No. 21-351

In the Supreme Court of the United States

COURTNEY WILD, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Crime Victims' Rights Act, 18 U.S.C. 3771, creates a cause of action for a freestanding lawsuit in the absence of any existing criminal proceeding.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-185) is reported at 994 F.3d 1244. The panel opinion of the court of appeals (Pet. App. 186-305) is reported at 955 F.3d 1196. The opinion of the district court dismissing petitioner's suit (Pet. App. 307-321) is reported at 411 F. Supp. 3d 1321. Earlier relevant opinions of the district court (Pet. App. 322-354, 355-368) are reported at 359 F. Supp. 3d 1201 and 817 F. Supp. 2d 1337.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 2021. The petition for a writ of certiorari was filed on August 31, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Statutory Background

In 2004, Congress enacted the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, commonly known as the Crime Victims' Rights Act (CVRA or Act), Pub. L. No. 108-405, Tit. I, § 102, 118 Stat. 2261 (18 U.S.C. 3771). The CVRA includes six subsections addressing crime victims' rights, the manner in which victims may assert those rights, and the role of federal courts and prosecutors in protecting those rights. 18 U.S.C. 3771(a)-(f). At the times relevant here, subsection (a) set forth the following "Rights of Crime Victims":

> (1) The right to be reasonably protected from the accused.
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> (5) The reasonable right to confer with the attorney for the Government in the case.
>
> (6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. 3771(a) (2006) (capitalization altered).[1]

Subsection (b)(1) provides that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." 18 U.S.C. 3771(b)(1). Subsection (c)(1) instructs "[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" to "make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." 18 U.S.C. 3771(c)(1).

Subsection (d), titled "Enforcement and Limitation," prescribes the manner in which a crime victim may seek to enforce rights created by the Act. 18 U.S.C. 3771(d) (capitalization altered). Subsection (d)(3), titled "Motion for relief and writ of mandamus," states that "[t]he district court shall take up and decide any motion asserting a victim's right forthwith." 18 U.S.C. 3771(d)(3) (capitalization altered). That motion must be filed "in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in

[1] In 2015, Congress amended subsection (a) to include additional rights. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113(a)(1), 129 Stat. 240 (18 U.S.C. 3771(a)(9)-(10)). Unless otherwise noted, all references to the CVRA in this brief refer to the version codified in the 2006 edition of the U.S. Code, which is the version "in effect during the events in question." Pet. App. 15.

the district court in the district in which the crime occurred." *Ibid.* If the district court denies the relief sought, "the movant may petition the court of appeals for a writ of mandamus." *Ibid.*

Congress included further limitations on the CVRA's remedial mechanisms. For example, subsection (d)(6), titled "No cause of action," states that "[n]othing in this chapter shall be construed to authorize a cause of action for damages." 18 U.S.C. 3771(d)(6) (capitalization altered). The same subsection declares that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Ibid.*

Congress also established an administrative scheme to "Promote Compliance" with the CVRA's provisions. 18 U.S.C. 3771(f) (capitalization altered). It requires the Attorney General to "promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations" concerning those victims. 18 U.S.C. 3771(f)(1). Among other things, those regulations must "designate an administrative authority * * * to receive and investigate complaints" alleging CVRA violations and establish "disciplinary sanctions, including suspension or termination from employment, for" such violations. 18 U.S.C. 3771(f)(2)(A) and (C); see 28 C.F.R. 45.10. The Attorney General is "the final arbiter of [an administrative] complaint," and "there [is] no judicial review" of his decision. 18 U.S.C. 3771(f)(2)(D).

B. Factual Background

Petitioner is one of many women who were, as minors, "victimized by notorious sex trafficker and child abuser Jeffrey Epstein." Pet. App. 2; see Indictment ¶ 1, *United States* v. *Epstein*, 19-cr-490 (S.D.N.Y July

2, 2019) (SDNY Indictment). Between 1999 and 2007, "Epstein and multiple coconspirators sexually abused more than 30 young girls, including [petitioner], in Palm Beach, Florida and elsewhere in the United States and abroad." Pet. App. 3; see SDNY Indictment ¶¶ 2-19.

Epstein came to the attention of law enforcement in 2005, when the parents of a 14-year-old girl informed Palm Beach police that Epstein had paid her for a massage. Office of Professional Responsibility (OPR), U.S. Dep't of Justice, *Executive Summary of Report: Investigation into the U.S. Attorney's Office for the Southern District of Florida's Resolution of Its 2006-2008 Federal Criminal Investigation of Jeffrey Epstein and Its Interactions with Victims during the Investigation* i (Nov. 2020) (OPR Report), https://go.usa.gov/xe3Bs. A police "investigation led to the discovery that Epstein used personal assistants to recruit girls to provide massages to him, and in many instances, those massages led to sexual activity." *Ibid.* Palm Beach police "brought the case to the State Attorney's Office," and "a Palm Beach County grand jury indicted Epstein, on July 19, 2006, for felony solicitation of prostitution." *Ibid.* Because the police chief and lead detective in Palm Beach "were dissatisfied with the State Attorney's handling of the case and believed that the state grand jury's charge did not address the totality of Epstein's conduct, they referred the matter to the Federal Bureau of Investigation (FBI) * * * for a possible federal investigation." *Ibid.*; see Pet. App. 323.

