

MEMORANDUM

To: Jeffrey Epstein File

From: Gregory L. Poe

Date: April 16, 2015

Re: Potential Participation by *Amici* in *Does v. United States*, No. 08-CV-80736-KAM (S.D. Fla.) Regarding Scope and Meaning of Crime Victims' Rights Act (18 U.S.C. § 3771)

I. Introduction.

This memorandum addresses why potential *amici* may wish to consider seeking to file a brief in *Does v. United States*, No. 08-CV-80736-KAM (S.D. Fla.), regarding the scope and meaning of the Crime Victims' Rights Act of 2004 ("CVRA") (codified at 18 U.S.C. § 3771). In *Does*, two asserted victims of Jeffrey Epstein in connection with a sex offense investigation filed a petition on July 7, 2008, claiming that the United States Department of Justice ("DOJ") had violated the CVRA by failing to notify them that Epstein and DOJ entered into a Non-Prosecution Agreement ("NPA") containing various obligations and conditions, and seeking rescission of the NPA as a remedy for the asserted violation. Dkt. 1.¹ Over the government's opposition, the district court ruled in two orders that (1) the rights of crime victims under the CVRA, including the right to confer with prosecutors, attach before charges are filed (see *Does v. United States*, 817 F. Supp. 2d 1337, 1341-43 (S.D. Fla. 2011); *Does v. United States*, 950 F. Supp. 2d 1262, 1266-68 (S.D. Fla. 2013)); and (2) a right of rescission is available to such crime victims as a potential remedy if the government violates their rights under the CVRA (*Does*, 950 F. Supp. 2d at 1266-70).²

¹ References to the docket in *Does* (No. 08-CV-80736-KAM) are in the form "Dkt. ____."

² Among other things, the government and Mr. Epstein agreed in the NPA that Mr. Epstein would agree to enter guilty pleas to two solicitation offenses in the State of Florida and make a binding recommendation for an eighteen-month sentence in county jail followed by twelve months of community control. See 950 F. Supp. 2d at 1264; see also *Does v. United States*, 749 F.3d 999, 1002-03 (11th Cir. 2014) (describing dormancy of the CVRA petition and related civil proceedings). The state court accepted the guilty pleas and sentenced Mr. Epstein as agreed. Mr. Epstein was subsequently incarcerated in county jail and completed service of his sentence. The district court held that a rescission remedy may be available under the CVRA in Mr. Epstein's case despite the fact that Mr. Epstein pleaded guilty in state court in reliance on the NPA, was incarcerated in reliance on the NPA, and complied with his obligations under the NPA. The district court has allowed Mr. Epstein "to intervene with regard to any remedy issue concerning the non-prosecution agreement." *Does v. United States*, 749 F.3d 1003, 1004 (11th Cir. 2014).

Although *Does* arises out of a federal investigation with respect to alleged federal sex offenses (which were never charged), the district court's rulings in *Does* have potentially far-reaching consequences for businesses attempting to resolve investigations through settlement mechanisms such as NPAs. Part II of this memorandum analyzes the CVRA and shows that the statute does not grant enforceable rights to putative crime victims in the pre-charge/investigatory context. Part III shows why the district court's orders in *Does*, which hold to the contrary, are incorrect. Part IV addresses the district court's ruling that the CVRA permits rescission of a non-prosecution agreement (regardless of the reliance and due process interests involved) and shows why that conclusion is wrong. Part V of this memorandum discusses the substantial adverse effects that the court's construction of the CVRA in *Does* potentially could have on a wide range of business interests if the court does not revisit its rulings. Corporations require predictability and reliability in resolving cases through NPAs and similar settlement vehicles, which have become increasingly common in the last 15 years. See, e.g., *2014 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, available at <http://www.gibsondunn.com/publications/Pages/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx> (page last visited April 15, 2015).

The potential problems associated with the district court's orders in *Does* are especially acute in complex investigations with broad public impact. Such matters include, for example, fraud investigations regarding alleged shareholder loss relating to publicly traded companies such as Enron; environmental and industrial matters involving accidents such as the Deepwater Horizon oil spill; pharmaceutical and medical device investigations cases relating to alleged product defects; and other complex regulatory cases. This memorandum includes arguments that potential *amici* may wish to consider in asserting that crime victims under the CVRA have no legal basis on which to (1) challenge or alter pre-charging decisions and agreements by DOJ; and (2) claim that a right of rescission (or any other remedy) exists with respect to NPAs and other pre-charge settlement mechanisms.

Does is pending resolution on the merits. As of the date of this memorandum, the court had not entered a deadline for dispositive motions or set a trial date regarding the question whether the government violated petitioners' rights under the CVRA. Given the scheduling uncertainty, potential *amici* interested in urging the court to revisit its construction of the CVRA should consider preparing a brief and an accompanying motion seeking permission to file, and having the materials ready in advance for filing at the appropriate time.

II. Analysis of the CVRA.

A. Background, Text, and Structure.

The CVRA was enacted in October 2004. *In re Cienfuegos*, 462 F.3d 1160, 1165 (9th Cir. 2006). The CVRA's enactment followed many years of unsuccessful efforts in the United States

Senate to add a victims' rights amendment to the Constitution. See, e.g., 150 Cong. Rec. S4261 (Apr. 22, 2004) (statement of Sen. Feinstein); Paul G. Cassell & Steven Joffe, *A Response to the Critics of the Crime Victims' Rights Act*, 105 Nw. U. L. Rev. 164, 165-67 (2011).³ The CVRA defines a crime victim as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e). The statute also enumerates rights held by crime victims and contains an enforcement mechanism for those rights.

The CVRA specifies eight rights of crime victims (as defined in Section 3771(e)):

- "The right to be reasonably protected from the accused." 18 U.S.C. § 3771(a)(1).
- "The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused." 18 U.S.C. § 3771(a)(2).
- "The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." 18 U.S.C. § 3771(a)(3).
- "The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4).
- "The reasonable right to confer with the attorney for the Government in the case." 18 U.S.C. § 3771(a)(5).
- "The right to full and timely restitution as provided by law." 18 U.S.C. § 3771(a)(6).
- "The right to proceedings free from unreasonable delay." 18 U.S.C. § 3771(a)(7).
- "The right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8).

The CVRA articulates an enforcement framework to protect the rights of crime victims. First, it gives federal judicial officers specific responsibilities. See 18 U.S.C. § 3771(b)(1) ("In any court proceeding involving an offense against a crime victim, the court shall ensure that the

³ The CVRA repealed section 502 of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4820 (which was codified at 42 U.S.C. § 10606). Part of the Crime Control Act of 1990 is known as the Victims' Rights and Restitution Act of 1990 ("VRRRA"). The now-repealed portion of the VRRRA granted rights to crime victims that were defined somewhat differently from the rights granted in the CVRA. Other parts of the VRRRA remain in effect. See, e.g., 42 U.S.C. § 10607 (list of mandatory services for crime victims as defined in the VRRRA).

crime victim is afforded [the rights specified in Section 3771(a)].” Second, it gives Executive Branch officers specific responsibilities. See *id.* § 3771(c)(1) (“Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime” shall “make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)”); *id.* § 3771(c)(2) (requiring “[t]he prosecutor” to “advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a)”). Finally, the CVRA allows both prosecutors and crime victims themselves to enforce rights granted in Section 3771(a). *Id.* § 3771(d)(3) (authorizing crime victims, or their lawful representatives, as well as “the attorney for the Government,” *id.* § 3771(d)(1), to assert the rights granted in Section 3771(a) by motion “in the 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”).

The CVRA requires a district court “to take up and decide [a motion seeking to enforce rights under Section 3771(a)] forthwith.” *Id.* § 3771(d)(3). Under the CVRA, both the government and crime victims may seek expedited mandamus review by a court of appeals of any decision denying relief. *Id.* The government (but not a crime victim) may assert as error on direct appeal any denial of a crime victim’s right. *Id.* § 3771(d)(4). The CVRA also provides that a crime victim may seek to reopen a plea or a sentence in specific and limited circumstances. *Id.* § 3771(d)(5). Section 3771(d)(6) of the CVRA states that “[n]othing in this chapter shall be construed to authorize a cause of action for damages,” and further states that “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”⁴

B. Application of Legal Principles.

Contrary to the district court’s ruling in *Does*, the text, structure, purpose, and legislative history of the CVRA support the conclusion that crime victims do not have enforceable pre-charge rights under the statute. Similarly, the text, structure, purpose, and legislative history of the CVRA are at odds with the district court’s conclusion in *Does* that crime victims may seek and obtain rescission of a pre-charge settlement agreement between the Department of Justice and an

⁴ Section 3771(f)(1) of the CVRA directed the Attorney General to promulgate regulations within one year of the CVRA’s enactment “to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.” Those regulations, which were duly enacted (see 28 C.F.R. § 45.10), designate an administrative authority within the Department of Justice to handle complaints relating to crime victims, and set forth a framework for training and disciplinary sanctions for willful noncompliance with federal laws regarding the treatment of crime victims. See 18 U.S.C. § 3771(f)(2); 28 C.F.R. § 45.10. The CVRA states that “the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint,” and that “there shall be no judicial review of the final decision of the Attorney General by a complainant.” 18 U.S.C. § 3771(f)(2)(D).

individual or entity seeking to resolve a criminal investigation. Indeed, basic principles of statutory construction compel a conclusion that Congress did not intend to afford such a remedy to crime victims under the CVRA. As the Department of Justice has put it: “[T]he rights identified in section 3771(a) [of the CVRA] are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment) and cease to be available if all charges are dismissed either voluntarily or on the merits (or if the Government declines to bring formal charges after the filing of a complaint).” Memorandum Opinion for the Acting Deputy Attorney General from the Office of Legal Counsel dated December 17, 2010. See 35 Op. O.L.C. 1, 2010 WL 6743535 *1 (“OLC Opinion”).

