No. 21-351

In The
Supreme Court of the United States

COURTNEY WILD,

Petitioner.

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE THE NATIONAL CRIME VICTIM LAW INSTITUTE, ET AL. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENTS OF INTEREST AMICI CURIAE..... 1

SUMMARY OF ARGUMENT 5

ARGUMENT 9

THE PETITION PRESENTS EXCEPTIONALLY IMPORTANT QUESTIONS THAT AFFECT VICTIMS NATIONWIDE REGARDING PRE-CHARGING ATTACHMENT OF THE CRIME VICTIMS' RIGHTS ACT AND THE REMEDIES AVAILABLE FOR PROSECUTORIAL VIOLATIONS OF THOSE RIGHTS..... 9

A. By Enacting the CVRA, Congress Intended to Afford Enforceable Rights that Give Victims the Role of Active Participants in the Criminal Justice Process..... 11

B. The Eleventh Circuit's Flawed Reliance on *Alexander v. Sandoval* Thwarts the Purpose of the CVRA..... 12

C. The Eleventh Circuit's Analysis Allows Offenders and the Government to Circumvent the CVRA and Its Intended Remedies 16

D. The Eleventh Circuit's Denial of Pre-Charge Remedies Has a Substantial Negative Impact on Significant Numbers of Victims 19

CONCLUSION..... 24

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Sandoval, 532 U.S. 275 (2001) 8, 12, 13, 14

Cannon v. University of Chicago, 441 U.S. 677 (1979) 14

Chafin v. Chafin, 568 U.S. 165 (2013) 9, 10

Cutter v. Wilkinson, 544 U.S. 709 (2005) 9

Doe 1 v. United States, 359 F. Supp. 3d 1201 (S.D. Fla. 2019) 10

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Powell v. McCormack, 395 U.S. 486 (1969) 9

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TABLE OF AUTHORITIES—Continued

Page

STATUTES

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18 U.S.C. § 3771(b)(1) 8, 16
18 U.S.C. § 3771(d)(3) 7, 11, 14
22 U.S.C. § 7101(a).....20

RULES

U.S. Sup. Ct. R. 10(c).....8

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Page

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TABLE OF AUTHORITIES—Continued

Page

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Page

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STATEMENTS OF INTEREST OF AMICI CURIAE[1]

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote victims' rights and victims' voices in the justice system through crime victim-centered legal advocacy, education and resource sharing. NCVLI accomplishes its mission through education and training of judges, prosecutors, victims' attorneys, advocates, law students, and community service providers; legal assistance on cases nationwide; analyzing developments in crime victim law; and advancing victims' rights policy. As part of its legal assistance, NCVLI participates as amicus curiae in cases that present victims' rights issues of broad importance. This is one of those cases, as it involves the fundamental issue of whether the rights to confer and to be treated with fairness under the Crime Victims' Rights Act are enforceable pre-charge.

Arizona Voice for Crime Victims, Inc. (AVCV) is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal justice process. To achieve these goals, AVCV

[1] No counsel for a party authored this brief in whole or in part and no person other than Amici Curiae or their counsel made any monetary contribution to the preparation or submission of this brief. Counsel of record for both parties received notice of Amici Curiae's intent to file and have consented to the filing of this brief.

empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement. AVCV seeks to foster a fair justice system which (1) provides crime victims with resources and information to help them seek immediate crisis intervention, (2) informs crime victims of their rights under the laws of the United States and Arizona, (3) ensures that crime victims fully understand those rights, and (4) promotes meaningful ways for crime victims to enforce their rights, including through direct legal representation. A key part of AVCV's mission is working to give the judiciary information and policy insights that may be helpful in the determination of important victims' rights issues.

Loyola Law School's Rights in System Enforced (RISE Clinic) is a new addition to the Loyola Social Justice Law Clinics, which engages students in the direct representation of survivors of violent crime who seek to assert their rights in state and/or federal criminal enforcement systems, and require legal assistance with collateral civil matters. The majority of Loyola RISE Clinic's current clients are survivors of human trafficking and commercial sexual exploitation. Therefore the RISE Clinic knows firsthand given the complex dynamics of this crime and this victim population that their voices are frequently not heard in criminal and civil matters where they are the victim or plaintiff. The RISE Clinic also knows firsthand that part of reclaiming and rebuilding their lives after experiencing sex trafficking is being empowered to be part of and

consulted about the criminal process and any plea deal Defendant might be offered.

