Exhibit 1

No. _____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Melvin and Lerah Parker,

Petitioners

-against-

United States District Court
for the District of Montana,

Respondent.

PETITION FOR A WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771(d)(3)

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

This petition is filed by Melvin and Lerah Parker of Libby, Montana, who are listed in the Superceding Indictment in this case as having been knowingly placed in imminent danger of death or serious bodily injury by the defendants. The Parkers are among 34 witnesses in the Government's case who the district court has refused to recognized as "crime victims," thereby precluding them from attending the trial as sequestered witnesses.

This petition arises out of a criminal case currently being prosecuted in the United States District Court for the District of Montana styled as *United States v. W.R. Grace & Co., Alan R. Stringer, Henry A. Eschenbach, Jack W. Wolter,*

William J. McCaig, Robert J. Bettacchi, O. Mario Favorito, and Robert C. Walsh, No. CR-05-07-M-DWM. The named defendants are interested parties to this petition. Defendant W.R. Grace & Co. is a publicly-held Delaware corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Grace filed for Chapter 11 bankruptcy in federal court in Delaware in April 2001. That proceeding remains pending.

This criminal case has been handled by District Judge Donald W. Molloy. Because this is a mandamus petition, the United States District Court for the District of Montana is technically the respondent. FED. R. APP. P. 21(b)(4).

NOTICE OF RELATED PROCEEDINGS

This Court has previously considered issues arising out of the underlying criminal prosecution in *United States v. W.R. Grace*, 493 F.3d 1119 (9th Cir. 2007), *rehearing en banc granted by United States v. W.R. Grace*, 508 F.3d 882 (9th Cir. 2007), *on rehearing en banc*, *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (regarding district court authority to require disclosure of government witness list and other issues); and in *United States v. W.R. Grace*, 504 F.3d 745 (9th Cir. 2007) (regarding "knowing endangerment" provision of the indictment and other issues).

This Court has also affirmed an award of costs against W.R. Grace in a "Superfund" case arising out of the asbestos contamination that is at issue in the criminal prosecution. *United States v. Grace*, 429 F.3d 1224 (9th Cir. 2005).

STATEMENT OF THE RELIEF SOUGHT

Petitioners Melvin and Lerah Parker petition this Court, pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3); the All Writs Act, 28 U.S.C. § 1651; and Fed. R. App. P. 21, for a writ of mandamus directing the United States District Court for the District of Montana to recognize them as "crime victims" under the CVRA of the crimes charged in *United States v. W.R. Grace et al.*, Case No. CR-05-07-M-DWM, and to afford them all of the rights that crime victims are guaranteed under the Act – including in particular the right to attend the criminal trial.

ISSUES PRESENTED

The Superseding Indictment in this case alleges that the defendants violated the Clean Air Act by knowingly placing the Parkers in imminent danger of death or serious bodily injury through release of asbestos at the Parkers' residence. The Crime Victims' Rights Act extends rights to all persons who have been "directly and proximately harmed as the result of the commission of a Federal offense . . . ." 18 U.S.C. § 3771(e). The district court nonetheless ruled that the Parkers were not protected "crime victims" under the Act because they were not "directly and proximately harmed as the result of" the crimes alleged in the Superseding Indictment, but merely placed at risk of harm.

1. The first issue presented in this petition is whether the charge of "knowing endangerment" through release of asbestos at the Parkers' residence sufficiently demonstrated harm to the Parkers to place them within the protections of the CVRA.

2. The second issue presented in this petition is whether the fact that the Parkers have been diagnosed with asbestosis, a chronic inflammatory medical condition affecting lung tissue, is sufficient to establish that they have been harmed "as the result of" the offenses charged in the Superseding Indictment.

3. The third issue presented in this petition is whether the district court erred in denying the Parkers "crime victim" status on the eve of trial when the earlier "law of the case" was that persons in their position were protected victims under the CVRA.

STATEMENT OF FACTS

The Superseding Indictment in this case alleges that the defendants in this case knew the dangers of the asbestos they caused to be released into the Libby, Montana air, yet they concealed the dangers, knowingly placing the Parkers and others at imminent risk of death or serious bodily injury. As explained in more detail in the Superseding Indictment, from 1963 through 1992, defendant W.R. Grace & Company mined vermiculite ore at a site seven miles outside Libby, and

then processed it nearby, including processing at a property known as the "Screening Plant" close to Libby. The vermiculite ore contained amphibole asbestos. Amphibole asbestos is a carcinogen and highly dangerous when inhaled, as it can trigger (after a latency period of many years) asbestosis and other asbestos-related diseases. W.R. Grace and the other defendants well knew these deadly dangers based on extensive confidential studies they had undertaken. Superseding Indictment at ¶¶ 6-8, 14-16, 47-51, 163-67, Mandamus Ex. 1.[1]

W.R. Grace approached the Parkers in October 1992 and offered to sell them the Screening Plant property. In December of that year, the sale was concluded. Yet from that day forward, W.R. Grace, knowing that the Parkers were establishing a residence on the property, failed to disclose the asbestos risk associated with it. Superseding Indictment at ¶ 163-67. Indeed, the Parkers not only established their residence on the property, but they built a commercial nursery there, hiring employees and encouraging customers to come there. They also used the property to provide a temporary home to five grandchildren over an extended period of time. As a result of W.R. Grace's decision to conceal the presence of asbestos, the

1 Along with this Petition, the Parkers have filed various exhibits, which are cited here as "Mandamus Ex. 1." The language in the Indictment is essentially identical to the language in a later-obtained Superseding Indictment. Because the Superseding Indictment is currently the operative charging instrument, all references in this petition are to the Superseding Indictment, which is attached as Exhibit 1. The original indictment in this case can found in the district court file as docket #1.

Parkers' children and grandchildren became exposed to dangerous levels of this hazardous substance. Brief in Support of Parkers' Motion to Assert Rights Pursuant to the CVRA at 5, Mandamus Ex. 3.

Both Melvin and Lerah Parker have asbestosis. *Id.* at 4. Asbestosis is a progressive disease that destroys the human lungs' ability to absorb oxygen and, in severe cases, results in severe disability or death. Superseding Indictment at ¶ 49, Mandamus Ex. 1. The Parkers, unfortunately, do not stand alone in Libby, as the rate of asbestosis mortality of the Libby population is 40 to 80 times higher than expected when compared to rates for Montana and the United States. *Id.* at ¶ 50.

PROCEEDINGS BELOW

On February 7, 2005, the Government filed its original Indictment in this case, charging in Count I that the defendants conspired toward (among other things) the object of releasing asbestos, a hazardous air pollutant, thus knowingly endangering members of the Libby community. Among the overt acts alleged in the conspiracy count was that the defendants, "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." Superseding Indictment at ¶ 166. The Indictment also charged, in Count III, that the Parkers had been

knowingly endangered because the defendants "did knowingly release and cause 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, in violation of 42 U.S.C. § 7413(c)(5)(A), 18 U.S.C. § 2." Superseding Indictment at ¶ 190.

Because they were specifically mentioned in the Indictment, the Parkers received notices from the Government of their rights under the Crime Victims' Rights Act. The district court also concluded the Justice Department had "duties" under the Act. *See United States v. Grace*, 401 F.Supp.2d 1057, 1063-64 (D. Mont. 2005).

