No. 11-1518

In The Supreme Court of the United States

JAMES R. FISHER AND ODYSSEY RESIDENTIAL HOLDINGS, L.P.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,

Respondent.

UNITED STATES AND BRIAN POTASHNIK,

Real Parties in Interest.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

JOHN H. CARNEY
ANDREW G. COUNTS
JOHN H. CARNEY & ASSOCIATES
One Meadows Building
5005 Greenville Avenue
Suite 200
Dallas, TX 76206
(214) 368-8300

PAUL G. CASSELL
Counsel of Record
APPELLATE LEGAL CLINIC
S. J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH
332 S. 1400 E., Room 101
Salt Lake City, UT 84112
(801) 201-8271
cassellp@law.utah.edu
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONERS

The Government's opposition concedes that there is "some disagreement among the courts of appeals" on the question presented by the petition (Br. Opp. 5) – an understated way to describe a clear division of opinion between eight different courts of appeals. Contrary to the Government's claim that the circuit split is "overstated" (Br. Opp. 10), this deep split on a recurring and important issue warrants this Court's immediate review.

The Government's opposition further claims that the circuit split has "little practical significance" (Br. Opp. 5), ostensibly because it makes no difference whether Courts of Appeals give crime victims ordinary appellate review or deferential mandamus review. But deferential mandamus review converts the Crime Victims' Rights Act's appellate provisions into a mere formality. Indeed, in this very case, the Fifth Circuit repeatedly relied on the narrow standard of review to avoid deciding whether petitioner was entitled to mandatory restitution promised by Congress.

Perhaps recognizing the strength of the argument for certiorari, the Government spends the bulk of its pleading arguing the ultimate merits of its position. But the Government fails to offer any coherent reason for believing that Congress wanted to deny crime victims the same sorts of appellate protections that other litigants receive. Nor can the Government explain how discretionary mandamus review is consistent with the CVRA's plain language requiring that

courts of appeals shall "take up and decide" a crime victim's application for enforcement of rights, 18 U.S.C. §3771(d)(3), and that appellate courts shall "ensure" that crime victims are accorded their rights, 18 U.S.C. §3771(b)(1). To guarantee enforcement of the congressional mandates in the CVRA, the Court should grant the petition.

1. The Government concedes that "[t]he courts of appeals are divided over the proper standard of review to apply to a mandamus petition filed under the CVRA" (Br. Opp. 10) – a circumstance that would seem to warrant certiorari given the issue's importance to the proper administration of a landmark congressional statute. Nonetheless, the Government contends that the circuit split is "overstate[d]." Br. Opp. 10. Apparently what it means by this is that (by its count) the split extends to six of the nation's circuits rather than eight – still the kind of broad division of opinion that would justify this Court's review.

But in any event, the Government's tabulation does not match the most recent Court of Appeals decision on the issue. Just four months ago the D.C. Circuit explained that "[t]hree circuits apply the traditional mandamus standard urged by [the defendant] and the government. Four do not." *United States v. Monzel*, 641 F.3d 528, 532-33 (D.C. Cir. 2011). The Circuit chose to make the split even more pronounced by making the division – by its own count – four-to-four. *Id.*

The Government also tries to reduce the significance of the eight-circuit split by contending that earlier decisions from, for example, the Second and Ninth Circuit gave crime victims ordinary appellate review while later decisions from other circuits have trended toward giving them only deferential mandamus review. Even looking narrowly at the time line, however, the circuit split is not moving toward any resolution. The first three circuits to rule (the Second, Ninth, and Third) all gave crime victims ordinary appellate review; then the next three (the Tenth, the Fifth, and the Sixth) afforded them only deferential mandamus review; then the Eleventh Circuit provided ordinary appellate review;[1] then, most recently, the D.C. Circuit decided to make the split an evenly divided four-to-four. Clearly the circuits are at odds.

