No. 19-13843

In the United States Court of Appeals for the Eleventh Circuit

IN RE: COURTNEY WILD,

Petitioner.

On Petition for Writ of Mandamus to the
U.S. District Court for the Southern District of Florida,
West Palm Beach Division, Case No. 9:08-cv-80736-KAM

UNOPPOSED MOTION OF SENATOR DIANNE FEINSTEIN AND FORMER SENATORS JON KYL AND ORRIN HATCH FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *Amici* provide the following Certificate of Interested Persons and Corporate Disclosure Statement.

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- Black, Roy (intervenor's counsel)
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- BRADLEY, GARRISON & KOMANDO, P.A. (*amicus curiae* NCVLI's counsel)
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- U.S. District Court for the Southern District of Florida (respondent)
- Villafaña, Maria (AUSA, Southern District of Florida)
- Weinberg, Martin (intervenor's counsel)
- Wild, Courtney (petitioner)

Respectfully submitted,

/s/ Allyson N. Ho
Allyson N. Ho
Counsel of Record

UNOPPOSED MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF REHEARING *EN BANC*

Pursuant to Federal Rule of Appellate Procedure 29(b)(3) and Eleventh Circuit Rule 29-3, Senator Dianne Feinstein and former Senators Jon Kyl and Orrin Hatch request leave to file the attached *amici curiae* brief in support of Courtney Wild's petition for rehearing e*n banc*. The parties have consented to their participation as *amici curiae* in this case.

1. *Amici curiae* are Senator Dianne Feinstein and former Senators Jon Kyl and Orrin Hatch. Senator Feinstein (currently the ranking member of the Judiciary Committee) and Senator Kyl were both members of the Senate Judiciary Committee—and Senator Hatch served as its Chairman—when Congress passed the Crime Victims' Rights Act in 2004. Senators Feinstein and Kyl drafted and, along with Senator Hatch, co-sponsored this landmark legislation.

2. As Senator Feinstein has explained, before the Act became the law of the land, crime victims were being "ignored, cast aside, and treated as non-participants in a critical event in their lives"—"kept in the dark by prosecutors to[o] busy to care enough, by judges focused on defendant[s'] rights, and by a court system that simply did not have a place for them."

150 Cong. Rec. 7294, 7296 (2004) (Sen. Feinstein). Worse still, as Senator Kyl noted, in "many cases these victims were being victimized a second time" by a system that "prevented them from participation in any meaningful way." *Id.* at 7298 (Sen. Kyl). To address these grave miscarriages of justice, *amici* Senators crafted the Act "to correct . . . the legacy of the poor treatment of crime victims." *Id.* at 7303 (Sen. Feinstein).

3. *Amici* Senators have a strong interest in ensuring that the landmark legislation they drafted and spearheaded is properly construed, and that crime victims and their families are afforded their hard-fought and much-deserved rights.

CONCLUSION

For these reasons, *amici* Senators respectfully request leave to file their *amici curiae* brief in support of rehearing *en banc*.

Dated: May 12, 2020

Respectfully submitted,

/s/ *Allyson N. Ho*
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CERTIFICATE OF CONFERENCE

I certify that I conferred with counsel for the parties, who indicated that the parties are not opposed to the relief sought by this motion.

/s/ *Allyson N. Ho*
Allyson N. Ho

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this motion was prepared in 14-point New Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. *See* Fed. R. App. P. 27(d)(1), 32(g)(1); 11th Cir. R. 29-1. This motion complies with the type-volume limitation of Rule 27(d)(2) because it contains 330 words, excluding the parts exempted under Rule 32(f).

/s/ *Allyson N. Ho*
Allyson N. Ho

CERTIFICATE OF SERVICE

I certify that, on May 12, 2020, a true and correct copy of this brief was served via the Court's CM/ECF system on all counsel of record.

/s/ *Allyson N. Ho*
Allyson N. Ho

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- U.S. District Court for the Southern District of Florida (respondent)
- Villafaña, Maria (AUSA, Southern District of Florida)
- Weinberg, Martin (intervenor's counsel)
- Wild, Courtney (petitioner)

Respectfully submitted,

/s/ Allyson N. Ho
Allyson N. Ho
Counsel of Record

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: Whether, as a majority of courts to consider the question have held, the Crime Victims' Rights Act applies before formal federal charges are filed.

