No._____

In the

United States Court of Appeals

for the

Eleventh Circuit

In Re: Courtney Wild,

Crime Victim-Petitioner.

PETITION FOR A WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771(d)(3)

Mandamus from the United States District Court for the Southern District of Florida

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLSOURE STATEMENT

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

The underlying Crime Victims' Rights Act petition was filed in the district court by two sexual assault victims, who were minors when they were sexually assaulted by Jeffrey Epstein. To protect their privacy, they were identified throughout the district court proceedings by the pseudonyms "Jane Doe 1" and "Jane Doe 2." Now, for purposes of this petition, petitioner Jane Doe 1 has determined that the best way to encourage other sexual assault victims to step forward is for her to proceed without a pseudonym. Petitioner's name is Courtney Wild.

While Ms. Wild files this petition alone, many of the issues she raises and remedies she seeks would apply to dozens of other women who were victimized when they were underage girls by Epstein. Accordingly, at various points, we refer to Ms. Wild's arguments as "the victims'" arguments.

The respondent is the United States. The underlying non-prosecution agreement at issue was negotiated by attorneys for the United States Attorney's Office for the Southern District of Florida, which (after its recusal) is currently

represented by the United States Attorney's Office for the Northern District of Georgia.

An intervenor in the proceedings below was Jeffrey Epstein. He is now deceased and therefore is no longer a party to these proceedings. It is also arguable that "potential co-conspirators of Epstein, including but not limited to Sarah Kellen, Adriana Ross, Lesley Groff, or Nadia Marcinkova" (DE 361-62 at 5) are interested in this case. Epstein's attorneys Roy Black and Martin Weinberg also intervened in the proceedings below on issues related to privileged documents.

Because this is a mandamus petition filed under the Crime Victims' Rights Act, the United States District Court for the Southern District of Florida (Marra, J.) is technically a nominal respondent.

No corporate entities are parties to this proceeding.

NOTICE OF A RELATED PROCEEDING

Intervenor Jeffrey Epstein and his attorneys previously filed an appeal in this case, challenging the district court's order releasing certain documents associated with negotiating the non-prosecution agreement. No. 13-12923. This Court rejected that appeal in a published decision. *See Jane Doe 1 et al. v. United States*, 749 F.3d 999 (11th Cir. 2014).

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TO THE HONORABLE COURT OF APPEALS:

Petitioner, Ms. Courtney Wild, submits this Petition for a Writ of Mandamus Pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3), as well as the All Writs Act, 28 U.S.C. § 1651, seeking reversal of the district court's decision denying her requests for a remedy for the Government's violations of her CVRA rights.

STATEMENT OF THE RELIEF SOUGHT

Ms. Wild is a victim of sex offenses committed by Jeffrey Epstein. In 2007, the Government and Epstein negotiated a secret non-prosecution agreement (NPA), extending immunity from federal prosecution to Epstein and his potential co-conspirators. On June 7, 2008, Ms. Wild filed an action seeking to enforce her rights and those of similarly situated victims under the CVRA. Following more than a decade of litigation, on February 21, 2019, the district court (Marra, J.) entered an opinion and order finding that the Government had violated the victims' rights to confer under the CVRA, 18 U.S.C. § 3771(a)(5), by negotiating the secret NPA. Appx. 15-47.[1] After extensive briefing on remedies, Jeffrey Epstein apparently committed suicide. Several weeks later, on September 16, 2019, the district court entered an order denying all pending motions as moot and denying

[1] Petitioner has filed an appendix along with her petition. References to the appendix are denotated by "Appx." References to other documents found in the district court's docket are denoted by docket entry, e.g., "DE 1."

any substantive relief to the victims. Appx. 48-62. The district court noted that despite the victims "having demonstrated that the Government violated their rights under the CVRA, in the end they are not receiving much, if any, of the relief they sought." Appx. 61-62.

As specifically authorized by the CVRA, *see* 18 U.S.C. § 3771(d)(3), Ms. Wild now comes to this Court, seeking a remedy for the proven violation of the victims' CVRA rights.

ISSUES PRESENTED

1. Did the district court err in denying the victims any remedy for a proven violation of their CVRA rights?
2. Did the district court err in concluding that it was "without jurisdiction" to grant the victims' request for the remedy of invalidating provisions in the NPA barring prosecution of Epstein's co-conspirators on grounds that the co-conspirators had not been joined as parties to the case?
3. Did the district court err in denying the victims' request for the remedy of a court hearing at which they could speak, a request that was supported by the Government?
4. Did the district court err in denying the victims' request for documents relevant to this case, including twice declining to rule on the victims' motion

for a finding that the Government waived work product protection over important documents?

5. Did the district court err in denying the victims' attorneys' fees under the Hyde Amendment?

6. Did the district court err by declining to specifically rule on whether the Government had violated the victims' rights to be treated with fairness and to "reasonable, accurate, and timely notice of any public court proceeding" involving the crime, 18 U.S.C. § 3771(a)(8) & (a)(2)?

FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

I. The Government Negotiates a Secret Non-Prosecution Agreement with Jeffrey Epstein.

This case arises out of a long-running conspiracy in the Southern District of Florida between Jeffrey Epstein and numerous co-conspirators to sexually abuse and traffic numerous underage girls. As the district court found, from between about 1999 and 2007, Epstein sexually abused more than thirty minor girls, including Ms. Wild, at his mansion in Palm Beach, Florida and elsewhere in the United States and overseas. Appx. 15. Because Epstein and his co-conspirators knowingly traveled in interstate and foreign commerce to sexually abuse these minors, the acts violated not only Florida law but also federal criminal laws. Appx. 16.

Ultimately, the crimes of Epstein and his co-conspirators came to the attention of state and federal law enforcement agencies. The FBI opened an investigation into the conspiracy in 2006. Appx. 16. After developing extensive evidence, the FBI referred the case for prosecution to the Government (i.e., the U.S. Attorney's Office for the Southern District of Florida (USAO-SDFL)). Appx. 16. The Government thereafter sent letters to the victims, including Ms. Wild, informing them that the Government recognized them as "victims" in the case and would afford them their rights under the CVRA. Appx. 17.

At around the same time as it was informing Epstein's victims of their rights, the Government embarked on extensive negotiations with multiple lawyers for Epstein about resolving the case. Appx. 16-17. Ultimately, on September 24, 2007, the Government and Epstein agreed to a secret non-prosecution agreement. The agreement provided that if Epstein pled guilty to two low-level Florida state "prostitution" crimes, the USAO-SDFL would not prosecute Epstein federally for any crimes he committed in the Southern District of Florida. Appx. 21. In addition, the Government agreed that it would not institute any criminal charges against "any potential co-conspirators of Epstein, including but not limited to Sarah Kellen, Adriana Ross, Lesley Groff, or Nadia Marcinkova." Appx. 22.[2] From the time that the FBI began investigating Epstein through the consummation

[2] The full text of the NPA is found at DE 361-62.

of the secret NPA, the Government never conferred with Epstein's victims about the NPA nor even told them that such an agreement was under consideration. Appx. 22. Epstein's attorneys were aware that the Government was concealing the NPA from the victims and, indeed, had sought assurances to that effect. Appx. 22.

After the Government and Epstein signed the NPA, they began negotiations about what the Government would be allowed to tell the victims about the agreement. Appx. 22. This was a deviation from the Government's standard practice. Appx. 22-23. Epstein's lawyers raised objections to the victims being told about the agreement, and the Government held off sending to the victims notification about it. Appx. 23-30.

Instead of receiving information about the previously signed NPA, on January 10, 2008, Ms. Wild and other victims received letters from the Government advising them that "[t]his case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation." Appx. 30. These letters to the victims did not disclose that the Government had already entered into an NPA with Epstein.

Thereafter, the Government sent similar misleading notifications and made other misleading statements concealing the NPA. For example, in mid-June 2008, Bradley Edwards, one of the attorneys for Ms. Wild, was asked by the line prosecutor in the case to provide information to the Government about Epstein's

crimes against his client. The line prosecutor made no mention whatsoever that a signed NPA already existed. At the end of the discussion, the line prosecutor asked Edwards to send information to the Office for it to consider in determining whether to file federal charges against Epstein. Appx. 31-33.

