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

AMICUS CURIAE BRIEF OF LEGAL MOMENTUM IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Legal Momentum is an advocacy group dedicated to, among other things, the rights of women, crime victims, and survivors of gender-based violence. Legal Momentum is the nation's longest serving civil rights organization dedicated to advancing the rights of women and girls. For over 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy, and education.

Legal Momentum has worked for decades to ensure that the survivors of gender-based violence have access to legal protections and remedies and an unbiased justice system. Legal Momentum was instrumental in the drafting and passage of the Violence Against Women Act and each of its subsequent reauthorizations. Legal Momentum has been involved in a range of advocacy on behalf of trafficking survivors, including as lead counsel on *Doe v. Backpage* (6:17-cv-218-Orl-28) and lead *amicus* in the trafficking case now before the Wisconsin Supreme Court, *State v. Kizer*.

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file. Petitioner and Respondent both have consented to the filing of this brief.

SUMMARY OF ARGUMENT

From 1999 to 2007, billionaire Jeffrey Epstein sexually abused at least thirty minor girls at his home in Florida.[2] One of them was Petitioner, then-14-year-old Courtney Wild.[3]

After a two-year joint investigation between the Palm Beach Police Department and the FBI, the FBI referred the matter to the U.S. Attorney's Office for the Southern District of Florida. App. 3-4. Epstein's high-profile defense attorneys negotiated with the U.S. Attorney's Office throughout 2007, ultimately reaching a nonprosecution agreement (NPA) in response to a fifty-three-page draft federal indictment; the NPA called for Epstein to plead guilty to state prostitution-related

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[2] According to a *Miami Herald* investigation, this was just the tip of the iceberg. *See*, *e.g.*, Julie K. Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, Miami Herald (Nov. 28, 2018), https://www.miamiherald.com/news/local/article220097825.html. (identifying over 80 women and girls molested by Epstein in Florida between 2001 and 2006). Epstein abused and trafficked girls worldwide, including at his homes in New York and New Mexico and his private island in the Caribbean. *Id*. He also purportedly passed girls around to various high-powered associates, including leaders in politics and business. *Id*.

[3] Wild's encounters with Epstein would change her life's trajectory. "Before she met Epstein, Courtney Wild was captain of the cheerleading squad, first trumpet in the band and an A-student at Lake Worth Middle School. After she met Epstein, she was a stripper, a drug addict and an inmate at Gadsden Correctional Institution in Florida's Panhandle." Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, *supra.*

charges, not federal charges. App. 356-57 (district court opinion).

The U.S. Attorney's Office simultaneously corresponded with over 30 known Epstein victims, providing them with notice pursuant to the Crime Victims' Rights Act (CVRA). "At no point between the start of the investigation and the signing of the NPA did federal prosecutors 'confer' with victims about the NPA, let alone tell them that it was under consideration. What is more, the government continued to send victims boilerplate letters stating that their case was 'currently under investigation' as late as *eight months after* signing the NPA." Zulkifl M. Zargar, *Secret Faits Accomplis: Declination Decisions, Nonprosecution Agreements, and the Crime Victim's Right to Confer*, 89 Fordham L. Rev. 343, 346 (2020); *see also* App. 357, 369-70.

Petitioner brought this action to enforce her rights under the CVRA. The district court initially concluded that the government had violated her CVRA rights, but ultimately found any remedy to be mooted by Epstein's untimely death from an apparent suicide after being arrested, jailed, and charged with similar crimes in the Southern District of New York. *See* App. 110, 307-68. The Eleventh Circuit issued deeply fractured panel and en banc opinions about the CVRA's pre-charge attachment and the availability of a remedy under the statute for these victims. This Petition followed.

Review is necessary in this high-profile case to resolve a split in the federal courts of appeals, district courts, and the Office of the Attorney General concerning the scope of victims' rights under the CVRA. Review is also necessary to help restore the public's faith in the criminal justice system, to enhance transparency, and to provide federal prosecutors with clear guidance about their pre-charge obligations to victims.

ARGUMENT

I. This Court should grant review to decide whether the CVRA provides victims a right to confer with the Government pre-charge and post-investigation, before the disposition of a criminal case.

A. This is an issue of nationwide importance on which federal courts of appeals, district courts, the Department of Justice, and academia are split.

