

**NO. 19-13843**

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**UNITED STATES COURT OF APPEALS  
FOR THE  
ELEVENTH CIRCUIT**

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**IN RE: COURTNEY WILD,  
Crime Victim-Petitioner**

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**BRIEF OF *AMICUS CURIAE* NATIONAL CRIME VICTIM LAW  
INSITUTE and CO-*AMICI* ORGANIZATIONS IN SUPPORT OF CRIME  
VICTIM-PETITIONER'S  
PETITION FOR REHEARING EN BANC**

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**On Petition for Writ of Mandamus Under the Crime Victims' Rights Act to  
the United States District Court for the Southern District of Florida**

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Richard C. Komando  
Florida Bar Number: 181366

Bradley, Garrison & Komando, P.A.  
1279 Kingsley Avenue, Suite 118  
Orange Park, Florida 32073  
Telephone: 904.269.1111  
Facsimile: 904.269.1115  
E-mail: [Rich@ClayLawyers.com](mailto:Rich@ClayLawyers.com)

*Counsel for Amicus Curiae  
National Crime Victim Law Institute and  
Co-Amici Organizations*

**LIST OF *AMICI CURIAE***

National Crime Victim Law Institute  
Arizona Voice for Crime Victims Inc.  
Chicago Alliance Against Sexual Exploitation  
Legal Momentum  
Michigan Coalition to End Domestic & Sexual Violence  
National Center for Victims of Crime  
Ohio Crime Victim Justice Center  
Women's Law Project

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

*Amici Curiae* are nonprofit organizations that regularly represent victims to protect their legal rights; none has a parent corporation or issues stock. Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1 and 26.1-2, the undersigned counsel certifies that to their knowledge, the interested persons identified in Crime Victim-Petitioner's Petition for Rehearing En Banc are correct and complete.

**11th Circuit Rule 35-5(C) Statement of Counsel**

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: whether the Crime Victims' Rights Act can attach before formal federal charges are filed.

May 12, 2020

Respectfully submitted,

/s/ Richard C. Komando

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Richard C. Komando  
Florida Bar Number: 181366

*Counsel of Record for Amicus Curia  
National Crime Victim Law Institute and  
Co-Amici Organizations*

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**STATEMENTS OF INTEREST OF *AMICI CURIAE***

The National Crime Victim Law Institute (NCVLI) and co-*amici* organizations have, coincident with the submission of this brief, filed a motion for leave to file this brief of *amici curiae*. See Fed. R. App. P. 29; Local Rule 29-3.

NCVLI is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education and resource sharing. NCVLI accomplishes its mission through education and training of judges, prosecutors, victims' attorneys, advocates, law students, and community service providers; legal assistance on cases nationwide; analyzing developments in crime victim law; and advancing victims' rights policy. As part of its legal assistance, NCVLI participates as *amicus curiae* in cases that present victims' rights issues of broad importance. This is one of those cases, as it involves the fundamental issue of whether the rights to confer and to be treated with fairness under the Crime Victims' Rights Act can attach pre-charge.

NCVLI is joined as co-*amici* by seven nonprofit organizations dedicated to protecting victims' legal rights.

Individual statements of interest of co-*amici curiae* are contained in the Appendix and in the accompanying motion.



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

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

**INTRODUCTION AND STATEMENT OF ISSUE  
WARRANTING EN BANC REVIEW**

This case involves a question of exceptional importance—whether the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, can attach before formal charges are filed. In the nearly 16 years since the CVRA's enactment, the panel decision is the first federal circuit to have held that the rights cannot attach. The panel decision is directly opposed to the only other federal circuit to have addressed this question. *See In re Dean*, 527 F.3d 391 (5th Cir. 2008) (per curiam).