Moreover, even though more (but not all) of the later decisions have gone against crime victims, the Government does not reveal its own role in this trend. The Government has recently been litigating against victims in the appellate courts and in some cases not providing the appellate courts with the CVRA's legislative history. This stridency has drawn strong criticism from the CVRA's chief congressional sponsor,

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[1] While the Eleventh Circuit did not have a separate "standard of review" section in *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008), the Circuit clearly ultimately applied ordinary appellate standards. Pet. 17 & n.3; *see also United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011) (identifying the law of the Eleventh Circuit as providing ordinary appellate review).

Senator Jon Kyl. In a letter two months ago to Attorney General Eric H. Holder, Jr., Senator Kyl noted that the first circuits to reach the issue had properly interpreted the CVRA to give victims conventional appellate protections. Letter from Senator Jon Kyl to Attorney General Eric H. Holder, 157 CONG. REC. S3608 (June 8, 2011).[2] But then the Justice Department filed a pleading in *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) telling the Tenth Circuit not to look at the CVRA's legislative history because the CVRA's language was "unambiguous." Yet "[a]t the time that the Justice Department filed this brief, no Court of Appeals agreed" with the Justice Department's position – and "three other Circuits had all issued unanimous rulings that crime victims were entitled to regular appellate review." *Id.* This led Senator Kyl to pointedly ask the Attorney General, "given that the Justice Department has an obligation to use its 'best efforts,' 18 U.S.C. §3771(c)(1), to afford crime victims their rights, how could the Department argue in *Antrobus* (and later cases) that the CVRA 'unambiguously' denied crime victims regular appellate protections of their rights when three circuits had reached the opposite conclusion?" *Id.*

Nor does Government offer anything other than the unsupported hope that the preexisting and longstanding split implicated in the decision below will

[2] For the convenience of the Court, a copy of this letter is attached to this brief as an appendix.

somehow resolve itself without this Court's intervention. The Government concedes petitioners' points that crime victims are increasingly seeking appellate protection of their rights and that the threshold issue in every CVRA petition is the standard of review. Pet. 28-29. The Government also appears to recognize that, for example, the Second Circuit has repeatedly applied ordinary appellate standards of review in CVRA cases without showing any inclination to reverse its position. Br. Opp. 11 (*citing In re Local No. 46 Metallic Lathers Union*, 568 F.3d 81, 85 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1521 (2010); *In re Rendon Galvis*, 564 F.3d 170, 174 (2009)). Likewise, the Ninth Circuit has applied normal appellate standards, asking whether the district court abused its discretion or committed legal error. *In re Kenna*, 453 F.3d 1136, 1137 (9th Cir. 2006) (*citing Kenna v. U.S. District Court*, 435 F.3d 1011, 1017 (9th Cir. 2006)). Thus, contrary to the suggestion of the Government (Br. Opp. 11), the Courts of Appeals – including the Fifth Circuit below – continue to reach differing conclusions about crime victims' appellate protections. This stark split will persist until this Court intervenes.

2. The Government's next makeweight argument against granting certiorari is that the standard of review issue is of "little practical importance." Br. Opp. 12. But the Government does not dispute that Congress designed the CVRA to be "the most sweeping federal victims' rights law in the history of the nation." Pet. 10 (*quoting* Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie*

Roper, Wendy Preston, Luarna Gillis, and Nila Lynn Crime Victims' Rights Act, 9 LEWIS & CLARK L. REV. 581, 582 (2005)); *see also* Brief of *Amicus Curiae* The National Crime Victim Law Institute at 6-7. Nor does the Government deny that crime victims will have great difficulty obtaining appellate protection of their rights under mandamus standards. Indeed, employing such standards would eviscerate the CVRA's appellate provisions, turning them into a "mere formality[ ] given the traditionally narrow scope of mandamus relief." *In re Amy Unknown*, 636 F.3d 190, 197 (5th Cir. 2011) (Jones, J., concurring).

