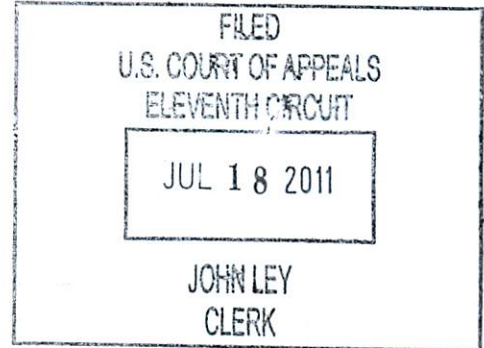
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

11-12716-GG
Case No.: 11-12802-G G

Southern District of Florida Docket No.:
10-CR-20907-COOKE



INSTITUTO COSTARRICENSE DE ELECTRICIDAD,

Appellant,

vs.

UNITED STATES OF AMERICA, ALCATEL-LUCENT FRANCE, S.A., ALCATEL-LUCENT TRADE INTERNATIONAL, A.G., ALCATEL CENTROAMERICA, S.A.,

Appellees.
______________________________________/

APPELLANT'S OPPOSITION TO GOVERNMENT'S MOTION TO DISMISS APPEAL

CERTIFICATE OF INTERESTED PERSONS

Appellant, Instituto Costarricense de Electricidad ("**ICE**"), by and through undersigned counsel and pursuant to Fed. R. App. P. 26.1, submits this Certificate of Interested Persons and Corporate Disclosure Statement (the "Amended Certificate"). ICE is a party in interest in the proceedings below and states that there is no parent corporation or publicly held corporation that owns 10% or more of its stock. The following persons and entities are disclosed pursuant to 11th Cir. R. 21.1-1.

1. Brombacher, Randolph
2. Cassell, Paul G.
3. Honorable Cooke, Marcia G.
4. Duross, Charles E.
5. Gaboury, Mario T.
6. Gentin, Andrew
7. Govin, James
8. Guerra, George L.
9. Heller, Dominique E.
10. Maglich, Jordan D.
11. Meyer, Robert
12. Morello, Gianluca

13. Rotker, Michael A.
14. Saavedra, Damaso
15. Sale, Jon
16. Weinstein, Martin
17. Wiand, Burton W.
18. Alcatel Centroamerica, S.A.,
19. Alcatel-Lucent, S.A.
20. Alcatel-Lucent France, S.A.
21. Alcatel-Lucent Trade International, A.G.
22. Instituto Costarricense de Electricidad (the victim)
23. Saavedra, Pelosi, Goodwin & Hermann, A.P.A.
24. Sale & Weintraub, P.A.
25. Wiand Guerra King P.L.
26. Willkie Farr & Gallagher LLP

RESPONSE IN OPPOSITION

The Department of Justice ("**DOJ**") has filed a pre-briefing motion to dismiss this appeal from denial of ICE's Petition for Relief Pursuant to 18 U.S.C. §3771(d)(3) and Objection to Plea Agreements and Deferred Prosecution Agreement ("**ICE's Petition for Relief**") by the U.S. District Court for the Southern District of Florida ("**District Court**"). ICE is a victim of the crimes admittedly committed by Alcatel-Lucent S.A., Alcatel-Lucent France, S.A., Alcatel-Lucent Trade International, A.G., and Alcatel Centroamerica, S.A. (collectively, "**Defendants**") and is an interested party that effectively intervened in the proceedings below.

DOJ contends this Court has no jurisdiction to hear a non-party appeal by a crime victim and heavily relies *U.S. v. Franklin*, 792 F.2d 998 (11th Cir. 1986). DOJ's motion should be denied for several independent reasons:

(1) This Court has jurisdiction pursuant to 28 U.S.C. §1291 ("**§1291**") to review the District Court's denial of ICE's requested relief and nothing in the Crime Victims' Rights Act ("**CVRA**"), 18 U.S.C. § 3771, limits it.