1. Definition of “Crime Victim.” As an overarching point, the definition in the CVRA of “crime victim” itself supports the conclusion that the statute does not grant pre-charge rights to putative (or actual) crime victims. The CVRA extends enforceable rights only to a person “directly and proximately harmed as a result of a commission of a Federal *offense*.” 18 U.S.C. § 3771(a) (emphasis added). Before the filing of a complaint (which is the earliest point in the federal criminal process at which a showing of probable cause is required, see Fed. R. Crim. P. 4(a)), the ability even to identify an alleged “offense” may be in question. Cf. *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) (“To determine a crime victim, then, first, we identify the behavior constituting ‘commission of a Federal offense.’ Second, we identify the direct and proximate effects of that behavior on parties other than the United States. [footnote omitted] If the criminal behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA.”). That problem takes on special significance in complex regulatory cases (*e.g.*, health care cases involving alleged product defects, environmental cases, and fraud cases involving shareholder loss issues). Nothing in the text of the CVRA suggests that Congress intended to allow asserted crime victims to file enforcement actions in such pre-charge circumstances where even the definition of a putative offense standing as the predicate for “crime victim” status under the statute (much less the actual existence of an offense) may be highly uncertain.

Most courts construing the CVRA have declined to characterize alleged victims of uncharged conduct that did not lead to criminal proceedings as “crime victims” who are entitled to enforceable rights. See, *e.g.*, *United States v. Daly*, 2012 WL 315409 *4 (D. Conn. 2012) (“a more logical interpretation of the statute is that a person has the rights of a ‘crime victim’ for purposes of the CVRA no sooner than the point in time when an offense has been charged”); *United States v. Turner*, 367 F. Supp. 2d 319, 326-27 (E.D.N.Y. 2005) (excluding victims of uncharged conduct from the class of those entitled to participatory rights under the CVRA because “the offense charged against a defendant can serve as a basis for identifying a ‘crime victim’ as defined in the CVRA”); *Searcy v. Paletz*, No. 6:07-1389-GRA-WMC, 2007 WL 1875802 *6 (D.S.C. June 27, 2007) (inmate does not qualify as a “crime victim” under the CVRA where there has been a prosecutorial decision not to charge another inmate accused of attacking him); *Searcy v. Skinner*, No. 6:06-1418-GRA-WMC, 2006 WL 1677177 *2 (D.S.C. June 16, 2006) (plaintiff inmate could not use CVRA as a basis to bring action against alleged attacker inmate where

government had declined to initiate a prosecution against the alleged attacker); *In re Merkosky*, 2008 WL 177762 *2 (N.D. Oh. 2008) (courts have found that the CVRA “does not confer any rights upon a victim until a prosecution is already begun”); *Stegman v. United States*, 2015 WL 728487 *1-2 (D. Kan. 2015) (Sections 3771(a)(1) (right to protection from accused) and Section 3771(a)(5) (right to confer) do not apply in pre-charging context); *In re Petersen*, 2010 WL 5108692 *2 (N.D. Ind. 2010) (“the U.S. Attorney didn’t have an obligation under the CVRA to confer with [victims] until after a charge was filed and a case opened”); *United States v. Rubin*, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008) (“the CVRA appears to simply accord [victims] standing to vindicate their rights as victims under the CVRA and to do so in the judicial context of the pending criminal prosecution of the conduct of the accused that allegedly victimized them”); see also *In re W.R. Huff Asset Management (United States v. Rigas)*, 409 F.3d 555 (2d Cir. 2005) (rejecting challenge to settlement agreement in forfeiture action in connection with Rigas/Adelphia fraud case and stating that “the CVRA does not grant victims any rights against individuals who have not been convicted of a crime”); *In re Antrobus*, 563 F.3d 1092, 1099 (10th Cir. 2009) (stating that “the purpose of the CVRA is to permit victim participation in ongoing criminal matters”); *In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010) (characterizing as “uncertain” the question whether a victim has rights before formal charges are filed).⁵

The history of the CVRA’s “crime victim” definition provides further support for the argument that Congress contemplated that the rights enumerated in Section 3771(a) would attach only after the commencement of criminal proceedings regarding an alleged offense. As stated above, the CVRA defines a crime victim as a “person directly and proximately harmed as a result of the commission of a Federal offense[.]” 18 U.S.C. § 3771(e). That definition is taken not from

⁵ The Fifth Circuit may take the position that the right to confer in Section 3771(a)(5) attaches before criminal proceedings have begun. See *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008). For the reasons discussed in Part III below, *Dean* is distinguishable. (And, if its conclusions are taken as a generally applicable holding, the decision is simply wrong.). The district court in *Does*, 817 F. Supp. 2d 1337; 950 F. Supp. 2d 1262, relied on *In re Dean* in concluding that CVRA rights attach before charges are filed; its orders are incorrect for the reasons discussed in Parts III and IV of this memorandum. In *Rubin*, a post-indictment case, the district court, citing *In re Dean*, stated in *dicta* that “the CVRA envisions the possibility of judicial vindication of certain CVRA rights outside the context of an actual prosecution.” 558 F. Supp. 2d at 417 n. 5. That *dicta*, however, contradicts the court’s statement earlier in its order (*id.* at 417) and is in tension with language later in its order. *Id.* at 419 (“assuming that it was within the contemplation and intendment of the CVRA to guarantee certain victim’s rights prior to the formal commencement of a criminal proceeding, the universe of such rights clearly has its logical limits”); *id.* at 425 (if dismissal instead of guilty plea had occurred, it would have been “before movants could rightly be termed victims under the CVRA”). See also *United States v. Okun*, 2009 WL 790042 * 2 (E.D. Va. 2009) (stating in *dicta* in post-indictment context, in course of addressing a government motion on behalf of victim/witnesses to attend trial, that the Fifth Circuit in *In re Dean* “has noted that victims acquire rights under the CVRA even before prosecution”).

VRRRA (the predecessor to the CVRA which defined a “victim” more broadly as “a person that has suffered direct physical, emotional, or pecuniary harm as the result of the commission of a crime,” 42 U.S.C. § 10607(e)(2)), but is instead tied closely to language in the Victim and Witness Protection Act of 1982 (VWPA) and the Mandatory Victims Restitution Act of 1996 (MVRA) that defines a “victim” as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.” See 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2). Restitution, of course, may be ordered only on the basis of an offense of conviction, whereas at least some of the rights enumerated in Section 3771(a) may be read to apply more broadly. See, e.g., *Hughey v. United States*, 495 U.S. 411, 422 (1990) (VWPA authorized restitution only for losses caused by the offense of conviction). Nonetheless, the history of the “crime victim” definition is significant, as courts have recognized. See *Turner*, 367 F. Supp. 2d at 326-27 (“[T]he full Congress passed the [CVRA] knowing that similar language in an earlier victims’ rights bill had been interpreted not to refer to uncharged conduct. . . . Since the [VWPA] and the CVRA use similar definitions of ‘victim,’ it appears that the same reasoning would exclude victims of uncharged conduct from the class of those entitled to participatory rights under the [CVRA]” (footnote omitted; emphasis in original)). See also OLC Opinion, 2010 WL 6743535 at n. 5.

2. The Enumerated Rights.

When viewed as a whole, the eight rights granted in Section 3771(a) should be read to attach only after a court proceeding commences. See *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (describing statutory construction as “a holistic endeavor” (quoting *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 371 (1988))). Five of the enumerated rights are either explicitly confined to a criminal proceeding that has been instituted or require the existence of a criminal proceeding as a necessary predicate. See 18 U.S.C. §3771(a)(2) (right to “notice of any public court proceeding”); *id.* § 3771(a)(3) (“right not to be excluded from any such public court proceeding”); *id.* § 3771(a)(4) (“right to be reasonably heard at any public proceeding”); *id.* § 3771(a)(6) (“right to full and timely restitution”); *id.* § 3771(a)(7) (“right to proceedings free from reasonable delay”). Although the remaining three rights on their face do not explicitly apply only in the post-charge context, see *id.* § 3771(a)(1) (“right to be reasonably protected from the accused”); *id.* § 3771(a)(5) (“reasonable right to confer with the attorney for the Government in the case”); *id.* § 3771(a)(8) (“right to be treated with fairness and with respect for the victim’s dignity and privacy”), the most natural interpretation of the statute is that those three rights, like the other five, do not apply before criminal proceedings are initiated in court.

