

In The
Supreme Court of the United States

—◆—
JAMES R. FISHER, et al.,

Petitioners,

v.

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

Respondents.

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

—◆—
**BRIEF OF *AMICUS CURIAE* THE
NATIONAL CRIME VICTIM LAW
INSTITUTE SUPPORTING PETITIONERS**

—◆—
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INTEREST OF *AMICUS CURIAE*¹

The National Crime Victim Law Institute (NCVLI) is a non-profit educational and advocacy organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the criminal justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training (including training hundreds of Department of Justice personnel on issues arising under the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA)); technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving victims' rights nationwide, including dozens of cases involving the CVRA. This case involves fundamental rights and interests of all crime victims because it concerns the standard required for victims to obtain appellate review of violations of their rights.



¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have been given at least 10 days notice of *amicus*' intention to file it.

SUMMARY OF THE ARGUMENT

As is extensively briefed by counsel for Mr. Fisher, there exists a circuit split among the Federal Circuits in their interpretation of what standard of review to apply to the section of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, requiring enforcement of victims' rights through a motion for relief and writ of mandamus.² 18 U.S.C. § 3771(d)(3). On one side, the Second, Third, Ninth, and Eleventh Circuits have ruled that victims of crime receive ordinary appellate review on their mandamus petitions; on the other, the Fifth, Sixth, Tenth, and D.C. Circuits have found that victims of crime receive "traditional" mandamus review, requiring a "clear and indisputable" error below before the appellate court will accept review. Pet'r Br. for Writ of Cert., pp. 12-27. The Court should grant certiorari to resolve this split. Sup. Ct. Rule 10(a). It should also grant certiorari because the petition raises "an important question of federal law that has not been, but should be, settled by this Court. . . ." Sup. Ct. Rule

² This split has also been noted by the United States Government Accountability Office's Report to Congressional Committees on the Crime Victims' Rights Act. United States Government Accountability Office, Report to Congressional Committees, *Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act*, 74 (Dec. 2008) (noting the split, and stating that "[s]uch conflicting U.S. court of appeals rulings – or circuit splits – are typically resolved by the Supreme Court").

10(c). This issue is important because the current status of the law is wanting, leaving victims with different sets of protections based solely on where the prosecution of the crime against them is taking place. This undermines the clear language and intent of the CVRA, which is to afford *all* victims enforceable rights and treat them with fairness. It is important that this Court take up and decide the petition so that it can promulgate a clear standard in this emerging field of law, and thus allow for consistent enforcement of victims' rights.



ARGUMENT

I. THE HISTORY OF VICTIMS' RIGHTS IN THIS COUNTRY UNDERSCORES THE IMPORTANCE OF FULLY ENFORCEABLE CRIME VICTIMS' RIGHTS.

As the Court has recognized, the early years of this country boasted strong participatory rights for victims in the criminal justice system. Indeed, crime victims could privately prosecute their own criminal cases. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 127-28 (1998) (Stevens, J., concurring) (“In past centuries in England, in the American colonies, and in the United States, private persons regularly prosecuted criminal cases.”); *see also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 801 (2000) (Stevens, J., dissenting) (noting that “private prosecutions were commonplace in the 19th century”). *See generally* William F. McDonald, *Toward*

a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 Am. Crim. L. Rev. 649, 649-54 (1975).

As the country shifted away from private prosecution in favor of a state-based approach to prosecution, victim involvement began to fall away. Rather than being seen as an integral part of the criminal justice system, crime victims were often relegated to the sidelines, treated merely as pieces of evidence, or even entirely ignored. This mistreatment of crime victims caught the attention of Congress. In the specific findings to an early piece of victims' rights legislation, the Victim Witness Protection Act of 1982, Congress recognized that "[w]ithout the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders." Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291 § 2(a)(1), 96 Stat. 1248, 1248 (1982). *See also* President's Task Force on Victims of Crime: Final Report (1982), at 114 (stating the criminal justice system has lost an "essential balance" by depriving the "innocent, the honest, and the helpless of its protection") (available at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf>).

