicle for "assert[ing]" her CVRA rights is a "[m]otion for relief" in the district court and, further, that "[t]he district court shall take up and decide any motion asserting a victim's right forthwith."

"As in all cases involving statutory construction . . . we assume that the legislative purpose is expressed by the ordinary meaning"—not the idiosyncratic meaning—"of the words used." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quotation marks and citation omitted). The term "motion" is—and long has been—commonly understood to denote a request filed within the context of a preexisting judicial proceeding. *See, e.g.*, *Motion*, *Black's Law Dictionary* (10th ed. 2014) ("Frequently, *in the progress of litigation*, it is desired to have the court take some action which is incidental to the main proceeding . . . . Such action is invoked by an application usually less formal than the pleadings, and called a motion." (quoting John C. Townes, *Studies in American Elementary Law* 621 (1911) (emphasis added)); *see also* 56 Am. Jur. 2d *Motions, Rules, and Orders* § 1 (2020) ("The term 'motion' generally means an application made to a court or judge to obtain a rule or order directing some act to be done in the applicant's favor *in a pending case*." (footnotes omitted and emphasis added)); 60 C.J.S. *Motions and Orders* § 1 (2020) ("The term 'motion' generally means an application made

to a court or judge for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant *in a pending case*. A motion is a request for relief, usually interlocutory relief, *within a case*." (footnotes omitted and emphasis added)); *Motion (Movant or Move)*, *The Wolters Kluwer Bouvier Law Dictionary: Desk Edition* (Stephen Michael Sheppard, ed., 2012) ("A motion is presented to a court *in a pending action*. . . ." (emphasis added)).

Just as importantly here—if not more so—the term "motion" has *never* been commonly understood to denote a vehicle for initiating a new and freestanding lawsuit. As one legal encyclopedia summarizes matters: "The function of a motion *is not to initiate new litigation*, but to bring before the court for ruling some material but incidental matter arising in the progress of the case in which the motion is filed. *A motion is not an independent right or remedy* . . . ." 56 Am. Jur. 2d, *supra*, § 1 (footnotes omitted and emphasis added). A new suit is generally commenced through a "complaint," which (per the Federal Rules of Civil Procedure) is a form of "pleading" and thus distinct from a "motion." *See* Fed. R. Civ. P. 3, 7. "[A] motion," put simply, "is not a pleading." *Garner's Dictionary of Legal Usage* 591 (3d ed. 2011).[12]

[12] Our dissenting colleagues insist that they have the "common, ordinary" meaning of the word "motion" on their side—so much so, in fact, that they claim to have "dismantle[d]" our "tortured construction" of the term. *See* Branch Dissenting Op. at 129–130; Hull Dissenting Op. at 177 n.7. Conspicuously, though, they offer no response to our exhaustive analysis of that word's accepted usage, as confirmed by legal dictionaries and encyclopedias.

The closest that the law seems to have come to using the word "motion" to signify an instrument for initiating a new action is 28 U.S.C. § 2255, which authorizes a federal prisoner to file a "motion" to "vacate, set aside or correct" his criminal sentence. But § 2255 doesn't truly reflect an understanding of the term "motion" as a means of commencing a stand-alone lawsuit, because—and to be clear, our dissenting colleagues don't dispute any of this—a convicted defendant files his so-called "motion" in "the court which imposed [his] sentence" and, indeed, *in his closed criminal case*. 28 U.S.C. § 2255(a)–(f); *see also* Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 3(b) (stating that once the inmate has filed his motion with the clerk, "[t]he clerk must file the motion and enter it on the criminal docket of the case in which the challenged judgment was entered"). Accordingly, "a motion under § 2255 is a further step in the movant's criminal case and *not a separate civil action*." *Id.*, Rule 1 advisory committee's note (emphasis added). So even a § 2255 "motion" presupposes a preexisting criminal proceeding.[13]

[13] We've been pointed to only two other instances, both arising out of the Federal Rules of Criminal Procedure, in which the term "motion" is even arguably used to initiate legal proceedings: Under Rule 41(g), which establishes the procedures governing searches during investigations, a third party may file a "motion" to enforce her rights before a criminal prosecution is formally commenced; and under Rule 17(c)(2), a witness may file a "motion" to quash a grand-jury subpoena before an indictment is handed down. Even setting aside the fact that both arise in altogether different contexts, those two examples don't alter our view that the term "motion" has never been *commonly* understood to denote a vehicle for initiating litigation, let alone as the vehicle for initiating a stand-alone civil action of the sort that Ms. Wild seems to

Moreover, it's not just that Ms. Wild's position would require us to give the word "motion" a peculiar meaning, but also (and worse) that it would require us to give that word—not the same word repeated twice in the same sentence or paragraph,[14] but the very same word—two *different* meanings, depending on the circumstances. If (as the statute plainly envisions) a crime victim asserts her rights in the course of a preexisting proceeding, then the term "motion" in § 3771(d)(3) carries its ordinary meaning—*i.e.*, a request for relief made in a pending action. If, by contrast, a victim were to seek to assert her rights before any criminal prosecution has commenced, then the term would take on the specialized, decidedly *un*-ordinary meaning that the legal dictionaries and encyclopedias expressly condemn. We are loathe to ascribe an idiosyncratic meaning to the word "motion," and we are doubly loathe to ascribe such different meanings to the very same word.[15]

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envision—let alone the sort of *Sandoval*-qualifying clear expression of an intent required to create a private right of action.

[14] *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("A word or phrase is presumed to bear the same meaning throughout a text . . . ."); *cf. also Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (rejecting interpretation that would "giv[e] the word 'filed' two different meanings in the same section of the statute").

[15] This case's procedural history provides still further evidence that subsection (d)(3)'s "motion" remedy doesn't authorize a crime victim to file a freestanding civil action, outside the confines of a preexisting proceeding. Although the Act specifies a "motion" as its lone judicial-enforcement mechanism, Ms. Wild filed a document called an "Emergency Victim's Petition" in the district court, and she did so without naming a defendant. No doubt confused, the clerk of the district court docketed Ms. Wild's "Petition" as a civil action against the United States. *See Does*, 817 F. Supp. 2d at 1339–41 & n.4. The obvious problem: Absent a waiver, the United States is immune from suit. If the CVRA was intended to provide a vehicle for initiating a freestanding

Additional context from subsection (d)(3) confirms our ordinary-meaning conclusion that the CVRA's "motion" remedy specifies a means of judicial enforcement within the confines of a preexisting proceeding. The subsection's third sentence begins, "If the district court denies the relief sought, the movant"—note, *not* "the plaintiff"—"may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). The subsection then directs the court of appeals (at least in the absence of the sort of agreement the parties reached here) to "take up and decide" the mandamus petition "within 72 hours." *Id.* Importantly here, the provision continues by stating that "[i]n no event shall *proceedings* be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter." *Id*. (emphasis added). That last sentence further demonstrates that Congress envisioned that judicial involvement and enforcement in CVRA matters would occur only in the context of preexisting "proceedings." *Id.*

In sum, Congress has given crime victims a specific means of judicial enforcement, a "motion"—which both plain-meaning and contextual considerations confirm denotes a vehicle for seeking relief within the context of a

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action against the government, it would have had to waive the United States' sovereign immunity, which, so far as we can tell, it didn't. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) (explaining that a waiver of the United States' sovereign immunity "must be unequivocally expressed in statutory text"); Scalia & Garner, *Reading Law* at 281 ("A statute does not waive sovereign immunity . . . unless that disposition is unequivocally clear.").

preexisting case, not for initiating a freestanding civil action. And as the Supreme Court emphasized in *Sandoval*—and as we will further unpack shortly in examining the CVRA's administrative-enforcement apparatus—"[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. at 290; *see also, e.g.*, *PCI Gaming Auth.*, 801 F.3d at 1295 (observing that when Congress has expressly created an alternative remedy for enforcing federal rights, "we ought not imply a private right of action" (quotation marks omitted)).

3

Subsection (d)(6), which is conspicuously titled "No cause of action," bolsters our view that the CVRA doesn't authorize a crime victim to file a freestanding civil action to assert her rights even before the commencement of—and in the absence of—criminal proceedings.

a

Perhaps most starkly, subsection (d)(6)'s first sentence states that "[n]othing in this chapter shall be construed to authorize a cause of action for damages . . . ." Far from a *Sandoval*-qualifying clear statement of congressional intent to create a private right of action, that provision very nearly forecloses one. Of course, one might object—as our dissenting colleagues do—that subsection (d)(6) doesn't expressly rule out a private suit for declaratory or injunctive relief. But under

Sandoval and its progeny, the question isn't whether Congress "intended to preclude" a private right of action, *see* Branch Dissenting Op. at 141–42, but rather, whether it *intended to provide* one. There is certainly nothing in subsection (d)(6)'s first sentence to suggest that it did.

Contrast, by way of example, 18 U.S.C. § 2255, which expressly creates a "[c]ivil remedy for personal injuries" arising out of particular child-sex crimes. That statute specifies that a minor victim "who suffers personal injury" as a result of a violation of any of various federal criminal statutes can "sue in any appropriate United States District Court" and recover compensatory and punitive damages and, if appropriate, "preliminary and equitable relief," as well as fees and costs. *Id.* § 2255(a). The statute goes on to prescribe a statute of limitations and rules governing service of process. *Id.* § 2255(b), (c). Clearly, Congress knows how to give crime victims a private cause of action when it wants to. Had it intended to do so in the CVRA, it presumably would have enacted some provision that resembles § 2255. It didn't even come close, and its "silence" in that respect "is controlling." *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1209 (11th Cir. 2009).

b

Subsection (d)(6)'s second sentence weighs even more heavily in our calculus: "Nothing in this chapter shall be construed to impair the prosecutorial

discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). To imply a private right of action authorizing a crime victim to file a freestanding lawsuit, even before the commencement of criminal proceedings, we would have to sanction a regime in which a federal court can order a federal prosecutor, presumably on pain of contempt, to conduct her criminal investigation in a particular manner. For reasons we will explain, Ms. Wild's "constru[ction]" of the CVRA would seriously "impair . . . prosecutorial discretion," in direct contravention of the Act's plain terms.

Broadly defined, the term "prosecutorial discretion" refers to the soup-to-nuts entirety of "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." *Prosecutorial Discretion*, *Black's Law Dictionary* (10th ed. 2014). The core of prosecutorial discretion, though—its essence—is the decision whether or not to charge an individual with a criminal offense in the first place. The Supreme Court has repeatedly reaffirmed the principle—which dates back centuries—that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United*

States v. Nixon, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869)).[16]

Ms. Wild's interpretation of the CVRA risks "impair[ing] . . . prosecutorial discretion" in at least two fundamental ways, which we will examine in turn.

i

As an initial matter, consider that the *very first* determination that a court must make when asked to enforce the CVRA is whether the party seeking the Act's benefit is a "crime victim." That's because the CVRA's opening provision makes clear that the Act's protections—the rights enumerated therein—are available *only* to "crime victim[s]." 18 U.S.C. § 3771(a) ("A crime victim has the following rights . . . ."). Notably for our purposes, the CVRA defines the term

[16] This prosecutorial discretion "flows not from a desire to give carte blanche to law enforcement officials but from recognition of the constitutional principle of separation of powers." *United States v. Ream*, 491 F.2d 1243, 1246 n.2 (5th Cir. 1974). As we said in *Ream*—

> The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

Id. (quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)); *accord, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. Const. art. II, § 3)).

"crime victim" to mean "a person directly and proximately harmed as a result of the commission of a Federal offense." *Id.* § 3771(e)(2)(A). Accordingly, any individual asserting rights under the CVRA must, at the very outset, demonstrate to the district court that she is a "crime victim" entitled to statutory protection. And, given the statutory definition's terms, in order to determine whether the individual has made the requisite showing, the court must decide whether a "Federal offense" has occurred. When a prosecutor has already commenced criminal proceedings against an identifiable individual for a specific crime, that prosecutor has made at least a presumptive determination that the individual has in fact committed a "Federal offense." So, as applied in the context of a preexisting criminal proceeding, the "crime victim" determination is straightforward: An individual who has been "directly and proximately harmed" as a result of the conduct charged by the government is entitled to CVRA protection and may assert her rights in court accordingly.

Not so outside the context of a preexisting criminal proceeding. In that circumstance, if an individual were to assert CVRA rights as a "crime victim," the court would first have to determine—but this time without any initial determination by the government in the form of a charging decision and, indeed, presumably while the government's investigation remains ongoing—whether or not a "Federal offense" has been committed. That scenario—which is a necessary

consequence of Ms. Wild's interpretation—presents at least three intractable problems.

First, and most obviously, that reading puts the cart before the horse: When else, if ever, is a court called on to decide whether an "offense" (*i.e.*, a crime) has occurred—as opposed to a moral wrong more generally—*before* the government has even decided to press charges? The answer, so far as we are aware, is never. Second, how, in the absence of a charging decision, would the court even go about ascertaining whether an "offense" had occurred? What would that proceeding look like? A mini- (or perhaps not-so-mini-) trial in which the court finds facts and makes legal determinations regarding an "offense" yet to be named? Finally, and in any event, it seems obvious to us that simply by conducting such a proceeding and by concluding (up front) that an "offense" has—or hasn't—occurred, the court would not only exert enormous pressure on the government's charging decisions, but also likely frustrate the government's ongoing investigation. The "impair[ment]" of prosecutorial discretion would be palpable.[17]

[17] To be clear, it's no answer to say—as our dissenting colleagues do—that because government prosecutors identified Ms. Wild and others as "crime victim[s]" in the 2007 victim-notification letters, requiring a court to make a "crime victim" determination prior to any charging decision wouldn't pose a problem. *See* Branch Dissenting Op. at 152–53. Needless to say, a prosecutor doesn't "impair [her own] discretion" by sending a victim-notification letter. By contrast, were a federal court to determine before the fact—literally, to prejudge—that a criminal "offense" had (or hadn't) occurred, it would be stepping all over prosecutors' toes. That very real concern is hardly a "red herring[]." *Id*. at 152.

ii

Separately, even if the threshold "crime victim" barrier could be overcome, the judicial *enforcement* of CVRA rights in the pre-charge phase would risk unduly impairing prosecutorial discretion. Consider first, as a baseline, how CVRA enforcement ordinarily occurs—post-charge, during the course of an ongoing prosecution. There, a crime victim who believes that government lawyers have violated her rights is quite unlikely to request the sort of extraordinary affirmative injunction that Ms. Wild sought here—a directive "order[ing]" prosecutors to confer with her and treat her fairly. Instead, she will simply ask the court to decline to take some action that prosecutors (or the defendant, or perhaps both) have advocated, on the ground that her statutory rights haven't been respected. So, for instance, a victim complaining that government lawyers set a hearing without properly notifying her, *see* 18 U.S.C. § 3771(a)(2)–(4), will ask the court to delay the hearing. A victim who asserts that prosecutors struck a plea deal without consulting her, *see id*. § 3771(a)(5), will ask the court to reject the agreement. Importantly here, while such requests provide the victim complete relief, they don't meaningfully impinge on post-charge prosecutorial prerogatives because a district court already has near-plenary control over its own docket and substantial discretion over whether to accept or reject a plea deal. Any marginal "impair[ment of] prosecutorial discretion" is therefore negligible.

Outside the context of a preexisting criminal proceeding, by contrast, the situation is starkly different, and the intrusion is significantly greater. It is in *that* circumstance, as the facts and procedural history of this case demonstrate, that a victim—there being no hearing to delay or agreement to challenge—will be left to ask the court (as Ms. Wild did here) to "order" prosecutors to confer with her or to treat her "fair[ly]." It is hard to imagine a more significant "impair[ment of] prosecutorial discretion" than a district court's injunction affirmatively ordering government lawyers (presumably on pain of contempt) to conduct their prosecution of a particular matter in a particular manner.

To be clear, even if all that Ms. Wild's interpretation risked was pre-charge judicial intervention in ongoing criminal investigations, the threat it posed to prosecutorial discretion would be reason enough to reject it. Freed from any line limiting judicial enforcement to the post-charge phases of a prosecution, courts would be empowered to issue injunctions requiring consultation with victims (to name just a few examples) before law-enforcement raids, warrant applications, arrests, witness interviews, lineups, and interrogations. Needless to say, that would work an extraordinary expansion of an already-extraordinary statute. But there's even more at stake here. What about the circumstance in which a prosecutor has declined to bring charges because she has determined that no crime was committed? Or, as in this case, where the prosecutor has simply made the decision

(right or wrong) that it isn't a wise use of government resources to litigate whether a federal crime occurred because the presumed perpetrator is already slated to serve time in state prison? Ms. Wild's reading of the CVRA would permit a putative victim to challenge the correctness, in either case, of the prosecutor's no-charge decision in court—effectively appealing the prosecutor's exercise of discretion to a federal district judge. Judicial review of a prosecutor's decision whether to prosecute is the very quintessence of an "impair[ment of] prosecutorial discretion."[18]

* * *

The commencement of criminal proceedings marks a clear and sensible boundary on the prosecutorial-discretion spectrum. Before charges are filed—when the government is still in the process of investigating and deciding "whether to prosecute"—its authority and discretion are understood to be "exclusive" and "absolute." *Nixon*, 418 U.S. at 693. By contrast, once the charging decision is made, the prosecutor steps into the court's jurisdiction—its "house," so to speak—and thus necessarily cedes some of her control of the course and management of

[18] Just a brief word in response to our dissenting colleagues' prosecutorial-discretion argument: They seem to say that their interpretation of the CVRA doesn't impair prosecution because § 3771(d)(6) states—as of course it does—that nothing in the Act "'shall be construed to impair prosecutorial discretion of the Attorney General or any officer under his direction.'" Branch Dissenting Op. at 153–54. To be clear, though, § 3771(d)(6) is not a panacea against "construc[tions]" of the Act that, in actual operation, impair prosecutorial discretion—it is a prohibition of such constructions. Subsection (d)(6), therefore, doesn't save our dissenting colleagues' interpretation, but rather condemns it.

the case. From that point forward, the court will "assume a more active role in administering adjudication of a defendant's guilt and determining the appropriate sentence." *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 737 (D.C. Cir. 2016). Interpreting the CVRA to authorize judicial enforcement only in the context of a preexisting proceeding—as its terms plainly permit—thus squares with the background expectation of judicial involvement. Reading the Act to provide a private right of action for pre-charge judicial enforcement, by contrast, contravenes the background expectation of executive exclusivity.[19]

C

The CVRA's final provision—§ 3771(f)—further demonstrates that the Act doesn't create a private right of action authorizing a crime victim to file a freestanding, pre-charge lawsuit to vindicate her statutory rights. In addition to the limited "motion" remedy specified in subsection (d)(3) and discussed already, subsection (f)—titled "Procedures to promote compliance"—mandates the

[19] Our dissenting colleagues' assertion that "concern[s] about impairment of prosecutorial discretion appl[y] equally post-indictment" (Branch Dissenting Op. at 153) ignores what we have called the "clear and sensible boundary" that is marked by the formal initiation of criminal proceedings and that Chief Judge Srinivasan astutely recognized for the D.C. Circuit in *Fokker Services*. There is a world of difference between a court insinuating itself into a prosecutor's case before charges are filed and stepping in to "administer[]" the case thereafter. 818 F.3d at 737.

Our dissenting colleagues accuse us of "drawing" our own line between the pre- and post-charge phases—*i.e.*, between detection and investigation, on the one hand, and formal prosecution, on the other. *See* Branch Dissenting Op. at 155; *see also* Hull Dissenting Op. at 177. That is incorrect. We have simply acknowledged—and enforced—the line that the CVRA itself embodies, and recognized that it (perhaps not surprisingly) is a sensible one.

promulgation of regulations to administratively "enforce the rights of crime victims and to ensure compliance by responsible officials" with CVRA rights, and then goes on to require that those regulations include a mechanism for "receiv[ing] and investigat[ing] complaints," for prescribing "training" for non-compliant DOJ employees, and for imposing "disciplinary sanctions" on willful violators. 18 U.S.C. § 3771(f)(1)–(2). As already explained, the Attorney General implemented subsection (f)'s directive by adopting regulations that not only prescribe a detailed administrative "[c]omplaint process" but also require DOJ officials to promptly "investigate" any alleged CVRA violations, "report the results of the investigation" up the chain, and, if violations are found, to impose a "range of disciplinary sanctions." 28 C.F.R. § 45.10(b)–(e). Both the Act and its implementing regulations expressly forbid "judicial review" of any administrative determination. *See* 18 U.S.C. § 3771(f)(2); 28 C.F.R. § 45.10(c)(8).

Congress's decision to direct the establishment of a robust administrative-enforcement scheme severely undermines any suggestion that (without saying so) it intended to authorize crime victims to file stand-alone civil actions in federal court. Our post-*Sandoval* decision in *Love v. Delta Air Lines*, 310 F.3d 1347 (11th Cir. 2002), illustrates that very point, against a remedial backdrop that bears some similarity to the CVRA. There, we held that Congress had not created a private right of action to enforce the prohibition on disability-based discrimination under

the Air Carrier Access Act. *Id*. at 1358–59. We reiterated *Sandoval*'s teaching that "[s]tatutory intent" to create a private remedy "is determinative," and we recalled our own earlier observation that "[t]he bar for showing [the required] legislative intent is high." *Id*. at 1352–53 (quotation marks and citations omitted). Most notably for present purposes, we observed (once again echoing *Sandoval*) that if a statute "provides a discernible enforcement mechanism . . . we ought not imply a private right of action because '[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id*. at 1353.

We emphasized in *Love* that the Air Carriers Access Act embodied its own remedial apparatus, which we described as having two parts. First, the Act created "an elaborate administrative enforcement scheme"—which, among other things, permitted aggrieved individuals to file complaints with the Department of Transportation, required the Department to investigate those complaints, and authorized the Department to impose a range of sanctions. *Id*. at 1354–55, 1358. Second, the Act authorized what we called "a *limited* form of judicial review"—in particular, it permitted "an individual with 'a substantial interest' in a DOT enforcement action [to] petition for review in a United States Court of Appeals." *Id*. at 1356, 1358. That two-track remedial regime, we concluded, "belie[d] any congressional intent" to create a freestanding "private right to sue in a federal

district court." *Id*. at 1354. Finding ourselves bound by Congress's intent—as reflected in statutory text and structure—we held that we couldn't "create by implication a private right of action, no matter how socially desirable or otherwise warranted the result may be." *Id.* at 1359–60.

Love's rationale—which, as noted, follows straightaway from *Sandoval*—maps onto this case pretty closely. Just as it did in the Air Carrier Access Act, in the CVRA Congress created both a robust administrative-enforcement regime—complete with "complaints," "investigat[ions]," "decision[s]," and "sanctions"—and a "limited" means of judicial review—namely, subsection (d)(3)'s "motion" remedy. The same conclusion that we reached in *Love* thus likewise follows here: Congress's "express provision of one method of enforcing a substantive rule"—or as in *Love*, *two* methods—"suggests that [it] intended to preclude others." *Love*, 310 F.3d at 1353 (quotations marks omitted) (quoting *Sandoval*, 532 U.S. at 290).

And indeed, as the Supreme Court emphasized in *Sandoval*, "[s]ometimes th[at] suggestion is so strong that it precludes a finding of congressional intent to create a private right of action . . . ." 532 U.S. at 290. Just so here. First, the only form of judicial "relief" that the CVRA expressly references is "a motion to re-open a plea or sentence"—which, it goes without saying, contemplates a preexisting criminal proceeding. 18 U.S.C. § 3771(d)(5). In particular, the Act states that a victim may move to re-open a plea or sentence "only if," among other

things, she "asserted the right to be heard before or *during the proceeding at issue* and such right was denied." *Id*. (emphasis added). In contrast to that remedial mismatch with Ms. Wild's requests, the administrative-enforcement process specifically provides for some of the very forms of relief that Ms. Wild sought here. *See id*. § 3771(f)(2) (requiring administrative-enforcement regulations to provide for "training" and "disciplinary sanctions"); *see also* 28 C.F.R. § 45.10(d)–(e) (providing for same).

Second, and relatedly, Ms. Wild's interpretation—that the CVRA authorizes her to bring a stand-alone civil action—contravenes the Act's clear statement that "there shall be no judicial review of the final decision of the Attorney General by a complainant." 18 U.S.C. § 3771(f)(2)(D); *see also* 28 C.F.R. § 45.10(c)(8) ("A complainant may not seek judicial review of the [Victims' Rights Ombudsman's] determination regarding the complaint."). On Ms. Wild's reading, any victim dissatisfied with the result of her administrative-complaint process could simply file a freestanding suit seeking the same relief, thereby circumventing the Act's prohibition on judicial review of agency determinations.

It is difficult—if not impossible—to reconcile Ms. Wild's freestanding pre-charge suit for judicial enforcement of her CVRA rights with the administrative-enforcement scheme that the Act establishes for addressing alleged violations. That difficulty constitutes still further evidence that Congress hasn't clearly

manifested its intent to authorize stand-alone civil actions of the sort that Ms. Wild filed here.[20]

* * *

In sum, we find that numerous aspects of the CVRA—among them, subsection (d)(3)'s specification of a "motion" remedy and warning against appellate review unduly delaying ongoing "proceedings," subsection (d)(6)'s "[n]o cause of action" language and prohibition on any construction of the Act that would "impair . . . prosecutorial discretion," and subsection (f)'s establishment of a detailed administrative-enforcement apparatus—preclude any conclusion that the Act reflects a *Sandoval*-qualifying clear expression of congressional intent to authorize a crime victim to file a freestanding civil action.

[20] With respect, we think that our dissenting colleagues misunderstand the relevance of the fact that, in addition to its (in-proceeding) "motion" remedy, the CVRA specifies a means of administrative enforcement. They reason backwards from the premises (which may or may not be correct) that "the administrative-enforcement scheme in the CVRA is not available to the victims in this case," and that "Epstein's victims [are thus] completely without a remedy," to the conclusion that a pre-charge cause of action *must* exist. Branch Dissenting Op. at 145, 148. To be sure, that mode of reasoning—if there's no other viable remedy, the courts should fashion one—prevailed in what the Supreme Court in *Sandoval* called the "*ancien regime*." 532 U.S. at 287. But the *Sandoval* Court couldn't have been much clearer that it was "sw[earing] off" its old way of thinking and establishing a new, more rigorous standard: Absent clear "statutory intent" to "create not just a private right but also a private remedy," a "cause of action does not exist and courts may not create one, no matter how desirable that might be as a matter of policy matter, or how compatible with the statute." *Id*. at 286–87. The point for present purposes is that in the *Sandoval* era the significance of an administrative apparatus is that it "suggests that Congress intended to preclude other" means of enforcement. *Id*. at 290.

D

Against all this, Ms. Wild relies on two provisions of the CVRA that, she insists, authorize her to seek pre-charge judicial enforcement of her statutory rights. Neither, we conclude, clearly demonstrates Congress's intent to create a private right of action.

1

First, and most prominently, Ms. Wild points to a single sentence—or, more precisely, a single comma phrase—in § 3771(d)(3), which she calls the Act's "venue" provision: "The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred." Basically, Ms. Wild's contention—which the district court adopted—is that the "no prosecution is underway" clause *must* mean that CVRA rights can be enforced in court before the commencement of criminal proceedings and, therefore, that subsection (d)(3)'s "motion" remedy *must* constitute a *Sandoval*-qualifying expression of clear congressional intent to create a private right of action that would authorize a stand-alone pre-charge civil action. We respectfully disagree. Subsection (d)(3) could just as easily—and far more sensibly, given the statutory context and the practical and constitutional problems that Ms. Wild's

interpretation would entail—be understood to refer to the period after a "prosecution" has run its course and resulted in a final judgment of conviction.

Ms. Wild and the district court read the "no prosecution is underway" clause to say, in effect, "no prosecution is [*yet*] underway"—thereby necessarily pointing to the period before the prosecution's commencement. But subsection (d)(3) is temporally agnostic—on its face, it could well mean that "no prosecution is [*still*] underway." *Cf. Underway,* Oxford English Dictionary, https://oed.com (last visited Jan. 8, 2021) (defining "underway" as it pertains to "a process, project, [or] activity" to mean "set in progress; in the course of happening or being carried out"); *Under way*, Merriam-Webster's Collegiate Dictionary 1365 (11th ed. 2014) (defining "under way" to mean "in progress: AFOOT"). So understood, the CVRA would sensibly permit a victim to file a *post*-prosecution motion alleging that the government violated her rights during the course of the prosecution and asking the court, for instance, to "re-open a plea or sentence." 18 U.S.C. § 3771(d)(5).[21]

[21] Ms. Wild objects that it would be odd, under the "no prosecution is underway" clause, to require a victim to file a post-prosecution CVRA motion in the "district in which the crime occurred" *rather than* the "district court in which the defendant is being prosecuted." But any supposed oddity is alleviated by the fact that under the Sixth Amendment, those two districts will almost always be the same: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI; *see also* Fed. R. Crim. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.").

2

Second, and separately, Ms. Wild points to § 3771(c)(1)— the so-called "coverage" provision—which states that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." From the premise that the CVRA applies to "federal

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We should note that there is still another way of understanding § 3771(d)(3)'s "no prosecution is underway" clause. That clause could be read to apply to the period of time between the initiation of criminal proceedings—which may occur as early as the filing of a criminal complaint under Federal Rule of Criminal Procedure 3—and the levying of formal charges in an indictment. The word "prosecution"—on which subsection (d)(3) pivots—is a legal term of art; in relevant part, it refers to "[t]he institution and continuance of a criminal suit [and] the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information." *Prosecution*, *Webster's New International Dictionary* (2d ed. 1944). Moreover, the law is clear, at least for Sixth Amendment right-to-counsel purposes, that a "prosecution" does *not* begin with the criminal complaint's filing. *See United States v. Langley*, 848 F.2d 152, 153 (11th Cir. 1988) (explaining that, with respect to a defendant's Sixth Amendment right to counsel, prosecution begins "only after the government initiates adversarial judicial proceedings," not with "[t]he mere filing of a complaint"); *see also, e.g.*, *United States v. States*, 652 F.3d 734, 741–42 (7th Cir. 2011) (same); *United States v. Boskic*, 545 F.3d 69, 82–84 (1st Cir. 2008) (same); *United States v. Alvarado*, 440 F.3d 191, 199–200 (4th Cir. 2006) (same). Rather, the Sixth Amendment right doesn't attach—because a "prosecution" doesn't begin—until, at the earliest, a suspect's "initial appearance before a judicial officer." *Rothgery v. Gillespie County*, 554 U.S. 191, 199 (2008). All of which is to say that even if Ms. Wild and the district court were correct that the "no prosecution is underway" clause meant that CVRA rights apply—and that a freestanding lawsuit may be initiated—before formal charges are filed, they may yet be incorrect that those rights can be judicially enforced during a pre-complaint investigation. Subsection (d)(3) can be read sensibly enough to apply (and to give victims a judicially enforceable right, for example, to "confer" with prosecutors, § 3771(a)(5)) between the filing of the criminal complaint and the suspect's initial appearance before a judge. That would, for instance, allow victims to express their views to prosecutors about whether the defendant should be granted pretrial release. *See* Fed. R. Crim. P. 5(d)(1)(C) (noting that pretrial-release decisions are made at the "initial appearance").

officers 'engaged in the detection, investigation, or prosecution of crime'"—with an emphasis on the provision's "detection" and "investigation" components—Ms. Wild reasons to the conclusion that "the Act protects victims before charges are filed." En Banc Reply Br. of Petitioner at 21.

Ms. Wild's reliance on subsection (c)(1) is misplaced for three reasons. First, and most obviously, that provision doesn't speak to judicial enforcement at all. Rather, unlike subsections (b) and (d), which address courts' responsibilities under the Act, subsection (c)(1) address *non*-judicial actors, requiring them to "make their best efforts" to ensure that crime victims' rights are respected. Accordingly, whatever § 3771(c)(1) may say about when CVRA rights attach, in the abstract—an issue that we have said we needn't decide—it can't provide the basis for discerning a private right of action to seek pre-charge judicial enforcement of those rights.

Second, and in any event, understood in proper context, it is clear to us that § 3771(c)(1) is a "to whom" provision, not a "when" provision. That is, it merely clarifies that CVRA obligations extend beyond the officers and employees of "the Department of Justice" to include, as well, the officers and employees of "other departments and agencies of the United States" that (like DOJ) are "engaged in the detection, investigation, or prosecution of crime"—*e.g.*, IRS, ICE, and TSA. Those agencies' employees, like DOJ's, must "make their best efforts to see that

crime victims" are afforded CVRA rights. If subsection (c)(1) were intended to be a "when" provision, then the phrase "in the detection, investigation, or prosecution of crime" presumably would have been situated differently in the provision, such that the full sentence would read: "Officers and employees of the Department of Justice and other departments and agencies of the United States ~~engaged in the detection, investigation, or prosecution of crime~~ shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a) in the detection, investigation, or prosecution of crime."[22]

Finally, Ms. Wild's reliance on § 3771(c)(1) proves entirely too much. If, as Ms. Wild thinks subsection (c)(1) shows, CVRA rights are subject to judicial enforcement during the "detection" and "investigation" of crime, then there is no

[22] Ms. Wild contends that this interpretation of § 3771(c)(1) can't explain "why Congress found it necessary to break out three separate phases of the criminal justice process: the 'detection,' 'investigation,' and 'prosecution' of crime." En Banc Br. of Petitioner at 21–22. If, she argues, Congress's intent was simply to cover federal agents during the post-charging phase of a case, it could have simply omitted the words "detection" and "investigation" from the Act, because any agent "who is in some way connected to the 'prosecution'—and, thus, in some way connected to crime victims—is already covered by the CVRA's language applying the Act to agencies engaged in 'prosecution.'" *Id.* at 22. Thus, she says, our interpretation impermissibly renders the terms "detection" and "investigation" meaningless. *Id.*; s*ee also* Paul G. Cassell et al., *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. Crim. L. & Criminology 59, 87 (2014). We don't think so. We read subsection (c)(1) not as "break[ing] out" three different phases, but rather as attempting to broadly cover all necessary government-employee participants—in short, to ensure that the Act's protection extends beyond prosecutors. "Doublets and triplets abound in legalese," especially given that Congress often uses a "belt-and-suspenders" approach when drafting statutes. *See* Scalia & Garner, *Reading Law* at 176–77 (cautioning that the surplusage canon must be applied "with careful regard to context" and that "a court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage").

meaningful basis—at least no meaningful *textual* basis—for limiting the Act's pre-charge application. To the contrary, Ms. Wild's reading of the term "investigation" in subsection (c)(1) would—as already noted—require law-enforcement officers to "confer" with victims, subject only to a squishy "reasonable[ness]" limitation, *see* § 3771(a)(5), before conducting a raid, seeking a warrant, making an arrest, interviewing a witness, convening a lineup, or conducting an interrogation. Moreover, every cop on the beat is involved in crime "detection"—even before any crime is committed. Of course, there can't be a "crime victim" until a crime occurs, so the inclusion of "detection" in the coverage provision just further demonstrates the misfit here. In other words, Ms. Wild's reading of "detection"—which would apply even before a crime's commission—renders the clause not just unreasonably extreme but also incoherent. Absent a much clearer indication, we cannot assume that Congress intended such a jarring result.

Presumably sensing the slipperiness of her position—which is inherent in her reliance on both § 3771(d)(3)'s "venue" provision and § 3771(c)'s "coverage" provision—Ms. Wild understandably seeks to draw a line that would capture this case only, without risking a landslide: "At least," she says, "in circumstances where a case has matured to the point where an investigation has been completed, federal charges have been drafted, and prosecutors and defense attorneys are

engaging in negotiations about disposition of those charges, prosecutors must confer with the victims as well." En Banc Br. of Petitioner at 33. That is a line, to be sure—and a line that happens to include this case—but it has no footing in the text of the provisions that she invokes for support. We cannot re-write, or arbitrarily circumscribe, the CVRA's text simply to accommodate a particular result.

* * *

Even giving Ms. Wild's "venue"- and "coverage"-provision arguments every benefit of every doubt, we don't see in either a *Sandoval*-qualifying clear expression of congressional intent to authorize a freestanding private right of action to enforce CVRA rights before the commencement of criminal proceedings. To the contrary, we find that the textual and structural evidence overwhelmingly demonstrates that the CVRA provides a mechanism for judicial enforcement only in the context of a preexisting proceeding. To the extent that the Act's language and structure leave any doubt about its proper scope, we presume that Congress "acted against the backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions." *Fokker Servs.*, 818 F.3d at 738. Had Congress intended to upend (rather than reinforce) those "long-settled understandings" by authorizing a crime victim to file a pre-charge suit seeking to enjoin prosecutors to conduct their investigation in a particular manner, we can

only assume it would have expressed itself more clearly. *See, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1947 (2016) ("Congress 'does not, one might say, hide elephants in mouseholes.'" (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001))).

V

For the foregoing reasons, we hold that the CVRA does not provide a private right of action authorizing crime victims to seek judicial enforcement of CVRA rights outside the confines of a preexisting proceeding. We have searched the Act's language and structure, and we simply cannot discern a clear expression of congressional intent to authorize the sort of stand-alone civil action that Ms. Wild filed here.

We are aware, of course, that many will misunderstand today's decision. To be clear, the question before us is not whether Jeffrey Epstein was a bad man. By all accounts, he was. Nor is the question before us whether, as a matter of best practices, prosecutors *should* have consulted with Ms. Wild (and other victims) before negotiating and executing Epstein's NPA. By all accounts—including the government's own—they should have. Our sole charge is to determine, on the facts before us, whether the CVRA provides Ms. Wild with a private right of action to enforce her rights outside of the context of a preexisting criminal proceeding. Despite our sympathy for Ms. Wild—and the courage that she has

shown in pursuing this litigation—we find ourselves constrained to hold that it does not.

PETITION DENIED.

WILLIAM PRYOR, Chief Judge, joined by NEWSOM, LAGOA, and TJOFLAT, Circuit Judges, concurring:

I join the majority's opinion in full. I write separately to respond to three fundamental errors in the dissenting opinions. First, by urging us to decide an issue that does not affect the outcome of this mandamus petition, our dissenting colleagues have forgotten that we do not issue advisory opinions. Second, the dissents commit the most common error of statutory interpretation by reading individual subsections in isolation instead of reading the whole text of the statute. Finally, the dissents misunderstand what it means to interpret statutes with a presumption against implied rights of action. I address each mistake in turn.

A. Federal Courts Lack the Power to Issue Advisory Opinions.

When we ordered rehearing en banc, we asked the parties to answer two questions in their briefs. First, does the Crime Victims' Rights Act, 18 U.S.C. § 3771, "grant[] a crime victim any statutory rights that apply before the filing of a formal criminal charge by the government prosecutor?" And second, "[i]f a crime victim has statutory rights under the [Act] that apply pre-charge, does the [Act] also grant a crime victim a statutory remedy to enforce a violation of their statutory rights?"

The majority opinion sensibly collapses these two questions into one: does the Act grant a crime victim the right "to file a freestanding civil suit seeking judicial enforcement of her rights under the [Act] in the absence of any underlying

proceeding"? Maj. Op. at 13–14. It explains that we need not decide whether the Act confers rights that attach before the commencement of criminal proceedings and that might be enforceable through non-judicial channels. *Id.* at 13. That determination would have no bearing on the outcome of this petition.

The dissents take issue with this approach and accuse us of "blithely" skipping over the first issue. Hull Dissenting Op. at 157; *see also* Branch Dissenting Op. at 111 ("This issue, which was the basis of the prior panel's decision, is an important legal question of first impression in our Circuit. Nevertheless, the Majority declines to address it in its *en banc* decision."). One of our dissenting colleagues is candid about her motivations. She urges us to answer the first question because of the "victims' perseverance in litigating the rights issue for a decade and obtaining en banc review of the rights issue," "the seriousness of the federal sex-trafficking crimes against petitioner Wild and the other 30-plus minor victims," "the government's egregious misconduct," and "the fact that if the Epstein victims' . . . rights attached pre-charge, the government's misconduct undisputedly violated them." *Id.* at 159–60. Conspicuously, the dissenters do not assert that answering the first question would change how we resolve the underlying case or controversy.

There is a well-known term for judicial opinions that interpret laws without resolving cases or controversies: advisory opinions. The federal judicial power is

limited to resolving actual "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "No principle is more fundamental to the judiciary's proper role in our system of government than [this] constitutional limitation[.]" *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976). The prohibition against advisory opinions is "the oldest and most consistent thread in the federal law of justiciability." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (internal quotation marks omitted). Today, it is "taken for granted" as "an uncontroversial and central element of our understanding of federal judicial power." Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 50 (7th ed. 2015).

The rule that federal courts do not issue advisory opinions can be traced back to the Founding era. In 1793, after Secretary of State Thomas Jefferson sent the Supreme Court questions about the rights and obligations of the United States to remain neutral toward the warring nations of Europe, the Court made clear that the Constitution prohibited it from advising the Executive Branch. 3 *Correspondence and Public Papers of John Jay* 486–89 (Henry P. Johnston ed. 1891). As the Justices explained in a letter to President George Washington, "the lines of separation drawn by the Constitution between the three departments of the government . . . and our being judges of a court in the last resort[] are

considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to." *Id.* at 488.

The prohibition against issuing advisory opinions also runs through our caselaw all the way back to *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). A federal statute authorized courts to determine disability pensions for Revolutionary War veterans. *Mistretta v. United States*, 488 U.S. 361, 402 (1989) (describing *Hayburn's Case*). These determinations were subject to review by the Secretary of War. *Id.* The Supreme Court was presented with a mandamus petition asking it to order a federal circuit court to consider a pension request. *Hayburn's Case*, 2 U.S. (2 Dall.) at 409. It decided not to take up the petition until the next term. *Id.* By then, Congress had amended the statute and rendered the controversy moot. *Id.* at 409–10. Although the Supreme Court never issued an opinion, five justices considered the statute while riding circuit, and the Supreme Court reporter included their opinions in a footnote. *Id.* at 410 n.†. All agreed that requiring a federal court to issue nonbinding opinions advising the Executive on how to perform its duties breached the separation of powers inherent in the constitutional structure. *Id.* The circuit court for the district of North Carolina, which included Justice James Iredell, doubted "the propriety of giving an opinion in a case which has not yet come regularly and judicially before" it. *Id.* at 414 n.†. "None can be more sensible," the court wrote, "than we are of the necessity of judges being in

general extremely cautious in not intimating an opinion in any case extra-judicially[.]" *Id.*

Like the pension recommendations that federal courts were asked to provide in *Hayburn's Case*, the dissents would have us advise the Executive Branch about what rights it must provide a crime victim going through political or administrative channels before the commencement of criminal proceedings. In other words, they would have us issue an advisory opinion about the powers and duties of the Executive. Although the dissents may disagree with our more modest approach to resolving this mandamus petition, there is nothing "blithe" about refraining from extra-judicial pronouncements and respecting our limited role under the Constitution.

The dissents respond to a strawman version of this concern by turning it into a jurisdictional issue. Hull Dissenting Op. at 160–64. Lest there be any confusion, I acknowledge that we have jurisdiction to decide whether the Act confers pre-charge rights, just as the original panel did. But because the majority opinion correctly decides that the Act does not confer any judicially enforceable rights before the commencement of criminal proceedings, nothing that we could say about pre-charge rights that might be enforceable through non-judicial channels would change the outcome of this petition.

The dissents counter that we could resolve the first question as an alternative holding. *Id.* at 162–64. But our answer to the first question would be an alternative holding only if we rejected the dissents' interpretation of the Act and concluded that the Act does not confer any pre-charge rights, judicially enforceable or otherwise. If, on the other hand, we were to agree with the dissents and say that the Act does confer pre-charge rights, those rights would not be judicially enforceable and our resolution of this petition for a writ of mandamus would not change. Moreover, our opinion about pre-charge rights would not be binding on the Executive in the same way that the opinions about pension requests were not binding in *Hayburn's Case*.

B. We Construe Statutes by Reading the Whole Text, Not Individual Subsections in Isolation.

The dissents repeatedly assert that their interpretation of the Act follows from the "plain and unambiguous meaning" of subsections (a)(5), (a)(8), and (d)(3). Branch Dissenting Op. at 114, 154 (internal quotation marks omitted). They accuse us of "do[ing] violence to the statutory text" by "drawing a line limiting judicial enforcement to the post-charge phases of a prosecution." *Id.* at 155 (internal quotation marks omitted). Our role as judges, they remind us, is to interpret and follow the law regardless of the outcome. *Id.* (citing *Bostock v. Clayton County*, 140 S. Ct. 1731, 1823 (2020) (Kavanaugh, J., dissenting)).

Our dissenting colleagues' professed commitment to textualism is laudable. But it is one thing to recite the canons of statutory interpretation, and it is an entirely different matter to apply them correctly. *See Bostock*, 140 S. Ct. at 1755–56 (Alito, J., dissenting) ("The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated . . . .").

The dissents commit a basic error of statutory interpretation by reading subsections (a)(5), (a)(8), and (d)(3) in isolation without looking to the rest of the Act. "Statutory construction . . . is a holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18 (1981) (internal quotation marks omitted). "Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at 167 (2012). And although the dissents cite the whole-text canon, Branch Dissenting Op. at 114, they fail to apply it in their analysis.

The dissents' error manifests itself in several ways. Take, for example, the dissents' focus on subsection (a), which provides a list of crime victims' rights. 18 U.S.C. § 3771(a). Most of these rights make sense only in the context of ongoing criminal proceedings, which supports the majority's view that crime victims cannot seek judicial enforcement of these rights until after criminal charges are filed. The dissents point out that two of these rights, read in isolation from the rest of the statute, could apply before the filing of criminal charges: "[t]he reasonable right to confer" with the government attorney and "[t]he right to be treated with fairness and with respect." *Id.* § 3771(a)(5), (a)(8). But the dissents fail to account for other provisions of the Act that make clear that the rights in subsection (a) can be asserted only in the context of ongoing criminal proceedings. The paragraph immediately after the list of crime victims' rights provides that a "court shall ensure that the crime victim is afforded the rights described in subsection (a)" "[i]n any *court proceeding* involving an offense against a crime victim." *Id.* § 3771(b)(1) (emphasis added). And the Act later provides that a crime victim may assert his or her rights in subsection (a) by filing a "motion" "in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." *Id.* § 3771(d)(3).

The dissents' answer to the problems posed by these provisions is to interpret the word "motion" in subsection (d)(3) as establishing a cause of action to launch a freestanding civil action. But the dissents do not dispute that the Act allows a crime victim to move the district court to assert his or her rights in an ongoing criminal proceeding. So the dissents have to interpret the word "motion" to mean two different things at the same time. In the context of an ongoing criminal proceeding, the dissents agree that a motion is an ordinary filing with the district court. But in the absence of a criminal proceeding, the dissents contend that the "motion" serves as a complaint that commences a civil action against the government. Subsection (d)(3) also provides that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." *Id.* Under the dissents' interpretation, a "movant" again means either one of two different things: the victim in a criminal proceeding or the plaintiff in a civil action. To further complicate matters, the Act uses the word "motion" again only two paragraphs later but with only one possible meaning. Subsection (d)(5) provides that "[a] victim may make a motion to re-open a plea or sentence," which makes sense only in the context of a criminal proceeding. *Id.* § 3771(d)(5). So the dissents treat the word "motion" as if it is a linguistic chameleon that changes its meaning in different circumstances to serve whatever purpose they favor, but we presume "that identical words used in different parts of the same act are intended

to have the same meaning." Scalia & Garner, *Reading Law* § 25, at 170 (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). The dissents have no explanation for their incongruous reading of the whole statute.

The dissents' interpretation of "motion" in subsection (d)(3) as sometimes creating a civil cause of action is also difficult to reconcile with subsection (d)(6), which is titled "No cause of action." 18 U.S.C. § 3771(d)(6). To be sure, the first sentence in subsection (d)(6) refers to a cause of action for damages only, which could leave open the possibility of declaratory or injunctive relief. But the second sentence provides, "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* And as Judge Tjoflat meticulously explains in his concurring opinion, allowing an individual to initiate a freestanding civil action seeking declaratory or injunctive relief under the Act in the absence of an ongoing criminal proceeding would unquestionably impair prosecutorial discretion. Tjoflat Concurring Op. at 84–96.

Finally, the dissents have no answer to the majority's point that the United States has not clearly waived sovereign immunity. Maj. Op. at 28 n.15. As a leading treatise explains, "A statute does not waive sovereign immunity . . . unless that disposition is unequivocally clear." Scalia & Garner, *Reading Law* § 46, at 281. No provision of the Act plausibly, much less unequivocally, suggests that the

United States has consented to be sued in a civil action by a crime victim seeking to enforce his or her rights under the Act.

By failing to read the whole text of the Act, the dissents commit a common error of statutory interpretation. When read in the context of the entire statute, their interpretation of subsections (a)(5), (a)(8), and (d)(3) is implausible.

C. Statutes Are Interpreted with a Presumption Against Implied Rights of Action.

The dissents expend significant time and energy asserting that the majority opinion is wrong that *Alexander v. Sandoval*, 532 U.S. 275 (2001), counsels against finding an implied cause of action in the Act. My colleagues may recall that our Court was reversed in *Sandoval*. I fear that the lesson of that reversal still has not been learned by some.

We interpret statutes with a presumption against, not in favor of, the existence of an implied right of action. Scalia & Garner, *Reading Law* § 51, at 313. The Supreme Court made this principle clear in *Sandoval* when it said that it had "sworn off the habit of venturing beyond Congress's intent" by discovering implied rights of action in statutory texts. 532 U.S. at 287. If a statute passed by Congress does not "display[] an intent to create not just a private right but also a private remedy," then "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87. Moreover, if the "statutory structure provides a

discernible enforcement mechanism, *Sandoval* teaches that we ought not imply a private right of action because 'the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Love v. Delta Air Lines*, 310 F.3d 1347, 1353 (11th Cir. 2002) (alteration adopted) (quoting *Sandoval*, 532 U.S. at 290).

The dissents' criticisms of the majority opinion's application of *Sandoval* to the Act are puzzling. They spend several pages explaining *Sandoval* in detail and arguing that the majority has misapplied it. Branch Dissenting Op. at 122–27, 142–46; Hull Dissenting Op. at 169–78. But they also contend that the Act expressly grants a private right of action. Branch Dissenting Op. at 121; Hull Dissenting Op. at 170, 176. If the Act expressly granted a private right of action, then *Sandoval* would be beside the point.

In addition to this schizophrenic line of attack, the dissents also misunderstand *Sandoval*. They contend that the Crime Victims' Rights Act is distinguishable from the statute at issue in *Sandoval* because it has "rights-creating language" and is addressed to crime victims instead of government agencies. Hull Dissenting Op. at 176 (internal quotation marks omitted). Never mind that the Act expressly provides for an administrative-enforcement mechanism by requiring the government to promulgate regulations for "receiv[ing] and investigat[ing] complaints" from crime victims and for "training" and "disciplin[ing]" government

employees. 18 U.S.C. § 3771(f)(1), (f)(2)(A)–(C). That fact alone should defeat the possibility of a pre-charge private right of action.

The dissents also wrongly assume that the Act's supposedly "rights-creating language" is concrete enough to be judicially enforceable. Hull Dissenting Op. at 173 (internal quotation marks omitted). The Supreme Court long ago explained that Congress sometimes uses language that is "intended to be hortatory, not mandatory." *Pennhurst*, 451 U.S. at 24. "A particular statutory provision, for example, may be so manifestly precatory that it could not fairly be read to impose a binding obligation on a governmental unit, or its terms may be so vague and amorphous that determining whether a deprivation might have occurred would strain judicial competence." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994) (alteration adopted) (citation and internal quotation marks omitted). Terms like "reasonable" and "sufficient," absent any statutory guidance as to how they are to be measured, are "far too tenuous to support the notion that Congress" meant to confer judicially enforceable rights on individuals. *Blessing v. Freestone*, 520 U.S. 329, 345 (1997); *see also Suter v. Artist M.*, 503 U.S. 347, 359–60 (1992). We expect Congress to "speak with a clear voice[] and [to] manifest[] an unambiguous intent to confer individual rights." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (alteration rejected) (internal quotation marks omitted).

"The reasonable right to confer with" a government attorney and "[t]he right to be treated with fairness and with respect" do not provide the kind of administrable language that the Supreme Court has said—time and again—is required of judicially enforceable rights. 18 U.S.C. § 3771(a)(5), (a)(8). It is one thing to say that these vague "rights" are enforceable in the context of a pending criminal action where the crime victim already has far more specific rights, such as protection from the accused, *id.* § 3771(a)(1), accurate and timely notice of court proceedings, *id.* § 3771(a)(2), the opportunity to be heard, *id.* § 3771(a)(4), and restitution, *id.* § 3771(a)(6). But it is implausible that the Act creates judicially enforceable "rights" to confer reasonably and to be treated with fairness and respect in a standalone civil suit.

* * *

One final point merits a response. The dissents remind us that "our role as judges is to interpret and follow the law as written, regardless of whether we like the result." Branch Dissenting Op. at 155 (alteration rejected) (quoting *Bostock*, 140 S. Ct. at 1823 (Kavanaugh, J., dissenting)). Respectfully, readers of today's opinions can judge for themselves who is faithfully interpreting the Act and who, if anyone, is allowing their policy preferences to influence their judgment.

NEWSOM, Circuit Judge, concurring:

When I authored the now-vacated panel opinion denying Ms. Wild's mandamus petition, I expressed my "sincere[] regret" that the decision had left her "largely emptyhanded." *In re Wild*, 955 F.3d 1196, 1220 (11th Cir. 2020), *reh'g en banc granted, opinion vacated*, 967 F.3d 1285 (11th Cir. 2020). Even as the en banc Court vindicates and reaffirms that decision today, I am filled with the same sense of sorrow. As our opinion summarizes, Ms. Wild "suffered unspeakable horror" at the hands of Jeffrey Epstein, one of this era's most infamous child predators. Maj. Op. at 2. Then, adding insult to an already grievous injury, government prosecutors (by their own admission) affirmatively misled Ms. Wild—and dozens of others like her—regarding the status of their criminal investigation. Shameful all the way around. The whole thing makes me sick.

But—and it's a big "but"—my job, as a judge, isn't to dispense "justice," in the abstract, as I see fit. My role in our tripartite form of government is, as relevant here, to faithfully interpret and apply the laws that Congress has passed in accordance with the precedents that the Supreme Court has established. Sometimes I'll like the results; sometimes I won't. But adherence to the rule of law requires a certain outcome-blindness—or at least outcome-agnosticism. That constraint—that fact of being bound by rules that others have made—is what separates judges from elected politicians in our constitutional system. On days like

this—when my heart breaks for one of the parties before me—it's also what makes being a judge particularly tough.

So, about today's decision, I'll simply say the same thing I said last go-round: "It's not a result [I] like, but it's the result [I] think the law requires." *In re Wild*, 955 F.3d at 1198. And my obligation—my oath—is to the law.

TJOFLAT, Circuit Judge, with whom WILLIAM PRYOR, Chief Judge, and WILSON, NEWSOM, and LAGOA, Circuit Judges, join, concurring:

I concur wholeheartedly in the majority's opinion. I write separately to elaborate on the untoward effects a pre-charge CVRA model would have on the fairness of our courts and on the separation of powers. My concurrence proceeds in three parts. First, I will outline the litigation models Judge Branch's dissent[1] and the majority propose: one conferring judicially enforceable rights to crime victims pre-charge, and one conferring such rights to crime victims post-charge. Then, I will identify two fairness concerns the dissent's pre-charge model would raise. Finally, to bring us home, I will expand on the majority's discussion of the separation of powers doctrine and elaborate on why a pre-charge CVRA model would impermissibly drag federal courts into the business of prosecution. By laying these problems out in simple terms, my hope is that readers of today's decision will understand precisely why we are compelled to deny Ms. Wild's petition.

I.

To orient the reader, I will begin with a brief overview of the pre- and post-charge CVRA litigation models.

[1] Although I recognize that more than one dissenting opinion was written in this case, because multiple judges concurred in Judge Branch's opinion, I will refer to her dissent as "the dissent" throughout my concurrence.

A.

Let's start with the dissent's pre-charge model.[2] For now, I will keep the analysis high-level, as I will walk through the problems with this model in detail in parts II and III.

If a victim's CVRA rights are judicially enforceable pre-charge, then any pre-charge efforts to vindicate those rights must begin, as the majority opinion explains, with a freestanding civil lawsuit against the United States Attorney[3] for the district in which the alleged crime was committed. In his civil complaint, the victim would need to allege that there is probable cause to believe that a specific person—for shorthand, "the accused"—committed a specific federal crime, and that the victim is indeed a "crime victim" as defined by 18 U.S.C. § 3771(e)(2).[4]

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[2] It is worth noting at the outset that I believe the pre-charge model would likely be used most frequently in complex cases—think wire fraud, financial fraud, etc. There is little need for CVRA enforcement of a victim's rights in a one-on-one crime, as the victim will almost certainly have been contacted by federal investigators to assist in investigating the offense. Indeed, it is likely that the attorney for the federal government would also be in contact with the victim prior to filing a criminal complaint or seeking an indictment, as the victim would presumably be a key trial witness.

