

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA/JOHNSON

JANE DOE #1 AND JANE DOE #2,

Petitioners,

vs.

UNITED STATES,

Respondent.

**UNITED STATES' SEALED REPLY IN SUPPORT OF ITS
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

In their *Response to Government's Sealed Motion to Dismiss for Lack of Subject Matter Jurisdiction* (DE 127) and their *Sealed Supplemental Response Regarding Remedies* ("Sealed Resp."), Petitioners' attempt to establish both their standing in these proceedings and this Court's subject matter jurisdiction over the proceedings. Notwithstanding Petitioners' arguments, however, this Court lacks subject matter jurisdiction over these proceedings because Petitioners lack Article III standing and because the claims raised by Petitioners are not constitutionally ripe.

I. The Claims Raised in the Petition Must Be Dismissed for Lack of Subject Matter Jurisdiction Because the Petitioners Lack Standing to Bring Those Claims.

In their responses to the government's motion to dismiss, Petitioners attempt to establish standing by arguing that the Non-Prosecution Agreement is an illegal agreement that can be set aside in these CVRA proceedings and by asserting, at the eleventh hour, that they are entitled to nearly two dozen additional civil remedies for the claimed violations of the CVRA. Petitioners' efforts, however, are unavailing. Petitioners' claimed CVRA violations/injuries cannot be redressed by the remedies they seek, Petitioners accordingly lack standing to pursue their CVRA

claims, and these proceedings must therefore be dismissed for lack of subject matter jurisdiction.¹ See, e.g., *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81, 185 (2000); *Florida Wildlife Federation, Inc. v. South Florida Water Management Dist.*, 647 F.3d 1296, 1302 (11th Cir. 2011); *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1161 (11th Cir. 2007); *Scott v. Taylor*, 470 F.3d 1014, 1018 (11th Cir. 2006); *National Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1242 (11th Cir. 2003).

A. This Court Must Address the Subject Matter Jurisdiction Issues Raised by the Government Before Allowing These Proceedings to Continue

As a threshold matter, Petitioners have argued that this Court cannot dismiss these proceedings at this time for lack of standing because the standing issues raised by the government are intertwined with the ultimate merits of their CVRA claims. DE 127 at 7-8. That is not so. Although the government disputes Petitioners' claims that the government's actions violated the CVRA,² the government's standing arguments have "assum[ed] *arguendo* that

¹ Petitioners nonetheless contend that, even if no remedy is available to them, they can circumvent constitutional standing requirements by invoking the "capable of repetition, yet evading review" exception for mootness. DE 127 at 18. However, "if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 170 (2000). Moreover, the "capable of repetition, yet evading review" exception is inapplicable in this case because it only applies "where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). Neither of those circumstances exists here.

² For example, the United States has disputed throughout these proceedings that the CVRA grants victims a statutory right to confer with the attorney for the government before federal criminal charges are instituted, and it further contends that Petitioners' claims that they were denied timely notice of court proceedings as required by 18 U.S.C. § 3771(a)(2) are frivolous; the only court proceedings that have taken place in connection with Epstein's criminal offenses were state court proceedings involving state criminal offenses, for which the CVRA does not

Petitioners' rights under the CVRA were violated when Epstein and the USAO-SDFL entered into the Non-Prosecution Agreement." Mot. to Dismiss at 3. Indeed, the basis of the government's motion is that, even assuming that the CVRA was violated as Petitioners claim, Petitioners lack standing to seek redress for those violations, and that these proceedings must accordingly be dismissed for lack of subject matter jurisdiction.

Under these circumstances, this Court is obligated to address and resolve the question of whether it has subject matter jurisdiction before proceeding any further with this matter. *E.g.*, *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999) (holding that "the district court should have resolved the issue of subject matter jurisdiction before reaching the merits of any other issue" and that "the district court erred in failing to first address its power to act"); *id.* at 410 ("Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue."); *Taylor v. Appleton*, 30 F.3d 1365, 1366 (11th Cir. 1994) ("[A] court must first determine whether it has proper subject matter jurisdiction before addressing the substantive issues."); *see also, e.g., Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

require notice, *see, e.g.*, 18 U.S.C. § 3771(a)(2), (b)(1); *cf.* 18 U.S.C. § 3771(a)(2)(A), (C) (curtailing notice rights and obligations even for *federal* proceedings when they involve a state crime); *United States v. Guevara-Toloso*, 2005 WL 1210982, *2 (E.D.N.Y. 2005) (recognizing that the CVRA does not require notice of public court proceedings based on violations of state criminal law), and, in any event, [REDACTED] provided Petitioners with pre-hearing notice of those state proceeding – in which Epstein pled guilty to state criminal charges – upon the government's learning that the state plea hearing had been scheduled, DE 14 at ¶ 11; DE 48 at ¶ 41.