After President Reagan's Task Force issued its report on the state of victims' rights in 1982, Congress and state legislators began to enact a flurry of federal and state legislation, recognizing that it is not just society, but individual victims who bear the

burden of the crime being prosecuted and require protections in the criminal justice system. At the state level, every state passed statutory protections for victims of crime and over thirty states passed constitutional amendments to ensure that crime victims received fair treatment in the criminal justice system. Andrew Nash, *Victims by Definition*, 85 Wash. U. L. Rev. 1419, 1425 (2008). Congress also began passing legislation, beginning with the VWPA (providing protections for victims, including provisions for restitution and the use of victim impact statements), followed by the Victims of Crime Act of 1984 (Pub. L. No. 98-473, 98 Stat. 2170) (creating victim compensation funds); the Victims' Rights and Restitution Act of 1990 (42 U.S.C. § 10606) (providing model rights for victims of crime) (superseded in part by the CVRA); the Violent Crime Control and Law Enforcement Act of 1994, (Pub. L. No. 103-322, 108 Stat. 2097) (mandating restitution for certain offenses and including the Violence Against Women Act of 1994); and the Mandatory Victims Restitution Act of 1996 (18 U.S.C. § 3663A) (expanding mandatory restitution to additional offenses).

Congress passed these laws to give crime victims rights in the criminal justice system. However, as was dramatically demonstrated during the trial of Timothy McVeigh, the Oklahoma City bomber who killed 168 people and injured scores more, these federal victims' rights statutes lacked a mechanism to enable victims to independently seek enforcement of those rights. In proceedings leading up to the trial of McVeigh, the

district court issued an order sequestering all witnesses under Federal Rule of Evidence 615, including victims who wished to present victim impact statements at sentencing. *See United States v. McVeigh*, 106 F.3d 325, 328 (10th Cir. 1997). This ruling was made despite the existence of the Victims' Rights and Restitution Act, which guaranteed victims the right to attend proceedings. *Id.* at 335. The victims and the government each appealed, the victims filed a writ of mandamus, and the government added an informal request for mandamus consideration to the Tenth Circuit. *Id.* at 328-29. The Court held that the government lacked ability to appeal or file the writ on jurisdictional grounds. *Id.* at 332-33. The Court further held that the victims lacked Article III standing and therefore could not seek review of a denial of their rights. *Id.* at 334. In so ruling, the Court relied on the lack of enforceable rights in the Victims' Rights and Restitution Act. *Id.* at 335. Despite Congress quickly passing a clarifying statute in response (the Victim Rights Clarification Act of 1997 (18 U.S.C. § 3510)), the trial court failed to enter an unequivocal order allowing victims both to attend the trial and make a victim impact statement. *United States v. McVeigh*, 958 F. Supp. 512, 515 (D. Colo. 1997). The end result was that the victims of the Oklahoma City tragedy – as well as victims beyond those in the case – were left without remedy and redress.

The CVRA was meant to remedy the enforcement issues that arose during the McVeigh trial. *See* 150 CONG. REC. S4269 (Apr. 22, 2004) (Statement of Sen.

Kyl) (“This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial [never occur again] and to avoid federal appeals courts from determining . . . that victims had no standing to seek review of their right to attend the trial under the former victims’ law that this bill replaces.”). Congress did so not only by creating clearly enumerated rights, but more importantly by giving courts an independent obligation to ensure that the rights are afforded, and providing a mechanism for appellate review to ensure full enforcement of those rights. 18 U.S.C. §§ 3771(a), (b), (d).