[3] I refer to the United States Attorney here and throughout this concurrence for ease of analysis. Of course, in the typical case, the victim would sue the specific attorney—typically an Assistant United States Attorney—in charge of the criminal investigation.

However, it is worth noting that, "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 1000 (1994). This presents an additional hurdle for the dissent's model, but because the Majority already ably discusses the sovereign immunity issue, Maj. Op. at 28–29 n.15, I will assume it is not a barrier to the victim's civil suit for the sake of analysis.

[4] That provision states: "The term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e)(2)(A).

The complaint would also seek some relief, presumably an injunctive order requiring the United States Attorney to honor the victim's rights under 18 U.S.C. § 3771(a)(5)—the "reasonable right to confer"—and (a)(8)—the "right to be treated with fairness and with respect."

In response, the United States Attorney would file an answer[5] to the complaint. It stands to reason that, in the answer, the United States Attorney would prefer a general denial—pursuant to Federal Rule of Civil Procedure 8(b)(3)—to avoid revealing any specific information that could jeopardize an ongoing federal investigation. Any attempt to keep the investigation under wraps, however, would likely be thwarted by the victim's requests for discovery of information from the investigation that is relevant to the CVRA claim—specifically the issue of probable cause. *See, e.g.*, *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1546 (11th Cir. 1985) ("The law's basic presumption is that the public is entitled to every person's evidence. The Federal Rules of Civil Procedure strongly favor full discovery whenever possible." (citations omitted)). Indeed, it is entirely possible that the crime victim's civil discovery would eventually subject the federal investigators to depositions.

[5] The crime victim's complaint and the United States Attorney's answer—along with any accompanying discovery—would presumptively be accessible by the public, *see Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (per curiam), absent a successful motion to seal the docket by one of the parties. I discuss some issues this raises in part III.

Ultimately, while the federal investigation is still ongoing, the district court would be required to hold a bench trial to determine whether there is probable cause to believe a federal crime has been committed, and if so, whether the victim who filed the complaint is a "crime victim" under the CVRA. This trial would presumably include the presentation of discovered evidence, testimony from some witnesses, fact finding, and, in the end, legal determinations by the district court. Assuming the district court concludes that (1) there is probable cause to believe a federal offense was committed and (2) the victim was indeed a "crime victim" of that offense,[6] the court must then go about the task of crafting an injunctive order[7] that mandates the United States Attorney's compliance with 18 U.S.C. § 3771(a)(5) and (a)(8) during the ongoing criminal investigation.

B.

Now, let's take a look at the majority's post-charge model. Under that model, a crime victim may seek to enforce his rights by filing a "motion" in a preexisting criminal action. *See* Maj. Op. at 26–27. The victim's motion would likely seek (among other things) an injunctive order requiring the United States

[6] Anything less than a finding that there is probable cause to believe the accused committed a federal crime and that the victim was harmed by that offense would render the pre-charge civil suit little more than a fishing expedition for information about an ongoing federal criminal investigation.

[7] *See infra* part III for a detailed discussion of the difficulties of constructing such an order.

Attorney to honor the victim's "reasonable right to confer" and "right to be treated with fairness and with respect"—just like the pre-charge model. But, under the post-charge model, there is no need to open a freestanding civil lawsuit, there is no need to interfere with the government's investigation, and there is no need to drag the United States Attorney into district court—the attorney is already before the court to prosecute the underlying criminal case. Instead, the post-charge model leaves only two narrow issues to be litigated in a hearing before the court: is the victim in fact a "crime victim" as defined in 18 U.S.C. § 3771(e), and if so, should an order issue to mandate the Government attorney's compliance with § 3771(a)(5) and (a)(8)?

Importantly, under this model, the crime victim's motion can be filed only *after* there has been a presumptive determination that a federal offense has been committed and that the accused is the one who committed it. To state the obvious, by the time a charge has been filed, the grand jury has already concluded that there is probable cause to believe that the accused committed the offense at issue.[8]

[8] The majority opinion suggests that the post-charge model is triggered by the levying of formal charges in an indictment. *See* Maj. Op. at 46–47 n.21. Though I take the majority's point on the meaning of the term "prosecution," *see id.*, I suggest that a finding of probable cause by a magistrate judge when issuing a warrant under Federal Rule of Criminal Procedure 4(a) or in a Rule 5.1 preliminary hearing would make the post-charge model operative as well. In both of those cases, the magistrate judge is asked to determine whether there is probable cause to believe that an offense has been committed and that the accused committed it. *See* Fed. R. Crim. P. 4(a), 5.1(e). For purposes of triggering the post-charge model, I see no reason why we should distinguish between a finding of probable cause made by the grand jury and the same finding made by a magistrate judge.

Indeed, in some instances, the accused may have already pled guilty by the time the crime victim files his motion, and thus any argument regarding the lack of probable cause would be waived. *See, e.g.*, *United States v. Pierre*, 120 F.3d 1153, 1155 (11th Cir. 1997) ("A defendant's unconditional plea of guilty, made knowingly, voluntarily, and with the benefit of competent counsel, waives all non-jurisdictional defects in that defendant's court proceedings." (alteration adopted)). As a result, there is no need in the post-charge model to determine whether probable cause exists to believe a crime that is currently being investigated was committed.

II.

With these models in mind, I turn to two fairness concerns that accompany the dissent's pre-charge CVRA litigation model.

A.

First, the dissent's pre-charge model raises the question of whether the individual accused of a federal crime must be joined in the crime victim's freestanding CVRA civil action. For a variety of reasons, I believe the answer must be "yes."

Rule 19 of the Federal Rules of Civil Procedure governs the joinder of parties. This Circuit has outlined a two-part test for determining "whether a party is indispensable" under Rule 19. *Focus on the Fam. v. Pinellas Suncoast Transit*

Auth., 344 F.3d 1263, 1279 (11th Cir. 2003) (citation omitted). "First, the court must ascertain under the standards of Rule 19(a) whether the person in question is one who should be joined if feasible. If the person should be joined but cannot be (because, for example, joinder would divest the court of jurisdiction) then the court must inquire whether, applying the factors enumerated in Rule 19(b), the litigation may continue." *Id.* at 1280 (citation omitted).

Part one of our two-part Rule 19 test focuses on whether a person is a "required party." A person is a required party to a lawsuit when (1) "in that person's absence, the court cannot accord complete relief among existing parties," or (2) where the absent party claims an interest relating to the action, disposing of the action without the absent party may "as a practical matter impair or impede the person's ability to protect the interest; or leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B)(i)–(ii).[9]

[9] The full text of Federal Rule of Civil Procedure 19(a)(1) states:

a) Persons Required to Be Joined if Feasible.

(1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

The second part of our test—drawn from Rule 19(b)—sets forth four nonexclusive factors "that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109, 88 S. Ct. 733, 737–38 (1968). These four factors include "(1) how prejudicial a judgment would be to the nonjoined and joined parties, (2) whether the prejudice could be lessened depending on the relief fashioned, (3) whether the judgment without joinder would be adequate, and (4) whether the plaintiff would have any alternative remedies were the case dismissed for nonjoinder." *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 848 (11th Cir. 1999).

So, a district court faced with a pre-charge CVRA lawsuit would first be asked to determine whether the accused is a "required party."[10] To address this question, let's look at two examples. First, consider a case in which the accused has entered into a nonprosecution agreement with the United States Attorney. If

> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

[10] The district court has a duty to join required parties on its own initiative. Fed R. Civ. P. 19(a)(2) ("If a person has not been joined as required, the court must order that the person be made a party.").

the crime victim's pre-charge suit ultimately seeks recission of the nonprosecution agreement between the accused and the government, it is abundantly clear that the accused is both a required *and* indispensable party. *See, e.g.*, Hon. William W. Schwarzer et al., Federal Civil Procedure Before Trial § 7:114 ("[A]ll parties to a contract and others having a substantial interest in it are indispensable in an action to rescind or set aside the contract." (quotation marks omitted)); *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." (cleaned up)). If the accused—a party to the contract—is not required, how could the district court go about "accord[ing] complete relief among existing parties"? Fed R. Civ. P. 19(a)(1)(A). It would be a strange result indeed for the court to rescind a contract that one of the signatories was not permitted to defend.

Second, even in a case without a nonprosecution agreement, I am convinced that the accused would be a required party in the civil suit. Regardless of the remedy sought, a crime victim's pre-charge CVRA suit will necessarily require a determination by the district court that there is probable cause to believe a federal offense has been committed and that the accused committed it. *See supra* part I.A. This is *exactly* the same determination a magistrate judge is asked to make at a

Federal Rule of Criminal Procedure 5.1 preliminary hearing. Fed. R. Crim. P. 5.1(e) ("If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.").[11] It goes without saying that a defendant's attendance is expected at the preliminary hearing, and the defendant would be permitted to cross-examine adverse witnesses and present evidence. *Id.* I see no reason that we should treat a pseudo-preliminary hearing in a pre-charge CVRA civil action any differently.

Indeed, my position finds some support in the text of Rule 19(a)(1)(B)(i): "A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if . . . that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Does the accused have an "interest relating to the subject of the" pre-charge CVRA suit? Undoubtedly. The pre-charge suit is litigating whether there is probable cause to believe that the accused committed a federal crime, and any ruling by the court on that issue may

[11] Indeed, this is also the same determination a magistrate judge is asked to make when determining whether an arrest warrant should issue. Fed. R. Crim. P. 4(a) ("If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it.").

ultimately affect the accused's rights. So then, would disposing of the action in the accused's absence impair the accused's ability to protect those rights? Of course. A district court allowing a crime victim to question witnesses adverse to the accused *in the accused's absence* stinks of unfairness.

Next, assuming the accused is a required party, the court must determine whether the accused is indispensable. *See Provident Tradesmens Bank & Trust Co*, 390 U.S. at 118–19, 88 S. Ct. at 742–43. In other words, the district court must decide whether the litigation may—"in equity and good conscience"—continue despite the accused's absence. Fed. R. Civ. P. 19(b). Surely it could not in the pre-charge suit. The first factor we have outlined in this consideration—"how prejudicial a judgment would be to the nonjoined and joined parties"—is nearly dispositive. *Laker Airways*, 182 F.3d at 848. A judgment in favor of the crime victim would necessarily entail a finding that there is probable cause to believe the accused committed a federal offense. As I will discuss *infra* part III, this determination places intense pressure on the United States Attorney to, at the very least, make an arrest of the accused.

The second factor—"whether the prejudice could be lessened depending on the relief fashioned"—militates for the same result. *Id.* Regardless of the relief fashioned, the district court, by rendering a judgment in favor of the crime victim, has already made a determination that there is probable cause to believe the

accused committed the offense. There simply is no way to lessen that prejudice to the accused, nor can the court lessen the pressure the decision places on the United States Attorney. So, although the third and fourth factors of the test—whether the judgment without joinder would be adequate and whether the plaintiff would have any alternative remedies were the case dismissed for nonjoinder—may, in some instances, cut the opposite direction, I see no way that the balance of these "pragmatic considerations" could ever weigh against a finding of indispensability. *In re Torcise*, 116 F.3d 860, 865 (11th Cir. 1997). As a result, the accused would need to be joined in any pre-charge CVRA suit.[12]

B.

With the accused's presence in the pre-charge civil suit secured, I turn briefly to my concerns about the accused's representation in that suit.

Pursuant to the Sixth Amendment, *criminal* defendants are entitled to the assistance of counsel. *United States v. Garey*, 540 F.3d 1253, 1262 (11th Cir. 2008) (en banc). That right attaches, for the purposes of the Sixth Amendment,

[12] Separately, I posit that the potential for unfairness to the accused in such a suit may require a judicially-created rule that the accused be permitted to attend the civil "preliminary hearing," regardless of the application of Rule 19. Otherwise, I have grave concerns that the district court will appear biased against the accused and will give the public the appearance of impropriety. *See* Code of Conduct for United States Judges Canon 2A (2019) ("An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. . . .").

when "a prosecution is commenced." *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207 (1991). In other words, a criminal defendant is entitled to counsel "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, *preliminary hearing*, indictment, information, or arraignment." *United States v. Gouveia*, 467 U.S. 180, 188, 104 S. Ct. 2292, 2297 (1984) (emphasis added) (citation omitted). But a *civil* litigant has no constitutional right to counsel, and while a court may appoint counsel for an indigent litigant, *see* 28 U.S.C. § 1915(e)(1),[13] the court has broad discretion in making this decision and should do so only in "exceptional circumstances," *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999).

Consider how the differing treatment of criminal defendants and civil litigants affects the majority's and dissent's positions. In the majority's post-charge model, the accused is a criminal defendant and thus has the right to counsel. *Garey*, 540 F.3d at 1262. But in the dissent's pre-charge model, the accused—assuming she must be joined in the suit—is no different than any other civil litigant and, as a result, has no right to counsel. This is an odd (and, I argue, unfair) result. In the criminal context, it is abundantly clear that a defendant is entitled to counsel at a preliminary hearing, consistent with the Sixth Amendment's "purpose of

[13] 28 U.S.C. § 1915(e)(1) specifically states that "[t]he court may request an attorney to represent any person unable to afford counsel."

protecting the unaided layman at critical confrontations with his adversary." *Gouveia*, 467 U.S. at 189, 104 S. Ct. at 2298. And yet, in a civil suit litigating *precisely* the same issue as a criminal preliminary hearing—that is, whether there is probable cause to believe the accused committed a federal offense—the dissent's model hangs the accused out to dry.

Now, one could argue that 28 U.S.C. § 1915(e)(1) provides a safety valve for this type of situation. And while I concede that § 1915(e)(1) may, in some circumstances, permit the district court to appoint counsel for a civil litigant, our case law makes clear that this mechanism should be used sparingly: "The appointment of counsel is . . . a privilege that is justified only by exceptional circumstances, such as where the facts and legal issues are so novel or complex as to require the assistance of a trained practitioner." *Dean v. Barber*, 951 F.2d 1210, 1216 (11th Cir. 1992) (quoting *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987) (citations omitted)). It is not immediately clear to me that a district court would conclude that a civil CVRA suit is "so novel or complex" as to require the appointment of counsel. And even if it were clear, an accused's request for court-appointed counsel would be a litigable issue, and different courts could reach different conclusions.

* * *

In short, I believe the operational difficulties that accompany a pre-charge civil CVRA suit open the door to rank unfairness. By litigating criminal law issues in a civil case, the dissent's model puts at risk the rights of the accused, rights that would otherwise be protected under the majority's post-charge criminal model. One can quibble with whether that *should* be the case as a theoretical matter, but our case law makes clear that it *cannot* be the case in practice. In any event, there is simply no way that Congress intended to create a freestanding cause of action that allows the rights of those accused of federal crimes to be litigated in civil cases in which they may not participate.

III.

Now, to the heart of the matter—the separation of powers.

There can be no doubt that the Executive Branch has exclusive power over prosecutorial decisions. *See United States v. Nixon*, 418 U.S. 683, 693, 94 S. Ct. 3090, 3100 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457, 19 L. Ed. 196 (1868) ("Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney . . . ."); *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 1656 (1985) ("[T]he decision of a prosecutor in the Executive Branch

not to indict . . . has long been regarded as [within] the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. Const. art. II, § 3)). This Executive Branch authority obviously includes the decision to investigate suspected criminal activity and whether to seek, or not seek, an indictment from the grand jury.

Federal courts may not arrogate the powers of the other branches of government.[14] *Application of President's Comm'n on Organized Crime*, 763 F.2d

[14] Puzzlingly, the dissent states that we must enforce the plain meaning of the CVRA "even if the proper interpretation raises policy concerns." Branch Dissenting Op. at 149 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 222, 123 S. Ct. 769, 790 (2003)). Of course, that is only true to the extent that the dissent's "plain meaning" interpretation of the CVRA does not render the statute unconstitutional; we will not enforce an unconstitutional statute. *See, e.g.*, *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 503, 127 S. Ct. 2652, 2686 (2007) (Scalia, J., concurring) (stating that when a statute creates an "unworkable and unconstitutional" regime, "it is our responsibility to decline enforcement"). For reasons I explain throughout part III, even if the dissent's read of the CVRA is correct, its arrogation of Executive Branch authority would nevertheless render the statute unconstitutional and thus unenforceable.

Of course, the dissent is correct that if the language of a statute is unambiguous, we will enforce the statute's plain meaning. Branch Dissenting Op. at 149–50 n.29. But "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380–81, 125 S. Ct. 716, 724 (2005). It is thus no answer to say that the separation of powers problems might not apply to Ms. Wild's case, *see* Branch Dissenting Op. at 153 n.30, or that we should consider the issue on an as-applied, case-by-case basis, *see id.* at 149–50 n.29, because we must consider the constitutional issues whether or not they apply to the specific facts of Ms. Wild's case, *Clark*, 543 U.S. at 380, 125 S. Ct. at 724. This is not some groundbreaking method of statutory interpretation—it is simply the canon of constitutional avoidance.

Now, if one believes that the CVRA unambiguously grants a crime victim a pre-charge freestanding cause of action, or if one believes the pre-charge model does not raise "serious constitutional problems," there is no issue. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 1397 (1988)). But I do not

1191, 1195 (11th Cir. 1985) ("What the separation of powers has been construed to prohibit is those arrogations of power to one branch of government which 'disrupt[] the proper balance between the coordinate branches.'" (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443, 97 S. Ct. 2777, 2790 (1977))). So, to maintain the separation of powers—which is based on "Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches" was essential to the preservation of liberty, *Myers v. United States*, 272 U.S. 52, 116, 47 S. Ct. 21, 25 (1926)—federal courts must stay out of the prosecution business. But despite repeated admonitions on this point from both the Supreme Court and this Court, the dissent's pre-charge CVRA litigation model would inevitably embed federal courts in the United States Attorney's investigation and prosecution of the case.

* * *

First, consider the issue of confidentiality. As I discussed in part I.A, there is a presumption that a crime victim's pre-charge civil action will be a matter of public record. *Wilson*, 759 F.2d at 1571 (stating that denying the public access to litigation records must be necessitated by a compelling governmental interest, and the denial must be narrowly tailored to that interest). This presents a very real

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believe the text is so clear, and—as I discuss below—I believe the separation of powers concerns that accompany the pre-charge model are severe. As a result, I am convinced that we are compelled to adopt the majority's post-charge model.

problem for the United States Attorney. In a high-profile case, the press will undoubtedly be active, and there is no guarantee in an unsealed case that witnesses—or even the crime victim—would not disclose confidential information. The disclosure of any confidential information regarding the government's ongoing investigation could derail the investigation and have serious detrimental effects on the well-being of informants and cooperating witnesses.[15] Indeed, witnesses called in the pre-charge civil case—whose testimony is now public—may become worthless to the United States Attorney in the subsequent criminal proceeding.

To this, one may say that district court judges should simply seal these pre-charge cases as a matter of course, or perhaps that we should treat them as we would a grand jury proceeding. I have two points in rebuttal. The first proposal—a presumption of sealing—is directly contrary to our precedent. *See id.* (discussing the "presumption of openness to civil proceedings"). It would be an extreme deviation from our caselaw and tradition to find a freestanding right of action in the CVRA and only then try to shut Pandora's box by kicking the presumption of

[15] For example, we have stated that, in the context of grand jury proceedings, secrecy is paramount to "encourage[] full and frank testimony on the part of witnesses." *Pitch v. United States*, 953 F.3d 1226, 1229 (11th Cir.), *cert. denied*, 141 S. Ct. 624 (2020). If witnesses in these pseudo-preliminary hearings thought their testimony—which could be released to the public—carried with it the threat of harm, it is difficult to imagine that they would ever be completely candid.

public access to the curb.[16] And while the second proposal—a grand-jury like proceeding—may have some appeal, grand jury secrecy is ensured by the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 6(e)(2)(b).[17] There is no such rule in the Federal Rules of *Civil* Procedure, and it is not clear to me that the judiciary could impose one.

* * *

Next, consider the catch-22 the crime victim's complaint creates for the United States Attorney. The government has two options when responding to the

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[16] As the Fifth Circuit has put it:

> Legal arguments, and the documents underlying them, belong in the public domain. American courts are not private tribunals summoned to resolve disputes confidentially at taxpayer expense. When it comes to protecting the right of access, the judge is the public interest's principal champion. And when the parties are mutually interested in secrecy, the judge is its only champion.

Binh Hoa Le v. Exeter Fin. Corp., No. 20-10377, 2021 WL 838266, at *8 (5th Cir. Mar. 5, 2021) (footnote omitted).

[17] Federal Rule of Criminal Procedure 6(e)(2)(B) reads:

> B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:
>
> (i) a grand juror;
>
> (ii) an interpreter;
>
> (iii) a court reporter;
>
> (iv) an operator of a recording device;
>
> (v) a person who transcribes recorded testimony;
>
> (vi) an attorney for the government; or
>
> (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

complaint: it can either admit that there is probable cause to believe the accused committed the crime, or it can deny. Both present serious problems.

If the United States Attorney concedes that there is probable cause, the public—and the crime victim—will reasonably wonder why the accused has not already been arrested or indicted. Of course, there are good reasons that the United States Attorney would prefer to continue investigating despite the existence of probable cause. Most obviously, probable cause is only enough for an indictment, not a conviction. To secure a conviction, the United States Attorney must gather enough evidence to overcome the presumption of innocence and prove guilt *beyond a reasonable doubt*. *See In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). In addition, it may be that the accused is being investigated for more than one crime. So, while the United States Attorney may hope to gather enough evidence to indict the accused on multiple crimes, the dissent's pre-charge model would have the government show its hand before it has fully built its case. The pressure this places on the government to seek an indictment or to make an arrest prematurely short circuits our system of justice.

Alternatively, what if the United States Attorney denies that there is probable cause to believe the accused committed a federal crime? On this point, I see two potential scenarios unfolding. On the one hand, the district court may—over the United States Attorney's denial—find probable cause, thereby influencing

the government's decision whether to file a complaint under Federal Rule of Criminal Procedure 3 or to seek an indictment. This plainly places federal courts in the prosecution business, and the public would surely see the outsized sway the court holds over the prosecutor's discretion.

On the other hand, the district court may agree with the United States Attorney and find no probable cause.[18] If the government then proceeds with its investigation and later indicts the accused on the same crime the crime victim's complaint alleged, what is the public left to think? In the pre-charge civil suit, the United States Attorney—wanting to continue its investigation unimpeded—is incentivized to make its *worst* case for probable cause. For example, the government may deny that certain evidence points to probable cause, or perhaps the government would take it easy on witnesses called by the crime victim in the civil case. But then, when the United States Attorney goes to indict, she would argue that the evidence *does* indicate that there was probable cause. Likewise, at

[18] Because the issue of probable cause would be tried as a bench trial, and not before a jury, the district court would be required to enter findings of facts and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1). As a result, there is simply no way that the district court can avoid making determinations regarding the existence—or non-existence—of probable cause and the facts that support that conclusion. To shirk this Rule 52(a)(1) responsibility would essentially preclude meaningful appellate review.

Of course, once the district court has made its findings and conclusions, the court's decision becomes a final, appealable order pursuant to 28 U.S.C. § 1291. The fact that the victim could appeal the district court's denial of probable cause—further protracting the pre-charge litigation—only increases the publicity drawn to the case and the potential for outside interference with the government's investigation.

the criminal trial, the United States Attorney would pull out all the stops when questioning the same witnesses she only lightly examined in the civil case.[19] Those paying careful attention would reasonably conclude that the government sandbagged in the civil case so that it could better prosecute the criminal one.

Unfortunately, the dissent's model leaves the United States Attorney with little room to maneuver. The government can (1) admit that there is probable cause and face the wrath of the public for failing to seek an indictment; (2) deny that there is probable cause, lose in the civil case, and still be expected by the public to prosecute the accused in a half-baked case; or (3) deny that there is probable cause, win in the civil case, be expected to prosecute the accused, go forward with the prosecution, argue that there is probable cause, and thus give the appearance of sandbagging.[20] Two rocks on one side, a hard place on the other.

[19] At the criminal trial, the United States Attorney would be prepared with additional ammunition to question these witnesses: their testimony from the civil trial. So long as the parties agree to the authenticity of the civil trial transcripts, the witnesses' prior testimony would be admissible as impeachment evidence. This could be very beneficial for the government. For example, if a cooperating witness's—who may have been somehow involved in the federal crime—testimony at the civil trial suggested the accused's guilt, the United States Attorney is equipped to impeach the cooperating witness should he attempt to flip his story at the criminal trial.

[20] There is, of course, a fourth scenario: the district court finds no probable cause, and the United States Attorney does not go on to prosecute the accused. I see little problem with that case, though one could express concern that a freestanding CVRA cause of action provides a platform for members of the public to falsely accuse individuals of committing federal crimes under the guise of filing a lawsuit.

* * *

Finally, consider how the pre-charge civil CVRA suit would likely proceed in practice. The crime victim would file suit alleging that the United States Attorney failed to honor 18 U.S.C. § 3771(a)(5)—the "reasonable right to confer"—and (a)(8)—the "right to be treated with fairness and with respect." After some motions, some discovery, and a pseudo-preliminary hearing, the parties would wind up before the district judge for a bench trial to determine whether the victim's CVRA rights have been violated. Assuming the court rules in favor of the victim, it must then craft a remedy—an injunction requiring the attorney to confer with the victim and to treat the victim with respect. This injunction poses two major problems for the dissent's model.

To start, how could a district judge craft an injunction that complies with Federal Rule of Civil Procedure 65? Under that rule, the order must be "specific[]" and "describe in reasonable detail . . . the act . . . required." Fed. R. Civ. P. 65(d)(1)(B)–(C). These requirements serve three purposes. First, they provide notice to the enjoined party of precisely what it must do to avoid being held in contempt—the party cannot be left guessing. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1311 (11th Cir. 1998). Second, a specific and reasonably detailed order is easy to enforce, while a vague order is not. *See Wynn Oil Co. v. Purolator*

Chem. Corp., 536 F.2d 84, 86 (5th Cir. 1976)[21] (stating that "(l)oose injunctive orders are neither easily obeyed nor strictly enforceable" (quoting 7 J. Moore, Federal Practice P 65.11, at 65-103 (2d ed. 1975) (alteration in original))). Third, an injunction that does not meet these requirements breeds disrespect for the courts and the rule of law.

In these pre-charge civil CVRA suits, an injunction requiring the attorney to "confer" with the victim and treat him "fairly" would be wide open to interpretation. It stands to reason that the United States Attorney would interpret the injunction as narrowly as possible—perhaps it only requires a short conversation with the victim about the investigation—while the victim would construe it as broadly as possible—perhaps it compels the government to cede to his wishes and rescind a nonprosecution agreement. Put simply, the parties would be left guessing about what the injunction required—such an injunction simply does not satisfy Rule 65. *See Robertson*, 147 F.3d at 1311.

But even if the district court could craft an adequately specific injunction, there is a second problem: compelling compliance with the injunction. Let's assume, for example, that the injunction requires the United States Attorney to attend an in-person meeting with the victim to discuss the criminal investigation.

[21] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

After the meeting, the crime victim may feel as though the United States Attorney is stalling a charging decision, or the victim may feel—for any number of reasons—that he was not treated fairly during the meeting. The victim could then return to the district court in which the civil action was filed and seek an order requiring the United States Attorney to show cause as to why she should not be held in contempt—and perhaps sanctioned—for failing to comply with the injunction. At the show-cause hearing, the United States Attorney would again have to explain why the investigation is being conducted a certain way or why certain information could not be disclosed to the crime victim. The district court would then need to dig around in the United States Attorney's investigation—potentially revealing confidential information—to discover exactly what had and had not been disclosed to the crime victim.[22] Ultimately, it is entirely possible that the district court would influence the course of the United States Attorney's investigation or order disclosure of otherwise confidential information to the crime victim.

[22] This is, in my view, the most serious interference with the executive branch's discretion. Before a magistrate judge has found probable cause in the criminal case—either under Federal Rule of Criminal Procedure 4(a) or Rule 5.1—the district court in the pre-charge civil case is being led on a fishing expedition by the victim to "discover" probable cause. Of course, even after probable cause has been found in the pre-charge suit, the district court is still required to poke around in the government's investigation to craft and enforce the injunctive relief requested by the victim. As the saying goes: "Once the camel gets its nose in the tent, the body will soon follow."

This contempt problem is not a one-and-done ordeal, either. At any step in the government's investigation, the crime victim could call upon the district court to meddle in the case. That problem is only compounded by large-scale cases in which multiple victims could—pursuant to the injunction—seek to have the United States Attorney conduct the investigation in conflicting ways.[23] This would essentially transform federal courts from impartial arbiters to prosecution micromanagers.

Plainly, such interference is unacceptable. The notion that a district court could have *any* input on a United States Attorney's investigation and decision whether to file a complaint or bring a case to the grand jury is entirely incompatible with the constitutional assignment to the Executive Branch of exclusive power over prosecutorial decisions. *Nixon*, 418 U.S. at 693, 94 S. Ct. at 3100. Additionally, it is hard to imagine a bigger intrusion on executive autonomy than the possibility that a United States Attorney will be held in contempt for

[23] The dissent makes much out of the fact that an Assistant United States Attorney acknowledged that Ms. Wild and others were "crime victims," arguing that this proves that crime victims will be readily identifiable and that my "parade of horribles" is actually a very manageable set of procedures. *See* Branch Dissenting Op. at 152–53. Not so fast. As an initial matter, the majority is correct to point out that "a prosecutor doesn't 'impair [her own] discretion' by sending a victim-notification letter." Maj. Op. at 35 n.17. The Assistant United States Attorney's actions do nothing to alleviate the separation of powers concerns the dissent's model raises. And, in any event, the dissent misses the point: we are not only deciding Ms. Wild's case today. The majority's opinion will set precedent for how CVRA suits will proceed in the Eleventh Circuit. The mere fact that an Assistant United States Attorney *in this case* recognized certain individuals as victims says nothing about how prosecutors and victims will act *in future cases*.

violating an injunction if her investigation is not handled as the victim and district court see fit.

Given the separation of powers problems the dissent's pre-charge model raises, and given that the majority's post-charge model avoids those problems, the Court is compelled by the canon of constitutional avoidance to adopt the latter model. *See Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 2241 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."). This conclusion is bolstered by the language of the CVRA, which explicitly states that none of the statute's provisions should be read to diminish prosecutorial discretion: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6).

IV.

So, for all the reasons stated in the majority's opinion, and for the fairness and separation of powers reasons I have outlined above, I believe the Court is required to deny Ms. Wild's petition.

BRANCH, Circuit Judge, joined by MARTIN, JILL PRYOR, and HULL, Circuit Judges, dissenting:

This petition for a writ of mandamus presents important issues of first impression regarding the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, that affect all crime victims in this Circuit. After over a decade of litigation, the Majority holds that Jeffrey Epstein's victims were not authorized to bring this petition because the CVRA does not permit stand-alone suits, and, therefore, it should have been dismissed at the very outset back in 2008. I respectfully dissent because (1) the plain text of the CVRA grants crime victims two "pre-charge" rights—the "reasonable right to confer with the attorney for the Government" and the "right to be treated with fairness"—and (2) it provides crime victims with the statutory private remedy of judicial enforcement of those rights "if no prosecution is underway" by filing a motion for relief "in the district court in the district in which the crime occurred." *See* 18 U.S.C. § 3771(a)(5), (a)(8), (d).

As background, a prior panel of this Court decided that the CVRA grants no crime victim any rights in the "pre-charge" period before an indictment. Thus, because the government never indicted Jeffrey Epstein, the panel held that his victims never had any CVRA rights. *In re Wild*, 955 F.3d 1196, 1219 (11th Cir. 2020). One member of the panel dissented, pointing out how (1) the plain text of the CVRA does not contain the requirement of a preexisting indictment or court

proceeding, and (2) the panel's holding materially rewrote the statute and gutted victims' rights under the CVRA. *Id.* at 1223–25 (Hull, J., dissenting).

Petitioner Wild filed a petition for rehearing *en banc*, which was granted. After vacating the panel opinion, we ordered briefing and oral argument on two issues:

> 1. Whether the [CVRA] . . . grants a crime victim any statutory rights that apply before the filing of a formal criminal charge by the government prosecutor?
>
> 2. If a crime victim has statutory rights under the CVRA that apply pre-charge, does the CVRA also grant a crime victim a statutory remedy to enforce a violation of their statutory rights?

The Majority now changes course and avoids the first issue completely, stating that "we needn't decide whether, in the abstract, the rights to confer and to be treated with fairness might attach prior to the formal commencement of criminal proceedings."

In answering only the second question, the Majority assumes implicitly, albeit in a cursory manner, that victims' rights "might attach" during the "pre-charge" period. But the Majority then holds that the CVRA does not give crime victims a private right to enforce their CVRA rights judicially unless the government decides to indict and commence court proceedings.[1] In other words,

[1] Because the prior panel held the victims had no pre-charge CVRA rights, it did not decide whether the victims had a statutory remedy to enforce any CVRA rights.

rather than discuss the "rights-creating" language in the CVRA and its relevance to the remedy issue, the Majority avoids the first *en banc* issue. *See Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (noting that the presence or absence of "'rights-creating' language" in a statute is "critical to the Court's analysis" of whether Congress intended to provide a private right of action to a particular benefitted class). The Majority then, in essence, adds a new requirement to the text of the CVRA—that there must be a preexisting indictment and ongoing court proceeding before a crime victim may file a motion for relief under § 3771(d). I dissent because the Majority errs in failing to enforce the plain text of the CVRA and in concluding that this case should have been dismissed at the outset in 2008.

My dissent proceeds in five parts. First, I review the facts surrounding the plea deal with Epstein. Second, I review the procedural history. Third, I turn to how Congress granted expressly to crime victims in § 3771(a)(5) and (a)(8) a "reasonable" right to confer and a right to be treated fairly and those rights attach pre-charge. Fourth, I review (A) how the Majority has misapplied and misinterpreted the Supreme Court's *Sandoval* decision; (B) how the CVRA text in § 3771(d) expressly provides victims who believe their CVRA rights were violated pre-charge with a statutory remedy—a private right to seek judicial enforcement of their statutory rights in § 3771(a)—when no prosecution is underway; (C) how the statutory interpretation errors in the Majority's reading of § 3771(d) and (f) leads it

to the opposite conclusion; and (D) how even under the Majority's analysis, the existence of the administrative remedy in § 3771(f) does not make the express judicial remedy in § 3771(d) unavailable to the victims, much less show that Congress did not intend a judicial remedy for crime victims in the "pre-charge" period. Fifth, I discuss why the CVRA plainly precludes any interference with prosecutorial discretion.

I. FACTS

As recounted by the Majority, following a 2005 report by the parents of a 14-year-old girl that then 52-year-old billionaire Jeffrey Epstein sexually abused their daughter, local Florida authorities—and later the FBI—began investigating Epstein. That investigation revealed that, between approximately 1999 and 2007, Epstein and multiple co-conspirators assembled a network of more than 30 underage girls whom he sexually abused at his mansion in Palm Beach, Florida. The victims included one of the initial petitioners in this case, Courtney Wild (Jane Doe 1), who was 15 years old when Epstein first sexually abused her.

Following the FBI's investigation, the U.S. Attorney's Office for the Southern District of Florida accepted the case for prosecution and assigned specific federal prosecutors to handle the case. The lead Assistant U.S. Attorney ("AUSA"), A. Marie Villafaña, sent a letter to the identified victims, informing each victim that she was protected by, and had rights under, the CVRA.

For example, in 2006, the U.S. Attorney's Office wrote petitioner Wild, stating that: (1) "you have a number of rights" under the CVRA, including "[t]he reasonable right to confer with the attorney for the United States in the case," "[t]he right to be treated with fairness," and "the right to petition the Court for relief" if Wild believed her CVRA rights were being violated; (2) "the U.S. Department of Justice and other federal investigative agencies, including the [FBI], must use their best efforts to make sure that these rights are protected"; and (3) "[y]ou also are entitled to notification of upcoming case events" and "[a]t this time, your case is under investigation." *See* 18 U.S.C. § 3771(a), (d)(3). In March 2007, the U.S. Attorney's Office began sending these letters to Epstein's other victims.

By May 2007, the U.S. Attorney's Office had completed an 82-page prosecution memo and a 53-page draft indictment against Epstein, charging him with federal crimes related to the sex trafficking of minor victims. The prosecutors were prepared and ready to indict Epstein.

Meanwhile, for over nine months in 2007 (from January to September), the U.S. Attorney's Office secretly engaged in discussions with Epstein's defense team regarding the forthcoming federal criminal charges. During this time, Epstein's defense team made multiple unsuccessful presentations to convince the U.S. Attorney's Office not to prosecute Epstein, maintaining he committed no federal

crimes. However, following a September 7, 2007 meeting with Epstein's defense team, U.S. Attorney Alexander R. Acosta[2] notified Epstein's team that "our Office [has] decided to proceed with the indictment."[3]

Despite this statement, the former U.S. Attorney subsequently changed his position for reasons not apparent from the record. Specifically, rather than pursue the indictment, the U.S. Attorney's Office entertained a non-prosecution agreement, whereby the U.S. Attorney's Office would defer federal prosecution of Epstein and his co-conspirators if Epstein pleaded guilty to two state prostitution-solicitation charges. And on September 24, 2007, the U.S. Attorney's Office and Epstein signed a seven-page agreement, entitled "Non-Prosecution Agreement," documenting the government's charging decision and Epstein's agreement with it.

The Agreement identified the federal crimes of Epstein and his co-conspirators[4] and provided that the U.S. Attorney's Office agreed that "prosecution in th[e] District for these offenses shall be deferred" provided that

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[2] From June 2005 to June 2009, Acosta was the U.S. Attorney for the Southern District of Florida.

[3] At that time, the State of Florida had already charged Epstein with one count of solicitation of prostitution.

[4] The Agreement listed the following federal crimes: (1) using and conspiring to use a facility of interstate commerce to persuade, induce, or entice minors to engage in prostitution, in violation of 18 U.S.C. §§ 2422(b), 371, and 2; (2) traveling and conspiring to travel in interstate commerce for the purpose of engaging in illicit sexual conduct with minors, in violation of 18 U.S.C. § 2423(b) and (e); and (3) recruiting, enticing, and obtaining a minor to engage in a commercial sex act, in violation of 18 U.S.C. §§ 1591(a)(1) and 2.

Epstein met certain conditions. Additionally, the Agreement extended immunity to Epstein's named co-conspirators, "Sarah Kellen, Adriana Ross, Lesley Groff, [and] Nadia Marcinkova," as well as "any potential co-conspirators" of Epstein's. In return for federal immunity, Epstein agreed to plead guilty to two low-level state solicitation of prostitution charges and serve 18 months in the county jail.[5]

A core term of the Agreement was that it remain secret from the public, even after it was finalized. The Agreement specifically provided that "[t]he parties anticipate that this agreement will not be made part of any public record," and that, should the United States receive "a Freedom of Information Act request or any compulsory process commanding the disclosure of the agreement, it will provide notice to Epstein before making that disclosure."[6]

The victims were not notified of the executed Agreement. Instead, for nine months after the September 2007 execution of the Agreement, the U.S. Attorney's Office continued to negotiate with Epstein's defense team about the extent of

[5] The Agreement also provided that the ongoing grand jury proceedings would be suspended. Epstein also agreed to pay for a government-selected attorney for those specific individuals that the government had already identified as "victims" under 18 U.S.C. § 2255, and to not contest jurisdiction, liability, or damages (up to an agreed-upon amount) should any of the identified victims elect to file suit for restitution pursuant to § 2255 (so long as the victim elected to proceed exclusively under § 2255, as opposed to a civil damages action).

[6] As the Agreement was being signed, Epstein's attorney Jay Lefkowitz e-mailed AUSA Villafaña, requesting: "Marie - *Please do whatever you can to keep this [Agreement] from becoming public*." (emphasis added). AUSA Villafaña assured Lefkowitz that the Agreement would be kept confidential.

crime victim notifications—a course of action which the U.S. Attorney's Office now admits is a deviation from the government's standard practice. Epstein's attorneys opposed any victim notifications, but the U.S. Attorney's Office insistently and repeatedly told Epstein's attorneys that it was statutorily obligated under the CVRA to notify and confer with the victims about the Agreement and upcoming events, including Epstein's state plea.[7]

Nevertheless, for still unknown reasons, the U.S. Attorney's Office acquiesced to the demands of Epstein's attorneys and did not notify all of the victims of the Agreement. Rather, the U.S. Attorney's Office affirmatively misled victims for months concerning the Agreement and the resolution of the federal case. For example, on January 10, 2008, the government sent Epstein's victims

[7] For example, in a December 6, 2007 letter, AUSA Villafaña informed Lefkowitz that "***[s]ection 3771 . . . commands that 'employees of the Department of Justice . . . engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)***.'" (emphasis added) (second ellipsis in original).

AUSA Villafaña went on to note that the "Non-Prosecution Agreement resolves the federal investigation by allowing Mr. Epstein to plead to a state offense. The victims identified through the federal investigation ***should be appropriately informed, and our . . . Agreement does not require the U.S. Attorney's Office to forego its legal obligations.***" (emphasis added)

AUSA Villafaña also sent Lefkowitz a draft of the Victim Notification Letter. She stated that the U.S. Attorney's Office would "not remove the language about contacting AUSA Villafaña or Special Agent Kuyrkendall with questions or concerns." Again, AUSA Villafaña wrote that "***federal law requires that victims have the 'reasonable right to confer with the attorney for the Government in this case.' 18 U.S.C. § 3771(a)(5)***." (emphasis added).

In a subsequent letter to Epstein's counsel, dated December 19, 2007, U.S. Attorney Acosta again addressed "the issue of victim's [*sic*] rights pursuant to Section 3771." U.S. Attorney Acosta stated: "***I understand that the defense objects to the victims being given notice of [the] time and place of Mr. Epstein's state court sentencing hearing. . . . We intend to provide victims with notice of the federal resolution, as required by law.***" (emphasis added).

more letters, this time misrepresenting that "[t]his case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation." Further, on January 31, 2008, Wild met with AUSA Villafaña, FBI agents, and another federal prosecutor, provided additional details of Epstein's sexual abuse of her, and expressed her hope that Epstein would be prosecuted. During that meeting, however, the federal prosecutors and FBI agents still did not disclose the Agreement to Wild. Then, in mid-June of 2008, Bradley Edwards, the attorney for Wild and several of Epstein's other victims, discussed with AUSA Villafaña the possibility of federal charges being filed against Epstein in the future. AUSA Villafaña failed to mention the Agreement or its terms.

On June 30, 2008, Epstein pleaded guilty in Florida state court to (1) solicitation of prostitution and (2) procuring a person under the age of 18 for prostitution. That same day, the state court sentenced Epstein to 18 months' imprisonment in the county jail.

Having still not been informed of the resolution of Epstein's federal case, on July 3, 2008, attorney Edwards sent a letter to the U.S. Attorney's Office communicating the victims' wishes that federal charges be filed against Epstein.

II. PROCEDURAL HISTORY

Because no prosecution was underway for years and lacking any information about the case, on July 7, 2008, Courtney Wild (proceeding as "Jane Doe 1") filed an emergency petition in "the district court in the district in which the crime occurred." *See* 18 U.S.C. § 3771(d)(3) ("The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred.").

Wild's petition alleged that she was a victim of Epstein's federal crimes and that the U.S. Attorney's Office had violated her CVRA rights (1) to confer with federal prosecutors, (2) to be treated with fairness, (3) to receive timely notice of relevant court proceedings, and (4) to receive information about restitution. Another of Epstein's victims identified as Jane Doe #2 later joined the petition.

Once the victims filed the petition in the district court, the U.S. Attorney's Office reversed course, contradicting what it had stated expressly in multiple earlier letters to the victims. The U.S. Attorney's Office now claimed that the CVRA rights never attached "pre-charge," and, therefore, because there was no criminal indictment (or information or complaint) ever filed, Epstein's victims never had any CVRA rights in the first place. It was only in the U.S. Attorney's Office's July 9, 2008, responsive pleading in the district court that Wild learned

that, over nine months earlier in September 2007, the U.S. Attorney's Office had signed an agreement with Epstein not to prosecute him for federal crimes if Epstein pleaded guilty to two state charges.

In August 2008, pursuant to a court order, the victims finally obtained a copy of the Agreement. What followed was more than a decade of contentious litigation between the victims, the government, and Epstein, who was allowed to intervene to oppose the victims' discovery requests. *See Doe No. 1 v. United States*, 749 F.3d 999, 1003 (11th Cir. 2014).

A. District Court's 2011 and 2013 Orders: Victims Have CVRA Rights That Attach "Pre-Charge"

During the district court proceedings, the government argued that "as a matter of law the CVRA does not apply before formal charges are filed, *i.e.*, before an indictment or similar charging document." *Does v. United States*, 817 F. Supp. 2d 1337, 1341 (S.D. Fla. 2011). The district court, in a published order, rejected this argument, holding that "the statutory language [of the CVRA] clearly contemplates pre-charge proceedings," and, therefore, "those rights must attach before a complaint or indictment formally charg[ing] the defendant with the crime" is filed. *Id.* at 1341–42.

Furthermore, in examining the statutory text and structure of the CVRA, the district court interpreted the CVRA as permitting a crime victim to initiate a freestanding cause of action to enforce the victim's CVRA rights where no

prosecution is underway—just as Wild did here. *Id.* at 1340–41. Specifically, citing § 3771(d)(3), the district court explained that "[i]f a prosecution is underway, the CVRA grants victims standing to vindicate their rights in the ongoing criminal action. If, however, a prosecution is not underway, the victims *may initiate a new action* under the CVRA in the district court of the district where the crime occurred." *Id.* (internal citation omitted). Having determined that the CVRA rights could attach pre-charge, the district court deferred ruling (pending discovery) on the issue of whether the particular rights asserted by the victims here—the rights to confer and to be treated fairly—attached, and, if so, whether the U.S. Attorney's Office violated those rights. *Id.* at 1343.

Thereafter, in a published order denying the government's subsequent motion to dismiss the action, the district court held that the "'reasonable right to confer . . . in the case' guaranteed by the CVRA at § 3771(a)(5) is properly read to extend to the pre-charge stage of criminal investigations and proceedings, certainly where—as here—the relevant prosecuting authority has formally accepted a case for prosecution." *Doe v. United States*, 950 F. Supp. 2d 1262, 1267 (S.D. Fla. 2013) (alteration in original).[8]

[8] For a number of years, discovery disputes continued. The district court ordered that the U.S. Attorney's Office disclose its correspondence with Epstein's defense counsel to the victims. Epstein, as an intervenor, appealed that order. *Doe No. 1 v. United States*, 749 F.3d 999 (11th Cir. 2014). In 2014, our Court heard that appeal. In affirming the discovery order (and finding that we had appellate jurisdiction), we noted that this very case was "*a proceeding ancillary to a*

B. District Court's February 2019 Order: Government Violated Victims' Rights

After years of litigation, in February 2019, the district court ruled that the U.S. Attorney's Office had violated the victims' CVRA rights to confer and to be treated fairly. *Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1218–22 (S.D. Fla. 2019). The court found that the U.S. Attorney's Office not only entered into the Agreement without conferring with the victims but also decided to "conceal the existence of the [Agreement] and mislead the victims to believe that federal prosecution was still a possibility."[9] *Id.* at 1218–19.

The district court directed the parties to brief potential remedies. *Id.* at 1222. Wild proposed several remedies, including an order scheduling a victim-impact hearing and a meeting between the victims and the prosecutors, the release of certain documents concerning the prosecutors' decision to enter into the Agreement, the recission of the Agreement, and the discovery of other materials.

C. District Court's September 2019 Order Closing Case

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criminal investigation," wherein the victims had brought this lawsuit to enforce their rights under the CVRA. *Id.* at 1001–04.

[9] Although the February 2019 order did not specifically mention the right to be treated fairly, the district court later clarified, in its order denying as moot Wild's requested remedies, that the petitioners' "right[s] to be treated with fairness and to receive notice of court proceedings . . . flow from the right to confer and were encompassed in the Court's ruling finding a violation of the CVRA." *Doe 1 v. United States*, 411 F. Supp. 3d 1321, 1329 (S.D. Fla. 2019) (footnote omitted). The government does not dispute that it never conferred with the victims and kept the Agreement secret. *See* Gov't En Banc Brief at 5.

Epstein was found dead in his prison cell of an alleged suicide on August 10, 2019.[10] On September 16, 2019, the district court entered an order closing the case. As to Epstein, the district court determined that "there is no longer an Article III controversy" given his death. As to the co-conspirators, the district court found it lacked jurisdiction over them.

D. Wild's Petition for Mandamus in this Court

Thereafter, on September 30, 2019, Wild filed a petition for writ of mandamus with this Court, seeking review of the district court's September 2019 order closing the case. *See* 18 U.S.C. § 3771(d)(3) ("If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus."). Her petition set forth various types of relief sought under the CVRA and explained why the petition was not moot.

The government opposed Wild's arguments on the merits and argued, in relevant part, that: (1) the action was moot because any rights the victims had already had been or would be vindicated; (2) the victims had no rights under the

[10] In July 2019, the U.S. Attorney's Office for the Southern District of New York ("SDNY") had unsealed an indictment charging Epstein with a sex-trafficking conspiracy and substantive sex trafficking involving conduct *that occurred in New York* (and Florida to some extent). While he was in custody on these charges, Epstein was found dead. Statement of Attorney General William P. Barr on the Death of Jeffrey Epstein (Aug. 10, 2018), available at https://www.justice.gov/opa/pr/statement-attorney-general-william-p-barr-death-jeffrey-epstein. In June 2020, the SDNY U.S. Attorney's Office indicted Ghislaine Maxwell for her participation with Epstein in the sexual abuse of numerous minor girls in New York and elsewhere. That case remains pending.

CVRA because the government never filed formal federal charges against Epstein in a court; and (3) the CVRA did not authorize the victims to file this case or authorize their requested remedies.

On April 14, 2020, a divided panel of this Court denied Wild's mandamus petition. A majority of the panel agreed with the government that the CVRA rights did not attach "pre-charge" and that the victims never had any statutory rights under the CVRA in the first place. *In re Wild*, 955 F.3d at 1219. The dissent disagreed, discussing why the victims had CVRA rights under the plain text of the statute. *Id.* at 1223–25 (Hull, J., dissenting). All agreed that if the victims had CVRA rights "pre-charge," the prosecutors egregiously violated them. Wild petitioned this Court for rehearing *en banc*. On August 7, 2020, this Court granted the petition, vacated the panel opinion, and directed the parties to brief two issues, which I discuss in turn.

III. CRIME VICTIMS' RIGHTS "PRE-CHARGE"

The first issue on which we ordered *en banc* briefing is whether the CVRA grants crime victims the rights to confer and be treated fairly prior to the filing of an indictment. This question is about the timing of when CVRA rights attach, not the scope of the rights. This issue, which was the basis of the prior panel's decision, is an important legal question of first impression in our Circuit. Nevertheless, the Majority declines to address it in its *en banc* decision. Because

the first question of whether the CVRA grants crime victims any rights prior to the filing of an indictment is inextricably intertwined with the second question of whether the CVRA grants crime victims a statutory remedy to enforce violations of those rights, I will address both in order.[11]

The CVRA grants "crime victims"[12] the following rights:

(1) The right to be reasonably protected from the accused.

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[11] Chief Judge Pryor's concurrence asserts that addressing the first en banc question results in an impermissible advisory opinion. It is well-established that "[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Thus, "a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." *Id.* (quotation omitted). Rather, a federal court's judgments must resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* (quotation omitted). Whether Epstein's crime victims had any CVRA rights that attached pre-charge was—and continues to be—a live controversy in this case. Indeed, the prior panel decision resolved this case on that very question. Consequently, addressing the first question issued by this *en banc* court does not result in an impermissible advisory opinion. *See id.* In any event, because I conclude that the CVRA grants crime victims a statutory remedy to enforce violations of their CVRA rights via a freestanding motion for relief under § 3771(d)(3) if no prosecution is underway, I must necessarily answer the first question—whether the CVRA grants crime victims any rights that attach pre-charge.

Chief Judge Pryor's concurrence contends that the dissents respond to the advisory opinion concern "by turning it into a jurisdictional issue" or advocating for an alternative holding. Similarly, he questions our purported "motivations" for answering the first *en banc* question. Lest there be any confusion, my response to the advisory opinion concern expressed in his concurrence is not cast in jurisdictional garb. Rather, as explained in the previous paragraph, because I conclude that the CVRA grants crime victims a statutory remedy to enforce violations of their CVRA rights via a freestanding motion for relief under § 3771(d)(3) if no prosecution is underway, I must necessarily answer the first question. Thus, my motivation for answering the first *en banc* question derives solely from a plain-text application of the statute.

[12] The CVRA defines a crime victim as "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e). The government agreed, during the course of the district court proceedings and on appeal, that petitioner Wild qualifies as a "crime victim" for purposes of the CVRA.

> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> (5) The reasonable right to confer with the attorney for the Government in the case.
>
> (6) The right to full and timely restitution as provided in law.
>
> (7) The right to proceedings free from unreasonable delay.
>
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a) (2008).[13] In this case, there are only two CVRA rights at issue: the conferral right set forth in subsection (a)(5) and the right to be treated with fairness and respect set forth in subsection (a)(8).

In determining when the statutory rights granted to crime victims in the CVRA attach, "[o]ur starting point is the language of the statute itself." *EEOC v.*

[13] These eight rights have not changed from 2004 to the present. However, in 2015, Congress added a ninth and tenth right to the CVRA. *See* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113(a)(1), 129 Stat. 227, 240.

STME, LLC, 938 F.3d 1305, 1313 (11th Cir. 2019) (quotation omitted). When "the language at issue has a plain and unambiguous meaning," we "need go no further." *United States v. St. Amour*, 886 F.3d 1009, 1013 (11th Cir. 2018) (quoting *United States v. Fisher*, 289 F.3d 1329, 1337–38 (11th Cir. 2002)); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). Furthermore, in determining the meaning of a statute, we "assume that Congress used the words of the statute as they are commonly and ordinarily understood and must construe the statute so each of its provisions is given full effect." *United States v. McLymont*, 45 F.3d 400, 401 (11th Cir. 1995). Therefore, "[w]e do not look at one word or term in isolation, but instead we look to the entire statutory context." *STME*, 938 F.3d at 1314 (quotation omitted).

Additionally, under the conventional rules of statutory construction, when Congress has used a more limited term in one part of a statute, *but left it out of other parts*, courts should *not* imply the term where it has been excluded. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation omitted)); *Russello v. United States*,

464 U.S. 16, 23 (1983) (declining to read a term appearing in two subsections of a statute to have the same meaning where there is "differing language" in the subsections). Thus, our statutory analysis begins (and ultimately ends) with the language of § 3771(a)(5) and (a)(8).

The plain language of § 3771(a)(5) and (a)(8) makes it clear that the rights attach prior to the filing of any indictment. Unlike the rights described in § 3771(a)(2), (a)(3), and (a)(4), which contain temporally-limiting language that ties those rights to post-indictment court proceedings, § 3771(a)(5) and (a)(8) contains no such language. The presence of temporally-limiting language in certain subsections of the CVRA and its absence in others demonstrates that when Congress wants to limit crime victims' rights to post-indictment court proceedings, it knows how to do so and does so expressly. *See Va. Uranium, Inc. v. Warren*, 587 U.S. ___, 139 S. Ct. 1894, 1900 (2019) (explaining that "in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write"); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 182 (2012) ("The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation has full force here. The silence of Congress is strident." (quoting *Comm'r of Internal Revenue v. Beck's Est.*, 129 F.2d 243, 245 (2d Cir. 1942))). Where, as here, the language Congress used is clear and unambiguous, our inquiry is complete. *CBS Inc. v.*

PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001). We are bound to "presume that Congress said what it meant and meant what it said." *Id.* (quoting *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (*en banc*)); *see also Keene Corp.*, 508 U.S. at 208. Therefore, under the plain language of the CVRA, the rights set forth in subsections (a)(5) and (a)(8) attach pre-charge.

Indeed, the remainder of the CVRA is structured in acknowledgement of the fact that the plain language of the CVRA provides that certain rights attach pre-charge. *See Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. __, __, 139 S. Ct. 1743, 1748 (2019) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989))); *Johnson v. United States*, 559 U.S. 133, 139 (2010) ("Ultimately, context determines meaning."). Specifically, subsections (c) and (d) expressly refer to the rights in subsection (a) and further bolster the conclusion that certain rights afforded to crime victims in subsection (a) attach pre-charge.

Section 3771(c), titled "[b]est efforts to accord rights," instructs that the Justice Department and "other departments and agencies of the United States engaged in the *detection, investigation, or prosecution of crime* shall make their best efforts to see that crime victims are . . . accorded[] the rights described in subsection (a)." 18 U.S.C. § 3771(c)(1) (emphasis added). There would be no

reason to mandate that federal agencies involved in crime "detection" or "investigation" ensure that crime victims are accorded their CVRA rights if those rights did not exist "pre-charge." Rather, the use of disjunctive wording in subsection (c)—the "or"—indicates agencies that fit either description must comply, even though in some circumstances the investigatory and prosecution phases may overlap. Furthermore, if victims have CVRA rights only *after* an indictment is filed, the other "departments and agencies" would then necessarily be involved, to some extent, with the "prosecution of [the] crime," and the use of the term "prosecution" would be sufficient to sweep in all relevant actors, making the "detection" and "investigation" language in subsection (c) superfluous. *See* Scalia & Garner, *supra*, at 176 ("If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision . . . , and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.").

