No. 23-10168

In the United States Court of Appeals for the Fifth Circuit

In re: Naoise Connolly Ryan, et al., Polskie Linie Lotnicze, Lot S.A., and Smartwings, A.S.,

Petitioners.

On Petitions for Writ of Mandamus to the United States District Court for the Northern District of Texas No. 4:21-CR-5-O (O'Connor, J.)

CONSOLIDATED RESPONSE FOR RESPONDENT UNITED STATES

LEIGHA SIMONTON
United States Attorney
Northern District of Texas

JEREMY SANDERS
Assistant Chief
Criminal Division, Fraud Section

KENNETH A. POLITE, JR.
Assistant Attorney General
Criminal Division

LISA H. MILLER
Deputy Assistant Attorney General
Criminal Division

W. CONNOR WINN
Criminal Division, Appellate Section
U.S. Department of Justice
950 Pennsylvania Ave., NW, Ste. 1264
Washington, DC 20530
202.669.6551
William.Winn@usdoj.gov

CERTIFICATE OF INTERESTED PERSONS

In re Ryan, No. 23-10168

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Adam Warren Aston (Smartwings counsel)

Adrian Vuckovich (crash-victim counsel below)

Allan Jonathan Medina (government counsel)

Alex Lewis (government counsel)

Alexandra N. Daly (LOT counsel)

Anthony Battista (LOT counsel)

Bayihe Demissie (petitioner)

Benjamin L. Hatch (Boeing counsel)

Brandon Michael Santos (Boeing counsel)

C. Harker Rhodes (Boeing counsel)

Callie A. Castillo (Smartwings counsel)

Carlos Antonio Lopez (government counsel)

Catherine Berthet (petitioner)

Chad E. Meacham (government counsel)

Chase Hilton (crash-victim counsel)

Chris Moore (petitioner)

Christopher Fenton (government counsel)

Colin Patrick Benton (LOT counsel)

Cory E. Jacobs (government counsel)

Craig Scott Primus (Boeing counsel)

Darren P. Nicholson (crash-victim counsel)

David J. Drez III (LOT counsel)

David M. Schoeggl (Smartwings counsel)

Diana Gurfel Shapiro (LOT counsel)

Emily Chelangat Babu (petitioner)

Erin Nealy Cox (former government counsel and movant below)

Erin R. Applebaum (crash-victim counsel)

Evan Kwarta (LOT counsel)

Glenn Leon (government counsel)

Guy Daud Iskander Zen S. (petitioner)

Huguette Debets (petitioner)

Ian Brinton Hatch (Boeing counsel below)

Jason Robert Marlin (crash-victim counsel below)

Javier de Luis (petitioner)

Jeffrey Richard Gilmore (Smartwings counsel)

Jeffrey Wallace Hellberg, Jr. (LOT counsel)

Jeremy Alan Fielding (Boeing counsel)

Jeremy Raymond Sanders (government counsel)

Jerrob Duffy (former government counsel)

John Karanja Quindos (petitioner)

Joshua Mwazo Babu (petitioner)

Katherine Ann Staton (Smartwings counsel)

Katie D. Bass (Smartwings counsel)

Kenneth A. Polite, Jr. (government counsel)

Kyle Kilpatrick Oxford (crash-victim counsel)

Leigha Simonton (government counsel)

Lisa H. Miller (government counsel)

Lorinda Laryea (government counsel)

Luca Dieci (petitioner)

Margaret Ann Garvin (amicus counsel)

Mariel A. Brookins (Boeing counsel)

Mark Filip (Boeing counsel)

Marianne Auld (counsel below for movant Erin Cox)

Mary Dow (LOT counsel)

Michael Stumo (petitioner)

Michael T. O'Neil (government counsel)

Nadia Milleron (petitioner)

Naoise Connolly Ryan (petitioner)

National Crime Victim Law Institute (amicus)

Nicholas Jon Ganjei (amicus counsel in district court)

Pablo Rojas (counsel)

Patrick Haney (Boeing counsel below)

Paul D. Clement (Boeing counsel)

Paul G. Cassell (crash-victim counsel)

Paul Njoroge (petitioner)

Polskie Linie Lotnicze Lot S.A. (petitioner)

Richard Bratton Roper, III (Boeing counsel)

Richard Cullen (Boeing counsel below)

Robert A. Clifford (crash-victim counsel)

Scott Philip Armstrong (government counsel)

Sean Tonolli (government counsel)

Senator Ted Cruz (amicus in district court)

Smartwings A.S. (petitioner)

Sri Hartati (petitioner)

The Boeing Company (respondent)

The Honorable Reed C. O'Connor (district judge)

Tracy A. Brammeier (crash-victim counsel)

United States of America (respondent)

United States District Court for the Northern District of Texas (respondent)

Warren T. Burns (crash-victim counsel)

W. Connor Winn (government counsel)

Yuke Meiske Pelealu (petitioner)

Zipporah Muthoni Kuria (petitioner)

/s/ W. Connor Winn
W. Connor Winn

STATEMENT REGARDING ORAL ARGUMENT

The government does not oppose petitioners' requests for oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

More than two years ago, the federal government and The Boeing Company (Boeing) executed a deferred prosecution agreement (DPA) to hold Boeing accountable for misleading the Federal Aviation Administration's (FAA) pilot-training division about Boeing's 737 MAX aircraft. This agreement required Boeing to take meaningful steps to atone for its criminal conduct. The DPA, for example, required Boeing to create a $500 million fund to compensate beneficiaries of those who died in two 737 MAX crashes without prejudice to their ability to also recover full damages from Boeing in civil suits.

Recently, the district court in this case ruled that the government should have conferred with the crash victims' beneficiaries, who the court deemed "crime victims" under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, before executing the DPA. Before the district court, the government recognized the terrible losses suffered by the crash victims' families and apologized for not meeting and conferring with all of the crash victims before executing the DPA. The court ultimately found that the government's legal error in failing to do so was made in good faith and therefore declined those victims' request to, among other things, modify, reject, or supervise the DPA's implementation.

These mandamus petitions chiefly concern whether the district court was right to deny these remedies. It was. A court's power to remedy CVRA violations is significant. But, at least under these circumstances, the statute does not allow the court to take the constitutionally dubious step of invading the Executive Branch's domain and interfering with or monitoring the government's decisions about whether and when to prosecute—the precise subject matter of a DPA. Indeed, if the CVRA could ever permit such an intrusion, it would be only where the government at least acted in bad faith to circumvent crime victims' rights. That is not this case.

The district court's order should stand. The court correctly refrained from modifying, rejecting, or supervising the DPA. And given what the court determined were "historic" and "good-faith" efforts by the government to engage with the crash victims' beneficiaries, the court reasonably declined to issue certain other discretionary remedies. It also permissibly applied the doctrine of laches in denying two airlines' belated CVRA motions. For all these reasons, this Court should deny the three pending mandamus petitions.

JURISDICTIONAL STATEMENT

The district court (O'Connor, J.) had jurisdiction in this criminal case under 18 U.S.C. § 3231. This Court has authority to issue a writ of mandamus if a district court improperly "denies the relief" sought by a "crime victim" under

the CVRA. 18 U.S.C. § 3771(d)(3); *see also* 28 U.S.C. § 1651(a) (giving this Court authority to issue "all writs necessary or appropriate" in aid of its jurisdiction). Petitioners sought such writs on February 23, 2023.

STATEMENT OF THE ISSUES

1. Whether the district court correctly understood its remedial authority under the CVRA, given the government's lack of bad faith in this case. In particular, whether:

   (a) the court rightly held that it lacked statutory or inherent authority to modify, reject, or supervise this DPA; and

   (b) the court permissibly exercised its discretion on this case's facts to deny the other remedies sought.

2. Whether the district court reasonably applied laches to bar two foreign airlines' belated motions for crime-victim status and equitable relief.

STATEMENT OF THE CASE

This matter began as a traditional criminal case against Boeing, but it evolved into CVRA litigation raising novel questions about a district court's remedial authority under that statute. The government recounts that arc here.

I. The Criminal Case Against Boeing

For over fifty years, Boeing has manufactured and sold a commercial passenger aircraft known as the Boeing 737 and, throughout the early and

mid-2010s, was preparing that aircraft's next iteration, the "737 MAX." Appx.31.[1] Boeing sought the FAA's approval to sell this aircraft in the United States and wanted the FAA to require minimal additional training for future 737 MAX pilots already flying other Boeing 737s. Appx.31, 35. After all, the more training needed, the more expensive an airline's transition to the 737 MAX would prove and the fewer planes Boeing could expect to sell. Appx.34-35.

Recognizing these high stakes, Boeing—acting through its employees and agents—misled the FAA's pilot-training team about a new feature of the 737 MAX's design. Appx.37, 43. Two Boeing employees concealed from that team the final operational scope of the aircraft's new Maneuvering Characteristics Augmentation System (MCAS). Appx.38-42. They hoped that omission would prevent the FAA's pilot-training team from imposing strenuous training requirements in connection with the 737 MAX. Appx.40. Their plan worked. Appx.43. The FAA issued Boeing's desired pilot-training determination and materials, and pilots for U.S.-based airlines flying the 737 MAX "were not

[1] Citations to "Appx.," "MR," and "SW.Appx." refer respectively to the appendices filed alongside the crash-victim beneficiaries', LOT's, and Smartwings' petitions for mandamus. Citations to "Supp.Appx." refer to the exhibit the government is filing alongside this consolidated response. Citations to "Op." refer to the district court's final opinion in this matter.

provided any information about MCAS in their airplane manuals and pilot-training manuals." Appx.43. Boeing was cleared to sell this aircraft domestically and, once foreign regulators approved, globally. Appx.43.

Boeing's fraud came to light over a year later, after two 737 MAXs crashed in short succession. In October 2018, a 737 MAX servicing Lion Air Flight 610 crashed off the Indonesian coast with no survivors. Appx.43. Four months later, a 737 MAX servicing Ethiopian Airlines Flight 302 crashed in Ethiopia and killed everyone aboard. Appx.45. MCAS potentially played a role in these crashes, and the FAA grounded all 737 MAX aircraft in the United States. Appx.44-45.

The government launched an investigation into Boeing and unearthed the company's misrepresentations to the FAA. Appx.6; *see also* Appx.34-43. That investigation did not, however, reveal evidence that the government believed would allow it to prove beyond a reasonable doubt what precisely caused the two plane crashes. Supp.Appx.9. The government ultimately filed a criminal information on January 7, 2021, charging Boeing with conspiring to defraud the FAA, in violation of 18 U.S.C. § 371. Appx.1-2.

That same day, the government filed and announced a DPA with Boeing. Appx.3-60. The DPA reflected the government's informed judgment that the public interest warranted initiating this fraud prosecution against Boeing and

providing the company—but not its officers or employees—with a conditional release of liability for the conduct described in the statement of facts supporting the DPA, as long as Boeing abided by numerous conditions for three years. Appx.6-9, 16.[2] Among other things, Boeing had to:

- establish a $500 million fund that would compensate the heirs, relatives, and beneficiaries of those who died in the Lion Air and Ethiopian Airlines crashes—without prejudice to their ability also to recover full damages from Boeing in civil suits, Appx.14-16;
- create a separate $1.77 billion fund to compensate the airlines who could no longer use the now-grounded 737 MAX aircraft, Appx.14;
- pay a $243,600,000 fine to the federal government, Appx.13;
- refrain from making "any public statement, in litigation or otherwise, contradicting [its] acceptance of responsibility" or the factual statement that accompanied the DPA, Appx.22; and
- overhaul its corporate compliance program, Appx.16-17.

[2] DPAs do not grant immunity to defendants. Rather, as described in *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 737 (D.C. Cir. 2016):

> In certain situations, rather than choose between the opposing poles of pursuing a criminal conviction or forgoing any criminal charges altogether, the [government] may conclude that the public interest warrants the intermediate option of a deferred prosecution agreement (DPA). Under a DPA, the government formally initiates prosecution but agrees to dismiss all charges if the defendant abides by negotiated conditions over a prescribed period of time. Adherence to the conditions enables the defendant to demonstrate compliance with the law. If the defendant fails to satisfy the conditions, the government can then pursue the charges based on facts admitted in the agreement.

If Boeing breached this agreement, it would be "subject to prosecution for any federal criminal violation of which the [Justice Department's Criminal] Fraud Section ha[d] knowledge." Appx.19.