Together, FBI agents and prosecutors in the United States Attorney's Office for the Southern District of Florida (USAO) "develop[ed] a federal case against Epstein." OPR Report i. During their investigation, they "discovered additional victims" of Epstein's criminal

conduct. *Ibid.* "As early as March 2007," prosecutors in the USAO sent letters advising those victims of their rights under the CVRA. Pet. App. 4; see *id.* at 324, 329, 369-370. By May 2007, the USAO had completed "a 53-page draft indictment alleging that Epstein had committed numerous federal sex crimes." *Id.* at 4.

While the USAO was developing its case, "Epstein's defense team engaged in extensive negotiations with government lawyers in an effort to avoid indictment." Pet. App. 4; see *id.* at 324-329. In July 2007, "Epstein's lawyers sent a detailed letter to prosecutors arguing that, in fact, Epstein hadn't broken any federal laws." *Id.* at 4. At a meeting later that month, the USAO "offered to end its investigation if Epstein pled guilty to [the pending] state charges, agreed to serve a minimum of two years' incarceration, registered as a sexual offender, and agreed to a mechanism through which victims could obtain monetary damages." OPR Report i.

After further negotiations, the two sides in September 2007 agreed to a non-prosecution agreement (NPA) under which "Epstein would plead guilty in Florida court to two state prostitution offenses, and, in exchange, he and any coconspirators * * * would receive immunity from federal prosecution" in the Southern District of Florida. Pet. App. 4-5; see OPR Report ii. The NPA "required Epstein to make a binding recommendation that the state court sentence him to serve 18 months in the county jail followed by 12 months of community control (home detention or 'house arrest')." OPR Report ii. The NPA "also included provisions designed to facilitate the victims' recovery of monetary damages from Epstein." *Ibid.*; see Pet. App. 5 n.1.

For roughly the next nine months, Epstein and his attorneys attempted "to change the terms" of the deal,

"while simultaneously seeking to invalidate the entire NPA by persuading senior [Justice] Department officials that there was no federal interest at issue and the matter should be left to the discretion of state law enforcement officials." OPR Report ii. Ultimately, in June 2008, the Office of the Deputy Attorney General informed Epstein's attorneys that the Department would not change the terms of the NPA. *Ibid.* One week later, "Epstein pleaded guilty to the state crimes as agreed and was sentenced to 18 months' imprisonment, 12 months' home confinement, and lifetime sex-offender status." Pet. App. 5; see OPR Report ii.

Although the USAO contacted many victims during its investigation and preparation of potential federal charges, "[v]ictims were not informed of, or consulted about, a potential state resolution or the NPA prior to its signing." OPR Report ii; see Pet. App. 4-6, 329-330. The NPA, moreover, provided that the "parties anticipate that this agreement will not be made part of any public record," and that the government would provide Epstein with notice before disclosing it. *Id.* at 5. Epstein's attorneys opposed disclosure of the NPA—including to the victims—and the government did not disclose its existence until after Epstein had pleaded guilty to the state charges in June 2008. See *id.* at 6-7, 331-341.

C. Prior Proceedings

1. In July 2008, petitioner filed a civil suit in the U.S. District Court for the Southern District of Florida. Pet. App. 7. In an initial pleading "filed *ex parte*, without naming a defendant," and captioned as an "Emergency Victim's Petition for Enforcement of Crime Victim's Rights Act," petitioner alleged that she was a "crime victim" within the meaning of the CVRA; that federal

prosecutors had violated her rights under the Act; and that the court should "'order the United States Attorney to comply with the provisions of the CVRA.'" *Id.* at 7-8. In particular, she alleged violations of her rights "to confer with the attorney for the Government in the case," 18 U.S.C. 3771(a)(5), and "to be treated with fairness and with respect for [her] dignity and privacy," 18 U.S.C. 3771(a)(8); see Pet. App. 8.

The case was largely "dormant" for the next two years, while petitioner and other victims pursued civil claims against Epstein. OPR Report ii. In 2011, petitioner moved for summary judgment, and the district court issued a decision addressing several threshold issues. Pet. App. 355-368. The court first concluded that, if "a prosecution" for an alleged federal crime "is not underway, the victims may initiate a new action under the CVRA in the district court of the district where the crime occurred." *Id.* at 359-360. The court then rejected the government's contention that CVRA rights do not attach before formal charges against a defendant are filed. *Id.* at 361-362. The court held, however, that further evidentiary proceedings were required to determine whether the government had violated the CVRA rights that petitioner asserted. *Id.* at 364.

2. "Following another eight years of litigation," the district court in February 2019 issued a decision holding that the government "had infringed" petitioner's rights under the CVRA. Pet. App. 9. In particular, the court concluded that federal prosecutors violated the CVRA by "enter[ing] into [the] NPA with Epstein without conferring with" petitioner and other victims "during its negotiation and signing." *Id.* at 347. The court then di-

rected the parties (including Epstein, who had intervened) to address "what remedy, if any, should be applied in view of the violation." *Id.* at 354.[2]

3. In July 2019, Epstein was indicted by a federal grand jury in the Southern District of New York for sex-trafficking minors and conspiring to do the same. Pet. App. 7. The indictment alleged that Epstein had "sexually exploited and abused dozens of minor girls at his homes in Manhattan, New York, and Palm Beach, Florida, among other locations." SDNY Indictment ¶ 1; see *id.* ¶¶ 5-19.

