No. 08A3

IN THE SUPREME COURT OF THE UNITED STATES

ALISA DEAN *ET AL.*

Applicants,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS AND BP PRODUCTS NORTH AMERICA INC.,

Respondents.

OPPOSITION TO APPLICATION FOR STAY PENDING FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

To the Honorable Antonin Scalia, Circuit Justice for the Fifth Circuit:

Applicants request the "extraordinary" remedy of a stay pending the filing and disposition of a petition for certiorari. *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (Rehnquist, C.J., in chambers) (internal quotation omitted). Respondent BP Products North America Inc.—the criminal defendant in the underlying case—respectfully submits that the request is unwarranted and should be denied. As a threshold matter, the plain language of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, precludes the requested stay. And even if the stay were not statutorily barred, applicants nonetheless fail to satisfy the demanding criteria for such extraordinary relief. These points are discussed in turn below.

I. The Plain Language of the CVRA Precludes a Stay.

Applicants are not entitled to an indefinite stay pending the filing and disposition of a petition for certiorari, first and foremost, because the statute under

which they are suing specifically precludes such relief. Although the CVRA grants crime victims unprecedented procedural rights to participate in the criminal justice system, it carefully defines and sharply limits their appellate rights. In particular, the statute provides that, if the district court denies victims the relief they seek, they "may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). The statute then requires the court of appeals to "take up and decide such application forthwith within 72 hours after the petition has been filed," and specifies that "*[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter*." *Id.* (emphasis added)

Needless to say, applicants' request for an indefinite stay pending the filing and disposition of a petition for certiorari seeks a stay of "more than five days," *id.*, and is thus barred by the plain language of the statute. Applicants try to avoid that straightforward point by asserting that it is "readily apparent from the text" of the CVRA that the prohibition on stays of more than five days "pertains only to the power of the *courts of appeals* to grant a stay in some circumstances," and "simply has no bearing on this application to this higher court." Stay App. 19 (emphasis in original). That is so, according to applicants, because § 3771(d)(3) "specifically mentions the 'court of appeals' four times," but does not mention this Court. *Id.* But the statutory limitation on stays is not restricted to the courts of appeals; rather, that provision broadly provides that "[i]n no event shall *proceedings be stayed* … [for] more than five days for purposes of enforcing this chapter." 18 U.S.C. § 3771(d)(3) (emphasis added). Indeed, if anything, the fact that § 3771(d)(3)

elsewhere only mentions the courts of appeals cuts *against* applicants: if the only appellate review contemplated by the statute is mandamus review by the courts of appeals, then the logical inference is that the applicants have no right to pursue further review in this Court at all. There is no basis in law or logic to conclude that the CVRA requires the courts of appeals to decide mandamus petitions within 72 hours and prohibits them from entering stays of more than five days, but then authorizes unfettered review by this Court free from the statutory limitation on stays. Any such conclusion, of course, would wholly frustrate the statutory objective of expediting appellate review under the CVRA in the first place.

Nor can applicants avoid the plain language of § 3771(d)(3) by invoking the maxim that repeals by implication are disfavored. *See* Stay App. 20-21 (citing *Beall v. United States*, 336 F.3d 419, 429 (5th Cir. 2003)). According to applicants, nothing in § 3771(d)(3) should be interpreted to "impliedly repeal[]" judicial authority to grant stays under other statutes such as 28 U.S.C. §§ 1651(a) and 2101(f) for more than five days. *Id.* at 20-21 & n.3. But that approach simply reads § 3771(d)(3) out of the U.S. Code. The maxim that repeals by implication are disfavored does not give courts a license to ignore a statute's plain text. Indeed, that maxim is wholly irrelevant here, since § 3771(d)(3) in no way "repeals" either § 1651(a) or § 2101(f), which continue to operate with full vigor except in the limited context of the CVRA. Instead, the relevant maxim here is that "the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (Scalia, J.), so that the specific limitation on stays set forth in § 3771(d)(3) limits the

more general authorization of stays set forth in §§ 1651(a) and 2101(f). That is the only way "to make sense rather than nonsense out of the *corpus juris*." *West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (Scalia, J.); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.") (internal quotations omitted); *Pennsylvania Dep't of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.").

