No. 23-10168

In the

United States Court of Appeals

for the

Fifth Circuit

In Re Naoise Connolly Ryan, Emily Chelangat Babu and Joshua Mwazo Babu, Catherine Berthet, Huguette Debets, Luca Dieci, Bayihe Demissie, Sri Hartati, Zipporah Kuria, Javier de Luis, Nadia Milleron and Michael Stumo, Chris Moore, Paul Njoroge, Yuke Meiske Pelealu, John Karanja Quindos, and Guy Daud Iskandar Zen S.,

Crime Victims' Representatives-Petitioners.

FAMILIES' REPLY IN SUPPORT OF A PETITION FOR A WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT

On Petition for Mandamus from the United States District Court for the Northern District of Texas Case No. 4:21-cr-005-O

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INTRODUCTION

Congress enacted the Crime Victims' *Rights* Act to create enforceable rights in federal criminal cases. No disagreement exists among the parties about the fact that the victims' families here were not afforded their CVRA rights to confer, to timely notice of a deferred prosecution agreement, and to be treated with fairness. Nor is there any disagreement among the parties that the CVRA commands that a district court "shall ensure" that crime victims are afforded their rights. 18 U.S.C. § 3771(b)(1).

Given this undisputed factual and legal background, one would expect that the Government's and Boeing's briefs would explain how the district court's refusal to ensure that the families were afforded their rights complies with the CVRA. But instead, the parties remarkably argue that they could covertly craft a DPA in violation of the law—and that the district court was then powerless to do anything about it.

If the parties' position were correct, then the CVRA becomes a dead letter. Fortunately for the administration of justice, their position is incorrect. Congress created procedural requirements for conferring with victims that the Government must follow in resolving criminal cases. Those requirements do not invade prosecutorial discretion. Those requirements do not regulate the substance of agreements that the Government might reach. Instead, those requirements regulate the process by which the Government reaches its agreements.

Here, the families challenge the Government's conceded failure (with Boeing's connivance) to "take Care that the Laws be faithfully executed," U.S Const., art. II, § 3—that is, that the CVRA be faithfully executed. The Government never conferred with the families before reaching its deal. And, as this Court has held, "[i]n passing the Act, Congress made the policy decision—which we are bound to enforce—that … victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached." *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008). Under *Dean,* the district court was "bound to enforce" the CVRA. And nothing prevents re-opening the procedurally illegal DPA to afford the families their CVRA rights to confer. Indeed, standard contract law prohibits courts from enforcing an illegal contract.

This Court should grant the petition and direct the district court to ensure that the families are afforded their CVRA rights by re-opening the DPA and affording the families the opportunity to confer with the Government about prosecuting Boeing for committing "the deadliest corporate crime in U.S. history." Op.25.

STANDARD OF REVIEW

As explained in the families' petition, the district court's decision not to afford them their CVRA rights is reviewed *de novo*, because it hinged on legal determinations. *See* Pet.13-14; *see also* Op.12 (noting that the principal disagreement is "over the scope" of the court's "judicial authority").

ARGUMENT

I. The Parties Agree That the Victims' Families Were Never Afforded Three CVRA Rights.

At the outset, it is important to emphasize that the district court found that the families were never afforded three CVRA rights. Appx.465. As explained in the families' petition (Pet.15-20), the families were promised by Congress—but were never afforded:

- Their "reasonable right to confer" with prosecutors, 18 U.S.C. § 3771(a)(5);
- Their "right to be informed in a timely manner of any plea bargain or deferred prosecution agreement;" § 3771(a)(9); and
- Their "right to be treated with fairness," § 3771(a)(8).

Against this undisputed backdrop, the issue for this Court is whether the district court was obligated to ensure that the families were afforded these three rights.

II. The District Court Failed to Follow the CVRA's Judicial Enforcement Provision.

A. The Plain Text of the CVRA's Judicial Enforcement Provision Required the District Court to Enforce the Families' Rights to Confer.

The families' petition asserts a straightforward proposition: This Court should enforce the CVRA according to its text. In the CVRA, Congress provided for judicial enforcement of CVRA rights:

> In any court proceeding involving an offense against a crime victim, the court **shall ensure** that the crime victim is afforded the rights described in [the CVRA].

18 U.S.C. § 3771(b)(1) (emphasis added). Here, the district court did not follow Congress's command that it "shall ensure" that the families were afforded their CVRA rights.

In the proceedings below, the families repeatedly advanced this argument. *See* Appx.591 (collecting record citations). And yet neither the Government nor Boeing ever responded. *See* Appx.592. In an effort to ensure that the district court did not miss their central point, the families' brief even highlighted this failure to respond: "*[T]he families' argument that this Court is required by 18 U.S.C. § 3771(b)(1), to excise the DPA's immunity provisions to 'ensure' that the families are given their CVRA right to confer about prosecuting Boeing is undisputed."* Appx.592 (emphasis in original). And yet, the Government's and Boeing's strategy to avoid the issue apparently worked: The district court never addressed the families' central argument. Pet.23.[1]

[1] The Government claims that the families "do not challenge the district court's ultimate balancing as an abuse of discretion and have thus waived that argument." Gov't-Resp.28 n.8. But the families raise the antecedent challenge that the district court failed to engage in *any* substantive analysis of the CVRA's judicial enforcement provision. Pet.23. Because the district court failed entirely to consider the families' statutory right to judicial enforcement of the CVRA, the court necessarily abused its discretion. *See Wantou v. Wal-Mart Stores Texas, L.L.C.*, 23 F.4th 422, 432 (5th Cir. 2022) ("A trial court abuses its discretion when its ruling is based on an erroneous view of the law ….").