May 12, 2020

Respectfully submitted,

/s/ *Allyson N. Ho*
Allyson N. Ho
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TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*[*]

Amici curiae are Senator Dianne Feinstein and former Senators Jon Kyl and Orrin Hatch. Senators Feinstein and Kyl served on the Senate Judiciary Committee—and Senator Hatch served as its Chairman—when Congress passed the Crime Victims' Rights Act. Senators Feinstein and Kyl drafted and, along with Senator Hatch, co-sponsored this landmark legislation. As Senator Hatch said at the time, "[n]o one has worked harder" than Senators Feinstein and Kyl "in trying to protect victims' rights," which is an issue "of utmost importance to the American people." 150 Cong. Rec. 7294, 7311–12 (2004) (Sen. Hatch).

As Senator Feinstein has explained, before the Act became the law of the land, crime victims were being "ignored, cast aside, and treated as non-participants in a critical event in their lives"—"kept in the dark by prosecutors to[o] busy to care enough, by judges focused on defendant[s'] rights, and by a court system that simply did not have a place for them." *Id.* at 7296 (Sen. Feinstein). Worse still, as Senator Kyl noted, in "many

[*] The parties have consented to the filing of this *amici* brief. This brief was not authored in whole or in part by counsel for any party. No party, party's counsel, or person—other than *amici curiae* or their counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

cases these victims were being victimized a second time" by a system that "prevented them from participation in any meaningful way." *Id.* at 7298 (Sen. Kyl).

To address these grave miscarriages of justice, *amici* Senators crafted the Act "to correct . . . the legacy of the poor treatment of crime victims." *Id.* at 7303 (Sen. Feinstein). Recognizing the importance of "confer[ring] with the prosecutor concerning a variety of matters and proceedings," Congress guaranteed victims "the right to confer with the Government concerning any critical stage or disposition of the case"—a right "intended to be expansive." *Id.* at 7302; *see* Hon. Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 603 (2005) (emphasizing importance of "permit[ting] the victim to address the court *before* the judge exercises discretion to accept or reject a plea") (emphasis added).

Amici Senators have a strong interest in ensuring that the landmark legislation they drafted and spearheaded is properly construed, and that crime victims and their families are afforded their hard-fought and much-deserved rights.

STATEMENT OF THE ISSUE WARRANTING *EN BANC* REVIEW

If anything, the Crime Victims' Rights Act is even *more* vitally important today than when it was first signed into law. But if permitted to stand, the panel decision will regrettably roll back the clock to the days before the Act, when "victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives." 150 Cong. Rec. at 7296 (Sen. Feinstein). Rehearing *en banc* is needed to avoid that tragic result, restore nationwide uniformity on an exceedingly important issue of federal law, and vindicate the rights of crime victims across the Nation.

To its credit, the panel majority regrets that its decision does nothing to "prevent federal prosecutors from negotiating 'secret' plea and non-prosecution agreements, without ever notifying or conferring with victims." 955 F.3d 1196, 1221 (11th Cir. 2020). But respectfully, statutory text, legislative history, and judicial precedent all confirm that this miscarriage of justice is *precisely* what the Act prevents. *See In re Dean*, 527 F.3d 391, 395 (5th Cir. 2005) ("In passing the Act, Congress made the policy decision—which we are bound to enforce—that the

victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached.").

The Court should grant rehearing to resolve the conflict, "protect crime victims' rights," and "ensure their involvement in the criminal justice process" just as the Act requires. 955 F.3d at 1227, 1236 n.16 (Hull, J., dissenting).

ARGUMENT

I. Rehearing *en banc* is needed to vindicate the rights of crime victims and ensure their involvement in the criminal justice system.

Over fifteen years ago, Congress passepd the Act with overwhelming bipartisan support. The culmination of decades of tireless advocacy and effort on behalf of crime victims across the Nation, the Act was named for Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn—all murder victims whose families were denied rights now guaranteed by the Act. *See* 150 Cong. Rec. at 7294–97, 7299–7300 (Sens. Feinstein & Kyl).

