No. 11-85

In the Supreme Court of the United States

AMY, THE VICTIM IN THE MISTY CHILD PORNOGRAPHY SERIES, PETITIONER

v.

MICHAEL M. MONZEL, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2259, which provides for mandatory restitution for victims of child-exploitation offenses, requires a showing that the defendant's offense proximately caused the victim's losses.

2. 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.

3. Whether a nonparty crime victim is entitled to appeal the restitution component of a defendant's criminal sentence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 641 F.3d 528. The district court's memorandum opinion (Pet. App. 45-74) is reported at 746 F. Supp. 2d 76. The district court's restitution order (Pet. App. 37-44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2011. The petition for a writ of certiorari was filed on July 15, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks this Court's review of a judgment arising from a federal prosecution in the United States

District Court for the District of Columbia. Following a guilty plea, respondent Monzel was convicted on one count of distributing child pornography, in violation of 18 U.S.C. 2252(a)(2), and one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) (Supp. II 2008). The government sought restitution under 18 U.S.C. 2259 on behalf of petitioner, a victim depicted in one of the images Monzel possessed, and the district court ordered Monzel to pay $5000 in restitution. Petitioner filed a petition for a writ of mandamus under the Crime Victims' Rights Act (CVRA), Pub. L. No. 108-405, Tit. I, 118 Stat. 2261 (18 U.S.C. 3771(d)(3)), and a direct appeal. The court of appeals granted petitioner's mandamus petition in part, dismissed her appeal, and remanded to the district court to recalculate the restitution amount. Pet. App. 1-36, 46-47 & n.2.

1. Restitution in "the full amount of the victim's losses" is mandatory when a defendant has been convicted of "any offense" under Chapter 110 of Title 18. 18 U.S.C. 2259. The possession of child pornography is a Chapter 110 offense. See 18 U.S.C. 2252(a)(4)(B) (Supp. II 2008). A "victim," in turn, is defined as an "individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. 2259(c). And the "full amount of the victim's losses" is defined broadly to include medical services (including psychiatric and psychological care); physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; attorney's fees and other litigation costs; and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3). Section 2259 further provides that the order of restitution "shall be issued and enforced in accordance with [18 U.S.C.] 3664." 18 U.S.C. 2259(b)(2). And Section 3664 places on the government the "burden

of demonstrating the amount of the loss sustained by a victim as a result of the offense" and provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." 18 U.S.C. 3664(e).

Although a crime victim is not a party to the criminal prosecution, the CVRA provides that the victim, or the government on the victim's behalf, may seek to enforce the victim's rights by filing a motion in the district court. See 18 U.S.C. 3771(d)(1) and (3). One such right is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. 3771(a)(6). 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." *Ibid.* 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).

2. On June 2, 2009, Monzel contacted an undercover law enforcement officer who was monitoring an on-line chat room frequented by individuals with a sexual interest in prepubescent children. Over the next several months, Monzel volunteered that he "played" with his two-year-old granddaughter and sent the undercover officer images depicting prepubescent children in sexually suggestive positions or engaging in sexual activity. On September 30, 2009, a search warrant was executed at Monzel's home. Various electronic memory devices were seized and a preliminary forensic examination re-

vealed the presence of over 800 images depicting children, including prepubescent children, naked and engaging in sexual activity. Statement of the Offense 1-4, 09-cr-243 Docket entry No. 12 (D.D.C. Dec. 10, 2009).

A federal grand jury in the District of Columbia returned an indictment charging Monzel with distribution of child pornography, in violation of 18 U.S.C. 2252(a)(2), and possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) (Supp. II 2008). Monzel pleaded guilty to both counts and the district court sentenced him to 120 months of imprisonment, to be followed by ten years of supervised release. Pet. App. 78-81.[1]

3. Following Monzel's guilty plea, the government received requests for restitution from three of the 30 identified victims depicted in the child-pornography images possessed or distributed by Monzel. Pet. App. 50. Petitioner was one of the claimant-victims and was identified by the pseudonym "Amy" to protect her privacy. *Id.* at 50-51. As relevant here, petitioner submitted materials supporting her request for "restitution in the amount of $3,263,758 for medical services relating to physical, psychiatric, or psychological care, physical and occupational therapy or rehabilitation, transportation, temporary housing, child care expenses, lost income, and attorney's fees and other costs." *Id.* at 62. The government submitted the three requests (including petitioner's) to the district court.[2]

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[1] Monzel filed a timely notice of appeal from that judgment. See *United States* v. *Monzel*, No. 10-3050 (D.C. Cir. filed June 7, 2010). The appeal is being held in abeyance pending disposition of this petition. 9/9/11 Order, *Monzel*, *supra*.