"The CVRA is an important achievement of the crime victims' rights movement – a coalition of crime victims, victims' families, scholars, and politicians who have advocated over the last forty years for greater involvement and more respectful treatment of victims in the criminal justice process." Elliott Smith, *Is There a Pre-Charge Conferral Right in the CVRA?*, 15 Univ. Chicago Legal Forum 407, 410 (2010); *see also* Charles Doyle, *Crime Victims' Rights Act: A Summary and*

Legal Analysis of 18 U.S.C. 3771, Congr. Research Service, 1-2 (June 8, 2021), https://sgp.fas.org/crs/misc/RL33679.pdf ("Legal reform in the name of the victims of crime began to appear in state and federal law in the 1960s. . . . Over time in many jurisdictions, these specific victim provisions were joined by a more general, more comprehensive victims' bill of rights.").

"A central motivation of the efforts to achieve and expand participatory rights for victims is tackling the problem of secondary victimization – harm that the government itself inflicts after the victim is already victimized by the crime. Victims often describe their experiences with the criminal process as retraumatizing" and hostile. Zargar, *Secret Faits Accomplis: Declination Decisions, Nonprosecution Agreements, supra*, at 352. "[W]hen the criminal justice system is viewed as unfair, victims will likely be dissuaded from participating in it; a crime victim treated unfairly is less likely to report an incident or threat of harm in the future." Lauren K. Cook, *A Victim's Right to Confer Under the Crime Victims' Rights Act*, 43 Campbell L. Rev. 543, 560 (2021).

The "novelty of the CVRA" is its enforcement provisions. Smith, *Is There a Pre-Charge Conferral Right in the CVRA?*, *supra*, at 412. The CVRA calls for the Attorney General to promulgate regulations to "enforce the rights of crime victims and to ensure compliance by responsible officials," requires courts "[i]n any court proceeding involving an offense against a crime victim" to ensure "that the crime victim is afforded the rights described" in the CVRA, and gives crime

victims themselves "the power to assert their rights by motion during the district court criminal proceedings or, if no prosecution is underway, in the district court in the district in which the crime occurred." *Id.* (cleaned up). The victims' right to confer is just that – a right to confer and participate in the criminal justice process, not a right to override a prosecutor's exercise of discretion.

The Petition in this case raises an important federal statutory issue under the CVRA concerning the existence of pre-charge, post-investigatory victim conferral rights. The federal circuit courts of appeals and district courts are split on this issue.[4] The fractured

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[4] The Eleventh and Fifth Circuits have reached different conclusions about the existence of a pre-charge conferral right. *Compare In re Wild*, 994 F.3d 1244, 1269 (11th Cir. 2021) (en banc) (majority holds "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") *with In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (asserting that CVRA rights attach prior to prosecution). *See also In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010) (noting that it is uncertain whether the CVRA applies "prior to [the] filing of . . . charges").

The district courts too are split. Some have concluded that CVRA rights attach pre-charge. *See*, *e.g.*, *Does v. United States*, 817 F. Supp. 2d 1337, 1341 (S.D. Fla. 2011) (CVRA rights can apply before formal charges are filed because "the statutory language clearly contemplates pre-charge proceedings."). Others hold that charges must be filed first. *In re Petersen*, No. 2:10-CV-298 RM, 2010 WL 5108692, at *2 (N.D. Ind. Dec. 8, 2010); *Taa v. JP Morgan Chase Bank N.A.*, No. 15-CV-01305-BLF, 2015 WL 1346805, at *3 (N.D. Cal. Mar. 23, 2015).

This split between federal courts of appeals and district courts supports review. *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964)

opinions in this case by both the original and en banc panels of the Eleventh Circuit illustrate this split of federal statutory interpretation, and the need for this Court to resolve it. *See*, *e.g.*, *Rinaldi v. United States*, 434 U.S. 22, 25 (1977) (reviewing 7-6 en banc decision). *Cf. Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2286 (2014) (Scalia, J., dissenting from denial of certiorari) (stating that the Court should have granted certiorari regarding a decision that bears "indicia of what we have come to call 'certworthiness,'" including an en banc decision that "prompted three powerful dissents"). Where, as here, the lower court decisions are so inconsistent as to leave the meaning of a federal statute in a state of confusion, the need for review by this Court is heightened.[5] *See*, *e.g.*, *Exxon Mobil Corp.*

(certiorari granted because of "the importance of the questions presented and conflicting views in the courts of appeals and the district courts"); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 646 (1981) (review granted "in light of the important constitutional issues presented and the conflicting results reached in similar cases in various lower courts," citing, *inter alia*, four differing federal district court rulings).