(2) The CVRA's legislative intent supports appellate jurisdiction, and the right to expedited mandamus review afforded by the CVRA supplements, and does not preclude, crime victim appeals.

(3) *Franklin* is not controlling because (i) it involved circumstances this Court explicitly distinguished from those in this case and (ii) it was decided before passage of the CVRA and the Mandatory Victims' Restitution Act ("**MVRA**"), 18 U.S.C. §3664.

FACTUAL AND PROCEDURAL BACKGROUND

For decades, Defendants admittedly conducted worldwide business through a scheme of corruption using "consultants" to funnel bribes to decision makers in return for telecommunications contracts.[1] Costa Rica was a small target of that scheme. Defendants funneled $17,387,405.74 to "consultants" to bribe six individuals affiliated with ICE (out of more than 15,000 directors and employees affiliated with ICE) to award Defendants contracts valued at $303 million. ICE received none of the bribe money. Rather, Defendants' crimes combined with the crimes of the six ICE individuals, who exploited ICE for personal gain, caused ICE direct and proximate losses. ICE first learned of these crimes in 2004, and the six individuals were promptly terminated and prosecuted with ICE's support.

On December 27, 2010, DOJ filed Informations in the District Court charging Defendant Alcatel-Lucent, S.A, with violating the Foreign Corrupt Practices Act ("**FCPA**") and the rest of the Defendants (*i.e.*, Alcatel-Lucent, S.A. subsidiaries) with conspiracy to violate the FCPA. The Informations demonstrate ICE was a target, and that ICE was directly and proximately damaged by Defendants' crimes. Other than acceptance of bribes by the six ICE individuals,

[1] Defendant Alcatel-Lucent, S.A., is an international telecommunications conglomerate that operates through subsidiaries, including the other Defendants. ICE is an entity that provides electricity and telecommunications services throughout Costa Rica.

nothing in the Informations suggests ICE was in any way involved in the crimes, let alone a "co-conspirator".

In Rule 11(c)(1)(C) Plea Agreements, the subsidiary Defendants pled guilty to the Information; Defendants had publicly announced these prospective settlements almost a year before. Since DOJ never contacted ICE, ICE's lawyers promptly contacted DOJ to identify ICE as a victim and to trigger crime victim rights procedures. DOJ declined to consider ICE a victim, ascribing the conduct of the six individuals previously affiliated with ICE to the principal (*i.e.*, the corporate entity ICE) whom they had defrauded.[2]

On May 2, 2011, ICE effectively intervened in the action below by filing a Petition for Relief, seeking to be recognized as a victim under the CVRA entitled to mandatory restitution under the MVRA. A hearing was held on June 1, 2011 after briefing. The District Court took no evidence and it never announced any cognizable findings of facts or conclusions of law. Instead, it stated ICE was not a victim because the District Court "thought" it would be difficult to "figure out the behavior of who was the victim and who was the offender" and that "essentially" Defendants and ICE occupied a "co-conspirator relationship."

The District Court's *de facto* adjudication of ICE as a "co-conspirator" was

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[2] DOJ's decision was reached before any conference with ICE.

reached without an evidentiary hearing and was not supported by record evidence or applicable law. Instead, the District Court summarily accepted the unsupported argument of DOJ and Defendants to conclude that ICE was not a victim. Uncontested record evidence, however, established ICE was directly and proximately harmed by Defendants' crimes. As a matter of law, the conduct of the six ICE individuals who accepted Defendants' bribes cannot be imputed to ICE.

ICE timely filed Petitions for Writ of Mandamus ("**Mandamus Peititions**") under the CVRA, which this Court *sua sponte* consolidated. ICE also noticed appeals from the oral Order denying victim status and restitution and from the judgment accepting Plea Agreements. A two-judge Panel, applying a heightened "clear and indisputable error" standard of review, summarily denied the Mandamus Petitions on a very expedited time frame. (This demanding standard of review does not apply to this appeal – which is a reason ICE is entitled to pursue it.) The Panel concluded the District Court did not clearly err in finding ICE "functioned as the offenders' coconspirator" and was not "directly and proximately harmed by the offenders' criminal conduct."