Now, in their briefing to this Court, the parties scramble to defend the district court's decision with new arguments they never advanced below. Accordingly, the Court can resolve this petition simply by granting it and directing the district court to decide these arguments in the first instance. *Cf.* 18 U.S.C. § 3771(c)(3) (directing the district court to "take up and decide" any motion asserting a victim's right). But rather than extend already protracted litigation, this Court should hold that the CVRA's judicial enforcement provision obligated the district court to ensure that the families were afforded their CVRA rights.

B. The Government's Interpretations of the CVRA's Judicial Enforcement Provision Are Unpersuasive.

The families believe that the CVRA means what it says—that "the court *shall ensure* that the crime victim is afforded the rights described in [the CVRA]." 18 U.S.C. § 3771(b)(1) (emphasis added). In contrast, the Government's view of this plain text is unclear. At some points in its brief, the Government suggests that the CVRA's "shall ensure" language means only that courts shall ensure that victims receive their rights "prospectively." Gov't-Resp.33. If accepted, the Government's argument would defang the CVRA and transform it into a toothless paper tiger. *Cf.* 150 CONG. REC. 22,953 (Oct. 9, 2004) (statement of Sen. Kyl) ("without the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. We are far past the point where lip service to

victims' rights is acceptable."). But the Government's prospective-only interpretation fails for at least four reasons.

First, the phrase "shall ensure" creates a mandatory obligation for the district court to protect rights without regard to when they were violated. "Shall" means "[h]as a duty to [or,] more broadly, is required to …." *Shall*, BLACK'S LAW DICTIONARY (11th ed. 2019). And to "ensure" something means to make it "sure, certain, or safe." *Ensure,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) (2002). And so, in this case, the district court had a duty to make the families' rights to confer about the DPA sure, certain, or safe—but never did so. To the contrary, the rights were ignored.

Second, a prospective-only interpretation would contradict the CVRA's language that allows crime victims to "re-open a plea or sentence" in certain defined circumstances. 18 U.S.C. § 3771(d)(5). To "re-open" an earlier proceeding necessarily requires retrospective application of the CVRA.

Third, a prospective-only interpretation would also render meaningless the CVRA's appellate provisions (§ 3771(d)(3)), because appellate enforcement actions (like this one) necessarily involve retrospective determinations.

Fourth, this Circuit and other circuits have uniformly concluded that CVRA rights can be enforced retrospectively. *See, e.g., In re Amy Unknown*, 701 F.3d 749, 774 (5th Cir. en banc 2012) (overturning district court denial of restitution), *rev'd on*

other grounds sub nom Paroline v. United States, 572 U.S. 434 (2014); *In re Brown*, 932 F.3d 162, 175 (4th Cir. 2019) (overturning decision not to award restitution and remanding); *Kenna v. U.S. Dist. Court for the C.D. of Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006) (holding that when a victim is denied the right to speak at sentencing, "the only way to give effect to [the victim's CVRA] right to speak . . . is to vacate the sentence and hold a new sentencing hearing"); *In re Doe*, 57 F.4th 667, 677 (9th Cir. 2023) (granting CVRA petition and remanding for determination of appropriate restitution award).

Perhaps recognizing the problems with its prospective-only-application argument, at other points in its briefing, the Government also contends that the CVRA's judicial enforcement provision only allows district courts to "exercise their *preexisting* statutory and inherent authority to safeguard a crime victims' rights." Gov't-Resp.18 (emphasis added). If so, then the district court here possessed "preexisting" authority to safeguard the families' CVRA rights as part of its preexisting power over DPAs, as the families explain below. *See* Part V, *infra*. But limiting the CVRA's judicial enforcement provision to "preexisting" powers can't be right either.

For starters, the Government's interpretation would essentially render the new enforcement clause "meaningless, thereby violat[ing] the canon of statutory construction that discourages courts from adopting a reading of a statute that renders

any part of the statute mere surplusage.*" In re S. Scrap Material Co., LLC*, 541 F.3d 584, 594 (5th Cir. 2008) (internal quotation omitted). If this provision merely recognized "preexisting" judicial power, then the provision added nothing new to the CVRA.

The Government's interpretation also ignores the CVRA's "drafting history"—that is, the "[e]nacted revisions in the words of statutes." *In re Crocker*, 941 F.3d 206, 213 (5th Cir. 2019). Congress crafted the CVRA's "shall ensure" provision in 2004 to replace the earlier, toothless Victims' Rights and Restitution Act of 1990. Pet.21. Congress had seen cases in which the courts had refused to enforce crime victims' rights. Pet.21-22 (discussing *United States v. McVeigh*, 106 F.3d 325, 335 (10th Cir. 1997)). Congress's straightforward, statutory response: Never again.[2] Congress wanted to expand previously existing enforcement powers—not leave victim's rights unprotected.