At the parties' request, the district court issued an order excluding time under the Speedy Trial Act to permit Boeing to demonstrate its good conduct during the term of that agreement. MR.131; *see also* 18 U.S.C. § 3161(h)(2). The government then began monitoring Boeing's compliance with the DPA.[3]

II. The CVRA Litigation

Nearly a year after the DPA was announced, some family members of those who died in the Lion Air and Ethiopian Airlines crashes (the Representatives) appeared in this case. They claimed that the government had violated the CVRA by failing to confer with them before executing the DPA and sought various remedies, including asking the district court to modify, reject, or supervise the DPA. Another 11 months later, two foreign airlines—LOT and Smartwings (the Airlines)—raised similar claims and requested similar

[3] The government thereafter prosecuted one of Boeing's 737 MAX Chief Technical Pilots who, as alleged in the indictment, misled the FAA and, separately, some of Boeing's airline customers. *See United States v. Forkner*, 4:21-cr-268 (N.D. Tex.). After a jury trial, that defendant was found not guilty on all counts.

remedies. What follows is an outline of the CVRA and the CVRA litigation with the Representatives and the Airlines (collectively, Petitioners).

A. Statutory Background

The CVRA details the rights of "crime victims," the ways in which those victims may assert those rights, and how federal courts and prosecutors are to protect those rights. 18 U.S.C. § 3771(a)-(f); *see also id.* § 3771(e)(2)(A) (defining a "crime victim" as a "person directly and proximately harmed as a result of the commission of a Federal offense"). Under the CVRA, "crime victims" have ten specific rights in federal criminal cases, including, as relevant here:

> (5) The reasonable right to confer with the attorney for the Government in the case.
>
> . . .
>
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
>
> (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
>
> . . .

18 U.S.C. § 3771(a).

Courts, prosecutors, and crime victims all play a role in safeguarding and asserting these rights. The courts "shall ensure" that, "[i]n any court proceeding involving an offense against a crime victim, . . . the crime victim is afforded" these rights. 18 U.S.C. § 3771(b)(1). Prosecutors "shall make their best efforts

to see that crime victims are notified of, and accorded," these rights, *id.* § 3771(c)(1), and may assert these rights on crime victims' behalf, *id.* § 3771(d)(1), (4). Finally, crime victims and their legal representatives may "assert[]" their rights under the CVRA through a "[m]otion for relief" "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." *Id.* § 3771(a), (d)(3). If that effort is unsuccessful, they "may petition the court of appeals for a writ of mandamus." *Id.* § 3771(d)(3).

Although the CVRA anticipates a court granting crime victims "relief," it does not say what that relief entails. All the statute states on this front is that courts may not grant "a new trial" based on a CVRA violation and may only rarely re-open a defendant's plea or sentence on that ground. 18 U.S.C. § 3771(d)(5). The statute does, however, affirm that nothing in it "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* § 3771(d)(6).

B. The Representatives' Claims

Against this statutory backdrop, the Representatives filed motions in December 2021 claiming crime-victim status and asserting that the government had violated the CVRA because it executed the DPA without notifying them or conferring with them about that agreement. Appx.74-75, 88-97. They then

asked the district court to: modify, reject, or supervise the DPA; arraign Boeing; order the government to turn over evidence about Boeing's crime and the DPA's negotiation and to confer about prosecuting Boeing; and refer the government to investigative authorities. Appx.98-99, 206-08, 606.

After these motions were filed, the government engaged with the Representatives. The government had not previously viewed them as "crime victims" based on its reading of the CVRA. Supp.Appx.7, 13-14. But the government recognized that it should have met and conferred with the Representatives before executing the DPA. Supp.Appx.6. It thus met with them and their attorneys three times in January 2022 (with the Attorney General attending one meeting) and listened carefully to their "perspectives on the Boeing 737 MAX crashes and the DPA" and their case-specific proposals. Supp.Appx.7.

Following these meetings, the government publicly apologized "for not meeting and conferring with" the crash victims' families "before entering into the DPA." Supp.Appx.6. It also apologized for "inaccurate information" that the Representatives had received in February 2020 from the Department of Justice's Victims' Rights Ombudsman, who had mistakenly told the Representatives that the government was not investigating Boeing. Supp.Appx.23-24; *see also* Appx.512-13 (explaining that the Department of

Justice's Victims' Rights Ombudsman's misstatements "were the product of a regrettable and inadvertent internal miscommunication at the Department"). Finally, the government stated that it would revise its internal guidelines to ensure that, if this situation were to recur, the presumption would be that "consultation and notice will occur" with such individuals. Supp.Appx.13.[4]

On October 21, 2022, after extensive briefing and taking testimony from two witnesses at an evidentiary hearing, the district court found that Boeing's fraud on the FAA directly and proximately caused the Lion Air and Ethiopian Airlines crashes. Appx.458-65. The court thus deemed the Representatives "crime victims" and ruled that the government had violated the CVRA by not conferring with them before executing the DPA. Appx.465. The court would later find, however, that the government's CVRA violation was based on a "legal error" concerning the CVRA's crime-victim definition—not a "bad faith" effort to circumvent that statute. Op.20.

That left the issue of remedies. Consistent with the district court's order, the government remained (and to this day, remains) committed to continuing to reasonably conferring with the Representatives throughout the remainder of the

[4] Attorney General Guidelines for Victim and Witness Assistance 18, 63 (2022) (effective Mar. 31, 2023) (fulfilling that promise and outlining limited circumstances where that presumption would not prove reasonable), *available at* https://www.justice.gov/d9/pages/attachments/2022/10/21/new_ag_guidlines_for_vwa.pdf.

DPA. Appx.504. The government spoke with the Representatives' counsel about their requested remedies in October 2022 and with the Representatives themselves in a five-hour in-person and teleconference meeting in November 2022. Appx.504; Op.7-8. These meetings led the government to support holding an arraignment for Boeing, Appx.504, 615, at which, during a three-hour-plus public hearing, several crash victims' representatives spoke or provided victim impact statements regarding their losses and Boeing's conduct, Op.8.

The government, however, continued to oppose remedies that would involve modifying, rejecting, or supervising the DPA, opening the government's case files, or referring the government to investigative authorities. Appx.504-06. It disagreed with the Representatives' suggestion that these remedies were available and warranted under the CVRA, the court's inherent authority, or, as to the DPA-related remedies only, the Speedy Trial Act, 18 U.S.C. § 3161. Appx.504-06; Supp.Appx.21-22.

C. The Airlines' Claims

Meanwhile, 11 months after this CVRA litigation began and almost two years after the DPA was executed, the Airlines appeared and claimed crime-victim status based on the reasoning in the district court's causation ruling. MR.289-303; SW.Appx.100-07. The Airlines too claimed that the government

had violated the CVRA when it executed the DPA without notifying them or conferring with them about that agreement. MR.301; SW.Appx.128. And they also sought remedies, with LOT seeking to re-open the DPA or judicial supervision of that agreement and Smartwings asking the court to order an "accounting" of the amounts spent from and remaining in the $1.77 billion fund that the DPA created for Boeing's airline customers. MR.302; SW.Appx.128.

The government opposed these motions on several grounds. Based on the attenuated causal chain between Boeing's admitted misconduct and the Airlines' harms, the government maintained that the Airlines were not crime victims, and it contended that their proposed remedies were unavailable or unwarranted in this case. *See* MR.358-72; SW.Appx.111-15. Lastly, the government invoked the laches doctrine against LOT. MR.364-69.

D. The District Court's Final Ruling

On February 9, 2023, the district court resolved the outstanding remedy and crime-victim status issues. It denied Petitioners' requested remedies and applied laches to bar the Airlines' requests for crime-victim status. Op.26, 29.

The district court first concluded that the remedies the Representatives sought (largely overlapping with the Airlines' requested remedies) were either unavailable or unwarranted in this case. Op.12-26. These remedies fell "into three categories" that "ask[ed] the Court to: (1) exercise its statutory or inherent

supervisory authority over the DPA; (2) enforce the victims' conferral rights; and (3) refer the Government to appropriate investigative authorities." Op.11.[5] For each category, the district court framed the remedial questions it faced as whether it "ha[d] statutory or inherent authority to provide" these remedies and, if it could "provide such remedies, whether it must." Op.12.

The district court denied the requested remedies under this framework. It started by concluding "that it lack[ed] both statutory and inherent authority that would permit any substantive review and disapproval or modification of the DPA at issue in this case." Op.26. The court joined the Second and D.C. Circuits in ruling that the Speedy Trial Act does not authorize courts to reject a DPA based on its substantive terms. Op.12-16. It further determined that its "inherent authority provides no basis upon which the Court may exercise supervisory authority over the DPA," because no government bad faith or impropriety took place in this case. Op.17, 20.

The district court then refused, as a matter of discretion, to order the government to give the Representatives its evidence or to refer the government for investigation. Op.21. That decision rested in part on the government's good-

[5] The Court viewed the "conferral rights" category to include the Representatives' request for orders requiring the government to disclose its evidence and internal communications relating to the DPA and to continue engaging with Petitioners. Op.21.

faith conferrals with the Representatives throughout this litigation, which gave "meaningful" though belated "effect" to their conferral rights. Op.25; *compare* Op. 20 (describing this "historic engagement" with the Representatives) *and* Op. 22-23 (same), *with* Op. 23-24 (outlining the scope of the CVRA right to confer). The court therefore declined to grant a "novel remedy" in favor of a "sparing and restrained exercise of [its] inherent remedial authority." Op.25.

Although the district court's remedy ruling precluded the Airlines' requested remedies, Op.28-29, the court also denied the Airlines' request for crime-victim status under the laches doctrine, Op.27-29. It viewed their almost two-year delay in seeking that status and related equitable relief as "lethargic" and without excuse given their access to counsel and longstanding knowledge of the DPA. Op.28. Because their delayed entrance into this case threatened to extend the litigation and the DPA, harming both the government and Boeing, the court found sufficient unexcused delay and prejudice to justify applying laches and bar the Airlines' requests for crime-victim status. Op.28-29.

III. Rulings Presented For Review

Petitioners filed mandamus petitions with this Court. All contend that the district court was obligated under the CVRA to grant them the remedies they seek. Representatives Pet. 15-29; LOT Pet. 25-28; Smartwings Pet. 26-30. They also, to varying extents, argue that the court had authority under the Speedy

Trial Act and inherent authority to grant their proposed DPA-related remedies. Representatives Pet. 29-33; LOT Pet. 28-29; Smartwings Pet. 26-27. Finally, the Airlines contend the court erred in invoking laches to bar their claims for crime-victim status. LOT Pet. 13-24; Smartwings Pet. 13-25.

SUMMARY OF ARGUMENT

District courts have significant authority to safeguard and protect crime victims' rights under the CVRA, and that authority will typically allow them to prevent or remedy violations of that statute. But in a few circumstances, Congress and the Constitution have limited the relief a court may grant. And, consistent with general remedial principles, a court must always make a case-specific judgment call about whether a given remedy will in fact cure a CVRA violation.

These principles rightly led the district court here to deny the unprecedented remedies that Petitioners sought. The CVRA nowhere authorizes a court to modify, reject, or supervise a DPA between the government and a criminal defendant. And reading its provisions to authorize that remedy would risk impermissibly interfering with the Executive Branch's constitutional role in deciding when and how to prosecute a criminal defendant, at least where the government acted in good faith when it executed the at-issue DPA. Here, given the government's good faith and "historic engagement" with

the Representatives, the court correctly declined to grant these DPA-related remedies and acted within its discretion when it denied the other novel remedies they proposed.

The district court also permissibly invoked laches and exercised its discretion to bar the Airlines' follow-on motions for crime-victim status and relief. The laches doctrine applies in CVRA disputes, and the court reasonably viewed the Airlines' almost two-year delay in bringing their claims as unexcused and prejudicial. It therefore did not abuse its discretion in applying laches here.

ARGUMENT

I. Petitioners' Proposed Remedies Were Unavailable Or Unwarranted On This Case's Facts.

Petitioners contend that the district court should have granted them remedies that are rarely, if ever, available or appropriate in federal criminal cases. As the district court determined, the government has proceeded in good faith throughout this case. There thus existed no ground for the court to modify, reject, or supervise the DPA, and the court did not abuse its discretion in declining to grant the other discretionary remedies that only the Representatives sought.

A. Standard Of Review

"[T]he court of appeals shall apply ordinary standards of appellate review" when deciding a crime victim's mandamus petition. 18 U.S.C. § 3771(d)(3).

