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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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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 court of appeals was entered on January 10, 2011. A petition for rehearing was denied on March 17, 2011 (Pet. App. 60-61). 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

Petitioners seek this Court's review of a judgment arising from a federal prosecution in the United States District Court for the Northern District of Texas. Pursuant to a plea of guilty, respondent Brian Potashnik

was convicted of conspiring to bribe a public official, in violation of 18 U.S.C. 371 and 18 U.S.C. 666(a)(1)(B) and (a)(2). Petitioners, competitors of Potashnik, sought restitution under the Crime Victims' Rights Act (CVRA), Pub. L. No. 108-405, Tit. I, 118 Stat. 2261 (18 U.S.C. 3771 (2006 & Supp. III 2009)). The district court declined to order restitution, and the court of appeals denied mandamus relief. Pet. App. 1-4, 46-47, 48.

1. In 1999, Donald Hill was elected to the Dallas City Council. He was reelected in 2001, 2003, and 2005. In August 2003, Hill nominated D'Angelo Lee to serve on the Dallas Planning and Zoning Commission. Later that year, the Dallas City Council appointed Lee to serve as commissioner for a term that expired on August 31, 2005. Between August 2004 and June 2005, Hill and Lee pressured respondent Potashnik, a real estate developer, to corruptly provide them with things of value. Potashnik agreed to those demands in order to advance the general interests of his company and to ensure the continuing goodwill of Hill and Lee, who had previously supported Potashnik's developments in and around Dallas. Potashnik believed that his refusal to comply would adversely affect his business. Gov't C.A. Resp. to Reh'g 1-2.

In September 2007, a federal grand jury in the Northern District of Texas returned an indictment charging Potashnik and others with an array of corruption-related offenses. On June 22, 2009, Potashnik pleaded guilty, pursuant to a plea agreement, to one count of conspiring to bribe a public official, in violation of 18 U.S.C. 371 and 18 U.S.C. 666(a)(1)(B) and (a)(2). Gov't C.A. Resp. to Reh'g 2; Pet. App. 48-49.

2. a. The CVRA provides "crime victim[s]," *i.e.*, persons who have been "directly and proximately harmed

as a result of the commission of a Federal offense" (18 U.S.C. 3771(e)), with various statutory rights. See 18 U.S.C. 3771(a). One such right is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. 3771(a)(6). Although the crime victim is not a party to the criminal prosecution, either the victim or the United States can seek to enforce the victim's CVRA rights by filing a motion in the district court. See 18 U.S.C. 3771(d)(1) and (3). The district court is required to "take up and decide" the motion "forthwith." 18 U.S.C. 3771(d)(3).

If the district court "denies the relief sought, the movant" (*i.e.*, the victim or the government) "may petition the court of appeals for a writ of mandamus." 18 U.S.C. 3771(d)(3). The court of appeals must generally "take up and decide" any mandamus petition within 72 hours after it is filed. *Ibid.* If the court of appeals denies mandamus relief, it must "clearly state[]" "the reasons for the denial * * * on the record in a written opinion." *Ibid.* The government may also "assert as error the district court's denial of any crime victim's right" through an "appeal" in the underlying criminal case. 18 U.S.C. 3771(d)(4).

b. Before Potashnik's sentencing, petitioners filed a CVRA motion in the district court seeking restitution under the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5(a), 96 Stat. 1253 (18 U.S.C. 3663), and the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227 (18 U.S.C. 3663A). Petitioners argued that Potashnik's offense directly and proximately caused them to incur business losses because city officials who had received Potashnik's bribes refused to approve petitioners' construction projects.

Petitioner Fisher testified at the sentencing hearing. When asked whether the City Council "necessarily would have approved" his development proposal if it had not approved Potashnik's project, Fisher replied that "[a]ll that is speculation"—"[w]e'll never know." Pet. App. 15.