As discussed above, a preexisting-powers-only interpretation would also conflict with the fact that Congress wrote into the CVRA certain "limitation[s] on relief" involving such things as motions to "re-open a plea or sentence." 18 U.S.C. § 3771(d)(5). Adding "limitations" on relief would have been entirely unnecessary if the CVRA did not create new enforcement powers for district courts. Instead,

[2] While the CVRA's text is unambiguous on this point, the families' interpretation is directly confirmed by the CVRA's legislative history. *See* Pet.22 (citing 150 CONG. REC. 7,303 (Apr. 22, 2004) (noting Congress's decision to overrule *McVeigh*).

Congress thought it was important for victims' rights to be "protected throughout the criminal justice process, and for courts to have the authority to *redo proceedings* other than the trial such as release hearings, pleas, and sentencings" to enforce victims' rights. 150 CONG. REC. 7,304 (Apr. 22, 2004) (statement of Senator Kyl in colloquy with Senator Feinstein) (emphasis added).

And finally, a preexisting-powers-only interpretation contradicts the provision's mandatory language. The Government reads the "shall ensure" language to apply only when courts possessed powers to act before the passage of the CVRA. But "shall" does not mean "sometimes." *Cf. Franco v. Mabe Trucking Co., Inc.,* 3 F.4th 788, 796 (5th Cir. 2021) (holding that Congress's use of "mandatory 'shall ... transfer' language" created "a mandatory duty for a court to transfer a case" when statute's requirements were met). Indeed, the Government's position ultimately collapses into incoherence, when it admits that this case presents a supposedly "rare situation[]" (Gov't-Resp.19) where the district court was allowed to violate the CVRA's plain language.

The Government also wheels out the constitutional-avoidance canon—claiming that a court's "interference" with a DPA would "trigger grave separation of powers concerns." Gov't-Resp.31-32. But "the trouble with this argument is that constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."

Feds for Medical Freedom v. Biden, ---F.4th---, 2023 WL 2609247 at *13 (5th Cir. en banc Mar. 23, 2023) (internal quotation omitted). The Government has not come close to offering a reasonable, alternative construction of the "shall ensure" language.

Finally, the Government's hand-waving about its "grave concern" in enforcing the CVRA as written is also difficult to square with its own interpretation of the CVRA. In its brief, the Government concedes that "it should have met and conferred with the [families] before executing the DPA." Gov't-Resp.10. Indeed, it reiterates its "public apolog[y]" for failing to do so. *Id.* And, as the families explained in the proceedings below, the Government's own regulations required it to meet with the families about its investigation—rather than give them false information that no such investigation existed. Appx.079. The Government never even begins to explain how "grave concern" could arise from this Court requiring the Government to do something that it admits it should have done.

C. Boeing's Interpretations of the CVRA's Judicial Enforcement Provision Are Also Unpersuasive.

Boeing's efforts to wave away the judicial enforcement provision are likewise unconvincing. Boeing contends that the CVRA merely "takes courts as it finds them and expects them to enforce its provisions through existing authorities and subject to existing limitations." Boeing-Resp.17. But if Congress wanted to limit the judicial

enforcement provision in that way, it could have written it that way. Instead, it added into law unqualified and mandatory language—"shall ensure."

Like the Government, Boeing also fails to address the fact that Congress did carve out several narrow limitations to the relief that district courts could grant under the CVRA. In a provision tellingly entitled "Limitation on relief," Congress prohibited district courts from ordering a new trial to protect victims' rights and restricted the ability of district courts to "re-open a plea or sentence" in certain situations inapplicable here. 18 U.S.C. § 3771(d)(5). Of course, the obvious conclusion from the text is that Congress was not taking courts "as it found them" but, instead, was conferring new judicial power—requiring new "limitations" on that power.

The CVRA's legislative history directly confirms this interpretation of the text: The CVRA's Senate co-cosponsors stated that the judicial enforcement provisions conferred powers on district courts to order "proceedings to be redone." *See* 150 CONG. REC. 7,304 (Apr. 22, 2004) (statement of Senator Feinstein in colloquy with Senator Kyl) (Section 3771(d)(5) "is not intended to prevent courts from vacating decisions in nontrial proceedings in which victims' rights were not protected and ordering those proceedings to be redone. It simply assures that a trial will not be redone."); *see also* Douglas Evan Beloof, *The Third Wave of Crime*

Victims' Rights: Standing, Remedy, and Review, 2005 BYU L. REV. 255, 343 ("The only restriction on voiding [in the CVRA] is prohibiting a retrial.").