Applicants further insist, however, that they are not seeking a stay "for purposes of enforcing this chapter," but instead "to enable them to obtain a writ of certiorari" from this Court. Stay App. 21 (internal quotations and brackets omitted). That argument is meritless. The whole point of the requested stay, as well as the forthcoming petition for certiorari, is to allow applicants to enforce their alleged rights under § 3771, a/k/a "this chapter." Accordingly, applicants cannot deny that they are seeking a stay for purposes of enforcing their alleged rights under § 3771.

Finally, applicants suggest that applying the plain language of § 3771(d)(3) would give rise to "serious separation of powers questions." Stay App. 21 n.3. That

argument is puzzling. As noted above, the CVRA gives crime victims certain procedural rights to participate in the criminal justice system, but at the same time sharply limits their appellate rights. Congress did not have to allow crime victims any appellate review whatsoever. Nor, having decided to grant some limited appellate review, was Congress forced to grant unlimited review, or to authorize unlimited stays while victims pursue appellate review. Given that Congress can limit this Court's appellate jurisdiction altogether, *see Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), there is certainly no constitutional problem with limiting stays, even if (as applicants assert) such limitations have the "practical effect of depriving the Supreme Court of jurisdiction to review their claims (and claims from other similarly situated crime victims in future cases)." Stay App. 21 n.3. Indeed, if any "serious separation of powers questions" lurk under the surface of this case, they relate to the infringement of the Executive's power to enforce the laws by entering into criminal plea agreements, not the Judiciary's power to grant stays.

II. Applicants Fail to Satisfy the Demanding Criteria for a Stay.

Above and beyond the dispositive threshold point that the CVRA affirmatively bars the extraordinary relief applicants are seeking, they cannot satisfy the traditional criteria for such relief. "The practice of the Justices has settled upon three conditions that must be met" before issuance of a stay pending certiorari. *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). "There must be [1] a reasonable probability that certiorari will be granted (or probable jurisdiction noted), [2] a significant possibility that the judgment below will be reversed, and [3] a likelihood of irreparable harm (assuming

the correctness of the applicant's position) if the judgment is not stayed." *Id.* As explained below, none of these factors—much less all three of them—would justify the extraordinary remedy of a stay pending the filing and disposition of a petition for writ of certiorari (even assuming such a stay were statutorily permissible).

A. Reasonable Probability That Certiorari Will Be Granted

Applicants contend that there is a "reasonable probability that certiorari will be granted" because the circuits are divided over the standard for appellate review of petitions for mandamus under the CVRA. *See* Stay App. 8-9 (noting conflict between the decision below and *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (*per curiam*), on the one hand, and *In re Walsh*, 229 Fed. Appx. 58 (3d Cir. 2007) (*per curiam*) (unpublished); *Kenna v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir. 2005), on the other hand).

While it is certainly true that a circuit conflict tends to be an important factor motivating this Court's exercise of its discretion to grant certiorari, such a conflict is neither necessary nor sufficient to warrant review. Here, notwithstanding the conflict, applicants cannot establish a "reasonable probability that certiorari will be granted." *Barnes*, 501 U.S. at 1302.

As an initial matter, the circuit conflict on the nature of mandamus review under the CVRA is more apparent than real. As noted above, two circuits (the Fifth and the Tenth) have held that the traditional mandamus standard applies under the CVRA, while three other circuits (the Second, Third, and Ninth) have held that a more relaxed standard applies in this context. But there is no reason to think

that this distinction made any difference in any of the cases. In *W.R. Huff* and *Walsh* (the Second and Third Circuit cases), the courts held that a more relaxed standard of mandamus review applied in the CVRA context, *see* 409 F.3d at 563; 229 Fed. Appx. at 60-61, but nonetheless denied relief even under that standard, *see* 409 F.3d at 563-64; 229 Fed. Appx. at 60-61. In *Kenna* (the Ninth Circuit case), the court held that a more relaxed standard of review applies, *see* 435 F.3d at 1017, but granted relief and strongly suggested that relief would be warranted even under the traditional mandamus standard, *see id.* In *Antrobus* (the Tenth Circuit case) and this case, the courts held that the traditional mandamus standard applied, and denied relief. *See* 519 F.3d at 1124-26; *id.* at 1126-27 (Tymkovich, J., concurring); *In re Dean*, 527 F.3d 391, 393-94 (5th Cir. 2008) (*per curiam*). But it is far from clear that these courts would have reached a different result under the more relaxed standard advocated by applicants here. Indeed, the Tenth Circuit made that point expressly in *Antrobus*, noting in response to a petition for rehearing that "[p]etitioners … fail to explain how the outcome would necessarily change under the standard of appellate review they seek. Neither is it obvious to us that the outcome would change." 519 F.3d at 1130-31 (order on denial of panel rehearing); *id.* at 1131 ("[Petitioners] fail to demonstrate or even suggest how adopting their proposed standard of review would affect the outcome of their petition.").

