No. 10-1518

IN THE

Supreme Court of the United States

JAMES R. FISHER, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR REAL PARTY IN INTEREST BRIAN POTASHNIK IN OPPOSITION

ABBE DAVID LOWELL
Counsel of Record
CHRISTOPHER MAN
CHADBOURNE & PARKE LLP
1200 New Hampshire Avenue, NW
Washington, DC 20036
ADLowell@chadbourne.com
(202) 974-5600

Counsel for Mr. Potashnik

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a "petition * * * for a writ of mandamus" filed under the Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(3), is subject to the traditional standard of review governing the issuance of a writ of mandamus.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unreported.

JURISDICTION

The judgment of the courts of appeals was entered on January 10, 2011. A petition for rehearing was denied on March 17, 2011. The petition for a writ of certiorari was filed on June 13, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

By letter dated September 14, 2011, the Court requested Mr. Potashnik's view as to whether a petition for a writ of certiorari in this case should be granted. Mr. Potashnik agrees with the United States that the Court should not grant certiorari because the lower courts decided the issue properly in this case, and because any purported split in authority among the courts of appeals is overstated and largely immaterial. Rather than repeat the arguments made by the United States, Mr. Potashnik contends that this case would be a poor vehicle for deciding the appropriate standard of review because the record makes clear that Petitioners' claims fail no matter what standard of review is applied, and also because Petitioners failed to preserve their appellate rights.

This case arises from a criminal prosecution in the U.S. District Court for the Northern District of Texas in which Mr. Potashnik was a defendant. At sentencing, Petitioners James R. Fisher and Odyssey Residential Holdings, L.P. sought restitution from Mr. Potashnik. Both the prosecution and Mr. Potashnik opposed Petitioners' request for restitution because Mr. Fisher was not a "victim" entitled to restitution under either the Crime Victims' Rights Act ("CVRA") or the Mandatory Victims Restitution Act ("MVRA"). The court held an evidentiary hearing on December 17, 2010.

The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e). The phrase "directly and proximately harmed" incorporates traditional notions of but-for and proximate causation, including the requirement that defen-

dant's conduct must have been a "substantial factor" in causing the alleged harm. *United States v. Sharp*, 463 F. Supp. 2d 556, 565-567 (E.D. Va. 2006); *see also United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011) ("It is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused."). If the link between the criminal conduct and the alleged harm is "too attenuated, either temporally or factually," then the putative victim is not a "victim" within the meaning of the statute. *Sharp*, 463 F. Supp. 2d at 566. An individual "must show more than a mere *possibility* that an alleged act caused [harm]" in order to claim rights under the Act. *Id*. at 567 (emphasis in original).

In this case, Mr. Fisher was permitted to testify and present other evidence at Mr. Potashnik's sentencing hearing. (Pet. App. 10-21.) Among other things, Mr. Fisher himself admitted that "we'll never know" whether his project (one he did not develop) would have been approved by the City Council in the absence of the pay-to-play conspiracy implemented by City officials, that it was, to use his own words, "[a]ll … speculation" whether any project would have been approved by the City, and that he did not know "whether [he] would have been successful on a level playing field." (Pet. App. 15.) Mr. Fisher described his own development corporation as "a fledgling company with virtually no development projects," whereas Mr. Potashnik's company was a "prominent national player" in the affordable housing industry, "one of the top developers in our business" with a "great track record" and over 60 successful developments. (Pet. App. 18, 20-21.) The prosecutors, who had first-hand knowledge of the case from an investigation that lasted over five years, agreed with

Mr. Potashnik that Petitioners were not "victims" under the statute, and noted that there was no evidence "that Mr. Potashnik paid the bribes to harm Mr. Fisher," that the record indicated Mr. Potashnik paid the monies "to get his own deals approved," that Mr. Potashnik's development project was already well underway before Mr. Fisher had even purchased land for his own project, and that City approval of Mr. Fisher's and Mr. Potashnik's projects was not mutually exclusive. (Pet. App. 33.) Mr. Potashnik also offered evidence that Mr. Fisher was on notice of the pay-to-play scheme (and even may have participated in it) at the time that he incurred many of the development expenses for which he now claims restitution. (Pet. App. 39.)

The district court agreed with Mr. Potashnik and the government that the Petitioners were not "victims," and denied Petitioners' request for restitution. Petitioners then filed a petition for a writ of mandamus with the Fifth Circuit challenging the district court's conclusion that they were not entitled to restitution, but did not file an appeal. The Fifth Circuit denied the writ in an unreported decision on January 10, 2011. (*See* Pet. App. 1-4.) This petition for certiorari followed.