The CVRA's plain language makes clear that it can attach pre-charging, a reading that aligns with Congress' intent to “correct, not continue, the legacy of poor treatment of crime victims in the criminal process.” 150 Cong. Rec. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). The panel's contrary decision rests on strained interpretation of the text and is premised on speculation that a contrary construction would produce impracticalities. Policy concerns are, however, best left to Congress. *See Magwood v. Patterson*, 561 U.S. 320, 334 (2010) (stating that the judiciary “cannot replace the actual text with speculation as

to Congress’ intent”). Further, the last twelve years belie the panel’s fear of “risking a landslide”. Op. 52. As the dissent correctly observed, “since the Fifth Circuit’s 2008 decision and the District Court’s 2011 decision, there has been no flood of civil suits by victims, no evidence of victims’ abuse of their CVRA rights, and no prosecutors’ complaints about impairment of their prosecutorial discretion.” Op. 65 (Hull, J., dissenting).

Given the plain language, the panel’s acknowledgment that it “is not implausible” that the CVRA attaches pre-charge, the clear legislative intent, and the undisputed reality that the victims endured “unspeakable horror” and were then “left in the dark—and, so it seems, affirmatively misled—by government lawyers,” the panel’s assessment that it was “constrained” to deny the petition strains credulity. Op. 2, 18. As the panel decision is in contradiction to both plain language and clear legislative intent—and creates a circuit split on an exceptional question of law—this Court should rehear this case en banc.

## ARGUMENT

### I. THE COURT SHOULD GRANT REHEARING EN BANC TO ENSURE THIS CIRCUIT’S CONSTRUCTION OF THE CVRA COMPORTS WITH THE STATUTE’S TEXT AND PURPOSE.<sup>1</sup>

#### A. The Plain Text Of The CVRA Supports Pre-Charge Attachment Of Rights.

Two CVRA rights are at issue, and all parties and courts involved agree that neither includes an explicit limitation constraining its application to post-charging. *See* 18 U.S.C. § 3771(a)(5), (8) (affording victims the “reasonable right to confer with the attorney for the Government in the case” and “[t]he right to be treated with fairness”). The consensus continues with recognition that, when read as a whole, the statute supports pre-charging attachment. *See* Op. 18 (“The

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<sup>1</sup> As argued by the Crime Victim-Petitioner in proceedings below, this “tale of national disgrace,” Op. 2, warrants invocation of equitable estoppel to bar the Government from arguing that the CVRA applies only post-charging. *See Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60-61 (1984) (recognizing that “the Government may not be estopped on the same terms as any other litigant” but declining to adopt “a flat rule that estoppel may” never “run against the Government” as there may be a case where the interest in avoiding estoppel “might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government”); *id.* at 61 n.13 (“To say to these appellants, “The joke is on you. You shouldn’t have trusted us,” is hardly worthy of our great government.” (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970))). Here, the Government informed the victims that they had pre-charge CVRA rights; the victims relied on this and subsequent representations and took no action, to their detriment. Only after the case had been litigated for some time did the Government reverse its stance. *See* Op. 81. The issue was then well-litigated, and nine years ago the district court decided that the CVRA does attach pre-charge.

interpretation of the CVRA that petitioner advances, and that the district court adopted, is not implausible; the CVRA could be read to apply pre-charge.”). In a strained and unnatural interpretation, the panel reaches a contrary conclusion, noting the CVRA “is neither best nor most naturally read” to attach pre-charge. *Id.*

First, the panel adopts a narrow definition of “case” in the right to confer clause, a definition that is inconsistent with the ordinary use of the term in criminal justice, including how the United States Department of Justice routinely uses it. *Compare* Op. 23 (finding “the term ‘case’ [only] refers to an ongoing judicial proceeding, not a law-enforcement investigation,” and it “requires the initiation of legal proceedings”) *with* U.S. Dep’t of Justice, Justice Manual (DOJ Justice Manual) § 9-75.020 (discussing prosecution priorities and how prosecutors should “evaluate” which “cases” to prosecute) *and* DOJ Justice Manual, Comment § 9-27.230 (addressing factors that “should not influence the decision” whether to prosecute, “such as the time and resources already expended in federal investigation of the case”).<sup>2</sup>

