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No. 20-1467

IN THE
Supreme Court of the United States

Michael Varco,

Petitioner

v.

Robert J. Contee III, in his official capacity as Chief
of the Metropolitan Police Department,

Respondent

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

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QUESTIONS PRESENTED

The Crime Victims' Rights Act ("CVRA") provides victims' rights that "crime victims," under the Act, may enforce by filing a motion in the court "in which a defendant is being prosecuted for the crime, or if no prosecution is underway, in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(a), (d)(3). Conversely, D.C.'s Crime Victims' Bill of Rights does not provide enforceable rights. D.C. Code § 23-1901(c).

Here, no parties dispute that Petitioner is a "crime victim" under the CVRA and no charges have been filed for the crime that harmed Petitioner. Petitioner sued the Chief of the D.C. Metropolitan Police Department ("MPD"), asserting two rights under the CVRA. A D.C. Circuit panel dismissed the first lawsuit because the court decided the D.C. Court of Appeals was the proper appeals court for the case. In the second lawsuit, a D.C. Court of Appeals panel decided that the CVRA does not apply to the MPD. That CVRA interpretation leaves D.C. crime victims without enforceable victims' rights against the MPD even though MPD officers often are the first officials that victims interact with after a crime.

The questions presented are:

1. Whether a person harmed by a D.C. Code offense, who qualifies as a "crime victim" under 18 U.S.C. § 3771(e)(2)(A), may assert rights under subsections (a)(1) and (a)(8) of the CVRA against the MPD Chief, in the Chief's official capacity?
2. Whether CVRA obligations apply to the MPD Chief if no criminal prosecution is underway?

LIST OF PARTIES

Michael Varco, is Petitioner here and was the Plaintiff-Petitioner below.

Peter Newsham, the former MPD Chief, was the Defendant below in his representative capacity.

Robert J. Contee III, the current MPD Chief,¹ is the Respondent here in his representative capacity.

¹ Peter Newsham left the MPD in December 2020. In January 2021, Chief Robert J. Contee III was sworn in as the new MPD Chief. MPD, Robert J. Contee III, <https://mpdc.dc.gov/biography/robert-contee1>. This petition refers to the MPD Chief.

STATEMENT OF RELATED PROCEEDINGS

Varco v. Newsham, No. 2019 CAB 8534 (D.C. Super. Ct. Sept. 23, 2020) (order dated Sept. 23, 2020 dismissing Plaintiff's Motion to Enforce Crime Victim's Rights for lack of subject matter jurisdiction).

In re Michael Varco, No. 20-OA-12 (D.C. Nov. 12, 2020) (per curiam) (order dated Nov. 12, 2020 denying petition for writ of mandamus).

Varco v. Newsham, No. 2019-0004, Mem. Op. & J. (D.D.C. Mar. 29, 2019) (order and memorandum opinion dated Mar. 29, 2019 dismissing Plaintiff's Motion to Enforce Crime Victim's Rights for lack of subject matter jurisdiction; opinion unsealed and entered on June 3, 2019).

In re Varco, No. 19-3046 (D.C. Cir. July 19, 2019) (per curiam) (order dated July 19, 2019 considering petitioner's petition for writ of mandamus and granting opposition's motion to dismiss; panel and en banc rehearing denied on September 26, 2019)

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Varco respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

OPINIONS BELOW

The District of Columbia Court of Appeals' order, on November 12, 2020, denying Varco's Petition for a Writ of Mandamus is unreported and reproduced at Pet. App. at 1a-2a.

The District of Columbia Superior Court's order, on September 23, 2020, dismissing Varco's Motion to Enforce Crime Victim's Rights is unreported and reproduced at Pet. App. at 3a-10a.

JURISDICTION

The District of Columbia Court of Appeals entered its order on November 12, 2020, denying Varco's petition for a writ of mandamus. That judgment became final on November 12, 2020. No petition for rehearing was filed.

This Court has jurisdiction under 28 U.S.C. § 1257(a) and (b).

