Nos. 09-70529, 09-70533

United States Court of Appeals for the Ninth Circuit

IN RE: MELVIN AND LERAH PARKER; UNITED STATES OF AMERICA,
Petitioners,

v.

U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA (MISSOULA),
Respondent,

W. R. GRACE & CO., HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. MCCAIG, ROBERT J. BETTACCHI, AND ROBERT C. WALSH,
Respondents-Real Parties in Interest.

On Petition for Writ of Mandamus to the United States District Court for the District of Montana (Molloy, C.J.) Case No. CR 05-07-M-DWM

JOINT BRIEF OF RESPONDENTS-REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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February 25, 2009

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Respondent-Real Party In Interest W. R. Grace & Co. ("Grace") states that it is a publicly held Delaware corporation. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock. Grace filed for Chapter 11 bankruptcy in federal court in Delaware in April 2001. That proceeding remains pending.

/s Michael D. Shumsky
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INTRODUCTION

On most points, the parties are in violent agreement. Despite the reams of paper that the Government and the Parkers devote to the following issues, no defendant contends that the crimes alleged in the indictment are victimless offenses; no defendant contests that the CVRA gives alleged victims the right to attend "court proceeding[s] involving an offense against [them]," 18 U.S.C. § 3771(b)(1); and no defendant disputes that the identity of a victim or victims for purposes of the CVRA must at this stage of the proceedings be "determined … by reference to the factual allegations in the charging instrument." Parkers' Pet. at 20 (quoting LAFAVE, ISRAEL, KING & KERR, 1 *Crim. Pro.* § 1.5(k) at n.415.5 (3d ed. 2007-08)).

Instead, the parties part ways on a narrow issue—one the district court appropriately recognized as both "sensitive and complex," GER67[1], but which Petitioners (for all the ink they spill on the foregoing points) all but ignore. Put simply, that issue is whether the trial these witnesses wish to attend involves alleged "offenses against [them]," 18 U.S.C. § 3771(b)(1), such that the procedural rights that the CVRA affords crime victims kick in. As the district court carefully explained, the manner in which the Government has chosen to frame its

[1] Citations to the GER refer to the Government's Excerpts of Record. Citations to the PER refer to the Parkers' Excerpts of Record.

indictment, the *unchallenged* legal rulings that constrain the scope of the offenses at issue in this prosecution, and the unprecedented theory of liability the Government is advancing in this case make it impossible to determine at this stage who is (and who is not) the victim of an alleged "offense against [them]." *Id*.

The district court thus did not remotely err in concluding that none of the witnesses identified in the Petitioners' moving papers has a right to attend these trial proceedings under the CVRA. As the district court properly recognized, the indictment's charges are strictly circumscribed by a five-year statute of limitations, GER73, 76-77, but fail *both* to allege a particular release that took place within the limitations period *and* to identify which particular individual was endangered by that release. *Id*. at 78, 81-82. The indictment instead charges only that there were *some* releases within the limitations period and that *some* unspecified person or persons were endangered by them. While the district court has allowed this prosecution to proceed notwithstanding the Government's failure to plead these offenses with particularity, it repeatedly has recognized these critical omissions in the indictment's charges. *United States v. W. R. Grace & Co.*, 401 F. Supp. 2d 1103, 1111-12 (D. Mont. 2005) (denying Defendants' motion for a bill of particulars specifying the persons allegedly endangered by prohibited releases on the ground that the "identities of the victims are a part of the government's *evidence*, not a part of its *theory*") (emphasis added); *United States v. W. R. Grace*

& Co., Unpublished Order at 19-20 (Docket No. 753, Sept. 19, 2006) (noting that "the Government has chosen not to allege that any particular person was endangered by the charged releases").

Those omissions have now come back to roost. Having determined to make the issue of who was victimized by the unidentified releases alleged in this case a matter of proof at trial rather than the subject of a pretrial allegation returned by an independent grand jury and supported by probable cause, the Government must live with the consequences. As the district court observed in its oral decision on this matter, the Government has in effect made the *identity* of the victims in this case one of "the critical issue or issues that are going to be tried," rather than part of "the factual allegations in the charging instrument." Parkers' Pet. at 20 (quotation omitted). Accordingly, there are at this stage "no *identifiable* victims, as the Act defines them, of the federal offenses alleged in the Superseding Indictment," GER83 (emphasis added), and none of the individuals identified in the Petitioners' papers have a right to attend the trial proceedings.

The Petitions should be denied.

JURISDICTIONAL STATEMENT

The district court's jurisdiction over this criminal prosecution is based on 18 U.S.C. § 3231. On February 13, 2009, the district court denied the petitioners' motions to assert rights under the Crime Victims' Rights Act ("CVRA"), 18 U.S.C.

§ 3771. GER63-83. This Court has jurisdiction to consider the ensuing Petitions for Writ of Mandamus pursuant to 18 U.S.C. § 3771(d)(3) (the CVRA) and 28 U.S.C. § 1651 (the All Writs Act).

STATEMENT OF THE ISSUE

Whether the district court erred by sequestering the witnesses alleged by the petitions (but not the indictment) to be victims of the charges at issue in the ongoing trial proceedings.

STATEMENT OF THE CASE AND THE FACTS

A. The Original Indictment

This case arises out of defendant W. R. Grace & Co.'s long-ceased vermiculite mining activities in and around Libby, a small town in northwestern Montana. By itself, vermiculite is not hazardous; it is a noncombustible form of mica that expands when heated, and thus has a variety of valuable commercial uses. Like most naturally occurring minerals, however, raw vermiculite ore contains impurities. The Government has known for decades that asbestos is one of several impurities present in the vermiculite ore found near Libby ("Libby vermiculite"), yet it is that presence which—decades after its discovery and public acknowledgement—forms the basis for this unprecedented criminal prosecution.

On February 7, 2005—more than a decade after Grace ceased its Libby mining operations and left the town—a federal grand jury in the District of Montana returned a ten-count indictment against Grace and seven of its former

employees: Alan Stringer, Henry Eschenbach, Jack Wolter, William McCaig, Robert Bettacchi, Mario Favorito, and Robert Walsh ("Defendants"). GER1-58.[2] The indictment's centerpiece was its first count, which alleged that Defendants carried out a 26-year criminal conspiracy with two distinct objects: (1) to violate the Clean Air Act's ("CAA") knowing endangerment provision, 42 U.S.C. § 7413(c)(5)(A), by releasing asbestos into the ambient air and thereby knowingly endangering persons in and around Libby (the "CAA object"); and (2) to defraud the federal government in violation of 18 U.S.C. § 371 by concealing the hazards associated with the impurities in Libby vermiculite in order to limit Grace's liability (the "fraud object"). GER15-16.