On August 10, 2019, "Epstein was found hanging in his cell and was later pronounced dead." OPR Report v. "The New York City Chief Medical Examiner concluded that Epstein had committed suicide." *Ibid.* Federal prosecutors in New York then "filed a *nolle prosequi* to dismiss the pending indictment against Epstein." *Ibid.* On August 27, 2019, the district court in New York "held a hearing at which more than a dozen of Epstein's victims—including [petitioner and other] victims of the conduct in Florida that was addressed through the NPA—spoke about the impact of Epstein's crimes." *Ibid.* The federal court in New York dismissed the Epstein indictment on August 29, 2019. *Ibid.*

4. In September 2019, the district court in this case denied the remedies proposed by petitioner and dismissed the suit. Pet. App. 307-321. Specifically, the court declined to order the rescission of the NPA be-

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[2] Following the district court's finding that the prosecutors in the Southern District of Florida had violated the CVRA, Department of Justice leadership recused that USAO from this litigation and assigned the U.S. Attorney's Office for the Northern District of Georgia to handle the matter for the government. OPR Report iv.

cause Epstein could no longer be prosecuted and because the court lacked jurisdiction over his co-conspirators, who (unlike Epstein) had not intervened in the case. *Id.* at 310-312. The court also declined to enter an injunction or otherwise direct the government to undertake certain remedial actions, in part because the government had already "agreed to confer with the victims" regarding any remaining decisions involving Epstein's co-conspirators, to arrange a meeting at which petitioner and other victims could address government representatives, and "to provide training to its prosecutors regarding the rights of victims under the CVRA." *Id.* at 314; see *id.* at 313-315. The court also declined to order the production of certain documents, impose sanctions on the government, or order the government to pay restitution or attorney's fees. *Id.* at 315-320.

5. Petitioner sought review of the district court's order by filing a petition for a writ of mandamus in the Eleventh Circuit. See 18 U.S.C. 3771(d)(3) (providing for that method of review); Pet. App. 11. A panel of the court of appeals denied the petition. Pet. App. 186-305. The panel held that "the CVRA does not apply before the commencement of criminal proceedings—and thus, on the facts of this case, does not provide [petitioner] any judicially enforceable rights." *Id.* at 235. Judge Hull dissented. *Id.* at 245-305.

6. The court of appeals granted rehearing en banc and denied the mandamus petition by a 7-4 vote. Pet. App. 1-185.

a. The en banc court resolved the case on the "threshold" ground that the CVRA does not provide a cause of action to assert statutory rights through "a freestanding lawsuit" filed "before the commencement

of (and in the absence of) any preexisting criminal proceeding." Pet. App. 20. The court explained that, under *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and related decisions of this Court, a court asked to recognize a freestanding right of action must "determine whether [a statute] displays an intent to create not just a private right *but also a private remedy*." Pet. App. 20 (quoting *Sandoval*, 532 U.S. at 286). Applying that approach, the court found "no clear evidence that Congress intended to authorize crime victims to seek judicial enforcement of CVRA rights prior to the commencement of criminal proceedings." *Id.* at 22.

The en banc court began its analysis with 18 U.S.C. 3771(b), which provides that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." That language, the court held, "contains *no* suggestion that the Act provides for judicial enforcement of crime victims' rights outside the confines of a preexisting 'proceeding.'" Pet. App. 23. Likewise, the court explained, Section 3771(d) "specifies that a crime victim's vehicle for 'assert[ing]' her CVRA rights is a '[m]otion for relief' in the district court," and "[t]he term 'motion' is * * * commonly understood to denote a request filed within the context of a preexisting judicial proceeding"—not "a vehicle for initiating a new and freestanding lawsuit." *Id.* at 25-26. (quoting 18 U.S.C. 3771(d)(3)) (first and second sets of brackets in original).

The en banc court drew further support from 18 U.S.C. 3771(d)(6), which provides that "[n]othing in th[e CVRA] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under

his direction." The court explained that allowing a free-standing lawsuit in the absence of criminal proceedings would undermine that assurance in "fundamental ways." Pet. App. 33. In particular, courts would be required to determine in the first instance "whether a 'Federal offense' has occurred," *id.* at 34, and whether to order "government lawyers (presumably on pain of contempt) to conduct their prosecution of a particular matter in a particular manner," *id.* at 37. The court also noted that Section 3771(f) "direct[s] the establishment of a robust administrative-enforcement scheme," which "severely undermines any suggestion that" Congress "intended to authorize crime victims to file stand-alone civil actions in federal court." *Id.* at 40.