Additionally, § 3771(d)(3) provides that "*if no prosecution is underway*," crime victims can assert the rights described in subsection (a) "in the district court in which a defendant is being prosecuted for the crime or, in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3) (emphasis added). Thus, the plain statutory language of subsection (d)(3) demonstrates that the CVRA grants crime victims' rights that apply prior to formal charges being filed.

It is noteworthy that the only other circuit court to address whether the statutory rights under the CVRA attach pre-indictment has reached the same conclusion, holding that "'[t]here are clearly rights under the CVRA that apply before any prosecution is underway.' Logically, this includes the CVRA's establishment of victims' 'reasonable right to confer with the attorney for the Government.'" *See In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (per curiam) (internal citation and quotation omitted). Notably, the facts of *In re Dean* are similar to the facts in this case. Specifically, after an explosion at a refinery owned and operated by BP Products North America Inc. ("BP") killed 15 people and injured more than 170, the Department of Justice ("DOJ") investigated and decided to bring federal charges against BP. *Id.* at 392–93. However, prior to the filing of an indictment or information, the government filed a sealed *ex parte* motion with the district court, advising the court that a plea agreement was imminent and requesting an order outlining the procedure it should follow under the CVRA. *Id.* at 392. The government indicated that due to the large number of victims, consulting the victims prior to finalizing the plea agreement was impracticable as were victim notifications of the pending agreement because media coverage could disrupt the plea negotiations and potentially prejudice the case. *Id.* Based on the government's concerns and its proposed recommendation for what would constitute a reasonable procedure under the CVRA given the circumstances, the

district court entered an *ex parte* order that prohibited the government from notifying the victims of a potential plea agreement until after one was executed. *Id.* at 393.

Thereafter, the government filed a criminal information under seal, and within days, the government and BP signed the plea agreement.[14] *Id.* Upon the signing of the plea agreement, the criminal information was unsealed, the plea agreement was announced, and notices were mailed to the victims "advising of scheduled proceedings and of their right to be heard." *Id.* Numerous victims came forward prior to, and at, the plea hearing and requested that the plea agreement be rejected based on the violations of their rights as crime victims under the CVRA. *Id.* The district court rejected the victims' request, and the victims filed a petition for a writ of mandamus in the U. S. Court of Appeals for the Fifth Circuit, pursuant to § 3771(d)(3). *Id.* Upon review, the Fifth Circuit concluded, as discussed above, that "'[t]here are clearly rights under the CVRA that apply before any prosecution is underway.' . . . includ[ing] the CVRA's establishment of victims' 'reasonable right to confer with the attorney for the Government.'" *Id.* at 394. The Fifth

[14] It is true that, unlike in this case, a criminal information was filed in *In re Dean*. 527 F.3d at 393. That point is a distinction without a difference, however, because in *In re Dean*, the court addressed the issue of the victims' CVRA rights prior to the filing of the criminal information.

Circuit also concluded, based on the unique facts of that case, that the government violated the victims' right to confer under § 3771(a)(5). *Id.*

We should join the Fifth Circuit in holding that under the plain language of the CVRA victims have a pre-charge right to confer with prosecutors. Since the government admits that it never conferred at any time with the victims, I also conclude under the factual circumstances of this case that the victims' conferral right was violated. However, I express no opinion as to the scope of the conferral right or at what precise point that right was violated in this case. I need go no further. As explained above, under the CVRA, the Epstein crime victims had a reasonable right to confer with the attorney for the United States and a right to be treated with fairness and these rights attach prior to any indictment or formal charges being filed and were violated. Accordingly, I now turn to the second question before this *en banc* court—whether the CVRA grants crime victims a statutory remedy to enforce a violation of their statutory rights.

IV. VICTIMS' STATUTORY REMEDY

As posited by the Majority, the second *en banc* issue requires us to determine whether Congress created in the CVRA "a private right of action"—*i.e.*, a statutory remedy in the form of a freestanding lawsuit to enforce a victim's CVRA rights prior to the commencement of formal criminal proceedings. The Majority and I agree that "[l]ike substantive federal law itself, private rights of

action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. Thus, our "judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* Our inquiry must focus on the "text and structure" of the statute. *Id.* at 288.

Applying *Sandoval* and its progeny to the CVRA, the Majority holds that, while Congress created a statutory remedy in § 3771(d) for crime victims to enforce their statutory CVRA rights by filing a motion for relief in an ongoing criminal proceeding, Congress did not authorize a freestanding private right of action outside the context of ongoing criminal proceedings. In other words, the Majority holds that when CVRA violations occur pre-charge, crime victims have no statutory remedy.

I disagree because, under the plain language of § 3771(d) and the CVRA's structure as a whole, Congress granted the victims a statutory remedy—a right to file a freestanding "[m]otion for relief" in "the district court in the district in which the crime occurred" when "no prosecution [is] underway." 18 U.S.C. § 3771(d)(3). Congress created an express right of action in § 3771(d)(3) and our inquiry should begin and end with the plain text of the CVRA. In holding otherwise, the Majority ignores the ordinary and common meaning of the statutory language in the CVRA and misapplies *Sandoval*. Because the Majority's holding

is premised on its application of *Sandoval*, I begin with a discussion of that decision and the flaws in the Majority's interpretation.

A. *Sandoval* and its application to the CVRA

As the Majority recognizes, in determining whether the CVRA authorizes crime victims to file a freestanding suit to enforce their CVRA rights outside of an ongoing criminal proceeding, *Sandoval* directs us to examine the text and structure of the statute for evidence of congressional "intent to create not just a private right but also a private remedy." 532 U.S. at 286; *Love v. Delta Air Lines*, 310 F.3d 1347, 1351–52 (11th Cir. 2002) (explaining that "legislative intent to create a private right of action [is] *the* touchstone of [the] analysis").

Two statutes were at play in *Sandoval*—§ 601 and § 602 of Title VI of the Civil Rights Act of 1964. Section 601 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. And § 602 provides that:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of [§ 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute

> authorizing the financial assistance in connection with which the action is taken. . . .

Id. § 2000d-1.

Under § 602, the DOJ enacted a federal regulation that forbid federal funding recipients from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. . . ." 532 U.S. at 278 (quoting 28 C.F.R. § 42.104(b)(2) (2000)). The Alabama Department of Public Safety accepted federal funding from the DOJ thereby subjecting itself to the provisions of Title VI. *Id.* Therefore, when the Alabama Department of Public Safety changed its policy and started administering written driver's license tests only in English, Sandoval (a Spanish speaker), on behalf of a proposed class, sued seeking to enjoin the English-only policy, arguing that it violated DOJ's regulation because it had the effect of discriminating against non-English speakers based on their national origin. *Id.* at 279. The district court concluded that Sandoval could sue under § 602 of to enforce the non-discrimination regulation and enjoined the English-only policy. *Id.* at 279. We affirmed. *Id.* Reversing, the Supreme Court held that § 602 created no private right of action to enforce the regulations promulgated under § 602 of Title VI. *Id.* at 281.

In reaching its decision, the Supreme Court explained that, despite the absence of express authorization in § 601, it was clear from the rights-creating

language in § 601 that Title VI provided for a private cause of action for individuals to enforce the statutory rights guaranteed to them in § 601 through which they could obtain injunctive relief and damages.[15] *Id.* at 279–80. But as the Supreme Court noted, § 601 did not apply to the issue raised in Sandoval's case.[16] *Id.* at 285. Thus, the issue in *Sandoval* was whether individuals had a private cause of action under § 602 to enforce violations of agency regulations. *Id.* at 286.

The *Sandoval* Court first looked to the language of § 602 for "rights-creating language"—*i.e.*, whether the statutory text evinced an intent on Congress's part to benefit a particular class of persons. *Id.* at 288–89. The *Sandoval* Court concluded that § 602 contained no "rights-creating" language. *Id.* The Supreme Court explained that "[s]tatutes that focus on the person regulated *rather than the individuals protected* create 'no implication of an intent to confer rights on a

[15] This conclusion flowed in part from the Supreme Court's earlier decision in *Cannon*, which in addressing § 901 of Title IX—which is patterned after § 601 of Title VI—recognized that both § 601 and § 901 contained "rights-creating" language that benefited a particular class of persons. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 683, 689–93 (1979). The Supreme Court concluded that, although nothing in the text of § 601 or § 901 authorized a private cause of action for a violation of the statute, the "rights-creating" language in the statutes demonstrated clear congressional intent to provide for a statutory remedy to enforce the rights guaranteed in § 601 and § 901. *Id.* at 694–703, 717. And, as noted in *Sandoval*, "Congress has since ratified *Cannon*'s holding." 532 U.S. at 280.

[16] The Supreme Court explained that § 601 forbid only intentional discrimination, not disparate impact discrimination. *Sandoval*, 532 U.S. at 280–81. Thus, it was "clear . . . that the disparate-impact regulation[] [at issue did] not simply apply [the provision] of § 601—since [the regulation] indeed forbid conduct that § 601 permits—and therefore [it was also] clear that the private right of action to enforce § 601 [did] not include a private right to enforce these regulations." *Id.* at 285–86. Accordingly, the Supreme Court explained that a right to enforce the regulations "must come, if at all, from the independent force of § 602." *Id.* at 286.

particular class of persons.'" *Id.* at 289 (emphasis added) (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). Section § 602 authorized federal agencies to issue regulations and empowered the agencies to enforce those regulations by terminating funding or "by any other means authorized by law." *Id.* at 289 (quoting 42 U.S.C. § 2000d-1). Thus, § 602—which "limit[ed] *agencies* to 'effectuat[ing]' rights already created by § 601"—was "yet a step further removed" from the types of statutes in which rights and private causes of action had been found because § 602 "focuse[d] neither on the individuals protected nor . . . on the funding recipients being regulated, but on *the agencies* that [would] do the regulating." *Id.* (emphasis added). The *Sandoval* Court also concluded that § 602's method "for enforcing its authorized regulations," such as withholding funding, similarly manifested no intent on Congress's part to create a private right of action under § 602 for individual persons to enforce agency regulations. *Id.* Rather, the Court reasoned that § 602's "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* at 290.[17]

[17] Further, § 602 provided numerous barriers even to an agency enforcement action, including that the agency must first notify the violators of their failure to comply with regulations and determine that compliance cannot be obtained by voluntary means. *Sandoval*, 532 U.S. at 289–90. These "elaborate restrictions on agency enforcement . . . tend to contradict a congressional intent to create privately enforceable rights through § 602 itself." *Id.* at 290. Because § 602 did not include any "rights-creating" language at all, there was no need for the Supreme Court to address "whether § 602's remedial scheme [could] overbear other evidence of congressional intent." *Id.* at 291.

We have emphasized that (1) *Sandoval* "clearly delimits the sources that are relevant to our search for legislative intent," and (2) "[f]irst and foremost, we look to the statutory text for 'rights-creating' language." *Love*, 310 F.3d at 1352 (quotation omitted). Thus, in order to determine whether Congress intended for crime victims, like Wild, to have a statutory remedy to enforce their CVRA rights outside the context of an ongoing criminal proceeding, we must apply the principles from *Sandoval* to the CVRA.

Under *Sandoval*, we must look for rights-creating language in the CVRA. *See Sandoval*, 532 U.S. at 288–89; *Love*, 310 F.3d at 1352 ("'Rights-creating language' is language 'explicitly confer[ing] a right directly on a class of persons that include[s] the plaintiff in [a] case,' or language identifying 'the class for whose especial benefit the statute was enacted.'" (citation omitted) (quoting *Cannon*, 441 U.S. at 690 n.13, and *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)). And it is clear that the rights-creating language that was lacking in § 602 is patently present in § 3771(a) of the CVRA. *See Sandoval*, 532 U.S. at 288 ("It is immediately clear that the 'rights-creating' language so critical to the Court's analysis in *Cannon* of § 601 is completely absent from § 602." (citation omitted)). The CVRA states that "[a] crime victim has the following *rights*," and goes on to list "[t]he reasonable *right* to confer with the attorney for the Government in the case," and "[t]he *right* to be treated with fairness and with respect for the victim's

dignity and privacy." 18 U.S.C. § 3771(a)(5), (8) (emphasis added). Accordingly, the CVRA's statutory language, with its clear and unmistakable focus on "the individuals protected" (crime victims), evinces Congress's clear "intent to confer rights on a particular class of persons." *See Sandoval*, 532 U.S. at 289 (quotation omitted). In other words, the text of the CVRA "expressly identifies the class Congress intended to benefit"—crime victims—and grants them certain statutory "rights." *Cannon*, 441 U.S. at 690.

And "it is a general and indisputable rule[] that where there is a legal right, there is also a legal remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries* *23). I agree with the Majority, however, that the presence of rights-creating language alone does not establish that crime victims have a statutory remedy. *Sandoval* made clear that the statute must "display[] an intent to create not just a private right but also a private remedy." 532 U.S. at 286 (emphasis added). Fortunately, unlike in *Sandoval*, in which the statute in question did not provide expressly for a private cause of action and the Court had to decide whether one should be implied—we need not concern ourselves with implying any remedy here. Rather, Congress's intent to provide crime victims with a private statutory remedy is crystal clear because it expressly provided for such a remedy in § 3771(d)—the ability to file a freestanding motion

for relief when no prosecution is underway to enforce applicable rights under § 3771(a).

B. Section 3771(d) expressly provides for a statutory remedy

Section 3771(d), entitled "Enforcement and limitations," provides as follows:

> **(d) Enforcement and limitations.**—
>
> **(1) Rights.**--The crime victim . . . may assert the rights described in subsection (a).
> . . .
> **(3) Motion for relief and writ of mandamus.**--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime *or, if no prosecution is underway, in the district court in the district in which the crime occurred*. The district court shall take up and decide any motion asserting a victim's right forthwith.

18 U.S.C. § 3771(d) (emphasis added). In the clear and unambiguous text of § 3771(d), Congress created a legal mechanism for crime victims to enforce their CVRA rights (*i.e.*, statutory remedy) whenever a violation of such rights might occur. Specifically, crime victims who believe that a violation of their statutory rights under the CVRA has occurred may file a motion for relief (1) "in the district court in which a defendant is being prosecuted for the crime," or (2) "*if no prosecution is underway*, in the district court in the district in which the crime occurred." *Id.* § 3771(d)(3) (emphasis added). As explained further below, read most naturally, the phrase "if no prosecution is underway" refers to situations in

which formal court proceedings have not yet begun—which is precisely what Epstein's victims faced.[18] This reading of the CVRA is the only one that gives full effect to the plain statutory text.

Notwithstanding the clear "rights-creating" language in the CVRA and Congress's express inclusion of a judicial mechanism to enforce those rights even "if no prosecution is underway," the Majority points to § 3771(d) and asserts that there is no "*Sandoval*-qualifying" clear expression of congressional intent to authorize a private right of action to enforce CVRA rights until after an indictment is filed. The Majority contends that this conclusion is compelled by the remaining structure of the CVRA for the following reasons: (1) § 3771(d)(3) authorizes a crime victim to file a "[m]otion for relief," and a "motion" cannot initiate a freestanding cause of action; (2) the phrase "if no prosecution is underway" in § 3771(d)(3) is best understood to refer to motions filed after the prosecution is completed—*i.e.*, post-judgment motions; and (3) § 3771(d)(6)—which states that "[n]othing in this chapter shall be construed to authorize a cause of action for damages" and "[n]othing in this chapter shall be construed to impair the

[18] The Majority expresses concern repeatedly that (1) the Epstein victims, like the plaintiffs in *Sandoval*, are trying to "*imply*" a cause of action where Congress has not expressly created one, and (2) *Sandoval* precludes "implying" a private right of action here. There is no need to "imply" a private right of action here because the CVRA expressly creates a judicial enforcement mechanism: a "[m]otion for relief" filed in "the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3). We can, and should, end our analysis with the plain text of the CVRA statute.

prosecutorial discretion of the Attorney General or any officer under his direction"—demonstrates that Congress did not intend to authorize a freestanding lawsuit outside the context of ongoing criminal proceedings. As explained further, contrary to the Majority's contention, nothing in the CVRA compels the conclusion that Congress did not intend to authorize a private statutory remedy outside the context of ongoing criminal proceedings.[19] Rather, for the reasons that follow, the CVRA as a whole supports the conclusion that Congress intended—and meant what it said—when it authorized expressly a private right of action for judicial enforcement of a crime victims' statutory rights set forth in subsection (a) if no prosecution is underway by the filing of a motion for relief in the district court in the district in which the crime was committed. *See* 18 U.S.C. § 3771(d)(3), (6).

C. Errors in the Majority's statutory interpretation of § 3771(d)

1. Failure to honor common, ordinary definition of "motion for relief" in § 3771(d)(3)

[19] I agree that statutory interpretation "requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them." *King v. Burwell*, 576 U.S. 473, 500–01 (2015) (Scalia, J., dissenting). As explained further in this opinion, the Majority's purportedly whole-text reading not only renders certain portions of the statute superfluous, but impermissibly rewrites the statute by adding to the text the following requirements: (1) all motions for relief must be filed in a preexisting court proceeding (or after an indictment is filed); and (2) a crime victim can never file a freestanding motion for relief.

The Majority insists that the term "[m]otion for relief" can mean only "a request filed within the context of a preexisting judicial proceeding." The common legal definition of "motion," however, is more general and broader than the definition the Majority ascribes to it. Specifically, a motion is "[a] written or oral application requesting a court to make a specified ruling or order." *Motion*, *Black's Law Dictionary* (11th ed. 2019); *see also Motion*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/motion (last visited March 16, 2021) (defining "motion" as "an application made to a court or judge to obtain an order, ruling, or direction"). This general definition encompasses a motion *initiating* a new proceeding, as well as one filed mid-proceeding, and the Majority's demand that we ascribe *only* a more specific, narrow definition to the word "motion" violates basic canons of statutory interpretation. *See* Scalia & Garner, *supra*, at 69 ("Words are to be understood in their ordinary, everyday meanings—unless context indicates that they bear a technical sense."); *see also In re Walter Energy*, 911 F.3d 1121, 1143 (11th Cir. 2018) ("To determine the ordinary meaning of a term, we often look to dictionary definitions for guidance.").

Further, although the Majority contends that "motion" can mean only a request filed in an ongoing judicial proceeding, the federal rules and statutes provide for quite a few motions that can be filed outside of an *ongoing* proceeding as free-standing motions. *See, e.g.*, 28 U.S.C. § 2255 (motions to vacate or correct

sentences); 28 U.S.C. § 1361 (mandamus proceedings are initiated as a new lawsuit); *see also In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) ("The mandamus proceeding before us is a *free standing cause of action*, brought by persons claiming to be CVRA victims against the district judge who denied them the right to appear and be heard." (emphasis added)); Fed. R. Crim. P. 41(g) (motions to return property); Fed. R. Crim. P. 17(c) (motion to quash a grand jury subpoena). Often, such motions, like the motion authorized under the CVRA, exist to provide third parties a vehicle to assert and protect their rights in the course of a criminal investigation to which they are not themselves a party.

For example, Federal Rule of Criminal Procedure 41(g), entitled "Motion to Return Property," provides that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may *move* for the property's return," and it instructs an aggrieved party to file "[t]he *motion* . . . in the district where the property was seized." Fed. R. Crim. P. 41(g) (emphasis added). Thus, Rule 41(g) authorizes third parties to file a freestanding "motion" to enforce their rights even before a prosecution is initiated, and the filing of such a motion is a separate enforcement action.

Another pertinent example is a motion to quash a grand jury subpoena under Fed. R. Crim. P. 17(c)(2). Motions under Rule 17(c)(2)—at least those directed at quashing subpoenas issued by a federal grand jury—are often filed prior to the

initiation of any formal court proceeding, *i.e.*, "pre-charge," because the subpoenas in question are usually issued by a grand jury during the course of an *investigation*.[20] And while federal grand juries are called into existence by order of the district court, *see* Fed. R. Crim. P. 6(a)(1), they operate more as instrumentalities of the U.S. Attorney's Office, *see* Wright & Miller § 101 ("In short, in the grand jury room it is the prosecutor who runs the show, a fact that has led some courts to observe that grand juries are for all practical purposes an investigative and prosecutorial arm of the executive branch of government." (quotation marks omitted)). Further, as we explained in *United States v. Eisenberg*, "[u]ntil an indictment is returned and a case presented to the United States District Court, the responsibility for the functioning of the grand jury is largely in the hands of the U.S. Attorney." 711 F.2d 959, 965 (11th Cir. 1983). However, the fact that the prosecutor exercises a lot of control over the grand jury "does not mean that the court cannot redress abuses by either the grand jury or a U.S. Attorney." *Id.* Rather, by filing a Rule 17(c) motion, an individual or company may ask the district court to quash an "unreasonable or oppressive" subpoena issued by the grand jury or to otherwise rein in perceived abuses by the grand jury or prosecutors. Fed. R. Crim. P. 17(c).

[20] Grand jury proceedings, by their very nature, occur *prior to the filing of charges*, as their purpose is to determine whether to bring charges is the first place. *See* 1 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 101 (4th ed. 2020).

In other words, Rule 17(c) authorizes an individual to file a freestanding motion to quash a subpoena, which essentially asks the district court to step in to ensure that the rights of third parties are respected, despite the fact that there is no ongoing court proceeding.[21] *See In re Grand Jury Proceedings*, 832 F.2d 554, 554 (11th Cir. 1987) (considering a third party's "claim of privilege to prevent disclosure of their state grand jury testimony"). The motion to quash need not—and in most cases could not—be filed in any ongoing court proceeding because in most instances no formal charges have been brought. *See, e.g.*, *id.* at 555; *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 996 (11th Cir. 1992); *In re Grand Jury Subpoena*, 831 F.2d 225, 226 (11th Cir. 1987). Rather, motions to quash subpoenas are filed in the district court overseeing the grand jury. In short, nothing precludes a "motion" from initiating a separate enforcement action.

The Majority also asserts that a reading of § 3771(d) that permits victims to file a freestanding motion for relief would cause the word "motion" to have two different meanings: (1) a freestanding motion; and (2) a motion filed in a preexisting judicial case. Wild's asserted interpretation of the statute, however, does not create this so-called dual meaning of motion. Rather, the common,

[21] In a prior interlocutory appeal in this case, we recognized the similarity between an action to quash a grand jury subpoena and an action to enforce CVRA rights, noting that "the victims' petition, like a grand jury proceeding, is ancillary to a criminal investigation." *Doe No. 1 v. United States*, 749 F.3d 999, 1005 (11th Cir. 2014).

general definition of the word motion is "[a] written or oral application requesting a court to make a specified ruling or order." *Motion*, *Black's Law Dictionary* (11th ed. 2019). While the CVRA may permit motions to be filed in either the district where the crime occurred or the district where the defendant is being prosecuted, the existence of alternative venues does not change the fundamental, ordinary, and common meaning of the word motion. That ordinary meaning—"a written or oral application requesting a court to make a specified ruling or order"—is consistent in both contexts. The text of the CVRA authorizes a motion for relief and specifically contemplates the filing of such a motion both before and after the initiation of a court proceeding. *See* 18 U.S.C. § 3771(d)(3). The controlling statutory interpretation "principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). The Majority can point to no canon of statutory construction that would justify deviating from the plain and ordinary meaning of the statute.[22]

[22] Chief Judge Pryor's concurrence asserts that the alleged dual meaning of motion demonstrates that I have failed to apply the whole-text canon and have erroneously read § 3771(a)(5), (a)(8), and (d)(3) in isolation. I disagree. As explained above, the meaning of the word "motion" remains the same regardless of whether the judicial enforcement mechanism is available pre- or post-charge. Furthermore, "[t]he whole-text canon refers to the principle that, when interpreting the meaning of a statute, the court should "consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner, *supra*, at 167. Many other canons are derived from the whole-text canon, including the surplusage canon. *Id.* at 168. Reading the CVRA as (1) providing crime victims with certain rights that attach pre-charge and (2) authorizing a private right of action to judicially enforce those rights

Moreover, as previously explained, there are other instances in the federal rules where the single word "motion," using its general, ordinary meaning, encompasses either a filing in an ongoing court proceeding or a freestanding filing in a district court outside the context of a court proceeding. *See* Fed. R. Crim. P. 41(g) ("A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return."); Fed. R. Crim. P. 17(c) ("On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."); *see also United States v. R. Enters.*, 498 U.S. 292, 297–98 (1991) (distinguishing the standard for judicial review of motions to suppress subpoenas issued pursuant to Rule 17 by a grand jury versus those "issued in the context of a prospective criminal trial").

Consequently, for the above reasons, the Majority errs in holding that a "motion for relief," as contemplated by § 3771(d)(3), must be filed in an ongoing court proceeding and cannot initiate a freestanding enforcement action.

2. Misinterpretation of "if no prosecution is underway" in § 3771(d)(3)

Additionally, the Majority asserts that the phrase "if no prosecution is underway" in subsection (d)(3) is best understood to refer to motions filed after the

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when no prosecution is underway adheres faithfully to the whole-text canon as it is the only one that gives full effect to the plain statutory text of the CVRA as a whole, while simultaneously avoiding rendering portions of the statute superfluous and impermissibly adding words to the text.

prosecution is completed—*i.e.*, post-judgment motions. This reading of § 3771(d)(3) is strained and does not comport with how the word "underway" is ordinarily or commonly understood. As the Majority acknowledges implicitly, in everyday parlance, if "a process, project, [or] activity" is not "underway," we generally understand that it has not yet begun. It therefore is not credible to say that the phrase "if no prosecution is underway" is just as likely to be commonly or ordinarily understood to refer to a post-prosecution scenario—*i.e.*, a judicial proceeding that has not only begun, but has fully completed.

Further, the Majority's reading of the CVRA—as requiring that the "[m]otion for relief" be filed only in an ongoing proceeding—creates two statutory interpretation problems. First, it effectively reads the phrase "if no prosecution is underway" out of the statute—a highly disfavored practice. *See* Scalia & Garner, *supra*, at 174 ("The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition. . . . As Chief Justice John Marshall explained: 'It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation.'" (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819))).

Second, the Majority's reading also impermissibly adds to the text of the statute the following requirements: (1) all motions for relief must be filed in a

preexisting court proceeding (or after an indictment is filed); and (2) a crime victim can never file a freestanding motion for relief. *See Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009) ("[W]e are not allowed to add or subtract words from a statute; we cannot rewrite it."); *see also Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute.").

Moreover, § 3771(d)(3) directs that "if no prosecution is underway" a motion for relief must be filed "in the district court in the district in which the crime occurred." *See* 18 U.S.C. § 3771(d)(3). This directive reveals the flaw in the Majority's interpretation of the phrase "if no prosecution is underway." Specifically, reading § 3771(d)(3)'s "if no prosecution is underway" language to refer only to post-judgment proceedings might require a victim to file a motion for relief in the district where the crime occurred in which there is no pending or closed court proceeding because the defendant was prosecuted in a different district. In other words, the motion for relief would initiate a freestanding cause of action, something the Majority insists the statute does not authorize. The Majority contends that this "supposed oddity" is alleviated because, under the Sixth Amendment, the district where the crime occurred will "almost always" be the district in which the defendant is charged and prosecuted. *See* U.S. Const. amend. VI (granting the accused the right to be tried "by an impartial jury of the State and

district wherein the crime shall have been committed."). But this explanation falls short.

First, had Congress intended the phrase "if no prosecution is underway" to mean that victims shall file a post-judgment motion for relief in the district court in which the defendant was charged or prosecuted, it could easily have said so explicitly.

Second, there are numerous circumstances—such as continuing offenses and offenses consisting of several transactions—in which a defendant is prosecuted in a different district than the one in which the crime occurred, notwithstanding the Sixth Amendment. *See* Fed. R. Crim. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."); Advisory Committee's Notes on 1944 Adoption of Fed. R. Crim. P. 18.[23]

In short, when engaging in statutory interpretation, we abide by the maxim that "[w]here the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must

[23] The Advisory Committee Notes to Rule 18 state that "numerous statutes have been enacted to regulate the venue of criminal proceedings, particularly in respect to continuing offenses and offenses consisting of several transactions occurring in different districts. These special venue provisions are not affected by the rule" and are consistent with the Sixth Amendment. Advisory Committee's Notes on 1944 Adoption of Fed. R. Crim. P. 18 (citations omitted).

presume that Congress said what it meant and meant what it said." *United States v. Strickland*, 261 F.3d 1271, 1274 (11th Cir. 2001) (quoting *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc)). The Majority's insistence that the CVRA's language—"motion for relief" and "if no prosecution is underway"—*could* be read to refer only to post-judgment proceedings turns this fundamental tenet of statutory interpretation on its head. Rather, we must presume that Congress "meant what it said," which is that in cases like this one where a prosecution is not yet "underway," victims are able to assert their "pre-charge" rights in motion for relief filed "in the district court in the district in which the crime occurred," which is what Wild did here.[24]

[24] Alternatively, the Majority suggests subsection (d)(3)'s "no prosecution is underway" language could also be read to refer specifically to the time between the filing of informal criminal charges—by way of, for example, a criminal complaint—and "the levying of formal charges in an indictment." Meaning, according to the Majority, that "even if Ms. Wild and the district court were correct that the 'no prosecution is underway' clause meant that CVRA rights apply—and that a freestanding lawsuit may be initiated—before formal charges are filed, they may yet be incorrect that those rights can be judicially enforced during a pre-complaint investigation." In support of this reading, the Majority points to the Sixth Amendment right to counsel, which is triggered when "a prosecution is commenced" by, at a minimum, a suspect's "initial appearance before a judicial officer." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 199 (2008). There is, of course, no such temporal limitation in the plain language of § 3771(d)(3). And this reading suffers from the same logical flaw as the Majority's primary alternative reading: if Congress meant to instruct victims to file a motion for relief in the district in which a defendant has been informally charged, it would have said so.

Furthermore, it is also not readily apparent why we should look to the Sixth Amendment right to counsel for our construction of "prosecution" and not instead to the Sixth Amendment's speedy trial right, which "may attach before an indictment and as early as the time of arrest and holding to answer a criminal charge." *Gouveia*, 467 U.S. at 190.

3. Misapplication of § 3771(d)(6)

In further support of its interpretation of § 3771(d)(3)'s "motion for relief" and "no prosecution is underway" language, the Majority emphasizes that § 3771(d)(6) explicitly precludes causes of action "for damages," which also supposedly demonstrates that Congress did not intend for a "motion for relief" to initiate a freestanding private cause of action. *See* 18 U.S.C. § 3771(d)(6) ("Nothing in this chapter shall be construed to authorize a cause of action for damages . . . ."). But § 3771(d)(6) actually supports the remedy pursued in this case.

Notably, the statute says nothing about the sort of declaratory or injunctive relief the victims sought here. While we generally "do not expect Congress to 'expressly preclude' remedies," *Christ v. Beneficial Corp.*, 547 F.3d 1292, 1298 (11th Cir. 2008), it follows necessarily that where Congress has done so, as in the CVRA, courts should be hesitant to exclude other remedies not listed in the preclusive language. *See Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 66 (1992) ("[W]e presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise."). To be sure, if Congress intended to preclude

all causes of action regardless of the relief sought, it would have been unnecessary to carve out money damages explicitly from the panoply of potential relief. *See Delgado v. U.S. Att'y Gen.*, 487 F.3d 855, 862 (11th Cir. 2007) ("[W]here Congress knows how to say something but chooses not to, its silence is controlling." (quotations omitted)). Thus, because Congress precluded causes of action for damages expressly, but did not mention declaratory or injunctive relief, there is no basis for concluding that Congress intended to preclude such other forms of relief.[25]

D. Misapplication of *Sandoval* to the administrative-enforcement scheme in § 3771(f)

I now turn to the Majority's argument that, under *Sandoval*, the existence of the administrative-enforcement scheme in § 3771(f) counsels against and

[25] In addition to its discussion of § 3771(d)(3) and (d)(6), the Majority also briefly notes that § 3771(b), the only other provision of the CVRA that explicitly mentions judicial enforcement of CVRA rights, does not authorize a cause of action and, in fact, suggests that the judiciary is responsible for enforcement only within the confines of a preexisting "proceeding." Subsection (b) specifies that "the court shall ensure that the crime victim is afforded the rights described in subsection (a)" "[i]n any court proceeding involving an offense against a crime victim." 18 U.S.C. § 3771(b). Thus, the Majority reasons that the fact that § 3771(b) directs a district court presiding over a court proceeding to "ensure" that crime victims are afforded their rights in the context of that proceeding necessarily precludes the enforcement of those same rights outside that context. I disagree because, if anything, § 3771(b) reinforces the separate and important role that § 3771(d) plays.

Subsection (b) simply makes clear that once a court proceeding has commenced, the district court has an ongoing duty to ensure that crime victims are accorded their rights, independent of whether a victim has filed a motion to enforce those rights. This duty is reinforced by the statute's prescription of a mechanism—in subsection (d)—for victims to enforce their rights that exist separate and apart from the district court's independent duty to ensure those rights are enforced in a proceeding over which it is presiding. 18 U.S.C. § 3771(d).

"undermines any suggestion that (without saying so) [Congress] intended to authorize crime victims to file stand-alone civil actions in federal court." I disagree because nothing in the administrative-enforcement scheme evidences any congressional intent to preclude the availability of the statutory legal mechanism Congress expressly provided for in § 3771(d)(3) where "no prosecution is underway." Moreover, as explained further, crime victims whose rights are violated in the pre-charge phase cannot avail themselves of the administrative scheme.[26]

Section § 3771(f) directs the Attorney General to "promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations" set out by statute. 18 U.S.C. § 3771(f)(1). Following this directive, DOJ adopted administrative regulations, codified at 28 C.F.R. § 45.10, that set forth an administrative "[c]omplaint process" and state that a victim's complaint "shall contain . . . [t]he district court case number" and "[t]he

[26] The Majority asserts that in addressing the fact that the administrative remedy in § 3771(f) is not available to crime victims who believe they have suffered a violation of their statutory rights under the CVRA during the pre-charge phase, I am somehow reasoning that "if there is no visible remedy, courts should fashion one." To be clear, that is not the basis of my reasoning. It is of course the task of the legislature to create a private remedy and, as explained previously, Congress created such a remedy expressly and unequivocally in § 3771(d)(3)—a "[m]otion for relief" filed in "the district court in the district in which the crime occurred." While the existence of an administrative remedy in *Sandoval* counseled against *implying* a private cause of action, we are not faced with an implied remedy case. We can, and should, end our analysis with the plain text of the CVRA statute and enforce the express private cause of action Congress authorized in § 3771(d)(3).

name of the defendant in the case." 28 C.F.R. § 45.10(c)(2)(iii)–(iv). If CVRA violations are found, DOJ officials may impose "disciplinary sanctions" and "[a] complainant may not seek judicial review of the [DOJ's] determination regarding the complaint." *Id.* § 45.10(c)(8).

The Majority argues that the regulations create a "robust administrative-enforcement scheme" which "undermines" any possibility that Congress intended to allow victims to file a stand-alone action to enforce any pre-charge rights the CVRA might grant them. In support of its position, the Majority primarily points to *Sandoval*'s statement that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. at 290. The Majority's reasoning is flawed.

First, the Majority misunderstands the breadth of the holding in *Sandoval*. *Sandoval* involved private plaintiffs seeking to enforce agency regulations under § 602 which contained no rights-creating language and set forth a comprehensive enforcement scheme for agencies to enforce their own regulations. *Sandoval*'s recognition that the administrative enforcement scheme set forth in § 602 undermined any "congressional intent to create privately enforceable rights" under § 602 did not alter its parallel recognition that plaintiffs had a private right of action to enforce their statutory rights under § 601—which contained rights-creating language similar to the CVRA. It follows, therefore, that notwithstanding

the existence of the enforcement scheme in § 3771(f), nothing precludes crime victims from pursuing the judicial enforcement mechanism set forth in § 3771(d)(3) to enforce their CVRA rights.

Indeed, under the Majority's own analysis, the CVRA expressly grants two possible remedial paths to crime victims post-indictment: *both* administrative and judicial enforcement of CVRA rights. Specifically, the Majority admits that if the government files an indictment, victims can file a motion for relief in a district court in that ongoing court proceeding or an administrative complaint filed with the DOJ under § 3771(f). Therefore, under the Majority's own analysis, the existence of the administrative remedy in § 3771(f) does not preclude the express judicial remedy in § 3771(d), much less show Congress intended to preclude that judicial remedy in favor of the § 3771(f) administrative scheme for crime victims whose rights have been violated in the pre-charge context.

Second, and perhaps most critically, the Majority's analysis forecloses all remedial paths to crime victims pre-indictment because the administrative-enforcement scheme in the CVRA is not available to the victims in this case. In *Sandoval*, it was not just that § 602 provided an alternative means to enforce the regulations; it was that the alternative means were actually *available* to enforce the regulation that the plaintiffs sought to enforce. In other words, the Supreme Court's ruling in *Sandoval* did not leave the government free to run afoul of

regulations promulgated under § 602, it simply recognized that the statute prescribed a different enforcement mechanism to address the government's violation. 532 U.S. at 290–91. But the administrative remedy in § 3771(f) requires that a victim's complaint contain a "district court case number" and "[t]he name of the defendant." 28 C.F.R. § 45.10(c)(2)(iii)–(iv). Therefore, crime victims, like those in this case, who suffer violations of their CVRA rights in the pre-charge period when there is no prosecution underway, would not be able to avail themselves of this administrative remedy.[27]

The Majority also argues that our post-*Sandoval* decision in *Love v. Delta Air Lines* supports the conclusion that the creation of the administrative scheme in § 3771(f) undermines any possibility that Congress intended for crime victims to be able to file freestanding actions to enforce their CVRA rights, but the Majority's reliance on *Love* is misplaced. In *Love*, we held that no implied private cause of action existed under the Air Carrier Access Act of 1986 ("ACAA"), 49 U.S.C. § 41705, for disabled individuals alleging a violation of the ACAA's anti-

[27] The Majority itself never says that these victims can vindicate their rights through the administrative process in § 3771(f). Rather, the Majority states that the victims' rights "*might be enforceable* through, say, political or administrative channels." (emphasis added). But given the language of the administrative scheme—which requires a victim's complaint to contain a district court case number—it is unclear to what political or administrative channels the Majority refers.

discrimination provision.[28] 310 F.3d at 1358–59. In reaching this holding, we applied the principles set forth in *Sandoval*, emphasizing that the focus was on interpreting the ACAA to determine whether it displayed a congressional "intent to create not just a private right but also a private remedy." *Id.* at 1352 (quotation omitted). We noted that it was "indisputable that the ACAA d[id] not expressly provide a private entitlement to sue in district court," and, therefore, if there was a private remedy, it would be an implied remedy. *Id.* at 1354. However, "the surrounding statutory and regulatory structure create[d] an elaborate and comprehensive enforcement scheme that belie[d] any congressional intent to create a private remedy." *Id.* Specifically, § 41705 provided for "three separate enforcement mechanisms": (1) individuals could file an administrative complaint with the Department of Transportation ("DOT"), and DOT was required to investigate all complaints with its broad sanction powers; (2) the air carriers were required to have internal dispute resolution mechanisms; and (3) individuals "with a substantial interest in a DOT enforcement action" could seek judicial review of the DOT decision in a United States Court of Appeals. *Id.* at 1354–57. We concluded that the two administrative enforcement mechanisms *paired with the right to seek judicial review* "strongly undermine[d] the suggestion that Congress

[28] The ACAA provides, in pertinent part, that "[i]n providing air transportation, an air carrier . . . . may not discriminate against an otherwise qualified individual on" certain grounds related to that individual's "physical or mental impairment." 49 U.S.C. § 41705(a).

also intended to create by implication a private right of action in a federal district court but declined to say so expressly." *Id.* at 1357.

This case is materially different from *Love*. First, unlike the ACAA, the CVRA expressly grants crime victims a right to file a motion for relief directly in a district court. *See* 18 U.S.C. § 3771(d)(3). Thus, the question in *Love*—whether there was an *implied* private remedy available for violations of the ACAA—is materially different from the question in this case. Second, under the administrative enforcement scheme of the ACAA, individuals who believed they were discriminated against had a right to file an administrative complaint and to seek judicial review of the final administrative decision. Here, it is clear that the CVRA grants crime victims certain rights that attach pre-charge, but, as discussed previously, crime victims cannot seek to vindicate violations of those rights through the administrative scheme in § 3771(f). This difference makes it clear that *Love*—and *Sandoval* for that matter—are distinguishable.

Moreover, because the administrative-enforcement scheme in § 3771(f) is not available to the victims here, the Majority's ruling—that the CVRA does not authorize a freestanding cause of action—leaves Epstein's victims completely without a remedy for the violation of their CVRA rights, despite the existence of rights-creating language in the CVRA and Congress's creation of a judicial remedy even when there is "no prosecution underway."

Accordingly, as explained previously, the Majority's misapplication of *Sandoval* and its flawed statutory interpretation of the CVRA as a whole results in its erroneous holding that there is no "*Sandoval*-qualifying" clear expression of congressional intent to authorize a private right of action to enforce CVRA rights until after an indictment is filed. Contrary to the Majority, I would hold that the CVRA's plain text, structure, and "the physical and logical relation of its many parts" provides crime victims with a clear statutory remedy to seek to enforce their statutory rights "pre-charge." *See* Scalia & Garner, *supra*, at 167.

V. PROSECUTORIAL DISCRETION

In an attempt to overcome the plain language of the CVRA, the Majority emphasizes policy concerns that permitting victims to file a motion for relief in a federal district court—in the absence of a preexisting indictment or court proceeding—would result in a number of ills, chief among them "unduly impairing prosecutorial discretion." But statutory interpretation begins and ends with the plain language of the statute, and we are required to enforce that plain meaning even if the proper interpretation raises policy concerns. *See Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003). "The wisdom of Congress' action . . . is not within our province to second guess." *Id.*[29] But even assuming *arguendo* that such policy

[29] I am not in any way suggesting that we ignore constitutional concerns. Such concerns, however, are simply not present in this case nor has the government raised any as-applied challenge to the constitutionality of the statute. Similarly, because I would hold that the statutory

concerns could justify abandoning the plain text of the statute, the Majority's concerns fall apart upon closer inspection.

For example, the Majority and Judge Tjoflat's concurring opinion explain that enforcing victim's rights pre-charge would require judges to identify victims and would risk judicial interference with ongoing "law-enforcement raids, warrant applications, arrests, witness interviews, lineups, and interrogations." In other words, pre-charge enforcement would permit victims and/or judges to exert "undue influence" over each step of criminal investigations and the government's charging decisions. I disagree because the text of the CVRA alleviates any concern that pre-charge enforcement would unduly impair prosecutorial discretion.

As an initial matter, the Majority, Judge Tjoflat's concurring opinion, and I agree that the Executive has exclusive and complete authority over charging decisions. *See United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to

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text is clear and unambiguous, the canon of constitutional avoidance discussed in Judge Tjoflat's concurring opinion never comes into play. *See Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (explaining that this canon "has no application absent ambiguity" (quotation omitted)).

Judge Tjoflat's concurring opinion argues that we are just deciding the case before us but are setting precedent for how the CVRA will be applied and such suits will proceed in the future. True to some extent. But there are any number of instances where the attachment and enforcement of the CVRA's conferral right pre-charge will not impair prosecutorial discretion. The fact that there may be some hypothetical future cases in which the application of the CVRA rights pre-charge *might* possibly intrude on prosecutorial discretion is not a basis for ignoring the plain language of the statute. Rather, the vehicle for addressing any risk to prosecutorial discretion by the parade of horribles posited by the Majority and Judge Tjoflat's concurring opinion is through an as-applied constitutional challenge—which the government is free to bring in a future case should such concerns arise.

prosecute a case . . . ."); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as [within] the special province of the Executive Branch."). Section 3771(a)(5) in no way undercuts this fundamental precept.

First, § 3771(d)(6) expressly prohibits interference with prosecutorial discretion by mandating that nothing in the Act "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6).

Second, the plain language of § 3771(a)(5) similarly makes it clear that no such intrusion on prosecutorial discretion will occur. Specifically, § 3771(a)(5) does not simply grant victims an unfettered conferral right. Rather, it merely grants a "*reasonable*" conferral right, and reasonableness is a common and forceful limiting principle that is familiar throughout the legal field. *See, e.g.*, *Hardy v. Cross*, 565 U.S. 65, 69–70 (2011) (explaining that for purposes of the Sixth Amendment's Confrontation Clause, the "lengths to which the prosecution must go to produce a witness" is a "question of reasonableness"); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.'"); *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989) (prison regulations affecting the sending of publications to prisoners must be analyzed under a reasonableness standard); *Strickland v. Washington*, 466 U.S.

668, 688 (1984) ("The proper measure of attorney performance" under the Sixth Amendment "remains simply reasonableness under prevailing professional norms."); *Hensley v. Eckerhart*, 461 U.S. 424, 426 (1983) (explaining that "in federal civil right actions the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" (quotation omitted)).

Furthermore, equally as limiting as the reasonableness principle is that the conferral right granted to victims in § 3771(a)(5) is limited to conferral "*with the attorney for the Government in the case*"—not with police or investigators. *See* 18 U.S.C. § 3771(a)(5). And nothing in the CVRA suggests any steps or decisions that a prosecutor must take or make in his charging decision. Thus, a plain reading of the statute indicates that there will be no judicial interference with a prosecutor's decision. If a prosecutor, after speaking with the victim, decides not to prosecute or take the case to a grand jury, there will be no violation for the district court to remedy.

The Majority's and Judge Tjoflat's concurring opinion's parade of horribles about mini-trials to identify crime victims and conferral "pre-charge" are red herrings. In the mine-run of cases that have advanced to the stage where a government attorney is assigned, it will be obvious—as it was in this case—who the identifiable victims are. The government's actions in this case prove this point:

AUSA Villafaña acknowledged the status of petitioner and others as "victims" of Epstein and sent them a letter stating that "as a victim . . . of a federal offense, you have a number of rights," including "[t]he reasonable right to confer with the attorney for the United States in the case" and "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." AUSA Villafaña had no trouble identifying Epstein's victims as "crime victims" under the statute and treating them as such.[30]

Moreover, the Majority's concern about impairment of prosecutorial discretion applies equally post-indictment. Specifically, the Majority does not dispute that, post-indictment, the conferral right in § 3771(a)(5) attaches and is

[30] The Majority and Judge Tjoflat's concurring opinion vigorously argue that identifying who is a crime victim pre-charge presents "three intractable problems": (1) courts, not prosecutors, deciding if any offense occurred; (2) the need for a "mini-trial" to figure out whether a federal offense occurred and who was a victim; and (3) courts exerting pressure on the government's charging decision by conducting such mini-trials. Yet the CVRA's definition of a crime victim is straightforward: a "crime victim" is "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e). Even in this massive sex-trafficking case in which no formal charges were ever filed, the prosecutors had no trouble determining that a federal offense had occurred and identifying 30 crime victims.

Judge Tjoflat's concurring opinion expresses concern that the fact that the government in this particular case was able to identify victims does not establish necessarily that the government will be able to do so in future cases. Nevertheless, the concerns identified by the Majority and Judge Tjoflat's concurring opinion surrounding the identification of victims are undermined by the fact that in the many years since the Fifth Circuit's opinion in *In re Dean* and the district court here ruled that crime victims have rights pre-charge, the government has not presented any evidence suggesting any difficulties in identifying crime victims of federal offenses or of mini-trials to do so. I stand by my conclusion that both the attachment pre-charge of crime victims' rights to reasonable conferral and to be treated fairly and with respect and the enforcement of those rights through a freestanding cause of action via a motion for relief if no prosecution is underway—as authorized expressly by Congress—do not impair prosecutorial discretion in this case.

enforceable via a motion for relief under § 3771(d)(3). Given the number of discretionary post-indictment decisions a prosecutor may make—reducing charges, upgrading charges, dismissing charges, and granting immunity—it is unclear how the mere filing of an indictment alleviates the concerns about "unduly impairing prosecutorial discretion." Rather, the same concerns set forth by the Majority are present regardless of whether a motion for relief is filed in the pre-charge phase or the post-indictment phase, which leads to the conclusion that these prosecutorial discretion concerns are overblown. Therefore, concerns about undue interference with prosecutorial discretion exist regardless of whether a motion for relief under § 3771(d)(3) is filed pre- or post-indictment. In any event, the CVRA expressly precludes such interference; thus, this concern certainly provides no basis for ignoring the plain language of the statute. Accordingly, in enforcing the plain language of the CVRA, prosecutorial discretion is in no way compromised.

VI. CONCLUSION

I would decide both *en banc* issues and hold that the CVRA's plain text: (1) granted the crime victims two statutory rights that attached in the "pre-charge" period—the reasonable right to confer with the attorney for the Government and the right to be treated with fairness and respect; and (2) granted the crime victims a statutory remedy—a private right to seek judicial enforcement of their statutory rights. *See* 18 U.S.C. § 3771(a)(5), (a)(8) and (d)(3). Therefore, I would remand

the case back to the panel to address in the first instance the issue raised in the original mandamus petition in this Court: whether the district court correctly concluded that, given Epstein's death, no remedy was available.

The Majority admits that it is drawing a "line limiting judicial enforcement to the post-charge phases of a prosecution"—one that "marks a clear and sensible boundary on the prosecutorial-discretion spectrum" and "squares with the background expectation of judicial involvement." The flaw is that the Majority's line-drawing is of its own making and does violence to the statutory text. *See Bostock v. Clayton Cty., Georgia*, 590 U.S. ___, 140 S. Ct. 1731, 1823 (2020) (Kavanaugh, J., dissenting) ("[O]ur role as judges is to interpret and follow the law as written, regardless of whether we like the result . . . [it] is not to make or amend the law"); *See Harbison v. Bell*, 556 U.S. 180, 199 (2009) (Thomas, J., concurring) (A statute's "silence with respect to a [temporal or procedural] limitation in no way authorizes [courts] to assume that such a limitation must be read into [the] subsections . . . in order to blunt the slippery-slope policy arguments of those opposed to a plain-meaning construction of the provisions under review.").

For all of these reasons, I respectfully dissent.

HULL, Circuit Judge, dissenting:

Respectfully, I join Judge Branch's Dissent in full. I write separately to add five points. To start, I discuss how the Majority skips over the first en banc issue and why we should answer whether the Epstein victims' statutory conferral rights in § 3771(a) attached pre-charge. That issue was the basis of the Panel opinion and was briefed and argued en banc. It involves an important legal issue of first impression in our Circuit. Significantly too, deciding whether under § 3771(a) Ms. Wild had statutory conferral rights pre-charge that were violated is integral to this ongoing dispute and the proper statutory interpretation of whether the remedy provision in § 3771(d) applies pre-charge.

Second, as to the merits of that first en banc issue, I agree with Judge Branch's Dissent that under the plain language of the CVRA victims have reasonable rights to confer with prosecutors and these rights attach pre-charge, and that the Epstein victims' rights were violated. Branch Dissenting Op. at 120.

Yet, to the extent one credits the Majority's concerns about prosecutorial discretion, I set forth a narrow "conferral right" ruling in Section II.A., which holds that after the government signed the Agreement, the Epstein victims had conferral rights under § 3771(a)(5). Once the ink was dry on the Agreement, the U.S. Attorney had exercised his discretion and made his charging decision. The government's post-Agreement misconduct—not conferring and telling the victims

about the Agreement, its terms, and upcoming state court events for nearly a year—alone is sufficient to establish CVRA violations. While not all the conferral rights that the victims request, this narrower ruling would decide the merits of the first issue and tee up concretely the second issue.

Third, as to the second issue, I discuss Sandoval in detail because the Majority uses snippets out of context and fails to tell the whole Sandoval story. In Sandoval there was no statute granting a private right of action, and the Sandoval inquiry was whether to imply a private right of action for Ms. Sandoval to enforce agency regulations. Here, though, the question is whether a specific statute, § 3771(d) enacted by Congress, expressly grants Ms. Wild, as a crime victim, a private right of action to enforce her own CVRA statutory rights (not agency regulations). I explain how the Majority misapplies Sandoval.

Fourth, I review the Amicus Brief of three U.S. Senators that also supports Judge Branch's conclusion that the CVRA's plain text does not condition a victim's rights and remedy upon a preexisting indictment. Fifth, I discuss why the Majority's ruling has far-reaching consequences beyond the Epstein case.

I. FIRST EN BANC ISSUE: CONFERRAL RIGHTS

The conferral-right issue is an important legal question of first impression in our Circuit. But the Majority blithely skips over the issue, although it was the basis of the Panel opinion and is now the first en banc issue briefed and argued.

Indeed, the Panel opinion squarely held: "We hold that at least as matters currently stand—which is to say at least as the CVRA is currently written—rights under the Act do not attach until criminal proceedings have been initiated against a defendant, either by complaint, information, or indictment." In re Wild, 955 F.3d 1196, 1198 (11th Cir. 2020). The Panel later stated: "[W]e hold that the CVRA does not apply before the commencement of criminal proceedings—and thus, on the facts of this case, does not provide the petitioner here any judicially enforceable rights." Id. at 1220. The Panel reasoned: "The facts that the CVRA (1) does not sanction freestanding suits and (2) does prescribe mid-proceeding "motion[s]" combine—especially in conjunction with subsection (a)'s enumeration—to indicate that the Act's protections apply only after the initiation of criminal proceedings." Id. at 1210 (alteration in original).

The Majority now says "we needn't decide whether, in the abstract, the rights to confer and to be treated with fairness might attach prior to the formal commencement of criminal proceedings." Maj. Op. at 13. Good gracious, there's nothing abstract about this case. The Majority admits that the facts are "beyond scandalous" and the victims were not only "left in the dark," but "affirmatively misled" by government attorneys. Maj. Op. at 2–3. To add insult to injury, the Majority refuses to answer the first en banc question as to whether the Epstein victims had any CVRA rights that attached pre-charge.

Moreover, that first en banc question—whether the CVRA in § 3771(a) granted victims rights that attach pre-charge—is an integral part of the proper statutory interpretation of the remedy provision in § 3771(d), which refers back to those § 3771(a) rights. Indeed, both the Majority and Chief Judge Pryor's concurrence examine the CVRA as a whole and look to various subsections of the CVRA to support their conclusion that § 3771(d) does not grant Ms. Wild a private cause of action. Pryor Concurring Op. at 159–64 ("We Construe Statutes by Reading the Whole Text, Not Individual Subsections in Isolation."); Maj. Op. at 30–33, 39–44 (examining other subsections of § 3771 and concluding they support its statutory interpretation of § 3771(d)(3)). Yet they refuse to decide whether the subsection (a)(5) and (8) rights apply "pre-charge." If the CVRA grants the victims rights that do attach pre-charge—as the plain language of § 3771(a)(5) and (a)(8) suggests—that would also support Judge Branch's conclusion that § 3771(d) provides Ms. Wild a private cause of action to enforce those rights in the pre-charge period before an indictment.

We should also decide the first issue as to pre-charge rights, given: (1) the Epstein victims' perseverance in litigating the rights issue for a decade and obtaining en banc review of the rights issue, that was forthrightly decided by the Panel opinion; (2) the seriousness of the federal sex-trafficking crimes against petitioner Wild and the other 30-plus minor victims; (3) the government's

egregious misconduct; and (4) the fact that if the Epstein victims' CVRA rights attached pre-charge, the government's misconduct undisputedly violated them. It defies basic fairness for the Majority, at this late stage, to avoid answering whether the Epstein victims had any CVRA rights pre-charge.

Chief Judge Pryor's concurrence alleges that our answering the first question would be issuing "an advisory opinion" to the Executive Branch. Pryor Concurring Op. at 54–59. Invoking Article III of the Constitution, his concurrence states that (1) an advisory opinion is one "that interpret[s] laws without resolving cases or controversies": (2) "[n]o principle is more fundamental to the judiciary's proper role in our system of government" than the "constitutional limitation" imposed by Article III; and (3) the "prohibition against advisory opinions is the oldest and most consistent thread in the federal law of justiciability." Pryor Concurring Op. at 55–56 (quotation marks omitted). His theory seems to be that the victims-rights issue became non-justiciable the moment a majority of this Court concluded the CVRA did not provide Ms. Wild with a pre-charge remedy for any violation of her statutory rights. This advisory-opinion theory is flawed, disregards the live controversy between the Epstein victims and the government as adverse parties, and disrespects the concrete injury to those victims.

