
6/19/08 [REDACTED] SUBMISSION TO
THE DASH

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

To Call Writer Directly:

Facsimile:

Dir. Fax:

June 19, 2008

Principal Associate Deputy Attorney General
Office of the Deputy Attorney General
United States Department of Justice

Dear Mr. Roth:

I again want to thank you for this opportunity to explain why we believe that a federal prosecution of Jeffrey Epstein is unwarranted. I appreciate your having informed us that you already have our May 19 and May 27 communications to the Deputy Attorney General, as well as our prior written submissions to CEOS and to the Southern District of Florida.

In light of the significant volume of our prior submissions and to facilitate your review, we have drafted four supplemental submissions that will provide a roadmap for your investigation of this matter. Given the bulk of these documents and their appended supporting attachments, you will receive this packet by messenger tomorrow. A brief description of each of the four submissions follows. First, I have included a succinct summary of the facts, law and policy issues at hand. This document sets forth a basic overview of the issues and summarizes our principal contentions as to why federal prosecution of this matter is neither appropriate nor warranted.

The three other submissions include: a summary of the irregularities and misconduct that occurred during the federal investigation; a letter from former CEOS attorney Stephanie Thacker that responds to CEOS's assessment of its limited review of Mr. Epstein's case; and a point-by-point rebuttal to First Assistant United States Attorney [redacted] recent letter which we believe contains factual inaccuracies typical of our correspondence from the United States Attorney's Office in Miami (the "USAO"). Also, for your reference, the package you receive tomorrow will contain a binder including all documentation to which we refer in our submissions. Finally, we will be providing a detailed checklist of each submission or substantive communication to the USAO. Our intention is that you have copies of each such document to enhance your review. If there are any that you have not received from the USAO or CEOS, please advise and we will fedex them to you without delay.

Chicago

Hong Kong

London

Munich

New York

San Francisco

Washington, [redacted]

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As you are likely aware, the Department's prior review of this matter was incomplete and, by its own admission, not "de novo." See Tab 38, May 15, 2008 Letter from [REDACTED]. Without considering the Non Prosecution Agreement that left this matter to be resolved in the State or any of the misconduct, CEOS reviewers, tasked with reviewing some of their own previously expressed opinions, assessed only whether the United States Attorney would "abuse [his] discretion" if he pursued this case. While we appreciate CEOS's willingness to examine these limited issues, its conclusion that a prosecution would not be an "abuse of discretion" rings particularly hollow in light of CEOS's admirably candid concessions that we have raised "compelling" objections and that a prosecution on these facts would require "novel" applications of federal law. Indeed, even a brief review of CEOS's own mission statement reveals how inapposite a federal prosecution is to the facts in this case.

Importantly, we note that the CEOS review was conducted prior to the Supreme Court's very recent decisions in *Santos* and *Cuellar*, which we believe—illuminating as they do the Court's interpretive methodology when it comes to federal criminal law—powerfully demonstrate the substantive vulnerability of the USAO's unprecedented employment of three federal laws. That Office's interpretation would never pass muster under the Supreme Court's recent pronouncements and should not be countenanced. That is all the more true under the circumstances where the duly appointed U.S. Attorney opined that, in effect, the "unitary" Executive Branch was driving this prosecution. We now know that is not so.

What I respectfully request, and what I hope you will provide, is a truly "de novo" review—that is, an independent assessment of whether federal prosecution of Mr. Epstein is both necessary and warranted in view of the legal and evidentiary hurdles that have been identified, the existence of a State felony plea and sentence that have been advocated by the State Attorney for Palm Beach County, and the many issues of prosecutorial misconduct and overzealousness that have permeated the investigation. I also request that you provide us with the opportunity during your review to meet with you in person to answer any questions you may have and to elucidate some of the issues in our submission.

We believe that an independent review will confirm our strong belief that federal prosecutors would be required to stretch the plain meaning of each element of the enumerated statutes, and then to combine these distorted elements in a tenuous chain, in order to convict Mr. Epstein. Indeed, just this week (and after two years of federal involvement in this matter), Assistant United States Attorney [REDACTED] re-initiated the federal grand jury investigation—in direct contravention of the parties' Non Prosecution Agreement—and issued yet another subpoena seeking evidence in this case. See Tab 19, Subpoena to [REDACTED]. In the subpoena, [REDACTED] directs [REDACTED] to appear on July 1, 2008 to give testimony and produce documents to FGJ 07-103 West Palm Beach. The attachment to the subpoena seeks documents such as photographs, emails, telephone billing information, and contact information that relate to Mr. Epstein as well as specific other people who received protection from federal

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prosecution as a result of Mr. Epstein's having entered into the September 24, 2007 Non Prosecution Agreement with the USAO.

Notably, the Non Prosecution Agreement contains the following agreed condition:

Further, upon execution of this agreement and a plea agreement with the State Attorney's Office, *the federal Grand Jury investigation will be suspended*, and all pending federal Grand Jury subpoenas will be held in abeyance unless and until the defendant violates any term of this agreement. The defendant likewise agrees to withdraw his pending motion to intervene and to quash certain grand jury subpoenas.

See Tab 21, September 24, 2007 Non Prosecution Agreement. It also guarantees that persons identified in the Grand Jury subpoena such as [REDACTED], [REDACTED], and Leslie Groff and others will not be prosecuted. The new Grand Jury subpoena clearly violates the Non-Prosecution Agreement. Although Mr. Epstein has exercised his rights to appeal to the Department of Justice with the full consent and knowledge of the USAO, he has not breached the Agreement. The re-commencing of the Grand Jury is in violation of the Agreement.

But further, the new investigation, which features a wide-ranging, fishing-expedition type to search in New York does nothing to satisfy the very essential elements of federal statutes that are lacking despite the intensity of an over two-year investigation in the Palm Beach area. Absent evidence of Internet luring, inducements while using the phone, travel for the purpose, fraud or coercion, the subject of the New York investigation is as lacking in the essential basis for converting a state case into a federal case as is the remainder of the Florida investigation.

The reaching out to New York to fill the void emanating from the failures of the Florida investigation compellingly demonstrates the misuse of federal resources in an overzealous, over-personalized, selective and extraordinary attempt to expand federal law to where it has never gone. This last-ditch attempt by [REDACTED] reinforces our belief that the USAO does not have facts that, without distortion, would justify a prosecution of Mr. Epstein.

In view of the prosecution's often-verbalized desire to punish Mr. Epstein, we believe that the prosecution summary suffers from critical inaccuracies and aggregates the expected testimony of witnesses so as to reach a conclusion of guilt. Our contention is reinforced by the fact that key prosecution witnesses have provided evidence and testimony that directly undermines the prosecution's misleading and inaccurate summary of its case. Indeed, we now have received statements from three of the principal accusers—[REDACTED] (through a state criminal deposition), [REDACTED] (through a federal FBI-USAO sworn and transcribed interview), and [REDACTED] (through a defense-generated sworn transcribed interview). Each of these witnesses categorically denies each essential element that the prosecution will have to prove in order to convert this quintessential state-law case into a federal matter.

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It thus is especially troubling that the USAO has not provided us with the transcript of [REDACTED] federal interview, nor the substance of the interviews with [REDACTED] or [REDACTED], nor any information generated by interviews with any of the approximately 40 alleged witnesses that the prosecution claims it has identified. Because the information provided by these women goes directly to the question of Mr. Epstein's guilt or innocence, it is classic *Brady* information. We understand that the U.S. Attorney might not want to disclose impeachment information about their witnesses prior to a charge or during plea negotiations. But we firmly believe that when the Government possesses information that goes directly to a target's factual guilt or innocence, the target should be informed about such heartland exculpatory evidence.

Most importantly, aside from whether the Department believes *Brady* obligates disclosure to a target of a federal investigation prior to the target's formal accusation, no such limit should apply to a Department review. Accordingly, we request that you go beneath the face of any summary provided to you by the USAO and instead review the actual witness transcripts and FBI 302s, which are essential for you to be able to make a truly independent assessment of the strength and wisdom of any federal prosecution.

After careful consideration of the record, and as much as it pains me to say this, I simply do not believe federal prosecutors would have been involved at all in this matter if not for Mr. Epstein's personal wealth and publicly-reported ties to former President Bill Clinton. A simple Internet search on Mr. Epstein reveals myriad articles and news stories about the former President's personal relationship with Mr. Epstein, including multi-page stories in *New York Magazine* and *Vanity Fair*. Mr. Epstein, in fact, only came to the public's attention a few years ago when he and the former President traveled for a week to Africa (using Mr. Epstein's airplane)—a trip that received a great deal of press coverage. I cannot imagine that the USAO ever would have contemplated a prosecution in this case if Mr. Epstein lacked this type of notoriety.

That belief has been reinforced by the significant prosecutorial impropriety and misconduct throughout the course of this matter. While we describe the majority of these irregularities in another submission, two instances are particularly troubling. First, the USAO authorized the public disclosure of specific details of the open investigation to the *New York Times*—including descriptions of the prosecution's theory of the case and specific terms of a plea negotiation between the parties. Second, [REDACTED] attempted to enrich friends and close acquaintances by bringing them business in connection with this matter. Specifically, she attempted to appoint a close personal friend of her live-in boyfriend to serve as an attorney-representative for the women involved in this case.

It also bears mentioning that actions taken by [REDACTED] present an appearance of impropriety that gives us cause for concern. [REDACTED] former law partner is currently pursuing a handful of \$50-million lawsuits against Mr. Epstein by some of the masseuses.

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Finally, as you know, Mr. Epstein and the USAO entered into an agreement that deferred prosecution to the State. In this regard, I simply note that the manner in which this agreement was negotiated contrasts sharply with ██████████ current representation that "[T]he SDFL indicated a willingness to defer to the State the length of incarceration . . ." See Tab 1, May 19, 2008 Letter from ██████████, p. 2. This statement is simply not true. Contrary to ██████████ assertion, federal prosecutors refused to accept what the State believed to be appropriate as to Mr. Epstein's sentence and instead, insisted that Mr. Epstein be required serve a two-year term of imprisonment (which they later decreased to 18 months plus one year of house arrest). Federal prosecutors have not only involved themselves in what is quintessentially a state matter, but their actions have caused a critical appearance of impropriety that raises doubt as to their motivation for investigating and prosecuting Mr. Epstein in the first place.

At bottom, we appreciate your willingness to review this matter with a fresh—and independent—set of eyes. To facilitate your review, I once again request the opportunity to make an oral presentation to supplement our written submissions, and we will promptly respond to any inquiries you may have.

Yours sincerely,
██████████
██████████

cc: Deputy Attorney General ██████████

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June 19, 2008

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Mr. [REDACTED]
Senior Associate Deputy Attorney General
Office of the Deputy Attorney General
United States Department of Justice
[REDACTED]

Dear Mr. Roth:

I write to offer my reaction to the May 15, 2008 correspondence from the United States Department of Justice Child Exploitation and Obscenity Section ("CEOS") regarding the federal investigation of Jeffrey Epstein by the United States Attorney's Office for the Southern District of Florida ("USAO").¹ I will refrain from recounting Mr. Epstein's arguments in detail here, but, rather, will highlight salient points responsive to the CEOS letter.

In particular, I write from a background well familiar with child exploitation cases and victim/witness issues. As the CEOS letter points out (CEOS letter at p. 3), I was a member of CEOS. In fact, I served as a federal prosecutor for twelve years; five years as an Assistant United States Attorney for the Southern District of West Virginia, and seven years at CEOS. I began working as a trial attorney for CEOS in 1999, and was promoted to Deputy Chief for Litigation in 2002, and ultimately to Principal Deputy Chief for the Section in 2004.

As those who have worked with me know, I have a history of working diligently on behalf of victims of crime. While at the United States Attorney's Office for the Southern District of West Virginia, I was a part of the prosecution team that prosecuted the first case in the country under the federal Violence Against Women Act. United States v. Bailey, 112 F.3d 758 (4th Cir.), cert denied, 522 U.S. 896 (1997). The case went to trial and the defendant was sentenced to life in prison. I also spearheaded the domestic violence and federal criminal child support prosecution efforts for that office, prosecuting some of the first cases in the country under the federal Child Support Recovery

¹ Citations to the May 15, 2008 correspondence will be referenced herein as "CEOS letter at p. ____."

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Act. Later, while at the Department of Justice, I co-authored the Department's Federal Child Support Prosecution Handbook.

My work at CEOS permitted me to continue my efforts on behalf of vulnerable victims of crime. While there, for example, I was part of the prosecution team in United States v. Dwight York, 428 F.3d 1325 (11th Cir. 2005), cert denied, 548 U.S. 908 (2006). York was the leader of a pseudo religious organization, and systematically molested countless children, some as young as six years old. The case went to trial and York was sentenced to 135 years in prison. As part of that trial team, I was awarded the Attorney General's Award for Distinguished Service. Additionally, at CEOS I was one of the architects of the Innocence Lost Initiative, a nationwide initiative designed to combat child prostitution. For this, I was awarded an Assistant Attorney General's Award for Outstanding Victim/Witness Service. Likewise, I was awarded a subsequent Assistant Attorney General's Award for Special Initiative in connection with a nationwide sex tourism prosecution initiative I helped to develop.

I say all this not for any boastful purpose, but, rather, to make clear that I am fully cognizant of victim issues, and that I am no pushover in terms of prosecution standards. I am also very well aware of the good work of CEOS, and the outstanding credentials of those who toil in that office.

With all due respect to CEOS, however (and recognizing that their review of this case was quite limited), given the facts and circumstances of this investigation, a federal prosecution of Mr. Epstein simply should not be countenanced. In my view, such prosecution would be counter to the important mandate of the Department of Justice as emblazoned on its seal, "Qui Pro Domina Justitia Sequitur," referring to the Attorney General "who prosecutes on behalf of justice."

As you well know, it is fundamental to that mandate that, as the representative of the people of the United States, the duty of a federal prosecutor is not simply to seek conviction as at any cost, but, rather, to seek justice. Berger v. United States, 295 U.S. 78, 88 (1935). ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.") While it is true that Berger was decided at the post-trial, as opposed to the pre-indictment, stage of the case, the bedrock principle contained in the above quote should transcend the entire investigation and prosecution process. Indeed, it is arguably most imperative at the investigation stage, at which point law enforcement is dealing with a presumptively innocent citizen.

In summary, we understand the allegations against Mr. Epstein to be that Mr. Epstein paid individuals to find friends and acquaintances, certain of whom were under the age of 18, to provide topless massages to him at his Palm Beach home in exchange for money. Mr. Epstein's assistants allegedly scheduled these massages for him over the telephone at the direction of Mr. Epstein, allegedly including some scheduling calls to underage women. However, the evidence contradicts these allegations. First, Mr. Epstein did not ask that the masseuses be under the age of 18. To the contrary, he specifically asked that they be 18 or older. As one witness commented, "[REDACTED] said tell

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them you're 18 because if you're not, he won't let you in his house." [REDACTED] at 38-39. Second, Mr. Epstein himself did not schedule such appointments. Third, Mr. Epstein would not know who would be providing a massage at any particular time. Fourth, and importantly, Mr. Epstein's assistants were not directed to contact underage women, and were not aware of the true ages of the women they contacted. In fact, more often than not, the masseuses themselves, or the individuals who introduced the masseuses, made the initial contact. As a result, Mr. Epstein and his assistants were routinely unaware of the identities of many of these young women before they arrived.

The allegations further include the assertion that Mr. Epstein engaged in unlawful sexual conduct with certain underage women who arrived at his house to provide a massage. At times, during these massages, Mr. Epstein masturbated, engaged in some sexual touching, and a small number of alleged acts of penetration. However, most of the women who performed massages on Mr. Epstein were over the age of 18. Many of the young women have sworn under oath that they, in fact, told Mr. Epstein that they were 18 or older, and that they did so because they knew that if they were not 18 years old, they would not be allowed into Mr. Epstein's home. In fact, Mr. Epstein has passed a polygraph examination to this effect relative to the government's primary, and youngest, alleged victim, [REDACTED]. Indeed, many of the women also worked at local massage parlors, which presumably had a requirement that the masseuse have reached the age of majority. To the extent there are allegations that Mr. Epstein should have been alerted to certain underage women based on conversations he allegedly had with them, those conversations would have taken place in person and at his home, thereby precluding any prior scheduling with knowledge of their true ages. As explained below, any factual allegations of repeat massages with such persons would lack necessary elements required for a federal nexus to such conduct.

All of the alleged activity occurred in Mr. Epstein's home in Palm Beach, Florida. Many of the massages allegedly involved conduct which, even if engaged in, is not proscribed by federal law, either because the masseuses were of age, or because conduct with underage masseuses only involved topless massages, massages in undergarments or naked massages. To the extent prohibited sexual activity occurred, any inducement, enticement, and/or persuasion used would have taken place during a face-to-face encounter—thus eliminating the possibility for the commission of a federal crime, which requires the existence of a communication through a facility of interstate commerce in which the defendant persuades or entices the minor to engage in illegal sexual activity. Furthermore, any prohibited sexual activity that did occur based on the facts on the record is best left to the state to address because the facts of this case do not fall comfortably within the federal domain.

This is a case about purely local activity, involving local actors, and affecting local interests and thus, should be handled by local authorities. Nonetheless, the USAO has indicated its intent to prosecute Mr. Epstein for purported violations of 18 U.S.C. §§ 2422, 2423, and 1591. However, as set forth in detail in prior submissions, the facts of this case fall squarely outside the heartland of those statutes – in fact, in law, and in congressional intent. As their plain

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text and history indicate, these statutes were designed to address problems that are truly national and international in scope: human trafficking in § 1591; telephone or Internet sexual predation in § 2422; and sex tourism in § 2423. Unlike the alleged conduct at issue here, those problems unquestionably present multi-jurisdictional obstacles that States and localities cannot confront effectively on their own. Mr. Epstein's conduct was purely local in nature, and the State of Florida and Palm Beach County are effectively prosecuting and punishing that conduct.

Although CEOS asserts, "that a prosecution of Mr. Epstein might not look precisely like the cases that came before it is not dispositive" (CEOS letter at p. 4), the fact is this case does not look anything like those cases. The facts here do not carry any of the hallmarks that typify an appropriate federal prosecution for child exploitation as reflected in all such prior federal prosecutions. Specifically, the facts here do not carry the hallmarks for a sex trafficking or child prostitution prosecution. Mr. Epstein did not target minors. In fact, the evidence indicates just the opposite. There was no travel in interstate commerce for the purpose of engaging in illicit sexual activity. There was no prohibited use of a facility of interstate commerce. There was no commercial for profit sexual enterprise. There was no force. There was no violence. There was no use of drugs or alcohol. There was no child pornography.

18 U.S.C. § 1591 is clearly designed to combat organized rings of individuals who engage in the business of human trafficking, involving both a commercial and coercive component. As President Bush has noted:

generally speaking, trafficking in persons refers to actions, often including the use of force, fraud or coercion, to compel someone into a situation in which he or she will be exploited for sexual purposes, which could include prostitution or pornography, or for labor without compensation, which could include forced or bonded labor . . . trafficking in persons is often linked to organized crime, and the profits from trafficking enterprises help fund other illegal activities. The growth of vast transnational criminal networks supported in part by trafficking in persons fosters official corruption and threatens the rule of law.²

This in no way describes the case here. Yet the USAO has been unwavering in its single minded focus to stretch the limits of these federal statutes beyond their intended use, and beyond precedent, in order to prosecute Mr. Epstein. As the CEOS letter acknowledges, the legal theories the USAO intends to attempt to pursue against Mr. Epstein are "novel," having never before been sanctioned by federal law. They should not be sanctioned now. As the Supreme Court recently pronounced, when a statutory term in a criminal statute could support both a narrow or broad application of the federal criminal law, "the tie must go to the defendant." United States v. Santos, 553 U.S. ____ and Cuellar v. United States, 553 U.S. ____ (June 2, 2008), Slip Op. at 6.