The Michigan Coalition to End Domestic and Sexual Violence (MCEDSV) is a nonprofit membership organization comprising more than 70 nonprofit organizations dedicated to the empowerment of all victims of domestic and sexual violence. MCEDSV seeks to build a lasting legacy in which sexual and domestic violence no longer exist. MCEDSV's Survivor Law Clinic seeks to make crime victims' rights more meaningful for all Michigan victims and envisions a system of criminal and civil justice that supports empowered recovery. MCEDSV is a part of a national effort to secure victims' rights enforcement in criminal courts and regularly participates as amicus curiae in select state and federal cases that present issues of broad importance to survivors of domestic and sexual violence such as this one.

Network for Victim Recovery DC (NVRDC), founded in 2012, provides free legal, case management, and advocacy services to survivors of all crime-types in The District of Columbia. The District is a unique jurisdiction in the United States. In the District the vast majority of local criminal matters are prosecuted by the United States Attorney's Office as opposed to a state agency. Accordingly, the federal Crime Victims' Rights Act (CVRA) is applicable to all prosecutions in the Superior Court for the District of Columbia. As a result, NVRDC litigates the provisions of the CVRA on a routine basis, and so, the interpretation of the CVRA impacts the very core of NVRDC's crime victims' rights

practice, its clients, and its services. Furthermore, NVRDC relies on the legal protections provided in the CVRA to hold prosecutors accountable as the District's local Government has no direct authority over Department of Justice employees or operating procedures. For these reasons, this matter is of extreme importance to NVRDC. The holding in this case threatens to negatively affect the basic operating parameters of the CVRA, reduce the accountability of prosecutors to victims, and damage the foundational legal underpinnings on which NVRDC regularly relies to conduct its business. Especially because the District is the only jurisdiction where the federal Crime Victims' Rights Act applies in local prosecutions, NVRDC has significant interest in the outcome of this case.

Ohio Crime Victim Justice Center (OCVJC) is a statewide nonprofit organization. OCVJC was founded in 2000 to provide no-cost legal representation to preserve and enforce crime victims' rights. The mission of OCVJC is to ensure that the constitutional, statutory, and inherent rights of Ohio's state and federal crime victims are upheld throughout the criminal justice process. OCVJC accomplishes this mission by providing no cost legal representation to Ohio crime victims in state and federal courts to preserve and enforce victims' rights during criminal proceedings. OCVJC also assists victims in protection order proceedings, Title IX proceedings, military proceedings, and immigration proceedings. In addition to providing legal assistance, OCVJC provides free victims' rights education and training to criminal justice system officials and allied

professionals, and briefs courts as amicus curiae on issues of importance regarding the rights of Ohio crime victims in state and federal courts.

South Carolina Victim Assistance Network (SCVAN), established in 1984, serves as the voice for all victims of crime in South Carolina and the people who serve them. SCVAN's mission is to provide support services for victims of crime and to prevent future crimes through advocacy, education, public awareness, technical assistance, and legal representation of crime victims. SCVAN, in addition to its Legal Services Program, serves crime victims statewide through the Crime Victim Information Services Program, Financial Relief for Victims Program, the Forensic Nurse Examiners Program, and the Faith Based Victim Services Program. SCVAN attorneys routinely represent crime victims when Constitutional and statutory protections afforded to victims are denied. SCVAN has a particular interest in protecting and expanding the rights and recognition of crime victims in South Carolina and beyond.

SUMMARY OF ARGUMENT

In 2004, Congress enacted the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, to provide victims with enforceable rights and to fix the "out of balance" criminal justice system. 150 Cong. Rec. S4262 (2004) (statement of Sen. Feinstein). The legislative history of the CVRA makes clear 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. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." *Id.* at S4269 (statement of Sen. Feinstein). In this case the courts and executive branch have done precisely this. The federal Government secretly negotiated and entered into a non-prosecution agreement (NPA) without any input from Jeffrey Epstein's many victims. The Eleventh Circuit's review of this conduct, over the course of more than ten years of litigation, resulted in a recognition of the Government's egregious conduct but, based upon flawed reasoning and erroneous case law interpretation, produced no relief for the victims, and thereby erased victims' rights and interests.