[2] All of the claimant-victims (including petitioner) were depicted in images that Monzel possessed but did not distribute. See Pet. App. 4, 46 n.2. The other two victims (known by the pseudonyms "Tara" and "Vicky") initially sought restitution in the amount of $2851.20 and

The district court concluded that all three claimants qualified as "victim[s]" under Section 2259 and that the government "demonstrated that the victims' alleged losses were proximately caused by Monzel's possession of these images." Pet. App. 60-61, 71. In a separate order, the court awarded petitioner (and one other victim) restitution in the amount of $5000. *Id.* at 43. The court considered "the nature and severity of the original sexual abuse depicted in the pornographic images of the victims" and "the fact that these victims have explained most eloquently in their victim impact statements how they are still deeply affected by the present, and probably future, viewing of those images." *Id.* at 42. The court considered the $5000 award to be a "nominal" amount that was appropriate because the government had not established the "specific amount of loss," but noted that it was "less than the actual harm this particular [d]efendant caused each victim." *Id.* at 41-42. The district court declined to order joint and several liability. *Id.* at 42-43.

4. Petitioner filed both a notice of appeal and a petition for a writ of mandamus under Section 3771(d)(3) of the CVRA. The court of appeals granted petitioner's mandamus petition in part, dismissed her appeal, and remanded to the district court to recalculate the restitution amount. Pet. App. 1-36.

The court of appeals first concluded that, in reviewing a mandamus petition filed under the CVRA, the court should apply "the traditional mandamus standard." Pet. App. 9-13. The court emphasized (1) that the statute's

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$312,953.60, respectively. *Id.* at 51, 62. Tara later withdrew her request because she had already been paid in full by other defendants. *Id.* at 38. Vicky was awarded $5000 in restitution, *id.* at 42-43, and she did not seek appellate review.

use of the word "'mandamus' strongly suggests [Congress] wanted 'mandamus,'" *id.* at 10; (2) that the juxtaposition of the mandamus provision with the provision allowing the government to assert the denial of a victim's rights "[i]n any appeal," 18 U.S.C. 3771(d)(4), confirmed that Congress intended to authorize only mandamus review, Pet. App. 10-11; and (3) that the abbreviated 72-hour deadline for deciding such petitions was inconsistent with plenary appellate review, *id.* at 11.

The court of appeals then held that, even under that heightened standard of review, petitioner was entitled to mandamus relief. Pet. App. 13-36. The court concluded that Section 2259 does require a showing of proximate cause. The court explained that because "[i]t is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused," it would "presume that a restitution statute incorporates [that] traditional requirement * * * unless there is good reason to think Congress intended the requirement not to apply." *Id.* at 15-17 (footnote omitted). Looking to the "text [and] structure of [Section] 2259," the court noted that Congress defined a "victim" as someone who was harmed "'as a result of' the defendant's offense." *Id.* at 17. The court also observed that without a proximate-cause limitation, "liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how 'remote' or tenuous the causal connection." *Id.* at 19. After considering arguments to the contrary, the court ultimately concluded that Congress did not "intend[] to negate the ordinary requirement of proximate cause." *Id.* at 17.

As for the appropriate restitution award, the court of appeals determined that "the record does not show that Monzel proximately caused all of [petitioner's] injuries" and, thus, "the district court did not clearly and indisput-

ably err by declining to impose joint and several liability on [Monzel] for the full" restitution amount. Pet. App. 24-25. At the same time, the court of appeals concluded that the district court did "clearly err" when it awarded "an amount of restitution it acknowledged was less than the harm Monzel had caused." *Id.* at 25. The court therefore directed the district court, on remand, to "consider anew the amount of [petitioner's] losses attributable to Monzel's offense and order restitution equal to that amount." *Id.* at 27.

