CIRCUMVENTING THE CRIME VICTIMS' RIGHTS ACT: A CRITICAL ANALYSIS OF THE ELEVENTH CIRCUIT'S DECISION UPHOLDING JEFFREY EPSTEIN'S SECRET NON-PROSECUTION AGREEMENT

Paul G. Cassell,[*] *Bradley J. Edwards*[**] *& Jordan Peck*[***]

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ABSTRACT

Whether crime victims have rights before the formal filing of criminal charges has recently come to the fore in one of the most publicized criminal cases in memory. For more than twelve years, victims of Jeffrey Epstein's sex trafficking organization have attempted to invalidate a non-prosecution agreement (NPA) entered between Epstein and federal prosecutors. The victims have argued that because prosecutors deliberately concealed the NPA from them, the prosecutors violated the federal Crime Victims' Rights Act (CVRA). But in April 2020, a divided panel of Eleventh Circuit Judges entered a surprising ruling, rejecting the victims' argument. The panel refused to find a CVRA violation, reasoning that because the Government never filed federal charges, the CVRA was never triggered.

In August 2020, the full Eleventh Circuit vacated the earlier panel decision and agreed to rehear the case en banc. This Article critiques the earlier panel decision and explains why the Eleventh Circuit en banc should proceed in the opposite direction. Under the now-vacated panel decision, "secret" justice was permitted, depriving crime victims in the Eleventh Circuit of any CVRA rights until the Government formally files charges. This decision would have created perverse incentives for the Government to negotiate secret agreements

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* Ronald N. Boyce Presidential Professor of Criminal Law, S.J. Quinney College of Law at the University of Utah.

** Managing Partner, Edwards and Pottinger, LLC.

*** J.D. Candidate 2022, Harvard Law School. The authors appreciate the assistance of co-counsel Jay Howell and Brittany Henderson during the litigation described in this Article. And the authors especially admire the courage of Courtney Wild, who has unflinchingly sought to hold Jeffrey Epstein and his coconspirators accountable for their crimes against her.

within the Eleventh Circuit rather than elsewhere, such as in the adjoining Fifth Circuit. This Article concludes that the Eleventh Circuit en banc should recognize that the CVRA extends rights to crime victims even before charges are filed. The Article also urges Congress to clarify and amend the CVRA to ensure that secret NPAs are not permitted in future federal criminal cases and, more broadly, to protect crime victims during federal criminal investigations.

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INTRODUCTION

As crime victims' rights enactments proliferate around the country, an important question is whether they apply before prosecutors file criminal charges.[1] Many rights in these enactments—such as the victim's right to be heard during criminal proceedings—can apply only after the filing of criminal charges. But other rights clearly could extend pre-charging. For example, a crime victim could be given a right to confer with prosecutors while prosecutors are considering what charges to file. Or a victim's right to be treated with fairness could apply during investigations.

Whether victims have pre-charging rights is a vital issue for making crime victims' protections effective. In many cases, prosecutors may enter into plea negotiations with defense attorneys well before drafting any charges. In some cases, prosecutors may even enter into non-prosecution agreements (NPAs) with defendants, agreeing never to lodge any charges. If crime victims' protections do not come into play until the formal filing of charges, then crime victims can be effectively excluded from any role regarding whether charges are filed or, if so, what those charges might be.

This issue has recently come to the fore in one of the most publicized criminal cases in memory. For more than twelve years, victims of Jeffrey Epstein's sex trafficking organization have attempted to invalidate an NPA entered into between federal prosecutors and Epstein.[2] The victims have argued that because the prosecutors deliberately concealed the NPA from them, the prosecutors violated their right to confer under the federal Crime Victims' Rights Act (CVRA).[3] In 2011, the federal district court

1. *See* Paul G. Cassell, *Introduction: The Maturing Victims' Rights Movement*, 13 OHIO ST. J. CRIM. L. 1, 1 (2015). *See generally* DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE (4th ed. 2018).

2. *See* BRADLEY J. EDWARDS & BRITTANY HENDERSON, RELENTLESS PURSUIT: MY FIGHT FOR THE VICTIMS OF JEFFREY EPSTEIN 218–19 (2020).

3. *See* Act of Oct. 30, 2004, Pub. L. 108-405, Title I, § 101, 118 Stat. 2261, (codified as amended at 18 U.S.C. § 3771).

presiding over the case agreed with the victims, concluding that the CVRA protected Epstein's victims even though the prosecutors had never formally filed federal criminal charges against him.[4]

Following years of litigation, however, the case went up on appeal to the Eleventh Circuit.[5] In April 2020, a divided panel entered a surprising ruling.[6] The panel recognized that victims, such as lead petitioner Courtney Wild, and more than thirty other girls "suffered unspeakable horror" at the hands of Epstein's international sex trafficking organization.[7] And the panel agreed that the prosecutors' concealment of the deal was "beyond scandalous" and produced "a tale of national disgrace."[8] Indeed, the panel explained that after the victims reported Epstein's sex abuse, they were "left in the dark—and, so it seems, *affirmatively misled*—by government lawyers" about a secret NPA that the prosecutors negotiated with Epstein.[9]

Yet on these egregious facts, a divided panel—in three separate opinions spanning 120 pages—refused to find any violation of the CVRA.[10] The panel reasoned that the CVRA was never triggered because the prosecutors—working closely with Epstein's battery of high-powered lawyers—maneuvered to avoid lodging federal criminal charges.[11] The panel admitted that under its narrow reading, "[T]he 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."[12] Judge Hull's passionate dissent put the matter more plainly: "[T]he [m]ajority's contorted statutory interpretation materially revises the statute's plain text and guts victims' rights under the CVRA."[13]

In August 2020, the full Eleventh Circuit vacated the panel decision and ordered rehearing en banc.[14] This Article critiques the earlier panel decision and explains why the Eleventh Circuit en banc should proceed in the opposite direction. Under the panel's ruling,

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4. *See In re* Wild, 955 F.3d 1196, 1200 (11th Cir.), *reh'g en banc granted*, *opinion vacated*, 967 F.3d 1285 (11th Cir. 2020).
5. *See id.* at 1198.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.* (emphasis added).
10. *See id.* at 1196, 1198, 1221, 1223, 1250.
11. *See id.*
12. *See id.* at 1221.
13. *See id.* at 1225 (Hull, J., dissenting).
14. *See In re* Wild, 967 F.3d 1285, 1285 (11th Cir. 2020).

"secret" justice would have been permitted, allowing prosecutors to circumvent the CVRA and deprive crime victims in the Eleventh Circuit of any CVRA rights until the Government formally files charges. The full Court acting en banc should give the CVRA a generous construction, and Congress should also intervene and amend the CVRA to protect victims in the Eleventh Circuit and elsewhere.

This Article proceeds in four parts. Part I provides the procedural background from the Epstein case, which led to the Eleventh Circuit addressing the issue of the CVRA's pre-charging application.[15] Part II then closely reviews the CVRA's text and structure.[16] This review establishes that, contrary to the Eleventh Circuit panel's holding, the CVRA extends some rights to crime victims before prosecutors file criminal charges. In particular, the CVRA's scope and venue provisions provide clear textual commands from Congress that victims can exercise certain CVRA rights while prosecutors are considering whether to institute charges. Part III then dissects the panel's conclusion that applying the CVRA before charges are instituted would have no "logical stopping point"[17] and would thus interfere with federal criminal investigations.[18] Contrary to the panel's position, the CVRA can easily be interpreted as extending rights to victims when a case has crystalized to the point that specific crimes and victims are identified. Indeed, the Fifth Circuit has long taken such a view, without any apparent difficulties.[19] Given the Eleventh Circuit's hostility toward broadly construing the CVRA to achieve its purposes, Part IV briefly sketches out what a congressional amendment to the CVRA would look like to clarify the Act's coverage and ensure that crime victims in the federal criminal justice system have protected rights before charging.[20] Congress could specifically guarantee that victims have the right to confer with prosecutors before any NPA is finalized. And, more broadly, Congress could guarantee that victims have CVRA rights during criminal investigations, such as the right to be treated fairly. A brief conclusion to this Article explains how the issues presented in the Epstein case under the CVRA may be litigated under similar state crime victims' rights provisions.[21] The same approach urged in this Article as a matter of federal law should

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15. *See infra* Part I.
16. *See infra* Part II.
17. *See In re Wild*, 955 F.3d at 1213.
18. *See infra* Part III.
19. *See In re* Dean, 527 F.3d 391, 394–95 (5th Cir. 2008).
20. *See infra* Part IV.
21. *See infra* CONCLUSION.

also be applied to those state provisions to ensure fair treatment of crime victims throughout our nation's criminal justice processes.

I. THE CVRA'S PRE-CHARGING APPLICATION DURING THE JEFFREY EPSTEIN CASE

The Jeffrey Epstein case usefully illustrates how the issue of applying crime victims' rights before prosecutors have filed charges can arise.

A. Epstein Obtains Immunity for Himself and His Coconspirators for Federal Sex Trafficking Charges

It is generally agreed that the facts underlying the Jeffrey Epstein case are, as the Eleventh Circuit's panel decision put it, "beyond scandalous—they tell a tale of national disgrace."[22] Between 1999 and 2007, well-heeled and well-connected financier Jeffrey Epstein and multiple coconspirators sexually abused more than thirty girls—some as young as fourteen—in Palm Beach, Florida, and other locations in the United States, England, and elsewhere.[23] Epstein's employees delivered the girls to Epstein, and then he would either sexually abuse them himself, give them to others to abuse, or both.[24]

Following a tip in 2005, the Palm Beach Police Department and FBI spent two years investigating Epstein's child-sex-abuse crimes.[25] After collecting compelling evidence against Epstein, the FBI referred the case for prosecution to the U.S. Attorney's Office for the Southern District of Florida.[26] While the federal prosecutors evaluated the case, they advised Epstein's victims, via letter, that "as a victim and/or witness of a federal offense, you have a number of rights."[27] These letters from the Office enumerated the eight CVRA rights, then in force, including notably "[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."[28]

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22. *See In re Wild*, 955 F.3d at 1198.
23. *See id.*
24. *See id.*
25. *See id.* Epstein's actions violated both state and federal laws involving child sex abuse. *See, e.g.*, 18 U.S.C. §§ 2422, 2243, 1591.
26. *See In re Wild*, 955 F.3d at 1198.
27. *See id.* at 1199.
28. *See id.* (quoting letters to victims, which in turn quoted 18 U.S.C. § 3771(a)(5) and (8)). In 2015, Congress amended the CVRA to add two additional rights. *See infra* note 188 and accompanying text. For general background

In May 2007, the federal prosecutors drafted a fifty-three-page indictment charging Epstein with numerous federal sex offenses.[29] The prosecutors then began contentious negotiations with Epstein's team of high-powered lawyers.[30] The prosecutors initially sought an agreement requiring Epstein to plead to at least one felony sex offense.[31] But after considerable pressure from Epstein's lawyers, the U.S. Attorney's Office agreed to a far more lenient NPA with Epstein, for reasons that have never been clearly explained.[32] Under the NPA, Epstein agreed to plead guilty only to two state felonies for soliciting prostitution with a minor.[33] In exchange, the U.S. Attorney's Office extended immunity to Epstein and all his coconspirators on the more serious federal charges.[34] After entering the state guilty pleas, Epstein was sentenced to only eighteen months in state jail.[35] During his jail term, Epstein was afforded "work release" to his luxurious office for twelve hours per day, six days per week.[36] And, of course, pursuant to the NPA, Epstein and his coconspirators escaped the filing of any federal charges.[37]

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about the enactment of the CVRA, see Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 850–52 (2005).