This Court's order on March 19, 2020, in response to Covid-19, has extended the deadline to file petitions for writs of certiorari to 150 days from the date of the lower court judgment.

RELEVANT STATUTORY PROVISIONS

The Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, and other relevant statutory provisions are reproduced in the appendix of this petition. Pet. App. at 19a-31a.

INTRODUCTION

Since the passage of the CVRA in 2004, this Court has not addressed the scope and availability of CVRA rights. This is a good case to change that.

When Varco asserted CVRA rights against the MPD Chief, a D.C. Court of Appeals panel decided the CVRA never applies to the MPD Chief and only obligates judges to protect victim's rights once a criminal case has been filed. Pet. App. at 1a. Effectively, the order also denies others like Varco -- a person harmed by a D.C. Code offense -- the ability to assert CVRA rights against MPD officials. Since only some MPD cases are charged by the D.C. U.S. Attorney's Office, the order effectively denies many crime victims of any CVRA rights at all.

The D.C. Court of Appeals' order conflicts with a D.C. Circuit order on the same issue. In 2019, a D.C. Circuit panel decided Varco cannot assert CVRA rights in federal court against the MPD Chief because D.C. Code victims have to file in the D.C. Superior Court. Pet. App at 14a. The conflict results because the D.C. Circuit directs D.C. Code crime victims to file in the D.C. Superior Court, but the D.C. Court of Appeals' interpretation of the CVRA bars anyone from asserting CVRA rights against the MPD Chief in the D.C. Superior Court.

The D.C. Court of Appeals' order divides that court with federal appellate courts in two ways.

First, with the D.C. Court of Appeals' order, the victim harmed by a D.C. code offense lacks CVRA rights against relevant investigators (i.e., MPD), but the victim harmed by a federal offense has CVRA

rights against relevant investigators (e.g., FBI). The CVRA gives the same rights to D.C. Code and federal-offense crime victims, 18 U.S.C. § 3771(a), (e)(2)(A), so D.C. Code crime victims also should have CVRA rights against the relevant investigators.

Second, the D.C. Court of Appeals' order conflicts with Fifth Circuit precedent. The D.C. Court of Appeals decided the CVRA "imposes obligations on judges to protect victim's rights once a criminal case been filed." Pet App. at 2a. In contrast, the Fifth Circuit has decided CVRA rights may attach before formal charges are filed, the Eleventh Circuit recently heard that question en banc, and a non-precedential D.C. Circuit order suggests victims may have CVRA rights even where there has been no formal charge. See *infra* at p. 16.

Further, the D.C. Court of Appeals' order is incorrect. Varco's main argument is the CVRA text, and controlling definition of "agency" in 18 U.S.C. § 6, show CVRA obligations apply to the MPD Chief. See *infra* at pp. 10-13. The D.C. Court of Appeals accepted the MPD Chief's arguments that the CVRA does not apply to the MPD Chief or MPD employees because the MPD is not an "agenc[y] of the United States," under 18 U.S.C. § 3771(c)(1), and because the District of Columbia has autonomy after the Home Rule Act. Pet. App. at 1a-3a.

But the MPD Chief and D.C. Court of Appeals are incorrect. The District was considered an agency of the United States before the Home Rule Act. The Home Rule Act did not change the definition of "agency" in 18 U.S.C. § 6. Even the Superior Court concedes the "agency" definition in 18 U.S.C. § 6 is

ambiguous about applying to parts of the District's government, such as the MPD. Pet. App. at 5a.

The Court should grant the petition. The judgment below turns wholly on the answers to both questions presented. This case is an ideal vehicle to resolve those questions. The D.C. Court of Appeals' error is unlikely to correct itself.

STATEMENT OF THE CASE

A. Legal Background - CVRA

In 2004, Congress passed the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, in response to how many crime victims had been ignored and treated poorly in the criminal justice system. *See* CVRA Floor Discussion, 150 Cong. Rec. S4262-66 (daily ed. Apr. 22, 2004).