ARGUMENT

1. There is no reason for this Court to grant certiorari to correct the standard of review applied by the Fifth Circuit to the petition for a writ of mandamus because the Fifth Circuit applied the correct standard. The Fifth Circuit reviewed the petition under the traditional standards applicable to all such writs, requiring Petitioners to show (1) that they had "'no other adequate means' to attain the desired relief"; (2) "a right to the issuance of a writ

that is 'clear and indisputable'"; and (3) that issuance of the writ was "'appropriate under the circumstances.'" (Pet. App. 2.) The Fifth Circuit applied these standards based on the plain language of the CVRA, which permits a putative victim whose motion for relief is denied by the district court to "petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). Despite this plain language, Petitioners argue that Section 3771(d)(3) "entitles crime victims to ordinary appellate review of district court decisions" rather than "merely deferential mandamus review of those decisions for clear and indisputable errors." (Pet. 3.)

Although there is no need to belabor the point that the Fifth Circuit decided the issue correctly because the United States' brief makes that point effectively, Mr. Potashnik does want to note that the Fifth Circuit followed the same approach as the D.C. Circuit in what is perhaps the most thorough and recent analysis of the text and structure of the CVRA in *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011). In a detailed and well-reasoned opinion, the court noted that the use of the term "mandamus" in the statute "strongly suggests that [Congress] wanted" traditional mandamus standards to apply because "'where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows that and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" *Id*. at 533 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). The court further explained that the statutory provision directly following the mandamus provision, which permits the

government to obtain ordinary appellate review of an order denying relief to a crime victim, lends additional support to this reading of the statute: "That Congress expressly provided for 'mandamus' in § 3771(d)(3) but ordinary appellate review in § 3771(d)(4) invokes 'the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Id*. (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)). The court concluded that the plain language of the statute, in conjunction with "the abbreviated 72-hour deadline" under which the appellate court must "take up and decide"[1] the petition, *see* 18 U.S.C. § 3771(d)(3), "suggests that Congress understood it was providing the traditional 'extraordinary remedy' of mandamus." *Monzel*, 641 F.3d at 533.

Petitioners ask this Court to adopt an interpretation of the statute that runs contrary to its plain meaning. Petitioners argue that when Congress used the term "mandamus" in Section 3771(d)(3), it really meant to provide ordinary appellate review. But that would be a particularly curious choice of words, as it is "more than well-settled that a writ of mandamus is not to be used as a substitute for appeal" and the writ is available only when an error "is *irremediable on ordinary appeal*, thereby justifying emergency relief

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[1] Petitioners make much of the fact that Section 3771(d)(3) requires the court of appeals to "take up and decide" the petition within 72 hours. (Pet. 11-12, 34-36; Pet. Reply 10.) But as the D.C. Circuit noted, this requirement says nothing about the standard of review, as "[a] court that denies relief under the traditional mandamus standard has most certainly 'take[n] up and decide[d]' the petition." *Monzel*, 641 F.3d at 533-34 (alterations in original).

in the form of mandamus." *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000) (emphasis in original). To say that the statutory term "mandamus" should be interpreted to mean "ordinary appellate review" is thus akin to arguing that the term "aggravated felony" should be read to mean "any old felony." Such an interpretation plainly contradicts the accepted meaning of the statutory terms. Mr. Potashnik thus agrees with the United States, the D.C. Circuit, and the court below that Section 3771(d)(3) means what it says—that "the movant may petition the court of appeals for a writ of mandamus" under the traditional legal standards governing such requests. There is no error for this Court to correct.

2. The United States also argues that any disagreement among the courts of appeals regarding the proper legal standard is "of little practical importance because any difference between the articulated standards is unlikely to produce divergent outcomes in any significant number of cases." (Br. Opp. 12.) This case illustrates why that is true, as the record that Petitioners themselves put forward demonstrates that they would not be entitled to restitution even if the Court were to adopt the standard of ordinary appellate review that they propose.

a. Under the ordinary standard of appellate review espoused by Petitioners in this case, the appellate court "reviews a district court's determinations under the CVRA for abuse of discretion." *In re Rendón Galvis*, 564 F.3d 170, 174 (2d Cir. 2009). Under this standard, "factual findings made by the district court in determining a putative victim's motion to enforce her rights" are reviewed for clear error. *Id.* As this Court previously explained, "the 'clearly erroneous'

standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions. When an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous." *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 400-01 (1990) (internal citations omitted). In a case such as this one, involving a request for restitution under the CVRA, the "factual findings" subject to review for clear error include "findings underlying determination of victim status" and "factual findings regarding causation." *In re Rendón Galvis*, 564 F.3d at 174 (citing *United States v. De La Fuente*, 353 F.3d 766, 772 (9th Cir. 2003)); *see also In re Stewart*, 641 F.3d 1271, 1275 (11th Cir. 2011) (holding that "finding of ultimate fact" as to causation is reviewed for clear error).