Several prominent CVRA cases starkly demonstrate the difference that the standard of review makes to crime victims. In *In re Dean*, 527 F.3d 391 (5th Cir. 2008), fifteen victims were killed and more than 170 injured in a horrific oil refinery explosion caused by a company's criminal acts. The Government then unlawfully denied the victims their CVRA right to confer with prosecutors concerning a proposed plea bargain. When the district court refused to enforce the victims' right, the victims sought protection in the Fifth Circuit. The Circuit agreed that the Government had violated the victims' right to confer, but declined to grant any relief – repeatedly citing the heightened and discretionary standard for mandamus relief. As commentators have recognized, "[t]he Fifth Circuit's dicta reveal that if it had used an abuse of discretion standard, the court likely would have reached the opposite result on the merits." Danielle Levine, *Public Wrongs and Private Rights: Limiting*

the Victim's Role in a System of Public Prosecution, 104 NW. U. L. REV. 335, 356 (2010).

Similarly, in the Tenth Circuit, two grieving parents (Ken and Sue Antrobus) sought protection of their CVRA right to give a victim impact statement at the sentencing of the man who illegally sold the weapon used to murder their daughter. The district court concluded, however, that their daughter was not the "victim" of the illegal firearm sale. Unfortunately, the Antrobuses were unable to obtain appellate relief because of the mandamus standard of review:

> Although the district court's conclusion that the Antrobuses' daughter was not a "crime victim" rested on shaky foundations, the Antrobuses were unable to secure full review of the decision despite making four separate trips to the Tenth Circuit. Instead, the Circuit would only tell the Antrobuses that, proceeding under the standard of clear and indisputable error, they had presented a "close case" and it was (as one concurring judge put it) "sad" that the district court and the Justice Department had not given them the full opportunity to make their case by revealing the facts of the case. These expressions of concern, of course, did nothing to vindicate the Antrobuses' rights.

Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599, 630-31 (2010).

This Court need look no further than this case to see the obvious real world difference the standard of review makes. The Fifth Circuit below repeatedly cited the deferential mandamus standard of review as the basis for its decision. Indeed, the second sentence in the Fifth Circuit's opinion explained that "[b]ecause our precedent requires us to apply a *highly deferential standard* when reviewing petitions for writs of mandamus, even under the statutes at issue here, we deny the writ." App. 1 (emphasis added). After reviewing the evidence underlying the district court's ruling, the Circuit would only venture that it was not clearly and indisputably wrong: "We will not reweigh these arguments in our deferential review, but rather note that these are permissible reasons for the district court to determine that the Petitioners were not victims of [the defendant's] crime. . . . *Again, we stress that this result is compelled by our deferential review of writs of mandamus.*" App. 3 (emphasis added).

Finally, a clear indication of the significance of the petition's question presented is the importance of the crime victims' rights at stake. Appellate courts are declining to enforce vital CVRA rights of crime victims under the mandamus standard of review, as each of the three cases just discussed illustrates. In *In re Dean*, dozens and dozens of crime victims (including 15 families whose loved ones were killed) were denied their congressionally-promised right to "confer" with prosecutors about a plea deal. In *In re Antrobus*, two parents were denied the opportunity to give a victim impact statement at the sentencing of the man whose

crime caused the murder of their daughter. And in this case, crime victims are being unlawfully denied several million dollars in mandatory restitution. This Court should grant the petition and definitively decide whether Congress intended for the appellate protections it enacted to lead to such unfortunate results.

3. The bulk of the Government's brief discusses not whether the Court should grant the petition but how the Court should ultimately resolve the petition's question presented. The Government, however, is unable to provide any coherent theory as to why the Court should construe the CVRA's appellate provisions to deny crime victims the ordinary appellate court protections other litigants receive.

To be sure, the CVRA provides that putative crime victims "may petition the court of appeals for a writ of mandamus." 18 U.S.C. §3771(d)(3). Because Congress used the term "mandamus," courts could assume the term "comes with a common law meaning, *absent anything pointing another way.*" Br. Opp. 6 (*citing Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238, 2245 (2011) (emphasis added)). In the CVRA, something "pointing another way" stands out in the statute's very next sentence. Congress commanded appellate courts to "*take up and decide* such application," 18 U.S.C. §3771(d)(3) (emphasis added) – a clear statement that Congress meant to overrule discretionary mandamus standards. Under conventional mandamus standards, "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. U.S. Dist.*