In this appeal, ICE intends to raise arguments that were not addressed in the Mandamus Petitions – contrary to DOJ's contention, ICE is not taking "two-bites of the proverbial apple." As discussed below, case law supports exercising jurisdiction over a crime victim's appeal, even where a petition for writ of

mandamus was filed pursuant to the CVRA, unless identical issues are raised in both. Accordingly, this Court should deny DOJ's Motion to Dismiss.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER CRIME VICTIMS' APPEALS PURSUANT TO §1291

Under §1291, this Court has jurisdiction to review the District Court's denial of ICE's petition to be recognized as a victim under the CVRA and for restitution under the MVRA. Enacted in 1948, §1291 confers on this Court general power to review "all final decisions" of the District Court. This broad language ensures that "[t]he courts of appeals have jurisdiction to review virtually every action taken by the District Court ...." 15A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3903 at 132 (1992 and 2009 Supp.); *accord Bray v. U.S.*, 423 U.S. 73, 74 (1975)(§1291 confers "broad jurisdiction of the courts of appeals over" final district court decisions).

Although the general rule is that only parties to a lawsuit may appeal an adverse decision, courts have regularly permitted non-parties to appeal in <u>both</u> civil <u>and</u> criminal cases when they have a direct interest at stake. *See, e.g., Devlin v. Scardelletti,* 536 U.S. 1 (2002)(allowing unnamed class member to appeal from class action settlement).[3] For example, the Fourth Circuit found it had jurisdiction

[3] *See also U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72,

under §1291 over a crime victim's appeal of an adverse "rape shield" statute ruling. *Doe v. U.S.*, 666 F.2d 43 (4th Cir. 1981). And, as discussed herein, the Third and Sixth Circuits have allowed appeals of restitution matters by crime victims. *See U.S. v. Kones*, 77 F.3d 66 (3rd Cir. 1996); *See U.S. v. Perry*, 360 F.3d 519, 529 (6th Cir. 2004).

DOJ does not appear to dispute the District Court's failure[4] to award ICE restitution is reviewable by this Court – on a DOJ appeal. But DOJ takes the hegemonic position that because it has decided not to support ICE's appeal, ICE is barred from seeking protection of its right to restitution, 18 U.S.C. 3771(a)(6).

DOJ reaches this remarkable conclusion through a convoluted construction of §1291. As ICE understands DOJ's position, DOJ agrees that under §1291 non-parties may appeal in criminal cases. (*See* Mot. to Dismiss at n.4 (collecting cases).). Further, ICE understands DOJ's position to be that even appeals involving the CVRA are proper under §1291 – provided they are taken by either a

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76 (1988); *Plain v. Murphy Family Farms*, 296 F.3d 975, 980 (10th Cir. 2002); *U.S. v. Briggs*, 514 F.2d 794 (5th Cir. 1974); *U.S. v. Chagra*, 701 F.2d 354 (5th Cir. 1983).

[4] For purposes of this Motion, the Court must assume the truth of the allegations in ICE's appeal (*i.e.*, that it was improperly denied victim status under the CVRA and restitution under the MVRA). *Erickson v. Pardus*, 51 U.S. 89, 94 (2007).

defendant or DOJ. (Mot. to Dismiss at 17.) Both DOJ and defendants have routinely appealed CVRA matters under §1291.[5]

Despite conceding these issues are properly appealable under §1291, DOJ attempts to carve out a unique exemption for crime victims' appeals implicating victim status and restitution. The overarching problem DOJ confronts is §1291's plain language, which does not distinguish between appeals by the government, a defendant, or a crime victim. Section 1291's broad language does not constrain jurisdiction to a particular class of individuals. Even a case relied upon by DOJ explicitly states as much. *U.S. v. Hunter*, 548 F.3d 1308 (10th Cir. 2008)(§1291 "[c]onstrains what may be appealed, not who may bring such appeals.").