On Friday, June 27, 2008, the Government called Edwards to provide notice that Epstein would be pleading guilty to state charges on Monday, June 30. Appx. 32. Edwards was not told that the plea related to the federal investigation and would prevent any federal criminal charges against Epstein and his co-conspirators for the sex abuse crimes committed in Florida. Appx. 32-33. Accordingly, Ms. Wild (and other victims) did not attend the hearing. Appx. 33.

II. The Victims File a Petition Alleging Violations of their Rights Under the Crime Victims' Rights Act and Protracted, Litigation Follows.

On July 7, 2008, Ms. Wild (proceeding under a pseudonym as "Jane Doe 1") filed a petition with the district court, alleging violations of her rights under the Crime Victims' Rights Act. DE 1. Shortly thereafter, "Jane Doe 2" joined the case. The district court held hearings on July 11, 2008 and on August 14, 2008 regarding the petition. During these hearings, victims' counsel attempted to learn what had happened in the case. Following the August hearing, the district court ordered the Government to disclose the NPA to the victims. *See* DE 26 at 1. Thereafter, while the Government provided the NPA to the victims, it refused to stipulate to the facts concerning how the NPA came into existence. DE 41 at 3.

Accordingly, the victims were forced to attempt to obtain information about what had happened in other ways.

After extended litigation in civil suits against Epstein, on June 30, 2010, the victims obtained correspondence between the Government and Epstein showing the extent to which prosecutors and defense attorneys had worked together to conceal the NPA from the victims. *Id.* Following further litigation, on March 21, 2011, the victims filed a motion for partial summary judgment that the Government had violated their CVRA rights. DE 48. After briefing on the issue, on September 26, 2011, the district court held that further discovery was required before summary judgment would be possible and ordered the Government to provide discovery. DE 99.

Rather than provide any discovery, on November 7, 2011, the Government filed a motion to dismiss the petition. DE 119. The victims promptly responded (DE 127), and the Government replied on January 26, 2012 (DE 144). Essentially no action followed on the case for more than a year, until on March 29, 2013, the district court "apologize[d] to the parties" for not ruling on the pending motion. DE 184 at 1.

On June 18, 2013, the district court denied the Government's motion to dismiss. Appx. 1-14. The district court held that the CVRA "is properly interpreted to authorize the rescission or 're-opening' of a prosecutorial agreement

– including a non-prosecution arrangement – reached in violation of the prosecutor's conferral obligations under the statute." Appx. 7. The court noted that "in their petition and supplemental pleadings, [the victims] have identified a remedy which is likely to redress the injury complained of – the setting aside of the non-prosecution agreement as a prelude to the full unfettered exercise of their conferral rights at a time that will enable the victims to exercise those rights meaningfully." Appx. 9 (emphasis deleted). In a separate order, the district court also directed that discovery could proceed, overruling arguments from the Government and Epstein's lawyers that their correspondence regarding the NPA was somehow privileged. DE 188.

On June 28, 2013, Epstein and his lawyers appealed to this Court on the privilege issue. Following oral argument, on April 18, 2014, this Court rejected Epstein's appeal and held that correspondence related to the NPA was not privileged. *See Jane Doe 1 et al. v. United States*, No. 13-12923, 749 F.3d 999 (11th Cir. 2014).

Meanwhile, on July 12, 2013, Epstein moved to intervene in the district court proceedings as to any remedy (DE 207), and the district court allowed him to intervene at that later stage (DE 246).

Following additional discovery disputes, on December 30, 2014, two additional victims – Jane Does 3 and 4 – sought to join the action. On April 7,

2015, the district court denied their motion to join (DE 324), explaining that the additional victims could "participate in this litigated effort to vindicate the rights of similarly situated victims – there is no requirement that the evidentiary proof submitted in this case come only from the named parties." DE 324 at 8.

After further discovery disputes, on February 10, 2016, the victims filed a motion for summary judgment, arguing that the Government had violated their CVRA rights to confer with prosecutors, to be treated with fairness, and to receive accurate notice of court hearings. DE 361. With regard to the right to confer, the victims explained that they had been deprived of any opportunity to influence the NPA due to the Government and Epstein's concealment of the agreement. DE 361 at 48-51. With regard to the right to be treated with fairness, the victims recited numerous additional examples of not being treated fairly, including the Government:

- Secretly discussing with Epstein's defense counsel contrived charges to avoid making victim notifications;
- Secretly discussing with Epstein's defense counsel to arrange a guilty plea in a jurisdiction located some distance from the victims to make it hard for them to find out what was happening;
- Secretly reaching a resolution of the case that would make it hard for a judge to see what was going on;
- Not telling the victims the NPA was under consideration;
- Deviating from standard policy by negotiating with defense counsel about the extent and substance of crime victim notifications;

- Negotiating with defense counsel about concealing the agreement;
- Working to have agents attend Epstein's sentencing hearing "incognito" without telling the victims what was happening;
- Committing to Epstein not to contact victims about the NPA;
- Entering into an NPA with a confidentiality provision that precluded compliance with CVRA victim notification obligations;
- Sending FBI agents to meet with three victims, while precluding the agents from being able to discuss the NPA;
- Agreeing with defense counsel to stop victim notifications required under the CVRA;
- Agreeing to notify victims only after Epstein had entered his plea;
- Sending deceptive letters about the case still being "under investigation";
- Concealing the NPA from attorneys for the victims;
- Failing to provide reasonable notice of Epstein's sentencing hearing to the victims; and
- Agreeing with Epstein to oppose the release of the NPA to the victims after his plea.

DE 361 at 52-53 (citations omitted).

After an unsuccessful attempt at mediation, on June 6, 2017, the Government responded to the summary judgment motion. DE 407. On August 11, 2017, the victims replied to the Government. DE 417. On the same day, the

victims also filed a motion for a finding that the Government had waived work-product protections over various documents. DE 414.

No action followed on the victims' 2016 summary judgment for more than a year. To alert the district court to the extended delay, on December 10, 2018, the victims filed a notice regarding the length of time that had elapsed. DE 431.

III. The District Court Rules that the Government Violated the Victims' Right to Confer with the Prosecutors about the Non-Prosecution Agreement.

On February 21, 2019, the district court granted the victims' motion for summary judgment, finding that the Government had violated the victims' CVRA rights. Appx. 15-47. The district court explained that it was undisputed that the Government entered into an NPA with Epstein without conferring with the victims. Appx. 40. Instead, the district court explained, "the Government sent letters to the victims requesting their 'patience' with the investigation even after the Government entered into the NPA." Appx. 40-41. At a bare minimum, the district court held, the CVRA required "the Government to inform [the victims] that it intended to enter into an agreement not to prosecute Epstein." Appx. 41. The victims "should have been notified of the Government's intention to take that course of action before it bound itself under the NPA." Appx. 41. Had the Government done so, the victims "could have conferred with the attorney for the Government and provided input. Hence, the Government would have been able to

ascertain the victims' views on the possible details of the [NPA]. Indeed, it is this type of communication between prosecutors and victims that was intended by the passage of the CVRA." Appx. 41.

The district court also found that the Government had "concealed" the NPA from the victims and "misled" the victims about the possibility of a federal prosecution:

> 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. When the Government gives information to victims, it cannot be misleading. While the Government spent untold hours negotiating the terms and implications of the NPA with Epstein's attorneys, scant information was shared with victims. Instead, the victims were told to be "patient" while the investigation proceeded.

Appx. 41-42 (emphases added). In light of the Government's illegal actions, the district court specifically held that under the facts of this case, the Government violated the victims' right to confer under the CVRA. Appx. 47. The district court did not reach the victims' arguments that the Government had violated their rights to be treated with fairness and receive accurate notice of court hearings. The district court also denied without prejudice the victims' motion for a finding that the Government had waived work-product protection over various documents, explaining that the victims "may reassert this argument if and when appropriate." Appx. 47.

After granting summary judgment, the district court directed briefing on what remedies were appropriate. Appx. 47. Accordingly, Ms. Wild submitted a brief listing nineteen proposed remedies, including rescission of the NPA's immunity provisions, a court hearing on the issues related to the case, production of various documents, and an award of attorneys' fees. DE 458 at 12-33. She also asked the district court to rule on her arguments that the Government had violated her rights to be treated with fairness and to accurate notice of court hearings. *Id.* at 33; *see also* DE 464 at 11-12. Ms. Wild also renewed her motion for a finding that the Government had waived work-product protection over various documents. DE 464 at 10-11.

