

**In The  
Supreme Court of the United States**

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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.*

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

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**REPLY BRIEF FOR PETITIONERS  
TO BRIEF OF REAL PARTY  
IN INTEREST BRIAN POTASHNIK**

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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.*

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## REPLY BRIEF FOR PETITIONERS

In their petition for a writ of certiorari, petitioners James R. Fisher and Odyssey Residential Holdings, L.P. (“Fisher”) contend that this Court should review the important and recurring issue of what standard of review applies to crime victims’ petitions to appellate courts under the Crime Victim’s Rights Act. The petition explains that eight circuits have considered the issue and are now divided four-to-four on the answer to that question. The petition further reviews both the CVRA’s plain language and authoritative legislative history, which demonstrate that the Fifth Circuit below violated the CVRA’s commands in failing to “take up and decide,” 18 U.S.C. § 3771(d)(3), Fisher’s pleading seeking enforcement of his CVRA right to restitution.

In a response ordered by this Court, real party in interest Brian Potashnik (the defendant convicted of conspiracy to commit bribery in the district court) contends that this Court should not grant certiorari to review this question. But Potashnik’s response mainly discusses the merits of the Fifth Circuit’s ruling below. Accordingly, his response fails to contest Fisher’s main argument: that this Court should review the four-to-four division among the circuits on this important question.

On the merits of the question presented in Fisher’s petition, Potashnik claims that the plain language of the CVRA requires extremely deferential review of crime victims’ claims in the courts of appeals. But

this would contradict the CVRA's requirements that courts of appeals must "take up and decide" crime victims' petitions, 18 U.S.C. § 3771(d)(3), and must "ensure" that crime victims' rights are respected, 18 U.S.C. § 3771(b)(1).

Potashnik also argues that the standard of review issue is not important to the ultimate resolution of Fisher's restitution request. But that argument flatly contradicts the Fifth Circuit's ruling below, which repeatedly and specifically relied on the standard of review as the basis for denying Fisher any relief. Moreover, were the Court to remand back to the Fifth Circuit for conventional appellate review, Fisher would prevail on his strong restitution claims.

Finally, Potashnik argues that because Fisher availed himself only of a mandamus remedy – and not a direct appeal – the Court should not grant the petition. But this argument too is meritless, as the mandamus issue is an important, distinct question worthy of review.

1. Potashnik's petition is most noteworthy for what it fails to discuss – namely, the intractable division among eight different courts of appeals on the standard of review applicable to appellate petitions for relief filed by crime victims. As discussed at length in Fisher's petition (Pet. 10-28), the circuits acknowledge that they are now squarely divided four-to-four on what standard applies. *Compare In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562

(2d Cir. 2005); *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008); *In re Walsh*, 229 Fed. Appx. 58, 61, 2007 WL 1156999 at \*2 (3d Cir. 2007); *with In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010); *United States v. Monzel*, 641 F.3d 528, 532-33(D.C. Cir. 2011), *pet. for cert. pending*, No. 11-85 (filed July 15, 2011).

Not only are the circuits divided, but the issue is recurring and important. As crime victims increasingly seek to protect their CVRA rights in the nation's courts of appeals, those courts confront immediately the foundational question of what standard of review to apply. In those circuits (like the Fifth) that give crime victims mere mandamus review, the CVRA's appellate protections become 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). This Court should review this critical issue.

2. Potashnik's response deals almost exclusively with the merits of the Fifth Circuit's narrow interpretation of the CVRA appellate protections. Potashnik claims that the term "mandamus" in the statute by itself forces a narrow mandamus standard of review. Potashnik contends that the use of that term brings with it "the cluster of ideas that were attached" to it, as courts ordinarily give such an interpretation "unless otherwise instructed." Potashnik Resp. at 5

(citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)). But Congress has “otherwise instructed” in the CVRA’s very next sentence, which requires courts of appeals to “take up and decide” a CVRA petition. 18 U.S.C. § 3771(d)(3). This phrase instructs these courts not to apply conventional mandamus standards of review, where “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 for Northern Dist. of California*, 426 U.S. 394, 403 (1976).

Potashnik claims that the “take up and decide” clause “says nothing about the standard of review.” Potashnik Resp. 6 n.1. But then what does the clause mean? Potashnik gives no coherent interpretation, apparently contending that it means only that appellate courts must issue some kind of ruling disposing of the petition. *Id.* But of course, courts are already required to rule on cases brought to them. Interpreting the language this way makes the language meaningless.

Congress did not enact a pointless provision. Instead, Congress intended to change ordinary mandamus procedures to guarantee that appellate courts would “broadly defend” crime victims’ rights:

[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 victims' rights*.

150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphases added); *see also* 157 CONG. REC. S3608 (June 8, 2011) (statement of Sen. Kyl) (Congress "specifically and clearly overruled such discretionary mandamus standards. . . ." in the CVRA).