29. *See In re Wild*, 955 F.3d at 1199.

30. *See id.*

31. *See* Conchita Sarnoff & Lee Aitken, *Jeffrey Epstein: How the Hedge Fund Mogul Pedophile Got Off Easy*, DAILY BEAST (Aug. 19, 2019, 2:48 PM), https://www.thedailybeast.com/jeffrey-epstein-how-the-hedge-fund-mogul-pedophile-got-off-easy [https://perma.cc/Z2PV-EQ67].

32. The U.S. Attorney responsible for the plea deal later revealed that after negotiations started, "[w]hat followed was a year-long assault on the prosecution and the prosecutors" by Epstein. *See* Letter from R. Alexander Acosta, U.S. Att'y, to Whom It May Concern (Mar. 20, 2011), https://www.thedailybeast.com/jeffrey-epstein-how-the-hedge-fund-mogul-pedophile-got-off-easy [https://perma.cc/Z2PV-EQ67]. Acosta, however, (implausibly) claimed that the pressure did not influence the ultimate disposition of the case. *See id.*

33. *See In re Wild*, 955 F.3d at 1229. This agreement had the effect of labeling Epstein's child victims, who could not lawfully consent to sexual activity with adults, as "prostitutes." *See id.* at 1248.

34. *See id.* at 1199.

35. *See* Landon Thomas, *Financier Starts Sentence in Prostitution Case*, N.Y. TIMES (July 1, 2008), http://www.nytimes.com/2008/07/01/business/01epstein.html?_r=1&ref=jeffrey_e_epstein [https://perma.cc/E6GW-KKDY].

36. *See* Kelly McLaughlin & Nicole Einbinder, *Jeffrey Epstein Enjoyed Unprecedented Freedom During His 13-Month Jail Term, But Nobody Will Say Why*, INSIDER (July 17, 2019, 3:14 PM), https://www.insider.com/jeffrey-epstein-work-release-program-florida-explainer-2019-7 [https://perma.cc/AGS8-WTTB].

37. *See In re Wild*, 955 F.3d at 1199.

While the U.S. Attorney's Office was negotiating and entering into the NPA with Epstein, it kept Epstein's victims in the dark about what was happening.[38] Indeed, the prosecutors' efforts graduated from passive nondisclosure to active misrepresentation.[39] For example, even after signing the NPA, the Office sent letters to the victims telling them that the case was "currently under investigation" and that they should have "continued patience."[40]

B. The District Court Holds that CVRA Rights Apply Pre-Charge

As word of Epstein's NPA began to leak, in July 2008, two of Epstein's victims (Jane Doe 1 and Jane Doe 2) filed suit in the U.S. District Court for the Southern District of Florida under the Crime Victims' Rights Act.[41] The victims argued that the prosecutors had violated their CVRA right to confer as well as their right to be treated with fairness.[42] The victims contended that prosecutors should have conferred with them about the NPA before it became final.[43]

In response, the U.S. Attorney's Office argued initially that it was under no obligation to extend the victims any rights under the CVRA because "CVRA rights do not attach in the absence of federal criminal charges filed by a federal prosecutor."[44] After briefing and argument, in 2011, the district court rejected the government's claim in a carefully reasoned decision.[45] The district court held that the victims' rights "to confer with the attorney for the Government in the

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38. *See id.*

39. *See id.*; *see also* Doe 1 v. United States, 359 F. Supp. 3d 1201, 1219 (S.D. Fla. 2019) ("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.").

40. *See In re Wild*, 955 F.3d at 1199–200.

41. Jane Doe 1 has since chosen to reveal that her name is Courtney Wild. *See infra* note 236 (providing further biographical information about Ms. Wild). Two of the authors of this Article (Cassell and Edwards) served as counsel for Ms. Wild in the case.

42. *See* Emergency Victim's Petition for Enforcement of Crime Victims' Rights Act at 1–2, Does v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011) (No. 9:08-cv-80736).

43. *See id.*

44. *See* United States' Response to Jane Doe #1 & Jane Doe #2's Motion for Finding of Violations of the Crime Victims' Rights Act & Request for a Hearing on Appropriate Remedies at 7, *Does*, 817 F. Supp. 2d 1337 (No. 9:08-cv-80736).

45. *See* Does v. United States, 817 F. Supp. 2d 1337, 1341 (S.D. Fla. 2011).

case" and "to be treated with fairness and with respect for [their] dignity and privacy" apply before charges are filed.[46]

In reaching its conclusion, the district court pointed to two CVRA provisions.[47] First, the court relied on the CVRA's "coverage" provision, which provides 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 the CVRA]."[48] The district court reasoned that this provision "contemplates pre-charge application of the CVRA" because it requires officers who are involved in the *detection* and *investigation* of federal crimes to afford victims their rights.[49] Second, the district court pointed to the CVRA's "venue" provision, which states that a victim can assert its CVRA rights "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."[50] The court determined that the plain reading of "no prosecution is underway" indicates that the CVRA rights apply pre-charge—i.e., before any prosecution is "underway."[51]

C. The District Court Finds the Government Violated the Victims' Rights but Ultimately Dismisses the Case as Moot

Following its ruling that the CVRA applied, the district court allowed the victims to obtain discovery on the government's plea negotiations with Epstein.[52] After many years of hard-fought litigation over how the NPA had been concocted, in February 2019, the district court granted summary judgment in favor of the victims.[53] Specifically, the district court found that the federal prosecutors violated the victims' CVRA rights by entering into the secret NPA with Epstein "without conferring with [the victims] during its negotiation and signing."[54] The district court then directed the victims

46. *See id.* at 1340–41 (quoting 18 U.S.C. § 3771(a)).
47. *See id.* at 1342.
48. *See id.* (quoting 18 U.S.C. § 3771(c)(1)) (emphasis added).
49. *See id*.
50. *See id.* (quoting 18 U.S.C. § 3771(d)(3)) (emphasis added).
51. *See id.*
52. *See id.* at 1345.
53. *See* Doe 1 v. United States, 359 F. Supp. 3d 1201, 1222 (S.D. Fla. 2019).
54. *See id*. at 1218.

and the government—and Epstein, who had intervened in the case—to brief "the issue of what remedy, if any, should be applied in view of the [CVRA] violation."[55]

In May 2019, the victims proposed multiple remedies for the proven CVRA violations. Of particular relevance to this Article, the victims sought recission of the immunity provisions in the NPA.[56] The victims argued that they were entitled to rescission of the immunity provisions so that they could use "the full unfettered exercise of their [CVRA] conferral rights at a time that [would] enable [them] to exercise those rights meaningfully."[57] The victims argued that other courts have stricken plea arrangements when they violate the law.[58] The victims could only exercise their right to confer with federal prosecutors about having charges filed against Epstein and his coconspirators if the district court voided the NPA's immunity provisions.[59] The victims also sought a bevy of other remedies, including a victim-impact hearing and a meeting between the victims and Alexander Acosta, the former U.S. Attorney for the Southern District of Florida who had secretly entered into the NPA.[60] The victims also sought discovery of certain grand-jury materials and other materials regarding the prosecutors' decision to enter into the NPA, as well as sanctions, attorneys' fees, and restitution.[61]

While the remedy issue was under consideration by the district court, in July 2019, Epstein was arrested; and then in August 2019, Epstein was found dead from apparent suicide in a New York correctional facility.[62] In light of Epstein's death, in September 2019, the district court dismissed the victims' suit, thereby denying the victims any remedies.[63] The court reasoned that the victims' claims regarding rescission of the NPA's immunity provisions had become moot.[64] As to Epstein, he was no longer subject to prosecution due to his death, and as to Epstein's coconspirators, the court lacked

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55. *See id*. at 1222.

56. *See* Jane Doe 1 and Jane Doe 2's Submission on Proposed Remedies at 12–21, Does v. United States, No. 9:08-cv-80736 (S.D. Fla. May 23, 2019).

57. *See id.* at 15 (quoting United States v. BP Prods. N. Am., Inc., Criminal No. H-07-434, 2008 WL 501321, at *14 (S.D. Tex. Feb. 21, 2008)).

58. *See id.* (citing U.S. v. Walker, 98 F.3d 944 (7th Cir. 1996)).

59. *See id.* at *14–15.

60. *See id.* at *22–24.

61. *See id.* at *24–33.

62. *See* Doe 1 v. United States, 411 F. Supp. 3d 1321, 1325–26 (S.D. Fla. 2019).

63. *See id*. at 1326–31.

64. *See id.* at 1326.

jurisdiction to consider any application of the NPA to them because they had not been joined as parties to the action.[65]

The district court also denied the victims' requests for a meeting with former U.S. Attorney Acosta because the court found it did not have jurisdiction over him.[66] The court also noted that the government had agreed to "arrange a meeting with government representatives" for the victims, the victims already had the opportunity for a hearing in the Southern District of New York, and the Epstein investigation ended upon his death.[67] Finally, for similar reasons, the court denied the victims' requests for monetary sanctions, restitution, and attorneys' fees.[68] The district court ended its opinion with a note of condolence for the victims. The court explained that

> despite [the victims] 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 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.[69]

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65. *See id.* at 1326–27 (holding that "[s]ince 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").

66. After orchestrating the Epstein NPA in 2007 and 2008, Acosta left the U.S. Attorney's Office and then reentered federal government service in 2016 as the Secretary of Labor. *See Alexander Acosta*, WIKIPEDIA https://en.wikipedia.org/wiki/Alexander_Acosta [https://perma.cc/SS4S-8QAP] (last visited July 11, 2021). When Epstein was arrested, a firestorm of controversy broke out over his role in the NPA, leading to his resignation. *See* Annie Karni et al., *Acosta to Resign as Labor Secretary Over Jeffrey Epstein Plea Deal*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/us/politics/acosta-resigns-trump.html [https://perma.cc/HP2W-SVDC].

67. *See Doe 1*, 411 F. Supp. 3d at 1328–29.

68. *See id.* at 1330–31.

69. *See id.* at 1331–32.

D. An Eleventh Circuit Panel Reverses the District Court's Holding that CVRA Rights Apply Pre-Charge—and the Circuit Agrees to Rehear the Case En Banc

Following the district court's mootness ruling and denial of the victims' remedial requests, in September 2019, the victims filed a petition for a writ of mandamus with the Eleventh Circuit Court of Appeals, "seeking reversal of the district court's decision denying [their] request for a remedy for the Government's violations of [their] CVRA rights."[70] The victims gave multiple reasons why, contrary to the ruling of the district court, the case was not moot, focusing in particular on the immunizing effects of the NPA on Epstein's coconspirators.[71] The victims noted that, under Federal Rule of Civil Procedure 19, the remedy for a failure to join a necessary party is not dismissal of an action, but rather an order directing that the necessary party be joined.[72] The victims argued that the case was not moot because if the district court had invalidated the NPA's immunity provision, the action would have permitted the victims to confer with prosecutors about prosecuting Epstein's coconspirators in Florida.[73]

Following oral argument, in April 2020 a divided (2-1) panel decision denied the petition for a surprising reason.[74] Rather than reach the mootness issue presented by the victims' petition, the panel, in an opinion written by Judge Newsom and joined by Judge Tjoflat, overturned the district court's previous holding from nine years earlier

70. *See* Petition for Writ of Mandamus at 1, *In re* Wild, 955 F.3d 1196 (11th Cir. 2019) (No. 19-13843). The petition to the Eleventh Circuit was filed by a single victim, Courtney Wild. Because Ms. Wild also sought to assert the rights of other Epstein victims, we will refer to the petition as having been filed by "the victims."