The indictment further charged Grace and certain individual defendants with three substantive counts of violating the CAA's knowing endangerment provision, GER44-45; two counts of wire fraud in violation of 18 U.S.C. § 1343, based on their transfer of certain asbestos-contaminated real property to third parties (including Petitioners Melvin and Lerah Parker); and four counts of obstructing

[2] Mr. Stringer died on February 24, 2007 and subsequently was dismissed from the indictment. In a separate pretrial order, the district court held that Mr. Favorito will be tried separately from the other defendants. Accordingly, the trial proceedings at issue here stem from the charges against Grace, Eschenbach, Wolter, McCaig, Bettacchi, and Walsh.

justice in violation of 18 U.S.C. § 1505, based on their alleged interference with EPA's eventual Superfund response action in Libby. GER46-49.

B. Post-Indictment Motions Practice And The Superseding Indictment

Within weeks of the indictment's return, the parties unleashed a barrage of pretrial motions addressing the validity of the indictment's charges and the scope of the issues at trial. To date, nearly one hundred substantive pretrial motions have been filed—many of which raise difficult issues of first impression—and the district court's resolution of the novel questions raised by this unprecedented prosecution has spawned three prior appeals to this Court (including one that was reheard *en banc*). Three of the district court's many pretrial dispositions have special relevance here, since each is responsible for producing significant changes to the indictment itself, narrowing the legal status of the remaining charges in this case, and limiting who can (and who cannot) at this stage be identified as a "crime victim" entitled to rights under the CVRA.

1. Dismissal Of The Wire-Fraud Counts

On March 3, 2006, the district court granted the Government's own motion to dismiss the indictment's wire-fraud counts in light of those counts' failure to plead that the alleged fraud was material. *United States v. W. R. Grace & Co. [Continuing Offense Order]*, 429 F. Supp. 2d 1207, 1248 (D. Mont. 2006). Of note here, the now-dismissed counts alleged (among other things) that the charged

defendants sought "to avoid liability by selling property … to [the Parkers] without disclosing the health hazard associated" with the property. Original Indictment ¶ 192.

2. Dismissal Of The Time-Barred CAA Counts

In the same order, the district court granted Defendants' motion to dismiss the indictment's substantive CAA counts to the extent those counts alleged offenses that were completed before the applicable statute of limitations period began on November 3, 1999. *Continuing Offense Order*, 429 F. Supp. 2d at 1239-45. In doing so, the court rejected the Government's contention that the CAA's knowing-endangerment provision establishes a "continuing offense" that cannot be charged until the endangerment brought about by the release ceases. The court held instead that the knowing-endangerment offense is "complete and may be prosecuted *at the first instant* another person is placed in imminent danger, regardless of how long the endangerment lasts." *Id*. at 1243 (emphasis added).

Because each of the indictment's CAA counts thus could be read to charge multiple—if entirely unspecified—releases of asbestos and acts of endangerment, and because many (if not most) of those releases occurred prior to the commencement of the limitations period in November 1999, the district court (a) dismissed the CAA counts to the extent they are based on endangerment that began prior to November 1999, *id*. at 1245; *id*. at 1248, and (b) explained that it would

take steps at trial to ensure the jury does not return a guilty verdict unless it unanimously agrees that Defendants caused a particular post-November 1999 release and unanimously agrees as to the particular person placed in danger by that release, through the use of "curative instructions to the jury, special interrogatories to insure unanimity, or the dismissal of all or part of the offending count." *Id*. at 1246. Although the Government could have taken an interlocutory appeal from that order, *see* 28 U.S.C. § 3731 (authorizing the Government to appeal any "order of a district court dismissing an indictment or information … as to any one or more counts, or any part thereof"), the Government waived its right to do so. Accordingly, that order is now the controlling law of this case.

3. Dismissal Of The Conspiracy Count's CAA Object And The Superseding Indictment

On June 8, 2006, the district court granted Defendants' motion to dismiss the CAA object of the conspiracy count as time-barred. *United States v. W. R. Grace& Co. [CAA Object Order]*, 434 F. Supp. 2d 879, 887 (D. Mont. 2006). As the district court explained in its decision, longstanding Supreme Court precedent requires an indictment to allege an overt act within the limitations period *as to each object* of a multi-object conspiracy, but no timely overt act alleged in the original indictment could be read to support the CAA object of the pleaded conspiracy. *Id*. 885-88 (applying *Yates v. United States*, 354 U.S. 298 (1957)); *see also United States v. W. R. Grace & Co. [CAA Object Appeal]*, 504 F.3d 745, 750

(9th Cir. 2007) (noting that while the Government "claim[ed] that certain overt acts … could support both the fraud object and the [CAA object]," the district court held that the alleged overt acts relied upon by the Government were pleaded as "acts of obstruction, not acts of wrongful endangerment").

Rather than appeal that decision under 28 U.S.C. § 3731, the Government sought and obtained a superseding indictment on June 26, 2006. In addition to deleting the previously dismissed wire-fraud charges and making superficial changes to the substantive Clean Air Act counts, the superseding indictment modified ten paragraphs (paragraphs 173-183) of the original conspiracy count in an attempt to resurrect the time-barred CAA object. *See CAA Object Appeal*, 504 F.3d at 750 ("The [conspiracy count of the] new indictment was substantially similar to the original indictment, amending only paragraphs 173-183.").

Defendants then moved to dismiss the CAA object from the superseding indictment, arguing both that the amendments to paragraphs 173-183 had not remedied the prior statute-of-limitations defect and that, in any event, re-indictment of the CAA object was barred by 18 U.S.C. § 3288 (providing that "a new indictment may be returned … within six calendar months of the date of the dismissal of the indictment," but explaining that "[t]his section does not permit the filing of a new indictment … where the reason for the dismissal was the failure to file the indictment … within the period prescribed by the applicable statute of

limitations"). The district court agreed with Defendants that section 3288 barred re-indictment of the CAA object and thus dismissed that object from the superseding indictment's conspiracy count. *United States v. W. R. Grace*, 455 F. Supp. 2d 1113 (D. Mont. 2006). This time, however, the Government appealed the dismissal under 28 U.S.C. § 3731, and this Court reversed—holding that prior Ninth Circuit precedent interpreting section 3288 permitted the Government to re-plead the CAA object by amending paragraphs 173-183 in a manner that "charg[ed] the exact same crimes based on approximately the same facts." *CAA Object Appeal*, 504 F.3d at 754.