As discussed below, each of the arguably ambiguous provisions is most logically interpreted on its own to apply only in the post-charge context. Buttressing the specific arguments, however, is the canon of statutory interpretation *noscitur a sociis* (meaning that “words and people are known by their companions,” *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000)), which guides a court to consider that “several items in a list shar[ing] an attribute counsels in favor of interpreting

the other items as possessing that attribute as well.” *Beecham v. United States*, 511 U.S. 368, 371 (1994). The fact that only three of the enumerated rights are arguably ambiguous and are interspersed with rights that plainly apply only to post-charge proceedings shows that the three rights in question should be informed by the meaning of the surrounding provisions. Cf. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 311-12 (1961) (construing for tax purposes the term “discovery” in the phrase “exploration, discovery or prospecting” to be limited to the finding of minerals, as suggested by its association with exploration and prospecting, and therefore inapplicable to income from a patented item). See OLC Opinion, 2010 WL 6743535 *8. Furthermore, when interpreting a statute, a court must presume in the absence of contrary evidence that Congress “legislated against the background of our traditional legal concepts.” *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978). Traditionally in the federal system, “a private citizen lack[ed] a judicially cognizable interest in the prosecution or nonprosecution of another.” *Linda R.S. v. Richard D. and Texas, et al.*, 410 U.S. 614, 618 (1973); see Cassell & Joffe, 105 Nw. U. L. Rev. at 180. Because the CVRA changed that tradition, the proposition that Congress intended to reach even further and allow putative crime victims to enforce CVRA rights during investigations requires a showing that the statute’s text, structure, purpose, and history do not support.

a. Section 3771(a)(1) (“right to be reasonably protected from the accused”).

For several reasons, the right granted in Section 3771(a)(1) should be read to apply only after court proceedings have begun. First, “the accused” is a term of art with deep roots in Anglo-American jurisprudence that identifies a person charged with a crime. See Black’s Law Dictionary 25 (9th ed. 2009) (“A person who has been arrested and brought before a magistrate or who has been formally charged with a crime. . . . A person against whom legal proceedings have been initiated.”); see also *Michigan v. Jackson*, 475 U.S. 625, 632 (1986) (“[A]fter a formal accusation has been made . . . a person who had previously been just a ‘suspect’ has become an ‘accused’ within the meaning of the Sixth Amendment”). In construing statutes, “where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.” *Morissette v. United States*, 342 U.S. 246, 263 (1952). Accord *United States v. Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008) (“Rationally, ‘accused’ [in Section 3771(a)(1)] must mean accused by criminal complaint, information or indictment of conduct victimizing the complainant. The right created or acknowledged by the CVRA to be ‘reasonably protected from the accused’ cannot have ripened before the earliest of one of these happenings.”); *Turner*, 367 F. Supp. 2d at 332 (Section 3771(a)(1) “appears to add no new substance to the protection of crime victims afforded by the Bail Reform Act [of 1984]”).

The statutory history underlying Congress's enactment of the CVRA further supports such an interpretation of Section 3771(a)(1). Section 503 of the VRRRA, which was enacted in 1990, requires designated "responsible officials" at a federal agency "engaged in the detection, investigation or prosecution of crime" to "arrange for a victim to receive reasonable protection from a suspected offender" at the "earliest opportunity after the detection of a crime." See 42 U.S.C. §§ 10607(a), (b), and (c)(2). That requirement remains in force and explicitly applies in the pre-charge context. The distinction between the government's obligation under the VRRRA to provide victims with reasonable protection from a "suspected offender" and the CVRA's "right to be reasonably protected from the accused," 18 U.S.C. § 3771(a)(1), underscores the conclusion that Section 3771(a)(1) applies only in the post-charge context. What is more, the right to protection from the accused in the CVRA replaced the right in Section 502 of the VRRRA "to be reasonably protected from the accused offender." See 42 U.S.C. § 10606(b)(2) (repealed). Construing 18 U.S.C. § 3771(a)(1) to provide the same scope of protection to a victim as 42 U.S.C. § 10607(c)(2) would fail to respect Congress's intent to use different words in two provisions of the same statutory scheme (and in the two portions of the VRRRA as originally enacted). That conclusion is forbidden. See, e.g., *Bailey v. United States*, 516 U.S. 137, 145 (1995) (holding that "a legislature is presumed to have used no superfluous words," and construing words "use" and "carry" in the same statutory scheme as having separate and non-overlapping meanings). See OLC Opinion, 2010 WL 6743535 *5.

Finally, the legislative history of the CVRA shows that Congress did not intend Section 3771(a)(1) to apply before criminal proceedings are initiated in court, and that the provision's purpose was two-fold: first, to protect victims during the pendency of criminal proceedings; and second, to protect victims post-conviction by ensuring that they could be heard with respect to parole and early release determinations concerning convicted offenders. See, e.g., *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) ("[A] court appropriately may refer to a statute's legislative history to resolve statutory ambiguity"). As a colloquy between the two original sponsors of the Senate bill, Senators Feinstein and Kyl, shows:

Ms. Feinstein: One final point. Throughout this act, reference is made to the "accused." Would the Senator also agree that it is our intention to use this word in the broadest sense *to include both those charged and convicted* so that the rights we establish apply throughout the criminal justice system?

Mr. Kyl: Yes[.]

150 Cong. Rec. 7304 (2004) (emphasis added). See also *In re Siler*, 571 F.3d 604, 609-10 (6th Cir. 2009) ("the legislative history of the bill indicates that Congress was concerned only with the

victim's right to take part in the criminal trial. See, e.g., 150 Cong. Rec. S4260, 4262-63 (2004)" (rejecting attempt under CVRA to unseal presentence investigation reports).⁶

b. Section 3771(a)(5) (the "reasonable right to confer with the attorney for the Government in the case")

The language of Section 3771(a)(5), which grants a "reasonable right to confer with the attorney for the Government in the case," also should be read to apply only after the initiation of criminal proceedings. First, the phrase "in the case" suggests that a court proceeding must be pending. See, e.g., *Chavez v. Martinez*, 538 U.S. 760, 766 (2003) ("a 'criminal case' at the very least requires the initiation of legal proceedings"); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action."); Black's Law Dictionary at 243 (defining "case" as a "civil or criminal proceeding, action, suit or controversy at law or in equity"). The legislative placement of a definite article ("the") before the word "case" further supports the interpretation that "the case" means a specific adversary proceeding instead of an ongoing investigation. Cf. *Rumsfeld Padilla*, 542 U.S. 426, 434-35 (2004) (interpreting use of the definite article "the person" with respect to a statutory provision concerning a habeas corpus custodian to mean that there is usually only one proper custodian – not several different ones). See OLC Opinion, 2010 WL 6743535 *6.

In the same vein, Congress's decision to tie a crime victim's right to confer to "the attorney" for the government in the case shows that the right attaches only after a criminal proceeding exists in which a prosecutor has appeared. Before a charge is filed, prosecutors may not play a lead role or even a substantial one, especially if an investigation has not reached the stage where evidence is being presented to a grand jury. See OLC Opinion, 2010 WL 6743535 *6.⁷ If Congress had intended the right to confer to attach during investigations, it could not

⁶ In statutory interpretation, "[f]loor statements are not given the same weight as some other types of legislative history, such as committee reports, because they generally represent only the view of the speaker and not necessarily that of the entire body. However, floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members, see *NLRB v. St. Francis Hosp. of Lynwood*, 601 F.2d 404, 415 n. 12 (9th Cir.1979), and they are given even more weight where, as here, other legislators did not offer any contrary views." *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011, 1015 (9th Cir. 2006).

⁷ Indeed, even in grand jury proceedings, the foreperson, not a prosecutor, is technically "in charge," Fed. R. Crim. P. 6(c), and such proceedings are secret. Fed. R. Crim. P. 6(e). Not surprisingly, the legislative history shows that Congress (consistent with Rule 6(e)'s strictures) did not intend to permit crime victims to attend grand jury proceedings. See 150 Cong. Rec. 22,951 (2004) (statement of Senator Kyl) ("the right is limited to public proceedings, thus grand jury proceedings are excluded from the right"). See OLC Opinion, 2010 WL 6743535 at n. 8.

logically have tied the right to confer to “the attorney for the Government[,]” given that an attorney may not even be involved in an investigation. *Id.* To underscore the point, Congress showed when it enacted the VRRRA in 1990 that it knows how to define the participants in the pre-charge context. In the VRRRA, Congress required designated “responsible officials” at all agencies “engaged in the detection, investigation or prosecution of crime,”⁴² U.S.C. § 10607(a), to provide specified services. In contrast, Congress’s decision in the CVRA to tie the right to confer to an “attorney” makes sense only if the right to confer relates to the various issues that arise during a criminal proceeding (*e.g.*, release and detention, witness considerations, trial and guilty plea issues, and sentencing issues).⁸

The legislative history of the CVRA further shows that the right to confer attaches only after the initiation of criminal proceedings. Floor statements by Senators Feinstein and Kyl (the original sponsors of the act in the Senate) emphasize the point. As Senator Feinstein stated, “[t]he victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused. . . . Of course, in providing victim information or opinion it is important that the victim be able to confer with the prosecutor concerning a variety of matters and proceedings. . . . This right is intended to be expansive. For example, *the victim has the right to confer with the Government concerning any critical stage or disposition of the case.*” 150 Cong. Rec. 7302 (2004) (emphasis added). For his part, Senator Kyl stated that “[t]his right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. *Under this provision, victims are able to confer with the Government’s attorney about proceedings after charging.*” *Id.* (emphases added); 150 Cong. Rec. S4260, S4268 (Apr. 22, 2004).