Article III of the Constitution grants our Court the power to decide "Cases" or "Controversies." U.S. Const. art. III, § 2. That constitutional phrase "require[s]

that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions." Carney v. Adams, 592 U.S. ___, 141 S. Ct. 493, 498 (2020). As the Supreme Court has explained, this "longstanding legal doctrine" prevents courts from (1) "providing advisory opinions at the request of one who, without other concrete injury, believes that the government is not following the law," and (2) ruling on hypothetical legal issues, the answers to which have no effect on the relationship between the parties before them. Id. at 501 (emphasis added); see also Flast v. Cohen, 392 U.S. 83, 96–97, 88 S. Ct. 1942, 1951 (1968) (noting that suits in which courts are asked to render advisory opinions "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests" (quoting United States v. Fruehauf, 365 U.S. 146, 157, 81 S. Ct. 547, 554 (1961)).[1]

Contrary to the concurrence, the first issue remains justiciable, and answering it would not be an advisory opinion. There is and has been a live controversy between Ms. Wild and the government as to the scope of her conferral

[1]Federal courts cannot issue advisory opinions because of the Constitution's case or controversy requirement. Thus, to be justiciable, the first issue must involve a genuine live controversy involving a present claim by one party and another party disputing it that can be determined judicially. See Carney, 592 U.S. at ___, 141 S. Ct. at 498. Whether the Epstein victims had conferral rights that the government violated is justiciable and should be decided for the reasons outlined above.

right under the CVRA and the government's violations of her rights. That genuine controversy did not end simply because the Majority decided to dispose of her lawsuit on a procedural ground without deciding the rights issue.

The concurrence also alleges (1) "our answer to the first question would be an alternative holding only if we . . . concluded that the Act does not confer any pre-charge rights, judicially enforceable or otherwise"; but (2) if we "say that the Act does confer pre-charge rights, those rights would not be judicially enforceable and our resolution of this petition for a writ of mandamus would not change," and thus our ruling on the rights issue would be an advisory opinion. But the justiciability of both merits and procedural issues depend on whether an underlying case or controversy exists and remains—not on the outcome the court reaches as to either issue. The federal law is replete with cases in which courts address two issues in the alternative, ruling alternatively on both the merits and procedural issues in cases, even though the resolution of the appeal or petition does not change. See, e.g., Riechmann v. Fla. Dep't of Corr., 940 F.3d 559, 580 (11th Cir. 2019) ("Although we conclude that the district court properly determined that Riechmann's Brady claim was procedurally defaulted, we will briefly address the substance of the underlying Brady claim, which we alternatively find lacks merit."); Echols v. Lawton, 913 F.3d 1313, 1323 (11th Cir.), cert. denied, 139 S. Ct. 2678 (2019) (concluding that while a plaintiff's "complaint state[d] a claim of

retaliation under the First Amendment," the defendant was nonetheless entitled to qualified immunity because he did not violate a First Amendment right that was clearly established); Dukes v. Deaton, 852 F.3d 1035, 1041 (11th Cir. 2017) ("Although we conclude that [the officer's] conduct violated the Fourth Amendment, qualified immunity protects him from suit because his violation was not clearly established in law when he acted."); Grider v. City of Auburn, Ala., 618 F.3d 1240, 1266–67 (11th Cir. 2010) (concluding, as to qualified immunity, that (1) no constitutional violation occurred, and (2) "[a]lternatively, at a minimum, Plaintiffs have not shown [the defendant] violated clearly established federal law"); Bundy v. Dugger, 850 F.2d 1402, 1414 (11th Cir. 1988) ("Alternatively, if the procedural default doctrine did not preclude us from examining the merits of the Faretta inquiry claim, we would conclude that [petitioner] was not entitled to relief on this ground."); Smith v. Local No. 25, Sheet Metal Workers Int'l Ass'n, 500 F.2d 741, 744–45 (5th Cir. 1974) (reviewing a court's order of "dismissal for lack of subject matter jurisdiction or alternatively a grant of summary judgment on the merits").[2] Furthermore, "in this circuit additional or alternative holdings are

[2]See also Hamm v. Comm'r, Ala. Dep't of Corr., 620 F. App'x 752, 782 (11th Cir. 2015) ("[W]e conclude that [the petitioner's] Brady claim here is procedurally defaulted and that a merits review is precluded. Alternatively, we find the claim to be without merit." (emphasis added)); Harris v. Goderick, 608 F. App'x 760, 764 (11th Cir. 2015) ("[E]ven assuming, arguendo, that [plaintiff's] false arrest claims are not barred by the statute of limitations, each non-immune defendant arguably possessed probable cause for actions taken in the course of prosecuting [plaintiff] for his probation violation . . . ."); Davies v. Former Acting Dist. Dir.-Orlando, 484 F. App'x 385, 389 & n.5 (11th Cir. 2012) (affirming the dismissal of a Bivens

not dicta, but instead are as binding as solitary holdings." Bravo v. United States, 532 F.3d 1154, 1162 (11th Cir. 2008).

The mere fact that a court has decided one issue—procedural or otherwise—that is capable of resolving a case on its own does not mean that no case or controversy exists and remains as to the other issue. The Panel opinion's holding—that Ms. Wild's CVRA rights did not attach pre-charge—was not an advisory opinion. And that holding alone resolved the case at the Panel stage. It makes no sense to conclude that this Court at the Panel stage properly decided the justiciable issue of whether Ms. Wild's rights under the CVRA attached pre-charge only up and until it concluded at the en banc stage that the Congress provided her with no cause of action to enforce any rights she might have.

Perhaps it's strategic to bypass the rights issue altogether, as the Majority does, rather than to hold Ms. Wild has CVRA rights that were violated but no remedy as to the government's misconduct. But it is wrong and a disservice to suggest that our Court's ruling on whether Ms. Wild had conferral rights pre-charge would constitute an impermissible advisory opinion.[3]

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claim as barred by the applicable statute of limitations but noting that, "[e]ven assuming arguendo that the statute of limitations did not bar this case . . . . it is apparent that Defendants would in any event be entitled to qualified immunity").

[3]As a separate and different argument, the Majority opinion likens its avoiding the victims' rights question (the first en banc issue) to qualified immunity cases, in which a court may bypass the antecedent constitutional-rights question. Maj. Op. at 14 n.9. But when a court skips over a constitutional issue, two things happen. First, the court avoids making any

II. NARROW RULING: TIME PERIOD AFTER THE AGREEMENT

Judge Branch's Dissent ably discusses why the CVRA's § 3771(a)(5) grants crime victims a "reasonable" conferral right with "the attorney for the Government" and how that conferral right attaches pre-charge and is not textually conditioned on a preexisting indictment or formal charge. I agree with her plain-text reading and that the government violated the Epstein victims' rights.

In addition, I already expressed my view that after the prosecutors concluded their investigation, drafted a 53-page indictment against Epstein, and began plea negotiations with Epstein's defense team, they had a legal obligation under the CVRA to confer with the victims before executing the secret plea Agreement. See In re Wild, 955 F.3d at 1250. Requiring an "attorney for the Government" to merely speak with a victim pre-charge in no way interferes with prosecutorial discretion. After speaking with a victim, the prosecutor retains exclusive

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precedent as to the constitutional violation, and the 42 U.S.C. § 1983 plaintiff in the next case will still have no clearly established law to cite. Second, the government officials will not be on notice that certain conduct is a constitutional violation. The fact that a court may elect to skip over an individual-rights question does not mean that a court should do so.

Indeed, for years in qualified immunity cases, the Supreme Court required lower courts to decide the constitutional question and stop avoiding it because otherwise the law would never be clearly established. See Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001). Although the Supreme Court has now relaxed this rule, the fact remains that the first question as to the victims' rights—like that of individual rights in qualified immunity cases—is an important legal question that should be answered here for the reasons articulated above. See Pearson v. Callahan, 555 U.S. 223, 236, 129 S. Ct. 808, 818 (2009) (holding that the two-step sequence from Saucier "should not be regarded as mandatory in all cases," but recognizing that it is "often beneficial" and "appropriate" and that "the Saucier Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent").

discretion over whether to indict or grant immunity. If a prosecutor confers, there is then no CVRA violation for a victim to complain about in a court.

But to the extent one nonetheless credits the Majority's concerns about possible interference with prosecutorial discretion, I set forth below a narrow conferral-right ruling based on only the time period after the prosecutor exercised his discretion, made his charging decision, and executed the Agreement.

A. Alternative Ruling: Conferral Right After the Agreement's Execution

The Majority concedes that: (1) after the Agreement's execution, the "prosecutors worked hand-in-hand with Epstein's lawyers . . . to keep the [September 2007] NPA's existence and terms hidden from victims"; (2) the government's efforts graduated to "active misrepresentation"; and (3) "it wasn't until July 2008—during the course of this litigation—that Ms. Wild learned of the NPA's existence, and until August 2008 that she finally obtained a copy of the agreement." Maj. Op. at 5–7. Once the Agreement was signed, the U.S. Attorney had exercised his prosecutorial discretion and was required to confer with and tell the victims. The prosecutors well knew this, writing Epstein's defense team that they must notify the victims about the Agreement and upcoming state plea.

Thus, as an alternative merits ruling on the first en banc issue, I would hold that after the prosecutor executed the Agreement with Epstein, (1) his victims had a reasonable right to confer with the prosecutor under § 3771(a)(5), and (2) the

government violated their rights by not disclosing the Agreement, its terms, and upcoming state court events, and by misrepresenting the case status. Such a narrow ruling is alone sufficient to establish the merits of Ms. Wild's conferral-right claim, and permits her claim to proceed.

B. Majority Repositions Its Blanket Post-Indictment Restriction from Conferral Right to Private Right of Action

It is telling too that, at the panel stage, the Panel Majority added a blanket post-indictment restriction to the conferral-right text in § 3771(a)(5) and held victims had no conferral rights before an indictment was filed. In re Wild, 955 F.3d at 1198. The Panel Majority feared that recognizing a conferral right pre-indictment created these problems: (1) undue interference with prosecutorial discretion; (2) the need for mini-trials to identify the victims and the federal offenses committed; and (3) federal judges' "injunctions requiring (for instance) consultation with victims before raids, warrant applications, arrests, witness interviews, lineups, and interrogations." Id. at 1216–18.

Now the en banc Majority (1) bypasses the conferral-rights issue altogether, (2) transposes those exact same fears over to the second issue as to a private right of action, and (3) adds the blanket post-indictment restriction to the private-right-of-action text in § 3771(d). It repositions the same arguments from the conferral-right issue to the private-right-of-action issue. Even if one credits those concerns, they evaporate under my narrow holding in Section II.A. that after the U.S.

Attorney signed the Agreement, the victims had conferral rights that the government violated.[4]

C. A Holding Limited to the Facts Before Us

The Majority and concurring opinions posit multiple operational difficulties if victims may file a freestanding motion in future cases. Although the CVRA expressly allows a motion for relief when "no prosecution is underway," 18 U.S.C. § 3771(d)(3), their opinions add a blanket post-indictment restriction to the statute and conclude a motion may be filed only when a formal prosecution is already underway. See Maj. Op. at 2–3, 44; Tjoflat Concurring Op. at 84.

Judicial restraint counsels against fashioning a blanket rule against all applications of the CVRA statute pre-charge; yet the Majority does that here. There is no ambiguity in the CVRA's statutory text, and there is no ambiguity as to how the CVRA's terms apply to the facts before us. Holding that the CVRA as applied in this particular case does not interfere with the prosecutor's discretion is all we need to say. How constitutional doctrines protecting prosecutorial discretion interact with the CVRA in other factual scenarios are questions for future cases. See Bostock v. Clayton Cty., Ga., 590 U.S. ___, ___, 140 S. Ct.

[4]This narrow conferral-right ruling limited to the post-Agreement time frame also pretermits any need to draw a line marking a precise point when the conferral right attaches. And because the prosecutor had made his charging decision and executed the Agreement, this eliminates debate about § 3771(d)(6)'s proscription against impairing prosecutorial discretion. See 18 U.S.C. § 3771(d)(6).

1731, 1749, 1753–54 (2020) (stating that "no ambiguity exists about how Title VII's terms apply to the facts before us" and that while "the [defendant] employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions," how "doctrines protecting religious liberty interact with Title VII are questions for future cases"). On these facts, the victims' CVRA rights were violated.[5]

III. PRIVATE RIGHT OF ACTION & SANDOVAL

As to the second en banc issue, I join Judge Branch's holding that the CVRA's text in § 3771(d)(3), as written by Congress, expressly granted Ms. Wild a private right of action to file a "[m]otion for relief" to enforce CVRA rights "in the district court in the district in which the crime occurred" when "no prosecution is underway." 18 U.S.C. § 3771(d)(3). Because the CVRA expressly grants a judicial enforcement mechanism, I need not and do not seek to imply a cause of action.

[5]Although Judge Tjoflat's concurring opinion invokes the canon of constitutional avoidance, it does not apply here because there is no ambiguity in the CVRA text. See United States v. Stevens, 559 U.S. 460, 481, 130 S. Ct. 1577, 1591–92 (2010) (providing that courts cannot "rely upon the canon of construction that 'ambiguous statutory language [should] be construed to avoid serious constitutional doubts'" unless the statute is first ambiguous (alteration in original)). As the Supreme Court recently explained, "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." Jennings v. Rodriguez, 538 U.S. ___, ___ 138 S. Ct. 830, 843–44 (2018) (declining to apply the canon of constitutional avoidance because the statutory language at issue was not ambiguous). To that end, the Supreme Court has cautioned that, "rewrit[ing] a . . . law to conform it to constitutional requirements . . . would constitute a serious invasion of the legislative domain." Stevens, 559 U.S. at 481, 130 S. Ct. at 1592 (second alteration in original) (citations and quotation marks omitted).

Furthermore, the Majority and concurring opinions heavily rely on Sandoval where the inquiry was whether to imply a private right of action for Ms. Sandoval to enforce agency regulations. Here, though, the question is whether a specific statute, § 3771(d) enacted by Congress, expressly grants Ms. Wild, as a crime victim, a private right of action to enforce her own CVRA statutory rights (not agency regulations). Because the Majority uses snippets of Sandoval out of context, I carefully walk the reader step-by-step through the Sandoval decision and then discuss Sandoval's meaning for this case.

A. Sandoval

Sandoval's facts. Alabama changed its written driver's license tests to English only. Alexander v. Sandoval, 532 U.S. 275, 278–79, 121 S. Ct. 1511, 1515 (2001). Federal regulations forbid federal funding recipients, like Alabama, from using procedures that had discriminatory effect. Id. at 278, 121 S. Ct. at 1515. Ms. Sandoval (a Spanish speaker) filed a lawsuit, as a class representative, to enjoin the English-only policy as discriminatory. Id. at 279, 121 S. Ct. at 1515. The Supreme Court held Ms. Sandoval did not have a private right of action to enforce the agency's regulations that forbid Alabama from using policies with discriminatory impact. Id. at 281, 285, 293, 121 S. Ct. at 1517, 1519, 1523. Only the agency could enforce its regulations. Sandoval discussed two statutes: §§ 601 and 602 of the Civil Rights Act.

Sandoval's § 601 ruling. Sandoval recognized that under § 601, individuals had a private right of action to enforce their statutory rights. Id. at 279–80, 121 S. Ct. at 1516. The Sandoval Court, citing Cannon[6] and the parties' concessions, took it as a given that individuals would have a private right to enforce their statutory rights in § 601. Id. But Ms. Sandoval was seeking to enforce agency regulations under § 602. Id. at 270, 121 S. Ct. at 1515.

Sandoval's § 602 ruling. The debated question in Sandoval was about the § 602 statute, which authorized federal agencies to issue regulations as follows:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of [§ 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1. Section 602 has no language about "rights" and no text authorizing a private right of action. Sandoval's no-right-of-action holding was only about whether § 602 authorized Ms. Sandoval to privately sue to enforce agency regulations. See Sandoval, 532 U.S. at 285–86, 121 S. Ct. at 1519.

Indeed, the § 602 inquiry in Sandoval was whether to imply a private cause of action for Ms. Sandoval to enforce the agency's regulations. See id. at 284–88,

[6]Cannon v. Univ. of Chicago, 441 U.S. 677, 99 S. Ct. 1946 (1979).

121 S. Ct. at 1518–20. The Sandoval Court concluded: (1) § 602 contained no "rights-creating" language; (2) instead § 602 merely authorized federal agencies to issue regulations to effectuate the provisions of § 601; and (3) thus § 602 evinced no intent on Congress's part to create an individual private right of action to enforce the agency's regulations. Id. at 288–89, 121 S. Ct. at 1520–21.

The Sandoval Court found § 602's lack of any "rights-creating" language highly relevant, noting that statutes that "focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." Id. at 289, 121 S. Ct. at 1521 (emphasis added). The statutory language in § 602 did not focus "on the individuals protected . . . but on the agencies that will do the regulating." Id. at 289, 121 S. Ct. at 1521.

The Sandoval Court also discussed how § 602's method for enforcing regulations included the agency's "terminating funding to the particular program," such as funding recipient Alabama. Id. at 289–91, 121 S. Ct. at 1521–22 (quoting 42 U.S.C. § 2000d-1). The Supreme Court reasoned that § 602's "*express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others*." Id. at 290, 121 S. Ct. at 1521–22 (emphasis added).

Four times, the Majority cites this italicized statement from Sandoval and argues the existence of the CVRA's administrative scheme in § 3771(f) suggests Congress intended to preclude a crime victim's private cause of action in

§ 3771(d). Maj. Op. at 21, 30, 41, 42. But as my detailed account of Sandoval demonstrates, the Majority is using this italicized statement wholly outside of its actual factual context in the Sandoval decision and summarily applying it to a materially different statutory text and structure.

Summarizing, in Sandoval the § 602 statute contained no language or any evidence of congressional intent to create either a private right or a private remedy for Ms. Sandoval. Thus, the Supreme Court in Sandoval held Ms. Sandoval could not sue. So what is Sandoval's meaning for this case that involves a materially different statute? Sandoval tells us what we must do: examine the text and structure of the CVRA for evidence of congressional intent to create both a private right and a private remedy, which I do below.

B. CVRA § 3771(d)

In stark contrast to the § 602 text, the CVRA text, enacted by Congress, includes exactly the sort of "rights-creating" language and private cause of action that the Sandoval Court found was absent from § 602. See id. at 288, 121 S. Ct. at 1521; see also Love v. Delta Air Lines, 310 F.3d 1347, 1352 (11th Cir. 2002) ("Rights-creating language is language explicitly confer[ing] a right directly on a class of persons that include[s] the plaintiff in [a] case, or language identifying the class for whose especial benefit the statute was enacted." (citation and quotation marks omitted) (alterations in original)).

The CVRA statute is replete with "rights-creating" language, such as "[a] crime victim has . . . [t]he reasonable right to confer with the attorney for the Government" and "[t]he right to be treated with fairness." 18 U.S.C. § 3771(a)(5), (8). The CVRA text, with its emphasis on a discrete class—crime victims—shows Congress's clear "intent to confer rights on a particular class of persons." See Sandoval, 532 U.S. at 289, 121 S. Ct. at 1521 (quotation marks omitted); see also Gonzaga Univ. v. Doe, 536 U.S. 273, 284, 122 S. Ct. 2268, 2275 (2002) (concluding the statute at issue was "phrased 'with an unmistakable focus on the benefited class.'" (quoting Cannon, 441 U.S. at 691, 99 S. Ct. at 1955)).

As to enforcement of those statutory rights, Sandoval tells us that the presence of this "rights-creating language" in a statute—here the CVRA—evinces an intent on Congress's part to create a private right of action to enforce those individual statutory rights. See Sandoval, 532 U.S. at 288, 121 S. Ct. at 1521. To be clear, though, we need not, and should not, imply a private right of action here. And we do not rely solely on the rights-creating language in § 3771(a)(5) and (8). As the Supreme Court notes, "[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights." Cannon, 441 U.S. at 717, 99 S. Ct. at 1968.

That is exactly what Congress did in the CVRA. In § 3771(d), Congress expressly provided a private right of action: a victim should "assert the rights described in subsection (a)" via a "[m]otion for relief" filed "in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(1), (3). This sentence is written in clear English prose. Further, Congress in the same sentence expressly differentiated between when a defendant is being prosecuted and when no prosecution is underway. It is linguistically implausible to read this text as always requiring Ms. Wild to file her motion for relief in a preexisting and ongoing criminal proceeding. The Majority's counterarguments cannot overcome Judge Branch's natural reading of this sentence or the clear commands of § 3771(d)'s text and statutory context.

C. Errors in Majority's Analysis About Sandoval

In my view, the Majority errs in its Sandoval analysis in several ways. First, the Majority endlessly voices concern that (1) the Epstein victims, like the Sandoval plaintiff, are trying to "imply" a cause of action where Congress has not expressly created one, and (2) Sandoval precludes "implying" a private right of action here. Maj. Op. at 19–22, 29–33, 39–44. The Majority opinion references implied causes of action four times. Maj. Op. at 20, 30, 32, 41. Chief Judge

Pryor's concurring opinion references implied rights of action six times. Pryor Concurring Op. at 54, 64–65.

Here, we need not, and do not, "imply" a private right of action because the CVRA expressly creates a judicial enforcement mechanism: a "[m]otion for relief" filed in "the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3). Our Court can, and should, stop at the plain text of the CVRA and the most natural reading of that text.

Second, the Majority keeps repeating: (1) "we find no clear evidence" that Congress intended crime victims to file this case, and (2) we find no "Sandoval-qualifying clear expression of congressional intent." Maj. Op. at 22, 27–28 n.13, 30, 44, 45, 51. The Majority ignores that Sandoval's finding of no congressional intent to grant Ms. Sandoval a private right of action was based on these key textual clues: (1) the § 602 statute had no "rights-creating language"; (2) the § 602 statute contained no text creating a judicial enforcement mechanism; (3) the § 602 statute only empowered the agency to promulgate regulations and was not enacted to benefit a discrete class of persons; and (4) the § 602 statute focused on the agencies that will do the regulating, not on the individuals protected. Precisely what was missing in § 602 is fully present in § 3771(a) and (d). And that statutory text in § 3771(a) and (d), enacted by Congress, expressly grants the Epstein victims a private right of action when no prosecution is underway.

Third, the Majority and Judge Tjoflat's opinions advance policy reasons for the Majority's bright-line rule that are untethered from Sandoval's analytical framework. To avoid impairing prosecutorial discretion, the Majority says we need a "line limiting judicial enforcement to the post-charge phases of a prosecution." Maj. Op. at 37. The Majority also contends that "[i]nterpreting the CVRA to authorize judicial enforcement only in the context of a preexisting proceeding . . . squares with the background expectation of judicial involvement" in a prosecutor's case. Id. at 37–38. The Majority concludes that "[r]eading the Act to provide a private right of action for pre-charge judicial enforcement, by contrast, contravenes the background expectation of executive exclusivity." Id. at 38. The Majority shuts the courthouse door to the Epstein victims by adding a strict preexisting indictment requirement to § 3771(d)(3) when none exists in the text of that section.

As Judge Branch's Dissent explains, this is not a straightforward, plain-text interpretation of § 3771(d)(3). Even the Majority admits it is "reading the Act" in a "practical" way to avoid judicial interference with prosecutorial discretion and "the background expectation of judicial involvement."[7] Id. at 36, 38, 44.

[7]Judge Branch's Dissent dismantles the Majority's tortured construction of § 3771(d)(3)'s terms, like "motion" and "no prosecution is underway." Her Dissent reviews how the Majority eschews the common, ordinary, everyday meaning of the word "motion," and wrongly defines "motion" to require a preexisting underlying court proceeding. Her Dissent explains the common meaning of "motion" and how federal law authorizes a "motion" to be filed

Simply put, we are not asked, as in Sandoval, to authorize an implied private right of action that is nowhere to be found in a statute. Rather, we are asked to give effect to the CVRA's plain text without adding words to the statute. The Majority accuses the Dissent and Ms. Wild of creating a remedy out of whole cloth because that outcome is "desirable" from a policy standpoint. Maj. Op. at 42. Yet it's the Majority who ignores the CVRA text in pursuit of its own policy concerns and preferred bright-line restriction of victims' rights to a post-indictment period.[8]

IV. U.S. SENATORS' AMICUS BRIEF

While the text controls, the legislative history of the CVRA is consistent with its plain text. See CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217,

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freestanding in numerous other areas of criminal law. I agree and need not cover this territory. Rather, I show how the Majority strays from the plain text and muses about expectations.

[8]Chief Judge Pryor's concurrence points out that each dissent spends at least 10 pages discussing Sandoval, an implied cause of action decision, even though they contend that the CVRA grants a private right of action. The concurrence describes the dissents as "puzzling" and "schizophrenic" for this reason: "If the Act expressly granted a private right of action, then Sandoval would be beside the point." Pryor Concurring Op. at 65.

Although clever wordsmithing, this is a non sequitur. Sandoval is necessarily discussed. First, the Majority and the concurring opinions rely heavily upon it; yet our explication of Sandoval reveals how they misconstrue Sandoval, an implied cause of action decision, and misapply it to the materially different statutory text and structure in the CVRA. Second, as the most recent Supreme Court decision cited, Sandoval instructs that we examine the text and structure of the statute at issue for evidence of congressional intent to create both a private right and a private remedy. But the Majority skips over the private rights issue altogether. Third, our journey through Sandoval demonstrates that the evidence of congressional intent that was missing in the § 602 statute in Sandoval is patently present in the CVRA's statutory language. Fourth, a full read of Sandoval is required to compare the § 602 text and the nature of the administrative enforcement scheme (with judicial review) available in that case with the CVRA text and wholly dissimilar administrative scheme (with no judicial review) unavailable to the victims here.

1229 n.7 (11th Cir. 2001) (recognizing the "bedrock principle" that there is no need to resort to legislative history where statutory text is clear, but nonetheless reviewing legislative history that "supports and complements the plain meaning of statutory language" (quotation marks omitted)); see also In re BFW Liquidation, LLC, 899 F.3d 1178, 1190 (11th Cir. 2018) (reasoning that legislative history "bolster[ed]" our reading of unambiguous statutory text).

Senator Diane Feinstein and former Senators Jon Kyl and Orrin Hatch filed an amicus brief in support of our Court's rehearing en banc the Panel's erroneous statutory interpretation of the CVRA. Senators Feinstein and Kyl drafted and, along with Senator Hatch, co-sponsored the CVRA. See Senators' Amicus Br. at 1. All three senators served on the Senate Judiciary Committee—with Senator Hatch as its chairman—when Congress passed the CVRA.

The Senators urge this Court to hold that the CVRA's plain text in § 3771(a) grants crime victims pre-charge rights to confer and be treated fairly, and in § 3771(d)(3) the right to enforce them, "if no prosecution is underway," by filing a motion for relief in the district court. See id. at 7–12 (citing 18 U.S.C. § 3771(a), (d)(3)). They urge fidelity to the CVRA's text as written and enacted by Congress, stressing that the CVRA's text does not contain a temporal limitation and does not depend upon the filing of an indictment:

> Critically, as the panel majority acknowledged, its decision was not compelled by statutory text. 955 F.3d at 1205. That comes as no surprise to the amici

> Senators who drafted that text. Two rights conferred by the Act—the right "to confer with the attorney for the Government" and the right "to be treated with fairness and with respect"—do not, by their text, depend upon the filing of formal charges. 18 U.S.C. § 3771(a)(5), (8).

Id. at 7. The Senators emphasize that, beyond the lack of any temporal limitation, two provisions—§ 3771(c)(1) and (d)(3)—"make clear that the Act's rights attach before formal charges are filed." Id. Section 3771(c)(1) requires that government employees "engaged in the detection, investigation, or prosecution of crime" shall make best efforts to accord victims their rights. See 18 U.S.C. § 3771(c)(1).

Next, the Senators submit that "if any doubts remain," about the pre-charge application of the CVRA, "the Act sweeps them away with its proviso [in § 3771(d)(3)] that the rights established by the Act may be asserted if no prosecution is underway, in the district court in the district in which the crime occurred." Senators' Amicus Br. at 7–8 (quotation marks omitted).

The Senators bolster their position by pointing to their statements in the Congressional Record at the time of the CVRA's enactment. Senators Feinstein and Kyl "emphasized that it 'is important for victims' rights to be asserted and protected throughout the criminal justice process'—and to do that, victims need to be 'heard at the very moment when their rights are at stake.'" Id. at 5 (quoting 150 Cong. Rec. 7294, 7304 (2004)). To accomplish that goal, the CVRA gives victims "the right to confer with the Government concerning any critical stage or disposition of the case." Id. at 6 (quoting 150 Cong. Rec. at 7302).

The Senators emphasize that the events giving rise to this litigation are "precisely the miscarriage of justice the Act was intended to—and contrary to the [Panel] majority decision, does—foreclose." Id. They express concern that our Court's erroneous decision limiting the CVRA to only the post-indictment phase of the criminal justice process "will undo decades of progress toward recognizing and vindicating the vitally important rights of crime victims." Id. at 11. No matter the Majority and concurring opinions' myriad policy concerns, Congress was entitled to grant crime victims conferral rights that do not depend upon the existence of a preexisting indictment or ongoing criminal proceeding. "Only that policy choice, embodied in the terms of the law Congress adopted, commands this Court's respect." Pereida v. Wilkinson, 592 U.S. ___, ___,141 S. Ct. 754, 767 (2021). This legislative history in the Senators' Amicus Brief also supports Judge Branch's natural reading of the CVRA's plain text.[9]

V. TWO-TIERED JUSTICE SYSTEM

[9]I appreciate my colleague's sincere "sense of sorrow," "heart break[]," and regret about the result reached in the Majority opinion authored by him. Newsom Concurring Op. at 68–69. But this personal consternation goes too far when it admonishes us that the job, as a judge, is "adherence to the rule of law," and the "obligation" and "oath" of a judge is to "the law" and implies that only the Majority opinion he has authored does that. Id.

If nothing else, we should all agree that each judge has taken the same oath and is attempting to honor the same obligation to the rule of law. The dissenters simply read the CVRA's plain statutory language quite differently. For what it's worth, the Senators read that text as the dissenters do. But I still don't believe any colleague has violated his or her oath.

The Majority's holding has far-reaching consequences in our Circuit. The pre-charge period has become critical in white-collar cases. Defense attorneys are hired to represent potential defendants pre-charge to negotiate and extract the best plea deal in advance of, or to forestall, any indictment. The Majority's ruling—limiting judicial enforcement of CVRA violations to a formal post-charge period—leaves federal prosecutors free to engage in the secret plea deals and deception pre-charge that resulted in the travesty here.[10]

Over the last fifteen years, there has been a dramatic increase in the use of pre-indictment "alternative settlement vehicles" such as deferred prosecution

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[10]The DOJ's failure to discipline its own prosecutors heightens the importance of the CVRA's private right of action. The DOJ's Office of Professional Responsibility ("OPR") conducted a review of the Epstein case. While the Report found that prosecutors exercised "poor judgment," it concluded they did not commit "professional misconduct" and did not recommend any sanctions or disciplinary actions. See Department of Justice Office of Professional Responsibility Report, Executive Summary, at ix–xii (Nov. 2020). The Report has been heavily criticized. See, e.g., Kevin G. Hall, Jay Weaver & Ben Wieder, Senator rips finding that Acosta used 'poor judgment' but broke no rules in Epstein case, Miami Herald, Nov. 14, 2020, available at https://www.miamiherald.com/news/local/article247133141.html ("'Letting a well-connected billionaire get away with child rape and international sex trafficking isn't "poor judgment"—it is a disgusting failure. Americans ought to be enraged,' Nebraska Sen. Ben Sasse, chairman of the Senate Judiciary Oversight Subcommittee, said in a statement Thursday afternoon. . . . .'The DOJ's crooked deal with Epstein effectively shut down investigations into his child sex trafficking ring and protected his co-conspirators in other states. Justice has not been served,' Sasse added.").

OPR's Report is viewed as a "whitewash," "letting everyone off the hook," "offensive," "hurtful," and "like another slap in the face to the victims." James Hill, Key takeaways from the Justice Department review of Jeffrey Epstein sweetheart deal, ABC News (Nov. 16, 2020), available at https://abcnews.go.com/US/key-takeaways-justice-department-review-jeffrey-epstein-sweetheart/story?id=74222922. Given the OPR Report, it is hardly surprising the victims continue to pursue this civil suit to discover and unravel the mystery of why the prosecutors not only signed such a sweetheart plea deal for the billionaire Epstein in the first place but did so in secret and then for nearly a year took great efforts to hide the Agreement by affirmative misrepresentations to the victims and their counsel too.

agreements and non-prosecution agreements to resolve federal crimes. See Cindy R. Alexander & Mark A. Cohen, The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements, 52 Am. Crim. L. Rev. 537, 537-40 & n.14 (2015).[11] Under the Majority's ruling, victims have no CVRA remedy when a prosecutor secretly negotiates these pre-charge agreements in the absence of federal charges.

The Majority's ruling also exacerbates disparities between wealthy defendants and those who cannot afford to hire well-connected and experienced attorneys during the pre-charge period. Most would-be defendants lack resources and usually have no counsel during this pre-charge period. Consequently, they do not have the pre-charge opportunity to negotiate the kind of extremely favorable deal that Epstein received. This sort of two-tiered justice system—one in which wealthy defendants hire experienced counsel to negotiate plea deals in secret and with no victim input—offends basic fairness and exacerbates the unequal playing field for poor and wealthy criminal defendants.

VI. CONCLUSION

[11]In 2020 alone, the DOJ executed 32 agreements to defer prosecution for corporate criminality. See Duke University School of Law & University of Virginia's Legal Data Lab, Data and Documents, Corporate Prosecution Registry, https://corporate-prosecution-registry.com/browse/; see also 2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements, Gibson Dunn (Jan. 8, 2020), https://www.gibsondunn.com/2019-year-end-npa-dpa-update/ (stating that the DOJ's use of NPAs and DPAs in white collar cases rose from 2 in 2000 to 31 in 2019 and has been normalized "[a]cross [a]gencies").

While the Majority laments how the national media fell short on the Epstein story, this case is about how the U.S. prosecutors fell short on Epstein's evil crimes. Mysteries remain about how Epstein escaped federal prosecution and why, for nearly a year, the government made affirmative misrepresentations to the Florida victims of his serious sex crimes and to the victims' counsel. The government egregiously violated Ms. Wild's CVRA rights. "Our criminal justice system should safeguard children from sexual exploitation by criminal predators, not re-victimize them," as the prosecutors did here. In re Wild, 955 F.3d at 1249–50 (Hull, J., dissenting).

The petition Ms. Wild filed in the district court was one that the CVRA expressly authorizes when no prosecution is underway. Ms. Wild has spent over ten years seeking to vindicate her statutory rights expressly created by Congress. Today, the Majority tells Ms. Wild and Epstein's other victims that all of that was for naught, since they never had the right to file their motion in the first place back in 2008. The Epstein victims have no remedy as to the government's appalling misconduct because the Majority rewrites the CVRA to add a blanket post-indictment limitation and reads out of the statute any ability for crime victims to judicially enforce their conferral rights outside of a preexisting criminal proceeding. The Majority's ruling eviscerates the CVRA and makes the Epstein case a poster child for an entirely different justice system for crime victims of

wealthy defendants. I respectfully dissent, once again. See id. at 1223–1250 (Hull, J., dissenting).

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13843

D.C. Docket No. 9:08-cv-80736-KAM

In re: COURTNEY WILD,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

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(April 14, 2020)

Before NEWSOM, TJOFLAT, and HULL, Circuit Judges.

NEWSOM, Circuit Judge:

This case, which is before us on a petition for writ of mandamus, arises out of a civil suit filed under the Crime Victims' Rights Act of 2004. Petitioner Courtney Wild is one of more than 30 women—girls, really—who were victimized by notorious sex trafficker and child abuser Jeffrey Epstein. In her petition, Ms.

Wild alleges that when federal prosecutors secretly negotiated and entered into a non-prosecution agreement with Epstein in 2007, they violated her rights under the CVRA—in particular, her rights to confer with the government's lawyers and to be treated fairly by them.

Despite our sympathy for Ms. Wild and others like her, who suffered unspeakable horror at Epstein's hands, only to be left in the dark—and, so it seems, affirmatively misled—by government lawyers, we find ourselves constrained to deny her petition. We hold that at least as matters currently stand—which is to say at least as the CVRA is currently written—rights under the Act do not attach until criminal proceedings have been initiated against a defendant, either by complaint, information, or indictment. Because the government never filed charges or otherwise commenced criminal proceedings against Epstein, the CVRA was never triggered. It's not a result we like, but it's the result we think the law requires.

I

The facts underlying this case, as we understand them, are beyond scandalous—they tell a tale of national disgrace.

Over the course of eight years, between 1999 and 2007, well-heeled and well-connected financier Jeffrey Epstein and multiple coconspirators sexually abused more than 30 minor girls, including our petitioner, in Palm Beach, Florida and elsewhere in the United States and abroad. Epstein paid his employees to find

minor girls and deliver them to him—some as young as 14. Once Epstein had the girls, he either sexually abused them himself, gave them over to be abused by others, or both. Epstein, in turn, paid bounties to some of his victims to recruit other girls into his ring.

Following a tip in 2005, the Palm Beach Police Department and the FBI conducted a two-year investigation of Epstein's conduct. After developing substantial incriminating evidence, the FBI referred the matter for prosecution to the United States Attorney's Office for the Southern District of Florida. Beginning in January 2007, and over the course of the ensuing eight months, Epstein's defense team engaged in extensive negotiations with federal prosecutors in an effort to avoid indictment. At the same time, prosecutors were corresponding with Epstein's known victims. As early as March 2007, they sent letters advising each one that "as a victim and/or witness of a federal offense, you have a number of rights." The letters, which the government distributed over the course of about six months, went on to enumerate the eight CVRA rights then in force—including, as particularly relevant here, "[t]he reasonable right to confer with the attorney for the [Government] in the case" and "the right to be treated with fairness and with respect for the victim's dignity and privacy."

By May 2007, government lawyers had completed both an 82-page prosecution memo and a 53-page draft indictment alleging that Epstein had

committed numerous federal sex crimes. In July, Epstein's lawyers sent a detailed letter to prosecutors in an effort to convince them that, in fact, Epstein hadn't committed any federal offenses. By September, the sides had exchanged multiple drafts of what would become an infamous non-prosecution agreement ("NPA"). Pursuant to their eventual agreement, Epstein would plead guilty in Florida court to two state prostitution offenses, and, in exchange, he and any coconspirators (at least four of whom have since been identified) would receive immunity from federal prosecution.[1] In June 2008, Epstein pleaded guilty to the state crimes as agreed and was sentenced to 18 months' imprisonment, 12 months' home confinement, and lifetime sex-offender status.

The district court found that "[f]rom the time the FBI began investigating Epstein until September 24, 2007"—when the government formally executed the NPA with Epstein—federal prosecutors "never conferred with the victims about a[n] NPA or told the victims that such agreement was under consideration." *Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1208 (S.D. Fla. 2019). Worse, it appears that prosecutors worked hand-in-hand with Epstein's lawyers—or at the very least

[1] The agreement also contained several provisions concerning Epstein's victims. The government, for instance, agreed to provide a list of known victims to Epstein and, "in consultation with and subject to the good faith approval of Epstein's counsel," to "select an attorney representative" for the victims, to be "paid for by Epstein." Epstein agreed not to contest liability or damages in a victim's civil suit, "so long as the identified individual elect[ed] to proceed exclusively under 18 U.S.C. § 2255, and agree[d] to waive any other claim for damages." An odd set-up—and one that, it seems to us, was likely calculated to quickly and quietly resolve as many victim suits as possible.

acceded to their requests—to keep the NPA's existence and terms hidden from victims. The NPA itself provided that "[t]he parties anticipate that this agreement will not be made part of any public record" and, further, that "[i]f the United States receives a Freedom of Information Act request or any compulsory process commanding the disclosure of the agreement, it will provide notice to Epstein before making that disclosure." Moreover, at approximately the same time that the sides concluded the NPA, they began negotiating about what prosecutors could (and couldn't) tell victims about the agreement. Seemingly in deference to Epstein's lawyers' repeated requests, the government held off—for nearly an entire year—on notifying Epstein's victims of the NPA's existence.

And to be clear, the government's efforts seem to have graduated from passive nondisclosure to (or at least close to) active misrepresentation. In January 2008, for example, approximately four months after finalizing and executing the NPA, the government sent a letter to petitioner stating that Epstein's case was "currently under investigation," explaining that "[t]his can be a lengthy process," and "request[ing her] continued patience while [it] conduct[ed] a thorough investigation." The government sent an identical letter to another victim in May 2008, some *eight* months after inking the NPA.[2]

[2] The government contends that these letters were technically accurate because the already-signed NPA remained under review by senior members of the Department of Justice. *See* Br. in Opp. to Pet. at 4 n.1.

If secrecy was the goal, it appears to have been achieved—there is no indication that any of Epstein's victims were informed about the NPA or his state charges until after he pleaded guilty. On the day that Epstein entered his guilty plea in June 2008, some (but by no means all) victims were notified that the federal investigation of Epstein had concluded. But it wasn't until July 2008—during the course of this litigation—that petitioner learned of the NPA's existence, and until August 2008 that she finally obtained a copy of the agreement.

We are doubtlessly omitting many of the sad details of this shameful story. For our purposes, we needn't discuss the particulars of Epstein's crimes, or the fact that the national media essentially ignored for nearly a decade the jailing of a prominent financier for sex crimes against young girls.[3] Today, the public facts of the case are well known—Epstein was eventually indicted on federal sex-trafficking charges in the Southern District of New York, and in August 2019, while awaiting trial, he was found dead in his jail cell of an apparent suicide.

II

In July 2008, petitioner brought suit in the United States District Court for the Southern District of Florida, styling her initial filing an "Emergency Victim's

[3] *Cf.* David Folkenflick, *A Dead Cat, A Lawyer's Call And A 5-Figure Donation: How Media Fell Short on Epstein*, NATIONAL PUBLIC RADIO (Aug. 22, 2019, 6:06 PM), https://www.npr.org/2019/08/22/753390385/a-dead-cat-a-lawyers-call-and-a-5-figure-donation-how-media-fell-short-on-epstei.

Petition for Enforcement of Crime Victim's Rights Act." As the district court explained, "because no criminal case was pending" at the time—no federal charges having been filed against Epstein or anyone else—petitioner "filed [her] petition as a new matter . . . which the Clerk of Court docketed as a civil action." *Does v. United States*, 817 F. Supp. 2d 1337, 1341 n.4 (S.D. Fla. 2011). Petitioner alleged that she was a "crime victim" within the meaning of the CVRA and that by keeping her in the dark about their dealings with Epstein, federal prosecutors had violated her rights under the CVRA—in particular, her rights "to confer with the attorney for the Government in the case," 18 U.S.C. § 3771(a)(5), and "to be treated with fairness and with respect for [her] dignity and privacy," *id.* § 3771(a)(8).[4]

Over the course of the ensuing decade, the district court issued a number of significant rulings. For our purposes, three of the court's orders are particularly important.

Initially, in 2011 the district court "addresse[d] the threshold issue whether the CVRA attaches before the government brings formal charges against the defendant." *Does*, 817 F. Supp. 2d at 1341. The court held that "it does because the statutory language clearly contemplates pre-charge proceedings." *Id.* As

[4] A second petitioner joined the suit shortly after it was filed. For simplicity's sake—and to avoid confusion—we will refer to "petitioner's" suit, in the singular.

relevant here, the district court relied principally on two CVRA provisions in so holding. First, it pointed to 18 U.S.C. § 3771(c)(1), which the parties here have called the Act's "coverage" provision. That subsection—of which much more later—states that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." The district court held that "[s]ubsection (c)(1)'s requirement that officials engaged in 'detection [or] investigation' afford victims the rights enumerated in subsection (a) surely contemplates pre-charge application of the CVRA." *Does*, 817 F. Supp. 2d at 1342. Second, the court pointed to subsection (d)(3), which the parties here call the "venue" provision and which states that a crime victim seeking to vindicate his or her rights under the CVRA must file a "motion" either "in the district court in which a defendant is being prosecuted or, if no prosecution is underway, in the district court in the district in which the crime occurred." If, the district court reasoned, "the CVRA's rights may be enforced before a prosecution is underway, then, to avoid a strained reading of the statute, those rights must attach before a complaint or indictment formally charges the defendant with the crime." *Does*, 817 F. Supp. 2d at 1342. Finally, the district court cited *In re Dean*, in which the Fifth Circuit had observed that "[a]t least in the posture of th[e] case" before it—

the court emphasized that it wasn't "speculat[ing] on the applicability to other situations"—the victim's right to confer with prosecutors applied pre-charge. 527 F.3d 391, 394 (5th Cir. 2008). Having "determined . . . as a matter of law [that] the CVRA can apply before formal charges are filed," the district court here "defer[red]" ruling on the question whether federal prosecutors had violated the Act until the parties could conduct additional discovery. *Does*, 817 F. Supp. 2d at 1343.

Following another eight years of litigation, the district court issued a pair of rulings that prompted the mandamus petition now before us. In February 2019, the court found that the government had infringed petitioner's CVRA rights. *See Doe 1*, 359 F. Supp. 3d at 1222. In particular, the court held that federal prosecutors violated the Act by "enter[ing] into a[n] NPA with Epstein without conferring with Petitioner[] during its negotiation and signing." *Id*. at 1219. "Had the Petitioner[] been informed about the Government's intention to forego federal prosecution of Epstein in deference to him pleading guilty to state charges," the district court emphasized, she "could have conferred with the attorney for the Government and provided input." *Id*. at 1218. The court concluded that it was precisely "this type of communication between prosecutors and victims that was intended by the passage of the CVRA." *Id*. at 1291.

Having found CVRA violations, the court directed the parties—which by then included Epstein as an intervenor—to brief "the issue of what remedy, if any, should be applied." *Id*. at 1222. In response, petitioner proposed multiple remedies: (1) rescission of the NPA; (2) an injunction against further CVRA violations; (3) an order scheduling a victim-impact hearing and a meeting between victims and Alexander Acosta, the former United States Attorney for the Southern District of Florida; (4) discovery of certain grand-jury materials, records regarding prosecutors' decision to enter into the NPA, and files concerning law-enforcement authorities' investigation of Epstein; (5) mandatory CVRA training for employees of the Southern District's United States Attorney's office; and (6) sanctions, attorneys' fees, and restitution. In August 2019, while the court was considering the parties' briefing regarding remedies, Epstein died of an apparent suicide; his death prompted another round of briefing on the issue of mootness.

In September 2019, having considered the parties' briefing and the impact of Epstein's death, the district court dismissed petitioner's suit, denying each of her requested remedies. *See Doe 1 v. United States*, 411 F. Supp. 3d 1321 (S.D. Fla. 2019). In its order, the district court made a number of rulings. First, it held that Epstein's death mooted any claim regarding the NPA's continuing validity, as he was no longer subject to prosecution. *See id*. at 1326. Relatedly, the court held that it lacked jurisdiction to consider petitioner's claim regarding the validity of the

NPA as it applied to Epstein's coconspirators; any opinion regarding that issue, the court concluded, would be merely advisory because the coconspirators—as non-parties to the suit—couldn't be estopped from asserting the NPA's validity at any future prosecution. *See id*. Second, the court denied petitioner's request for an injunction on the ground that she had failed to show "continuing, present adverse effects" or any "real and immediate" threat of future CVRA violations. *Id*. at 1328. Third, the court rejected petitioner's requests for a victim-impact hearing and a meeting with Acosta on the grounds that petitioner had already participated in an Epstein-related hearing in New York, that the Epstein prosecution had concluded, and that the government had already agreed to confer with victims concerning any ongoing investigation of Epstein's coconspirators. *See id*. at 1328–29. Fourth, the court denied petitioner's discovery requests for grand-jury materials and investigative files. *See id*. at 1329–40. Fifth, the court declined to order "educational remedies," as the government had already agreed to implement CVRA training for employees of the Southern District's United States Attorney's office. *Id*. at 1330. And finally, the court rejected petitioner's request for sanctions, fees, and restitution. *See id*. at 1330–31.

Seeking review of the district court's order refusing every remedy that she had sought, petitioner filed—as the CVRA directs—a petition for writ of mandamus with this Court. *See* 18 U.S.C. § 3771(d)(3) (stating that "[i]f the

district court denies the relief sought," a victim "may petition the court of appeals for a writ of mandamus"). The government filed a "brief in response" in which it not only opposed petitioner's arguments on the merits, but also raised several threshold arguments concerning the scope of the CVRA and the circumstances in which rights under the Act are judicially enforceable. In reply, petitioner contended (among other things) that by failing to "cross appeal," the government had waived its arguments about the CVRA's applicability and enforceability.[5]

* * *

This case presents a host of issues, many of first impression. Before jumping in, we begin with an introductory summary of the CVRA.

III

The CVRA is a compact statute, occupying but one section (and only two pages) of the United States Code. *See* 18 U.S.C. § 3771. The entire Act comprises just six subsections, the pertinent portions of which we will summarize briefly.

The Act opens, in subsection (a), with a catalogue of "rights" that federal law guarantees to "crime victims." (The Act separately defines the term "crime victim" to mean "a person directly and proximately harmed as a result of the commission of a Federal offense." *Id*. § 3771(e)(2)(A).) The version of the CVRA

[5] Although the CVRA instructs the court of appeals to "take up and decide" any mandamus petition "forthwith within 72 hours," the parties here stipulated to an extended briefing and decision schedule, which the CVRA authorizes. 18 U.S.C. § 3771(d)(3).

in effect during the events in question here—between 2006 and 2008—stated as follows:

> **(a) Rights of crime victims.**—A crime victim has the following rights:
>
> **(1)** The right to be reasonably protected from the accused.
>
> **(2)** The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> **(3)** The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> **(4)** The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> **(5)** The reasonable right to confer with the attorney for the Government in the case.
>
> **(6)** The right to full and timely restitution as provided in law.
>
> **(7)** The right to proceedings free from unreasonable delay.
>
> **(8)** The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a).

Subsection (b), titled "Rights afforded," focuses on courts' responsibilities under the Act. It provides—as relevant here—that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." *Id.* § 3771(b)(1).

(Subsection (b)(2) pertains to habeas corpus proceedings, in which crime victims enjoy a more limited set of rights; it isn't relevant here.)

Subsection (c), titled "Best efforts to accord rights," imposes obligations on *non*-judicial actors. One of its constituent clauses—which we introduced earlier as the so-called "coverage" provision—states as follows:

> Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

18 U.S.C. § 3771(c)(1).

Subsection (d) addresses "Enforcement and limitations." Several of subsection (d)(3)'s provisions are relevant here. One—the "venue" provision—states that "[t]he rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in which the crime occurred." Another provides that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus"—and as amended in 2015, and thus before petitioner sought review here, it goes on to clarify that in deciding any mandamus petition under the CVRA, "the court of appeals shall apply ordinary standards of appellate review." Subsection (d)(6) is also relevant in two respects. First, it states that "[n]othing in this chapter shall be construed to authorize a cause of action for

damages." Second, and separately, it emphasizes that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."

Finally, subsection (f)—we've already introduced subsection (e), which defines the term "crime victim"—instructs the Attorney General to "promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations" concerning those victims. *Id.* § 3771(f)(1).

With that primer, we proceed to address petitioner's case.

IV

Petitioner contends—and as already explained, the undisputed facts show—that federal prosecutors in the Southern District of Florida negotiated "a secret non-prosecution agreement" with Epstein, and that "[f]rom the time that the FBI began investigating Epstein through the consummation of the secret NPA, the Government never conferred with Epstein's victims about the NPA [or] even told them that such an agreement was under consideration." Petition for Writ of Mandamus at 4–5. By keeping her (and others) in the dark concerning Epstein's NPA, petitioner asserts, the government violated the CVRA.

The unique circumstances of this case—and in particular, the fact that Epstein was never charged in the Southern District of Florida—tee up what the

district court correctly called a "threshold" question: Does the CVRA apply in the period before criminal proceedings are initiated, either by criminal complaint, information, or indictment? If it does, then we must proceed to consider a cascade of logically subsequent questions—among them, (1) whether the Act authorized the district court to rescind the NPA, both generally and, more specifically, as applied to Epstein's alleged coconspirators; (2) whether petitioner was entitled to discovery of certain grand-jury materials, DOJ records pertaining to prosecutors' decision to enter into the NPA, and FBI files concerning the Epstein investigation; (3) whether petitioner's participation in an Epstein-related victim-impact hearing in New York effectively moots her request for relief here; and (4) whether federal law entitles petitioner to recover attorneys' fees. If, by contrast, the CVRA doesn't apply before the commencement of criminal proceedings, then our inquiry is at an end.[6]

[6] Before considering the merits of the question whether the CVRA applies before the initiation of criminal proceedings, we must briefly address a front-end procedural issue. Petitioner contends (Reply in Supp. of Pet. at 11–14) that the government waived any argument that the CVRA doesn't apply here when it failed to file a "cross-appeal" from the district court's 2011 order, which (as already explained) held "as a matter of law [that] the CVRA can apply before formal charges are filed." *Does*, 817 F. Supp. 2d at 1343. We reject petitioner's waiver argument. It's true that in the usual case, the government's failure to cross-appeal the district court's adverse 2011 order might well have precluded our review of that decision. *See Greenlaw v. United States*, 554 U.S. 237, 244–45 (2008). This, though, isn't the usual case. Petitioner didn't file an "appeal"; rather, as the CVRA requires, she filed a petition for writ of mandamus. *See* 18 U.S.C. § 3771(d)(3); *see also* 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3932 (3d ed. 2019) (explaining that a mandamus petition is "an original application to the court of appeals"). The question before us, therefore, is not whether to affirm or reverse the district court's orders, but rather whether to grant or deny the petition—and, it seems to us,

Whether the CVRA applies prior to the initiation of criminal proceedings is not just a threshold question, but also a question of first impression in this Circuit. The Fifth Circuit has stated—albeit in dictum, without meaningful explanation, and seemingly without the benefit of adversarial testing—that the Act can apply before criminal proceedings begin. *See In re Dean*, 527 F.3d 391, 934 (5th Cir. 2008). The Sixth Circuit has deemed it "uncertain" whether CVRA protections apply "prior to [the] filing of . . . charges." *In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010). The district courts that have considered the question are divided. *Compare, e.g.*, *United States v. Oakum*, No. 3:08CR132, 2009 WL 790042, at *2 (E.D. Va. Mar. 24, 2009) (holding that CVRA rights can attach prior to the commencement of criminal proceedings), *with, e.g.*, *United States v. Daly*, No. 3:11CR121 AWT, 2012 WL 315409, at *4 (D. Conn. Feb. 1, 2012) (holding to the contrary).

As already explained, the district court here concluded that the CVRA *can* apply before the initiation of criminal proceedings—"pre-charge," for short—and, accordingly, that petitioner enjoyed the protections of the Act during the period

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the government is entitled to raise any argument it likes in support of its position that we should deny. And while the CVRA (as amended in 2015 to resolve a then-existing circuit split) directs us to "apply ordinary standards of appellate review" in deciding the mandamus petition, *see* 18 U.S.C. § 3771(d)(3)—rather than the heightened "clear usurpation of power or abuse of discretion" standard that typically applies in the mandamus context, *In re Loudermilch*, 158 F.3d 1143, 1145 (11th Cir. 1998)—it does not direct us to employ the *rules of procedure* that would apply if this were a typical appeal.

that preceded the execution of Epstein's NPA. In particular, petitioner asserts in these proceedings that the government violated her "reasonable right to confer" with the lead prosecutor, 18 U.S.C. § 3771(a)(5), and her right "to be treated with fairness," *id*. § 3771(a)(8)—neither of which, she says, is limited by its terms to the post-charge phase of a criminal prosecution.[7] In support of her position that CVRA rights can apply before criminal proceedings begin, petitioner points (as did the district court) to § 3771(c)(1)—which refers to federal-government agencies engaged in the "detection [and] investigation" of crime, in addition to its "prosecution"—and to § 3771(d)(3)—which, in specifying the venue where a victim should seek relief under the Act, refers to the eventuality that "no prosecution is underway."

The interpretation of the CVRA that petitioner advances, and that the district court adopted, is not implausible; the CVRA could be read to apply pre-charge. We conclude, though—reluctantly, especially given the mistreatment that petitioner seems to have suffered at the hands of federal prosecutors—that the Act is neither best nor most naturally read that way. For reasons that we will explain, we hold that (1) the CVRA's text and structure, (2) the historical context in which

[7] Petitioner also contends (albeit only in passing) that the government violated her right to "timely notice of any public court proceeding," 18 U.S.C. § 3771(a)(2), in connection with the June 30, 2008 state-court hearing at which Epstein pleaded guilty to Florida prostitution offenses. *See* Pet. at 54.

the Act was passed, and (3) the prosecutorial-discretion principles that the Act was designed to safeguard—and which, we think, petitioner's interpretation would compromise—demonstrate that its protections apply only after the initiation of criminal proceedings. If Congress believes that we have misinterpreted the CVRA—or, for that matter, even if it believes that we have correctly interpreted the statute as currently written but that its scope should be expanded—then it should amend the Act to make its intent clear.

A

In construing the CVRA, "we begin, as we must, with a careful examination of the statutory text," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017), looking "to the particular statutory language at issue, as well as the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). On balance, we conclude that the Act's terms—including the provisions on which petitioner relies—demonstrate that its protections apply only after the commencement of criminal proceedings.