The en banc court rejected petitioner's reliance on Section 3771(d)(3)'s provision that CVRA rights "shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." 18 U.S.C. 3771(d)(3); see Pet. App. 45-46. Although petitioner read that clause to authorize a freestanding suit *before* a prosecution is underway, the court explained that it "could just as easily—and far more sensibly, given the statutory context and the practical and constitutional problems that [petitioner's] interpretation would entail—be understood to refer to the period after a 'prosecution' has run its course and resulted in a final judgment of conviction." *Id.* at 45-46.

The en banc court also rejected petitioner's reliance on Section 3771(c)(1)'s provision that federal "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims

are notified of, and accorded, the rights described in subsection (a)." 18 U.S.C. 3771(c)(1); see Pet. App. 47-51. That statutory language, the court explained, "doesn't speak to judicial enforcement at all," but "merely clarifies that CVRA obligations extend beyond the officers and employees" of the Department of Justice to include other departments and agencies engaged in the detection, investigation, or prosecution of crime. *Id.* at 48.

The en banc court emphasized that the legal question it had answered was separate from "whether, as a matter of best practices, prosecutors *should* have consulted with" petitioner and other victims "before negotiating and executing Epstein's NPA." Pet. App. 52; see *ibid.* ("By all accounts—including the government's own—they should have."). The court also expressed "sympathy for" petitioner and "the courage that she has shown in pursuing this litigation," but found itself "constrained to hold that" her suit could not proceed. *Id.* at 52-53.

b. Chief Judge Pryor, joined by three other judges, filed a concurring opinion. Pet. App. 54-67. Among other points, the concurrence explained that construing "the word 'motion' in subsection (d)(3)" to establish "a cause of action to launch a freestanding civil action" would require interpreting the word to "mean two different things at the same time." Pet. App. 62. Specifically, when there is (or has been) a criminal proceeding, a "motion" would refer to "an ordinary filing with the district court." *Ibid.* But in "the absence of a criminal proceeding," the same term would mean "a complaint that commences a civil action against the government." *Ibid.* The concurrence noted that the CVRA "uses the word 'motion' again only two paragraphs later but with only one possible meaning" unrelated to any freestanding civil action. *Ibid.* (citing 18 U.S.C. 3771(d)(5)). The

concurrence reasoned that "motion" accordingly should not be construed to establish "a cause of action to launch a freestanding civil action." *Ibid.*

Judge Newsom, who authored both the en banc and panel majority opinions, wrote a concurrence explaining that the result inspired a "sense of sorrow" but was compelled by "adherence to the rule of law." Pet. App. 68. Judge Tjoflat, joined by four other judges, issued a concurrence expanding on the constitutional problems that the majority held would be created by petitioner's interpretation, including requiring a court to decide—before the Executive Branch has decided—whether a federal crime has been committed. *Id.* at 70-96.

c. Judge Branch, joined by three other judges, dissented. Pet. App. 97-155. In her view, "(1) the plain text of the CVRA grants crime victims two 'pre-charge' rights—the 'reasonable right to confer with the attorney for the Government' and the 'right to be treated with fairness'—and (2) it provides crime victims with the statutory private remedy of judicial enforcement of those rights 'if no prosecution is underway' by filing a motion for relief 'in the district court in the district in which the crime occurred.'" *Id.* at 97 (quoting 18 U.S.C. 3771(a)(5), (a)(8), and (d)). The dissent described the motion for relief as a "freestanding" vehicle that establishes a cause of action rather than as a pleading that may be filed in an already-existing proceeding against a criminal defendant. *Id.* at 112 n.11.

Judge Hull joined Judge Branch's dissent and also filed a separate dissent. Pet. App. 156-185. She reiterated her position that the CVRA rights asserted by petitioner "attach pre-charge," *id.* at 156, and added that, in her view, "the CVRA expressly creates a judicial enforcement mechanism: a '[m]otion for relief' filed in 'the

district court in the district in which the crime occurred,'" *id.* at 176 (quoting 18 U.S.C. 3771(d)(3)) (brackets in original).

D. Additional Developments

Beginning in early 2019, the Department of Justice's OPR undertook a thorough investigation and review of the "decision to resolve the federal investigation of Epstein through the NPA." OPR Report vi. When OPR completed its report in November 2020, Justice Department officials met with victims and their legal representatives in Florida to discuss the findings. Office of Public Affairs, U.S. Dep't of Justice, *Statement on DOJ Office of Professional Responsibility Report on Jeffrey Epstein 2006-2008 Investigation* (Nov. 12, 2020) (OPA Statement), https://go.usa.gov/xecjA. The Department then transmitted the full report to Congress and publicly released a 12-page executive summary that thoroughly recounts the OPR's findings. See *ibid.*[3]

OPR concluded that none of the government officials involved committed professional misconduct with respect to "the development, negotiation, and approval of the NPA" or "the government's interactions with victims." OPR Report ix-x. OPR did, however, find that the "decision to resolve the federal investigation through the NPA constitute[d] poor judgment," and that the USAO's "lack of transparency and its inconsistent messages" to victims "reflected poorly on the Department as a whole, and [were] contradictory to the Department's mission to minimize the frustration and confusion that victims of a crime endure." *Id.* at x, xi.

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[3] The Department explained that the Privacy Act prohibits public release of the full report. OPA Statement, *supra*.