The CVRA differed from previous victim-rights laws because it gave crime victims legal standing to assert their rights in court. *Id.* at S4261-62, 66 (statements of Sen's. Feinstein and Kyl).

Under the CVRA, a crime victim may assert rights by filing a motion in the court "in which a defendant is being prosecuted for the crime, or if no prosecution is underway, in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(1), (d)(3). If the district court denies the relief sought, then the crime victim may petition for a writ of mandamus to the "court of appeals." *Id.* at § 3771(d)(3).

A 2015 CVRA Amendment clarifies:

- the term "district court" applies to the D.C. Superior Court,

- the term “court of appeals” applies to the District of Columbia Court of Appeals, and
- the “court of appeals” shall apply ordinary standards of appellate review in deciding the petition for a writ of mandamus.

Id. at § 3771(d)(3), (e)(1)(B), (e)(3).

The CVRA defines a “crime victim” as a person “directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.” 18 U.S.C. § 3771(e)(2)(A).

The CVRA rights asserted here are the “(1) The right to be reasonably protected from the accused,” and “(8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.” *Id.* at § 3771(a).

As relevant here, the CVRA requires “Officers 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 shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)” of the CVRA. *Id.* at § 3771(c)(1). This part, according to a CVRA sponsor, shows the CVRA was meant to protect the crime victim from the investigative phase to the end of the case. Letter from Jon Kyl, U.S. Sen., to Eric H. Holder, Att'y Gen. (June 6, 2011), reprinted in 157 Cong. Rec. S3608 (Daily ed. June 8, 2011).

18 U.S.C. § 5-6 provide the definitions for “United States” and “agency” that apply to 18 U.S.C. § 3771(c)(1) of the CVRA.

The CVRA also requires courts to ensure that a crime victim is afforded the rights under the CVRA “In any court proceeding involving an offense against a crime victim” *Id.* at § 3771(b)(1).

B. Factual and Procedural Background

On July 31, 2016, Varco suffered harm from an attack in the District of Columbia. See Pet. App. at 4a. The MPD documented the attack in a report, assigned an incident number, and classified the attack as an aggravated assault (D.C. Code § 22-404.01). *Ibid.* The MPD gave Varco an application for crime-victim’s compensation. Varco’s CVRA Motion, filed Jan. 5, 2020, p. 68 of Mot. App. (page # refers to page of appendix).

After the attack, Varco asked the MPD to use resources to find the attackers. For example, the MPD declined Varco’s request to pursue cell-phone location records. *Id.* at p. 69 of Mot. App. In April 2017, Varco learned the MPD suspended its investigation, without telling Varco, so Varco asked the MPD to put a video of the attack on the MPD’s YouTube channel. *Id.* at pp. 70-74 of Mot. App.

In May 2017, the MPD posted a video² to an unlisted YouTube link, which meant no one would see the video – or provide crime leads to the MPD – unless Varco shared the link. The unlisted link bothered Varco because the MPD used public links

² YouTube, Persons of Interest in Aggravated Assault, 1100 b/o 19th St, NW, on July 31, 2016, <https://www.youtube.com/watch?v=MdrjECC1r1E&feature=youtu.be> (uploaded May 16, 2017).

for investigating other cases but would not do the same in Varco's case. Varco's CVRA Mot., p. 4.

In September 2017, Varco put the link in an amicus brief because Varco wanted the MPD to find the people who attacked him. Brief of Amicus Curiae Michael Varco in Support of Respondent, at n. 3, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

A year later, in August 2018, Varco learned the content in the video would let anyone get a MPD report with Varco's name and address. Varco's CVRA Mot. at pp. 3-4 and 18-19. Also, using MPD procedures, Varco easily obtained MPD reports with the names and addresses of other crime victims. Varco's CVRA Mot., at p. 4.