1

We begin where petitioner does, with the catalogue of "rights"—quoted in full above—that the CVRA guarantees to "crime victims." (As already noted, the Act defines the term "crime victim"—more on that later.) Petitioner relies chiefly on § 3771(a)(5)'s guarantee of a "reasonable right to confer with the attorney for

the Government in the case," and § 3771(a)(8)'s guarantee of the "right to be treated with fairness." She contends that by failing to inform her—and worse, affirmatively misleading her—about its ongoing negotiations with Epstein, the government violated both provisions. We will address subsections (a)(5) and (8) in due course, but because "[s]tatutory construction . . . is a holistic endeavor," and because "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), we first examine the balance of § 3771(a).[8]

In the main, anyway—and there isn't any real dispute about this—the CVRA's enumeration seems to focus on the post-charge phase of a criminal prosecution, and in particular on ensuring that crime victims have notice of (and an opportunity to be heard in) pending criminal proceedings. Indeed, six of the eight rights listed in § 3771(a)—all except for those specified in subsections (5) and (8)—either expressly refer to or necessarily presuppose the existence of an ongoing criminal proceeding. Subsections (a)(2), (3), (4), and (7) leave no doubt

[8] *Accord, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 167 (2012) (quoting Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton* § 728, at 381a (1628; 14th ed. 1791), for the proposition that "[i]f any section [of a law] be intricate, obscure or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other").

whatsoever—all of them apply, by their plain terms, to "proceeding[s]," "public proceedings," or "public court proceedings." Not surprisingly, there seems to be general agreement that these "proceeding"-focused rights apply only after the filing of a complaint or criminal charges. *See* Reply in Supp. of Pet. at 17; Paul G. Cassell, *et al*., *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. of Crim. L. and Criminology 59, 71 (2014).

Subsections (a)(1) and (6) aren't quite as clear, but they too are best understood as specifying rights that attach only after criminal proceedings have begun. Subsection (1) guarantees a crime victim's right to protection from "the accused." § 3771(a)(1). Both in ordinary spoken English and as a legal term of art, the word "accused" refers to someone against whom criminal proceedings have been commenced. *See, e.g.*, *Webster's New International Dictionary* 17 (2d ed. 1944) (defining "accused" as "one charged with an offense; the defendant in a criminal case"); *see also Michigan v. Jackson*, 475 U.S. 625, 632 (1986) ("[A]fter a formal accusation has been made . . . a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment . . . ."). Subsection (a)(6), which guarantees a victim's right to "full and timely restitution," likewise presupposes the initiation—and indeed perhaps the maturation or even conclusion—of criminal proceedings. *Black's*, for instance,

defines the term "restitution," in relevant part, to mean "[c]ompensation for loss; esp., full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation." *Black's Law Dictionary* 1507 (10th ed. 2014).

So, it seems to us, the rights enumerated in subsections (a)(1), (2), (3), (4), (6), and (7) are properly understood as applying only after the initiation of criminal proceedings. And again, petitioner doesn't really contend otherwise. Instead, she focuses on subsections (a)(5) and (8), which she says are framed broadly enough that they can be understood to apply pre-charge. Let's take a closer look.

Subsection (a)(5) guarantees a crime victim the "reasonable right to confer with the attorney for the Government in the case." Petitioner and her lead counsel (in his academic writings) emphasize that this provision refers to the attorney handling "the case" rather than "the charges," Reply in Supp. of Pet. at 17, and they assert that the term "case" can "refer both to a *judicial* case before a court and an *investigative* case pursued by a law enforcement officer," Cassell *et al*., *supra*, at 72 (emphasis added).[9] Although it's true, at least in the abstract, that the term

[9] Ordinarily, of course, we don't impute a lawyer's out-of-court positions to his client—and we needn't do so even in this case. We cite Professor Cassell's article here (and elsewhere) for several reasons: (1) because he is not only petitioner's counsel but also one of the nation's foremost authorities on victims'-rights issues in general and the CVRA in particular; (2) because the article is wholly consistent with petitioner's position as articulated in her brief and at oral argument; and (3) because it expands on and deepens petitioner's in-court arguments and thus ensures that we are considering the strongest version of her position.

"case" *can* mean either thing, in legal parlance the judicial-case connotation is undoubtedly primary. *See, e.g.*, *Black's*, *supra*, at 258–59 (defining "case" first as "[a] civil or criminal proceeding, action, suit or controversy at law or in equity" and only second as "[a] criminal investigation"); *Webster's New International*, *supra*, at 415 (defining "case" as used in "[l]aw" as "a suit or action in law or equity; a cause"). Moreover, and in any event, two contextual considerations convince us that, as used in subsection (a)(5), the term "case" refers to an ongoing judicial proceeding, not a law-enforcement investigation.

First, the Supreme Court has held that in the criminal context, a "case" does not "encompass the entire criminal investigatory process," but rather "at the very least requires the initiation of legal proceedings." *Chavez v. Martinez*, 538 U.S. 760, 766 (2003). Notably, in so holding, the Court drew on longstanding tradition, citing its now nearly 150-year-old decision in *Blyew v. United States* for the proposition that the word "case" is synonymous with the word "cause" and "mean[s] a proceeding in court, a suit, or action." 80 U.S. (13 Wall.) 581, 595 (1872). Second, and separately, subsection (a)(5) refers not just to "the case" in general, but more particularly to "the attorney for the Government in the case." While it is undoubtedly true that government lawyers may be involved in a criminal investigation pre-charge, the provision's reference to a single, specific individual—"the attorney for the Government"—indicates that the conferral right

attaches only after proceedings have begun, at which point that particular person will presumably be more readily identifiable. *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 434–35 (2004) (holding that the "use of the definite article . . . indicates that there is generally only one" person covered). By the same token, there will surely be many criminal investigations to which no lawyers have (yet) been assigned—let alone a single, identifiable "attorney for the Government." Accordingly, if, as petitioner asserts, subsection (a)(5) was intended to apply pre-charge, during the investigation phase, it makes little sense that Congress would have tethered the conferral right to a single government lawyer.

On balance, therefore—and particularly in the light of subsections (a)(1), (2), (3), (4), (6), and (7), all of which clearly apply only after the initiation of criminal proceedings—we conclude that § 3771(a)(5)'s conferral right does not attach during the pre-charge, investigatory phase. Rather, subsection (a)(5) is best understood as guaranteeing a crime victim's right to consult with the lead prosecutor—*i.e.*, "the attorney for the Government"—in a pending prosecution—*i.e.*, "the case."[10]

[10] *See generally* Wayne R. LaFave et al., *Criminal Procedure* § 13.1, at 849 (6th ed. 2017) ("Under the federal victims' rights statute [*i.e.*, 18 U.S.C. § 3771], a crime victim is granted a 'reasonable right to confer with the attorney for the Government in the case,' but it is nowhere specified that the conference must precede or concern the prosecutor's charging decision . . . .").

Petitioner also relies (albeit more obliquely) on subsection (a)(8), which vaguely guarantees a crime victim's right "to be treated with fairness and with respect for [his or her] dignity and privacy." It is certainly true that this fair-treatment right has no inherent temporal limitation—on its face, it could apply pre-charge, post-charge, or for that matter even post-conviction. But well-established canons of interpretation require us to interpret subsection (a)(8)'s general right to fair treatment by reference to the subsections (and their constituent rights) that precede it. *See, e.g.*, *Johnson v. United States*, 559 U.S. 133, 139 (2010) ("Ultimately, context determines meaning . . . ."); *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("[W]ords and people are known by their companions."). Because the rights enumerated in subsections (a)(1)–(7) are best understood as applying only after the institution of criminal proceedings, subsection (a)(8)'s guarantee of "fairness" is, too. What the Supreme Court said recently in applying *noscitur a sociis*—"the well-worn Latin phrase that tells us that statutory words are often known by the company they keep"—applies here as well: In § 3771(a), "we find . . . both the presence of company that suggests limitation and the absence of company that suggests breadth." *Lagos v. United States*, 138 S. Ct. 1684, 1688–89 (2018).[11]

[11] In spending pages dissecting our citations to cases applying the *noscitur a sociis* canon, the dissent misses the forest for the trees. *See* Dissenting Op. at 98–100. The fundamental point is

Taken as a whole, then, we conclude that the catalogue of rights specified in § 3771(a) are best read as applying only after the institution of criminal proceedings.

2

We are fortified in that conclusion by the only two provisions of the Act that speak directly to judicial enforcement of victims' statutory rights.

The first is § 3771(b), titled "Rights afforded." At oral argument, petitioner's counsel invoked subsection (b)(1) affirmatively, noting—with emphasis—its directive that "the court *shall ensure* that the crime victim is afforded the rights" enumerated in subsection (a). *See* Oral Arg. at 5:45–5:57. True, but that's only part of the story. In its entirety, subsection (b)(1) reads as follows: "*In any court proceeding involving an offense against a crime victim*, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." 18 U.S.C. § 3771(b)(1) (emphasis added). By its plain terms, then, subsection (b)(1) empowers courts to enforce CVRA rights *only* during pending criminal proceedings—of which there were none here.

simply that subsection (a)(8)'s meaning should be informed by its surrounding statutory context, and that because subsections (a)(1)–(7) are most properly read to apply only after the commencement of criminal proceedings, it makes sense—absent some contrary indication—to interpret subsection (a)(8)'s vague fair-treatment provision the same way.

The second is § 3771(d), which specifies—and strictly circumscribes—the procedural mechanisms by which an alleged victim must assert and seek to enforce CVRA rights. Two (related) points are worth making. As an initial matter, the Act clearly indicates that Congress did not intend to authorize private individuals to initiate stand-alone suits or actions, outside the confines of existing criminal proceedings, to enforce their statutory rights. Quite the contrary, in fact—subsection (d)(6), titled "No Cause of Action," expressly states that "[n]othing in this chapter shall be construed to authorize a cause of action for damages." § 3771(d)(6)). *Cf. Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (explaining that "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress").

Instead—and this is point two—subsection (d)(3) specifies that a victim must assert his or her rights in a "motion for relief" filed in district court and requires the court to consider and decide that "motion" promptly. 18 U.S.C. § 3771(d)(3). As commonly understood, a "motion" is a request filed within the context of an ongoing judicial proceeding, not a vehicle for launching a new and freestanding piece of litigation.[12] *See, e.g.*, *Black's*, *supra*, at 1168 ("'Frequently,

[12] As already explained, subsection (d)(3) states that "[t]he rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in which the crime occurred." We address below petitioner's contention that the "if no prosecution is underway" language demonstrates that the CVRA applies before the initiation of criminal proceedings. *See infra* at 33–36.

in the progress of litigation, it is desired to have the court take some action which is incidental to the main proceeding . . . . Such action is invoked by an application usually less formal than the pleadings, and is called a motion.'" (quoting John C. Townes, *Studies in American Elementary Law* 621 (1911)); *cf*. Fed. R. Civ. P. 3, 7 (distinguishing between a "motion" and a "pleading"—the latter of which is defined to include a "complaint," which is the prescribed vehicle for commencing a freestanding action).[13]

The facts that the CVRA (1) does not sanction freestanding suits and (2) does prescribe mid-proceeding "motion[s]" combine—especially in conjunction

[13] A third aspect of § 3771(d)(3) likewise counsels—albeit perhaps a bit more indirectly—in favor of the conclusion that CVRA rights are intended to apply, and be enforced, only within the context of an ongoing criminal prosecution. As already explained, under subsection (d)(3), a crime victim's sole recourse to this Court is via petition for writ of mandamus. *See* 18 U.S.C. § 3771(d)(3) ("If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus."). Although a petition for mandamus is "an original application to the court of appeals," the writ "is not an independent grant of appellate jurisdiction" but, rather, "'may go only in aid of appellate jurisdiction' that exists on some other basis." 16 Wright & Miller, *supra*, § 3932 (quoting *Parr v. United States*, 351 U.S. 513, 520 (1956)). The "minimum condition" for mandamus relief, therefore, is "that the case be one that may lie within the prospective future jurisdiction of the court of appeals, or that has in fact come within its jurisdiction in the past." *Id*. When CVRA rights are asserted in the context of a criminal proceeding, our mandamus jurisdiction is clear, because our *appellate* jurisdiction over the underlying criminal proceeding (and any rulings, verdicts, and judgments rendered therein) is clear. And the CVRA itself provides that "[i]n any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates." 18 U.S.C. § 3771(d)(4). By contrast, in the absence of a criminal prosecution, mandamus jurisdiction in this Court is less certain—harder to justify—simply because it's less certain how the case could otherwise arrive, in the form of an appeal, on our doorstep.

with subsection (a)'s enumeration—to indicate that the Act's protections apply only after the initiation of criminal proceedings.[14]

3

In fairness, petitioner is not without her own textual arguments. In urging us to hold that CVRA rights—or at least some of them—apply even before the initiation of criminal proceedings, she relies principally on two subsections, which the parties call the "coverage" and "venue" provisions, respectively. Neither, we conclude, clearly demonstrates that the rights specified in the Act attach during the pre-charge, investigative phase.

Petitioner first points to § 3771(c)(1)—the "coverage" provision—which, as already explained, states that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection

[14] It is also relevant, we think—even if more marginally so—that the drafters and ratifiers of the Federal Rules seem to have anticipated that CVRA "motions" would be filed within the context of an existing criminal proceeding—not as freestanding actions. The Federal Rules of Criminal Procedure, which "govern the procedure in all criminal proceedings" in United States courts, *see* Fed. R. Crim. P. 1(a)(1), expressly incorporate portions of the CVRA. In particular, Rule 60—titled "Victim's Rights"—implements several of the rights specified in § 3771(a), and further (echoing § 3771(d)(3)) clarifies that "[a] victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime." Fed. R. Crim. P. 60(b)(4). The Federal Rules of Civil Procedure, which "govern the procedure in all civil actions and proceedings in the United States district courts," *see* Fed. R. Civ. P. 1, contain no similar provision, and make no reference to the CVRA.

(a)." 18 U.S.C. § 3771(c)(1). From the premise that "the CVRA applies to the 'detection [or] investigation' of crimes," petitioner reasons to the conclusion, which the district court adopted, that "the Act's drafters 'surely contemplate[d] pre-charge application of the CVRA.'" Reply in Supp. of Pet. at 15 (quoting *Does*, 817 F. Supp. 2d at 1342). We disagree for two reasons.

First, understood in proper context, it seems clear to us that subsection (c)(1) is a "to whom" provision, not a "when" provision. That is, it clarifies that CVRA obligations extend beyond the officers and employees of "the Department of Justice" to include, as well, the officers and employees of "other departments and agencies of the United States" that (like DOJ) are "engaged in the detection, investigation, or prosecution of crime"—*e.g.*, IRS, ICE, and TSA. Those agencies' employees, like DOJ's, must "make their best efforts to see that crime victims" are afforded CVRA rights. Subsection (c)(1) doesn't expressly speak to when CVRA rights attach, and it certainly doesn't clearly demonstrate that those rights attach before the initiation of criminal proceedings. Government employees (whether of DOJ or some other DOJ-like agency) who are involved in all three of the referenced phases are necessarily involved post-charge. Subsection (c)(1) simply

makes clear that the Act reaches beyond prosecutors (and DOJ) to reach other actors in the criminal-justice system.[15]

Second, and more importantly, petitioner's reliance on § 3771(c)(1) proves entirely too much. If, as petitioner thinks subsection (c)(1) shows, CVRA rights apply during the "detection" and "investigation" of crime, then there is no meaningful basis—at least no meaningful *textual* basis—for limiting the Act's pre-charge application to the NPA context. To the contrary, on petitioner's reading, subsection (c)(1) would—to cite just a few examples—require law-enforcement officers to "confer" with victims, subject only to a squishy "reasonable[ness]" limitation, *see* § 3771(a)(5), before conducting a raid, seeking a warrant, making an arrest, interviewing a witness, convening a lineup, or conducting an interrogation. Absent a much clearer indication, we cannot assume that Congress intended such a jarring result. Presumably sensing the slipperiness of their position, petitioner and her counsel have said that courts can simply draw the line

[15] Petitioner's counsel has contended that this interpretation of § 3771(c)(1) can't explain "why Congress found it necessary to break out three separate phases of the criminal justice process: the 'detection,' 'investigation,' and 'prosecution' of crime." Cassell *et al*., *supra*, at 87. If, he argues, Congress's "intent was simply to cover, for example, FBI agents or EPA agents during the post-charging phase of a case, it could have simply omitted" the words "detection" and "investigation" from the Act, because those agents "would be engaged in the 'prosecution' of the case when assisting the victim after the filing of formal charges." *Id*. Thus, he says, our interpretation impermissibly renders the terms "detection" and "investigation" meaningless. *Id*. We don't think so. We read subsection (c)(1) not as "break[ing] out" three different phases, but rather as attempting to broadly cover (perhaps using a belt-and-suspenders approach) all necessary government-employee participants—in short, to ensure that the Act's protection extends beyond prosecutors.

farther downstream—when, for instance, as counsel put it at oral argument, an investigation has "matured" to the point where (as here) prosecutors "are negotiating with defense attorneys and signing agreements." Oral Arg. at 8:30, 9:10–9:17. "At that point at least," counsel said, "a conferral right exists" under subsection (a)(5). *Id*. at 9:10–9:17. That is a line, to be sure—and a line that happens to capture this case—but it has no footing whatsoever in the "detection [or] investigation" language to which petitioner points in support of her position.[16] As tempting as it might be to do so—especially on the facts before us here—we cannot re-write, or arbitrarily circumscribe, the Act's text simply to make it fit petitioner's theory.[17]

For these reasons, we cannot accept petitioner's contention that § 3771(c)(1) demonstrates that the CVRA applies before the initiation of criminal proceedings.

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[16] In his article on the subject, petitioner's lead counsel offered a similar limiting construction, which he framed this way:

> CVRA rights attach when an officer or employee of the Department of Justice or any other department or agency of the United States engaged in the detection, investigation, or prosecution of crime *has substantial evidence that an identifiable person has been directly and proximately harmed as a result of the commission of a federal offense . . . and in the judgment of the officer or employee, that person is a putative victim of that offense*.

Cassell *et al*., *supra*, at 92 (emphasis added). Professor Cassell's proposal reads like a finely-tuned statutory provision—but one that, unfortunately, Congress never enacted.

[17] For reasons we will explain, the dissent's interpretation—so far as we can discern it—suffers from the same flaw. *See infra* at 51–52.

Petitioner is on slightly stronger footing, we think, in pointing to the CVRA's "venue" provision, § 3771(d)(3). In relevant part, that provision states that "[t]he rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in which the crime occurred." Petitioner contends—and the district court agreed—that the "no prosecution is underway" clause *must* mean that CVRA rights "'may be enforced before a prosecution is underway'" and, accordingly, that "'those rights must attach before a complaint or indictment formally charges the defendant with the crime.'" Reply in Supp. of Pet. at 15 (quoting *Does*, 817 F. Supp. 2d at 1342). Petitioner's interpretation of subsection (d)(3) is not implausible—that provision could be read to mean that CVRA rights attach before the commencement of criminal proceedings. But it isn't necessary, either, and in light of the remainder of the Act's text—and the practical implications of petitioner's construction, the details of which we explore below—we are reluctant to adopt it, or at least to invest it with the significance that petitioner does.

There are, we think, at least two alternative ways of understanding § 3771(d)(3). First, and perhaps most obviously, it could be read to apply to the period of time between the initiation of criminal proceedings—which may occur as early as the filing of a criminal complaint under Federal Rule of Criminal

Procedure 3—and the levying of formal charges in an indictment.[18] The word "prosecution"—on which subsection (d)(3) pivots—is a legal term of art; in relevant part, it refers to "[t]he institution and continuance of a criminal suit [and] the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information." *Webster's New International*, *supra*, at 1987. Moreover, the law is clear, at least for Sixth Amendment right-to-counsel purposes, that a "prosecution" does *not* begin with the criminal complaint's filing. *See United States v. Alvarado*, 440 F.3d 191, 199–200 (4th Cir. 2006) ("The filing of a federal criminal complaint does not commence a formal prosecution."); *see also, e.g.*, *United States v. States*, 652 F.3d 734, 741–42 (7th Cir. 2011) (same); *United States v. Boskic*, 545 F.3d 69, 82–84 (1st Cir. 2008) (same). Rather, the Sixth Amendment right does not attach—because a "prosecution" does not begin—until, at the earliest, a suspect's "initial appearance before a judicial officer." *Rothgery v. Gillsespie County, Tex.*, 554 U.S. 191, 199 (2008). All of which is to say that even if petitioner and the district court were correct that the "no prosecution is underway" clause meant that CVRA rights apply "before"

[18] Presumably because it finds this the more difficult of the two interpretations of subsection (d)(3) to deal with, the dissent labels it our "alternative[]" position and relegates its response to a footnote—notwithstanding that we introduce it as the "[f]irst, and perhaps most obvious[]" reading. *See* Dissenting Op. at 92 n.17. By contrast, the dissent goes on for pages challenging what we offer (next page) as an "alternative[]" interpretation, (mis)stating our position as being that "this venue provision is about 'post-judgment' matters." *Id*. at 91–93.

formal charges are filed, they may yet be incorrect that those rights should be understood to attach during a pre-complaint investigation. Subsection (d)(3) can be read sensibly enough to apply (and to give victims the right, for example, to "confer" with prosecutors, § 3771(a)(5)) between the filing of the criminal complaint and the suspect's initial appearance before a judge—and thus, for instance, to express their views to prosecutors about whether the defendant should be granted pretrial release. *See* Fed. R. Crim. P. 5(d)(1)(C) (noting that pretrial-release decisions are made at the "initial appearance").

Alternatively, subsection (d)(3) could be interpreted to refer to the period *after* a "prosecution" has run its course and resulted in a final judgment of conviction. Petitioner and the district court read the "no prosecution is underway" clause to say, in effect, "no prosecution is [*yet*] underway"—thereby necessarily pointing to the period "before" (their word) the prosecution's commencement. But subsection (d)(3)'s is temporally agnostic—on its face, it could just as easily mean that "no prosecution is [*still*] underway." *Cf. Underway,* Oxford English Dictionary, https://oed.com/view/Entry/212225?rskey=hlolT7&result=1#eid (last visited April 13, 2020) (defining "underway" as it pertains to "a process, project, [or] activity" to mean "set in progress; in the course of happening or being carried out"). No one doubts, for instance, that a victim could file a post-judgment motion alleging that the government violated her rights during the course of the

prosecution and asking the court, say, to "re-open a plea or sentence." 18 U.S.C. § 3771(d)(5).[19]

Moreover, petitioner's broad reading of § 3771(d)(3) suffers from the same slippery-slope problems that plague her reading of § 3771(c)(1). To say, as the petitioner does—and as the district court did—that subsection (d)(3) indicates that CVRA "rights must attach *before* a complaint or indictment formally charges the defendant with the crime,'" Reply in Supp. of Pet. at 15 (quoting *Does*, 817 F. Supp. 2d at 1342), tells us nothing about *how long* "before." Again, must prosecutors consult with victims before law-enforcement officers conduct a raid, seek a warrant, or conduct an interrogation? That seems exceedingly unlikely. As we've explained, petitioner understandably wants to craft a rule that will cover this case without opening the floodgates to those possibilities—seemingly by reference to some sort of once-the-investigation-has-matured criterion. That criterion, though, has no basis in the CVRA's text. Petitioner's reading of subsection (d)(3)'s "no prosecution is underway" clause—like her reading of subsection (c)(1)'s "detection [or] investigation" clause—provides no logical stopping point.

* * *

[19] We concede that this reading isn't perfectly seamless, in that it would require the victim to file her post-judgment motion "in the district in which the crime occurred" rather than, as one might expect, in the district in which the prosecution occurred and the conviction was entered.

For all these reasons, we conclude that the CVRA's text is best read as applying only after the commencement of criminal proceedings, whether by complaint, information, or indictment.[20]

B

The historical context in which the CVRA was enacted confirms what the Act's text indicates—namely, that it was not meant to apply prior to the institution of criminal proceedings. Congress enacted the CVRA against the backdrop of another victims'-rights statute, the Victims' Rights and Restitution Act of 1990. The CVRA repealed and replaced some parts of the VRRA, but left others intact.

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[20] Although a marginal consideration, we also note that our interpretation is consistent with that offered by the Department of Justice, both in its implementing regulations and in an explanatory memorandum authored by the Office of Legal Counsel.

First, as already noted, in the CVRA's concluding subsection Congress directed DOJ to "promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims." 18 U.S.C. § 3771(f)(1). DOJ did so, and those regulations are codified at 28 C.F.R. § 45.10. Although the regulations don't expressly address the question whether CVRA rights apply before the commencement of criminal proceedings, or instead only afterward, they do, on balance, seem to assume the latter interpretation. The provision specifying the information that an alleged victim must include in her administrative complaint, for instance, states that the document "shall contain," among other information, "[t]he district court case number" and "[t]he name of the defendant in the case." *Id*. § 45.10(c)(2)(iii)–(iv). Needless to say, both items indicate (even if indirectly) DOJ's considered view that the Act's provisions apply only once a criminal case is pending.

Second, in December 2010, DOJ's Office of Legal Counsel issued a formal 16-page opinion—titled "The Availability of Crime Victims' Rights Under the Crime Victims' Right Act of 2004"—in which it concluded, following an exhaustive analysis, that CVRA rights do *not* apply before the commencement of criminal proceedings. *See* The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, 35 Op. O.L.C. 1 (Dec. 17, 2010). OLC's 2010 opinion reinforced and formalized an earlier 2005 determination that had likewise concluded, "preliminar[ily]," that "the rights guaranteed by the CVRA [are] limited in their applicability to pending criminal proceedings." *Id*. at 1.

Notably, the "Services to victims" section of the VRRA, which the CVRA preserved, includes provisions that, by their express terms, plainly apply before criminal proceedings begin.[21]

That section opens with a phrase that the CVRA repeats—noting that it applies to government agencies "engaged in the detection, investigation, or prosecution of crime." 34 U.S.C. § 20141(a). Unlike the CVRA, though, the VRRA directs the head of each such agency to designate individuals who will be responsible for identifying victims and for performing certain victim-related services "at each stage of a criminal case." *Id*. The VRRA goes on state that "[a]t the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation, a responsible official shall . . . identify the victim or victims of a crime [and] inform the victims of their right to receive, on request, [certain enumerated] services." *Id*. § 20141(b). By referring to the period immediately following "the detection of a crime" and to the existence of an ongoing "investigation"—with which the responsible official should be careful not to "interfer[e]"—the VRRA clearly extends victim-notice rights into the pre-charge phase.

[21] In a legislative-history-laden footnote, the dissent accuses us of "fail[ing] to recognize the CVRA *repealed* significant parts of the VRRA." Dissenting Op. at 101 n.21. As the paragraph to which this note is appended demonstrates, that is incorrect. The point—which we explain in text and to which the dissent offers no response—is that *the portions of the VRRA that the CVRA left in place* contain provisions that explicitly apply pre-charge, and that if Congress had intended the CVRA to have the same reach, it could (and should) have said so.

The VRRA is similarly explicit when describing the sorts of "services" to which victims are entitled. Following subsection (a)'s direction, subsection (c) marches—methodically, and roughly chronologically—through the various "stage[s]" of a crime's commission, detection, investigation, and prosecution. Subsection (c)(1) states, for instance, that "the responsible official shall"—presumably immediately in the aftermath of a crime's commission, and thus by definition before any charges are filed—inform the victim where she can "receive emergency medical and social services." *Id*. § 20141(c)(1)(A). Subsection (c)(2) then provides that the responsible official shall ensure that the victim receives "reasonable protection from a suspected offender"—notably, not "the accused," as in the CVRA, but "a suspected offender." *Id*. § 20141(c)(2). Continuing, subsection (c)(3) states that the official shall provide the victim "the earliest possible notice" of, among other things, and under appropriate circumstances, "the status of the investigation of the crime" and "the arrest of the suspected offender"—both of which, obviously, refer to pre-charge events. *Id*. § 20141(c)(3)(A)–(B). It is not until subsection (c)(3)(C)—which refers to "the filing of charges against a suspected offender"—that the VRRA's focus conspicuously shifts to rights pertaining to "charges," "trial[s]," "hearing[s]," and "proceedings." *See id*. § 20141(c)(3)(C)–(c)(5).

The VRRA's provisions—about which Congress indisputably knew when it framed and enacted the CVRA—demonstrate that when Congress wants to extend victims-rights protections pre-charge, it knows how to do so, and does so expressly. The fact that the CVRA contains no similar language counts heavily against petitioner's interpretation under what we have called an entire "family" of interpretive canons. *See Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1209 (11th Cir. 2009) (citing the interrelated principles, for instance, that "where Congress knows how to say something but chooses not to, its silence is controlling," and that "when Congress uses different language in similar sections, it intends different meanings" (citations omitted)).[22]

* * *

Together, these textual and contextual considerations lead us to conclude that, on balance, the CVRA is best interpreted to apply only after the commencement of criminal proceedings. Although not precisely on point, we find resonance in much of what the Supreme Court recently said in *Lagos v. United*

[22] One might reasonably ask why petitioner here didn't proceed under the VRRA, some of whose provisions (unlike, we conclude, the CVRA's) clearly apply before the initiation of criminal proceedings—and which, therefore, the government here may well have violated. The answer, in short, is that the VRRA provides no mechanism for judicial enforcement whatsoever—not even the limited "motion"-based remedy that the CVRA authorizes. *See* 34 U.S.C. § 20141(d) ("This section does not create a cause of action or defense in favor of any person arising out of the failure of a responsible person to provide information as required . . . ."). So, while (on our reading, anyway) the rights available under the VRRA are more broadly applicable than those under the CVRA, they are not judicially enforceable—and thus, as we will explain shortly, don't give rise to the practical concerns that a pre-charge application of CVRA rights would.

States, 138 S. Ct. 1684 (2018), which concerned another federal victims'-rights statute, the Mandatory Victims Restitution Act. In particular, the Court there addressed a portion of that statute requiring reimbursement of expenses that a crime victim "incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A(b)(4). The question before the Court was whether that provision should be interpreted narrowly, to require reimbursement only of those expenses that a victim incurred during a *government* "investigation" and *criminal* "proceedings," or more broadly, to include expenses incurred during *any* "investigation" and *any* case-related "proceedings." *Lagos*, 138 S. Ct. at 1688.

The Court unanimously adopted the narrower reading. In doing so, the Court readily acknowledged that there were "contrary arguments . . . favoring a broad interpretation"—in particular, that the more limited reading "will sometimes leave a victim without a restitution remedy sufficient to cover" some offense-related expenses and thereby contravene the Act's "broad purpose." *Id*. at 1689. The Court further conceded that while it thought the statute's "individual words suggest[ed]" a more "limited interpretation," they "d[id] not demand" it. *Id*. at 1688. Even so, the Court held that, understood in context—for instance, the fact that the terms "investigation" and "proceedings" were both linked to the word "prosecution"—the more limited reading was preferable from a textual and

structural standpoint. The Court also emphasized that "Congress ha[d] enacted many different restitution statutes with differing language, governing different circumstances," and that while some of them contained provisions specifically requiring "full" restitution, the Mandatory Victims Restitution Act "contain[ed] no such language." *Id*. at 1689–90.

The Court concluded its interpretive analysis this way: "[G]iven th[e] differences between the Mandatory Victims Restitution Act and other restitution statutes, we conclude that the considerations we have mentioned, particularly those based on a reading of the statute as a whole, tip the balance in favor of our more limited interpretation." *Id*. at 1690. Just so here. In light of CVRA's text's overarching focus on the period following the initiation of criminal proceedings, and the obvious differences between the CVRA and the VRRA—which by its terms plainly reaches into the pre-charge phase—we too conclude that the interpretive balance tips in favor of a more limited reading.

C

There is a final consideration here, and it is to our minds a weighty one. The CVRA's final substantive provision—which Congress slotted in just before statutory definitions and a closing directive to the Attorney General to promulgate implementing regulations—states that "[n]othing in this chapter [*i.e.*, the entirety of the Act] shall be construed to impair the prosecutorial discretion of the Attorney

General or any officer under his direction." 18 U.S.C. § 3771(d)(6). For reasons we will explain, we conclude that petitioner's "constru[ction]" of the Act—as applying before the initiation of criminal proceedings—would indeed "impair . . . prosecutorial discretion."

Broadly defined, the term "prosecutorial discretion" refers to the soup-to-nuts entirety of "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." *Black's*, *supra*, at 565. The core of prosecutorial discretion, though—its essence—is the decision whether or not to charge an individual with a criminal offense in the first place. The Supreme Court has repeatedly reaffirmed the principle—which dates back centuries—that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869)).[23]

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[23] This prosecutorial discretion "flows not from a desire to give carte blanche to law enforcement officials but from recognition of the constitutional principle of separation of powers." *United States v. Ream*, 491 F.2d 1243, 1246 n.2 (5th Cir. 1974). As we said in *Ream*—

> The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the

We believe that petitioner's interpretation of the CVRA risks "impair[ing] . . . prosecutorial discretion" in at least two fundamental ways. As an initial matter, consider that the *very first* determination that a court must make when asked to enforce the CVRA is whether the party seeking the Act's benefit is a "crime victim." The reason is because the CVRA's opening provision makes clear that the Act's protections—the rights enumerated therein, already discussed at some length—are available *only* to "crime victim[s]." 18 U.S.C. § 3771(a) ("A crime victim has the following rights . . . ."). Notably for our purposes, the CVRA statutorily defines the term "crime victim" to mean "a person directly and proximately harmed as a result of the commission of a Federal offense." *Id*. § 3771(e)(2).

Accordingly, any movant asserting rights under the CVRA must, at the very outset, demonstrate to the district court that he or she is a "crime victim" entitled to statutory protection. And, given the statutory definition's terms, in order to determine whether the movant has made the requisite showing, the court must decide whether a "Federal offense" has occurred. When a prosecutor has already

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> free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

Id. (quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)); *accord, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'").

commenced criminal proceedings against an identifiable individual for a specific crime, he or she has made at least a presumptive determination that the individual has in fact committed a "Federal offense." So, as applied post-charge—in the context of ongoing criminal proceedings—the "crime victim" determination is straightforward: An individual who has been "directly and proximately harmed" as a result of the conduct charged by the government is entitled to CVRA protection.

Not so before the commencement of criminal proceedings. In that circumstance, if a movant were to assert CVRA rights as a "crime victim," the court would first have to determine—but this time without any initial determination by the government in the form of a charging decision and, indeed, presumably while the government's investigation is ongoing—whether or not a "Federal offense" has been committed. That scenario—which is a necessary consequence of petitioner's interpretation—presents at least three intractable problems.

First, and most obviously, petitioner's reading puts the cart before the horse: When else, if ever, is a court called on to decide whether an "offense" (*i.e.*, a crime) has occurred—as opposed to a moral wrong more generally—*before* the government has even decided to press charges? The answer, so far as we are aware, is never. Second, how, in the absence of a charging decision, would the court even go about ascertaining whether an "offense" had occurred? What would

that proceeding look like? A mini- (or perhaps a not-so-mini-) trial in which the court finds facts and makes legal determinations regarding an "offense" yet to be named? Finally, and in any event, it seems obvious to us that simply by conducting such a proceeding and by concluding (up front) that an "offense" has—or has not—occurred, the court would not only exert enormous pressure on the government's charging decisions, but also likely impair the government's ongoing investigation. The "impair[ment]" of prosecutorial discretion, we think, would be palpable.

Separately, even if the threshold "crime victim" barrier could be overcome, the *enforcement* of CVRA rights in the pre-charge phase would risk unduly impairing prosecutorial discretion. Consider, as a general matter, how CVRA enforcement occurs. If, for instance, an individual claiming to be a covered victim believes—as did petitioner here—that the government hasn't "confer[red]" with her in the manner prescribed by § 3771(a)(5) or "treated [her] with fairness" as required by § 3771(a)(8), then she will—as did petitioner here—ask a district court to "order" prosecutors to confer and to treat her "fair[ly]." *See* Emergency Pet. at 2. Even in the post-charge phase, those are pretty extraordinary requests. It is no small thing to ask a judge to issue an injunction ordering the government's lawyers (presumably on pain of contempt) to conduct their prosecution of a particular matter in a particular manner. But at least after the commencement of criminal

proceedings—and accordingly *after* the government has submitted itself and its case to the district court's jurisdiction and supervision—the CVRA explicitly authorizes the court's intervention. Congress made a clear determination that the intrusion was necessary and appropriate.

Before the commencement of criminal proceedings, though, the intrusion would be significantly greater, both quantitatively and qualitatively. As a quantitative matter, petitioner's interpretation—pursuant to which the CVRA's protections would extend into the "detection" and "investigation" phases—risks greatly multiplying the sheer number of opportunities for judicial intervention in law-enforcement and prosecutorial affairs. Freed from any line limiting the Act's applicability to the post-charge phases of a prosecution, courts would be empowered to issue injunctions requiring (for instance) consultation with victims before raids, warrant applications, arrests, witness interviews, lineups, and interrogations. That would work an extraordinary expansion of an already-extraordinary statute.

The intrusion occasioned by a pre-charge interpretation of the CVRA would also be qualitatively different. The commencement of criminal proceedings marks a sensible boundary on the prosecutorial-discretion spectrum. As already explained, before charges are filed—when the government is still in the process of investigating and deciding "whether to prosecute"—its authority and discretion are

understood to "exclusive" and "absolute." *Nixon*, 418 U.S. at 693. By contrast, once the charging decision is made, the prosecutor steps into the court's jurisdiction—its "house," to speak—and thus necessarily cedes some of her control of the course and management of the case. From that point forward, the court will "assume a more active role in administering adjudication of a defendant's guilt and determining the appropriate sentence." *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 737 (D.C. Cir. 2016). Interpreting the CVRA to apply post-charge—as its terms plainly permit—thus squares with the background expectation of judicial involvement. Interpreting the Act to apply pre-charge, by contrast, contravenes the background expectation of executive exclusivity.[24]

* * *

For reasons we have explained, we conclude that the CVRA is best understood—in accordance with its terms and the context in which it was

[24] For at least two reasons, it is no answer to say, as the district court did, that the CVRA would entitle movants only to a "voice" in a prosecutor's pre-charge decisionmaking process, not a "veto" over the decisions themselves—or, as the dissent does, that "nothing in the CVRA empowers crime victims to force a prosecutor to prosecute." Dissenting Op. at 63. First, giving movants even a guaranteed right under § 3771(a)(5) to "confer" with government actors before detection- and investigation-phase activities like raids, warrant applications, and interrogations could severely impact law-enforcement and prosecutorial decisionmaking. Second, there is essentially no limit to the sorts of pre-charge relief that an enterprising movant could seek—or that an innovative judge might grant—under § 3771(a)(8)'s fair-treatment provision. While perhaps not likely, it is not outside the realm of possibility that an alleged victim might argue—or that a district court might conclude—that the only "fair" thing to do in a particular circumstance would be to require the government to indict a suspect, or to charge him in a particular manner.

enacted—to apply only after the initiation of criminal proceedings. To the extent the Act's language and structure leave any doubt about its proper scope, we must assume that Congress "acted against the backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions." *Fokker Servs.*, 818 F.3d at 738. Had Congress intended to upend (rather than reinforce) those "long-settled understandings," we can only assume it would have expressed itself more clearly. *See, e.g.*, *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1947 (2016) ("Congress 'does not, one might say, hide elephants in mouseholes.'" (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001))).[25]

[25] The dissent relies heavily on the Fifth Circuit's decision in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), which it says "held" that "[t]here are clearly rights under the CVRA that apply before any prosecution is underway." Dissenting Op. at 103 (quoting *Dean*, 527 F.3d at 394). To the extent that *Dean* is properly read to "h[o]ld" that CVRA rights apply before the commencement of criminal proceedings—which we doubt, for reasons we will explain—we disagree with and decline to follow it. In that case, following an explosion at an oil refinery that killed 15 people and injured more than 170, the Department of Justice considered prosecuting the owner. Before bringing any charges, though, prosecutors filed an *ex parte* motion in the district court (1) alerting the court that a plea agreement was forthcoming and (2) asking the court's permission to delay notifying known victims until after the agreement was executed, for fear that pre-plea notification would be impracticable and could jeopardize the plea-negotiation process. The district court agreed, the plea agreement was signed, and the victims were notified thereafter. Several victims subsequently moved to appear and urged the district court to reject the plea agreement on the ground that, by maintaining secrecy, prosecutors (and the court) had violated their CVRA-based "reasonable right to confer with the attorney for the Government." 18 U.S.C. § 3771(a)(5). When the district court refused to reject the plea agreement, the victims sought mandamus relief from the court of appeals.

Although the Fifth Circuit ultimately declined to issue the writ, it observed—in what, given its ultimate disposition, was technically dictum—that the district court had violated the CVRA by acceding to the government's request that victims not be notified in advance of the plea deal. In so doing, it noted the district court's "acknowledg[ment]" that "[t]here are clearly

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For the foregoing reasons, we hold that the CVRA does not apply before the commencement of criminal proceedings—and thus, on the facts of this case, does not provide the petitioner here any judicially enforceable rights.

Having so held, two final words.

First, regarding the dissent: Although we have endeavored along the way to meet a few of the dissent's specific critiques, we must offer here two more global responses. As an initial matter, with respect to the dissent's charge (Dissenting Op. at 65) that we have "dresse[d] up" what it calls a "flawed statutory analysis" with "rhetorical flourish"—well, readers can judge for themselves whose rhetoric is in fact more florid. *See, e.g.*, *id*. at 61 ("So how does the Majority bail the U.S. Attorney's Office out of its egregious CVRA violations . . . ?"); *id*. at 94 ("So how

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rights under the CVRA that apply before any prosecution is underway." 527 F.3d at 394. "Logically," the court of appeals said, "this includes the CVRA's establishment of victims' 'reasonable right to confer with the attorney for the Government.'" *Id*. (quoting 18 U.S.C. § 3771(a)(5)). Thus, the Fifth Circuit noted, "[a]t least in the posture of this case (and we do not speculate on the applicability to other situations), the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain." *Id*.

We decline to follow *Dean*'s dictum for several reasons. First, the *Dean* briefing reveals that the parties there didn't even dispute whether the CVRA applies before the commencement of criminal proceedings; accordingly, the question that this case so clearly tees up was never subjected to adversarial testing. Second, and perhaps relatedly, the Fifth Circuit's three-sentence discussion—which does little more than echo the district court's own "acknowledg[ment]"—is devoid of any analysis of the CVRA's text, history, or structural underpinnings. Finally, even read for all it might be worth, the Fifth Circuit's observation that the CVRA applied pre-charge in the circumstances before the court there was—for reasons we have explained at length and in detail, and with all due respect—simply incorrect.

in the holy name of plain text . . . ?"); *id*. ("The Majority hacks away at the plain text with four tools."); *id*. ("The Majority cherry picks the meaning of 'case' . . . ."); *id*. at 96 ("Nonsense."); *id*. at 98 ("As its third tool to axe the plain text . . . ."); *id*. ("Do not fall for this."); *id*. 106 (accusing us of ruling "by judicial fiat"); *id*. at 109–10 (twice accusing us of fearing crime victims more than "wealthy defendants").

More substantively, it remains unclear to us exactly how the dissent thinks the CVRA should be interpreted and applied. It's obvious that our dissenting colleague doesn't particularly like our reading—namely, that CVRA rights don't attach before the initiation of criminal proceedings. (Which is fine—as we've already confessed, we don't particularly *like* it either.) But she offers no intelligible alternative of her own. At times, the dissent suggests—broadly, but without elaboration—that the Act should be construed to apply "pre-charge." *See* Dissenting Op. at 67, 90, 95 n.19, 96–97, 104, 106, 109, 112. That reading (while we think wrong) at least has the benefit of coherence and clarity. But the dissent (we think wisely) doesn't seem eager to defend so sweeping an interpretation, presumably because it has no logical stopping point. Instead, the dissent hints—although again, without any real explanation—that CVRA rights should be understood to apply only (or at least?) "once the criminal case has matured to plea

negotiations." *Id*. at 96.[26] Where, though—or as our dissenting colleague would say, where "in the holy name of plain text"—does that limiting criterion come from? As best we can tell, it is devised specifically to capture this case without risking a landslide. For reasons we have explained in detail, we believe that the CVRA is most properly (if imperfectly) read to apply only after the commencement of criminal proceedings. One thing of which we are certain: That interpretation is far superior to the dissent's good-for-this-train-only, once-the-investigation-has-matured reading—which, so far as we can tell, has no meaningful footing in the Act's text, history, or structure.

Second, and far more importantly, regarding the consequences of our interpretation: It isn't lost on us that our decision leaves petitioner and others like her largely emptyhanded, and we sincerely regret that. Under our reading, the CVRA will not prevent federal prosecutors from negotiating "secret" plea and non-prosecution agreements, without ever notifying or conferring with victims, provided that they do so before instituting criminal proceedings. We can only

[26] *Accord, e.g.*, *id*. at 66–67 (insisting that "[t]his case is not about the start or middle stages of a criminal investigation" but, rather, "a completed investigation" and prosecutors' preliminary "deci[sion] to proceed with an indictment"); *id*. at 69 ("The prosecutors were prepared to indict Epstein."); *id*. at 70 ("[P]rosecutors were recommending and ready to proceed with the federal indictment of Epstein."); *id*. at 97 (asserting that the right to confer attaches "[o]nce an investigation is completed, the case has matured to the indictment-drafting stage and pre-charge plea negotiations with defense counsel have begun"); *id*. at 111 (contending that prosecutors had an obligation to confer here "given the investigation was completed, the 53-page indictment was drafted, and the prosecutor[s were] already conducting pre-charge plea negotiations with Epstein's defense team").

hope that in light of the protections provided by other statutes—and even more so in the wake of the public outcry over federal prosecutors' handling of the Epstein case—*they will not do so*.

The question before us, though, isn't whether prosecutors should have consulted with petitioner (and other victims) before negotiating and executing Epstein's NPA. It seems obvious to us—and, indeed, the government has expressly conceded—that they should have. Our sole charge is to determine, on the facts before us, whether the CVRA obligated prosecutors to do so. We simply cannot say that it did.

PETITION DENIED.

TJOFLAT, Circuit Judge, concurring:

I concur without reservation in Judge Newsom's opinion for the Court. I write separately because the model the dissent creates, in which a victim is permitted to sue the United States Attorney[1] for refusing to confer about a criminal matter prior to indictment, would, in operation, result in Judicial Branch interference with the Executive Branch's function of investigating and prosecuting federal crimes. Such a model raises serious questions about whether, by doing so, the judiciary would be violating the constitutional principle of separation of powers.[2]

There can be no doubt that the Executive Branch has exclusive power over prosecutorial decisions. *See United States v. Nixon*, 418 U.S. 683, 693, 94 S. Ct. 3090, 3100 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."); *Confiscation Cases*, 74 U.S. 454, 457 (1868) ("Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney . . . ."); *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 1656

[1] I refer to the U.S. Attorney here and throughout this opinion for ease of analysis. Of course, in the typical case, the victim would sue the specific attorney in charge of the criminal investigation.

[2] This case presents an atypical CVRA scenario. In the ensuing discussion, I explain how the dissent's interpretation of the statute would likely be applied in a typical case, in which the U.S. Attorney's Office is considering whether to impanel a grand jury to hear evidence indicating that an individual may have committed a criminal offense against another individual and caused the latter to suffer an injury.

(1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as [within] the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. Const., Art. II, § 3)). This Executive Branch authority obviously includes the decision to investigate suspected criminal activity and whether to seek, or not seek, an indictment from the grand jury. These pre-charge decisions are the focus of this case.

The dissent interprets the CVRA as authorizing a victim to bring a U.S. Attorney to court for refusing to confer with her about a matter under criminal investigation. To illustrate what would likely occur if we permitted the victim to do that—i.e., to envision how the dissent's interpretation of the CVRA would operate in practice—consider a simple case of mail fraud.

Jane Doe is the victim of a fraudulent scheme. She finds out that the U.S. Attorney's Office is investigating the scheme and wants to discuss it with the attorney handling the investigation. The attorney refuses her request, so she sues him. Applying the dissent's interpretation, the district court finds that the attorney violated the CVRA by failing to confer with the victim. The court issues an injunction requiring the attorney to confer with Doe and to treat her fairly.[3] Even

[3] Another problem with the dissent's interpretation is that such an injunction could not be crafted in compliance with Rule 65 of the Federal Rules of Civil Procedure. Under that rule, the

if the court could craft such an injunction to comply with Rule 65 of the Federal Rules of Civil Procedure, which I doubt, the court would then be continually involved in the criminal investigation from the moment it issued the injunction. At any moment during the inevitable twists and turns of a pre-indictment criminal investigation, the victim could allege that the attorney had violated the injunction, and the attorney would be back in front of the district court to show cause why he should not be held in contempt.[4] But the event most likely to trigger such a hearing is the attorney's decision not to take the case to the grand jury, and that decision is completely within the Executive Branch's prosecutorial discretion. Therefore, applying the dissent's interpretation of the CVRA would clearly interfere with the Executive Branch's investigative and prosecutorial functions.

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order must be "specific" and "describe in reasonable detail . . . the act . . . required." Fed. R. Civ. P. 65(d)(1)(b)–(c). These requirements serve three purposes.

First, they provide notice to the enjoined party of precisely what it must do to avoid being held in contempt—the party cannot be left guessing. Second, a specific and reasonably detailed order is easy to enforce, while a vague order is not. Third, an injunction that does not meet these requirements breeds disrespect for the courts and the rule of law.

In cases like this one, an injunction requiring the attorney to confer with the victim and treat her fairly could not meet Rule 65's requirements. In my hypothetical, "conferral" and "fairness" likely would mean different things to the attorney and Doe, meaning the parties would be left guessing about what the injunction required. Therefore, such an injunction would not comply with Rule 65. To make matters worse, failure to comply with Rule 65 would exacerbate the problem discussed below—specifically, excessive judicial interference with an ongoing investigation—because the district court would frequently need to oversee disputes about whether the attorney's handling of the investigation was violating the inherently vague injunction.

[4] Moreover, and perhaps worst of all, there is nothing stopping a victim from challenging the attorney's decisions at multiple steps along the way. Once the district court is involved, a victim could allege that the attorney did not confer with her, or did not treat her fairly, whenever he makes each new investigatory or prosecutorial decision.

Having explored the consequences of the dissent's interpretation of the CVRA, it is clear that such an interpretation cannot be accepted. The notion that a district court could have any input on a U.S. Attorney's investigation and decision whether to bring a case to the grand jury is entirely incompatible with the constitutional assignment to the Executive Branch of exclusive power over prosecutorial decisions. Additionally, it is hard to imagine a bigger intrusion on executive autonomy than the possibility that a U.S. Attorney will be held in contempt for violating an injunction if her investigation is not handled as the victim and district court see fit. Therefore, the dissent's interpretation raises serious constitutional issues by concluding that there are no temporal limitations on the CVRA rights to confer with, and to be treated fairly by, the U.S. Attorney.[5]

In contrast, under Judge Newsom's interpretation, this problem does not exist because the CVRA only gives victim's post-charge rights. And, post-charge, the district court is not dragging the U.S. Attorney into court against his will and

[5] The dissenting opinion asserts that it "in no way injects judicial interference into a prosecutor's decisions" because "[t]he fact that a prosecutor must confer with a victim pre-charge does not mean the district court can exercise any control over the prosecutor's ultimate decision whether to indict." Dis. Op. at 113. But this is clearly wrong based on the facts of this case—prosecutors chose to enter an NPA with Epstein, and the victim wants the Court to undo that agreement. My dissenting colleague would likely argue that, because the U.S. Attorney could re-enter an NPA with Epstein's co-conspirators after conferring with victims, forcing the U.S. Attorney to confer would not invade the executive's prosecutorial discretion. This riposte overlooks the reality that exclusive discretion does not come with caveats. In other words, imposing the dissent's conditions that the executive must satisfy before it can exercise its prosecutorial discretion means that it does not truly have exclusive discretion.

imposing a condition upon his prosecutorial discretion—the attorney is voluntarily before the court, and it is appropriate for the court, in its active role in the criminal proceedings, to examine the attorney's failure to comply with his CVRA obligations. In such circumstances, there is no concern about the separation of powers because the court is not meddling in the Executive Branch's decisions until executive officers have chosen to present themselves to the court.

In sum, the dissent's interpretation creates serious constitutional concerns that Judge Newsom's interpretation does not. And it is "settled policy" that, when confronted with two potential interpretations of a statute, we should avoid the interpretation that "engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *See Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 2241 (1989). Therefore, Judge Newsom's interpretation should be adopted. This conclusion is bolstered by the language of the statute, itself, which explicitly states that none of the CVRA's provisions should be read to diminish prosecutorial discretion: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). Clearly, the author of the

statute—Congress—recognized the need to avoid any construction that results in the problem that the dissent's approach creates.[6]

For all of the reasons set forth in Judge Newsom's opinion, and because such an interpretation avoids raising serious constitutional questions, the CVRA is best understood as not applying until charges are commenced against a defendant.

[6] Putting aside the separation of powers problem, under the dissent's approach, the judiciary, based on Congressional authority in the form of a statute, appears to be putting its thumb on the scale against the individuals being investigated by law enforcement. In a sense, the judiciary is telling the executive that it had better indict its suspects or potentially face a CVRA action. But the only time that it is appropriate for the judiciary to do so, based on Congressional authority, is during criminal sentencing, where sufficient due process safeguards are in place to protect the accused's constitutional rights. Because such safeguards are obviously not in place pre-charge, this effect of the dissent's interpretation is another reason not to adopt it.

HULL, Circuit Judge, dissenting:

This appeal presents legal questions of first impression in this Circuit regarding the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, which grants a statutory "bill of rights" to crime victims. In my view, the Majority patently errs in holding, as a matter of law, that the crime victims of Jeffrey Epstein and his co-conspirators had no statutory rights whatsoever under the CVRA. Instead, our Court should enforce the plain and unambiguous text of the CVRA and hold that the victims had two CVRA rights—the right to confer with the government's attorney and the right to be treated fairly—that were repeatedly violated by the U.S. Attorney's Office in the Southern District of Florida.[1]

Here, the U.S. Attorney's Office (1) drafted a 53-page indictment against sex trafficker and child abuser Epstein and (2) repeatedly wrote his defense team that the government had proof beyond a reasonable doubt that he victimized more than 30 women as minors. Shockingly though, the Office then (1) conducted many days of extensive plea negotiations with Epstein's attorneys and secretly entered into a Non-Prosecution Agreement ("NPA"), granting Epstein federal immunity in return for his plea to two state prostitution-solicitation charges, (2) never conferred one minute with the victims about the NPA or told the victims that such an

[1]Federal prosecutors located in the U.S. Attorney's Offices in both West Palm Beach and Miami handled Epstein's case. I will refer to those offices collectively as "the U.S. Attorney's Office" or "the Office."

agreement was under consideration, (3) worked closely with Epstein's lawyers to keep the NPA's existence and terms hidden from the victims, (4) actively misrepresented to the victims that the criminal investigation continued when the NPA was already signed, and (5) never informed the victims about the NPA until after Epstein pled guilty in State Court and the secret sweetheart deal was done.

Remarkably too, without notice and conferral with the victims, the NPA granted federal immunity not only to Epstein, but also to "any potential co-conspirator of Epstein, including but not limited to Sarah Kellen, Adriana Ross, Lesley Groff, or Nadia Marcinkova." It is only because the victims filed this lawsuit, and the District Court ordered the NPA be produced, that the victims and the public learned the truth about the plea negotiations and the NPA's grant of federal immunity to Epstein and his co-conspirators.

So how does the Majority bail the U.S. Attorney's Office out of its egregious CVRA violations and reverse the District Court's ruling? The Majority holds that Epstein's crime victims had no CVRA rights at all because the plea negotiations with Epstein's defense counsel were conducted "pre-charge" and the Office never filed the indictment and commenced court proceedings. That is to say, the Majority crafts a bright-line, blanket restriction on the statute: the CVRA grants crime victims no rights whatsoever unless and until a formal indictment is filed in a court. See Maj. Op. at 2.

The Majority concludes "the CVRA was never triggered" at all, even though the U.S. Attorney's Office prepared a 53-page indictment against Epstein but later secretly entered into a plea deal, granting federal immunity to Epstein and his co-conspirators. Id. According to the Majority, because the Office cleverly entered into a sweetheart plea deal with Epstein "pre-charge" and never filed the indictment, the victims never had any CVRA rights in the first place. Id. at 2, 18-19.[2]

I dissent because the plain and unambiguous text of the CVRA does not include this post-indictment temporal restriction that the Majority adds to the statute. Although, as I discuss later, the two rights provisions at issue include other limiting principles, there is no textual basis for the bright-line, post-indictment only restriction the Majority adds to the statute. Rather, the Majority's contorted statutory interpretation materially revises the statute's plain text and guts victims' rights under the CVRA. Nothing, and I mean nothing, in the CVRA's plain text requires the Majority's result.

See for yourself. The CVRA grants "crime victims" these two unambiguous rights in subsection (a):

[2]The Majority holds that "the rights under the Act do not attach until criminal proceedings have been initiated against a defendant, either by complaint, information, or indictment." See Maj. Op. at 2. But for ease of reference in my dissent, I collectively refer to the initiation of criminal proceedings as by "filing an indictment" because most prosecutions begin that way. In contrast, a "complaint" can initiate only misdemeanor prosecutions and an "information" can initiate felony charges only if the defendant waives grand jury presentment.

