I. [CAPTION]

"Due process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes." *United States v. Hill*, 643 F.3d 807, 874 (11th Cir. 2011), *quoting United States v. Harvey,* 869 F.2d 1439, 1443 (11th Cir.1989) (en banc). *See, e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971)("when a plea rests in any significant degree on a promise ... of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled"); *United States v. Al-Arian*, 514 F.3d 1184, 1190 (11th Cir. 2008)("Due process requires the government to adhere to the promises it has made in a plea agreement"). A person's reliance interests relating to a non-prosecution agreement are entitled to the same constitutional protection. *See*, *e.g.*, *United States* v. *Stolt-Nielsen*, 524 F. Supp. 2d 609, 615-16 (E.D. Pa. 2007)(non-prosecution agreements "are to be construed in light of 'special due process concerns'" (quoting *United States* v. *Baird*, 218 F.3d 221, 229 (3d Cir. 2000) (citations omitted)); *United States* v. *Garcia*, 519 F.2d 1343, 1345 (9th Cir. 1975)("these principles are fully applicable to the deferred prosecution agreement between the Government and Garcia."); *see also Cady* v. *Arenac County*, 574 F.3d 334, 341-42 (6th Cir. 2009) (comparing a deferred prosecution agreement to a plea agreement and concluding that a prosecutor was entitled to absolute immunity in connection with entering into a deferred prosecution agreement). Thus, the government is, as it itself recognizes, constitutionally required to abide by the terms of the nonprosecution agreement that it entered into with Mr. Epstein. *See* Doc. 205-2 at 3-4 ("[C]onstitutional due process guarantees do not allow either the Non-Prosecution Agreement – which by its terms induced Epstein to, *inter alia*, plead guilty to state criminal charges and serve an 18-month sentence of state incarceration – or the governmental obligations undertaken therein to be set aside."). Indeed, this Court has also recognized the binding nature of the NPA. *See* Opinion and Order, February 21, 2019, Doc. 435 at 27 ("Although the binding effect of the NPA was contingent

upon Epstein pleading guilty to the state charges, that contingency was out of the control of the government. *The government's hands were permanently tied if Epstein fulfilled his obligations under the NPA.*" (emphasis added)); *id.* at 30 n.6 ("Once an NPA is entered into without notice, the matter is closed . . . .").

Under the circumstances of this case, it would be fundamentally unfair to Mr. Epstein and a violation of his rights to due process of law to invalidate the NPA as a remedy for the CVRA violation found by the Court.[1] Compliance with the CVRA was the duty of the government, not of Mr. Epstein. While Mr. Epstein was understandably concerned about confidentiality, it was for the government to decide the extent to which it could accommodate Mr. Epstein's desire for confidentiality consistent with its obligations under the CVRA. If the government believed, as it has told the Court that it did, that the CVRA did not require it to inform petitioners about the NPA, Mr. Epstein certainly was not obliged to insist that it do so. The government has explained to the Court why it believes it complied with the requirements of the CVRA, and the Court has rejected those contentions. The government's non-compliance, as found by the Court, is not, however, the fault of Mr. Epstein, and he should not be penalized for it. It is standard fare for defense counsel to make proposals to the government as to how matters should proceed or how they should be resolved, and it is up to the government to determine how far it may agree to such proposals consistent with law, DOJ policy, and its perception of the public interest. Once the

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[1] Because this memorandum is directed solely to the question of remedy, it does not address the findings of facts in this Court's Opinion and Order or the rulings of law made based on those facts. What Mr. Epstein will say is that he was not a party to the summary judgment proceedings, and the government's factual admissions on which the Court predicated certain of its findings—admissions made solely for the purposes of petitioners' motion for partial summary judgment, *see* Doc. 407 at 1 n.1—are not binding on him. And in arguing herein that the Court *should* not invalidate the NPA, he is not abandoning his primary argument that the Court *cannot* invalidate the NPA to remedy a CVRA violation, although he recognizes that the Court has decided otherwise.

government has entered into an agreement with a criminal defendant, such as the NPA here, the defendant is constitutionally entitled to rely on the government's performance of it.

The inequities in invalidating the NPA at this juncture are stark. "Nonprosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law. Under these principles, if a defendant lives up to his end of the bargain, the government is bound to perform its promises." *United States v. Castaneda*, 162 F.3d 832, 835-36 (5th Cir. 1998). Mr. Epstein, in good faith reliance on that agreement, has fully performed each and every one of his obligations under the NPA. Solely because of the obligations imposed on him by the NPA, he pled guilty to state court charges and served 13 months of an 18-month prison term, followed by a year of community control. He has not contested liability in civil actions brought against him under 18 U.S.C. §2255, has paid the attorney representing claimants who brought actions, and has entered into civil settlements with all such §2255 claimants, amounting to many millions of dollars. He has registered as a sex offender. He has settled monetary damage civil suits brought by other claimants outside of the 18 U.S.C. §2255 context due in significant part to his plea of guilty and to the other requirements of the NPA.