B. *Petitioners Lack Standing to Seek Rescission of the Non-Prosecution Agreement Between the USAO-SDFL and Epstein*

In an effort to establish standing and circumvent the requirements of *Santobello* ■. *New York*, 404 U.S. 257, 262 (1971), and its progeny, Petitioners argue that the Non-Prosecution Agreement between the USAO-SDFL and Epstein is an illegal contract that is void and cannot be enforced by the courts. Petitioners, however, do not actually contend that any term or promise in the Non-Prosecution Agreement is illegal or prohibited by law – and they certainly cite no law establishing that any provision of the agreement is illegal. Indeed, Petitioners have acknowledged, and this Court has also recognized, that the USAO-SDFL and Epstein can legally enter into an agreement containing the terms and promises in the Non-Prosecution Agreement. *See, e.g.*, DE 15 (July 11, 2008 Hr’g Tr.) at 22 (setting forth Petitioners’ agreement that “it is within [the government’s] discretion” to “decide on [its] own that . . . the agreement was fair after [the government] ha[s] talked with the victims”); *see also id.* at 6-7 (Court’s recognition that government “can agree to prosecute or it can agree to going forward with the agreement it had already reached and after consulting [Petitioners] and in taking into consideration [Petitioners’] views, decide to go forward anyway”); DE 99 at 4 (citing 18 U.S.C. § 3771(d)(6) and recognizing that CVRA does not constrict prosecutorial discretion regarding charging and handling of criminal matters).

Because the Non-Prosecution Agreement in this matter does not contain terms or promises prohibited by law (and is therefore not an illegal agreement), it is legally distinct from the “illegal agreements” in the cases cited by Petitioners. *See* DE 127 at 8-11; DE 48 at 37-39. The plea agreements in the cases relied upon by Petitioners contained (or were challenged as containing) unlawful terms or promises that, to be performed, would have required the respective courts to impose legally prohibited sentences; such unlawful terms/promises, unlike the lawful

terms in the Non-Prosecution Agreement, could not be enforced. *See State v. Garcia*, 582 N.W.2d 879, 881-83 (Minn. 1998) (plea agreement promised a sentence that did not contain a statutorily-required 10-year conditional release term and would have required court imposition of an unlawful sentence); *State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998) (holding that court could not impose a concurrent sentence that was prohibited by law despite fact that defense and prosecution understood plea agreement to promise such a concurrent sentence); *Ex parte Rich*, 194 S.W.3d 508, 514-15 (Tex. Crim. App. 2006) (holding that court could not impose a sentence prohibited by law despite plea agreement which called for a sentence that “exceed[ed] the statutory range of punishment”); *State v. Mazzone*, 268 W.Va. 368, 371, 374, 572 S.E.2d 891, 894, 897 (2002) (holding that court could not enforce plea agreement that called for court to unlawfully sentence the defendant by treating two misdemeanor offenses as felony offenses); *see also United States v. Walker*, 98 F.3d 944, 946-47 (7th Cir. 1996) (concluding that judge was not compelled to impose a concurrent sentence where judge had erroneously represented at defendant’s arraignment that any sentence in the case would be concurrent with a sentence that the defendant was already serving – a legally erroneous construction of 18 U.S.C. § 3858(b) – and where rescission “would [have] restore[d] the defendant to the approximate status quo ante”); *Craig v. People*, 986 P.2d 951, 959-60, 961-93 (Colo. 1999) (holding that plea agreement made no unlawful promises, but concluding that court would not have been required to impose an unlawful sentence without a statutorily-required parole term if the plea agreement had promised such an unlawful sentence).

Apparently recognizing that the Non-Prosecution Agreement and its terms are not unlawful, Petitioners instead claim that the agreement is illegal because it “was arrived at illegally” when the USAO-SDFL allegedly acted in violation of 18 U.S.C. § 3771 by failing to

confer with Petitioners about the Non-Prosecution Agreement before entering into that agreement with Epstein. DE 127 at 8; *see also id.* at 9 (contending that agreement was “negotiated . . . in violation of the victims’ rights”). Even assuming *arguendo* that § 3771 was violated when the USAO-SDFL and Epstein entered into the Non-Prosecution Agreement, any such failing in the manner in which the USAO-SDFL and Epstein “arrived at” the Non-Prosecution Agreement would not make the otherwise lawful agreement – which the government had the prosecutorial discretion to negotiate and enter, *see* 18 U.S.C. § 3771(d)(6) (“Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”) – illegal or void *ab initio*. Indeed, if § 3771 had made the agreement illegal and void *ab initio*, then Epstein would never have been legally required to abide by the otherwise lawful terms of the Non-Prosecution Agreement. Yet, § 3771 clearly would not have provided Epstein any relief from his obligations under the Non-Prosecution Agreement. On the contrary, the CVRA makes clear that “[a] person accused of the crime may not obtain any form of relief” pursuant to the Act. 18 U.S.C. § 3771(d)(1). Thus, at most, a government failure to comply with § 3771 when entering into an otherwise legal agreement might arguably make that agreement *voidable*, like when there is fraud or duress in the making of a contract, but it would not make the agreement *void*.³