This Court therefore reviews the district court's legal conclusions *de novo*, factual findings for clear error, and its discretionary judgments for an abuse of discretion. *In re Doe*, 57 F.4th 667, 672-73 (9th Cir. 2023). Arguments not raised below are reviewed for plain error. Fed. R. Crim. P. 52(b).

B. The CVRA's Remedial Scheme Relies On A District Court's Preexisting Statutory And Inherent Authorities.

As noted earlier, the CVRA directs courts to "ensure that the crime victim" is afforded his or her rights, 18 U.S.C. § 3771(b)(1), and, to that end, authorizes district courts to grant crime victims "relief," *id.* § 3771(d)(3). But the statute does not state what that relief should be or grant courts any new remedial authority. Instead, it relies on courts to wisely exercise their preexisting statutory and inherent authority to safeguard a crime victim's rights. *Cf. Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (noting the well-settled rule that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done" (internal quotation marks omitted)).

A district court's statutory and inherent authorities will in tandem almost always permit it to safeguard crime victims' rights or remedy violations of those rights. For instance, "a victim complaining that government lawyers set a hearing without properly notifying her will ask the court to delay the hearing." *In re Wild*, 994 F.3d 1244, 1262 (11th Cir. 2021) (en banc) (internal citation

omitted); *see also United States v. Hughey*, 147 F.3d 423, 431 (5th Cir. 1998) (district court has inherent authority to manage docket). Similarly, "[a] victim who asserts that prosecutors struck a plea deal without consulting her will ask the court to reject the agreement." *In re Wild*, 994 F.3d at 1262 (internal citation omitted); *United States v. Smith*, 417 F.3d 483, 487 (5th Cir. 2005) (district court has discretionary statutory authority to reject a plea agreement).

The rare situations in which a district court will prove unable to remedy a CVRA violation are those where Congress or the Constitution have precluded a court from doing so. Recall, for example, that Congress provided that nothing in the CVRA "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6); *see also id.* § 3771(d)(5) (limiting new trials and the re-opening of pleas or sentences). The Constitution similarly places limits on the remedies a court may grant if those remedies might interfere with the Executive Branch's functions. *See United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 137 (2d Cir. 2017); *cf. In re Wild*, 994 F.3d at 1262 (noting how the earlier CVRA enforcement examples "provide the victim complete relief," but "don't meaningfully impinge on post-charge prosecutorial prerogatives").

C. The District Court's Remedial Order Comported With The CVRA.

Despite Petitioners' contentions otherwise, Representatives Pet. 23-24; LOT Pet. 28-29; Smartwings Pet. 26-27, 29, the district court correctly applied this remedial framework when it considered Petitioners' requested remedies. The court examined its statutory and inherent authority and rightly determined that it lacked the authority in this specific case to modify, reject, or supervise the DPA under either the Speedy Trial Act or the court's inherent supervisory powers. It further determined that, although it likely had discretionary authority to grant the other remedies requested by the Representatives, those remedies were not warranted on the facts of this case.

1. Courts Cannot Rewrite A DPA Under The Speedy Trial Act.

The Representatives renew their contention that the Speedy Trial Act grants a district court authority to withhold approval "of one part of the DPA." Representatives Pet. 32. That argument lacks merit.

The Speedy Trial Act generally requires that a criminal trial begin no more than 70 days after a defendant is charged or first appears in court. 18 U.S.C. § 3161(c)(1). "For a DPA to function as intended, the parties must obtain an exemption from" this requirement, as DPAs tend to last longer than 70 days and the charges filed alongside a DPA would otherwise "be subject to mandatory dismissal once the 70-day period had run." *HSBC Bank*, 863 F.3d at 130.

Congress therefore facilitated DPAs by excluding from that 70-day timeline "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, *with the approval of the court*, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2) (emphasis added).

This "with the approval of the court" language, however, does not afford courts *carte blanche* to reject a DPA in whole or in part. *HSBC Bank*, 863 F.3d at 138. Instead, it authorizes the court to weigh whether a DPA "is genuinely intended to 'allow[] the defendant to demonstrate his good conduct' and does not constitute a disguised effort to circumvent the speedy trial clock." *Id.* (quoting 18 U.S.C. § 3161(h)(2)); *accord United States v. Fokker Servs. B.V.*, 818 F.3d 733, 744 (D.C. Cir. 2016); Op.16. That limitation respects the constitutional separation of powers, which has long reserved to the Executive Branch decisions about whether and when to commence or maintain a prosecution. *Fokker Servs.*, 818 F.3d at 737 (explaining that a DPA manifests this judgment). And it accords with the constitutional-avoidance canon: "[i]f, in the context of DPAs, Congress intended to rejigger the historical allocation of authority between the courts and the Executive, we would expect it to do so

rather clearly." *HSBC Bank*, 863 F.3d at 138. The Speedy Trial Act's "vague 'approval' requirement" does not clear that bar. *Id.*[6]

2. The District Court Lacked Inherent Authority To Modify, Reject, Or Supervise This DPA.

Petitioners also suggest the district court did not appreciate the scope of its inherent authority to modify, reject, or supervise the DPA in various fashions. Representatives Pet. 29-33; LOT Pet. 28-29; Smartwings Pet. 26-27. They are mistaken. The court properly recognized that infringing on the constitutional separation of powers in the manner Petitioners proposed would not be permissible here.

The federal courts have inherent authority that permits them "to supervise the administration of criminal justice among the parties before the bar." *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (internal quotation marks omitted). These inherent or supervisory powers "deal strictly with the courts' power to control their *own* procedures." *United States v. Williams*, 504 U.S. 36, 45-46 (1992). They are therefore usually invoked only when "a defendant raises

[6] In any event, even if the Representatives read the Speedy Trial Act correctly, it would at most permit a district court to approve or reject a "written agreement" as a whole, 18 U.S.C. § 3161(h)(2)—not cherry pick provisions that it dislikes and excise them to create an agreement to which neither party consented. *Cf. United States v. Crowell*, 60 F.3d 199, 203 (5th Cir. 1995) (forbidding a court from dictating the terms of a plea agreement). *Contra* Representatives Pet. 32 (requesting such relief).

a purported impropriety in [] federal criminal proceeding[s] and seeks the court's redress of the impropriety." *HSBC Bank*, 863 F.3d at 136 (internal quotation marks omitted); *United States v. Hasting*, 461 U.S. 499, 505 (1983) (explaining that court may rely on inherent authority to remedy a "violation of recognized rights," "preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury," and "deter illegal conduct" in federal criminal proceedings).

By contrast, "the federal judiciary's supervisory powers over prosecutorial activities that take place outside the courthouse is extremely limited, if it exists at all." *HSBC Bank*, 863 F.3d at 136 (internal quotation marks omitted). That is especially true when it comes to interfering with a prosecutors' charging decisions—*i.e.*, "whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought"—because the Constitution assigns primacy in those decisions to the Executive Branch. *Fokker Servs.*, 818 F.3d at 737. A court's inherent powers cannot circumvent such constitutional limitations. *See United States v. Tsarnaev*, 142 S. Ct. 1024, 1036 (2022); *cf. Williams*, 504 U.S. at 50 (noting that the supervisory power "would not permit judicial reshaping of the grand jury institution" and "substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself").

Given these principles, the district court appropriately joined the Second Circuit in holding that it is rarely (if ever) permissible for a court to exercise inherent or supervisory powers to modify, reject, or supervise a DPA. Op.17. Again, DPAs involve the Executive Branch's "core prerogative to dismiss criminal charges" when it sees fit and carry out its constitutional "duty under Article II to see that the laws are faithfully executed." *Fokker Servs.*, 818 F.3d at 743. A court's ability to police a DPA's negotiation and execution is thus, as a constitutional matter, "extremely limited, *if it exists at all*." Op.20 (quoting *HSBC Bank*, 863 F.3d at 136). Courts may possibly have a hypothetical authority to intercede if a DPA "'so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court'" or "when there is clear evidence of bad faith" or Executive Branch misconduct. Op.17 (quoting *HSBC Bank*, 863 F.3d at 136); *see also In re Stone*, 986 F.2d 898, 904 (5th Cir. 1993) (per curiam) (cautioning courts against "becoming monitors of the wisdom and soundness of Executive action" (internal quotation marks omitted)).

Whatever the case, the district court found no bad faith or impropriety here and therefore correctly declined to exercise its inherent authority over the DPA. Op.20. No litigant has ever claimed that the DPA's provisions are substantively illegal or unethical. *See, e.g.*, Representatives Pet. 31 (claiming

only that the DPA was negotiated through a procedure that violated the CVRA). The court below also rightly viewed the government's failure to confer with and provide notice to the crash victims in this case to flow from an honest "legal error" about who counts as a "crime victim" under the CVRA, "not [from] bad faith or impropriety." Op.20. Indeed, Petitioners do not challenge this factual finding, which is far from clearly erroneous. *See United States v. Scully*, 951 F.3d 656, 668 (5th Cir. 2020) (lack of bad faith finding reviewed for clear error).

Petitioners offer a variety of responses as to why the district court misconstrued its inherent authority in this case and why it should have modified, rejected, or supervised the DPA. Those claims lack merit.

The Representatives contend that the district court thought "its inherent authority extended only to reviewing issues involving the integrity of jury convictions," when it also provides a means to remedy a "violation of recognized rights" like those contained in the CVRA. Representatives Pet. 31 (emphasis and internal quotation marks omitted). That is incorrect. The court well understood that its inherent authority could in proper cases serve to "remedy [a] violation of recognized rights," Op.17 (internal quotation marks omitted); indeed, it viewed the other remedies that the Representatives sought as ones it likely could grant under its inherent authority to address CVRA violations, Op.21-22. What instead prevented the court from exercising its

inherent authority in connection with the DPA was the constitutional separation of powers and the case-specific lack of bad faith or impropriety necessary for a court to possibly wade into the Executive Branch's charging domain. Op.18-20.

LOT, meanwhile, argues for the first time that the district court could not have determined its inherent authority here without allowing the parties an opportunity "to investigate and determine whether bad faith negotiations occurred." LOT Pet. 29. The district court did not commit plain error in declining to afford LOT such an opportunity.[7] LOT never alleged that the government acted in bad faith when negotiating the DPA. *See* MR.399-400. It certainly did not make a plain and obvious *prima facie* showing of bad faith, the showing necessary to dispense with the presumption of regularity that is afforded to prosecutorial decision-making and to access the government's internal files to prove allegations of bad faith or prosecutorial misconduct. *See United States v. Armstrong*, 517 U.S. 456, 468 (1996).

[7] The Representatives, not LOT, requested discovery and a hearing on this front before the district court but have not renewed, and thus have waived, such a request here. LOT's newfound argument, meanwhile, is reviewed for plain error. *United States v. Evans*, 892 F.3d 692, 711 n.1 (5th Cir. 2018) (collecting authorities for the proposition that "[t]ypically, a defendant must bring his own objections to preserve them").

Besides, the allegations that the other litigants made, even if accepted as true, would not have made a *prima facie* case of bad faith in connection with the DPA. They demonstrated that:

- the Department of Justice's Victims' Rights Ombudsman provided inaccurate information about the existence of a criminal investigation into Boeing; and
- the government did not confer with the Representatives before it executed a DPA with Boeing.

See Op.18; Appx.483-86. Given the presumption of regularity and the government's good-faith behavior throughout these proceedings, that evidence did not present a *prima facie* case of bad faith. Indeed, as the district court concluded, these events amounted to a case of good-faith mistakes and legal error. *See United States v. Swenson*, 894 F.3d 677, 685 (5th Cir. 2018) (affirming that "mere error or oversight" is not bad faith (internal quotation marks omitted)); *Crowe v. Smith*, 261 F.3d 558, 563 (5th Cir. 2001) ("A court abuses its discretion when its finding of bad faith is based on an erroneous view of the law or a clearly erroneous assessment of the evidence."); *see also Dep't of Com. v. New York*, 139 S. Ct. 2551, 2583 (2019) (Thomas, J., concurring) (cautioning against "attributing bad faith to an officer of a coordinate branch of Government" if "there are equally plausible views of the evidence").

Finally, Smartwings claims that the district court had the inherent authority to order an accounting of the DPA's compensation fund for airlines or

to require regular reports regarding Boeing's compliance with the DPA. Smartwings Pet. 26-27, 29. Those remedies would again involve "supervising" the DPA and Boeing's performance under that agreement. And absent at least a showing of government misconduct or bad faith in the implementation of the DPA, that approach is improper. *See HSBC Bank*, 863 F.3d at 136-37 (holding that a district court's invocation of its inherent authority to supervise the implementation of a DPA was misguided at least absent government misconduct or bad faith when overseeing that agreement).

