NO. 19-13843

UNITED STATES COURT OF APPEALS
FOR THE
ELEVENTH CIRCUIT

IN RE: COURTNEY WILD,
Crime Victim-Petitioner

BRIEF OF *AMICUS CURIAE* NATIONAL CRIME VICTIM LAW INSITUTE IN SUPPORT OF CRIME VICTIM-PETITIONER'S PETITION FOR A WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771(d)(3)

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae National Crime Victim Law Institute is a section 501(c)(3) nonprofit organization; it has no parent corporation and issues no stock. Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1 and 26.1-2, the undersigned counsel certifies that to their knowledge, the interested parties identified in Crime Victim-Petitioner's Petition for a Writ of Mandamus is correct and complete.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Crime Victim Law Institute (NCVLI) has, coincident with the submission of this brief, filed a motion for leave to file brief of *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29.

NCVLI is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education and resource sharing. NCVLI accomplishes its mission through education and training of judges, prosecutors, victims' attorneys, advocates, law students, and community service providers; providing legal assistance on cases nationwide; researching and analyzing developments in crime victim law; and promoting the National Alliance of Victims' Rights Attorneys & Advocates. NCVLI also participates as *amicus curiae* in select state, federal and military cases that present victims' rights issues of broad importance. This is one of those cases as it involves the most fundamental of issues—the right to a remedy when a rights violation has been found.

STATEMENT IN COMPLIANCE WITH FRAP 29(a)(4)(E)

No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person (other than *amicus curiae,* its members, or its attorneys)—contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

Crime Victim-Petitioner identified six issues. *Amicus curiae* addresses the first two: (1) whether the district court erred in denying the victims any remedy for a proven violation of their CVRA rights; and (2) whether the district court erred in concluding that it was "without jurisdiction" to grant the victims' requested remedy.

SUMMARY OF THE ARGUMENT

In 2004, Congress enacted the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, to provide victims with enforceable rights and to fix the "out of balance" criminal justice system. 150 Cong. Rec. S4262 (Apr. 22, 2004) (statement of Sen. Feinstein). The legislative history makes clear that "[i]t is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." *Id.* at

S4269 (statement of Sen. Feinstein). Yet the district court's decision does precisely this.

After finding the CVRA authorizes the rescission of a non-prosecution agreement as a remedy for a violation of the victims' conferral right, and finding that the government violated the CVRA by misleading the victims and concealing its intent to enter the non-prosecution agreement with Jeffrey Epstein, the district court provided no remedy for the rights violation. This determination was based on a flawed application of the mootness doctrine.

The victims brought an enforcement action against the government, not Mr. Epstein, to seek redress for the government's violation of the victims' rights. By dismissing the case simply because Mr. Epstein has died, the district court effectively rendered the victims inconsequential in their own lawsuit. The case and controversy between the government and the victims is alive and well.

The maxim that "that every right, when withheld, must have a remedy, and every injury its proper redress," has been a settled common law principle since the founding of this nation. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (citing 3 W. Blackstone, Commentaries 109 (1783)). Despite this, the district court dismissed the victims' articulated remedies and failed to craft any more suitable remedy. The district court then added insult to injury when it wrote that the victims "may take solace . . . in the fact that this litigation has brought national attention to the Crime

Victims' Rights Act and the importance of victims in the criminal justice system." Pet. Appx. 061-062.

As the decision below serves to whittle down the CVRA, and it is inconsistent with federal courts' statutory duty to safeguard the victims' rights, this Court should reverse the district court decision.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The facts and procedural history have been ably recounted by the Crime Victim-Petitioner. *Amicus* does not repeat them.

ARGUMENT

I. THE CONTROVERSY OVER THE NON-PROSECUTION AGREEMENT WAS NOT RENDERED MOOT BY JEFFREY EPSTEIN'S DEATH.

The Article III doctrine of "mootness has two aspects: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). A case only becomes moot "'when it is impossible for a court to grant *any effectual relief whatever* to the prevailing party.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added). "'As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot.'" *Id.* (Emphasis added).[1]

[1] In cases that involve multiple parties or issues, a case is not moot as long as a live controversy exists between at least one litigant on each side, or at least one requested relief is still in dispute. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 712,

While this case may appear exceptional as it is a dispute in a criminal case context between the victims and the government with little present involvement of the accused—that uniqueness does not alter the legal analysis. The record in this case leaves no doubt that a live controversy exists, and the parties—the victims and the government—have a concrete interest in the outcome of the dispute over the non-prosecution agreement secured in violation of the victims' rights. The district court was capable of affording various remedies, including invalidating or voiding the agreement. Instead, the district court "confuse[d] mootness with the merits," *Chafin*, 568 U.S. at 173, when it determined the issue was moot because "there can be no criminal prosecution against [Mr. Epstein]," Pet. Appx. 052. Whether Mr. Epstein's co-conspirators, who are not parties to this case, can argue they are immune from prosecution in the future is "not pertinent to the mootness inquiry" in this case. *Chafin,* 568 U.S. at 173 (observing that "but such uncertainty [of enforcement of an order] does not typically render cases moot" and "[c]ourts often adjudicate disputes where the practical impact of any decision is not assured"). Because the district court erred as a matter of law when it determined that Mr.