C. Orders Relating To Putative Victims

While the foregoing motions practice and appellate proceedings were unfolding, the Government was busy waging an aggressive public campaign to persuade hundreds of Libby residents that they were "victims" of Defendants' alleged misconduct. As one official asserted at a public meeting shortly after the original indictment was handed down:

> [Y]ou don't have to be physically diagnosed with an asbestos-related disease to be considered a victim. Many people are victims without being ill. There's financial hardship. There's just a number of avenues. The U.S. Attorney is adamant in this case that *everybody that feels they're a victim will be considered a victim* and treated as such. So please don't think, well, I haven't been diagnosed or I don't have any family members that are ill. If you want to be a part of this, you're absolutely entitled to.

United States v. W. R. Grace & Co., Unpublished Order at 3 (Docket No. 212, Mar, 5, 2005) (emphasis added). Despite repeated admonitions from the district court to refrain from further public comment on the case, the Government's ongoing campaign now has led prosecutors to assert that they have identified some 2000 individuals who fit the Government's feelings-based interpretation of the term "crime victim." The Government intends to call at least thirty of those individuals as witnesses in this case. GER69.

At a *Daubert* hearing on January 22, 2009, the Defendants asserted their right to preclude lay witnesses from attending trial proceedings under Fed. R. Evid. 615 ("At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses."). GER60. The district court recognized at that time that the CVRA creates an exception to Rule 615 for "crime victims," but explained that it was impossible at this stage to identify *which* individuals were victims of the "unusual" offenses charged in this case:

> This case is unusual because if you have a case where there is someone who is caught with drugs, child pornography, someone who's allegedly robbed a credit union or a bank, someone who's been involved in a violent act, there is generally a person or persons who are identifiable as victims.
>
> Under the definition of 18 U.S. Code 3771(e), it says that, For purposes of this chapter, the term, quote, crime victim, means a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia.

> Of course, that obviously is the critical issue or issues that are going to be tried and, consequently, it is my determination, as the Congress has defined the term crime victim, there are no crime victims identifiable in this case.

GER304-05. The court therefore ruled that all fact witnesses would be sequestered under Rule 615. GER306.

On February 2, 2009, the Government moved for reconsideration of the district court's January 22 order, asserting that 34 of the Government's witnesses (including Petitioners) "*believe* they have been harmed as a direct result of deliberate acts of the defendants," Gov't Dist. Ct. Br. at 3 (emphasis added), and thus have a "right not to be excluded from … public court proceedings" under 18 U.S.C. § 3771(a)(3). *Id*. at 4 (quoting CVRA).

Days later, the Parkers filed their own motion asserting their alleged right to attend trial proceedings under the CVRA. Following the Government's lead, the Parkers argued that they have a right to "attend all proceedings in this case" because they "believe" they are victims of "defendants' crimes." PER Ex. 3 at 4. Unlike the other 32 "victims" identified in the Government's submission, however, the Parkers also noted that they were "specifically identified in the indictment as having been 'directly and proximately harmed' by the charges." *Id*. at 8-9 (quoting 18 U.S.C. § 3771(e)). To support that assertion, the Parkers identified three specific provisions of the indictment:

> Paragraph 165, which as part of the conspiracy count alleges that "*[o]n or about December 17, 1993*, defendants W.R. GRACE and BETTACHI knowing the Screening Plant property was contaminated with tremolite asbestos, signed a deed transferring title of the Screening Plant property to the Parkers and failed to disclose the health hazard associated with said property";
>
> Paragraph 166, which as part of the conspiracy count alleges that "*on or about December 17, 1993*, defendants W.R. Grace, BETTACHI and STRINGER, knowing the Screening Plant property was contaminated with tremolite asbestos and knowing that the Parkers resided on and established a commercial nursery on said property, failed to disclose the health hazard associated with said property"; and
>
> Paragraph 188, which as part of a single Clean Air Act count alleges that "beginning on or about November 3, 1999 and continuing until on or about June 15, 2000 … the defendants, W.R. GRACE, ALAN R. STRINGER, JACK W. WOLTER, and ROBERT J. BETTACHI did knowingly release and caused to be released into the ambient air a hazardous air pollutant, namely, asbestos, and at the time knowingly placed another person in imminent danger of death or serious bodily injury *by selling real property* known as the 'Screening Plant' to the Parker family."

See id. at 8 (quoting ¶¶ 165, 166, 188 of the superseding indictment).

On February 13, 2009, the District Court issued a written order denying both the Government's and the Parkers' motions under the CVRA. The court based its conclusion that none "of the thirty-four individuals listed in this government's brief [including the Parkers] meet the definition of crime victim," GER68, on "the unusual theory of criminal liability the government has advanced in this matter," GER66, and the "temporal framework within which the government has situated its theory of criminal liability." GER73. As the court explained, its prior, unchallenged statute-of-limitations orders require the Government to demonstrate

that Defendants knowingly engaged in conduct that—according to the indictment itself—occurred prior to the limitations period (such as the sale of property to the Parkers in 1993), but that resulted in a release into the "ambient air of a hazardous pollutant after November 3, 1999, at which time 'another person' must have been placed 'in imminent danger of death or serious bodily injury.'" GER78 (quoting the CAA). As a result, "if there are victims of the federal offenses the government alleges, they must have been imminently endangered after November 3, 1999," since any charges based on endangerment commencing prior to November 3, 1999 would be barred by the statute of limitations. GER77-78; *see also* Continuing Offense Order, 249 F. Supp. 2d at 1249 (holding that the knowing-endangerment offense is "complete and may be prosecuted at the first instant another person is placed in imminent danger, regardless of how long the endangerment lasts").

Above and beyond the fact that the superseding indictment failed to specify that any particular person first was endangered by a post-1999 release, the district court then held that neither the Government nor the Parkers had established that any of the persons named in their papers met that criteria:

> The government offers no such argument, and points to no facts indicating that the witnesses who believe they are victims were imminently endangered at some moment after November 3, 1999. *To the contrary, the government's documentary evidence and the testimony of its experts pertaining to the timing of exposure and the manifestation of the alleged harm suggest that the individuals the government identifies as victim-witnesses may not be victims of the federal offenses alleged in the Superseding Indictment.* The

> government has provided no basis for identifying victims other than that certain persons (along with the government) believe they are victims, and certain persons are identified as knowingly endangered in the Superseding Indictment.

GER78 (emphasis added; internal citation omitted).

These petitions for writ of mandamus followed.

STANDARD OF REVIEW

This Court has *in dicta* suggested that a district court's decision on CVRA-related matters should be reviewed for abuse of discretion. *In re Kenna*, 435 F.3d 1011, 1017 (9th Cir. 2006) (suggesting that an abuse-of-discretion standard ought to apply, but noting that the petition in that case met the traditional standard for mandamus relief). As other circuits have begun to address this issue, the clear trend is to apply the traditional standard for obtaining mandamus relief to petitions seeking mandamus under the CVRA. *See, e.g.*, *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *In re Antrobus*, 519 F.3d 1123, 1127 (10th Cir. 2008). Among other things, that standard requires the petitioner to identify a "clear error of law" in order to justify the writ. *In re Clemens*, 428 F.3d 1175, 1180 (9th Cir. 2005) ("In the absence of a clear error of law by the district court, we must deny the petition for a writ of mandamus.").