ICE agrees with DOJ that crime victims and other non-parties lack the ability to appeal, without limitation, in every criminal case. But applicable constraints are not determined by rewriting §1291; instead, they are determined by applying existing jurisprudence on non-party appeals. In deciding whether to allow an appeal, courts have considered whether "the decree [appealed from] affects a third party's interests," and, if so, "he is often allowed to appeal." *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1211 (D.C. Cir. 2004); *accord*

[5] *See, e.g., U.S. v. Moussaoui*, 483 F.3d 220, 226-33 (4th Cir. 2007); *U.S. v. Vampire Nation*, 451 F.3d 189, 195 (3rd Cir. 2006); *U.S. v. Burkholder*, 590 F.3d 1071 (9th Cir. 2010) (§1291 cited by DOJ as basis for jurisdiction).

West v. Radio-Keith Orpheum Corp., 70 F.2d 621, 624 (2d Cir. 1934).[6]

In determining whether the decree sufficiently affects a third party's interests to permit an appeal, courts have considered "whether [1] the non-party actually participated in the proceedings below, [2] the equities weigh in favor of hearing the appeal, and [3] the non-party has a personal stake in the outcome." *See SEC v. Forex Asset Management, LLC*, 242 F.3d 325, 329 (5th Cir. 2001). ICE clearly meets each of these three prongs: it participated in the proceedings below; it has asserted Congressionally-protected victim rights; and it has a personal stake in receiving restitution. This three-prong test is the appropriate one for determining whether a putative crime victim can appeal.

II. THE CVRA DOES NOT LIMIT THIS COURT'S JURISDICTION UNDER §1291

Unable to find any basis for its position in the language of §1291, DOJ looks to the Crime Victims' Rights Act as the basis for constricting crime victims' rights. It would be remarkable to find that an Act designed to expand crime victims' rights in fact constricted them; nothing in the Act supports that conclusion.

[6] Generally, non-parties like crime victims do not have to formally "intervene" to appeal; a district court's decision to permit a non-party to participate in a dispute is "the equivalent of authorizing intervention." *In re Sealed Case (Medical Records)*, 381 F.3d at 1211; *In re Siler*, 571 F.3d 604, 608 (6th Cir. 2009). Here, ICE participated and effectively intervened in the proceedings below by filing its Petition for Relief.

Congress enacted the CVRA in October 2004 to solidify and broaden crime victims' rights. As the Act's sponsors explained, the CVRA was designed "to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." Statement of Sen. Feinstein, 150 CONG. REC. S4269 (April 22, 2004). Most important, the legislative history is clear that in adopting the CVRA Congress intended to protect and confirm remedies for crime victims found in then-exiting "case law:"

> It is not the intent of [the CVRA] to limit any laws in favor of crime victims that may currently exist, whether these laws are statutory, regulatory, or found in case law.

150 CONG. REC. SS4267 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added).

When the CVRA was enacted in 2004, crime victims' appeals under §1291 had been permitted in cases such as *Doe*, *Kones*, and *Perry*.[7] Congress explicitly intended to protect rights recognized in pro-victim "case law" while overruling decisions denying crime victims the ability to protect their rights, including specifically the *McVeigh* decision, as DOJ acknowledges (Mot. to Dismiss at 11-12). *See* 150 CONG. REC. S10911 (Oct. 9, 2004) ("This legislation is meant to ensure that cases like the *McVeigh* case, where victims of the Oklahoma City

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[7] In some instances, such appeals were blocked. *U.S. v. McVeigh*, 106 F.3d 325 (10th Cir 1997) (no standing to appeal order barring victims from watching trial).

bombing were effectively denied the right to attend the trial, are no longer followed.") (statement of Sen. Kyl).

"Congress is presumed to be aware of court decisions construing statutes ...." *In re Griffith*, 206 F.3d 1389, 1393 (11th Cir. 2000). If DOJ's proposed reading of §1291 and the CVRA is accepted, then crime victims throughout the Third and Sixth Circuits would be stripped of their right to appeal, previously recognized in cases such as *Doe, Kones,* and *Perry.* This is not only a perverse construction of a remedial statute designed to protect crime victims, but also one directly at odds with definitive legislative history.