[5] This confusion is also reflected in a myriad of law review articles that analyze the courts' widely varying approaches to the statute. *See*, *e.g.*, Smith, *Is There a Pre-Charge Conferral Right in the CVRA?*, *supra*, at 407; Cook, *A Victim's Right to Confer Under the Crime Victims' Rights Act*, *supra*, at 543; Zargar, *Secret Faits Accomplis: Declination Decisions, Nonprosecution Agreements, and the Crime Victim's Right to Confer; supra*, at 343; Paul Cassell et al., *Circumventing the Crime Victims' Rights Act: A Critical Analysis of the Eleventh Circuit's Decision Upholding Jeffrey Epstein's Secret Non-Prosecution Agreement*, 2021 Mich. St. L. Rev. 211; 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 (2014).

v. Allapattah Servs., Inc., 545 U.S. 546, 550-51 (2005); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 442-44 (2003).

This conflict is further heightened by the Attorney General's 2010 Memorandum Opinion, prepared in response to this case, which concludes that CVRA rights do not attach to pre-charge nonprosecution dispositions.[6] Memorandum of the Acting Deputy Attorney General, *The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004* (Dec. 17, 2010), https://www.justice.gov/sites/default/files/olc/opinions/2010/12/31/availability-crime-victims-rights.pdf. Conflicts between an agency or executive branch interpretation of a statute, and that of the courts, has often led this Court to grant review. *See First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 672, 674 (1981) (certiorari granted in part because of the continuing disagreement between the Board and Courts of Appeals); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612,

[6] The Attorney General's Memorandum Opinion predated an amendment to the CVRA clarifying that crime victims are to be notified of plea agreements or deferred prosecution agreements, including those that may take place prior to a formal charge. *See* H.R. Rep. No. 114-7 (Jan. 27, 2015), Justice for Victims of Human Trafficking Act of 2015 at 7. Congress later declined, however, to adopt a much more sweeping amendment to the CVRA that would have also clearly delineated nonprosecution agreements to be covered by the statute, as well as provided for more wide reaching rights and remedies for victims. *See* Courtney Wild Crime Victims' Rights Reform Act of 2019, H.R. 4729, 116th Cong. (2019). Because the proposed amendment provided for wide-ranging changes beyond the non-prosecution agreement language, Congress' failure to pass the amendment should not be viewed as a wholesale rejection of the CVRA's coverage of such agreements.

1621 (2018) (granting certiorari to "clear the confusion" caused by a developing circuit split and the "battling" views of the Solicitor General and the National Labor Relations Board).

The various court decisions, including the Eleventh Circuit's splintered en banc and panel decisions in this case, reach diametrically opposite conclusions about the statute's scope based on its text.

The Fifth Circuit in *In re Dean*, 527 F.3d at 394, for example, concluded that a victim's right to confer with the government could attach pre-charge by relying on the statutory interpretation in the underlying district court opinion, *United States v. BP Products North America Inc.*, 2008 WL 501321, *36 (S.D. Tex. 2008). The district court focused on the venue provision in section 3771(d)(3) of the CVRA, as well as on the terms "proceeding" and "case" used in different provisions of the statute. *BP Products North America Inc*, 2008 WL 501321, at *36-37. The court posited that "proceeding" implied that the right attached post-charge, while "case" implied a pre-charge right. *Id.* Because the right to confer was tied to a "case" and not a "proceeding," the Fifth Circuit concluded that the right to confer was "[l]ogically" included as a pre-charge right. *Dean*, 527 F.3d at 394.[7]

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[7] Other courts have come to the same conclusion based on similar reasoning. *See Does*, 817 F. Supp. 2d at 1341; *United States v. Rubin*, 558 F. Supp. 2d 411, 417 n.5 (E.D.N.Y. 2008); *United States v. Oakum*, No. 08-132, 2009 U.S. Dist. LEXIS 24401, 2009 WL 790042, at *2 (E.D. Va. Mar. 24, 2009).