The Government's petition expressly "agrees with the positions of Fifth and Tenth Circuits, which have held that traditional mandamus standards apply to petitions filed under 18 U.S.C. § 3771(d)(3))." Gov't Pet. at 15 n.4. The Parkers

take issue with the Department of Justice's position—and this Court should reject their contrary approach. As the Tenth Circuit recently explained,

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows *and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken* and the meaning its use will convey to the judicial mind unless otherwise instructed.

Antrobus, 519 F.3d at 1124 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)) (emphasis added). That ancient maxim has particular force here, since the CVRA provides that aggrieved parties may "petition the court of appeals for a writ of mandamus," 18 U.S.C. § 3771(d)(3), and the term "mandamus is the subject of longstanding judicial precedent" that is well known to Congress. *Antrobus*, 519 F.3d at 1124; *see also id*. at 1127 (citing *inter alia Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170-71 (1803)).

Accordingly, when Congress chose to authorize review of CVRA rulings by allowing an aggrieved party to seek "a writ of mandamus," 18 U.S.C. § 3771(d)(3), it "adopt[ed] the cluster of ideas" attached to the writ—including its sharply circumscribed scope. Had Congress otherwise intended to provide ordinary appellate review of these issues, it could and would have said so. *See Antrobus*, 519 F.3d at 1128-29 ("Congress well knows how to provide for ordinary interlocutory appellate review, rather than mandamus review, when it wishes to do so."); *id*. at 1129 ("[A]lthough it is only a rough measure, a computer-aided search

of the United States Code indicates that the phrase 'interlocutory appeal' appears 62 times, and the word 'interlocutory' appears 123 times in the same sentence as the word 'appeal.'"); *see also CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1226 (11th Cir. 2001) ("Where Congress knows how to say something but chooses not to, its silence is controlling.").

No court that applies a relaxed standard of review for CVRA petitions has remotely grappled with the Tenth Circuit's analysis—or even attempted to tie its decision to the language of the statute. For instance, the Second Circuit's decision in *In re W.R. Huff Asset Mgmt. Co.*—the fountainhead of the contrary line of authority—asserted only that

> Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court's decision denying relief sought under the provisions of the CVRA. It is clear, therefore, that a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus.

409 F.3d 555, 562 (2d Cir. 2005) (statutory citations omitted). But there is nothing "clear" about that conclusion; it is a classic *non sequitur*. The fact that Congress selected mandamus *as the vehicle* for CVRA review in no way suggests that Congress intended to relax the longstanding standards for obtaining relief *through that vehicle*. The two other courts that have suggested such an approach—

including the *obiter dicta* in *Kenna*—simply cite *Huff* without substantive analysis. *In re Walsh*, 229 Fed. Appx. 58 at *2 (3d Cir. 2007); *Kenna*, 435 F.3d at 1017.

Perhaps as a result, the Parkers now try to fill the logical gap in these cases by asserting that the CVRA "specifically and obviously overrules conventional mandamus standards by directing that '[t]he court of appeal *shall take up and decide such application forthwith* ...." Parkers' Pet. at 11 (quoting 18 U.S.C. § 3771(d)(3) with added emphasis). But there is nothing "specific" or "obvious" about that conclusion; it, too, is a *non sequitur*. The fact that Congress required appellate courts to resolve CVRA mandamus petitions *on an expedited basis* has no bearing *on the standards* appellate courts must apply in doing so. If anything, the (perhaps unreasonably) short timetable set forth by the statute only confirms that Congress intended the traditional mandamus standard to apply in these proceedings, including its clear-error-of-law requirement: "It seems unlikely that Congress would have intended *de novo* review in 72 hours of novel and complex legal questions." *Antrobus*, 519 F.3d at 1130.

Faced with all of this, the Parkers ultimately seek to undermine the statute's plain text by quoting a single snippet of the CVRA's legislative history. Parkers' Pet. at 11 (quoting 150 Cong. Rec. S4262 (Apr. 22, 2004 (statement of Sen. Feinstein)). Needless to say, the statements of individual legislators are not the law, and resort to legislative history is inappropriate in the absence of genuine

textual ambiguity—of which there is none here. *United States v. Serawop*, 409 F. Supp. 2d 1356, 1358 (D. Utah 2006) (Cassell, J.) ("[L]egislative history cannot change the meaning of a statute."); *see also United States v. Sioux*, 362 F.3d 1241, 1246-47 (9th Cir. 2004) ("[I]t is well-settled that 'reference to legislative history is inappropriate when the text of the statute is unambiguous.' We therefore decline [defendant's] invitation to troll [the] legislative history in search of statements that might—or might not—contradict the plain language of the [law].") (quoting *HUD v. Rucker*, 535 U.S. 125, 132 (2002) (internal footnote and citations omitted)).[3]

Accordingly, this Court should make clear that the traditional standards for review of a mandamus petition apply to mandamus petitions under the CVRA.

REASON FOR DENYING THE WRIT

THE DISTRICT COURT DID NOT REMOTELY ERR—OR OTHERWISE ABUSE ITS DISCRETION—BY SEQUESTERING THE WITNESSES IDENTIFIED IN THE PETITIONS.

The Federal Rules of Evidence require trial courts to sequester witnesses upon any party's request in order "reduce the danger that a witness's testimony will be influenced by hearing the testimony of other witnesses, and to increase the

[3] Even if it were appropriate to comb through floor statements despite the statute's plain text, the single statement the Parkers cite hardly undermines the well-reasoned conclusions of the Tenth and Fifth Circuits. In short, Senator Feinstein's short-hand description of the writ as a mechanism for "appeal" does not even intimate that CVRA petitions must be decided under different standards than ordinary mandamus petitions.

likelihood that the witness's testimony will be based on her own recollections." *United States v. Hobbs*, 31 F.3d 918, 921 (9th Cir. 1994). In light of these essential goals, Rule 615's strict witness-sequestration requirement is subject only to narrow exceptions—for (1) a party, (2) its corporate representative, or non-parties (3) whose presence is essential to a party's case or (4) who otherwise can demonstrate that a statute specifically authorizes their presence. Fed. R. Evid. 615.