The same is true here. Although the Fifth Circuit ultimately denied applicants' petition for mandamus, the court nonetheless addressed the merits of their claims and *agreed* with applicants that their rights under the CVRA had been

violated. *See Dean*, 527 F.3d at 394-95. The Fifth Circuit emphasized the importance of victims' participation in the criminal justice system, and remanded the case to the district court (which has not yet accepted the proposed plea agreement) to consider their views. As the Fifth Circuit put it, "[w]e are confident … that the conscientious district court will fully consider the victims' objections and concerns in deciding whether the plea agreement should be accepted." *Id.* at 396; *see also id.* ("We … deny relief, confident that the district court will take heed that the victims have not been accorded their full rights under the CVRA and will carefully consider their objections and briefs as this matter proceeds."). Applicants hardly could have expected anything more, even if the Fifth Circuit had accepted their proffered standard of review. Indeed, the result here is strikingly similar to the result in *Kenna*, in which the Ninth Circuit applied a relaxed standard of mandamus review under the CVRA. There, as here, the appellate court concluded that CVRA rights had been violated, but simply remanded to the district court without ordering any particular remedy. *See Kenna*, 435 F.3d at 1017-18. In other words, *Kenna* itself belies applicants' assertion that "[i]f ordinary appellate standards apply …, *no … avoidance of relief* for the victims is possible," and that "[t]he standard-of-review issue is *outcome determinative* in this case." Stay App. 10 (emphasis added).

Certainly, given the fact that the law in this area is developing quickly, it is neither necessary nor appropriate for this Court to enter the fray before it becomes clear that the apparent circuit conflict is more than illusory. It is worth noting that

no court has endorsed a relaxed mandamus standard under the CVRA since the Tenth Circuit rejected that standard, after careful analysis, in *Antrobus*. *See* 519 F.3d at 1124-25; *see also id.* at 1127-31 (order denying petition for rehearing). The Fifth Circuit is the only circuit to address this issue in the wake of *Antrobus*, and the Fifth Circuit sided with the Tenth Circuit. There is reason to believe that other circuits may now do so too, especially because the standard of review does not appear to have affected the result in any of the cases that endorsed a more relaxed standard of review. Indeed, the Ninth Circuit in *Kenna* followed the Second Circuit's lead in *W.R. Huff* in part because "[w]e are aware of no court of appeals that has held to the contrary." 435 F.3d at 1017.

In any event, this case does not present a good vehicle for addressing the conflict. As noted above, this case presents the threshold question whether the CVRA by its terms precludes a stay of more than five days. The underlying standard of review issue will be presented in the forthcoming petition for certiorari in *Antrobus*, which (in light of a recently granted extension of time, No. 07A951) is now due on August 11, 2008. That case presents the underlying standard of review issue without the threshold stay issue because the defendants there already have been sentenced pursuant to their guilty pleas, and the victims are not barred from seeking to re-open those pleas because the defendants there did not plead "to the highest offense charged." 18 U.S.C. § 3771(d)(5)(C); *see also United States v. Hunter*, No. 2:07-CR-307-DAK, 2008 WL 153785, at *2 (D. Utah Jan. 14, 2008). Particularly given that applicants here have not shown how resolution of the

standard-of-review issue in their favor would lead to a different result in this case, this case simply does not present a good vehicle for deciding that issue.

B. Significant Possibility That The Judgment Below Will Be Reversed

Applicants next contend that a stay is warranted because there is a "significant possibility" that the judgment below will be reversed in the event this Court were to grant certiorari. Stay App. 11. Again, applicants are wrong. Even assuming *arguendo* that this Court were to grant certiorari in this case to resolve the circuit conflict described above, this Court is unlikely to reverse the Fifth Circuit's conclusion that when Congress used the term "mandamus" in the CVRA, it meant to incorporate the well-defined traditional standards for mandamus review, not some undefined and indefinite "junior varsity" mandamus standard. *See Dean*, 527 F.3d at 393-94.