Under D.C. Code §§ 5-113.01(a)(1), 5-113.06, the public may order MPD reports that reveal the victim's name and address. Some crime victims (e.g., a sexual-offense victim) are eligible for address confidentiality, but many other crime victims (e.g., assault victims) are ineligible. *See* D.C. Code § 4-555.01 *et seq.*

In January 2019, Varco originally sued the MPD Chief in federal court, asserting CVRA rights. *Varco v. Newsham*, No. 2019-0004, Mem. Op. & J. (D.D.C. Mar. 29, 2019) (see Pet. App at 16a, unsealed on May 28, 2019).³ Varco petitioned for a writ of mandamus after the D.C. District Court dismissed the lawsuit.

³ The opinion (now unsealed) is at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019mc0004-9.

A D.C. Circuit panel dismissed the lawsuit for a lack of jurisdiction. *In re Varco*, 2019 U.S. App. LEXIS 21654 (D.C. Cir. July 19, 2019) (per curiam) (holding since “no prosecution is underway and the only potential charge is for a D.C. Code offense,” Plaintiff “must assert his rights, if any, that arise under the [CVRA] … in Superior Court for the District of Columbia.”), reh’g denied, No. 19-3046 (D.C. Cir. Sept. 26, 2019) (see Pet App. at 14a-15a).

On December 31, 2019, Varco sued the MPD Chief in the D.C. Superior Court and, on January 5, 2020, filed a motion asserting CVRA rights for several remedies, including:

1. An order, based on enforcing Varco’s privacy right under 18 U.S.C. § 3771(a)(8), that bars the MPD from publicly disclosing documents that reveal Varco’s name and address without obtaining Varco’s written consent, redacting Varco’s name and address, or obtaining a court order for the disclosure;
2. An order, based on enforcing Varco’s right to be “treated with fairness” under 18 U.S.C. § 3771(a)(8), that makes the MPD change the video of the attack against Varco from an unlisted to a public link on the MPD’s YouTube channel; and
3. An order, based on enforcing Varco’s right to be “reasonably protected from the accused,” 18 U.S.C. § 3771(a)(1), that makes the MPD give Varco clearer images of four people shown in the MPD’s video of the attack against Varco.

Varco’s CVRA Mot. at p. 3.

On September 23, 2020, the D.C. Superior Court dismissed Varco's lawsuit for lack of subject matter jurisdiction. Pet. App. at 3a-4a. The court accepted the MPD Chief's argument that the CVRA does not apply to the MPD or its employees because the MPD is not an "agenc[y] of the United States," under 18 U.S.C. § 3771(c)(1) and, *inter alia*, because the District of Columbia has self-government authority after the Home Rule Act (D.C. Code § 1-201.01 et. seq). *See id.* at 4a and 6a-7a.

The D.C. Superior Court rejected Varco's argument that the CVRA text, definitions for "United States" and "agencies" in 18 U.S.C. § 5-6, and legislative history support applying the CVRA to the MPD Chief. *See* Pet. App. at 5a, 6a, and 8a. The D.C. Superior Court also rejected Varco's argument that the MPD historically was considered an "agency" of the United States. *Id.* at 7a-8a n. 1.

On November 9, 2020, Varco petitioned for a writ of mandamus, which the D.C. Court of Appeals denied on November 12, 2020. *Id.* at 1a. In denying Varco's petition, the D.C. Court of Appeals agreed with the Superior Court that the CVRA does not apply to the MPD Chief because the MPD is not an "agenc[y] of the United States" under 18 U.S.C. § 3771(c)(1) and because the District of Columbia has autonomy under the Home Rule Act. *See* Pet. App. at 1a-2a.

On December 11, 2020, Varco filed a motion requesting publication of the D.C. Court of Appeals' order dated November 12, 2020, but no ruling has been made on that motion. Varco also relocated after the D.C. Court of Appeals' order.

REASONS FOR GRANTING THE PETITION

I. The D.C. Court Of Appeals Erred In Its Interpretation Of The CVRA

The D.C. Court of Appeals made two errors in its interpretation of the CVRA.