Finally, the court of appeals explained that "[t]o prevail on her petition," petitioner needed to first demonstrate that "mandamus is her only adequate remedy." Pet. App. 27. Agreeing with "every circuit to consider the question" "[s]ince the enactment of the CVRA," the court concluded that "mandamus is a crime victim's only recourse for challenging a restitution order." *Ibid.* The court explained that "the default rule [is] that crime victims have no right to directly appeal a defendant's criminal sentence," *id.* at 29 (quoting *United States* v. *Aguirre-González*, 597 F.3d 46, 54 (1st Cir. 2010)) (brackets in original), and that "[t]he CVRA does not alter this rule," *id.* at 31. The CVRA, the court explained further, "expressly provides for mandamus review" and "also expressly authorizes the government to assert crime victims' rights on direct appeal." *Ibid.* "That Congress included these provisions but did *not* provide for direct appeals by crime victims is strong evidence that it did not intend to authorize such appeals." *Id.* at 32. Accordingly, the court of appeals granted the mandamus petition in part and dismissed petitioner's direct appeal.

ARGUMENT

1. As an initial matter, review by the Court is not warranted at this time because the decision of the court of appeals is interlocutory. The court of appeals *granted* petitioner's mandamus petition in part and remanded the case to the district court to reconsider the amount of restitution due to petitioner. Pet. App. 36. The district court has not yet determined the appropriate restitution award on remand, and that interlocutory posture "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); compare *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."), with *United States* v. *Virginia*, 518 U.S. 515, 526, 530 (1996) (review granted after final judgment). When the district court issues a new restitution order, petitioner will be able to raise her current claims—together with any other claims that may arise with respect to that order—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). Review in the current procedural posture would be premature.

2. In any event, further review is not warranted. Petitioner first contends (Pet. 26-29) that the court of appeals erred in holding that 18 U.S.C. 2259 requires a showing that the defendant's offense proximately caused the victim's losses. The court of appeals' decision is correct and accords with the decisions of nearly every court of appeals to consider the issue. The lone exception is a Fifth Circuit panel decision, and a petition for rehearing en banc is currently pending in that case.

a. Section 2259 mandates an award of restitution to a victim, like petitioner, who was harmed "as a result of" a defendant's possession of images depicting her sexual abuse. See 18 U.S.C. 2259(a), (b)(4) and (c). As the court of appeals explained, however, "Congress [is] presumed to have legislated against the background of our traditional legal concepts which render [proximate cause] a critical factor." Pet. App. 17 (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978)) (brackets in original). By defining a "victim" as an individual harmed "as a result of" the defendant's offense, Congress incorporated the preexisting "bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused." *Id.* at 15-16 (footnote omitted); see *United States* v. *Aumais*, No. 10-3160, 2011 WL 3926922, at *5 (2d Cir. Sept. 8, 2011) (endorsing the "D.C. Circuit's reasoning").

Moreover, Congress used express proximate-cause language to describe the types of losses that are compensable under Section 2259. A restitution order must cover "the full amount of the victim's losses." 18 U.S.C. 2259(b)(1). The statute defines that phrase to include five enumerated categories of losses (*e.g.*, medical services; physical therapy; necessary transportation, temporary housing, or child care; lost income; and attorney's fees), as well as "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3)(A)-(F). Although the phrase "proximate result" appears at the end of the catch-all subsection, several courts of appeals have reasonably read it as applying equally to the other enumerated categories. See *United States* v. *McDaniel*, 631 F.3d 1204, 1208-1209 (11th Cir. 2011); *United States* v. *Laney*, 189 F.3d 954, 965 (9th Cir. 1999); *United States* v. *Crandon*, 173 F.3d 122, 125-126 (3d Cir.), cert. denied, 528 U.S. 855 (1999);

see also *United States* v. *Wright*, 639 F.3d 679, 686-687 (5th Cir. 2011) (Davis, J., specially concurring); cf. *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."). At the very least, Congress's inclusion of a proximate-cause limitation in the catch-all provision should not be read to abrogate "the traditional [proximate-cause] requirement for everything *but* the catch-all." Pet. App. 19. If that had been Congress's intent, "surely it would have found a clearer way of doing so." *Ibid.*