Indeed, the Tenth Circuit's reasoning on this point (which the Fifth Circuit adopted by reference, *see id.*) is unassailable. As the Tenth Circuit 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)). This Court has often ratified this basic principle of statutory interpretation and judicial restraint. *See, e.g.*, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 613 (1992) (Scalia, J.); *Braxton v. United States*, 500 U.S. 344, 351 n.* (1991) (Scalia, J.). There can be no question, as the Tenth Circuit further explained, that

"mandamus is the subject of longstanding judicial precedent" with which Congress presumptively is familiar. *Antrobus*, 519 F.3d at 1124; *see also id.* at 1127 ("Mandamus is a well worn term of art in our common law tradition.") (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170-71 (1803) and *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380 (2004)). Under this view, when Congress chose to authorize review of CVRA rulings by allowing an aggrieved party to "petition the court of appeals for a writ of mandamus," 18 U.S.C. § 3771(d)(3), Congress understood that mandamus review was sharply limited in scope. If Congress had wanted to authorize plenary appellate review, it could and presumably would have done 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.").

The circuits that have ruled otherwise have provided no such reasoned explanation for their approach. Indeed, the Second Circuit's decision in *W.R. Huff*—the wellspring of the contrary line of authority—relies on a unsustainable leap of logic. After describing the traditional demanding standards for mandamus review, the *W.R. Huff* Court declared as follows:

> Under the plain language of the CVRA, … 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 at 562 (statutory citations omitted). But that is a classic *non sequitur*. The fact that Congress chose mandamus as the vehicle for appellate review in no

way suggests that Congress intended to relax the traditional standards for mandamus relief. The Second Circuit never explained why Congress would have used the word "mandamus" if it meant "appeal." Similarly, the Ninth Circuit in *Kenna* simply asserted, without analysis, that "[t]he CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute." 435 F.3d at 1017. The Ninth Circuit provided no support for that assertion other than to cite the Second Circuit's decision in *W.R. Huff*. *See id.* And the Third Circuit, in turn, did nothing more than cite *Kenna* and *W.R. Huff*. *See Walsh*, 229 Fed. Appx. at 60-61.

Because the Second, Third, and Ninth Circuits made no effort whatsoever to anchor their approach in the language of the statute, applicants gamely take up the challenge. The CVRA demands plenary appellate review notwithstanding its reference to "mandamus," applicants contend, because the statute "directs that 'the court of appeals *shall take up and decide* such application [for mandamus] forthwith….'" Stay App. 11 (quoting 18 U.S.C. § 3771(d)(3); emphasis added by applicants; brackets modified). Applicants argue that this "command" to "take up and decide" the mandamus petition "transform[s] a discretionary mandamus petition into a mandatory appeal." *Id.*

But that is yet another *non sequitur*. That fact that Congress authorized appellate review by way of a petition for writ of mandamus, and required appellate courts to "take up and decide such application forthwith within 72 hours after the petition has been filed," 18 U.S.C. § 3771(d)(3), in no way suggests that Congress

intended to change the ordinary standards for mandamus review. To the contrary, as the Tenth Circuit has explained, the requirement that a court of appeals must decide a CVRA mandamus petition within 72 hours only *confirms* that the scope of review of such a petition is sharply limited. *See Antrobus*, 519 F.3d at 1130 ("It seems unlikely that Congress would have intended *de novo* review in 72 hours of novel and complex legal questions."). Applicants cannot, and do not, dispute that the Fifth Circuit took up and decided their mandamus petition. Their problem is that nothing in the statute requires a court of appeals, in taking up and deciding a mandamus petition, to depart from the traditional standards for mandamus review, much less to grant relief or any particular remedy.