Further, the panel adopts a narrow and uncommon definition of “prosecution” in § 3771(d)(3), the venue provision. The panel determined that “prosecution” is a “legal term of art” that does not start even with the filing of a

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<sup>2</sup> DOJ Justice Manual, Title 9, available at <https://www.justice.gov/jm/title-9-criminal>.

criminal complaint—an interpretation at odds with any natural, ordinary understanding. *Compare* Op. at 34 (finding the term “prosecution” does not begin until “the levying of formal charges in an indictment” and citing Sixth Amendment right to counsel case law), *with* DOJ Justice Manual, § 9-27.300, Comment (stating “[o]nce it has been determined to commence prosecution, *either by filing a complaint or an information*, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend” (emphasis added)).<sup>3</sup>

Finally, the panel’s construction requires reading a limitation into the text where none exists. *See* Op. 101 n.21 (Hull, J., dissenting) (observing that “had Congress wanted to limit the CVRA’s conferral and fairness rights to certain stages of a criminal case, it could have simply drafted the legislation more narrowly and tied those rights to ‘charges,’ ‘trial[s],’ ‘hearing[s],[’] and ‘proceedings’ like it did with different rights in the VRRRA”) (first and second alterations in original)). A statute’s “silence with respect to a [temporal or procedural] limitation in no way

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<sup>3</sup> Thirteen years ago the Government interpreted the terms “case” and “prosecution” as affording rights pre-charge and informed Epstein’s victims of their rights “to confer with the attorney for the United States in the case” and “to be treated with fairness”; the Government promised to “make its ‘best efforts’ to ensure their “CVRA rights were protected.” Op. 68 (Hull, J. dissenting) (quoting notification letter from the U.S. Attorney’s Office). The Government’s earlier interpretation of the text, which is in step with the current DOJ Justice Manual, demonstrates that rehearing en banc is warranted to reconsider the conclusion that “the Act is neither best nor most naturally read” to apply pre-charge. Op. 18.

authorizes [courts] to assume that such a limitation must be read into [the] subsections . . . in order to blunt the slippery-slope policy arguments of those opposed to a plain-meaning construction of the provisions under review.”

*Harbison v. Bell*, 556 U.S. 180, 199 (2009) (Thomas, J., concurring).

Rehearing en banc is required to give effect to the ordinary, plain meaning of the statutory text.

**B. Reading The CVRA As Applying Pre-Charging Ensures Each Word Has Meaning And Furthers The CVRA’s Purpose.**

Reading the plain language of the CVRA with the canons of statutory construction in mind makes clear that en banc review is warranted. First, the panel’s finding that the “if no prosecution is underway” clause in § 3771(d)(3) “could be interpreted to refer to the period *after* a ‘prosecution’ has run its course,” Op. 35 (emphasis in original), would render part of § 3771(d)(3) inoperative or superfluous, in violation of the surplusage canon. *See* Op. 92-93 (Hull, J., dissenting) (addressing § 3771(d)(3)’s direction to file an action “in the district in which the crime occurred” if “no prosecution is underway” and observing that post-judgment actions “would logically be filed in the district court where the conviction was entered” (citing *Corley v. United States*, 556 U.S. 303, 314 (2009))).

Second, while the remedial legislation canon of statutory construction has been criticized, *see, e.g., Regions Bank v. Legal Outsource PA*, 936 F.3d 1184,

1195 (11th Cir. 2019), cert. docketed sub nom. *Phoenix v. Regions Bank*, 19-815 (Dec. 27, 2019), it is nonsensical to interpret a statute clearly meant to redress a harm in a manner that exacerbates that very harm. Even a court skeptical of the canon of construction should interpret a statute to effectuate its purpose if it does not strain the plain language or add terms. *See Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995) (finding that the canon of remedial legislation “may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory ‘purposes’ more effectively”).<sup>4</sup>

Rehearing en banc is required to ensure the CVRA is afforded its full meaning and effect.