Petitioner correctly observes (Pet. 27) that Section 2259 reflects Congress's intent to impose a broad restitution remedy. Properly conceived, proximate cause is flexible enough to achieve Congress's objective to provide restitution in child-pornography possession cases while avoiding extreme results. As this Court recently explained, "the phrase 'proximate cause' is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011). An overly restrictive approach to proximate cause cannot be reconciled with Congress's clear intent to mandate restitution for "any offense under this chapter," which includes possession of child pornography. See 18 U.S.C. 2259(a).[3]

[3] This case would not be an appropriate vehicle to explore the application of a proximate-cause standard in a child-pornography possession case. Although the court of appeals found the record insufficient to demonstrate "that Monzel caused *all* of [petitioner's] losses," Pet. App. 21, it accepted the district court's determination that Monzel caused petitioner actual harm that exceeded the $5000 restitution award. The court therefore remanded the case for the district court to reconsider,

b. Nearly every court of appeals to consider the question has held, in accord with the D.C. Circuit, that Section 2259 requires a showing of proximate cause. See *Aumais*, 2011 WL 3926922, at *5 (2d Cir.); *United States* v. *Kennedy*, 643 F.3d 1251, 1261 & n.13 (9th Cir. 2011); *McDaniel*, 631 F.3d at 1208-1209 (11th Cir.); see also *Laney*, 189 F.3d at 965 (9th Cir.); *Crandon*, 173 F.3d at 125 (3d Cir.).

The lone exception is the Fifth Circuit. In *In re Amy Unknown*, 636 F.3d 190 (2011), the Fifth Circuit concluded that Section 2259 does not impose a "global requirement of proximate causation," but rather limits the requirement that there be proximate cause to the catch-all provision. *Id.* at 199. The court asserted that this would not give rise to "limitless restitution" because the statute does include a "general causation requirement," in that it defines a "victim" as an "individual harmed *as a result* of a commission of a crime under this chapter." *Id.* at 200. Shortly after that decision, however, another Fifth Circuit panel decided an appeal brought by a criminal defendant raising similar restitution issues. In that case, all three members of the panel signed a special concurrence expressing their disagreement with the holding in *In re Amy Unknown* and urging the court of appeals to grant en banc review. See *Wright*, 639 F.3d at 686-692. Petitions for rehearing en banc are currently pending in both cases. The Fifth Circuit, therefore, may well reconsider the issue and eliminate any disagreement.

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under a proximate-cause standard, "the amount of [petitioner's] losses attributable to Monzel's offense and order restitution equal to that amount." *Id.* at 26-27.

Review of the narrow conflict would be premature at this time.[4]

3. Petitioner next contends (Pet. 33-34) that the court of appeals erred in concluding that mandamus relief under the CVRA is subject to the traditional mandamus standard of review. That claim does not warrant further review.[5]

a. The CVRA provides that, if a district court denies a motion by a putative crime victim, "the movant [*i.e.*, 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); Pet. App. 10 ("That Congress called for 'mandamus' strongly suggests it wanted 'mandamus.'"); *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,

[4] Petitioner also notes disagreement among the district courts (Pet. 17-23), but this Court does not ordinarily grant review to resolve conflicts among district courts. See Sup. Ct. R. 10(a).

[5] As petitioner notes (Pet. 32 n.7), the same issue is presented by the petition for a writ of certiorari in *Fisher* v. *United States Dist. Ct.*, No. 10-1518 (filed June 13, 2011), which is currently pending before the Court.

381 (2004) (quoting *Kerr* v. *United States Dist. Ct.*, 426 U.S. 394, 403 (1976)). Nothing in the CVRA overcomes that presumption.

Indeed, immediately after authorizing a crime victim (or the government) to petition for "a writ of mandamus," 18 U.S.C. 3771(d)(3), 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) (citation omitted; brackets in original); see Pet. App. 10-11; *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 for different parties in other contexts.[6] 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.[7] Con-

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[6] 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).

[7] 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

gress 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 court correctly applied (for example) proximate-cause principles to a potentially complicated factual record. See Pet. App. 11 ("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. Petitioner contends (Pet. 33-34) that, unlike traditional "mandamus" review, "mandamus" review under the CVRA should be conducted under the standards usually associated with an ordinary appeal. Petitioner's arguments lack merit.