3. The District Court Appropriately Denied Other Discretionary Remedies.

The Representatives argue in passing that the district court erred when it declined to exercise its inherent authority—*i.e.*, "use its CVRA enforcement power"—to grant their proposed non-DPA remedies (access to the government's evidence or referring the government to investigative authorities). Representatives Pet. 25. Moreover, they attack the court's underlying assessment that the government "substantially and meaningfully satisfied" the CVRA's "reasonable right to confer," which informed its ultimate discretionary decision to deny these other remedies.[8] Representatives Pet. 27-29. Both arguments lack merit.

[8] The Representatives do not challenge the district court's ultimate balancing as an abuse of discretion and have thus waived that argument. *See*

To start, the district court was not obligated to exercise its inherent powers. "Just because a district court has [an] inherent power . . . does not mean that it is appropriate to use that power in every case." *Dietz v. Bouldin*, 579 U.S. 40, 48 (2016). Those powers must instead "be exercised with restraint and discretion" given their potency, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991), meaning courts must weigh whether to use those powers on a case-by-case basis, *see, e.g.*, *Crowe v. Smith*, 151 F.3d 217, 236 (5th Cir. 1998).

The district court then did not clearly err or abuse its discretion in concluding that the government's "historic engagement" with the Representatives counseled against the discretionary remedies they sought. Op.20, 22-23. The government held several meetings with the Representatives or their counsel, and the Attorney General himself attended one such meeting. Op.22. The Representatives there had the opportunity to convey their views on Boeing's conduct and the DPA to the prosecuting attorneys and then had the opportunity to reiterate those views to not only the government, but also the district court and public writ large at Boeing's arraignment. Op.23.

United States v. Wills, 40 F.4th 330, 337 (5th Cir. 2022). And they would not prevail in any event, given the court's reasoned balancing of: Congress's awareness of this matter, the government's good faith throughout this case, and the government's repeated conferrals with the Representatives once they asserted rights under the CVRA. Op.25-26; *see also* Op.21 (concluding the government's conferrals "substantially and meaningfully satisfied" this right).

Although these efforts could not fully "cure" the government's earlier lack of conferral, the district court permissibly viewed them as giving "meaningful effect" to the victims' rights. Op.23. The CVRA's conferral right allows crime victims "to communicate meaningfully with the government, personally or through counsel," when reasonable and thereby ensures that the government will "ascertain the victims' views" before it "ultimately exercis[es] its broad discretion." *In re Dean*, 527 F.3d 391, 394-95 (5th Cir. 2008) (per curiam). The "historic engagement" described above came as close as possible in this case to satisfying that right *post-hoc*. The district court thus reasonably factored that point into its decision to favor restraint and not "award a novel remedy" under its inherent remedial authority. Op.25; *cf. Dean*, 527 F.3d at 395 (withholding discretionary mandamus relief where victims belatedly enjoyed "substantial and meaningful participation" and aired their views on a plea agreement).

D. The CVRA Did Not Otherwise Require The District Court To Grant These Remedies.

The above discussion demonstrates how the CVRA's remedial scheme functions and how the district court hewed to well-established statutory interpretation and constitutional principles in weighing what remedies it could and should grant. But Petitioners propose reading the CVRA differently. The statute provides that courts "shall ensure that [a] crime victim is afforded the rights described in" the CVRA, 18 U.S.C. § 3771(b)(1), and Petitioners contend

that this provision required the district court to modify, reject, or supervise the DPA. Representatives Pet. 20-25; LOT Pet. 25-26; Smartwings Pet. 26. In doing so, they focus on one CVRA provision at the expense of others and interpret the CVRA in a way that would call its constitutionality into question. This Court should reject that project.

The first flaw in Petitioners' reading of the CVRA is ignoring the rule that "statutes must be read as a whole." *Guam v. United States*, 141 S. Ct. 1608, 1613 (2021) (brackets and internal quotation marks omitted). Petitioners never acknowledge that Congress provided that "[n]othing" in the CVRA "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). That provision refutes Petitioners' attempt to read the statute's vague "shall ensure" provision as requiring courts to modify, supervise, or reject DPAs based on CVRA violations. After all, allowing courts to decide when prosecution should occur and on what terms would clearly "impair" the Executive Branch's prosecutorial discretion. *Fokker Servs.*, 818 F.3d at 744 (explaining that a "court's withholding of approval" of a DPA "would amount to a substantial and unwarranted intrusion on the Executive Branch's fundamental prerogatives").

The constitutional-avoidance canon leads to the same result. A court's interference with a DPA would trigger grave separation of powers concerns. As

explained, "we would expect" a congressional statute authorizing that relief "to do so rather clearly." *HSBC Bank*, 863 F.3d at 138. And if the Speedy Trial Act's "with the approval of the court" language (which at least refers to DPAs) is too vague to grant courts such authority, *id.*; *Fokker Servs.*, 818 F.3d at 743-45, the CVRA's even vaguer "shall ensure" provision cannot clear this bar.

The Representatives and LOT nevertheless insist that § 3771(b)(1) affords them the DPA-related relief they seek for a few different reasons. They first turn to broad statements by the CVRA's legislative sponsors and to the statute's larger role in ensuring crime victims' rights. Representatives Pet. 20-22; LOT Pet. 25-26. Yet this legislative and statutory history demonstrates only that Congress meant for courts to take the CVRA seriously and to strive to protect crime victims' rights. It does not countermand Congress's plain command in § 3771(d)(6) against impairing prosecutorial discretion or suggest that Congress envisioned courts remedying a CVRA violation through constitutionally dubious means.

The Representatives and LOT also overread this Court's statement that courts are "bound to enforce" the CVRA. Representatives Pet. 26; LOT Pet. 27-28 (quoting *In re Dean*, 527 F.3d at 395). The petitioners in *Dean* asked the district court to reject a plea agreement, negotiated in violation of their conferral rights, to allow them to speak with the government before any plea agreement

was executed. 527 F.3d at 392. But although § 3771(b)(1) required at that time that courts "shall ensure" that crime victims are afforded their rights, this Court did not grant mandamus relief. *Id.* at 395-96. Instead, the court emphasized the need to accord the crime victims their rights going forward. *Id.* *Dean* thus suggests that the CVRA's "shall ensure" language requires courts to prospectively accord crime victims their rights, not to always unwind events in a criminal case.

In any event, rejecting a plea agreement is a remedy different in kind from modifying, rejecting, or supervising a DPA. *Fokker Servs.*, 818 F.3d at 745-46. District courts have explicit authority to reject or accept plea agreements under Federal Rule of Criminal Procedure 11, "rooted in the Judiciary's traditional power over criminal sentencing." *Id.* at 745 (emphasis omitted). But "[t]he context of a DPA is markedly different," as it "involves no formal judicial action imposing or adopting its terms." *Id.* at 746. So even if *Dean* had required courts to reject plea agreements not yet in force, it would say nothing about whether the CVRA requires courts to employ similar remedies when it comes to DPAs.

This difference between plea agreements and DPAs also highlights the flaws in the decision in *Does v. United States*, 950 F. Supp. 2d 1262 (S.D. Fla. 2013), on which the Representatives rely. Representatives Pet. 24-25. That district court saw "no logical reason to treat a 'non-prosecution agreement' . . .

any differently from a 'plea agreement,'" 950 F. Supp. 2d at 1268, and therefore interpreted the CVRA's limited authorization for re-opening a "plea" to permit also re-opening a non-prosecution agreement, *id.* at 1267 (discussing 18 U.S.C. § 3771(d)(5)).[9] This reasoning overlooked the clear differences between plea agreements and non-prosecution agreements. *See id.* Plus, like the Representatives, that court did not consider Congress's explicit command in the CVRA against construing it to impair prosecutorial discretion. *See id.*

Petitioners finally suggest that the district court's inability to award DPA-related relief renders the CVRA a toothless statute and invites prosecutorial abuse. LOT Pet. 26-27 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 163 (1803), for the proposition that "where there is a legal right, there is also a legal remedy"); *accord* Smartwings Pet. 27, 29; Representatives Pet. 30. They are mistaken. As explained, the district court has broad powers to prevent or remedy CVRA violations, and, in most cases, its preexisting statutory or inherent authority can ensure that crime victims' rights are honored and respected. *See supra* at 18-19. The problem, then, is not that the CVRA is a frail

[9] The decision in *Does* also ignores that the CVRA authorizes re-opening a plea based only on a denial of the CVRA "right to be heard" at a plea proceeding, 18 U.S.C. § 3771(d)(5)(A), which is different from "the right to confer" with the prosecutor, *compare id.* § 3771(a)(4), *with id.* § 3771(a)(5). Therefore, even if § 3771(d)(5)(A) did contemplate re-opening a "deferred prosecution agreement," it would not be on the facts of either *Does* or this case.

statute; it is quite effective. Rather, the problem is that Petitioners have sought novel and—absent at least government misconduct or bad faith relating to the DPA in this case—likely unconstitutional remedies concerning this DPA.

II. The District Court Permissibly Barred The Airlines' CVRA Petitions Under The Laches Doctrine.

As just demonstrated, the Airlines' requested remedies are unavailable for constitutional and statutory reasons. As the district court determined, however, the Airlines also unjustifiably and prejudicially delayed in asserting CVRA claims, and thus their request for crime-victim status and relief is barred by the equitable doctrine of laches. That alternative holding was correct.

A. Standard Of Review

This Court reviews a district court's decision concerning the availability of laches *de novo*, any relevant factual findings for clear error, and its fact-specific application of laches for an abuse of discretion. *See SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 580 U.S. 328, 334-36 (2017); *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 900 (5th Cir. 2016).

B. Laches May Apply In CVRA Disputes.

"[L]aches is a defense developed by courts of equity; its principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 678 (2014). Put another way, "[l]aches is a gap-filling

doctrine" that bars belated claims on a case-by-case basis if Congress has not enacted a pertinent statute of limitations. *SCA Hygiene*, 580 U.S. at 335.

The CVRA contains just such a "gap." The statute places no explicit time limit on a putative crime victim's ability to claim a CVRA violation. Even so, the CVRA emphasizes the need for speed and finality when litigating crime-victim motions. It provides that courts must quickly rule on a CVRA motion and forbids them from staying or continuing a criminal case for "more than five days" when adjudicating a crime victim's claims. 18 U.S.C. § 3771(d)(3). As mentioned, it also never permits a new trial based on a violation of the CVRA and only rarely allows re-opening a plea or sentence. *Id.* § 3771(d)(5). Congress, in other words, envisioned the prompt resolution of CVRA claims and signaled a need for quick and final dispositions in criminal cases.

Accordingly, a belated motion for crime-victim status or relief is a natural fit for laches. *See Fed. Ins. Co. v. United States*, 882 F.3d 348, 365 (2d Cir. 2018) (applying a laches framework to decide whether CVRA mandamus petition was barred); *see also In re Allen*, 701 F.3d 734, 735 n.1 (5th Cir. 2012) (per curiam) (reserving whether laches could bar a motion for crime-victim status based on a sufficiently "inconvenient delay"). Otherwise, putative crime victims could, as in this case, come out of the woodwork years after relevant events in a criminal case occurred—even if they had knowledge of those events all along—and seek

to hit rewind and replay due to alleged violations of rights they never previously asserted. Laches may bar such belated and unexcused efforts by a putative crime victim when they would prejudice the government or defendant. *Cf. Fed. Ins. Co.*, 882 F.3d at 365 (noting in the CVRA context that "the time to challenge [restitution] orders cannot be limitless").

The Airlines' objections to this are threefold. They note that laches is usually not available in criminal cases. LOT Pet. 15-16; Smartwings Pet. 14. But that is because defendants may not assert "laches . . . as a defense against the United States when it is acting in its sovereign capacity to enforce a public right or protect the public interest," *United States v. Popovich*, 820 F.2d 134, 136 (5th Cir. 1987), and statutes of limitations or statutory and constitutional speedy-trial guarantees guard against prosecutorial delay, *United States v. Milstein*, 401 F.3d 53, 63 (2d Cir. 2005) (per curiam). That general rule thus says nothing about whether laches may bar a belated CVRA motion for relief.