Undeterred, applicants next invoke the maxim that "a 'statute should be read to avoid rendering its language redundant if reasonably possible.'" Stay App. 12 (quoting *Arana v. Ochsner Health Plan*, 352 F.3d 973, 978 (5th Cir. 2003)). According to applicants, the Fifth and Tenth Circuits' conclusion that mandamus means mandamus would render "superfluous" the CVRA's "detailed provisions about crime victims' mandamus petitions," because "before the CVRA's enactment, a crime victim could (like anyone else) seek discretionary mandamus under the All Writs Act." *Id.* But that is simply not true. Before the CVRA's enactment, a crime victim had none of these rights. Having created the underlying CVRA rights, Congress could have denied the recipients of those rights any appellate review whatsoever. Congress instead chose to give the recipients of those rights sharply limited appellate rights, as spelled out in § 3771(d)(3). By making mandamus the

exclusive mechanism for challenging an alleged denial of CVRA rights, and sharply limiting the time for mandamus review, Congress made clear that crime victims do not have ordinary appellate rights in this context. Far from being "superfluous," Stay App. 12, the mandamus provisions of § 3771(d)(3) thus prevent crime victims from claiming that they are entitled to even greater appellate rights. Accordingly, it is ironic that applicants now argue that those very provisions somehow *relaxed* the traditional standards for mandamus review.

Similarly, applicants' reliance on legislative history, *see* Stay App. 12-14, gets them nowhere. They note that, in hearings on the legislation, Senators Kyl and Feinstein stated that the CVRA authorized appellate review by way of a petition for mandamus to remedy alleged errors. *See id.* But none of those statements says that mandamus petitions under the CVRA are to be decided under different standards (except insofar as specified in the statute itself) than ordinary mandamus petitions. To be sure, sometimes Senators Kyl and Feinstein referred to a crime victim's "appeal," rather than "mandamus petition," but there is no indication that those references were anything other than a mere shorthand, and were meant to overturn traditional standards for mandamus review. Individual legislators' statements, after all, are not the law, and are not to be parsed like statutes. In light of the unambiguous statutory text and the venerable *Morisette* presumption, even the most determined of the "[o]ther Justices on the Court [who] frequently resort to legislative history," Stay App. 12 n.1, would be unlikely to find these

snippets sufficient to warrant creating an entirely new and indeterminate mandamus standard of review under the CVRA.

At bottom, thus, this is not a situation where circuits on either side of a split engaged in careful and deliberate analysis and reached conflicting results. Rather, this is a situation in which the first circuit to address the question (the Second Circuit) made an unwarranted and unexplained logical leap, but nonetheless was followed by two other circuits (the Third and Ninth Circuits) before another circuit (the Tenth) finally gave the issue some overdue scrutiny. For the very reasons that the Fifth Circuit in this case had little difficulty in siding with the Tenth Circuit's cogent analysis, *see Dean*, 527 F.3d at 393-94 (citing *Antrobus*, 519 F.3d at 1127), applicants cannot show that there is a "significant possibility" that this Court would reverse the Fifth Circuit's judgment even if it were to grant certiorari.

C. Likelihood Of Irreparable Injury

Applicants finally contend that a stay is warranted because they will suffer irreparable injury absent such a stay. *See* Stay App. 14-16. Although applicants did not file their stay request in this Court for two weeks after the Fifth Circuit denied their stay request, they assert that immediate relief from this Court is necessary because "[w]ithout a stay, the District Court will be free to continue to review—and quite possibly accept—the proposed plea agreement," which would allow respondent BP Products North America Inc. to "*argue* that the victims will have lost the ability to seek any further appellate protection of their rights." *Id.* at 14, 15-16 (emphasis added).

The most telling thing about this argument is that applicants are very careful *not* to say that their petition *would* be rendered moot in the event the district court were to accept the plea agreement. Rather, applicants try to hedge their bets, asserting that respondent may "argue" mootness without themselves taking any position on that point. But, as the party with the burden of establishing irreparable injury, applicants do not have the luxury of playing so coy.

Indeed, it is far from clear what decision applicants are even seeking to stay. As applicants concede, the Fifth Circuit has issued its mandate, so the case is already back in the district court. *See* Stay App. 21-22. Under these circumstances, applicants do not explain how "a stay of the enforcement of the judgment and decree of the Court of Appeals," *id.* at 1, would help them. In the end, as applicants grudgingly admit, they appear to be asking this Court to stay the district court proceedings directly. *See id.* at 21 n.3. But applicants have never asked the district court to stay its own proceedings, and they do not explain why they did not seek relief from that court in the first instance. *See* S. Ct. R. 23(3).