After various extended pre-trial legal proceedings over nearly four years,[2] the district court set a trial date of February 23, 2009. Shortly before trial, on January 22, 2009, the district court held a pre-trial motions hearing. At that hearing, after considering arguments from defense counsel and the Government (but without hearing from, or giving notice to the Parkers or any of the other affected victim-

2 The Government filed a Superseding Indictment on June 26, 2006. In *United States v. W.R. Grace*, 504 F.3d 745 (9th Cir. 2007), this Court reversed the district court's dismissal of various counts of that Superseding Indictment, rejecting the district court's conclusion that the statue of limitations barred certain additions to the knowing endangerment allegations.

witnesses), the district court ruled that the Parkers and all of the Government's witnesses would be sequestered, excepting only the case agent and expert witnesses. The district court acknowledged the right of crime victims to attend trials under the CVRA, 18 U.S.C. § 3771(a)(3), but then concluded that the right did not apply to the Parkers and other similarly-situated witnesses: "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 a robber of 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." Hearing of Jan. 22, 2009, Tr. at 304, Mandamus Ex. 2. The district court then quoted the definition of protected "crime victim" found in the CVRA – i..e., "a person directly and proximately harmed as a result of the commission of a federal offense . . . ." *Id.* at 304-05 (*quoting* 18 U.S.C. § 3771(e)). Immediately after reciting the definition, the district court stated: "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." *Id.* at 305. The district court therefore excluded all of the government's witnesses, including the Parkers, under the general rule of witness sequestration – Fed. R. of Evid. 615. *Id.* at 332.

On February 2, 2009, the Government filed a motion asking that the Court declare that 34 witnesses – including the Parkers – be declared to be "crime victims" with protected rights under the CVRA. The Government explained that "the Superseding Indictment alleges facts that, if taken as true, show that each of the thirty-four victim-witnesses suffered harm, . . . i.e., . . . the action and/or inaction of one or more of the defendants placed these specific individuals in imminent danger of death or serious bodily injury." Gov't Br. in Support of Motion to Accord Rights to Victim-Witnesses at 6-7 (district court dkt. #897). The Government supported its motion with a sealed exhibit describing how each of the 34 individuals was linked to the allegations of harm in the Superseding Indictment. *Id.* at 9.

Nine days later, the Parkers were able to obtain *pro bono* legal counsel to represent their interests and filed their own motion seeking recognition as protected "crime victims" under the Crime Victims' Rights Act. The Parkers' supporting brief explained that they were specifically identified in the Superseding Indictment as having been knowingly endangered by the defendants. Therefore, they easily fit the CVRA's definition of victim. The brief also noted that the Parkers suffer from asbestosis and therefore had compelling reasons for wanting to observe the medical testimony during the trial, along with a more general interest in attending the trial to see whether justice was being done. The Parkers also requested an accelerated

decision on their motion, in light of the CVRA's promise to victims of a right to a decision on their motions "forthwith." 18 U.S.C. § 3771(d)(3).

The seven defendants (represented by several dozen defense attorneys) filed no response to either the Government's motion or the Parkers' motion.

On February 13, 2009, the district court rejected both the Government's and the Parkers' motions. The court first concluded that the proper methodology for determining whether someone was a victim under the CVRA was to "assume that the federal offense alleged has occurred, and then identify, if possible, who was directly and proximately harmed as a result of the commission of the offense." Order of Feb. 13, 2009, at 9, Mandamus Ex. 4. The district court then turned to the specifics of this case, explaining that the "problem is a consequence of the government's novel theory of the case." *Id.* at 11. Under the knowing endangerment provisions of the Clean Air Act, criminal penalties are possible for "any person who knowingly releases in to the ambient air any hazardous air pollutant . . . and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury . . . ." 42 U.S.C. § 7413(c)(5)(A). Reading this provision, the district court was unwilling to afford the Parkers (and other Government witnesses) any rights under the CVRA because, in its view, the

charges involved mere "risk of harm" rather than "harm" itself. The district court stated that the charges involved exposing the witnesses

> to an imminent risk of harm. The [Crime] Victims' Rights Act, on the other hand, defines a crime victim as "a person directly and proximately harmed." . . . One plausible resolution of the issue here is to say that the federal offenses alleged in the Superseding Indictment have "victims" who have been exposed to an imminent risk of harm, but who have not necessarily been harmed. This interpretation leads to the conclusion that because victims of the federal offenses alleged are not necessarily harmed, they are not necessarily victims under the Act, which are by definition person directly and proximately harmed.

Order of Feb. 13, 2009, at 18, Mandamus Ex. 4.

The district court also specifically rejected the Parkers' argument that Count III of the Indictment made them victims: "Count III seems to allege that the sale of the property exposed the Parker family to an imminent *risk* of harm. It does not allege the Parkers were directly and proximately *harmed* as a result of the commission of the offense of the knowing endangerment." *Id.* (emphases added). Accordingly, the district court denied the Parkers' motion (and the Government's motion for the other witnesses). This timely petition for mandamus review followed.[3]

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3 The Parkers are filing six days after the district court's ruling, using the time computation rules spelled out in Fed. R. Crim. P. 26(a).

Also, this morning the trial in the underlying criminal case began in federal district court in Missoula, Montana. The Parkers, however, remain unable to observe the proceedings, as they continue to be covered by the trial judge's sequestration order.

STANDARD OF REVIEW

I. THE PARKERS ARE ENTITLED TO ORDINARY APPELLATE REVIEW, NOT DEFERENTIAL MANDAMUS REVIEW.

Even though the Parkers have filed a petition for mandamus relief, they are entitled to ordinary appellate review of their claims rather than deferential mandamus review. The Parkers come before the Court through a provision in the CVRA specifically providing that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3).[4] Ordinarily, the issuance of a writ of mandamus lies in large part within the discretion of the court of appeals. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). The plain language of the CVRA, however, specifically and obviously overrules conventional mandamus standards by directing that "[t]he court

4 As the plain language of this provision indicates, the CVRA appellate review procedure is available not only to those who have previously been found to be "crime victims" but more broadly to those who are "movants" under the statute. *See, e.g., In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (reviewing on CVRA mandamus petition the issue of whether movants were "crime victims" under the CVRA); *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) (same), *petition for rehearing pending*.

of appeals *shall take up and decide such application forthwith* . . . ." 18 U.S.C. § 3771(d)(3) (emphasis added). As explained by the CVRA's Senate co-sponsor, Senator Feinstein, the CVRA thus involves "*a new use* of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of his rights by a trial court to the court of appeals . . . ." 150 CONG. REC. S4262 (April 22, 2004 (statement of Sen. Feinstein) (emphases added).

This Court has held that petitioners under the CVRA are entitled to ordinary appellate review and need not make some extraordinary showing. In *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006), this Court explained that the CVRA's plain language modifies many aspects of mandamus procedure to give crime victims a quick way to obtain appellate review:

> [T]he CVRA contemplates active review of orders denying victims' rights claims even in routine cases. The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.

Id. at 1017. Three Circuits agree with this Court, although there is now a "circuit split" on this issue. *See In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562-63 (2d Cir. 2005) ("a petition 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"); *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008) (recognizing petitioners as "victims" under the CVRA without requiring any extraordinary showing); *In re Walsh*, 229 Fed.Appx. 58 at *2 (3rd Cir. 2007) (citing and following *Kenna* and *Huff* in affording ordinary appellate review). *But see In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008) (without looking at the legislative history or purposes of the CVRA "respectfully disagree[ing] . . with the decision of our sister circuit courts" and holding that crime victims must meet heightened mandamus standards of showing a "clear and indisputable" error); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (same). Because *Kenna* is the well-settled law of this Circuit, the Parkers are entitled to ordinary appellate review of their claim.

II. THE LEGAL QUESTION OF WHETHER THE PARKERS ARE "VICTIMS" IS REVIEWED *DE NOVO*.

Because the facts in this case have not been disputed, the legal question underlying this petition – whether the Parkers fit the definition of "crime victims" under the CVRA – is a legal issue that is reviewed *de novo*. *See, e.g., United States*

v. Brock-Davis, 504 F.3d 991, 996, 998-99 (9th Cir. 2007) (reviewing issue of whether entity was a "crime victim" under restitution statute *de novo*); *United States v. De La Fuente*, 353 F.3d 766, 771 (9th Cir. 2003) (same).

STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

Petitioners Melvin and Lerah Parker are spending today at their home in Libby, Montana, rather than attending the trial of the defendants in the federal courthouse in Missoula, Montana. They have been barred by court order from watching the trial because they are witnesses in the case.

The Parkers are keenly interested in that trial. They wish to learn everything they can about the crimes, about the medical evidence on asbestosis, and, more generally, about whether justice is being done in this criminal prosecution.