The Government responded, acknowledging that it "should have communicated its resolution of the federal criminal investigation of Epstein to his victims more effectively and in a more transparent manner." DE 462 at 2. While the Government recognized it could not "[t]urn back time and put the victims back in the position they would have been in over a decade ago," the Government argued that the appropriate remedies for its violations were a meeting with the victims, participating in a public court hearing in which the victims could provide victim impact statements, and further training of prosecutors on victims' rights. *Id.* at 2, 6-7. Epstein also filed a response, objecting to rescission and other remedies. DE 463. Ms. Wild replied separately to each response (DE's 464 and 466).

After all this briefing was finalized, on August 10, 2019, Jeffrey Epstein apparently committed suicide.

IV. After Eleven Years of Litigation, the District Court Denies the Victims Any Remedy.

On September 16, 2019, the district court denied any substantive remedy to Ms. Wild and the other victims. With regard to their request for rescission of the NPA's immunity provision covering Epstein's co-conspirators, the district court concluded that "[a]ny decision by the Court on that question is meaningless without their participation in this proceeding." Appx. 53. While Epstein had intervened in the case and would have been bound by any ruling, "the alleged co-conspirators did not intervene, nor were they obligated to do so." Appx. 53. Moreover, noted the district court, "no party to this proceeding sought to join them to this case. Since the alleged co-conspirators are not parties to this case, any ruling this Court makes that purports to affect their rights under the NPA would merely be advisory and is thus beyond this Court's jurisdiction to issue." Appx. 53.

With regard to the victims' and the Government's joint request that the court hold a hearing at which the victims could speak, the district court denied this request. The court noted that a judge in the Southern District of New York had allowed some of the victims to speak in his courtroom. Appx. 56. In addition, the court believed that it could not play a role in any investigation related to Epstein.

Appx. 56. (The court did not explain how holding a hearing in Florida at which various victims would speak was part of a criminal investigation in New York.)

With regard to the victims' request for production of documents (including grand jury materials), the district court noted that it had previously found some of the documents to be privileged and that releasing them "could" adversely affect on-going investigations. Appx. 57.

The district court also denied the victims' request for attorneys' fees, finding that the Government's litigating positions were not in bad faith. Appx. 60-61.

The district court also refused to rule on the victims' arguments that the Government had violated their rights to fairness and to accurate notice of court hearings, concluding that a ruling on these two rights was "encompassed" in the court's previous ruling on the right to confer. Appx. 57.

The district court explained that the net effect of its order was 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." Appx. 61-62. The court also noted that the litigation "resulted in the United States Department of Justice acknowledging its shortcomings in the dealing with crime victims . . . ." Appx. 62.

The district court then denied all pending motions in the case as moot and directed the clerk to "close the case." Appx. 62.

This petition followed.

STANDARD OF REVIEW

Before this Court, Jane Doe 1 and 2 are entitled to ordinary appellate review of their issues. While in 2014 this Court held that a "highly deferential" standard of review applies to a CVRA mandamus petition, *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1237 (11th Cir. 2014), in 2015 Congress overruled that result by amending the CVRA. *See* 18 U.S.C. § 3771(d)(3) ("In deciding such application, the court of appeals shall apply ordinary standards of appellate review.") (added by Pub. L. 114-22, Title I, § 1123(c)(2), May 29, 2015); *see also* H.R. Rep. 114-7, at 8 (2015). *See generally* Catherine M. Goodwin, FEDERAL CRIMINAL RESTITUTION § 12:17 (2019).

STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

Fifteen years ago, Congress passed the Crime Victims' Rights Act because it found that in case after case "victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care . . . and by a court system that simply did

not have a place for them." 150 CONG REC. 7296 (2004) (statement of Sen. Feinstein). In passing the CVRA, Congress mandated a series of rights for crime victims. Sadly, in 2007, when the Government began handling this case, it did precisely what Congress thought it had forbidden: The Government deliberately kept crime victims "in the dark" about its non-prosecution agreement with Jeffrey Epstein. In concealing what it was doing, the Government refused to afford victims the rights they had been promised by Congress – particularly the rights to "confer with the attorney for the Government in the case," "to be treated with fairness," and "to reasonable, accurate, and timely notice of any public court proceeding." 18 U.S.C. § 3771(a).

In February 2019, after more than a decade of litigation, the district court ruled that in orchestrating a secret non-prosecution agreement, the Government had "misled" the victims and violated their CVRA rights. But following extensive briefing – and the apparent suicide of Epstein – the district court concluded that it could not award any remedy to the victims. The district court's ruling turns the CVRA into a hollow promise for victims and should be overturned.

I. The CVRA Required the District Court to Provide Some Relief to the Victims Rather than Dismiss Their Action Without any Remedy.

The district court's decision to close the victims' case rather than fashioning any remedy violated its obligations under the CVRA. Since the earliest days of our nation, it has been settled law that "where there is a legal right, there is also a legal

remedy . . . ." *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (internal quotation omitted). When a violation of federal law is established, "federal courts generally have the power to grant any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 784 (6th Cir. 1996) (internal quotation omitted). Federal courts should "presume the availability of all appropriate remedies [for a federal right of action] unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 66 (1992). This Court has made clear that "the district court is presumed to have the authority to grant the requested relief, absent some indication in the underlying statute that such relief is not available." *Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less*, 910 F.3d 1130, 1152 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 634 (2019). Thus, "unless the underlying statute clearly and validly limits the equitable jurisdiction of the district court, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Id.* at 1152 (internal quotation omitted).

More generally, the "federal courts have historically had broad authority to fashion equitable remedies . . . ." *Hardison v. Cohen*, 375 F.3d 1262, 1266 (11th Cir. 2004). Settled law holds that "the nature of the remedy is to be determined by the nature and scope of the . . . violation." *Nichols v. Hopper*, 173 F.3d 820, 824

(11th Cir. 1999) (internal quotation omitted). This Court has expressly required district courts to fashion appropriate equitable remedies when plaintiffs have proven a violation of statutory provisions. *See, e.g., Alabama Hospital Ass'n v. Beasley,* 702 F.2d 955, 962 (11th Cir. 1983) (in light of statutory violation, we "accordingly remand to the district court so that it may devise an appropriate equitable remedy.").

Beyond these general principles, the CVRA itself required the district court to protect victims' rights, emphasizing that "[i]n any court proceeding involving an offense against a crime victim, the court *shall ensure* that the crime victim is afforded the rights described in [the CVRA]." 18 U.S.C. § 3771(b)(1) (emphasis added). And the CVRA is obviously "remedial legislation" that should be broadly construed to achieve its remedial purposes. *Edwards v. Kia Motors of America, Inc.,* 554 F.3d 943, 948 (11th Cir 2008). Indeed, as the Senate co-sponsor of the CVRA explained, "it is the clear intent and expectation of Congress that the *district . . . courts* will establish procedures that will allow for a prompt adjudication of any issues regarding the assertion of a victim's right, while *giving meaning* to the rights we establish." 150 CONG. REC. 22953 (Oct. 9, 2004) (statement of Sen. Kyl) (emphases added).

In denying any remedy to the victims, the district court violated its statutory obligation to "ensure" that the victims were afforded their rights and ignored the

congressional direction to "give meaning" to the CVRA. And the district court ignored the CVRA requirement that, where a court denies a victim CVRA relief, "[t]he reasons for any decision denying relief . . . shall be clearly stated on the record." 18 U.S.C. § 3771(b)(1). Instead, the district court gave priority to summarily "bring[ing] an end [to] this lengthy and contentious litigation." Appx. 61. The district court thought that the victims would "take solace" in the fact that they brought "national attention to the Crime Victims Rights Act." Appx. 61. But the victims were entitled to more than the district court's consoling sympathies. The district court erred in failing to craft any sort of remedy for the victims, and this Court should reverse the district court's decision for this reason alone.

II. The District Court Erred in Concluding that it was "Without Jurisdiction" to Grant the Victims the Remedy of Invalidating the NPA's Provisions Barring Prosecution of Epstein's Co-Conspirators.