Courts’ independent obligation to enforce victims’ rights is found in the text of the CVRA. The CVRA states: “In any court proceeding involving an offense against a crime victim, the court *shall ensure* that the crime victim is afforded the rights described in subsection (a).” 18 U.S.C. § 3771(b). This provision has been interpreted consistently with its plain meaning. *See United States v. Turner*, 367 F. Supp. 2d 319, 323 (E.D.N.Y. 2005) (noting that the CVRA mandates that courts must “ensure that the crime victim is afforded the [enumerated] rights,” which requires courts to do “something more than merely ruling on applications for relief made pursuant to subsection (d)(3)”; *United States v. Ingrassia*, No. CR-04-0455 (ADS) (JO), 2005 WL 2875220, *9 (Sept. 7, 2005) (noting the “independent obligation” to ensure victims of crime are afforded their rights).

For “any court” – including appellate courts – to ensure fully that victims’ rights are enforced, Congress also explicitly created appellate standing for victims and provided a means for higher courts to review the merits of the victims’ rights issue. It did so under the “enforcement” subsection of the CVRA, in which it allowed for crime victims to assert the rights described in subsection (a), and allowed for crime victims to petition the court of appeals for a writ of mandamus. 18 U.S.C. § 3771(d)(1), (d)(3). Congress further required that the court of appeals “shall take up and decide such application forthwith. . . .” 18 U.S.C. § 3771(d)(3).

By imposing an independent obligation on courts to afford victims’ rights, and by providing an affirmative enforcement mechanism for victims whereby courts must “take up and decide” their motions for relief, Congress stayed true to its intent of creating enforceable victims’ rights. This intent is seen in floor debates before the passage of the CVRA. Co-sponsor Senator Kyl stressed the importance of the enforcement aspect of the bill, noting:

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. S4270 (Apr. 22, 2004) (Statement of Sen. Kyl) (emphasis added). Another co-sponsor of the CVRA, Senator Feinstein, concurred, stating: “Appellate review of denials of victims’ rights is just as important as the initial assertion of a victim’s right.” *Id.* (statement of Sen. Feinstein).³

II. CONSISTENT INTERPRETATION OF THE CVRA’S MANDAMUS PROVISION IS AN IMPORTANT ISSUE THAT SHOULD BE RESOLVED BY THIS COURT.

This Court should grant Mr. Fisher’s petition because the enforceability of crime victims’ rights in the federal court system is an important issue and the need for case law interpreting these rights is great. As the history above makes clear, only within the last seven years have core federal victims’

³ These statements show that Congress intended that appellate courts review the merits of the victim’s right at issue. The appellate court is to “order relief” – not simply determine whether to take the case so that it may order relief, as would be the case under a strict mandamus standard. Similarly, by evincing an intent to take the issue away from “the very trial court that may have erred,” a higher standard than “clear and indisputable error” is implied. This conclusion was made even clearer in a recent letter from co-sponsor Senator Kyl to Attorney General Holder, in which he wrote: “Ordinarily, whether mandamus relief should issue is discretionary. The plain language of the CVRA, however, specifically and clearly overruled such discretionary mandamus standards. . . .” Letter of Sen. Kyl to Attorney General Holder (157 CONG. REC. S3608 (June 8, 2011)).

rights become enforceable. See Federal Judicial Center, *The Crime Victims' Rights Act of 2004 and the Federal Courts*, at 1 (Oct. 24, 2005) (“[The CVRA] effectively replaces 42 U.S.C. § 10606 . . . now repealed by the CVRA, which included a list of victims’ rights but did not provide any means of enforcement.”) (available at [http://www.fjc.gov/public/pdf.nsf/lookup/cvra0001.pdf/\\$file/cvra0001.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cvra0001.pdf/$file/cvra0001.pdf)).