These include important substantive and procedural rights that enable victims and their families to have greater involvement in the criminal justice process. 18 U.S.C. § 3771(a); *see United States v.*

Moussaoui, 483 F.3d 220, 234 (4th Cir. 2007); *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The statute was enacted to make crime victims full participants in the criminal justice system.").

Before the Act, "[t]oo often crime victims [were] unable to exercise their rights because they were not informed of the proceedings. Pleas and sentencings . . . all too frequently occurred without the victim ever knowing that they were taking place." 150 Cong. Rec. at 7302 (Sen. Feinstein); *see id.* at 7298 (Sen. Kyl) ("[I]n many cases these victims were being victimized a second time . . . . They were suffering through the trauma of the victimization and then being thrown into a system which they did not understand, which nobody was helping them with, and which literally prevented them from participation in any meaningful way.").

In particular, the Act's drafters—*amici* Senators Feinstein and Kyl—emphasized that it "is important for victims' rights to be asserted and protected *throughout* the criminal justice process"—and to do that, victims need to be "heard at the very moment when their rights are at stake." *Id.* at 7303–04 (Sens. Feinstein & Kyl) (emphasis added); *see also* Letter from Sen. Jon Kyl to Att'y Gen. Eric H. Holder Jr. (June 6, 2011), *reprinted in* 157 Cong. Rec. 8854, 8854 (2011) ("When Congress enacted the

CVRA, it intended to protect crime victims throughout the criminal justice process—from the investigative phases to the final conclusion of a case.").

To accomplish that crucial purpose, the Act gives victims "the right to confer with the Government concerning *any* critical stage or disposition of the case"—a right "intended to be expansive." 150 Cong. Rec. at 7302 (Sen. Feinstein) (emphasis added). But in this case, as even the panel majority agrees, the victim was "left in the dark—and, so it seems, affirmatively misled—by government lawyers." 955 F.3d at 1198. That is *precisely* the miscarriage of justice the Act was intended to—and, contrary to the majority decision, *does*—foreclose. *See* Kyl, Twist & Higgins, 9 Lewis & Clark L. Rev. at 602 ("When a case is resolved through a plea bargain without the victim's knowledge or participation, a grave injustice has been committed by the authorities.").

Indeed, as the panel dissent points out, the government initially took the position that it "had *statutory obligations under the CVRA* to notify the victims of the [non-prosecution agreement], to confer with the victims, and to tell them about upcoming events." 955 F.3d at 1231 (Hull, J., dissenting). As explained next, the government's initial position was correct—as statutory text, legislative history, and judicial precedent all confirm.

II. Rehearing *en banc* is needed to ensure fidelity to statutory text and restore uniformity among the courts of appeals.

Critically, as the panel majority acknowledged, its decision was not compelled by statutory text. 955 F.3d at 1205. That comes as no surprise to the *amici* Senators who drafted that text. Two rights conferred by the Act—the right "to confer with the attorney for the Government" and the right "to be treated with fairness and with respect"—do not, by their text, depend upon the filing of formal charges. 18 U.S.C. § 3771(a)(5), (8). And two other provisions make clear that the Act's rights attach before formal charges are filed. *See* 18 U.S.C. § 3771(c)(1) (government employees "engaged in the detection, investigation, or prosecution of crime" shall accord victims their rights under the Act); 18 U.S.C. § 3771(d)(3) ("if no prosecution is underway," venue is proper in the district where the offense was committed).

The plain and ordinary meaning of these provisions is apparent. The Act guarantees victims the right to be treated with fairness and respect and to confer with the prosecutor—during the detection, investigation, *or* prosecution of a crime. And if "any doubts remain," the Act "sweeps them away with its proviso that the rights established by the Act may be asserted 'if no prosecution is underway, in the district court in the district

in which the crime occurred.'" Kyl, Twist & Higgins, 9 Lewis & Clark L. Rev. at 594 (citing 18 U.S.C. § 3771(d)(3)); *see also* 955 F.3d at 1237 (Hull, J., dissenting) ("the [Act's] venue provision in § 3771(d)(3) conclusively demonstrates that the Act gives crime victims rights pre-charge").