In keeping with its commitment to the district court, the Department of Justice provided USAO personnel with additional CVRA training, including review of federal laws governing victim rights and Department guidance related to each right enumerated under the CVRA. See Gov't En Banc C.A. Br. 9 n.2. That guidance provides that Departmental policy is to notify and provide victims with their CVRA rights "as early in the criminal justice process as is feasible and appropriate." U.S. Dep't of Justice, *Attorney General Guidelines for Victim and Witness Assistance* 35 (rev. May 2012), https://go.usa.gov/xexj8.

In addition, the Deputy Attorney General recently instituted a comprehensive review to update the Department's existing guidance based on legal changes and lessons learned over the last decade. Memorandum from Lisa Monaco, Deputy Attorney General, to Heads of Components, *Re: Revision of the Attorney General Guidelines for Victim and Witness Assistance* (Oct. 1, 2021), https://go.usa.gov/xecD6. And the Department has engaged closely with victims as it continues to pursue Epstein's co-conspirators. See Gov't En Banc C.A. Br. 15. On June 29, 2020, a federal grand jury in the Southern District of New York indicted Ghislaine Maxwell—a close associate of Epstein—on numerous charges related to Epstein's sex-trafficking conspiracy. See *United States* v. *Maxwell*, No. 20-cr-330. Maxwell proceeded to trial, several victims testified, and the jury returned guilty verdicts on five counts in late December 2021.[4]

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[4] The district court in *Maxwell* correctly held that the NPA entered in the Southern District of Florida does not bar prosecution of Maxwell in the Southern District of New York for the charges at

ARGUMENT

The abuse and trauma endured by petitioner and the many other victims of Jeffrey Epstein's sex-trafficking crimes are profoundly distressing. The government deeply regrets that it did not communicate more clearly and forthrightly with petitioner and other victims during its initial investigation of Epstein's federal crimes. As the OPR report concluded, the decision to resolve that investigation through an NPA reflected "poor judgment." OPR Report x. In addition, "the government's lack of transparency and its inconsistent messages led to victims feeling confused and ill-treated" and meant that "victims were not treated with the forthrightness and sensitivity expected by the Department." *Id.* at xi. The Department has resolved to learn from those errors and ensure they are not repeated—including by coordinating closely with victims in its ongoing pursuit of Epstein's co-conspirators, reaffirming its commitment to inform crime victims about expected charging decisions as early in the process as feasible and appropriate, and initiating a comprehensive review of its existing guidelines in this area.

As a matter of law, however, the decision below is correct. The en banc court of appeals carefully analyzed the CVRA and correctly held that, under the framework articulated by this Court in decisions like *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the statute does not create a cause of action to file a freestanding civil suit against the United States when it has not initiated a criminal prosecution. That conclusion follows not only from the statutory text and structure, but also from core separation-of-powers principles.

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issue in that case. See *United States* v. *Maxwell*, 534 F. Supp. 3d 299, 310-311 (S.D.N.Y. 2021).

No aspect of the decision below warrants this Court's review. Petitioner does not contend that the court of appeals' holding conflicts with any decision of this Court or another court of appeals. Indeed, although the question whether the CVRA authorizes a freestanding suit in the absence of a criminal prosecution could arise in a range of different circumstances, no other court of appeals has yet addressed it. Nor do the particular facts of this case support review. This long-running litigation is in many respects tragic, but the courts below correctly resolved it, and petitioner would be unlikely to obtain meaningful relief even if this Court granted certiorari and reversed.

A. The Decision Below Is Correct

1. As this Court has long emphasized, "private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. In determining whether a plaintiff can sue under a particular statute, the dispositive question is thus whether the statute "displays an intent to create not just a private right but also a private remedy." *Ibid.* Absent a clear indication of such intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-287; see, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 (2002); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). The decision below reflects a straightforward application of those principles to the CVRA.

a. As the en banc court explained, the CVRA provides 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 sub-

section (a)"—which includes the rights asserted by petitioner. 18 U.S.C. 3771(b)(1). The most natural reading of that direction is that the rights can be asserted only in the context of an existing "proceeding"—*i.e.*, a criminal prosecution. *Ibid.*; see Pet. App. 23.

That reading is reinforced by the CVRA provision governing "[e]nforcement." 18 U.S.C. 3771(d) (capitalization omitted). It provides for a crime victim to assert statutory rights by filing a "[m]otion for relief." 18 U.S.C. 3771(d)(3) (capitalization omitted). By far the most common understanding of the term "motion" is "a request filed within the context of a preexisting judicial proceeding." Pet. App. 25 (citing sources). By contrast, "the term 'motion' has never been commonly understood to denote a vehicle for initiating a new and freestanding lawsuit." *Id.* at 26. Indeed, petitioner, in asserting her CVRA rights here, did not caption her filing as a "motion," but rather as an "Emergency Victim's Petition." *Id.* at 28 n.15.