² February 25, 2003 Trafficking in Persons National Security Presidential Directive.

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A full and fair review of the facts here is critical to this analysis. Yet, it is clear that CEOS did not conduct such a review. In his recent letter to Jay Lefkowitz, First Assistant United States Attorney ("FAUSA") [REDACTED] confirmed our understanding that the USAO was to have "facilitated" an "independent *de novo* review of the investigation" by the Department. (May 19, 2008 [REDACTED] letter at p. 5). Yet, the CEOS review was not complete, and by its own terms not *de novo*.

As CEOS itself noted, "our review of this case is limited both factually and legally. We have not looked at the entire universe of facts in this case. It is not the role of the Criminal Division to conduct a complete factual inquiry from scratch." (CEOS letter at p. 1). Indeed, entire subject areas relevant to the inquiry were not considered at all by CEOS. In essence, CEOS was only in a position to make the most cursory possible review, an "abuse of discretion" review, without considering the facts at the necessary level of detail, and without taking into account the many and varied issues of misconduct we have raised in this case. As the CEOS letter indicates, "we did not review the facts, circumstances, or terms included in the plea offer nor any allegations that individuals involved in the investigation engaged in misconduct." (CEOS letter at p. 2). All of this begs the question – if it is not CEOS' role to "conduct a complete factual inquiry," and CEOS did not consider any of the allegations of misconduct here, which at the very least have created a strong appearance of impropriety, and, at worst evidence an intent and effort to unfairly prejudice Mr. Epstein to the financial benefit of the friends and colleagues of the prosecution team in the USAO, then where and when can justice ever hope to be served in this case? This is a prosecution burden that cannot, and should not, be brushed aside.

We contend the limited nature of the CEOS review deeply affected its conclusions. For example, CEOS most likely did not review original documents, such as transcripts, and instead relied on the summaries of federal prosecutors and FBI agents, against whom we have raised serious concerns regarding misconduct. If the summary memos from the USAO are as flawed as other USAO communications have been, and which we have been able to show are misleading and inaccurate, the CEOS abuse of discretion review is likely flawed as well. Moreover, although the USAO expected, and personally promised to us, an independent review, FAUSA [REDACTED] letter also makes clear that our pivotal legal challenge to the use of 18 U.S.C. § 2422(b) had already "been previously raised and thoroughly considered and rejected by . . . CEOS prior to" the recent CEOS review. (May 19, 2008 [REDACTED] letter at p. 5). The fact that CEOS had to evaluate its own decision with respect to some of the allegations against Mr. Epstein prevents its subsequent review and opinion from being truly independent.

Following this most recent CEOS review "limited both factually and legally," and with no citation to any case law relative to the statutes in question, CEOS concludes merely, "federal prosecution in this case would not be improper or inappropriate (CEOS letter at p. 5);" in essence, that the United States Attorney could bring this case in the exercise of his federal discretion should he so choose ("we conclude that U.S. Attorney Acosta could properly use his discretion to authorize prosecution in this case."). (CEOS letter at p. 2). However, CEOS drew the conclusion that the

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federal prosecution of Mr. Epstein would not be “improper or inappropriate” absent any review at all of the misconduct here, and absent a full review of the facts and law. The facts, the law, and the alleged misconduct are each necessarily inextricably intertwined with the question of whether or not this is a viable federal prosecution. These imposed limits flawed the review from the outset. In any event, CEOS concedes that the defense team makes “many compelling arguments.” (CEOS letter at p. 5). In the end, then, one is left with the impression that the CEOS review and opinion, although concluding that the USAO could push forward at its own discretion, is a much qualified one.

The federal prosecution of Mr. Epstein has been a moving target from the inception. Each time the allegations, the witnesses or the applicable law is subject to a searching inquiry, we have found that the allegations have been misrepresented, the law does not apply to the actual facts here, and the USAO prosecution theory falls apart. Yet, in the face of the voluminous evidence we have submitted in this regard, while acknowledging that the theories are “novel,” and that our arguments against federal prosecution are “compelling,” CEOS concluded, “Mr. Acosta could rightfully conclude that this federal issue is best resolved by a jury” and that “the USAO has a good faith basis to fully develop the facts on this issue and brief the law to permit a court to decide whether the law appropriately reaches such conduct.” With all due respect, and recognizing that CEOS may be – and apparently was – limited in its authority, it should not be the prerogative of the prosecution arm of the United States government to simply roll the dice, and let the court system just sort it out when dealing with the life and liberty of a United States citizen. The Department of Justice should not be so cavalier when labeling someone as a child molester. While it may be within the discretion of the USAO to do so, it is not in accord with the principles of justice.

Indeed, as noted, just a few weeks ago, the Supreme Court underscored this point in Santos and Cuellar. The Court made clear that prosecutorial discretion does not provide the USAO cart blanche to expand criminal statutes as they seek to do here with complete disregard for congressional intent. The Court rejected speculation as a basis of determining the scope of a criminal statute; “probability is not a guide which a court, in construing a penal statute, can safely take.” Slip op. at 7, quoting United States v. Wiltberger, 5 Wheat. 76,105 (1820). “We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.” Slip op. at 12.

Based on my experience, I believe that the facts here do not warrant a federal child exploitation prosecution. At its core, this case is quintessentially a state concern as opposed to implicating any federal interest. Indeed, the Florida State Attorney’s Office (“SAO”), led by the chief of the Sex Crimes Division, thoroughly investigated this matter, and presented it to the grand jury. The facts, as opposed to the deeply flawed press reports, were carefully assessed by experienced State prosecutors who aggressively enforce State criminal laws. Following an extensive 15-month State investigation, Mr. Epstein was indicted by a State grand jury on a single felony count of solicitation of prostitution.

During the investigation, the State prosecutor exhaustively reviewed the evidence, met face-to-face with many of the alleged victims, considered their credibility – or lack thereof – and

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considered the extent of exculpatory evidence, including a psychosexual evaluation of Mr. Epstein and a polygraph examination demonstrating that Mr. Epstein genuinely believed at the time of the alleged conduct that the State's key witness ([REDACTED]) was over the age of 18. Then, after months of negotiations, the State reached what it believed was an appropriate resolution of the case. Importantly, this resolution was consistent with that of cases involving other defendants who had engaged in similar conduct. Implementation of the State resolution of the case was held in abeyance, however, due to the unexpected commencement of the successive federal criminal investigation.

While it is true, as CEOS points out, (CEOS letter at p. 3) that many criminal prosecutions turn on issues of credibility of witnesses, to which many members of the defense team can attest (having had decades of federal criminal litigation experience among us), this does not serve to divest the prosecutor of his/her duty to make a searching inquiry of the facts before using the power of prosecution, and the weight of the United States government, to level serious accusations. CEOS likewise acknowledges as much, "the prosecutors are in the best position to assess the witnesses' credibility." (CEOS letter at p. 3).

Since the CEOS letter also singles me out as someone who should be familiar with witness issues, I feel compelled to note that, of course, I am well aware that it is not uncommon for witnesses to give conflicting statements. I am also fully aware that the credibility of key government witnesses may be strongly impacted by the \$50 million incentive provided via the civil lawsuits at play, and encouraged by the government here.³ I have also read many of the conflicts between witness testimony and [REDACTED] own rendition of that testimony in his reports and/or search warrant affidavit. [REDACTED] apparently formed a view early on as to the purported criminality of Mr. Epstein's conduct regardless of the mountain of evidence to the contrary. For a prosecutor that has had an opportunity to review the full facts, and to meet with the witnesses, however, "conflicting statements" cross the line to a "lack of credibility" that simply can not sustain a prosecution. That is where an appropriate application of prosecutorial discretion must be brought to bear.

Again, CEOS was not itself in the position to exercise such discretion. By its own admission, CEOS did not make a full review of the witness statements here, and CEOS certainly did not sit down across the table and speak to these witnesses. We understand that was apparently not its perceived role. But, CEOS should recognize that at least one prosecutor in this case – the Chief of the SAO Sex Crimes Division has done so. Lana Belohlavek not only met with and interviewed these witnesses during the course of the 15-month state investigation prior to any federal involvement, but she again sat across the table from many of them in connection with recent civil

³ It is important to note here that this investigation was launched not upon the complaint of any alleged victim, but, rather, upon the complaint of [REDACTED] father, [REDACTED], and her stepmother, [REDACTED]. More notable still is the fact that [REDACTED] Hardly pillars of credibility. Yet, the USAO did not supply this information to the defense. Even more telling is the fact that [REDACTED] filed a [REDACTED] lawsuit purportedly on behalf of his daughter without her authority or knowledge.

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depositions in this matter. Ms. Belohlavek, and the SAO, is likewise well familiar with the breadth of the federal investigation, and has integrated that knowledge into the current enhanced state sentencing recommendation. The SAO remains firm in the position that the proposed state resolution is a sound one, and that there was no child exploitation here. Notably, however, not once during the pendency of the federal investigation has the USAO ever reached out to its state prosecutive counterpart that initiated this investigation in the first place to discuss the issues or to thoroughly ferret out the facts or the witness credibility issues.

In the eight lines the CEOS letter accords to the topic of witness credibility CEOS asserts, "there are multiple mutually-corroborating witnesses," (CEOS letter at p. 3). However, the CEOS letter does not highlight a single one. In contrast, we have put forth numerous "mutually corroborating" witness statements. Far from supporting a federal prosecution, these statements instead corroborate that 1) the alleged victims lied to Mr. Epstein about their age; 2) there was no use of a facility of interstate commerce by Mr. Epstein; 3) there was no inducement or coercion; 4) there was no commercial enterprise; and 5) there was no illicit sexual conduct.

Indeed, Mr. Epstein took several steps to ensure that no minors entered his home, most notably, by affirmatively asking the women whether they were actually 18. See [REDACTED] At 38-39. That fact – which many of the potential witnesses have confirmed in sworn interviews – strongly indicates that Mr. Epstein specifically intended to *preclude* anyone under 18 from giving him a massage. That fact is confirmed by, among other things, [REDACTED] testimony that "he likes the girls that are between the ages of like 18 and 20" [REDACTED] Tr. at 12. In fact, the evidence bears out that the majority of the women who came to Mr. Epstein's residence to provide a massage were over 18.

Many of the young women who were aged 16 and 17 visited Mr. Epstein's residence only once or twice, and the evidence strongly shows that they lied to Mr. Epstein about their age. Two of these individuals, [REDACTED] and [REDACTED], were 14 and 15 at the time they met Mr. Epstein. Given that each has brought a civil lawsuit against Mr. Epstein, with [REDACTED] and her family seeking [REDACTED] from Mr. Epstein, their testimony against Mr. Epstein is per se suspect. But, despite their obvious incentive to harm Mr. Epstein, their testimony actually confirms his innocence. [REDACTED], for instance, has testified that [REDACTED], who introduced her to Mr. Epstein, expressly told her to lie to Mr. Epstein about her age,

Q: And [REDACTED] told you that if you weren't 18 Epstein wouldn't let you into his house, right?

A: That's – yes, yes.

[REDACTED] (deposition) at 32.

Q: You didn't want Mr. Epstein to know that you were lying about your age, right?

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A: Correct.

Q: You didn't want Mr. Epstein to know that you were not 18 yet, right?

A: Correct.

[REDACTED]. (deposition) at 36.

In fact, [REDACTED] told Mr. Epstein that she was 18 years old, and confirmed this fact with Palm Beach Police. *Id.* at 36. Beyond that, [REDACTED] "swore on her mother's grave" that she and Mr. Epstein did not engage in sex of any kind. [REDACTED]. (deposition) at 24. She further repeatedly explained that prior to the time she went to Mr. Epstein's house (she went there only once), nobody ever tried to coerce her to engage in sexual activity with Mr. Epstein. Not over the telephone, not over the Internet, not at all. [REDACTED]. (deposition) at 31-32. These are not facts upon which a federal case can stand.

[REDACTED] age was also unknown to Mr. Epstein when she went to his home. [REDACTED], who was introduced to Mr. Epstein by [REDACTED], testified in her federal sworn interview that [REDACTED] told her to lie to Epstein. *See* [REDACTED] Tr. at 8 ("*she just said make sure you're 18 because Jeffrey doesn't want any underage girls*") (emphasis added). [REDACTED] testimony strongly suggests that [REDACTED] lied to Mr. Epstein about her own age as well. [REDACTED] also self represented that she worked at a local [REDACTED] massage parlor that presumably required a minimum age.

The conduct of [REDACTED] is likewise illustrative of "mutually corroborating" testimony which supports the fact that this is not an appropriate federal case. In the same way that [REDACTED] was referred to Mr. Epstein and brought to his home without having been introduced or acquainted in any manner, [REDACTED] was referred by someone else, [REDACTED], who also told her to lie to Mr. Epstein about her age, which she did. ([REDACTED] Tr. at pp. 8-9).

CEOS seeks to buttress the USAO prosecution by asserting "it is possible to satisfy that element [proof of specific intent as to the age of the alleged victims] with proof that the defendant was deliberately ignorant of facts which would suggest that the person was a minor." (CEOS letter at p. 2). Such assertion is counter to the law and to the facts. Reliance on a deliberate ignorance standard as to any of the three statutes in issue requires the factual predicate of an intent not to learn of an incriminating fact. This is the antithesis of the factual context of this case where there is repeated proof that the minors believed that they had to lie because Mr. Epstein had an actual practice of attempting to verify age, and would not let them in his house if they were under the age of 18. *See United States v. Kennard*, 472 F.3d 851, 857-858 (11th Cir. 2006), quoting *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003) (An instruction on deliberate ignorance is appropriate only if it is shown [among other things] . . . that the defendant purposely contrived to avoid learning

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of all of the facts in order to have a defense in the event of a subsequent prosecution.”). Thus, the facts preclude reliance on the concept of deliberate ignorance as a substitute for proof.

The fact that the search warrant affidavit in this case is rife with mis-statements and omissions regarding the key element of age is critical. However, CEOS concludes with no apparent supporting analysis, “despite the numerous factual errors you describe, the U.S. Attorney’s Office could still plausibly argue that the mistakes – whether inadvertent or intentional – were not material to the determination” (CEOS letter at p. 3). Although, as CEOS notes, there are “numerous” such misrepresentations, through affirmative statement or intentional omission, a focus on but one of those misrepresentations highlights that such misrepresentations were, in fact, material. The fact is that [REDACTED] grossly misrepresented Mr. Epstein’s intent as it related to the age of the women he permitted entry to his residence.

In the search warrant affidavit, [REDACTED] affirmed that [REDACTED] [REDACTED] claimed:

[Mr. Epstein] told her the younger the better.

And, [REDACTED] stated she once tried to bring a 23 year old female and Epstein stated that the female was too old.

What [REDACTED], no doubt intentionally, omitted was [REDACTED] further explanation, which rendered Mr. Epstein’s comments *innocuous*:

A: Let me put it this way, he – I tried to bring him a woman who was 23 and he didn’t really like it.

Q: He didn’t go for it?

A: It’s not that he didn’t go for it. It’s just that he didn’t care for it. *And he likes the girls that are between the ages of 18 and 20.* ([REDACTED] Statement at 12) (emphasis added).

Had that critical information, information that turns allegedly illegal conduct into more innocent conduct, been included, it would have seriously undermined the probable cause for the search warrant.

Similarly, and equally problematic, [REDACTED] *did not* include the many statements demonstrating that, when asked by Mr. Epstein, the women affirmatively misrepresented their ages as being 18, and/or that Mr. Epstein was not aware of their true ages. Indeed, although [REDACTED] did note that [REDACTED] told Mr. Epstein that she was 18, he omitted from the affidavit the key point as to why she lied:

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[REDACTED] said tell him you're 18 because if you're not, he won't let you in his house. So I said I was 18. As I was giving him a massage, he was like how old are you. And then I was like 18. But I kind of said it really fast because I didn't want to make it sound like I was lying or anything. [REDACTED] at 38-39.

Thus, consistent with the guidance provided in Franks v. Delaware, 438 U.S. 154 (1978), the search warrant affidavit in this case reveals knowing and reckless falsehoods and omitted *material* information. This is precisely the type the United States Supreme Court sought to guard against.

The age of the alleged victims, and of Mr. Epstein's intent in that regard, is an element of the crimes that must be proven in order to sustain a conviction. In particular, § 2422(b) requires that the defendant specifically intended to target a minor. See, e.g., United States v. Murrell, 368 F.3d 1286 (11th Cir. 2004) (“[T]o prove an attempt the government must first prove that [defendant], using the internet, acted with a *specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex.*”) (Emphasis added). Section 2422(b) expressly requires that the crime be committed “knowingly,” and that requisite mental element applies as to each element of the crime. United States v. XCitement Video, Inc., 513 U.S. 64, 68-69 (1994); United States v. Meek, 366 F.3d 705, 718 (9th Cir. 2004); United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002); United States v. Bailey, 228 F.3d 637, 638-639 (6th Cir. 2000). How, then, could the USAO “plausibly argue” that a misrepresentation about an element of the crime could be viewed as “not material”? If the elements of the alleged crime are not met, there is no probable cause to sustain the search warrant in the first instance. If the elements are not met, there is no federal crime. That is material.

Moreover, it is clear from the plain text of the statute that the statutorily proscribed act pursuant to 18 U.S.C. §2422(b) is the actual use of a facility of interstate commerce to persuade, entice, induce, or coerce. “The underlying criminal conduct Congress expressly proscribed in passing §2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself. That is, if a person persuaded a minor to engage in sexual conduct (e.g., with himself or a third party) without then committing any sex act himself, he would nevertheless violate §2422(b).” United States v. Murrell, 368 F.3d 1283, 1286 (11th Cir. 2004). See also, United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000) (“Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.”). Thus, if there has been sexual misconduct (which we deny) without the requisite persuasion, there is no violation of this federal law.

The investigation and testimony in this case makes clear that Mr. Epstein did not use any facility of interstate commerce to commit any act forbidden by 18 U.S.C. § 2422(b)—to persuade, induce, entice, coerce—nor did he direct any of his assistants to do so. Indeed, by way of example, [REDACTED] was clear on this point at her deposition during which she repeatedly testified that nobody—not Mr. Epstein or any of his assistants—ever used the Internet or phone in any way to try to persuade her to engage in sexual activity with Mr. Epstein. [REDACTED] (deposition) at 31-32. Nonetheless, even assuming, *arguendo*, that persuasion to engage in sexual conduct occurred over

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the telephone (which we deny), it is black letter law that the *mens rea* must coincide with the *actus reus*. Thus, the government must prove that Mr. Epstein has the specific intent to target a known minor to engage in prohibited sexual activity *at the time of the call*. We have seen zero evidence of this. To the extent Mr. Epstein *later* may have persuaded a particular individual to engage in unlawful sexual activity *during a massage*, such persuasion occurred face to face, and can not work retroactively to render the earlier phone call an offense under the statute.