Finally, the legislative history regarding the failed effort to amend the Constitution with a victims’ rights provision, which led to the compromise enactment of the CVRA, *Kenna*, 435 F.3d at 1016, supports the conclusion that the “reasonable right to confer with the attorney for the Government in the case” granted in Section 3771(a)(5) of the CVRA takes effect only the initiation of a criminal proceeding in court. See Sen. Rep. No. 108-191 (November 7, 2003) at 1 (“The Committee on the Judiciary, to which was referred the joint resolution (S.J. Res. 1) to propose an

⁸ Section 3771(c)(1) of the CVRA, which requires federal officials involved in the “detection, investigation or prosecution of crime [to] make their best efforts” to ensure that crime victims are accorded their CVRA rights, does not mean that the rights listed in Section 3771(a) apply in the investigatory or pre-charge context. The phrase simply identifies the class of federal officials to which a “best efforts” obligation has been assigned (and does not define when rights arise). See OLC Opinion, 2010 WL 6743535 * 11.

amendment to the Constitution of the United States to protect the rights of crime victims, having considered the same, reports favorably thereon, without amendment, and recommends that the joint resolution do pass”). The Senate Report states that “*victims do not have the right to be heard by prosecutors and defense attorneys negotiating a deal. Nonetheless, the Committee anticipates that prosecutors may decide, in their discretion, to consult with victims before arriving at a plea*” (emphases added). Sen. Rep. No. 108-191 at 37.⁹ As Judge Kozinski noted regarding another CVRA issue, the Senate Report regarding the failed constitutional amendment “disclose[s] a clear congressional intent” in determining the meaning of the CVRA. See *Kenna*, 435 F.3d at 1016; accord *Daly*, 2012 WL 315409 *4; *Stegman*, 2015 WL 728487 *1-2; *In re Petersen*, 2010 WL 5108692 *2.

- c. Section 3771(a)(8) (the “right to be treated with fairness and with respect for the victim’s dignity and privacy”

Just as Section 3771(a)(1) (protection from the accused) and Section 3771(a)(5) (right to confer) are best read to apply only after the initiation of criminal proceedings in court, the “right to be treated with fairness and with respect for the victim’s dignity and privacy,” 18 U.S.C. § 3771(a)(8), is best read in the same light. The wording of Section 3771(a)(8) is arguably broader than the language in the other seven provisions in Section 3771(a). Respect for fairness, dignity, and privacy is a concept with theoretically broad application not necessarily tied to court-related proceedings. But the right granted in Section 3771(a)(8) makes sense only in the context of the other seven rights enumerated in the CVRA. The interpretive canon *noscitur a sociis*, discussed above at 7-8, applies with special force to Section 3771(a)(8). The logical application of the first seven rights, as discussed above, should inform and guide any interpretation of the language in Section 3771(a)(8).

Moreover, nothing in the CVRA *prohibits* the Department of Justice from applying the rights and principles in Section 3771(a)(8) (or, for that matter, the rights and principles in the other seven provisions of Section 3771(a)) in the investigatory/pre-charge context as a matter of policy. The Department of Justice, in fact, *has* such a policy regarding the pre-charge context. See *Attorney General Guidelines for Witness and Victim Assistance* (rev. May 2012) at 41-42 (“In circumstances where plea negotiations occur before a case has been brought, Department policy is that this should include reasonable consultation prior to the filing of a charging instrument with the court”). The question is whether the right conferred in Section 3771(a)(8) attaches and is enforceable by a putative crime victim in court before a charge even exists. For the reasons discussed above at 10-12 with respect to Section 3771(a)(5) (the right to confer with an attorney for the government in a case), the injection of a court action brought by a putative victim in the investigatory environment, who asserts violations of the right to be treated “with fairness” and

⁹ In fact, the Department of Justice has decided to exercise its discretion exactly in that manner as a matter of discretionary policy as discussed in the next subsection.

with respect for dignity and privacy, could adversely affect and potentially interfere with ongoing investigations and require judicial attention to (and premature conclusions regarding) sensitive matters that may be only nascent from the law enforcement perspective.

The legislative history supports a conclusion that Section 3771(a)(8) applies only after criminal proceedings have commenced in court. As the OLC Opinion states:

Every example of crime victims experiencing unfairness, indignities, or violations of their privacy discussed in the legislative history refers to situations occurring after the filing of charges and typically involved a deprivation of one or more of the other rights protected by the Act as well. For instance, the floor debates reflect concern with the fairness and dignity with which crime victims are treated during pending criminal prosecutions. See, *e.g.*, 150 Cong. Rec. 7296-97 (2004) (statement of Sen. Feinstein) (describing several examples of the failure to notify crime victims of critical hearings in criminal cases, as well as other instances where crime victims were problematically excluded from criminal proceedings); *id.* at 7297 (“This is not the way criminal justice should be practiced in the United States of America. The time has come to give victims of crime the right to participate in the system, the right to notice of a public hearing, the right to be present at that public proceeding, the right to make a statement when appropriate, the right to have restitution, if ordered by a judge, the right to know when your assailant or attacker is released from prison, and the right to be treated by our prosecutors and by our criminal justice system with respect and dignity.”); *id.* at 7298 (statement of Sen. Kyl) (“Fair play for crime victims, meaningful participation . . . in the justice system, protection against a government that would take from a crime victim the dignity of due process – these are consistent with the most basic values of due process in our society.”). [footnote omitted]

OLC Opinion, 2010 WL 6743535 *8. Furthermore, as the OLC Opinion states:

In the more extensive legislative history for S.J. Res. 1, 108th Cong. (2003) (the proposed constitutional amendment for which the CVRA emerged as a statutory substitute), the numerous examples of alleged affronts to fairness, dignity, and privacy suffered by crime victims again uniformly arise from the conduct of criminal proceedings and relate to perceived failures by courts to allow a crime victim to participate meaningfully in those proceedings against the alleged victimizer. See generally S. Rep. No. 108-191, at 19-20, 25, 28 (2003).

Id. at n. 10. As the floor statements reflect, “Congress was concerned with ensuring fair treatment for crime victims in the context of pending criminal proceedings, rather than creating a right that could be asserted independent of any criminal prosecution.” *Id.* *8. In short, the right to fairness,

dignity, and privacy in Section 3771(a)(8), “like the other seven rights, should be understood as applying only after the filing of criminal charges against a defendant.” *Id.*

After the Department of Justice issued the OLC Opinion, Senator Kyl stated in a letter to the Attorney General that “[w]hen Congress enacted the CVRA, it intended to protect crime victims throughout the criminal justice process – from the investigative phases to the final conclusion of a case.” Letter from Senator Kyl to Attorney General Holder (June 6, 2011), *reprinted in* 157 Cong. Rec. S3609, 2011 WL 2223980. Later in 2011, Senator Kyl reiterated that position. Letter from Senator Kyl to Attorney General Holder (November 2, 2011), *reprinted in* 157 Cong. Rec. S7060-01, 2011 WL 5208819. Senator Kyl’s post-enactment interpretation of the CVRA is not consistent with the statute’s text, history, and purpose (as evidenced by Senator Kyl’s own participation in the colloquy with Senator Feinstein). If Section 3771(a)(1) were construed to apply during investigations, a person claiming “crime victim” status would be entitled to seek a court order for protection without any charge pending. In such a scenario, a federal judge would be required to decide whether a federal offense existed, which may require fact-finding that could adversely affect both an ongoing investigation and any ultimate prosecution. *Cf. United States v. Atlantic States Cast Iron Pipe Company*, 612 F. Supp. 2d 453, 535 (D. N.J. 2009) (recognizing in sentencing context that court, in light of CVRA’s definition of “crime victim,” must “make factual findings to determine” whether harm was caused by a “federal offense”). What is more, a putative crime victim would be entitled to seek a writ of mandamus within 72 hours in an “independent cause of action against the district judge,” *In re Stewart*, 641 F.3d 1271, 1274 (11th Cir. 2011), creating another round of fact-based litigation concerning a putative “offense” before Executive Branch action had even occurred.

Apart from the illogic of such a scenario, an interpretation of the CVRA that rights attach before criminal proceedings are instituted would conflict with the principle that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case,” *United States v. Nixon*, 418 U.S. 683, 693 (1974), as well as the requirement in Section 3771(d)(6) of the CVRA requiring that the CVRA not “be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.” See OLC Opinion, 2010 WL 6743535 at n. 7. In any event, statements made after a statute’s enactment are “not a legitimate tool of statutory interpretation.” *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 131 S.Ct. 1068, 1081-82 (2011); *Sullivan v. Finkelstein*, 496 U.S. 617, 631-63 (1990) (Scalia, J., concurring in part) (“the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed”).¹⁰

¹⁰ Senator Kyl suggested in an article not long after the CVRA was enacted that the right to be reasonably protected from the accused may apply “without regard to the existence of legal proceedings” (which could be understood to include the pre-complaint context). See Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9

3. The CVRA's Enforcement Structure.

Just as the provision of rights in Section 3771(a) is best read to apply only in the post-charging context, the CVRA's enforcement structure supports the conclusion that the rights attach only after the government has initiated criminal proceedings. Every enforcement mechanism in the CVRA – including the mechanism that allows crime victims to assert their rights directly – concerns criminal proceedings. First, in Section 3771(b)(1) (under the heading “Rights Afforded”), the CVRA states that “[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a).” That provision explicitly requires courts to afford CVRA rights only *during pending criminal proceedings*. Second, in Section 3771(d)(3), which allows crime victims to assert their rights by motion, the CVRA “explicitly provides crime victims the right to participate in a *pending criminal proceeding* without intervening or becoming a party to the litigation by filing a motion on their own behalf.” See OLC Opinion, 2010 WL 6743535 *9 (emphasis added). Third, in Section 3771(d)(3), the CVRA allows crime victims to seek a writ of mandamus from a court of appeals if the district court denies the relief sought by motion in a pending criminal proceeding. What is more, the CVRA requires “[t]he prosecutor” to advise crime victims that they “can seek the advice of an attorney” with respect to their CVRA rights. See 18 U.S.C. § 3771(c)(2). For the reasons discussed above regarding Section 3771(a)(5) (the right to confer with the attorney for the government in a case), “[t]he prosecutor” may not even be identifiable in some pre-charge contexts. As if to highlight the relation of the enforcement mechanisms only to pending criminal proceedings, no provision of the CVRA explicitly allows crime victims to initiate independent judicial proceedings by any mechanism to enforce the rights granted in Section 3771(a).