The district court ultimately declined to order restitution. The court held that "this is not a [MVRA] case" because "bribery is not a property crime as defined by the statute." Pet. App. 46. In the alternative, the district court concluded that, even if the MVRA applied, petitioners would not qualify as crime victims because, given the speculative nature of their claims, they "are not persons directly and proximately harmed as a result of" Potashnik's offense. *Id.* at 46-47. The district court also rejected petitioners' alternative argument that the plea agreement itself provided for restitution. *Id.* at 24-25.

3. No appeal was filed. On January 6, 2011, petitioners filed a petition for a writ of mandamus under the CVRA, challenging the district court's denial of their request for restitution. The court of appeals denied the petition. Pet. App. 1-4.

The court of appeals explained that, under *In re Dean*, 527 F.3d 391 (5th Cir. 2008), "writs of mandamus filed under the CVRA are reviewed as we would review other writs of mandamus." Pet. App. 2. Applying that standard, the court concluded that petitioners were not entitled to relief because they had not identified any "clear and indisputable error in the district court's determination that [p]etitioners were not victims for purposes of the CVRA and MVRA." *Ibid.* The court stated that the evidence, "when reasonably construed, could lead to the conclusion that the amount of restitution

claimed was too speculative to label [p]etitioners directly or proximately harmed by the actions of Potashnik." *Id.* at 3. The court explained that "evidence was adduced that the approval of Potashnik's project did not necessarily preclude the approval of the [p]etitioners', that Potashnik's project could have been denied irrespective of the bribes, [and] that the bribes were tendered to obtain general good will rather than to secure this specific project." *Ibid.*[1] The court of appeals also rejected petitioners' alternative argument that the plea agreement itself required restitution, concluding that "the district court's construction of the plea agreement is permissible under our standard of review." *Id.* at 4.

ARGUMENT

Petitioners contend (Pet. 10-38) that the traditional mandamus standard of review does not apply to a mandamus petition filed under the CVRA, and that the courts of appeals are divided on the proper standard of review in CVRA cases. Although there is some disagreement among the courts of appeals on this issue, the Court's review is not warranted. The court of appeals' decision is correct; petitioners overstate the extent of the circuit conflict; and that disagreement is of little practical significance.

1. The court of appeals correctly held that, in order to obtain mandamus relief under the CVRA, petitioners were required to demonstrate that the district court had committed "clear and indisputable" error.

a. The CVRA provides that, if a district court denies a motion by a putative crime victim, "the movant [*i.e.*,

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[1] The court of appeals did not address the district court's determination that the MVRA did not apply because the MVRA, like the CVRA, "has as a prerequisite the existence of a 'victim.'" Pet. App. 3 n.6.

the putative victim] may petition the court of appeals for a writ of mandamus." 18 U.S.C. 3771(d)(3). When Congress uses a term of art like "mandamus," it is presumed to "adopt[] the cluster of ideas that were attached to [it] in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); see *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 (2011) ("[W]here Congress uses a common-law term in a statute, we assume the 'term . . . comes with a common law meaning, absent anything pointing another way.'") (citation omitted); *United States* v. *Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011) ("That Congress called for 'mandamus' strongly suggests it wanted 'mandamus.'"), petition for cert. pending, No. 11-85 (filed July 15, 2011); *In re Antrobus*, 519 F.3d 1123, 1124-1125, 1127-1128 (10th Cir. 2008) (per curiam) (same). One of the "cluster of ideas" attached to the writ of mandamus is that relief will be granted only if the petitioner's right to the writ is "clear and indisputable." *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 381 (2004) (quoting *Kerr* v. *United States Dist. Ct.*, 426 U.S. 394, 403 (1976)). Nothing in the CVRA overcomes that presumption.

Indeed, whereas Section 3771(d)(3) authorizes a crime victim (or the government) to petition for "a writ of mandamus," the very next Subsection authorizes "the Government" to challenge a "district court's denial of any crime victim's right" through an "appeal," 18 U.S.C. 3771(d)(4). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*,

464 U.S. 16, 23 (1983) (brackets in original); see *Monzel*, 641 F.3d at 533; *Antrobus*, 519 F.3d at 1129. Congress could have allowed nonparty crime victims to obtain ordinary appellate review by authorizing "immediate appellate review" or "interlocutory appellate review," as it has in a number of other statutes.[2] See *id.* at 1124, 1128-1129. Instead, Congress authorized another established form of judicial review—a petition for "a writ of mandamus"—and that authorization carries with it the traditional mandamus standard of review.