³ “A void contract is no contract at all; it binds no one and is a mere nullity. . . . A voidable contract, on the other hand, is one to which one or more of the parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract or to extinguish the power of avoidance by ratifying the contract.” 17A Am. Jur. 2d Contracts § 10; *see also* Restatement (Second) of Contracts § 7 & cmts. a, e. Because the Petitioners’ claims and noncompliance with the CVRA would at most make the Non-Prosecution Agreement voidable, not void, the cases cited by Petitioners concerning void agreements, *see* DE 127 at 12, are inapposite.

A voidable agreement, however, is not automatically subject to rescission. On the contrary, contract law – which governs the Non-Prosecution Agreement⁴ – has long established that the actions of a party seeking the rescission or cancellation of a contract may bar such relief:⁵

Where a party, with knowledge of facts entitling him to rescission of a contract or conveyance, afterward, without fraud or duress, ratifies the same, he has no claim to the relief of cancellation. An express ratification is not required in order thus to defeat his remedy; any acts of recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it, have the effect of an election to affirm.

Hendricks ■ *Stark*, 99 Fla. 277, 285, 126 So. 293, 296-97 (Fla. 1930) (internal quotation omitted); *see, e.g., United States* ■ *Baird*, 218 F.3d 221, 230-31 (3d Cir. 2000) (recognizing that “[u]ntil the party who has the power of avoidance elects to exercise it, the contract remains intact. Moreover, even though one of the parties has the power of avoidance, he may extinguish that power by ratification of the contract.”) (quoting John E. Murray, Jr., *Murray on Contracts* § 17, at 31 (3d ed. 1990)); *AVVA-BC, LLC* ■ *Amiel*, 25 So. 3d 7, 11 (Fla. 3d DCA 2009) (“[W]here a party seeking rescission has discovered grounds for rescinding an agreement and either remains silent when he should speak or in any manner recognizes the contract as binding upon him, ratifies or accepts the benefits thereof, he will be held to have waived his right to

⁴ “Nonprosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law.” *United States* ■ *Castaneda*, 162 F.3d 832, 835 (5th Cir. 1998); *see also Taylor* ■ *Singletary*, 148 F.3d 1276, 1284 (11th Cir. 1998) (“When enforcing an immunity agreement, we look to the terms of the agreement itself, determined by applying common law contractual principles.”); *United States* ■ *Thompson*, 25 F.3d 1558, 1562 (11th Cir. 1994) (“In determining the extent of immunity afforded a defendant under an immunity agreement, a court should apply basic principles of contract law”).

⁵ Ordinarily, rescission of an agreement is a remedy reserved to the parties to that agreement or those in contractual privity with them. *See, e.g., Thompkins* ■ *Lil’ Joe Records, Inc.*, 476 F.3d 1294, 1315 (11th Cir. 2007) (holding that “the first requirement of a suit for rescission under Florida law” is “that the parties to the lawsuit lie in contractual privity”).

rescind.”) (reversing judgment rescinding agreement) (quotation omitted); Restatement (Second) of Contracts § 380(1)-(2) (power to avoid, *i.e.*, to rescind or cancel, a voidable contract is lost if party seeking to avoid contract “manifests to the other party his intention to affirm [the contract] or acts with respect to anything that he has received in a manner inconsistent with disaffirmance”); Restatement (Second) of Contracts § 380 cmt. a (“A party who has the power of avoidance may lose it by action that manifests a willingness to go on with the contract. Such action is known as ‘affirmance’ and has the effect of ratifying the contract.”); 17A Am. Jur. 2d Contracts § 11 (“The defect in a voidable contract may be cured by ratification by the party at whose instance it might have been avoided, and ratification may be express or implied by the conduct of the parties.”) (footnotes omitted).