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<sup>4</sup> The CVRA was enacted as a direct response to inadequacies of prior legislation and poor treatment of victims. *See* 150 Cong. Rec. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (recognizing the CVRA’s goal of preventing denials of victims’ rights akin to what happened in the Oklahoma City Bombing case); 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (“The [CVRA] was enacted to overcome the effects of a criminal justice system that had become ‘out of balance—while criminal defendants have an array of rights under law, crime victims have few meaningful rights.’”)

## II. THE COURT SHOULD GRANT REHEARING EN BANC TO AVOID AN UNNECESSARY SPLIT OF THE COURTS OF APPEALS.

In holding that the rights conferred by the CVRA do not apply pre-charging, the panel unnecessarily split from the rule established twelve years ago by the Fifth Circuit. *Cf. In re Dale*, 582 F.3d 568, 575 n.8 (5th Cir. 2009) (invoking “general prudential concerns with creating unnecessary circuit splits”); *United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012) (Murphy, J., concurring) (stating “the circuits have historically been loath to create a split where none exists” because “[t]he avoidance of unnecessary circuit splits furthers the legitimacy of the judiciary and reduces friction flowing from the application of different rules to similarly situated individuals based solely on their geographic location”).

In *In re Dean*, twelve victims petitioned the Fifth Circuit, claiming a plea agreement was reached in violation of their CVRA rights to confer with the attorney for the Government, to be treated with fairness, and to notice of the plea. 527 F.3d at 392 (referring to the district court decision for the underlying history at *United States v. BP Prods. N. Am. Inc.*, Crim. No. H-07-434, 2008 WL 501321, at \*1-6 (S.D. Tex. Feb. 21, 2008)). The Fifth Circuit agreed that the victims’ rights had been violated and agreed with the district court’s finding that “[t]here are clearly rights under the CVRA that apply before any prosecution is underway,” including victims’ right to confer. *Id.* at 392, 394.



The panel rejects the Fifth Circuit’s decision and creates a split for two primary reasons. First, it found the Fifth Circuit’s decision to be “devoid of any analysis of the CVRA’s text, history, or structural underpinnings.” Op. 50 n.25. This is inaccurate; the Fifth Circuit noted its careful examination of “the pleadings, the thorough order of the district court, and the applicable law” before concluding the victims’ rights were violated. *In re Dean*, 527 F.3d at 394. The district court’s opinion, which the Fifth Circuit explicitly referenced, contains pages of historical context, textual review, and analysis of case law regarding CVRA rights. *See BP Prods. N. Am. Inc.*, 2008 WL 501321, at \*7-17. With respect to just the portion of the decision addressing victims’ right to confer, the district court engaged in lengthy analysis of whether the right applies pre-charging, *id.* at \*11-15, including references to the Congressional record, *id.* at \*11, 12, 14; to Supreme Court decisions, *id.* at \*11; to the CVRA text, *id.* at \*11, 13, 14; to federal court decisions, *id.* at \*12, 12 n.7, 13, 14, 15; and to secondary sources, *id.* at \*12, 12 n.7, 14.<sup>5</sup>

Second, the panel labels the Fifth Circuit’s holding “dictum.” Op. 49 n.25. Notably, despite the Fifth Circuit’s reasoned conclusion that the victims’ rights

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<sup>5</sup> In *In re Dean*, the victims clearly asserted that their rights applied pre-charging, and the attorney for the government had every opportunity to contest that assertion before the trial and appellate courts.

were violated pre-charging, it nevertheless denied the victims' petition for a writ of mandamus based upon traditional mandamus review. *In re Dean*, 527 F.3d at 394. The Fifth Circuit would not have needed to state “[w]e find a statutory violation,” *id.* at 392, and engage in an analysis of whether the writ was appropriate had it not first concluded that there was an underlying violation of the victims' pre-charging rights.