In another case on similar facts (the Jeffrey Epstein case), a federal district court relied on this same reasoning to conclude that crime victims could seek to re-open a previously crafted, secret non-prosecution agreement. The court explained that the CVRA "contemplates such a result where, under the 'enforcement and limitations' provision, § 3771(d)(5), the conditions under which '[a] victim may make a motion to re-open a plea or sentence' in order to remedy a failure to afford a right provided under the CVRA are specifically prescribed." *Doe v. United States*, 950 F. Supp. 2d 1262, 1267 (S.D. Fla. 2013). Boeing ignores *Doe*—and its reasoning. But the decision's unassailable point is that the CVRA did not "take courts as it found them." Boeing-Resp.17. Instead, the CVRA granted courts new powers to take such steps as re-opening pleas and sentences, subject to certain limitations. Boeing concedes, through its silence, that none of the limitations apply here. Nor could the CVRA's limitations on re-opening "a plea or sentence" (§ 3771(d)(5)) apply in this case, where Boeing has pled not guilty and has never been sentenced. Accordingly, the plain meaning of the CVRA's judicial enforcement provision controls—and the district court was required to "ensure" that the families were afforded their CVRA rights by "re-opening" the DPA to the limited extent necessary to afford them their CVRA rights to confer.

Boeing also creates a strawman in contending that the families believe that the district court was "obligated to give them every remedy they requested." Boeing-Resp.20. But the families are seeking enforcement of their CVRA rights to confer—something to which they were statutorily entitled. The district court had no discretion to decide whether to enforce those CVRA rights. Congress had already made that choice.[3]

Unable to make a persuasive textual argument in support of its position, Boeing ultimately retreats to a general fairness argument. Boeing claims that it would somehow be "beyond improper" for this Court to ignore Boeing's "enormous reliance interests" in the DPA. Boeing-Resp.22. But Boeing ignores the fact that its purported "reliance" interests could have weight only if its interests were justified. *See Cenac v. Orkin, L.L.C.,* 941 F.3d 182, 198 (5th Cir. 2019) (discussing circumstances in which reliance is unreasonable and entitled to no weight). Boeing never explains what statements it relied upon to believe that the Government had met its CVRA obligations—presumably because no such representation was made. No such representation exists in the DPA. And the DPA states it is the "complete agreement" between the Government and Boeing. Appx.025. This Court has held

[3] The families continue to seek other "remedies" in addition to enforcement of their right to confer. *See* Pet.2. They are entitled to these remedies to enforce (for example) their CVRA right to be treated fairly. *See* 18 U.S.C. § 3771(a)(8).

that "reliance on promises made outside of an unambiguous, fully-integrated agreement is unreasonable as a matter of law." 941 F.3d at 198.

In addition to being legally unsupportable, Boeing's factual claim that it properly relied on the secret DPA borders on farcical. The families proffered that they could prove that "Boeing was aware that the victims' families had not been conferred with and that the DPA was being kept secret from them." Appx.480.[4] Boeing never denies this point. The obvious conclusion is that Boeing thought it could skirt the CVRA. And then, by adding into the DPA a "poison pill" of a fund (Appx.254), Boeing thought it could create an insurmountable disincentive for any challenge to the illegal agreement.

But the tangled web Boeing weaved has now unraveled. It is well settled that "the law will not tolerate privately negotiated end runs around the criminal justice system." *United States v. Sheinbaum*, 136 F.3d 443, 448 (5th Cir. 1998) (internal quotation omitted). And a criminal defendant is never entitled to the benefit of an illegal bargain. *See, e.g., United States v. Walker*, 98 F.3d 944, 947 (7th Cir. 1996) (defendant not entitled to enforce a plea deal that was "vitiated by illegality"). As a sophisticated corporation, Boeing must have known that "illegal promises will not be enforced in cases controlled by the federal law," *Wise v. Wilkie*, 955 F.3d 430, 439

[4] During its December 2022 meeting with the families, the Government did not deny Boeing's knowledge that the DPA was being concealed from the victims' families and said only that it could not discuss the subject. Appx.612.

(5th Cir. 2020) (internal quotation omitted), especially where doing so would be "to the detriment of an innocent third party," *Baker v. Raymond Intern., Inc.*, 656 F.2d 173, 182 (5th Cir. 1981).

Nor would a ruling for the families produce "endless confusion and extensive litigation" over how to unwind the DPA. Boeing-Resp.22. This Court should simply direct the district court to re-open limited parts of the DPA, by setting aside its immunity provisions[5] as a precursor to the families being afforded their rights to confer. No other litigation is contemplated or permitted. *See* Appx.18-20 (explaining how Boeing has no rights against the families under the DPA, as the families were not parties to the DPA). Indeed, Boeing's poison pill of the DPA's victims' compensation fund consisted of moneys it irrevocably paid into an "escrow account" (Appx.14)—precisely to prevent any subsequent litigation.

Boeing claims that rescinding the immunity provisions would mean that the entire DPA becomes "void." Boeing-Resp.22. But the families have never sought that remedy. And Boeing has never asked to have the entire DPA declared void if the limited remedy of rescinding the immunity provisions is granted. *See* Dkt. 129 at 10-12. Indeed, Boeing is clearly trying to use the poison pill it placed in its agreement as a shield to prevent enforcement of the law—i.e., enforcement of the CVRA. This

[5] The "immunity provisions" in question are identified in the families' filings below. Appx.276 n.4.