On the other hand, other courts have concluded that no pre-charge conferral right attaches, also citing statutory language. For example, the court in *In re Petersen*, 2010 WL 5108692, at *2, held that while the CVRA guarantees crime victims a range of substantive and participatory rights in court proceedings, "there are no court proceedings in this case because no criminal charges have been filed." *Id.* The court in *United States v. Atlantic States Cast Iron Pipe Company*, 612 F. Supp. 2d 453, 460 (D.N.J. 2009) focused on the term "crime victim" in the CVRA to suggest that the filing of charges is necessary for CVRA rights to attach. The court explained that the definition of "crime victim" is based on federal restitution statutes – the Victim and Witness Protection Act and the Mandatory Victims Restoration Act. *Id.* Both of those statutes have been interpreted to require a court to look to the offense of conviction to determine the identity of victims entitled to restitution. *Id.* at 463-65.

This division played out in the Eleventh Circuit panel and en banc opinions as well. The Eleventh Circuit panel majority opinion, written by Circuit Judge Newsom, concluded that the rights under the CVRA only attach post-charge. App. 203-04. The panel majority reasoned that because of the consistent use of the term "proceeding" in the statute, much of the CVRA could be understood to apply after the initiation of criminal charges. App. 205-07. The majority recognized the use of the term "case" with regard to the statutory conferral right, but relied on dictionary definitions and use of the term elsewhere to conclude that this term

was best understood to refer to a judicial proceeding. App. 207-09.

The majority also addressed the venue provision of the CVRA, under which a victim can assert her CVRA rights even "*if no prosecution is underway*." Other courts have relied on this language to find a pre-charge conferral right. But the panel majority concluded this language could mean either: 1) the time between the initiation of criminal proceedings and the levying of formal charges in an indictment, or 2) the period after prosecution has run its course and resulted in a conviction. App. 218-20. This language, the majority concluded, did not require a pre-charge application of the CVRA conferral right.

Circuit Judge Hull dissented, decrying what she called the majority's "flawed statutory analysis." App. 279. "[T]he Majority cherry picks the meaning of 'case' in § 3771(a)(5) and narrows it to mean judicial case only," but the term has a much broader meaning which encompasses both a judicial proceeding and a criminal investigation. App. 279-80.

The fractured en banc decision reflects additional layers of disagreement.

The majority en banc opinion, again written by Circuit Judge Newsom, presents a different reason the CVRA claims in this case fail. App. 20. The majority focused on the second question on which en banc review was granted: "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 pre-existing criminal proceeding." App. 20. The court concluded there was no clear intent to allow a crime victim to initiate a freestanding lawsuit for violation of her CVRA rights; to the contrary, the CVRA allows a victim to assert her rights in a "motion," which requires a preexisting proceeding. App. 22-31.

The en banc majority also emphasized that a different interpretation would unduly impair prosecutorial discretion,[8] expressing concern that allowing pre-charge rights would "put the cart before the horse" and require a prosecutor to identify victims and conclude that an offense had been committed before even deciding to file charges, which would place immense pressure on the government's prosecuting decision. App. 31-38. The majority was also concerned that judicial enforcement of CVRA pre-charge rights would "unduly impair prosecutorial discretion" by allowing a putative victim to challenge a prosecutor's decision, "effectively appealing the prosecutor's exercise of discretion to a federal district judge." App. 36-38.

The two dissenting opinions (including one joined by three other members of the court) took a different view.

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[8] Notably, several state victims' rights statutes provide conferral rights before the formal filing of charges; prosecutorial discretion was apparently no bar to them. *See*, *e.g.*, Haw. Rev. Stat. Ann. § 801D-2, D-4(a)(1) (LexisNexis 2007); Mo. Ann. Stat. § 595.209(10) (West 2011).

The four-judge dissent authored by Judge Branch pointed out that the "majority now changes course [from the panel decision] and avoids the first [en banc] issue completely": Whether the CVRA grants a crime victim any statutory rights that apply before the filing of a formal criminal charge by the government prosecutor. App. 98. According to the dissent, the majority opinion also "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." App. 99. This flowed, in the dissent's view, from the majority's failure "to enforce the plain text of the CVRA." App. 99. Indeed, the majority's interpretation, the four-judge dissent concluded, "does violence to the statutory text." App. 155. "[U]nder 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.' " App. 121.

