No. 22-____

IN THE

Supreme Court of the United States

JON LAWRENCE FRANK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Deanna M. Rice
Nathan T. Tschepik
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

Melissa C. Cassel
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111

Patrick L. Bryant
Counsel of Record
Cadence Mertz
FEDERAL PUBLIC DEFENDER'S OFFICE
Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0885
Patrick_Bryant@fd.org

QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act, pursuant to which retirement plan benefits "may not be assigned or alienated," 29 U.S.C. § 1056(d)(1), precludes the government from garnishing an individual's 401(k) plan account to satisfy a restitution order under the Mandatory Victims Restitution Act.

2. Whether a lump-sum distribution from a 401(k) plan account constitutes "earnings" subject to the 25 percent cap on garnishment under the Consumer Credit Protection Act, 15 U.S.C. §§ 1672(a), 1673(a).

RELATED PROCEEDINGS

United States v. Frank, No. 1:17-cr-00114-LMB-MSN-1 (E.D. Va. Apr. 26, 2022)

United States v. Frank, No. 20-6706 (4th Cir. Aug. 10, 2021)

United States v. Frank, No. 22-6806 (4th Cir. Feb. 7, 2023)

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jon Lawrence Frank respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's opinion is not reported but is available at 2023 WL 1794153 and reproduced in the Appendix to the Petition ("Pet. App.") at 1a-3a. The court of appeals' prior published opinion in this case is reported at 8 F.4th 320 and reprinted at Pet. App. 19a-46a. Relevant district court opinions are unreported but available at 2022 WL 528852 and 2020 WL 2205066 and reproduced at Pet. App. 8a-18a and Pet. App. 47a-53a.

JURISDICTION

The Fourth Circuit entered judgment on February 7, 2023. Pet. App. 1a. On April 6, 2023, the Chief Justice extended the time in which to file a petition for a writ of certiorari to June 7, 2023. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions—15 U.S.C. §§ 1672, 1673, 18 U.S.C. §§ 3613, 3663A, and 29 U.S.C. § 1056—are reproduced at Pet. App. 54a-68a.

INTRODUCTION

This case concerns the government's effort to access funds in petitioner's 401(k) retirement plan

account to satisfy a restitution order under the Mandatory Victims Restitution Act of 1996 ("MVRA").

When it comes to 401(k) plan assets, the MVRA's restitution mandate runs into two competing provisions. First, the Employee Retirement Income Security Act of 1974 ("ERISA") shields retirement plan benefits from participants' creditors, 29 U.S.C. § 1056(d)(1), to "ensure that the employee's accrued benefits are actually available for retirement purposes," H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 68 (1974). Second, the Consumer Credit Protection Act of 1968 ("CCPA") places a general 25 percent cap on garnishment of an individual's "disposable earnings," 15 U.S.C. § 1673(a)—a limitation the MVRA expressly incorporates, 18 U.S.C. § 3613(a)(3). The CCPA defines "earnings" as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise," and further specifies that this expansive definition "includes periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a).

The Fourth Circuit below, however, held that neither ERISA nor the CCPA posed an obstacle to garnishment of petitioner's retirement funds. In doing so, the court eviscerated key protections Congress has extended to retirement plan benefits—protections that by their very nature apply even when enforcing them frustrates other worthy aims.

This Court should not permit the decision below to stand. The Fourth Circuit's holding that the general provisions of the MVRA displace ERISA's specific protections for retirement benefits conflicts with *Guidry v. Sheet Metal Workers National Pension Fund*, 493

U.S. 365 (1990), where the Court explained that Congress must speak clearly if it wants to create an exception to ERISA's bar on assignment or alienation of benefits. Congress has chosen to include two explicit, detailed exceptions to that prohibition in ERISA itself, but those exceptions do not reach the circumstances here, and the MVRA does not say anything about ERISA.

Had the Fourth Circuit faithfully followed *Guidry*, the government would not have been permitted to garnish petitioner's 401(k) plan benefits at all. But the Fourth Circuit further erred in holding that the CCPA did not help petitioner either, because the funds in petitioner's retirement account were distributed—at the government's direction and over petitioner's objections—as a single lump sum, rather than a series of periodic payments. That holding conflicts with the Eighth Circuit's instruction that the "only test" for determining whether the CCPA's garnishment cap applies is "whether the payment is 'compensation paid or payable for personal services.'" *United States v. Ashcraft*, 732 F.3d 860, 863 n.4 (8th Cir. 2013) (quoting 15 U.S.C. § 1672(a)).

Certiorari should be granted.