Rehearing en banc is necessary to avoid an unnecessary a circuit split.

## CONCLUSION

Congress enacted the CVRA to provide victims with enforceable rights throughout the criminal justice process and to fix the “out of balance” criminal justice system. 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). The CVRA uses language that is uniformly acknowledged to plausibly apply pre-charging. In a baffling construction of the text and rejection of statutory purpose, the panel splits from the only other Circuit to have decided the issue. This case demands rehearing en banc.

Respectfully submitted,

/s/ Richard C. Komando

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Richard C. Komando  
Florida Bar Number: 181366

Bradley, Garrison & Komando, P.A.  
1279 Kingsley Avenue, Suite 118  
Orange Park, Florida 32073  
Telephone: 904.269.1111  
Facsimile: 904.269.1115  
E-mail: [Rich@ClayLawyers.com](mailto:Rich@ClayLawyers.com)

*Counsel of Record for Amicus Curiae  
National Crime Victim Law Institute and  
Co-Amici Organization*

## APPENDIX

### STATEMENTS OF *CO-AMICI CURIAE*

#### Arizona Voice for Crime Victims Inc. (AVCV)

AVCV is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement. AVCV seeks to foster a fair justice system which (1) provides crime victims with resources and information to help them seek immediate crisis intervention, (2) informs crime victims of their rights under the laws of the United States and Arizona, (3) ensures that crime victims fully understand those rights, and (4) promotes meaningful ways for crime victims to enforce their rights, including through direct legal representation. A key part of AVCV's mission is working to give the judiciary information and policy insights that may be helpful in deciding victims' rights issues.

#### The Chicago Alliance Against Sexual Exploitation (CAASE)

CAASE is an Illinois-based not-for-profit that opposes sexual harm by directly addressing the culture, institutions and individuals that perpetrate, profit from, or support such harms. CAASE engages in direct legal services, prevention education, community engagement, and policy reform. CAASE's legal department

provides legal services to survivors of sexual assault, including to survivors in their criminal cases. On behalf of its individual clients and in support of its overall mission, CAASE is interested in seeing that federal and state laws and precedent related to victims' rights, and especially victims' of sex crimes rights, are appropriately interpreted and applied so as to further—and not undermine—efforts to hold both systems' acceptance and individuals who perpetrate sexual assault appropriately accountable for their actions.

### Legal Momentum

Legal Momentum, the Women's Legal Defense and Education Fund, is the nation's oldest legal advocacy organization for women and girls. It has a particular focus on gender-based violence. Legal Momentum was the leading advocate for the landmark Violence Against Women Act (VAWA) and its subsequent reauthorizations, which seek to redress the historical inadequacy of the justice system's response to sexual and domestic violence. Since 1980 Legal Momentum's National Judicial Education Program (NJEP) educated the judiciary on issues related to the fair adjudication of sexual assault cases. NJEP's curriculum *Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, has been presented across the country. NJEP's publication, *Judges Tell: What I Wish I Had Known Before I Presided in*

an Adult Victim Sexual Assault Case, is utilized by judges and justice system professionals nationwide.

Michigan Coalition to End Domestic & Sexual Violence (MCEDSV)

MCEDSV is the state's catalyst for creating empowered and transformed individuals, communities, and societies committed to building a lasting legacy of equality, peace and social justice, where domestic and sexual violence no longer exists. Envisioning a system of criminal and civil justice that supports empowered recovery, MCEDSV's Survivor Law Clinic of seeks to make crime victims' rights more meaningful for all Michigan victims. MCEDSV is part of a national effort to secure victims' rights enforcement in criminal courts.