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n.1 (2005) (finding the action is not moot, even though two of the plaintiff-petitioners challenging the failure of prison officials to accommodate their religious exercises had been released from custody, because "[w]ithout a doubt, a live controversy remains among the still-incarcerated petitioners, the United States, and respondents"); *Powell v. McCormack*, 395 U.S. 486, 497 (1969) ("Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy.").

Epstein's death rendered the non-prosecution agreement dispute moot, the Court should grant the Petition and reverse.

II. THE DISTRICT COURT'S FAILURE TO PROVIDE A REMEDY CONTRADICTS CLEAR AND WELL-ESTABLISHED LAW.

It is an "indisputable rule, that where there is a legal right, there is also a legal remedy." *Marbury v. Madison,* 5 U.S. 137, 163 (1803) (citing 3 W. Blackstone, Commentaries 23 (1783)); *accord Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 68-69 (1992) (rejecting the government's argument that courts have abandoned the general rule that all appropriate relief is available to vindicate a federal right; and holding that damages is available as a remedy in an action to enforce Title IX); *see also Bruschi v. Brown*, 876 F.2d 1526, 1531 (11th Cir. 1989) (taking "special note" that the Supreme Court has made clear that "'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant necessary relief'"). In fact, the Supreme Court once cautioned:

> [T]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist. And if the remedy cannot be applied by the [district] court, it exists nowhere.

Kendall v. United States ex rel. Stokes, 37 U.S. 524, 624 (1838).

In this case, after finding the government deliberately misled the victims and denied them their right to provide input into a process that resulted in a non-prosecution agreement for heinous crimes committed against them, the district court failed to afford a remedy. The district court's failure to craft any remedy for the victims under the circumstances of this case is a "monstrous absurdity"; and the absurdity grows when one peruses the history of the case.

In June 2013, the district court concluded that the CVRA "authorize[s] the rescission or 're-opening' of . . . a non-prosecution agreement reached in violation of a prosecutor's conferral obligations under the statute." Pet. Appx. 007. In reaching this conclusion, the district court rejected the government's "futility" argument, premised on the government's assertion that it would honor the terms of the agreement "even if the court were to set it aside and order the government to confer with the victims before reaching a final charging decision." Pet. Appx. 009. In rejecting this, the district court explained:

> The fallacy with this . . . argument derives from [the government's] misidentification of the alleged injury sought to be remedied in the case: The victims' CVRA injury is *not* the government's failure to prosecute Epstein federally . . . . Rather, it is the government's failure to confer with the victims before disposing of contemplated federal charges. . . . The court rejects the notion that a victim must show the likelihood or at least a possibility of a prosecution as a pre-requisite to demonstrating standing for redress of conferral rights under the CVRA . . . .

Pet. Appx. 010 (emphasis in original).

Six years later, the district court adopts the very argument it previously rejected. *See* Pet. Appx. 052 ("As a result of Mr. Epstein's death, there can be no criminal prosecution against him and the Court cannot consider granting [the] [remedy of rescission] to the victims.") This turn—presumably for no reason other than the death of Mr. Epstein—rendered futile the victims' 11-year litigation battle to vindicate their rights.

The district court's about face is comprehensible only if one has gone through the looking glass. *Cf. United States v. Galloway*, 976 F.2d 414, 438 (8th Cir. 1992) (Bright, J., dissenting, joined by Arnold, C. J., Lay, J., and McMillian, J.) ("Only in the world of Alice in Wonderland, in which up is down and down is up, and words lose their real meaning, does such a[n] [outcome] comply with the [law].").

The outcome is particularly troubling in light of the CVRA mandate that courts "shall ensure" that victims are afforded all of their rights under the law. 18 U.S.C. § 3771(b)(1). This obligation extends not only to ensuring that others honor victims' rights but also to ensuring that courts honor victims' rights. *See United States v. Palmer*, 643 F.3d 1060, 1067 (8th Cir. 2011) (reversing the district court's restitution order because it imposed a special condition that "manifestly violates the law"; and observing that the reversal is "consistent with our solemn

statutory duty to safeguard the child's [CVRA] 'right to full and timely restitution as provided in law'" (citing 18 U.S.C. § 3771(b)(1)).

The CVRA's unambiguous mandate to "ensure" victims' rights are afforded combined with the well-established principle that where there is a right, there is a remedy, requires this Court to conclude that the victims are entitled to a remedy as a matter of law. Any other outcome is an "abdicat[ion] [of the Court's] historic judicial authority to award appropriate relief in cases brought in our court system." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. at 74 ("It is well to recall that such authority historically has been thought necessary to provide an important safeguard against abuses of legislative and executive power[.]").

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the Court should reverse and remand with direction to grant the victims' all necessary and appropriate remedies to redress the violations of the victims' rights.

Respectfully submitted,

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CERTIFICATE OF COMPILIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure (FRAP) 29(5) because this brief contains 2052 words, including the parts of the brief exempted by FRAP 32(f), which is no more than one-half the maximum length authorized by the rules for a party's principal brief.

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

CERTIFICATE OF SERVICE

I Hereby Certify that on October 30, 2019, the undersigned electronically filed with the Clerk of Court (CM/ECF) a true and correct copy of the foregoing by using the CM/ECF system which will send a notice of electronic filing to the parties to the proceedings below or their counsel of record, and on the U.S. District Court for the Southern District of Florida (Marra, J.):

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