71. *See id.* at 20–44.

72. *See id.* at 22–32.

73. *See id.* at 32–36. The validity of the victims' position that their case is not moot has only been reinforced by recent events. In July 2020, Epstein's main (alleged) coconspirator, Ghislaine Maxwell, was arrested and charged in the Southern District of New York with conspiring with Epstein in sexually trafficking minor girls. *See* Nicole Hong et al., *Ghislaine Maxwell, Associate of Jeffrey Epstein, is Arrested*, N.Y. TIMES, https://www.nytimes.com/2020/07/02/nyregion/ghislaine-maxwell-arrest-jeffrey-epstein.html [https://perma.cc/KE3X-PCRQ] (Oct. 22, 2020). Defense attorneys for Maxwell have since made clear that they intend to argue that the Epstein NPA blocks prosecution of Ms. Maxwell. *See* Thom Hals & Karen Freifeld, *Long Legal Battle by Jeffrey Epstein Victims Could Sink Maxwell's Defense*, REUTERS (July 14, 2020, 7:07 AM), https://www.reuters.com/article/us-people-ghislaine-maxwell-plea/long-legal-battle-by-jeffrey-epstein-victims-could-sink-maxwells-defense-idUSKCN24F19A [https://perma.cc/6Q29-7NCY].

74. *In re Wild*, 955 F.3d at 1197–98.

that CVRA rights apply before the government formally files criminal charges against a defendant.[75]

The panel conceded that the facts of the case were "beyond scandalous," but concluded it was "constrained" to deny Ms. Wild's petition.[76] As the panel saw things, CVRA rights "do not attach until criminal proceedings have been initiated against a defendant, either by complaint, information, or indictment."[77] While the panel recognized the plausibility of the district court's broader interpretation of the CVRA, the panel "reluctantly" concluded that the "best" and "most

75. *See id.* at 1198. The jurisdiction of the Circuit to have reached this issue is questionable. *See id.* at 1198–202. After the district dismissed their case as moot, the victims sought review of that mootness determination in the Eleventh Circuit. *See id.* at 1199–1200. The Government did not file any cross-appeal raising the issue of the CVRA's pre-charging application, instead presenting that issue, among others, only in its response brief. *See id.* at 1202. Ordinarily, without a cross-appeal, the Government could not enlarge the issues presented on appeal. *See* Greenlaw v. United States, 554 U.S. 237, 244–45 (2008). However, because the victims have used the appellate procedural vehicle specified in the CVRA, an "application" for a writ of mandamus, 18 U.S.C. § 3771(d)(3), the panel concluded that the Government was entitled to raise "any argument it likes" against granting the victims' application. *In re Wild*, 955 F.3d at 1204 n.6. But this position failed to give full effect to the fact that, in 2015, Congress amended the CVRA's appellate provisions, providing that "[i]n deciding such [CVRA] application, the court of appeals shall apply *ordinary standards of appellate review*." *See* 18 U.S.C. § 3771(d)(3) (emphasis added). The clear rationale for Congress' amendment was the urging of crime victims' rights advocates that "when victims of crime are denied [CVRA] relief in the district court, they should receive the same sort of appellate protections as other litigants." *See* Catherine M. Goodwin, FEDERAL CRIMINAL RESTITUTION § 12:17 (2020) (quoting Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599, 599 (2010)). Accordingly, in its 2015 amendment, Congress essentially codified the Second Circuit's holding that Congress has "chosen a petition for mandamus as a mechanism by which a crime victim may *appeal* a district court's decision denying relief sought under the provisions of the CVRA." *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562 (2d Cir. 2005) (emphasis added). Rather than straightforwardly apply the amendment to simply give crime victims "ordinary standards of appellate review," the panel artificially and improperly gave crime victims only ordinary substantive (but not procedural) standards of appellate review. *See In re Wild*, 955 F.3d at 1234 (quoting 18 U.S.C. § 3771(d)(3)). This approach very much deviated from "ordinary standards" of appellate review that Congress created, because it meant that the victims must confront arguments and obstacles that other appellate litigants do not face. *See id.* at 1218. As a result, the Eleventh Circuit should never have reached the issue of the CVRA's pre-charging application because it was never properly presented through a Government appeal. *See id.* at 1196, 1204 n.6.

76. *See In re Wild*, 955 F.3d at 1198.

77. *Id.*

natural[]" reading was that the Act was not triggered until the Government formally filed federal charges.[78]

Examining the CVRA's text, the panel looked to the eight enumerated victims' rights in statute, noting that most of them seemed to "focus on the post-charge phase of a criminal prosecution," such as the right to speak at certain court hearings.[79] The victims conceded that many of the rights the CVRA applied after the filing of criminal charges, but argued that at least two rights applied during earlier phases of the process.[80] One right was the "reasonable right to confer with the attorney for the Government in the case."[81] The panel rejected the victims' argument that the word "case" referred to both criminal investigations and judicial proceedings.[82] Instead, quoting several dictionaries and two Supreme Court cases, the panel held that "case" primarily refers to judicial proceedings, and the criminal investigation meaning is secondary.[83] Additionally, the panel focused on the specific reference to the right to confer for the "attorney for the Government."[84]

The victims also relied on the CVRA right "to be treated with fairness and with respect for [his or her] dignity and privacy."[85] The panel recognized that this right does not contain any express temporal limitation to after the filing of charges.[86] However, applying the statutory interpretation maxim, *noscitur a sociis*—"words are often known by the company they keep"—the panel determined that this right only applied post-charging because Congress grouped the rights with the other rights that applies post-charging.[87]

The panel summed up its decision by explaining it was "not a result we like, but it's the result we think the law requires."[88] The panel ruefully observed that

> [i]t isn't lost on us that our decision leaves . . . [the victims] largely emptyhanded, and we sincerely regret that. Under our reading, the CVRA will not prevent federal prosecutors from negotiating 'secret' plea and non-

78. *See id*. at 1205.
79. *See id*. at 1206.
80. *See id*. at 1207.
81. 18 U.S.C. § 3771(a)(5).
82. *See In re Wild*, 955 F.3d at 1207.
83. *See id.*
84. *See id.*
85. § 3771(a)(8).
86. *See In re Wild*, 955 F.3d at 1208.
87. *See id.*
88. *Id.* at 1198.

> prosecution agreements, without ever notifying or conferring with victims, provided that they do so before instituting criminal proceedings.[89]

The panel majority's holding leaving Epstein's victims "emptyhanded" provoked a strenuous dissent from Judge Hull.[90] She argued that the majority "patently err[ed]" in giving the CVRA such a narrow reading.[91] In Judge Hull's view, the panel's regrettable interpretation of the CVRA could be avoided simply by "enforc[ing] the plain and unambiguous text of the CVRA."[92] Judge Hull concluded that the panel's "contorted statutory interpretation materially revises the statute's plain text and guts victims' rights under the CVRA."[93] In Judge Hull's view, "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."[94]

Following the Eleventh Circuit panel's ruling, in May 2020, the victims filed a petition for rehearing en banc.[95] The victims' petition drew quick support in amicus briefs from CVRA co-sponsors Senator Dianne Feinstein and former Senators Jon Kyl and Orrin Hatch and from the National Crime Victim Law Institute.[96]

On August 7, 2020, the Eleventh Circuit, acting en banc, vacated the panel's earlier decision and set the case for rehearing before the full Court.[97]

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89. *Id.* at 1221.

90. *See id.* at 1223, 1250 (Hull, J., dissenting) (stating that the Court is the reason for the unfortunate result).

91. *See id.* at 1224.

92. *See id.*

93. *Id.* at 1225.

94. *Id.* at 1226.

95. *See generally* Petition for Rehearing En Banc, *In re* Wild, No. 19-13843 (11th Cir. May 5, 2020).

96. *See* Brief of Senator Dianne Feinstein and Former Senators Jon Kyl and Orrin Hatch as *Amici Curiae* in Support of Rehearing *En Banc* at 1, *In re* Wild, No. 19-13843 (11th Cir. May 12, 2020). The brief argues that "[w]hen Congress enacted the CVRA, it intended to protect crime victims . . . from the investigative phases to the final conclusion of a case." *Id.* at 5–6 (quoting Letter from Jon Kyl, U.S. Sen., to Eric H. Holder Jr., Att'y Gen., (June 6, 2011), *reprinted in* 157 CONG. REC. 8854, 8854 (2011)). *See generally* Brief of *Amicus Curiae* National Crime Victim Law Institute and Co-*Amici* Organizations in Support of Crime Victim-Petitioner's Petition for Rehearing En Banc, *In re* Wild, No. 19-13843 (11th Cir. May 12, 2020).

97. *In re* Wild, 967 F.3d 1285, 1285 (11th Cir. 2020) (mem.).

II. THE CVRA'S TEXT MAKES CLEAR THAT THE ACT APPLIES BEFORE CRIMINAL CHARGES ARE FORMALLY FILED

Simply put, the Eleventh Circuit panel got this one wrong. The panel decision conflicts with the CVRA's clear text, specifically the provisions extending rights, defining the Act's coverage, and providing venue for enforcement. The Eleventh Circuit en banc should recognize that the CVRA extends crime victims' rights before prosecutors formally file charges.

A. The CVRA's Rights Are Not Tied to the Filing of Criminal Charges

As enacted in 2004, the CVRA enumerates eight specific rights for crime victims.[98] Some of those rights are explicitly tied to public court proceedings—but others plainly are not. For instance, victims have the right "not to [be] excluded for any . . . public court proceeding" and "to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing . . . ."[99] Obviously, because no public court proceedings can take place without the filing of formal criminal charges, these rights only attach after prosecutors have filed charges.

But other CVRA rights are clearly not linked to court proceedings. Arguably the most expansive of these rights is a victim's "right to be treated with fairness and with respect for the victim's dignity and privacy."[100] A right to "fairness" can logically and easily apply not only to judicial proceedings after the filing of an indictment, but earlier, such as when prosecutors are considering whether and how to file charges. If Congress wanted to limit this overarching right to fairness to matters connected with formal charges, it easily could have said so—but did not.