The legislative history of the CVRA supports the conclusion that the enforcement structure is limited to court proceedings and that “protecting the ability of crime victims to participate in pending criminal proceedings was the primary purpose underlying the Act.” See OLC Opinion, 2010 WL 6743535 *9. As the Office of Legal Counsel has stated:

Much of the impetus for enactment of the CVRA arose after the Tenth Circuit issued a decision in *United States v. McVeigh*, the prosecution of Timothy McVeigh, the bomber of the federal building in Oklahoma City, limiting the ability of victims to enforce in court their rights under the VRRRA. *Id.* [footnote omitted] The district judge ordered the sequestration of crime victims from the trial in anticipation of hearing victim-impact statements at sentencing. The victims and

Lewis & Clark L. Rev. 581, 594 (2005). Notably, Senator Kyl included in his comment only Section 3771(a)(1) (right to protection from the accused) and Section 3771(a)(8) (right to fairness, dignity, and privacy) – *not* Section 3771(a)(5)'s right to confer. *Id.* at 594, 609-10. Senator Kyl's evolving view of the CVRA's scope further demonstrates, even apart from the application of legal principles, that his post-enactment remarks carry no weight.

their families sought mandamus review in the Tenth Circuit, relying, *inter alia*, on the language in section 502(b)(4) of the VRRRA, granting them a “right to be present at all public court proceedings related to the offense.” 106 F.3d 325, 328-29 (10th Cir. 1997). The Tenth Circuit denied the mandamus petition, holding that crime victims lacked standing to enforce their rights under the VRRRA in court. [footnote omitted] *Id.* at 335 (declaring VRRRA enforceable only through the “best efforts” of the Government).

OLC Opinion, 2010 WL 6743535 *9. See also Memorandum for Kathryn Turman, Acting Director, Office for Victims of Crime, from William Michael Treanor, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Effect of 42 U.S.C. Section 10607 on Proposed Revisions to the Attorney General’s Guidelines for Victim and Witness Assistance* at 4 (Jan. 15, 1999) (VRRRA’s “best efforts” obligation does not create judicially enforceable rights).

The legislative history reflects Congress’s acute concern that crime victims should have standing to participate in ongoing criminal proceedings. See, *e.g.*, 150 Cong. Rec. 7295 (2004) (statement of Sen. Feinstein) (“Nowhere was the need for this legislation made more clear than during the trials over the Oklahoma City bombing.”); see also *id.* at 22,953 (statement of Sen. Kyl) (“This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims’ law that this bill replaces.”). Supporters of the CVRA “repeatedly expressed concern regarding the failures of the judicial system to account sufficiently for victims’ interests and emphasized the need to give crime victims the opportunity to participate in such proceedings through judicially-enforceable rights.” OLC Opinion, 2010 WL 6743535 *9. The OLC Opinion adds:

Congress was also troubled generally [before enacting the CVRA] by courts denying victims standing with respect to restitution orders under the VWPA. See S. Rep. No. 108-191, at 13 (2003) (“In those rare cases when [victims seek restitution] they face a daunting array of obstacles, including barriers to their even obtaining ‘standing’ to be heard to raise their claims.”). Prior to the CVRA, courts generally denied victims standing to be heard in VWPA cases. See, *e.g.*, *United States v. Johnson*, 983 F.2d 216, 221 (11th Cir. 1993) (crime victim lacks standing under VWPA to challenge denial of restitution order); *United States v. Kelley*, 997 F.2d 806, 808 (10th Cir. 1993) (same). These cases rested in part on a series of Supreme Court decisions denying standing to crime victims more generally. See, *e.g.*, *Leeke v. Timmerman*, 454 U.S. 83, 86-87 (1981) (because decision to prosecute is solely within discretion of prosecutor, private citizen has no judicially cognizable right to challenge how prosecutor goes about making decision to prosecute); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“a private citizen

lacks a judicially cognizable interest in the prosecution or non-prosecution of another”).

OLC Opinion, 2010 WL 6743535 at n. 13. The OLC Opinion further states:

The legislative history reflects a clear concern with a failure to provide crime victims with a meaningful opportunity to participate in criminal proceedings, and consequently the need to create express enforcement mechanisms for the rights. See, e.g., H.R. Rep. No. 108-711, at 2 (2004), reprinted in 2004 U.S.C.A.N. 2274, 2276 (“Victims of crime often do not feel their voices are heard or that their concerns are adequately addressed in the judicial process. . . . This legislation addresses these concerns by codifying the rights of victims and providing the means to enforce those rights.”); 150 Cong. Rec. 7296 (2004) (statement of Sen. Feinstein) (“In case after case we found victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors to[o] busy to care enough, by judges focused on defendant’s rights, and by a court system that simply did not have a place for them.”); *id.* at 7297 (“The time has come to give victims of crime the right to participate in the system”); *id.* at 7298 (statement of Sen. Kyl) (describing the Act as providing crime victims “meaningful participation . . . in the justice system”).

See 2010 WL 6743535 at n. 14. Just as the text of the CVRA ties enforcement actions to pending criminal proceedings, “the legislative history contains no discussion of the possibility of crime victims bringing independent proceedings to enforce their rights rather than enforcing them in the context of existing, pending criminal proceedings.” *Id.* *9.

The Federal Rules of Criminal Procedure provide further support for the conclusion that the rights granted in Section 3771(a) do not attach before criminal proceedings are initiated in federal court. Fed. R. Crim. P. 1(b)(12), which was added in 2008 (then as Rule 1(b)(11)) to incorporate the definition of “crime victim” in the CVRA, states: “‘Victim’ means a ‘crime victim’ as defined in 18 U.S.C. § 3771(e).” The Committee Notes to the 2008 amendment state: “Upon occasion, disputes may arise over the question whether a particular person is a victim. Although the rule makes no special provision for such cases, the courts have the authority to do any necessary fact finding and make any necessary legal rulings.” The Federal Rules of Criminal Procedure, however, apply only to “criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.” Fed. R. Crim. P. 1(a). The “fact finding” and “legal rulings” that would be required in pre-charge litigation, in other words, would be independent of the procedural rules that would govern the outcome of an actual criminal proceeding (and potentially influence the outcome of an actual criminal proceeding).

4. The “if no prosecution is underway” Clause in Section 3771(d)(3)

Section 3771(d)(3) of the CVRA is a venue provision. It states that 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 court in the district in which the crime occurred.” 18 U.S.C. § 3771(d)(3) (emphasis added). Read in passing, the emphasized phrase may appear to permit a putative crime victim to assert some of the rights listed in Section 3771(a) before criminal proceedings are initiated in a given case. But the language refers only to the period of time between the initiation of a criminal proceeding in court and the filing of formal charges. The language does *not* support the conclusion that the rights listed in Section 3771(a) exist or may be enforced without any criminal proceeding having been instituted.

The word “prosecution” (like “the accused”) is a term of art that refers to the “levying of formal charges, and not merely the issuance of a warrant upon the filing of a complaint[.]” See OLC Opinion, 2010 WL 6743535 *10 (noting that Fed. R. Crim. P. 7(a)(1) “requires that a felony ‘be prosecuted by indictment,’ and therefore any prosecution of a felony must commence with the return of an indictment by a grand jury” or by the filing of an information by the government, *id.* 7(b)). See *Kirby v. Illinois*, 406 U.S. 682, 688-90 (1972) (for purposes of Sixth Amendment right to counsel, “criminal prosecution” does not commence with filing of complaint and issuance of arrest warrant); *United States v. Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987) (filing of complaint and issuance of arrest warrant do not commence criminal prosecution for Sixth Amendment purposes, but rather, based on Fed. R. Crim. P. 7, “prosecution commenced when the indictment was handed down”); *United States v. Alvarado*, 440 F.3d 191, 200 (4th Cir. 2006) (stating that, for Sixth Amendment purposes, “[t]he filing of a federal criminal complaint does not commence a formal prosecution”). Thus, “a ‘prosecution’ does not necessarily commence simply because criminal proceedings have been initiated by the filing of a complaint, although an initial ‘appearance must be held ‘without unnecessary delay’ after a defendant is arrested on a warrant.” OLC Opinion, 2010 WL 6743535 *10 (citing Fed. R. Crim. P. 5(a)(1)(A), which provides that the initial appearance of a person arrested pursuant to a warrant). At an initial appearance, a magistrate judge must inform a person of his rights, afford the person a reasonable opportunity to consult with counsel, and make an initial determination with respect to the defendant’s continued detention. Fed. R. Crim. P. 5(d). Even before a “prosecution” is “underway,” therefore, CVRA-secured rights may be at stake (including the right of crime victims to be heard with respect to the possible release of the defendant). No evidence undercuts the presumption, see *Morissette*, 342 U.S. at 263, that Congress enacted the CVRA consistent with the narrower understanding of the term “prosecution.”¹¹

¹¹ When a person is arrested outside of the district in which a crime is alleged to have occurred, some initial proceedings occur in the district of arrest under Rule 5(c). Section 3771(d)(3)’s requirement that a victim seek relief “in the district court in the district in which the crime occurred” directs the victim to the court where the prosecution most likely would occur (*i.e.*, the

5. The “prosecutorial discretion” Clause in Section 3771(d)(6).

Section 3771(d)(6) provides: “Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.” That statement recognizes the deeply rooted principle that the government controls whether to investigate a case, bring charges, or even abandon a prosecution. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[t]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed”) (citing U.S. Const. art. II, § 3). A conclusion that the rights granted in Section 3771(a) apply in the pre-charging context is in tension with that principle. As discussed above at 13-14, a construction of the CVRA that would allow private individuals to initiate judicial proceedings before any criminal charge has been filed would require judges to make determinations – including whether a “Federal offense” had occurred as a predicate for “crime victim” status under Section 3771(e) – during an ongoing investigation. Nothing in the CVRA’s text, structure, or history suggests that Congress intended that the statute create a pressure point for charging decisions or risk interference with the ability of law enforcement officials to assemble a case. To the contrary, the evidence supports the opposite position.