The Parkers would have a statutory right to attend the trial if they are "crime victims" under the CVRA. CVRA promises all "victims" of federal crimes a series of rights, including a right to attend the trial. 18 U.S.C. § 3771(a)(3). It broadly defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e). Nonetheless, the district court has refused to recognize the Parkers as victims of the crimes be tried. The court reasoned that because the charges in this case allege release of hazardous asbestos placing the Parkers in imminent danger of death or serious bodily injury –

rather than actually killing or seriously injuring them – they were not "victims" of alleged offenses. The district court's conclusion threatens to strip crime victims of their rights in a whole host of federal criminal proceedings and should be reversed for three separate reasons.

First, the Superseding Indictment alleges that the Parkers have been placed in "imminent danger of death or serious bodily injury." Being placed in grave danger is, *ipso facto*, a harm sufficient to trigger the protections of the CVRA. Any other conclusion would mean that there would be no "victims" of a whole host of federal offenses that involve threat of injury rather than actual physical injury, including not only the most serious environmental crimes but other federal offenses such as attempted murder, drive-by shooting, assault, child endangerment, and mailing of threatening communications. These offenses are not "victimless" crimes because they create fear and other emotional injuries. The Parkers have been harmed by the defendants' crimes because of the obvious psychic harm stemming from being placed in the shadow of imminent death and serious bodily injury. Moreover, in this case the Parkers have suffered very tangible harm from being forced to undertake medical monitoring to detect any asbestosis that might develop. For reasons such as these, this Court has already held that a person who is knowingly

exposed to a hazardous substance has been harmed. *United States v. Elias*, 269 F.3d 1003, 1021-22 (9th Cir. 2001).

Second, even if physical injury were a necessary precondition for the Parkers to claim their rights, they have suffered physical injury. Tragically, they both have asbestosis – a clear physical harm that the district court simply ignored in denying them "crime victim" status.

Finally, for several years it has been the "law of the case" that the Parkers (and other victim-witnesses like them) were protected by the CVRA. Shortly before the trial, the district court abruptly changed their status by concluding that they were not protected victims under the CVRA. The district court violated the "law of the case" doctrine in reversing course without any good reason for doing so.

I. THE CRIME VICTIMS' RIGHTS ACT BROADLY DEFINES THE "CRIME VICTIMS" WHO ARE ENTITLED TO CLAIM ITS PROTECTIONS, INCLUDING ITS RIGHT TO ATTEND THE TRIAL.

A. The CVRA is Remedial Legislation That Gives Crime Victims Generous Rights to Participate in the Federal Criminal Justice Process.

The Crime Victims' Rights Act is broad, remedial legislation that Congress passed and the President signed into law in October 2004. Pub. L. No. 108-405, 118 Stat. 2251 (codified at 18 U.S.C. § 3771). Congress intended to enact a "broad and encompassing" statute "which provides enforce[able] rights for victims." 150

CONG. REC. S4261 (Apr. 22, 2004) (statement of Sen. Feinstein). Congress was concerned that crime victims in the federal system were "treated as non-participants in a critical event in their lives. They were kept in the dark by . . a court system that simply did not have a place for them." *Id.* To reform the system, Congress gave victims "the simple right to know what is going on, to participate in the process where the information that victims and their families can provide may be material and relevant . . . ." *Id.*

The CVRA gives victims of federal crimes a series of rights, including the right to notice of court proceedings and the right "not to be excluded from any . . . public court proceeding" except on clear and convincing evidence that the victim's testimony would be materially altered. 18 U.S.C. § 3771(a)(3). The CVRA further assures victims broadly that they will "be treated with fairness." 18 U.S.C. § 3771(a)(8).

Congress intended the CVRA to dramatically rework federal criminal proceedings. In the course of construing the CVRA generously, this Court has observed: "The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process." *Kenna v. U.S. Dist. Court for C.D.*

Cal., 435 F.3d 1011, 1013 (9th Cir. 2006). Accordingly, as remedial legislation, the CVRA "is to be construed broadly so as to achieve the Act's objective." *Padilla v. Lever*, 463 F.3d 1046, 1057 (9th Cir. 2006).

B. Congress Intended that the Courts Give the CVRA's Definition of "Crime Victim" a Generous Construction.

This Court should give liberal construction not only to the CVRA as a whole but to its definition of "crime victim" in particular. After reciting the definition-of-"victim" language at issue here, one of the Act's two co-sponsors explained that it was "an *intentionally broad definition* because all victims of crime deserve to have their rights protected . . . ." 150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added). The description of the victim definition as "intentionally broad" was in the course of floor colloquy with the other primary sponsor of the CVRA and therefore deserves significant weight. *See Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011, 1015-16 (9th Cir. 2006) (discussing significance of CVRA sponsors' floor statements). The provision at issue here must thus be construed broadly in favor of the Parkers.

C. The Right to Attend a Trial is Critically Important for Crime Victims and the Parkers.

One of the rights protected in the CVRA is the victim's right to attend the trial unless there is some compelling reason for exclusion. The crucial reason for this right was articulated by Senator Feinstein in the CVRA's legislative history. She explained in words that apply directly to the Parkers that:

> Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to . . . be present at proceedings is counter to the fundamental principles of this country. It is simply wrong.

150 CONG. REC. S4268 (Apr. 22, 2004) (statement of Sen. Feinstein).

The protection in the Crime Victims' Rights Act for victims to attend trials builds on well-established values. In 1982, President Reagan's Task Force on Victims of Crime found that "the crime is often one of the most significant events in the lives of victims and their families." PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 80 (1982). The Task Force therefore concluded that victims, "no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial." *Id.* In the wake of that recommendation, many states (and, of course, Congress) have passed laws allowing victims to observe the trial. *See generally* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascedant National*

Consensus, 9 LEWIS & CLARK L. REV. 481 (2005). The Parkers are, therefore, simply seeking to exercise a fundamental right recognized throughout this country.

It is worth noting that the defendants have no constitutional right to sequester the Parkers. *See Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988); *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006) (upholding right of victim representatives to attend trial under the CVRA). *See generally* Beloof & Cassell, 9 LEWIS & CLARK L. REV. at 527-34 (comprehensively collecting the case law on the issue). The defendants' ability to sequester the Parkers therefore hinges on Fed. R. Evid. 615. But that rule contains an exclusion for "a person authorized by statute to be present." Fed. R. Evid. 615(4). Because the CVRA generally authorizes victims to attend trial,[5] it "abrogate[s] Rule 615, at least with respect to crime victims." *In re Mikhel*, 453 F.3d at 1139.

5 The CVRA does allow a victim to be sequestered, but only if the trial court "after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony" at trial. 18 U.S.C. § 3771(a)(3). The defendants have never even argued – much less carried their burden of providing clear and convincing evidence – that the Parkers' testimony would be in any way altered – much less "materially" altered – if they were afforded the right to attend the trial. Therefore, the defendants have waived any right to make such a claim now. Moreover, even if they were to attempt to make such a claim now, it would be spurious. They would have no good faith basis for even asserting – much less proving clearly and convincingly – that there would be a "material" change in the Parkers' testimony. *See* 150 CONG. REC. S4268 (Apr. 22, 2004) (statement of Sen. Kyl) (this provision will allow crime victims to attend trials "in the vast majority of cases"). Finally, before the district court could even consider excluding the Parkers, it would be obligated to "make every effort to permit the fullest attendance possible by the victim" and to "consider reasonable alternatives to the exclusion of the victim from the criminal proceeding." 18 U.S.C. § 3771(b)(1).

II. THE PARKERS ARE ENTITLED TO ASSERT THEIR RIGHTS AS "CRIME VICTIMS" BASED ON THE ALLEGATIONS IN THE INDICTMENT.

In ruling that the Parkers were not victims, the District Court first assumed that they were entitled to rely on the allegations made in the Superseding Indictment in seeking "victim" status. *See* Order of Feb. 13, 2009, at 9. But because it is possible that the defendants may challenge this conclusion, it is worth briefly noting why crime victims can rely on an indictment's allegations in obtaining their rights.