Petitioners now assert that the witnesses identified in their moving papers are entitled to mandamus relief because they fall within the latter exception. That is so, they contend, because those witnesses have been harmed by Defendants' alleged misconduct, and thus have a right to attend proceedings under the CVRA. That approach misunderstands the law. By its plain terms, the CVRA applies only to court proceedings "involving an offense *against* a crime victim," 18 U.S.C. § 3771(b)(1) (emphasis added), and the determination of whether an alleged offense was committed against a particular individual can (as the Parkers' own petition explains) be determined only by the factual allegations set forth in the charging instrument. The district court properly held that the manner in which the Government has framed its indictment, the court's *unchallenged* pretrial rulings, and the "novel" and "unusual" theory of liability the Government now advances make it impossible at this stage to determine whether the broad, non-particularized

offenses charged in these proceedings were committed "against" any of the witnesses identified in Petitioners' moving papers.

A. The District Court Properly Held That It Is Not Yet Possible To Identify Any Specific Individual Entitled To Attend Proceedings Under The CVRA.

The CVRA grants persons who have been "directly and proximately harmed as a result of the commission of a Federal offense," 18 U.S.C. § 3771(e), the right to attend "proceeding[s] involving an offense against [them]." *Id.* § 3771(b)(1). The Parkers conceded both below and on appeal, and Grace agrees, that the question of whether a given individual has *pre-conviction* rights under the CVRA must be resolved "'by reference to the factual allegations in the charging instrument.'" Parkers' Pet. at 20 (quoting LAFAVE *ET AL.*, 1 *Crim. Pro.* § 1.5(k) at n.415.5).

There are three justifications for that straightforward approach. First, it is black-letter law that the grand jury's indictment defines the scope of the offenses at issue in a criminal case. *Stirone v. United States*, 361 U.S. 212, 217 (1960) ("[A] court cannot permit a defendant to be tried on charges that are not made in the indictment against him."); *see also Schmuck v. United States*, 489 U.S. 705, 717-18 (1989) ("It is an ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him. This stricture is based at least in part on the right of the

defendant to notice of the charge brought against him.") (internal citations omitted). Since the scope of rights afforded by the CVRA is in turn tied specifically to the alleged "offense[s]" at issue in the "proceeding," 18 U.S.C. § 3771(b)(1), the indictment's recitation of the alleged offenses necessarily circumscribes the CVRA inquiry prior to conviction.

Second, and as the Parkers themselves observe, this approach is justified because courts "can properly presume that an indictment is supported by probable cause." Parkers' Pet. at 20 (citing *FDIC v. Mallen*, 486 U.S. 230, 240-41 (1988)). Accordingly, where a criminal indictment or information identifies a particular person as the victim of an alleged crime, the person's status as a putative "victim" rests on more than the Government's unsupported say-so: the evidence giving rise to the allegation has been vetted by an independent grand jury, and thus provides a reasonable basis for tentatively treating that individual as the "victim" of an "offense against [them]" despite the defendant's presumed innocence in pre-conviction proceedings.[4]

[4] The foregoing concerns obviously are not present in post-conviction or plea-related proceedings, where the defendant's guilt has been established beyond a reasonable doubt and the court can consult the evidence adduced at trial, during the plea colloquy, in connection with sentencing, or that otherwise is not contested by the defendant. *See, e.g.*, *United States v. Brock*, 504 F.3d 991, 999 (9th Cir. 2007).

Finally, and as the district court observed, this approach generally makes identifying "victims" an easy task in run-of-the-mill cases. If the indictment alleges that a person was robbed, the person who allegedly was robbed is a "victim" with rights under the CVRA because the resulting prosecution involves the alleged commission of an offense against them; if the indictment alleges that a parent peddled pornographic images of their child, the child is a "victim" with rights under the CVRA because the resulting prosecution involves the alleged commission of an offense against them; and if the indictment alleges that a woman was raped, the woman is a "victim" with rights under the CVRA because the resulting prosecution involves the alleged commission of an offense against her. GER58; GER71-72.

This case, however, is anything but run-of-the-mill, and it perfectly illustrates the dangers of departing from the hornbook rule that the CVRA's application to pre-conviction proceedings must be determined from the factual allegations in the indictment. That is so in part because the freestanding, post-indictment allegations of harm made by Petitioners depend on complex scientific and medical judgments that are strongly disputed by Defendants—who will at trial vigorously challenge the Government's assertion that their alleged conduct endangered any alleged victim of the charges at issue in this case. But it is especially so because the indictment utterly fails to specify *both* the *particular*

conduct upon which its broadly framed charges are based *and* the *particular* individuals against whom the alleged offenses were committed, and because the statute of limitations sharply circumscribes the extent to which the indictment's few particulars support chargeable criminal offenses in the first place.

As the district court recognized, these complications now have led the Government to adopt a "novel theory of the case" the "temporal framework [of] which … affects the analysis of who is an identifiable victim of the federal offenses alleged in the Superseding Indictment." GER73. In the Government's own words, that "novel theory of the case" is as follows:

> To prove [Defendants'] actions caused the release of asbestos into the ambient air [in violation of the CAA's knowing-endangerment provision], the government will introduce evidence at trial that the grounds of certain properties in and around Libby … were contaminated [prior to the limitations period] with asbestos-contaminated vermiculite materials. The government will then introduce the opinions of expert witnesses, who will testify that normal human activities (such as running, driving, sweeping or shoveling) released asbestos fibers into the ambient air [after the limitations period]. Experts will also opine that the releases placed persons in imminent danger of substantial bodily injury.

Opening Br. of the United States at 40-41 ["Gov't CAA Object Appeal Br."], *United States v. W. R. Grace & Co.*, 504 F.3d 745 (9th Cir. 2007); *see also* GER73, 77-78 (noting that "the government apparently plans to introduce evidence, for some purposes, from before the earliest date within the statute of

limitations period," but that "under the government's theory of the case, the [endangerment] must refer to a moment after November 3, 1999.").

There are many problems with that theory, not least of which is that Defendants contest its legitimacy as a basis for conviction. The key point for present purposes, however, is that its "unusual" nature, GER66, makes it impossible at this stage to identify which (if any) individuals are "victims" of a chargeable offense, since it requires the Government to prove that the "victims of the federal offenses the government alleges … must have been imminently endangered after November 3, 1999" but not earlier. GER78. Otherwise, "the statute of limitations prevents the government from prosecuting the federal offenses alleged in the Superseding Indictment." GER77-78.