It is undisputed that federal prosecutors have significant discretion regarding whether, when and what charges to bring in a criminal case, and whether to enter into NPAs with those who commit federal crimes. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion."). This discretion is not unfettered, however. The CVRA imposes legal constraints on that discretion by affording rights to crime victims, including the rights to be treated with dignity and respect, 18 U.S.C. § 3771(a)(8) (granting crime victims "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy"), and to confer with the

prosecution, *id.* § 3771(a)(5) (granting crime victims "[t]he reasonable right to confer with the attorney for the Government in the case").

When CVRA rights are denied, victims are explicitly authorized to seek a remedy. *Id*. § 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. 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."). Arguably, the availability of a remedy has no greater significance to victims than in regards to NPAs because once an NPA is entered into many victims' rights are nullified. Conferral prior to an NPA is the *only* opportunity for a victim to be heard regarding their significant safety, financial and psychological rights and interests. *See*, *e.g.*, *id.* § 3771(a)(1) (providing victims with "[t]he right to be reasonably protected from the accused"); *id.* § 3771(a)(6) (providing victims with "[t]he right to full and timely restitution as provided in law"); *cf.* Eric M. Werner, *Avoiding the Second Assault: A Guidebook for Trauma-Informed Prosecutors*, 25 Lewis & Clark L. Rev. 573, 590 (2021) (discussing how prosecutors can help victims reduce trauma by providing a victim with opportunities to engage with the case as a powerful tool against alienation and lack of control caused by the crime); Theodore R. Sangalis, *Elusive Empowerment: Compensating the Sex*

Trafficked Person under the Trafficking Victims Protection Act, 80 Fordham L. Rev. 403, 438 (2011) ("[C]ompensation that seeks to make victims whole can be an important first step in their recovery.").

The Eleventh Circuit's holding that crime victims lack standing to remedy pre-charge rights violations created an end run around the rights and protections that Congress intended. The Eleventh Circuit did this despite the CVRA mandate that courts "shall ensure" that victims are afforded all of their rights under the law. 18 U.S.C. § 3771(b)(1). The Eleventh Circuit reached its conclusion based on a flawed reading and application of *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See In re Wild*, 994 F.3d 1244 (11th Cir. 2021). Allowed to stand, the current state of the law would leave every victim of a federal crime in the Eleventh Circuit and nationally vulnerable to secret deals that strip them of their rights with no way to challenge the Government's conduct. This undermines the clear language and intent of the CVRA. This case presents important questions of federal law that need to be settled by this Court Pursuant to U.S. Sup. Ct. R. 10(c).

ARGUMENT

THE PETITION PRESENTS EXCEPTIONALLY IMPORTANT QUESTIONS THAT AFFECT VICTIMS NATIONWIDE REGARDING PRE-CHARGING ATTACHMENT OF THE CRIME VICTIMS' RIGHTS ACT AND THE REMEDIES AVAILABLE FOR PROSECUTORIAL VIOLATIONS OF THOSE RIGHTS.[2]

For many years, national and international attention has focused on Jeffrey Epstein's horrific victimization

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[2] Jeffrey Epstein's death did not render the important issues presented in this case moot. The Article III doctrine of "mootness has two aspects: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). A case only becomes moot "when it is impossible for a court to grant *any effectual relief whatever* to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165 172 (2013) (emphasis added). "'As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot.'" *Id.* (emphasis added). In cases that involve multiple parties or issues, a case is not moot as long as a live controversy exists between at least one litigant on each side, or at least one requested relief is still in dispute. *See*, *e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 712, n.1 (2005) (finding the action is not moot, even though two of the plaintiff-petitioners challenging the failure of prison officials to accommodate their religious exercises had been released from custody, because "[w]ithout a doubt, a live controversy remains among the still-incarcerated petitioners, the United States, and respondents"); *Powell v. McCormack*, 395 U.S. 486, 497 (1969) ("Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy."). The record in this case leaves no doubt that a live controversy exists, and the parties—the victims and the Government—have a concrete interest in the outcome of the dispute over a non-prosecution agreement secured in violation of the victims' rights.