The dissent observed that deciding for Wild would *not* unduly interfere with prosecutorial discretion. App. 151-54. The interference concerns expressed 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." App. 154. And "[i]n any event, the CVRA expressly precludes such interference; thus, this concern

certainly provides no basis for ignoring the plain language of the statute." *Id*.

Judge Hull, who joined the four-judge dissent, also wrote separately, observing: "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." App. 184. She warned: "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." App. 184-85.

The opposing interpretations of varying portions of the CVRA by members of the Eleventh Circuit, as well as by other circuit and district court judges and the Attorney General himself, has led them to reach opposite conclusions about the statute's reach. This Court needs to step in and provide uniformity on this important federal statute, which is implicated in every federal criminal case.

B. This Court should not wait for a deeper inter-circuit conflict to emerge. Clarity is necessary from this Court now.

This case, to some degree, is *sui generis*. But in other ways – ways equally relevant to a *certiorari* determination – it is not. Both its unique and its recurring aspects call out for this Court's review.

Few cases are as lurid and high profile as this one. But, uniquely, the notoriety of this case stems as much from the NPA as from Jeffrey Epstein's repeated sexual assault of and widespread trafficking in young girls and association with powerful, high-profile leaders. *See*, *e.g.*, Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, *supra*. The resulting public perception is that the secret NPA was an unfair "sweetheart deal"[9] made possible by Epstein's high level connections and wealth – as well as, perhaps, a desire to protect other powerful figures who may have participated in the trafficking.

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[9] *See* Andrew Anthony, *Meet Julie K. Brown, the woman who brought down Jeffrey Epstein*, The Guardian (July 25, 2021), https://www.theguardian.com/us-news/2021/jul/25/meet-julie-k-brown-the-woman-who-brought-down-jeffrey-epstein; Julie K. Brown et al., *Lawmakers Issue Call for Investigation of Serial Sex Abuser Jeffrey Epstein's Plea Deal*, Miami Herald (Dec. 6, 2018), https://www.miamiherald.com/latest-news/article222719885.html.

Moreover, the very *sui generis* nature of this case is in part what revealed the NPA itself, and what makes review of the issue presented here possible.[10] It may be a very long wait for another case to squarely present the same issue.

As such, this case has become a barometer by which the public assesses the integrity of the courts and the criminal justice system. It is therefore important for both the victims in this case and the public to have clarity about the propriety of the government's conduct in this case. This Court alone can provide that.

Guidance from this Court about the pre-charge application of the CVRA is urgently necessary for other reasons too. Pre-charge, post-investigatory dispositions are common in white collar crime cases; clarity about the Government's pre-charge CVRA obligations therefore is important for this category of cases. *See* Smith, *Is There a Pre-Charge Conferral Right in the*

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[10] Indeed, in a lesser-known case, the NPA may never have come to light at all. The media attention to this case, particularly by an investigative reporter at the *Miami Herald*, and the doggedness of the victims themselves, set the stage for public disclosure of the NPA and the full scope of Epstein's crimes. *See*, *e.g.*, Julie K. Brown, *Court to Unseal up to 2,000 Pages of Jeffrey Epstein-Related Documents*, Miami Herald (July 8, 2019), https://www.miamiherald.com/news/state/florida/article232251212.html; Julie K. Brown and Sarah Blaskey, *Huge Cache of Records Details How Jeffrey Epstein and Madam Lured Girls into Depraved World*, Miami Herald (Aug. 11, 2019), https://www.miamiherald.com/news/state/florida/article233704797.html; *Brown v. Maxwell*, 929 F.3d 41, 53 (2d Cir. 2019) (unsealing summary judgment filings in defamation case arising from Epstein criminal case).