As to the purported violation of 18 U.S.C. § 2423 for allegedly traveling in interstate commerce for the purpose of engaging in illicit sexual activity, CEOS does not deny that Mr. Epstein was returning to one of his residences when he traveled to Florida.⁴ CEOS explicitly stated it “fully understand[s] our argument” (CEOS letter at p.2) that Mr. Epstein should not be charged under § 2423(b) because the dominant purpose for his traveling to Palm Beach was not to engage in illegal sexual activity, but to simply return to one of his residences. Rather, this is apparently another “compelling” point of law which may be left to “a court to decide whether the law properly reaches such conduct.” (CEOS letter at p. 2).⁵ Notably, implicit in this concession by CEOS is that the law has never before been so applied, that is, there is no precedent for a court to extend the statute as the USAO seeks to do here. In fact, the United States Supreme Court prohibited the criminalization of travel under identical circumstances over a half century ago. See, Mortenson v. United States, 322 U.S. 369, 374 (1944) (intention to engage in proscribed conduct must “exist before the conclusion of the interstate journey and must be the *dominate motive* of such interstate movement.” (Emphasis added.)

Beyond an absence of proof regarding the travel element in connection with 18 U.S.C. §2423, the requisite age requirement for a violation of that statute is important. 18 U.S.C. §2423, by reference to Chapter 109A (18 U.S.C. §2423(f)(1)), specifically defines a minor for purposes of that statute as an individual who has not attained the age of 16. If an alleged victim is 16 years of age or older, a violation of this statute pursuant to 2423(f)(1) can only occur if it can be proven that force, threat or drugs were involved. See, 18 U.S.C. §§ 2241 *et seq.* There are no such allegations here. As a result, in order to find a violation under 18 U.S.C. § 2423, the United States would have to prove that Mr. Epstein engaged in one of the sexual acts defined at 18 U.S.C. § 2246(2) with an individual under the age of 16, and that he formed the intent and dominant purpose to do so prior to the time he made a return trip to Florida. Again, there is no such evidence here. [REDACTED] has specifically testified that 1) she never engaged in sexual activity with Mr. Epstein; 2) she never even met or talked to Mr. Epstein prior to her arrival at his house; and 3) she lied about her age not only to Mr. Epstein, but, in fact, to the world on her MySpace page when she said that she was 18 years old. It is, then, also worth noting in this regard that 18 U.S.C. §§2243(c) provides an affirmative defense if proven by a preponderance of the evidence if Mr. Epstein reasonably believed that [REDACTED] was

⁴ In addition to his residence there, Mr. Epstein also has several businesses, and personal matters and contacts to which he attends in Florida. For example, beginning in 2002, Mr. Epstein visited his mother nearly every weekend in Palm Beach until she passed away in April, 2004.

⁵ As previously set forth herein, and as more fully explained in other submissions related to this case, the recent Supreme Court decisions in Santos and Cuellar make this attempted stretch of the law improper.

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had attained the requisite legal age. Finally, although 18 U.S.C. §2423(f)(2) also defines "illicit sexual conduct" as any commercial sex act with a person under the age of 18, 18 U.S.C. §2423(g) also provides a specific affirmative defense as to that age element if proven by a preponderance of the evidence that Mr. Epstein reasonably believed that the young women had attained the requisite legal age. As we have demonstrated, time and again the women involved lied to Mr. Epstein as to their true age, representing that they were, in fact, over the age of 18. Many of them also represented that they worked at local massage parlors, which presumably would have imposed a legal age requirement.

Lastly, in contrast to 18 U.S.C. §1591, Mr. Epstein's conduct did not involve trafficking of women or children in the sex industry, and was not part of any phenomenon that, in the aggregate, had an economic impact on interstate or foreign commerce. Additionally, Mr. Epstein did not benefit financially from the alleged conduct. Therefore, as the SAO determined, and still believes, Mr. Epstein was a customer, a "John" for whom prosecutions are best left to the State to address. Indeed, there is no reported precedent extending federal law to a local "John" who does not violate the child exploitation statutes. Indeed, CEOS does not point to a single case where federal prosecutors have used § 1591 in a case involving facts like these. Instead, every § 1591 prosecution has involved national or international sex trafficking and/or for-profit prostitution rings, involving the *knowing* use of minors and/or forcible coercion, or forcible rape, physical abuse or intimidation. These are the elements required by the statute, and they are not met here.

Although CEOS could, perhaps, point to United States v. Evans, 476 F.3d 1176 (11th Cir. 2007) as a case that, standing alone, involved wholly intrastate conduct, the facts of that case are far different in key respects than this one. The Evans case involved both the commercial and coercive components that Congress, and administration policy statements intended in 18 U.S.C. § 1591 prosecutions. Evans, and his co-conspirators (Madison and Yearby) were not "Johns." **They operated a for profit prostitution ring marked by control of, and extreme violence toward, the victims, who they knew were underage.** Indeed, Evans forced one such victim, age 14 years old, to continue to work even after she had been hospitalized with AIDS. As part of their business, Evans and his co-conspirators provided the victims with cell phones, hotels, and condoms, and the victims were forced to give all of their money from this prostitution ring to Evans and his co-conspirators. None of this type of activity comes close to the facts regarding Mr. Epstein. Finally, but significantly, the prostitution ring in Evans was not, in fact, entirely intrastate as the companion case of one of the Evans co-defendants makes clear. See, United States v. Madison, 477 F.3d 1312, 1313-1314 (11th Cir. 2007) (Jane Doe #2 stated that she traveled to Atlanta, Georgia with Madison to work as a prostitute).

Thus, courts, including the Eleventh Circuit in Evans, have underscored the point that § 1591 simply is not intended to cover the kind of alleged conduct at issue here. "Section 1591 does not criminalize all acts of prostitution (a vice traditionally governed by state regulation). Rather, its reach is limited to sex trafficking that involves children or is accomplished by force, fraud, or coercion." United States v. Evans, 476 F.3d at 1179 n. 1; See also United States v. Sims, 171 Fed.

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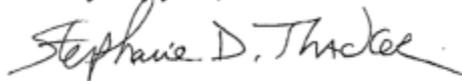
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Appx. 849, 2006 WL 14581 at *3 (11th Cir. 2006) (to establish Sims's guilt on the sex trafficking of a minor count, the government had to show that Sims *benefited financially* from Owen's sexual activity and that Sims *knew* that (a) force or coercion would be used to cause Owens to engage in a criminal sex act or (b) that Owens was under the age of 18.) (emphasis added). Again, none of these factors is present in this case. The Eleventh Circuit's interpretation of the statute makes perfect sense: were § 1591 not limited in this fashion, it would threaten to criminalize a host of localized behavior that has nothing to do with human trafficking, and, thus, is of no valid federal interest.

In sum, to accord discretion to the USAO, albeit without benefit of the requested full *de novo* review, to exercise authority to pursue a prosecution which involves a "novel" application of three federal statutes in the face of numerous "compelling arguments" is not warranted, as it is not supported by the facts, the law, or justice. Echoing the admonition of the Supreme Court in the Berger decision, the Comment to Rule 3.8 of the Rules of Professional Conduct (Special Responsibilities of a Prosecutor), says it best "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that a defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." This is a responsibility that can not be taken for granted. The government bears the burden of assuring that it possesses sufficient evidence to prove each element of a crime with respect to some specific victim before publicly branding Mr. Epstein a child molester. In this case, however, the USAO has not met its burden for any victim for any of the crimes alleged. It is not enough to simply gloss over the required proof, and rely on the jury or the court to just sort it all out in the end. The stakes are too high. As a result, the USAO should not be permitted to pursue an unfounded federal criminal case against Mr. Epstein under the guise of prosecutorial discretion.

Such prosecution in this case necessarily would appear to be selective to Mr. Epstein. To be clear, our request that Mr. Epstein should not be prosecuted federally would not permit him to go completely unpunished, but, rather, would simply place him in the same prosecution position as others similarly situated. Therefore, we continue to believe that after a complete, *de novo*, and independent review, the only appropriate conclusion will be that this case is best left to the state to resolve.

Very truly yours,



STEPHANIE D. THACKER

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SUBJECT TO PROTECTIVE ORDER PARAGRAPHS 7, 8, 9, 10, 15, and 17

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Response to Letter by FAUSA [REDACTED] Dated May 19, 2008

In a May 19, 2008 letter to Jay Lefkowitz (*See* Tab 1), SDFL First Assistant U.S. Attorney [REDACTED] provided what purported to be a summary of the events that have occurred during the investigation of Mr. Epstein. [REDACTED] letter is fraught with inconsistencies, false and misleading characterizations and outright falsehoods. The comparison below between the false assertions in [REDACTED] letter and what actually transpired is only the tip of the iceberg. We respectfully submit that [REDACTED] letter alone demonstrates the degree to which the record of facts have been distorted and these distortions have permeated this unprecedented investigation.

1. "INDEPENDENT" AND "DE NOVO" REVIEW.

[REDACTED] Letter:

- "[W]e obliged your request for an independent *de novo* review of the investigation and facilitated such review at the highest levels of the Department of Justice." Tab 1, May 19, 2008 Letter from [REDACTED], p. 5, ¶ 3.

The Truth:

- CEOS' review, concluded in May 2008, was neither independent nor *de novo*.
 - CEOS' review was not "independent:"
 - [REDACTED], who conducted the review on behalf of CEOS, *had already reviewed the prosecution memo on this matter eight months earlier*. During a meeting with defense counsel at the United States Attorney's Office in Miami (the "USAO") in September of 2007, he opined that he so believed in the prosecution that he "*would try the case myself*."
 - Indeed, Mr. [REDACTED] acknowledges that Mr. [REDACTED] had previously opined on this matter, stating:

This particular attack on this statute [18 U.S.C. § 2242(b)] had been *previously* raised and thoroughly considered *and rejected by . . . CEOS* prior to the execution of the [Deferred Prosecution] Agreement [in September 2007].

Id., p. 5 (emphasis added).

- The statute Mr. [REDACTED] referred to (§ 2422(b)) lies at the heart of the Epstein investigation. Thus, according to Mr. [REDACTED], Mr. [REDACTED] was tasked with *reviewing his own prior decision* regarding applying the key statute under which the SDFL proposed prosecuting Mr. Epstein.

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- The defense immediately raised concerns regarding the non-independence of the review when told that it would be Mr. [REDACTED] tasked with providing the review, but was told that when Mr. [REDACTED] rendered his prior opinion, “he was not really up to speed on the facts”
- CEOS’ review was not *de novo*:
 - By letter dated May 15, 2008 (four days before [REDACTED] letter), Mr. [REDACTED] advised Mr. Lefkowitz that CEOS reviewed the matter only for *abuse of discretion*:

[T]he question we sought to answer was whether U.S. Attorney Acosta would *abuse his discretion* if he authorized prosecution in this case.

See Tab 38, May 15, 2008 Letter from [REDACTED], p. 1 (emphasis added). *See also, id.*, p. 2 (“Mr. Acosta would not be *abusing his discretion* if he decided to pursue such a course of action.”); and p. 5 (“Mr. Acosta would not be *abusing his* prosecutorial *discretion* should he authorized federal prosecution of Mr. Epstein.”).

- For the factual record of its “abuse of discretion” review, CEOS relied on the very same prosecution memo that it had already reviewed in rendering its prior opinion, stating:

As you know, our review of this case is limited, both factually and legally. We have not looked at the entire universe of facts in this case.

See Id., p. 1 (emphasis added).

- Nor did CEOS review any facts related to the irregular provisions in the Deferred Prosecution Agreement or the numerous complaints of prosecutorial misconduct, both of which are inextricably intertwined with the impropriety of the investigation. *Id.* at 1.

2. NOTIFICATION OF WITNESSES.

[REDACTED] Letter:

- Mr. [REDACTED] dismissed the totality of the defense’s objections to the inappropriate notification the SDFL proposed to send to its witnesses, stating merely that:

“[Y]ou objected to victims['] being notified of *time and place* of Epstein’s state[-]court sentencing hearing.”

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See Tab 1, May 19, 2008 Letter from [REDACTED], p. 4, ¶ 1.

The Truth:

- The defense engaged in days of negotiation and made 14 separate *substantive* objections to the unprecedented notification letter that Mr. [REDACTED] threatened to send to an undisclosed list of “victims.” The eventual transmission of this highly misleading letter was only halted by an appeal to AAG [REDACTED]. Among those substantive objections (which related to far more than the “time and place” of the state’s sentencing hearing) were:
 - Sending the letter would contravene the government’s commitment to take no position regarding potential claims of government witnesses. See Tab 39, November 28, 2008 Email from J. Lefkowitz to [REDACTED].
 - The letter cited to an inapplicable statute (the Justice for All Act of 2004) as its justification for being sent. *Id.* AUSA Acosta later conceded that the citation to this statute as a justification was wholly incorrect.
 - The letter wrongly advised all recipients that Mr. Epstein would be required to register as “a *sexual predator* for the remainder of this life.”
 - The letter amounted to an invitation to civil litigation against Mr. Epstein, advising recipients that they had the right to seek civil damages from Mr. Epstein, and in an underlined instruction, stated that if they chose an attorney other than the one chosen by the government they would be required to pay his fees, but if they chose the government’s choice, Mr. Epstein would be required to pay the fees.

3. MISCHARACTERIZATION OF OUR ARGUMENTS.

[REDACTED] Letter:

- [REDACTED] letter misleadingly characterizes our substantive defense of the government’s investigation as, “the investigation merely produced evidence of relatively innocuous sexual conduct with some minors who, unbeknownst to Mr. Epstein, misrepresented their ages.”

See Tab 1, May 19, 2008 Letter from [REDACTED], p. 2.

The Truth:

- We never made such a claim. To the contrary, we argued that sworn statements we have taken of the alleged victims demonstrate that law enforcement has presented versions of their testimony that are necessarily sensationalized and fictionalized. We presented

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evidence that Mr. Epstein routinely and daily receives massages from adults. Only a small percentage of the masseuses turned out to be minors. The majority of those minors interviewed by law enforcement admitted to lying directly to Epstein about their ages (not “unbeknownst to Epstein”), and inventing further false details to substantiate their lies. Indeed, the civil attorney for several of these women admitted at his recent press conference that they lied to Mr. Epstein about their ages. Numerous witnesses testified that Mr. Epstein asked that all masseuses be over the age of 18. Further, the evidence is undisputed that Mr. Epstein’s assistants scheduled the massages and Mr. Epstein did not know which masseuses his assistants had scheduled on a particular day, until the massage took place. We admitted that there was sexual conduct, and argued—not that it was “innocuous” as Mr. ██████ alleges—but that it was mostly Mr. Epstein’s own self-pleasuring, which did not satisfy the requisite federal element of criminal sexual conduct (which is, in turn, defined by state law). These are important distinctions and show that Mr. ██████ has misrepresented the record about the most basic part of our defense.

4. ██████ DEMANDS AN UNREALISTIC DEADLINE TO COMPLY WITH AN AGREEMENT HE UNILATERALLY MODIFIES.

Letter:

- “Unless [Mr. Epstein] complies with all of the terms and conditions of the [Deferred Prosecution] Agreement, *as modified by the United States Attorney’s December 19, 2007 letter to Ms. Sanchez* by close of business on Monday, June 2, 2008, the SDFL will elect to terminate the Agreement.” *Id.*, p.1

The Truth:

- The Deferred Prosecution Agreement was **never** modified by U.S. Attorney Acosta’s December 19, 2007 letter. Oddly, Mr. ██████ acknowledges this on page 4 of his May 19 letter, where he writes that Mr. Acosta “proposed” this modification and that “[Mr. Lefkowitz] rejected these proposals.” Thus, Mr. ██████ is threatening to terminate the Deferred Prosecution Agreement, unless Mr. Epstein complies with a unilateral modification that Mr. ██████ concedes was never agreed to by defense counsel.
- Orchestrating the information, plea and sentencing requirements of the Deferred Prosecution Agreement within the extremely limited two-week timeframe imposed by ██████ June 2, 2008 deadline would have been difficult enough.
- More importantly, as explained below, the SDFL has refused to provide the defense with information it requires to enable Mr. Epstein to comply with the additional plea and sentencing requirements of the Deferred Prosecution Agreement (let alone, by the June 2 deadline arbitrarily imposed by Mr. ██████).
 - The Deferred Prosecution Agreement requires Mr. Epstein to plead guilty to and be sentenced for an additional offense which requires that he be registered as a sex offender. In different places in his May 19, 2008 letter, Mr. ██████

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describes the additional charge to which Mr. Epstein is required to plead guilty under the Deferred Prosecution Agreement as “procurement of minors to engage in prostitution” or “solicitation of minors to engage in prostitution.” The former is an offense for which Mr. Epstein would be required to register, but one for which the state has no evidence to charge Mr. Epstein and the SDFL refuses or is unable to provide evidence that it claims it has. The latter requires no registration, but it is the offense which, over and over again, ██████████ insisted upon including in the Deferred Prosecution Agreement, and is one which the State believes is appropriate. The inconsistency between the description of the offense required by the SDFL, the elements of an offense that can be justified on the facts of this case and the SDFL’s requirement that the offense be a registrable one has created substantial confusion.

- As a result of this confusion, in December 2007, both the defense and the state requested that the SDFL provide the factual allegations to enable Mr. Epstein and the State to create a truthful factual recitation of a registrable offense required by the Deferred Prosecution Agreement, but, to date, the SDFL has failed to do so without any explanation.

- Mr. ██████████ refuses to provide the requested factual allegations, which the State cannot furnish, and now demands a two week deadline to comply. Thus Mr. ██████████ has unreasonably imposed a deadline with which he himself has made it impossible for Mr. Epstein to comply.

5. WAIVER OF APPEAL TO ASSISTANT ATTORNEY GENERAL ██████████.

██████████ Letter:

- “[T]he SDFL provided you with 30 days to appeal the decision to the Assistant Attorney General of the United States ██████████” and “you chose to forego an appeal to AAG ██████████.”

Id.; p. 2.

The Truth:

- Mr. Acosta tolled an August 17 deadline, acknowledging that there were “serious issues” about the case that needed to be discussed, and scheduled a meeting with the defense for September 7, 2007. At the September 7, 2007 meeting, with ██████████ in attendance, the government dismissed the defense’s objections and set a September 21, 2007 deadline to finalize a non-prosecution agreement or the defense would face an already-drafted 53-page indictment, purportedly identifying 40 minors, with a guideline range of 188 months.
- Facing ██████████ threatened draconian indictment, without the claimed offer of the right to raise objections in an appeal to AAG ██████████, the defense chose to negotiate an

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Agreement to Defer Prosecution to the State, an agreement without precedent and fraught with substantial practical and legal hurdles to its implementation.

6. THE SDFL DID NOT DEFER TO THE STATE.

██████ Letter:

- “[T]he SDFL indicated a willingness to defer to the State the length of incarceration.”

Id., p. 2.

The Truth:

- The SDFL neither deferred to the State, nor even discussed with the State, the length of Mr. Epstein’s incarceration. In a letter to the defense, Criminal Division Chief, ██████ rejected the sentence contemplated by the State’s plea agreement, writing that “the federal interest will not be vindicated in the absence of a *two-year term* of state imprisonment.” See Tab 40, August 3, 2007 Email from ██████. Of course, this position is contrary to Section 9-2031D of the U.S. Attorney’s Manual (indicating that the “result” of a state prosecution is “*presume[d]*” to have vindicated the federal interest). It is understandable, therefore, that Mr. ██████ might want to retreat from it now. Indeed, the final Deferred Prosecution Agreement (DPA) restricts the state-court judge from exercising any of his rightful discretion and to specifically prohibit the judge from offering probation, community control or any other alternative in lieu of incarceration. DPA, ¶ 2(a).