There is no dispute, moreover, that the CVRA authorizes a crime victim to assert a statutorily protected right by filing a "motion," 18 U.S.C. 3771(d)(3), in the usual sense of that word—for example, a motion "to be reasonably heard at" a plea or sentencing hearing, 18 U.S.C. 3771(a)(4). Petitioner's position would thus require giving the term "motion" in Section 3771(d)(3) two different meanings: a case-initiating document akin to a complaint or petition, *and* a request for relief within an existing case. A "single use of a statutory phrase," however, generally "must have a fixed meaning," so this Court "avoid[s] interpretations that would 'attribute different meanings to the same phrase.'" *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) (citation omitted); see Pet. App. 25;

see also Pet. App. 61-62 (Pryor, C.J., concurring) (elaborating on that flaw in petitioner's reading).

Relatedly, authorizing a "motion asserting a victim's right," 18 U.S.C. 3771(d)(3), would be at best an atypical way for Congress to create a freestanding cause of action for a crime victim. Another provision of Title 18 provides that a minor "victim of a violation of" certain criminal statutes "*may sue in any appropriate United States District Court*" to obtain relief. 18 U.S.C. 2255(a) (emphasis added). Similarly, a bill proposed in 2019 would have authorized a crime victim to "*bring an action in the district court* to annul a nonprosecution agreement." Courtney Wild Crime Victims' Rights Reform Act of 2019, H.R. 4729, § 2(3)(F), 116th Cong., 1st Sess. (emphasis added). Those simple and straightforward statements show how Congress can create an independent cause of action for a crime victim when it wants to do so—and that it did not do so in the CVRA.[5]

b. Other aspects of Section 3771(d) further confirm that Congress permitted assertion of CVRA rights only in existing proceedings. Section 3771(d)(3), for example, provides for review of a district court's decision by a mandamus petition—not an ordinary appeal—and states that "[i]n no event shall proceedings be stayed or

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[5] The court of appeals stated that it had been "pointed to only two other instances, both arising out of the Federal Rules of Criminal Procedure, in which the term 'motion' is even arguably used to initiate legal proceedings." Pet. App. 27 n.13 (citing Fed. R. Crim. P. 17(c)(2) and 41(g)). But those two provisions, which arise in different and specialized contexts, do not alter the fact that "the term 'motion' has never been *commonly* understood to denote a vehicle for initiating litigation, let alone as the vehicle for initiating a standalone civil action of the sort that [petitioner] seems to envision." *Ibid.*

subject to a continuance of more than five days for purposes of enforcing th[e CVRA]." 18 U.S.C. 3771(d)(3). That provision plainly contemplates existing criminal proceedings rather than standalone CVRA suits. See Pet. App. 29.

Of particular significance, Section 3771(d)(6) provides that "[n]othing in th[e CVRA] shall be construed to impair * * * prosecutorial discretion." As the court of appeals explained, freestanding civil suits seeking to impose requirements on prosecutors or investigators in the absence of criminal proceedings would severely impair prosecutorial discretion. See Pet. App. 31-39; *id.* at 70-96 (Tjoflat, J., concurring). Among other intractable problems, Article III courts would have to adjudicate as an initial matter whether uncharged conduct constitutes "commission of a Federal offense." 18 U.S.C. 3771(e). See Pet. App. 36-39. Opening the door to such unprecedented judicial determinations would not only "impair" prosecutorial discretion, 18 U.S.C. 3771(d)(6), but would create serious separation-of-powers concerns given the Executive's "broad discretion to enforce the Nation's criminal laws," *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (citations and internal quotation marks omitted). The court of appeals rightly interpreted the CVRA to avoid such constitutional questions. Pet. App. 51.

c. Congress's creation of an *administrative* mechanism "to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims," 18 U.S.C. 3771(f)(1), underscores that Congress did not expect freestanding lawsuits to be the mechanism for asserting CVRA violations outside of criminal proceedings, see Pet. App. 39-44; see also *United States* v.

Monzel, 641 F.3d 528, 542 (D.C. Cir.) (explaining that the CVRA's "carefully crafted and detailed enforcement scheme," provides "strong evidence that Congress did *not* intend to authorize other remedies") (citations and internal quotation marks omitted), cert. denied, 565 U.S. 1072 (2011). At a minimum, the administrative-enforcement mechanism, combined with the statutory evidence discussed above, supports the court of appeals' conclusion that Congress did not authorize a freestanding suit of the kind at issue here with the clarity required by *Sandoval*.

2. Petitioner offers several responses (Pet. 23-30), but none is persuasive.

a. Petitioner relies primarily (Pet. 24-26) on Section 3771(d)(3)'s provision that "[t]he rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred." 18 U.S.C. 3771(d)(3) (emphasis added). Quoting Judge Branch's dissent, petitioner contends (Pet. 25) that the decision below "effectively reads the phrase 'if no prosecution is underway' out of the statute.'" As the en banc court explained, however, that language retains effect under the court's interpretation because it would "permit a [crime] victim to file a *post*-prosecution motion alleging that the government violated her rights during the course of the prosecution." Pet. App. 46. Critically, such a motion would not impair prosecutorial discretion in the ways that a motion divorced from any criminal prosecution would, because it would not require courts to address in the first instance whether federal crimes had been committed or whether to direct the government's investigation and charging decisions.