CVRA?, *supra*, at 408-09 (noting the importance of pre-charge plea bargaining in white collar crime cases; "[p]re-charge plea bargaining has advantages for white-collar defendants" – indeed, "white collar defense attorneys tend to regard the case that extends past the precharge stage as a failure"). Trafficking cases, too – some nearly as sprawling as Jeffrey Epstein's – continue to be filed. *See*, *e.g.*, National Human Trafficking Resource Center, *Ten Years of Sex Trafficking Cases in the United States* (July, 2016), https://humantraffickinghotline.org/resources/ten-years-sex-trafficking-cases-united-states (noting that in 2015, "the National Human Trafficking Resource Center (NHRTC) responded to over 5,500 cases of human trafficking," seventy-five percent of which involved sex trafficking; providing an overview of twenty-eight sex trafficking cases prosecuted in the United States between 2006 and 2015); Aaron Schank, *Former La Luz Del Mundo Member Alleges the Church Ran Child Sex Slavery Ring*, LAist (Feb. 13, 2020), https://laist.com/news/la-luz-del-mundo-child-abuse-allegations-holy-supper (describing civil and criminal allegations of child rape and human trafficking against the leaders of a Mexico-based global megachurch); *People v. Garcia*, Los Angeles Superior Court Felony Complaint, Case No. BA484133 (criminal complaint against leaders of La Luz Del Mundo); *Martin v. La Luz Del Mundo*, U.S. District Court, Central District of California, Complaint, Case No. 2:20-cv-01437 (civil RICO and Trafficking complaint). As we explain below, trafficking victims tend to have negative experiences with the justice system; clarifying expectations under the CVRA will help restore their trust in

the system and make future trafficking prosecutions possible.

In short, for a myriad of reasons, it is important for this Court to clarify the rights of victims and prosecutorial obligations to consult them under the CVRA. This case provides a rare vehicle for this Court to do so.

II. Trafficking and sexual assault harm hundreds of thousands of women and girls, who are often disbelieved or themselves treated as criminals. By allowing them a voice in the criminal justice system, the CVRA helps victims restore their dignity and regain trust in the justice system, and encourages reporting of such crimes in the first place.

The CVRA plays a particularly important role in providing agency to victims of sex trafficking and sexual assault – many of whom have historically suffered a second round of mistreatment by the justice system.

"Trafficking in humans for sexual exploitation has reached epic proportions. Estimates of the total number of people trafficked across international borders each year vary from 700,000 to 2 million. Of those people, an estimated 80% are female, and 70% of those females are trafficked for the purposes of sexual exploitation." April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex*

Trafficking Victims in the United States, 30 Harv. J.L. & Gender 231, 231 (2007). "[T]he United States government estimates that between 45,000 and 50,000 women and children are trafficked into the United States every year for sexual exploitation." *Id*. at 233. However, trafficking does not always involve movement across national or state borders. Indeed, many victims are trafficked within their own communities, some without ever leaving their homes. *See* Polaris, *Myths, Facts and Statistics*, https://polarisproject.org/myths-facts-and-statistics/.

The techniques traffickers use to procure women vary: "[s]ome women are kidnapped and forced into sex trafficking . . . [by] members of organized crime networks [who] forcibly take women off the streets or drug them and sell them to traffickers"; "[m]any other women are convinced to strike a deal with traffickers whereby they incur debts in exchange for entry and transportation into a country where specific jobs await, but instead, upon arrival, they are forced into sex slavery to pay off the debts." Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, *supra* at 236. Many are victims of overlapping domestic violence and sex trafficking, trafficked by an intimate partner who uses physical and/or psychological coercion. Intimate partner traffickers often effectuate and then capitalize on resulting "traumatic bonding," a condition of psychological enslavement once referred to as Stockholm Syndrome. *See* American Bar Association,

Human Trafficking and Domestic Violence: A Primer for Judges (Jan. 1, 2013), https://www.americanbar.org/groups/judicial/publications/judges_journal/2013/winter/human_trafficking_and_domestic_violence_a_primer_for_judges/.