III. The District Court’s Conclusion in *Does* That CVRA Rights Attach Before a Criminal Proceeding Has Begun Is Erroneous and Should be Reconsidered.

A. The Rationales in the *Does* Orders.

In *Does*, Jane Doe #1 (joined shortly thereafter by Jane Doe #2) filed a petition in the United States District Court for the Southern District of Florida on July 7, 2008 seeking to enforce asserted rights under the CVRA. See 817 F. Supp. 2d at 1339-40. Petitioners alleged that the government violated their rights under the CVRA (including Section 3771(a)(5)’s right to confer with the prosecutor and Section 3771(a)(8)’s right to be treated with fairness) by failing to tell petitioners that (1) negotiations were occurring between the government and counsel for Mr. Epstein with respect to an investigation regarding ostensible federal offenses relating to sexual misconduct; and (2) the government had entered into a non-prosecution agreement (NPA) with Mr. Epstein. *Id.*; Dkt. 1. Petitioners claimed that the NPA should be invalidated as the appropriate remedy. *Id.* at 1341; Dkt. 1.

charging district). That framework is especially sensible because it conforms with Fed. R. Crim. P. 18 (“the government must prosecute an offense in a district where the offense was committed”). See OLC Opinion, 2010 WL 6743535 *10. Although a misdemeanor offense may be charged by complaint, see Fed. R. Crim. P. 58(b)(1), there is no indication that Congress intended the meaning of the word “prosecution” in the venue provision (Section 3771(d)(3)) to turn on that point. To the contrary, the focus in the legislative history and elsewhere is entirely on serious felony offenses.

Over the government's opposition, the district court (the Honorable Kenneth A. Marra) held as a "threshold issue," in an order dated September 26, 2011, that the "CVRA attaches before the government brings formal charges against the defendant." 817 F. Supp. 2d at 1341.¹² First, the court stated a supposed textual rationale that "the statutory language clearly contemplates pre-charge proceedings." *Id.* For that conclusion, the court cited Section 3771(a)(2) and Section 3771(a)(3) (both of which refer to "court proceeding[s]") and stated that CVRA rights attach before a charging instrument is filed because it is "possible" that an initial appearance after a warrantless arrest on a weekday could take place before the filing of a complaint. *Id.* at 1341-42. Second, the court stated that Section 3771(c)(1)'s imposition of obligations on employees of federal agencies "engaged in the detection, investigation, or prosecution" of criminal activity "surely contemplates pre-charge application of the CVRA." *Id.* at 1342. Third, the court stated that the "if no prosecution is underway" language in Section 3771(d)(3) requires a conclusion that CVRA rights attach before charges are filed "to avoid a strained reading of the statute." *Id.* Fourth, the court cited as support for its conclusion the decisions in *In re Dean*, 527 F.3d 391; *Rubin*, 558 F. Supp. 2d 411; *Okun*, 2009 WL 790042; and *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 WL 501321, at *11 (S.D. Tex. 2008) (denying request to reject plea agreement as remedy for asserted violations of CVRA rights but stating that "[t]here are clearly rights under the CVRA that apply before any prosecution is underway."), *mandamus denied in part*, *In re Dean*, 527 F.3d 391.

The district court held in a second order that rescission of the NPA is available as a remedy if it ultimately determines that the government violated petitioners' CVRA rights. See 950 F. Supp. 2d at 1267. The remedy issue is discussed in Part IV below. In the second order, the district court revisited the issue of CVRA rights, and narrowed its focus to whether the government had violated the right to confer granted in Section 3771(a)(5) in the pre-charge investigatory context. See 950 F. Supp. 2d at 1266-68. The court held that the right to confer "is properly read to extend to the pre-charge stage of criminal investigations" and that the "case law and legislative history of the statute support such an expansive reading of the statutory mandate." *Id.* at 1267.

¹² In its first order, the court stated that the U.S. Attorney's Office for the Southern District of Florida had "accepted" for "investigation" an inquiry by the Federal Bureau of Investigation that had opened in 2006. *Id.* at 1339. In its second order (discussed in Part IV below), with respect to petitioners' claim that the government's NPA with Epstein could be rescinded, the court found that the government had "accepted the case for prosecution." 950 F. Supp. 2d at 1264; *id.* at 1267 ("the relevant prosecuting authority has formally accepted a case for prosecution"); *id.* at 1270 ("a federal prosecutorial authority which formally accepted the case against Epstein for prosecution"). The court did not explain, and the record does not show, that the government had "formally accepted" a "case" for "prosecution." Nor did the court explain what it meant by its characterizations. As discussed above at 17-18, the term "prosecution" is a term of art in American jurisprudence.

B. The Conclusions in the *Does* Orders are Incorrect.

Every rationale provided by the district court in *Does* for concluding that CVRA rights attach before a criminal proceeding commences lacks merit. The first stated rationale – that “the statutory language clearly contemplates pre-charge proceedings” because a warrantless arrest on a weekday may result in an initial appearance before the filing of a complaint – confuses the critical distinction between court proceedings and investigations. No court or litigant to our knowledge has suggested that the CVRA does not apply to court proceedings. To the contrary, the 2008 amendments to the Federal Rules of Criminal Procedure, which were enacted to comply with the CVRA, make clear that a “crime victim” under the CVRA has rights that apply to *all* criminal proceedings. See Fed. R. Crim. P. 1(a) (“These rules govern the procedure in all criminal proceedings in the United States district courts”), 1(b)(12) (explicitly defining “crime victim” with reference to the CVRA’s definition), 5; *supra* at 17. The district court apparently developed its rationale *sua sponte*. Counsel for petitioners (including professor and former federal district judge Paul Cassell, perhaps the most prominent victims’ rights advocate in the country) did not raise the argument in the pleadings that resulted in the order. See Dkt. 48-52. The district court’s rationale is not addressed (or even mentioned) in any other case that has addressed the scope of the CVRA.

The court’s second rationale – that Section 3771(c)(1)’s imposition of obligations on all “officers and employees” of federal agencies “engaged in the detection, investigation, or prosecution” of criminal activity “surely contemplates pre-charge application of the CVRA” – fails for the reasons discussed above at note 8. The “detection, investigation, or prosecution” language in the CVRA simply defines a class of federal officials – not a temporal distinction. What is more, the language appears in a section of the CVRA entitled “Best Efforts to Accord Rights” that imposes obligations on federal employees – not the section granting rights to crime victims.

The court’s third rationale – that the “if no prosecution is underway” language in Section 3771(d)(3) requires a conclusion that CVRA rights attach before charges are filed “to avoid a strained reading of the statute” – is wrong for the reasons discussed above at 18. The word “prosecution” is a term of art. See OLC Opinion, 2010 WL 6743535 *10. Furthermore, the district court’s (erroneous) first rationale discussed above contradicts its third rationale and shows *why* Congress intended the “if no prosecution is underway” clause to capture the warrantless-arrest-on-a-weekday scenario.

As a fourth rationale, the district court relied on the Fifth Circuit’s decision in *In re Dean*, 527 F.3d 391 (5th Cir. 2008). *Dean*, however, arose in a peculiar context and is distinguishable for several reasons. As an initial matter, no party in *Dean* – either in the district court or the Fifth Circuit – contested the claim that the Section 3771(a)(5)’s right to confer applies before criminal proceedings commence. And no briefing on that issue occurred in either the district court or the court of appeals. See *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 WL 501321, at *12 (S.D. Tex. 2008) (“The briefs have not cited cases addressing whether the CVRA requires

prosecutors to ‘confer’ with victims before any charging instrument is filed”), *mandamus denied in part, In re Dean*, 527 F.3d 391.

In *Dean*, which arose out of an explosion at a BP refinery resulting in 15 deaths and more than 170 injuries, the government filed an *ex parte* motion before any criminal proceedings had commenced in court requesting that the district court restrict notice to victims under the CVRA until after charges and a plea agreement against the company had been filed and unsealed. *Id.* at 392-93. The district court entertained the motion, which had been opened on a miscellaneous docket, and issued the requested order. *Id.* at 393. The government’s argument, accepted by the district court, was that its requested procedure was appropriate given Section 3771(a)’s “reasonableness” requirements in light of the practical difficulties in the case (such as media exposure). *Id.* at 395. On petition for a writ of mandamus filed by twelve victims filed after the company had entered a guilty plea under Fed. R. Crim. P. 11(c)(1)(C), the Fifth Circuit rejected the government’s argument and held that the *ex parte* proceeding was improper. *Id.* At the same time, the court denied petitioners’ request that the case be “remanded with instructions that the plea agreement [not be] accepted.” 527 F.3d at 392.