Court, 426 U.S. 394, 403 (1976). As the court below recounted, normal mandamus standards require a petitioner to satisfy "the issuing court, *in the exercise of its discretion*, . . . that the writ is appropriate under the circumstances." App. 2 (emphasis added). But permitting a court of appeals to decline to protect a crime victim's right in "the exercise of its discretion" disregards the congressional command that appellate courts must "take up and decide" the victims' application. As one of the CVRA's Senate sponsors directly explained, Congress obviously changed traditional discretionary mandamus standards for CVRA cases:

> [W]hile mandamus is generally discretionary, this provision [18 U.S.C. §3771(d)(3)] means that courts *must* review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to *broadly defend* the victims' rights.
>
> Without the right to seek appellate review and a guarantee that the appellate court will hear *the appeal* and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate courts are designed to *remedy errors of lower courts and this provision requires them to do so for victim's rights*.

150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphases added).

This case starkly highlights how the mandamus standard of review contravenes the CVRA's plain language. While Congress required courts of appeals to "take up and decide" a crime victim's petition, the Fifth Circuit here never took up and decided Fisher's petition asserting that he was entitled to restitution under the *Mandatory* Victim Restitution Act. Instead, using deferential mandamus standards, the most that the Fifth Circuit was willing to say was that "permissible reasons" (App. 3) existed for the district court to deny Fisher his promised restitution. Failing to decide the claims in crime victims' petitions like Fisher's defies the CVRA's basic architecture.[3]

The Government's interpretation also contravenes the CVRA's plain language that "[i]n any court proceeding involving an offense against a crime victim,

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[3] The Government also relies on 18 U.S.C. § 3771(d)(4). Br. Opp. 6. Contrary to the Government's description, however, the provision does *not* "authorize[ ] 'the Government' to challenge a 'district court's denial of any crime victim's right' through an appeal." *Id.* Rather, the provision reads: "In any appeal in a crime case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal related." 18 U.S.C. § 3771(d)(4). As Senator Kyl has explained, "The intent underlying this provision was to supplement the crime victims' appeal provision found in § 3771(d)(3) by permitting the Department to also help develop a body of case law expanding crime victims' rights in the many *defense appeals* that are filed. It was not intended to in any way narrow crime victims' rights to seek relief under § 3771(d)(3)." Letter from Senator Jon Kyl to Attorney General Eric H. Holder, 157 CONG. REC. S3609 (June 8, 2011) (emphasis added) (reprinted in the appendix to this brief).

the court shall *ensure* that the crime victim is afforded the rights described in [the CVRA]." 18 U.S.C. §3771(b)(1) (emphasis added). To "ensure" means to "make[ ] certain[ ] that things occur or that events take place." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 85 (2d ed. 1995). Thus, Congress requires that appellate courts must make certain that victims receive (among other rights) their right to "full and timely restitution as provided in law." 18 U.S.C. §3771(a)(6).

The Fifth Circuit below did not make certain that Fisher received the restitution to which he was entitled by law. Rather, the Fifth Circuit only deferentially reviewed the district court's denial to determine whether its construction of the statute and its understanding of the facts were within some broad "permissible" range. App. 3. This kind of limited review failed to give Fisher the full appellate protections that Congress commanded when it required that appellate courts must "ensure" that crime victims are afforded their rights.

In sum, when it enacted the CVRA, Congress was concerned that "without the ability to enforce the rights in the . . . appellate courts of this country any rights afforded are, at best, rhetoric." 150 CONG. REC. S10910 (Oct. 9, 2004) (statement of Sen. Kyl). Congress accordingly put in place enforcement provisions to "ensure that never again are victim's rights provided in word but not in reality." 150 CONG. REC. S10910 (Oct. 9, 2004) (statement of Sen. Kyl). Yet in the decision below (and many others like it), appellate courts offer crime victims mere rhetoric about their

rights, rather than genuine enforcement. This Court should grant the petition, reverse the decision below, and give victims the protections Congress enacted in the CVRA.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

JOHN H. CARNEY
ANDREW G. COUNTS
JOHN H. CARNEY & ASSOCIATES
One Meadows Building
5005 Greenville Avenue
Suite 200
Dallas, TX 76206
(214) 368-8300

PAUL G. CASSELL
Counsel of Record
APPELLATE LEGAL CLINIC
S. J. QUINNEY COLLEGE OF LAW
AT THE UNIVERSITY OF UTAH
332 S. 1400 E., Room 101
Salt Lake City, UT 84112
(801) 201-8271
cassellp@law.utah.edu

Counsel for Petitioners
James R. (Bill) Fisher
and Odyssey Residential
Holdings, L.P.