That Congress required courts of appeals to "take up and decide" the mandamus petition within 72 hours, see 18 U.S.C. 3771(d)(3), reinforces the conclusion that the traditional mandamus standard of review applies.[3] Congress could reasonably expect a court of appeals to decide within that short interval whether a district judge has committed the sort of obvious error that would traditionally afford a basis for mandamus relief. It is far less reasonable to expect an appellate court to determine within that limited time frame whether the district

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[2] See, *e.g.*, 8 U.S.C. 1535(b); 9 U.S.C. 16(a)(2); 10 U.S.C. 950d(a) (Supp. III 2009); 18 U.S.C. 1835; 18 U.S.C. 2518(10)(b); 18 U.S.C. 3731; 18 U.S.C. App. [3] § 7, at 687 (Supp. III 2009); 28 U.S.C. 798(b); 28 U.S.C. 1292(b); 42 U.S.C. 247d-6d(e)(10); Fed. R. Civ. P. 23(f).

[3] Some of the rights conferred on crime victims by the CVRA must, by their nature, be exercised during the criminal trial itself. See, *e.g.*, 18 U.S.C. 3771(a)(3) (providing, subject to a specified exception, that a crime victim has "[t]he right not to be excluded from any * * * public court proceeding" involving the crime). When a petition for mandamus asserts that the district court has denied a right of that character, prompt disposition of the petition by the court of appeals is essential to ensure that the trial is not disrupted or unduly delayed. See 18 U.S.C. 3771(d)(3) ("In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing [the CVRA].").

court correctly applied (for example) proximate-cause principles to a potentially complicated factual record. See *Monzel*, 641 F.3d at 533 ("full briefing and plenary appellate review within the 72-hour deadline will almost always be impossible"); *Antrobus*, 519 F.3d at 1130 ("It seems unlikely that Congress would have intended *de novo* review in 72 hours of novel and complex legal questions."); see also *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010) (per curiam).

b. Petitioners contend (Pet. 34-38) that, unlike traditional "mandamus" review, "mandamus" review under the CVRA should be conducted under the standards usually associated with an ordinary appeal. Petitioners' arguments lack merit.

Petitioners first suggest (Pet. 34-36) that, if a court of appeals applies the traditional mandamus standard, it would breach its obligation to "take up and decide" the mandamus petition, as required by 18 U.S.C. 3771(d)(3). In making that argument, however, petitioners rely on the "discretionary" nature of mandamus review. Pet. 34-35. The court of appeals here did not deny the mandamus petition as an exercise of its discretion; it denied the petition based on its express determination that the district court had not committed any "clear and indisputable" error. See Pet. App. 2. "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 533-534 (brackets in original). Similarly, a requirement that the court "ensure" that a crime victim is afforded certain rights (Pet. 36-37), "says nothing about the standard of review." *Monzel*, 641 F.3d at 533.

Petitioners next argue that, because "a crime victim could (like anyone else) seek mandamus" under the All Writs Act, 28 U.S.C. 1651, application of the traditional

mandamus standard would render the CVRA's provision superfluous. Pet. 36. Before the CVRA was enacted, however, courts generally denied nonparty crime victims in a criminal case any opportunity to seek judicial review, whether through the All Writs Act or otherwise, of a ruling adversely affecting their interests. See, *e.g.*, *United States* v. *McVeigh*, 106 F.3d 325, 328-329 (10th Cir. 1997) (per curiam) (dismissing victims' mandamus petition challenging pretrial order prohibiting them from attending trial at which they were expected to testify); *Aref* v. *United States*, 452 F.3d 202, 207 (2d Cir. 2006) ("We are aware of no authority authorizing a non-party to petition the Court of Appeals for a writ of mandamus in a criminal case."); *Monzel*, 641 F.3d at 534 (citing cases). The CVRA abrogated *that* restriction by authorizing crime victims to seek judicial review of an adverse decision by way of a "petition * * * for a writ of mandamus." 18 U.S.C. 3771(d)(3). Application of traditional mandamus standards to petitions filed under the CVRA does not render that authorization superfluous.