7. SUGGESTION OF ADDITIONAL STATE PLEA

Mr. ██████’s Letter:

- The parties considered: “as suggested by [the defense], a plea to state charges encompassing Epstein’s conduct.” See Tab 1, May 19, 2008 Letter from ██████, p.2, ¶ 2.

The Truth:

- It was the government, and not the defense, that suggested a plea to state charges to resolve the federal investigation. ██████ ██████ proposed declining prosecution in favor of the state. Although Mr. Epstein and the State Attorney’s Office *had already reached a plea agreement*, in August 2007, Mr. ██████ and AUSA ██████ warned that they intended to prosecute Epstein federally unless his counsel (*i.e.*, not the U.S. Attorney’s Office) sought *more stringent conditions* to the State’s proposed plea agreement. These stringent conditions included, among other things, the two-year prison term demanded by Mr. ██████ (discussed above) and a charge requiring him to register as a sex offender.

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8. ALL IDENTIFIED VICTIMS BE PUT IN SAME POSITION AS IF EPSTEIN HAD BEEN TRIED.

██████████ Letter:

- “The Agreement provides for a method of compensation for the victims such that they would be placed in the same position as if Epstein had been convicted of one of the enumerated offenses set forth in Title 18, United States Code Section, 2255.”

Id.

The Truth:

- Mr. ██████████ continues to mischaracterize the highly irregular provisions of the Deferred Prosecution Agreement. The SDFL did not merely attempt to preserve the compensation rights of those it identified as victims; it attempted to create compensation rights for those it identified, without imposing on them the burden of proving that they were in fact victims under § 2255.
 - In the Deferred Prosecution Agreement, the SDFL required Mr. Epstein to waive the right to contest liability under 18 U.S.C. § 2255 as to a list of individuals that the SDFL would not disclose to Mr. Epstein until after he was sentenced and to pay for an attorney to secure compensation under § 2255 for those undisclosed individuals, or if they decided to sue Mr. Epstein.
 - § 2255 ordinarily provides individuals with a right to recover minimum guaranteed damages of \$150,000, without having to prove actual damages, only if: (1) they were victims of an enumerated federal offense, including offenses under 18 U.S.C. §§ 2422 and 2423, (2) they were minors at the time of the offense, and most importantly (3) they were personally injured as a result of the offense.
 - The defense has confirmed examples of women who testified that they were not victims of Mr. Epstein and suffered no personal injury. These women were, nevertheless, on the list of “victims” identified by the government. . In fact, when confronted with the testimony of a women who denied both being a victim and incurring personal injury, ██████████ actually acknowledged such testimony. To justify inclusion of that woman on the government’s list, however, ██████████ then challenged her own witness’s credibility.
- For this reason, it is false to state that these “identified” individuals are in the same position that they would have been had Epstein been convicted at trial. Had there been a trial, Mr. Epstein would have had a right to confront these individuals through cross-examination. Any individual that did not establish that she was a minor victim of conduct that satisfied each element of an enumerated statute under § 2255, or that she suffered personal injury, would not qualify for any treatment under § 2255. However, under the Deferred Prosecution Agreement, as an “identified individual” on the government’s list,

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this same individual would nevertheless be entitled to engage an attorney paid for by Mr. Epstein to recover \$150,000 of damages from Mr. Epstein under § 2255 without ever alleging any injury. In fact, the defense was told that the only question Mr. Epstein would be permitted to ask before paying the girls is “have you ever met Epstein.” Thus, the Deferred Prosecution Agreement places identified individuals in a far better position than they would be in if Mr. Epstein were convicted at trial.

9. ASSIGNMENT OF RIGHT TO SELECT LEGAL REPRESENTATIVE.

██████████ Letter:

- “Prior to any issues arising concerning the implementation of the 2255 provision, the SDFL unilaterally agreed to assign its responsibility to select the attorney representative for the alleged victims to an *independent* third-party.”

See Tab 1, May 19, 2008 Letter from ██████████, p. 4, f.3.

The Truth:

- That such an assignment was the SDFL’s “*unilateral*” decision is false. Before the SDFL decided to assign selection of the “attorney representative” to an independent third party, AUSA ██████████ had already proposed an “attorney representative.” She had proposed local products-liability lawyer, Humberto Ocariz, and claimed he had been recommended by a “good friend in the Appellate Division.” ██████████ account was misleading, as it omitted that this “good friend” was her live-in boyfriend, and that Mr. Ocariz was his former law-school roommate. When we discovered this independently, we objected. Only then did the SDFL propose assigning the selection process to an independent special master and agree to amend the Deferred Prosecution Agreement. Thus, while it may be true that the SDFL assigned its selection responsibility to avoid the appearance of favoritism, it did not do it “*unilaterally*,” but, rather, only after Epstein uncovered the Office’s misleading disclosure and apparent conflict-of-interest.

10. TIMETABLE FOR MOVING FORWARD.

██████████ Letter:

- “On February 25, 2008, I sent you an e-mail setting forth a timetable for moving forward in the event that CEOS disagreed with your position. That time is now.”

Id., p. 6.

The Truth:

- Mr. ██████████ provides only part of the history of this case in order to justify his improper actions. He had stated he would close the investigation if CEOS told him to. However, CEOS at our very first contact said that under no circumstances did they see that as their

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role. They said they would only advise on an abuse of discretion standard. Making the outcome a foregone conclusion. Furthermore, in response to the February 25 e-mail, which attempted to establish a schedule to limit the entire review process (the defense has repeatedly suggested that the misconduct was intertwined with the investigation and would therefore seek higher review), Mr. Lefkowitz e-mailed Mr. Acosta directly. On February 29, 2008, Mr. ██████ responded to Mr. Lefkowitz's e-mail to Mr. Acosta, stating that Mr. ██████ was acting out of frustration, but "[p]lease be assured that it has not, and never has been, this Office's intent to interfere or restrict the "review process" for either Mr. Epstein or CEOS. I leave it to you and CEOS to figure out how best to proceed and will await the results of that process." As stated above, CEOS determined that it would not review many of the defense's objections and as to the remainder of those objections, its review would be limited (contrary to Mr. Acosta's assurances), which left the need, supplemented by the defense's subsequent request, for a more thorough review of critical issues by others at the Department of Justice. ██████ re-imposition of the (albeit modestly extended) timetable was an obvious attempt, in violation of his February 29 agreement, to thwart the request made by the defense to the Deputy Attorney general, to complete the review process that Mr. Acosta had promised.

11. "DELAY."

████████ Letter:

- In a section entitled "Delay," Mr. ██████ states that "the SDFL again agreed to accommodate Epstein's request to appear in state court for plea and sentencing on January 4, 2008."

Id., p. 3.

The Truth:

- Curiously, Mr. ██████ fails to mention correspondence from the U.S. Attorney stating that delay of that date would be "inevitable" as the defense has raised "serious questions" about the propriety of the prosecution. Strikingly, in that same section, Mr. ██████ claims that "the Agreement *did not contemplate a staggered* 'plea and sentencing,'" despite quoting, three sentences earlier, from the Agreement's *staggered requirement* that Epstein plead and be sentenced by October 26, and "begin serving his sentence not later than January 4, 2008."

* * *

We are, like most attorneys seeking Department review, without access to the USAO prosecution summaries or other submissions to the Department. Given the substantial issues that have been raised in this and other submissions, we request that you conduct a de novo review that goes beneath the face of any conclusions being advocated by the USAO; instead, we seek a review that is based on the transcripts of witness testimony themselves so that the reviewer can

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make an independent decision not adversely affected by conclusions that over and over have proven, witness by witness, allegation by allegation, to be inaccurate and unwarranted and not an appropriate basis for the exercise of federal prosecutorial authority.

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SUMMARY OF MISCONDUCT ISSUES IN THE MATTER OF JEFFREY E. EPSTEIN

The manner in which federal prosecutors have pursued the allegations against Mr. Epstein is highly irregular and warrants full review by the Department. While we repeatedly have raised our concerns regarding misconduct with the United States Attorney's Office in Miami (the "USAO"), not only has it remained unwilling to address these issues, but Mr. Epstein's defense counsel has been instructed to limit its contact to the very prosecutors who are the subject of this misconduct complaint. For your review, this document summarizes the USAO's conduct in this case.

Background

1. In March 2005, the Palm Beach Police Department opened a criminal investigation of Palm Beach resident, Jeffrey E. Epstein. The press has widely reported that Mr. Epstein is a close friend of former President Bill Clinton.
2. In July 2006, after an intensive probe, including interviews of dozens of witnesses, returns of numerous document subpoenas, multiple trash pulls and the execution of a search warrant on his residence, Mr. Epstein was indicted by a Florida Grand Jury on one count of felony solicitation of prostitution.
3. In a publicly released letter, Palm Beach Police Chief Michael Reiter criticized the Grand Jury's decision and the State Attorney's handling of the case. Shortly after the Grand Jury's indictment, the Chief took the unprecedented step of releasing his Department's raw police reports of the investigation (including [REDACTED] unedited written reports of witness statements and witness identification information), that were later proven to be highly inaccurate transcriptions of witnesses' actual statements. The Chief also publicly asked federal authorities to prosecute the case.

[REDACTED] Becomes Involved in Mr. Epstein's Case at the Earliest Stage

4. In early November of 2006, Epstein's lawyers had their initial contact with the newly assigned line federal prosecutor, [REDACTED]. Although it is extremely unusual for a First Assistant United States Attorney to participate in such a communication, FAUSA [REDACTED] was present on that very first phone call.
5. On November 16, 2006, despite the fact that the investigation exclusively concerned illegal sexual conduct during massage sessions, [REDACTED] issued irrelevant official document requests seeking Mr. Epstein's 2004 and 2005 personal income-tax returns, and later subpoenaed his medical records. See Tab 16, November 16, 2006 Letter from [REDACTED].

[REDACTED] Becomes Personally Involved in a Dispute Over Another State Sex Case

6. In March 2007, FAUSA [REDACTED] reported to local police an attempted trespass by a 17-year-old male. Mr. [REDACTED] claimed that the individual had attempted to enter [REDACTED] home without invitation to make contact with his 16-year-old daughter, but he spotted the young man before the perpetrator had an opportunity to enter the house. The

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same individual had previously fled the home of another neighbor after entering that house uninvited, when, looking for the bedroom of their 17-year-old daughter, he mistakenly entered the bedroom of their 14-year-old daughter, touched her on the leg and startled her awake. *State of Florida v. Johnathan Jeffrey Zirulnikoff*, Case No. F078646 (June 28, 2007).

7. After a thorough review by the Miami State Attorney's Office, and sex-crimes prosecutor Laura Adams, the investigation revealed that the defendant and both the neighbor's 17-year-old daughter and [REDACTED] daughter were previously acquainted. The defendant was charged with simple trespass in connection with his unauthorized entry into the neighbor's house. *Id.*
8. FAUSA [REDACTED], however, demanded that the young man be *registered as a sex offender* and objected to any sentence short of incarceration. The Assistant State Attorney in charge of the sex-crimes unit reported [REDACTED] conduct during the proceedings as "outrageous." The defendant's attorney described Mr. [REDACTED] as being "out of control." Shortly after, Mr. [REDACTED] began publicly deriding the elected State Attorney, his office and the state process for prosecuting sex offenses, as "a joke."

Unauthorized Tactics in Disregard of the United States Attorney's Manual are Used

9. In June 2007, [REDACTED] subpoenaed the investigating agent of Epstein's attorney, Roy Black, in a clear effort to invade the defense camp. The subpoena was specifically drafted to discover the investigator's contacts, with all prospective witnesses, Mr. Epstein and his attorneys.¹ Not surprisingly, [REDACTED] issued this subpoena *without the requisite prior approval* by the DOJ's Office of Enforcement Operations. See United States Attorneys' Manual, § 9-13.410. When confronted, she misleadingly responded that she had consulted with the Department of Justice and *was not required to obtain OEO approval* because her subpoena was not directed to "an office physically located within an attorney's office." See Tab 18, December 13, 2007 Letter from [REDACTED] at 4 n.1. This answer clearly suggests that [REDACTED] had intentionally misled the Department officials about the items that her subpoena sought.²

¹ The subpoena sought, among other things: "All documents and information related to the nature of the relationship between [the investigator and/or his firm] and Mr. Jeffrey Epstein, including but not limited to . . . records of the dates when services were performed . . . telephone logs or records of dates of communications with Mr. Epstein (or with a third party on Mr. Epstein's behalf); appointment calendars/datebooks and the like (whether in hard copy or electronic form) for any period when work was performed on behalf of Mr. Epstein or when any communication was had with Mr. Epstein (or with a third party on Mr. Epstein's behalf) . See Tab 17, June 18, 2007 Subpoena to William Riley/ Riley Kiraly, ¶ 3.

² Indeed, we are aware of two other recent instances in which [REDACTED] placed serious misrepresentations before a court. On July 31, 2007, in the grand-jury litigation arising out of this case, she filed the "Declaration of [REDACTED]" attaching the state detective's affidavit in support of a search warrant for Epstein's house. See *In Re Grand Jury Subpoenas Duces Tecum OLY-63 and OLY-64*, No. FGJ 07-103(WPB) (S.D. Fla. July 31, 2007). At the time she filed [REDACTED] affidavit, she knew it contained numerous material misrepresentations, including gross misstatements of witness statements and other evidence. Second, we
(Continued...)

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Mr. Epstein is Required to Agree to Civil Liability In Order to Avoid a Federal Indictment

10. On July 31, 2007, during negotiations over a possible federal plea agreement, FAUSA [REDACTED] and [REDACTED] demanded that Mr. Epstein agree to the imposition of civil liability under 18 U.S.C. § 2255 as a pre-condition to deferral of federal prosecution. To the best of our knowledge, the inclusion of such a term in a deferred prosecution agreement of this kind is absolutely unprecedented.³ Specifically, [REDACTED] demanded that Mr. Epstein waive the right to contest civil liability to a list of individuals she said were "victims" of § 2255, *whose names, however, she refused to disclose*, and agree to *pay damages of a minimum of \$150,000* to each and every one of such undisclosed individuals, and *hire an attorney to represent them if they decided to sue him*. See Tab 20, July 31, 2007 Draft of Deferred Prosecution Agreement.
11. [REDACTED] and [REDACTED] insisted that the identities of the individuals on the list not be disclosed to Mr. Epstein or his counsel *until after Mr. Epstein was already sentenced* in the state case.
- (a) Over the next two months, Mr. [REDACTED] refused to negotiate these terms. They ultimately became incorporated into the final deferred prosecution agreement. See Tab 21, September 24, 2007 Non-Prosecution Agreement, ¶¶ 7-11.
- (b) It was not until seven months later, in February 2008, that Epstein's lawyers were able to take their first official statement from one of the women FAUSA [REDACTED] alleged were minor victims of federal offenses.
- (c) This statement, a deposition of [REDACTED], the initial complainant in the state case, taken in the presence of her lawyer, proved that none of the necessary elements for any federal charge could be satisfied based on [REDACTED] brief contact with Mr. Epstein. The witness also admitted lying to Mr. Epstein, testifying that she told him that she was an adult and wanted him to believe that she was an adult. See Tab 13, [REDACTED], (deposition), p. 35 ("Q. So you told Jeff that you were 18 years old, correct? A. Yes."), 37 ("Q. You wanted Mr. Epstein to believe that you really were 18, right? A. Correct.").
- (d) Shortly after this deposition, the defense was able to obtain statements from other women on [REDACTED] so called "list of § 2255 victims" and, so far, all such statements also continue to demonstrate that Mr. [REDACTED]'s repeated representations to the defense about the existence of federal jurisdiction were false.

understand that [REDACTED] was recently reprimanded at a special hearing convened by a United States District Judge in the West Palm Beach Division of the Southern District of Florida, for making misrepresentations during a prior sentencing proceeding.

³ In fact, [REDACTED], a former deputy to CEOS Chief [REDACTED], has stated that she knew of no other case like this being prosecuted by CEOS.

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12. In August 2007, in a clear attempt to coerce a state settlement, ██████ threatened to broaden the investigation to include a money laundering violation (18 U.S.C. § 1956), though all the funds expended were simply Mr. Epstein's, and a violation for operating an unlicensed money-transmitting business (18 U.S.C. § 1960), though Mr. Epstein never had such a business. See Tab 22, August 31, 2007 Letter from ██████ to ██████ (reciting, in a target letter to one of Epstein's employees, that the investigation concerns "suspected violations of federal law, including but not limited to, possible violations of Title 18, United States Code, Sections . . . 1591, . . . 1956, 1960 . . .") (emphasis added).
13. On the very same day that the grand jury issued subpoenas to the records-custodian and employees of Epstein's businesses for *all financial transactions* from 2003 forward, ██████ (who we were told was not authorized to act in this regard without supervisory approval) *promised to close the money-laundering investigation* "if the sex offense case is resolved." See Tab 23, August 16, 2007 Letter from ██████ to G. Lefcourt ("In other words, if the sex offense case is resolved, the Office would close its investigation into other areas as well. The matter has not been, and it does not appear that it will be, resolved so the money laundering investigation continues, and Request Number 6 [seeking records of every financial transaction conducted by Epstein and his six businesses from "January 1, 2003 to the present"] will not be withdrawn.").
14. Two weeks later, when Mr. Epstein continued to oppose federal prosecution during negotiations and Mr. Epstein's counsel sought a meeting with the United States Attorney, ██████ then classified all of Mr. Epstein's assistants as targets (sending a target letter to one of them and promising the attorney of the other two that additional target letters would be served on them as well), dispatched FBI agents to the homes of two of his secretaries, and personally telephoned Mr. Epstein's largest business client to advise him of the nature of the investigation. See Tab 22, August 31, 2007 Letter from ██████ to ██████.

FAUSA ██████ Forces Mr. Epstein's Lawyers to Convince the State Prosecutors To Impose a More Severe Sentence Than They Believe Is Appropriate

15. Throughout the plea negotiations with the USAO, Mr. ██████ and ██████ continually insisted that the only way they would agree not to bring a federal indictment was if Epstein's lawyers, not the state prosecutors as required under the *Petite Policy*, convinced the state prosecutors to impose a more severe punishment than the state believed was appropriate under the circumstances.
16. FAUSA ██████ version of the history with respect to the sentence he required Mr. Epstein's lawyers to seek from the State contradicts his later assertion, which is patently false—that "*the SDFL indicated a willingness to defer to the State the length of incarceration*" and "*considered a plea to federal charges that limited Epstein's sentencing exposure . . .*" See Tab 1, May 19, 2008 Letter from ██████. In fact, by a email dated August 3, 2007, Criminal Division Chief ██████ advised the defense that the federal government required a minimum term of two years of incarceration. See Tab 40, August 3, 2007 Email from ██████. Subsequently, ██████.

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██████████ emailed the defense stating that United States Attorney Acosta would accept no less than 18 months of incarceration, following by a one-year term of house arrest.

Federal Prosecutors Misrepresented the Number of Alleged “Victims.”