Similarly, the CVRA grants victims the "reasonable right to confer with the attorney for the Government *in the case*."[101] Of course, "case" is commonly used to refer not only to a judicial proceeding before a court, but also to an investigation pursued by law enforcement. For example, while *Black's Law Dictionary* offers as the first definition of "case" a "civil or criminal proceeding, action, suit or controversy at law or equity," the second definition is a "criminal

98. *See* 18 U.S.C. § 3771(a) (2004) (enumerating eight rights).
99. § 3771(a)(3), (4).
100. § 3771(a)(8).
101. § 3771(a)(5) (emphasis added).

investigation" as in "the Manson case."[102] Indeed, the Eleventh Circuit itself has frequently used the word "case" to describe criminal investigations.[103]

The panel apparently determined that the CVRA's drafters had not employed this more expansive usage.[104] The panel argued that while "it's true . . . that the term 'case' *can* mean either thing, in legal parlance the judicial-case connotation is undoubtedly primary."[105] In so holding, as Judge Hull persuasively argued, the panel violated "conventional rules of statutory construction."[106] For example, "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," and "where 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."[107] In the CVRA, Congress expressly limited some rights to court proceedings—but not others.[108] Therefore, under conventional interpretive rules, the panel should have concluded that Congress meant what it said in using the expansive term "case" rather than a narrow formulation such as "case in the District Court."

B. The CVRA's Coverage Provision Makes Clear That the Act Applies Before Charges Are Filed

The CVRA's "coverage" provision also indicates that the Act applies during criminal investigations. The coverage provision states that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the

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102. *Case*, BLACK'S LAW DICTIONARY (11th ed. 2019).

103. *See, e.g.*, United States v. Ronda, 455 F.3d 1273, 1281 (11th Cir. 2006) (noting "the FBI requested and received from the Miami Police Department the entire *case* files from the Department's investigations of all four shooting incidents"); United States v. Vinales, 564 F. App'x 518, 527–28 (11th Cir. 2014) (referring to DEA agent's "perceptions gleaned from his investigation of this case"), *cert. granted, judgment vacated*, 135 S. Ct. 2928 (2015); United States v. Houltin, 566 F.2d 1027, 1029 (5th Cir. 1978) (stating that law enforcement "violated the fourth amendment by using illegal wiretaps during the investigation phase of the case").

104. *See In re* Wild, 955 F.3d 1196, 1207 (11th Cir. 2020), *reh'g en banc granted, opinion vacated*, 967 F.3d 1285 (11th Cir. 2020).

105. *Id.* (relying primarily on which definition appears first in dictionaries).

106. *Id*. at 1236 (Hull, J., dissenting).

107. *Id.* (citing Keene Corp. v. United States, 508 U.S. 200, 208 (1993)); *id.* at 1236–37 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012)).

108. *See* 18 U.S.C. § 3771(a).

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 [the CVRA]."[109] The district court had relied heavily on the coverage provision, reasoning that the CVRA's inclusion of agencies handling the "detection" or "investigation" of crimes indicates that the drafters "surely contemplate[d] pre-charge application of the CVRA."[110]

The panel, however, read the coverage provision as "a 'to whom' provision, not a 'when' provision," because it does not "expressly speak to when CVRA rights attach," and "[g]overnment employees . . . who are involved in all three of the referenced phases are necessarily involved post-charge."[111] Judge Hull persuasively contested the panel's reasoning, explaining that "[l]ogically, 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."[112]

The panel, while not disputing that the dissent's interpretation was a natural and straightforward reading of the CVRA, disagreed that the language of the coverage provision "clearly demonstrates that the rights specified in the Act attach during the pre-charge, investigative phase."[113] In attempting to explain why Congress found it necessary to break out three separate phases of the criminal justice process, the panel was forced to retreat to the position that Congress was somehow "attempting to broadly cover (perhaps using a *belt-and-suspenders approach*) all necessary government-employee participants . . . ."[114] The panel's concession gives away the game. Reading the CVRA as containing "belt-and-suspenders" language renders an important part of the statute superfluous. This interpretation thus violates a cardinal rule of statutory construction that, whenever possible, statutes should be read to give meaning to each word that Congress has selected.[115] In

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109. § 3771(c)(1) (emphasis added).

110. *See In re Wild*, 955 F.3d at 1210 (quoting Does v. United States, 817 F. Supp. 2d 1337, 1342 (S.D. Fla. 2011)).

111. *Id.* at 1210–11.

112. *Id.* at 1237 (Hull, J., dissenting).

113. *Id.* at 1210.

114. *See id.* at 1211 n.15 (emphasis added).

115. *See, e.g.*, TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (stating that an Act of Congress should be construed whenever possible so that "no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotation marks omitted).

covering federal agencies involved in the "detection" and "investigation" of crime, Congress clearly had in mind . . . well . . . agencies involved in detecting and investigating crime. These steps in the criminal justice process obviously come before the filing of criminal charges. The panel's interpretation improperly deprives those words of any meaningful role in the statute.

C. The CVRA's Venue Provision Extends CVRA Rights Pre-Charging

The CVRA's "venue" provision also plainly indicates that the Act applies before charges are filed. The provision states that the rights described in the CVRA "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."[116] The victims argued that the "no prosecution is underway" language demonstrates that a victim's CVRA rights may be enforced before a prosecution begins, and thus "must attach before a complaint or indictment formally charges the defendant with the crime."[117] It is hard to see why Congress would include this provision unless the CVRA applies before the formal filing of charges. Indeed, the dissent concludes that this provision "conclusively demonstrates that the Act gives crime victims rights pre-charge."[118] Read most naturally, the dissent explains that the "venue provision provides that, if a prosecution is underway, victims may assert their rights in the ongoing criminal action. If, however, 'no prosecution is underway,' victims may assert their rights in the district court of the district in which the crime occurred."[119]

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116. 18 U.S.C. § 3771(d)(3) (emphasis added).

117. *See In re Wild*, 955 F.3d at 1212 (quoting Does v. United States, 817 F. Supp. 2d 1337, 1342 (S.D. Fla. 2011)).

118. *See id.* at 1237 (Hull, J., dissenting).

119. *Id.* at 1237–38 (citation omitted); *see also* Frank v. United States, 789 Fed. App'x 177, 179 (11th Cir. 2019) (seeming to read this provision the same way as the dissent); Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 594 (2005) ("While most of the rights guaranteed by the CVRA apply in the context of legal proceedings following arrest and charging, other important rights are triggered by the harm inflicted by the crime itself . . . . [T]he CVRA sweeps . . . away [any doubts on this point] with its proviso 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.'").

The panel grudgingly conceded that the victims' interpretation was "not implausible."[120] But the panel refused to adopt it, holding that there are "at least two alternative ways of understanding" the venue provision.[121] First, the panel argued that because a "prosecution" is not commenced by the filing of a formal complaint but rather begins upon "a suspect's initial appearance before a judicial officer," the venue provision could be read to apply to the period of time between the initiation of criminal proceedings and the levying of formal charges through an indictment.[122] Second, the panel contended that "no prosecution is underway" could also "refer to the period *after* a 'prosecution' has run its course . . . ."[123]

The panel's first reading is strained. The panel believes that the phrase "no prosecution is underway" could hypertechnically refer only to the mere hours "between the filing of the criminal complaint and the suspect's initial appearance before a judge . . . ."[124] The panel's reading is anything but the "most obvious" interpretation, since victims' interests are not often implicated during these hours.[125] In fact, no other court has ever given the venue provision such a narrow construction.[126] Perhaps this narrow construction is because, in many federal criminal cases, no complaint is *ever* filed; many federal criminal cases proceed by way of formal indictment.[127]

The panel's reading of the "no prosecution underway" language hinges on the counterintuitive idea that even the formal filing of a federal criminal complaint does not trigger a "prosecution"—and thus the CVRA's no-prosecution-underway language refers to at least a few hours during the criminal justice process.[128] However, several sources commonly use the term "prosecution" to refer to events that happen after the filing of a complaint.[129] The nation's leading criminal procedure hornbook states that "[w]ith the filing of the complaint, the arrestee officially becomes a 'defendant' in a criminal prosecution."[130] Additionally, multiple Federal Rules of Criminal Procedure use the

120. *See In re Wild*, 955 F.3d at 1212.
121. *See id.*
122. *See id.*
123. *Id.* at 1213.
124. *See id.*
125. *See id.* at 1212 n.18.
126. *See id.* at 1205.
127. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.2(g), at 10 (5th ed. 2009).
128. *See In re Wild*, 955 F.3d at 1213.
129. *See, e.g.*, LAFAVE ET AL., *supra* note 127, at 11.
130. *See id.*

term "prosecution" in this way.[131] For example, under Rule 20(a) of the Federal Rules of Criminal Procedure, "a prosecution" may be transferred from the judicial district "from which a warrant on a complaint has been issued."[132] Under Rule 20(c), if the transfer on a complaint ultimately leads to a not guilty plea, then the "clerk must return the papers to the court where the prosecution began . . . ."[133] As these sources illustrate, the common-sense meaning of the term "prosecution" is that, when the Government has filed a sworn complaint—i.e., a "written statement of the essential facts constituting the offense charged,"—a "prosecution" has begun.[134] Before then, no prosecution is "underway," and under the CVRA's venue provision, victims assert their CVRA rights in the district where the crime was committed.[135]

Rather than adopting this uncomplicated reading of the statute, the panel resorted to a different body of law, citing various cases regarding when the Sixth Amendment right to counsel attaches.[136] These constitutional rulings hold that, in the context of the Sixth Amendment, no right to counsel attaches until the defendant physically appears in Court—and thus no "prosecution" begins until that time.[137] However, the panel's cited caselaw is inapposite on this issue. First, Congress enacted the CVRA in 2004.[138] The panel's caselaw is all post-CVRA enactment and directly conflicts with substantial pre-enactment Court of Appeals authority, which holds that the filing of a complaint *is* sufficient to trigger the Sixth Amendment's right to counsel.[139] Second, as the dissent pointed out, it is unclear why the panel believed that the time frame for the attachment of the right to counsel under the Sixth Amendment is dispositive for determining when a "prosecution" typically begins.[140]

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131. *See* FED. R. CRIM. P. 20(a), (c); *see also id.* at 58(b), (c).

132. *Id.* at 20(a) (emphasis added).

133. *See id.* at 20(c) (emphasis added).

134. *See id.* at 3.

135. *See* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260.

136. *See In re Wild*, 955 F.3d 1196, 1212 (11th Cir. 2020).

137. *See id*. at 1212 (citing United States v. Alvarado, 440 F.3d 191, 199–200 (4th Cir. 2006); United States v. States, 652 F.3d 734, 741–42 (7th Cir. 2011); United States v. Boskic, 545 F.3d 69, 82–84 (1st Cir. 2008); Rothgery v. Gillespie Cnty., 554 U.S. 191, 199 (2008)).

138. 118 Stat. at 2260.

139. *See, e.g.*, Manning v. Bowersox, 310 F.3d 571, 575 (8th Cir. 2002); Smith v. Lockhart, 923 F.2d 1314, 1318 (8th Cir. 1991); Hanrahan v. United States, 348 F.2d 363, 366 n.6 (D.C. Cir. 1965).

140. *See In re Wild*, 955 F.3d at 1238 n.17. (Hull, J., dissenting).