When a party delays in seeking rescission, especially when the delay prevents restoration of the status quo, or when the party treats the agreement as binding or seeks a benefit or performance under that agreement, that party is thereafter foreclosed from seeking rescission of the agreement. *See, e.g., Abbadessa* ■ *Moore Business Forms, Inc.*, 987 F.2d 18, 23-24 (1st Cir. 1993) (holding that voidable contracts could not be rescinded where parties seeking rescission on basis of duress treated agreements as binding and sought benefits pursuant to the agreements) (applying New Hampshire law); *Diffenderfer* ■ *Heublein, Inc.*, 412 F.2d 184, 188-89 (8th Cir. 1969) (concluding that contract, even if procured by duress, was ratified by actions of alleged victim who later acquiesced in a course of action under contract); *Mazzoni Farms, Inc.* ■ *E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 313 (Fla. 2000) (concluding that “[a] prerequisite to rescission is placing the other party in status quo” and that “a party who accepts the proceeds and benefits of a contract remains subject to the burdens the contract places upon him”) (internal quotation omitted); Restatement (Second) of Contracts § 380; *see also Barnette* ■ *Wells Fargo*

Nevada Nat. Bank of San Francisco, 270 U.S. 438, 444-46 (1926) (holding that cancellation of conveyance was precluded by delay in seeking that remedy and affirmative action evincing election to allow agreement to stand); *Blinco* ■ *Green Tree Servicing LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005) (“Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.”); *Rood Co.* ■ *Bd. of Public Instruction of Dade County*, 102 So. 2d 139, 141-42 (Fla. 1958) (holding that rescission/cancellation of an agreement is not available as a remedy where it is not sought promptly, the agreement is ratified, or benefits are sought or accepted pursuant to the agreement); 17A Am. Jur. 2d Contracts § 11 (“If a person wants to rely upon the invalidity of a voidable contract, he or she must disclaim it and refuse to permit anything to be done under it to the extent it concerns him or her.”); 25 Am. Jur. 2d Duress and Undue Influence § 31 (contract that is voidable due to duress is ratified if, *inter alia*, the victim delays in seeking relief from the contract, “affirmatively acknowledges the validity of the contract,” or “allow[s] other persons to act on the contract in such a way as would be to their detriment if the contract was not upheld”); *cf. Molinos Valle Del Cibao, C. por A.* ■ *Lama*, 633 F.3d 1330, 1355 (11th Cir. 2011) (“Ratification of an agreement occurs where a person expressly or impliedly adopts an act or contract entered into in his or her behalf by another without authority.”) (quoting *Deutsche Credit Corp.* ■ *Peninger*, 603 So.2d 57, 58 (Fla. 5th DCA 1992) (citations omitted)).

The actions that Petitioners have taken since learning of the Non-Prosecution Agreement legally preclude them from seeking rescission of the Non-Prosecution Agreement. When Petitioners had the opportunity to address rescission of the Non-Prosecution Agreement before the terms of that agreement were performed – that is, before Epstein served the state court sentence that was induced by the agreement – they withdrew their request that this Court treat the

matter as an emergency requiring expedited resolution. *See* DE 15 at 25-26; DE 99 at 4 (“Plaintiffs explained that their petition did not present an emergency and that therefore an immediate resolution was not necessary.”). Then, rather than unqualifiedly seeking rescission or cancellation of the Non-Prosecution Agreement because of asserted violations of the CVRA, Petitioners instead opted to evaluate the Non-Prosecution Agreement and its potential benefits to them, as well as the possibility that they could make use of the agreement in their planned civil lawsuits against Epstein. *See* DE 27 (Aug. 14, 2008 Hr’g Tr.) at 6 (“[I]f the agreement was designed to protect these victims in a criminal as well as a civil context, and we are going to be filing civil cases against Mr. Epstein, and this agreement, undoubtedly it will play a big role in the amount of protection the victims have been allotted, as well as the course of action in the civil cases.”); *id.* at 18 (announcing that Petitioners would be “evaluat[ing] the effect of th[e] [Non-Prosecution] agreement and whether or not we’re going to continue to pursue this case”). Indeed, Petitioners explained to the Court that rescission of the Non-Prosecution Agreement would likely not serve their best interests. *See id.* at 4 (“[B]ecause of the legal consequences of invalidating the current agreement, it is likely not in my clients’ best interest to ask for the relief that we initially asked for.”). Moreover, after announcing their indecision to pursue the setting aside of the Non-Prosecution Agreement, and after seeking permission to disclose the Non-Prosecution Agreement to others, Petitioners had no pending request for any particular form of relief from this Court – and certainly no pending request to rescind the Non-Prosecution Agreement – for more than 18 months. *See* Case Docket Sheet; DE 99 at 4 (“This action was relatively inactive for the next year and one-half while Plaintiffs litigated civil actions against Epstein.”); *see also* DE 27 at 16. Instead, Petitioners deferred any effort to have the Court set

aside the Non-Prosecution Agreement and allowed Epstein to serve the state prison sentence that he accepted in reliance on and as part of his agreement with the USAO-SDFL.