One important remedy that the district court should have awarded was rescission of the NPA's provisions extending immunity to Epstein's co-conspirators. The immunity provisions were part of a secret and illegal agreement and continue, to this day, to block the victims' from conferring with prosecutors in Florida about federal prosecution of the co-conspirators who enabled Epstein to sexually abuse dozens of minor girls. Even though the victims had been pursuing a rescission remedy for years and years, the district court ultimately refused to rule on the victims' request for such a remedy. Instead, in a terse, two-paragraph

statement, the district court noted Epstein's death and held that, as a result, it was "without jurisdiction" to grant rescission. In the district court's view, rescinding the immunity provisions in the agreement between the Government and Epstein would affect the rights of non-parties (i.e., Epstein's co-conspirators), who had not been joined to the CVRA action. Any ruling without their participation would be "meaningless" and merely "advisory" and thus outside of permissible judicial action under Article III. Appx. 53.

The district court's ruling constituted a reversible error of law for at least three reasons. First, even assuming that the co-conspirators should have been joined to the action, the district court erred in failing to simply order their joinder, as required by Rule 19 of the Federal Rules of Civil Procedure. Second, a ruling rescinding the immunity provisions would have been binding on the USAO-SDFL and helped to protect the victims' CVRA right to confer with that Office. Accordingly, such a ruling would not have been "meaningless" and fell within the court's Article III powers. And third, in any event, the district court could have entered a ruling binding on the co-conspirators even though they were not parties to the case.

A. Even Assuming that the District Court Was Correct that the Co-Conspirators Had to Be Joined as Parties, the District Court Erred in Precipitously Closing the Case Rather than Ordering Joinder.

The district court concluded that Epstein's co-conspirators had to be joined to the case for it to make a ruling on rescission of the NPA's immunity provision. But rather than taking the simple step of ordering joinder, the district court stated that, without joinder, it lacked power to grant the requested relief and summarily closed the case. Appx. 52-53. The district court gave no reason why it was closing this important case rather than taking steps to protect the rights of Ms. Wild and Epstein's other victims and its decision violated its obligations under Fed. R. Civ. P. 19. This Court should reverse and remand, with directions that the district court order the joinder of the co-conspirators and then reach the merits of the rescission issue.

1. Under Rule 19 of the Federal Rules of Civil Procedure, the District Court Should Have Ordered that the Co-Conspirators Be Joined as Parties.

A prime purpose underlying the joinder rules is to "expedite the resolution of disputes, thereby eliminating unnecessary lawsuits." *Swan v. Ray*, 293 F.3d 1252, 1253 (11th Cir. 2002) (internal quotation omitted). Reflecting that underlying purpose of simplifying litigation, the Federal Rules of Civil Procedure[3] simply

[3] Because the CVRA does not contain procedural rules, the district court held repeatedly that the Federal Rules of Civil Procedure governed procedural aspects of the case. *See* DE 330 at 23; *see also* DE 257 at 3.

direct that, when a situation arises where, in "a person's absence, the court cannot accord complete relief among existing parties" because "a person has not been joined as required, *the court must order that the person be made a party.*" Fed. R. Civ. P 19(a) & (a)(2) (emphasis added). Cases interpreting this provision have repeatedly held that, if a joinder problem arises in granting relief, the proper response is not to terminate the case but rather to direct that any necessary missing parties be joined. *See, e.g., Askew v. Sheriff of Cook County*, 568 F.3d 632, 637 (7th Cir. 2009) (district court erred when it dismissed case rather than order missing required party to be joined); *Teamsters Local Union v. Fargo-Moorhead Auto. Dealers Ass'n*, 620 F.2d 204, 205–06 (8th Cir. 1980) (when plaintiff has failed to join a necessary defendant, "joinder under Rule 21 is the obvious remedy . . . . Nonjoinder of these parties is not ground for dismissal of the action."). And the mandatory language of Rule 19(a)(2) – requiring that "the court *must* order that the person be made a party" – leaves no room for discretion. *See 101 W. 136th St. Realty Corp. v. HUD*, 1988 U.S. Dist. LEXIS 12991, at *33 (S.D.N.Y. 1988) ("If joinder is feasible, the Court must order it; the mandatory language of the rule divests the Court of any discretion to dismiss the case."). *See generally* 7 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1611 (3d ed.) ("[T]he nonjoinder of someone described in Rule 19(a) does not result in a dismissal if that person can be made a party to the action. If joinder is feasible, the court must order it; the

court has no discretion at this point because of the mandatory language of the rule."); MOORE'S FEDERAL PRACTICE (3d ed. 2019) § 19.04[4][a] (Rule 19(a)(2) "leaves no discretion on this point [that the court must order a necessary party to be added]").

Applying Rule 19, if the district court was correct in its assumption that joining the co-conspirators as parties was necessary to resolve the rescission issue,[4] then the Court should have simply ordered the co-conspirators' joinder to allow the rescission remedy to be adjudicated.

Indeed, the district court had previously ruled that rescission of the NPA was a permissible remedy in this case, without suggesting to the victims that they needed to join any additional parties. Back in 2011, the Government moved to dismiss the victims' CVRA petition, arguing that the district court could not grant any relief to the victims since Epstein's NPA had already been consummated. On June 18, 2013, the district court rejected the Government's position that no such remedy was possible, explaining that "the CVRA is properly interpreted to authorize the rescission or 're-opening' of a prosecutorial agreement – including a non-prosecution agreement – reached in violation of the prosecutor's conferral obligations under the statute." Appx. 7. The district court recognized that "in their petition and supplemental pleadings, [the victims] have identified a remedy which

[4] In the sections below, we dispute that assumption.

is likely to redress the injury complained of – the setting aside of the non-prosecution agreement as a prelude to the full, unfettered exercise of their conferral rights *at a time that will enable the victims to exercise those rights meaningfully*." Appx. 9 (emphasis in original). In other words, the district court explained, the victims' "injury can be redressed by setting aside the agreement and requiring the government to handle its disposition of the Epstein case in keeping with the mandates of the CVRA, including the pre-charge conferral obligations of the government. Appx. 10.

While the district court had ruled back in 2013 that rescission was a permissible remedy, more than six years later, on September 16, 2019, the district court ruled that it lacked "jurisdiction" to grant that very remedy. The court *sua sponte* raised the issue of joinder of the co-conspirators, observing that "no party to this proceeding has sought to join [the co-conspirators] to this case." Appx. 53. Yet the court failed to acknowledge that, at no point during eleven years of litigation, had the Government ever suggested that the victims needed to join the co-conspirators to the case to obtain the relief the district court had previously held they could seek.

The district court erred in treating the absence of the co-conspirators as parties as some sort of "jurisdiction[al]" problem. Appx. 53. It cited no authority for the proposition that a joinder issue created a "jurisdictional" barrier to

determining the dispute between the parties to the case: the victims and the Government. As the Advisory Committee Notes to Rule 19 make clear, "[i]t is true that an adjudication between the parties before the court may leave a party exposed to a later inconsistent recovery by the absent persons. These are factors which should be considered in deciding whether the action should proceed or should rather be dismissed; *but they do not themselves negate the court's power to adjudicate as between the parties who have been joined*." Fed. R. Civ. P., Rule 19, Adv. Comm. Note, 1966 Amendment (emphasis added). *See* 7 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1611 (3d ed.) ("Since the indispensable-party doctrine is equitable both in its origin and nature, . . . scholarly commentary as well as the vast majority of courts reject this 'jurisdictional' characterization.").

This requirement of adding a party rather than terminating an action is reinforced by Rule 21 of the Federal Rules of Civil Procedure, which provides that "[m]isjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party." Case law under this provision confirms what the rule's plain language provides – i.e., that dismissal is not an appropriate response to a joinder issue. *See, e.g., Letherer v. Alger Group, L.L.C.*, 328 F.3d 262, 267 (6th Cir. 2003) ("Courts cannot dismiss actions where there has been misjoinder of parties, but they may drop or add parties under Rule 21.").

This Court has set out the appropriate inquiry for considering joinder under Rule 19. First, the district court must determine if a person's joinder is required under Rule 19(a) as indispensable to the action – i.e., whether the court can accord complete relief among the existing parties. *See Molinos Valle Del Cibao, C. por. A. v. Lama*, 633 F.3d 1330, 1344 (11th Cir. 2011). If a party is necessary to provide complete relief, then the district court is required to determine whether that party's joinder is feasible. *See id.* If that party can be joined without destroying the court's jurisdiction, then the person must be joined if feasible. Fed. R. Civ. P. 19(a)(2).