In fact, if the panel had looked to the caselaw for the attachment of the right to a speedy trial under the Sixth Amendment, then it would have found that a "prosecution" begins "as early as the time of arrest and holding to answer a criminal charge."[141]

Moreover, the panel's interpretation of when no "prosecution is underway" gives a decidedly technical interpretation of the CVRA, counterintuitively construing it as employing "legal term[s] of art."[142] A reading that employs the common meaning of the CVRA's language makes more sense, as most crime victims, unlike criminal defendants, will lack legal counsel to help them navigate the criminal justice process.[143] Thus, when unrepresented crime victims are reading the venue provision in the CVRA to determine where to assert their rights, they should not be expected to have mastered a subtext of Sixth Amendment right-attachment jurisprudence upon which the panel's strained reading necessarily relies.

After the panel gave its first interpretation of the venue provision as applying during the very first hours after the filing of a criminal complaint, without any sense of apparent irony the panel offered an alternative interpretation—that clause might also be read to somehow refer not to the very beginning of the process, but to its very end.[144] The panel's puzzling interpretation of the clause reasoned that the no-prosecution-underway language might refer to the time "period *after* a 'prosecution' has run its course and resulted in a final judgment of conviction."[145] The dissent correctly pointed out that the panel's alternative interpretation "does not comport with how the word 'underway' is ordinarily or commonly understood."[146] Indeed, "[i]t is a stretch to say that when something is not 'underway,' it is commonly or ordinarily understood to mean that the something is completed."[147]

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141. *See id.* (citing United States v. Gouveia, 467 U.S. 180, 190 (1984)).

142. *See id.* at 1212 (quoting *Prosecution*, *WEBSTER'S NEW INTERNATIONAL DICTIONARY* (2d ed. 1944) (defining "prosecution" as "[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")).

143. *See* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 77 (2015).

144. *See In re Wild*, 955 F.3d at 1213.

145. *See id.*

146. *See id.* at 1238 (Hull, J., dissenting) (reasoning that "[i]n everyday parlance, if 'a process, project [or] activity' is not 'underway,' we generally understand that to mean it has not yet begun").

147. *Id.*

This alternative reading is also curious because, if a *final* judgment exists, then it is hard to understand how any victims' rights could still be at stake. But in an attempt to defend its reading, the panel noted that the CVRA permits a victim to "re-open a plea or sentence."[148] Then, recognizing a problem, the panel immediately dropped a footnote, conceding 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."[149] Not "perfectly seamless" indeed! For example, under the panel's reading, the CVRA could require a victim to file a post-judgment motion to reopen a defendant's criminal sentence in a court that lacks any jurisdiction to do so. It is unclear why the panel prefers this fallback reading of the no-prosecution-underway clause over the dissent's "seamless" reading, especially after recognizing the plausibility of the dissent's interpretation.

One last point is that in the sentence immediately following the venue provision, the CVRA refers to the district court taking up and deciding "any *motion* asserting a victim's right forthwith."[150] It might be argued that this reference to a "motion" presumes a preexisting criminal case in which the victim could make a filing. But such a reading would be inconsistent with another provision of the Federal Rules of Criminal Procedure, which use the term "motion" in connection with court filings before the initiation of a criminal prosecution.[151] Rule 41 of the Federal Rules of Criminal Procedure—"Search and Seizure"—provides the federal rules regulating searches during investigations, under which third parties may file "motions" to enforce their rights even before a prosecution is initiated.[152] Rule 41(g) provides:

> Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may *move* for the property's return. *The motion* must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide *the motion*. If it grants *the motion*, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.[153]

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148. *See id.* at 1213 (majority opinion) (citing 18 U.S.C. § 3771(d)(5)).
149. *Id.* at 1213 n.19.
150. 18 U.S.C. § 3771(d)(3) (emphasis added).
151. *Compare id.*, *with* Fed. R. Crim. P. 41(g).
152. *See* Fed. R. Crim. P. 41(g).
153. *Id.* (emphases added).

Under this rule, a "motion" for return of property may be filed against the United States "in the district where the property was seized," a motion which is then litigated separately from any prosecution—as a separate enforcement action.[154] If the United States refuses to stipulate to the facts about the warrant's execution and how the property was taken, discovery might be required. And, of course, third parties who are not defendants (or suspected defendants) in any criminal case can take advantage of this rule and file "a motion" regarding the government's actions in a criminal investigation. By analogy, the term "motion" in the CVRA similarly encompasses, among other things, a crime victim's CVRA motion to enforce the victim's rights before the formal filing of criminal charges.

In sum, the panel's interpretation of the CVRA does not give the statutory language its most straightforward reading. Perhaps recognizing the problems with its textual approach, the panel also relied on policy arguments against giving the statute its most natural interpretation. We turn to these policy arguments in the next Part.

III. Reading the CVRA as Extending Some Pre-Charging Rights Does Not Unduly Burden Law Enforcement

In an attempt to support its strained reading of the CVRA, the panel argued that adopting the victims' interpretation would burden law enforcement.[155] In the panel's view, if the CVRA applies before charges are filed, then there would be "no logical stopping point"—and the Government would be required to consult with victims "before raids, warrant applications, arrests, witness interviews, lineups, and interrogations."[156] This Part responds to the panel's far-fetched, slippery slope argument. In fact, as experience demonstrates, applying CVRA rights pre-charge will not interfere with criminal investigations.

A. CVRA Rights Can Apply Before Charging Without Interfering with the Proper Functioning of the Criminal Justice System

The panel reasoned that reading the CVRA as applying before charges are filed would "open[] the floodgates" to the possibility of prosecutors being required to confer with victims "before law-

154. *See id.*
155. *See In re* Wild, 955 F.3d 1196, 1218 n.24 (11th Cir. 2020).
156. *See id.* at 1218, 1220.

enforcement officers conduct a raid, seek a warrant, or conduct an investigation."[157] While the victims had suggested that the CVRA rights would only attach once the investigation had matured to a certain point, the panel rejected such a logical approach by reasoning that it "has no basis in the CVRA's text."[158] As the panel saw things, if CVRA rights were to "apply during the 'detection' and 'investigation' of [a] 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."[159] Concluding that the victims' reading extending rights before charging "provides no logical stopping point," the panel held that "the CVRA's text is best read as applying only after the commencement of criminal proceedings, whether by complaint, information, or indictment."[160]

The panel's argument about untoward consequences is unconvincing. The CVRA's right to confer is, in fact, limited to the "*reasonable* right to confer."[161] The panel recognized that reasonableness limitation, but held that it was a "squishy" limitation that could be overlooked to "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."[162] The panel refused to "assume that Congress intended such a jarring result."[163]

It is unclear why the panel did not simply conclude that a "jarring result" would be an "unreasonable" result—i.e., something that the CVRA did not require. Judge Hull's dissent quite properly focused on this contradiction.[164] She explained that "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 [m]ajority's speculations about 'enterprising' crime victims and 'innovative' judges" applying the CVRA to inappropriate circumstances.[165] Presumably, the reasonableness limitation to the CVRA's right to confer explains why the panel's conjectured problems have never

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157. *Id.* at 1213.

158. *See id.*

159. *Id.* at 1211.

160. *Id.* at 1213.

161. *See* 18 U.S.C. § 3771(a)(5) (emphasis added) (giving victims "the *reasonable* right to confer with the attorney for the Government in the case").

162. *In re Wild*, 955 F.3d at 1211.

163. *Id.*

164. *See id.* at 1245 (Hull, J., dissenting) (focusing on the power of the victim's "*reasonable* right to confer").

165. *Id.*

occurred anywhere in the country, even though, as discussed below, the CVRA has been applied pre-charging by other courts—such as the Fifth Circuit.[166]

The panel opinion's recurring concern was that applying the CVRA pre-charging, while "not implausible" as a matter of text, somehow produced a result that the panel disagreed with—i.e., a requirement that law enforcement officials will too often be forced to "reasonably" confer with crime victims before charges are filed.[167] As an empirical matter, the panel's concerns are overblown, as we discuss in the next Section.[168] But as a jurisprudential matter, the panel opinion is curious. The Eleventh Circuit has repeatedly endorsed a textual approach to statutory construction, holding that when the statutory "language at issue has a plain and unambiguous meaning," the court "need go no further."[169] Judge Hull put the point incisively, observing that "[g]iven this is a plain-text case, the [m]ajority curiously carries on at length about slippery slopes and bad policy implications . . . ."[170]

Ultimately, it is for Congress to decide what kinds of rights crime victims deserve at various points in the federal criminal justice process.[171] It is hard to comprehend how the panel concluded that Congress did not intend to cover cases such as the Epstein case, especially given that the panel "regret[ed]" its ruling and that it seemed "obvious" that prosecutors should have conferred with Epstein's victims.[172] Instead of adopting a less "regrettable" reading of the CVRA, the panel essentially determined that Congress drafted the Act—a broad bill of rights for crime victims—in a way that could be easily circumvented by prosecutors through "negotiating 'secret' plea and non-prosecution agreements . . . before instituting criminal proceedings."[173] Surely a more desirable reading of the Act is one that blocks such deceitful maneuvers.

The panel did not doubt that avoiding secret plea deals was desirable, but eschewed reading the CVRA this way based on a prediction that applying the act pre-charging would produce

166. *See infra* Section III.B.
167. *See In re Wild*, 955 F.3d at 1212.
168. *See infra* Section III.B.
169. *See, e.g.*, United States v. St. Amour, 886 F.3d 1009, 1013 (11th Cir. 2018).
170. *See In re Wild*, 955 F.3d at 1226 (Hull, J., dissenting).
171. *See id.* at 1237.
172. *See id.* at 1221 (majority opinion).
173. *See id.*

intractable administrative problems.[174] However, the panel's sky-will-fall prediction is belied by the Justice Department's demonstrated ability to provide pre-charging rights to victims—including during the Epstein case that was before the Court![175] For example, the Justice Department had no difficulty determining that, as of 2006, when an "attorney for the Government in the case" was actively negotiating with Epstein's defense team, the case had matured to the point that Epstein's victims possessed CVRA rights.[176] Indeed, the Government's lead prosecutor mailed more than thirty Epstein victims "*standard* CVRA victim notification letters" telling Ms. Wild and other victims that, "as a victim . . . of a federal offense you have a number of [CVRA] rights."[177] Thereafter, the Government sent notices about the progress of the case to Epstein's victims—although the candor of those notices was dubious.[178] Thus, the Government itself initially took the position that the victims 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 [their] CVRA rights were being violated"—which belies the idea that extending rights before charges would be impractical.[179] Indeed, as Judge Hull explained, "[t]his initial position of the U.S. Attorney's Office . . . is not surprising," because "[t]he [CVRA] was enacted to make crime victims full participants in the criminal justice system."[180]

Additionally, in 2011, the District Court read the CVRA the same way that the U.S. Attorney's Office had previously—that is, that the CVRA applied before charges were filed.[181] And the sky did not fall in the Southern District of Florida for the more than eight years since the ruling. If the panel's concerns had materialized, surely it would have been possible to find a concrete example to illustrate the point during the many hundreds of federal criminal prosecutions that moved forward in that court.

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174. *See id.* at 1220.

175. *See* Doe 1 v. United States, 359 F. Supp. 3d 1201, 1205 (S.D. Fla. 2019).

176. *See* 18 U.S.C. § 3771(a)(5) (2018); *see also Doe 1*, 359 F. Supp. 3d at 1205.

177. *See Doe 1*, 359 F. Supp. 3d at 1208 (emphasis added). *See generally* Petition for Rehearing En Banc, *In re* Wild, 955 F.3d 1196 (11th Cir. 2020) (No. 19-13843).