A court can properly presume that an indictment is supported by probable cause. *See FDIC v. Mallen*, 486 U.S. 230, 240-41 (1988). Accordingly, an allegation in the indictment that a person is a victim is sufficient to trigger rights under the CVRA.[6] As one of the nation's leading criminal procedure hornbooks has explained: "Whether a person is a victim is determined *pretrial* by reference to the factual allegations in the charging instrument." LAFAVE, ISRAEL, KING & KERR, 1 CRIMINAL PROCEDURE § 1.5(k) at n. 415.5 (3rd ed. 2007-08) (emphasis added).

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[6] It is not necessary, however, that a victim be listed in the indictment to have rights under the CVRA. *See In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008) ("The CVRA . . . does not limit the class of victim to those whose identity constitutes an element of the offense or who happen to be identified in the charging document. The statute, rather, instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties. Under the plain language of the statute, a party may qualify as a victim, even though [he] may not have been the target of the crime, as long as [he] suffers harm as a result of the crime's commission."); *see also United States v. Brock-Davis*, 504 F.3d 991, 999 (9th Cir. 2007) (awarding restitution to "crime victim" not mentioned in the indictment because mention in the indictment is "immaterial" to obtain victim status).

Any other conclusion would gut the CVRA. The CVRA gives crime victims rights with regard to proceedings involving not only convicted defendants, but also rights before any conviction. *See* Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 594 (2005) (article by CVRA Senate co-sponsor explaining that rights apply *at least* by indictment). One clear example is the CVRA's conferral of rights on victims to be heard at bail hearings. *See* 18 U.S.C. § 3771(a)(4) (giving victims the right to be heard at any proceeding involving "release"). Of course, a defendant has not been convicted at this point in the process – yet the CVRA gives victims procedural rights at this time. These rights implicitly require courts to treat persons as "crime victims" under the CVRA based on the allegations in a filed criminal indictment. This is a commonplace feature of crime victims' rights enactments around the country. *See generally* BELOOF, CASSELL & TWIST, VICTIMS IN CRIMINAL PROCEDURE 52 (2d ed. 2006) ("Most victims' rights statutes . . . link formal victim status to the *filing* of criminal charges"). If victims' rights had to await a jury determination of guilt, then it would be impossible to afford crime victims any rights in the criminal justice system except at sentencing. As one federal judge has recognized, "That syllogism – which renders the CVRA inapplicable to this or any

other criminal case unless and until the defendant is proved guilty beyond a reasonable doubt – produces an absurd result that I must presume Congress did not intend." *United States v. Turner*, 367 F.Supp.2d 319, 326 (E.D.N.Y. 2005). Indeed, one court has even indicated that "[i]t goes without saying that" victims would have rights under the CVRA after the filing of an indictment. *United States v. Rubin*, 558 F.Supp.2d 411, 422 (E.D.N.Y. 2008). This Court has followed the same approach. *See In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006) (reversing pre-trial sequestration order of victim family members under the CVRA before any finding of guilt).

III. THE PARKERS ARE "VICTIMS" UNDER THE CVRA BECAUSE THEY WERE HARMED BY THE DEFENDANTS' CRIME OF KNOWINGLY PLACING THEM IN IMMINENT DANGER OF DEATH OR SERIOUS BODILY INJURY.

A. The Superseding Indictment Specifically Identifies the Parkers as Having Been Harmed.

As is clear from the Second Superseding Indictment, the Parkers are "crime victims" of the defendants' crimes, because they are "person[s] directly and proximately harmed as result of" the crimes. 18 U.S.C. § 3771(e). The Superseding Indictment in fact specifically identifies the Parkers as victims in Counts I and III. Count I (the conspiracy count) charges that "[o]n or about December 17, 1993, defendants W.R. GRACE and BETTACCHI 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." Indictment at ¶ 165 (emphasis added), Mandamus Ex. 1. The conspiracy count goes on to state that "[b]eginning on or about December 17, 1993, defendants W.R. GRACE, BETTACCHI 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." *Id.* at ¶ 166 (emphasis added).

Count III also identifies the Parkers as victims, alleging what is commonly referred to as knowing endangerment under the Clean Air Act, specifically:

> That beginning on or about November 3, 1999 and continuing until on or about June 15, 2000, at Libby within the State and District of Montana, 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 by selling real property known as the "Screening Plant" *to the Parker family*, in violation of 42 U.S.C. § 7413(c)(5)(A), 18 U.S.C. § 2.

Indictment at ¶ 188 (emphasis added).

In light of these allegations, it is clear that the Superseding Indictment identifies the Parkers as the victims of the defendants' charged crimes.[7] Focusing just on Count III, for example, the underlying statute (42 U.S.C. § 7413(c)(5)(A)) forbids the release of hazardous substances into the ambient by anyone "who knows at the time that he thereby places *another person* in imminent danger of death or serious bodily injury . . . ." One of the elements of the offense, therefore, is endangering a victim. *See United States v. Protex Industries, Inc.*, 874 F.2d 740, 744 (10th Cir. 1989) (interpreting parallel "knowing endangerment" provision in RCRA; "[t]he gist of the 'knowing endangerment' provision of the RCRA is that a party will be criminally liable if, in violating other provisions of the RCRA, [he] places *others* in danger of great harm").

Related portions of the statute confirm this understanding. Immediately after the penalty provision of § 7413(c)(5)(A), Congress has added an affirmative defense if the person endangered consents to the danger:

> It is an affirmative defense to a prosecution that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of –

7 Because the Superseding Indictment charges a crime of "knowing" endangerment, it is also clear that this case is quite distinguishable from those involving "toxic torts." Exposing someone tortiously (i.e., negligently) to a toxic substance is a far cry from "knowingly" exposing someone to such a substance. If a tort analogy is to be drawn to this case, it would be something like the tort of knowing endangerment or perhaps intentional infliction of emotional distress.

> (i) an occupation, a business, or profession; or
> (ii) medical treatment or medical or scientific experimentation conducted by professional approved methods and such other person had been made aware of the risks involved prior to giving consent.

42 U.S.C. § 7413(c)(5)(C). This provision demonstrates that in some circumstances the person endangered would not be viewed as a victim of the offense, because he would have consented to the danger involved in the charge. At the same time, the logical implication is that, absent proof of this affirmative defense, Congress understood that the person endangered was a victim.

B. Being Placed in Imminent Danger of Death or Serious Bodily Injury Is Not a "Risk of Harm" but Harm Itself.

Even though the Superseding Indictment viewed the Parkers as victims of the defendants' offenses, the district court was nonetheless unwilling to afford the Parkers (and other Government witnesses) their rights under the CVRA. In the district court's view, the charges in the Superseding Indictment involved mere "risk of harm" rather than "harm" itself. Order of Feb. 13, 2009, at 18, Mandamus Ex. 4. The district court, for example, specifically rejected the Parkers' argument that Count III of the indictment made them victims: "Count III seems to allege that the sale of the property exposed the Parker family to an imminent *risk* of harm. It does not allege the Parkers were directly and proximately *harmed* as a result of the commission of the offense of the knowing endangerment." *Id.* (emphases added).

If the district court believed that it lacked a sufficient basis for finding the Parkers to be victims based on the allegations in the Superseding Indictment, then it clearly made in mistake in not looking to the other evidence in the case. The Government in its charging documents obviously focused on covering the elements of the offense – not providing all of the details regarding how the Parkers and other persons had been harmed by the defendants. "The CVRA . . . does not limit the class of victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document. The statute, rather, instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties." *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008). Here, the harmful effects of the offenses on the Parkers were clearly shown by their own pleadings to the district court. *See* Part IV, *infra* (discussing Parkers' asbestosis).

But even focusing solely on the charging instrument in this case, the district court's sweeping reasoning is fatally flawed and should be rejected. A person who is identified in the indictment as having been knowingly placed in imminent danger of death or serious bodily injury through release of a hazardous substance has been – *ipso facto* – harmed.