Mr. Epstein can never be returned to the status quo ante—the time he spent in jail and on probation cannot be restored to him, the prejudice he has suffered from being required to register as a sex offender cannot be undone, and he will never recoup the millions of dollars he paid in legal fees and settlements because the NPA required him to do so. Invalidating the agreement after full performance by Mr. Epstein would have severe due process implications.[2]

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[2] Where such grave constitutional concerns are present, the doctrine of constitutional avoidance counsels strongly against using the CVRA to rescind private individual's nonprosecution agreement as a remedy for violation of the statute's terms by the government.

The inequities in invalidating the NPA become even more stark when petitioners' own conduct is examined. Even though the action has been pending since 2008, petitioners knowingly sat on their CVRA claims for years as Mr. Epstein served a prison sentence and as he satisfied all the requirements of his non-prosecution agreement. Rather than seek emergency relief from the Court, petitioners appeared at a status conference on July 11, 2008, *knowing that Mr. Epstein was in prison*, and told the Court that they saw no reason to proceed on an emergency basis. Doc. ___ **[Trans. July 11, 2008**] at 24-25. Moreover, in a hearing one month later, petitioners specifically asked that the Court *not* invalidate the non-prosecution agreement "because of the legal consequences of invalidating the current agreement, it is likely not in [the petitioners'] interest to ask for the [rescission] relief that we initially asked for." Doc. ___ **[Trans. August 14, 2008]** at 4. Petitioners thus eschewed moving this case forward in favor of their pursuing, over at least the next eighteen months, civil settlement actions against Mr. Epstein *prior to, rather than concurrently with*, litigating their CVRA rights.[3] As this Court has

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That doctrine "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005). To the extent that the CVRA is susceptible of a construction which would permit rescission of a nonprosecution agreement as a remedy, as this Court has concluded (a proposition with which Mr. Epstein strenuously disagrees), the doctrine "directs that 'when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail.'" *Brown v. United States*, 748 F.3d 1045, 1068 (11th Cir. 2014), *quoting Martinez,* 543 U.S. at 380-81. The manifest constitutional problems which would be raised by rescission of the NPA as a remedy – the infringement of the constitutionally-granted prerogative of the Executive to decide whom to charge with a federal crime and the violation of Mr. Epstein's right under the Due Process Clause – mandate forgoing this choice of remedy.

[3] The CVRA itself makes clear that it contemplates swift action on actions brought to complain of violations of CVRA rights. It provides:

> The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district

observed, "[o]ver the course of the next eighteen months, the CVRA case stalled as petitioners pursued collateral civil claims against Epstein." Doc. 189 at 5, ¶ 8. As the direct result, Mr. Epstein has, to his detriment, served a prison sentence (2008-09), served a year of community control probation (2009-10), and made monetary payments that are directly related to his obligations under the NPA to pay legal fees for attorney representation and not to contest liability for underlying offenses to those suing under §2255 alone. So inactive were petitioners in this case that the Court dismissed the case for lack of prosecution in September, 2010. (Doc. 38).

II. [EQUITABLE ESTOPPEL]

There was a reason why petitioners were in no hurry to proceed with their CVRA action: so that they could rely on the NPA to establish liability in their §2255 cases. In both of their civil actions for damages against Mr. Epstein, petitioners took the position that Mr. Epstein was estopped from contesting liability by the NPA, thus relying on it to advance their litigation positions. In Jane Doe No. 1's complaint she stated that she

> is included in the list of victims identified by the Federal Government as victims of the Defendant, Jeffrey Epstein's illegal conduct. The Defendant, Jeffrey Epstein, is thus estopped by his plea and agreement with the Federal Government from denying the acts alleged in this Complaint, and must effectively admit liability to Plaintiff.

[cite to civil complaint] Jane Doe No. 2's complaint contained identical language. *See* **[insert cite to civil complaint]** A few months later, the petitioners amended their civil complaints,

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> court in the district in which the crime occurred. *The district court shall take up and decide any motion asserting a victim's right forthwith.* If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith *within 72 hours after the petition has been filed*, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration.