Petitioner suggests (Pet. 33) 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, petitioner relies on the discretionary nature of mandamus review. Pet. 33-34. The court of appeals here, however, *granted* the mandamus petition in part. And while the court denied the petition

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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].").

to the extent petitioner sought "the full $3,263,758," it did so based on its express determination that the district court had not "clearly and indisputably err[ed]," *id.* at 24-25, not as an exercise of discretion. As the court of appeals explained, "[a] court that denies relief under the traditional mandamus standard has most certainly 'take[n] up and decide[d]' the petition." *Id.* at 12 (brackets in original). Similarly, a requirement that the court "ensure" that a crime victim is afforded certain rights (Pet. 33-34), "says nothing about the standard of review." Pet. App. 12.

Petitioner's reliance (Pet. 33-34) on the CVRA's legislative history is also misplaced. 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 petitioner relies do not speak to the appropriate standard of review. See Pet. App. 12-13 (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.

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

Four courts of appeals, including the D.C. Circuit, have held (correctly) that mandamus petitions filed under the CVRA are subject to the traditional mandamus standard of review. See Pet. App. 9-13; *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, 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.*, *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 pressure[]" 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 mentioned 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*).[8]

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

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[8] Petitioner contends that the Third and Eleventh Circuits have also "afforded crime victims ordinary appellate review." Pet. 30-31. But the Third Circuit decision on which she relies 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, 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 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.

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 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 Pet. App. 13 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").

In any event, this case would be a particularly inappropriate vehicle to consider the choice of competing standards of review—*i.e.*, between an "abuse of discretion" standard and a "clear and indisputable error" standard—because the court of appeals *granted* petitioner's mandamus petition under the heightened standard.

4. Finally, petitioner argues (Pet. 34-38) that, even if "mandamus" relief under the CVRA is subject to the traditional mandamus standard of review, nonparty crime victims denied restitution (or dissatisfied with the amount of restitution ordered) may appeal the restitu-

tion component of a defendant's criminal sentence under 28 U.S.C. 1291. The court of appeals' conclusion that mandamus is petitioner's exclusive avenue for appellate review is correct and it is consistent with the decisions of every court of appeals to consider this question under the CVRA. In any event, the court of appeals' decision did not prejudice petitioner—the court granted petitioner's mandamus petition *because* it concluded that a direct appeal was not available. Further review is not warranted.

a. Petitioner relies on the "far-reaching" language of 28 U.S.C. 1291, but she ignores the "well[-]settled" "rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); see *Grant* v. *United States*, 227 U.S. 74, 78-79 (1913) (barring nonparty's attempt to seek a writ of error).[9] "Notwithstanding the rights reflected in the restitution stat-

[9] Two courts of appeals have expressed the view that the question "is not whether [the court] lack[s] jurisdiction under [Section] 1291, which 'constrains *what* may be appealed, not *who* may bring such appeals'; 'the issues of jurisdiction under [Section] 1291 and non-party appellate rights are distinct.'" *Aguirre-González*, 597 F.3d at 52-53 (quoting *United States* v. *Hunter*, 548 F.3d 1308, 1311, 1312 (10th Cir. 2008)). Those courts did not address, however, this Court's pre-Section 1291 precedent barring appeals by nonparties or whether Section 1291 should be read to incorporate the principle of those cases. Nor did they address 18 U.S.C. 3742, which provides jurisdiction for sentencing appeals only when brought by the government or by a criminal defendant. See 18 U.S.C. 3742(a) and (b). But regardless whether the principle is characterized as a jurisdictional rule or a rule of appellate practice, the general rule against nonparty appeals is "well settled" (*Marino*, 484 U.S. at 304), and both characterizations lead to the same result in this case. Cf. *Greenlaw* v. *United States*, 554 U.S. 237, 245 (2008) (declining to decide "theoretical status" of cross-appeal rule as "jurisdictional" or a "rule of practice," when the outcome would be the same) (citation omitted).

utes, crime victims are not parties to a criminal sentencing proceeding." *Aguirre-González*, 597 F.3d at 53. Accordingly, "the baseline rule is that crime victims, as non-parties, may not appeal a defendant's criminal sentence." *Ibid.*