1. The Clean Air Act Does Not Use the Term "Risk" But Rather the Term "Danger."

The district court jumped to substitute the word "risk" of harm to describe the crimes charged in this case. Indeed, the district court specifically stated: "According to the charging statute's own terms, a victim of the offense is another person exposed to an imminent *risk* of harm." Order of Feb. 13, 2009, at 18, Mandamus Ex. 4 (emphasis added). This is simply untrue. By its "own terms," the Clean Air Act provides criminal penalties for "any person who knowingly releases into the ambient air any hazardous air pollutant . . . and who knows at the time that he thereby *places another person in imminent danger* of death or serious bodily injury . . . ." 42 U.S.C. § 7413(c)(5)(A) (emphasis added). Thus, the prohibited result is not placing another person at "risk" but rather placing them in "imminent danger."

This is no mere semantic quibble; the concept of placing someone in danger is not analyzed in terms of risking harm, but rather is generally recognized as a harm itself. This is known as the doctrine of "danger creation" liability. As recently explained in *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006), "[T]his circuit has held state officials liable, in a variety of circumstances, for their roles in creating or exposing individuals to *danger* they otherwise would not have faced" (emphasis added). Accordingly, because the Parkers have been placed in "imminent danger," they have been harmed.

2. Risk-Creation Crimes are Not "Victimless" Crimes.

More generally, even assuming that the district court was correct in describing the statute as a "risk"-creation statute, the court was wrong to conclude that placing someone at grave risk does not harm them.

It is important to understand what is at stake under the district court's reasoning. If the district court's broad proposition that even being placed in imminent danger of death or serious bodily injury through an environmental crime is not sufficient "harm" to trigger the Crime Victims' Rights Act, then crime victims' rights in environmental crimes will be a dead letter. The most important criminal environmental statutes are all written in parallel terms involving knowing endangerment. *See* 42 U.S.C. § 7413(c)(5)(A) (Clean Air Act); 42 U.S.C. § 6928(e) (RCRA); 33 U.S.C. § 1319(c)(3)(B) (Clean Water Act). If charges under these statutes do not confer rights on victims, then environmental crimes will effectively become "victimless" crimes.

Indeed, if the district court's analysis is accepted, crime victims' rights will be swept away in many other contexts. Consider, for example, a prosecution for attempted murder under 18 U.S.C. § 1113. If the defendant intends to kill a person and shoots a bullet at that person's head, the fact that the bullet whistles past the person's ear rather than striking and killing him would, in the district court's view,

seemingly be a mere "risk of harm" rather than actual harm. Under the district court's reasoning, then, such a crime of attempted murder becomes a "victimless" crime because the target faced mere risk of death from the bullet, rather being injured or killed.

Other examples of incongruous results generated by the district court's approach are easy to find. For instance, the federal criminal code defines a "crime of violence" as including any felony offense "that, by its nature, involves a substantial *risk* that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16 (emphasis added). Violent crimes under this section would seemingly become "victimless" crimes if the district court's analysis is followed, as risk of physical force being used is not the same as actual force being used.

As another illustration, the federal criminal code provides a 25-year prison term for a drive-by shooter, that is, for any person "who, in furtherance . . . of a major drug offense and with the intent to intimidate, harass, injure, or maim, fires a weapon into a group of two or more persons and who, in the course of such conduct, causes grave *risk* to any human life . . . ." 18 U.S.C. § 36(b)(1) (emphasis added). This crime, too, is seemingly rendered victimless through the analysis of the district court. Under the district court's analysis, it makes no difference if the

drive-by shooter hits someone. Because the statutory offense is defined in terms of "grave risk" rather than actual injury, it cannot have a victim.

As one final illustration, consider the crime of "assault" within federal jurisdiction. 18 U.S.C. § 113. This crime is committed not only by actually injuring a person but also by "a *threat* to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (emphasis). For instance, waving a knife in someone's face is an assault. *See* WAYNE R. LAFAVE, CRIMINAL LAW 737 (3d ed. 2000) (in contrast to battery, "[a]ssault, on the other hand, needs no such physical contact; it might almost be said that it affirmatively requires an absence of contact"). But following the district court's reasoning, because the crime of assault can involve a mere "threat" to inflict injury rather than requiring the infliction of injury, it is a "victimless" crime.

The district court's clear error was in equating the required "harm" under the CVRA with some sort of immediate physical injury. This approach would constrict the CVRA to the federal criminal offenses that involve direct physical injury – leaving out other crimes such attempted murder, drive-by shootings, assault, stalking, child endangerment, mailing threatening communications, and a whole

host of other crimes where the essence of the offense is placing a person at risk physically, psychologically, or economically.[8] But there is simply no basis for concluding that Congress wanted the "harm" necessary to trigger the protections of the CVRA narrowly confined to those producing physical injury. To the contrary, Congress adopted an "intentionally broad definition" of "victim," 150 CONG. REC. S4270 (Apr. 22, 2004) (statement of Sen. Kyl), that was designed to make "victims independent participants in the criminal justice process." *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). The sweeping congressional purpose would be plainly thwarted if large swaths of the federal criminal code were viewed as defining mere "victimless" crimes outside the protections of the CVRA.[9]

Congress presumably would not have wanted the uninjured target of an attempted murder or drive-by shooting to be denied victim status simply because of the mere fortuity of the criminal's bad aim with his gun. At a minimum, the target

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8 The district court's approach would seemingly cover certain forms of completed financial crimes that result in out-of-pocket financial losses to a victim, but would seemingly exclude crimes in which the financial loss had yet to materialize.

9 The examples given above have all involved specific crimes that are defined in terms of risk of a particular *result* occurring. But many other crimes are defined in terms of risk through the *mens rea* they employ. For example, crimes of recklessness involve conscious disregard of a risk to another person. *See, e.g., United States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005). Crimes of negligence involve failing to be aware of a risk that a reasonable person should have been aware of. The district court's analysis also seems to turn many of these crimes into victimless crimes, as the elements of these offenses are defined in terms of risk.

of an attempted murder or drive-by shooting suffers fear and an invasion of his right to personal security, thereby suffering harm. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 122 (4th ed. 2006) ("'[S]ocial harm' may be defined as the negation, *endangering*, or destruction of an individual, group, or state interest which was deemed socially valuable. Thus, the drunk driver and the attempted murderer of the sleeping party have *endangered* the interests of others, and have caused 'social harm' under this definition") (emphases added) (internal quotation omitted). Indeed, a whole host of offenses commonly thought to be covered by the Crime Victims' Rights Act rest on this chain of reasoning. A victim of assault, for example, who has had a knife waved in his face has not suffered direct physical injury but surely qualifies for protection under the Act because of the psychic toll and invasion of his sense of security that such a crime entails.[10]

More generally, being exposed to a risk creates a harm to a victim. As one legal scholar has explained, "We have an interest in being safe – in being securely free of the risk of substantive harm; that interest is set back when I am endangered, even if no substantive harm ensues." R.A. Duff, *Criminalizing Endangerment*, 65

10 A psychic toll is not the only sort of intangible harm that can establish a "victim." For example, an affront to dignity by itself has been found to confer "crime victim" status under the CVRA. *See United States v. Goodwin*, 287 Fed.Appx. 608, 2008 WL 2906515 at *1 (9th Cir. 2008) (referring to a child as a "victim" under the CVRA of the crime of the possession of child pornography).

LA. L. REV. 941, 949 (2005). Similarly, another scholar concluded that all persons "have a legitimate interest in avoiding unwanted risks. A [defendant] who inflicts a risk of harm on another damages that interest, thus lowering the victim's baseline welfare." Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 964 (2003) (answering "yes" to the question posed in the title). As a result, being exposed to a risk of disease like asbestosis is clearly a harm:

> If harm is [defined as] a setback to a legitimate interest, it should not be difficult to see why risk of harm is itself a harm, for it is not difficult to make the case that exposure to risk is a setback to a legitimate interest. [I]t is clear from the fact that a normal, non-suicidal person would choose a higher rather than a lower chance of developing cancer that there is a perfectly commonsensical way in which being exposed to an increased risk of developing cancer is a setback to a person's most fundamental interests.