STATEMENT

A. Statutory Background

This case involves the interaction of three federal statutes: ERISA, the MVRA, and the CCPA.

1. ERISA is "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air*

Lines, Inc., 463 U.S. 85, 90 (1983); *see* 29 U.S.C. § 1001. Congress's "most important purpose" in enacting ERISA was "to assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." S. Rep. No. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4849.

Under ERISA, "[e]very employee benefit plan" must "be established and maintained pursuant to a written instrument"—i.e., a governing plan document. 29 U.S.C. § 1102(a)(1). Plan fiduciaries, in turn, are required to act "in accordance with the documents and instruments governing the plan." *Id.* § 1104(a)(1)(D). As relevant here, and in furtherance of ERISA's aim of protecting retirement plan benefits, ERISA mandates that plan documents "provide that benefits provided under the plan may not be assigned or alienated." *Id.* § 1056(d)(1). This requirement, known as the "anti-alienation" rule, was adopted to "ensure that the employee's accrued benefits are actually available for retirement purposes." H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4734. The anti-alienation provision "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents who may be, and perhaps usually are, blameless), even if that prevents others from securing relief for the wrongs done them." *Guidry*, 493 U.S. at 376.

ERISA identifies only two situations in which its prohibition on the assignment or alienation of plan

benefits "shall not apply." 29 U.S.C. § 1056(d)(3)-(4). First, ERISA requires plans to "provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order," as defined in the statute. *Id.* § 1056(d)(3). Second, the anti-alienation rule does not bar "any offset of a participant's benefits … against an amount that the participant is ordered or required to pay to the plan if … the order or requirement to pay" arises from certain wrongs committed against the retirement plan. *Id.* § 1056(d)(4). These statutory exceptions, the Court has instructed, "are not subject to judicial expansion." *Boggs v. Boggs*, 520 U.S. 833, 851 (1997).

To encourage employers to sponsor retirement plans and employees to participate in them, Congress has made certain tax benefits available to ERISA-governed plans that comply with rules described in the tax code. In particular, the sponsoring employer may take an income tax deduction for contributions paid into the plan, *see* 26 U.S.C. § 404(a), and participants can defer taxes on benefits until they are distributed, *id.* § 402(a). The anti-alienation principle is also central to this tax scheme: a trust is "qualified" for tax purposes—i.e., it is eligible for preferential tax treatment—only if "the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." *Id.* § 401(a)(13); *see Patterson v. Shumate*, 504 U.S. 753, 759-60 (1992) (retirement plans must comply with anti-alienation rules to maintain tax-qualified status).

Recognizing the importance of the anti-alienation rule under the tax code as well as ERISA, when Congress has created exceptions to ERISA's anti-

alienation provision, it has also amended the tax code to explicitly state that plans will not lose their tax-qualified status if they permit alienation of benefits in circumstances covered by an exception. *See* 26 U.S.C. § 401(a)(13)(B)-(C).

2. The MVRA amended the federal criminal code to make restitution mandatory as to certain offenses. It provides that, "when sentencing a defendant convicted of" one of the specified offenses, "the court shall order … that the defendant make restitution to the victim of the offense … ." 18 U.S.C. § 3663A(a)(1). The covered offenses include "any offense committed by fraud or deceit." *Id.* § 3663A(c)(1)(A)(ii).

The MVRA directs that orders of restitution "shall be issued and enforced in accordance with section 3664." *Id.* § 3663A(d). Section 3664, in turn, states that an "order of restitution may be enforced by the United States in the manner provided for in" certain statutory provisions that govern enforcement of criminal fines. *Id.* § 3664(m)(1)(A)(i). The referenced provisions include 18 U.S.C. § 3613, under which "[t]he United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law." *Id.* § 3613(a). Under that provision, subject to certain exceptions, "a judgment imposing a fine may be enforced against all property or rights to property of the person fined," "[n]otwithstanding any other Federal law." *Id.*

Section 3613(a) goes on to describe a set of explicit exceptions to its authorization to collect fines (and restitution) against "all property or rights to property." The exceptions are described by reference to a

provision of the tax code that lists various property exempted from tax levies. *See id.* § 3613(a)(1). The types of property deemed unavailable for fines and restitution under § 3613(a)(1) include clothing, school books, fuel, furniture, and unemployment benefits, as well as annuity and pension payments under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, special pension payments to Medal of Honor recipients, and certain military pensions. *See* 18 U.S.C. § 3613(a)(1); 26 U.S.C. § 6334(a). The exemptions for some other property shielded from tax levies under § 6334(a), such as a minimum exemption for wages, salary, and other income, and certain public assistance payments, are not incorporated under § 3613(a). *Compare* 18 U.S.C. § 3613(a)(1) *with* 26 U.S.C. § 6334(a).