of young girls; in large part, it was Epstein's money, position of influence, and relationships with powerful individuals from all over the world that made his criminal conduct front-page news. *See*, *e.g.*, Mahita Gajanan, *Here's What to Know About the Sex Trafficking Case Against Jeffrey Epstein*, Time (updated July 17, 2019), https://time.com/5621911/jeffrey-epstein-sex-trafficking-what-to-know/ (detailing Epstein's famous connections, wealth and crimes); Joshua Partlow, *The Layers of Jeffrey Epstein's Connections*, Wash. Post (Aug. 21, 2019), https://www.washingtonpost.com/graphics/2019/national/epstein-connections/. The same traits that made his criminality "newsworthy" allowed him to negotiate an NPA without any notice to, or input from, his victims in violation of their rights. *See Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1218 (S.D. Fla. 2019) (finding "it is undisputed that the Government entered into a [sic] NPA with Epstein without conferring with Petitioners during its negotiation and signing"). While the specific facts surrounding this case may be unique, what happened to the victims is not, and the Eleventh Circuit's decision will perpetuate a damaging reality on future victims.

Both the district court and the appellate court were capable of affording various remedies, including invalidating or voiding the agreement. Whether Mr. Epstein's co-conspirators, who are not parties to this case, can argue they are immune from prosecution in the future is "not pertinent to the mootness inquiry" in this case. *Chafin*, 568 U.S. at 175 (observing that "but such uncertainty [of enforcement of an order] does not typically render cases moot" and "[c]ourts often adjudicate disputes where the practical impact of any decision is not assured").

A. By Enacting the CVRA, Congress Intended to Afford Enforceable Rights that Give Victims the Role of Active Participants in the Criminal Justice Process.

The CVRA was passed nearly 17 years ago to ensure that victims of federal crime would no longer be powerless; to ensure that no matter how powerful their offender, they would have a voice in the process and those working in criminal justice would treat them with fairness and dignity. *See* 18 U.S.C. § 3771(a)(5),(8) (affording 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 and with respect for the victim's dignity and privacy"); *see also Kenna v. U.S. Dist. Ct. for C.D.Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006) (finding that the CVRA was "enacted to make crime victims full participants in the criminal justice system" and that one of the statutory aims is to "to allow the victim 'to regain a sense of dignity and respect rather than feeling powerless and ashamed' "). The CVRA also guaranteed victims a remedy by law if their rights were violated. 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. 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.").

Notwithstanding the CVRA's plain language and clear congressional intent, the Eleventh Circuit denied victims remedies for pre-charging rights violations. This means that even after almost two decades of the statute's existence and federal victims' rights jurisprudence, victims of crime can be treated as if they do not exist. This case is of critical importance because it provides this Court an opportunity to ensure victims of federal offenses have access to justice and the specific rights and remedies Congress created through the CVRA.

B. The Eleventh Circuit's Flawed Reliance on *Alexander v. Sandoval* Thwarts the Purpose of the CVRA.

The Eleventh Circuit erred largely due to misplaced reliance on this Court's decision in *Alexander v. Sandoval*. *See In re Wild*, 994 F.3d 1244, 1255 (11th Cir. 2021) (stating that in resolving this case, its "loadstar is *Alexander v. Sandoval*"). Reliance on *Sandoval* is flawed for at least three reasons.

First, in *Sandoval*, this Court held that individuals have no private right of action to enforce the disparate-impact regulations promulgated under one specific statutory provision of Title VI of the Civil Rights Act of 1964 when the rights-creating statute those regulations are designed to effectuate does not prohibit activities that have a disparate impact on racial groups. *Alexander v. Sandoval*, 532 U.S. 275, 279-81, 293 (2001). This Court has "made clear . . . that its

holding [in *Sandoval*] relied on the specific statute before it." *Glob. Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 59 (2007) (finding *Sandoval* "simply beside[s] the point" in light of the "differences in statutory language, context, and history"). Not only is *Sandoval* inapposite because of the narrowness and specificity of the law at issue, but also because the nature of the law at issue in *Sandoval* is distinguishable. Unlike the CVRA, the statute at issue in *Sandoval* contained no " 'rights-creating' language"; it merely "authorizes federal agencies 'to effectuate the provisions of [another statute] . . . by issuing rules, regulations, or orders of general applicability.' " *Sandoval*, 532 U.S. at 288.