First, the D.C. Court of Appeals decided the CVRA does not apply to the MPD Chief. Pet. App. at 1a. The appeals court focused on the “agenc[y] of the United States” phrase in 18 U.S.C. § 3771(c)(1) of the CVRA and on the District of Columbia’s autonomy under the Home Rule Act (D.C. Code § 1-201.01, *et seq.*). *Id.* at 1a-2a. Because the MPD Chief is an employee of the District of Columbia, the court decided the MPD Chief is not an officer or employee of a federal “agenc[y] of the United States,” within the meaning of 18 U.S.C. § 3771(c)(1) of the CVRA. *Id.* at 2a. The word “federal” is not in § 3771(c)(1).

Second, the D.C. Court of Appeals erred when it decided the CVRA “imposes obligations on judges to protect victim’s rights once a criminal case been filed,” but not beforehand. See Pet. App. at 2a.

Both errors conflict with the CVRA text. Instead of construing the CVRA based on the Home Rule Act, the D.C. Court of Appeals should have construed the CVRA based on the CVRA.

A. The CVRA Text Applies To The MPD

Based on the CVRA text and the definition of “agency” in 18 U.S.C. § 6, the MPD Chief is an officer and employee of an “agenc[y] of the United States,” within the meaning of 18 U.S.C. § 3771(c)(1). The CVRA requires “Officers and employees of the [DOJ]

and other departments and *agencies of the United States* engaged in the *detection, investigation, or prosecution* of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." *Id.*

The term "agenc[y]" in the CVRA applies to "*any corporation* in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." 18 U.S.C. § 6. That definition applies to the District of Columbia because the District of Columbia is a municipal corporation in which the United States has a proprietary interest. Pet. App. at 2a (notes D.C. is a municipal corporation); *see also* U.S. Const. Art. I, § 8, cl. 17 (District created by land ceded to the United States government).

Under 18 U.S.C. § 5, the term "United States" includes places subject to the jurisdiction of the United States. That applies to "District of Columbia" because Congress has authority over the District. U.S. Const. Art. I, § 8, cl. 17; D.C. Code § 1-206.01; *see also* U.S. Const. amend. XXIII § 1 cl. 1 (D.C. is the "Seat of the Government of the United States").

Also, before 18 U.S.C. § 6 became law, in 1948, the District of Columbia was considered an "agency" of the United States. *See Metro. R.R. Co. v. District of Columbia*, 132 U.S. 1, 8-9 and 12 (1889); 14 Comp. Dec. 646, 659 (1908).

Varco's CVRA interpretation is reasonable for applying CVRA obligations to the MPD Chief. The D.C. Superior Court concedes the "agency" definition in 18 U.S.C. § 6 is ambiguous. Pet. App. at 5a. A relevant DOJ opinion also determines the definition

of “agency” in 18 U.S.C. § 6 is ambiguous about applying to the District of Columbia. Applicability of 18 U.S.C. § 205(a)(2) to Representation Before Non-Federal Agency, 24 Op. O.L.C. 13, 18-19 (2000). The author of that DOJ opinion – now Judge Pillard – was on the D.C. Circuit Panel that decided Varco’s first lawsuit. Pet. App. at 14a.

This Court has explained the definitions of “agency” and “department” in 18 U.S.C. § 6, “First adopted in 1948, and applicable to all of Title 18 . . . create a presumption in favor of the ordinary meaning of the terms at issue” *Hubbard v. United States* 514 U.S. 695, 700 (1995). Thus, treating the MPD (i.e., part of a municipal corporation) as part of a corporation make sense because the MPD is part of a municipal corporation.

Comparing the “agenc[y] of the United States” phrase in 18 U.S.C. § 3771(c)(1) with the “agency of the Executive Branch of the Federal Government” phrase in 18 U.S.C. § 3771(b)(2)(C) further supports a broad interpretation of the “agenc[y] of the United States” phrase in 18 U.S.C. § 3771(c)(1).