17. In September 2007, in order to add additional pressure on Mr. Epstein to execute a deferred prosecution agreement, ██████████ claimed that there were “40” minors on the government’s list of purported § 2255 victims. To compound that misleading characterization, she continued to insist that a guardian-ad-litem be appointed to represent these purported “minors” in the proceedings. See Tab 24, September 19, 2007 Email from ██████████ to J. Lefkowitz.
18. When challenged as to whether there was a genuine need for a *guardian*, given that ██████████ continued to refuse to disclose the names or any other information about her putative list of “minors,” she eventually conceded that *only “1 is definitely under 18 still, and I think there is another minor.”* See Tab 25, September 23, 2007 Email from ██████████ to J. Lefkowitz (emphasis added).
19. The next day, ██████████ retreated from the number “40,” stating that she had now “compiled a list of *34 confirmed minor victims with no definition of how they would be considered as such.* There are six others, whose names we already have, who need to be interviewed by the FBI to confirm whether they were 17 or 18 at the time of their activity with Mr. Epstein.” See Tab 26, September 24, 2007 Email from ██████████ to J. ██████████ (emphasis added). This statement indicated that, at least the “six others” (and, as it turns out, all those identified except two) had reached the age of majority, and, in fact, no guardian was necessary to represent their interests.

Defense Counsel was Falsely Advised That the Non Prosecution Agreement Would Be Kept Confidential.

20. On September 24, Epstein and the USAO executed a Non Prosecution Agreement.
21. His attorneys asked ██████████ to “please do whatever you can to keep this from becoming public.” See Tab 27, September 24, 2007 Email from J. Lefkowitz to ██████████.
22. ██████████ replied that she had “forwarded your message **only to Alex [Acosta],** ██████████ [██████████], and ██████████. I don’t anticipate it going any further than that.” *Id.*
23. ██████████ stated that the agreement would be “placed in the case file, which will be kept confidential since it also contains identifying information about the girls.” *Id.*

The Prosecution Immediately Notifies Three Plaintiffs That Mr. Epstein Has Executed A Non Prosecution Agreement

24. In direct violation of these representations, “shortly after the signing,” the government notified “three victims” of the “general terms” of the Non Prosecution Agreement. See

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Tab 18, December 13, 2007 Letter from [REDACTED] (admitting that the notification occurred "shortly after the signing").

Misleads Mr. Epstein In An Attempt To Refer Plaintiffs to Her Boyfriend's Close Friend

25. On September 25, [REDACTED] recommended a local products-liability defense attorney, Humberto "Bert" Ocariz, Esq., for the highly lucrative post of attorney representative for the government's list of as-yet-undisclosed "victims."⁴
- (a) [REDACTED] wrote to the defense, "I have never met Bert, but *a good friend in our appellate section* and one of the district judges in Miami are good friends with him and recommended him." See Tab 28, September 25, 2007 Email from [REDACTED] to J. Lefkowitz (bottom email) (emphasis added).
 - (b) [REDACTED] failed to disclose that this "*good friend in our appellate section*" was her *live-in boyfriend*. See Tab 18, December 13, 2007 Letter from [REDACTED] (conceding the "relationship" with "my boyfriend").
 - (c) Beyond her clear conflict-of-interest and affirmative effort to conceal it, it is unimaginable that [REDACTED] would have engaged in an *ex-parte* communication with a United States District Judge in the same district about the details of a pending grand-jury investigation without prior disclosure and supervisory approval.
 - (d) Later, it became clear that [REDACTED] also had at least one other *ex-parte* communication with that same United States District Judge about the grand jury's investigation. See Tab 29, October 5, 2007 Email from [REDACTED] to J. Lefkowitz (stating that "one of the District Judges in Miami mentioned [retired Judge Joseph Hatchett] as a good choice" to decide any fee disputes concerning Epstein's paying for a lawyer to represent the unnamed women in claims against Epstein).
26. The next day, [REDACTED] advised the defense that she was removing one of the alternatives to Mr. Ocariz from our consideration, on the basis that "one of his partners is married to an AUSA here," and explained that, because of that personal relationship,

⁴ These actions were improper. As you know, the Department prohibits employees from using any nonpublic information to secure private benefits of any kind: "An employee shall not ... *allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.*" 5 C.F.R. § 2635.703 (emphasis added). Among the examples of prohibited disclosure specifically illustrated by this regulation is the disclosure of nonpublic information to "friends" to further their financial interests, *id.*, at Example 1, and the disclosure of nonpublic information to a newspaper reporter, *id.*, at Example 5 (see allegations below regarding the leak to the *New York Times*). Furthermore, the Justice Department prohibits its employees from using their position to benefit friends or relatives. See 5 C.F.R. § 2635.702; see also 5 C.F.R. § 2535.502.

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"[t]here is too great a chance of an appearance of impropriety." See Tab 28, September 26, 2007 Email from [REDACTED] to J. Lefkowitz.

27. The following day, [REDACTED] relayed that, and asked us to respond to, the very first concern raised Mr. Ocariz, which was "how are they going to get paid" and whether "there is any cap or other limitation on attorney's fees that [Epstein] will pay in the civil case." See Tab 30, September 27, 2007 Email from [REDACTED] to J. Lefkowitz.
28. [REDACTED] clearly contemplated that Mr. Epstein would be paying for Mr. Ocariz at his "hourly rate" to represent the alleged "victims" against Epstein even "if all [the] girls decide they want to sue." *Id.*
29. When the defense complained of [REDACTED] undisclosed conflict-of-interest in selecting her boyfriend's friend to prosecute civil claims against Mr. Epstein on behalf of her undisclosed list of purported "victims," [REDACTED] later argued that Mr. Epstein had no right to complain because "the Non-Prosecution Agreement vested the Office with the exclusive right to select the attorney representative." See Tab 18, December 13, 2007 Letter from [REDACTED]. Shortly after being notified, however, United States Attorney Acosta removed Mr. Ocariz from consideration, and requested an amendment to the Non Prosecution Agreement.
30. In response to the many complaints about [REDACTED] misconduct and violations of the United States Attorney's Manual, Criminal Division Chief [REDACTED] [REDACTED] characterized her as "unsupervisable."
31. Contrary to the express agreement of United States Attorney Acosta that the federal government would not interfere in the administration of any state sentence, [REDACTED] continued to try to deny the right of the State to issue work release and/or gain time by stating that Mr. Epstein must "make a binding recommendation that the Court impose" a sentence of 18 months of continuous confinement in the county jail. See Tab 21, September 24, 2007 Non Prosecution Agreement. Shortly thereafter, Mr. [REDACTED] sent the FBI to meet with the state sex-crimes prosecutor in an attempt to secure her commitment to oppose a work release option.

FAUSA [REDACTED] Attempts to Thwart Discovery

32. On October 31, Mr. [REDACTED] emailed Mr. Epstein's counsel, confirming that "I understand that the plea and sentence will occur on or before the *January* 4th [2008] date." See Tab 41, October 31, 2007 Email from [REDACTED] to J. Lefkowitz (emphasis added).
33. On November 5, despite [REDACTED] having sent that email just one week before, after learning that the defense had begun to question women on their "list," Mr. [REDACTED] wrote Mr. Epstein's attorneys demanding that his plea and sentencing in the State case now *be moved up to November 2007*. See Tab 2, November 5, 2007 Letter from [REDACTED].
34. Mr. [REDACTED] further demanded in the letter that Mr. Epstein's attorneys "confirm that there will be no further efforts to contact any victims" until the victims are represented by counsel. *Id.* As the women were all adults, there could be no lawful justification for Mr.

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██████ demand, other than to protect prospective plaintiffs from being interviewed prior to their retaining an attorney (including, as it turned out, ██████ former law partner) to bring civil lawsuits against Epstein.

35. Mr. ██████ also demanded that Epstein “begin his term of incarceration not later than January 4, 2008,” *id.*, which turned out to be just three weeks before the first civil lawsuit would be filed against Epstein.
36. Contrary to the express agreement of United States Attorney Acosta that the federal government would not interfere in the administration of any state sentence, Mr. ██████ tried to limit gain time and or work release by stating that Mr. Epstein must “make a binding recommendation that the Court impose a sentence of 18 months of continuous confinement in the county jail.” *Id.* (This followed ██████ position that the Office would consider a state sentence ordering probation in lieu of incarceration to be a breach of the deferred-prosecution agreement.) Shortly thereafter, Mr. ██████ sent the FBI to meet with the state sex-crimes prosecutor in an attempt to secure her commitment to oppose work release.
37. Mr. ██████ insisted that Mr. Epstein not learn the identities of the government’s list of alleged “victims” *until after Epstein was sentenced and incarcerated.*
38. We have reason to believe that, around this same time, ██████ former law partner, Jeffrey Herman, had met with the father of one of the prospective plaintiffs, ██████. ⁵ At the same time (and until as recently as March of 2008), the Official Florida Bar website continued to identify Mr. ██████ as a named partner in Mr. Herman’s firm. *See* Tab 31, Florida Bar Website page.
39. Mr. Herman, who is the named partner in the former firm of Herman, Sloman, & Mermelstein, filed five lawsuits, each asking for \$50 million, against Mr. Epstein. Each lawsuit is entitled “*Jane Doe # vs. Jeffrey Epstein*,” despite the fact that each of the plaintiffs is an adult and not entitled to plead anonymously. *See* Tab 32, Examples of Federal Complaints.
40. Mr. Herman convened press conferences contemporaneously with filing three of the suits. In the most recent press conference, he admitted that all of the plaintiffs lied to Epstein about their ages. *See* Tab 33, Herman Public Statement. One of the supposedly traumatized “victims” actually pled in her complaint that she returned to Epstein’s house “on many occasions for approximately three years.” Another of these supposedly traumatized “victims” herself acted to introduce her friends and acquaintances to Mr.

⁵ The Justice Department rules disqualify employees from working on matters in which their former employers have an interest: “*an employee shall be disqualified for two years from participating in any particular matter in which a former employer is a party or represents a party if he received an extraordinary payment from that person prior to entering Government service.*” The two-year period of disqualification begins to run on the date that the extraordinary payment is received.” 5 C.F.R. § 2635.503(a) (emphasis added).

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Epstein. All of these plaintiffs are apparently on the above-described government "victim" list.

FAUSA [REDACTED] Attempts to Encourage Civil Suits and the Hiring of the Government's Choice of Attorney

41. On November 27, Mr. [REDACTED] sent an email to Mr. Epstein's attorneys stating that "I intend to notify the victims by letter after COB Thursday [two days later]." See Tab 34, November 27, 2007 Email from [REDACTED] to J. Lefkowitz.
42. The morning of November 28, attorneys for Mr. Epstein faxed a letter to Assistant Attorney General [REDACTED], requesting a meeting with her to discuss the impropriety of the USAO's encouraging civil lawsuits against Mr. Epstein under the guise of the terms of the Non Prosecution Agreement. See Tab 35, November 28, 2007 Letter from [REDACTED] to A. [REDACTED].
43. Late in the day on November 28, Epstein's attorneys received from [REDACTED] a copy of the USAO's proposed victim-notification letter that "[REDACTED] / asked that I forward." See Tab 36, November 28, 2007 Email from [REDACTED] to J. Lefkowitz.
 - (a) The proposed victim-notification letter cited as authority the "Justice for All Act of 2004" (which U.S. Attorney Acosta later agreed had no application to these circumstances). It referred to the addressees as minor "victims," suggested they make statements in state court, that they were not entitled to make, and referred incorrectly to Mr. Epstein as a "sexual predator." *Id.*
 - (b) FAUSA [REDACTED] also proposed advising recipients, in an underlined sentence that, "You have the absolute right to select your own attorney" to "assist you in making . . . a claim" for "damages from [Epstein]." But that "[i]f you do decide to use [two attorneys selected by the U.S. Attorney's "special master"] as your attorneys, Mr. Epstein will be responsible for paying attorney's fees incurred during the time spent trying to negotiate a settlement." *Id.*

The USAO Leaks Confidential Information to the New York Times

44. Perhaps most troubling of all, the USAO has repeatedly leaked information about this case to the media—including to Landon Thomas, the senior business correspondent for the *New York Times*. We have personally reviewed Mr. Thomas's own notes, and they are remarkably detailed about highly confidential aspects of the prosecution's theory of the case and the plea negotiations.
45. Mr. Thomas's calls to the USAO initially were referred to Assistant United States Attorney [REDACTED]. AUSA [REDACTED] informed Mr. Thomas that federal authorities were considering charging Mr. Epstein under 18 U.S.C. §§ 1591, 2422 and 2423, and told the reporter that Mr. Epstein had both lured girls over the telephone and traveled in interstate commerce for the purpose of engaging in sex with minors. AUSA [REDACTED] also divulged the terms and conditions of the USAO's negotiations with Mr. Epstein—including the fact that Mr. Epstein had proposed "house arrest" with extra

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stringent conditions—which Mr. ██████ could only have learned from ██████ ██████, ██████ or United States Attorney Acosta himself.

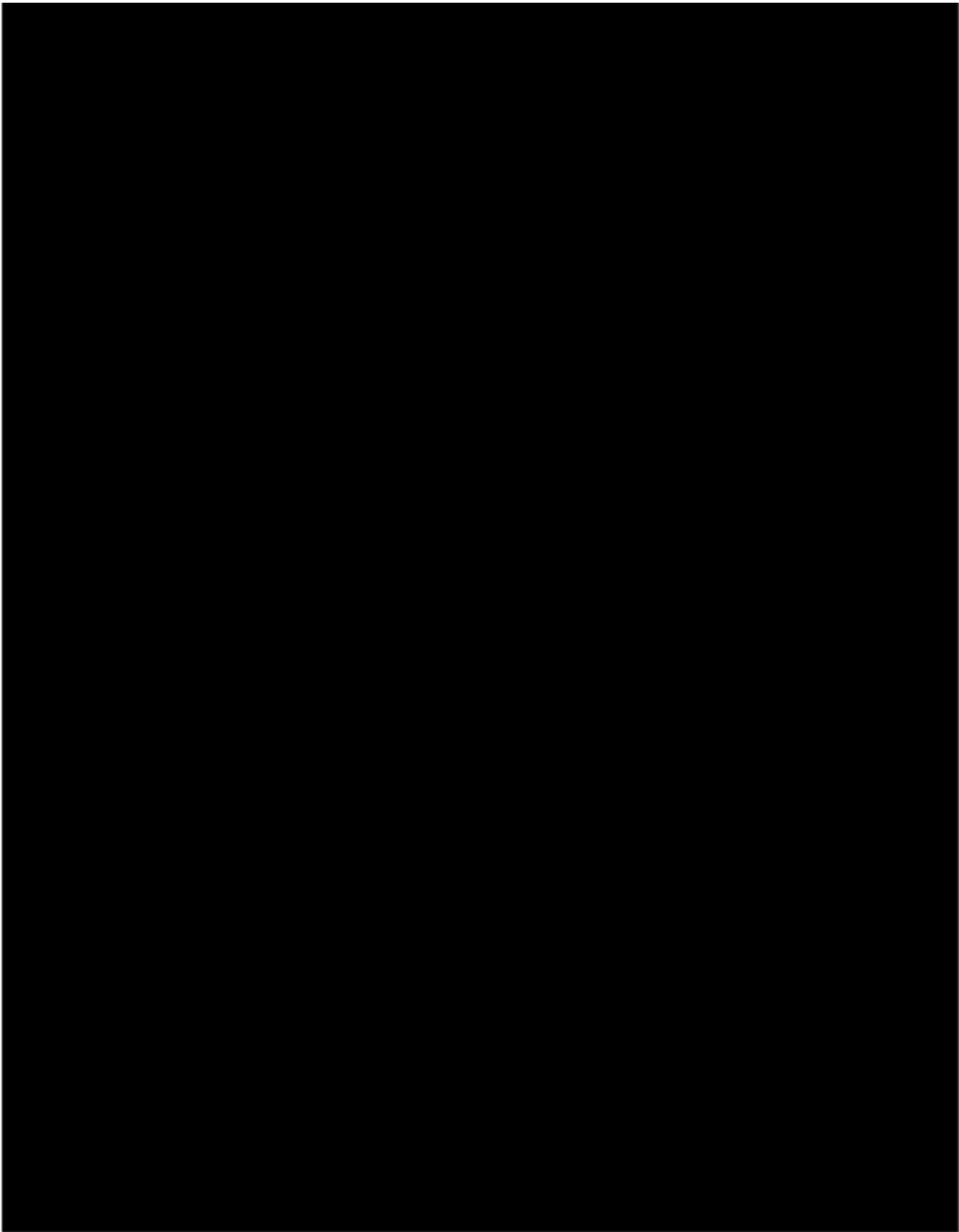
46. AUSA ██████ then asked why Mr. Epstein should ... be treated differently than anyone else. Mr. Thomas apparently stated that he understood that there was evidence that the women had lied about their ages. AUSA ██████ replied that this was not a defense and that Mr. Thomas should not believe “the spin” of Mr. Epstein’s “high-priced attorneys.” Indeed, Mr. ██████ told Mr. Thomas that the USAO was very concerned about a Palm Beach editorial that questioned whether Mr. Epstein would receive a rich man’s justice. AUSA ██████ then stated that, in fact, Mr. Epstein “doesn’t have a defense.”
47. Mr. Epstein’s attorneys learned of the call and complained to the USAO. Counsel for Mr. Epstein then had an in-person meeting with FAUSA ██████ and United States Attorney Acosta describing these leaks to the *New York Times*. During Mr. Thomas’ next call to the USAO, made two weeks later, AUSA ██████ “admonished” him (in the words of Mr. Thomas) for disclosing the contents of their prior conversation to the defense, and strongly “reminded” Mr. Thomas that AUSA ██████ prior comments about Mr. Epstein had only been “hypothetical” in nature. That claim is sheer nonsense: AUSA ██████ had disclosed specific details of Mr. Epstein’s case, including plea terms proposed by the defense, as revealed based on Mr. Thomas’s own contemporaneous hand-written notes.
48. Shortly thereafter, Mr. ██████ wrote to the defense that Mr. Thomas was given, pursuant to his request, *non-case specific information* concerning *specific* federal statutes.” See Tab 37, February 27, 2008 Email from ██████. Again, that claim was utterly false; Mr. Thomas’s contemporaneous hand-written notes, reviewed by Jay Lefkowitz, confirm that the USAO had violated settled Department policy and ethical rules by providing case-specific information about the Department’s legal theories and plea negotiations.

Conclusion

We bring these difficult and delicate matters of misconduct to your attention not to require any disciplinary action or review by the Office of Professional Responsibility. Although we have been told that some of this misconduct has been self-reported (only after we raised these complaints in writing), we feel confident that not all the facts were adequately presented. Rather, we believe that they are highly relevant to your decision whether to authorize a federal prosecution in this case. This pattern of overzealous prosecutorial activity strongly suggests improper motives in targeting Jeffrey Epstein, not because of his actions (which are more appropriately the subject of state prosecution), but, rather, because of who he is and who he knows. We also bring this pervasive pattern of misconduct to your attention because we believe it taints any ongoing federal prosecution. The misconduct pervades the evidence in this case. The offers of financial inducement to witnesses, improperly encouraged by the government, make their potential testimony suspect. The reliance on tainted evidence gathered by the state will require a careful sorting out of poisonous fruits.

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Most important, however, is that the extraordinary nature of this misconduct, so unusual in ordinary federal prosecutions, raises the gravest of concerns about why prosecutors would go to such lengths in a case already being prosecuted by the State and with so little, if any, federal concern. Accordingly, we ask you to conduct your own investigation of these matters, because we believe that what we have provided you may constitute only the tip of a very deep iceberg. Without the power of subpoena, which we currently lack, we are unable to dig deeper. We strongly believe that there is far more exculpatory evidence that has not been disclosed, more leaks that we have not yet uncovered and more questionable behavior. This is a case that cries out for a deeper investigation than we are capable of conducting, before any decision to prosecute is permitted.