178. *See supra* note 40 and accompanying text.

179. *In re Wild*, 955 F.3d at 1227 (Hull, J., dissenting).

180. *Id*. (quoting Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006)).

181. *See* Does v. United States, 817 F. Supp. 2d 1337, 1341 (S.D. Fla. 2011).

In its briefing before the Eleventh Circuit, the Justice Department did not argue—much less provide evidence—that it would be unduly burdened by affording pre-charging rights to victims.[182] Its silence on this point is likely because federal agencies have long been required to provide victims' rights before charging.[183] Well before it enacted the CVRA in 2004, Congress enacted the Victims' Rights and Restitution Act of 1990 (VRRA).[184] In that statute, Congress mandated that all federal agencies engaged in "the detection, investigation, or prosecution of crime" must "[i]dentify the victim or victims of a crime" at "the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation . . . ."[185] The VRRA further requires federal agencies to provide the identified victims with "the earliest possible notice of . . . the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation."[186] In light of these provisions, the Justice Department's investigative agencies have long "provide[d] [service referrals, reasonable protection, and notice concerning the status of the investigation] to thousands of victims every year, whether or not the investigation results in a federal prosecution."[187] Thus, when Congress was crafting the CVRA in 2004, it presumably understood that the Justice Department was already providing pre-charging notifications to crime victims because of the VRRA's requirements.

Additionally, in 2015, Congress added a new right to the CVRA that indisputably applies pre-charging—specifically, "the right to be informed of . . . the services described in [the VRRA]."[188] This 2015 amendment confirms that Congress understood the CVRA as applying pre-charging, because the amendment requires notice to victims about VRRA "services" provided well before charges are filed.[189] For example, the VRRA states that rape victims should be provided with notice of medical services available to them.[190] But victims seeking to

182. *See generally* En Banc Brief of the United States of America in Response to Petition for Writ of Mandamus Under the Crime Victims' Rights Act, *In re* Wild, 955 F.3d 1196 (11th Cir. 2020) (No. 19-13843-Q).

183. *See* 42 U.S.C. § 10606 (currently codified as 34 U.S.C. § 20141).

184. *See id.*

185. *Id.*

186. *See* 34 U.S.C. § 20141(c)(3) (2018).

187. *See* Letter from Ronald Weich, Assistant Att'y Gen., to Jon Kyl, U.S. Sen. (Nov. 3, 2011) (on file with author).

188. *See* 18 U.S.C. § 3771(a)(10).

189. *See In re* Wild, 955 F.3d 1196, 1214–15 (11th Cir. 2020).

190. *See id*. at 1214.

enforce their (2015) CVRA right to notice about VRRA services must rely on the CVRA's pre-existing (2004) enforcement mechanisms—including the venue provision discussed in Part II of this Article.[191] The fact that, in 2015, Congress added a right that undeniably applies before charges are formally filed—and simply relied on the existing (2004) venue provision—confirms that Congress thought that it already enacted a statute that applied before formal charging.[192] Put another way, given that Congress thought it could "plug-and-play" a new CVRA provision providing notice about certain pre-charging services into the then-existing CVRA enforcement mechanisms, those mechanisms must have already applied pre-charging. And the broader point remains: The Justice Department has been able to provide victims' rights before the filing of criminal charges without any demonstrated administrative problems.[193]

B. The Fifth Circuit's Long-Standing Application of the CVRA Before Charging Refutes the Eleventh Circuit Panel's Policy Concerns About Pre-Charging Rights

If the panel was correct that applying the CVRA pre-charging application would produce a parade of horribles, then those horribles should have already materialized in the Fifth Circuit.[194] That Circuit—large and populous and adjacent to the Eleventh Circuit—has long applied the CVRA before formal charges are filed without any reported problems.[195]

In 2008, the Fifth Circuit decided *In re Dean.*[196] That case arose out of a federal criminal investigation for an explosion at a refinery operated by BP Products North America (BP), which killed fifteen and

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191. *See* 18 U.S.C. § 3771(d)(3).

192. *See* Does v. United States, 817 F. Supp. 2d 1337, 1342–43 (S.D. Fla. 2011).

193. *See* 18 U.S.C. § 3771(c)(1).

194. They should also have occurred in some states, where victims' rights attach before the formal filing of criminal cases. *See* Paul G. Cassell et al., *Crime Victims' Rights During Criminal Investigations? Apply the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 98–103 (2014).

195. *See id.* at 73.

196. *See In re* Dean, 527 F.3d 391, 396 (5th Cir. 2008). In the interest of full disclosure, one of the authors (Cassell) served as counsel for the crime victims in the case.

injured more than 170 people.[197] Suspecting that the explosion may have been due to BP's corporate malfeasance, the Justice Department investigated possible federal criminal violations.[198] As the case progressed, the federal prosecutors entered into plea negotiations with BP.[199] But, as in the Epstein case, the defense attorneys for BP pushed the government to keep its negotiations secret.[200] So, the federal prosecutors asked for a court order relieving the government of any obligation to consult with the victims until after the plea was final.[201] The district court believed that "any public notification of a potential criminal disposition resulting from the government's investigation [of the] explosion would prejudice [BP] and could impair the plea negotiation process and may prejudice the case in the event that no plea is reached."[202]

After a plea deal was signed and agreed to between the federal prosecutors and BP, it was unsealed, and victims of the explosion sought to have the agreement set aside.[203] Unsuccessful in the district court, the victims sought to have the agreement set aside by the Fifth Circuit.[204] Relying on the CVRA, the Fifth Circuit rejected the district court's decision to keep a plea deal secret from victims until after it was filed.[205] The Fifth Circuit explained that "[i]n passing the [CVRA], Congress made the policy decision—which we are bound to enforce—that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached."[206] The Circuit remanded the case back to the district court for further proceedings to give the victims an opportunity to object to the arrangement.[207]

The *Dean* holding created a problem for the Eleventh Circuit panel majority. As a result of that 2008 decision, Fifth Circuit precedent has extended to victims' CVRA rights before charges were filed for more than a decade. Given that the Circuit has handled well over one hundred thousand criminal cases during that time, why have

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197. *See* United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321, at *1 (S.D. Tex. Feb. 21, 2008).
198. *See id.*
199. *See id.*
200. *See id.* at *1–2.
201. *See id.* at *1.
202. *See In re* Dean, 527 F.3d 391, 393 (5th Cir. 2008).
203. *See BP Prods. N. Am. Inc.*, 2008 WL 501321, at *5–6.
204. *See In re Dean*, 527 F.3d at 393.
205. *See id.*
206. *Id*. at 395.
207. *See id.* at 396.

no reports emerged of the kinds of problems that the panel prophesized in the Epstein case?[208] Indeed, the Administrative Office of U.S. Courts (AO) keeps track of the number of reported CVRA cases in which a request for relief is denied. This data makes it possible to determine whether the Fifth Circuit, in particular, has been burdened with CVRA claims. During fiscal year 2017 (the most recent year for which data are available), the AO reported that only four mandamus actions were brought under the provisions of the CVRA, and six district court cases denied requested CVRA relief.[209] Only one of these cases (a district court case) was within the Fifth Circuit, and that case did not involve the CVRA's pre-charging application.[210]

The panel attempted to bury the inconvenient fact that the Fifth Circuit has long been doing what the panel argued was essentially impossible.[211] The panel majority relegated its discussion of *Dean* to a footnote and then gave several unpersuasive reasons for splitting from the *Dean* holding.[212] For example, the panel characterized the Fifth Circuit ruling as "technically dictum" because the Fifth Circuit ultimately denied the mandamus petition asking for the plea to be set aside and simply remanded to the district court.[213] But to achieve that result, the Fifth Circuit had initially *granted* the victims' petition, blocking any further district court consideration of the BP plea agreement until the Fifth Circuit could finally rule.[214] And then, when the Circuit finally released its published opinion, it stated in the opinion's opening paragraph that "[w]e *find a statutory violation* [of the CVRA]."[215] The penultimate sentence in the Fifth Circuit's decision also instructed that, on remand, "the district court will *take heed that the victims have not been accorded their full rights under the CVRA* . . . ."[216] The Eleventh Circuit panel's footnote appears to be the first time, in the more than a decade since the Fifth Circuit handed

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208. *See* U.S. SENTENCING COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 35 tbl. 1 (2019) (reporting 21,369 federal offenders in the Fifth Circuit in fiscal year 2019 alone).

209. *See* Letter from James C. Duff, Dir., Admin. Off. for U.S. Cts., to Mike Pence, Vice President 1 (Dec. 28, 2018) (on file with author).

210. *See id.*

211. *See In re* Wild, 955 F.3d 1196, 1219 n.25 (11th Cir. 2020).

212. *See id.*

213. *See id.*

214. *See In re* Dean, 527 F.3d 391, 393 (5th Cir. 2008).

215. *Id.* at 392 (emphasis added).

216. *Id.* at 396 (emphasis added).

down its decision, that any court or legal scholar has called the Fifth Circuit decision dictum.[217]

The panel also gave as a reason for declining to follow *Dean* that the parties there "didn't even dispute whether the CVRA applies before the commencement of criminal proceedings," and accordingly, the question "was never subject to adversarial testing."[218] But in raising this narrow jurisprudential point, the panel missed the larger point: The CVRA covered pre-charging plea negotiations was so obvious to the parties in that case—including the Justice Department—that no one even thought to contest it. Presumably the reason that Justice Department lawyers were not challenging the issue was that they have long been applying the CVRA before charging without difficulty.

If the Eleventh Circuit panel decision is reinstated en banc, the circuit split with the Fifth Circuit will create undesirable "forum shopping."[219] For example, whether prosecutors must confer about NPAs is a recurring issue, particularly in complicated and important criminal investigations.[220] In fact, in the context of resolving the investigation of corporate crimes, deferred and NPAs are the "standard method."[221] Thus, under the Eleventh Circuit panel's ruling, multistate businesses could try and negotiate secret NPAs in the Eleventh Circuit that would be impossible in other circuits.[222] In other words, before charges are filed, the Eleventh Circuit would become a safe haven for circumventing the CVRA.

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217. We recently used Westlaw to run a search, which identified 150 "citing references" to *In re Dean*. Using Westlaw's "search within results" feature, we were unable to identify a single reference to "dicta" or "dictum" in connection with the *In re Dean* decision—other than the panel's opinion. *See In re Wild*, 955 F.3d at 1219 n.25.

218. *See id.*

219. *See Forum Shopping*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/forum_shopping [https://perma.cc/M2TU-CAVC] (last visited Feb. 1, 2021) (defining forum shopping as "[w]hen multiple courts have concurrent jurisdiction over a plaintiff's claims, the plaintiff may *forum shop*, or choose the court that will treat his or her claims most favorably").

220. *See* Peter J. Henning, *Dealing with Corporate Misconduct*, 66 FLA. L. REV. F. 20, 20 (2015).

221. *See* id.

222. *See In re Wild*, 955 F.3d at 1219.

IV. Moving Beyond the Epstein Litigation to Protect Crime Victims During Investigations

This Part discusses how Congress could amend he CVRA to improve protections for crime victims during criminal investigations.