Congress presumably used different words in 18 U.S.C. § 3771(b)(2)(C) and (c)(1) to achieve different scope.

Also, the Home Rule Act did not change the definition of “agency” in 18 U.S.C. § 6 or give the D.C. Council authority to exempt the MPD Chief from CVRA obligations. In fact, the D.C. Council lacks authority to amend or repeal the CVRA because the CVRA is not exclusive in its application to the District. *See* D.C. Code § 1-206.02(a)(3).

B. CVRA Rights Apply Pre-Charging

Second, a careful reading of the CVRA text shows judges have an obligation to protect crime victims' rights before a criminal case is filed.

For example, the CVRA's venue provision says crime victims can assert their rights under 18 U.S.C. § 3771(a) by filing a motion "in the district court in which a defendant is being prosecuted for the crime, *or if no prosecution is underway*, in the district court in the district in which the crime occurred." *Id. at* § 3771(d)(3). Also, "The district court shall take up and decide *any motion* asserting a victim's rights forthwith," not just decide motions if a criminal case has been filed. *Id.* The term "district court" includes the D.C. Superior Court. *Id. at* § 3771(e)(3).

Also, Varco asserted CVRA rights in 18 U.S.C. § 3771(a) – "(1) The right to be reasonably protected from the accused . . . [and] (8) The right to be treated with fairness and with respect for the victim's dignity and privacy" – that do not require pending charges.

II. The D.C Court of Appeals' Error On An Important Issue Warrants This Court's Review And Will Not Correct Itself

It is an issue of national importance when a person harmed by a crime in the nation's capital cannot enforce CVRA rights against the MPD Chief and/or other MPD employees. Many people besides Varco are affected because D.C. has ~35,000+ crime victims each year. MPD, Crime Statistics – Citywide, <https://mpdc.dc.gov/page/crime-statistics-citywide> (last visited Apr. 4, 2021).

The error divides the D.C. Court of Appeals from some federal appellate courts applying the CVRA. That division undermines crime victims' rights in the District of Columbia and elsewhere. Thus, this Court's review is warranted. The error will not correct itself.

A. Uniformity For CVRA Obligations Is Needed On Relevant Investigators

A recent case, *United States v. Dixon*, 355 F. Supp. 3d 1 (D.D.C. 2019), shows why the CVRA must apply to the MPD. Otherwise, CVRA protections may be circumvented.

In *Dixon*, a federal grand jury indicted Dixon on multiple counts, including robbery and unlawful possession of a firearm by a convicted felon. *Id.* at 3. After Dixon's arrest, the court granted a protective order that limited access to police body-worn camera (BWC) material that could reveal the victim's name and address. *Id.* at 5. In granting the protective order, the court noted the CVRA not only protects the privacy of a victim's name and address, but also obligates judges to afford CVRA rights. *Id.* at 5 (citing 18 U.S.C. § 3771(a)(1), (a)(8), (b)).

However, exempting the MPD from CVRA obligations undermines the protective order. Under D.C. Code §§ 5-113.01(a)(1) and 5-113.06 and MPD policies, the protective order in *Dixon* may be circumvented. The MPD investigated the Dixon case. *See* MPD, Arrests Made in Multiple Robbery Offenses, <https://mpdc.dc.gov/release/arrests-made-multiple-robbery-offenses-144> (last visited Apr. 3, 2021) (discusses arrest of Dixon). Using MPD procedures, Dixon could have a buddy obtain an

MPD report that has the victim's name and address. Then Dixon could find out the victim's name and address when Dixon receives the MPD report from his buddy. Thus, through the MPD, Dixon could circumvent the protective order. Accordingly, the MPD must have CVRA obligations too.

Because the MPD cannot protect Varco's privacy under the CVRA and comply with D.C. Code §§ 5-113.01(a)(1) and 5-113.06 at the same time, Varco argued the CVRA should preempt D.C. Code §§ 5-113.01(a)(1) and 5-113.06 on impossibility and/or obstacle grounds. Varco's CVRA Motion at pp. 15-17.