The panel majority found support for its contrary view not in the text of the Act, but in the provisions of other, earlier victims' rights laws that explicitly applied pre-charge. 955 F.3d at 1214–15. Had the majority trained its focus more closely on the text of *this* law, however, it would have seen that while the Act expressly limits *some* rights to the post-indictment context, it imposes *no* such limits on the right to confer (or the right to fairness and respect) at issue in this case. *Compare* 18 U.S.C. § 3771(a)(2)–(4), *with* 18 U.S.C. § 3771(a)(5), (8).

In all events, the majority's reliance on earlier laws is misplaced given that the Act was "meant to correct, not continue, the legacy of the poor treatment of crime victims." 150 Cong. Rec. at 7303 (Sen. Feinstein) ("It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch."). Regrettably, that will be the inevitable result if the panel decision is permitted to stand.

The panel decision is troubling for another reason. "[D]espite the use of a writ of mandamus as a mechanism for victims' rights enforcement, Congress intended that such writs be reviewed under ordinary appellate review standards." H.R. Rep. No. 114-7, at 8 (2015); Justice for Victims of Trafficking Act of 2015 § 113(a)(1), Pub. L. No. 114-22, 129 Stat. 227, 240 (codified at 18 U.S.C. § 3771(a)(9)); *see* 150 Cong. Rec. at 7304 ("[W]hile mandamus is generally discretionary, this provision means that courts must review these cases. . . . This provision ensures review and encourages courts to broadly defend the victims' rights.").

The Act permits the government to "assert as error the district court's *denial*"—but not *enforcement*—"of any crime victim's right." 18 U.S.C. § 3771(d)(4) (emphasis added). Yet here, the government was permitted to argue just the opposite—without even filing its own appeal or cross-appeal. *See Greenlaw v. United States*, 554 U.S. 237, 244 (2008) ("Under [the] unwritten but longstanding [cross-appeal] rule, an appellate court may not alter a judgment to benefit a nonappealing party.").

The panel decision not only departs from the Act's text, structure, and history, but also creates a circuit split. In *In re Dean*, as here, the government negotiated a plea agreement pre-charge without conferring

with the victims. 527 F.3d 391, 395 (5th Cir. 2008). The Fifth Circuit held that "the victims should have been notified of the ongoing plea discussions and . . . allowed to communicate meaningfully with the government, personally or through counsel, before a deal was struck." *Id*.

"In passing the Act," the Fifth Circuit explained, "Congress made the policy decision—which we are bound to enforce—that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached." *Id*.[1] At a minimum, the full Court should consider this case *en banc* before breaking with the Fifth Circuit and creating a circuit split.

What is more, although the Fifth Circuit's decision in *Dean* has been the law in Texas, Louisiana, and Mississippi for over a decade, the concerns expressed by the panel majority about interference with prosecutorial discretion have yet to materialize. *See* 955 F.3d at 1205, 1216–18; *id.* at 1226 (Hull, J., dissenting) (noting that in over a decade since the Fifth Circuit's decision, "there has been no flood of civil suits by victims, no

[1] Although the Fifth Circuit ultimately denied mandamus relief, it did so "confident that the district court will take heed that the victims have not been accorded their full rights under the CVRA and will carefully consider their objections and briefs as this matter proceeds." *Id.* at 396.

evidence of victims' abuse of their CVRA rights, and no prosecutors' complaints about impairment of their prosecutorial discretion").

* * *

The Nation has made great strides toward treating crime victims and their families with greater respect, providing them with much-needed assistance, and ensuring they are included in criminal justice proceedings that impact their lives so profoundly. The Act took a major step forward in addressing the plight of crime victims—and *amici* Senators are deeply concerned that if the panel decision is permitted to stand, it will undo decades of progress toward recognizing and vindicating the vitally important rights of crime victims.

CONCLUSION

For these reasons, the Court should grant the petition for rehearing *en banc*.

Dated: May 12, 2020

Respectfully submitted,

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/s/ *Allyson N. Ho*
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