Court should not allow Boeing's subversive stratagem to succeed. As the families alleged below, Boeing knew that it was entering into a covert agreement. Appx.480-486. It has no right to any enforcement of the secretly negotiated DPA's provisions to the detriment of the innocent families. And accordingly, the DPA's immunity provisions must be set aside to afford the families the "full unfettered exercise of their conferral rights at a time that will enable the [families] to exercise those rights meaningfully." *Doe v. United States*, 950 F. Supp. 2d 1262, 1268 (S.D. Fla. 2013).

III. The District Court Failed to Follow This Court's Decision in *In Re Dean.*

This case looks like déjà vu all over again. Fifteen years ago, prosecutors and defense counsel for a well-connected corporate defendant orchestrated a secret plea deal without following the CVRA's conferral requirements. And this Court blocked that illegal maneuver. In *In re Dean*, 527 F.3d 391 (5th Cir. 2008), this Court held that, in enacting the CVRA, "Congress made the policy decision—*which [courts] 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.* at 395 (emphases added).

Attempting to distinguish *Dean*, the Government and Boeing contend that, because this Court did not grant mandamus relief there, this Court should not grant relief here. Gov't-Resp.32-33; Boeing-Resp.24. But the parties misconstrue *Dean*. Rather than invalidate the plea bargain that had been illegally negotiated, *Dean*

effectively remanded the case to the district court for further proceedings—proceedings at which the victims were to be afforded their CVRA rights. *Id.* at 396. *Dean* explained that, following a remand, the plea agreement with which the victims disagreed would then be before the district court for its review and possible approval—or disapproval. *Id. Dean* noted that the decision whether "to grant mandamus is largely prudential." *Id.* And considering that the plea agreement had not yet been approved, *Dean* determined that "the better course" was to "deny relief, 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.*

Thereafter, the case went back to the district court. The district court then held two hearings with victims' counsel and received expert reports from the victims. *United States v. BP Products North America, Inc.*, 610 F. Supp. 2d 655, 673 (S.D. Tex. 2009). Next, the district court carefully considered the victims' objections, writing a 75-page opinion analyzing them. The district court specifically heeded this Court's instruction to "carefully consider" the victims' objections. The district court explained that it had "ensured that the victims have had ample opportunity" in which to have "their views and information fully considered." *Id.* at 726. While the district court ultimately approved the plea, the district court explained that it had "taken extensive steps, including over the parties' objections, to ensure that the CVRA

violation did not *in any way diminish the force or effect* of the victims' objections." *Id.* at 727 (emphasis added).

Since this Court's 2008 *Dean* decision, Congress has overturned the prudential standard that applied to appellate review of a CVRA petition then, now requiring appellate courts to consider CVRA claims under ordinary standards of appellate review. Pet.13. And under those ordinary standards, leaving the district court's decision in place would contravene *Dean*'s holding that courts are "bound to enforce" the CVRA's command that "victims have the right to inform" the process by which agreements resolving a criminal case are reached. 527 F.3d at 395. And unlike *Dean*—where the district court ensured that the "the CVRA violation did not in any way diminish the force or effect of the victims' objections"—here the CVRA violation has completely deprived the victims of any opportunity to object to the sweetheart deal the parties have struck, which immunizes Boeing from criminal liability for "the deadliest corporate crime in U.S. history." Op.25.

In re Dean also answers the Government's and Boeing's arguments that ensuring the families' CVRA rights somehow infringes on prosecutorial discretion. *See* Gov't-Resp.19 (citing 18 U.S.C. § 3771(d)(6)); Boeing-Resp.17 (same). *Dean* specifically held that the CVRA conferral requirement "is not an infringement, as the district court believed, on the government's independent prosecutorial discretion;

instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion." *Id.*

Here, the families ask only to confer in a reasonable way before the Government makes its prosecution decision. Thus, as Senator Cruz sagely explained in supporting the families below, "the problem here is not that the Justice Department exercised its discretion, but that it did so in violation of Congressionally mandated procedural requirements that ensure that prosecutorial decisions are informed by the experiences of crime victims." Appx.423.

IV. Post-Hoc "Listening Sessions" Did Not Afford the Victims' Families Their CVRA Rights.

While the victims' families have never had an opportunity to convince the Government to prosecute Boeing, they were afforded several belated "listening sessions." Trying to spin the straw of these listening sessions into the gold of meaningful conferral, the Government points to the district court's description of these sessions as "historic engagement." Gov't-Resp.29 (citing Op.20).

To be sure, the victims' families appreciated the Attorney General taking thirty minutes of his time to listen to them. Whether that was "historic" or "engagement," however, is completely beside the point. The CVRA promised the victims' families more than an after-the-fact chance to comment about what should have happened previously. As in *Dean,* the CVRA required that the victims "should have been

allowed to communicate meaningfully with the government, personally or through counsel, *before a deal was struck*." *In re Dean,* 527 F.3d at 395 (emphasis added).

The Government also asserts that the district court "permissibly viewed" these belated listening sessions as giving "meaningful effect" to the victims' rights. Gov't-Resp.30 (citing Op.23). Not true. The victims lost the only thing that mattered to them: The opportunity to persuade the Government to hold Boeing criminally accountable for the deaths of their family members. By definition, the after-the-fact listening sessions could have no effect, much less "meaningful" effect.