Here, the district court failed to follow the standard steps for a joinder inquiry. While the district court appears to have obliquely concluded Epstein's co-conspirators were needed to provide complete relief, it does not appear to have ever considered whether their joinder was feasible. Had the court considered the feasibility of their joinder, the conclusion would have been obvious: The NPA lists by name four of Epstein's co-conspirators. The district court could have simply ordered that (at least) these four persons be joined to the action. Rule 19 required the district court to proceed in this way, rather than closing the case. *See* 7 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1604 (3d ed.) ("Once it has been decided that a person whose joinder is feasible should be brought into the action, the claimant should be given a reasonable opportunity to add that person.").

Of course, once these four individuals were joined to the action, even under the district court's crabbed analysis of the issue, a determination of rescission of the immunity provisions would not merely be advisory. For example, the district court had held that, because Epstein had intervened in this case, he "would have been bound by any ruling issued by the Court" (Appx. 53) and thus jurisdiction existed to adjudicate the NPA's validity as to him. Yet somehow, once Epstein died, the district court was not prepared to follow a similar approach for his co-conspirators.

While the NPA specifically identifies four co-conspirators, given the vast scope of Epstein's sex trafficking and abuse conspiracy, it is apparent that many other co-conspirators potentially assisted Epstein. *Cf.* Appx. 15-16 (noting allegations that Epstein had long been involved in abusing minor females). And the Government, no doubt, possesses substantial information about other potential co-conspirators. To the extent that joining these persons to the action was required for the district court to grant relief (a point we disprove below), the district court should have directed their joinder.

Joining the co-conspirators to the action was clearly a preferable approach to the district court's precipitously closing the case. The district court had taken significant time in ruling on various motions filed in this case over the eleven years of litigation. For example, the district court took more than eighteen months to

rule on the Government's motion to dismiss the action (DE 189) and more than three years to rule on the victims' summary judgment motion (DE 435).[5] Against that backdrop, it is hard to understand why the district court would not have directed that the co-conspirators be joined to action within, for example, 45 days. This approach would have permitted the Court to reach the remedial issues that the victims had presented over years and years of litigation attempting to vindicate their congressionally conferred rights.

Confirming this conclusion is the fact that dismissing a case for failure to join an indispensable party does not constitute an adjudication on the merits of a case. Fed. R. Civ. P. 41(b); *see* MOORE'S FEDERAL PRACTICE (3d ed. 2019) § 19.02[4][d]. Thus, if the district court's decision is affirmed by this Court, it would appear that the victims could simply re-file their action against the United States, listing the co-conspirators as parties necessary to the action – and start the litigation all over again. It has long been recognized that the rules of procedure "were not adopted to set traps and pitfalls by way of technicalities for unwary litigants." *Des Isles v. Evans*, 225 F.2d 235, 236 (5th Cir. 1955). In *sua sponte* closing the case due to non-joinder of the co-conspirators – and failing to give the victims' any opportunity to brief the issue or to effect joinder – the district court improperly elevated procedure over substance.

[5] Some of the three years was consumed in an unsuccessful mediation effort.

This Court has instructed that a "district court can only dismiss an action on its own motion as long as the procedure employed is fair." *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir. 2011) (internal quotations omitted). And the victims have a right to be treated with fairness under the CVRA. 18 U.S.C. § 3771(a)(8). To employ fair procedures, a district court must generally "provide the plaintiff with notice of its intent to dismiss or an opportunity to respond." *Id.* Here, the district court should have notified the victims of the need to join the co-conspirators to the action, particularly given Epstein's unexpected death following the completion of the remedies briefing. This Court should reverse the district court's denial of any relief and remand with instructions that the district court order, under Rule 19, joinder to the action of any person whose participation is necessary to accord Ms. Wild the relief that she seeks.

2. Under Rule 19 of the Federal Rules of Civil Procedure, the District Court Should Have Considered Whether, in Equity and Good Conscience, the Action Could Have Proceeded Without Joinder of Some Unidentified Co-Conspirators of Epstein.

For all the reasons just explained, if the district court had investigated, it would have found that joinder was feasible for the four named co-conspirators in the agreement, as well as potentially dozens of others. However, for the sake of completeness, even if the district court had concluded that joinder of some co-conspirators was not feasible, its decision to close the case for lack of jurisdiction would still be erroneous. Federal Rule of Civil Procedure 19(b) provides that "[i]f a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." The Rule then lists various factors that the district court must consider in making that determination, including "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(4). Here, the district court entirely failed to consider Rule 19 in its ruling, much less analyze the factors that are needed to inform a well-grounded decision about whether to take the extreme action of denying any remedy.

The equities in this case required that the action proceed. As the district court acknowledged at the end of its ruling closing the case, "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." Appx. 61. This stark fact should have led to the court to search for resolutions of the case that would have addressed the Government's CVRA violations. For this reason as well, this Court should reverse the district court's decision and remand for the more fulsome inquiry into "equity and good conscience" that should inform a decision of whether to close the case.

B. Rendering a Decision that the Co-Conspirator Immunity Provisions Are Invalid Would Not Be "Meaningless" Because It Would Help Protect the Victims' "Right to Confer" With the Prosecutors.

Even assuming for the sake of argument that the co-conspirators could not have been joined to the proceedings below, the district court still committed a reversible legal error in concluding that a ruling on the co-conspirator immunity provisions was "meaningless." Appx. 53. The district court had before it adversarial parties: the petitioner victims and the respondent Government. As the district court had recognized as long as 2013, the continuing existence of the immunity provision creates a barrier to Ms. Wild and other Epstein victims conferring with the Government about prosecuting those who are criminally responsible for their sexual abuse. As the district court explained in 2013 in rejecting the Government's motion to dismiss, the victims' injury in this case "is the government's failure to confer with the victims before disposing of contemplated federal charges. This injury can be redressed by setting aside the

agreement and requiring the government to handle its disposition of the Epstein case in keeping with the mandates of the CVRA, including the pre-charge conferral obligations of the Government." Appx. 10.

In precipitously closing the case, the district court concluded that a ruling rescinding the immunity provisions of the NPA would "affect[] the rights of non-parties to this case." Appx. 52. But just two sentences later in its ruling, the district court disclaimed any ability to affect the rights of non-parties in the case, stating that if it rescinded the immunity provisions, the co-conspirators would have a later opportunity to assert the protections of the immunity provisions should the Government decide to prosecute them. Appx. 52-53. The district court failed to recognize the contradiction in its ruling.

Instead of declining to rule on the victims' request for rescission of the immunity provisions, the district court should have reached the issue – and rescinded the provisions. The fact that another person might have an interest in that ruling does not "negate the court's power to adjudicate as between the parties who have been joined." Fed. R. Civ. P., Rule 19, Adv. Comm. Note, 1966 Amendment. A ruling rescinding the immunity provisions would have permitted the victims to confer with government prosecutors about the possibility of obtaining prosecution of Epstein's co-conspirators in the Southern District of

Florida – i.e., would have afforded them their rights under the CVRA.[6] Of course, following such conferral, the prosecutors would have then decided either to prosecute some of the co-conspirators in Florida or not to prosecute. But that uncertainty regarding the prosecutors' ultimate decision in no way demonstrates that a ruling about rescission would be "meaningless." Indeed, the district court itself made this point powerfully in its 2013 ruling. Then, the district court "reject[ed] the notion that a victim must show the likelihood or at least a possibility of a prosecution as a pre-requisite to demonstrating standing for redress of conferral rights under the CVRA. . . . " Appx. 10-11.

As for the interests of the potential co-conspirators, if the Government conferred with the victims and then decided to file charges against Epstein's co-conspirators in Florida, the co-conspirators would then have been free to argue – at that time – that the rescission of the immunity provisions somehow violated their rights. The possibility that the co-conspirators might complain about the ruling in the future, however, did not prevent the district court from reaching the issues properly before it. As numerous courts have held, "[s]peculation about the occurrence of a future event does not render all parties potentially affected by that

[6] In a footnote in its decision, the district court curiously suggested that the USAO-SDFL "can make an independent judgment as to whether it believes it is bound by the non-prosecution provision of the NPA as it relates to the alleged co-conspirators and proceed accordingly." Appx. 54 n.3. But the Office has already announced its view that it is bound by those provisions. *See, e.g.,* DE 462 at 18.

future event necessary or indispensable parties under Rule 19." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir. 1983). *See, e.g., MasterCard Int'l, Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 385 (2d Cir. 2006) ("While there is no question that further litigation [involving an absent party] is inevitable if MasterCard prevails in this lawsuit, Rule 19(a)(1) is concerned only with those who are already parties."). As we explain in the following section of this petition, such a legal challenge by co-conspirators would fail – either because the earlier ruling would bind them or because, on the merits, their claim would fail. But the mere fact that subsequent litigation might occur hardly makes an initial ruling "meaningless." For example, following court-ordered rescission, the Government would be bound by that ruling and thus obligated to proceed on the legal premise that no immunity existed.