Id. at 972-73.

So too here: even setting aside the medical fact that the Parkers' lungs are now impaired by asbestosis (discussed in Part IV of this Petition), the single fact that they (and their children and grandchildren) must live their lives in the shadow of having been placed in imminent danger of death or serious bodily injury creates far more than sufficient harm to obtain the protection of the Crime Victims' Rights Act. In the words of one of the drafters of the CVRA, "Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives." 150 CONG. REC. S4268 (Apr. 22, 2004) (statement of Sen. Feinstein). The

Parkers and their family members have been placed in considerably more danger than, for example, the uninjured victim of someone displaying a knife. They should accordingly be recognized as crime victims under the CVRA.

3. The Danger the Parkers Faced Harmed Them By Forcing Them to Take Remedial Medical Measures.

The Parkers have suffered not only from the psychic and emotional harm of being placed in danger through the defendants' crimes, but more tangibly through the obvious need to take responsive remedial measures. The defendants' crimes have forced them to undertake medical monitoring, not only for themselves but also for their children and grand children.[11] Such medical monitoring is reasonable under the circumstances. *See Abuan v. General Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993) (allowing medical monitoring where as a proximate result of exposure to a harmful substance a "plaintiff suffers a significantly increased risk of contracting a serious latent disease"). Such medical monitoring is also obviously the direct result of the defendants' crimes. Moreover, even if asbestosis had not yet materialized, the Parkers would have to remain ever vigilant for its symptoms in their lungs by virtue of the fact that the defendants have exposed them to asbestos.

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11 Should it be necessary for the proper resolution of their Petition, the Parkers can provide medical bills and other quantification of the significant financial costs they have borne due to medical monitoring. The Parkers were unable to provide that quantification to the district court because of the suddenness of its decision that they were not crime victims, reversing the previous "law of the case" that they were. *See* Part V.B, *infra*.

This Court has plainly held that the need to take remedial measures because of a crime is "direct and proximate harm" from that crime. A good illustration comes from *United States v. De La Fuente*, 353 F.3d 766 (9th Cir. 2003), a case in which this Court found that the U.S. Postal Service was a "crime victim" of the offense of mailing threats to injure contained in 18 U.S.C. § 876(c). In *De La Fuente*, the defendant had mailed a letter with a harmless white powder, attempting to simulate anthrax. When the letter broke open at a mail processing center, the Postal Service was forced to evacuate the center, losing the work time of its employees. Because these losses were "directly related to the offense conduct," this Court concluded that the Postal Service had been "directly and proximately harmed" under the restitution statute, 18 U.S.C. § 3663A(a)(2).[12] As a result, the Postal Service was a "victim" of the offense and eligible for restitution for its employees lost time.

The loss to the Post Office found to be sufficient harm in *De La Fuente* pales in comparison to the loss that the Parkers have suffered. The Parkers must spend the rest of their lives attempting to respond not to a substance that proved to be

12 The same "direct and proximate" harm language found in the restitution statutes appears in the CVRA. In drafting the CVRA, Congress simply borrowed the phrase from the restitution statutes. *See* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 857.

harmless, but rather to asbestos – a substance that is specifically categorized as quite hazardous. *See* 42 U.S.C. § 7412(b)(1). Interestingly, the courts have found "victim" status as the result of losses stemming from the need to respond to even harmless substances because it is the defendants' crime that has necessitated the response. *See, e.g., United States v. Quillen*, 335 F.3d 219, 226 (3rd Cir. 2003) (rejecting defendant's argument that "the expense of this expeditious (but in hindsight literally unnecessary) response did not result in an actual loss directly resulting from his conduct"). If responding to a harmless substance creates victim status, surely the Parkers' need to respond to the release of asbestos at their residence that has placed them in "imminent danger of death or serious bodily," 42 U.S.C. § 7413(c)(5)(A) qualifies. Moreover, the Parkers must respond not merely to an economic loss (i.e., the loss of postal workers' time) but to a serious danger to their health and, indeed, their lives. And finally, it was the Parkers who were "knowingly" placed in danger by the defendants, not a chance intermediary like the Post Office which was harmed by happenstance. These facts plainly render the Parkers protected victims under the CVRA.

4. This Court Has Previously Recognized that Knowing Endangerment Crimes Have Victims.

If there remained any doubt about the Parkers' "victim" status, it disappears in light of this Court's previous conclusion that being knowingly exposed to a

hazardous substance is a direct and proximate harm. In *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), defendant Elias had knowingly exposed a worker (Dominguez) to cyanide, which ended up causing serious physical injuries. Elias was convicted of a knowing endangerment crime under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(e), and making false statements under 18 U.S.C. § 1001. The district court then awarded significant restitution to Dominguez pursuant to 18 U.S.C. § 3663 – a statute that authorizes restitution for any victim who has been "directly and proximately harmed" by a Title 18 offense. 18 U.S.C. § 3663(a)(2). In reluctantly reversing the district court's restitution award, this Court first observed that a Title 42 offense is not a Title 18 offense, and therefore restitution was not authorized for the RCRA conviction. This Court then turned to the Government's fallback position that restitution was authorized for the Title 18 false statements conviction. It rejected the argument with reasoning that is directly applicable here: "Elias did not harm Dominguez by lying; *he harmed him by knowingly exposing him to hazardous waste.*" 269 F.3d at 1021-22 (emphasis added). Accordingly, this Court has recognized that a knowing exposure to a hazardous substance is a "harm," and the same reasoning controls here.

For all these reasons, this Court should hold that the Parkers are "crime victims" protected by the CVRA because they were harmed when the defendants

placed them in imminent danger of death or serious bodily injury through the release of asbestos at their residential property.

IV. THE PARKERS ARE ALSO "VICTIMS" BECAUSE THE "RESULT OF" THE DEFENDANTS' CRIMES WAS HARM TO THEM – NAMELY, ASBESTOSIS.

For all the reasons just explained, the district court erred in concluding that the Parkers faced mere "risk" of harm. But even accepting this premise of the district court, it still clearly erred in holding that the Parkers were not guaranteed rights by the CVRA.

The CVRA extends its protections to those who have been harmed "as a result of" the commission of a federal offense. 18 U.S.C. § 3771(e). Assuming that the charges in this case can be described as offenses that involve the mere risk of harm, the Parkers can obtain the protections of the CVRA if "as a result of" that offense they were harmed. *See In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008). Tragically, for the Parkers (and many other government witnesses), the risk of harm has now materialized in their lungs – both Melvin and Lerah Parker have asbestosis.

The reason that the Clean Air Act forbids release of asbestosis into the ambient air is obviously that it may harm those who breathe it. As explained in the Superseding Indictment, "[a]irborne exposure to tremolite asbestos by breathing

into human lungs causes scarring of the lung tissues and can cause the disease known as 'asbestosis.'" Superseding Indictment at ¶ 48, Mandamus Ex. 1. Asbestosis is undeniably a "harm." Again, as explained in the Superseding Indictment, "[a]sbestosis is a progressive disease that destroys the human lung's ability to absorb oxygen, and in severe cases, results in severe disability or death." *Id.* at ¶ 49.

In their brief in the district court, the Parkers explained that they have "both been diagnosed with asbestosis, a chronic inflammatory medical condition affecting lung tissue . . . ." Brief in Support of Parkers' Motion to Assert Rights Pursuant to the CVRA at 4, Mandamus Ex. 3. They further asserted a connection to the defendants' crimes. *Id.* (The medical records underlying these assertions have been provided to the defendants by the Government as part of pre-trial discovery in this case.) These proffered facts were not questioned by the district court and were not challenged by the defendants.[13] Because the district court dismissed the Parkers'

13 The defendants may attempt to argue that they did not have adequate time to respond to the Parkers' arguments in the court below. If they make this claim, it should be rejected.