Potashnik is also simply wrong to suggest that the Fifth Circuit in fact "took up and decided" Fisher's restitution claim. To the contrary, the Fifth Circuit used the deferential mandamus standard of review to duck the issue. The Circuit ventured only the tepid assertion that there was evidence that "could lead" to the district court's conclusion. App. 3. Relying specifically on the mandamus standard of review, the Circuit refused to rule on whether Fisher was a victim with a right to restitution. Instead the Circuit said that it would "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 Potashnik's crime. . . . *Again, we stress that this result is compelled by our deferential review of writs of*

*mandamus.*” App. 3 (emphasis added). This is a far cry from the kind of active appellate enforcement of victims’ rights that Congress intended.

Potashnik also ignores Fisher’s argument that the CVRA requires all courts – including appellate courts – to “ensure that the crime victim is afforded the rights described in [the CVRA],” 18 U.S.C. § 3771(b)(1) (emphasis added). Here the Fifth Circuit never “ensured” that Fisher was afforded his “right to full and timely restitution as provided in law,” 18 U.S.C. § 3771(a)(6).

Finally, Potashnik completely misunderstands the CVRA’s basic architecture when he contends that it would be impossible for Congress to have intended for CVRA *mandamus* petitions to serve as substitutes for appeals. Potashnik suggests that a writ is typically available only when an error is irremediable on ordinary appeal. Potashnik Resp. 6-7. But that is precisely the situation in which many crime victims will be when appealing CVRA rulings. The CVRA specifically provides that “[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter.” 18 U.S.C. § 3771(d)(3). Accordingly, to ensure effective appellate enforcement of CVRA rights within that time frame, Congress sought to weld together the rapid procedural vehicle of a *mandamus* petition with broad standards of regular appellate review. As one of the CVRA’s co-sponsors explained, Congress designed the CVRA to 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 (April 22, 2004) (statement of Sen. Feinstein) (emphases added).

3. Potashnik also contends that even if Fisher were to prevail before this Court, he would not ultimately prevail on the remand to the Fifth Circuit. Accordingly, Potashnik contends this Court would be rendering an “advisory opinion” (Potashnik Resp. 10). This is nonsense; the mere fact that Fisher may not prevail on remand after this Court corrects the Fifth Circuit’s erroneous interpretation of the CVRA hardly makes the correction purely advisory. “The judicial Power” extends to cases “arising under . . . the Laws of the United States,” U.S. Const. art. III, § 2, cl. 1, and a federal “court [is] properly asked to construe a [federal] law. . . .” *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993).

In any event, Fisher will prevail on the merits of his restitution claim if this case is remanded to the Fifth Circuit for ordinary appellate review. Fisher is entitled to receive substantial restitution under the *Mandatory Victim Restitution Act* (MVRA), 18 U.S.C. § 3663A. The district court summarily rejected Fishers’ argument that the MVRA applied to this case with the terse statement that Potashnik’s crime was “not a property crime as defined by the statute.” App. 46. But the MVRA requires a district court to enter a restitution award for various kinds of federal crimes, “including any offense committed by fraud or deceit.”

18 U.S.C. § 3663A(c)(1) (emphasis added). Potashnik pled guilty to Count 10 of the indictment, which charged that he and others had conspired to “*corruptly* offer, give, and agree to give something of value of \$5,000 or more to a person” in connection with federal programs run by the City of Dallas. App. 161 (emphasis added). The means for doing this included such deceitful actions as concealing the bribes “through the preparation of sham written agreements, the use of nominee companies, and the omission of material facts concerning the financial benefits that were sought on behalf of, and received by” the bribed government officials. App. 161 (citing indictment that detailed sham gifts, fraudulent reporting, concealed kickbacks, structured bank withdrawals, “front” companies, hidden bribery payments, and other similar corrupt overt acts in furtherance of the conspiracy). It is hard to imagine a crime that more clearly involved fraud and deceit than Potashnik’s. On remand on an ordinary appellate standard of review the Fifth Circuit will reverse the district court’s erroneous legal conclusion to the contrary.

The district court not only committed obvious legal error in determining what law applied, but also clear error in ruling that Fisher was not a “victim” of Potashnik’s offense. Potashnik spills a good deal of ink reminding this Court that a district court’s factual findings are to be upheld by an appellate court so long as they are not clearly erroneous. Potashnik Resp. 8-9. But in this case, the district failed to make

any factual findings<sup>1</sup> – even though the CVRA requires a district court to “clearly state[] on the record” the “reasons for any decision denying relief under [the CVRA].” 18 U.S.C. § 3771(b)(1). The district court simply asserted Fisher was not a victim without even explaining why, much less making findings to support such a conclusion. App. 46 (“[I]f the Mandatory Victim Restitution Act applies, the Court concludes that Mr. Fisher and Odyssey are not persons directly and proximately harmed as a result of the commission of the offense. . . .”).