The Airlines also mistakenly suggest that the CVRA's text or purposes foreclose applying the laches doctrine. LOT Pet. 14, 16-17; *accord* Smartwings Pet. 14-15. The CVRA's text, they note, "does not contain a time limit within which putative crime victims must seek relief in the district court." LOT Pet. 14 (internal quotation marks omitted). But that gets things backwards; it is the lack of such a time limit that makes laches available. *SCA Hygiene*, 580 U.S. at 335;

Petrella, 572 U.S. at 678. LOT, meanwhile, wrongly relies on broad statements by one Senator about victims' rights to try and divine Congress's views on the specific role of laches in the CVRA context. *Cf. N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."). And its other assertion that applying laches could permit the government to circumvent the CVRA with "impunity" stands at odds with LOT's later recognition that the unclean-hands doctrine would curtail such bad-faith behavior. *Compare* LOT Pet. 17, *with id.* at 19.

The Airlines finally misread this Court's decision in *In re Allen* to preclude a laches defense in the CVRA context. LOT Pet. 14-15; Smartwings Pet. 15-16. That decision, however, reserved whether a sufficiently "inconvenient delay . . . could trigger the doctrine of laches or some other legal principle that might bar a request for crime victim status." *In re Allen*, 701 F.3d at 735 n.1. This Court held only that a motion for crime-victim status "a few weeks before sentencing" was not inconvenient enough to justify laches. *Id.*

C. The District Court Did Not Abuse Its Discretion By Applying Laches Here.

When considering a laches defense, a district court must look to whether (1) a party delayed in asserting a right or claim; (2) the delay was excusable; and (3) the party against whom the claim is asserted suffered undue prejudice. *Envt'l*

Def. Fund, Inc. v. Alexander, 614 F.2d 474, 478 (5th Cir. 1980). Laches' elements are "interrelated," so the longer the delay, the less prejudice the party asserting laches must show (and vice-versa). *Armco, Inc. v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1155, 1161 (5th Cir. 1982); *see also Smith v. Caterpillar, Inc.*, 338 F.3d 730, 734 (7th Cir. 2003). Its application will also always "depend[] upon the circumstances" of a case, *Alexander*, 614 F.2d at 478, and the decision to apply laches is therefore a discretionary one, *Retractable Techs., Inc.*, 842 F.3d at 900.

The district court correctly applied these principles and reasonably ruled that laches barred the Airlines' request for crime-victim status and relief. It first recognized the Airlines' almost two-year delay in "request[ing] relief . . . after the [g]overnment filed the DPA." Op.27. The CVRA and the criminal law care about finality and rapid adjudication of criminal cases, and the DPA here had only a three-year duration. All that, combined with the CVRA's lack of a time limitation, opened the door to a laches defense based on the Airlines' delay. *See Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 533 (1956) (delay necessary to support laches varies with context); *Norris v. United States*, 257 U.S. 77, 80-81 (1921) (finding no reasonable diligence where plaintiff waited 11 months to assert his rights).

Next, the district court understandably found that the Airlines' delay was inexcusable. Both airlines were sophisticated, had counsel, and learned of the

DPA on January 7, 2021. MR.294-95; Smartwings Pet. 6. Their two-year delay in attempting to assert their rights did not "result[] from a lack of knowledge about the proceedings, incapacity, or other reason justifying" that delay. Op.28; *see also* Op.27-28 (noting the Airlines waited to file their CVRA motions until after the Representatives had obtained a "favorable ruling" regarding their claim to crime-victim status). Those facts justified the district court's finding that the Airlines' delay was unexcused. *See Hefner v. New Orleans Pub. Serv., Inc.*, 605 F.2d 893, 898 (5th Cir. 1979) (litigant did not claim to have been "unaware of the terms of" the challenged consent decree or fraudulently or accidentally misled about its existence); *Save Our Wetlands, Inc. (SOWL) v. U.S. Army Corps of Engr's*, 549 F.2d 1021, 1028 (5th Cir. 1977) ("Given the visibility and publicity of the [challenged project] . . . the plaintiffs' delay in bringing this litigation was inexcusable.").

Finally, the district court reasonably concluded that the Airlines' two-year delay in requesting crime-victim status and equitable relief was sufficiently prejudicial to warrant laches. Op.28-29. The court viewed that delay as likely to extend this litigation "well beyond [the DPA's] expected expiration date" in

January 2024 and therefore, necessarily, the DPA. Op.28.[10] An extension of the DPA's three-year term would cause the government to expend further resources on implementing and monitoring the DPA and would interfere with Boeing's reliance interest in concluding its criminal liability. Op.28. Such prejudice may support a laches defense. *See Hefner*, 605 F.2d at 828 (agreeing that parties being forced "to incur additional expense solely because of plaintiff's delay" and the thwarting of reliance interests associated with a consent decree count as prejudice).

Together, the Airlines' significant and unexcused delay and the resulting prejudice to the parties permitted the district court to apply laches and bar the Airlines' request for crime-victim status and equitable relief. Though the Airlines challenge this ruling on several fronts, they have demonstrated no abuse of discretion in the court's reasoning or clear error in its factual findings.

The Airlines begin with a mistaken argument that the district court should have pretermitted its laches analysis by first deciding whether the government violated their CVRA rights and therefore possessed unclean hands that would bar a laches defense. LOT Pet. 18-20; Smartwings Pet. 18-19. That order of

[10] Moreover, any success by the Airlines in modifying, rejecting, or supervising the DPA may well have led to an appeal by the government or Boeing.

operations was unnecessary here. The district court had just ruled that the government had committed good-faith "legal error," and thus did not act in bad faith, when it violated the CVRA in this case. Op.20. That finding rendered the Airlines' unclean-hands argument untenable. *See Dahl v. Pinter*, 787 F.2d 985, 988 (5th Cir. 1986) (noting that "inadvertent act[s]" do not provide grounds for an "unclean hands" argument), *vacated on other grounds*, 486 U.S. 622 (1988); *accord Primerica Life Ins. Co. v. Woodall*, 38 F.4th 724, 726 (8th Cir. 2022) (explaining that for the unclean-hands "doctrine to apply, the offending acts typically must be *willful*").

Turning to the laches analysis, the Airlines both contend that the district court's calculation of a nearly two-year delay overstates how long they waited to assert their rights under the CVRA. LOT Pet. 20-22; *see also* Smartwings Pet. 20 (misstating the delay attributed to Smartwings). But the Airlines can show no clear error here. The period of delay for laches begins when a litigant knew or should have known their rights had been violated and continues until the moment when they assert those rights. *See, e.g.*, *Armco, Inc.*, 693 F.2d at 1161; *SOWL*, 549 F.2d at 1028. The Airlines admitted to learning about the DPA on January 7, 2021, and both knew that the government had not conferred with them before executing that agreement. MR.294-95; Smartwings Pet. 6. Yet neither sought crime-victim status or relief until October 2022.

The Airlines' arguments as to why the district court clearly erred in declining to find this delay excused are also without merit. Indeed, Smartwings admits that it deliberately waited to assert its rights because it found the CVRA litigation complicated and preferred to let the Representatives litigate challenging causation issues before deciding whether to throw its hat in the ring. Smartwings Pet. 21-22. That is no excuse. *See Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1032 (9th Cir. 2012) ("We do not encourage successive challenges, where one plaintiff awaits the outcome of another plaintiff's [case] before bringing its own claim." (internal quotation marks omitted)). And Smartwings' further contention that it had to wait to evaluate Boeing's performance under the DPA before filing its CVRA motion makes little sense. Smartwings Pet. 23. Smartwings' CVRA challenge concerns how the government negotiated the DPA; it did not need to spend two years monitoring Boeing's behavior under that agreement for its specific CVRA claim to ripen.

LOT similarly does not show clear error in the district court's no-excuse finding. Discussing or litigating civil tort or contract claims (LOT Pet. 20-22) with Boeing is very different from raising CVRA claims with the government or district court—who alone have obligations under the CVRA. And although LOT contacted the government in December 2021, it did not assert crime-victim status or an intent to commence CVRA litigation, and the government never

encouraged LOT to forgo such claims. MR.308-16 (instead complaining about Boeing's civil litigation strategy and summarily suggesting re-opening the DPA); *cf. Mackall v. Casilear*, 137 U.S. 556, 567 (1890) (no excusable delay where defendant did not recognize plaintiff's claims or encourage prospect of out-of-court settlement); *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 616 F.2d 1315, 1328 (5th Cir. 1980) ("Where the plaintiff is engaged in other litigation involving [a] patent, to escape a defense of laches he must at least inform [a not-yet participating] potential infringer of his intent to pursue his rights under the patent.").

Beyond contesting the length of their delay, both Airlines cite cases suggesting a two-year delay may not suffice to invoke laches. LOT Pet. 14; Smartwings Pet. 20-21. But they overlook that statutory and factual context determine whether a particular delay triggers laches. *Supra* at 38. Their discussion of *In re Allen*, for instance, forgets that the putative crime victims there sought to assert the "right to be heard" at sentencing a few weeks before that proceeding would take place. *See* 701 F.3d at 735 n.1; *In re Allen*, No. 12-40954, Br. for Pet. for a Writ of Mandamus, at 15 (5th Cir. Sept. 4, 2012). There was thus arguably no delay whatsoever under the CVRA in that case. Here, by contrast, the three-year DPA that LOT and Smartwings seek to overturn had already been on the books for almost two years by the time they intervened. The

district court therefore did not abuse its discretion in finding that this length of delay supported laches.

The Airlines next question the district court's prejudice analysis, contending primarily that their intervention did not in fact threaten to prolong these proceedings or subject Boeing and the government to further undue expense or uncertainty regarding the DPA. LOT Pet. 23; Smartwings Pet. 23-24. But the Airlines sought to upend the DPA two years into its three-year lifespan: LOT asked the court to re-open or supervise the DPA, and Smartwings sought, as a first step, to impose additional accounting and reporting requirements. All of that relief would have interfered with the settled expectations of the parties and would likely have resulted in (at least) an extension of the DPA and a disruption of the benefits to Boeing and the government that flowed from their bargain. *See City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 217-18 (2005) ("[L]aches is not . . . a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.") (internal quotation marks omitted).

Moreover, inherent in the Airlines' arguments is an assumption that the district court's October 2022 causation opinion guaranteed them crime-victim status. *See* LOT Pet. 23; Smartwings Pet. 23-24. Neither Boeing nor the

government thought that was the case below. *See* MR.358-59, 379-83; SW.Appx.111-12, 121. And given its experience with the CVRA litigation between the government, Boeing, and the Representatives, the court was by no means clearly wrong in determining that the Airlines' new CVRA motions—and the district court and appellate proceedings they would spawn—could drag out the criminal case well beyond January 6, 2024. *See, e.g.*, SW.Appx.130 (Smartwings agreeing that further remedy briefing would be necessary).

Lastly, Smartwings argues that the district court wrongly applied laches *sua sponte* to bar Smartwings' request for crime-victim status. Smartwings Pet. 17-18. But Smartwings should have known that laches could be an issue in this case based on the earlier briefing concerning LOT's CVRA motion.[11] And in any event, a district court may *sua sponte* invoke a laches defense—at least where, as here, the prejudiced parties have not explicitly waived reliance on that defense. *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1057 n.8 (5th Cir. 1985); *cf. Mowbray v. Cameron Cnty., Tex.*, 274 F.3d 269, 281 (5th Cir. 2001) (permitting *sua sponte* ruling on *res judicata* "where all of the relevant facts are contained in

[11] The government did not invoke laches against Smartwings because it did not read that airline's opening brief to invoke the court's inherent authority to award equitable relief, as opposed to making a premature request to jumpstart the restitution process authorized under the CVRA. *See* SW.Appx.104-06. Smartwings shifted its argument in its reply brief. SW.Appx.128.

the record before us and all are uncontroverted" (internal quotation marks omitted)).

CONCLUSION

For these reasons, the Court should deny Petitioners' mandamus petitions.

Respectfully submitted,

LEIGHA SIMONTON
United States Attorney
Northern District of Texas

JEREMY SANDERS
Assistant Chief
Criminal Division, Fraud Section

KENNETH A. POLITE, JR.
Assistant Attorney General
Criminal Division

LISA H. MILLER
Deputy Assistant Attorney General
Criminal Division

/s/W. Connor Winn
W. CONNOR WINN
Criminal Division, Appellate Section
U.S. Department of Justice
950 Pennsylvania Ave., NW, Ste. 1264
Washington, DC 20530
TEL 202.669.6551
William.Winn@usdoj.gov

March 27, 2023

CERTIFICATE OF SERVICE

I certify that, on March 27, 2023, I served an electronic copy of the Consolidated Response for the United States on all litigants via the Court's ECF system. I certify that all participants in the case are registered ECF users and that service will be accomplished through the ECF system.