Finally, petitioners' reliance (Pet. 37-38) on the CVRA's legislative history is misplaced for two reasons. First, Congress's use of a traditional term of legal art unambiguously conveys its intent to incorporate the "clear and indisputable error" standard historically associated with mandamus review, and "reference to legislative history is inappropriate when the text of the statute is unambiguous," *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 132 (2002). Second, the floor statements on which petitioners rely do not speak to the appropriate standard of review. Petitioners were afforded "immediate" review of the purported denial of their rights; the court of appeals did "review" petitioners' arguments; and the appellate court would have

granted relief if it had found that the district court had committed a "clear and indisputable" error. See *Monzel*, 641 F.3d at 534 & n.4 (rejecting reliance on legislative history). Congress expressly provided for "mandamus" review, and the court of appeals correctly held that the traditional mandamus standard of review therefore applies.

2. The courts of appeals are divided over the proper standard of review to apply to a mandamus petition filed under the CVRA. Petitioners overstate the extent of the conflict, however, and the actual disagreement does not warrant this Court's review.

a. Four courts of appeals, including the Fifth Circuit, have held (correctly) that mandamus petitions filed under the CVRA are subject to the traditional mandamus standard of review. See *Monzel*, 641 F.3d at 532-534 (D.C. Cir.); *Acker*, 596 F.3d at 372 (6th Cir.)*; In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *Antrobus*, 519 F.3d at 1124-1125, 1127-1130 (10th Cir.). Consistent with the court of appeals' decision here (Pet. App. 2), these circuits generally require crime victims to demonstrate that the district court has "clear[ly] and indisputabl[y]" erred in denying them relief. *E.g.*, *Monzel*, 641 F.3d at 534; *Dean*, 527 F.3d at 394; *Antrobus*, 519 F.3d at 1125, 1130.

In contrast, the Second Circuit has held that "a district court's determination under the CVRA should be reviewed for abuse of discretion." *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2005) (*Huff*). The Ninth Circuit has similarly held that the writ should issue whenever "the district court's order reflects an abuse of discretion or legal error." *Kenna* v. *United States Dist. Ct.*, 435 F.3d 1011, 1017 (2006). As the Tenth Circuit observed, both opinions were decided under "time pres-

sure[]" and include only a "brief passage" that fails to explain "why Congress chose to use the word *mandamus* rather than the word *appeal*." *Antrobus*, 519 F.3d at 1128. Moreover, both cases were decided before the Fifth, Sixth, Tenth, and D.C. Circuits held that traditional mandamus standards apply, and neither the Second nor the Ninth Circuit confronted the statutory-interpretation arguments underlying those decisions. Cf. *Kenna*, 435 F.3d at 1017 (noting that it was "aware of no court of appeals that has held to the contrary").

In the five years since *Kenna* was decided, every court of appeals to consider the issue in a published opinion has agreed that the traditional mandamus standard of review should apply. The Ninth Circuit has never applied (or even cited) the standard of review set forth in *Kenna* in any other case. And although the Second Circuit has referenced the "abuse of discretion" standard in two more recent cases, it has never addressed the competing case law. See *In re Local No. 46 Metallic Lathers Union*, 568 F.3d 81, 85 (2009) (per curiam), cert. denied, 130 S. Ct. 1521 (2010) (*Local No. 46*); *In re Rendón Galvis*, 564 F.3d 170, 174 (2009) (per curiam) (*Galvis*).[4]