The Fifth Circuit provided Petitioners with precisely the review they now seek, concluding that the district court's factual findings were not clearly erroneous. After summarizing the evidence presented to the district court at sentencing, the Fifth Circuit specifically held that the record provided "permissible reasons for the district court to determine that the Petitioners were not victims of Potashnik's crime because the harm is too speculative to be considered direct or proximate." (Pet. App. 3.) As noted above, a district court's factual findings are to be upheld under the "clearly erroneous" standard so long as they "fall[] within a broad range of permissible conclusions." *Cooter &*

Gell, 496 U.S. at 400-01. That very finding was made by the Fifth Circuit in this case.

Petitioners emphasize the panel's repeated references to a "deferential" standard of review, but they fail to explain how a more stringent standard would have altered the appellate court's review of the district court's factual findings regarding causation and "victim" status under the CVRA.[2] The opinion itself leaves little doubt that the result would have been the same under either standard, explaining that the evidence presented at sentencing supported the conclusion "that the district court *did not clearly err* in refusing to label the Petitioners 'crime victims.'" (Pet. App. 3 n.6 (emphasis added).)

A separate panel of the Fifth Circuit reached the same conclusion in *In re Fisher*, 640 F.3d 645 (5th Cir. 2011), a case involving one of Mr. Potashnik's alleged co-conspirators, Ronald Slovacek. In that case, Petitioner filed the same request for $1.8 million in restitution from Mr. Slovacek, arguing, as he does here, that the conduct of Mr. Slovacek and his co-conspirators "had rendered his $1.8 million investment worthless." *Id*. at 647. Because a written order in that case had not issued within 72 hours of Mr. Slovacek's sentencing hearing, the Fifth Circuit based its review primarily on the sentencing transcript and factual findings from Mr. Potashnik's case.

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[2] Petitioners can point to no difference in the treatment of contested factual issues under the two standards of review because there is none, as at least one court of appeals has already concluded. *See In re Stewart*, 641 F.3d at 1275 (noting that whether the court employed traditional appellate or mandamus review, the district court's factual findings remained subject to the same standard: "did the court base its decisions on findings of fact that are clearly erroneous").

Id. at 648. The court noted the district court's findings that "the claim that Fisher would have had a fair opportunity or a level playing field in the absence of the conspiracy was too speculative to support an order of restitution," and "that it was too speculative to conclude that competing on a level playing field would have enabled Fisher to avoid his $1.8 million loss." *Id*. at 649. Like the prior panel, the court reviewed these findings *for clear error*, concluding that "[n]either of these findings was *clearly erroneous*." *Id*. (emphasis added).

The Fifth Circuit has thus twice concluded that the district did not abuse its discretion by finding that Petitioners were not "victims" entitled to restitution under the CVRA because they had not been "directly and proximately harmed" by Mr. Potashnik's conduct. These holdings leave little doubt that any purported error in the articulated standard of review in this case was entirely meaningless as to these Petitioners, as these Petitioners have already received the "clear error" review they now seek in this Court. In short, Petitioners merely are asking this Court for an advisory opinion that would make no difference to the outcome of this case.

b. Even if this Court were to review the district court's factual findings as Petitioners request, the record amply supports the district court's conclusion that Petitioners were not "victims" entitled to restitution under the CVRA.

Petitioners made an investment decision to sink costs into a development project that required City approval. Because Petitioners would have incurred these costs even in the absence of any bribery scheme, these costs are not recoverable as restitution. *See United States v. Griffin*, 324 F.3d 330, 367-68

(5th Cir. 2003) (holding that development costs that "would have been incurred had there never been a bribery scheme" were not eligible for restitution); *see also United States v. Vaknin*, 112 F.3d 579, 589 (1st Cir. 1997) ("Restitution should not be ordered in respect to a loss which would have occurred regardless of the defendant's conduct.").

Moreover, as the district court recognized, Mr. Fisher plainly admitted that it was "all speculation" whether the conduct of Mr. Potashnik and his alleged co-conspirators directly harmed Petitioners, as "we'll never know" whether the City would have approved *any* project—much less Mr. Fisher's fledgling project—in the absence of the pay-to-play scheme. Such statements made it impossible for the district court to conclude that Mr. Potashnik's conduct "directly or proximately harmed" Petitioners, as the alleged harms were entirely speculative. *See In re Stewart*, 641 F.3d at 1275 (denying restitution where insolvency of third party caused any loss); *see also United States v. Chalupnik*, 514 F.3d 748, 754 (8th Cir. 2008) (holding "[r]estitution to MVRA victims must be based on the amount of loss *actually caused* by the defendant's offense" and that such losses "may not be based entirely upon speculation") (internal quotation omitted; emphasis in original)). Thus, even if the Court adopted Petitioner's proposed standard of review, Petitioner would not be entitled to restitution in this case.[3]