In addition, the "injury" that applicants are now suggesting might be "irreparable"—their alleged injury arising from their inability to re-open a guilty plea "to the highest offense charged," 18 U.S.C. § 3771(d)(5)(C)—stems from the statute itself. Congress authorized crime victims to "make a motion to re-open a plea … *only if* … the accused has not pled to the highest offense charged." *Id.* (emphasis added). Where, as here, the accused was charged with only one offense, any guilty plea would necessarily be "to the highest offense charged." *Id.* If the

district court were to accept the plea, applicants' inability to re-open the plea (and accordingly their injury) would flow from the statute, not the decision below. In other words, applicants' real grievance is with their limited rights under the CVRA: even "assuming the correctness of [applicants'] position," *Barnes*, 501 U.S. at 1302, with respect to the decision that they intend to challenge in their petition for certiorari, the "injury" that that they now characterize as "irreparable"—their inability to re-open a guilty plea to "the highest offense charged"—is simply not a cognizable injury under the CVRA, and hence provides no basis for a stay.

Indeed, as a practical matter, it is far from clear that applicants have suffered any "injury" at all from the decision below. As noted above, although the Fifth Circuit ultimately denied mandamus relief, the Fifth Circuit *accepted* applicants' basic submission that their rights under the CVRA had been violated, and remanded this case with "confiden[ce]" that the district court would fully consider their objections before accepting the plea. *See Dean*, 527 F.3d at 396. There is no question that applicants received a full and fair opportunity to present their views on the plea to the district court in open court, in the presence of counsel for the government. *See id.* Thus, nothing prevents both the district court and the government from considering those views before the proposed guilty plea is finalized. Applicants' "injury" argument appears to stem from their misguided assumption that the standard-of-review issue that they intend to present to this Court would be "outcome determinative," Stay App. 10, on the theory that an ordinary appellate standard of review, as opposed to a mandamus standard of

review, would necessarily give them "ordinary appellate relief—i.e., a rejection of the proposed plea agreement, sending the parties back to renegotiate." *Id.* at 14. As noted above, that assumption is unwarranted: there is nothing magical about ordinary appellate review that would give applicants an "*assured remedy* for the established violation of their right." *Id.* at 15 (emphasis added). *See generally Kenna*, 435 F.3d at 1017-18.

D. Other Equitable Considerations

Even assuming that applicants could satisfy all three of the foregoing conditions, moreover, those conditions "are not necessarily sufficient" to warrant a stay, and "[e]ven when they all exist, sound equitable discretion will deny the stay when 'a decided balance of convenience,' does not support it." *Barnes*, 501 U.S. at 1304-05 (quoting *Magnum Import Co. v. Coty*, 262 U.S. 159, 164 (1923)). "It is ultimately necessary, in other words, to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (internal quotation omitted).

Here, the injury to applicants (if any) from the denial of a stay is substantially outweighed by the injury to respondent BP Products North America Inc. and to the public interest more generally. It goes without saying that a criminal defendant has the most substantial stake in the resolution of its own criminal proceeding. That is not to deny that victims also have a legally cognizable stake in that proceeding; the CVRA created such a stake. But, as noted above, the CVRA imposed substantial limitations on the victims' stake, including a ban on seeking to reopen guilty pleas "to the highest offense charged." 18 U.S.C.

§ 3771(d)(5)(C). Certainly, in light of that statutory ban, a criminal defendant's right to prompt adjudication of a guilty plea "to the highest offense charged" outweighs a victim's non-existent (because counter-statutory) interest in re-opening such a plea. Similarly, the judicial system as a whole has an important interest in ensuring the prompt resolution of pending criminal matters, and additional delay thus harms the public interest in finality.

Here, the plea proceedings already have been substantially delayed, given that sentencing originally was scheduled for November 27, 2007. That delay is particularly inappropriate in light of Congress' manifest efforts to *prevent* the CVRA from becoming an engine of delay in an already backlogged criminal justice system, including the requirements that a district court must decide a motion under the CVRA "forthwith," that a court of appeals must decide any mandamus petition "within 72 hours after the petition has been filed," and that "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter." 18 U.S.C. § 3771(d)(3). In light of these short deadlines, applicants cannot fairly characterize the indefinite stay they are requesting (which, in light of their representation that they do not even intend to file their petition until August 25, 2008, *see* Stay App. 23, would likely last for at least four months) as "relatively short," *id.* at 17; in this context, such a delay is remarkably long. No such delay is warranted. Accordingly, this Court should deny the application for a stay.

Respectfully submitted,

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