/s/W. Connor Winn
W. Connor Winn

CERTIFICATE OF COMPLIANCE

1. This response complies with this Court's order permitting the government to file a consolidated response not to exceed 11,500 words, as the response contains 10,493 words, excluding the parts of a brief exempted by Fed. R. App. P. 32(f).

2. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared on a proportionally spaced typeface using Microsoft Office 365 in 14-point Calisto MT font.

3. This response complies with the privacy redaction requirement of Fed. R. App. P. 25(a) because it contains no personal data identifiers.

4. This response has been scanned for viruses with the most recent version of McAfee Endpoint Security, version 10.7, which is continuously updated, and according to that program, is free of viruses.

/s/ W. Connor Winn
W. Connor Winn

No. 23-10168

In the United States Court of Appeals for the Fifth Circuit

In re: Naoise Connolly Ryan, et al., Polskie Linie Lotnicze, Lot S.A., and Smartwings, A.S.,

Petitioners.

On Petitions for Writ of Mandamus to the United States District Court for the Northern District of Texas No. 4:21-CR-5-O (O'Connor, J.)

SUPPLEMENTAL APPENDIX FOR RESPONDENT UNITED STATES

LEIGHA SIMONTON
United States Attorney
Northern District of Texas

JEREMY SANDERS
Assistant Chief
Criminal Division, Fraud Section

KENNETH A. POLITE, JR.
Assistant Attorney General
Criminal Division

LISA H. MILLER
Deputy Assistant Attorney General
Criminal Division

W. CONNOR WINN
Criminal Division, Appellate Section
U.S. Department of Justice
950 Pennsylvania Ave., NW, Ste. 1264
Washington, DC 20530
202.669.6551
William.Winn@usdoj.gov

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA v. THE BOEING COMPANY	**No. 4:21-CR-00005-O**

THE UNITED STATES OF AMERICA'S RESPONSE TO THE MOTION FILED BY REPRESENTATIVES OF CERTAIN CRASH VICTIMS OF LION AIR FLIGHT 610 AND ETHIOPIAN AIRLINES FLIGHT 302 FOR FINDINGS THAT THE DEFERRED PROSECUTION AGREEMENT WAS NEGOTIATED IN VIOLATION OF THE CRIME VICTIMS' RIGHTS ACT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

The United States of America (the "Government") recognizes the indescribable and irreparable losses suffered by the representatives of eighteen crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 (the "Movants") and the losses suffered more generally by the loved ones of the 346 people who perished on those flights. Nothing will ever make up for these losses.

Recognizing that fact, the Government never forgot or ignored those individuals as it worked to resolve this case. The Government negotiated a Deferred Prosecution Agreement ("DPA")[1] with The Boeing Company ("Boeing") that recognized these losses and provided compensation and assistance to the crash victims' beneficiaries above and beyond what the law—including the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, the Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. § 3663A, or any other law—compelled. Namely, the Government required Boeing to establish a $500 million fund to compensate the crash victims' beneficiaries, which supplements any damages that they may recover through civil litigation. The DPA also prevented Boeing from ever disputing certain facts relating to a new part of the Boeing 737 MAX and Boeing's fraudulent misrepresentations to the Federal Aviation Administration ("FAA") Aircraft Evaluation Group about that part. In these ways, the DPA provided some benefits to the crash victims' beneficiaries.

Nevertheless, the Government apologizes for not meeting and conferring with these crash victims' beneficiaries before entering into the DPA, even though it had no legal obligation to do

[1] Citations to "DPA" and "SOF" refer to the Deferred Prosecution Agreement entered into between the Government and The Boeing Company and the incorporated Statement of Facts, respectively, filed together at Dkt. 4, and, where appropriate, are followed by the relevant paragraph number; "Dkt." refers to the docket entries in this case and, where appropriate, is followed by the relevant page number; "Forkner Dkt." refers to docket entries in the related case pending before this Court, *United States v. Forkner*, No. 4:21-CR-00268 (N.D. Tex.), and, where appropriate, is followed by the relevant page number.

so. Even if such consultations would not have changed the DPA, there is a chance that earlier consultation may have been able to provide these individuals with insight into the Government's approach toward corporate criminal prosecution and this case. The Government has recently met with some of the Movants and their representatives to listen to their perspectives on the Boeing 737 MAX crashes and the DPA on January 10, 14, and 26, 2022, with the third of these three meetings involving the Attorney General. The Department of Justice will continue to learn from this and other cases when determining what revisions to its internal policies, guidelines, and practices are warranted.

None of this, however, means that this Court should grant the Movants' motions for findings that the DPA was negotiated in violation of the CVRA and for certain remedies for those alleged violations. Dkt. 52. As explained below, the CVRA does not authorize the extraordinary relief that the Movants seek here, nor is such relief warranted in any event because the Movants are not "crime victims" under the CVRA. Thus, as a legal matter, their motions should be denied.

I. Factual Background

The Government carefully investigated and weighed the potential charges it could bring against Boeing and believed it could prove beyond a reasonable doubt. Throughout that process, it also endeavored to advocate for and compensate the families, heirs, and beneficiaries of the victims of the Lion Air Flight 610 and Ethiopian Airlines Flight 302 crashes. Indeed, the Government went above and beyond its legal duties in this case to ensure that these crash victims' beneficiaries received millions of dollars in guaranteed monetary compensation from Boeing no matter the outcome of their lawsuits against the company. Additionally, the admissions that Boeing made as part of the DPA placed the crash victims' beneficiaries in a favorable litigating position against Boeing in subsequent civil litigation.

A. Boeing's Illegal Conduct

On October 29, 2018, Lion Air Flight 610 took off from Jakarta, Indonesia, and, shortly after takeoff, crashed into the Java Sea. SOF ¶ 48. None of the 189 crewmembers and passengers survived. *Id*. Similarly, on March 10, 2019, Ethiopian Airlines Flight 302 departed Addis Ababa, Ethiopia, and, shortly after takeoff, crashed. *Id.* ¶ 53. Again, none of the 157 passengers and crewmembers survived. *Id.* The extent of these tragedies and the suffering of the passengers, crewmembers, and their loved ones is indescribable.

Flights 610 and 302 both were serviced by the Boeing 737 MAX—a commercial airplane that was one of Boeing's best-selling airplane models. SOF ¶¶ 4-5, 48, 53. The 737 MAX included as part of its flight controls a new "Maneuvering Characteristics Augmentation System" ("MCAS"), which was initially designed to fix the plane's tendency to "pitch up" during a certain flight maneuver called a high-speed, wind-up turn. *Id*. ¶¶ 20-23. As Boeing agreed in the statement of facts accompanying the DPA, the FAA Aircraft Evaluation Group learned after the crashes that MCAS activated during the flights and may have played a role in the crashes. *Id.* ¶¶ 49, 53.

As the statement of facts accompanying the DPA indicates, Boeing later represented different facts to different components of the FAA about when MCAS could activate. SOF ¶ 25. In particular, Boeing had disclosed to FAA officials responsible for determining whether the 737 MAX met U.S. federal airworthiness standards that MCAS's operational scope had been expanded after its initial design and was no longer limited to activating only during high-speed flight, but instead could activate during nearly the entire speed range for the 737 MAX, including at low-speed flight. *Id.* But when the Boeing employee who was primarily tasked with interacting with a separate group of FAA officials responsible for determining pilot training requirements for U.S.-based airlines operating the 737 MAX learned that MCAS could activate during low-speed flight,

he deliberately misled these FAA officials while withholding this new information. *Id.* ¶¶ 31-44. That deceit caused the FAA's pilot-training authorities to not include information about MCAS in pilot training requirements for U.S.-based airlines operating a Boeing 737 MAX. *Id.* ¶¶ 45-47.

Given all this, there was no doubt that Boeing had conspired to defraud the federal government when it deceived the FAA Aircraft Evaluation Group. DPA ¶ 1; Dkt. 1 at 1-2 (felony information). The Government's investigation, however, did not produce evidence that it believed would allow it to prove beyond a reasonable doubt what factors had caused the crashes of Lion Air Flight 610 and Ethiopian Airlines Flight 302. SOF ¶¶ 49, 53 (noting that the FAA learned that MCAS "*may have* played a role" in the plane crashes after they occurred (emphasis added)). In other words, the evidence in the record in this case does not prove beyond a reasonable doubt a direct and proximate connection between (1) Boeing's fraud on the FAA Aircraft Evaluation Group regarding MCAS and any potential impact on training for U.S.-based airlines and (2) the crashes of two flights in foreign countries, run by foreign airlines, overseen by foreign regulators, and flown by foreign pilots.

This left the Government in a challenging situation. Based on the evidence collected during the criminal investigation, it could prove that Boeing had conspired to defraud the FAA Aircraft Evaluation Group. Under the legal requirements of the federal restitution statutes, however, the Government believed that conviction on that count alone would not entitle the beneficiaries of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 to an order of restitution from Boeing at sentencing. 18 U.S.C. § 3663A(a)(1)-(2) (stating that, "when sentencing a defendant convicted of an offense described in subsection (c), the court shall order . . . that the defendant make restitution to the victim of the offense," and defining the term "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which

restitution may be ordered"); *see also, e.g.*, *United States v. Kim*, 988 F.3d 803, 811 (5th Cir. 2021) (explaining that the Mandatory Victims Restitution Act "authorizes restitution to a victim directly and proximately harmed by the defendant's offense of conviction" (internal quotation marks omitted)); *In re Fisher* ("*Fisher I*"), 640 F.3d 645, 647 (5th Cir. 2011) (explaining that restitution is limited to "crime victims," *i.e.*, those who are "directly and proximately harmed as a result of the commission of a Federal offense" (quoting 18 U.S.C. § 3771(e)). Moreover, the MVRA, 18 U.S.C. § 3663A, only applies in the event that there is a *conviction*, and the Government's considered judgment was—and remains—that a DPA, rather than a guilty plea, was the appropriate resolution for Boeing in this matter based on the facts and circumstances.[2] Thus, absent the Government's successful negotiation of the $500 million fund from Boeing through the DPA, the crash victims' beneficiaries would not be entitled to any compensation from Boeing as part of the corporate resolution.

B. The DPA

On January 7, 2021, the Government filed (1) a one-count criminal information (the "Information") charging Boeing with conspiring to defraud the United States, in violation of 18 U.S.C. § 371, and (2) the final, executed DPA relating to that charge. Dkts. 1, 4. Under the terms

[2] A DPA is not an immunity agreement. Rather, as described in *United States v. Fokker Services B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016):

> In certain situations, rather than choose between the opposing poles of pursuing a criminal conviction or forgoing any criminal charges altogether, the Executive may conclude that the public interest warrants the intermediate option of a deferred prosecution agreement (DPA). Under a DPA, the government formally initiates prosecution but agrees to dismiss all charges if the defendant abides by negotiated conditions over a prescribed period of time. Adherence to the conditions enables the defendant to demonstrate compliance with the law. If the defendant fails to satisfy the conditions, the government can then pursue the charges based on facts admitted in the agreement.

of the DPA, the United States agreed to defer any prosecution of Boeing for defrauding the FAA Aircraft Evaluation Group so long as it complied with the conditions of the DPA for a three-year period. *See* DPA ¶¶ 3, 20. Should Boeing breach any of the conditions of the DPA—including its promise to distribute $500 million to the crash victims' beneficiaries and its promise not to contest the admissions it had made in the attached Statement of Facts—the Government has the discretion to prosecute Boeing for the crime charged in the Information. *See* DPA ¶¶ 26-30.

The DPA conferred several significant benefits on the crash victims' beneficiaries. Most significantly, the DPA required Boeing to establish a $500 million "Crash-Victim Beneficiaries" fund. DPA ¶¶ 7, 13-19. This fund was designed to provide "compensation to the heirs, relatives, and/or legal beneficiaries of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302." *Id*. ¶ 7. The DPA required Boeing to set up a claims-handling system to distribute these funds and to bear all the costs associated with that process. Id. ¶¶ 13-18. And to date, more than $471 million—94 percent of the $500 million—has been disbursed from this fund to beneficiaries of 326 of the 346 crash victims, including all but two of the Movants.

The DPA also precluded Boeing from using the fact of these payments to prevent the fund's beneficiaries "from pursuing any other lawful claim that" they "might have against [Boeing]." DPA ¶ 19. The beneficiaries of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 may thus continue to try and hold Boeing civilly liable—a question on which the Government has never taken a stance—and, if successful, these crash victims' beneficiaries will recover the full scope of their expected damages. If those claims should prove unsuccessful, the crash victims' beneficiaries will still have obtained some compensation for their loss and suffering.