The Government obscures this critical point by claiming that listening to the families came "as close as possible in this case to satisfying that right [to confer] *post-hoc*." Gov't-Resp.30. But tellingly, the Government never reveals what happened during the sessions. That's because there was no reasonable conferral—even after the DPA had been concluded. Instead, the families repeatedly raised questions about the impossibility of prosecuting Boeing under the current DPA. Appx.611. The Government took the position that it was legally bound to follow the DPA and therefore could not consider Boeing's prosecution for crimes connected with the two crashes. Appx.611. The families also asked questions about the Government's representations in its briefs that it acted in "good faith." Appx.612. Rather than answer, the Government refused to provide information about that

subject, including refusing to explain the DPA's negotiating history or the Government's communications with Boeing during the negotiations. Appx.612.

In short, what occurred was a one-way interaction in which the families asked questions and the Government listened without any substantive response—not dialog approaching the CVRA's promised "reasonable right to confer." Thus, as *amicus* Senator Cruz powerfully explained below in support of the families, "Belated meetings and an apology are no substitute for following the law, and this Court should say so." Appx.423.

V. The District Court Possessed Inherent and Other Authority to Vindicate Congressionally Conferred CVRA Rights.

This Court need look no further than the CVRA judicial enforcement provision to overturn the decision below. But there's much more. The district court also erred in concluding that it lacked inherent and other authority to vindicate the families' CVRA rights.

The district court found—and the Government and Boeing do not effectively dispute—that three of the families' CVRA rights were violated. *See* Part I, *supra.* And the district court also recognized—and the Government and Boeing do not dispute—that the court possessed "inherent authority" to remedy a "violation of recognized rights." *See* Op.17 (quoting *United States v. HSBC Bank USA, N.A.,* 863 F.3d 125, 136 (2d Cir. 2017) and *United States v. Hasting*, 461 U.S. 499, 505 (1983)). But after the district court alluded to its authority to protect "recognized rights," it

backtracked. The district court stated that "a court may invoke its supervisory powers in the name of 'judicial integrity' only for the specific purpose of 'ensuring that a conviction rests on appropriate considerations validly before the jury'." Op.18 (quoting *Hasting*, 461 U.S. at 505). The district court then held that "[b]ecause there is neither conviction nor jury at issue here, there is no basis to use judicial integrity as a justification for involving this Court's inherent authority." Op.18.

The district court's confusion about its legal power to protect "recognized rights" requires reversal. Indeed, the primary case it cited—*HSBC Bank*—points the way to properly resolving this case in favor of the families.

In *HSBC*, the district court had taken steps to provide transparency regarding a DPA between the Government and defendant HSBC. The district court publicly released an independent monitor's reports prepared under a DPA, citing judicial power under the Speedy Trial Act to approve a DPA. *See HSBC,* 863 F.3d at 129. In reversing the district court's decision to take such steps, the Second Circuit observed that generally a "presumption of regularity support[s] prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Id.* at 136 (internal quotations omitted). But the Circuit concluded its opinion with the warning that "while the district court exceeded its authority in this case, the Take Care Clause of the Constitution is not a blank check. Where the presumption of regularity has been called into question, we do not

foreclose the possibility that steps of the kind taken by the district court here could be warranted." *Id.* at 142; *accord United States v. Fokker Services B.V.*, 818 F.3d 733, 747 (D.C. Cir. 2016) (noting enhanced judicial power over DPAs that contain "illegal or unethical provisions").

Here, the presumption of regularity has not merely been "called into question"; sadly, the presumption has been destroyed. In a ruling not challenged before this Court, the district court specifically found that the Department violated the CVRA (Appx.465), denying the "recognized rights" of the families under that law. It is in exactly these "extremely limited" circumstances that judicial action is required to vindicate the law—namely, the CVRA. *See United States v. Strouse*, 286 F.3d 767, 772 (5th Cir. 2002) (recognizing the inherent judicial power "'to implement a remedy for violation of recognized rights'" (quoting *Hasting*)); *see also United States v. Saena Tech Corporation*, 140 F.Supp.3d 11, 31 (D.D.C. 2015) (discussing expanded district court power where a DPA "would involve the court in illegal … agreements"). As Professor Peter Reilly from Texas A&M University School of Law explained in his comprehensive article on DPAs, the relevant caselaw holds that "inherent supervisory power serves to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety." Peter R. Reilly, *Deferred Prosecution as Discretionary Injustice*, 2017 UTAH L. REV. 839, 849 (2017).

Rather than follow these principles, the district court concluded that because no jury trial rights were at issue here, there was "no basis" (Op.18) for it to act. However, this legal conclusion is surely too narrow and demands reversal. The district court ignored the need to "implement a remedy for violation of recognized rights." *HSBC*, 863 F.3d at 135 (quoting *Hasting*, 461 U.S. at 505). And while such an action must be approached "with some caution," clearly any "balancing [of] the interests involved" would favor vindicating the Congressionally mandated rights of the families. *Hasting*, 461 U.S. at 506-07. *See generally* Amicus Br. of the National Crime Victim's Law Institute at 11-15.