3. Section 3613(a) also explicitly incorporates the CCPA's limitation on garnishment, stating that "the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply to enforcement of the [fine or restitution] judgment." 18 U.S.C. § 3613(a)(3). Under the referenced CCPA provision, no more than 25 percent of an individual's "disposable earnings" may be seized in most garnishment proceedings under federal and state law. 15 U.S.C. § 1673(a)(1). The CCPA defines "earnings" as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." *Id.* § 1672(a). An individual's "disposable earnings" are the earnings "remaining after the deduction ... of any

amounts required by law to be withheld." *Id.* § 1672(b).

B. Proceedings Below

1. In June 2017, petitioner pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343. Pet. App. 21a. His sentence included an order to pay $19,440,331 in restitution. *Id.* The government recovered and remitted to the victim of the fraud more than $7 million. *Id.*

Then, in September 2019, the government filed an application for a writ of garnishment through which it sought to access funds in petitioner's 401(k) retirement plan account—approximately $479,504 at the time—to apply toward his outstanding restitution obligation. *Id.* 4a, 21a-22a. The writ named the plan's trustee, Charles Schwab & Co., Inc. ("Schwab"), as the garnishee. *Id.* Although petitioner, as a former employee, was entitled under the terms of the plan to request a distribution of his account, *see id.* 22a, he had not elected to do so.

Petitioner moved to quash the writ, arguing in relevant part that his 401(k) plan account was protected by ERISA's anti-alienation provision and that, even if the government could compel a distribution of that account, its recovery would be limited by the CCPA's 25 percent cap on garnishment of "earnings." *Id.*

2. The government's application was referred to a magistrate judge, who concluded that the "MVRA's directive mandating victim restitution trumps ERISA's robust protection of retirement funds." *Id.* 23a (quoting C.A. J.A. 165). Because ERISA's anti-alienation rule did not apply, the magistrate

reasoned, the government was permitted to elect a lump-sum distribution of petitioner's account despite petitioner's objections. *Id.* 23a-24a (citing C.A. J.A. 177-79). The magistrate then concluded that the CCPA did not limit the amount the government could collect, because the government elected to have the funds distributed as a lump sum rather than a series of periodic payments. *Id.* 24a (citing C.A. J.A. 178-79).

3. The district court adopted the magistrate's findings of fact and conclusions of law in relevant part. *See id.* 24a. The court held that the MVRA's general "notwithstanding" provision signaled "Congress's clear intent to override ERISA's anti-alienation provision"—even though the MVRA does not mention ERISA, and ERISA itself does not reflect the claimed exception to its anti-alienation rule. *Id.* 49a. The district court also held that lump-sum distributions of retirement benefits were not "earnings" under the CCPA, so the statute's 25 percent cap on garnishment did not apply. *Id.* 51a.

4. Petitioner appealed, and the Fourth Circuit affirmed the district court's rulings concerning ERISA's anti-alienation rule and the CCPA's garnishment cap. *Id.* 26a-39a, 44a-46a.

As to the anti-alienation rule, the court of appeals held that the text of the MVRA stating that "criminal restitution orders may be enforced against 'all property or rights to property' … makes 'quite clear' that absent an express exemption, all of a defendant's assets are subject to a restitution order." *Id.* 30a (quoting 18 U.S.C. § 3613(a); *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc)). Not only

that, the court said, the MVRA "straightforwardly addresses how we should resolve any incompatibility between [its] broad directive and ERISA's anti-alienation provision: The MVRA's specification of 'all' property applies '[n]otwithstanding any other Federal law.'" Pet. App. 30a (quoting 18 U.S.C. § 3613(a)). While the Fourth Circuit believed the "plain text of the MVRA" resolved the issue, the court also purported to find additional support for its interpretation in the MVRA's "statutory context." *Id.* 31a. Specifically, the court highlighted the MVRA's explicit exclusion and inclusion of certain other types of benefits that are protected by anti-alienation provisions, as well as parallels between restitution orders and tax levies, which "may be enforced against assets otherwise protected by anti-alienation provisions, including ERISA's." *Id.* 31a-34a.