Second, and relatedly, Boeing agreed not to make "any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the Company," including its admission

of the facts set forth in the Statement of Facts. DPA ¶ 32. That limitation provided all of the crash victims' beneficiaries with an advantageous position in future civil litigation with Boeing because Boeing could not relitigate any of the facts relating to its fraud on the FAA Aircraft Evaluation Group. Indeed, in the wake of the DPA's publication, Boeing settled or proposed settling multiple civil suits brought by representatives of the crash victims and even made limited concessions of liability in some of these cases. *See, e.g.*, *In re Ethiopian Airlines Flight ET 302 Crash*, No. 1:19-CV-02170 (N.D. Ill.); *In re Boeing Co. Deriv. Litig.*, C.A. No. 2019-0907-MTZ (Del. Ch.).

On the same day that the Government filed the criminal charge against Boeing and the DPA, the Government issued a press release publicly disclosing the criminal information, the DPA, and the creation of the crash victims' benefit fund. *See* Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion | OPA | Department of Justice. The press release concluded with instructions for the crash victims' beneficiaries: "Individuals who believe they may be an heir, relative, or legal beneficiary of one of the Lion Air Flight 610 or Ethiopian Airlines Flight 302 passengers in this case should contact the Fraud Section's Victim Witness Unit by email at: Victimassistance.fraud@usdoj.gov or call (888) 549-3945."

C. Relevant Procedural History

On December 16, 2021, nearly a year after the DPA was filed, and after virtually all of the crash victims' beneficiaries fund payments had been made, the Movants filed with this Court three motions seeking a declaration that the Government violated the CVRA when it negotiated the DPA with Boeing and a broad range of relief under the CVRA or this Court's inherent authority. *See* Dkts. 15, 16, 18. Among other things, the motions requested (1) an order directing the Government to meet and confer with the crash victims' families about their evidence, the Government's charging decisions, and ways of holding Boeing accountable, Dkt. 52 at 27; (2) an order compelling the Government to turn over its documents and evidence of Boeing's crimes to the

crash victims, *id.*; (3) an exercise of this Court's supervisory power over the DPA, *id.*; Dkt. 17 at 3-13; (4) an arraignment of Boeing and a hearing on its conditions of release, Dkt. 18 at 3-11; Dkt. 52 at 27; and (5) a referral of the Government's behavior to investigative authorities, Dkt. 52 at 27.

The Government thereafter met with some of the Movants and their representatives to listen to their perspectives on the crashes and the DPA. These meetings took place on January 10, 14, and 26, 2022, with the Attorney General attending the third of these three meetings. The Government appreciates the perspectives of the Movants, although it continues to stand by its previous charging decision and the DPA it negotiated with Boeing, as well as its charging decision in the related prosecution of Mark A. Forkner (who is presumed innocent unless and until proven guilty), the former Chief Technical Pilot who led Boeing's 737 MAX Flight Technical Team, who was indicted for wire fraud and fraud involving aircraft parts on October 14, 2021.

That said, the Department of Justice has been, for some months, working to revise its internal policies, guidelines, and practices.[3] The policies to be promulgated by the Deputy Attorney General's Working Group will ensure that if this situation arises in the future, consultation and notice will occur.

II. Argument

As a threshold matter, the Movants do not qualify as "crime victims" under the CVRA. But this Court need not reach that issue, for, as later explained, the CVRA remedies that Movants

[3] On October 1, 2021, the Deputy Attorney General directed the Department's Office of Legal Policy to reconvene the Department's Crime Victims Working Group to review and propose revisions to the Attorney General Guidelines for Victim and Witness Assistance. *See* Memorandum from the Deputy Attorney General, *Revision of the Attorney General Guidelines for Victim and Witness Assistance* (Oct. 1, 2021), *available at* https://www.justice.gov/dag/page/file/1438231/download.

seek are simply not available, nor are any of the requested non-CVRA sanctions warranted. The unavailability of these remedies alone provides a basis for denying the Movants' motions, should this Court disagree with the Government's position on the CVRA's triggering language.

A. The Lion Air and Ethiopian Airlines Crash Victims Are Not CVRA "Crime Victims."

The CVRA provides a "crime victim" with certain enumerated rights. 18 U.S.C. § 3771(a). The statute narrowly and precisely defines a "crime victim" as a person who has been "directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e)(2)(A). "A person is directly harmed by the commission of a federal offense where that offense is a but-for cause of the harm." *Fisher I*, 640 F.3d at 648. "A person is proximately harmed when the harm is a reasonably foreseeable consequence of the criminal conduct." *Id.*; *see also Paroline v. United States*, 572 U.S. 434, 444-45 (2014) ("Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct.").

The direct and proximate cause inquiries focus on the facts and circumstances of the offenses in a given case. That approach is consistent with how courts approach other similarly worded victims' rights statutes. *See, e.g.*, *United States v. Razzouk*, 984 F.3d 181, 188 (2d Cir. 2020), *cert. denied*, 142 S. Ct. 223 (2021); *United States v. Battista*, 575 F.3d 226, 231 & n.4 (2d Cir. 2009). Critically, "a person may not assert victim status because a defendant *could have* been charged with an additional offense or a different crime." UNITED STATES SENTENCING COMMISSION *Primer on Crime Victims' Rights 2021* at 13 n.88.[4] These limitations respect the CVRA's command that "[n]othing" in the statute "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction," 18 U.S.C. § 3771(d)(6), and

[4] *Available at* https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_Crime_Victims.pdf.

prevent courts from intruding upon the Executive Branch's exclusive charging domain, *see In re Wild*, 994 F.3d 1244, 1261 (11th Cir. 2021) (en banc) (plurality op.), *petition for cert. filed*, No. 21-351 (Aug. 31, 2021).

In light of the statutory definition, the Movants do not qualify as "crime victims" within the meaning of the CVRA. To bring a federal charge, a prosecutor must believe "that the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction" beyond a reasonable doubt. U.S.J.M. § 9-27.220; *see also* U.S.J.M. § 9-28.300 (noting that, "[g]enerally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches," and that "due to the nature of the corporate 'person,' some additional factors are present." (citation omitted)). After completing its investigation, the Government had sufficient evidence to charge Boeing with a conspiracy to defraud the FAA Aircraft Evaluation Group. The Government did not charge Boeing with any form of federal negligent homicide in connection with the crashes of Lion Air Flight 610 and Ethiopian Airlines Flight 302.

In so stating, the Government takes no position on whether Boeing may be liable in a civil proceeding for the failure of its planes.[5] Rather, the Government's point is far more limited: the

[5] The applicable standards of proof for "proximate cause" notably differ in criminal law as compared with civil law. *United States v. BP Prod. N. Am. Inc.*, 610 F. Supp. 2d 655, 688 (S.D. Tex. 2009) ("[P]roximate causation in a criminal case presents a higher threshold for proof than proximate causation in a civil tort case"); *United States v. Spinney*, 795 F.2d 1410, 1416 n.2 (9th Cir. 1986) (rejecting the argument that the Restatement of Torts "provides a useful guideline for resolving the proximate cause issue in this case," because "[p]roximate cause analysis in crimes differs from tort analysis of causation.").

evidence here does not meet the proof demanded by the CVRA between the fraud on the FAA Aircraft Evaluation Group—which establishes standards only for U.S.-based airlines—and the horrific crashes in Ethiopia and Indonesia of planes operated by foreign airlines and flown by foreign pilots overseen by foreign regulators. Put another way, the evidence in the record does not establish that (1) but for Boeing's conspiracy to defraud the FAA Aircraft Evaluation Group, Lion Air Flight 610 and Ethiopian Airlines Flight 302 would not have crashed; or that (2) any causal link on this front was reasonably "foreseeable" and not too attenuated. *See Paroline*, 572 U.S. at 448; *cf. Fisher I*, 640 F.3d at 647-49 (rejecting a property developer's claim that a rival's conspiracy to bribe city officials rendered the developer a "crime victim" because he was not "the target of the crime" and had not shown that his competitor's conspiracy induced him to invest in these development projects (internal quotation marks omitted)); *In re McNulty*, 597 F.3d 344, 352 (6th Cir. 2010) (mandamus petitioner, fired and "blackball[ed]" for refusing to participate in antitrust conspiracy, was not a "crime victim" of that conspiracy because those harms were "ancillary to the actions involved in forming a conspiracy and restraining interstate commerce"); *In re Doe*, 264 F. App'x 260, 264 (4th Cir. 2007) (per curiam) (unpublished) (holding petitioner under Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663, was not a "victim" because "the chain of causation between [the defendant's] conduct and her [harm] is too attenuated"); *In re Antrobus*, 519 F.3d 1123, 1125 (10th Cir. 2008) (denying mandamus relief upon conclusion that the district court did not clearly err in holding that defendant's conviction for illegal sale of firearm did not render child later killed with that firearm a "crime victim" "because [the

defendant's] offense and [the murderer's] rampage were too factually and temporally attenuated" (internal quotation marks omitted)).[6]

Having reviewed the Movants' contrary arguments, the Government respectfully disagrees with their analysis. Neither their summary insistence that Boeing "accept[ed] responsibility for its crime that so grievously harmed hundreds of passengers and crew," Dkt. 52 at 5, nor their inaccurate claim that the Government could have somehow charged Boeing with a more heinous crime, changes the outcome here. *Cf. McNulty*, 597 F.3d at 352 n.9 ("[F]or purposes of the CVRA definition of 'crime victim,' the only material federal offenses are those for which there is a conviction or plea."). Similarly, the Movants' reliance on *In re Dean* is inapposite because the parties in *Dean* did not dispute that the victims in that case were CVRA "crime victims." 527 F.3d 391, 392-93 (5th Cir. 2008) (per curiam); *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 WL 501321, at *1, *3 (S.D. Tex. Feb. 21, 2008).

The other legal proceedings against Boeing that the Movants cite also do not establish that the Movants are crime victims of the charged conspiracy to defraud the FAA Aircraft Evaluation Group. Again, much of the evidence and allegations in those proceedings does not speak to the particular offense charged in this case, and none of it solves the but-for cause and proximate cause issues with the Movants' supposed crime victim status. To the contrary, the Government has made

[6] Relatedly, while the Court's analysis should focus upon the charges in the Information, the DPA, and the supporting Statement of Facts, the Movants have also not addressed indications that there were multiple contributing factors leading to the crashes beyond the MCAS-related training pilots received in those countries—training that, again, the FAA Aircraft Evaluation Group did not oversee. *See* KOMITE NASIONAL KESELAMATAN TRANSPORTASI, *Aircraft Accident Investigation Report* at 215 (http://knkt.dephub.go.id/knkt/ntsc_aviation/baru/2018%20-%20035%20-%20PK-LQP%20Final%20Report.pdf, last visited February 7, 2022); FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA MINISTRY OF TRANSPORT, *Interim Investigation Report* at 130-32 (https://reports.aviation-safety.net/2019/20190310-0_B38M_ET-AVJ_Interim.pdf, last visited February 7, 2022).

clear in the related individual prosecution, *United States v. Forkner*, No. 4:21-CR-00268 (N.D. Tex.), that it has not charged the former Boeing former 737 MAX Flight Chief Technical Pilot defendant with causing the crashes of Lion Air Flight 610 or Ethiopian Airlines Flight 302 and that it does not intend to argue that he caused them. *See* Forkner Dkt. 32 at 12; Forkner Dkt. 69 at 5. Meanwhile, there is nothing in the Movants' motions showing how a congressional investigation into Boeing's leadership and the FAA or a shareholder derivative lawsuit about Boeing leadership's turning a blind eye to supposed safety problems at the company (Dkt. 52 at 13, 16) demonstrate how Boeing's conspiracy to defraud the FAA Aircraft Evaluation Group, as charged here, caused the crashes.