The Government filed its brief in support of all of the witnesses (including the Parkers) being recognized as "victims" on February 2, 2009. Br. in Support of Motion to Accord Rights to Victim-Witnesses (district court dkt. #897). The Government's brief explained that the district court was obligated to "'take up and decide any motion asserting a victim's right forthwith.'" *Id.* at 10 (*quoting* 18 U.S.C. § 3771(d)(3)). Accordingly, the defendants were on notice at that point that the district court was statutorily obligated to rule on the crime victims' motion "immediately" and "without delay." BLACK'S LAW DICTIONARY 680 (8th ed. 2004) (first definition of "forthwith").

The Parkers filed their own motion asserting their rights on February 11, 2009. Br.

motion, these facts must therefore be accepted for the limited purposes of ruling on this Petition. *See Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002) (on review of a district court order dismissing complaint, allegations in the complaint are taken as true and construed in the light most favorable to the nonmoving party).

The Parkers' assertion of a link to the defendants' crimes is hardly speculative. The Superseding Indictment recounts the chilling fact that "[t]he rate of asbestosis mortality of the Libby population is 40 to 80 times higher than expected when compared to rates for Montana and the United States." Superseding Indictment at ¶ 50. Moreover, "[m]odern science has not established a safe level for asbestos exposure for which there is no increased risk of disease." *Id.* at ¶ 47. Indeed, this Court has already ruled that it "cannot escape the fact that people are sick and dying as a result of this continuing exposure [to W.R. Grace's asbestos in

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in Support of Parkers' Motion to Assert Rights Pursuant to the CVRA, Mandamus Ex. 3. Their supporting memorandum also invoked their CVRA right to a decision "forthwith," and explained that they would consider seeking relief with this Court unless the district court extended them rights under the Act by February 17, 2009. *Id.* at 17-18.

In light of all this, the decision of the seven defendants (represented by the 37 attorneys listed in the certificate of service) not to file any sort of response should be deemed a waiver of their right to now contest these facts for the limited purpose of determining whether the Parkers are "victims" under the CVRA.

Libby, Montana]." *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1226-27 (9th Cir. 2005).[14]

Remarkably, the district court eschewed making the very determination that it had to make if it was going to reject the Parkers' motion seeking recognition as victims. The district court concluded: "In this criminal case the Court is not in a position to address whether individuals have been harmed *as [a] result of* hazardous air pollutants in Libby, Montana." Order of Feb. 13, 2009, at 19 (emphasis added). But the CVRA promised the Parkers that, if they were harmed "*as a result of*" the offenses charged in the Superceding Indictment, then they would have protected rights. The district court obviously erred in failing to consider that issue – and, indeed, in failing to ultimately find that the Parkers had been harmed by the crimes charged.

V. THE DISTRICT COURT ERRED IN FAILING TO FOLLOW THE "LAW OF THE CASE" THAT THE PARKERS WERE PROTECTED "VICTIMS" UNDER THE CRIME VICTIMS RIGHTS ACT.

14 The facts in this Court's ruling against W.R. Grace in the "Superfund" appeal can be used against it in this case, as W.R. Grace is collaterally estopped from denying them. The standard of proof is the same in this case (probable cause, see Part II, *supra*) as in the Superfund case. It is irrelevant that the other individuals defendants in this criminal case were not parties to the Superfund case. The Superfund case can be used here against defendant W.R. Grace. If based on this and the other evidence the Parkers gain a right under the CVRA to attend the criminal trial of W.R. Grace, then the individual defendants who are jointly on trial with W.R. Grace lose their statutory right to sequester the Parkers. *See* Fed. R. Evid. 615(4) (exempting from sequestration "a person authorized by statute to be present").

A. The District Court Had Effectively Ruled Earlier in the Case That the Parkers Were "Crime Victims" under the CVRA.

The district court's decision to exclude the Parkers (and other Government witnesses) from the trial because they were not "victims" was an abrupt reversal that violated the "law of the case" doctrine. The district court had previously ruled effectively that the Parkers were victims. The district court should not have reversed course on the eve of trial without an intervening change in circumstances.

This case was indicted in February 2005. On September 30, 2005, the district court released an order denying the defendants' motion for sanctions against the Government for alleged improper pretrial publicity. In the course of the ruling, the Court rejected a defense argument that a Victim-Witness Specialist within the U.S. Attorney's Office had made improper statements regarding the case during a public meeting with victims pursuant to the CVRA. The Court held:

> Most of the statements made by the Specialist are probably within the "legitimate law enforcement purpose" exception *because they were made in the course of fulfilling . . . DOJ's duties under the [CVRA]*. This is so even if the statements should not have been made in the manner they were. Although these statements were made in public and disseminated in at least one local newspaper, they relate to topics that the DOJ is arguably required to address under the [CVRA], including a right to have timely notice of proceedings.

United States v. Grace, 401 F.Supp.2d 1057, 1063-64 (D. Mont. 2005) (emphasis reordered). In ruling that the U.S. Attorney's Office had made statements "in the

course of fulfilling . . . DOJ's *duties* under the [CVRA]," the district court necessarily found that there were "crime victims" under the Act. The Office could not have had "duties" to perform under the Act if there were no crime victims.

The district court similarly ruled that the Office had obligations under the CVRA in its order directing discussion of issues at an upcoming status conference (to be held on October 24, 2008). The October 10, 2008, order identified as a matter to be discussed "[t]he Crime Victims Right Act, 18 U.S.C. § 3771, and the government's plans for complying with the statute's directive that the prosecution make its best efforts to see that crime victims are notified of and according their rights under the statute." Order of Oct. 10, 2008 at 2 (district court dkt. #814). Here again, the Government would have no need to make its "best efforts" under the CVRA to notify crime victims of their rights (*see* 18 U.S.C. § 3771(c)(1)) unless there were in fact crime victims who possessed rights under the statute.

In light of these earlier rulings,[15] it was error for the district court to reverse course on the eve of trial. Its holding that the Parkers lacked rights under the CVRA

15 The district court had also ruled that the entire community of Libby was not a victim in this case. *See* Order of May 15, 2005, at 4 ("'While the entire community of Libby is affected by asbestos issues, I am confident in this case the word *victim* was not intended to mean community'") (quoting *United States v. Grace*, 401 F.Supp.2d 1057, 1059 (D. Mont. 2005)). Of course, even if all the residents of a particular community are not victims, it hardly follows that particular individuals – like the Parkers, who suffer from asbestosis as the result of direct contact with W.R. Grace – are not victims.

ran contrary to the "law of the case." Such reversal without any change in circumstances or the relevant legal landscape was inappropriate. *See Minidoka Irrigation Dist. v. Dep't of Interior,* 406 F.3d 567, 573 (9th Cir. 2005) ("Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court . . . in the same case").

The Parkers presented this "law of the case" argument to the district court, who peremptorily rejected it:

> The Parkers assert that when the Court recognized . . . that the statements at issue in that Order were "probably within the legitimate law enforcement purpose exception because they were made in the course of fulfilling . . . DOJ's duties under the [CVRA]," the Court "necessarily found that there were 'crime victims' under the Act." The brief makes no attempt to offer an intermediate premise – which would preferably come in the form of a legal argument – connecting the first premise (the Court recognized the government was attempting to fulfill its statutory obligations) to its conclusion (there are crime victims under the Act).

Order of Feb. 13, 2009, at 17 n.7. The district court's summary rejection of the Parkers' argument overlooked the plain fact that the Parkers had offered the obvious intermediate premise. In their brief, the Parkers had explained that the U.S. Attorney's Office could not "have duties under the *Crime Victims'* Rights Act if there were no crime victims." Br. in Support of Parkers' Motion to Assert Rights Pursuant to the CVRA at 15 (emphasis in original). The Parkers' intermediate

premise is undeniable. The CVRA provides that the Justice Department and related agencies "shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the CVRA]." 18 U.S.C. § 3771(c)(1). These "best efforts" obligations, however, are not triggered until a criminal case with a "crime victim" exists. *See In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (discussing point at which Justice Department's obligations to enforce the CVRA arises); *see also In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008) (reminding the Justice Department of need to afford victims' their rights under the CVRA). Because the district court had found that the Department had best efforts "duties" under the Act, it necessarily found that there were crime victims under the Act. It conclusion to the contrary on the eve of trial should therefore be reversed as a violation of the "law of the case" doctrine.