18 U.S.C.A. § 3771(d)(3)(emphasis added).

stating, in identical language in both amended complaints:

> 20. In June 2008, in the Fifteenth Judicial Circuit in Palm Beach County, Florida, Defendant, Jeffrey Epstein, entered pleas of "guilty" to various Florida state crimes involving the solicitation of minors for prostitution and the procurement of minors for the purposes of prostitution.
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> 21. As a condition of that plea, and in exchange for the Federal Government not prosecuting the defendant, Jeffrey Epstein, for numerous federal offenses, Defendant Jeffrey Epstein, additionally entered into an agreement with the Federal Government acknowledging that the Plaintiff was a victim of his conduct.
>
> 22. The Plaintiff is included in the list of victims identified by the Federal Government as victims of the Defendant, Jeffrey Epstein's illegal conduct. Defendant, Jeffrey Epstein, is thus estopped by his plea and agreement with the Federal Government from denying the acts alleged in this Complaint, and must effectively admit liability to the Plaintiff.

[cite to amended complaints][4]

One of the purposes the government sought to achieve through the NPA was to ensure monetary compensation for petitioners and others similarly situated, and petitioners readily availed themselves of that benefit. Only *after* they had successfully resolved their civil cases against Mr. Epstein, achieving the benefits that the agreement conferred upon them, did petitioners resurrect their claim that the NPA should be invalidated. Petitioners should not now be rewarded with the relief of setting aside the very agreement on the validity of which they relied to support their civil actions against Mr. Epstein. Indeed, the doctrine of equitable estoppel precludes such a course. "The doctrine of equitable estoppel is grounded in fairness." *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1342 (11th Cir. 2012). "The purpose of the doctrine is to prevent a plaintiff from, in effect, trying to have his cake and eat it too; that is, from

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[4] The complaints and amended complaints have been submitted as exhibits to prior pleadings by the government. *See* Doc. 408, Exs. P and Q; Doc. 205-6 **[check filing for how to further identify]**

"rely[ing] on the contract when it works to [his] advantage [by establishing the claim] and repudiat[ing] it when it works to [his] disadvantage . . . ." *In re Humana Inc. Managed Care Litigation*, 285 F.3d 971, 976 (11th Cir. 2002), *rev'd on other grounds*, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), *quoting Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. 688, 692 (S.D.N.Y. 1966). This case does not involve an arbitration clause which petitioners are seeking to evade, but the same equitable estoppel principle applies. "Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005), *citing Humana*, 285 F.3d at 976. As third-party beneficiaries of the NPA, petitioners claimed the benefit of the NPA in their state court damage claims against Epstein by arguing that Epstein was precluded by the NPA from contesting liability to them. After successfully concluding their damage claims actions, petitioners should not now be heard to contend that the same NPA they relied on is invalid because it was entered into in violation of their rights under the CVRA.

III. [JUDICIAL ESTOPPEL]

Judicial estoppel precludes a party from "asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002), *overruled in part*, *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1176–77 (11th Cir. 2017). It is "an equitable concept intended to prevent the perversion of the judicial process," *id.*, which prohibits "parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001).

"Stated simply, the doctrine of judicial estoppel rests on the principle that "absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." *Slater*, 871 F.3d at 1180-81, *quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996). The Eleventh Circuit "employs a two-part test to guide district courts in applying judicial estoppel: whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were 'calculated to make a mockery of the judicial system.' *Slater*, 871 F.3d at 1181, *quoting Burnes*, 291 F.3d at 1285. These two factors "are not inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine." *Burnes*, 291 F.3d at 1286.

This doctrine bars petitioners' contention that the NPA should be invalidated as part of the remedy for the CVRA violation found by the Court. In their civil actions, both petitioners relied on the provisions of the NPA to preclude Mr. Epstein from contesting his liability to them, also telling this Court at about the same time that they did *not* seek to invalidate the NPA, as it was not in their interests to do so. *See* page ___, *supra.* Petitioners—third-party beneficiaries of the NPA[5]—knew when they brought suit that Mr. Epstein, under the terms of the NPA by which

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[5] To be a third-party beneficiary of a contract, it must have been "the intent and purpose of the contracting parties . . . to confer a direct and substantial benefit upon the third party." *Blu-J, Inc. v. Kemper C.P.A. Grp.*, 916 F.2d 637, 640 (11th Cir. 1990). The NPA provides:

> If any of the individuals referred to in paragraph (7), *supra*, elects to file suit pursuant to 18 U.S.C. § 2255, Epstein will not contest the jurisdiction of the United States District Court for the Southern District of Florida over his person and/or the subject matter, and Epstein waives his right to contest liability and also waives his right to contest damages up to an

he was bound, was prohibited from contesting liability, and, living up to the terms of the agreement, on which petitioners were expressly relying, Mr. Epstein did not contest liability and entered into settlement agreements with them that conferred on them substantial financial benefit. **[is this accurate??]**In effect, petitioners were suing, in part, to enforce the terms of the NPA for their benefit. There was not the slightest suggestion at that time, when it served the petitioners' interests, that the NPA was vulnerable to invalidation and, if invalidated, would eliminate the benefit on which petitioners were relying.