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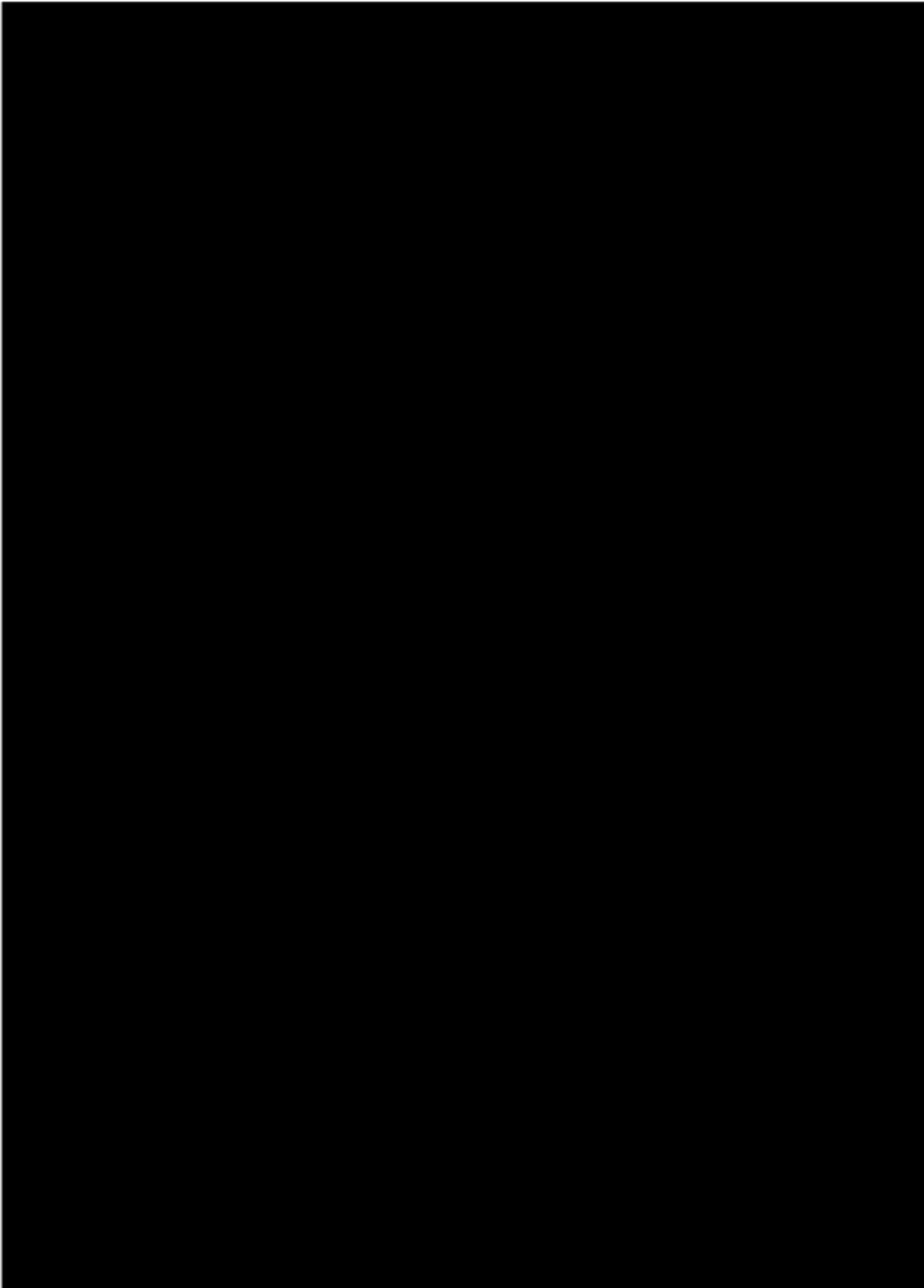
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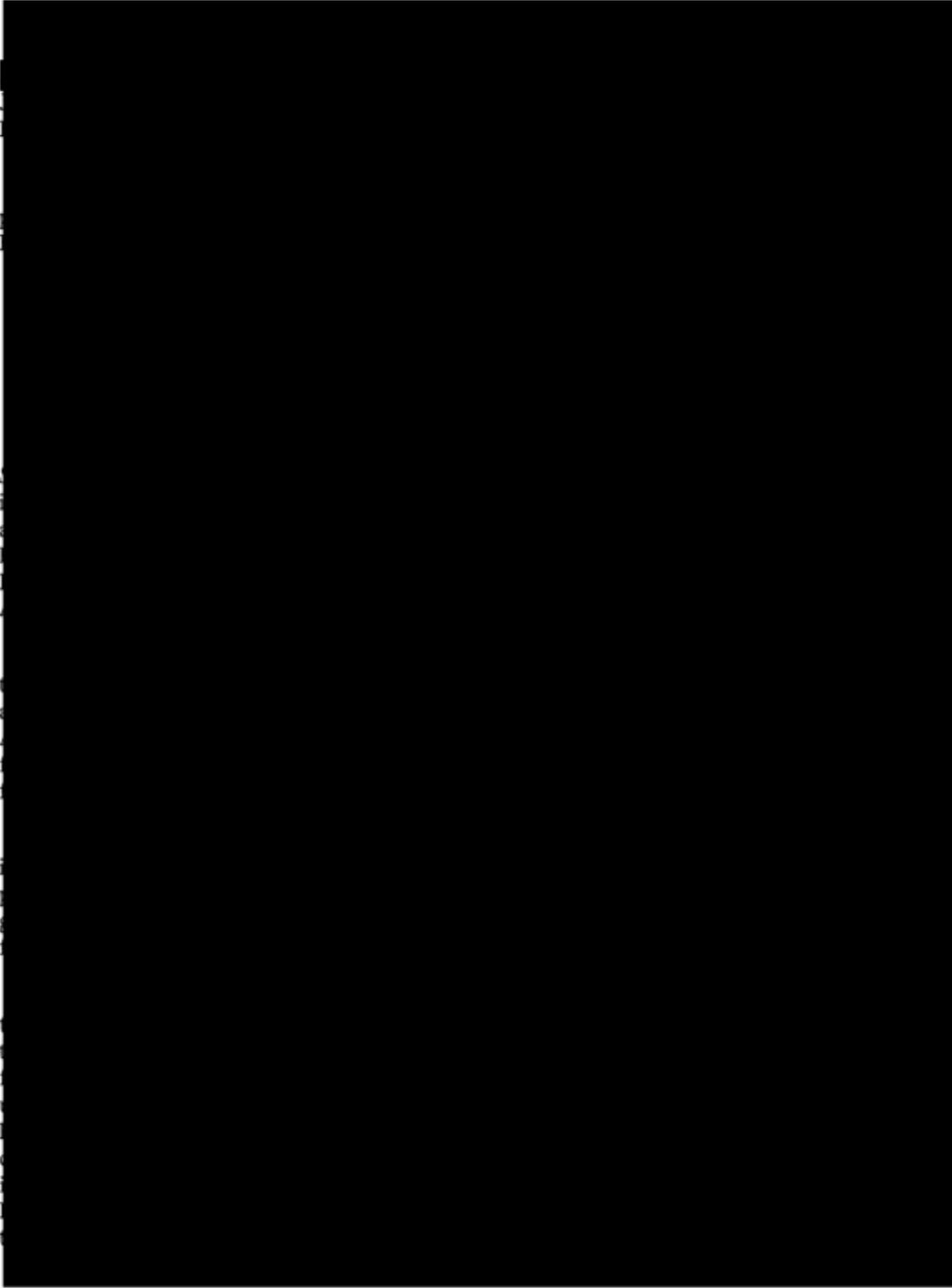
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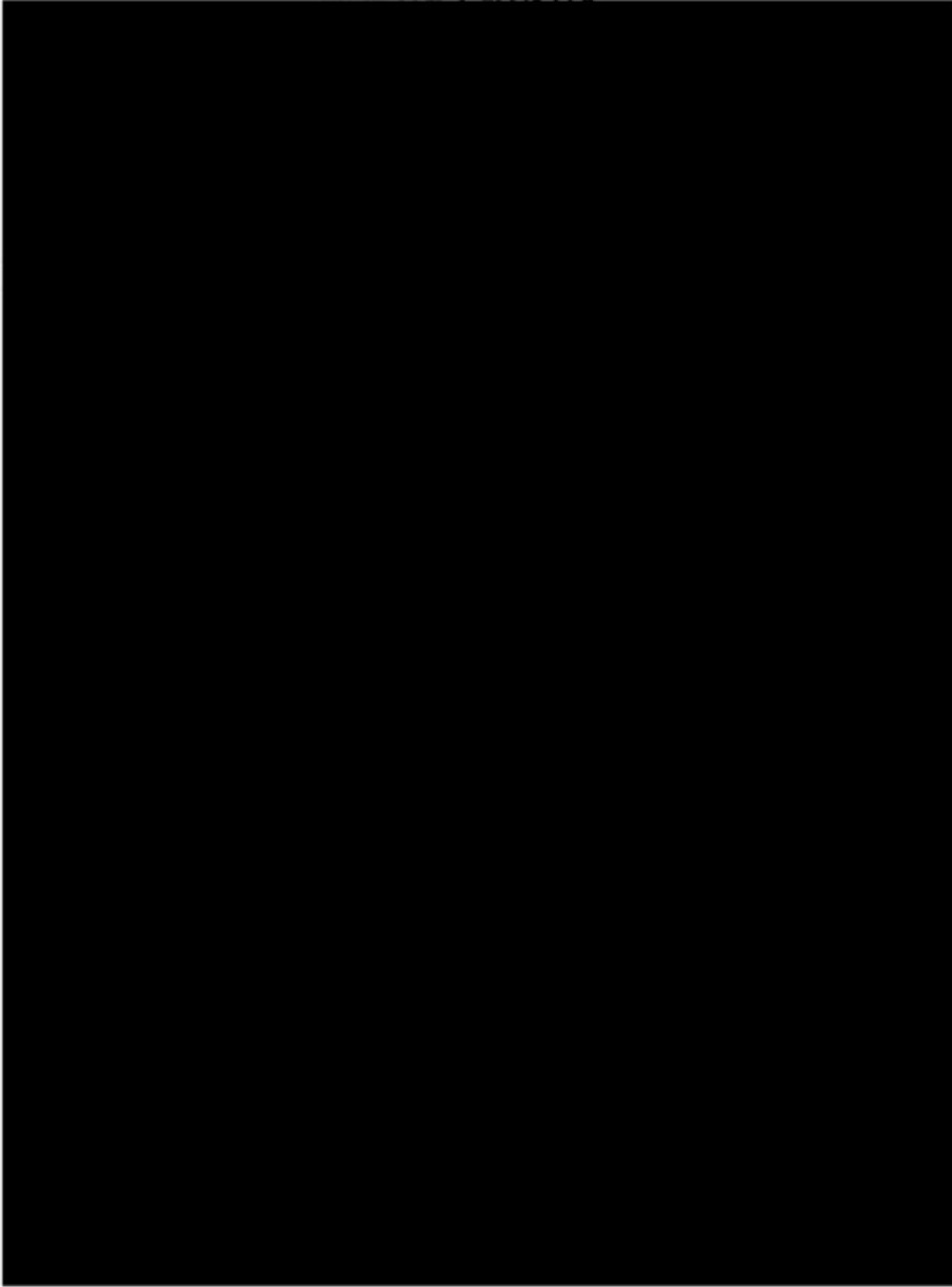
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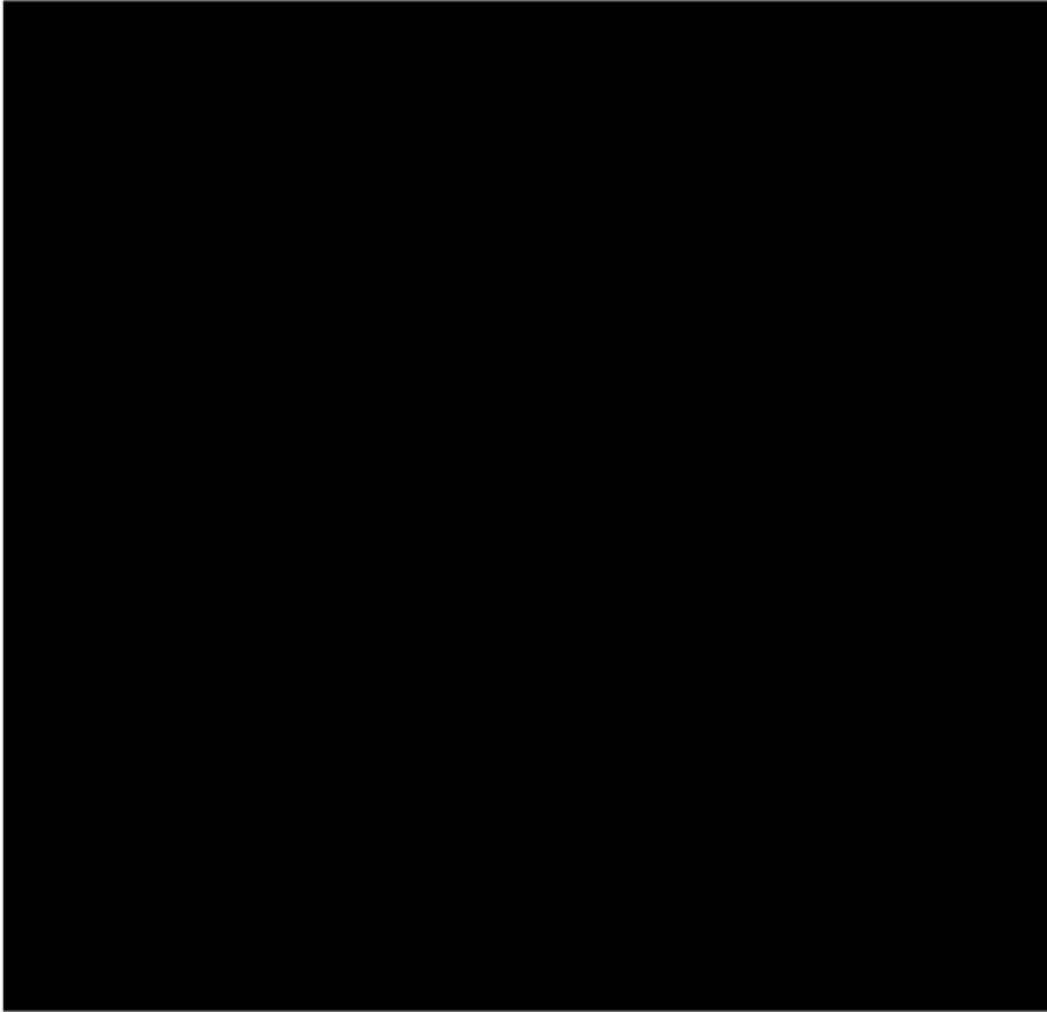
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SUBJECT TO PROTECTIVE ORDER PARAGRAPHS 7, 8, 9, 10, 15, and 17

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SUBMISSION TO THE OFFICE OF THE DEPUTY ATTORNEY GENERAL

IN THE MATTER OF JEFFREY E. EPSTEIN

Jeffrey Epstein, a successful businessman and noted philanthropist with no prior criminal record, has been investigated for potential violations of 18 U.S.C. §§ 1591, 2422(b) and 2423(b). Since the limited review conducted by CEOS, two Supreme Court decisions—one authored by Justice Scalia and the other by Justice Thomas—have revitalized the bedrock principles that federal criminal statutes must be narrowly construed, that they may not be stretched to federalize conduct not clearly covered by their prohibitions, and that whenever there are two plausible constructions of a criminal statute, the narrower construction (which safeguards liberty) rather than the broader construction (which expands the federal prosecutor’s arsenal) controls under the venerable rule of lenity.

Mr. Epstein’s conduct—including his misconduct—falls within the heartland of historic state police and prosecutorial powers. Absent a significant federal nexus, matters involving prostitution have always been treated as state-law crimes even when they involve minors. Mr. Epstein’s conduct lacks *any* of the hallmarks that would convert this quintessential state crime into a federal one under any of the statutes prosecutors are considering.

Mr. Epstein lived in Palm Beach, and his interstate travel was merely to go home. Any sexual conduct that occurred after he arrived was incidental to the purposes for his travel. Even CEOS admitted that applying § 2423(b) to a citizen traveling home would be “novel.” In fact, it would be both unprecedented and in conflict with Supreme Court cases that have withstood the test of time for over 60 years.

Moreover, Mr. Epstein did not use the internet (either via email or chatrooms) to communicate with any of the witnesses in this investigation. Indeed, he did not use any other facility of interstate commerce, including the phone, to knowingly persuade, entice, or induce anyone to visit his home—the “local” locus of all the incidents under investigation—much less to persuade, entice, or induce a known minor to engage in prohibited sex acts, as § 2422(b) requires. Nor did anyone on his behalf “persuade” or “induce” or “entice” or “coerce” anyone as these words are ordinarily understood and as the new Supreme Court decisions mandate they be applied: narrowly, without stretching ordinary usage to conform to a prosecutor’s case-specific need for a broad (and in this case unprecedented) application. In addition, as will be shown below, § 2422(b) requires that the object of the communication be a state law offense that “can be charged.” Yet because the state of Florida’s statute of limitations is one year for the first prostitution offense and three years for other targeted offenses, and because all or virtually all of the offense conduct at issue in the federal investigation occurred prior to June 20, 2005, those acts can *not* be charged by the State, and thus cannot meet this essential element of federal law.

Finally, Mr. Epstein neither coerced, nor enslaved, nor trafficked, nor derived any profit from his sexual conduct. He was an ordinary “John,” not a pimp. But § 1591 is directed only against those who engage in force or fraud or coercion or who are in the business of commercial

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sexual trafficking. The statute has never been applied to a “John,” and only a highly and impermissibly selective prosecution could stretch § 1591 to reach conduct like that at issue in this case.

In short, without “novel” interpretive expansions—a description used by CEOS itself—it cannot be shown that Mr. Epstein violated any of the three federal statutes identified by prosecutors. As the Supreme Court’s recent decisions in *Santos* and *Cuellar* make clear, federal law may not be stretched in that manner, and the current federal investigation relies, as its foundation, on impermissibly elastic stretches of each statute beyond any reported precedent; beyond the essential elements of each statute; well outside the ordinary construction of each statute’s limitations; and on a selective, extraordinary, and unwarranted expansion of federal law to cover conduct that has always been exclusively within the core of state powers.

At this point in time, the need for Departmental oversight is critical. We appreciate this opportunity to submit our assessment of the key facts in this case and review of the pertinent federal statutes, and respectfully request that the Office of the Deputy Attorney General end federal involvement in this matter so that the State of Florida may resolve this case appropriately.

Summary of the Facts

Mr. Epstein has maintained a home in Palm Beach, Florida for the past 20 years. While there, he routinely conducted business, received medical attention, socialized with friends, and helped care for his elderly mother. Mr. Epstein also had various women visit his home to perform massages. He did not personally schedule the massage appointments or communicate with the women over the phone or the Internet. Rather, Mr. Epstein’s personal assistants scheduled many types of appointments, personal trainers, chiropractors, business meetings and massages. The phone message pad taken from his house and in the possession of the government confirmed that in many cases, the women themselves contacted Mr. Epstein’s assistants to inquire about *his* availability—rather than vice versa.