Not only was the district court’s conclusion unsupported, it was also plainly wrong. For starters, Fisher was financially harmed from spending \$200,000 in attorneys’ fees to help collect information for the FBI. Fisher’s itemized list of restitution requests presented to the district court includes this specific amount, App. 88, but Potashnik nonetheless contends Fisher has somehow “waived” this argument. Potashnik Resp. 11 n.3. But Fisher pressed this point specifically before the district court. App. 29 (“[t]his Court has authority to award *attorney’s fees* . . . to make a victim whole”(emphasis added)). Then

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<sup>1</sup> In contrast to the lack of factual findings here, the Fifth Circuit later reviewed more specific factual findings in *In re Fisher*, 640 F.3d 645 (5th Cir. 2011). Accordingly, the Fifth Circuit’s ruling in that case is not persuasive authority about what would happen on remand in this case where the district court failed to make findings supporting its conclusions. In any event, Mr. Fisher will be filing a petition for certiorari to review the Fifth Circuit’s adverse decision in that later case in early November.

in the Fifth Circuit, Fisher renewed the claim that he was entitled to restitution for “attorneys and other litigation expenses associated with assistance to [the] FBI in [the] investigation of defendant’s offense . . . in compliance with [the] plain language of [the] Mandatory Victims Restitution Act directing courts to require defendant[s] convicted of fraud to reimburse victim[s] for expenses incurred during [the] participation in [the] investigation or prosecution of [the] offense.” App. 134.<sup>2</sup> Plainly on any remand, the Fifth Circuit will reverse the district court for failing to consider this clear financial harm.

Fisher was also harmed when he was deprived of a valuable opportunity to have his low-income housing projects fairly considered by the Dallas City Council. Potashnik does not deny that the projects his conspirators promoted were in direct competition with Fisher’s projects. The restitution question is

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<sup>2</sup> Potashnik also scurrilously suggests that Fisher “even may have participated in” the pay-to-play crime for which he was convicted. App. 4. This incredible assertion is belied by (among many other things) the fact that at sentencing both the district court judge and the prosecutors went out of their way to specifically thank Fisher for his courage in refusing to submit to extortion and exposing Potashnik’s conspiracy. *See* App. 23 (Court: “Whatever I do in connection with your request for restitution, I thank you for your courage in reporting the issue to the FBI. . . . You exercised courage that had others exercised, the whole thing would have come out differently, and I thank you for it.”); App. 31 (Prosecutor: “I want to take this opportunity, as the Court did, to once again express my deep heartfelt thanks to Mr. Fisher and his company, Odyssey Residential Holdings, for doing what they did in this case.”).

thus whether Fisher lost a valuable opportunity to have the City Council fairly evaluate his projects. While (as Fisher forthrightly conceded) it would be “speculation” to conclude that the Dallas City Council would have certainly approved his projects, it is undeniable that he lost a valuable opportunity to have his projects reviewed on a level playing field (i.e., by honest government officials). App. 14-15. The loss of this valuable opportunity was itself a harm for which Fisher was entitled to restitution – as cases involving government corruption have specifically held. See *Phoenix Bond & Indemnity Co. v. Bridge*, 477 F.3d 928, 930 (7th Cir. 2007) (plaintiffs alleged that a defendant was distorting an auction process by submitting additional fraudulent bids; “loss of a (valuable) chance is real injury.”); *Bulletin Displays, LLC v. Regency Outdoor Adver., Inc.*, 518 F.Supp.2d 1182, 1191 (C.D.Cal. 2007) (where defendant had bribed the city council to secure contracts for the defendant, the competing plaintiff “lost a valuable chance at winning a contract”); *Astech-Marmon, Inc. v. Lenoci*, 349 F.Supp.2d 265, 267 (D.Conn. 2004) (the defendant’s alleged crime had the effect of “subverting the municipal bidding process and denying . . . [plaintiff] the opportunity to bid on and perform City work.”).

4. Potashnik finally argues that this Court should not review the question presented because Fisher sought review in the Fifth Circuit only by means of a CVRA mandamus petition and did not concurrently file a direct “parallel” appeal. Potashnik

Resp. 12-13. This argument is meritless for three reasons.

First, if the Court would like to simultaneously review questions regarding both crime victims' mandamus rights and direct appeal rights, pending before the Court is a petition with these two issues presented. *See* Pet. for a Writ of Certiorari, *United States v. Monzel*, No. 11-85 (filed July 15, 2011). The Court could accordingly grant the petition in that case and then hold this petition pending resolution there.

Second, if the Court believes that the appeal question sheds useful light on the mandamus question, it is of course free to enlarge the question presented here. *See* Pet. at 22-23 n.6 (reviewing this point and *citing* *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)).

Third and most important, the mandamus question is clearly a separate and distinct one from the direct appeal question. The CVRA promises to crime victims like Fisher that they will have a rapid means for fully protecting their rights through a CVRA mandamus petition. The Fifth Circuit, however, has belied that promise by constructing a narrow standard of appellate review for crime victims' CVRA petitions. This Court should review that important question, correct the Fifth Circuit's erroneous construction, and provide ordinary appellate protection of significant CVRA rights to Fisher and countless other crime victims across the country.



**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, Texas 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

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