Finally, the Government's efforts to secure compensation for the crash victims' beneficiaries through the DPA (Dkt. 52 at 11 (citing DPA ¶ 13)) do not make the Movants "crime victims" under the CVRA. Once again, the Government consciously went above and beyond the legal requirements of the CVRA as it strove to recognize the Lion Air Flight 610 and Ethiopian Airlines Flight 302 crash victims. While the Government believes that its efforts have been successful in this regard, given that $471 million—94 percent of the $500 million crash-victim fund—has been disbursed to 307 of the 346 crash victims, the creation of this fund does not subvert the CVRA's statutory scheme.[7]

This is not the first case in which the Government has, through a negotiated resolution, obtained compensation from a corporate defendant for individuals who did not meet the definition of a "crime victim" under the CVRA or MVRA. In 2016, in *United States v. Takata Corp.*, No. 2:16-CR-20810 (E.D. Mich.), Takata Corporation pleaded guilty, pursuant to a plea agreement, to

[7] The Government also has significant practical concerns about how the distribution of this $500 million to the crash victims' beneficiaries would be unwound if the DPA between the Government and Boeing were set aside.

one count of wire fraud, in violation of 18 U.S.C. § 1343. 16-CR-20810 (E.D. Mich.), Dkt. 23. In addition to securing restitution for statutory victims of the charged offense, as part of the plea, the company agreed, pursuant to 18 U.S.C. § 3663A(a)(3), to pay "additional restitution" to "individuals who suffered (or will suffer) personal injury caused by the malfunction of a Takata . . . airbag inflator," among others—even though those individuals were not directly and proximately harmed by the wire fraud offense and thus, were not statutory crime victims in the case. *Id.* at 11.

In later litigation concerning an individual killed in an automobile accident involving an "overly aggressive deployment" of a Takata airbag inflator, the district court expressly "recognized that individuals suffering personal injury or wrongful death because of Takata's defective PSAN inflators are not direct victims of the criminal wire fraud committed by Takata against the [original equipment manufacturers]." *United States v. Takata Corp.*, No. 16-CR-20810, 2021 WL 4962138, at *2 (E.D. Mich. Oct. 26, 2021). Specifically, the court held that such "individuals do not meet the definition of 'victims'" under either the CVRA or the MVRA, but rather "hold a special status as 'other persons'" entitled to compensation only because it had been negotiated by the parties as part of the plea agreement. *Id.* The same is true here: although "the government made it a priority to afford [the Movants] some level of compensation" through the Crash-Victim Beneficiaries fund, *id.* (internal quotation marks omitted), that does not mean that they are statutory "crime victims."

B. The Court Should Deny the Remedies Sought by the Movants.

In any case, even assuming *arguendo* that the Movants qualify as "crime victims," it remains the case that the Movants are not entitled to the broad extra-statutory remedies they seek. The Movants assert that this Court has "ample remedies that it could order" should it conclude that the CVRA was violated in this case. *See* Dkt. 52 at 27-28 & nn.14-15. But even if this Court were

to conclude that the Government should have given notice to the representatives of the crash victims or conferred with them before it publicly filed the DPA, the remedies sought by the Movants far exceed the scope of the remedies that Congress has authorized.

Crime victims are not "parties" to a criminal prosecution. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) ("A 'party' to litigation is 'one by or against whom a lawsuit is brought.'" (brackets omitted)). Although crime victims have obvious psychological, emotional, and financial interests in a criminal prosecution, they are not "parties" to it, and they therefore cannot control the course of the litigation. *See* Black's Law Dictionary 1122 (6th ed. 1990) (distinguishing between "interested persons" and "parties"). The CVRA was adopted against this longstanding background principle, *see also* 18 U.S.C. § 3771(d)(6) ("Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."), and, as the Fifth Circuit has noted, nothing in the CVRA "reflects Congress' intent to depart from" it. *In re Amy Unknown*, 701 F.3d 749, 755-56 (5th Cir. 2012) (en banc) (holding that crime victims, as non-parties, may not appeal from a final judgment in a criminal case), *vacated on other grounds sub nom. Paroline v. United States*, 572 U.S. 434, 463 (2014); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 53-54 (1st Cir. 2012) (same). Nor may crime victims intervene in a criminal case to make themselves parties to it. *See United States* v. *Alcatel-Lucent France, S.A.*, 688 F.3d 1301, 1306 (11th Cir. 2012) (per curiam).

Despite their status as interested non-parties, crime victims have certain specified rights under the CVRA alongside the ability to enforce those rights expeditiously. For example, a crime victim or representative may file a motion in the district of prosecution asserting the denial of CVRA rights, *see* 18 U.S.C. § 3771(d)(3), and the district court is required to "take up and decide any motion asserting a victim's right forthwith," *id*. The CVRA further provides that, if the district

court denies the relief sought, then "the movant may petition the court of appeals for a writ of mandamus," which the court should ordinarily "take up and decide" within 72 hours of filing. *Id*. Only in cases where a crime victim promptly alleges a denial of the right to be heard in connection with an ongoing proceeding, and has timely and successfully sought mandamus relief, may the victim make "a motion to re-open a plea or sentence." 18 U.S.C. § 3771(d)(5). Here, the Movants waited until almost a year after the DPA was filed, and after virtually all of the crash victims' beneficiaries fund payments had been distributed, before filing their motions for relief, contrary to the CVRA's provisions requiring prompt invocation of the limited rights it affords to crime victims.[8]

The Movants are mistaken in claiming that this Court may order additional remedies under the CVRA, and there is no reason that this Court should attempt to fashion any other remedies using its supervisory powers based on the facts here. *See United States v. Kovall*, 857 F.3d 1060, 1065 (9th Cir. 2017) ("There are limitations on the relief a victim may obtain."); *see also Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. 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."). For example, the Movants assert that this Court may conduct a "substantive review" of the DPA, Dkt. 17 at 11, "withhold" court approval of the DPA, *id*., and even "excise[ ]," Dkt. 52 at 27, the provision of the DPA that the Movants incorrectly claim immunizes Boeing, *see* p. 5 n.2, *supra*, but these are not available remedies under the CVRA. Indeed, the fact that the CVRA provides a crime victim with the ability to "make a motion to re-open" a "plea or sentence"—but

[8] Apart from this limited remedy in the criminal case itself, the CVRA also specifies that no "cause of action for damages" against the Government "or any of its officers or employees" may lie. 18 U.S.C. § 3771(d)(6).

not a deferred prosecution agreement—strongly confirms that Congress did not intend that outcome and did not intend to permit a non-party crime victim to control the quintessential discretionary prosecutorial decision of deciding whether to bring charges, or, as in this case, to defer the prosecution of such charges. 18 U.S.C. § 3771(d)(5); *see United States v. LaBonte*, 520 U.S. 751, 762 (1997) (explaining that the "discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect" is an "integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors"); *United States v. Fokker Services B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016) (ordering relief by mandamus where district court sought to thwart a DPA: "The Executive's primacy in criminal charging decisions is long settled.").

The Movants' derivative request for Boeing to be arraigned is likewise beyond the scope of the remedies provided by the CVRA, and Fed. R. Crim. P. 10, on which the Movants rely, does not require arraignment to take place within a particular period of time. Nor, again contrary to the Movants' arguments, does the CVRA contemplate or authorize their broad claims for document discovery. Even putting to the side the weighty issues of attorney-client privilege, work product protection, deliberative process privilege, grand jury secrecy, and the Privacy Act attendant to an order requiring the disclosure of the Government's investigative files, *see* Fed. R. Crim. P. 16(a)(2), the Movants point to no statutory authority—in the CVRA or elsewhere—that would permit such "an unbridled gallop to any and all information in the government's files." *United States v. Rubin*, 558 F. Supp. 2d 411, 425 (E.D.N.Y. 2008). As one court has recognized, "[g]ranting rights to the prosecution's investigative discovery file to persons wishing to establish themselves as a victim is a significant right to append to the CVRA. If Congress had wanted to afford members of the public the right to prosecution files to determine their victim status, it should

have clearly identified that right in the CVRA." *United States v. Hunter*, No. 2:07-CR-307, 2008 WL 110488, at *1 (D. Utah Jan. 8, 2008), *mandamus pet. denied*, *In re Antrobus*, 563 F.3d 1092 (10th Cir. 2009); *see also United States v. Moussaoui*, 483 F.3d 220, 234, 237 (4th Cir. 2007) (concluding that neither the CVRA nor the district court's "inherent powers" permitted an order requiring the Government to disclose to crime victims non-public discovery materials provided to a criminal defendant in the course of discovery).[9]

C. Communications with the Victims' Rights Ombudsman and the Government

Beyond the legal and remedial arguments they raise in their motions, the Movants have faulted the Government's handling of this matter on a few other fronts. Though these arguments bear on neither the Movants' status under the CVRA nor the availability of the remedies they seek, the Government addresses those concerns here.

First, the Government apologizes to the Movants and other representatives of the crash victims that the Department of Justice's Victims' Rights Ombudsman in February 2020 conveyed inaccurate information to certain of the crash victims' beneficiaries' representatives. Dkt. 52 at 4, 24-26 (citing Dkt. 16, Gallagher Aff., Ex. 16, Appx. 075). The Government recognizes the critical importance of truthful, complete, and respectful communications with the public (regardless of victim status). This situation should have been handled differently. The Ombudsman provided the information that she had at the time; however, the Department does not ordinarily confirm or

[9] The Government respectfully requests the opportunity to submit additional briefing should the Court consider the Movants' request that the Court impose other sanctions based upon its inherent authority. In any event, such relief would be wholly unwarranted. *See, e.g.*, *Sandifer v. Gusman*, 637 F. App'x 117, 121 (5th Cir. 2015) (per curiam) (unpublished) ("In order to impose sanctions against an attorney under its inherent power, a court must make a specific finding that the attorney acted in bad faith." (internal quotation marks omitted)).

deny the existence of a criminal investigation and must always be mindful of the need to maintain confidentiality of nonpublic, sensitive information.

Second, the Movants repeatedly refer to the DPA as a "[b]ehind closed doors" and "secret[ ]" agreement because they were not consulted about the contents of the DPA. Dkt. 52 at 1, 17. The Department does not believe that anything about the negotiation of the DPA was contrary to law or existing policy because the Movants are not CVRA "crime victims" of the charged offense.

III. The Movants' Motions Should Be Denied Without an Evidentiary Hearing.

Finally, the Court need not convene an evidentiary hearing to rule on the motion before it. "Evidentiary hearings are not granted as a matter of course; such a hearing is required only if any disputed material facts are 'necessary to the decision of the motion.'" *United States v. Dean*, 100 F.3d 19, 21 (5th Cir. 1996) (per curiam). "As a general rule, an evidentiary hearing is unnecessary where the district court does not have to resolve complex factual disputes in order to decide the motion." *Smith v. O'Brien*, 59 F.3d 1241 (Tbl.), 1995 WL 413052, at *1 (5th Cir. Jun 19, 1995) (per curiam) (unpublished); *see also United States v. MMR Corp.*, 954 F.2d 1040, 1046 (5th Cir. 1992) (upholding decision to deny evidentiary hearing where district court's conclusion regarding disputed issue "would not likely have been affected by an evidentiary hearing"). Here, the dispute between the parties principally relates to the legal conclusions that can be drawn from the established facts in the record. *See* Dkts. 1, 4. Accordingly, no evidentiary hearing is warranted.

CONCLUSION

For the foregoing reasons, the motion should be denied without an evidentiary hearing.

Respectfully submitted,

KENNETH A. POLITE, JR.
Assistant Attorney General
Criminal Division
United States Department of Justice

By: *s/ Jerrob Duffy*
Jerrob Duffy, Deputy Chief
New York Bar No. 2803559
jerrob.duffy2@usdoj.gov

United States Department of Justice
Criminal Division, Fraud Section
1400 New York Avenue, N.W.
Washington, D.C. 20005
202-514-2000 (office)
202-514-3708 (fax)

CHAD E. MEACHAM
United States Attorney
Northern District of Texas

By: *s/ Chad E. Meacham*
United States Attorney
Texas Bar No. 00784584
chad.meacham@usdoj.gov

United States Attorney's Office
Northern District of Texas
801 Cherry Street, 17th Floor
Fort Worth, TX 76102
817-252-5200

Certificate of Service

I certify that on February 8, 2022, I electronically filed this pleading with the clerk of the court for the U.S. District Court, Northern District of Texas, using the Court's electronic case filing system, which will send a notification of electronic filing to notify counsel of record for Defendant Boeing and the Movants.

s/ Jerrob Duffy
JERROB DUFFY
Deputy Chief, Fraud Section
New York Bar No. 2803559

CERTIFICATE OF SERVICE

I certify that, on March 27, 2023, I served an electronic copy of the Supplemental Appendix for the United States on all litigants via the Court's ECF system. I certify that all participants in the case are registered ECF users and that service will be accomplished through the ECF system.

/s/W. Connor Winn
W. Connor Winn