A federal court possesses Article III jurisdiction to rule on an issue when it "can fashion *some form* of meaningful relief . . . ." *Church of Scientology of California v. United States,* 506 U.S. 9, 12 (1992) (emphasis in original). Here an order directed to the U.S. Attorney's Office for the Southern District of Florida that the immunity provisions in its NPA were null and void would have been "some form" of meaningful relief, even if the full effect of that order could potentially be challenged by others in subsequent proceedings. The order would be meaningful to the victims, because they would be free to exercise their CVRA conferral rights

with the Government. And the order's ultimate effect on co-conspirators, if any, could wait until another day.

C. The District Court Erred in Concluding that the Potential Co-Conspirators Would Not Be Bound by a Rescission Ruling.

In any event, the district court also committed a reversible legal error in concluding that Epstein's co-conspirators would not have been bound by a ruling rescinding the NPA's immunity provisions. The co-conspirators would have been bound for at least three reasons. First, even third-party beneficiaries to a contract have no rights under a voidable agreement or an agreement that violates public policy. Second, the conspirators were mere incidental beneficiaries rather than intended beneficiaries of the NPA. And, finally, the co-conspirators were represented by Epstein's defense of the agreement.

1. Epstein's Co-Conspirators Had No Rights Under the NPA's Illegal and Voidable Provisions.

It appears generally agreed in this case that the NPA should be construed according to principles of contract law. *See, e.g.,* DE 462 at 18. A standard principle of contract law is that "if a contract is voidable or unenforceable at the time of its formation, the right of any beneficiary is subject to the infirmity." RESTATEMENT (SECOND) OF CONTRACTS § 309(1) (1981). Relatedly, "[i]f a contract ceases to be binding in whole or in part because of impracticability, public policy, non-occurrence of a condition, or present or prospective failure of performance, the

right of any beneficiary is to that extent discharged or modified." RESTATEMENT (SECOND) OF CONTRACTS § 309(2) (1981).

In the court below, the victims argued at length that the immunity provisions were voidable and unenforceable under general principles of contract law. *See* DE 464 at 19-25; DE 466 at 26-40. It is well-settled that parties "may not enter a contract that is void as a matter of public policy." *Neiman v. Provident Life & Accident Ins. Co.*, 217 F. Supp. 2d 1281, 1286 (S.D. Fla. 2002) (*citing King v. Allstate Ins. Co.,* 906 F.2d 1537, 1540 (11th Cir.1990)). For example, under "Florida law, a contract that violates public policy is void and unenforceable." *Neiman*, 217 F. Supp. 2d at 1286.

The *Restatement of Contracts* helpfully sets out the basic tenets of contract law regarding the unenforceability of terms violating public policy. The *Restatement* notes that "a promise or other term of an agreement is unenforceable on grounds of public policy if [1] legislation provides that it is unenforceable or [2] the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." RESTATEMENT (SECOND) OF CONTRACTS § 178(1). Here, both rationales rendered the NPA's immunity provisions unenforceable.

First, concerning legislation rendering the provisions unenforceable, as explained above, the CVRA itself directed that the district court should have

"ensure[d]," 18 U.S.C. § 3771(b)(1), that Ms. Wild (and other victims) had a right to confer about whether to prosecute Epstein's federal crimes against them. The CVRA itself thus mandated that the immunity provisions be declared unenforceable, to protect the victims' right to confer.

Second, the public policy embodied in the CVRA requires the immunity provisions be rendered unenforceable. Congress enacted the CVRA because it found that in case after case "victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care enough . . . and by a court system that simply did not have a place for them." 150 CONG REC. 7296 (2004) (statement of Sen. Feinstein). Against that background, it would flout not only the CVRA's specific provisions but also its underlying public policy to allow a secret agreement reached by the Government and Epstein take effect even though it was negotiated by keeping the victims "in the dark." As a result, there was never an enforceable immunity provision in the NPA. *See San Pedro v. United States*, 79 F.3d 1065, 1068 (11th Cir. 1996) (in order for any provision in a plea agreement to be enforceable, "there must have been a valid, binding agreement in the first instance").

A good illustration of how an unenforceable agreement creates no rights for alleged third-party beneficiaries comes from this Court's decision in *Terry v.*

Northrup Worldwide Aircraft Services, Inc., 786 F.2d 1558 (11th Cir. 1986). There, alleged third party beneficiaries brought an action to enforce their rights under a federal defense contract with a defense contractor, Northrup. *Id.* at 1560. On appeal, this Court dismissed for lack of jurisdiction. This Court explained that, because Northrup had sought review of the contract in the Office of Federal Contract Compliance Programs (OFCCP), the operation of contract provisions in which the beneficiaries claimed an interest had been suspended. This Court accordingly dismissed the beneficiaries' lawsuit, as "there was no enforceable contract because the . . . agreement was stayed pending view [by the OFCCP]." *Id.* at 1561. This Court also cited the provisions of the *Restatement of Contracts (Second)* quoted above. *Id.*

Here, the district court should have followed the same approach as this Court did in *Terry*. It should have first considered the extensive briefing by the victims and the Government (and Epstein) on whether the immunity provisions were voidable or unenforceable. For all the reasons that the victims' provided, the provisions were voidable and unenforceable. The district court should have then entered a ruling to that effect, which would have "discharged" any rights that the alleged third-party beneficiaries had in the NPA.

2. Epstein's Co-Conspirators Are Merely Incidental Beneficiaries to His Non-Prosecution Agreement.

The district court should have also found that the co-conspirators were not intended beneficiaries of the non-prosecution agreement. A general principle of contract law is that "only a party to a contract or an intended third-party beneficiary may sue to enforce the terms of a contract or obtain an appropriate remedy for breach." *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JPMorgan Chase Bank, Nat. Ass'n*, 671 F.3d 1027, 1033 (9th Cir. 2012). The co-conspirators were not described in the NPA as "parties" to the agreement – Epstein and the Government are the agreement's only signatories. *See* DE 361-62. Because the co-conspirators are not parties to the NPA, they could only have rights if they were intended beneficiaries – rather than mere incidental beneficiaries. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302.

In the context of a government contract, demonstrating intended third-party beneficiary status "is a comparatively difficult task. Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, rather than intended beneficiaries, and so may not enforce the contract absent a clear intent to the contrary." *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship*, 671 F.3d at 1033 (internal quotations omitted). This "clear intent" hurdle is a "high one" and is not satisfied "even by a showing that the contract operates to the [third parties'] benefit and was entered into with them in mind." *Id.*

In addition to demonstrating an intent to confer a benefit, a party seeking to take advantage of a federal contract must also demonstrate "an intent on the part of the contracting parties to grant [him] enforceable rights." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1160 (9th Cir. 2016). Here, nothing in the NPA indicates any intention by the Government to give co-conspirators in Epstein's criminal sex trafficking organization enforceable rights. Indeed, it would be hard to imagine federal prosecutors wanting to benefit those who were criminally involved in federal sex trafficking crimes. *Cf.* DE 462 at 4 (noting the Justice Department national priority of combatting human trafficking and child exploitation). To be sure, to secure *Epstein*'s agreement to the NPA, the Government had to extend certain *quid pro quo* benefits to *him.* And, as a result, he would have had enforceable rights to ensure that that the Government abided by the NPA's obligations to him, *see Santobello v. New York*, 404 U.S. 257 (1971) – as least to the extent that those provisions were lawful and negotiated lawfully, *see San Pedro v. United States*, 79 F.3d 1065, 1068 (11th Cir. 1996) (in order for any provision in a plea agreement to be enforceable, "there must have been a valid, binding agreement in the first instance"). But it is hard to see anything in the NPA that demonstrates that the Government was also agreeing to confer upon dozens of unnamed "potential co-conspirators" fully enforceable rights to challenge criminal prosecutions against them.