The majority of the massages were just that and nothing else. Mr. Epstein often would be on the telephone conducting business while he received his massage. At times, the masseuses would be topless, and some sexual activity might occur—primarily self-masturbation on the part of Mr. Epstein. On other occasions, no sexual activity would occur at all. There was no pattern or practice regarding which masseuse would be scheduled on a particular day—if one would be scheduled at all—or whether any sexual activity might occur. Indeed, Mr. Epstein almost never knew which masseuse his assistants had scheduled until she arrived. See Tab 3, [REDACTED] Toll Records.

Mr. Epstein specifically requested that each masseuse be at least 18 years old. The vast majority of the masseuses were in fact in their twenties, many accompanied to Mr. Epstein’s home by friends or even other family members. Furthermore, most of the women who have testified that they were actually under 18 have specifically admitted to systematically lying to Mr. Epstein about their age. See Tab 4 [REDACTED] at 38-39; Tab 5, [REDACTED] Tr. at 16; Tab 6,

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Tr. at 6, 8, 22, 45; Tab 7, Tr. 13; Tab 8 Tr. at 8; Tab 9, Tr. at 5; and Tab 10, Tr. at 14-15 (excerpts from these transcripts are included below). Furthermore, the women who visited Mr. Epstein's home all visited voluntarily and many willingly returned several times.

The State Attorney's Office (the "SAO") has vast experience prosecuting sex crimes and conducted an exhaustive, 15-month investigation of Mr. Epstein. A Grand Jury has concluded that Mr. Epstein was merely a local "John," guilty of soliciting prostitution in violation of state law. Notably, Florida law distinguishes soliciting from procuring and compelling prostitution if minors are involved. Indeed, soliciting is a misdemeanor except for the commission of a third subsequent offense, turning it into a felony. The SAO, therefore, sought and obtained an indictment charging Mr. Epstein with felony solicitation of prostitution. Mr. Epstein is prepared to plead guilty and accept a sentence for that offense—a sentence that, notably, is far more severe than that meted out to other "Johns" convicted of violating Florida's solicitation laws for cases in which sexual activity was alleged.

Though CEOS points out its admirable goal of "protecting children," a moniker that engenders high emotions, the conduct alleged here involves women over 16, which is the age of consent in 38 states and supplies the effective federal age of consent. The young women were by no means the target of high-school trolling; they were individuals who, with friends, visited Mr. Epstein's house—a home full of friends and staff. The civil complaints filed against Mr. Epstein reiterate the fact that the individuals who visited Mr. Epstein would visit with their friends. And Mr. Epstein never spoke to or had any contact with these women before they arrived at his house. And again, the State is handling this matter appropriately.

We respectfully submit that that should be the beginning and the end of this matter. As you know, the Department's *Petite* Policy precludes successive federal prosecutions after a State has acted: "[A] state judgment of conviction, plea agreement [here held in abeyance solely as a result of the federal investigation], or acquittal on the merits shall be a *bar* to any subsequent federal prosecution for the same act or acts." U.S.A.M. § 9-2.031A (emphasis added). Consistent with that principle, and of particular relevance to this case, the Department itself just recently observed the following:

[P]rostitution-related offenses have historically been prosecuted at the state or local level. This allocation between state and Federal enforcement authority does not imply that these crimes are less serious, but rather reflects important structural allocations of responsibility between state and Federal governments.... [T]he Department is not aware of any reasons why state and local authorities are not currently able to pursue prostitution-related crimes such that Federal jurisdiction is necessary.

See Tab 11, November 9, 2007 Letter from Justice Department Principal Deputy Assistant Attorney General [REDACTED] to the House Committee on the Judiciary, p. 8-9.

Summary of the Law

We have reviewed every reported case under 18 U.S.C. §§ 1591, 2422(b), and 2423(b), and cannot find a single one that resulted in a conviction on facts akin to the ones here. In some respects, it is not surprising that no precedent supports federal prosecution of a man who engaged in consensual conduct, in his home, that amounts to solicitation under State law. After all, prostitution, even when the allegations involve minors, is fundamentally a State concern, *United States v. Evans*, 476 F.3d 1176, n.1 (11th Cir. 2007) (noting that federal law “does not criminalize all acts of prostitution (a vice traditionally governed by state regulation)”), and there is no evidence that Palm Beach County authorities and Florida prosecutors cannot effectively prosecute and punish the conduct. See also *Batchelder v. Gonzalez*, No. 4:07-cv-00330-SPM-AK, 2007 WL 5022105 (N.D. Fla. Oct. 19, 2007). In fact, the opposite is true—the state-elected officials, cognizant of the local mores of the community, have a lauded history of just such prosecutions.

In any event, and as set forth below, none of the federal statutes in this case remotely supports a prosecution on the facts of this case without each and every element being stretched in a novel way to encompass the behavior at issue. We begin with first principles. Courts in this country have “traditionally exercised restraint in assessing the reach of federal criminal statutes, both out of deference to the prerogatives of Congress, *Dowling v. United States*, 473 U.S. 207 (1985), and out of concern that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’” *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)) (citation omitted).

Two recent Supreme Court decisions dramatically underscore these principles and help to highlight why federal prosecution in this case would be improper as a matter of both law and policy. See *United States v. Santos*, No. 06-1005 (June 2, 2008); *Cuellar v. United States*, No. 06-1456 (June 2, 2008). Though they both address the interpretation and application of the federal money laundering statute, 18 U.S.C. § 1956, the principles they set forth are equally applicable here. In *Santos*, the Court held that the statutory term “proceeds” means “profits” rather than “receipts,” and thus gave the statute a significantly narrower interpretation than what the government had urged. In his plurality opinion, Justice Scalia emphasized that where a statutory term in a criminal statute could support either a narrow or broad application, the narrow interpretation must be adopted because “[w]e interpret ambiguous criminal statutes in favor of defendants, not prosecutors.” Slip op. at 12. As his opinion explained, the rule of lenity “not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed. It also places the weight of inertia upon the party that can best induce

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Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." Slip op. at 6.¹

In *Cuellar*, the Court examined the link between the money-laundering statute's *mens rea* requirement and the underlying elements of the offense. After a careful textual analysis of the statute and its structure, the Court ruled that the defendant's conviction could be sustained only if he knew that the *transportation* of funds to Mexico was designed to conceal their nature, location, source, ownership or control—not merely that the defendant knew that the *funds* had been hidden during their transportation to Mexico. Slip op. at 10-17.

Both decisions relied on the ordinary meaning of the statutory terms Congress chose. And both rejected attempts to broaden those words to cover conduct not clearly targeted by Congress. Taken together, these decisions reject the notion that prosecutors can take language from a narrowly drawn federal statute—especially one that itself federalizes the prosecution of conduct traditionally within the heartland of State police powers—and convert it into a license to reach additional conduct by ignoring, rewriting or expansively interpreting the law. Both cases additionally rejected the notion that statutes should be broadly construed in order to facilitate prosecutions or to in anyway diminish the burden on prosecutors to prove each essential element of a federal charge in conformity with Congress's determinations as to what is within the federal criminal law and what is not. The conflict between the *Santos* and *Cuellar* decisions and CEOS's grant of effectively unlimited discretionary authority to the USAO to take federal law to "novel" places where they have never reached before could not be starker.

These lessons have no less force in the context of Executive Branch decision-making than they do in the context of Judicial interpretation. As you are aware, when federal prosecutors exercise their discretion, they bear an independent constitutional obligation to faithfully interpret the law as written—not to broaden its scope beyond the limits endorsed by both Congress and the President. There is no support for CEOS's view that the courts or a jury should ultimately decide whether a "novel" construction of the law is correct. Instead, the Executive Branch itself has a non-delegable obligation not to exceed its authority; the power of other branches to check or remedy such usurpation does not legitimize executive action that exceeds its bounds. See Tab 12, November 2, 1994 Memorandum from Assistant Attorney General [REDACTED] to the Hon. Abner J. Mikva, Counsel To The President, on Presidential Authority To Decline To Execute Unconstitutional Statutes, available at <http://www.usdoj.gov/olc/nonexcut.htm>.

In this case, the text, structure, and history of the relevant federal statutes unambiguously indicate that these statutes were designed to address problems of a national and international

¹ Justice Stevens, in his concurring opinion, also acknowledged the rule of lenity, calling the plurality opinion's discussion of that rule "surely persuasive." *United States v. Santos*, No. 06-1005, slip op. at 5 (June 2, 2008) (Stevens, J., concurring).

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scope—not the local conduct that is alleged here—and each of these statutes requires proof of the defendant’s actual knowledge that simply is not present in this case. Any attempt to stretch the language of these statutes to cover this case would be a misuse of the law and contrary to express legislative intent. In short, the elements under each federal statute—18 U.S.C. §§ 1591, 2422(b) and 2423(b)—are not satisfied here.

1. 18 U.S.C. § 2422(b)

18 U.S.C. § 2422(b) requires the government to prove beyond a reasonable doubt that the defendant engaged in communications over an interstate facility (*e.g.*, the Internet or phone) with four concurrent intentions: (1) to knowingly (2) persuade, induce, entice or coerce, or attempt to persuade, induce, entice, or coerce (3) a minor (4) to engage in prostitution or criminal sexual activity for which the person can be charged. Mr. Epstein’s conduct does not satisfy the elements of § 2422(b). Each element must be individually stretched, and then conflated in a tenuous chain to encompass the alleged conduct with any individual woman.

As the statute makes clear, the essence of this crime is the communication itself—not the resulting act. The Court of Appeals for the Eleventh Circuit, in *Murrell*, underscores the point:

The defendant in *Bailey* contended that attempt under § 2422(b) ‘requires the specific intent to commit illegal sexual acts rather than just the intent to persuade or solicit the minor victim to commit sexual acts.’ *Id.* at 638. In response, the court held ‘[w]hile it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves. Hence, a conviction under the statute only requires a finding that the defendant had an intent to persuade or to attempt to persuade.’

United States v. Murrell 368 F.3d 1283, 1287 (11th Cir. 2004) (citing *United States v. Bailey*, 228 F.3d 637, 638-39 (6th Cir.2000)). Thus, the targeted criminal conduct must occur *through* the interstate facility, not thereafter, and the *scienter* element must be present at the time of the call or Internet contact.

In this case, however, Mr. Epstein did not use an interstate facility to communicate any illegal intention in this case; the phone calls were made by his assistants in the course of setting up many other appointments. Neither a conspiracy charge nor a charge of aiding and abetting can fulfill the *mens rea* requirement here. Indeed, neither Mr. Epstein nor his assistants knew whether sexual activity would necessarily result from a scheduled massage. And certainly, no such activity was ever discussed on the phone by either Mr. Epstein or his assistants. Instead, as the record in this case makes clear, many appointments resulted in no illegal sexual activity, and often, as confirmed by the masseuses’ own testimony, several individuals who were contacted by phone visited Mr. Epstein’s house and did not perform a massage at all. Where sexual activity

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did result, it was mainly self-pleasuring masturbation and not necessarily illegal, but spontaneous and resulted from face-to-face conversations during the massage. Thus, the fact that Mr. Epstein *later* may have persuaded any particular masseuse to engage in unlawful activity *during the massage* does not work retroactively to render the earlier scheduling phone call an offense under § 2422(b). Nor is there any evidence that women who returned to Mr. Epstein's home time and again were somehow coerced or induced over a facility of interstate commerce to do so.

The first essential element of § 2422(b) that “[w]hoever, using the mail or any facility or means of interstate or foreign commerce,” by its plain language, requires that the communication, which is the essence of the crime and its *actus reus*, take place during the use of the facility of interstate commerce (in this case, unlike the vast majority of Internet chat room sting operations, a telephone). The statute is not ambiguous. It requires that the criminal conduct occur while the defendant is “using” (i.e. engaged in the communication), not thereafter.

Given the utter lack of direct evidence against Mr. Epstein, prosecutors have signaled that they intend to offer a purely circumstantial case if this matter proceeds to trial—essentially arguing that “routine and habit” evidence could substitute for actual proof that an interstate facility was used to solicit sex from minors. Thus, despite the fact that the calls themselves were not made by Mr. Epstein and did not contain the necessary explicit communication to knowingly induce minors to provide sexual favors for money, prosecutors are seeking to turn the phrase “are you available”—the same phrase used with friends, chiropractors, and trainers—into a ten-year mandatory prison sentence. In any case, the prosecution’s attenuated argument regarding “routine and habit” will also not fit the facts of this case. The witness testimony at issue makes clear that there was no clear “routine or habit” with respect to the interactions at issue. And in those unpredictable instances where sexual contact resulted, it was a product of what occurred *after* the benign phone communication, not during the call itself.

The prosecution’s theory of liability—that a call to a person merely to schedule a visit to the defendant’s residence followed by a decision made at the residence to engage in prohibited sexual activity is sufficient—cannot survive either a “plain language” test or the rule of lenity as they have been authoritatively construed in the recent *Santos* and *Cuellar* cases. The statute cannot be read otherwise. As the *Cuellar* decision makes clear, a proper interpretation of a federal criminal statute is guided “by the words of the operative statutory provision,” not by outside objectives, such as those facilitating successful prosecution. See *Cuellar, supra*, Slip op. at 7. As Justice Alito stated in his concurring opinion, the government must prove not just the “effect” of the secretive transportation, but also that “petitioner knew that achieving one of these effects was a design (i.e. purpose) of the transportation” of currency. *Cuellar v. United States, supra*, 553 U.S., Slip op. At 1 (Alito, J. concurring). Similarly, it is not enough that one effect of a communication scheduling a visit between Mr. Epstein and a minor was that there might be subsequent face-to-face inducement. Instead, the statute, as drafted, defines the crime as the communication and demands that far more be proven than that the use of an interstate facility resulted in a later meeting where even an inducement (as opposed to a solicitation) was made.

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The prosecution has never represented to counsel that they have evidence that would prove that the inducement or enticement to engage in illegal sexual acts occurred over the phone (or Internet). The prosecution's references to "routine and habit" evidence that would substitute for the explicit communications usually found in the transcripts from chat rooms or sting operations is tenuous at best. In essence, the prosecution would be alleging communications understood, but not spoken, by two people, one of whom was usually a secretary or assistant. Separating the *actus reus* and the *mens rea*, however, and premising criminal liability on persuasion that might occur *after* the communication, or on the existence of a specific intent to engage in illegal sex with a minor that arises *after* the communication would violate the bedrock principle of criminal law that predicates liability on the concurrence of the act and the criminal state of mind. Even if, *arguendo*, the communication and *mens rea* could be separated (a premise which is at odds with the requirement of concurrence), Mr. Epstein denies that the factual proof demonstrates such a pattern or practice. Instead, the evidence compellingly proves that there was no regularity or predictability to the content of the communication or in what occurred at meetings that were telephonically scheduled (including those that are the subject of this investigation).

A second essential element of 2422(b) requires that the defendant "knowingly" induce, persuade, entice or coerce a person believed to be a minor. ". . . [K]nowingly . . . induces . . ." requires the Court to define inducement so it is consistent with its ordinary usage and so the term is not so broad that it subsumes the separate statutory terms of "entices" and "persuades." Inducement has a common legal meaning that has been endorsed by the government when it operates to *narrow* the affirmative defense of entrapment. *Inducement* must be more than "mere solicitation;" it must be more than an offer or the providing of an opportunity to engage in prohibited conduct. *See, e.g., United States v. Sanchez-Berrios*, 424 F.3d 65, 76-77 (1st Cir. 2005); *United States v. Brown*, 43 F.3d 618, 625 (11th Cir. 1995). The government cannot fairly, or consistent with the rule of lenity, advocate a broader definition of the same term when it *expands* a citizen's exposure to criminal liability than when it *limits* the ambit of an affirmative defense to criminal conduct. If the term is ambiguous, absent clear Congressional intent on the issue, the Court's decision in *Santos* requires that the narrower rather than the broader definition be used.

The facts simply do not prove Mr. Epstein's culpability for knowingly inducing or persuading minors. First, in the case of masseuses who agreed or even sought to return to see Mr. Epstein on successive occasions, there is no evidence that there was any inducement, persuasion, enticement or coercion over the phone. And, for masseuses seeing Mr. Epstein for the first time, there was generally no telephone contact with Mr. Epstein and there was no knowledge that any third party at Mr. Epstein's specific direction was inviting them to Mr. Epstein's home over the phone rather than in face-to-face meetings. The women who visited Mr. Epstein's home were all friends of friends. Contrary to the facts in this case, § 2422(b)'s knowing inducement element is essential to federal liability and, given its hefty minimum mandatory punishment, it should not be interpreted as a strict liability statute.

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There is insufficient evidence that Mr. Epstein targeted minors, as required. The evidentiary pattern does not even establish willful blindness since Mr. Epstein took steps to ensure his visitors were over 18—and certainly took none to avoid knowing. But, even if the government contends that it possesses evidence that could demonstrate that Mr. Epstein knew or should have known or suspected that a small number of the masseuses were underage, that would still not make this an appropriate case for federal, rather than state prosecution. The federal statutes were not intended to supersede state prosecutions involving isolated instances of underage sex. Instead, the federal statutes were intended for large-scale rings or for an individual who was engaged, while using interstate facilities such as the Internet, with the willful targeting of minors.

The government's evidence, even when stretched to the limit, will not show a pattern of targeting underage persons for illegal sexual activity. A federal prosecution should not become a contest between the prosecution and defense over whether the defendant knew, suspected or should have known whether a particular person was or was not over age. The history of cases brought under this statute make crystal clear that knowledge of the defendant regarding the age of the women is required—either by admission or by incontrovertible transcripts of conversations (i.e. stings operations which require repeated acknowledgment of the defendant's awareness of the victims' age). Even states with absolute liability about mistake regarding age rarely prosecute cases where definitive proof is lacking (Palm Beach County rarely does and when it does, it imposes house arrest sentences). This is a matter for the exercise of state prosecutorial discretion and not federal mandatory minimum statutes that were not intended to cover such conduct.

A third essential element of § 2422(b) is the requirement that the government prove that the defendant actually believed that the person being persuaded (coerced, etc.) was a minor at the time of the communication. See e.g., Offense Instruction 80, Eleventh Circuit Pattern Jury Instructions-Criminal (2003) (“The defendant can be found guilty of that offense only if...the defendant believed that such individual was less than (18) years of age...”); *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) (§ 2422(b) requires that the defendant knowingly target a minor). Importantly, then, all the elements must be proven with respect to a specific person. However, we are told that the majority of proof is no more than toll records, not recorded conversations or Internet chat transcripts, but toll records and perhaps a memory of what was said years ago on a particular call for a particular request from a particular person acting at Mr. Epstein's direction.

Two final points bear special emphasis here. The statute, which according to *Santos* and *Cuellar* must be narrowly construed, also requires that the inducement be to engage in prostitution or sexual activity “for which [the defendant] can be charged.” 18 U.S.C. § 2422(b). However, simple prostitution is not defined (or made punishable) in the U.S. Code, and state law thus supplies the appropriate reference point. Under Florida law, “prostitution” entails the “giving or receiving of the body for sexual activity for hire,” Fla. Stat. § 796.07(1)(a), and the term “sexual activity” is limited to “oral, anal, or vaginal penetration by, or union with, the

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sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation.” Fla. Stat. § 796.01(1)(d). Also, the Florida Supreme Court jury instructions define prostitution as involving “sexual intercourse.” As a result, topless massages—even ones for hire that include *self*-masturbation—fall outside the ambit of the state-law definition of prostitution. Absent proof beyond a reasonable doubt that, at the critical time of the communication, Mr. Epstein had a specific intent to persuade another to engage in prostitution or “sexual activity,” *as defined by Florida law*, he cannot be guilty of an offense under § 2422(b).