> **(a) Rights of crime victims.**—A crime victim has the following rights:
>
> . . . .
>
> **(5)** The reasonable right to confer with the attorney for the Government in the case.
>
> . . . .
>
> **(8)** The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a)(5), (8). The text does not contain the Majority's post-indictment temporal restriction. Simply put, crime victims do not have to wait for the government to file a formal indictment and commence court proceedings before having these CVRA rights.

In fact, the CVRA's venue provision in § 3771(d) expressly provides that, "if no prosecution is underway," the victims can file suit to assert their subsection (a) rights "in the district court in the district in which the crime occurred." Id. § 3771(d)(1), (3). In filing this lawsuit back in 2008, the petitioner crime victims did what the CVRA expressly authorized them to do.

To be clear, nothing in the CVRA empowers crime victims to force a prosecutor to prosecute. See id. § 3771(d)(6). As the Concurring Opinion well points out, the Executive Branch has exclusive authority and absolute discretion over prosecutorial decisions and whether to seek indictment or not. Conc. Op. at 54-55. But what the CVRA does do is grant victims a statutory right to have an opportunity to speak to the prosecutor before the prosecutor makes that decision. In § 3771(c), the CVRA even mandates that the U.S. Attorney's prosecutors, while

"engaged in the . . . investigation[] or prosecution of crime shall make their best efforts" to accord victims these statutory rights in subsection (a). Id. § 3771(c)(1). After conferral, the prosecutor has the exclusive authority and discretion whether to indict or not. Pre-charge, the Office spent days conferring and negotiating with Epstein's defense team, but had not a minute for the victims.

Unlike the Majority, I agree with the Fifth Circuit that crime victims have a CVRA right to confer with the government attorney, even if a plea deal is struck before any formal indictment is filed. See In re Dean, 527 F.3d 391, 394 (5th Cir. 2008). As the Fifth Circuit emphasized: "In passing the Act, Congress made the policy decision—which we are bound to enforce—that the victims have a right to inform the plea negotiations process by conferring with prosecutors before a plea agreement is reached." Id. at 395.

What's worse is that the Majority concedes, as it must, that § 3771(a)(5)'s conferral right and § 3771(a)(8)'s right to be treated with fairness have no temporal limitation on their face and that petitioners are "not without [their] own textual arguments." Maj. Op. at 20, 25, 29. The Majority admits: "The interpretation of the CVRA that petitioner advances, and that the district court adopted, is not implausible; the CVRA could be read to apply pre-charge." Id. at 18. Yet, the Majority refuses to enforce the Act as written by Congress and grafts onto the plain and unambiguous text a restriction Congress never enacted.

The roadmap for my dissent follows. First, I recount more facts about the undisputed conduct of the U.S. Attorney's Office. This includes how initially the Office wrote the victims, and later Epstein's attorneys, that the victims had ongoing CVRA rights to confer and be treated fairly. Tellingly, it was not until the petitioner victims filed this lawsuit that the Office reversed course and took the stance that the victims never had any CVRA rights in the first place.

Next, I examine the CVRA text and apply the relevant canons of statutory interpretation. Then, I show the flaws in the Majority's statutory analysis. In one breath, the Majority urges Congress to fill the gap left by (the Majority's reading of) the CVRA and in the next tells us why granting victims two CVRA rights "pre-charge" would be a bad idea.

Given this is a plain-text case, the Majority curiously carries on at length about slippery slopes and bad policy implications that the Majority says counsel against enforcing any victim rights "pre-charge." Yet, since the Fifth Circuit's 2008 decision and the District Court's 2011 decision, there has been no flood of civil suits by victims, no evidence of victims' abuse of their CVRA rights, and no prosecutors' complaints about impairment of their prosecutorial discretion.

The Majority also dresses up its flawed statutory analysis with rhetorical flourish, using language like "scandalous," "national disgrace," and "the sad details of this shameful story," while also expressing sincere empathy for the victims:

"Despite our sympathy for Ms. Wild and others like her, who suffered unspeakable horror at Epstein's hands, only to be left in the dark—and, so it seems, affirmatively misled—by government lawyers, we find ourselves constrained to deny her petition." Maj. Op. at 2, 6. The Majority confesses that "[i]t isn't lost on us that our decision leaves petitioner and others like her largely emptyhanded" and "we sincerely regret that." Id. at 52. In addition to ruminating in sincere regret and sympathy, we, as federal judges, should also enforce the plain text of the CVRA—which we are bound to do—and ensure that these crime victims have the CVRA rights that Congress has granted them.

Next, I address the constitutional concerns about the CVRA raised in the Concurring Opinion, although that, so far, has not been the issue in this appeal. Lastly, I address the remedy and why, due to the U.S. Attorney's Office's egregious violations of the victims' rights, this Court should remand the case to the District Court for consideration of the victims' requested remedies.

I. PROSECUTORS ADVISE VICTIMS HAVE CVRA RIGHTS

This case is not about the start or middle stages of a criminal investigation. Rather, as detailed below, this case is about (1) a completed investigation of federal sex-trafficking crimes against minor girls and (2) the U.S. Attorney's Office's repeated communications that it (a) had "proof beyond a reasonable doubt" that over 30 minor girls were victims of Epstein's criminal sexual conduct

and (b) had "decided to proceed with [Epstein's] indictment." Let's start with the investigation and how the Office in 2006 wrote the victims that they did have CVRA rights pre-charge.

A. 2005 – 2007 Criminal Investigation

In 2005, the parents of a 14-year-old girl reported to the Palm Beach Police Department that Jeffrey Epstein sexually abused their daughter. This report began the investigation into the then 52-year-old billionaire Jeffrey Epstein—an investigation that ultimately revealed that Epstein assembled a network of underage girls whom he sexually abused at his mansion in Palm Beach, Florida, elsewhere in the United States, and overseas.

In 2006, at the Palm Beach Police Department's request, the Federal Bureau of Investigation ("FBI") opened a federal investigation into Epstein's and his personal assistants' use of facilities of interstate commerce to induce girls between the ages of 14 and 17 to engage in illegal sexual activities. Thereafter, the U.S. Attorney's Office accepted the case for prosecution and assigned specific federal prosecutors to the case.

The FBI established that Epstein used young female recruiters and paid employees to find and bring minor girls to him, as often as three times a day, for his own and others' sexual gratification. Epstein also directed other people to sexually abuse the minor girls, including his co-conspirator Nadia Marcinkova.

This in-depth federal investigation proved that, between 2001 and 2007, Epstein sexually abused more than 30 minor girls, and multiple co-conspirators either procured the girls for Epstein's sexual gratification or participated in the sexual abuse themselves. The victims include the petitioners in this case, Jane Doe 1 and Jane Doe 2, who were 15 years old when first sexually abused by Epstein.

B. Aug. 2006 Letter to Crime Victim about CVRA Rights

Throughout the two-year investigation, once a victim of Epstein's sexual abuse was identified, the lead Assistant U.S. Attorney ("AUSA") assigned to the case, A. Marie Villafana, sent a letter telling the victim that she was protected by the CVRA and explaining her statutory rights under the CVRA.

For example, in 2006 and before an indictment was drafted in 2007, the U.S. Attorney's Office told petitioner Jane Doe 2 in a letter that she had statutory rights "to confer with the attorney for the Government in the case," "to be treated with fairness," and to petition the District Court if her CVRA rights were being violated. See 18 U.S.C. § 3771(a), (d)(3). The Office's 2006 letter explained that the Department of Justice would make its "best efforts" to ensure Jane Doe 2's CVRA rights were protected. Later, in March 2007, the Office began sending similar letters to Epstein's other victims, informing them of their ongoing CVRA rights.

This initial position of the U.S. Attorney's Office—that the petitioners had ongoing CVRA rights—is not surprising given that the CVRA was enacted to

protect crime victims' rights and ensure their involvement in the criminal justice process. United States v. Moussaoui, 483 F.3d 220, 234 (4th Cir. 2007); Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The [CVRA] was enacted to make crime victims full participants in the criminal justice system.").

II. MAY 2007: FEDERAL INDICTMENT PREPARED

By May 2007, the U.S. Attorney's Office had completed an 82-page prosecution memo and a 53-page draft indictment against Epstein, charging him with numerous federal crimes of sex trafficking minor victims. The prosecutors were prepared to indict Epstein. For the victims, so far, so good. But what the victims didn't know is what was secretly going on behind the scenes.

III. JAN. – SEPT. 2007: PROSECUTORS NEGOTIATE WITH EPSTEIN

Meanwhile and unbeknownst to the victims, for over nine months in 2007 (from January to September), the U.S. Attorney's Office was discussing with Epstein's defense team the forthcoming federal criminal charges. During this time, Epstein's defense team made multiple presentations to the Office to try to convince them not to prosecute Epstein, maintaining he committed no federal crimes.[3]

[3]Jeffrey Epstein's defense team included at various times attorneys from multiple law firms, such as: (1) Jay P. Lefkowitz, Kirkland & Ellis, New York, NY; (2) Roy Black, Black Srebnick Kornspan & Stumpf, Miami, FL; (3) Gerald B. Lefcourt, Law Office of Gerald B. Lefcourt, P.C., New York, NY (4) Lilly Ann Sanchez, Fowler White Burnett, Miami, FL; (5) Jack A. Goldberger, Goldberger & Weiss, West Palm Beach, FL; and (6) Joe D. Whitley, Alston & Bird, Washington D.C.; as well as Harvard Law Professor Alan Dershowitz. While not all attorneys participated in each defense presentation, the record here reveals some activity by each of Epstein's defense attorneys during either 2007 or 2008.

Those defense presentations were not successful. The record contains extensive communications showing that, as of August 2007, the Office's prosecutors were recommending and ready to proceed with the federal indictment of Epstein.

In early September 2007, U.S. Attorney R. Alexander Acosta met with some of Epstein's defense team, along with the federal prosecutors assigned to Epstein's case and the Chief of the Child Exploitation and Obscenity Section of the Department of Justice's Criminal Division in Washington, D.C. Epstein's defense team again raised federalism-based arguments that were rejected. As U.S. Attorney Acosta explained, "[a]fter considering the arguments raised at the September 7th meeting, and after conferring with the FBI and with [the Chief of the Child Exploitation and Obscenity Section], our Office decided to proceed with the indictment." At that time, the State of Florida had already charged Epstein with one count of solicitation of prostitution.

IV. NON-PROSECUTION AGREEMENT

What happened next remains baffling, to put it mildly. During September 2007, Epstein's defense attorneys engaged in more intensive pre-indictment plea negotiations with the U.S. Attorney's Office.

Although the record does not explain why, the Office then took the position that two types of plea agreements could apply to Epstein's federal crimes: (1) a plea agreement to federal charges; or (2) a non-prosecution agreement, whereby

the Office would agree not to federally prosecute Epstein and his co-conspirators, in return for which Epstein would plead guilty to a mere two state prostitution-solicitation charges and agree to an 18-month sentence in the county jail.

On September 16, 2007, Epstein's counsel Jay Lefkowitz sent the U.S. Attorney's Office a proposed written agreement, wherein the Office would extend immunity from federal prosecution to Epstein and certain co-conspirators.[4] The next day, Epstein's counsel Lefkowitz followed up, asking if the Office "intend[ed] to make the deferred prosecution agreement public," should Epstein agree to "go that route." AUSA Villafana responded: "A non-prosecution agreement would not be made public or filed with the Court, but it would remain part of our case file. It probably would be subject to a FOIA request, but it is not something that we would distribute without compulsory process."

The victims were not told that plea negotiations were ongoing, much less that the Office was seriously considering a non-prosecution agreement granting federal immunity to Epstein and his co-conspirators. Rather, the parties made great efforts to keep that secret from the victims and the public, too.

[4]In an e-mail to Lefkowitz, dated September 16, 2007, AUSA Villafana suggested strategies to conceal portions of the plea deal from the courts, stating that a prosecutor had "recommended that some of the timing issues be addressed only in the state agreement, so that it isn't obvious to the judge that we are trying to create federal jurisdiction for prison purposes." AUSA Villafana added: "I will include our standard language regarding resolving all criminal liability and I will mention 'co-conspirators,' but I would prefer not to highlight for the judge all of the other crimes and all of the other persons that we could charge."

A. Sept. 24, 2007: Execution and Terms of NPA

On September 24, 2007, the U.S. Attorney's Office and Jeffrey Epstein signed a seven-page agreement, entitled the "Non-Prosecution Agreement."[5] The NPA provided that the Office would not prosecute Epstein or his co-conspirators in the Southern District of Florida for federal felony crimes of sex trafficking more than 30 minors if: (1) Epstein pled guilty in Florida State Court to two state prostitution-solicitation charges, and (2) Epstein made a binding recommendation that the State Court impose an 18-month sentence in the county jail. The crimes listed in the NPA were: (1) sex trafficking of minors by force, fraud, or coercion, in violation of 18 U.S.C. §§ 1591(a)(1) and 2; (2) conspiracy to travel and traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with minor females, in violation of 18 U.S.C. § 2423(b), (e), and (f); and (3) conspiracy to use and using means of interstate commerce to knowingly persuade, induce, or entice minor females to engage in prostitution, in violation of 18 U.S.C. §§ 2422(b) and 371.

[5]The only four signature lines on the September 24, 2007 NPA were: (1) U.S. Attorney Acosta by AUSA Villafana; (2) Jeffrey Epstein; (3) Gerald Lefcourt, Counsel to Jeffrey Epstein; and (4) Lilly Ann Sanchez, Attorney for Jeffrey Epstein. From June 2005 to June 2009, Acosta was the U.S. Attorney for the Southern District of Florida.

As for the victims, the NPA added insult to injury. The NPA provided that if and only if the victims agreed to waive any other claim for damages, the victims could obtain an attorney paid for by Epstein and file 18 U.S.C. § 2255 civil lawsuits against Epstein for restitution. Of course, restitution in a criminal case is not contingent upon a victim giving up rights to pursue damages claims.

Even more striking, the NPA extended immunity to any "potential co-conspirator" of Epstein's, stating: "In consideration of Epstein's agreement to plead guilty and to provide compensation in the manner described above, . . . the United States also agrees that it will not institute any criminal charges against any potential co-conspirators of Epstein, including but not limited to Sarah Kellen, Adriana Ross, Lesley Groff, or Nadia Marcinkova."[6] Apparently, the co-conspirators had not cooperated or assisted the government. Rather, the sole consideration for their federal immunity was that Epstein plead to two state charges and provide potential restitution to his victims, but only if the victims waived all damages claims against Epstein. The NPA even stated "that this agreement will not be made part of any public record."[7]

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[6]At oral argument in this appeal, counsel for the respondent U.S. Attorney's Office agreed that it was highly unusual—never seen before—that the government would extend federal immunity to Epstein's co-conspirators without having the co-conspirators sign onto a plea agreement or provide some cooperation in exchange for federal immunity. The co-conspirators did not sign the NPA and were not listed as parties to it.

[7]As the NPA was being signed, Epstein's attorney Lefkowitz e-mailed AUSA Villafana,

B. Office Does Not Confer with Crime Victims

Although the U.S. Attorney's Office accepted the case for prosecution and prepared a 53-page indictment, the Office never conferred with the victims about the NPA and never told the victims that such an agreement was being considered, much less being negotiated. While the Office spent untold hours negotiating the NPA's terms with Epstein's skilled defense team, the Office never told the victims that it was negotiating and signing an agreement that would grant federal immunity to Epstein and his co-conspirators. The Office kept this information from Epstein's victims, despite earlier having sent most, if not all, of the girls the CVRA letters, which advised that the victims had a "right to confer with the attorney for the United States in the case" and a "right to be treated with fairness."

V. SEPT. 2007 – JULY 2008: PROSECUTORS HIDE NPA

The U.S. Attorney's Office also failed to tell the victims about the NPA for at least nine months after it was executed. Instead, the Office misrepresented to the victims that "this case" was still under investigation, advised them "to be patient," and never disclosed the government's NPA with Epstein.

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requesting: "Marie—Please do whatever you can to keep this [NPA] from becoming public." AUSA Villafana assured Lefkowitz that the NPA would be kept confidential.

A. Prosecutors Negotiate With Defense about Notifying Victims

During that nine-month period, the U.S. Attorney's Office and Epstein's defense team negotiated whether and to what extent the victims would be told about the NPA's resolution of the federal case. In this case, the Office admitted that it was a deviation from the government's standard practices to negotiate with defense counsel about the extent of crime victim notifications. Nevertheless, Epstein's defense attorneys demanded that the victims not be told about the resolution of the federal case because otherwise Epstein "will have no control over what is communicated to the identified individuals [the victims] at this most critical stage."

Epstein, of course, did not want the victims to know there would be no federal prosecution of his sex-trafficking-of-minors crimes if he pled guilty in State Court to merely soliciting prostitution. Everyone knew the victims would be disgusted, raise vigorous objections on the federal level, and try to convince the State Court judge not to be beguiled into accepting such a state plea that was tied to no federal prosecution for sex-trafficking crimes against more than 30 minor victims. While his state plea did not happen until June 30, 2008, in the interim, Epstein's attorneys worked to keep the terms of the 2007 NPA secret until after Epstein's state plea was accepted and the deal was done.

In later correspondence with Epstein's attorneys, AUSA Villafana admitted that Epstein did not want the U.S. Attorney's Office to inform the State Attorney's Office of the facts supporting the additional state prostitution-solicitation charge, nor did Epstein want federal victims to contact the State Court or prosecutor because the state prosecutor's "opinion may change if she knows the full scope of [Epstein's] actions." To this date, the U.S. Attorney's Office has presented no evidence that it or anyone else told the State Court, either before or during Epstein's state hearing, about the secret consideration Epstein had negotiated with the federal government—federal immunity for him and all co-conspirators—if the State Court accepted his state plea.[8]

Consistent with Epstein's demands, the U.S. Attorney's Office did not notify the victims about the NPA. But before acquiescing, the manner in which the Office responded to Epstein's demands unmasks the truth.

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[8]Epstein's defense team had legitimate concerns that the State Court judge would not accept Epstein's plea if tied to such a broad, secret federal immunity deal. Under Florida law, a State trial judge is never bound to honor a negotiated plea agreement. Goins v. State, 672 So. 2d 30, 31 (Fla. 1996). During a plea colloquy, a trial judge may announce that she is not bound by the plea agreement because other factors make the trial judge's concurrence impossible. King v. State, 578 So. 2d 23, 24 (Fla. Dist. Ct. App. 1991); see also Fla. R. Crim. P. 3.171(d) ("After an agreement on a plea has been reached, the trial judge may have made known to him or her the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, the judge shall advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible."). The NPA itself acknowledged that the entire deal was contingent on the State Court judge accepting the negotiated state plea agreement and sentence.

If the victims had been told the truth about the 2007 NPA, they would have had ample time to make their views known to the State Court before Epstein's plea on June 30, 2008. If the State Court rejected the plea, there was no federal immunity for Epstein and his co-conspirators.

Initially, the Office responded that the government had statutory obligations under the CVRA to notify the victims of the NPA, to confer with the victims, and to tell them about upcoming events, such as Epstein's state plea in return for no federal prosecution. Here are examples of what the Office wrote Epstein's attorneys in November and early December of 2007:

- "The United States has a statutory obligation (Justice for All Act of 2004)[9] to notify the victims of the anticipated upcoming events and their rights associated with the agreement entered into by the United States and Mr. Epstein in a timely fashion."

- "Section 3771 . . . commands that 'employees of the Department of Justice . . . engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).'"

- "Our Non-Prosecution Agreement resolves the federal investigation by allowing Mr. Epstein to plead to a state offense. The victims identified through the federal investigation should be appropriately informed, and our [NPA] does not require the U.S. Attorney's Office to forego its legal obligations."

- "[T]he Office believes that it has proof beyond a reasonable doubt that each listed individual was a victim of Mr. Epstein's criminal conduct while the victim was a minor. The law requires us to treat all victims 'with fairness and with respect for the victim's dignity and privacy.' 18 U.S.C. § 3771(a)(8). We will not include any language that demeans the harm they may have suffered."

- "[W]e will not remove the language about contacting AUSA Villafana or Special Agent Kuyrkendall with questions or concerns. Again, federal law

[9]The CVRA was enacted as part of the Justice for All Act of 2004, Pub. L. No. 108-405, § 102, 118 Stat. 2260 (codified as amended at 18 U.S.C. § 3771 (2015). As does the Majority, I quote the version of the CVRA in effect during the 2006 to 2008 events in question.

> requires that victims have a 'reasonable right to confer with the attorney for the Government in this case.' 18 U.S.C. § 3771(a)(5)."

The evidence shows the Office repeatedly told Epstein's attorneys that it had CVRA obligations to notify and confer with the victims about the NPA and upcoming events. As the state plea would resolve Epstein's federal sex-trafficking crimes, the CVRA, as well as basic decency and fairness, demanded the Office tell the victims of that critical fact and about the State Court proceeding.

Yet, on December 19, 2007, U.S. Attorney Acosta sent a letter to Epstein's counsel addressing "the issue of victim's rights pursuant to Section 3771." U.S. Attorney Acosta stated: "I understand that the defense objects to the victims being given notice of time and place of Mr. Epstein's state court sentencing hearing. . . . We intend to provide victims with notice of the federal resolution, as required by law. We will defer to the discretion of the State Attorney regarding whether he wishes to provide victims with notice of the state proceedings[.]" Despite U.S. Attorney Acosta representing that "[w]e intend to provide victims with notice of the federal resolution, as required by law," the Office never did that before Epstein pled guilty in State Court on June 30, 2008, and the deal was consummated.

B. 2008 Victims Misled

Another chapter in this sordid story. Before going to State Court, Epstein apparently was not satisfied with his defense team's success in securing the highly

favorable NPA. In January 2008, Epstein's attorneys sought higher-level review within the Justice Department.[10] U.S. Attorney Acosta agreed to allow Epstein to delay further his State Court plea while his attorneys appealed to main Justice. This time Epstein's defense team got nowhere.

Nonetheless, during this review period, the U.S. Attorney's Office still did not tell the victims a signed NPA existed. Instead, on January 10, 2008, the government sent Epstein's victims letters misrepresenting that "[t]his case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation."

Jane Doe 1's sworn testimony is revealing. On January 31, 2008, Jane Doe 1 met with AUSA Villafana, FBI agents, and another federal prosecutor and provided additional details of Epstein's sexual abuse of her. Jane Doe 1 said she hoped Epstein would be prosecuted and that she was willing to testify against him at trial. Based on the earlier letters she received, Jane Doe 1 believed the federal prosecutors would contact her before reaching any final resolution. During that meeting, however, the federal prosecutors and FBI agents still did not disclose to

[10]Epstein wanted one last shot at convincing the U.S. government that there was no basis for his federal criminal liability and he should not have to plead to anything. Epstein's appeal was unsuccessful. On June 23, 2008, the Office told Epstein's attorneys that the Deputy Attorney General had completed his review of the Epstein matter and "determined that federal prosecution of Mr. Epstein's case [wa]s appropriate."

Jane Doe 1 that the Office had signed the NPA, which barred Epstein's federal prosecution for sex-trafficking crimes against her.

The U.S. Attorney's Office continued to conceal the existence of the NPA from all the victims for months to come. In mid-June of 2008, Bradley Edwards, the Fort Lauderdale, Florida attorney for several of Epstein's victims, contacted AUSA Villafana to inform her that he represented Jane Doe 1 and, later, Jane Doe 2. AUSA Villafana and Edwards discussed the possibility of federal charges being filed against Epstein in the future. Edwards was led to believe that federal charges could still be filed by the Office, with AUSA Villafana failing to mention the NPA or any other possible resolution of Epstein's federal case.

VI. JUNE 30, 2008: EPSTEIN'S STATE PLEA

On June 30, 2008, Epstein pled guilty in Florida State Court to (1) solicitation of prostitution and (2) procuring a person under the age of 18 for prostitution. That same day, the State Court sentenced Epstein to 18 months' imprisonment in the county jail. As the Majority concedes, there is no indication that any of Epstein's victims were informed about the NPA or the terms of his state plea until later. Maj. Op. at 6.

Having still not been informed of the resolution of Epstein's federal case, on July 3, 2008, attorney Edwards sent a letter to the U.S. Attorney's Office communicating the victims' wishes that federal charges be filed against Epstein.

Attorney Edwards explained: "We urge you to move forward with the traditional indictments and criminal prosecution commensurate with the crimes Mr. Epstein has committed, and we further urge you to take the steps necessary to protect our children from this very dangerous sexual perpetrator." Because Epstein was "a sexual addict that focused all of his free time on sexually abusing children," Edwards emphasized that "[f]uture abuse and victimization is obvious to anyone who really reviews the evidence in this case, and future sexual abuse of minors is inevitable unless [Epstein] is prosecuted, tried and appropriately sentenced."

VII. PROCEDURAL HISTORY

On July 7, 2008, Courtney Wild (proceeding as "Jane Doe 1") filed an emergency petition alleging that she was a victim of Epstein's federal crimes and that the U.S. Attorney's Office had violated her CVRA rights (1) to confer with federal prosecutors, (2) to be treated with fairness, (3) to receive timely notice of relevant court proceedings, and (4) to receive information about restitution.

Two days later, on July 9, 2008, the U.S. Attorney's Office responded, arguing for the first time, that the CVRA did not apply at all to pre-indictment plea negotiations with a potential federal defendant. Once sued, the Office changed its position despite having earlier written the victims, and later Epstein's defense

team, that the victims had ongoing CVRA rights, and that the Office had statutory obligations to accord the victims those rights.[11]

It was only in the Office's July 9, 2008, responsive pleading that Jane Doe 1 first saw reference to the fact that, over nine months earlier in September 2007, the Office had signed an agreement with Epstein to not prosecute him for federal crimes if Epstein pled guilty to two state charges.

Also on July 9, 2008, the U.S. Attorney's Office sent short letters to petitioner Wild and Epstein's other victims stating: (1) "the United States . . . was prepared to name [each girl] in an Indictment as victims of an enumerated offense by Mr. Epstein"; but (2) the "United States has agreed to defer federal prosecution in favor of [Epstein's] state plea and sentence, subject to certain conditions." That cursory notification still did not provide the full terms of the NPA, such as the provision extending federal immunity to Epstein's co-conspirators.[12]

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[11]In a footnote, the Majority cites to a 2010 opinion by the Justice Department's Office of Legal Counsel ("OLC"). Maj. Op. at 37 n.20. The Justice Department's 2010 OLC opinion, like the change of position by the Justice Department's local U.S. Attorney's Office, came only after Epstein's victims filed this lawsuit. See Mohasco Corp. v. Silver, 447 U.S. 807, 825, 100 S. Ct. 2486, 2497 (1980) (holding that an agency's "'interpretation' of a statute cannot supersede the language chosen by Congress").

[12]The Majority contends: "On the day that Epstein entered his guilty plea in June 2008, some (but by no means all) victims were notified that the federal investigation of Epstein had concluded" citing an e-mail AUSA Villafana sent to "Jason" (full name redacted) after Epstein's State Court hearing. Maj. Op. at 6. There is no evidence, however, that the two petitioners here, their attorney Edwards, or other victims were told that the state plea was related to Epstein's crimes against them, much less that the state plea would foreclose the possibility of federal prosecution for Epstein's federal crimes against his victims.

After multiple hearings, the District Court ordered the U.S. Attorney's Office to disclose the NPA to the victims. In August 2008, the petitioners finally obtained a copy of the NPA. Among other relief, the victims sought rescission of the NPA.

What followed was more than a decade of contentious litigation between the victims, the U.S. Attorney's Office, Epstein, and his various defense attorneys.[13] In 2011, the District Court "addresse[d] the threshold issue whether the CVRA attaches before the government brings formal charges against a defendant." Does v. United States, 817 F. Supp. 2d 1337, 1341 (S.D. Fla. 2011). In a thorough opinion, the District Court held that it does under the plain text of the CVRA. Id. at 1341-43. Later, on February 21, 2019, the District Court ruled that the U.S. Attorney's Office entered into the NPA without first conferring with the victims and violated the victims' CVRA rights to confer and be treated fairly.[14] Doe 1 v. United States, 359 F. Supp. 3d 1201, 1218-22 (S.D. Fla. 2019).

After extensive briefing on remedies for the victims, Epstein was found dead on August 10, 2019. On September 16, 2019, the District Court entered an order

[13]Epstein and some of his defense team intervened to argue against victims obtaining their correspondence about the negotiation and execution of the NPA. Although the petitioners seek rescission of the NPA as to Epstein's co-conspirators, the co-conspirators never moved to intervene.

[14]In a later order, the District Court explained that the petitioners' "right to be treated with fairness and to receive notice of court proceedings . . . flow from the right to confer and were encompassed in the Court's ruling finding a violation of the CVRA."

denying the victims any remedies and closed the case. As to Epstein, the District Court determined that "there is no longer an Article III controversy" given his death. As to the co-conspirators, the District Court found it lacked jurisdiction over them.

Victim Wild filed a petition for writ of mandamus with this Court, seeking review of the District Court's order denying relief. See 18 U.S.C. § 3771(d)(3) ("If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. . . . In deciding such application, the court of appeals shall apply ordinary standards of appellate review.").[15]

VIII. QUESTION PRESENTED

This appeal presents this legal question: Whether, after completing its investigation, preparing a 53-page indictment, and conferring with Epstein's defense team about a pre-charge plea, the Office violated the victims' CVRA rights by (1) not conferring with any of Epstein's victims before agreeing to the NPA, (2) intentionally and unfairly concealing the NPA from the victims, and (3) affirmatively misrepresenting the case status to the victims after the NPA was executed. The answer depends solely on the text of the CVRA, to which I turn.

[15]In this appeal, the Majority does not contest that: (1) our Court applies the ordinary standards of appellate review; and (2) we review de novo statutory interpretation issues and any fact findings for clear error. No party argues any fact-finding error occurred, and thus we review de novo the District Court's ruling that the victims had pre-charge CVRA rights. If the victims had pre-charge CVRA rights to confer and be treated fairly, no party disputes those rights were repeatedly violated by the U.S. Attorney's Office.

IX. CVRA'S STATUTORY TEXT

A. CVRA's Bill of Rights for Victims

In interpreting the CVRA, our Court is guided by the traditional canons of statutory construction. "Our 'starting point' is the language of the statute itself." EEOC v. STME, LLC, 938 F.3d 1305, 1313 (11th Cir. 2019) (quoting Harrison v. Benchmark Elecs. Huntsville, Inc., 593 F.3d 1206, 1212-14 (11th Cir. 2010)). We "assume that Congress used the words of the statute as they are commonly and ordinarily understood and must construe the statute so each of its provisions is given full effect." United States v. McLymont, 45 F.3d 400, 401 (11th Cir. 1995). Therefore, "[w]e do not look at one word or term in isolation, but instead we look to the entire statutory context." STME, 938 F.3d at 1314 (quoting Harrison, 593 F.3d at 1212).

The CVRA grants crime victims these eight rights in subsection (a):

> (1) The right to be reasonably protected from the accused.
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

> (5) The reasonable right to confer with the attorney for the Government in the case.
>
> (6) The right to full and timely restitution as provided in law.
>
> (7) The right to proceedings free from unreasonable delay.
>
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a) (2008) (emphasis added). These are not merely aspirational principles. Section 3771(c)(1) directs that "[o]fficers and employees of the Department of Justice . . . engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are . . . accorded[] the rights described in subsection (a)." Id. § 3771(c)(1). And if crime victims' rights are violated, the CVRA provides a procedural mechanism—this lawsuit—whereby the victims may assert their CVRA rights in federal court. Id. § 3771(d)(3). Undisputedly, the petitioners qualify as "crime victims" as defined in the CVRA. See id. § 3771(e) ("[T]he term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense.").

B. Subsections 3771(a)(5) and (a)(8)

The two subsections at issue here are (a)(5) and (a)(8), which grant crime victims "[t]he reasonable right to confer with the attorney for the Government in the case" and "[t]he right to be treated with fairness." 18 U.S.C. § 3771(a)(5), (8). These two statutory rights are stated in plain language. The text of the two rights

has no post-indictment temporal limitation on its face. The language of § 3771(a)(5) and (a)(8) is not ambiguous, intricate, obscure, or doubtful (as the Majority suggests). Maj. Op. at 20 & n.8. As enacted, Congress granted these rights to victims of crime, and though the rights are not wholly unlimited as discussed later, Congress did not restrict these rights to only the time after an indictment is filed in federal court. In interpreting a statute, when "the language at issue has a plain and unambiguous meaning," we "need go no further." United States v. St. Amour, 886 F.3d 1009, 1013 (11th Cir.), cert. denied, 139 S. Ct. 205 (2018) (quoting United States v. Fisher, 289 F.3d 1329, 1337-38 (11th Cir. 2002)).[16] Our statutory analysis thus should start and end with the language of subsections (a)(5) and (a)(8).

The overall statutory structure of § 3771 also supports this plain text reading. Beyond their plain language, what Congress omitted from subsections (a)(5) and (a)(8) of § 3771, but expressly included in subsections (a)(2), (a)(3), and (a)(4), is instructive too. In § 3771, subsection (a)(2) grants victims the right to "notice of any public court proceeding"; subsection (a)(3) grants victims the right "not to be

[16]As noted, the CVRA was enacted to protect crime victims' rights and ensure their involvement in the criminal justice process. See Moussaoui, 483 F.3d at 234; Kenna, 435 F.3d at 1016. In this context, a comprehensive construction of the victims' rights to confer and be treated fairly in § 3771(a)(5) and (a)(8) is fitting. See Yates v. United States, 574 U.S. 528, __, 135 S. Ct. 1074, 1081-82 (2015) (explaining that "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole").

excluded from any such public court proceeding"; and subsection (a)(4) grants victims the right "to be reasonably heard at any public proceeding in the district court." 18 U.S.C. § 3771(a)(2)-(4).

In stark contrast, in subsections (a)(5) and (a)(8), Congress granted victims rights to confer and be treated fairly without tying those rights to "public court proceedings" or "public proceedings in the district court." Congress's omission of the distinct phrase of "public court proceedings" in subsections (a)(5) and (a)(8) is highly significant.

First, under the conventional rules of statutory construction, where Congress has used a more limited term in one part of a statute, but left it out of other parts, courts should not imply the term where it has been excluded. See Keene Corp. v. United States, 508 U.S. 200, 208, 113 S. Ct. 2035, 2040 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) (declining to read a term appearing in two subsections of a statute to have the same meaning where there is "differing language" in the subsections).

Second, "[a] familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory

provision that is included in other provisions of the same statute." Hamdan v. Rumsfeld, 548 U.S. 557, 578, 126 S. Ct. 2749, 2765 (2006); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012) ("[W]here a document has used one term in one place, and a materially different term in another, the presumption is that the different term denoted a different idea.").

In other words, had Congress wanted the conferral and fairness rights to apply only after the government has filed an indictment in court, Congress could have easily written subsections (a)(5) and (a)(8) more narrowly, as it did in other parts of subsection (a). But "the presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions." Scalia & Garner, supra at 101 ("General terms are to be given their general meaning (generalia verba sunt generaliter intelligenda)."). Indeed, the § 3771(a) subsections explicitly tied to court proceedings show that when Congress wants to limit crime victims' rights to post-indictment court proceedings it knows how to do so and does so expressly. The CVRA's text draws a clear distinction between a victim's rights to confer and be treated fairly and a victim's rights to have notice of and participate in "public court proceedings," and our Court is required to enforce the statute's distinction as Congress wrote and enacted it.

C. Subsections 3771(c) and (d)

Two other CVRA subsections—§ 3771(c) and (d)—also support my conclusion that Epstein's victims had the rights to confer and be treated fairly before plea negotiations were completed. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Home Depot U.S.A., Inc. v. Jackson, 587 U.S. __, __, 139 S. Ct. 1743, 1748 (2019) (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809, 109 S. Ct. 1500, 1504 (1989)). "Ultimately, context determines meaning." Johnson v. United States, 559 U.S. 133, 139, 130 S. Ct. 1265, 1270 (2010). Subsections (c) and (d) not only provide context for subsection (a), but expressly refer to the rights in subsection (a).

Section 3771(c), titled "Best efforts to accord rights," instructs that the Justice Department and "other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are . . . accorded[] the rights described in subsection (a)." 18 U.S.C. § 3771(c)(1) (emphasis added). Logically, there would be no reason to mandate that federal agencies involved in crime "detection" or "investigation" see that victims are accorded their CVRA rights if those rights did not exist pre-charge. Indeed, the use of disjunctive wording—the "or"—indicates

agencies that fit either description must comply, and not just, for example, the FBI, which is at times engaged in both crime investigation and prosecution.

A victim's right to conferral is with the government's attorney in the case, not with the FBI. But the fact that the FBI has a "best efforts" duty during the criminal investigation to see that a victim's conferral rights are honored is another textual signal that the victim has conferral rights pre-charge, where the case has matured to the point that a government attorney is assigned.

Lest any doubt remains, the CVRA's venue provision in § 3771(d)(3) conclusively demonstrates that the Act gives crime victims rights pre-charge. Section 3771(d)(3) provides: "The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." Id. § 3771(d)(3) (emphasis added).

Read most naturally, this venue provision provides that, if a prosecution is underway, victims may assert their rights in the ongoing criminal action. Id. If, however, "no prosecution is underway," victims may assert their rights in the district court of the district in which the crime occurred. Id. And if a crime victim's CVRA rights may be enforced before a prosecution is formally underway in district court, then to avoid a strained reading, those rights must attach at some point before an indictment formally charges the defendant with the crime.

So how does the Majority resist the plain reading of the venue provision in § 3771(d)(3)? To be fair, the Majority admits first that: "Petitioner's interpretation of subsection (d)(3) is not implausible—that provision could be read to mean that CVRA rights attach before the commencement of criminal proceedings." Maj. Op. at 33. But then the Majority argues that, after a criminal case is totally over, there is no prosecution underway and hence this venue provision is about "post-judgment" matters. Id. at 35-36. The Majority's reading of § 3771(d)(3) does not comport with how the word "underway" is ordinarily or commonly understood. In everyday parlance, if "a process, project, [or] activity," is not "underway," we generally understand that to mean it has not yet begun. Id. at 35. It is a stretch to say that when something is not "underway," it is commonly or ordinarily understood to mean that the something is completed.[17]

In addition, the Majority's interpretation of the phrase—"if no prosecution is underway"—makes no sense because a post-judgment action would logically be filed in the district court where the conviction was entered. Even the Majority

[17]Alternatively, the Majority argues that § 3771(d)(3)'s "no prosecution is underway" provision applies to the very narrow and specific period between the filing of a criminal complaint and levying formal charges by indictment. Maj. Op. at 33-35. But there is, of course, no such temporal limitation in the plain language of § 3771(d)(3), nor is there any indication this provision applies only to the subset of criminal proceedings involving a complaint. It is also not readily apparent why the Majority only looks to the Sixth Amendment right to counsel for its construction of "prosecution" and not also to the Sixth Amendment's speedy trial right in all criminal "prosecutions." Id. at 34. The Sixth Amendment speedy trial right "may attach before an indictment and as early as the time of arrest and holding to answer a criminal charge." United States v. Gouveia, 467 U.S. 180, 190, 104 S. Ct. 2292, 2298 (1984).

"concede[s] that this reading isn't perfectly seamless, in that it would require the victim to file her post-judgment motion 'in the district in which the crime occurred' rather than, as one might expect, in the district in which the prosecution occurred and the conviction was entered." Id. at 36 n.19.

Not "perfectly seamless" is an odd statutory interpretation. The Majority's faulty interpretation actually makes this part of the venue provision superfluous. See Corley v. United States, 556 U.S. 303, 314, 129 S. Ct. 1558, 1566 (2009) ("[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1247 (11th Cir. 2008) (stating under the canon against surplusage, "we strive to give effect to every word and provision in a statute when possible"). Our job is to enforce the statute as written by Congress.

In sum, the victims' two statutory rights—to confer and be treated fairly—though not unlimited, have no bright-line, post-indictment temporal restriction on their face. See 18 U.S.C. § 3771(a)(5), (8). Federal agencies and prosecutors engaged in the "detection, investigation, or prosecution" of crime "shall make their best efforts" to see that crime victims are "accorded[] the rights described in subsection (a)." See id. § 3771(c)(1). And "if no prosecution is underway," the venue provision directs victims that "[t]he rights described in subsection (a) shall

be asserted . . . in the district court in the district in which the crime occurred." See id. § 3771(d)(3).

D. Majority's Flawed Statutory Analysis

So how in the holy name of plain text does the Majority add such a substantive and temporal restriction on the victims' rights to confer and be treated fairly and hold that victims have no CVRA rights until after the government files an indictment and commences proceedings? The Majority hacks away at the plain text with four tools.

First, the Majority cherry picks the meaning of "case" in § 3771(a)(5) and narrows it to mean judicial case only. Maj. Op. at 22-23. "Case," however, has long had a much broader meaning than the Majority uses. As stated in dictionary definitions, "case" is both "a circumstance or situation (as a crime) requiring investigation or action by the police or other agency" and "the matters of fact or conditions involved in a suit: a suit or action in law or equity." Case, Webster's Third New International Dictionary 345 (2002). Likewise, in Black's Law Dictionary, the term "case" can mean both "[a] civil or criminal proceeding, action, suit, or controversy at law or in equity <the parties settled the case>" and "[a] criminal investigation <the Manson case>." Case, Black's Law Dictionary 258-59 (10th ed. 2014). As shown in my factual background, everyone involved in

Epstein's case—from AUSA Villafana, to the Deputy Attorney General, and even Epstein's defense team—called this a "case" before an indictment was filed.

The Majority brushes aside the fact that the term "case" can mean both a judicial case and an investigative case on the basis that Black's first defines "case" as a civil or criminal proceeding and only second as a criminal investigation. Maj. Op. at 22-23.[18] But since when is statutory interpretation as simple as picking the first definition listed in a Black's dictionary entry to the exclusion of a word's ordinary meaning? The Majority cites no legal support for its "first listed dictionary definition" canon of construction.[19]

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[18]The Majority argues: "Although it's true, at least in the abstract, that the term 'case' can mean either thing, in legal parlance the judicial-case connotation is undoubtedly primary." Maj. Op. at 22-23.

[19]As to the term "case," even the Majority cites Chavez v. Martinez, 538 U.S. 760, 766, 123 S. Ct. 1994, 2000-01 (2003), which supports my conclusion that the CVRA's conferral right attaches pre-charge. See Maj. Op. at 23. In Chavez, the Supreme Court construed the Fifth Amendment's Self-Incrimination Clause, which prohibits a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Supreme Court concluded the phrase "criminal case" "requires the initiation of legal proceedings" and does not "encompass the entire criminal investigatory process" because a person can only be compelled to be "a witness against himself" in his own criminal prosecution. Chavez, 538 U.S. at 766, 123 S. Ct. at 2000-01. But Chavez itself points out that, for the target of a criminal case, "legal proceedings" for purposes of the Fifth Amendment privilege against self-incrimination includes pre-indictment grand jury proceedings—at which the target cannot be compelled to testify. Id. at 767-68, 123 S. Ct. at 2001. More importantly for this case, the Supreme Court clarified: "We need not decide today the precise moment when a 'criminal case' commences; it is enough to say that police questioning does not constitute a 'case' any more than a private investigator's precomplaint activities constitute a 'civil case.'" Id. at 766-77, 123 S. Ct. at 2001. Here, the CVRA conferral right is with the government's attorney in the case, not with the police or an investigator. Not only did the Office target Epstein, but it drafted an indictment and met with Epstein's defense counsel about a plea in the case. To say that mature stage is not a CVRA "case" under Chavez's reasoning is illogical.

The Majority also cites to Blyew v. United States, 80 U.S. (13 Wall.) 581, 595 (1872) for

Although "case" means both criminal investigation and formal criminal proceedings, it is worth noting whom the conferral right is between: the victim and the attorney for the government. That fits the petitioners' claim that once the criminal case has matured to plea negotiations by "the attorney for the Government in the case" with defense counsel, the victims had the right to know that and to confer with the government's attorney.

As its second instrument, the Majority drills down on the meaning of "the attorney for the Government" in § 3771(a)(5). The Majority argues that it means one attorney and therefore the conferral right "attaches only after proceedings have begun, at which point that particular person will presumably be more readily identifiable." Maj. Op. at 23-24. I don't quarrel with the fact that an attorney needs to be "readily identifiable," as the Majority puts it. But the Majority wrongly concludes that happens only once court proceedings begin after a formal indictment. That conclusion is divorced from reality and sorely lacking in explanation. Who does the Majority think procures an indictment—just some random attorney not assigned to the case pre-charge? Nonsense. Contrary to the Majority's presumption, specific government attorneys are routinely assigned to

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the unremarkable proposition that the words "case" and "cause" are synonyms and can "mean[] a proceeding in court, a suit or action." Maj. Op. at 23. But if in Chavez, over 130 years after Blyew, the Supreme Court still hasn't defined the precise moment a criminal case commences, I don't see how Blyew supports the Majority's proposition that a "case" means only post-indictment proceedings.

draft indictments and handle pre-charge matters. Once an investigation is completed, the case has matured to the indictment-drafting stage and pre-charge plea negotiations with defense counsel have begun, there is obviously a "readily identifiable" attorney in the case.

What I quarrel with is the Majority's leap from this statutory phrase to its mistaken conclusion that this phrase translates to the Majority's claimed post-indictment restriction on the conferral right. Notably, the pre-charge period has become crucial to white-collar defense attorneys, who are hired to represent potential defendants pre-charge precisely in order to negotiate with the already assigned, readily identifiable prosecutor and extract the best plea deal in advance of any indictment. The Majority's pre-charge rule will deny victims' CVRA rights to confer and fairness in cases involving white-collar and other wealthy defendants who commonly engage in pre-charge plea negotiations.

Jeffrey Epstein's case illustrates my point. The U.S. Attorney's Office assigned specific attorneys, with AUSA Villafana being the lead prosecutor and primary attorney who negotiated with Epstein's defense team. And Epstein's defense team spent days negotiating with the Office to extract the best plea deal pre-charge. As such, there was a readily identifiable attorney—"the attorney for the Government"—for Epstein's victims to confer with even though formal court proceedings had not yet commenced. We should take the victims' rights granted in

§ 3771(a)(5) and (a)(8) at face value and not restrict them to benefit the privileged few.[20]

As its third tool to axe the plain text, the Majority contends that its reading of § 3771(a)(5) and (a)(8) is supported by the canon noscitur a sociis, that is, "'a word is known by the company it keeps.'" See S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 378, 126 S. Ct. 1843, 1849 (2006); Maj. Op. at 25-26. Do not fall for this. The noscitur a sociis principle is a "useful rule of construction where words are of obscure or doubtful meaning and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words." Russell Motor Car Co. v. United States, 261 U.S. 514, 520, 43 S. Ct. 428, 430 (1923). But here, the meaning of the plain words in § 3771(a)(5) and (a)(8) is not in doubt and all other contextual clues support that meaning. Thus, the canon cannot be invoked to defeat Congress's decision to grant crime victims these plainly-worded rights of conferral and fairness. See Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 226-27, 128 S. Ct. 831, 839-40 (2008) (rejecting the invocation of

[20]The Majority does not dispute that prosecutors and defense counsel routinely negotiate pre-charge plea agreements, particularly in white-collar cases. Paul G. Cassell, et al., Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed, 104 J. Crim. L. and Criminology 59, 84 (2014). Guilty pleas, in fact, account for over 97% of all criminal convictions obtained by the government. See U.S. Courts, Judicial Business 2019 Tables: Criminal Defendants Terminated, by Type of Disposition and Offense (Table D-4) (Sept. 30, 2019) (only 1,663 of the 78,767 defendants convicted of federal crimes in the year ending September 30, 2019, were found guilty by a judge or jury after a criminal trial; the rest pled guilty), https://www.uscourts.gov/judicial-business-2019-tables.

this canon as an "attempt to create ambiguity where the statute's text and structure suggest none").

Moreover, the cases the Majority cites for this canon involved statutes with much stronger and closer contextual clues than in § 3771(a). See Gutierrez v. Ada, 528 U.S. 250, 254-58, 120 S. Ct. 740, 743-46 (2000) (applying the canon to narrow the phrase "any election" where it was closely surrounded by six specific references to gubernatorial elections); Lagos v. United States, 584 U.S. __, __, 138 S. Ct. 1684, 1688-89 (2018) (applying the canon to narrow the words "investigation" and "proceedings" to government investigations and criminal proceedings where the words were closely surrounded by three specific expenses victims would incur during government investigations and prosecutions, but not in private investigations and bankruptcy proceedings).

Importantly too, the three subsection (a) rights in § 3771 that refer to court or public "proceeding[s]" are rights that could not exist absent such a proceeding. A victim's right to receive "timely notice of," "not . . . be excluded from," or "be reasonably heard at" a proceeding would not attach until the time when such a proceeding would or could be held. See 18 U.S.C. § 3771(a)(2)-(4). Those rights are contingent on the existence of a court proceeding, of which a victim might be notified, from which a victim might be excluded, or at which a victim might be heard. In contrast, a victim's rights to confer or be treated fairly in no way flow

from or presuppose ongoing court proceedings. It makes little sense to take the inherent temporal limits placed on rights explicitly tied to and dependent upon court proceedings and transfer them to rights which do not carry that particular limitation.

Although public court proceedings are mentioned in three different rights in § 3771(a)(2)-(4), and crime victims have the right to be protected from the accused in § 3771(a)(1), as well as the right to "full and timely restitution" in § 3771(a)(6), nothing in the overall statutory context suggests subsection (a) is focused exclusively on victims' rights accruing only after the filing of an indictment. See Ali, 552 U.S. at 225-26, 128 S. Ct. at 839-40 (refusing to apply the canon noscitur a sociis to narrow the phrase "any other law enforcement officer" in 28 U.S.C. § 2680(c) to the scope of the phrase that preceded it, "any officer of customs or excise," because "nothing in the overall statutory context suggests that customs and excise officers were the exclusive focus of the provision"); see also Beecham v. United States, 511 U.S. 368, 371, 114 S. Ct. 1669, 1671 (1994) (explaining that the noscitur a sociis "canon of construction is by no means a hard and fast rule"). The temporal limitations in other § 3771(a) subsections are not inconsistent in any way with the conclusion that crime victims' rights to confer and be treated fairly

"sweep[] as broadly as [the] language suggests."[21] See Ali, 552 U.S. at 226, 128 S. Ct. at 840.

The Majority's fourth attempted blow at the CVRA's plain text in subsections (a)(5) and (a)(8) comes via a marred reading of the word "motion" in subsection (d)(3). Section 3771(d)(3) provides that a CVRA victim asserts her subsection (a) rights in the district court by filing a "[m]otion for relief." 18 U.S.C. § 3771(d)(3). Again, "if no prosecution is underway," that motion is to be filed "in the district court in the district in which the crime occurred." Id. Once filed, "[t]he district court shall take up and decide any motion asserting a victim's right forthwith." Id.

In considering the usage of "motion" in § 3771(d)(3), the Majority asserts that a "motion" is solely a request filed within the context of an ongoing judicial

[21]Unable to find support in the CVRA's plain text, the Majority turns to language in an older victims-rights enactment—the Victims' Rights and Restitution Act of 1990 ("VRRA"). Maj. Op. at 38-41. But the Majority fails to recognize the CVRA repealed significant parts of the VRRA because the legislation was ineffective. See Justice for All Act of 2004, § 102(c). The CVRA's legislative history refers to earlier unsuccessful victims' litigation under the VRRA and cautions that "[i]t is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. [The CVRA] . . . is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal [justice] process." 150 Cong. Rec. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

In any event, the VRRA did not contain any "right to confer," or a "right to be treated with fairness," and thus it does not provide guidance for construing the CVRA's conferral and fairness rights here. More still, as the Majority hints at, had Congress wanted to limit the CVRA's conferral and fairness rights to certain stages of a criminal case, it could have simply drafted the legislation more narrowly and tied those rights to "charges," "trial[s]," "hearing[s], and "proceedings" like it did with different rights in the VRRA. See Maj. Op. at 39-40. When Congress wants to limit victims-rights protections to only certain stages of a criminal case, it knows how to do so.

proceeding. Maj. Op. at 27-28. The Majority argues that, since CVRA rights can only be asserted in a "mid-proceeding 'motion[],'" the CVRA's protections apply only after court proceedings have started. See id. at 28.

As with "case," the Majority slices in half the definition of the word "motion." The common legal definition of "motion" is more general and broader: a motion is "[a] written or oral application requesting a court to make a specified ruling or order." Motion, Black's, supra, at 1168. This general definition encompasses a motion initiating a new lawsuit or proceeding, as well as one filed mid-proceeding. In fact, the federal rules and statutes allow quite a few motions to initiate new proceedings in the district court, such as motions to quash grand jury and other subpoenas, Fed. R. Crim. P. 17(c)(2), and motions to vacate, set aside, or correct sentences, 28 U.S.C. § 2255. See also 28 U.S.C. § 1361 (mandamus proceedings are initiated as a new lawsuit). This very case is a free-standing civil action litigated for a decade because the CVRA expressly provides that "if no prosecution is underway," the "[m]otion for relief" is filed "in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3). If anything, § 3771(d)(3) demonstrates that the Majority has added a very substantive

restriction—victims have no CVRA rights until an indictment commences court proceedings—that has no meaningful footing in the text of the statute.[22]

E. In re Dean, 527 F.3d 391 (5th Cir. 2008)

The only other circuit court to address this precise issue has come to the same conclusion as I do. The Fifth Circuit has held: "'[T]here are clearly rights under the CVRA that apply before any prosecution is underway.' . . . Logically, this includes the CVRA's establishment of victims' 'reasonable right to confer with the attorney for the Government.' 18 U.S.C. § 3771(a)(5)." In re Dean, 527 F.3d at 394. The facts of In re Dean are instructive too.

After an explosion at a refinery owned and operated by BP Products North America Inc. ("BP") killed 15 people and injured more than 170, the Department of Justice investigated and decided to bring federal charges against BP. Id. at 392-93. Before filing them, the government negotiated a plea deal with BP. Id. at 392. At the government's request, the district court entered an ex parte order that prohibited the government from notifying the victims of a potential plea agreement until after one was executed. Id. at 392-93. Later, the government and BP signed a plea agreement without the government's attorneys conferring with the victims. Id. at 393, 395.

[22]Let's be clear: If the Majority's view holds, this civil case should have been dismissed at its very inception because the Office never filed a formal indictment.

The Fifth Circuit concluded that the government violated the victims' right to confer under § 3771(a)(5) by executing the plea agreement without informing the victims of the likelihood of the criminal charges and learning the victims' views on the possible details of the plea bargain. Id. at 394.

Here, similar to the posture in In re Dean, the U.S. Attorney's Office investigated Epstein's sex-trafficking crimes, decided to bring federal charges against him, and engaged in pre-indictment plea negotiations with Epstein's defense team. The Office and Epstein then executed an NPA, extending immunity to Epstein and his co-conspirators, without ever conferring with Epstein's victims in violation of § 3771(a)(5). What's worse, here, the Office deliberately concealed the NPA's existence and misled the victims to believe that federal prosecution was still a possibility, telling them to be "patient" while the investigation proceeded.

The Majority heavily criticizes the Fifth Circuit's In re Dean for merely "echo[ing]" the Texas district court's conclusion that "[t]here are clearly rights under the CVRA that apply before any prosecution is underway" and as lacking discussion of the CVRA's text, history, or structure. Maj. Op. at 49-50 n.25. What the Majority leaves out is that the Texas district court's decision—echoed by the Fifth Circuit—contains a thorough examination of the CVRA's text, history, and structure, which led it to conclude that § 3771(a)(5)'s right to confer and § 3771(c)'s related notice obligation apply to the period before a charging

instrument is filed. See United States v. BP Prods. N. Am. Inc., No. H-07-433, 2008 WL 501321 at *11-15 (S.D. Tex. Feb. 21, 2008). We should join our Fifth Circuit sister.

F. Majority's Slippery Slopes and Policy Arguments

The Majority invokes a parade of horribles—"a jarring result"—that it believes would follow if (1) the CVRA was interpreted to grant crime victims the right to confer with the government's attorney before an indictment is filed and (2) courts were "[f]reed from any line limiting the Act's applicability" to post-charge court proceedings. Maj. Op. at 31, 47. The Majority suggests that interpreting § 3771(d)(3)'s "no prosecution is underway" clause to mean that CVRA rights attach pre-charge would open the floodgates to victim lawsuits seeking to make prosecutors consult with victims before "law-enforcement officers conduct a raid, seek a warrant, or conduct an interrogation[.]" Id. at 36. The Majority also posits that interpreting the CVRA to grant rights during the "investigation" of a crime would "require law-enforcement officers to 'confer' with victims . . . before conducting a raid, seeking a warrant, making an arrest, interviewing a witness, convening a lineup, or conducting an interrogation." Id. at 31.