Congress' inclusion of an immediate right to mandamus review in the CVRA (18 U.S.C. § 3771(d)(3)) should not be construed as an intent to foreclose a crime victim's pre-existing right to appeal under §1291. Rather, it is a supplemental remedy provided to crime victims, which they may choose to invoke to receive an expedited, but generally more stringent, review. Indeed, just last month (on June 6, 2011) the co-sponsor of the CVRA, Senator Kyl, confirmed for Attorney General Eric Holder Congress' intent to add accelerated mandamus relief to victims' pre-existing rights of appeal. Senator Kyl wrote that Congress was aware crime victims had taken ordinary appeals in cases such as *Doe* and *Kones* and that "Congress sought to leave these protections in place, while expanding them to ensure that crime victims could obtain quick vindication of their rights in

appellate courts...." Letter of Senator Jon Kyl to Attorney General Eric Holder, June 6, 2011, *reprinted in* 157 CONG. REC. S3608 (June 8, 2011).

Senator Kyl's letter added that in 18 U.S.C. §3771(d)(4), Congress gave DOJ the opportunity "[i]n any appeal in a criminal case ... [to] assert as error the District Court's denial of any crime victim's right in the proceeding to which the appeal relates." 18 U.S.C. § 3771(d)(4). Senator Kyl explained this provision was designed to "help develop a body of case law expanding crime victims' rights in the many defense appeals that are filed." 157 CONG. REC. S3608. It was "not intended to bar crime victims from asserting other remedies. <u>For instance, it was not intended to block crime victims from taking an ordinary appeal from an adverse decision affecting their rights (such as a decision denying restitution) under 28 U.S.C. § 1291.</u>" *Id.* (emphasis added).[8]

Indeed, limiting crime victims to a clear and indisputable error standard risks making the CVRA "a mere formality, given the traditionally narrow scope of mandamus relief ...." *In re Amy Unknown*, 636 F.3d 190, 197 (5th Cir. 2011)

[8] Section 3771(d)(4) confirms that §1291 confers appellate jurisdiction over appeals regarding victims' issues. Typically, the only way a defendant and DOJ can appeal a CVRA ruling is through §1291. Yet, neither a defendant's nor a government's appeal is mentioned in §3771(d)(4). Obviously, §3771(d)(4) does not implicitly block a party's post-judgment appeal of CVRA issues under §1291. Section 3771(d)(4) should not be read to block a post-judgment <u>victim</u> appeal of those issues. Such a reading would mean that the <u>only</u> person barred by the CVRA from appealing a victim's rights issue under §1291 is the crime victim!

(Jones, J., concurring). Accordingly, instead of reading the expedited mandamus review provision as the exclusive vehicle for crime victim appellate review, it should be read as a supplemental procedure. A crime victim who desires an extremely accelerated (72-hour) review of a district court ruling limited to determining whether the district court committed "clear and indisputable" error can use the CVRA's mandamus provision. The victim, however, may also receive thorough (and lengthier) appellate review under §1291. This reading fully harmonizes the mandamus review provision, §1291, and legislative history, leaving intact pre-existing rights of crime victims to take appeals under §1291. Perhaps most importantly, this reading is consistent with "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951, 1969 (2008). This reading fulfills Congress's intent that crime victims not be

> left to the mercy of the very trial court that may have erred .... For a victim's right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief.... It is the clear intent and expectation of Congress that the district and appellate courts will establish procedures that will ... giv[e] meaning to the rights we establish.

150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphases added); *accord* 157 CONG. REC. S3609 (June 8, 2011). Only by hearing ICE's appeal on the merits will this Court fulfill Congress's plan.

Further, nothing in the CVRA precludes crime victims from seeking regular appellate review. Rather, the CVRA states that crime victims "**may** petition the court of appeals for a writ of mandamus," to obtain expedited review consistent with Congress's intentional movement towards affording crime victims' enhanced rights. Had Congress intended mandamus review to be crime victims' exclusive appellate remedy, it could have said so, but it did not.