The basic problem here is that the indictment wholly fails to identify which individuals (if any) fit that bill. While three counts of the superseding indictment charge that various defendants knowingly caused "*releases*" of asbestos in violation of the CAA (and that all Defendants conspired to cause those releases), Gov't CAA Object Appeal Br. at 40-41, no provision of the original indictment nor any provision of the superseding indictment specifies a *particular* release that occurred after November 3, 1999 or (with the possible exception of the Parkers, who are discussed in greater detail below) a *particular* person who was endangered by such a release after November 3, 1999. Nor is the order at issue here the first

time the district court recognized this significant gap in the indictment's charges. In a prior—unappealed—order precluding the Government's experts from testifying about pre-1999 exposures, the court explained:

> *[T]he Government has chosen not to allege that any particular person was endangered by the charged releases,* making it impossible to assess whether an alleged victim's historical exposure to asbestos makes it more likely that his post-1999 environmental exposure would result in endangerment. As has often been the case in this litigation, the Government is proceeding in the broadest manner possible, leaving the Court to assess not the condition of an "eggshell victim," but rather the collective state of an "eggshell community." If indulged by the Court, the Government's argument, *combined with its decision not to name any alleged endangerment victim in the Indictment*, would allow the Government to bootstrap into evidence proof of decades of exposures suffered by *people who could not possibly be victims of the releases for which the Defendants stand accused*.

United States v. W. R. Grace & Co., Unpublished Order at 19-20 (Dist. Ct. Docket No. 753, Sept. 19, 2006) (emphasis added); *see also* 401 F. Supp. 2d at 1111-12 (denying Defendants' motion for a bill of particulars identifying the alleged victims of the charged offenses on the ground that "[t]he identities of the victims are a part of the government's evidence, not a part of its theory" in the indictment).

The Government tried to get around this fatal deficiency in the district court by asserting that the 34 individuals on its list of putative victims "believe" they are victims of the offenses alleged in the indictment and thus have a right to attend trial under the CVRA. But the statute says nothing about a putative victim's "beliefs"; it asks only whether the proceedings "involve[e] an offense against a crime

victim." 18 U.S.C. § 3771(b)(1). As the district court consistently has recognized, the factual allegations in the indictment fail to allege that any of the chargeable offenses at issue in these proceedings were committed against a particular individual—that is, that any particular individual was for the first time endangered by a prohibited release of asbestos after November 3, 1999. There is thus no basis for according them rights under the CVRA.

Nor is there any basis for according those individuals rights under the CVRA based on the Government's *post-indictment* assertions that the identified witnesses were in fact harmed by a chargeable release of asbestos. For the reasons set forth above, it is inappropriate to look beyond the indictment's factual allegations at this stage of the proceedings. *See supra* at 20-23. But even if it were permissible to do so, the district court properly held that the Government's submission failed to demonstrate that any of the individuals it identifies are victims of a chargeable offense:

> The government … points to no facts indicating that the witnesses who believe they are victims were imminently endangered at some moment after November 3, 1999. *To the contrary, the government's documentary evidence and the testimony of its experts pertaining to the timing of exposure and the manifestation of the alleged harm suggest that the individuals the government identifies as victim-witnesses may not be victims of the federal offenses alleged in the Superseding Indictment.* The government has provided no basis for identifying victims other than that certain persons (along with the government) believe they are victims.

GER78 (emphasis added).

That conclusion is unimpeachable. Indeed, many of the individuals whom the Government alleges are "victims" were—by the Government's own account—allegedly exposed to releases of asbestos in the workplace; prior to the start of the limitations period in 1999; and prior even to the enactment of the CAA in 1990. As a result, none of those individuals possibly can be considered a victim of the chargeable offenses at issue in these proceedings; to the extent these persons were endangered, the alleged releases took place [1] indoors (rather than in the ambient air, as the plain text of the statute and this Court's prior orders require, *see* CAA Object Appeal, 504 F.3d at 760 (affirming district court's exclusion "of documents and studies derived from indoor air releases for the purpose of proving a release into the ambient air" because "the indoor releases may not reflect the level of releases into the ambient air")), [2] long before the statute of limitations (and, in many cases, prior even to the enactment of the Clean Air Act), or [3] both.

Because the district court's assessment of the record is clearly correct, the Government now changes tack in its Petition. Rather than basing its claims on the putative victims' "beliefs" about whether they were harmed by the crimes alleged in the indictment or arguing that the district court erred in finding that the individuals identified in the Government's moving papers were harmed outside the limitations period, the Government now asserts that the district court's statute-of-limitations concerns were in essence irrelevant. That is so, the Government

contends, because the district court's order "fails to appreciate the significance of the conspiracy alleged in Count I of the Superseding Indictment, which is an 'ongoing' offense from approximately 1976 to 2002 that directly and proximately harmed each of the 34 excluded victim-witnesses in this case." Gov't Pet. at 17-18 (quoting 18 U.S.C. § 3771(e)); *id*. at 20 ("Any person 'directly and proximately harmed by the defendants' ongoing criminal conspiracy between 1976 and 2002 is a 'crime victim' for purposes of the CVRA.") (quoting 18 U.S.C. § 3771(e)).

That approach suffers from two fatal defects. First, even if the Government were *right* that anyone harmed between 1976 and 2002 (rather than after November 3, 1999) *could* qualify as a victim entitled to rights under the CVRA, the fact remains that the indictment does not allege that *these* particular witnesses were harmed by the allegedly unlawful conduct (with the possible exception of the Parkers). At this point, the Government's self-interested assertion that offenses were committed against these particular witnesses—charges that never have been sanctioned by a grand jury, and which currently are being challenged by Defendants at trial—rest on nothing more than its own say-so, rather than on the grand jury's carefully vetted indictment. *But see Stirone*, 361 U.S. at 218 ("The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.").

Second, and perhaps more important, the Government is *wrong* that anyone harmed between 1976 and 2002 (rather than after November 3, 1999) can qualify as a victim entitled to the procedural rights set forth in the CVRA. The Government's argument here stems from the fact that "Count I of the Superseding Indictment alleges a criminal conspiracy *in violation of 18 U.S.C. § 371*," Gov't Pet. at 18 (emphasis added), and the otherwise unremarkable proposition that "[c]onspiracy is a continuing offense, which is charged and punished as one crime from beginning to end." *Id*. (quoting *United States v. Inafuku*, 938 F.2d 972, 972 (9th Cir. 1991)). According to the Government, that supposedly avoids the limitations issue identified by the district court because any person harmed by the allegedly "ongoing criminal conspiracy between 1976 and 2002 is a 'crime victim' for purposes of the CVRA." Gov't Pet. at 20.