Because enforceable victims’ rights are still so new, a clear, consistent analysis of the scope of the rights and an understanding of how courts are likely to interpret them is especially vital to ensuring their enforcement. It is also because the field is so new that the already strict mandamus standard is likely to be even stricter in practice. A result of the strict mandamus standard is that there will be fewer higher court interpretations of victims’ rights laws, since most often a lower court’s interpretation will not result in a “clear and indisputable” error. However, this hatches a chicken and an egg problem, because the dearth of appellate court interpretations of the victims’ rights laws will mean that generally, when faced with a victims’ rights issue, lower courts will be relying solely on statutory text. When that statute does not have an authoritative interpretation it will be far harder for an appellate court to determine that the lower court’s reading of it was clearly and indisputably in error.

The existing circuit split undermines the imperative for consistent analysis of this burgeoning field because it results in victims in different circuits being treated differently. Under the framework in existence

now, a victim in New York, a jurisdiction which follows the appellate standard,⁴ simply has rights that are more enforceable than a victim in Texas, which follows the traditional mandamus standard.

Take, for instance, the 5th Circuit case *In re Dean*, 527 F.3d 391 (5th Cir. 2008). In that case, an oil explosion killed fifteen victims and injured more than 170. *Id.* at 392. In discussions leading up to a plea agreement between the government and the oil company, the government filed an *ex parte* motion with the district court seeking to have the plea sealed and prohibiting notifying the victims of the agreement until it had been executed. *Id.* at 393. Despite acknowledging that “the district court . . . misapplied the law and failed to accord the victims the rights conferred by the CVRA,” the Court held that the mandamus standard was not satisfied because petitioners had not demonstrated that the issuance of the writ was “clear and indisputable.” *Id.* at 394. By so doing, the Court whittled down the CVRA’s enforcement mechanisms and placed virtually unrestricted authority in the hands of the trial court. *Id.* at 396 (“We are confident, however, that the conscientious district court will fully consider the victims’ objections and concerns in deciding whether the plea agreement

⁴ Since the 2005 decision of *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555 (2d Cir. 2005) – the first circuit court to interpret the mandamus provision of the CVRA and the first to find that the appellate standard applied – lower courts in this circuit have continued to uphold the appellate standard. *See, e.g., In re Local #46 Metallic Lathers Union*, 568 F.3d 81, 85 (2d Cir. 2009); *In re Rendon Galvis*, 564 F.3d 170, 174 (2d Cir. 2009).

should be accepted.”). This confidence is misplaced, however, because the strict reading of the mandamus provision leaves the lower courts with little guidance on how to interpret these new rights.

The implications are clear: allowing the existing circuit split to stand will result in disparate enforcement of federal law. The CVRA contains a provision requiring that victims be treated with “fairness.” 18 U.S.C. § 3771(a)(8). Congress intended that this concept of fairness “include[] the notion of due process.” 150 CONG. REC. S4269 (April 22, 2004) (statement of Sen. Kyl). “The fundamental purpose of procedural due process is to ensure fairness in the manner in which government exercises its power.” *Pollock v. Baxter Manor Nursing Home*, 706 F.2d 236, 237 (8th Cir. 1983) (McMillian, J., dissenting) (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring)). To fully ensure fairness, the due process clause should encompass “the consistent application of the laws as written by the legislature. . . .” Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body*, 40 U. Mich. J. L. Reform 93, 146 n. 265 (1996).

The current state of the law does not allow for such consistency. Indeed, had the *Dean* case been heard in New York, the plea agreement would have been rejected, and the victims would have been afforded their right to confer with the prosecutor in the case prior to the plea agreement. To afford victims relief based solely on where they live or where the crimes take place violates notions of fundamental fairness. 150 CONG. REC. S4270 (April 22, 2004)

(statement of Sen. Kyl). (“[A]ll victims of crime deserve to have their rights protected. . .”).

◆

CONCLUSION

Allowing the existing circuit split to stand would severely impact the ability of an untold number of victims to assert and enforce their statutorily mandated rights. Rather than allow for an inconsistently applied standard in an emerging field of law, the Court should take up and decide this important issue.

Respectfully submitted,

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