This Court applies the plain meaning of statutes unless doing so would lead to not just an unwise, but to a"clearly absurd result." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1228 (11th Cir. 2001)("[T]he result produced by the plain meaning canon must be truly absurd before the [absurdity] principle trumps it."); *American Bankers Ins. Group v. U.S.*, 408 F.3d 1328, 1332 (11th Cir. 2005) ("To justify departure ..., the absurdity must be so gross as to shock the general moral or common sense."). There is nothing "absurd" about allowing a crime victim to seek appellate review of a district court decision denying restitution. To the contrary, DOJ's position would yield an "absurd" result because this Court would essentially be rewriting the text of the CVRA to include limitations where none exist and repealing by implication §1291. Courts should "not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite." *Myers v. TooJay's Mgmt. Corp.*, 2011 WL 1843295, *7 (11th Cir. 2011); *U.S. v. Griffith*, 455 F.3d 1339,

1344 (11th Cir. 2006)("[W]e are not licensed to practice statutory remodeling."); *Jackson v. Stinnett,* 102 F.3d 132, 135 (5th Cir. 1996)("It is hornbook law that repeals by implication are not favored.")(internal quotation omitted). Accordingly, this Court should follow the plain language of §1291, decline to insert a limitation into the plain text of the CVRA, and allow ICE to directly appeal from the District Court's adverse decision.

III. CONTRARY TO DOJ'S ASSERTION, *FRANKLIN* IS NOT CONTROLLING

A. *Franklin* Involved Circumstances This Court Explicitly Distinguished From Those In This Appeal

DOJ contends this Court's decision in *Franklin* is controlling and stands for the proposition that no statutory authorization exists for ICE, a non-party crime victim, to appeal an order relating to restitution. (Mot. to Dismiss at 3.) DOJ is wrong. In *Franklin*, this Court dismissed an appeal from an unsatisfactory restitution order under the Victim and Witness Protection Act ("**VWPA**") for want of jurisdiction. Critically, in doing so the Court stated:

> [H]owever, we <u>intimate no view on two issues *not* before us</u>: First, whether a victim has an implied right to intervene in a sentencing proceeding ...; second, whether an appeal may be taken to this court from an order denying such intervention or, if intervention is granted, from the district court's final disposition of the restitution issue.

792 F.2d at1000 (emphasis added). Accordingly, *Franklin*'s holding is limited to the facts of that case, in which a non-party, who did not participate in the

sentencing proceeding and who cited no statute that would permit an exercise of jurisdiction, noticed an appeal. This Court distinguished that case from the circumstances here where a victim effectively intervened "to urge the district court to incorporate a restitution order" and appealed "from the district court's final disposition of the restitution issue." *Id.*; *Siler*, 571 F.3d at 608 (finding victim who petitioned district court was *de facto* "intervenor"); *see supra* n.6. Accordingly, contrary to DOJ's contention, *Franklin* does not control.

A. *Franklin* Was Decided Before Passage Of The CVRA And MVRA, And This Court Should Adopt The Third and Sixth Circuits' Approach

Franklin was decided before passage of the CVRA and the MVRA. Assuming *arguendo* that *Franklin* stood for the proposition the DOJ says it does, this Court should recede from it nonetheless because it pre-dates the CVRA and relies on the VWPA and, thus, the "underpinnings" of the decision are called into serious question.[9] *See Perry*, 360 F.3d at 529 ("Since the cases holding that victims cannot appeal restitution orders depend so heavily on the VWPA, the differences between the VWPA and the MVRA help show why these older decisions do not preclude Intervenor from appealing the district court's elimination

[9] "*Stare decisis* is not an inexorable command" and courts may reconsider decisions when "the theoretical underpinnings of those decisions are called into serious question." *State Oil Co v. Khan*, 522 U.S. 3, 20 (1997); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

of her property interest."). The CVRA materially differs from the VWPA and, as discussed above, was enacted to protect then-existing victim rights and to broaden them, and not to limit or abolish then-existing rights. Against that backdrop, this Court should follow the approach adopted by the Third and Sixth Circuits and find that victims are not restricted to mandamus as the exclusive method of review.