157 CONG. REC. [S3607]

CRIME VICTIMS' RIGHTS ACT

Mr. KYL. Mr. President, I ask unanimous consent that the following letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[S3608] U.S. SENATE
Washington, DC, June 6, 2011.

Hon. ERIC H. HOLDER, Jr.,
Attorney General, U.S. Department of Justice,
Washington, DC.

DEAR ATTORNEY GENERAL HOLDER: I am writing about the Justice Department's implementation of the Crime Victims' Rights Act – an act that I co-sponsored in 2004. These questions relate to an Office of Legal Counsel ("OLC") Opinion made public on May 20, 2011 and more broadly to concerns I have heard from crime victims' advocates that the Department has been thwarting effective implementation of the Act by failing to extend the Act to the investigative phases of criminal cases and by preventing effective appellate enforcement of victims' rights. I am writing to ask you to answer these questions and explain the Department's actions in these areas.

GOVERNMENT PROTECTION OF VICTIMS' RIGHTS DURING INVESTIGATION OF A CRIME

When Congress enacted the CVRA, it intended to protect crime victims throughout the criminal justice

process – from the investigative phases to the final conclusion of a case. Congress could not have been clearer in its direction that using "best efforts" to enforce the CVRA was an obligation of "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the *detection*, *investigation*, or prosecution of crime. . . ." 18 U.S.C. § 3771(c)(1) (emphasis added). Congress also permitted crime victims to assert their rights either in the court in which formal charges had already been filed "or, *if no prosecution is underway*, in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3) (emphasis added).

Despite Congress' clear intention to extend rights to crime victims throughout the process, the Justice Department is reading the CVRA much more narrowly. In the recent OLC opinion, for example, the Department takes the position that "the CVRA is best read as providing that the rights identified in section 3771(a) are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment) and cease to be available if all charges are dismissed either voluntarily or on the merits (or if the Government declines to bring formal charges after the filing of a complaint)." The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, Memorandum from John E. Bies (Dec. 17, 2010, publicly released May 20, 2011) (hereinafter "OLC Opinion"). Indeed, in that same opinion, I am surprised to see the Department citing a snippet from my floor remarks during the passage of the

CVRA for the proposition that crime victims can confer with prosecutors only after the formal filing of charges. See id. at 9 (citing 150 Cong. Rec. S4260, S4268 (Apr. 22, 2004) (statement of Sen. Kyl).

I did want to express my surprise that your prosecutors are so clearly quoting my remarks out of context. Here is the full passage of my remarks, which were part of a colloquy with my co-sponsor on the CVRA, Senator Feinstein:

Senator Feinstein: Section . . . (a)(5) provides a right to confer with the attorney for the Government in the case. *This right is intended to be expansive.* For example, the victim has the right to confer with the Government concerning any critical stage or disposition of the case. *The right, however, is not limited to these examples.* I ask the Senator if he concurs in this intent.

Senator Kyl: Yes. The intent of this section is just as the Senator says. This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, *victims are able to confer with the Government's attorney about proceedings after charging*.

150 Cong. Rec. S4260, S4268 (Apr. 22, 2004) (statements of Sens. Feinstein & Kyl) (emphases added). Read in context, it is obvious that the main point of

my remarks was that a victim's right to confer was "intended to be expansive." Senator Feinstein and I then gave various examples of situations in which victims could confer with prosecutors, with the note that the right to confer was "not limited to these examples." It is therefore troubling to me that in this opinion the Justice Department is quoting only a limited portion of my remarks and wrenching them out of context to suggest that I think that crime victims do not have any right to confer (or to be treated with fairness) until after charging.