Second, the Eleventh Circuit's reliance on *Sandoval*'s "observ[ation] that '[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others" is untenable. 944 F.3d at 1255, 1264-65 (second alteration in original). This Court recently cautioned that such canons of construction must be considered alongside the canon of construction that requires courts to "hesitate[ ] ' "to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." ' " *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020). The Eleventh Circuit's construction of the CVRA renders meaningless and superfluous the provision of the CVRA that allows crime victims to assert and seek enforcement of CVRA rights "in the district court in which the crime

occurred" "if no prosecution is underway." 18 U.S.C. § 3771(d)(3).

Third, the Eleventh Circuit concluded that there is "no clear evidence that Congress intended to authorize crime victims to seek judicial enforcement of CVRA rights prior to the commencement of criminal proceedings." 994 F.3d at 1256. In reaching this conclusion, the en banc court reasoned that this Court in *Sandoval* "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." *Id.* at 1255 (alteration in original). Yet as this Court explained when it reversed the Eleventh Circuit's application of *Sandoval* in *Jackson v. Birmingham Bd. of Education, Sandoval* merely "held that private parties may not invoke Title VI regulations to obtain redress for disparate-impact discrimination because Title VI itself prohibits only intentional discrimination." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). Neither *Sandoval* nor this Court's subsequent case law has abandoned the principle that a private right of action to enforce statutory rights may be implied by a rights-creating statute. *See Sandoval*, 532 U.S. at 279-80 (reaffirming precedent recognizing private individuals have an implied private right of action "to enforce § 601 of Title VI and obtain both injunctive relief and damages" under *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and its progeny); *Jackson*, 544 U.S. at 171, 172 (holding "the private right of action implied by Title IX encompasses claims of retaliation. . . .

where the funding recipient retaliates against an individual because he has complained about sex discrimination," notwithstanding the fact that Title IX does not explicitly address retaliation).

Moreover, this Court recently rejected an analysis that employed a logic similar to that of the Eleventh Circuit. In *Maine Cmty. Health Options*, the Court addressed whether private insurance companies may sue the Government to recover money that they claim the Government owes under the terms of § 1342 of the Affordable Care Act. *Maine Cmty. Health Options*, 140 S. Ct. at 1319. The Court concluded that § 1342's use of mandatory language—providing, for example, that the Government " 'shall pay' " insurers for losses exceeding the statutory threshold—creates a legal obligation on the part of the Government that gives rise to an implied right of action to enforce that obligation. *Id.* at 1320-21, 1329-30.

In this case, the statutory text, structure and legislative history plainly show that Congress intended to create rights that are enforceable by crime victims, and rights that apply pre-charge must be enforceable by way of action outside the context of a pre-existing criminal case. This Court must not let stand a lower court decision that renders a mandatory statutory obligation to afford rights meaningless based on an erroneous application of this Court's case law.

C. The Eleventh Circuit's Analysis Allows Offenders and the Government to Circumvent the CVRA and Its Intended Remedies.

In this case, after finding the Government deliberately misled the victims and denied them their right to provide input into a process that resulted in an NPA for heinous crimes committed against them, the Eleventh Circuit added insult to injury. Not only did the court fail to afford a remedy but it deemed it unnecessary to even consider a remedy by stripping the victims of their legal status. The outcome is particularly troubling in light of the CVRA mandate that courts "shall ensure" that victims are afforded all of their rights under the law. 18 U.S.C. § 3771(b)(1). This CVRA obligation extends not only to ensuring that others honor victims' rights but also to ensuring that courts honor victims' rights. *See United States v. Palmer*, 643 F.3d 1060, 1067 (8th Cir. 2011) (reversing the district court's restitution order because it imposed a special condition that "manifestly violates the law"; and observing that the reversal is "consistent with our solemn statutory duty to safeguard the child's [CVRA] 'right to full and timely restitution as provided in law' " (quoting 18 U.S.C. § 3771(b)(1)).