B. The District Court's Precipitous Reversal of Course Prejudiced the Parkers by Limiting Their Ability to Produce Evidence Supporting Their Position That They Were Crime Victims.

The district court's last minute change of course also had an important practical harm on the Parkers. Until quite recently, the Parkers were following the district court proceedings and were assuming they would attend the trial. Indeed, the Parkers had been specifically notified of their protected right to attend. Then, on January 22, 2009, without any notice to the Parkers (or other Government

witnesses), the district court ruled that they lacked any rights in the case (at least until after a guilty verdict, as the issue of harm was "the critical issue . . . that [is] going to be tried," Hearing of Jan. 22, 2009, Tr. at 304, Mandamus Ex. 2). *Cf.* 18 U.S.C. § 3771(a)(8) (crime victims have the right "to be treated with fairness").[16] After the ruling, the Parkers were unable to secure (pro bono) legal counsel to defend their rights until shortly before February 11, 2009, when counsel quickly filed a motion for the Parkers in the district court. Not surprisingly, as a result of this limited time to review the case, their legal counsel were unable to submit medical records detailing the nature of their asbestosis and reasons for specifically linking it to the vercumilite mined and the asbestosis released by the defendants.[17] Counsel for the Parkers were also prevented from gathering the necessary medical bills to show precisely how much money they have spent in medical monitoring of themselves (not to mention their children and grandchildren). In view of the practical problems created for the Parkers by the district court's on-again-off-again ruling, any deficiencies in the record they assembled should not be held against

16 While the Court did hear from the Government, the rights provided in the CVRA "are personal to the individual crime victims and it is that crime victim that has the final word regarding which of the specific rights to assert and when." 150 CONG. REC. S4269 (Apr. 22, 2004) (statement of Sen. Kyl).

17 The defendants, however, have already received all of the Parkers' medical records as part of pre-trial discovery.

them.[18]

This is not to say that this Court should remand for some sort of a complicated evidentiary hearing below. The CVRA provides a bill of rights for crime victims, entitling them to notice of court hearings, to attend court hearings, and to speak at bail, plea and sentencing hearings. *See* 18 U.S.C. § 3771(a). This structure makes it clear that Congress expected that citizens who were victims of federal crimes (be they victims of robbery, burglary, fraud, assault, or any other offense) should get a notice of court hearing, could travel to the courthouse, and would then be heard regarding bail, pleas, and sentences. Indeed, in discussing the CVRA's provisions giving victims "standing" to enforce their rights (18 U.S.C. § 3771(d)), Senator Kyl stated: "This provision allows a crime victim to enter the criminal trial court *during* proceedings involving the crime against the victim, to *stand with other counsel in the well of the court,* and assert the rights provided in this bill." 150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphases added).

Congress' vision of crime victims entering the courtroom "during"

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18 If the Parkers are recognized as "victims" under the CVRA, they would be entitled to procedural protections in the criminal justice process, such as the right to attend the trial and the right to argue for restitution. But before the defendants could be ordered to pay any restitution to the Parkers, they would (of course) have to be convicted and then would be guaranteed the right to a full restitution hearing. *See* 18 U.S.C. § 3664(e). During that hearing, the defendants would be able to produce evidence and challenge any of the claims made by the Parkers.

proceedings and standing "in the well of the court" at the time when their rights were at stake would be obstructed if victims had to demonstrate their status in a complex evidentiary hearing. Moreover, as a practical matter, such a technical requirement would block the vast majority of crime victims from obtaining their rights. While the Parkers have legal counsel in this criminal case, the 32 other Government witnesses apparently do not. This is hardly surprising, as many crime victims (like many criminal defendants) are indigent and thus will be unable to afford legal counsel. *See* U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES (table 14) (2006) (collecting victimization statistics; highest victimization rates at lowest income levels); John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 696-701 (2002) (discussing difficulties crime victims have in securing attorneys). Moreover, most victims are unfamiliar with the intricacies of the federal criminal justice process. They may also be struggling emotionally and physically to cope with the aftereffects of serious crimes.

In the circumstances that typically surround a federal criminal prosecution, it is unrealistic to expect crime victims to be able to file some sort of complex evidentiary declaration before being protected by the CVRA. Similarly, in this case,

if this Court orders any sort of a remand, it should structure that remand to permit the Parkers and the 32 other Government witnesses to be able to quickly and easily claims their rights under the CVRA. And indeed, even simpler still, for all the reasons explained earlier in this brief, the Court should simply issue the writ and direct that the Parkers be recognized as "crime victims" under the CVRA.[19]

VI. THE COURT SHOULD RULE WITHIN 72 HOURS AND THEN ULTIMATELY PUBLISH ITS DECISION ON THIS PETITION IN VIEW OF THE NATIONAL IMPORTANCE OF THE ISSUES PRESENTED.

The Parkers are entitled to a decision on their Petition within 72 hours. *See* 18 U.S.C. 3771(d)(3). While the Parkers do not seek a stay of the trial starting this morning, they do expressly invoke their right to an accelerated decision.[20] Of course, each day that goes by sees the Parkers suffer "irreparable harm," as they are irretrievably losing the opportunity to attend the trial that was promised to them in

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19 This Court should also make clear that, upon a finding that the Parkers are "crime victims," they are immediately entitled to exercise their right to attend the trial without obstruction by the defendants. The CVRA guarantees crime victims the right to attend trial unless extraordinary showings regarding a "material" change in their testimony can be proven by the defense through "clear and convincing" evidence. 18 U.S.C. § 3771(a)(3). Such a demanding showing not possible here. *See supra* note 5.

20 In view of the extremely accelerated time frames of the CVRA, the Parkers provided notice to the parties and the Court on Tuesday, February 17, 2009, that they would be filing this petition. The Parkers also provided an electronic "courtesy" of this petition to the parties and the Court today (February 23, 2009), one day in advance of formal filing (February 24, 2009).

the CVRA.

The CVRA requires the Court to either grant this Petition or "clearly state on the record in a written opinion" any reason for denying it. 18 U.S.C. § 3771(d)(3). The Parkers respectfully request that the Court release a published opinion on the disposition of their Petition. The district court has published the opinion that is under review. *See United States v. Grace*, ___ F.Supp.2d ___, 2009 WL 368240 (D. Mont. 2009). More important, the issues raised by this Petition are likely to recur and go to the heart of the proper administration of the CVRA. There are only a few published appellate court opinions on who qualifies as a protected "crime victim" under the CVRA. *See In re Antrobus*, 519 F.3d 1123, 1125 (10th Cir. 2008) (resolving "crime victim" issue under the CVRA and finding only one published district court opinion on the subject). Moreover, many crime victims lack sufficient funds to secure legal counsel to carefully brief CVRA issues or to pursue them in the appellate courts. Accordingly, it is extremely important that, in those cases where crime victims have been able to secure counsel, that a body of case law surrounding the CVRA develop. Therefore, the Court should publish its opinion. Of course, if the Court needs additional time to publish its opinion, it could grant or deny the petition within 72 hours, with a published opinion following.

CONCLUSION

The Parkers were directly and proximately harmed as a result of offenses charged against the defendants. The writ should therefore issue to direct the district court to recognize the Parkers as "crime victims" with rights under the CVRA.

The Court should also publish its decision on this Petition, because the decision will answer important questions regarding which "crime victims" can obtain protections under the CVRA – a question of national importance that is likely to recur in the future.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2009 the foregoing Petition for a Writ of Mandamus Pursuant to the Crime Victim's Rights Act, 18 U.S.C. §3771(d)(3) was served upon the following by, pursuant to agreement with counsel, sending an electronic copy of the foregoing to the e-mail addresses indicated below:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

The undersigned certifies that this Petition complies with the limitations contained in FRAP 21 and FRAP 32(a)(7)(B) because it contains 13,352 words, fewer than the 14,000-word limit for a 30-page document, according to the Wordperfect software that counsel employs.

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