While Petitioners delayed their decision and efforts to rescind the Non-Prosecution Agreement, Petitioners contemporaneously advanced the obligations that Epstein had undertaken in the Non-Prosecution Agreement, demanding that Epstein perform pursuant to the Non-Prosecution Agreement in the civil lawsuits that they had instituted against him. Indeed, Petitioners and other asserted victims of Epstein relied upon the Non-Prosecution Agreement when seeking civil relief against Epstein in their civil lawsuits and affirmatively advanced the terms of the Non-Prosecution Agreement as a basis for civil relief from Epstein. *See, e.g.*, Compl. ¶¶ 18-20, *E.W. █ Epstein*, Case No. 50-2008-CA-028058 (Fla. 15th Jud. Cir.) (asserting, on Sept, 10, 2008, that Epstein’s “agreement with the Federal Government acknowledge[ed] that E.W. was a victim of his conduct” and that Epstein was “thus estopped by his . . . agreement with the Federal Government from denying the acts alleged in this Complaint, and must effectively admit liability to the Plaintiff”); Am. Compl. ¶¶ 20-22, *E.W. █ Epstein*, Case No. 50-2008-CA-028058 (Fla. 15th Jud. Cir.) (asserting same on Dec. 23, 2008) (attached as Exhibit B); Compl. ¶¶ 18-20, *L.M. █ Epstein*, Case No. 50-2008-CA-028051 (Fla. 15th Jud. Cir.) (asserting, on Sept, 10, 2008, that Epstein’s “agreement with the Federal Government acknowledge[ed] that L.M. was a victim of his conduct” and that Epstein was “thus estopped by his . . . agreement with the Federal Government from denying the acts alleged in this Complaint, and must effectively admit liability to the Plaintiff”); Am. Compl. ¶¶ 20-22, *L.M. █ Epstein*, Case No. 50-2008-CA-028051 (Fla. 15th Jud. Cir.) (asserting same on Dec.

⁶ Petitioners have previously cited to and relied upon their complaints in *E.W. █ Epstein*, Case No. 50-2008-CA-028058 (Fla. 15th Jud. Cir.), and *L.M. █ Epstein*, Case No. 50-2008-CA-028051 (Fla. 15th Jud. Cir.), in these proceedings. *See* DE 48 at ¶ 1.

23, 2008) (attached as Exhibit D) *see also* First Am. Compl. ¶¶ 32-33, *Doe* █. *Epstein*, Case No. 08-80893-CIV-MARRA (S.D. Fla.) (“assert[ing] a cause of action against the Defendant, Jeffrey Epstein, pursuant to [18 U.S.C. § 2255] and the [Non-Prosecution] agreement between the Defendant, Jeffrey Epstein, and the United States Government”); Compl. ¶¶ 19-20, *L.M.* █. *Epstein*, Case No. 09- 81092-CIV-Cohn (S.D. Fla.) (asserting that plaintiff was “covered by” provisions of the Non-Prosecution Agreement between the government and Epstein and that Epstein was thus “estopped by his plea and agreement with the Federal Government from denying the acts alleged in [the] Complaint, and must effectively admit liability to the Plaintiff, L.M., including admitting liability for all counts enumerated in this Complaint”).⁷

Thus, Petitioners abandoned their initial request for immediate court intervention; announced that “it is likely not in [Petitioners’] bests interest to ask for the relief that [Petitioners] initially asked for” because of “the legal consequences of invalidating the [Non-Prosecution Agreement]”; delayed any identification of the relief that they intended to seek for their claimed CVRA violations; and sought to enforce the terms of the Non-Prosecution Agreement to obtain civil relief from Epstein in their civil lawsuits. Even assuming *arguendo* that the CVRA would allow a victim to seek rescission of a non-prosecution agreement between the government and an uncharged individual, *Petitioners’ actions* would legally preclude them from obtaining such a remedy in these proceedings. *See, e.g., Blinco*, 400 F.3d at 1312; *Rood*, 102 So. 2d at 141-42; *AVVA-BC*, 25 So. 3d at 11; Restatement (Second) of Contracts § 380(1)-(2) & cmt. a.