The *Dixon* case involves one crime victim in the District of Columbia, but some cases may have crime victims from multiple areas. *See e.g.*, *United States v. Belfort*, No. 98-CR-0859, 2014 WL 2612508, at *3-*4 (E.D.N.Y. June 11, 2014) (court denying television producer's request for a copy of names and amount of restitution owed to 1300+ victims of Jordan Belfort's crimes because the victims' CVRA rights to privacy overcame the presumption of public access to court documents).

The CVRA must protect the privacy rights of each of those crime victims in each jurisdiction to be effective. Otherwise, if government officials publicly release the names and addresses of victims, the information may be distributed. *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (holding civil liability on newspaper for publishing the name of rape victim, which it obtained from a publicly-released police report, violated the First Amendment).

Also, unless the CVRA applies to MPD officials, the MPD could frustrate a crime victim's ability to enforce CVRA rights by not transferring a case to the U.S. Attorney's Office for the District of Columbia ("DC USAO"). If the DC USAO never gets involved in a case, then the DC USAO might argue that it has no CVRA obligations for a case.

B. The D.C. Court of Appeals' Order Creates A Split On Whether CVRA Rights Apply Pre-Charging

In this case, the D.C. Court of Appeals panel decided that the CVRA only obligates judges to protect victim's rights once a criminal case has been filed. Pet. App. at 1a.

That interpretation conflicts with Fifth Circuit precedent, where crime victims have rights under the CVRA before a criminal case has been filed. *See In re Dean*, 527 F. 3d 391, 394-96 (5th Cir. 2008) (a plea deal made without consulting victims violated the victims' reasonable right to confer with prosecutor).

Also, the Eleventh Circuit is deciding if CVRA rights apply before criminal proceedings. *In re Wild*, 955 F.3d 1196 (11th Cir. 2020), *vacated, reh'g en banc granted*, No. 19-13843, 2020 WL 4557083 (11th Cir. Aug. 7, 2020) (mem.). Argument for the en banc rehearing of *In re Wild* was on December 3, 2020.

Also, a D.C. Circuit panel order suggests CVRA rights exist before a criminal case:

Under the CVRA, victims may participate in proceedings even where there has been no formal charge. *See, e.g.*, 18 U.S.C. § 3771(a)(9). Because victim status can be

argued for even prior to the filing of an indictment, it is clear that Congress intended courts to look beyond the four corners of an indictment or plea agreement.

In re: Henriquez, No. 15-3054, 2015 WL 10692637, at *1 (D.C. Cir. Oct. 16, 2015) (per curiam).

There is a need for uniformly recognizing CVRA rights apply before a criminal case has been filed. Without uniformity, the prosecutor from the DC USAO has different CVRA obligations before the D.C. Court of Appeals and the D.C. Circuit.

For crimes that relate to D.C. Code and federal offenses, there is a potential for abuse.

If the prosecutor only pursues the D.C. Code offense, then the prosecutor may be able to avoid conferring with the crime victim until after a plea deal has been reached. If challenged to the D.C. Court of Appeals, that court does not recognize the need of the court to protect the victim's rights (e.g., reasonable right to confer with the government attorney under 18 U.S.C. § 3771(a)(5)) until a criminal case has been filed. *See* Pet. App. at 2a.

On the other hand, if the prosecutor pursues the D.C. Code and federal offenses, then the prosecutor may have to respect the crime victim's conferral rights before finalizing the plea deal. If challenged to the D.C. Circuit, the panel order of *In re: Henriquez* suggests the crime victim has conferral and other CVRA rights before a formal charge has been filed.

The CVRA does not impair which offenses the prosecutor decides to pursue. 18 U.S.C. § 3771(d)(6).

C. The Error Will Not Correct Itself

In this case, the D.C. Court of Appeals panel decided the CVRA never applies to the MPD Chief and only obligates judges to protect victim's rights once a criminal case has been filed. Pet. App. at 1a.