Like all slippery slope arguments, the soundness of the Majority's position depends on "an empirical prediction that a proposed rule will increase the

likelihood of some other undesired outcome occurring." See B.H. ex rel. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 317 (3d Cir. 2013); Frederick Schauer, Slippery Slopes, 99 Harv. L. Rev. 361, 381 (1985) ("[A] persuasive slippery slope argument depends for its persuasiveness on temporally and spatially contingent empirical facts," and "without empirical evidence" of an underlying reality, "the slippery slope argument has nothing on which to stand."). Yet, the Majority offers no empirical basis for its slippery slope arguments or its professed need to add, by judicial fiat, a bright-line, post-indictment restriction on the CVRA's plain text.

What's more, the actual facts show the Majority's feared hypotheticals are pure conjecture. For 12 years, it's been the rule in the Fifth Circuit that crime victims have the right to confer with the government's attorney before formal criminal proceedings have commenced. Yet there is no evidence whatsoever that federal prosecutors in Texas, Louisiana, and Mississippi must confer with crime victims before law-enforcement officers "conduct[] a raid, seek[] a warrant, mak[e] an arrest, interview[] a witness, conven[e] a lineup, or conduct[] an interrogation." And in the nine years since the District Court's 2011 opinion in this case—also holding that crime victims have the right to confer with government's attorney pre-charge—we haven't seen reports that federal prosecutors in the Southern District

of Florida are conferring with victims before law enforcement conducts a raid or convenes a lineup, for example. The Majority's misgivings are illusions.

G. Limiting Principles in the CVRA

Besides lacking empirical plausibility, the Majority's feared hypotheticals are legally implausible and ignore several limiting criteria contained in the text of the CVRA itself. In this regard, here are the Majority's stated worries: (1) if a victim's rights can attach pre-charge, then there is "no logical stopping point" and no "limiting criterion," see Maj. Op. at 36, 52; (2) "there is essentially no limit to the sorts of pre-charge relief that an enterprising movant [victim] could seek—or that an innovative judge might grant," see id at 48 n.24; and (3) if crime victims have rights pre-charge, then courts would intrude on prosecutorial discretion because: "Freed from any line limiting the Act's applicability to the post-charge phases of a prosecution, courts would be empowered to issue injunctions requiring (for instance) consultation with victims before raids, warrant applications, arrests, witness interviews, lineups, and interrogations," see id. at 47.

While the Majority scrutinizes the text of § 3771(c)(1) and (d)(3) for its limiting principle and finds none for subsection (a)(5)'s conferral right, it conspicuously overlooks the text of the conferral right itself, which contains powerful limiting criteria. First, § 3771(a)(5)'s conferral right is with "the attorney for the Government in the case," not with police or investigators. That alone

resolves some of the Majority's slippery slope concerns because the CVRA does not give crime victims the right to confer with anyone other than the government's attorney.

Second, and relatedly, as the Majority concedes, § 3771(a)(5)'s conferral right presupposes that a "readily identifiable" attorney for the government has been assigned to the case. As even the Majority recognizes, that also means the case has matured beyond the police investigative stage before the right applies.

Third, § 3771(a)(5) grants crime victims the right to confer with the government's attorney, but only to the extent that conferral is "reasonable." The Majority summarily discards this reasonableness limitation as "squishy." Maj. Op. at 31. Yet, a victim's "reasonable right to confer" is a forceful limiting principle and embodies a common, workable legal standard that is sufficient to stave off the Majority's speculations about "enterprising" crime victims and "innovative" judges. Reasonableness has long stood the test of time in limiting other actors' conduct. See, e.g., Hardy v. Cross, 565 U.S. 65, 69-70, 132 S. Ct. 490, 493-94 (2011) (for purposes of the Sixth Amendment's Confrontation Clause, the "lengths to which the prosecution must go to produce a witness" is a "question of reasonableness"); United States v. Banks, 540 U.S. 31, 35-36, 124 S. Ct. 521, 524-25 (2003) (for purposes of the Fourth Amendment, the execution of a warrant is subject to a reasonableness standard); Ohio v. Robinette, 519 U.S. 33, 39, 117 S.

Ct. 417, 421 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.'"); Kyles v. Whitley, 514 U.S. 419, 432-33, 115 S. Ct. 1555, 1565 (1995) (under the Due Process Clause and Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), prosecutors must disclose all evidence, upon request, that is favorable to the defense, so long as the evidence is "material," meaning it is reasonably probable that the result of the proceeding would have been different had the evidence been disclosed); Doggett v. United States, 505 U.S. 647, 651, 654, 656, 112 S. Ct. 2686, 2690, 2692-93 (1992) (in determining whether the government violated a defendant's Sixth Amendment speedy trial right, courts must consider, inter alia, whether any delays attributable to the prosecution were reasonable); Thornburgh v. Abbott, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881 (1989) (prison regulations affecting the sending of publications to prisoners must be analyzed under a reasonableness standard); Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1984) ("The proper measure of attorney performance" under the Sixth Amendment "remains simply reasonableness under prevailing professional norms.").

Looking beyond the text of § 3771(a)(5), the conferral right is also subject to the CVRA's express mandate that nothing in the Act "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). Likewise, only a "crime victim" has the

conferral right, which limits the right to a person "directly and proximately harmed as a result of the commission of a Federal offense." Id. § 3771(e). Taken together, these statutory provisions bound the conferral right, such that the Majority's trepidations are too far-fetched to justify disregarding the CVRA's plain text. The Majority does not cite a single factual incident or judicial decision where its apprehensions have become reality. Despite its best efforts, the Majority has identified no reason to contravene the CVRA's plain text as Congress enacted it.

Because the Majority's blanket restriction denies victims all conferral rights during the pre-charge period, the Majority admits that its rule "will not prevent federal prosecutors from negotiating 'secret' plea and non-prosecution agreements" pre-charge. Maj. Op. at 52. In light of the public outcry about the Epstein case, the Majority says it "can only hope" that prosecutors "will not do so." Id. at 52-53. Let's distill this further. The Majority is more afraid of a future "crime victim" potentially asking a "readily identifiable" government "attorney" to confer "reasonably" with her pre-charge, than it is of secret pre-charge plea deals for wealthy defendants, even though it's now common practice for them to seek the best plea deal in advance of indictment. The Majority's new blanket restriction eviscerates crime victims' CVRA rights and makes the Epstein case a poster-child for an entirely different justice system for crime victims of wealthy defendants.

Rather than rewriting the CVRA to protect against so-called "enterprising" victims and "innovative" judges, this Court should: (1) recognize that the CVRA's text already contains powerful limiting principles—"a reasonable right to confer" only "with the attorney for the Government in the case," granted only to defined "crime victims" and without impairment of prosecutorial discretion; (2) enforce the plain text of § 3771(a)(5) and (a)(8) in this case; (3) hold that the Office's prosecutor in the case had an obligation to confer with Epstein's victims, given the investigation was completed, the 53-page indictment was drafted, and the prosecutor was already conducting pre-charge plea negotiations with Epstein's defense team; and (4) conclude that the Office violated the victims' right to be treated fairly by not disclosing the signed NPA before the State Court hearing and by misrepresenting the case status to the victims.

H. Concurring Opinion

Now, my brief response to my colleague's Concurring Opinion. His Opinion submits that "the Executive Branch has exclusive power over prosecutorial decisions" and that "authority obviously includes the decision . . . whether to seek, or not seek, an indictment from the grand jury," both propositions with which I wholeheartedly agree. Conc. Op. at 54-55.

The Concurring Opinion contends, however, that "the model the dissent creates"—requiring the U.S. Attorney's Office to confer with a victim about a

criminal matter prior to indictment—(1) "raises serious questions about whether, by doing so, the judiciary would be violating the constitutional principle of separation of powers," and (2) "would clearly interfere with the Executive Branch's investigative and prosecutorial functions." Id. at 54, 56. The Concurring Opinion further states: "The notion that a district court could have any input on a U.S. Attorney's investigation and decision whether to bring a case to the grand jury is entirely incompatible with the constitutional assignment to the Executive Branch of exclusive power over prosecutorial decisions." Id. at 57. The Opinion concludes, therefore, that "the CVRA is best understood as not applying until charges are commenced against a defendant" because "such an interpretation avoids raising serious constitutional questions." Id. at 59.

This Concurring Opinion is helpful because it highlights what is and what is not the issue in this appeal. First, nothing in the CVRA as Congress wrote it permits the district court to suggest to a U.S. Attorney any investigation or grand jury steps that he must take. The CVRA requirement is only that the prosecutor speak with the victim before making a final indictment decision. If a U.S. Attorney, after reasonably conferring with the victim, decides not to take the case to the grand jury, there will be no CVRA violation for the district court to remedy, and thus no "meddling in the Executive Branch's" exclusive powers under the Constitution. See id. at 58.

Happily enough, my plain reading of the statute in no way injects judicial interference into a prosecutor's decisions. In fact, not even the victims here claim they have any authority over a prosecutor's decision as to who to indict or not indict, or for what crime. The victims' bare-bones claim is only that the CVRA required a prosecutor in the Office to confer with them before making those weighty and final decisions. The fact that a prosecutor must confer with a victim pre-charge does not mean the district court can exercise any control over the prosecutor's ultimate decision whether to indict.

Here, after drafting a 53-page indictment, the U.S. Attorney's Office spent not hours, but days conferring pre-charge with Epstein's defense team. All the CVRA does is obligate the prosecutor to give the victims a reasonable opportunity to confer with them too. This is no impairment whatsoever on the prosecutor's authority to decide whether to indict or not. The CVRA even expressly mandates that nothing in the Act "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6).

At oral argument in this appeal, counsel arguing for the respondent U.S. Attorney's Office agreed the constitutionality of the CVRA was not being challenged. With all due respect, this constitutional separation-of-powers concern is a red herring.

Also, the canon of constitutional avoidance does not apply here because the CVRA is plain and unambiguous. See United States v. Stevens, 559 U.S. 460, 481, 130 S. Ct. 1577, 1591-92 (2010) (providing that courts cannot "rely upon the canon of construction that 'ambiguous statutory language [should] be construed to avoid serious constitutional doubts'" unless the statute is first ambiguous). As the Supreme Court recently explained, "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." Jennings v. Rodriguez, 538 U.S. __, __ 138 S. Ct. 830, 843-44 (2018) (declining to apply the canon of constitutional avoidance because the statutory language at issue was not ambiguous). Instead, constitutional avoidance serves the "basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made." Almendarez-Torres v. United States, 523 U.S. 224, 237-38, 118 S. Ct. 1219, 1277-28 (1998). To that end, the Supreme Court has cautioned that, "rewrit[ing] a law to conform it to constitutional requirements . . . would constitute a serious invasion of the legislative domain." Stevens, 559 U.S. at 481, 130 S. Ct. at 1592.

Another observation. The Concurring Opinion insists the problems it identifies would not exist post-charge because, in that case, the district court would not be "imposing a condition upon his prosecutorial discretion." Conc. Op. at 57-58. But a government attorney makes all sorts of discretionary prosecutorial

decisions following an indictment, chief among them whether to enter into a plea agreement with the accused and potentially dismiss some or all of the charges. Thus, to the extent the Concurring Opinion perceives separation-of-powers issues with a district court ordering the government's attorney merely to confer with victims about prosecutorial discretionary decisions, it is not clear why the Majority's post-indictment restriction avoids those issues, given the victims can complain about lack of conferral following an indictment too.

In any event, the Concurring Opinion usefully illustrates the importance of the CVRA's mandate in § 3771(d)(6)—nothing in the Act "shall be construed to impair . . . prosecutorial discretion"—as yet another forceful limiting principle in the CVRA text that alleviates any need for the Majority to transplant its very substantive and temporal restriction on top of the plain text of § 3771(a)(5) and (a)(8).

X. REMEDY

To remedy the Office's proven CVRA violations, the victims proposed the following: (1) an order scheduling a public hearing in the Southern District of Florida in which the victims could participate and present victim-impact statements to the District Court; (2) discovery of records regarding law-enforcement's investigation of the crimes against the victims; (3) discovery of records explicating why the U.S. Attorney's Office decided to grant Epstein federal immunity; (4) the

Department of Justice's designation of a representative to explain the Office's decision to resolve the Epstein case without any federal prosecution; (5) mandatory CVRA training for criminal prosecutors in the Office; (6) a requirement that the Office use its best efforts to provide victims (who request it) accurate and timely notice of future case events regarding Epstein's crimes; and (7) sanctions, attorney's fees, and restitution.

Yet before the District Court ruled on the remedies, Epstein died on August 10, 2019. On September 16, 2019, the District Court directed the Clerk to "close the case and all pending motions are denied as moot." Because the Office could no longer prosecute the intervenor Epstein, the victims' additional remedy requests—such as rescission of the NPA as to him—were clearly moot. However, as the victim petitioner argues before us, this civil case remains live as between the victims and the Office with respect to the victims' other requested remedies.

Accordingly, I would remand this case to the District Court to fashion a remedy for the proven CVRA violations. Federal courts have had broad authority to fashion equitable remedies after petitioners have proven a violation of statutory provisions. Hardison v. Cohen, 375 F.3d 1262, 1266 (11th Cir. 2004); Nichols v. Hopper, 173 F.3d 820, 824 (11th Cir. 1999); Ala. Hosp. Ass'n v. Beasley, 702 F.2d 955, 962 (11th Cir. 1983) (in light of statutory violation, we "accordingly remand to the district court so that it may devise an appropriate equitable remedy").

Furthermore, it has long been an "indisputable rule, that where there is a legal right, there is also a legal remedy." Marbury v. Madison, 5 U.S. 137, 163 (1803) (quoting 3 William Blackstone, Commentaries *23). For that reason, "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 66, 68-69, 112 S. Ct. 1028, 1033-34 (1992) (rejecting government's argument that courts have abandoned the general rule that all appropriate relief is available to vindicate a federal right); Bruschi v. Brown, 876 F.2d 1526, 1531 (11th Cir. 1989) (taking "special note" the Supreme Court has made clear that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant necessary relief").[23]

In closing the case, the District Court did mention that there had been an Epstein-related hearing in New York on August 27, 2019, but that was held after the remedy briefing here was completed. That hearing, scheduled on six days' notice, involved potential prosecution in New York for crimes in New York—not those in Florida. There is no evidence, and the District Court made no factual

[23]In the remedy briefing, the Office did not appear to oppose the District Court's ordering a public hearing in Florida in this case, at which the victims could make victim impact statements—an equitable remedy well within the District Court's discretion. The District Court could preside over the public hearing in a manner similar to the way district courts handle victim impact statements in the context of a criminal sentencing.

findings, about what transpired at the New York hearing. The Office's claim on appeal that the New York hearing was a sufficient remedy for its CVRA violations wholly lacks merit.[24]

Epstein's death also heightened the need for the District Court to carefully examine the victims' remedy request for document disclosure. Early on, the District Court denied certain document requests based on attorney-client privilege. Subsequently, in the course of the litigation, the U.S. Attorney's Office made numerous representations about its deliberations, both internally and externally with Epstein's attorneys, including a detailed affidavit from a line prosecutor purporting to describe those deliberations. Thereafter, the victims filed motions claiming that the Office had waived, in whole or in part, the work-product privilege given what the Office itself had now filed and how the Office sought to defend its conduct in this case. The District Court never made a waiver ruling, or any document-by-document findings, as to this remedy request. If anything, the informational remedies sought by the victims have enhanced importance now. Mysteries still exist about how Epstein and his co-conspirators escaped federal

[24]In closing the case as moot in light of Epstein's death, the District Court sua sponte concluded the co-conspirators had become necessary and indispensable parties and their participation as parties was now needed to afford the victims any relief. Prior to Epstein's death, no one contended that the victims needed to join the co-conspirators as indispensable parties to this action. Because the District Court did not afford the victims notice and at least an opportunity to consider whether to move to join the four named co-conspirators, the petitioner victim asks for a remand on this remedy issue too.

prosecution for multiple sex-trafficking crimes against over 30 minor girls in Florida.[25]

XI. CONCLUSION

While the Majority laments how the national media fell short on the Jeffrey Epstein story, this case is about how the U.S. prosecutors fell short on Epstein's evil crimes. See Maj. Op. at 6. Our criminal justice system should safeguard children from sexual exploitation by criminal predators, not re-victimize them. The Majority concludes that our Court is constrained to leave the victims "emptyhanded," and it is up to Congress to "amend the Act to make its intent clear." Id. at 19, 52. Not true. The empty result here is only because our Court refuses to enforce a federal statute as Congress wrote it. The CVRA is not as impotent as the Majority now rewrites it to be.

Given the undisputed facts that the U.S. Attorney's Office completed its investigation, drafted a 53-page indictment, and negotiated for days with Epstein's defense team, the Office egregiously violated federal law and the victims' rights by (1) not conferring one minute with them (or their counsel) before striking the final NPA deal granting federal immunity to Epstein and his co-conspirators,

[25]In closing the case as to the victims' request for attorney's fees, the District Court did not cite the Hyde Amendment or any legal standard. See Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes). Some of the requested documents would shed further light on that issue. This is only to say these are potential remedies that are not moot, which the District Court should first explore further.

(2) intentionally and unfairly concealing the NPA from the victims, as well as how the upcoming State Court plea hearing would directly affect them, and (3) affirmatively misrepresenting the status of the case to the victims after the NPA was executed. I would remand for the District Court to fashion a remedy.

For all of these reasons, I respectfully dissent from the Majority's (1) decision that the crime victims of Epstein and his co-conspirators had no statutory rights whatsoever under the Crime Victims' Rights Act, and (2) denial of the victims' petition in this case as a matter of law.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 14, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-13843-K
Case Style: In re: Courtney Wild
District Court Docket No: 9:08-cv-80736-KAM

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, each party to bear own costs.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call CaCelia Williams, Q at (404)335-6219.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1A Issuance of Opinion With Costs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE 1 AND JANE DOE 2,

Petitioners,

vs.

UNITED STATES of AMERICA,

Respondent.
_____/

OPINION AND ORDER[1]

This cause is before the Court upon Jane Doe 1 and Jane Doe 2's Submissions on Proposed Remedies (DE 458); the Government's Response to Petitioners' Submission on Proposed Remedies (DE 462); Limited Intervenor Jeffery Epstein's Brief in Opposition to Proposed Remedies (DE 463); Jane Doe 1 and Jane Doe 2's Reply to the Government in Support of their Submission on Proposed Remedies (DE 464); Jane Doe 1 and Jane Doe 2's Reply to Intervenor Epstein's Brief in Opposition to Proposed Remedies (DE 466); Jane Doe 1 and Jane Doe 2's Statement Noting Death Pursuant to Rule 25 of the Federal Rules of Civil Procedure (DE 475); Response to Rule 25 Notice, and Suggestion of Mootness (DE 476) and Jane Doe 1 and Jane Doe 2's Motion to Strike Response to Rule 25 Notice (DE 477).

On February 21, 2019, the Court entered its Order (DE 435) finding that the Government violated the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. §3771, when it failed to confer with Petitioners prior to entering into a non-prosecution agreement ("NPA") with Jeffrey Epstein ("Mr. Epstein"). The Court permitted the parties to brief and present additional evidence relative

[1] The Court presumes familiarity with its prior Orders.

to the issue of what remedies, if any, should be imposed by the Court as a result. The briefing was extensive and the Court has carefully reviewed all of the arguments. No additional evidence was presented by any of the parties. Furthermore, during the time the matter was under advisement, Mr. Epstein died, which resulted in additional briefing. The Court will simply provide an abbreviated summary of the parties' arguments, given that the briefs are available on the public docket.

Petitioners initially requested the following remedies: (1) rescind the provisions in the NPA between the U.S. Attorneys Office in the Southern District of Florida and Mr. Epstein that barred his prosecution and the prosecution of his named and unnamed alleged co-conspirators; (2) declare that the United States Constitution would permit such a prosecution; (3) enjoin the U.S. Attorney's Office to forthwith make its best efforts to protect the CVRA rights of Jane Doe 1 and Jane Doe 2 and other Epstein victims; (4) enjoin the U.S. Attorney's Office to forthwith confer with Jane Doe 1 and Jane Doe 2 and other Epstein victims to provide them with accurate and timely notice of future case events; (5) order a meeting for the victims with members of the current U.S. Attorney's Office and the former U.S. Attorney's Office, including former U.S. Attorney Alexander Acosta; (6) conduct a court hearing for victims, requiring the attendance of Mr. Acosta;[2] (7) provide various information to the victims including information in the Government's possession about why it did not prosecute Epstein's crimes, grand jury material, information from the Federal Bureau of Investigation ("FBI"), sealed material submitted by the Government to the Court and material filed by the Government in DE 414 and DE 348; (8)

[2] Petitioners' request included the required attendance of Mr. Epstein. Petitioners also requested a letter of apology from the U.S. Attorney's Office, but have since withdrawn that request.

require the Justice Department to conduct a course of training for employees in the U.S. Attorney's Office in the Southern District of Florida about the CVRA and (9) order the Government to pay monetary sanctions, restitution, attorney's fees and costs.

The Government asserts that these remedies are not authorized by the CVRA. The Government, however, states that it should have communicated more effectively with Petitioners and proposes the following remedies: (1) the Department of Justice will designate a representative to meet with Petitioners and other victims to discuss the decision to resolve the Epstein case; (2) the Government will participate in a public court proceeding in which Petitioners can make a victim impact statement and (3) all criminal prosecutors in the United States Attorney's Office for the Southern District of Florida will undergo additional training on the CVRA, victim rights and victim assistance issues.

Prior to his death, Mr. Epstein addressed the rescission remedies proposed by Petitioners, asserting that they were unauthorized by the CVRA, precluded by contract law, the doctrines of judicial and equitable estoppel, substantive due process, separation of powers and ripeness. Mr. Epstein also opposed the Government's proposed remedy of a proceeding in which "unadjudicated victims" "make impact statements about a person who has not been convicted of, or facing sentencing for, a federal crime," (DE 463 at 61.)

Petitioners provided the Court with a reply memoranda addressing both the Government's arguments (DE 464), as well as those of Mr. Epstein. (DE 466). On August 12, 2019, Petitioners filed a statement, noting Mr. Epstein's death. As part of that notice, Petitioners argue that Mr. Epstein's death rendered all of his objections to Petitioners' proposed remedies moot. (DE 475 at 1.) Moreover, Petitioners contend that most of the Government's objections which were

"predicated on protecting Epstein's interests" are also moot. (Id.) Based on this theory, Petitioners urge the Court to grant all of Petitioners' proposed remedies, including invaliding the provisions in the NPA that precluded prosecution of Epstein's alleged co-conspirators. (Id.)

Mr. Epstein's attorneys responded that his death rendered Petitioners' request for rescission of the NPA moot. Petitioners have asked the Court to strike this response since Mr. Epstein is dead, and therefore he should no longer have a voice in this proceeding.

Remedies against Jeffrey Epstein and the Alleged Co-Conspirators

Jane Doe 1 and Jane Doe 2 seek an order finding the provisions in the NPA barring the prosecution of Epstein's alleged co-conspirators null and void, to the extent they prevent their prosecution for federal crimes committed in the Southern District of Florida against Jane Doe 1 or 2 (or any other victim of a federal sex crime offense committed by Epstein's alleged co-conspirators within the Southern District of Florida).

Article III of the U.S. Constitution grants the judiciary the authority to adjudicate cases and controversies. "In our system of government, courts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy." Already, LLC v. Nike, Inc., 568 U.S. 85, 90 (2013). "[A]n 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." Id. at 90-91; see also Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed'") (quoting Preiser v. Newkirk, 422 U.S. 395, 401 (1975)); Gagliardi v. TJCV Land Tr., 889 F.3d 728, 733 (11th Cir. 2018) (a justiciable case or controversy must be present "at all stages of review.")

Here, there is no longer an Article III controversy permitting the Court to address the appropriateness of the remedy of rescission. As a result of Mr. Epstein's death, there can be no criminal prosecution against him and the Court cannot consider granting this relief to the victims. Id. at 733. ("Mootness demands that there be something about the case that remains alive, present, real, and immediate so that a federal court can provide redress in some palpable way."); see also Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013) ("If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot.")

Likewise, the Court is without jurisdiction to grant Petitioners' request for rescission of the NPA provisions with respect to Mr. Epstein's alleged co-conspirators. That request invites the Court to render an advisory opinion. "Strict application of the ripeness doctrine prevents federal courts from rendering impermissible advisory opinions and wasting resources through review of potential or abstract disputes." National Advert. Co. v. City of Miami, 402 F.3d 1335, 1339 (11th Cir. 2005). "While the constitutional aspect of [the ripeness] inquiry focuses on whether the Article III requirements of an actual "case or controversy" are met, the prudential aspect asks whether it is appropriate for this case to be litigated in a federal court by these parties at this time." Id.

By requesting rescission of the NPA with respect to the alleged co-conspirators, Petitioners seek a ruling affecting the rights of non-parties to this case. If the Court granted such relief, and a criminal prosecution was to be instituted against the alleged co-conspirators, they would be free to assert the benefits, if any, which inured to them under the NPA as a bar to any prosecution. The question of the validity of the non-prosecution provisions of the NPA as they

relate to the alleged co-conspirators will have to be litigated with their participation if any prosecution against them is ever brought. Any decision by this Court on that question is meaningless without their participation in this proceeding. Steans v. Combined Ins. Co. of Am., 148 F.3d 1266, 1270 (11th Cir. 1998) ("a judgment *in personam* is not binding on a party who is not designated as a party.") Mr. Epstein chose to intervene in this case relative to the question of an appropriate remedy, and thus he would have been bound by any ruling issued by the Court. The alleged co-conspirators did not intervene, nor were they obligated to do so. See Martin v. Wilks, 490 U.S. 755, 763 (1989) ("a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined."), superseded by statute in not relevant part as stated in, Landgraf v. USI Film Products, 511 U.S. 244 (1994). Moreover, no party to this proceeding sought to join them to this case. Since the alleged co-conspirators are not parties to this case, any ruling this Court makes that purports to affect their rights under the NPA would merely be advisory and is thus beyond this Court's jurisdiction to issue.[3]

[3] A hypothetical will serve to buttress this conclusion. As was noted in the briefs of the parties, this action was initiated by Petitioners on July 7, 2008. (DE 1.) Four days later, this Court held a hearing on Petitioners' request for relief. (DE 10.) Shortly thereafter, on August 14, 2008, Petitioners' counsel chose not to pursue the request to invalidate the NPA at that time, but rather sought production of the NPA to evaluate it and decide how Petitioners wished to proceed. (DE 27 at 4.) Thereafter, there was no activity on the merits of this case for 2 years during which time Mr. Epstein performed under the NPA. The Court then issued an Order to Show Cause as to why the case should not be dismissed for lack of prosecution. (DE 40.) After receiving Petitioners' response to the Order to Show Cause (DE 41), the Court permitted the case to proceed and the parties began to litigate the case on the merits.

Let us assume at that point in the litigation, at which time Mr. Epstein had not intervened, rather than challenging Petitioners' claims, the United States had decided that it erred in failing to advise the victims of its intent to enter into the NPA, and agreed to settle this case with Petitioners. Petitioners and the United States then entered into a settlement agreement which provided, in relevant part, that they would submit a joint stipulation to the Court for the entry of a Consent Decree, a provision of which would hold that the NPA was invalid, and that the non-

Request for Injunction

Petitioners request that the Court issue an injunction requiring the U.S. Attorney's Office in the Southern District in Florida to make its "best efforts" to protect the CVRA rights of Mr. Epstein's victims, to confer with Jane Doe 1 and Jane Doe 2 and other Epstein victims who request it, and to provide them with accurate and timely notice of future case events.

The Court denies the request for the issuance of such injunctive relief. Petitioners only show "past exposure to illegal conduct" and do not show "continuing, present adverse effects." City of Los Angeles v. , 461 U.S. 95, 102 (1983). In discussing standing to seeking injunctive relief, the United States Court of Appeals for the Eleventh Circuit has explained the doctrine in the following way:

Because injunctions regulate future conduct, a party has standing to seek injunctive

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prosecution provision in the NPA was null and void. The Consent Decree would further provide that the United States Attorney's Office for the Southern District of Florida was free to prosecute Mr. Epstein for any federal crimes which he may have committed relative to the victims. Let us further assume that the Court approved the settlement agreement and entered a Consent Decree consistent with it. The United States Attorney's Office for the Southern District of Florida, armed with the Consent Decree holding that the NPA was invalid, then proceeded before a grand jury and obtained an indictment against Mr. Epstein. Mr. Epstein is then arrested and a criminal case against him proceeds. Under this hypothetical set of facts, could anyone seriously contend that Mr. Epstein would be bound by the Consent Decree which was entered in a case to which he was not a party and in which he had no opportunity to be heard? Of course not. Any such contention would be absurd. The Consent Decree would have been advisory only and not binding in any way against Mr. Epstein. The validity of the NPA would have to be litigated within the context of the criminal case brought against him. That is precisely the case with the alleged co-conspirators. The United States Attorney's Office for the Southern District of Florida can make an independent judgment as to whether it believes it is bound by the non-prosecution provision of the NPA as it relates to the alleged co-conspirators and proceed accordingly. If the office concludes it is not bound, and chooses to pursue criminal charges against those individuals, the validity of the non-prosecution provision will appropriately be resolved within the context of those criminal proceedings.

> relief only if the party alleges, and ultimately proves, a real and immediate-as opposed to a merely conjectural or hypothetical-threat of future injury. Logically, a prospective remedy will provide no relief for an injury that is, and likely will remain, entirely in the past. Although past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury, past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.

Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir.1994) (internal citations and quotation marks omitted).

At this point, as to Mr. Epstein, there are no present or future CVRA rights of victims to protect. As to any alleged co-conspirators, the United States has agreed to confer with the victims regarding its decision relative to Mr. Epstein's case. It is further willing to participate in a forum[4] where the victims may express how their interaction with Mr. Epstein and his alleged co-conspirators affected them. The Government has also agreed to provide training to its prosecutors regarding the rights of victims under the CVRA. The Court has no reason to doubt the Government's representations to the Court, and no reason to believe that it will not follow through with these commitments. Hence, the Court concludes that there is no real and immediate threat of repeated violations of the CVRA, and that any injury that occurred in this case will remain entirely in the past. Thus, the Court finds that the granting of injunctive relief is not warranted in this case.

[4] While the parties contemplated this forum to be before this Court, it need not be and can be conducted anywhere the parties choose. The parties can also invite the news media to any such forum.

Meeting with the Former U. S. Attorney and Court Hearing

The Court has no jurisdiction over Alexander Acosta, the former U.S. Attorney, who is now a private citizen. Therefore, the Court denies Petitioner's request that it order Mr. Acosta to appear at a meeting with the victims. Given that the Government has agreed to arrange a meeting with Government representatives for Petitioners, the Court will not enter an Order directing this meeting. As indicated previously, the Court presumes and fully expects the Government will honor its representation that it will conduct this meeting. The Court also declines to conduct a Court sanctioned proceeding to allow Mr. Epstein's victims an opportunity to address the Court on these topics. First, it is a matter of public knowledge that the United States District Judge who was presiding over the criminal case brought against Mr. Epstein in the Southern District of New York already provided that opportunity to Mr. Epstein's victims. Second, now that Mr. Epstein is deceased, any investigation regarding his criminal culpability has ended. To the extent any investigations are continuing as to Mr. Epstein's alleged co-conspirators, this Court can play no role in these investigations or their resolution, and the victims will have their opportunity to express their views to the U.S. Attorney's Office and other representatives of the U.S. Department of Justice who will have the ultimate say on how those investigations proceed.

Production of Documents

The parties have already engaged in discovery and the Court has previously made rulings concerning privilege and work product. The finding by the Court of a violation of the CVRA does not void its finding on the privileged materials. These privileged documents include those relating to the Government's decision to enter into the NPA with Mr. Epstein. To the extent Petitioners seek production of FBI files relating to its investigation of Mr. Epstein and his alleged

co-conspirators, it is also a matter of public knowledge that there is an ongoing investigation by the Department of Justice relative those individuals. The FBI's documents, to the extent they were not otherwise protected by attorney/client or work product privileges, in all likelihood, are relevant to that ongoing investigation. The Court's ordering of production of those documents could adversely affect and interfere with that ongoing investigation. Thus, the Court will not order their production.

Furthermore, to the extent Petitioners seek this remedy based on their argument that the Court never ruled on whether the Government violated the Petitioners' right to be treated with fairness and to receive notice of court proceedings,[5] the Court rejects this theory. These rights all flow from the right to confer and were encompassed in the Court's ruling finding a violation of the CVRA. Thus, there is no basis for further production of documents.

Lastly, with respect to Petitioners' argument that they are entitled to grand jury records to obtain information as to why there was no prosecution of Mr. Epstein, the Court denies this request. The traditional rule of grand jury secrecy may be set aside under certain circumstances as set forth by Rule 6(e) of the Federal Rules of Criminal Procedure. "[T]he party seeking disclosure of the grand jury material must show a compelling and particularized need for disclosure." United States v. Aisenberg, 358 F.3d 1327, 1348 (11th Cir. 2004). Furthermore, "the private party must show circumstances had created certain difficulties peculiar to this case, which could be alleviated by access to specific grand jury materials, without doing disproportionate harm to the salutary purpose of secrecy embodied in the grand jury process." Id.

[5] Likewise, the Court rejects Petitioners' argument that additional remedies flow from these additional rights.

at 1348-49 (internal quotation marks omitted). Here, Petitioners have not shown that they will suffer an injustice if they are denied access to grand jury materials. Nor have Petitioners shown that access to these materials is compelling or particularized to their asserted interests under the CVRA. Additionally, those materials may be relevant to any ongoing investigation relating to the alleged co-conspirators, the disclosure of which would interfere with that investigation. Therefore, the Court denies Petitioners access to the materials over which grand jury secrecy applies under Rule 6(e) of the Federal Rule of Criminal Procedure.

Educational Remedies

Petitioners seek an order requiring a course of training for employees in the U.S. Attorney's Office for the Southern District of Florida about the CVRA. The Government does not oppose providing such training. Once again, the Court presumes and fully expects the Government will honor its representation that it will provide training to its employees about the CVRA and the proper treatment of crime victims. Thus, the Court finds that issuance of such an order is not necessary or warranted under the facts of this case, and once again fully believes and expects that the Government will honor its representation.

Monetary Sanctions, Restitution and Attorney's Fees

The parties agree that the CVRA does not "authorize a cause of action for damages." 18 U.S.C. § 3771(d)(6). Petitioners seek sanctions, claiming that sanctions are a traditional means for enforcing rights for the failure to comply with a law.

Courts have the inherent power to impose sanctions based on the court's needs to "manage its own affairs so as to achieve the orderly and expeditious disposition of cases." In re Sunshine Jr. Stores, Inc., 456 F.3d 1291, 1304 (11th Cir. 2006). This power, however, is to

manage and address actions that have taken place while litigation is pending before the Court, not to address actions taken prior to the litigation. See Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1014 (11th Cir. 1985)("The bad faith vexatious conduct must be part of the litigation process itself."); Lamb Eng'g & Const. Co. v. Nebraska Pub. Power Dist., 103 F.3d 1422, 1437 (8th Cir. 1997) (the district court's power to award attorney's fees as a sanction for bad faith conduct does not extend to prelitigation conduct); Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758, 766 (10th Cir. 1997) (same).[6] In contrast, remedies serve to redress a wrong that occurred prior to the litigation.

Notably, the cases cited by Petitioners in support of the imposition of sanctions (DE 464 at 60) involved conduct that arose during the course of litigation, and not conduct engaged in prior to the institution of the lawsuit. Here, Petitioners seek sanctions as punishment for the Government violating the CVRA, which is conduct that occurred prior to the institution of this

[6] In Chambers v. NASCO, Inc., 501 U.S. 32, 74 (1991), the dissenting Justices objected to the Court's ruling that they believed permitted sanctions being imposed for prelitigation conduct. 501 U.S. at 60 (Scalia, J., dissenting); 501 U.S. at 61(Kennedy, J., dissenting). The majority opinion in Chambers, however, made clear that its holding did not authorize the imposition of sanctions for prelitigation conduct. The Court stated, "the District Court did not attempt to sanction petitioner for breach of contract, but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation," and the Court expressed "no opinion as to whether the District Court would have had the inherent power to sanction the petitioner for conduct relating to the underlying breach of contract." Chambers, 501 U.S. at 54 n.16. The Court further stated "the District Court made clear that it was policing abuse of its own process when it imposed sanctions 'for the manner in which this proceeding was conducted in the district court from October 14, 1983, the time that plaintiff gave notice of its intention to file suit.'" 501 U.S. 54 n.17. Thus, the majority opinion in Chambers implicitly supports this Court's ruling, and courts that have decided cases after Chambers have adopted this view. See Guevara v. Mar. Overseas Corp., 59 F.3d 1496, 1503 (5th Cir. 1995), abrogated on other grounds by Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009); Association of Flight Attendants, AFL-CIO v. Horizon Air Indus., Inc., 976 F.2d 541, 548–49 (9th Cir. 1992); see also supra Lamb Eng'g; Towerridge.

lawsuit. Authorized remedies, not sanctions, are therefore the appropriate conduit for such relief.

Petitioners also seek an award of restitution. Petitioners' request is improper for several reasons. First, it is essentially a request for money damages from the Government, which is not allowed under the CVRA. Second, although Petitioners claim the CVRA permits "the right to full and timely restitution" under the CVRA, restitution is limited only to those circumstances "provided in law." 18 U.S.C. § 3771(a)(6). Hence, Petitioners would have to point to a specific statute that authorizes an award of restitution. See 18 U.S.C. § 228(d); 18 U.S.C. §1593; 18 U.S.C. 2264; 18 U.S.C. § 2318(d); 18 U.S.C. §2323(c); 18 U.S.C. § 2428; 18 U.S.C. § 3556; 18 U.S.C. § 3572; 18 U.S.C. §3611; 18 U.S.C. § 3663; 18 U.S.C. § 3663A; 21 U.S.C. § 853(q); 21 U.S.C. § 882. The CVRA does not authorize an award of restitution against the United States.

The Court also rejects Petitioners' request for attorney's fees. To the extent Petitioners seek fees by claiming the Government acted in bad faith or vexatiously, the Court rejects that position. While the Court concluded that the Government violated the CVRA, the Court did not and does not find that the Government acted in bad faith throughout this litigation. Nor does the Court find any basis to draw such a conclusion on the record before it. Although unsuccessful on the merits of the issue of whether there was a violation of the CVRA, the Government asserted legitimate and legally supportable positions throughout this litigation. Thus, there is no basis to grant Petitioners attorney's fees as a sanction. Nor is there a basis to grant Petitioners attorney's fees because their "litigation efforts directly benefit[ted] others." (DE 458 at 31 citing Chambers, 501 U.S. at 45.) This theory relies upon a line of cases that permits the allowance of attorney's fees out of a fund which created, increased or was preserved by an attorney's services and for

which equity courts historically permitted compensation for the attorney's successful efforts. See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975); Sprague v. Ticonic Nat. Bank, 307 U.S. 161 (1939). This theory is simply inapplicable to the facts of this case. For these reasons, the Court denies Petitioners' request for attorney's fees.[7]

Motion to Strike

The Court denies Petitioners' Motion to Strike. The legal arguments made by Mr. Epstein's attorneys simply provide the current state of law that the Court is obligated to follow, whether or not Mr. Epstein's attorneys provided the Court with a memorandum of law.

Conclusion

This Order brings to an end this lengthy and contentious litigation. Recent events have rendered the most significant issue that was pending before the Court, namely, whether the Government's violation of Petitioners' rights under the CVRA invalidated the NPA, moot. Other relief sought by Petitioners was either beyond the jurisdiction of the Court to grant, unavailable under the law or, in the exercise of the Court's discretion and under all of the circumstances of the case, unnecessary or unwarranted. So, despite Petitioners having demonstrated the Government violated their rights under the CVRA, in the end they are not receiving much, if any, of the relief they sought. They may take solace, however, in the fact that this litigation has brought national attention to the Crime Victims' Rights Act and the importance of victims in the

[7] Petitioners also asked that they be granted the remedies requested in a sealed pleading (DE 134) filed on December 7, 2011. Almost all of these remedies are either addressed in this Order, the Court's prior Order (DE 435), or have been mooted by the death of Mr. Epstein. The only remedy that remains is Petitioners' request that the Court unseal the briefing concerning this remedy, which can be found at docket entries 119 and 134. The Court will order the Clerk to unseal these documents.

criminal justice system. It has also resulted in the United States Department of Justice acknowledging its shortcomings in dealing with crime victims, and its promise to better train its prosecutors regarding the rights of victims under the CVRA in the future. And rulings which were rendered during the course of this litigation likely played some role, however small it may have been, in the initiation of criminal charges against Mr. Epstein in the Southern District of New York and that office's continuing investigation of others who may have been complicit with him.

In view of all of the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1) The Clerk shall unseal docket entries 119 and 134.

2) Jane Doe 1 and Jane Doe 2's Motion to Strike Response to Rule 25 Notice (DE 477) is denied.

3) This Order shall constitute a judgment for purposes of Fed. R. Civ. P. 58.

4) The Clerk will close the case and all pending motions are denied as moot.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, 16th this day of September, 2019.

KENNETH A. MARRA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE 1 AND JANE DOE 2,

Petitioners,

vs.

UNITED STATES,

Respondent.
_____/

OPINION AND ORDER

This cause is before the Court upon Jane Doe 1 and Jane Doe 2's Motion for Partial Summary Judgment (DE 361); the United States's Cross-Motion for Summary Judgment (DE 408); Jane Doe 1 and Jane Doe 2's Motion to Compel Answers (DE 348) and Jane Doe 1 and Jane Doe 2's Motion for Finding Waiver of Work Product and Similar Protections by Government and for Production of Documents (DE 414). The Motions are fully briefed and ripe for review. The Court has carefully considered the Motions and is otherwise fully advised in the premises.

I. Background

The facts, as culled from affidavits, exhibits, depositions, answers to interrogatories and reasonably inferred, for the purpose of these motions, are as follows:

From between about 1999 and 2007, Jeffrey Epstein sexually abused more than 30 minor girls, including Petitioners Jane Doe 1 and Jane Doe 2 (hereinafter, "Petitioners"), at his mansion in Palm Beach, Florida, and elsewhere in the United States and overseas. (Government Resp. to Petitioner's Statement of Undisputed Material Facts (hereinafter, "DE 407" at ¶ 1.) Because

Epstein and his co-conspirators knowingly traveled in interstate and international commerce to sexually abuse Jane Doe 1, Jane Doe 2 and others, they committed violations of not only Florida law, but also federal law. (DE 407 at ¶ 2.) In addition to his own sexual abuse of the victims, Epstein directed other persons to abuse the girls sexually. (DE 407 at ¶ 3.) Epstein used paid employees to find and bring minor girls to him. Epstein worked in concert with others to obtain minors not only for his own sexual gratification, but also for the sexual gratification of others. (DE 407 at ¶ 8.)

In 2005, the Town of Palm Beach Police Department ("PBPD") received a complaint from the parents of a 14 year old girl about her sexual abuse by Jeffery Epstein. The PBPD ultimately identified approximately 20 girls between the ages of 14 and 17 who were sexually abused by Epstein. (DE 407 at ¶ 4.) In 2006, at the request of the PBPD, the Federal Bureau of Investigation ("FBI") opened an investigation into allegations that Epstein and his personal assistants used the facilities of interstate commerce to induce girls between the ages of 14 and 17 to engage in illegal sexual activities. (DE 407 at ¶ 5.) The FBI ultimately determined that both Jane Doe 1 and Jane Doe 2 were victims of sexual abuse by Epstein while they were minors. Jane Doe 1 provided information about her abuse and Jane Doe 2's abuse to the FBI on August 7, 2007. (DE 407 at ¶ 6.)

From January of 2007 through September of 2007, discussions took place between the U.S. Attorney's Office for the Southern District of Florida ("the Office") and Jeffrey Epstein's attorneys. (DE 407 at ¶ 9.) On February 1, 2007, Epstein's defense team sent a 24-page letter to the Office going over what they intended to present during a meeting at the Office the same day. (DE 407 at ¶ 10.)

By March 15, 2007, the Office was sending letters to victims informing them of their rights pursuant to the Crime Victims' Rights Act ("CVRA"). (DE 407 at ¶ 11.) By May of 2007, the Office had drafted an 82-page prosecution memorandum and a 53-page indictment outlining numerous federal sexual offenses committed by Epstein. (DE 407 at ¶ 12.) On or about June 7, 2007, FBI agents had delivered to Jane Doe 1 a standard CVRA victim notification letter.[1] The notification letter promised that the Justice Department would make its "best efforts" to protect Jane Doe 1's rights, including "the reasonable right to confer with the attorney for the United States in the case" and " to be reasonably heard at any public proceeding in the district court involving [a] . . . plea." The notification further stated that, "[a]t this time, your case is under investigation." (DE 407 at ¶ 13.) Jane Doe 1 relied on those representations and believed that the Government would protect those rights and keep her informed about the progress of her case. (DE 407 at ¶ 14.)

On July 6, 2007, Epstein's lawyers sent a 23-page letter lodging numerous arguments to persuade the Office that no federal crimes had been committed by him. (DE 407 at ¶ 15.) By August 3, 2007, the Government had rejected Epstein's various arguments against federal

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[1] On or about August 11, 2006, Jane Doe 2 received the same CVRA letter. (DE 407 at ¶ 7.)

Initially, Jane Doe 2 was unwilling to provide any information to the FBI or the Office unless she was assured her statements would not be used against her. She also described Epstein as "an awesome man" and stated that she hoped "nothing happens to" him. (DE 415 at ¶¶ 14-15.) This was during the time period where Jane Doe 2 had obtained counsel paid for by Epstein. (Jane Doe 2 Decl. ¶¶ 5-7.)

Assistant United States Attorney ("AUSA") A. Marie Villafaña ("line prosecutor" "Villafaña") testified that both Jane Doe 1 and Jane Doe 2 received letters describing their rights under the CVRA. Although Jane Doe 1 and 2 were given Ms. Villafaña's and the FBI agent's name and phone number, neither contacted either of them. (Villafaña Decl. ¶ 5, DE 403-19.)

charges and sent a letter to Epstein's counsel stating, "[w]e would reiterate that the agreement to Section 2255 [a civil restitution provision] liability applies to all of the minor girls identified during the federal investigation, not just the 12 that form the basis of an initial planned charging instrument." (DE 407 at ¶ 17.) On September 10, 2007, multiple drafts of a non-prosecution agreement ("NPA") had been exchanged between Epstein's counsel and the Office. (DE 407 at ¶ 18.)

On September 12, 2007, while attempting to create alternative charges against Epstein, the Office expressed concern about "the effect of taking the position that Mr. Epstein's house is in the special maritime and territorial jurisdiction of the United States" because the Government had "no evidence of any assaults occurring either on Mr. Epstein's plane or offshore from his residence." (DE 407 at ¶ 19.) On September 13, 2007, the line prosecutor emailed Epstein's counsel indicating an effort to come up with a solution to the aforementioned concern and she stated that she had been "spending some quality time with Title 18 looking for misdemeanors." The line prosecutor further indicated, "I know that someone mentioned there being activity on an airplane. I just want to make sure that there is a factual basis for the plea that the agents can confirm." Epstein's counsel responded, "[a]lready thinking about the same statutes." (DE 407 at ¶ 20.)

On September 14, 2007, after having spoken on the telephone about the subject matter of the September 13 emails, Epstein's counsel and the line prosecutor exchanged emails including a proposed plea agreement for Epstein to plead guilty to assaulting one of his coconspirators. (DE 407 at ¶ 21.) On September 15, 2007, the line prosecutor sent an email to the Epstein defense team raising concerns about a resolution that would not involve one of

Epstein's minor victims and stating:

> I have gotten some negative reaction to the assault charge with [a co-conspirator] as the victim, since she is considered one of the main perpetrators of the offenses that we planned to charge in the indictment. Can you talk to Mr. Epstein about a young woman named [Jane Doe]? We have hearsay evidence that she traveled on Mr. Epstein's airplane when she was under 18, in around the 2000 or 2001 time frame.

(DE 407 at ¶ 22.)

On September 16, 2007, the line prosecutor corresponded with Epstein's counsel about having Epstein plead guilty to obstruction of justice for pressuring one of his co-conspirators not to turn over evidence or complying with a previously-served grand jury subpoena. (DE 407 at ¶ 23.) The Office also stated, "On an 'avoid the press' note, I believe that Mr. Epstein's airplane was in Miami on the day of the [co-conspirator] telephone call. If he was in Miami-Dade County at the time, then I can file the charge in the District Court in Miami, which will hopefully cut the press coverage significantly." They also discussed having Epstein plead guilty to a second charge of assaulting a different co-conspirator. (DE 407 at ¶ 24.)

On September 16, 2007, the line prosecutor wrote to Epstein's counsel indicating that the Office did not like the factual basis for the proposed charges as the Office was "not investigating Mr. Epstein [for] abusing his girlfriend." (DE 407 at ¶ 25.) The correspondence further stated:

> Andy [i.e., AUSA Andrew Laurie] recommended that some of the timing issues be addressed only in the state agreement, so that it isn't obvious to the judge that we are trying to create federal jurisdiction for prison purposes.
>
> I will include our standard language regarding resolving all criminal liability and I will mention 'co-conspirators,' but I would prefer not to highlight for the judge all of the other crimes and all of the other persons that we could charge. Also, we do not

> have the power to bind Immigration . . . there is no plan to try to proceed on any immigration charges against either Ms. [co-conspirator] or Ms. [coconspirator]

(Ex. 7, DE 361-7.)

In the same email, the line prosecutor wrote to defense counsel about a meeting outside the U.S. Attorney's Office: "Maybe we can set a time to meet. If you want to meet 'off campus' somewhere, that is fine." (DE 407 at ¶ 27.) On about September 16, 2007, Epstein's counsel provided a proposed NPA to the Government that extended immunity from federal prosecution not only to Epstein, but also to certain co-conspirators. (DE 407 at ¶ 28.)

On September 17, 2007, the line prosecutor wrote to defense counsel Jay Lefkowitz: "Please send [a document] to my home e-mail address – [redacted] and give me a call on my cell [redacted] so I can be ready for some discussions tomorrow." (DE 407 at ¶ 29.) On September 17, 2007, Lefkowitz responded: "[D]o you have another obstruction proffer I can review that you have drafted? Also, if we go that route, would you intend to make the deferred prosecution agreement public?" (DE 407 at ¶ 30.)

On September 18, 2007, the Office responded: "A non-prosecution agreement would not be made public or filed with the Court, but it would remain part of our case file. It probably would be subject to a FOIA request, but it is not something that we would distribute without compulsory process." (DE 407 at ¶ 31.) On September 20, 2007, the U.S. Attorney's Office wrote: "On the issue about 18 USC 2255, we seem to be miles apart. Your most recent version not only had me binding the girls to a trust fund administered by the state court, but also promising that they will give up their 2255 rights.… In the context of a non-prosecution agreement, the office may be more willing to be specific about not pursuing charges against others." (DE 407 at ¶ 32.)

On September 21, 2007, Palm Beach County State Attorney Barry Krischer wrote the line prosecutor about the proposed agreement and added: "Glad we could get this worked out for reasons I won't put in writing. After this is resolved I would love to buy you a cup at Starbucks and have a conversation." (DE 407 at ¶ 33.) On September 21, 2007, the line prosecutor emailed Epstein's counsel stating, "I think that the attached addresses the concerns about having an unlimited number of claimed victims, without me trying to *bind* girls whom I do not represent." (DE 407 at ¶ 34.) On September 23, 2007, the U.S. Attorney's Office sent an email to Lefkowitz stating: "It is factually accurate that the list we are going to give you are persons we have identified as victims. If we did not think they were victims, they would have no right to bring suit." (DE 407 at ¶ 35.)

On September 24, 2007, the line prosecutor sent an e-mail to a prospective representative for the Epstein victims, entitled "Conflict Check." The email confirmed the girls' status as victims, stating: "Please keep this confidential because these are minor victims. This is a preliminary list." Later on September 24, 2007, the line prosecutor sent an email to Lefkowitz stating: "I have compiled a list of 34 confirmed minors." (DE 407 at ¶ 36.) As correspondence continued on September 24, 2007, and the NPA was being executed, Lefkowitz sent an email to the line prosecutor stating: "Marie – Please do whatever you can to keep this [i.e., the NPA] from becoming public." (DE 407 at ¶ 37.)

On September 24, 2007, Epstein and the Office formally reached an agreement whereby the United States would defer federal prosecution in favor of prosecution by the State of Florida. Epstein and the Office accordingly entered into a NPA reflecting such an agreement. (DE 407 at ¶ 38.) The NPA provided that "the United States, in consultation with and subject to the good faith approval of Epstein's counsel, shall select an attorney representative for [the victims], who shall be

paid for by Epstein." The NPA also provided that if any of the victims elected to bring suit under 18 U.S.C. § 2255, they must agree to waive any other claim for damages. As part of the NPA, Epstein would not contest the jurisdiction of the United States District Court and waived his right to contest liability and damages. (NPA, DE 361-62.)

Among other provisions, the NPA expanded immunity to any "potential coconspirator" of Epstein's: "In consideration of Epstein's agreement to plead guilty and to provide compensation in the manner described above, if Epstein successfully fulfills all of the terms and conditions of this agreement, the United States also agrees that it will not institute any criminal charges against any potential co-conspirators of Epstein, including but not limited to Sarah Kellen, Adriana Ross, Lesley Groff, or Nadia Marcinkova." (DE 407 at ¶ 40.) The NPA also provided that: "The parties anticipate that this agreement will not be made part of any public record. If the United States receives a Freedom of Information Act request or any compulsory process commanding the disclosure of the agreement, it will provide notice to Epstein before making that disclosure." (DE 407 at ¶ 41.)

From the time the FBI began investigating Epstein until September 24, 2007—when the NPA was concluded—the Office never conferred with the victims about a NPA or told the victims that such an agreement was under consideration. (Marie Villafaña Decl. ¶ 7, DE 361-64; DE 407 at ¶ 43.) Many, if not all, other similarly-situated victims received standard CVRA victim notification letters substantively identical to those sent to Jane Doe 1 and Jane Doe 2. (DE 407 at ¶ 44.) The Office did not consult or confer with any of the victims about the NPA before it was signed. (DE 407 at ¶¶ 45-46.)

Epstein's counsel was aware that the Office was deliberately keeping the NPA secret from the victims and, indeed, had sought assurances to that effect. (DE 407 at ¶ 48.) After the NPA was

signed, Epstein's counsel and the Office began negotiations about whether the victims would be told about the NPA. (DE 407 at ¶ 49.) It was a deviation from the Government's standard practice to negotiate with defense counsel about the extent of crime victim notifications. (DE 407 at ¶ 50.)

On September 24, 2007, the Office sent an email to Lefkowitz:

> Thank you, Jay. I have forwarded your message only to [United States Attorney] Alex [Acosta], Andy, and Roland. I don't anticipate it going any further than that. When I receive the originals, I will sign and return one copy to you. The other will be placed in the case file, which will be kept confidential since it also contains identifying information about the girls.
>
> When we reach an agreement about the attorney representative for the girls, we can discuss what I can tell him and the girls about the agreement. I know that Andy promised Chief Reiter an update when a resolution was achieved.… Rolando is calling, but Rolando knows not to tell Chief Reiter about the money issue, just about what crimes Mr. Epstein is pleading guilty to and the amount of time that has been agreed to. Rolando also is telling Chief Reiter not to disclose the outcome to anyone.

(DE 407 at ¶ 52.)

On September 25, 2007, the line prosecutor sent an e-mail to Lefkowitz stating: "And can we have a conference call to discuss what I may disclose to . . . the girls regarding the agreement." (DE 407 at ¶ 53.) Also on September 25, 2007, the line prosecutor sent an email to Lefkowitz which stated in part: "They [Ted Babbitt, Stuart Grossman, Chris Searcy, [L]ake Lytal] are all very good personal injury lawyers, but I have concerns about whether there would be an inherent tension because they may feel that THEY might make more money (and get a lot more press coverage) if they proceed outside the Terms of the plea agreement. (Sorry – I just have a bias against plaintiffs' attorneys.) One nice thing about Bert is that he is in Miami where there has been almost no coverage of this case." (DE 407 at ¶ 54.)

On September 26, 2007, the line prosecutor sent an e-mail to Lefkowitz in which she

stated: "Hi Jay – Can you give me a call at 561-[xxx-xxxx] this morning? I am meeting with the agents and want to give them their marching orders regarding what they can tell the girls." (DE 407 at ¶ 55.) On September 27, 2007, the attorney representative for the victims emailed the Office and asked whether he could get a copy of the indictment or plea agreement to find out "exactly what Epstein concedes to in the civil case." (Sept. 27, 2007 email, DE 362-2.) Upon inquiry from the Office, Lefkowitz responded by stating that the attorney representative "certainly [] should not get a copy of any indictment." (DE 407 at ¶ 57.) That same day, the line prosecutor informed Epstein's counsel of concerns raised by the attorney representative for the girls. Specifically, "[t]he concern is, if all 40 girls decide they want to sue, they don't want to be in a situation where Mr. Epstein says this is getting too expensive, we won't pay anymore attorneys' fees." (DE 407 at ¶ 58.)