Petitioner contends (Pet. 25) that the court of appeals' interpretation would authorize a "freestanding" suit of the kind the court found impermissible, because a victim could "assert[]" his or her statutory "rights" in the "district in which the crime occurred," 18 U.S.C. 3771(d)(3), which could be different from the district in which the prosecution took place. But petitioner does not contest the court's observation that such a situation is unlikely to occur, because the Sixth Amendment generally requires criminal prosecutions to be in the district where the crime was committed. Pet. App. 46 n.21. And even if that situation did occur, a *post*-prosecution suit would not be a "freestanding" suit in the sense that the court found contrary to the statute, because it would not "impair" prosecutorial discretion. 18 U.S.C. 3771(d)(6).

Petitioner also suggests (Pet. 26) that Section 3771(d)(3) should be read to authorize a freestanding pre-prosecution civil suit because some of the CVRA's enumerated rights apply before a prosecution is underway. But that argument turns on the scope of the statutory right—a question that the court of appeals specifically declined to resolve, Pet. App. 13—not the separate and dispositive question whether Congress created "a private remedy." *Sandoval*, 532 U.S. at 286.

b. Petitioner additionally relies (Pet. 26-28) on 18 U.S.C. 3771(c)(1), which states that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." In petitioner's view (Pet. 26), that provision's references to "detection" and "investigation"

mean that "the CVRA can apply during a criminal investigation."

That argument is misguided in multiple respects. As an initial matter, the court of appeals correctly explained that Section 3771(c)(1) is best read as defining the range of government employees required to safeguard victims' rights, not the point at which they must safeguard those rights—*i.e.*, as "a 'to whom' provision, not a 'when' provision." Pet. App. 48. In any event, the provision "doesn't speak to judicial enforcement at all," and therefore "can't provide the basis for discerning a private right of action to seek pre-charge judicial enforcement of those rights." *Ibid.*

c. Finally, petitioner dismisses (Pet. 28-30) much of the court of appeals' analysis regarding prosecutorial discretion as reflecting "policy" concerns. But as noted, the CVRA's text expressly states that it shall not "be construed to impair * * * prosecutorial discretion." 18 U.S.C. 3771(d)(6). And the Executive Branch's prosecutorial discretion derives from the President's "constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *Armstrong*, 517 U.S. at 464 (quoting U.S. Const. Art II, § 3). The court's observation that petitioner's reading of the statute would impair prosecutorial discretion accordingly reflected not reliance on mere policy considerations, but rather faithful application of the text of the statute and principles of constitutional avoidance.

Petitioner understandably focuses (Pet. 29-30) on the particular prosecutorial conduct in this case. She notes that the USAO provided some information to victims before making its charging decision, and she suggests that the CVRA permits a suit "[a]t least in circumstances where a case has matured to the point where an

investigation has been completed, federal charges have been drafted, and prosecutors and defense attorney are engaging in negotiations about disposition of those charges." But nothing in the CVRA's text or structure suggests that the statute could be interpreted to apply *only* in the highly specific circumstances that petitioner outlines. As the court of appeals explained, petitioner's position reflects "a line that happens to include this case" but that has "no footing in the text of the provisions that she invokes for support." Pet. App. 51; cf. *Department of Homeland Sec.* v. *MacLean*, 574 U.S. 383, 394 (2015) (explaining that a proposed "interpretation happens to fit this case precisely, but * * * needs more than that to recommend it").

Instead, the logic of petitioner's position would permit freestanding civil suits against the government at any point in the pre-prosecution process—*e.g.*, when law-enforcement personnel are "conducting a raid, seeking a warrant, making an arrest, interviewing a witness, convening a lineup, or conducting an interrogation." Pet. App. 50. Petitioner does not appear to dispute that such suits would amount to a serious invasion of the Executive's prosecutorial discretion. And even to the extent that petitioner's claim could somehow be cabined to the particular context of NPAs, the government's decisions *not* to charge crimes would still be subject to judicial scrutiny—a fundamental break from the settled principle that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974). At the very least, the court below was correct that, if Congress had "intended such a jarring result," it would have provided a far "clearer indication" than it did here. Pet. App. 50.

B. This Court's Review Is Unwarranted

1. Petitioner does not claim that the decision below conflicts with any decision of this Court or another court of appeals. Petitioner nevertheless suggests (Pet. 22) that there is "divergence between" the approach taken by the court below and the approach taken by the Fifth Circuit in *In re Dean*, 527 F.3d 391 (2008) (per curiam). Unlike this case, however, *Dean* did not involve the question whether the CVRA authorizes a freestanding suit absent initiation of a criminal proceeding. See *id.* at 392 (explaining that victims in *Dean* asked the district court to reject a plea agreement "*[i]n the related criminal proceeding*") (emphasis added).

Petitioner observes that the district court in the decision giving rise to *Dean* concluded that some CVRA rights "apply before any prosecution is underway." Pet. 21 (citations omitted). But the Fifth Circuit did not endorse that holding; it stated only that "victims have a right to * * * confer[] with prosecutors *before a plea agreement is reached*," which is not necessarily before a criminal prosecution is filed. *Dean*, 527 F.3d at 395 (emphasis added). And even if *Dean* could be read to support petitioner's position that some CVRA rights attach before a prosecution is initiated, that would not resolve the "determinative" question here: whether the statute "create[s] not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286. The court of appeals specifically distinguished *Dean* on that ground. Pet. App. 13 n.7.