Additionally, in light of Petitioners’ conduct with respect to the Non-Prosecution Agreement, Petitioners’ reliance on *In re Dean*, 527 F.3d 391 (5th Cir. 2008), *see* DE 127 at 6,

⁷ This court may take judicial notice of its records. *See United States* █. *Rey*, 811 F. 2d 1453, 1457 n.5 (11th Cir. 1987).

fails to support their efforts to seek rescission of the agreement. In *In re Dean*, in response to the victims' mandamus petition, the appellate court ordered a stay that allowed the victims to litigate their CVRA rights in a manner that safeguarded their role in the criminal justice process while maintaining the status quo. See 527 F.3d at 393 (order "directed the district court to take no further action to effect the plea agreement"). Indeed, the proceedings were still at a point where no sentence had been imposed or served and where the district court could still "consider the victims' objections and concerns in deciding whether the plea agreement should be accepted." *Id.* at 396; see Fed. R. Crim. P. 11(c)(3), (e). In contrast, no steps were taken by Petitioners to request or ensure the maintenance of the status quo in this matter. Instead, Petitioners abandoned their initial requests for emergency relief under the CVRA, failed to pursue the expedited enforcement contemplated by the CVRA, deferred making a decision to seek rescission of the Non-Prosecution Agreement, allowed Epstein to continue serving his state court sentence in accordance with the Non-Prosecution Agreement, and allowed their CVRA petition to languish before this Court as they pursued civil lawsuits against Epstein in which they invoked the terms of the Non-Prosecution Agreement as a basis for relief. Thus, in stark contrast to *Dean*, rescission has become unavailable as a remedy because the status quo cannot be restored and because Petitioners have acted in a manner that has ratified the Non-Prosecution Agreement. See *Mazzoni Farms*, 761 So. 2d at 313 (concluding that "[a] prerequisite to rescission is placing the other party in status quo"); *Renfrow v. First Mortg. America, Inc.*, 2011 WL 2416247, *3 (S.D. Fla. June 13, 2011) (Marra, J.) ("restoring the parties to the *status quo ante* is an element of a rescission claim"); see also, e.g., *Blinco*, 400 F.3d at 1312; *AVVA-BC*, 25 So. 3d at 11; Restatement (Second) of Contracts § 380.

In sum, under the circumstances present in this matter, the Non-Prosecution Agreement is not subject to being set aside, rescinded, or canceled – regardless of whether or not the government failed to comply with the CVRA. On the contrary, *Santobello* and its progeny require the USAO-SDFL to continue to abide by the terms of the Non-Prosecution Agreement, and due process precludes this Court from rescinding the agreement when one of the parties to that agreement (Epstein) is not a party to the proceedings.⁸ See Mot. to Dismiss at 3-5. Accordingly, Petitioners cannot obtain redress for whatever CVRA injury the Non-Prosecution Agreement may have caused them, and they accordingly lack standing to proceed with these proceedings.

C. Because the CVRA Does Not Provide for Civil Remedies, Petitioners Cannot Obtain Redress for Claimed CVRA Injuries Through Their Requests for Civil Remedies. Accordingly, Petitioners Lack Standing in These Proceedings.

Confronted with the government’s jurisdictional challenge to their request to have this Court set aside the Non-Prosecution Agreement, Petitioners list – for the first time after more than three years of litigation – more than a dozen additional civil remedies which they now seek for their claimed violations of the CVRA. See DE 127 at 14-15; Sealed Resp. at 3-4. In doing

⁸ Petitioners contend that the government lacks standing to argue that a court order setting aside the Non-Prosecution Agreement would amount to a constitutional violation of Epstein’s rights and would require the government to act unconstitutionally. DE at 127 at 11. That argument– that the government cannot object to being compelled to violate the constitutional rights of individuals, rights which the Constitution charges the government with protecting, and cannot seek to prevent the court from committing constitutional error – defies credulity. See, e.g., *In re Paradyne Corp.*, 803 F.2d 604, 608 n.7 (11th Cir. 1986) (“The government has standing to seek disqualification of defense attorneys facing potential conflicts of interest due to the government’s interest in preventing reversals of convictions on sixth amendment grounds . . .”). Indeed, it is ironic that such an argument is made in a proceeding under the CVRA, which charges the government with ensuring that the rights of third parties– crime victims – are protected in criminal proceedings. See 18 U.S.C. § 3771(c)(1). Here, moreover, the government is not seeking affirmative relief or court intervention, but is instead seeking both to ensure that it discharges its own duties and obligations in a constitutional matter and to prevent a constitutional violation from occurring.

so, Petitioners presume that the CVRA authorizes some form of civil suit or civil cause of action through which they can pursue a panoply of civil legal and equitable remedies. That assumption, however, is erroneous. The CVRA does not contemplate civil litigation, and the civil remedies that Petitioners seek are simply unavailable under the CVRA.

As courts have recognized, the CVRA's function is to protect crime victims from the perpetrators of the crimes against them and to provide those victims with the opportunity to participate in the federal criminal justice process involving those crimes. *See United States v. Moussaoui*, 483 F.3d 220, 234 (4th Cir. 2007) ("The CVRA was designed to protect victims and guarantee them some involvement in the criminal justice process."); *see also, e.g., In re Gyamfi*, 362 F. App'x 385, 386 (4th Cir. 2010) (same); *In re Siler*, 571 F.3d 604, 609 (6th Cir. 2009) ("The CVRA provides the district court with authority to protect the victim's limited right to participate in the criminal trial process.").