In addition, the Speedy Trial Act provision that the Government relies upon to craft DPAs, 18 U.S.C. § 3161(h)(2), fortifies the conclusion that the district court should have acted here. As this district court acknowledged, § 3161(h)(2) contains language requiring "the approval of the court." Op.12-16. The district court believed that this language did not authorize it to "withhold approval of a DPA based on disagreement with its terms or leniency." Op.16. But the victims asked for something very different—i.e., for the district court to excise one part of the DPA to enforce CVRA rights. The prosecutors' purported "good faith" in somehow accidentally denying the families their CVRA rights for nearly two years is irrelevant to this

calculus.[6] If Congress's "with the approval of the court" language means anything, it must mean that a district court should not lend its support to a provision negotiated unlawfully in violation of the families' recognized CVRA rights.

In sum, the Government (working closely with Boeing) deprived victims of their recognized CVRA rights by hiding the DPA until after it was finalized. If the district court's decision is left in place, then prosecutors and powerful defendants will have a playbook for skirting the CVRA in the future—and the Act will effectively become a dead letter. This Court should hold that the district court was obligated to protect crime victims' rights—and had the power to do so not only under the CVRA but also under other, preexisting inherent and statutory authority.

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[6] The district court found that the Department provided the families false information. Op.19. But, relying upon an unsworn statement in the Government's brief, the district court also suggested that it was possible that the Government's two separate false statements were "a result of 'regrettable and inadvertent internal miscommunication.'" Op.19 (quoting Appx.512-513). The district court never reached a definitive conclusion on whether the Government acted in bad faith. Op.19. And the victims' families proffered below that they could establish that the Justice Department's false statements were, at a minimum, made in reckless disregard of the truth. Appx.478. The families continued to press this argument in their petition. Pet.19-20. Accordingly, they did not somehow "waive" their argument. *Cf.* Gov't-Resp.25 & 26 n.7 (claiming, incorrectly, that the families have "waived" their argument that the Government acted in bad faith).

Because the district court refused the families an evidentiary hearing on this point, this Court must assume the truth of the families' allegations—if this point makes a difference to the outcome. *See Clark v. Johnson*, 202 F.3d 760, 765 (5th Cir. 2000). But, in any event, as explained in this reply, the Court need not definitively resolve this issue to rule in favor of the families.

VI. The Families Represent "Crime Victims" Protected by the CVRA.

In a final, pro forma section of its brief, Boeing summarily challenges the district court's factual finding that those killed in the two crashes are "crime victims" under the CVRA. Boeing.Resp.25-30. This thinly developed argument also lacks merit.

A. In the Absence of an Appeal by Boeing, This Court Lacks Jurisdiction to Review the "Crime Victim" Ruling Below.

Neither Boeing (nor the Government) have appealed from the district court's "crime victim" ruling, and consequently this Court lacks jurisdiction to review that issue. If Boeing wants separate relief from that ruling below, it needs to file its own appeal at the appropriate time—rather than interject that issue on an interlocutory basis into the families' petition. *See* 28 U.S.C. § 1291 (allowing appeals only from a final decision); 18 U.S.C. § 3742 (allowing defendant appeals only from a sentence).

At this time, this case is before this Court solely on the families' CVRA petition, to which this Court must "apply ordinary standards of appellate review" and "take up and decide" very rapidly. 18 U.S.C. § 3771(d)(3). The families did not present the "crime victim" issue in their petition, and that petition presents the only appellate questions that Congress has authorized this Court to "take up and decide." Indeed, given that Congress has generally required appellate courts to resolve CVRA petitions within 72 hours, 18 U.S.C. § 3771(d)(3)—under appellate rules that do not generally provide for mandamus reply briefs, *see* Fed. R. App. 21(b)—Congress

could not have envisioned CVRA responses raising new and separate issues to which a crime victim would need to immediately reply.

To be sure, under ordinary standards of appellate review, in some situations an appellee can defend the judgment below through an argument that has not been presented in an appellant's appeal. But Boeing advances no such claim for jurisdiction here. And, in any event, were the Court to deny the families' petition on Boeing's new and separate argument, it would effectively expand the judgment below—from specifically denying the families' requested relief concerning their CVRA conferral rights to expansively denying them any CVRA protection whatsoever.[7] As a respondent to a CVRA petition, Boeing cannot seek such a ruling expanding its rights. *See Greenlaw v. United States*, 554 U.S. 237, 245 (2008) ("an appellate court may not alter a judgment to benefit a nonappealing party"); *Art Midwest Inc. v. Atlantic Limited Partnership XII*, 742 F.3d 206, 211 (5th Cir. 2014) (same).