Trafficking victims experience devastating consequences from the crimes they endure. The neurological and psychological impacts of human trafficking are well documented. *See*, *e.g.*, James Levine, *Mental Health Issues in Survivors of Sex Trafficking*, 4 Cogent Medicine 1, 2 (2017); Chitra Raghavan and Kendra Doychak, *Trauma-Coerced Bonding and Victims of Sex Trafficking*, 17 Int'l J. Emergency Mental Health and Human Resilience 583, 583 (2015) (discussing "wide range of physical, sexual, and emotional consequences"). Victims are at particular risk of "severe and potentially life-threatening" physical and mental health problems, including complex PTSD, dissociation, and self-injurious behaviors. *Report of the Task Force on Trafficking of Women and Girls*, American Psychological Association, 3 (2014), https://www.apa.org/pi/women/programs/trafficking/report.pdf. These adverse outcomes are especially pronounced for child trafficking victims. *See* Patricia Kerig and Julian Ford, *Trauma Among Girls in the Juvenile Justice System*, Nat'l Child Traumatic Stress Network, 7 (2014), https://www.nctsn.org/sites/default/files/resources/trauma_among_girls_in_the_jj_system.pdf ("Trauma disrupts a number of emotional, cognitive, and interpersonal processes that are important for adolescent development, particularly capacities for affective- and

self-regulation, interpersonal trust, and effective problem-solving.").

Unfortunately, police and judicial interventions often penalize trafficking victims rather than perpetrators. *See* Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 Am. Crim. L.R. 207, 208 (2015) ("when it comes to sex trafficking," "the criminal law has too often been used to penalize victims, rather than penalizing those who victimize them"); Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 Yale L. & Pol'y Rev. 1, 18 (2011) ("[Y]oung girls are prosecuted at reportedly higher rates than even the men who exploit them."); American Psychological Association, *Resolution on Human Trafficking in the United States, Especially of Women and Girls* (2017), https://www.apa/org/about/policy/trafficking-women-girls (encouraging legislation treating trafficking victims as victims rather than as criminals). In short, "[i]ndividuals trafficked in the commercial sex industry, who are victims of a serious crime, face criminal penalties for prostitution-related offenses that their traffickers force them to commit." Alyssa M. Barnard, "*The Second Chance they Deserve": Vacating Convictions of Sex Trafficking Victims*, 114 Colum. L. Rev. 1463, 1463 (2014); *see also* Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, *supra*, at 243 ("[p]rior to the enactment of the TVPA [Trafficking Victims Protection Act]," when "government officials discovered a sex trafficking victim, they typically labeled her an illegal

alien, perhaps jailed her for prostitution, sent her to a detention center, . . . and then deported her back to her home country.").[11]

Sexual assault is significantly underreported to law enforcement in the United States.[12] *See* Rachel E. Morgan and Jennifer L. Truman, *Criminal Victimization, 2019*, U.S. Dep't of Justice, Bureau of Justice Statistics, 8, Tbl. 6 (Sept. 2020), https://www.bjs.gov/content/pub/pdf/cv19.pdf. (33.9% of rape and sexual assault incidents were reported to law enforcement in 2019, compared to 46.5% of all violent crimes). *See also* Dean Kilpatrick and Christine Hahn, *Navigating Accusations of Sexual Violence: What Everyone Ought to Know and Do*, 42 THE BEHAVIOR THERAPIST 198-207

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[11] Several recent cases demonstrating the ubiquitous criminalization of trafficking victims have garnered national attention. *See*, *e.g.*, Deneen Smith, *State Supreme Court Takes Up Chrystul Kizer Case*, Kenosha News (Sept. 21, 2021), https://www.kenoshanews.com/news/local/state-supreme-court-takes-uup-chrystul-kizer-case/article_2acfe586-f2df-55f6-8d55-16b4e5cc0d00.html; Mallory Gafas and Tina Burnside, *Cyntoia Brown Is Granted Clemency After Serving 15 Years in Prison for Killing Man Who Bought Her for Sex*, CNN (Jan. 8, 2019), https://www.cnn.com/2019/01/07/us/tennessee-cyntoia-brown-granted-clemency/index.html; Jessica Contrera, *The State of Ohio vs. A Sex-Trafficked Teenager*, The Washington Post (June 1, 2021), https://www.washingtonpost.com/dc-md-va/interactive/2021/child-sex-trafficking-alexis-martin-ohio/.

[12] Survivors – particularly women of color – may not report sexual assault to law enforcement because of fear of reprisal, economic or emotional dependence on an assailant, or distrust in the criminal justice system. *See*, *e.g.*, Samone Ijoma, *False Promises of Protection: Black Women, Trans People & the Struggle for Visibility as Victims of Intimate Partner and Gender Violence*, 18 U. Md. L.J. of Race, Relig., Gender & Class 255, 281-83 (2018).