In giving an example that the victims would have such rights after charging, I was not suggesting that they had no such right earlier in the process. Elsewhere in my remarks I made clear that crime victims had rights under the CVRA even before an indictment is filed. For example, in the passage quoted above, I made clear that crime victims had a right to consult about both "the case" and "case proceedings" – i.e., both about how the case was being handled before being filed in court and then later how the case was being handled in court "proceedings." As another example, Senator Feinstein and I explained that we had drafted the CVRA to extend a right to victims to attend only "public" proceedings, because otherwise the rights would extend to grand jury proceedings. See, e.g., 150 Cong. Rec. S4260, S4268 (Apr. 22, 2004) (statements of Sens. Feinstein & Kyl). Of course, no such limitation would have been necessary under the CVRA if CVRA rights attach (as the Department

seems to think) only after the filing of a grand jury indictment.

Courts have already rejected the Justice Department's position that the CVRA applies only after an indictment is filed. For example, in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), the Department took the position that crime victims had no right to confer with prosecutors until after the Department had reached and signed a plea agreement with a corporation (BP Products North America) whose illegal actions had resulted in the deaths of fifteen workers in an oil refinery explosion. Of course, this position meant that the victims could have no role in shaping any plea deal that the Department reached. In rejecting the Department's position, the Fifth Circuit held that "the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain." Id. at 394.

In spite of this binding decision from the Fifth Circuit, crime victims' advocates have reported to me that the Justice Department is still proceeding in the Fifth Circuit and elsewhere on the assumption that it has no obligations to treat victims fairly or to confer with them until after charges are formally filed. Given the Fifth Circuit's Dean decision, this position appears to place the Department in violation of a binding court ruling that extends rights to thousands of crime victims in Louisiana, Mississippi, and Texas. And more generally, the Department's position simply has no grounding in the clear language of the CVRA.

My first question: What is the Justice Department doing to extend to victims their right to fair treatment and their right to confer with prosecutors when the Justice Department is negotiating pre-indictment plea agreements and non-prosecution agreements with defense attorneys, including negotiations within the Fifth Circuit?

CRIME VICTIMS' RIGHT TO APPELLATE PROTECTION

Protection of crime victims' rights in appellate courts is an important part of the CVRA. As you know, when Congress passed the CVRA, the federal courts of appeals had recognized that crime victims could take ordinary appeals to protect their rights. See, e.g., *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (rape victim allowed to appeal district court's adverse "rape shield statute" ruling); *United States* v. *Kones*, 77 F.3d 66 (3rd Cir. 1996) (victim allowed to appeal adverse restitution decision). Congress sought to leave these protections in place, while expanding them to ensure that crime victims could obtain quick vindication of their rights in appellate courts by providing – in § 3771(d)(3) – that "[i]f the district court denies the relief sought, the [victim] may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). Ordinarily, whether mandamus relief should issue is discretionary. The plain language of the CVRA, however, specifically and clearly overruled such discretionary mandamus standards by directing that "[t]he court of appeals *shall*

take up and decide such application forthwith. . . ." 18 U.S.C. § 3771(d)(3) (emphasis added). As I explained when the Senate considered the CVRA:

> [W]hile mandamus is generally discretionary, this provision [18 U.S.C. § 3771(d)(3)] means that courts *must* review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to *broadly defend* the victims' rights.

150 CONG. REC. S4270 (Apr. 22, 2004) (statement of Sen. Kyl) (emphases added). Similarly, the CVRA's cosponsor with me, Senator Feinstein, stated that the Act would create "a new use of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of their rights by a trial court to the court of appeals." 150 CONG. REC. S4262 (statement of Sen. Feinstein) (emphases added); see also id. (statement of Sen. Kyl) (crime victims must "be able to have . . . the appellate courts take the appeal and order relief). In short, the legislative history shows that § 3771(d)(3) was intended to allow crime victims to take accelerated appeals from district court decisions denying their rights and have their appeals reviewed under ordinary standards of appellate review.