As important, the plain language of the phrase “for which any person can be charged” necessarily excludes acts as to which the state’s statute of limitations has run. Under Florida law, prostitution and prostitution-related offenses are misdemeanors in the second degree for a first violation.² See Fla. Stat. § 796.07(4)(a). The limitations period for a misdemeanor in the second degree is one year, and there is no tolling provision based upon the victim’s age. See Fla. Stat. § 775.15(b). Even as to allegations of third degree felonies, the statute of limitations is three years. Thus, any conduct alleged to have occurred before mid-June 2005 cannot be charged as a matter of state law and thus cannot be a predicate for a § 2422(b) offense—even if the federal statute of limitations has not run on any given § 2422(b) offense because of the lengthier statute codified in 18 U.S.C. § 3282. Thus, no prosecution under § 2422(b) can be brought based upon inducement of prostitution or sexual activity for which Florida’s statute of limitation has run. Furthermore, in Florida, the statute of limitations does not simply give rise to an affirmative defense. On the contrary, statute of limitations “creates a substantive right which prevents prosecution and conviction of an individual after the statute has run.” See *State v. King*, 282 So. 2d 162 (Fla. 1973); *Tucker v. State*, 417 So. 2d 1006 (Fla. 3d D.C.A. 1982) (citing cases).

Given the one-year statute of limitations, any conduct that might amount to prostitution or other chargeable sexual activity that occurred before one year from today is not conduct for which any person can be charged with a criminal offense. Also, given the three year statute of limitations for third degree felonies, any allegations of illegal state criminal conduct that is classified as a third degree felony cannot be charged in the state and, concomitantly, cannot be the basis for a federal charge under § 2422(b), to the extent that it occurred—as did almost all of the pivotal allegations (e.g., the [REDACTED] allegation which was made in March of 2005) prior to mid-June of 2005.

2. 18 U.S.C. § 1591

² The offense is a felony of the third degree only for a third or subsequent violation. Fla. Stat. § 796.07(4)(c).

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18 U.S.C. § 1591, a sex trafficking statute, provides up to 40 years' imprisonment for anyone (1) who recruits or obtains by any means a person in interstate commerce (ii) knowing that the person is under 18 and (iii) knowing that the person will be caused to engage in a commercial sex act. The most heinous of crimes, described on the CEOS website, fall within this statute and include the buying and selling of children and the forced servitude of third-world immigrants brought to this country to be enslaved. Mr. Epstein's behavior is nowhere near the heartland of this statute. This statute has also been previously reserved for prostitution rings involving violence, drugs and force. In stark contrast, there is no jurisdictional hook that brings Mr. Epstein's conduct within the ambit of the statute, and securing a prosecution on these facts would require a court to set aside both reason and precedent to convict a local 'John' with a sex-slavery crime. It can not be said that Mr. Epstein engaged in trafficking and slavery nor did he knowingly recruit or obtain underage women with knowledge that they would be caused to engage in a commercial sex act. Thus, prosecuting him under this statute would expand the law far beyond its scope.

To the extent there are cases where prosecutors think that Mr. Epstein should have known that certain women were underage, there is no evidence that Mr. Epstein "caused [them] to engage in a commercial sex act." The term "cause" naturally implies the application of some sort of force, coercion, or undue pressure, but there is no evidence that Mr. Epstein's interactions with the women were anything but consensual. Again, many of the women phoned Mr. Epstein's assistant themselves in order to determine whether *he* wanted a massage. Nor can the cause requirement be proved simply by the fact that Mr. Epstein compensated the women. After all, the statute *elsewhere* requires that the women "engage in a commercial sex act," which by definition means that they would have received something of value in exchange for sexual services. Interpreting the statute to authorize prosecution whenever a commercial sex act results from solicitation thus would render the term "caused" superfluous, and would make every 'John' who interacts with an underage prostitute guilty of a federal crime—even where the transaction is entirely local. Read in context, then, there is no doubt that the statute targets pimps and sex-traffickers who knowingly obtain underage girls and direct them to engage in prostitution. There is not a shred of evidence that Mr. Epstein (or his assistants) did any such thing, and he cannot be prosecuted under this statute.

The *Cuellar* and *Santos* decisions also foreclose a prosecution under § 1591. Just as the federal money laundering statute did not come down to a proscription against transportation of criminal proceeds that are hidden, the sex trafficking of children statute cannot be boiled down and expanded to a federal proscription of commercial sexual activity with persons who turn out to be below the age of 18.

3. 18 U.S.C. § 2423

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18 U.S.C. § 2423(b), a statute enacted to prevent sex tourism, provides up to 30 years of imprisonment for anyone who travels across state lines (i) for the purpose of engaging in (ii) illicit sexual conduct with a minor. Neither of those elements is satisfied here.

Mr. Epstein did not travel to Palm Beach *for the purpose of* engaging in sexual activity with a minor, within the meaning of the statute. The evidence is indisputable that Palm Beach was where Mr. Epstein spent most of his discretionary time, and that his travels to Palm Beach were merely trips returning often to his home of twenty years—not the escapades of a sex tourist off to some destination inextricably intertwined with the required significant or dominant purpose of that trip to be to have “illicit sexual conduct.” Epstein’s trips to Palm Beach were simply those of a businessperson traveling home for weekends or stopping over on his way to or from New York and St. Thomas or to visit his sick and dying mother in the hospital for months on end. He certainly did not travel to his home in Florida for the dominant purpose of engaging in sexual conduct with a person who he knew was under 18 when he did not know, at the time he decided to travel, from whom he was to receive a massage, if he were to receive one at all.

In *Cuellar*, the unanimous Supreme Court linked the term “design” in the money-laundering statute to the terms “purpose” and “plan,” and stressed that those terms all required the defendant to “formulate a plan for; devise”; “[t]o create or contrive for a particular purpose or effect”; [carry out] “[a] plan or scheme”; or “to conceive and plan out in the mind.” Slip. op. at 12 (citing dictionary definitions). The same link is present here, and it simply cannot be said that Mr. Epstein’s design, plan, or purpose in traveling to Palm Beach was to engage in illicit sexual conduct with minors; his design or plan or purpose was simply to return to his home.

Any construction of § 2423(b)’s “for the purpose of” language to include purposes beyond the dominant purpose of the travel would run afoul of the rule of lenity and due process principles discussed earlier. Any attempted prosecution of Mr. Epstein under a more expansive construction of the “for the purpose of” language would also violate the separation of powers doctrine. Congress, which selected the “for the purpose of” language signaled no clear intention to make it a federal crime whenever an actor has engaged in illicit sexual conduct following his crossing of state lines as long as it might be said that sexual activity at his destination was among the activities he pursued there. Congress well knows how to write a statute in this field which eliminates a purpose requirement. See 18 U.S.C. § 2423(c) (“Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person ...”). § 2423(b) is not such a statute.

Federal court decisions watering down the “for the purpose of” requirement fly in the face of the two Supreme Court decisions addressing that element. See *Hansen v. Huff*, 291 U.S. 559 (1934); *Mortensen v. United States*, 322 U.S. 369 (1944). *Santos* and *Cuellar* speak loudly and clearly against prosecutors seeing such elasticity in federal criminal statutes, including those enacted to protect important federal interests. In cases involving the federalization of activity that is within the States’ historic police power, Congress must speak with particular clarity. See, e.g., *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989).

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Relevant Past Cases

We have not been able to find a single federal prosecution based on facts like these—but have voluminous evidence of federal prosecutors routinely declining to bring charges in cases far more egregious than this one. To take just one obvious example, federal prosecutors have self-consciously refrained from involvement in the literally dozens of sexual cases of former priests, opting instead to allow seasoned state prosecutors (like the ones in this case) to pursue the accused former clergymen. That is so despite (1) the large number of victims, (2) the vast geographic diversity of the cases, and (3) the fact that some of these cases involve allegations that the defendant forcibly molested, abused, or raped literally dozens of children—including some as young as five years old—over a period of years. Nonetheless, federal prosecutors have not hesitated to let their state counterparts pursue these cases free from federal interference—even though the sentences meted out vary greatly on account of the fact that “[c]riminal penalties are specific to localities or jurisdictions.”³ The facts of this case, which involve the solicitation of consensual topless massages and some sexual contact, entirely in the privacy of his home and almost entirely by women over the age of 18, pale in comparison to the outright sexual abuse and degradation of preteen minors in many of the priest cases.

Nor does this case bear any of the hallmarks that typify the cases that federal prosecutors have pursued under the federal statutes at issue here. When asked, the closest case suggested by the prosecutors was *United States v. Boehm*—and it hardly could differ more from Mr. Epstein’s case. In *Boehm*, the defendant was charged with conspiracy to distribute cocaine and cocaine base to minors, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 859(a); being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1); and sex trafficking of children in violation of 18 U.S.C. §§ 371 and 1591. *United States v. Boehm*, Case No. 3:04CR00003 (D. Alaska 2004). Boehm’s actions, unlike Mr. Epstein’s, also had a strong interstate nexus: Boehm purchased and distributed large quantities of crack cocaine and cocaine that traveled in interstate commerce, and he used his home and hotels (which were used by interstate travelers) to purchase drugs and distribute them to minors while also arranging for these minors to have sex with him and others. Indeed, Boehm not only (1) purchased cocaine in large quantities; (2) distributed the drugs to minors; (3) possessed illegal firearms; (4) and arranged for the minors to have sex with other members of the conspiracy in exchange for drugs; but (5) admitted to knowing the ages of the individuals involved.⁴ Here, by contrast, as previous stated, all of the conduct took place in Mr. Epstein’s private home in Palm Beach; there was no for-profit enterprise; no interstate component; no use by Mr. Epstein of an instrumentality of interstate commerce; no violence; no force; no alcohol; no drugs; no guns; and no child pornography.

³ See http://www.bishop-accountability.org/reports/2004_02_27_JohnJay/2004_02_27_Terry_JohnJay_3.htm#cleric7.

⁴ In fact, Boehm and his co-defendants distributed drugs to approximately 12 persons between the ages of 13 and 21. Boehm also had a prior criminal history—and one that clearly showed he was a danger to society: he previously had been convicted of raping both a thirteen year-old girl and a fifteen year-old girl. (Day 7 of Sentencing hearing p. 32).

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To the extent there is a similar, but more egregious, local Florida case on the books, it is that of Barry Kutun, a former North Miami city attorney accused of having sex with underage prostitutes and videotaping the sessions. Mr. Kutun pleaded guilty on May 18, 2007 in a Miami-Dade County courtroom as part of an agreement with State prosecutors and he received five years probation and a withholding of adjudication with no requirement to register as a sex offender—all without a shred of involvement by federal prosecutors, who declined to prosecute him. Indeed, given the wide use of the telephone in today's society, it gives a rogue prosecutor carte blanche to turn any local crime into a federal offense. Given the federal government's decision to abstain from prosecuting that case, it is hard to understand how the federal prosecutors responsible for this case think that the State's treatment of Mr. Epstein somehow leaves federal interests substantially unvindicated. There is simply no basis for the federal prosecutors' disparate treatment of Mr. Epstein.

Summary of the Evidence

Finally, we wish to share new evidence—obtained through discovery in connection with the civil lawsuits filed in this matter—which confirms that further federal involvement in this matter would be inappropriate. This testimony taken to date categorically confirms that (i) Mr. Epstein did not target minors; (ii) women under 18 often lied to Mr. Epstein about their ages; (iii) Mr. Epstein did not travel in interstate commerce for the purpose of engaging in illegal sexual activity; (iv) Mr. Epstein did not use the Internet, telephone or any other means of interstate communication to coerce or entice alleged victims; (v) Mr. Epstein did not apply force or coercion to obtain sexual favors; and (vi) all sexual activity that occurred was unplanned and purely consensual. The women's own statements—made under oath—demonstrate the absence of a legitimate federal concern in this matter, and highlight the serious practical difficulties an attempted federal prosecution would face.

- Mr. Epstein did not recruit or obtain these women in interstate commerce (necessary for a conviction under § 1591).
 - ██████████ confirmed that she did not know Mr. Epstein and had absolutely no contact with him—be it through Internet, chat rooms, email, or phone—prior to their arrival at his home. See Tab 13, ██████████ (deposition), p. 30.
 - ██████████ has stated that (like many other women) she first met Mr. Epstein when her friend, ██████████, introduced her to him. See Tab 14, ██████████ Tr. A, p. 4-5.
- Mr. Epstein was told the girls were over 18.
 - ██████████ expressly admitted to lying to Mr. Epstein about her age. See Tab 13, ██████████ (deposition), p. 37 (“Q. So you told Jeff that you were 18 years old, correct? A. Yes.”).
 - ██████████ stated that she not only always made sure she had a fake ID with her and lied to Mr. Epstein by telling him she was 18, but that she

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also had conversations with other women in which these women hoped that "Jeffrey didn't find out [their] age[s]." See Tab 6, [REDACTED] Tr., p. 45.

- [REDACTED]. [REDACTED] also stated that she: "would tell my girlfriends just like [REDACTED] approached me. Make sure you tell him you're 18. Well, these girls that I brought, I know that they were 18 or 19 or 20. And the girls that I didn't know and I don't know if they were lying or not, I would say make sure that you tell him you're 18." See Tab 6, [REDACTED] Tr., p. 22.
- [REDACTED]. [REDACTED] stated that [REDACTED]. [REDACTED] told her say that she was 18 if asked. See Tab 14, [REDACTED] Tr. A, p. 8.
- [REDACTED] stated that she "told him I was 19." See Tab 5, [REDACTED] Tr., p. 16.
- Mr. Epstein did not know these women would be caused to engage in a sex act (necessary for a conviction under § 1591) and any sexual activity that took place was unplanned.
 - [REDACTED]. [REDACTED] stated "sometimes [Mr. Epstein] likes topless massages, but you don't have to do anything you don't want to do. He just likes massages." See Tab 6, [REDACTED] Tr., p. 7.
 - [REDACTED]. [REDACTED] also stated "[s]ometimes [Mr. Epstein] just wanted his feet massaged. Sometimes he just wanted a back massage." See Tab 6, [REDACTED] Tr., p. 19.
- Mr. Epstein did not use an interstate facility to communicate an illegal objective to the alleged victims (necessary for a conviction under § 2422(b)).
 - [REDACTED] confirmed that Mr. Epstein never emailed, texted, or chatted in an Internet chat room with her. See Tab 13, [REDACTED]. (deposition), p. 30.
- Mr. Epstein did not target minors (necessary for a conviction under § 2422(b))
 - [REDACTED]. [REDACTED] stated, "I always made sure -- I had a fake ID, anyways, saying that I was 18. And [REDACTED] (who is [REDACTED] friend who brought her to Mr. Epstein's home)] just said make sure you're 18 because Jeffrey doesn't want any underage girls." See Tab 6, [REDACTED] Tr., p. 8.
- Mr. Epstein did not use the phone or the Internet to induce proscribed sexual activity (necessary for a conviction under § 2422(b)).
 - [REDACTED]. [REDACTED] stated that there was never any discussion over the phone about her coming over to Mr. Epstein's home to engage in sexual activity: "The only thing that ever occurred on any of these phone calls [with [REDACTED] or another assistant] was, 'Are you willing to come over,' or,

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“Would you like to come over and give a massage.” See Tab 14, [REDACTED] Tr. A, p. 15

- [REDACTED] confirmed that she was informed that she was going to Mr. Epstein’s house to give him a massage and nothing else, and that no one “said anything to [her] on the telephone [or over the Internet] about sexual activity with Mr. Epstein.” See Tab 13, [REDACTED]. (deposition), p. 24-25.
- [REDACTED] also confirmed that no one associated with Mr. Epstein ever tried to call her or contact her through the Internet to try to persuade, induce, entice or coerce her to engage in any sexual activity. See Tab 13, [REDACTED]. (deposition), p. 31.
- Mr. Epstein did not travel to Palm Beach for the purpose of engaging in sexual activity with a minor (necessary for a conviction under § 2423(b)).
 - Mr. Epstein spent at least 100 days a year in Palm Beach for family purposes, business purposes, and social purposes, and to maintain a home.
 - While in Palm Beach, Mr. Epstein routinely visits family members and close friends, has seen his primary care physician for checkups and prescribed tests in the Palm Beach area, and until her death in April of 2004, regularly saw his mother who was hospitalized and then convalesced in south Florida.
 - From 2003 through 2005 there was no month when Mr. Epstein did not spend at least one weekend in Palm Beach.
 - The Palm Beach area is the home base for his flight operations, for maintenance of his aircraft, and for periodic FAA inspections.
 - Additionally, Mr. Epstein’s pilots and engineers all resided in Florida.
- Mr. Epstein’s conduct did not involve force, coercion or violence and any sexual activity that took place was consensual. The witness transcripts are replete with statements such as the following:
 - [REDACTED] stated that she was not persuaded, induced, enticed or coerced by anyone to engage in any sexual activity. See Tab 13, [REDACTED]. (deposition), p. 31.
 - [REDACTED] stated: “[Mr. Epstein] never tried to force me to do anything.” See Tab 14, [REDACTED] Tr. A, p. 12.
 - [REDACTED] stated, “I said, I told Jeffrey, I heard you like massages topless. And he’s like, yeah, he said, but you don’t have to do anything that you

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don't feel comfortable with. And I said okay, but I willingly took it off." See Tab 6, █████ Tr., p. 10.

- █████. █████ also stated "[s]ome girls didn't want to go topless and Jeffrey didn't mind." See Tab 6, █████ Tr., p. 23.
- Mr. Epstein did not engage in luring.
 - Mr. Epstein's message books show that several masseuses would regularly call Mr. Epstein's assistants, without any prompting by Mr. Epstein or his assistants, asking to visit Mr. Epstein at his home.
 - █████. █████ stated "a lot of girls begged me to bring them back [to Mr. Epstein's house]."
- There was no alcohol or drugs involved, a fact that is not in dispute.
- Mr. Epstein has no prior criminal history, a fact that is not in dispute.
- These women do not see themselves as victims.
 - █████. █████ indicated under oath that the FBI attempted to persuade her that she was in fact a "victim" of federal crimes when she herself repeatedly confirmed that she was not. See Tab 14, █████ Tr. A, p. 9-12 and Tab 15, █████ Tr. B, p. 7.

Conclusion

Jeffrey Epstein, a self-made businessman with no prior criminal history, should not be prosecuted federally for conduct that amounts to, the solicitation of prostitution. A federal prosecution based on these facts would be an unprecedented exercise of federal power, a misuse of federal resources, and a prosecution that would carry with it the appearance, if not the reality, of unwarranted selectivity given the incongruity between the facts as developed in this matter and the factual paradigms for all other reported federal prosecutions under each of the three statutes being considered. It would require the pursuit of a novel legal theory never before sanctioned by federal law—and that indeed is inconsistent with each of the statutes prosecutors have identified. Accordingly, we respectfully request that you direct the U.S. Attorney's Office for the Southern District of Florida to discontinue its involvement in this matter, and return responsibility for this case to the State of Florida.