The district court's decision must be reversed for legal error because it simply *assumed* that the co-conspirators' "rights" would have been implicated by a ruling on the immunity provisions. *See* Appx. 53 ("Since the alleged co-conspirators are not parties to this case, any ruling this Court makes that purports to affect their rights under the NPA would merely be advisory . . . ."). What the district court should have done instead was to apply the well-recognized presumption against intended beneficiary status, conclude that the co-conspirators did not have enforceable rights in an illegal agreement reached between the Government and Epstein, and rescind the co-conspirator immunity provisions.

3. Epstein's Co-Conspirators Are Represented by Him and Would Be Bound by Any Judgment Entered in the Case.

A third and independent reason why Epstein's co-conspirators would have been bound by a district court's ruling rescinding the immunity provisions is that Epstein served as their representative. The Supreme Court has confirmed "that in certain limited circumstances a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit." *Taylor v. Sturgell*, 553 U.S 880, 894 (2008). Adequate representation requires a showing that a party was "acting in a representative capacity." 18A Wright & Miller, FED. PRACTICE AND PROCEDURE - JURISDICTION § 4454 (3d ed.).

Here Epstein's "representative capacity" follows a fortiori from the text of the immunity agreement itself. The agreement extended immunity to "potential

co-conspirators *of Epstein* . . . ." DE 361-62 at 5 (emphasis added). Thus, the agreement itself makes the immunity contingent on being in a co-conspiratorial relationship with Epstein.

At the time the district court closed the case, Epstein had already provided extensive briefing on the validity of NPA's immunity provisions. *See* DE 463 at 14-49. His briefing argued strenuously against rescission. If the district court had ruled on those arguments in entering judgment against the Government, the ruling would have been binding on the co-conspirators, as Epstein was their "representative."

For purposes of this petition, however, this Court need not reach the ultimate determination of whether representation in fact existed. Instead, to reverse the district court, this Court need only decide that the district court's conclusion that "any ruling" it could make would be "merely . . . advisory" (Appx. 53) was legally erroneous. A district court ruling rescinding the immunity provisions would have made available an argument that it was binding on the co-conspirators and accordingly was not "meaningless."

Any other conclusion would produce a truly bizarre result. The district court explicitly stated that, if Epstein had not committed suicide, it could have reached the question of the validity of the NPA's immunity provisions, as he would have

been "bound" by the Court's ruling. It would be perverse if Epstein's decision to take his own life operates to confer immunity on his criminal co-conspirators.

III. The District Court Erred in Denying the Victims' Unopposed Requested Remedy of a Court Hearing at Which the Victims Could Speak.

As another partial remedy, Ms. Wild also sought a public court hearing where she (and other similarly situated Florida victims) could address the court, the USAO-SDFL, and Epstein about the impact of the crimes Epstein committed. DE 458 at 23-24. In response, the Government *agreed* that such a hearing was appropriate, and asked the district court to preside over a hearing where any Epstein victim could participate. The Government asked that the hearing be handled in a manner similar to the way the Court would handle victim impact statements in the context of a criminal sentencing, which would "serve to give the victims a voice . . . ." DE 462 at 7.

Remarkably, despite the agreement of the victims and the Government, the district court declined to hold such a hearing for two reasons. First, the district court stated that "it is a matter of public knowledge that the United States District Judge who was presiding over the criminal case brought against Mr. Epstein in the Southern District of New York already provided that opportunity to Mr. Epstein's victims." Appx. 56. To be sure, it is a matter of public record that some of Epstein's victims were able to speak at a hearing dismissing criminal charges against Epstein in the Southern District of New York following his death. *See*

United States v. Epstein, 1:19-cr-00490-RMB, DE 54 (transcript of hearing held on Aug. 27, 2019) (S.D.N.Y.). But it is also a matter of public record that this hearing involved charges filed in New York and was scheduled on only six days' notice. In declining to award this remedy, the court below never made any factual findings about how many victims were actually able to attend the hearing on such short notice, and particularly how many victims from Florida were able to travel to New York. Moreover, even for victims who were able to travel to New York, they would have been away from their family and friends and not able to speak to the public in Florida. Absent any factual findings about the specifics of the New York hearing, the district court had no basis for concluding that hearing was a complete and sufficient remedy for Epstein's *Florida* victims.

Second, the district court briefly stated that it could play no role in the investigation of Epstein and that the victims could provide their views on the investigation to representatives of the Department of Justice. Appx. 56. But the district court misunderstood the proposed hearing's purpose. The hearing was not designed to assist in investigating Epstein or anyone associated with him. Instead, as both the victims and the Government made clear in their pleadings, the hearing was to serve as a substitute for the denial of earlier opportunities for the victims to have a voice in the process. *See, e.g.,* DE 464 at 43-46.

This Court has held that "the district court is presumed to have the authority to grant the requested relief, absent some indication in the underlying statute that such relief is not available." *Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less*, 910 F.3d 1130, 1152 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 634 (2019). The district court provided no valid reason for declining to hold a public hearing, which both the victims *and* the Government agreed was an appropriate remedy in this case. This Court should reverse the district court's unjustified decision to not provide this remedy to the victims.

IV. The District Court Erred in Declining to Order the Government to Produce Documents as a Remedy in this Case.

As another remedy in the case, the victims sought from the district court an order directing the Government to produce various documents. *See, e.g.,* DE 464 at 10-11, 46-56. Here again, the district court's response failed to address the victims' justifications. The CVRA commands that, where a district court denies a victim CVRA relief, "[t]he reasons for any decision denying relief . . . shall be clearly stated on the record." 18 U.S.C. § 3771(b)(1). This Court should reverse the district court's decision for failure to clearly state the reasons for denying the relief of document production and remand with directions that the documents be produced.

One set of documents that the victims requested was information that they had sought earlier in the case – documents over which the district court had

sustained the Government's assertion of work product privilege. DE 458 at 28 (requesting documents covered by DE 414, which was a motion for finding waiver of work product protection over various documents). These documents had been the subject of two separate motions by the victims arguing that the Government had waived work product protection – and both times the district court denied the motion without explanation.

The documents in question concerned deliberations by the Government regarding whether to prosecute Epstein that the district court had previously reviewed. DE 330 at 12. In 2015, during the discovery phase of this case, the district court concluded that many of these documents were covered by work-product protection. DE 330 at 12-17. However, three years later, in the course of responding to the victims' motion for summary judgment in this case, the Government made numerous representations about its internal deliberations – including filing a detailed affidavit from the line prosecutor purporting to describe what happened during those deliberations. *See* DE 403-19. In light of the Government's multiple disclosures about its deliberations, on August 11, 2017, the victims filed a motion for a finding that the Government had waived its work-product protection. DE 414.

Eighteen months later, on February 21, 2019, the district court granted partial summary judgment in favor of the victims. In the course of its ruling, the

district court added a single sentence stating, without explanation, that it was denying the victims' motion for a finding of waiver "without prejudice." Appx. 47.

The victims renewed their waiver motion as part of their remedies briefing, asking the district court – once again – for a finding of waiver and explaining that it was important for the victims to have the opportunity to learn as much as possible about the decision-making in this case. DE 458 at 28-29. The Government filed no specific response to this request. *See* DE 464 at 55-56. But the district court denied this request for reasons that are not clearly stated.

The district court noted that its finding of a CVRA violation "does not void its finding on the privileged materials." DE 478. The victims, however, were not arguing that the *district court's findings voided* protection; rather, the victims were arguing, as they had nearly two years earlier, that the *Government's actions* waived any protection over the documents. The district court's decision should be reversed and remanded with directions for the court to rule on the victims' motion alleging waiver by the Government.

In addition to declining to produce information about the Justice Department's deliberations, the district court also refused to produce requested information regarding the FBI investigation. Appx. 57. The reason it gave was that the materials "in all likelihood" were relevant to the on-going criminal investigation of Epstein's co-conspirators and that production "could" adversely

affect that investigation. Appx. 57. But the Government had never made any such argument. *See* DE 462 (Government remedies brief filed on June 24, 2019, that does not disclose or discuss any on-going investigation of Epstein). And the district court never made any clearly stated document-by-document findings that would have been needed to sustain its speculation. The district court's unsupported decision on this point should be reversed as well.