National Center for Victims of Crime (NCVC)

NCVC, a nonprofit organization based in Washington, D.C., is a leading resource and advocacy organization for all victims of crime. The mission of NCVC is to forge a national commitment to help victims of crime rebuild their lives. The National Crime Victim Bar Association is an affiliate and program of the National Center for Victims of Crime. It is the first professional association of attorneys and expert witnesses dedicated to helping victims seek justice through the civil system. NCVC has filed *amicus curiae* briefs in cases across the country to advance the rights and interests of crime victims.

Ohio Crime Victim Justice Center (OCVJC)

OCVJC is a statewide nonprofit organization. OCVJC was founded in 2000 to provide no-cost legal representation to preserve and enforce crime victims' rights. The mission of OCVJC is to ensure that the constitutional, statutory, and inherent rights of Ohio's state and federal crime victims are upheld throughout the criminal justice process. OCVJC accomplishes this mission by providing no cost legal representation to Ohio crime victims in state and federal courts to preserve and enforce victims' rights during criminal proceedings. OCVJC also assists victims in protection order proceedings, Title IX proceedings, military proceedings, and immigration proceedings. In addition to providing legal assistance, OCVJC provides free victims' rights education and training to criminal justice system officials and allied professionals, and briefs courts as amicus curiae on issues of importance regarding the rights of Ohio crime victims in state and federal courts.

Women's Law Project (WLP)

WLP is Pennsylvania-based nonprofit legal advocacy organization that seeks to advance the legal, social, and economic status of all people regardless of gender. To that end, WLP engages in impact litigation and policy advocacy, public education, and individual counseling. Founded in 1974, WLP prioritizes program

activities and litigation on behalf of people who are marginalized across multiple identities and disadvantaged by multiple systems of oppression. WLP is committed to ending violence against women and children and to safeguarding the legal rights of women and children who experience sexual abuse. WLP has provided counseling to victims of violence through its telephone counseling service, engages in public policy advocacy work, and serves as counsel for and joins as *amicus curiae* seeking to improve the response of the legal system to victims of sexual assault and violence.



## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 29(b)(4) because this brief contains 2598 words, excluding the parts of the brief excluded by 11th Cir. R. 29-3.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Time New Roman typeface using Microsoft Word 2016.

/s/ Richard C. Komando

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Richard C. Komando  
Florida Bar Number: 181366

## CERTIFICATE OF SERVICE

I Hereby Certify that on May 12, 2020, the undersigned electronically filed with the Clerk of Court (CM/ECF) a true and correct copy of the foregoing by using the CM/ECF system which will send a notice of electronic filing to the parties to the proceedings below or their counsel of record, and to the U.S. District Court for the Southern District of Florida (Marra, J.):

*Counsel for Petitioners*

Bradley J. Edwards, Esquire  
Edwards Pottinger LP  
[brad@epllc.com](mailto:brad@epllc.com)

Jay Howell, Esquire  
Jay Howell & Associates  
[jay@jayhowell.com](mailto:jay@jayhowell.com)

Paul G. Cassell  
S.J. Quinney College of Law at the  
University of Utah  
[Cassellp@law.utah.edu](mailto:Cassellp@law.utah.edu)

*U.S. District Court for the  
Southern District of Florida*

[marra@flsd.uscourts.gov](mailto:marra@flsd.uscourts.gov)

*Counsel for the United States*

Jill Steinberg  
[Jill.Steinberg@usdoj.gov](mailto:Jill.Steinberg@usdoj.gov)

Nathan Kitchens  
[Nathan.Kitchens@usdoj.gov](mailto:Nathan.Kitchens@usdoj.gov)

*Counsel for Jeffrey Epstein*

Martin Weinberg  
[owlmgw@att.net](mailto:owlmgw@att.net)

Roy Black  
[pleading@royblack.com](mailto:pleading@royblack.com)

/s/ Richard C. Komando

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Richard C. Komando  
Florida Bar Number: 181366