It is true that the court in *Dean* criticized the government’s pre-charge failure to confer with victims. *Id.* at 394-95. It is not entirely clear, however, whether the court’s criticism was simply a leveling of the playing field in the case given the government’s unwarranted *ex parte* filing, or instead reflects a view that the CVRA creates an enforceable right to confer in every case that exists before a criminal proceeding begins in court. *Id.* at 394-95. For instance, although there is language in *Dean* stating that the right to confer under Section 3771(b)(5) applies before criminal proceedings begin, the opinion refers to the importance of right to confer “[a]t least in the posture of this case (and we do not speculate on the applicability to other situations)[.]” *Id.*¹³

To the extent *Dean* holds that the Section 3771(b)(5) of the CVRA grants crime victims an enforceable right to confer with the attorney for the government before court proceedings are commenced, it is wrong for the reasons discussed above in Part II(B)(2)(c). First, the textual arguments (*e.g.*, the use of the phrases “the attorney for the Government” and “in the case”) are inconsistent with the notion that the right to confer attaches before criminal proceedings commence. Second, the legislative history of the CVRA (including the floor statements of its co-sponsors), as well as the Report of the Senate Judiciary Committee regarding the failed

¹³ The position of the Department of Justice, as a discretionary policy matter, is that plea negotiations “should include reasonable consultation prior to the filing of a charging instrument with the court.” See *Attorney General Guidelines for Witness and Victim Assistance* (rev. May 2012) at 41-42; *supra* at 12. For petitioners in CVRA cases, however, it is essential that a right to confer be deemed to exist under the statute because that triggers the argument regarding the availability of remedies (such as rescission of a NPA). See Part IV below (discussing the remedial issues).

constitutional amendment, show that Congress intended the right to confer to attach only after the initiation of criminal proceedings.¹⁴

The citations by the district court in *Does* to three district court cases (*Rubin*, 558 F. Supp. 2d 411; *Okun*, 2009 WL 790042; and *BP Products*, 2008 WL 501321) simply highlight the frailty of the court's reasoning. As discussed above (at 6, n.5, and 8), the discussion in *Rubin* of whether the right to confer attaches before the commencement of criminal proceedings is not only *dicta* but includes internally contradictory statements. As for *Okun*, the discussion again is *dicta*, and, moreover, the court simply cited *Dean* without any elaboration. See *supra* at 6 n.5 (discussing *Okun*). The citation to the *BP Products* decision in the Southern District of Texas (the subject of the mandamus petition addressed in *Dean*), which appears to conclude that the CVRA's right to confer attaches before criminal proceedings begin in court but equivocates in a lengthy discussion of authority, see 2008 WL 501321 *11-15, adds scant weight to petitioners' side of the balance in light of *Dean* and the idiosyncratic nature of the case. Finally, the district court in *Does* cited only one of the many cases contrary to its position (*In re Petersen*, which rejected the argument that the right to confer in Section 3771(a)(5) attaches before criminal proceedings commence; see *supra* at 6) and simply disagreed with *Petersen*'s conclusion. 817 F. Supp. 2d at 1343 n.5. In short, the district court's ruling in *Does* that CVRA rights attach before criminal proceedings commence is mistaken and should be reconsidered.¹⁵

¹⁴ The 72-hour compressed time frame that applies to a petition for writ of mandamus under the CVRA, see 18 U.S.C. § 3771(d)(3), may also have played a role in *Dean*'s lack of clarity (along with the fact that no one disputed or briefed the issue as to when the right to confer attaches). In another context, the Fifth Circuit recognized the limitations that courts of appeals face in rendering CVRA-related decisions under such time pressure. See *In re Amy Unknown*, 701 F.3d 749, 758 (5th Cir. 2012) ("While Amy asserts that two additional circuits favor her position, those courts have not clearly accepted her position, and it is unclear that they would do so if presented with the opportunity to fully analyze the legal issues this question presents. See *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) (granting mandamus on question of whether a person was a crime victim who could participate in district court proceedings without reviewing traditional mandamus factors); *In re Walsh*, 229 Fed.Appx. 58, 60-61 (3d Cir. 2007) (in *dicta*, agreeing with the Second and Ninth Circuits that 'mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771 in the appropriate circumstances.'").

¹⁵ *Does* already has been cited favorably by a district court considering CVRA claims in connection with the disaster resulting in 29 deaths at a mine then owned by the Massey Energy Company. See *Skeens v. Alpha Natural Resources*, 2013 WL 1966238 (May 10, 2013) (stating in *dicta* that "there are clearly rights in [Section 3771] (a) that apply before a prosecution is underway" and citing *Does*), *dismissed in part, vacated in part, and remanded on other grounds*, 583 Fed. Appx. 200 (4th Cir. 2014).

IV. The District Court in *Does* Erroneously Recognized a Right to Rescission of a Non-Prosecution Agreement

Although the district court has not yet ruled on the merits of the petition in *Does*, it issued an order on June 19, 2013 denying the government's motion to dismiss for lack of subject matter jurisdiction filed on November 8, 2011. See 950 F. Supp. 2d at 1266. The court rejected the government's argument that "the remedy petitioners seek – a vacating or re-opening of the non-prosecution agreement – is not a legally viable option at this juncture" as well as the government's contention that rescission "is prohibited by constitutional Due Process guarantees – even if entered into in violation of the CVRA." *Id.*

The district court held that Section 3771(d)(5) of the CVRA, which allows a victim to "make a motion to re-open a plea or sentence" in specified circumstances, "[c]learly . . . contemplates" and "authorize[s] the rescission or 're-opening' of a prosecutorial agreement – including a non-prosecution arrangement – reached in violation of a prosecutor's conferral obligations under the statute." *Id.* at 1267. The court stated that it would "not embrace [the government's] strained reading of the statute." *Id.* According to the court, "the [CVRA] is properly interpreted *impliedly* to authorize a 're-opening' or setting aside of pre-charge prosecutorial agreements made in derogation of the government's CVRA conferral obligations as well." *Id.* (emphasis added). The court added: "[T]here is no logical reason to treat a 'non-prosecution agreement' . . . any differently from a 'plea agreement[.] . . . Where the statute expressly contemplates that a 'plea' may be set aside if entered into in violation of CVRA conferral rights, it necessarily contemplates that a 'non-prosecution' agreement may be set aside if entered in violation of the government's conferral obligations." *Id.* at 1268. The court concluded that "the victims' CVRA injury is *not* the government's failure to prosecute Epstein federally – an end within the sole control of the government. Rather, it is the government's failure to confer with the victims before disposing of contemplated federal charges." *Id.*¹⁶

The district court's holding with respect to a rescission remedy – which relies on the proposition that the CVRA creates an implied remedy based on the "logical" conclusion that a plea agreement and NPA should be treated identically – is deeply flawed for three reasons.

¹⁶ The district court in *Does* also stated that petitioners are "crime victims" within the meaning of Section 3771(e) of the CVRA. 950 F. Supp. 2d at 1269. As a basis for that conclusion, the court stated that "the non-prosecution agreement at issue refers to five distinct federal sex offense crimes involving minors contemplated against Epstein[.]" *Id.* Mr. Epstein pleaded guilty to two solicitation offenses in the State of Florida as a condition of the NPA. Although the government did not dispute the court's finding that petitioners are "crime victims" under the CVRA "as a result of federal offenses allegedly committed by Epstein[.] *id.* at 1270, Mr. Epstein disputes that a legitimate basis for any federal charge against him existed.

1. No Implied Rescission Remedy Exists.

The plain language of Section 3771(d)(5) (entitled “*Limitation on Relief*” (emphasis added); Section 3771(d) itself is entitled “*Enforcement and Limitations*” (emphasis added)) allows a crime victim only a circumscribed ability to move to “re-open a plea or sentence” and only in specified circumstances: (1) where “the victim has asserted the right to be heard before or during the *proceeding* at issue and such right was denied;” (2) the victim petitions the court of appeals for a writ of mandamus *within 14 days*; and (3) “in the case of a plea, the accused has not pled to the highest offense charged” (emphasis added). The statute says nothing about other remedies. Section 3771(d)(1) provides that a crime victim “may assert the rights described [Section 3771(a).]” And Section 3771(d)(3) (entitled “Motion for Relief and Writ of Mandamus”) refers only to a district court’s obligation to “take up and decide any motion asserting a victim’s right forthwith.” But neither of those provisions suggests that Congress intended – beyond the specified circumstances regarding pleas and sentences in Section 3771(d)(5) – that a court may impose remedies apart from ordering that a crime victim may assert the specified rights.