But that simply is not so. While Count I does charge a continuing conspiracy that allegedly was intended to violate "18 U.S.C. § 371" between 1976 and 2002, *id*. at 18, the key point here is that the offense defined by that statute consists of conspiring "either to commit any offense *against the United States*, or *to defraud the United States*." 18 U.S.C. § 371; *see also* Superseding Indictment ¶ 71(b) (alleging an overarching conspiracy "*to defraud the United States* … in violation of 18 U.S.C. § 371") (emphasis added). Thus, by definition and as alleged, the trial proceedings on the § 371 object of the conspiracy charge do not

involve an "*offense against*" any of the witnesses identified in the Petitioners' papers. 18 U.S.C. § 3771(b)(1). They involve an "offense against *the United States*," *id*. § 371, and thus provide no basis for Petitioners' invocation of the CVRA. The same problem applies to the obstruction-of-justice counts (which the United States in any event did not raise as a basis for applying the CVRA in its district-court papers, *but see Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003) (waiver of arguments not presented to the district court)). *See* 18 U.S.C. § 1505 ("Whoever corruptly … influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had *before any department or agency of the United States* [shall be fined or imprisoned].").

That, of course, explains why the district court focused its attention on whether any of the putative victims were harmed for the first time after November 3, 1999—the start of the limitations period for purposes of the CAA-based offenses in this case. While the Government now asserts that the district court "misapplie[d] the statute of limitations" to those offenses because it "seemingly conclude[d] that each element of … the federal offenses alleged in the Superseding Indictment must occur within the statute of limitations," Gov't Pet. at 21, the district court did no such thing. Instead, it sought to interpret the statutory offenses

in a manner that would accommodate the Government's "novel" and "unusual" theory, and thus did nothing more than restate its prior holding that the charged offenses *may* be viable so long as the Government can prove the offenses were completed within the limitations period (even if the foundation for the completing act—*i.e.*, the act of imminent endangerment—was laid prior to the limitations period). GER75 (accepting "[t]he task of interpreting the statute to accommodate the government's theory"); *id*. ("[U]nder the government's theory, the act need not occur on or after the earliest date within the statue of limitations period, so long as its eventual consequence does."); *id*. ("Necessary to the government's theory, then, is the proposition that only the eventual consequence—the introduction of a hazardous air pollutant into the ambient air and resulting endangerment—must have occurred on or after the earliest date within the statute of limitations period."). The Government does not seriously challenge the district court's careful application of that test to the record in this case, *see* GER78 ("The government … points to no facts indicating that the witnesses who believe they are victims were imminently endangered at some moment after November 3, 1999."), and this Court has no basis for second-guessing that conclusion.

At bottom, the district court did not remotely err—or otherwise abuse its discretion—by applying its prior, unchallenged statute-of-limitations orders in the course of assessing whether the individuals who "believe" they are "victims"

actually can be identified as "victims" of the charged offenses at issue in these proceedings. Chief Judge Molloy has presided over this case for more than four years and thus far has issued some forty published (and dozens of unpublished) opinions resolving pretrial motions that shape the charges involved in these proceedings. Given the unprecedented complexity of the factual issues in this case and the unique legal constraints that apply to it, he is the best position to assess the scope of the remaining charges and the character of the pleaded factual allegations in light of "the unusual theory of criminal liability the government has advanced in this matter," GER66, and the "temporal framework within which the government has situated its theory of criminal liability." GER73. He did not clearly err or otherwise abuse his discretion in doing so.

B. The Indictment Does Not Charge Offenses Against The Parkers.

The Parkers concededly present a closer case than any of the other individuals identified in the Government's papers since (in contrast to the other witnesses) they at least are mentioned in the indictment. As the district court recognized, however, the key problem here is that the particular provisions of the indictment on which they rely do not identify them as victims of a chargeable offense at issue in these proceedings, and the CVRA thus accords them no greater rights than other fact witnesses subject to sequestration under Rule 615. *See* 18 U.S.C. § 3771(b)(1) (CVRA applies only to court proceedings "involving an

offense against a crime victim"). Because the Parkers (in marked contrast to the Government) actually rely on specific provisions of the indictment to assert their status as putative victims, Parkers' Pet. at 22-25, careful attention to those provisions is necessary.

1. Paragraphs 165 and 166

Paragraphs 165 and 166 are part of the superseding indictment's dual-object conspiracy count alleging that Defendants conspired to knowingly endanger persons by releasing asbestos in violation of the CAA, on one hand, and to defraud the federal government and thereby limit Grace's liability by concealing the hazards of Libby vermiculite, on the other. But these particular provisions of the indictment provide no support *for its CAA object*—and thus provide no basis for the Parkers' assertion that they are "crime victims" based on the factual allegations contained in those paragraphs. After all, the specific overt acts those paragraphs allege—Grace's transfer, and the charged defendants' alleged failure to disclose contamination of, certain property to the Parkers "*on or about December 17, 1993*," GER38 (emphasis added)—took place nearly six years *before* the five-year statute of limitations began to run on November 3, 1999, and well over five years *before* any of the other overt acts the indictment alleges in support of the CAA object. Thus, to the extent those factual allegations have any legal relevance to the trial proceedings in light of the district court's prior statute-of-limitations orders,

they relate only to the conspiracy count's fraud object under 18 U.S.C. § 371—which, as set forth above and by definition, could only have been carried out "against the United States," not the Parkers. *Supra* at 30-31.

That conclusion follows from the district court's prior, unappealed order holding that the original indictment failed to allege any timely overt act in furtherance of the charged conspiracy's CAA object. As that order explained, the various overt acts alleging that Defendants failed to disclose the extent of asbestos contamination in and around Libby—including with respect to the property sold to the Parkers—initially were pleaded in a manner that supported *the fraud object* of the alleged conspiracy alone, *not* its CAA object. *CAA Object Order*, 434 F. Supp. 2d at 887-88 (holding that, as pleaded, key acts relating to the "concealment of the extent of the contamination in Libby [were carried out] in furtherance of the defrauding object of the Count I conspiracy [but] cannot be construed as alleging acts in furtherance of the knowing endangerment object"). That is particularly true of the property-transfer acts (including paragraphs 165-66) recited in the initial indictment, not least of all because the original indictment expressly set forth the Government's theory that the charged property transfers (including the sale of property to the Parkers allegedly without disclosure of its contamination) were intended "to avoid liability" as part of "a scheme or artifice *to defraud*." Original Indictment ¶¶ 192, 194 (emphasis added).