That error probably will not correct itself. The D.C. Court of Appeals' order will deter other crime victims – at their expense – from asserting CVRA rights against the MPD. Even if another D.C. Code crime victim sues the MPD Chief, whether in the D.C. Superior Court or the D.C. District Court, both courts likely would dismiss the lawsuit.

A dismissal is expected because the courts are effectively split: the D.C. Court of Appeals order does not apply the CVRA to the MPD; and the D.C. Circuit's order directs D.C. Code Crime Victims to file in the D.C. Superior Court. Pet. at 1a-2a, 14a-15a, and 11a-13a (reh'g denied).

The MPD Chief, Chief Contee, might argue that the error could correct itself because the panel orders from the D.C. Court of Appeals (see Pet. App. 1a) and the D.C. Circuit (see Pet. App. 14a) are both unpublished. However, the D.C. Court of Appeals order may be published because Varco timely filed a motion requesting publication of the court's order on November 12, 2020. Also, the D.C. Circuit seems unlikely to change its order in Varco's first lawsuit because it denied Varco's rehearing petitions, see Pet. App. at 11a-13a.

Also, unpublished decisions still deserve review if warranted. *See Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from

denial of certiorari) (That “the decision below is unpublished is . . . yet another reason to grant review.”); *Smith v. United States*, 502 U.S. 1017, 1020 n. (1991) (Blackmun, J., dissenting from denial of certiorari) (“The fact that the Court of Appeals’ opinion is unpublished is irrelevant.”).

III. This Case Is An Ideal Vehicle

This case is an ideal vehicle for resolving the questions presented.

First, the MPD Chief and D.C. Court of Appeals acknowledge⁴ Varco qualifies as a “crime victim” under the CVRA, Pet. App. at 2a (“[t]here is no dispute that petitioner was a victim of an assault.”), so that simplifies this case.

Second, Varco has sought reasonable relief under the CVRA. Varco tried to protect the privacy of his name and address. The CVRA can be used for that purpose. *See e.g., United States v. Dixon*, 355 F. Supp. 3d 1 (D.D.C. 2019).

Even though Varco no longer has the same address in the MPD’s report on Varco, this Court still should review whether Varco can protect the privacy of his name and address. The privacy harm to Varco is not moot. Varco may need to report another crime to the MPD one day and could face the same privacy issues again. No one should have privacy worries if they file a MPD report. Reporting a crime is a prerequisite for getting crime-victim’s compensation.

⁴ MPD Chief conceded Varco is “crime victim” in Respondent Peter Newsham’s Motion To Dismiss or, in the Alternative, Opposition to the Petition for a Writ of Mandamus filed in *In re Varco*, No. 19-3046 (D.C. Cir. July 9, 2019), at p. 3 n. 2.

District of Columbia Courts, Eligibility, <https://www.dccourts.gov/services/crime-victims-compensation-matters/eligibility> (last visited Apr. 4, 2021). Thus, crime victims miss out if privacy concerns deter them from reporting crimes to the MPD.

As for Varco's other requested relief, it is unfair that the MPD posts YouTube videos for some cases, but will not do so for Varco. The MPD's refusal for Varco makes it less likely to receive tips that could solve Varco's case. The MPD just has to change a privacy setting for the video. YouTube, Change video privacy settings, <https://support.google.com/youtube/answer/157177?hl=en> (last visited Apr. 4, 2021). It also is reasonable, as Varco has tried under the CVRA, 18 U.S.C. § 3771(a)(1), to make the MPD give Varco clear images of people involved in the attack on Varco.⁵

⁵ Varco tried to get the images through a DC FOIA request, but the Mayor's Office of Legal Counsel denied the request based on DC FOIA exemptions. Varco's Motion To Supplement the Record and Request for In-Camera Review of MPD Video Evidence, filed Feb. 5, 2020, App. C.

Conclusion

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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