A. Addressing Secret Non-Prosecution Agreements

For all the reasons discussed above, the Eleventh Circuit's divided panel decision allowing secret NPAs contradicts both the CVRA's plain language and important public policy considerations. Now that the case has been set for rehearing en banc, the full Eleventh Circuit should reject the panel decision and instead give a full-throated endorsement of the CVRA pre-charging coverage—for all the reasons articulated in this Article.

But regardless of how this particular case ultimately plays out before the Circuit (or potentially the Supreme Court), the CVRA's protections for crime victims need to be clearly established.[223] Even the panel decision appeared to recognize that further congressional action would be useful on this issue.[224] In calling its own decision "regret[table]," the panel noted that it was simply interpreting the CVRA in light of how "matters currently stand—which is to say at least as the CVRA is currently written . . . ."[225] The panel concluded that it was constrained to leave the victims "emptyhanded," and it was up to Congress to "amend the Act to make its intent clear."[226] In fact, the panel noted that its decision would allow prosecutors to enter secret pleas and NPAs "without ever notifying or conferring with victims . . . ."[227] The panel was unhappy with this conclusion, admitting that in "the wake of the public outcry over federal prosecutors' handling of the Epstein case," "[w]e can only hope" that prosecutors will not strike secret plea deals in the future.[228]

The dissent, while vehemently disagreeing with whether further congressional action was required to give victims pre-charging rights,

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223. If the Eleventh Circuit were to adhere to the earlier panel position in ruling on the case en banc, the result would be a clear circuit split with the Fifth Circuit. *See supra* notes 196–222 and accompanying text. Such a circuit split might well prompt Supreme Court review. *See* SUP. CT. R. 10(a) (noting circuit split as one of the compelling reasons for granting a writ of certiorari).

224. *See In re Wild*, 955 F.3d at 1198, 1205.

225. *Id.*

226. *Id.* at 1205, 1221.

227. *See id.* at 1221.

228. *Id.* (emphasis omitted).

powerfully explained that the panel's decision rendered the CVRA "impotent" in important situations and had the effect of "revis[ing] the statute's plain text and gut[ting] victims' rights under the CVRA."[229] The dissent, too, seemed to invite congressional action.[230] The dissent put the point plainly, concluding that "[o]ur criminal justice system should safeguard children from sexual exploitation by criminal predators, not re-victimize them."[231] Presumably, the dissent was recognizing that child sex trafficking victims in other cases might not be able to secure pro bono attorneys to pursue more than twelve years of litigation to litigate and protect their rights—which is what the attorneys for Courtney Wild and other Epstein victims have had to undertake.[232]

One way of addressing the need to protect victims before charges are filed is set out in proposed legislation currently pending before Congress.[233] In 2019, Representative Jackie Speier and a bipartisan group of other members of Congress introduced a bill that would ensure that no other courts would reach the strained conclusion of the Eleventh Circuit panel majority.[234] The legislation is entitled the "Courtney Wild Crime Victims' Rights Reform Act of 2019" (CVRRA),[235] recognizing the important role that Courtney Wild—the lead victim in the Eleventh Circuit's *In re Wild* case—has played in trying to hold Jeffrey Epstein accountable.[236] As Representative Speier explained, her bill was named for Courtney Wild, who survived sexual abuse by Epstein and then

> courageously led the way in asserting the rights of the scores of victims who fell prey to Jeffrey Epstein in Florida and were kept in the dark as federal prosecutors hashed out a secret and shockingly lenient plea deal. Courtney Wild fought in court for over 10 years before a Federal District Court finally

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229. *See id.* at 1225, 1250 (Hull, J., dissenting).

230. *See id.* at 1250.

231. *Id.* at 1249–50.

232. *See id.* at 1234.

233. *See generally* Courtney Wild Crime Victims' Rights Reform Act of 2019, H.R. 4729, 116th Cong. (1st Sess. 2019).

234. *See generally id.*

235. *See generally id.*

236. *See generally* Kate Sheehy, *Jeffrey Epstein Accuser: I Was 14 Years Old and Still in Braces When Abuse Began*, N.Y. Post (July 8, 2019), https://nypost.com/2019/07/08/jeffrey-epstein-accuser-i-was-14-years-old-and-still-in-braces-when-abuse-began/ [https://perma.cc/3B49-2XR6]; *see also* BRADLEY J. EDWARDS, RELENTLESS PURSUIT 24–40 (2020) (discussing Ms. Wild's efforts to obtain a prosecution of Epstein); JEFFREY EPSTEIN: FILTHY RICH (Netflix 2020) (depicting Ms. Wild discussing her sexual abuse and later efforts to bring Epstein to justice).

> declared that her rights, and the rights of other victims of the serial sexual predator, under the Crime Victims' Rights Act . . . were violated.[237]

The CVRRA contains several important provisions that would help ensure that crime victims like Ms. Wild never again have to face arguments like those advanced by federal prosecutors in the Epstein case.[238] Of particular importance for this Article, the legislation would add language that would specifically supersede the Eleventh Circuit panel's perverse ruling.[239] While the panel held that victims had the right to confer with prosecutors only after charges had been filed, the CVRRA would make clear—through clarifying legislation—that crime victims have the reasonable right to confer about a disposition of specific charges before those charges are filed.[240] The CVRRA would extend a right to victim to confer not only about "the case," but also "any plea bargain or other resolution of the case *before such plea bargain or resolution is presented to the court or otherwise finalized*."[241] Thus, if approved, the CVRRA would add specific language delineating that victims possess pre-charging rights when criminal case resolutions are being negotiated, "[c]larify[ing] that

237. *See* Press Release, Jackie Speier, Rep. Speier Introduces Bipartisan Courtney Wild Crime Victims' Rts. Reform Act of 2019 to Rectify Injustices Faced by Epstein's Victims (Oct. 17, 2019), https://speier.house.gov/2019/10/rep-speier-introduces-bipartisan-courtney-wild-crime-victims-rights-reform-act-of-2019-to-rectify-injustices-faced-by-epstein-s-victims [https://perma.cc/33EG-BJU3].

238. *See id.*

239. *See id.*

240. Representative Speier's legislation is designed not to expand existing law, but to clarify existing law. *See id.* This point is important because, in a truly ironic twist, the federal prosecutors defending the Epstein NPA before Eleventh Circuit cited her legislation, designed to prevent any recurrence of violations of victims' rights, as reason for denying the victims any relief. *See* En Banc Brief of the United States of America in Response to Petition for Writ of Mandamus under the Crime Victims' Rights Act, *supra* note 182, at 43. Precisely to avoid such a misreading of congressional intent, Representative Spier's press release accompanying the proposed legislation explicitly stated that the bill was designed to "clarify" what was already contained in existing law. *See* Press Release, *supra* note 237. Indeed, the Government's argument was so misleading that Representative Spier wrote to the Attorney General to explain that she was "displeased that [her] legislation and accompanying press release were misinterpreted, and [she] trust[s] that [the Attorney General] will direct. . . prosecutors to correct with the Eleventh Circuit their erroneous description of the proposed legislation." *See* Letter from Jackie Speier, Rep., to William Barr, Att'y Gen. (Nov. 21, 2019). The Government never took any corrective action, as Representative Speier had requested. *See generally* Courtney Wild Crime Victims' Rights Reform Act of 2019, H.R. 4729, 116th Cong. (1st Sess. 2019).

241. H.R. 4729, § 2(1)(A) (amending 18 U.S.C. § 3771(a)(5)) (emphasis added).

victims of federal crimes have the right to confer with the Government and be informed about key pre-charging developments in a case, such as plea bargains, non-prosecution agreements, and referrals to state and local law enforcement."[242]

The CVRRA also expands language in the 2015 amendment to the CVRA, providing that victims must receive timely notice not only of a "plea bargain" or "deferred prosecution agreement," but also of any "non[-]prosecution agreement, or the referral of a criminal investigation to another Federal, State, or local law enforcement entity."[243] This language would also prevent prosecutors from ever again reaching the kind of secret NPA that they reached in the Epstein case.[244]

The CVRRA also contains a provision that would simplify litigation regarding crime victims' rights compliance.[245] The CVRRA provides that if a dispute arises about CVRA compliance, then the Justice Department "shall promptly provide to the victim and, if requested, to the court reviewing the issue all relevant information and documents concerning the circumstances . . . ."[246] This provision would respond to the remarkable fact that between filing their action to enforce the CVRA and their motion for summary judgment, Epstein's victims spent more than seven years(!) in litigation that produced hundreds of docket entries.[247] Those years were spent attempting to pry information from the government about what had happened leading up to the secret NPA with Epstein.[248] Just as prosecutors have long been required to provide all exculpatory

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242. Press Release, *supra* note 237.

243. H.R. 4729, § 2(1)(B) (amending 18 U.S.C. § 3771(a)(9)).

244. While prosecutors would be forbidden from reaching deals that are secret from victims, the CVRRA contains a provision that, upon a showing of good cause, victims could be required to maintain "the confidentiality of any nonpublic information disclosed to the victim." *See id.* This provision could be invoked in the rare case where needs related to ongoing investigation might require some form of confidentiality. *See id.*

245. *See* Press Release, *supra* note 237.

246. *See* H.R. 4729, § 2(2).

247. *See* Victim's Petition for Enforcement of Crime Victims' Rights Act, 18 U.S.C. Section 3771 at 1, Does v. U.S., No. 9:08-cv-80736 (S.D. Fla. July 7, 2008); Jane Doe 1 and Jane Doe 2's Consolidated Statement of Undisputed Material Facts and Motion for Partial Summary Judgment with Incorporated Memorandum of Law at 1, *Does*, No. 9:08-cv-80736 (Feb. 10, 2016).

248. *See, e.g.*, Jane Doe #1 and Jane Doe #2's Motion for Order Directing the U.S. Attorney's Office Not to Withhold Relevant Evidence at 3–5, *Does*, No. 9:08-cv-80736 (March 21, 2011) (describing government refusal to providing correspondence and other information about the case).

information to criminal defendants, the prosecutors should likewise be required to rapidly provide to victims information about the circumstances surrounding a possible violation of crime victims' rights.[249]

B. Extending Rights During the Investigative Process

The changes discussed above would effectively address one of the key problems in the Epstein case: secret NPAs.[250] But addressing such secret case resolutions is a manifestation of a larger problem; namely, how to ensure that crime victims are treated fairly during criminal investigations.[251] In an article six years ago, two of us (Cassell and Edwards) suggested that the CVRA rights could be properly interpreted as extending victim rights before charges are filed when a federal criminal case has crystalized to a point where identifiable victims exist.[252] We formulated our proposed interpretation 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.[253]

In defense of this interpretation, we suggested that this formulation would borrow from the CVRA's "coverage" provision and would provide a workable approach to determining when a case had progressed to the point where crime victims' rights could reasonably attach.[254]

The panel decision specifically discussed this interpretation in its decision, explaining that "Professor Cassell's proposal reads like a finely-tuned statutory provision—but one that, unfortunately, Congress never enacted."[255] For reasons discussed throughout this Article, we disagree that the CVRA does not currently extend pre-charging rights to victims. But, of course, Congress could respond to the Eleventh Circuit's narrow—and self-described "unfortunate"—

249. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).
250. *See* H.R. 4729, § 2(1)(B).
251. *See* Press Release, *supra* note 237.
252. *See* Cassell et al., *supra* note 194, at 92.
253. *See id.*
254. *See supra* notes 110–115 and accompanying text.
255. *In re* Wild, 955 F.3d 1196, 1211 n.16 (11th Cir. 2020).

reading of the CVRA by adopting a "finely-tuned statutory provision" along these lines.