The key point here, then, is that while the Government eventually salvaged the conspiracy count's CAA object by amending certain of its provisions, neither paragraphs 165 or 166 (or indeed, any of the other provisions relating to Grace's property transactions) were among them. To the contrary, as this Court recognized during one of the Government's prior appeals, the conspiracy count of the "new indictment was substantially similar to the original indictment, *amending only paragraphs 173-183*" to make clear that *those* provisions related to both objects of the conspiracy. *CAA Object Appeal*, 504 F.3d at 750 (emphasis added). As a result, the unaltered overt acts pleaded in paragraphs 165 and 166 of the indictment continue to support only the conspiracy count's defraud object—and, both as pleaded and by definition, the Parkers are not victims of that offense: only the federal government is. GER15-16 (Superseding Indictment ¶ 71(b)) (alleging a conspiracy "*to defraud the United States* … in violation of 18 U.S.C. § 371") (emphasis added); *see also* 18 U.S.C. § 371 (criminalizing conspiracies "to commit any offense *against the United States*," including ones "*to defraud the United States*") (emphasis added); 18 U.S.C. § 3771(b)(1) (rights set forth in CVRA apply only to proceedings "involving an offense against a crime victim").

2. Paragraph 188

In contrast to paragraphs 165 and 166, paragraph 188 does mention the Parkers in connection with violation of the CAA's knowing-endangerment

provision and it recites a date within the applicable statute of limitations. GER44-45 (Superseding Indictment ¶ 188) ("*beginning on or about November 3, 1999 and continuing until on or about June 15, 2000* … the defendants, W.R. GRACE, ALAN R. STRINGER, JACK W. WOLTER, and ROBERT J. BETTACHI did knowingly release and caused to be released into the ambient air a hazardous air pollutant, namely, asbestos, and at the time knowingly placed another person in imminent danger of death or serious bodily injury *by selling real property* known as the 'Screening Plant' to the Parker family."). Nonetheless, paragraph 188 provides no support for the Parkers' contention that they are "victims" of that offense within the meaning of the statute.

As the district court recognized, it is hard to see *how* the knowing endangerment offense, which is only "complete upon the introduction into the ambient air of a hazardous air pollutant, could be complete upon the transfer of title to real property." GER81. But even if that were possible, the indictment itself doesn't actually allege that the Parkers were victims of the release that allegedly took place by virtue of the title transfer. Indeed, in clear contrast to the other CAA counts, this count of the indictment does not even vaguely identify *who* was endangered by the release it alleges:

> Paragraph 186 (Count II): [B]eginning on or about November 3, 1999, and continuing until on or about February 3, 2005, at Libby, within the State and District of Montana, defendant W.R. Grace did knowingly release and caused to be released into the ambient air a

> hazardous air pollutant, namely, asbestos, and at the time, knowingly placed another person, *namely the residents of the town of Libby and Lincoln County* in imminent danger of death of serious bodily injury.…
>
> Paragraph 188 (Count III): [B]eginning on or about November 3, 1999 and continuing until on or about June 15, 2000 … the defendants, W.R. GRACE, ALAN R. STRINGER, JACK W. WOLTER, and ROBERT J. BETTACCHI did knowingly release and caused to be released into the ambient air a hazardous air pollutant, namely, asbestos, and at the time knowingly placed another person in imminent danger of death or serious bodily injury.…

Given the striking absence of a "namely clause" in this count of the indictment and resulting lack of specificity, the most that can be said is that it is possible that the charged release allegedly endangered the Parkers. But it is equally possible that the charged release allegedly endangered someone else entirely. After all, as the indictment elsewhere charges, there was "a commercial nursery on said property," GER38 (Superseding Indictment ¶ 166); *see also* Parkers' Pet. at 3 (noting that "the Parkers … built a commercial nursery there, *hiring employees and encouraging customers to come there*") (emphasis added). As a result, this count of the indictment just as easily could be read to charge that the offense was committed against the nursery's employees or its customers, but not the Parkers themselves.

These vagaries—the indictment's utter failure to specify the particular release that has been charged and the particular individual who was harmed by that release—have long been recognized by the district court. Indeed, they previously

led the court to express its concern that the jury could convict the defendants of violating the CAA without agreeing unanimously about the particular act of endangerment underlying the verdict and/or the particular person endangered by it, and therefore to announce its intention to protect Defendants' constitutional right to a unanimous verdict by employing "curative instructions to the jury, special interrogatories to insure unanimity, or the dismissal of all or part of the offending count." Continuing Offense Order, 429 F. Supp. 2d at 1246. And they are precisely why the district court observed in its CVRA order that "*As the government has charged the offenses in Counts I, II, III, and IV*—the counts to which the Act is applicable—the Court cannot identify any crime victims as the Act defines them." GER69.

At the end of the day, the Government—and, perhaps unfortunately, the Parkers—has to live with the consequences that follow from the manner in which it has charged the offenses in this case. By "proceeding in the broadest manner possible," *United States v. W. R. Grace & Co.*, Unpublished Order (Dist. Ct. Docket No. 753) at 19-20 (Sept. 19, 2006), choosing "not to allege that any particular person was endangered by the charged releases," *id.*, and then adopting both an "unusual theory of criminal liability," GER66, and entirely "novel theory of the case" that seeks to leapfrog the statute of limitations, GER73, the Government has made it impossible at this stage to identify who—if anyone—was

harmed by the conduct giving rise to the charges in this case. These problems easily could have been avoided before the Government obtained its indictment; but having opted to make "[t]he identities of the victims … a part of the government's evidence, not a part of its theory," 401 F. Supp. 2d at 1111-12, they cannot now be dodged. The district court did not come close to erring when it recognized these consequences, and the Petitions should be denied.

In light of the foregoing analysis, Petitioners' remaining arguments need not be addressed—with the possible exception of the Parkers' assertion that the district court somehow violated the "law of the case" doctrine. In a word, that argument is frivolous. As this court has held:

> The doctrine simply does not impinge upon a district court's power to reconsider its own interlocutory order provided that the district court has not been divested of jurisdiction over the order…. The legal effect of the doctrine of the law of the case depends upon whether the earlier ruling was made by a trial court or an appellate court. *All rulings of a trial court are subject to revision at any time before the entry of judgment*. A trial court may not, however, reconsider a question decided by an appellate court.

City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 888-89 (9th Cir. 2001) (quoting *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986), with added emphasis and internal quotations omitted); *see also Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981) ("As long as a district … court has jurisdiction over the case … it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be

sufficient."). Thus, even if there were an inconsistency between the district court's years-old suggestion that there may be victims against whom alleged offenses were committed for purposes of the CVRA and its more recent conclusion—informed by years of intervening developments and careful consideration of this case—that those persons cannot yet be identified, the "law of the case doctrine" provides no basis whatsoever for the entry of extraordinary mandamus relief.

CONCLUSION

For the foregoing reasons, the Petitions should be denied.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit R. 28-2.6, Defendants-Respondents hereby incorporate the Petitioners' Statement of Related Cases.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 11,655 words. I used Microsoft Word 2000 to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2009, pursuant to an agreement among all counsel, I served the foregoing JOINT BRIEF OF RESPONDENTS-REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS upon each of the following counsel by electronic mail:

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