To protect the rights conferred on crime victims by § 3771(a) and to secure contemporaneous victim participation in the criminal justice process, the CVRA created a very specific procedural enforcement scheme designed to quickly resolve issues affecting victims' rights. 18 U.S.C. § 3771(d); *see, e.g., id.* § 3771(d) (3) (requiring district court to "take up and decide any motion asserting a victim's right forthwith"); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 55 (1st Cir. 2010) ("The CVRA plainly envisions that crime victims' petitions challenging a denial of their rights will be taken up and decided in short order. It requires expeditious consideration by the district court [and] quick appellate review . . ."). That enforcement scheme, however, does not contemplate or authorize the filing of any civil lawsuit or any other civil litigation by a crime victim, nor does it create any civil remedy for a violation of the CVRA. *See, e.g., Moussaoui*, 483 F.3d at 234 ("The rights codified by the CVRA . . . are

limited to the criminal justice process”); *In re Gyamfi*, 362 F. App’x at 386 (holding that “petitioner was not entitled to the protections of 18 U.S.C. § 3771 in his district court proceedings which were civil in nature”). Indeed, the CVRA expressly provides that there is “[n]o cause of action” in the enforcement scheme established by § 3771(d). *See* 18 U.S.C. § 3771(d)(6) (providing for “No cause of action.”).

Instead of authorizing a victim to institute a civil action, the CVRA created a specific victims-rights-enforcement scheme within the federal criminal justice process – indeed, within Title 18 of the United States Code, which addresses “Crimes and Criminal Procedure.”⁹ That rights-enforcement scheme is based on the filing of a “motion asserting a victim’s rights” – not a civil complaint or a civil lawsuit. 18 U.S.C. § 3771(d)(3); *see Sieverding* ■ *U.S. Dept. of Justice*, 693 F. Supp. 2d 93, 110 (D.D.C. 2010) (recognizing that it is “only through a motion” that the CVRA “permits” individuals to assert statutory rights arising under the CVRA, such as the “right to confer” and “discuss . . . allegations of criminal acts and [DOJ’s] decisions to prosecute or not prosecute”) (citing 18 U.S.C. § 3771(d)(3)); *see also, e.g., In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009) (“The CVRA contemplates that individuals asserting victim status *may bring a motion in the district court* even when criminal proceedings are not ongoing, and that the district court’s denial of such a motion is reviewable by mandamus.”) (citing 18 U.S.C. § 3771(d)(3); emphasis added); *compare* Fed. R. Civ. P. 3 (“A civil action is commenced by filing a complaint with the court.”).¹⁰ The CVRA allows the filing of such a motion “in the

⁹ More specifically, the CVRA is found in Part II of Title 18, which is the part of the United States Code specifically devoted to “Criminal Procedure.”

¹⁰ Unlike other legislation, *see, e.g.,* 26 U.S.C. § 6110(d)(3) (allowing nonparty intervention in certain tax proceedings to protect a taxpayer’s identity), the CVRA also does not grant victims a right to intervene in court proceedings. *See Brandt* ■ *Gooding*, 636 F.3d 124, 136 (4th Cir. 2011) (“[T]he CVRA’s plain language makes no reference to intervention; the Act therefore grants no privilege, much less an unconditional right, to intervene.”) (quotation omitted).

district court in which a defendant is being prosecuted for the crime, or if no prosecution is underway, in the district court in the district in which the crime occurred.” 18 U.S.C. § 3771(d)(3). By allowing a victim to file a motion “in the district court in the district in which the crime occurred” even when “no prosecution is underway,” the CVRA grants all victims the same avenue of relief – a motion through which to assert their rights within the criminal justice system. *Id.* But nothing in the CVRA grants any victim a civil enforcement option or any additional remedies by virtue of the facts that a prosecution has not been instituted and that the CVRA thereby authorizes the victim to file his § 3771(d)(3) motion as a freestanding miscellaneous proceeding. 18 U.S.C. § 3771. On the contrary, the CVRA charges courts with ensuring victim rights in “court proceeding[s] involving an offense against a crime victim,” not in civil proceedings. 18 U.S.C. § 3771(b)(1). Finally, the CVRA also creates a process for expedited review by a court of appeals of the denial of a motion authorized by § 3771. 18 U.S.C. § 3771(d)(3).