The Third Circuit specifically allowed a crime victim to appeal a trial court restitution decision in *Kones*. 77 F.3d at 68 (after physician convicted of mail fraud and patient denied restitution, patient allowed to appeal restitution decision under §1291). In fact, DOJ contended in that case that jurisdiction over the victim's appeal was proper under §1291. *See* Br. for the U.S., *U.S. v. Kones*, No. 95-1434 at 1 (Aug. 1, 1995). The Third Circuit agreed. 77 F.3d at 68 ("We have appellate jurisdiction pursuant to ... §1291."). That decision was not a "drive-by jurisdictional ruling" having limited precedential value. (Mot. to Dismiss at 18-19.) Rather, it was matter in which DOJ joined a crime victim in advocating the Third Circuit had jurisdiction under §1291, and the Third Circuit specifically found that that was correct. DOJ contends that in enacting the CVRA, Congress "did not disturb (or purport to disturb) the established body of pre-CVRA precedent holding that nonparty crime victims may not appeal the final judgment in a criminal case." (Mot. to Dismiss p. 12). DOJ is partially correct. As discussed above in Section

II, Congress intended not to disturb certain then-existing victim rights – but it was those favoring victims, such as the right to appeal.

Further, pre-CVRA cases upon which DOJ relies rested on the proposition that crime victims lacked a sufficient personal stake in the controversy to have standing to appeal. *See U.S. v. Johnson*, 983 F.2d 216 (11th Cir. 1993). *Perry* analyzed those cases and concluded they were no longer persuasive after passage of the MVRA because they relied upon the fact that "[u]nder the VWPA, a court did not have to award restitution. Restitution fell within the District Court's discretion, which meant that a decision to award restitution, or award arguably insufficient restitution, was not fairly traceable to any statutory violation." *Perry*, 360 F.3d at 531. In view of the "pro-victim" structure of modern restitution statutes, the Sixth Circuit refused to follow the older decisions. *Id.* at 524-27. Proceeding under the provisions of the Mandatory Victims Restitution Act, *Perry* explained earlier VWPA cases rested on the proposition that "the victim had no right to receive anything at all" and that restitution "does not turn on the victim's injury, but on the penal goals of the State." *Id.* at 530. Under the more recent mandatory restitution provisions, however, "[n]one of this is true anymore." *Id.*

Since *Perry*, the statutory restitution scheme has become – in *Perry*'s words – even more "pro-victim." The CVRA elevated restitution from being merely part of a criminal proceeding to being an absolute "right" of a crime victim. 18 U.S.C.

§3771(a)(6) (victims shall have "[t]he right to full and timely restitution as provided in law"). Further, it provided victims the right to pursue their rights in court. 18 U.S.C. §3771(d)(1) ("The crime victim ... may assert the rights described in [the CVRA]."). As the definitive legislative history makes clear, this provision gives crime victims "standing" in the criminal justice process, because "without the ability to enforce the rights in the criminal trial <u>and appellate courts</u> of this country any rights afforded are, at best, rhetoric." 150 CONG. REC. S10192 (Oct. 9, 2004) (statement of Sen. Kyl)(emphasis added).[10]

DOJ relies on *U.S. v. Hunter*, 548 F.3d 1308 (10th Cir. 2008), which concluded that crime victims may not take an appeal under the CVRA from the prison sentence imposed on a defendant. (Mot. to Dismiss at 15). In so ruling, *Hunter* emphasized that crime victims could seek review of adverse rulings through a CVRA mandamus petition, as ICE has done here. *Id.* at 1317. *Hunter* is distinguishable in at least three ways. First, *Hunter* treated the victims' appeal as one from the final criminal <u>judgment</u>, and particularly as one from the prison sentence. *Hunter* was therefore able to conclude that "[w]hile non-parties may have an interest in aspects of the case, they do not have a tangible interest in the outcome" of the defendant's prison sentence. *Id.* at 1312. Here, in contrast, ICE

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[10] In light of the rights afforded victims by the CVRA, it is indisputable that ICE has standing to pursue this appeal.

has an obvious "tangible interest" in the outcome of its appeal seeking monetary restitution. And ICE is appealing not just from a judgment in the case below, but also from a separate order denying it victim status and restitution.