B. The District Court's Factual Findings on the "Crime Victim" Issue Are Not Clearly Erroneous.

In any event, the "crime victim" ruling below was correct and must be affirmed. To determine "crime victim" status, "[t]he necessary inquiry is a fact

[7] Entirely apart from the issues raised in this petition, as "crime victim" representatives, the families will continue to receive certain CVRA rights prospectively, such as the right to confer with the Justice Department before any decision about dismissing the DPA is made in January 2024. *See* Dkt. 128 at 1.

specific one" and the district court's decision can only be overturned if its factual findings were "clearly erroneous." *In re Rendon Galvis*, 564 F.3d 170, 175 (2nd Cir. 2009). Where (as here) a district court has heard evidence, "[s]o long as the district court's account of the evidence is plausible in light of the record viewed in its entirety, its findings must be affirmed, even if the court of appeals might have weighed the evidence differently." *Corporativo Grupo R SA DE C.V. v. Marfield Ltd. Inc*., ---F.4th---, 2023 WL 2624800, at *3 (5th Cir. Mar. 24, 2023).

Last summer, the district court held a two-day evidentiary hearing, heard from two well-qualified experts, and ultimately entered extensive findings of fact that Boeing's crime "directly and proximately harmed" those killed in the two Boeing 737 MAX crashes. Appx.448-65. The district court reached straightforward conclusions about the effects of Boeing's lies to the FAA about pilot training. As the district court explained, "[a]ny 'matter-of-fact inquiry' by reasonable 'laypeople' would suggest that poorly training pilots might result in a catastrophic incident such as an airplane crash. This prediction from ordinary experience, played out in the dual accidents in question, [which] further evinces direct causation." Appx.461 (quoting, inter alia, *Paroline v. United States*, 572 U.S. 434, 444 (2014)). The district court's well-supported findings of fact lead inexorably to one conclusion: "Had Boeing's employees not [criminally] concealed their knowledge about MCAS, the [FAA] would have certified a more rigorous level of training, pilots around the world would

have been adequately prepared for MCAS activation, and neither crash would have occurred." Appx.461.

Boeing's real quarrel does not appear to be with the district court's specific factual findings about "direct and proximate" harm. Instead, Boeing appears be upset that the Court embarked on the inquiry at all. Boeing-Resp.28 (arguing that an evidentiary hearing on "victim" status is a "misfit" for a criminal case but "well suited" for civil litigation).[8] But under this Court's precedents, the district court was required to make such an evidentiary determination.

In an earlier CVRA case, this Court held that determining whether a person was "directly harmed" by a crime "requires a court to create 'a mental picture of the situation identical to the actual facts in all respects save one: the defendant's wrongful conduct is now corrected to the minimal extent necessary to make it conform to the law's requirements.'" *In re Fisher*, 649 F.3d 401, 403 (5th Cir. 2011) (quoting David W. Robertson, 75 TEX. L. REV. 1765, 1774-75 (1997) (cleaned up)).

Boeing's further complaint that the proceedings below were somehow "one-sided" (Boeing-Resp.28) rings hollow when one learns that the district court offered Boeing (and the Government) an opportunity to present counter-evidence—and both declined. Appx.449.

[8] Boeing does not mention that in certain civil litigation arising out of the two crashes it has *stipulated* to its liability. *See, e.g.,* Stipulation, *In re: Ethiopian Airlines Flight ET 302 Crash,* 1:19-cv-02170, Dkt. #1217-1 (N.D. Ill. Nov. 10, 2021).

Boeing also makes a doom-and-gloom prediction that, in future CVRA cases, it will be difficult to determine who is a crime victim. Boeing-Resp.28-29. Yet most federal cases involving victims concern crimes uncontestably producing physical or financial injury to identifiable individuals—such as bank robbery or wire fraud. In more complex cases, one hopes that in the future the Government will demonstrate more curiosity about the harms inflicted by a defendant's crime than it exhibited in this case—and afford victims their rights. Indeed, in recent regulations (apparently promulgated in response to this case), the Justice Department now promises that it will extend CVRA rights even to those who do not meet the statutory definition of "victim." *See Justice Department Updates Guidelines for Victim and Witness Assistance* (Oct. 21, 2022).[9]

In any event, the CVRA is now nearly two decades old. And a recent survey of CVRA "victim" caselaw failed to find any evidence of the practical difficulties Boeing seeks to conjure. *See* Paul G. Cassell & Michael Ray Morris, *Defining "Victim" Through Harm: Crime Victim Status in the Crime Victims' Rights Act and Other Victims' Rights Enactments*, 61 AM. CRIM. L. REV. ___, [58]-[63] (forthcoming 2023) (describing district court's ruling here as consistent with substantial CVRA caselaw).[10] If the concerns that Boeing speculates above ever

[9] Available at https://www.justice.gov/opa/pr/justice-department-updates-guidelines-victim-and-witness-assistance.
[10] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4365790.

materialize, Congress is free to limit the statute's reach. But until Congress narrows the CVRA's scope, this Court's obligation is to enforce the law as currently written.

CONCLUSION

The Court should grant the families' petition.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation for this reply because this brief contains fewer than 7,250 words, as authorized by this Court order of April 11, 2023.

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

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CERTIFICATE OF SERVICE

I certify that on April 17, 2023, the foregoing document was served on the parties to the proceedings below (i.e., the Government and The Boeing Company) through the Court's CM/ECF filing system.

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