"Since the enactment of the CVRA, every circuit to consider the question has held that mandamus is a crime victim's only recourse for challenging a restitution order." Pet. App. 27; see *Aguirre-González*, 597 F.3d at 54-55; *United States* v. *Hunter*, 548 F.3d 1308, 1311-1316 (10th Cir. 2008).[10] As discussed (p. 13, *supra*), a crime victim (unlike the government) does not have an express right under the CVRA to appeal a criminal defendant's sentence. To the contrary, the CVRA provides that victims may seek "mandamus" review to challenge the district court's restitution order. As the court of appeals explained, "[h]ad Congress intended to allow victims to directly appeal, it seems likely it would have provided them that right under [Section] 3771(d)(4) just as it provided them mandamus petitions under [Section] 3771(d)(3)." Pet. App. 32. Moreover, construing the CVRA to permit nonparty crime victims to appeal would contravene Congress's directive that the CVRA not be construed to "impair the [government's] prosecutorial discretion." 18 U.S.C. 3771(d)(6). "If individuals were

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[10] Petitioner relies on the Sixth Circuit's decision in *In re Siler*, 571 F.3d 604 (2009), to suggest that there is a circuit split. See Pet. 37-38. In that case, the appeal challenged the district court's refusal to disclose the defendants' presentence investigation reports two years after the criminal case had closed; it would have had no impact on the defendants' sentence. 571 F.3d at 608-609. Moreover, as petitioner acknowledges (Pet. 38), the Sixth Circuit distinguished *Siler* in a subsequent case and held that crime victims have no right to appeal an order denying restitution when they simultaneously file a mandamus petition under 18 U.S.C. 3771(d)(3). See *Acker*, 596 F.3d at 373.

allowed to re-open criminal sentences after all issues have been resolved—including any mandamus petitions by victims—then the government's prosecutorial discretion would be limited. A successful appeal by the [victims] would require a new sentencing hearing that could lead to a new sentence." *Hunter*, 548 F.3d at 1316.

b. Petitioner nevertheless suggests a broader conflict "on whether crime victims who are denied their rights in the district court can take a direct appeal to the courts of appeals." Pet. 34. That conflict is also overstated.

As the court of appeals recognized (Pet. App. 33), even before the CVRA, most circuits had held that a crime victim could not directly appeal a criminal restitution sentence. See *United States* v. *United Sec. Sav. Bank*, 394 F.3d 564, 567 (8th Cir. 2004) (per curiam) (holding that victim lacked standing to appeal under the Mandatory Victims Restitution Act); *United States* v. *Mindel*, 80 F.3d 394, 396-398 (9th Cir. 1996) (holding that victim lacked standing to appeal under the Victim and Witness Protection Act); *United States* v. *Kelley*, 997 F.2d 806, 807-808 (10th Cir. 1993) (same); *United States* v. *Johnson*, 983 F.2d 216, 218-221 (11th Cir. 1993) (same); *United States* v. *Grundhoefer*, 916 F.2d 788, 791-793 (2d Cir. 1990) (same). Petitioner relies on two court of appeals cases which, she contends, held to the contrary. But in *United States* v. *Perry*, 360 F.3d 519 (6th Cir. 2004) (cited at Pet. 36), the victim "was not appealing an order *awarding* restitution; rather, she was appealing an order affecting her ability to *enforce* an order awarding restitution." Pet. App. 34-35; see *Perry*, 360 F.3d at 522 (appealing order vacating judgment lien obtained to enforce restitution award). And, in *United States* v. *Kones*, 77 F.3d 66 (3d Cir.), cert. denied, 519 U.S. 864 (1996) (cited at Pet. 36), "the government did

not contest the court's jurisdiction to hear the victim's appeal," and "the court's statement of its jurisdiction was one sentence long and devoid of discussion." Pet. App. 30 n.13 (citing *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (stating that "drive-by jurisdictional rulings" have "no precedential effect")).

That some courts, including the D.C. Circuit, have allowed nonparty crime victims to appeal in criminal cases in some circumstances, Pet. 35, does not give rise to a conflict when they conclude that crime victims have no such right to appeal in other circumstances. As the court of appeals explained (Pet. App. 29), the cases on which petitioner relies are distinguishable, in that they did not involve "a request by a victim to alter a defendant's sentence." That distinction is sound and consistent with the decisions of other courts of appeals. See *Aguirre-González*, 597 F.3d at 54 (distinguishing cases that would not have "required the court to disturb the sentence imposed"); *Hunter*, 548 F.3d at 1315 ("To our knowledge, there is no precedent—nor any compelling justification—for allowing a non-party, post-judgment appeal that would reopen a defendant's sentence and affect the defendant's rights.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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