Second, *Hunter* relied on a provision allowing crime victims "to re-open a plea or sentence only if ... the victim petitions the court of appeals for a writ of mandamus within 14 days." 18 U.S.C. §3771(d)(5), *discussed in Hunter*, 548 F.3d at 1315. *Hunter* reasoned the Circuit's earlier ruling rejecting the victims' CVRA mandamus petition barred any further effort to obtain relief via an appeal. Whatever the soundness of this reasoning in the context of a victim's challenge to a prison sentence, the immediate next sentence in the statute states: "This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code." 18 U.S.C. § 3771(d)(5) (emphases added). This language shows Congress did not want any burden placed on crime victims attempting to protect their right to restitution.

A third distinguishing fact from *Hunter* is that ICE also appeals the order denying victim status and the District Court's unsupported conclusion that ICE was a "co-conspirator." That part of its appeal is plainly not an appeal from a criminal judgment, and accordingly *Hunter*'s rationale is simply inapplicable.[11]

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[11] DOJ also relies on *U.S. v. Aguirre-Gonzalez*, 597 F.3d 46, 53-54 (1st Cir. 2010), which relied heavily on *Hunter* to conclude that a crime victim could not appeal

More persuasive is the analysis in *Siler*. There, the Court exercised jurisdiction under §1291 and allowed a crime victim (who had filed a contemporaneous mandamus petition) to appeal a CVRA issue.[12] 571 F.3d at 608. The Sixth Circuit explained: "We have cited with approval cases from other circuits holding that appeals may be taken by nonparties who were treated on all sides as de facto parties but who never formally intervened." *Id.* The Sixth Circuit found this reasoning persuasive, noting that "if the [District Court] decree affects [a non-parties'] interests, he is often allowed to appeal." 571 F.3d at 608.

CONCLUSION

For all these reasons, the Court should follow the reasoning of the Third and Sixth Circuits and find jurisdiction under §1291.

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denial of restitution under the CVRA. (Mot. to Dismiss at 15). *Aguirre-Gonzalez* is accordingly unpersuasive for several of the same reasons as *Hunter*. Similarly, the D.C. Circuit relied on *Hunter* to conclude that a crime victim could not take an appeal from a criminal judgment that did not contain restitution, and DOJ relies on that case as well. *U.S. v. Monzel*, ---F.3d---, 2011 WL 1466365 (Apr. 19, 2011); (Mot. to Dismiss p. 15). But here again, the Court relied on the fact that the victim was appealing solely from an adverse restitution decision. In this case, ICE is also appealing from an order denying it victim status under the CVRA.

[12] The Sixth Circuit ultimately denied the non-parties' appeal and so denied the alternative mandamus petition as well. ICE, however, intends to raise arguments in its initial appeal that were not before this Court in its Petition for Mandamus and, therefore, disposition of the Mandamus Petition does not warrant dismissal of ICE's appeal. *Cf. In re Acker*, 596 F.3d 370, 373 (2010)("[W]here the direct appeal was filed at the same time as the mandamus petition <u>and raises the identical issues,</u> there is no additional right of appeal")(emphasis added).

Respectfully submitted, this 18th day of July, 2011.

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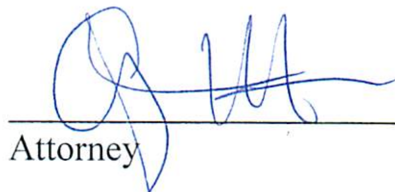

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