Criminal trials are public to ensure justice is done and to allow a check on the powers of Government. Non-public resolution of cases is quite prevalent, particularly in cases of sexual violence; in these cases, even when charging occurs only two percent go to jury trial and the remainder plea bargained. *See* John Gramlich, *Jury duty is rare, but most Americans*

see it as part of good citizenship, Pew Research Center (Aug. 24, 2017), http://pewrsr.ch/2w1rVqK ("In fiscal 2016, federal courts called 194,211 people for petit jury duty, down 37% from 307,204 in fiscal 2006. And 43,697 people were selected for federal petit jury duty, down 39% from 71,578 a decade earlier. The decrease in jurors tracks a broader decline in the number of federal jury trials: In 2016, just 2% of 77,318 total federal defendants had their cases decided by a jury, half the total in 2006.").

Notably, NPAs are a space in criminal law that, even more so than plea agreements, avoid public scrutiny and insulate the federal Government from community perspectives. *Cf.* Lauren K. Cook, *A Victim's Right to Confer Under the Crime Victim's Rights Act*, 43 Campbell L. Rev. 543, 560 (2021) ("Without jury trials insulating the criminal justice process with community perspectives, Government attorneys often make prosecutorial decisions in a vacuum of their own experience."). Courts do not review or approve proposed NPAs, and NPAs are not required to be made public. *See* Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. Rev. 1483, 1510 (2017) (stating "[a] non-prosecution is not filed with a judge and, therefore, cannot be reviewed by a judge; such an agreement states that prosecutors will not file if the corporation complies with its terms").

Congress sought to give crime victims meaningful rights in the criminal justice process. As one CVRA sponsor explained, "[w]ithout the ability to enforce

[victims'] rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric." 150 Cong. Rec. S4269 (Apr. 22, 2004) (statement of Sen. Kyl). Congressional intent was clear—improve victims' experience in the criminal justice process by enacting enforceable rights. *See id.* at S4262 (statement of Sen. Feinstein) (responding to the question of why the CVRA was necessary and stating that "case after case we found victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care enough, by judges focused on defendant's rights, and by a court system that simply did not have a place for them. The result was terrible—often the experience of the criminal justice system left crime victims and their families victimized yet again"); *id.* at S4269 (statement of Sen. Kyl) (stating that "[t]he enforcement provisions of [the CVRA] ensure that never again are victim's rights provided in word but not in reality").

Unfortunately, the Eleventh Circuit, in contravention of Congress' intent and the plain language of the statute, interpreted the CVRA to exclude a remedy for pre-charging violations leaving a large class of victims without legal recognition or redress. *Cf.* Dana Pugach & Michal Tamir, *Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements*, 28 Hastings Women's L.J. 45, 53 (2017) (discussing how victim participation in plea agreements conveys "vindication and moral recognition not only of the damage but also of the victim's emotional needs"); Douglas E. Beloof, *Weighing Crime Victims' Interests in*

Judicially Crafted Criminal Procedure, 56 Cath. Univ. L. Rev. 1135, 1159 (2007) (stating that validation that victims were wronged can come from the conviction and sentencing of their offenders). This Court must not allow a lower court decision to stand that endorses conduct in clear contravention of statutory language and legislative intent.

D. The Eleventh Circuit's Denial of Pre-Charge Remedies Has a Substantial Negative Impact on Significant Numbers of Victims.

Unfortunately, the many sex trafficking victims of Jeffrey Epstein are but a small portion of the thousands of victims in the United States each year. For this reason, this case will have a devastating ripple effect on the many other victims who have already suffered considerable harm at the hands of their offenders and who will now be at risk of suffering at the hands of the criminal justice process.[3]

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[3] Amici focus on sex trafficking victims, but this case will affect all victims of federal crimes, including victims of corporate crimes where non-prosecution agreements are encouraged. *See In re Wild*, 994 F.3d at 1326-27 & n.11 (Hull, J., dissenting) (alteration in original) (discussing the "dramatic increase in the use of pre-indictment 'alternative settlement vehicles' such as deferred prosecution agreements and non-prosecution agreements to resolve federal crimes"; and observing recent data for corporate crimes shows "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'" (first citing 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,