2. Petitioner's principal argument for certiorari centers (Pet. 18) on what she views as the particular problems created by "secret NPAs." But as explained above (see pp. 24-25, *supra*), the statutory text does not furnish a basis for construing the CVRA as creating a right

to bring a pre-prosecution suit *only* with respect to NPAs. If a victim can bring a freestanding suit asserting a CVRA violation when a criminal prosecution has not been commenced by reason of a NPA, nothing in the statute bars victims from bringing freestanding suits to remedy asserted CVRA violations when criminal prosecutions are not commenced for other reasons, such as a prosecutorial declination, a lack of evidence, a need for continued investigation, an opportunity to build on a suspect's cooperation, a lack of resources, or some other basis.

For similar reasons, petitioner is mistaken (Pet. 19) that this case presents "a now-or-never opportunity to enforce the CVRA's rights for crime victims." As just noted, the central question here—whether the CVRA permits freestanding suits in the absence of a criminal prosecution—could arise in many different contexts. And federal courts routinely address interpretive questions arising from the CVRA, see, *e.g.*, *In re Brown*, 932 F.3d 162, 168 (4th Cir. 2019); *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012) (per curiam), so it is entirely possible that the legal question presented here will arise again. Moreover, Congress has considered legislation that would seem to directly resolve the question presented, see p. 20, *supra*, which would provide another mechanism for obtaining a resolution in line with petitioner's position without this Court's review.

Petitioner suggests (Pet. 15-18) that the government will exploit the decision below by resolving more cases through NPAs negotiated without knowledge of the victims. As noted above, however, the Department's policy is to notify and provide victims with their CVRA rights as early in the criminal justice process as is feasible and

appropriate. The Department's *Justice Manual* specifies that in considering a non-criminal disposition of a matter, prosecutors "should consider the interests of any victims" and "should be available to confer with the victim in furtherance of the [CVRA]." U.S. Dep't of Justice, *Justice Manual* § 9-27.250 (July 2020). The Department in this case recognized that, "as a matter of best practices," it "*should* have consulted with" petitioner and other victims "before negotiating and executing Epstein's NPA." Pet. App. 52; see Gov't En. Banc C.A. Br. 15. The Department engaged closely with victims in both its 2019 prosecution of Epstein in New York and its recent successful prosecution of Ghislaine Maxwell. And the Department recently embarked on a review of its guidance to prosecutors regarding victim and witness assistance. See p. 16, *supra*.

3. Finally, petitioner contends (Pet. 31) that certiorari is warranted to review "the effect of the Eleventh Circuit's" asserted "errors on this particular case." But this Court does not typically review assertions of case-specific error. And the practical relief potentially available to petitioner at this point is limited. As the district court explained in dismissing the case, many of petitioner's requested remedies can no longer meaningfully be granted (*e.g.*, rescinding the NPA as to Epstein) or have already been provided (*e.g.*, CVRA training for prosecutors and consultation on pursuit of co-conspirators). See Pet. App. 10-11, 310-320. Thus, while the government agrees with the courts below that petitioner has shown commendable "courage * * * in pursuing this litigation," *id.* at 52-53, and "has brought national attention to the [CVRA] and the importance of victims in the criminal justice system," *id.* at 320-321, the government

also agrees with those courts that this litigation can no longer proceed.[6]

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[6] Petitioner asserts (Pet. 33) that the OPR report's discussion of a "gap * * * in [former] U.S. Attorney Alex Acosta's email inbox" indicates that "the Justice Department affirmatively misrepresented that its prosecutors had disclosed all of the relevant external emails regarding the Epstein agreement" during discovery proceedings in the district court. A few days after the report was issued, petitioner raised similar issues in a motion to supplement the record in the court of appeals. See *ibid.* (citing motion); Pet. C.A. Mot. to Supp. Rec. 7 (citing "OPR Report 288"). The court denied the motion, explaining that it "reflect[ed] some misunderstanding about the issues properly before the en banc Court." C.A. Order 1 (Nov. 18, 2020). As that order indicates, the discovery issues petitioner seeks to raise are not relevant to the statutory-interpretation question that is the subject of the court of appeals' decision and the petition before this Court.

In any event, the source that petitioner references states (at 288) that "OPR found no evidence indicating that the gap in Acosta's emails was caused by any intentional act or for the purpose of concealing evidence relating to the Epstein investigation and concludes that it was most likely the result of a technological error" that also affected accounts from other U.S. Attorney's Offices. It also states that, despite the gap, OPR was able to "examine a significant number of Acosta's emails from this time due to the extensive case files kept by the USAO; the availability of Acosta's sent email, which did not contain a similar gap; and the availability of emails of other USAO subjects and witnesses who were included on emails with Acosta." *Ibid.* OPR has informed this Office that it found no evidence that any Department attorneys were aware of the gap before OPR discovered that gap during its investigation, which began in 2019 (several years after the completion of discovery in this case).

Petitioner's allegations that Department attorneys engaged in misrepresentations or other improper conduct—allegations that have been repeated by petitioner's counsel in subsequent communications with Department officials—have been shared with OPR for its review and any further action that is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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