Also on that same day, the line prosecutor sent an email to state prosecutors Lanna Belohlavek and Barry Krischer: "Can you let me know when Mr. Epstein is going to enter his guilty plea and what judge that will be in front of? I know the agents and I would really like to be there, 'incognito.'" (DE 407 at ¶ 59.)

On October 3, 2007, the Office sent a proposed letter that would have gone to a special master for selecting an attorney representative for the victims under the NPA's compensation procedure. The letter described the facts of the Epstein case as follows: "Mr. Epstein, through his assistants, would recruit underage females to travel to his home in Palm Beach to engage in lewd conduct in exchange for money. Based upon the investigation, the United States has identified 40 young women who can be characterized as victims pursuant to 18 U.S.C. § 2255. Some of those women went to Mr. Epstein's home only once, some went there as many as 100 times or more. Some

of the women's conduct was limited to performing a topless or nude massage while Mr. Epstein masturbated himself. For other women, the conduct escalated to full sexual intercourse." (DE 407 at ¶ 60.)

On October 10, 2007, Lefkowitz sent a letter to U.S. Attorney Alex Acosta stating, in pertinent part: "Neither federal agents nor anyone from your Office should contact the identified individuals to inform them of the resolution of the case, including appointment of the attorney representative and the settlement process. Not only would that violate the confidentiality of the agreement, but Mr. Epstein also will have no control over what is communicated to the identified individuals at this most critical stage. We believe it is essential that we participate in crafting mutually acceptable communication to the identified individuals." The letter further proposed that the attorney representative for the victims be instructed that "[t]he details regarding the United States's investigation of this matter and its resolution with Mr. Epstein is confidential. You may not make public statements regarding this matter." (DE 407 at ¶ 61.)

U.S. Attorney Acosta then met with Lefkowitz for breakfast and Lefkowitz followed up with a letter stating, "I also want to thank you for the commitment you made to me during our October 12 meeting in which you . . . assured me that your Office would not . . . contact any of the identified individuals, potential witnesses, or potential civil claimants and their respective counsel in this matter." (DE 407 at ¶ 63.)

On October 24, 2007, AUSA Jeff Sloman sent a letter to Jay Lefkowitz, proposing an addendum to the NPA clarifying the procedures for the third-party representative for the victims under the NPA's compensation provisions. (DE 407 at ¶ 64.) On October 25, 2007, AUSA Sloman sent a letter to Retired Judge Davis about selecting an attorney to represent the victims under the

NPA's compensation procedure. (DE 407 at ¶ 65.)

On about October 26 or 27, 2007, Special Agents E. Nesbitt Kuyrkendall and Jason Richards met in person with Jane Doe 1. They explained that Epstein would plead guilty to state charges, he would be required to register as a sex offender for life, and he had made certain concessions related to the payment of damages. (DE 407 at ¶ 70.) According to Jane Doe 1, the Agents did not explain that the NPA had already been signed. (Jane Doe 1 Decl. ¶ 5, DE 361-26.) Jane Doe 1's understanding was that the federal investigation would continue. (Jane Doe 1 Decl. ¶ 6.) In contrast, Special Agent Kuyrkendall stated that the meeting with Jane Doe 1 was to advise her of the main terms of the NPA.[2] (Kuykendall Decl. ¶ 8, DE 403-18.) After the meeting, Special Agent Kuyrkendall became concerned about what would happen if Epstein breached the NPA, and thought that if the victims were aware of the NPA, the provision about monetary damages could be grounds for impeachment of the victims and herself. (Kuykendall Decl. ¶ 9.) According to Special Agent Kuyrkendall, the investigation of Epstein continued through 2008. (Kuykendall Decl. ¶ 11.)

In addition to Jane Doe 1, FBI agents only talked to two other victims out of the 34 identified victims about the "general terms" of the NPA, including the provision providing a federal civil remedy to the victims. (DE 407 at ¶ 76.) After these meetings with three victims, Epstein's defense team complained. (DE 407 at ¶ 77.)

On about November 27, 2007, AUSA Sloman sent an e-mail to Lefkowitz, (with a copy to U.S. Attorney Acosta) stating that the Office had a statutory obligation to notify the victims about Epstein's plea to state charges that was part of the NPA:

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[2] Special Agent Kuyrkendal also stated that on August 7, 2007, Jane Doe 1 never asked to confer with anyone from the government about charging decisions or any resolution of the matter. (Kuykendall Decl. ¶ 7.)

> The United States has a statutory obligation (Justice for All Act of 2004) to notify the victims of the anticipated upcoming events and their rights associated with the agreement entered into by the United States and Mr. Epstein in a timely fashion. Tomorrow will make one full week since you were formally notified of the selection. I must insist that the vetting process come to an end. Therefore, unless you provide me with a good faith objection to Judge Davis's selection [as special master for selecting legal counsel for victims pursuing claims against Epstein] by COB tomorrow, November 28, 2007, I will authorize the notification of the victims. Should you give me the go-head on [victim representative] . . . selection by COB tomorrow, I will simultaneously send you a draft of the letter. I intend to notify the victims by letter after COB Thursday, November 29th.

(DE 407 at ¶ 79.)

On November 28, 2007, the Government sent an email to Lefkowitz attaching a letter dated November 29, 2007 (the apparent date upon which it was intended to be mailed) and explained that "I am writing to inform you that the federal investigation of Jeffrey Epstein has been completed, and Mr. Epstein and the U.S. Attorney's Office have reached an agreement containing the following terms." The proposed letter then spelled out a number of the provisions in the NPA, including that because Epstein's plea of guilty to state charges was "part of the resolution of the federal investigation," the victims were "entitled to be present and to make a statement under oath at the state sentencing." (DE 407 at ¶ 80.)

On November 29, 2007, Lefkowitz sent a letter to U.S. Attorney Acosta objecting to the proposed victim notification letter, stating that it is inappropriate for any letter to be sent to the victims before Epstein entered his plea or had been sentenced. Lefkowitz also told the Government that the victims should not be invited to the state sentencing, that they should not be encouraged to contact law enforcement officials, and that encouraging the attorney representative to do anything other than get paid by Epstein to settle the cases was to encourage an ethical conflict. (DE 407 at ¶

82.)

On about November 30, 2007, U.S. Attorney Acosta sent a letter to one of Epstein's defense attorneys, Kenneth Starr, stating: "I am directing our prosecutors not to issue victim notification letters until this Friday at 5 p.m., to provide you with time to review these options with your client." The letter also explained that the line prosecutor had informed U.S. Attorney Acosta "that the victims were not told of the availability of Section 2255 relief during the investigation phase of this matter" despite the fact that the "[r]ule of law . . . now requires this District to consider the victims' rights under this statute in negotiating this Agreement." (DE 407 at ¶ 83.) On December 5, 2007, Starr sent a letter to U.S. Attorney Acosta (with copy to AUSA Sloman) asking about issuance of victim notification letters and stating: "While we believe that it is wholly inappropriate for your Office to send this letter under any circumstances, it is certainly inappropriate to issue this letter without affording us the right to review it." (DE 407 at ¶ 85.)

On about December 6, 2007, AUSA Sloman sent a letter to Lefkowitz stating in part:

> [E]ach of the listed individuals are persons whom the Office identified as victims. [T]he Office is prepared to indict Mr. Epstein based upon Mr. Epstein's 'interactions' with these individuals. This conclusion is based upon a thorough and proper investigation - one in which none of the victims was informed of any right to receive damages of any amount prior to the investigation of her claim.
>
> [T]he Office can say, without hesitation, that the evidence demonstrates that each person on the list was a victim of Mr. Epstein's criminal behavior.
>
> Finally, let me address your objections to the draft Victim Notification Letter. You write that you don't understand the basis for the Office's belief that it is appropriate to notify the victims. Pursuant to the 'Justice for All Act of 2004,' crime victims are entitled to: 'The right to reasonable, accurate, and timely notice of any public court proceeding … involving the crime' and the 'right not to be excluded from any such public court proceeding.…' 18 U.S.C. § 3771(a)(2) & (3). Section 3771 also commands that 'employees of the Department of Justice . . . engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime

> victims are notified of, and accorded, the rights described in subsection (a).' 18 U.S.C. § 3771(c)(1)….
>
> With respect to notification of the other information that we propose to disclose, the statute requires that we provide a victim with the earliest possible notice of: the status of the investigation, the filing of charges against a suspected offender, and the acceptance of a plea. 42 U.S.C. 10607(c)(3). Just as in 18 U.S.C. 3771, these sections are not limited to proceedings in a federal district court. Our Non-Prosecution Agreement resolves the federal investigation by allowing Mr. Epstein to plead to a state offense. The victims identified through the federal investigation should be appropriately informed, and our Non-Prosecution Agreement does not require the U.S. Attorney's Office to forego its legal obligations. [T]he Office believes that it has proof beyond a reasonable doubt that each listed individual was a victim of Mr. Epstein's criminal conduct while the victim was a minor. The law requires us to treat all victims "with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. 3771(a)(8).

The letter included a footnote stating: "Unlike the State's investigation, the federal investigation shows criminal conduct by Mr. Epstein at least as early as 2001, so all of the victims were minors at the time of the offense." (DE 407 at ¶ 83.)

On December 7, 2007, defense attorney Lilly Ann Sanchez sent a letter to AUSA Sloman, requesting "that the Office hold off on sending any victim notification letters." No letters were sent in December of 2007. (DE 407 at ¶ 88.) On December 13, 2007, the line prosecutor sent a letter to Lefkowitz stating that "You raised objections to any victim notification, and no further notifications were done." (DE 407 at ¶ 89.) On December 19, 2007, U.S. Attorney Acosta sent a letter to Lilly Ann Sanchez stating, "I understand that the defense objects to the victims being given notice of time and place of Mr. Epstein's state court sentencing hearing. We intend to provide victims with notice of the federal resolution, as required by law. We will defer to the discretion of the State Attorney regarding whether he wishes to provide victims with notices of the state proceedings. (DE 407 at ¶ 90.)

In January of 2008, any requirement that Epstein carry out his obligations under the NPA was delayed while he sought higher level review within the Justice Department. (DE 407 at ¶ 92.) On January 10, 2008, Jane Doe 1 and Jane Doe 2 were sent victim notification letters from the FBI advising them that "[t]his case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation." (DE 407 at ¶ 93.) The January 10, 2008 notification letters did not disclose that the Jane Doe 1 and Jane Doe 2 case in the Southern District of Florida was the subject of the NPA entered into by Epstein and the Office, or that there had been any potentially binding resolution. (DE 407 at ¶ 94.) Other victims received the same letters as sent to Jane Doe 1 and Jane Doe 2. (DE 407 at ¶ 95.)

According to the declaration of Jane Doe 1, she believed that criminal prosecution of Epstein was important and she wanted to be consulted by prosecutors before any resolution. Based on the letters received, she believed the Government would contact her before reaching any final resolution. (Jane Doe 1 Decl. ¶ 9.) On January 31, 2008, Jane Doe 1 met with FBI Agents and an AUSA from the U.S. Attorney's Office. She provided additional details of Epstein's sexual abuse of her. The AUSA did not disclose to Jane Doe 1 at this meeting that they had already negotiated a NPA with Epstein. (DE 407 at ¶ 97.) According to the declaration of Jane Doe 2, while she recognizes she did not initially help the investigation, she later tried to cooperate with the investigation but was never given an opportunity to cooperate with the investigation.[3] (Jane Doe 2

[3] The Government believed that a negotiated resolution was in the best interest of the Office and the victims as a whole based on information obtained from the victims and the agents assigned to the case. (Villafaña Decl. ¶ 19.) The Government also believed that Epstein was trying to set aside the NPA and therefore the Government needed to be prepared for a prosecution. (Villafaña Decl. ¶ 34.) Petitioners object to this evidence, claiming the Government previously claimed work product and similar protections over internal materials. Given that the Court is ruling in favor of Petitioners on the present motions, the Court need not address this

Decl. ¶ ¶ 13-14, DE 361-27.)

On March 19, 2008, the line prosecutor sent a lengthy email to a prospective pro bono attorney for one of Epstein's victims who had been subpoenaed to appear at a deposition. The email listed the attorneys representing Epstein, the targets of the investigation, and recounted in detail the investigation that had been conducted to that point. The email did not reveal the fact that Epstein had signed the NPA in September 2007. (DE 407 at ¶ 98.)

On May 30, 2008, Jane Doe 5, who was recognized as an Epstein victim by the Office, received a letter from the FBI advising her that "[t]his case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation." (DE 407 at ¶ 99.) The May 30, 2008 victim letter to Jane Doe 5 also acknowledged the victims' rights under the CVRA . (DE 407 at ¶ 100.)

In mid-June of 2008, Mr. Bradley Edwards, the attorney for Petitioners, contacted the line prosecutor to inform her that he represented Jane Doe 1 and, later, Jane Doe 2. Edwards asked to meet to provide information about the federal crimes committed by Epstein against these victims. The line prosecutor and Edwards discussed the possibility of federal charges being filed in the future. Edwards was led to believe federal charges could still be filed, with no mention whatsoever of the existence of the NPA or any other possible resolution to the case. (DE 407 at ¶ 101.)

At the end of the call, the line prosecutor asked Edwards to send any information that he wanted considered by the Office in determining whether to file federal charges. The line prosecutor did not inform Edwards about the NPA. (DE 407 at ¶ 102.) On June 19, 2008, Edwards

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issue. To the extent it might have an impact on future rulings, Petitioners may reassert this argument if and when appropriate.

sent an email to the line prosecutor requesting to meet and discuss plans. (DE 407 at ¶ 103.)

On June 23, 2008, the line prosecutor sent an email to Lefkowitz stating that the Deputy Attorney General had completed his review of the Epstein matter and "determined that federal prosecution of Mr. Epstein's case [wa]s appropriate. Accordingly, Mr. Epstein ha[d] until the close of business on Monday, June 30, 2008, to comply with the terms and conditions of the agreement between the United States and Mr. Epstein." (DE 407 at ¶ 105.)

On or about June 27, 2008, the Office called Edwards to provide notice to his clients regarding the entry of Epstein's guilty plea in state court. (DE 407 at ¶ 107.) According to Edwards, the line prosecutor only told him that Epstein was pleading guilty to state solicitation of prosecution. He was not told that the state plea was related to the federal investigation or that the state plea would resolve the federal crimes. Edwards claims he was not told his clients could address the state court. (Edwards Decl. ¶ ¶17-18, DE 416-1.) In contrast, the line prosecutor claims she told Edwards that his clients could address the state court. (Villafaña Decl. ¶ 38, DE 403-19.)

On or before June 30, 2008, the Office prepared a draft victim notification to be sent to the victims. The notification was designed to inform the victims of the provisions of the deferral of federal prosecution in favor of state charges. The notification letter began by describing Epstein's guilty plea in the past tense: "On June 30, 2008, Jeffrey Epstein … entered a plea of guilty to violations of Florida statutes forbidding the solicitation of minors to engage in prostitution and felony solicitation of prostitution." Later, a substantively identical letter was prepared for Epstein's and his counsel's review. (DE 407 at ¶ 110.)

On June 30, 2008, the Office sent an e-mail to Epstein's counsel: "The FBI has received several calls regarding the Non-Prosecution Agreement. I do not know whether the title of the

document was disclosed when the Agreement was filed under seal, but the FBI and our office are declining comment if asked." (DE 407 at ¶ 111.) That same day, Epstein pled guilty to state law solicitation of prostitution charges. (DE 407 at ¶ 112.) Immediately following the June 30, 2008 hearing, the line prosecutor told one of the victims' attorneys that Epstein had "pled guilty today in state court." (DE 407 at ¶ 113.) Also after the plea, the line prosecutor emailed the assistant state attorney a copy of the NPA to be filed under seal. (July 1, 2008 email, DE 362-38.)

On June 30, 2008, based on what she had been told by the Government, Jane Doe 1 thought that the Office was still investigating and pursuing her case. She did not receive notice that Epstein's state guilty plea affected her rights in any way. If she had been told that the state plea had some connection to blocking the prosecution of her case, she would have attended and tried to object to the judge to prevent that plea from going forward. (Jane Doe 1 Decl. ¶ 13.) According to the line prosecutor, Edwards did not tell her that Jane Doe 1 wanted to meet with her before a resolution was reached. (Villafaña Decl. ¶ 37, DE 403-19.)

On July 3, 2008, as specifically directed by the Office, Edwards sent a letter to the Office communicating the wishes of Jane Doe 1, Jane Doe 2, and Jane Doe 5 that federal charges be filed against Epstein: "We urge the Attorney General and our United States Attorney to consider the fundamental import of the vigorous enforcement of our Federal laws. We urge you to move forward with the traditional indictments and criminal prosecution commensurate with the crimes Mr. Epstein has committed, and we further urge you to take the steps necessary to protect our children from this very dangerous sexual predator." (DE 407 at ¶ 118.)

On July 7, 2008, the line prosecutor corresponded with Epstein's counsel seeking his signed agreement concerning a notification letter to the victims before beginning the distribution of that

letter. (DE 407 at ¶ 120.) That same day, Jane Doe 1 filed an emergency petition for enforcement of her rights under the CVRA. (DE 407 at ¶ 126.) On July 9, 2008, Edwards saw the first reference to the NPA when the Government filed its responsive pleading to Jane Doe's emergency petition. (Edwards Decl. ¶ 21.)

On July 8, 2008, the line prosecutor sent a letter to Epstein's counsel stating that victims would be informed about the civil compensation provision of the NPA the next day:

> In accordance with the terms of the Non-Prosecution Agreement, on June 30, 2008, the United States Attorney's Office provided you with a list of thirty-one individuals "whom it was prepared to name in an Indictment as victims of an enumerated offense by Mr. Epstein." . . . In deference to your vacation, we allowed you a week to provide us with any objections or requested modifications of the list and/or the Notification language. Yesterday, I contacted you via telephone and e-mail, but received no response. Accordingly, the United States hereby notifies you that it will distribute the victim notifications tomorrow, July 9, 2008, to each of the thirty-two identified victims, either directly or via their counsel.

(DE 407 at ¶ 127.)

On July 9, 2008, Epstein's counsel sent a letter to the line prosecutor raising concerns about the notifications, and suggesting modifications to the notification letter. Epstein's counsel also objected to the victim notification letters containing certain information about the NPA. (DE 407 at ¶ 128.) The line prosecutor responded: "Without such an express Acknowledgment by Mr. Epstein that the notice contains the substance of that Agreement, I believe that the victims will have justification to petition for the entire agreement, which is contrary to the confidentiality clause that the parties have signed." (DE 407 at ¶ 129.) That same day, the U.S. Attorney's Office sent victim notification letters to Jane Doe 1 and Jane Doe 5, via their attorney, Edwards, and to other identified victims of Epstein. That notification contained a written explanation of

some of the civil compensation provisions of the NPA. The notification did not provide the full terms of the NPA.

On July 10, 2008, Epstein's counsel continued to protest victim notification as evidenced by an email to the line prosecutor stating, "we respectfully request a reasonable opportunity to review and comment on a draft of the modified notification letter you intend to mail before you send it." (DE 407 at ¶ 131.)

On August 10, 2008, Jane Doe 1 and Jane Doe 2 filed a motion seeking release of the NPA. (DE 407 at ¶ 136.) On August 14, 2008, the line prosecutor emailed Epstein's counsel stating that the court has "ordered us to make the Agreement available to the plaintiffs." (DE 407 at ¶ 141.)

On August 18, 2008, Lefkowitz wrote the line prosecutor that Epstein objected to disclosure of the terms of the NPA, but that Epstein would "cooperate with the government to reach an agreement as to substance of the notification to be sent to the government's list of individuals. Based on the Agreement, the information contained in the notification should be limited to (1) the language provided in the Agreement dealing with civil restitution (paragraphs 7-10) and (2) the contact information of the selected attorney representative. We object to the inclusion of additional information about the investigation of Mr. Epstein, the terms of the Agreement other than paragraphs 7-10 and the identity of other identified individuals." (DE 407 at ¶ 143.) On August 21, 2008, the Government sent a letter to Epstein's counsel stating that, "[c]opies of the victim notifications will continue to be provided to counsel for Mr. Epstein."

Jane Doe 2 was not informed of the contents of the NPA until August 28, 2008, when the line prosecutor provided a copy to Edwards. (DE 407 at ¶ 146.) On September 2, 2008, the line

prosecutor sent an email to Epstein's counsel stating, "I will start sending out the victim notifications today. In accordance with your request, I have changed the language regarding the victims' right to receive a copy of the Agreement." (DE 407 at ¶ 147.) On September 2 and 3, 2008, the Office sent to Jane Doe 1 and other identified victims amended notification letters, stating "the United States has agreed to defer federal prosecution in favor of this state plea and sentence." (Sept. 3, 2008 letter, DE 363-66; (DE 407 at ¶ 148.)

On September 16, 2008, attorney Jeffrey Herman, who represented several Epstein victims, wrote to the line prosecutor to object to the restitution procedures established in the NPA after learning that another attorney, established through the NPA, would be making unsolicited contacts to the victims. Mr. Herman explained that the notification letters were "misleading" because they referred generally to a waiver of "any other claim for damages," without informing them that this waiver might include a valuable punitive damages claim against an alleged billionaire. (DE 407 at ¶ 152.) On September 17, 2008, the line prosecutor sent an email to State Attorney Barry Krischer, explaining that the NPA "contain[ed] a confidentiality provision that require[ed] us to inform Mr. Epstein's counsel before making any disclosure." (DE 407 at ¶ 153.)

Around this same time period, Jane Doe 1 and Jane Doe 2 filed actions in Palm Beach County, seeking money damages from Epstein from sexually abusing them. (Petitioners' Resp. to Gov't's Statement of Undisputed Material Facts (hereinafter "DE 415") at ¶ ¶ 8-9.) Eventually, they received monetary settlements of their lawsuits. (DE 415 at ¶ 12.)

In moving for summary judgment, the Petitioners make the following arguments in support of their contention that the Government violated their CVRA rights. The Government

violated Petitioners' right to confer under the CVRA: (1) when the Government was negotiating and signing the NPA; (2) when the Government sent letters telling Petitioners to be patient while the Government completed its investigation and (3) when the Government did not tell the victims that the state plea would extinguish the federal case. Petitioners also claim the Government violated their right to be treated with fairness under the CVRA by concealing the negotiations of the NPA. Additionally, Petitioners contend the Government violated their rights to reasonable and accurate notice when it concealed that the NPA and the federal investigation were implicated in the state court proceeding.

In moving for and responding to summary judgment, the Government contends that there is no right to notice or conferral about a NPA; it was reasonable for the Government to send letters to victims while continuing to investigate the case because the Government could not assume that Epstein would plead guilty; and the line prosecutor contacted Petitioners' attorneys about the state court plea hearing. The Government also claims it did not violate the right to reasonable, accurate and timely notice because the CVRA does not create any right to notice of state court proceedings and, in any event, the Government gave notice. The Government asserts it did not treat the victims unfairly and used its best efforts to comply with the CVRA, including complying with the Attorney General's guidelines for victim assistance. Furthermore, the Government argues that Petitioners are equitably estopped from challenging the NPA because they relied upon the NPA in their state court civil actions against Epstein. Lastly, the Government contends that Petitioners are judicially estopped from challenging the validity of the NPA because they have asserted mutually inconsistent positions; namely, that the NPA is invalid in federal court but was binding on Epstein in state court.

II. Summary Judgment Standard

The Court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(a), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) and (B).

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477

U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." Anderson, 477 U.S. 242, 249-50.

III. Discussion

The CVRA was designed to protect victims' rights and ensure their involvement in the criminal justice process. United States v. Moussaoui, 483 F.3d 220, 234 (4th Cir. 2007); Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The [CVRA] was enacted to make crime victims full participants in the criminal justice system."). The statute enumerates the following ten rights:

> (1) The right to be reasonably protected from the accused.
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> (5) The reasonable right to confer with the attorney for the Government in the case.
>
> (6) The right to full and timely restitution as provided in law.
>
> (7) The right to proceedings free from unreasonable delay.
>
> (8) The right to be treated with fairness and with respect for the victim's dignity and

> privacy.
>
> (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
>
> (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

18 U.S.C. § 3771(a).

This Court previously held the following with respect to the CVRA: First, the rights under the CVRA attach before the Government brings formal charges against a defendant. Does v. United States, 817 F. Supp. 2d 1337, 1341 (S.D. Fla. 2011). Second, the CVRA authorizes the rescission or "reopening" of a prosecutorial agreement, including a non-prosecution agreement, reached in violation of a prosecutor's conferral obligations under the statute. Doe v. United States, 950 F. Supp. 2d 1262, 1267 (S.D. Fla. 2013). Third, section 3771(d)(5) of the CVRA authorizes the setting aside of pre-charge prosecutorial agreements, despite the fact that the particular statutory enforcement provision expressly refers to the reopening of a plea or sentence. Id. at 1267. Fourth, the "reasonable right to confer . . . in the case" extends to the pre-charge state of criminal investigations and proceedings. Id. Fifth, the federal sex offense crimes involving minors allegedly committed by Epstein renders these Petitioners crime victims under the CVRA. Id. at 1269. Sixth, "questions pertaining to [the] equitable defense[s] are properly left for resolution after development of a full evidentiary record." Id. at 1269 n. 6.

Here, it is undisputed that the Government entered into a NPA with Epstein without conferring with Petitioners during its negotiation and signing. Instead, the Government sent letters to the victims requesting their "patience" with the investigation even after the Government

entered into the NPA. At a bare minimum, the CVRA required the Government to inform Petitioners that it intended to enter into an agreement not to prosecute Epstein. Although the binding effect of the NPA was contingent upon Epstein pleading guilty to the state charges, that contingency was out of the control of the Government. The Government's hands were permanently tied if Epstein fulfilled his obligations under the NPA. Thus, Petitioners and the other victims should have been notified of the Government's intention to take that course of action before it bound itself under the NPA. Had the Petitioners been informed about the Government's intention to forego federal prosecution of Epstein in deference to him pleading guilty to state charges, Petitioners could have conferred with the attorney for the Government and provided input. In re Dean, 527 F.3d 391, 394 (5th Cir. 2008) (there are rights under the CVRA including the "reasonable right to confer with the attorney for the Government"). Hence, the Government would have been able to "ascertain the victims' views on the possible details of the [non-prosecution agreement]." Id. Indeed, it is this type of communication between prosecutors and victims that was intended by the passage of the CVRA. See United States v. Heaton, 458 F. Supp. 2d 1271 (D. Utah 2006)(government motion to dismiss charge of using facility of interstate commerce to entice minors to engage in unlawful sexual activity would not be granted until government consulted with victim); United States v. Ingrassia, No. CR-04-0455ADSJO, 2005 WL 2875220, at *17 n. 11 (E.D.N.Y. Sept. 7, 2005) (Senate debate supports the view that the contemplated mechanism for victims to obtain information on which to base their input was conferral with the prosecutor concerning any critical stage or disposition of the case).

Particularly problematic was the Government's decision to conceal the existence of the

NPA and mislead the victims to believe that federal prosecution was still a possibility.[4] When the Government gives information to victims, it cannot be misleading. While the Government spent untold hours negotiating the terms and implications of the NPA with Epstein's attorneys, scant information was shared with victims. Instead, the victims were told to be "patient" while the investigation proceeded.

The Government, however, interprets the CVRA as only obligating the prosecutor to answer inquiries by a crime victim and does not impose a duty on the prosecutor to give notice about case developments, other than what is required in section 3771(a)(2). Such an interpretation is in direct contravention of the intent of the CVRA. See Ingrassia, 2005 WL 2875220, at *17 n.11 (Senate debate explaining the right to confer is "intended to be expansive" including the right of victim to confer "concerning any critical state of disposition of the case"). In any event, no meaningful conferral could take place as long as the Government chose to conceal the existence of the NPA from the victims.[5]

Nor does the Court agree with the Government that the 2015 amendment to the CVRA, section 3771(a)(9), which gave victims the "right to be informed in a timely manner of any plea

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[4] Even if the Court accepted the Government's version of the facts relative to the Agent having told Jane Doe 1 the "main terms" of the NPA (which is left undefined), the victims were not told about it until *after* it was signed and the Government was bound. This precluded the Government from obtaining any input from the victims.

[5] The Government devotes time to distinguishing between the words "confer" and "notice" and suggesting that "confer" is more limited in scope than "notice." Nothing about the definition of confer, however, suggests it is limited to one party bearing the burden of communication. See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary (last visited January 7, 2019) ("to compare views or take counsel"); Blacks Law Dictionary (10th ed. 2014) ("to hold a conference, to consult with one another").

bargain or deferred prosecution agreement" specifically excluded the right of victims to be informed of a non-prosecution agreement. Prior to this amendment, this Court held that the right to confer extended to the pre-charge state of criminal investigations and proceedings. Doe, 950 F. Supp. 2d at 1267; see also 157 Cong. Rec. S7060-01, 157 Cong. Rec. S7060-01, S7060 (CVRA co-sponsor Senator Jon Kyl's 2011 letter to the Attorney General, explaining that "Congress intended the CVRA to broadly protect crime victims throughout the criminal justice process-from the investigative phases to the final conclusion of a case.")

The 2015 amendment did not serve to repeal or restrict the obligations of the Government to confer with victims in the early stages of a case. Instead, the 2015 amendment clarified that certain events, such as plea agreements or deferred prosecution agreements, must be conveyed to the crime victim. Put another way, the 2015 amendment codified what the courts had been interpreting the CVRA to require, such as entitlement to notice of a plea bargain. See In re Dean, 527 F.3d at 394 ("the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain"); United States v. Okun, No. CRIM. 3:08CR132, 2009 WL 790042, at *2 (E.D. Va. Mar. 24, 2009) (the statutory language of the CVRA gives the victims' rights before the accepting of plea agreements).

To the extent the Government relies upon the "interpretive canon, *expressio unius est exclusio alterius*, 'expressing one item of [an] associated group or series excludes another left unmentioned'" the Court is not persuaded. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80 (2002) (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)). "The force of any negative implication . . . depends on context." Marx v. General Revenue Corp., 568 U.S. 371, 381 (2013).

"[T]he *expressio unius* canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it, and that the canon can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion." Id. (internal citations and quotation marks omitted).

The expansive context of the CVRA lends itself to only one interpretation; namely, that victims should be notified of significant events resulting in resolution of their case without a trial. See Kenna v. U.S. Dist. Court for C.D.Cal., 435 F.3d 1011, 1016 (9th Cir. 2006) ("[t]he statute was enacted to make crime victims full participants in the criminal justice system"); Heaton, 458 F. Supp. 2d at 1273 (the right to confer is "not limited to particular proceedings" but is "expansive" and applies broadly to "any critical stage or disposition of the case"). Reading into the statute a negative implication that victims need not be informed of non-prosecution agreements, and only informed of the more common events of plea bargains or deferred prosecution agreements, would be inconsistent with the goal of the CVRA.[6] In the context of plea agreements, the CVRA provides victims with rights prior to the acceptance of plea agreements. See In re Dean, 527 F.3d at 394; United States v. Okun, No. CRIM. 3:08CR132, 2009 WL 790042, at *2 (E.D. Va. Mar. 24, 2009). Furthermore, victims obtain rights under the CVRA even before prosecution. Okum, 2009 WL 790042, at *2 (citing In re Dean, 527 F.3d at 394). Based on this authority, the Court concludes that the CVRA must extend to conferral about non-prosecution agreements.

[6] A NPA entered into without notice has a more damaging impact on the victims than a plea agreement entered into without notice. When a plea agreement is entered into without notice, the victims will at least have an opportunity to provide input to a judge at sentencing. Once a NPA is entered into without notice, the matter is closed and the victims have no opportunity to be heard regarding any aspect of the case.

Next, the Government claims it did not violate the right to confer when, in January of 2008, it sent letters to the victims counseling patience because, at that time, Epstein's attorneys were seeking review of the NPA at higher levels within the Department of Justice. As indicated previously, however, at this point, the Government had bound itself to the terms of the NPA unless Epstein failed to comply with its terms. It was a material omission for the Government to suggest to the victims that they have patience relative to an investigation about which it had already bound itself not to prosecute. While Epstein was within his rights to attempt to persuade higher authorities within the Department of Justice to overrule the prosecutorial decisions of the U. S. Attorney's Office in the Southern District of Florida, the CVRA was designed to give the victims the same opportunity to attempt to affect prosecutorial decisions before they became final. Instead, the Office engaged in lengthy negotiations with Epstein that included repeated assurances that the NPA would not be "made public or filed with the Court." (DE 407 at ¶ 31.)

Nor did the Justice Department guidelines create an exemption from the CRVA's statutory requirements. Although the Government points to guidelines that conflicted with the requirements of the CVRA (by restricting CVRA rights until after a formal indictment), the Court is not persuaded that the guidelines were the basis for the Government's decision to withhold information about the NPA from the victims. If that had been the case, the Government would not have sent the victim letters telling them that they had rights protected under the CVRA. Nor would they have told Epstein's attorneys that it had obligations to notify the victims. In any event, an agency's own "'interpretation' of a statute cannot supersede the language chosen by Congress." Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980).

Next, the Court rejects the Government's contention that Jane Doe 2 is not protected by

the CVRA because she made statements favorable to Epstein early in the investigation.[7] There is no dispute that Epstein sexually abused Jane Doe 2 while she was a minor. Therefore, regardless of her comments to the prosecutor, she was a victim. See 18 U.S.C. § 3771(e) (the CVRA defines a victim as "a person directly and proximately harmed as a result of the commission of a Federal offense"); In re Stewart, 552 F.3d 1285, 1288 (11th Cir. 2008) ("to determine a crime victim, then, first, we identify the behavior constituting 'commission of a Federal offense.' Second, we identify the direct and proximate effects of that behavior on parties other than the United States. If the criminal behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA.").

The Court need not resolve the factual questions surrounding what and when the victims were told about the state court proceeding and whether a state court proceeding is covered by the CVRA. Under the facts of this case, once the Government failed to advise the victims about its intention to enter into the NPA, a violation of the CVRA occurred.

Nor does the Court need to consider the Government's estoppel arguments at this time. These arguments relate only to the remedy, and not the determination of whether there was a CVRA violation. Therefore, the Court will address this issue at the appropriate juncture.

Lastly, the Court will address the Government's argument that its prosecutorial discretion permitted it to enter into the NPA. The Government correctly notes that the CVRA provides that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C.A. § 3771(d)(6). The Court is not ruling

[7] In fact, the Office considered Jane Doe 2 a victim as early as August of 2006 when it sent her a CVRA letter.

that the decision not to prosecute was improper. The Court is simply ruling that, under the facts of this case, there was a violation of the victims rights under the CVRA.

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1) Jane Doe 1 and Jane Doe 2's Motion for Partial Summary Judgment (DE 361) is **GRANTED** to the extent that Petitioners' right to conferral under the CVRA was violated.

2) The United States's Cross-Motion for Summary Judgment (DE 408) is **DENIED.**

3) Jane Doe 1 and Jane Doe 2's Motion to Compel Answers (DE 348) is **DENIED WITHOUT PREJUDICE.**

4) Jane Doe 1 and Jane Doe 2's Motion for Finding Waiver of Work Product and Similar Protections by Government and for Production of Documents (DE 414) is **DENIED WITHOUT PREJUDICE.**

5) The parties should confer and inform the Court **within 15 days of the date of entry of this Order** how they wish to proceed on determining the issue of what remedy, if any, should be applied in view of the violation.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 21st day of February, 2019.

KENNETH A. MARRA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA/JOHNSON

JANE DOES #1 AND #2,

Plaintiffs,

vs.

UNITED STATES,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court upon Plaintiffs' Motion for Finding of Violations of the Crime Victims' Rights Act (DEs 48, 52), Plaintiffs' Motion to Have Their Facts Accepted Because of the Government's Failure to Contest Any of the Facts (DE 49), Plaintiffs' Motion for Order Directing the U.S. Attorney's Office Not to Withhold Relevant Evidence (DE 50), and Bruce E. Reinhart's Motion to Intervene or in the Alternative for a *Sua Sponte* Rule 11 Order (DE 79).[1] All motions are fully briefed and ripe for review, and the Court has heard oral arguments on all motions. The Court has carefully considered the briefing and the parties' arguments and is otherwise fully advised in the premises.

[1] The Court is awaiting supplemental briefing on the Motion to Intervene of Roy Black, Martin Weinberg, and Jay Lefkowitz (DE 56) and will rule on that motion after it is fully briefed. Also, because the proposed interveners seek intervention to request a protective order against disclosure of certain correspondences at issue in Plaintiffs' Motion to Use Correspondence to Prove Violations of the Crime Victims' Rights Act and to Have Their Unredacted Pleadings Unsealed (DE 51), the Court will defer ruling on the latter motion until the intervention motion is ripe for review.

Background[2]

Plaintiffs Jane Doe #1 and Jane Doe #2 are alleged victims of federal sex crimes committed by Jeffrey Epstein in Palm Beach County. Between 2001 and 2007, Epstein sexually abused multiple underage girls at his Palm Beach mansion, including Plaintiffs. In 2006, the Federal Bureau of Investigation ("FBI") opened an investigation into allegations that Epstein was inducing underage girls to engage in sexual acts. The case was eventually presented to the United States Attorney's Office for the Southern District of Florida, which accepted it for investigation. The Palm Beach County State Attorney's Office was also investigating similar allegations against Epstein. Plaintiffs allege that the FBI and U.S. Attorney's Office's investigation developed a strong case for a federal prosecution against Epstein based on "overwhelming" evidence.

In June 2007, the FBI delivered to Jane Doe #1 a standard victim-notification letter, which explained that the case against Epstein was "under investigation" and notified Jane Doe #1 of her rights under the Crime Victims' Rights Act ("CVRA"). In August 2007, Jane Doe #2 received a similar notification letter.

In September 2007, Epstein and the U.S. Attorney's Office began plea discussions. The negotiations led to an agreement under which Epstein would plead guilty to two state felony offenses for solicitation of prostitution and procurement of minors for prostitution and the U.S.

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[2] This background discussion is based on the allegations in Plaintiffs' Petition for Enforcement of Crime Victims' Rights Act (DE 1) and the Statement of Material Facts in Plaintiffs' Motion for Finding of Violation of the Crime Victims' Rights Act (DEs 48, 52). These allegations are not yet supported by evidence and the Court relies on them here solely to provide the context for the threshold legal issues addressed in this order. As discussed below, further factual development is necessary to resolve the additional issues raised in Plaintiffs' motions.

Attorney's Office would agree not to prosecute Epstein for federal offenses. On September 24, 2007, Epstein and the U.S. Attorney's Office executed a Non-Prosecution Agreement ("NPA") under these terms.

Plaintiffs contend that the U.S. Attorney's Office did not confer with them regarding the plea discussions and, in fact, intentionally kept secret the negotiations and the NPA. From September 24, 2007, the day on which the NPA was executed, through June 2008, the U.S. Attorney's Office did not notify either Plaintiff of the existence of the NPA.

During this period, Plaintiffs communicated multiple times with the FBI and U.S. Attorney's Office, but neither Plaintiff was informed of the NPA. On January 10, 2008, the FBI sent letters to Plaintiffs advising them that "[t]his case is currently under investigation," but failing to disclose the existence of the NPA. On January 32, 2008, Jane Doe #1 met with FBI agents and attorneys from the U.S. Attorney's Office to discuss her abuse by Epstein. The government did not disclose the existence of the NPA. In mid-June 2008, Plaintiffs' counsel contacted the Assistant United States Attorney ("AUSA") handling their case to discuss the status of the investigation. The AUSA did not disclose the existence of the NPA. On June 27, 2008, the U.S. Attorney's Office notified Plaintiffs' counsel that Epstein was scheduled to plead guilty in state court on June 30, 2008. The U.S. Attorney's Office did not disclose the existence of the NPA nor the relationship between Epstein's state plea and the U.S. Attorney's Office's agreement to forgo federal charges. On July 3, 2008, Plaintiffs' counsel sent a letter to the U.S. Attorney's Office stating Jane Doe #1's desire that it bring federal charges against Epstein.

On July 7, 2008, Jane Doe #1 filed a petition in this Court to enforce her rights under the CVRA.[3] Jane Doe #1 alleged that she believed plea discussions were under way between Epstein and the U.S. Attorney's Office, and that the government, by failing to notify her of this development, had violated her rights under the CVRA. The United States responded to the petition on July 9, 2008, arguing that (1) a federal indictment had never been returned against Epstein and therefore the CVRA did not attach, and (2) nevertheless, the U.S. Attorney's Office had used its best efforts to comply with the CVRA. The government's response also disclosed that the U.S. Attorney's Office had entered into the NPA with Epstein.

On July 11, 2008, this Court held a hearing on Jane Doe #1's petition, at which Jane Doe #2 was added as a plaintiff. At the hearing, Plaintiffs explained that their petition did not present an emergency and that therefore an immediate resolution was not necessary. On August 14, 2008, the Court held a status conference and ordered the United States to turn over the NPA to all identified victims, including Plaintiffs, and further ordered the parties to work out the terms of a protective order governing the NPA's disclosure.

This action was relatively inactive for the next year and one-half while Plaintiffs litigated civil actions against Epstein. After those cases settled, Plaintiffs attempted to resolve their CVRA dispute with the U.S. Attorney's Office. On March 18, 2011, after the parties' settlement efforts failed, Plaintiffs filed a series of motions, which the Court now addresses in turn, along with Bruce E. Reinhart's Motion to Intervene.

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[3] Jane Doe #2 joined this action after Jane Doe #1 filed the initial Petition for Enforcement of Crime Victims' Rights Act.

I. Motion for Finding of Violations of the Crime Victims' Rights Act

The CVRA was designed to protect victims' rights and ensure them involvement in the criminal-justice process. *United States v. Moussaoui*, 483 F.3d 220, 234 (4th Cir. 2007); *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The [CVRA] was enacted to make crime victims full participants in the criminal justice system."). The statute enumerates the following eight rights:

> (1) The right to be reasonably protected from the accused.
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> (5) The reasonable right to confer with the attorney for the Government in the case.
>
> (6) The right to full and timely restitution as provided in law.
>
> (7) The right to proceedings free from unreasonable delay.
>
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a).

If a prosecution is underway, the CVRA grants victims standing to vindicate their rights in the ongoing criminal action. 18 U.S.C. § 3771(d)(3). If, however, a prosecution is not underway, the victims may initiate a new action under the CVRA in the district court of the

district where the crime occurred.[4] *Id.* The statute also tasks the district courts and the prosecutors with the responsibility of protecting these rights. *See* 18 U.S.C. § 3771(b)(1) ("[T]he court shall ensure that the crime victim is afforded the rights described in subsection (a)."); § 3771(c)(1) ("Officers and employees of the Department of Justice . . . shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).").

Here, Plaintiffs first argue that as a matter of law the CVRA's protections attach before a formal charge is filed against the criminal defendant. Accordingly, Plaintiffs contend that the CVRA applied here and that the U.S. Attorney's Office violated their CVRA rights; namely, their rights to confer, to be treated with fairness, and to accurate and timely notice of court proceedings. Based on these violations, Plaintiffs request that this Court set a briefing schedule and hearing on the appropriate remedy, which according to Plaintiffs is to invalidate the non-prosecution agreement.

The United States argues that as a matter of law the CVRA does not apply before formal charges are filed, i.e., before an indictment or similar charging document, and therefore does not apply here because formal charges were never filed against Epstein. The United States further argues that even if the CVRA applied here, the U.S. Attorney's Office complied with its requirements.

The Court first addresses the threshold issue whether the CVRA attaches before the government brings formal charges against the defendant The Court holds that it does because the

[4] Here, because no criminal case was pending, Plaintiffs filed their petition as a new matter in this judicial district, which the Clerk of Court docketed as a civil action.

statutory language clearly contemplates pre-charge proceedings. For instance, subsections (a)(2) and (a)(3) provide rights that attach to "any public court proceeding . . . involving the crime." Similarly, subsection (b) requires courts to ensure CVRA rights in "any court proceeding involving an offense against a crime victim." Court proceedings involving the crime are not limited to post-complaint or post-indictment proceedings, but can also include initial appearances and bond hearings, both of which can take place before a formal charge. By way of example, under Rule 5(a)(1)(A) of the Federal Rules of Criminal Procedure, upon arrest the defendant must be taken before a magistrate judge "without unnecessary delay" for an initial appearance. If the arrest takes place on a weekday, "without unnecessary delay" will typically require that the initial appearance occur the following morning, which will often be within twenty-four hours of arrest. *See United States v. Mendoza*, 473 F.2d 697, 702 (5th Cir. 1973) (holding that the government satisfied Rule 5's "without unnecessary delay" requirement by bringing the defendant before the magistrate judge on the first weekday morning following the arrest). By contrast, Rule 5(b) requires that where the defendant is arrested without a warrant, the government must file the complaint "promptly." The Supreme Court has interpreted "promptly" under Rule 5(b) as generally requiring that the complaint be filed within forty-eight hours of arrest. *Cnty. Of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). It is therefore possible that where the defendant is arrested on a weekday without a warrant, the initial appearance—which may also involve the detention or bond hearing under Rule 5(d)(3)—will take place before the government files the criminal complaint.

Subsection (c)(1) requires that "Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the *detection, investigation*, or

prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights in subsection (a)." (Emphasis added). Subsection (c)(1)'s requirement that officials engaged in "detection [or] investigation" afford victims the rights enumerated in subsection (a) surely contemplates pre-charge application of the CVRA.

Subsection (d)(3) explains that the CVRA's enumerated rights "shall be asserted in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred." (Emphasis added). If the CVRA's rights may be enforced before a prosecution is underway, then, to avoid a strained reading of the statute, those rights must attach before a complaint or indictment formally charges the defendant with the crime.

This interpretation is consistent with other federal decisions that have addressed the scope of the CVRA. For instance, in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), the court held that subsection (a)(5)'s "right to confer" applied before any prosecution is underway. *Id.* at 394. Specifically, the court explained:

> The district court acknowledged that "there are clearly rights under the CVRA that apply before any prosecution is underway." Logically, this includes the CVRA's establishment of victims' "reasonable right to confer with the attorney for the Government." At least in the posture of this case (and we do not speculate on the applicability to other situations), the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain.

Id. at 394 (internal citation and quotation marks omitted). Federal district courts have reached similar conclusions. *See, e.g.*, *United States v. Rubin*, 558 F. Supp. 2d 411, 417 n.5 (E.D.N.Y. 2008) (discussing victims' "ability to seek pre-prosecution relief" under the CVRA); *United States v. Okun*, No. 08-132, 2009 WL 790042, at *2 (E.D. Va. Mar. 24, 2009) ("[T]he Fifth

Circuit has noted that victims acquire rights under the CVRA even before prosecution. This view is supported by the statutory language, which gives the victims rights before the accepting of plea agreements and, therefore, before adjudication of guilt."); *United States v. BP Prods N. Am. Inc.*, No. 07-434, 2008 WL 501321, at *11 (S.D. Tex. Feb. 21, 2008) ("There are clearly rights under the CVRA that apply before any prosecution is underway."), *mandamus denied in part*, *In re Dean* 527 F.3d 391 (5th Cir. 2008).

The United States argues that because the CVRA accords rights related to "any court proceeding," 18 U.S.C. §§ 3771(b)(1), (d)(3), and "in the case," § 3771(b)(5), the CVRA applies only after formal charges are filed. The Court finds this argument unavailing. First, as discussed above, "court proceedings" can occur before formal charges are filed. Similarly, subsection (a)(5)'s reference to the right to confer with "the attorney for the Government in the case," is not limited to post-charge proceedings, as the United States is represented by attorneys in each criminal case at, for example, initial appearances and bond hearings.[5] Last, the government's interpretation ignores the additional language throughout the statute that clearly contemplates pre-charge protections, such as subsection (c)(1)'s mandate that U.S. agencies involved at the "detection" and "investigation" stage use their best efforts to accord victims their enumerated rights under the CVRA and subsection (d)(3)'s provision that victims may vindicate their CVRA

[5] For this reason, the Court respectfully disagrees with the interpretation adopted in *In re Petersen*, No. 10-298, 2010 WL 5108692 (N.D. Ind. Dec. 8, 2010), upon which the United States relies. *See id.* at *2 (holding that a "victim's 'right to be treated with fairness and with respect for [his or her] dignity and privacy' may apply before any prosecution is underway and isn't necessarily tied to a 'court proceeding' or 'case,'" but concluding that "the right 'to confer with the attorney for the Government in the case' . . . arise[s] only after charges have been brought against a defendant and a case has been opened"). *But see In re Dean*, 527 F.3d at 394 (holding that under subsection (a)(5), "the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges").

rights even if "no prosecution is underway." *See United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999) ("[W]e read the statute to give full effect to each of its provisions. We do not look at one word or term in isolation, but instead we look to the entire statutory context.") (citation omitted).

The Court also rejects the United States' argument that pre-charge CVRA rights could impair prosecutorial discretion and decision-making. Any encroachment into the prosecutors' discretion is expressly limited by the CVRA itself, which provides: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). As the court explained in *Rubin*, "there is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy, or object to or appeal pretrial or in limine orders . . . . In short, the CVRA, for the most part, gives victims a voice, not a veto." 558 F. Supp. at 418; *see also BP Prods N. Am.*, 2008 WL 501321, at *15 ("Even under an expansive approach, the reasonable right to confer on a proposed plea agreement and the government's obligation to provide notice of that right is subject to the limit that the CVRA not impair prosecutorial discretion."). Thus, to the extent that the victims' pre-charge CVRA rights impinge upon prosecutorial discretion, under the plain language of the statute those rights must yield.

Having determined that as a matter of law the CVRA can apply before formal charges are filed, the Court must address whether the particular rights asserted here attached and, if so, whether the U.S. Attorney's Office violated those rights. However, the Court lacks a factual record to support such findings and must therefore defer ruling on these two issues pending the limited discovery discussed below.

II. Motion to Have Their Facts Accepted Because of the Government's Failure to Contest Any of the Facts

For the reasons stated on the record at the August 12, 2011 hearing on this motion, the Court will deny Plaintiffs' request to have their facts accepted as true.

III. Motion for Order Directing the U.S. Attorney's Office Not to Withhold Relevant Evidence

Plaintiffs request an order from the Court "directing the U.S. Attorney's Office not to suppress material evidence relevant to this case." (DE 50 at 1). Specifically, Plaintiffs seek all information and material known to the government that may be favorable to the victims regarding possible violations of their rights under the CVRA. The United States opposes the motion, arguing that neither the CVRA nor the Federal Rules of Civil Procedure impose a duty upon the U.S. Attorney's Office to provide evidence to Plaintiffs here.

At the August 12, 2011 hearing on this motion, the United States agreed that this Court, under its inherent authority to manage this case, could impose discovery obligations on each party. Because the Court finds that some factual development is necessary to resolve the remaining issues in this case, it will permit Plaintiffs the opportunity to conduct limited discovery in the form of document requests and requests for admissions from the U.S. Attorney's Office. Either party may request additional discovery if necessary.

Because the Court will allow this limited factual development, it is unnecessary to decide here whether the CVRA or the Federal Rules of Civil Procedure provide discovery rights in this context. The Court therefore reserves ruling on Plaintiffs' motion.

IV. Bruce E. Reinhart's Motion to Intervene or in the Alternative for a *Sua Sponte* Rule 11 Order

Bruce E. Reinhart seeks leave to intervene as a party-in-interest under Rule 24(b) of the Federal Rules of Civil Procedure. Reinhart seeks to intervene to file a motion for sanctions based on allegedly "unfounded factual and legal accusations made about Movant in Plaintiffs' Motion for Finding of Violations of the Crime Victims' Rights Act." (DE 79 at 1). In that motion, Plaintiffs alleged that Reinhart, a former Assistant U.S. Attorney, "joined Epstein's payroll shortly after important decisions were made limiting Epstein's criminal liability" and improperly represented Epstein victims in follow-on civil suits. (DE 48 at 22). Plaintiffs contend that such conduct "give[s], at least, the improper appearance that Reinhart may have attempted to curry [favor] with Epstein and then reap his reward through favorable employment." (DE 48 at 23). Reinhart takes great offense to these accusation—which he contends are false, irrelevant to the CVRA claims, and gratuitous—and seeks intervention to rebut these allegations and move for sanctions.

Under Rule 24(b) of the Federal Rules of Civil Procedure, "the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." It is "wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention." *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1246 (11th 2006). The Court will deny Reinhart's request to intervene.

First, the Court finds that Reinhart's claim does not share a common question of law or fact with the CVRA action. Reinhart claims that two paragraphs of Plaintiffs' forty-page motion make groundless and bad-faith accusations against his integrity and character. However, the veracity of Plaintiffs' two paragraphs—i.e., whether Reinhart used his position at the U.S. Attorney's Office to ingratiate himself with Epstein and advance his career in private practice—involves no common questions with the Plaintiffs' claims that the U.S. Attorney's Office violated their CVRA rights through the process in which it entered into the NPA with Epstein. Indeed, Reinhart's motion argues that the allegations against him are "irrelevant" and that Plaintiffs "do[] not make any effort to connect these allegations to the relief [they] seek[]." (DE 79 at 2).

Second, even if these accusations shared common questions with Plaintiffs' CVRA claims, the Court would exercise its discretion and deny intervention. The Court cannot permit anyone slighted by allegations in court pleadings to intervene and conduct mini-trials to vindicate their reputation. Absent some other concrete interest in these proceedings, the Court does not believe that the allegations here are sufficiently harmful to justify permissive intervention. Reinhart has publicly aired his opposition to and denial of Plaintiffs' contentions, both on this docket and in open court, and the Court finds that further proceedings on this issue are unwarranted. For the same reason, the Court declines to conduct a *sua sponte* Rule 11 inquiry.

Conclusion

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that Plaintiffs' Motion for Finding of Violations of the Crime Victims' Rights Act (DEs 48, 52) is GRANTED IN PART. The Court concludes that the CVRA can apply before formal charges are filed. The

Court defers ruling on the merits of Plaintiffs' CVRA claims until the parties complete the discovery ordered herein.

It is further ORDERED AND ADJUDGED that Plaintiffs' Motion to Have Their Facts Accepted (DE 49) is DENIED.

The Court reserves ruling Plaintiffs' Motion for Order Directing the U.S. Attorney's Office Not to Withhold Relevant Evidence (DE 50) pending the discovery ordered herein.

It is further ORDERED AND ADJUDGED that Bruce E. Reinhart's Motion to Intervene or in the Alternative for a *Sua Sponte* Rule 11 Order (DE 79) is DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this 26th day of September, 2011.

KENNETH A. MARRA
United States District Judge

U.S. Department of Justice

United States Attorney
Southern District of Florida

500 South Australian Ave., Suite 400
West Palm Beach, FL 33401
(561) 820-8711
Facsimile: (561) 820-8777

June 7, 2007

DELIVERY BY HAND
Miss [redacted]

Re: Crime Victims' and Witnesses' Rights

Dear Miss [redacted]

Pursuant to the Justice for All Act of 2004, as a victim and/or witness of a federal offense, you have a number of rights. Those rights are:

(1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any public court proceeding involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any public court proceeding, unless the court determines that your testimony may be materially altered if you are present for other portions of a proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing.
(5) The reasonable right to confer with the attorney for the United States in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

Members of the U.S. Department of Justice and other federal investigative agencies, including the Federal Bureau of Investigation, must use their best efforts to make sure that these rights are protected. If you have any concerns in this regard, please feel free to contact me at 561 209-1047, or Special Agent Nesbitt Kuyrkendall from the Federal Bureau of Investigation at 561 822-5946. You also can contact the Justice Department's Office for Victims of Crime in Washington, D.C. at 202-307-5983. That Office has a website at www.ovc.gov.

You can seek the advice of an attorney with respect to the rights listed above and, if you believe that the rights set forth above are being violated, you have the right to petition the Court for relief.

In addition to these rights, you are entitled to counseling and medical services, and protection from intimidation and harassment. If the Court determines that you are a victim, you also may be entitled to restitution from the perpetrator. A list of counseling and medical service providers can be provided to you, if you so desire. If you or your family is subjected to any intimidation or harassment, please contact Special Agent Kuyrkendall or myself immediately. It is possible that someone working on behalf of the targets of the investigation may contact you. Such contact does not violate the law. However, if you are contacted, you have the choice of speaking to that person or refusing to do so. If you refuse and feel that you are being threatened or harassed, then please contact Special Agent Kuyrkendall or myself.

You also are entitled to notification of upcoming case events. At this time, your case is under investigation. If anyone is charged in connection with the investigation, you will be notified.

Sincerely,

R. Alexander Acosta
United States Attorney

By: A. Marie Villafaña

A. Marie Villafaña
Assistant United States Attorney

cc: Special Agent Nesbitt Kuyrkendall, F.B.I.

CHAPTER 237—CRIME VICTIMS' RIGHTS

§ 3771. Crime victims' rights

(a) Rights of Crime Victims.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights Afforded.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(c) Best Efforts To Accord Rights.—

(1) Government.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and Limitations.—

(1) Rights.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error.—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions.—For the purposes of this chapter, the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(f) Procedures To Promote Compliance.—

(1) Regulations.—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents.—The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the

treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

(Added Pub. L. 108–405, title I, §102(a), Oct. 30, 2004, 118 Stat. 2261.)