In spite of that unequivocal legislative history, the Justice Department has in past cases asserted a contrary position. In *In re Antrobus*, 519 F.3d 1123

(10th Cir. 2008), Ken and Sue Antrobus sought to obtain appellate review of a ruling by a trial court that they could not deliver a victim impact statement at the sentencing of the man who sold the murder weapon used to kill their daughter. The Tenth Circuit ruled against them on the basis that the Antrobuses were not entitled to regular appellate review, but only discretionary mandamus review. See id. at 1124-25. The Tenth Circuit did not consider the legislative history in reaching this conclusion, leading the Antrobuses to file petitions for rehearing and rehearing en banc – petitions that recounted this legislative history. In response, the Justice Department asked the Tenth Circuit to deny the victims' petitions. Remarkably, the Justice Department told the Tenth Circuit that it could ignore the [S3609] legislative history because the CVRA "is unambiguous." Response of the United States, *In re Antrobus*, No. 08-4002, at 12 n.7 (10th Cir. Feb. 12, 2008).

At the time that the Justice Department filed this brief, no Court of Appeals agreed with the Tenth Circuit. At the time, three other Circuits had all issued unanimous rulings that crime victims were entitled to regular appellate review. See *In re W.R. Huff Asset Mgmt. Co.,* 409 F.3d 555, 562 (2d Cir. 2005); *Kenna v. US. Dist. Ct. for the Cent. Dist. of Ca.,* 435 F.3d 1011, 1017 (9th Cir. 2006); *In re Walsh*, 229 Fed.Appx. 58, at 60 (3rd Cir. 2007).

My next question for you is, given that the Justice Department has an obligation to use its "best efforts," 18 U.S.C. § 3771(c)(1), to afford crime victims their

rights, how could the Department argue in Antrobus (and later cases) that the CVRA "unambiguously" denied crime victims regular appellate protections of their rights when three circuits had reached the opposite conclusion?

GOVERNMENT'S RIGHT TO ASSERT ERROR DENIAL OF VICTIMS' RIGHTS

To further bolster protection of crime victims' rights, Congress also included an additional provision in the CVRA – § 3771(d)(4) – allowing the Justice Department to obtain review of crime victims' rights issues in appeals filed by defendants: "In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates." 18 U.S.C. § 3771(d)(4). The intent underlying this provision was to supplement the crime victims' appeal provision found in § 3771(d)(3) by permitting the Department to also help develop a body of case law expanding crime victims' rights in the many defense appeals that are filed. It was not intended to in any way narrow crime victims' rights to seek relief under § 3771(d)(3). Nor was it intended to bar crime victims from asserting other remedies. For instance, it was not intended to block crime victims from taking an ordinary appeal from an adverse decision affecting their rights (such as a decision denying restitution) under 28 U.S.C. § 1291. Crime victims had been allowed to take such appeals in various circuits even before the passage of the CVRA. See, e.g., *United*

States v. Kones, 77 F.3d 66 (3rd Cir. 1996) (crime victim allowed to appeal restitution ruling); *United States v. Perry*, 360 F.3d 519 (6th Cir. 2004) (crime victims allowed to appeal restitution lien issue); *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (crime victim allowed to appeal rape shield ruling).

As I explained at the time the CVRA was under consideration, this provision supplemented those pre-existing decisions by "allow[ing] the Government to assert a victim's right on appeal even when it is the defendant who seeks appeal of his or her conviction. This ensures that victims' rights are protected throughout the criminal justice process and that they do not fall by the wayside during what can often be an extended appeal that the victim is not a party to." 150 CONG. REC. S4270 (Apr. 22, 2004) (statement of Sen. Kyl).

I have heard from crime victims' advocates that the Department has not been actively enforcing this provision. Indeed, these advocates tell me that they are unaware of even a single case where the Department has used this supplemental remedy. My final question: Is it true that the Department has never used this provision in even a single case in the more than six years since the CVRA was enacted?

Sincerely,

JON KYL,
U.S. Senator.

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