Apparently dissatisfied with the rights-enforcement scheme created by Congress, Petitioners seek to engraft an entire civil remedial scheme onto the CVRA despite the fact that the legislatively-created enforcement scheme for CVRA rights is found in the criminal justice process, contemplates no civil proceedings, and provides for no causes of action. *See* DE 127 at 4-5. The cases cited by Petitioners, *see* DE 127 at 4, 6, do not advance their efforts to expand the CVRA into a civil remedial scheme. Those cases support the unremarkable proposition that courts generally have power to grant appropriate relief for recognized civil causes of action,¹¹ but, as previously explained, *there is no civil cause of action* under the CVRA. The CVRA

¹¹ Notably, Petitioner quoted from the *dissent* in *Intracoastal Transp., Inc.* █ *Decatur County*, 482 F.2d 361 (5th Cir. 1973); the majority actually held that the act it was considering created no private cause of action, and it remanded the case “with directions to dismiss appellees’ complaint.” *Id.* at 367-68.

creates no causes of action and only provides for the filing of a “motion” to enforce victim rights in “court proceeding[s] involving an offense against a crime victim,” *i.e.*, within a criminal proceeding. Indeed, as explained above, the CVRA contains a “carefully crafted and detailed enforcement scheme,” the existence of which “provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.” *United States States* ■ *Monzel*, 641 F.3d 528, 542 (D.C. Cir.), *cert. denied*, No. 11-85, ___ S. Ct. ___, 2011 WL 3055311 (Nov. 28, 2011) (quoting *Mertens* ■ *Hewitt Associates*, 508 U.S. 248, 254 (1993)); *see United States* ■ *Hunter*, 548 F.3d 1308, 1315 (10th Cir. 2008) (declining to “to read additional remedies” into the CVRA beyond those expressly contained in the Act); *see also Karahalios* ■ *Nat’l Fed’n of Fed. Employees*, 489 U.S. 527, 533 (1989) (“[I]t is . . . an ‘elemental canon’ of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.”) (quoting *Transamerica Mortgage Advisors, Inc.* ■ *Lewis*, 444 U.S. 11, 19 (1979)); *Nat’l R.R. Passenger Corp.* ■ *Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.”); *McDonald* ■ *Southern Farm Bureau Life Ins. Co.*, 291 F.3d 718, 725 (11th Cir. 2002) (“When Congress creates certain remedial procedures, we are, ‘in the absence of strong indicia of contrary congressional intent, . . . compelled to conclude that Congress provided precisely the remedies it considered appropriate.’”) (quoting *Karahalios*, 489 U.S. at 533). Moreover, the additional civil remedies that Petitioners seek to engraft onto the CVRA are simply not recognized remedies within the criminal justice system, of which the CVRA is a part. Such civil remedies are simply incompatible with criminal proceedings, and, notwithstanding Petitioners’ arguments, there is nothing whatsoever in the CVRA to indicate that Congress was taking the

novel step of introducing a far-flung civil remedial scheme into the criminal justice process through the CVRA.

Because the panoply of civil remedies requested by Petitioners are unavailable in these proceedings under the CVRA, Petitioners lack standing to pursue those remedies, and this Court must accordingly dismiss the proceedings for lack of subject matter jurisdiction.

D. *The Remedies Petitioners Seek Cannot Serve to Remedy Their Claimed CVRA Injuries, and Petitioners Thus Lack Standing in These Proceedings.*

II. Petitioners' CVRA Claims Must Be Dismissed for Lack of Subject Matter Jurisdiction Because They Are Not Constitutionally Ripe.

Conclusion

For the reasons set forth above and in the United States' *Sealed Motion to Dismiss for Lack of Subject Matter Jurisdiction*, the United States respectfully requests that this Court enter an order dismissing the Petitioners' claims and these proceedings for lack of subject matter jurisdiction.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

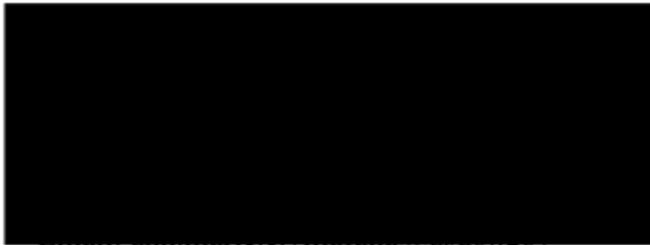
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *United States' Sealed Reply in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction* was served via United States Mail this 24th day of January, 2012, upon Counsel for Petitioners Jane Doe #1 and Jane Doe #2, accompanied by a copy of the November 7, 2011 *Sealed Order Granting Government's Motion for Limited Disclosure of Grand Jury Matter*. Pursuant to the Order regarding the disclosure of Grand Jury Information, a copy was not served upon the proposed intervenors.

Assistant United States Attorney

SERVICE LIST

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Case No. 08-80736-CIV-MARRA/JOHNSON
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