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[3] Before this Court, Petitioners now claim that they requested restitution for losses that "included (for example) $200,000 in attorneys' fees for providing assistance to the Government during the lengthy investigation of the case." (Pet. 5.) This statement is extremely misleading, as Petitioners failed to present any specific claim for such attorneys' fees in the district court. (cont'd)

c. Finally, this case presents a poor vehicle for resolving any purported split in authority because Petitioners failed to preserve their rights by filing a direct appeal. In a footnote, Petitioners state that Mr. Fisher "did not file a direct appeal along with his CVRA petition because he believed he was entitled to relief under the mandamus standard of review and that, in any event, the Fifth Circuit should give him ordinary appellate review of his CVRA petition." (Pet. 24 n.6.) The latter possibility was squarely foreclosed by the Fifth Circuit's decision over two and a half years earlier in *In re Dean*, which held that traditional mandamus standards apply to CVRA petitions. *In re Dean*, 527 F.3d 391, 393-94 (5th Cir. 2008). Moreover, the assertion that Mr. Fisher felt it was unnecessary to preserve his rights by filing a direct appeal in this case is directly refuted by his conduct in the related proceedings against Mr. Slovacek. In that case, Mr. Fisher filed both a

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Petitioner's motion for restitution provided a list of "liquidated damages" and "unliquidated damages" for which Mr. Fisher sought restitution. (Pet. App. 85-90.) The list of "liquidated damages" included a line item for $200,000 in "Legal Fees to Haynes & Boone," but the following paragraph specifically stated that "[t]he damages incurred by Movants are specific to certain projects that were undertaken by Movants, *in the normal scope of their business*," and then listed those development projects. (Pet. App. 88 (emphasis added).) Petitioners' motion for restitution failed to present any argument that Mr. Fisher was entitled to legal fees incurred due to his independent decision to cooperate with the FBI investigation, nor did Mr. Fisher present any argument or authority to support his bald assertion before the Fifth Circuit that he was entitled to such legal fees under the MVRA. (Pet. App. 102-03, 128.) Thus, quite apart from the issue of whether attorneys' fees voluntarily incurred by Mr. Fisher were directly or proximately caused by Mr. Potashnik's conduct, any such claim for attorneys' fees has been waived.

petition for a writ of mandamus and a direct appeal and then urged the court of appeals to "consolidate the mandamus petition with his appeal raising identical issues, treat the petition as an opening brief on the merits of the appeal, and consolidate decision on the appeal." *In re Fisher*, 640 F.3d at 650. Petitioners' failure to preserve their rights by filing a direct appeal in this case is significant for two reasons.

First, Petitioners urge this Court to essentially read into the statute the standard of ordinary appellate review when they have not, in fact, sought ordinary appellate review in the Fifth Circuit. As Petitioners admit in their petition for certiorari, it is by no means clear whether a crime victim can directly appeal the denial of a motion for restitution in the Fifth Circuit. (Pet. 24 n.6.) A panel of the Fifth Circuit raised the issue without deciding it in *In re Amy Unknown*, 636 F.3d 190, 194-97 (5th Cir. 2011), and Mr. Fisher's motion to consolidate his petition for a writ of mandamus with a direct appeal in *In re Fisher* was denied "without prejudice to any right of appeal Fisher may enjoy" under the CVRA. *In re Fisher*, 640 F.3d at 650. In this case, Petitioners devote much of their argument to the contention that the rights and protections afforded crime victims under the CVRA require some form of ordinary appellate review. But the simple fact of the matter is that Petitioners never sought normal appellate review in the Fifth Circuit in this case.

Second, if this Court were to address the issues raised in Mr. Fisher's petition for certiorari, it should do so in a case in which petitioners have preserved their rights by filing a direct appeal. As noted above, a writ of mandamus is typically used as a procedural

tool to seek "emergency relief" when a trial court's ruling would be "*irremediable on ordinary appeal.*" *In re Occidental Petroleum Corp.*, 217 F.3d at 295 (emphasis in original). Petitioners operate under the assumption that any error made by the district court in this case was irremediable because ordinary appeal was unavailable, but they failed to test this assumption by filing a direct appeal. The availability of direct appellate review may obviously inform the Court's interpretation of the statutory provision at issue, as direct appeal, if available, would eviscerate any need to read such a standard into the statute's mandamus provisions. But that issue has not been preserved in this particular case, and Mr. Fisher's petition thus presents a poor vehicle for this Court to offer any comprehensive interpretation of the Act.

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ABBE DAVID LOWELL
Counsel of Record
CHRISTOPHER MAN
CHADBOURNE & PARKE LLP
1200 New Hampshire Avenue, NW
Washington, DC 20036
ADLowell@chadbourne.com
(202) 974-5600

Counsel for Mr. Potashnik

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