The district court also refused to produce grand jury materials to the victims. The victims had sought such production under both Federal Rule of Criminal Procedure 6(e) and this Circuit's separate and supplemental doctrine giving district court's additional inherent power to order disclosure of grand jury materials. DE 458 at 26-27 (*citing Pitch v. United States*, 915 F.3d 704 (11th Cir. 2019)). The Government failed to respond to the victims' inherent powers argument – much less provide specific justifications for continued secrecy. *See* DE 464 at 50. The victims pointed out this omission to the district court, *id.* – only to see the district court ignore their argument as well. The district court discussed only whether the materials should be released under Rule 6(e), not citing – much less discussing – the inherent powers argument. *See* Appx. 57-58. An analysis of a disclosure issue under the court's inherent authority "requires a fact intensive analysis that depends on the competing interests in a particular case." *Pitch*, 915 F.3d at 710. The Government never advanced a competing interest for secrecy. The victims were

entitled to have the district court address their argument – this Court should reverse and remand to the district court with directions to rule on the issue.

Finally, the victims asked for the release of documents that the Government was withholding involving potential defense misconduct. *See* DE 464 at 55-56 (asking for release of documents covered by DE 348); *see also* DE 466 at 19-23. The Government never objected to this production. And the district court never addressed this requested remedy. This Court should direct the district court to rule on this remedy specifically.

V. The District Court Erred in Denying the Victims Their Attorneys' Fees.

After their attorneys spent several thousand hours obtaining a ruling in the victims' favor, the victims also sought attorneys' fees. The Government's only argument against a fee award was that sovereign immunity precluded it. DE 462 at 30. The victims replied by explaining that sovereign immunity was explicitly waived via the Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 UI.S.C. § 3006A, historical and statutory notes). DE 464 at 59-61. The victims also explained that, in this particular case, fees were appropriate because of the Government's conscious wrongdoing. *See United States v. Shaygan*, 652 F.3d 1297, 1313 (11th Cir. 2011) ("We define bad faith for purposes of the Hyde Amendment as the conscious doing of a wrong" (internal quotation omitted)).

In denying the victims' request for fees, the district court did not cite the Hyde Amendment or its legal standard. But the district court did state that it rejected the position that the Government had acted in bad faith, concluding that the Government had asserted legally supportable positions throughout this litigation. Appx. 60. The district court had, however, previously made findings of fact that the Government had made an affirmative "*decision* to *conceal* the existence of the NPA and *mislead* the victims to believe that federal prosecution was still a possibility." Appx. 41-42. And rather than stipulate to these facts, that Office engaged in ten years of litigation to conceal what it had done. *See* DE 41 at 2-4. Moreover, the Government asserted privilege over documents that would shed further light on the subject. *See* DE 414. The victims pointed these facts out to the district court (DE 478 at 13), but the district court did not address them. Again, the CVRA commands that, where a district court denies a victim CVRA relief, "[t]he reasons for any decision denying relief . . . shall be clearly stated on the record." 18 U.S.C. § 3771(b)(1). This Court should reverse the district court's decision declining to award fees based on these unaddressed facts and remand for further proceedings on the issue.

VI. The District Court Erred in Declining to Specifically Rule on Whether the Government Had Violated the Victims' Rights to be Treated with Fairness and to Reasonable, Accurate, and Timely Notice of Public Court Proceedings.

In addition to declining to award the victims any remedies after eleven years of litigation, the district court also failed to provide a substantive ruling on all of the victims' arguments concerning the Government's violation of their rights. On February 10, 2016, the victims sought summary judgment on the question of whether the Government had violated their rights under the CVRA. The victims specifically asserted violation of three separate rights: (1) their right to confer with prosecutors, 18 U.S.C. § 3771(a)(5); (2) their right to be treated with fairness, 18 U.S.C. § 3771(a)(8); and (3) their right to reasonable and accurate notice of court proceedings, 18 U.S.C. § 3771(a)(2). DE 361 at 48-55. More than three years later, on February 21, 2019, the district court ruled on the victims' summary judgment motion. While the district court acknowledged that the victims had raised three separate violations of their rights (Appx. 37), in its ultimate ruling it addressed only the victims' allegation that the Government had violated their right to confer – finding that the Government had violated their "right to conferral." Appx. 47. In its ruling, the district court did not cite – much less discuss – the other two rights.

In their remedies briefing, the victims repeatedly pointed out that they still had pending two additional arguments about two additional violations of their

rights. *See, e.g.,* DE 464 at 11-12. For example, in their initial remedies submission, the victims asked the district court to find that the Government has also violated these two rights. DE 458 at 33. Thereafter, the Government did not respond to this argument, and the victims continued to ask the Court for a ruling on these two issues – which could serve as the predicate for additional remedies for the victims. DE 464 at 11-12; DE 466 at 63-65.

Ultimately, however, the district court did not provide any substantive ruling on these two rights. The district court did briefly state in two sentences that, to the extent that the victims were seeking documents based on a violation of the two rights, it was "reject[ing] this theory. These rights [to fairness and notice] all flow from the right to confer and were encompassed in the Court's ruling finding a violation of the CVRA." Appx. 57.

The district court's partial treatment of these two important arguments violated the CVRA. The district court only addressed the rights in the context of a document production argument – but failed to make a general ruling on the rights for all other contexts. Once again, the CVRA commands that, where a district court denies a victim CVRA relief, "[t]he reasons for any decision denying relief . . . shall be clearly stated on the record." 18 U.S.C. § 3771(b)(1). The victims were entitled to a clear statement of why the district court was not finding a violation of these two rights.

In particular, regarding their right to be treated with fairness, in their summary judgment motion, the victims enumerated as individual bullet points sixteen separate examples of the Government violating their right to be treated with fairness. *See* Fact Section, Part II, *supra* (recounting sixteen examples of violations of the right to fair treatment) (*citing* DE 361 at 52-53). As even a quick perusal of the list makes clear, not all of these issues were "encompassed" by the district court's ruling concerning conferral with the victims about the NPA.

In addition, regarding the right to reasonable and accurate notice of court hearings, the victims made detailed allegations about the events surrounding the June 30, 2008 state court hearing, during which Epstein pled guilty to state crimes, thereby triggering the NPA. The victims explained that they received less than one business days' notice of the hearing and that they received inaccurate information about what was to happen at the hearing. DE 361 at 54-55. Here again, the merits of these allegations were not "encompassed" in a ruling regarding conferral on a non-prosecution agreement consummated nine months earlier.

The district court's refusal to reach these issues harmed the victims. For example, if the district court had ruled in the victims' favor on the issues regarding their right to be treated with fairness, they then could have pressed additional arguments on remedies, such as attorneys' fees. *See* DE 458 at 33; DE 464 at 11-12; DE 466 at 63-64. Also, if the district court had found a violation of the right to

accurate notice of a court hearing, that could have helped the victims obtain a substitute court hearing – such as the hearing that the district court declined to hold. At the very least, after eleven years of litigation, the district court should have reached *all* of the victims' arguments about the Government's violation of their rights.

CONCLUSION

For all these reasons, this Court should reverse the decision below and remand with instructions to the district court that it should grant the victims all appropriate remedies, including the remedies of rescission of the NPA's immunity provisions, holding a public hearing on the case, release of documents, and an award of attorneys' fees. This Court should also instruct the district court to reach the victims' arguments that the Government violated their right to be treated with fairness and to reasonable and accurate notice of court hearings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. Appx. P. 32(a)(7)(B) because this brief contains 12,995 words, excluding the parts of the brief exempted by Fed. R. Appx. P. 32(a)(7)(B)(iii), according to the Microsoft Word software that counsel employs. A stipulated motion is also pending to confirm that the Ms. Wild can file a petition of no longer than 13,000 words.

This brief complies with the typeface requirements of Fed. R. Appx. P. 32(a)(5) and the type style requirements of Fed R. Appx. P. 32(a)(6) because this brief has been prepared in a proportionally spaced Time New Roman typeface using 14-point Times New Roman type.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 30, 2019, the foregoing document was served on the parties to the proceedings below (i.e., the Government and now-deceased Jeffrey Epstein) or their counsel of record, and on the U.S. District Court for the Southern District of Florida (Marra, J.), via e-mail at the following addresses:

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