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[4] Petitioners contend that the Third and Eleventh Circuits have also "afforded crime victims ordinary appellate review." Pet. 12. But the Third Circuit decision on which they rely is unpublished and non-precedential, and it has never been cited by that court. See *In re Walsh*, 229 Fed. Appx. 58 (2007) (per curiam). Moreover, the court in *Walsh* relied exclusively on *Huff* and *Kenna*—the only pertinent court of appeals' decisions that had been issued at that time. *Id.* at 60. In *In re Stewart*, 552 F.3d 1285 (2008) (per curiam), the Eleventh Circuit did not address the standard of review. Indeed, as petitioners recognize (Pet. 17), in a second petition for a writ of mandamus in the same case, the court of appeals cited the competing authorities, noted that it "did not explicitly state the standard [it] used" in the earlier case, and

b. The disagreement among the courts of appeals is also of little practical importance because any difference between the articulated standards is unlikely to produce divergent outcomes in any significant number of cases. Indeed, several courts of appeals have declined to determine the appropriate standard of review because the choice among competing standards would not have affected the outcomes of the particular cases before them. *E.g.*, *In re Stewart*, 641 F.3d 1271, 1274-1275 (11th Cir. 2011) (per curiam) (concluding that the court need not resolve the issue because the mandamus petitioner was not entitled to relief under either standard); *In re Zackey*, No. 10-3772, 2010 WL 3766474 (3d Cir. Sept. 22, 2010) (same); *United States* v. *Aguirre-González*, 597 F.3d 46, 56 (1st Cir. 2010) (same); *In re Brock*, 262 Fed. Appx. 510, 512 (4th Cir. 2008) (per curiam) (same); *In re Doe*, 264 Fed. Appx. 260, 262 (4th Cir. 2007) (per curiam) (same); see *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009) (per curiam) (finding it unnecessary to resolve the issue because the mandamus petitioner was entitled to relief under either standard).

In all three Second Circuit cases applying the "abuse of discretion" standard, the mandamus petition was denied. See *Huff*, 409 F.3d at 564; *Local No. 46*, 568 F.3d at 88; *Galvis*, 564 F.3d at 176; cf. *Antrobus*, 519 F.3d at 1131 (finding it far from "obvious * * * that the outcome would change" under the ordinary appellate standard of review). And although the Ninth Circuit granted the mandamus petition in *Kenna*, it is unlikely that the standard of review was outcome-determinative. In that case, the district court refused to allow acknowledged

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declined to decide the issue because "it ma[d]e[] no difference." See *In re Stewart*, 641 F.3d 1271, 1273-1275 (11th Cir. 2011) (per curiam). Thus, the issue remains open in the Third and Eleventh Circuits.

victims to allocute, as required by 18 U.S.C. 3771(a)(4), and that sort of stark deviation from the statutory mandate might well have been remediable under the traditional mandamus standard. See *Kenna*, 435 F.3d at 1017 (noting that relief might well be warranted under traditional mandamus standard); see also *Monzel*, 641 F.3d at 534 n.4 (noting that "a court applying the traditional mandamus standard can still remedy errors of law, provided the errors were clear and the petitioner has a right to relief").

Contrary to petitioners' contention (Pet. 30-34), the circumstances of this case do not suggest that the choice among competing standards of review—*i.e.*, between an "abuse of discretion" standard and a "clear and indisputable error" standard—was likely to be outcome-determinative. Although the court of appeals did rely on the "deferential" standard of review traditionally associated with mandamus (Pet. App. 1), the "abuse of discretion" standard is also "deferential," the proximate-cause determination is intensely factbound, and the court of appeals remains ill-equipped to "reweigh" the evidence (*id.* at 3).[5] There is consequently no reason to suppose that

[5] Petitioners suggest (Pet. 24 n.6) that the Court may also wish to consider, along with the standard-of-review issue, the distinct question whether the CVRA permits nonparty crime victims to appeal from the final judgment in a criminal case. Cf. Pet. at ii, *Monzel* v. *United States*, No. 11-85 (filed July 15, 2011). That question is not properly before the Court because it was neither pressed nor passed on below. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below.") (citation omitted). Moreover, because petitioners concede (Pet. 24 n.6) that they did not file any appeal here, this case is an inappropriate vehicle to decide whether a nonparty crime victim *could* appeal in some future case.

this case would have been decided differently in either the Second or the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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