In construing statutes, a court cannot properly imply remedies that Congress did not intend to include. See, e.g., *National Railroad Passenger Corporation v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458 (1974) (“A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies”); *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 14-15 (1981) (where Congress has provided “elaborate enforcement provisions” for remedying the violation of a federal statute, “it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under” the statute [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.” (internal quotation marks and citation omitted)). The only possible exception to that rule is if “strong indicia of contrary congressional intent” exist. *Middlesex County Sewerage Authority*, 453 U.S. at 15. With respect to the CVRA, no such “strong indicia” exist. To the contrary, as discussed above in Part II, there is an *absence* of any such indicia. See also *United States v. Monzel*, 641 F.3d 528, 542-43 (D.C. Cir. 2011) (applying principles of statutory construction regarding remedial schemes to the CVRA itself and concluding that the statute does not contain an implied right to direct appeal by crime victims); *id.* (“[T]he CVRA’s ‘carefully crafted and detailed enforcement scheme provides ‘strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.’” *Id.* (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993), and *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)).

2. The District Court’s Construction Is Not Supported by the Statutory Text.

Even if Congress somehow intended that a settlement agreement and plea agreement may be treated identically under the CVRA, there is no reason (textual or otherwise) to conclude that

Congress intended the remedial limitations explicitly stated in Section 3771(d)(5) with respect to pleas and sentences to be relaxed with respect to NPAs and other types of settlement agreements. If the victim has not “asserted the right to be heard before or during the proceeding at issue and such right was denied[.]” then no basis for re-opening exists. As the district court itself recognized, the NPA already had been executed by the time that petitioners filed their complaint, and Mr. Epstein already had pleaded guilty to solicitation offenses in state court and otherwise met obligations under the NPA. *Does*, 817 F. Supp. 2d at 1339. Accordingly, even if settlement discussions during an investigation somehow may be deemed to constitute a “proceeding at issue,” the petitioners in *Does* did not assert their putative rights “before or during the proceeding at issue.” Nor did the asserted victims meet the second requirement in Section 3771(d)(5) – petitioning to “the court of appeals for a writ of mandamus within 14 days.” If anything, the text of Section 3771(d) simply reinforces an interpretation of the CVRA that does not permit rights to be asserted before a criminal “proceeding” commences in court.

The Fifth Circuit’s decision in *Dean*, whatever it may mean with respect to *when* CVRA rights attach, shows that the rescission remedy embraced by the district court in *Does* is not supported by the statute. Although concluding that the district court should have given the crime victims the right to confer regarding the plea agreement at issue, the Fifth Circuit denied the victims’ request for an instruction that the plea agreement not be accepted. *Dean*, 527 F.3d at 392. The court of appeals stated that “the better course is to deny relief[.]” *Id.* at 396. If the Fifth Circuit had believed that unwinding the plea agreement was an appropriate remedy for a CVRA violation, its prudential decision would not have been logical. See also *In re W.R. Huff Management Co.*, 409 F.3d 555 (2d Cir. 2005) (government is not “restricted by the CVRA from effecting reasonable settlement . . . measures against non-convicted defendants”); cf. *Skeens v. Alpha Natural Resources*, 2015 WL 1541758 *6 (S.D. W. Va. 2015) (dismissing civil action on ground that plaintiffs lacked standing to enforce a non-prosecution agreement and stating that “enforcement of the NPA remained squarely within the United States’ prosecutorial discretion”).

3. The District Court’s Ruling is Inconsistent
With the Doctrine of Constitutional Avoidance.

Finally, even if the text and principles of statutory construction regarding remedial schemes did not run counter to the district court’s conclusion, the doctrine of constitutional avoidance, which the district court did not mention in either of its orders, undermines the court’s conclusion that a rescission remedy exists. If an “acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ see *Crowell v. Benson*, 285 U.S. 22, 62 (1932),” a court is “obligated to construe the statute to avoid such problems.” *I.N.S. v. St. Cyr*, 533 289, 299-300 (2001) (citing *Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). The rule of construction is mandated “out of

respect for Congress, which [the Supreme Court] assume[s] legislates in the light of constitutional limitations[.]” *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

The Due Process Clause of the Fifth Amendment protects a person’s interests that arise out of a plea agreement. See, e.g., *United States v. Harvey*, 869 F.2d 1439, 1443-44 (11th Cir. 1989) (“Due process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes” (citing *Mabry v. Johnson*, 467 U.S. 504 (1984) (plea agreement), and *Santobello v. New York*, 404 U.S. 257 (1971) (plea agreement) (additional citations omitted)). 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.”); *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).¹⁷

In *Does*, the rescission remedy recognized by the district court, if applied, would leave Jeffrey Epstein (after having (1) relied on the government’s promises in the NPA; (2) pleaded guilty in the State of Florida as a condition of the NPA; (3) been incarcerated in county jail in reliance on the NPA; and (4) fulfilled his other obligations under the NPA) exposed to further investigation, discretionary decisionmaking over which he lacks control, and potential prosecution. As *Stolt-Nielsen* and the other cases cited above make clear, the application of a rescission remedy in Mr. Epstein’s matter would undermine the purpose of the Due Process Clause. Because the district court’s interpretation of the CVRA with respect to the rescission remedy is not consistent with basic constitutional principles, and because an alternative construction of the CVRA exists that does not tread on the Constitution, the district court’s construction must be deemed incorrect even it were not otherwise wanting.¹⁸

¹⁷ As courts have recognized in the context of CVRA-related litigation, substantial due process issues exist under the statute even with respect to the re-opening of pleas and sentences specifically authorized by the statutory text. See, e.g., *Kenna*, 453 F.3d at 1017; cf. *Turner*, 367 F. Supp. 2d at 326-27.

¹⁸ The district court’s rescission remedy also implicates principles of state sovereignty. Mr. Epstein and the State of Florida entered into a binding plea agreement in light of the NPA and Mr. Epstein pleaded guilty to two state criminal offenses and served a sentence of incarceration in reliance on the NPA. See *Does*, 950 F. Supp. 2d at 1264. The parties’ actions in the criminal proceeding in the State of Florida were partially induced by the NPA. The rescission of the NPA could bring into question the legitimacy of the state court’s acceptance of Epstein’s guilty plea, and the resulting judgment of conviction, which would raise potential issues under the *Rooker-*

V. The Potential Adverse Effects on Business Interests of the District Court's Statutory Construction

Although *Does* involves only a challenge to a DOJ decision relating to the investigation of alleged sex offenses, the district court's construction of the CVRA sweeps far beyond the immediate context of the case and implicates business interests across a wide range of industries. The district court's rulings, if they stand, may adversely affect business interests in two ways. First, a pre-charge "right to confer" introduces third parties (*i.e.*, asserted victims) into the relationship between DOJ and a company attempting to resolve an investigation – thus introducing uncertainty, potential delay, and cost. Second, if a rescission remedy is available to crime victims, unpredictability will surround non-prosecution agreements and similar pre-charge settlements, with the corporate entity virtually powerless to control the risk posed by third-party actors.

Corporate settlements "provide parties with a means to manage risk," and the assessments involved in the resolution of a matter are "uniquely" for the parties to make. See *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 295 (2d Cir. 2014) (vacating district court's refusal to accept proposed consent decree between federal enforcement agency and financial institution). Corporations, like individuals, have due process rights that are implicated in criminal matters. See, *e.g.*, *Stolt-Nielsen*, 524 F. Supp. 2d at 615-16; *United States v. Unimex, Inc.*, 991 F.3d 546, 551 (9th Cir. 1993) (reversing corporation's conviction at trial in light of pretrial asset seizure in violation of Due Process Clause). And corporations, like individuals, have protected reliance interests with respect to settlement agreements resolving criminal investigations. See, *e.g.*, *Stolt-Nielsen*, 524 F. Supp. 2d at 615-16.

Even in the civil context, a federal agency's decision not to take enforcement action is "presumptively unreviewable." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Even in the civil context, the "statutory authority of the Attorney General to control litigation is not diminished without a clear and unambiguous directive from Congress," *United States v. Hercules, Inc.*, 961 F.2d 796, 798-99 (8th Cir. 1992) (citing *United States v. California*, 332 U.S. 19, 27 (1947)), such as "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33. The CVRA contains no such "clear and unambiguous directive." To the contrary, it explicitly sets forth, in Section 3771(f), the longstanding principle in American jurisprudence that prosecutorial discretion is virtually absolute. See, *e.g.*, *United States v. HSBC Bank USA, N.A.*, 2013 WL 3306161 *5 (E.D.N.Y. 2013) (accepting deferred prosecution agreement and stating that "[t]he government has absolute discretion to decide not to prosecute" and that "[e]ven a formal, written agreement to that effect, which is often referred to as

Feldman doctrine. See, *e.g.*, *Casale v. Tillman*, 558 F.3d 1258, 1260-61 (11th Cir. 2009); *Powell v. Powell*, 80 F.3d 464, 466-68 (11th Cir. 1996).

a ‘non-prosecution agreement,’ is not the business of the courts”).¹⁹ If the district court’s orders in *Does* are not reconsidered, the risk that further interference with corporations’ abilities to resolve investigations reliably and predictably is likely to increase.

VI. Conclusion.

The district court’s orders in *Does* have no case-related boundaries. The court’s rulings that putative crime victims have enforceable rights under the CVRA during an investigation, and have a right to rescind settlement agreements as a remedy for violations of those rights, are as applicable to large-scale corporate matters as they are to events involving two individuals. Before the district court rules on the merits in *Does*, an opportunity should exist for potential *amici* to submit a brief addressing why the court should reconsider its decisions and embrace an understanding of the CVRA that is consistent with congressional intent.

¹⁹ Prosecutorial discretion, of course, cannot be exercised in violation of the Constitution. See, e.g., *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (exercise of prosecutorial discretion cannot be “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification”). In *Does*, no such issues are involved – only the scope and meaning of the CVRA.