(September 2019) (only approximately eighteen percent of forcible rapes and ten percent of drug-facilitated rapes are reported). Nonetheless, crime statistics show that in the United States someone is sexually assaulted every sixty-eight seconds and, on average, over 433,000 individuals are sexually assaulted each year. *See* Rape, Abuse and Incest Network (RAINN), *Scope of the Problem: Statistics*, https://www.rainn.org/statistics/scope-problem (last visited September 21, 2021), citing the U.S. Dep't of Justice, Bureau of Justice Statistics, National Crime Victimization Survey, 2018 (2019), https://www.bjs.gov/content/pub/pdf/cv18.pdf. Over ninety percent of sexual assault victims are women. *National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release*, CDC (Nov. 2018), https://www.cdc.gov/violenceprevention/pdf/2015databrief508.pdf.

On top of this, "[t]he United States criminal justice system has a long history of not investigating and prosecuting the crime of sexual assault, as [less than three percent] of reported assaults result in a conviction." Rebecca Campbell et al., *Changing the Criminal Justice Response to Sexual Assault: An Empirical Study of a Participatory Action Research Project*, 67 Am. J. Community Psychol. 166, 166 (2021). "Survivors consistently describe their experiences reporting to the police as re-traumatizing and hurtful as they endure victim-blaming questions about their credibility, integrity and character," while "actual progress on the investigation is so slow or non-existent it 'feels like nothing' is being done to investigate the

reported crime."[13] *Id.* at 167; *see also id.* at 178 ("[t]he U.S. criminal justice system has not taken the crime of rape seriously for decades"; "foundational laws, policies, and procedures make it burdensome, at best, and retraumatizing, at worst, for survivors to report and pursue prosecution.")

Simply put, survivors can expect that their experiences will be discounted or disbelieved, including by law enforcement. *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 Pa. L. Rev. 1, 29 (2017); Sarah Ullman, *Talking About Sexual Assault: Society's Response to Survivors*, PsycNET (2010), https://psycnet.apa.org/record/2009-18375-000 ("[M]any victims who tell others about their assault must endure a 'second assault' in the form of negative reactions, such as victim blaming and disbelief. One third to two thirds of victims may experience such reactions."); Elizabeth Kennedy, *Victim Race and Rape: a Review of Recent Research*, Feminist Sexual Ethics Project (2003), https://www.brandeis.edu/projects/fse/slavery/united-states/slav-us-articles/kennedy-full.pdf (some studies indicate that Black rape victims are often perceived as less credible than white victims).

As a result, victims report "experiencing loss of trust in the police and the justice system after not

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[13] That feeling can often turn out to be accurate. Sexual assault rape kits, for example, have consistently gone untested, leaving biological evidence in 200,000 to 400,000 rape cases ignored. *Id*. To some, "the rape kit backlog is a tangible symbol" of an "accumulated criminal justice failures to take rape – and rape victims – seriously." *Id*. at 178.

being believed and/or their report not being followed-up." Karen McQueen et al., *Sexual Assault: Women's Voices on the Health Impacts of Not Being Believed by Police*, 21 BMC Women's Health 217, 4 (2021). *Cf*. Rebecca Campbell et al., *Changing the Criminal Justice Response to Sexual Assault: An Empirical Study of a Participatory Action Research Project*, *supra*, at 178 (in one urban police department, "many assumed testing [a] sample of [rape] kits would be a waste of resources, yielding no actionable information for police or prosecutors" and that the "victims were not believable": fifty-eight percent of these kits yielded positive hits in CODIS; twenty-eight percent of those were to suspected serial sex offenders).

The CVRA gives sex trafficking and sexual assault victims a voice in the criminal justice system – a system which victims and their advocates perceive to have consistently let them down in the past. By lending transparency to the process and opening a channel of communication with the prosecutor and the court, the CVRA plays an important role in repairing these victims' faith in both the system and themselves. If the CVRA is read to exclude a right to pre-charge prosecutorial consultation – even where, as here, the prosecutor has already prepared a lengthy draft indictment after a multi-year investigation – these victims will see this as further evidence of their exclusion from the criminal justice system. Doing so therefore risks reinforcing the underreporting of these crimes.

CONCLUSION

For these reasons, and for the reasons stated in the petition, this Court should grant review.

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