Sex trafficking is at epidemic proportions in the United States, with women and children being most at risk of victimization. *See* 22 U.S.C. § 7101(a) (stating the congressional findings in support of the Victims of Trafficking and Violence Protection Act of 2000; finding victims of trafficking "are predominately women and children" and finding extensive sexual exploitation of those victims). There is no accurate estimate of the number of trafficking victims in the United States "due to the complexity of the crime and difficulty in identifying victims." Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 Harv. J. on Legis. 17, 22 (2017). While there are disagreements about the exact numbers, it is undeniable that the rate of victimization is high. Some reports "estimate 45,000 to 50,000 victims trafficked in the United States," and "[m]ore recently, federal Government estimates claim that 14,500 to 17,500 victims are sold into sex trafficking into the United States each year, not including those trafficked *within* the country." *Id.* (emphasis in original). While estimates of the scope of sex trafficking vary, some organizations working with trafficking

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537-40 & n.14 (2015); then quoting 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/)); *see also* Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 Va. L. Rev. Online 60, 64-65 (2016) (discussing how the U.S. Department of Justice *Principles of Federal Prosecution of Business Organizations* "encourage the use of deferred and non-prosecution agreements for corporations, recommending their use as a middle ground, short of a conviction but not quite a declination").

victims report data that reveal the enormous scope of this crime. For example, in 2019, the U.S. National Trafficking Hotline identified 8,248 situations of sex trafficking with 14,597 victims. Polaris, *2019 Data Report*, 3 (2019), https://polarisproject.org/wp-content/uploads/2019/09/Polaris-2019-US-National-Human-Trafficking-Hotline-Data-Report.pdf. This data, collected only through the Trafficking Hotline, likely represents a small subset of actual trafficking occurring in the United States and the actual prevalence of the crime is potentially much greater.

Despite the widespread prevalence and devastating impacts, sexual violence and trafficking are underprosecuted in the federal system. For example, in fiscal year 2015, 557 suspects were referred to U.S. attorneys with sex trafficking as the lead charge and 560 were referred for transportation for illegal sex activity as the lead charge. Mark Motivans & Howard N. Snyder, Bureau of Justice Statistics Special Report, *Federal Prosecution of Human-Trafficking Cases, 2015*, 4 (June 2018), https://bjs.ojp.gov/content/pub/pdf/fphtc15.pdf. Only 51.1 percent of sex trafficking suspects referred to U.S. attorneys in 2015 were prosecuted in U.S. district courts; 4.3 percent were prosecuted in magistrate courts; and for 44.6 percent of the suspects, prosecution was declined. *Id*. at 6. Approximately one quarter of all human trafficking matters were declined for reasons such as prioritization of federal resources (8 percent) and alternative to federal prosecution utilized (7 percent). *See id*. at 7. In 2019, the federal Government increased the number of human trafficking

investigations, but the number of prosecutions decreased for the second year in a row, and the number of convictions decreased. *See* U.S. Dep't of State, Office to Monitor and Combat Trafficking in Persons, *2020 Trafficking in Persons Report: United States*, https://www.state.gov/reports/2020-trafficking-in-persons-report/united-states/ (stating in 2019, the Department of Justice formally opened "607 human trafficking investigations," but only initiated a total of 220 prosecutions, of which "208 involved predominately sex trafficking").

It is unclear how many federal crimes are resolved with NPAs and that number is likely to remain a mystery since these resolutions can often go undetected. It took the notoriety surrounding Jeffrey Epstein and the tireless work of the victims' attorneys for more than 10 years to bring this important issue to this point. The participatory status created by the CVRA was meant to rectify the very harms caused by cases such as this—cases of victim exclusion. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 929 (2006) (stating that participating in the legal system "makes victims feel empowered and helps them to heal emotionally"); Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 Journal of Traumatic Stress 159, 163 (2003) (stating "dissatisfaction appears to be highest among victims who are denied a chance to participate in the legal system, in spite of their expressed wish to do so"); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed*

Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning, 34 Wayne L. Rev. 7, 19 (1987) (stating that "offering [victims] rights that allow the opportunity for increased participation in the criminal justice system proceedings are methods that could reduce victims' perceptions of inequity, thereby reducing the potential for further psychological harm"; and stating the "failure to provide victim . . . the right of participation should result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm"). This Court should accept certiorari to resolve critical issues impacting victims nationwide.

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CONCLUSION

The Eleventh Circuit's decision is contrary to the plain language and purpose of the Crime Victims' Rights Act and is based on erroneous legal analysis. As it stands, the decision will allow countless victims to be erased from the federal justice system with no way to seek relief. This case allows this Court the opportunity to ensure that the courts interpret the CVRA the way Congress intended.

Respectfully submitted,

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