Now, having reaped for themselves the benefits that the NPA conferred upon them, petitioners claim that the NPA is invalid because they were not consulted before the government entered into it and that they would have opposed the NPA had they been consulted, thus arguing against the very benefits which they exploited to their great advantage. The first part of the *Slater* standard is plainly satisfied here: the position now taken by the petitioners in this case could not be more inconsistent with the position it took in the state civil actions. Then, the contract was argued to be valid and binding on Mr. Epstein; now, it is argued to be the product of misconduct and therefore invalid. Such blatant inconsistency is certainly calculated to make a mockery of the judicial system: trying to convince one court to rule in favor of petitioners based on the binding validity of the NPA and then trying to convince this Court that the agreement was void *ab initio*

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amount as agreed to between the identified individual and Epstein, so long as the identified individual elects to proceed exclusively under 18 U.S.C. § 2255, and agrees to waive any other claim for damages, whether pursuant to state, federal, or common law.

NPA at 4, ¶8. By imposing on Mr. Epstein the duty to refrain from challenging his civil liability to petitioners, the NPA conferred "a direct and substantial benefit" on them, and was intended by the parties to do so.

because they were not consulted before the government entered into the agreement. This was no inadvertence or mistake. Petitioners are represented by able and sophisticated lawyers, petitioners' manipulation of the legal system for their benefit was intentional and calculated. It would indeed make a mockery of the judicial system if petitioners are permitted to capitalize on the liability concession in the NPA, with Mr. Epstein adhering to the obligations that the NPA imposed on him and on which petitioners expressly relied in their civil actions, only to now have that very agreement invalidated at the behest of petitioners after they had availed themselves of the benefits that the agreement conferred on them.

IV. [EXECUTIVE DISCRETION]

The CVRA cannot be construed to invalidate a pure exercise of executive discretion such as the decision to enter into a nonprosecution agreement. "Few subjects are less adapted to judicial review that the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . . ." *United States v. Fokker Services B.V.*, 818 F.3d 733, 741 (D.C.Cir. 2016), *quoting Newman v United States*, 382 F.2d 479, 480 (D.C.Cir. 1967). As the Supreme Court has explained:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to

outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Wayte v. United States, 470 U.S. 598, 607-08 (1985).

Fokker Services addressed the intersection of judicial and executive powers with respect to a deferred prosecution agreement and held, based on constitutional considerations regarding the powers conferred on the Executive, that the district court could not reject the deferred prosecution agreement in that case based on its disagreement with the Executive's charging decisions. Unlike a deferred prosecution agreement, which results in the filing of criminal charges and thus in at least some role for the judicial system to play, nonprosecution agreements are contracts between the government and the defendant that are never filed with the court and do not result in the institution of criminal charges. *See Fokker Services*, 818 F.3d at 733 (describing nonprosecution agreements as the "out-of-court analogue[]" of deferred prosecution agreements); *see also* Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components, U.S. Att'ys re: Selection and Use of Monitors in Deferred Prosecution Agreements and Non–Prosecution Agreements with Corporations (Mar. 7, 2008) at note 2, *available at* http://www.justice.gov/usam/criminal-resource-manual-163-selection-and-use-monitors (last visited February 24, 2019)("In the nonprosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court.").

If courts are not free to invalidate deferred prosecution agreements, then nonprosecution agreements are even less the business of the courts, given the complete absence of judicial involvement in their negotiation and execution.

The government has absolute discretion to decide not to prosecute. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 . . . (1987) ("[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review."). *Even a formal, written agreement to that effect, which is often referred to as a "non-prosecution agreement," is not the business of the courts.*

United States v. HSBC Bank USA, N.A., 2013 WL 3306161 at *5 (E.D.N.Y. July 1, 2013)(emphasis added). *See United States v. Adams*, 281 F. Supp. 3d 622, 623-24 (M.D. La. 2017)("Courts may not engage in judicial review of pretrial diversion agreements by deciding who may be placed in pretrial diversion programs . . . or curbing the Government's decision to permit a party to participate in pretrial diversion. (citation omitted)). Here, the Court expressly did *not* rule "that the decision not to prosecute was improper." Opinion and Order at 32-33.

When individuals or entities enter into nonprosecution agreements with the government, which will generally require that they substantially change their position in reliance, for example, through cooperation, disgorgement, or other detrimental reliance, they must be able to rely on the predictability and certainty inherent in such agreements, *i.e.,* that if they, as Mr. Epstein has done, fully perform their duties and obligations under the agreement, they will not, at some later date, be again subject to investigation and possible prosecution for the offenses encompassed within their NPAs. Invalidation of this NPA could have mischievous ramifications well beyond this particular case, if persons or entities entering into NPAs with the government are exposed to indefinite uncertainty regarding the extent to which they are actually protected by their NPAs.