As explained earlier in this Article, adding such language into the CVRA would not create any noticeable problems for federal law enforcement agencies.[256] Indeed, under the VRRA, federal law enforcement agencies have been obligated ever since 1990 to provide identified victims with "the earliest possible notice of . . . the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation."[257] Federal law enforcement agencies are thus already well versed in responding to the concerns of crime victims during criminal investigations.

The effect of extending CVRA rights into the investigative process is limited but important. The most far-reaching substantive right that victims would gain during the investigation would be the "right to be treated with fairness and with respect for the victim's dignity and privacy."[258] But while that right is far-reaching, affording victims this right should not require any changes to existing law enforcement practices. Hopefully, federal agencies are already treating victims fairly and respectfully and providing a right to such treatment would simply reinforce and guarantee what should be an existing practice.

Since 2015, victims have also had a right under the CVRA "to be informed of the rights under this section and the services described in [the VRRA] . . . ."[259] This provision provides pre-charging notice to crime victims about such services as the medical treatment available to rape victims.[260] Clearly this previously established right has been—and can continue to be—afforded to victims before charges are filed. Indeed, the Justice Department is already providing such notices "to thousands of victims every year, whether or not the investigation results in a federal prosecution."[261]

256. *See supra* notes 194–221 and accompanying text.

257. 34 U.S.C. § 20141(c)(3).

258. *See* 18 U.S.C. § 3771(a)(8). *See generally* Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 126–28 (discussing the way in which fairness and dignity provisions for crime victims have been interpreted).

259. 18 U.S.C. § 3771(a)(10). A discussion of the statute can be found at *supra* notes 188–191 and accompanying text.

260. *See* 34 U.S.C. § 20141(c).

261. *See* Letter, *supra* note 187.

And finally, extending rights before charging would give victims the "right to be reasonably protected from the accused."[262] This right can be particularly important for victims of violent crimes, who may face retaliation by those who have victimized them because they are cooperating with law enforcement. Extending a right of protection for such victims can be literally a life-or-death matter.[263] Waiting for the filing of charges before giving crime victims reasonable protection is waiting too long.[264]

Reading the CVRA as generally extending rights before charging would not be an innovation, but rather a reaffirmation of the original vision of the CVRA's drafters. In 2005, the year after the CVRA's enactment, Senator Kyl wrote a law review article about the law that he had successfully co-sponsored.[265] In his article, Senator Kyl explained that the CVRA applies before charges are filed:

> While most of the rights guaranteed by the CVRA apply in the context of legal proceedings following arrest and charging, other important rights are triggered by the harm inflicted by the crime itself. For example, the right to be treated with fairness, the right to be reasonably protected from the accused (who may qualify as the accused before his arrest), and the right to be treated with respect for the victim's dignity and privacy each may arise without regard to the existence of legal proceedings.[266]

In 2005, Senator Kyl clearly believed that the CVRA extended these rights to crime victims even before charges are filed.[267] That vision was sound then and, in the wake of an appellate panel's departure from it, should now be codified even more directly into the CVRA.

CONCLUSION

The highly publicized Jeffrey Epstein case highlights a perennial issue that occurs often, even in more routine criminal cases. Victims have critical concerns at stake even before prosecutors formally file criminal charges—rights that Congress appeared to have protected for victims of federal crimes in enacting the CVRA. But, unfortunately,

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262. *See* 18 U.S.C. § 3771(a)(1).

263. *See generally* Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47 (2010) (discussing the purpose and potential reforms of the CVRA's protections).

264. *See* Kyl et al., *supra* note 119, at 594.

265. *See generally id.* (describing the historical and legislative background of the CVRA).

266. *See id.*

267. *See id.*

the Eleventh Circuit panel ruling, if reinstated by the Eleventh Circuit en banc, would mean that, at least for victims within that Circuit, the CVRA would provide no protection for victims during criminal investigations.[268] And prosecutors would remain free, for example, to circumvent the CVRA and negotiate secret NPAs.

Hopefully, the earlier panel was an aberration, which will be swiftly disavowed by the Eleventh Circuit acting en banc—or by the Supreme Court, if the Eleventh Circuit en banc splits from the Fifth Circuit's position that the CVRA applies pre-charging. But Congress can also amend the CVRA to prevent future litigation and guarantee protection for crime victims. Congress should clarify the Act by directly adding language that victims have a right to confer about NPAs and other dispositions of federal criminal cases. And Congress should also clarify that during criminal investigations, crime victims possess other general CVRA rights, such as the right to fair treatment.

Of course, the issues surrounding the fair treatment of crime victims are not confined to federal criminal cases. As crime victims' rights become a recognized part of America's criminal justice architecture, those rights should also extend into the investigative and charging processes. The filing of criminal charges is an important set in the criminal justice process. But it is illogical to deprive crime victims of any rights until prosecutors finally make their charging decision. As the Epstein case sadly illustrates, such an artificial boundary can be misused by prosecutors to dispose of criminal cases while keeping victims in the dark about what is happening.

Crime victims suffer immediately—and often irreparably—when criminals commit crimes. Victims deserve rights in the criminal justice process while prosecutors determine whether to hold those criminals accountable.

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POSTSCRIPT

Shortly before this Article was to be published, the Eleventh Circuit handed down its en banc decision in *In re Wild.*[269] By a 7–4 vote, the Circuit rejected the position advanced in this Article,

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268. *See In re* Wild, 955 F.3d 1196, 1198 (11th Cir. 2020) (holding that the CVRA does not apply until after criminal proceedings are initiated against a defendant).

269. *See generally In re* Wild, 994 F.3d 1244 (11th Cir. 2021) (en banc).

concluding that Ms. Wild was not entitled to pursue a court action to vindicate her rights under the CVRA. The en banc majority's reasoning was slightly different than the earlier panel majority's. This time, Judge Newsom (the author of the earlier majority decision) held not that Ms. Wild lacked pre-charging rights under the CVRA, but rather that she could not enforce any CVRA rights that she might possess via a "freestanding lawsuit."[270] Reviewing provisions in the CVRA, the majority could 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."[271]

Central to the en banc majority's decision was the CVRA's language which specifies that "a crime victim's vehicle for 'assert[ing]' her CVRA rights is a '[*m*]*otion* for relief' in the district court . . . ."[272] As the majority saw things, a "motion" is not commonly understood "to denote a vehicle for initiating a new and freestanding lawsuit."[273] But the majority was quickly forced to concede that the term "motion" had been used twice in the Federal Rules of Criminal Procedure in exactly this sense,[274] as discussed earlier in this Article.[275]

The en banc majority's real basis for declining to allow a "freestanding" enforcement action appeared to be the policy concern that "judicial enforcement of CVRA rights in the pre-charge phase would risk unduly impairing prosecutorial discretion."[276] The majority thought that allowing district judges to order prosecutors to confer with victims "would work an extraordinary expansion of an already-extraordinary statute."[277] But there is nothing "extraordinary" about simply requiring prosecutors to "reasonably confer" with, for example, crime victims like Ms. Wild. As Judge Branch's dissent ably explained, the CVRA's conferral right "is limited to conferral '*with the attorney for the Government in the case*'—not with police or investigators. 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."[278]

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270. *See id.* at 1255.
271. *Id.* at 1256.
272. *Id.* at 1257 (emphasis added).
273. *See id.*
274. *See id.* at 1258 n.13 (citing Fed. R. Crim. P. 41(g) & 17(c)(2)).
275. *See supra* notes 140–153 and accompanying text.
276. *See In re Wild*, 994 F.3d at 1262 (emphasis omitted).
277. *Id.*
278. *Id.* at 1313 (Branch, J., dissenting) (internal citation omitted).

The en banc majority also found fault with the way in which Congress had written the CVRA. Although the majority agreed that Congress had sought to confer far-reaching rights on victims of crime, the majority concluded that the "reasonable right to confer" with a government attorney and the "right to be treated with fairness and respect" failed to "provide the kind of administrable language that the Supreme Court has said . . . is required of judicially enforceable rights."[279] The majority went on to add that "Congress sometimes uses language that is 'intended to be hortatory, not mandatory.'"[280]

This construction of the CVRA as merely creating "hortatory" suggestions rather than enforceable rights plainly thwarts what Congress intended. As the 2004 colloquy between the Senate sponsors of the Act made clear, Congress thought that it had "drafted a statute which . . . [was] broad and encompassing, which provides enforcement [of] rights for victims . . . ."[281] Indeed, the animating goal of the CVRA—what "makes this legislation so important, and different from earlier legislation"—was that the CVRA "provides mechanisms to enforce the set of rights provided to victims of crime."[282] Congress thought that its mechanisms would "ensure that the rights defined [in the CVRA] are not simply words on paper, but are meaningful and functional."[283] The congressional sponsors went on to explain that "[w]ithout the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. We are far past the point where lip service to victims' rights is acceptable. The enforcement provisions of this bill ensure that never again are victim's rights provided in word but not in reality."[284]

The author of the en banc decision—Judge Newsom—appeared to feel uncomfortable in taking this important piece of legislation and rending it mere hortatory lip service to crime victims. Indeed, Judge Newsom felt compelled to write a concurrence to his own decision. He explained that he was filled with a "sense of sorrow" in denying Ms. Wild any relief.[285] After recounting what had happened to Ms. Wild, Judge Newson called the events "[s]hameful all the way around" and acknowledged that "[t]he whole thing makes me sick."[286] But the

279. *See id.* at 1275 (Pryor, J., concurring).
280. *Id.* at 1274.
281. 150 Cong. Rec. S4260-01 (2004).
282. *Id.*
283. *Id.*
284. *Id.*
285. *See In re Wild*, 994 F.3d at 1275 (Newsom, J., concurring).
286. *See id.*

four judges in the en banc dissent carefully explained a way to interpret the CVRA that would avoid "shameful" results and not leave judges "sick"—the interpretation also offered by this Article. Given a competing reasonable interpretation, why the majority thought Congress crafted victims' rights protections that would leave victims like Ms. Wild empty-handed remains a mystery.

As this Article goes to press, Ms. Wild is preparing a petition for certiorari, asking the Supreme Court to review the Eleventh Circuit's decision. Hopefully the Court will grant that petition, review the Eleventh Circuit's ruling, and interpret the CVRA in a way that leads to the vindication of rights for Ms. Wild and other victims of federal crimes. Congress did not intend for the CVRA to merely extend illusory rights to victims like Ms. Wild. Instead, in the Crime Victims' *Rights* Act, Congress intended to provide "rights" to victims—rights that they could enforce in the nation's courts.

The Eleventh Circuit's en banc decision may have temporarily prevented victims like Ms. Wild from enforcing their rights, at least within that circuit. But tide of victims' rights in this country is ever rising. It seems likely that the Eleventh Circuit's ruling will soon be—and should be—engulfed by more enlightened court decisions and subsequent expansive clarifying congressional legislation.

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