Petitioner argued that the MVRA did not demonstrate a sufficiently clear intent to displace ERISA's anti-alienation rule under *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), but the Fourth Circuit disagreed. The court asserted that "the MVRA, unlike the [competing statutory provision] at issue in *Guidry*, is not more 'general' than ERISA for these purposes," and "even if the 'specific over the general' canon otherwise would apply, the MVRA still would govern, because the MVRA manifests the necessary 'clear intention' to bring ERISA-protected accounts within its scope." *Id.* 35a-36a (citation omitted).

With respect to the CCPA, the Fourth Circuit held that the government could circumvent the 25 percent cap on garnishment by electing a lump-sum

distribution of petitioner's retirement benefits, because the statute's "plain text" showed that the cap applies only to periodic payments from 401(k) plans. Pet. App. 44a-45a. By specifying that the definition of "earnings" *includes* "periodic payments pursuant to a pension or retirement program," the court said, the CCPA specifically *excludes* non-periodic payments pursuant to a retirement plan. *Id.* 44a. While the court of appeals recognized that, as a general matter, "the CCPA's garnishment cap is not limited exclusively to payments made with a defined frequency," the court thought "retirement accounts are different," because the CCPA specifically references periodic payments from retirement plans. *Id.* 45a. The Fourth Circuit believed that reference "would have been entirely superfluous had Congress intended also to cover non-periodic payments." *Id.*

The Fourth Circuit remanded for the district court to determine in the first instance whether the plan document contained conditions limiting petitioner's property right—and by extension, the government's—in his retirement funds. *Id.* 26a.

5. On remand, the district court held that the government was entitled to access all funds in petitioner's 401(k) plan account other than amounts to be withheld to satisfy federal and state tax obligations. *Id.* 17a. At the court's direction, Schwab calculated the estimated taxes to be withheld. *Id.* 5a-6a. The district court subsequently ordered Schwab to withhold the calculated amounts and deliver to the Clerk of the Court the remainder of the funds in petitioner's account. *Id.* 6a-7a. Schwab complied with that order,

distributing to the court $342,468 from petitioner's account. *See* D. Ct. Dkt. No. 138-1.

6. Following the remand proceedings, petitioner again appealed the district court's restitution order, renewing his arguments regarding ERISA's anti-alienation rule and the CCPA's garnishment cap. Pet. App. 2a. The Fourth Circuit affirmed for the reasons stated in its prior published opinion. *Id.*

This petition followed.

REASONS FOR GRANTING THE PETITION

This case presents two important, recurring questions about whether and to what extent the government can access funds in an individual's 401(k) plan account to satisfy a restitution order under the MVRA. The Fourth Circuit's ruling on the first question conflicts with this Court's precedent, and the court's holding on the second question conflicts with the rule applied in the Eighth Circuit and endorsed by the Department of Labor. This case is an ideal vehicle for deciding these debated and related questions, and the Court should grant certiorari to do so.

I. The Court Should Grant Review To Reaffirm That ERISA's Specific Anti-Alienation Provision Cannot Be Displaced Through General Statutory Entitlements Or Enforcement Mandates

The Fourth Circuit's holding that the MVRA's general restitution provisions override ERISA's specific anti-alienation rule contravenes this Court's decision in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), and several court of

appeals judges have rightly disagreed with the interpretation adopted by the Fourth Circuit.

A. *Guidry* Requires An Unmistakable Expression Of Congressional Intent To Create An Exception To ERISA's Prohibition On Alienation Of Retirement Plan Benefits

As this Court has explained, "[s]tatutory anti-alienation provisions are potent mechanisms to prevent the dissipation of funds." *Boggs*, 520 U.S. at 851. ERISA's anti-alienation rule in particular reflects a "policy of special intensity: Retirement funds shall remain inviolate until retirement." *Id.* (quotation omitted). The Court accordingly has "vigorously … enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exception to the broad statutory bar." *Patterson*, 504 U.S. at 760 (citing *Guidry*, 493 U.S. 365).

The Court has taken the same approach whether presented with a proposed equitable exception to the anti-alienation rule or one purportedly rooted in a competing, general statutory command. In *Guidry*, the CEO of a labor union pled guilty to embezzling funds in violation of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), and the union argued that, to redress its injuries, it was entitled to the pension benefits the CEO would otherwise receive. *Guidry*, 493 U.S. at 367-69. As the source of its entitlement, the union looked to the LMRDA's remedial provisions, which authorized private rights of action "to recover damages ... or other appropriate relief for the benefit of the labor organization." *Id.* at

374 (citing 29 U.S.C. § 501(b) (1982)). According to the union, the statutory entitlement to "other appropriate relief for the benefit of the labor organization" displaced ERISA's anti-alienation rule. *Id.* at 374-75.

The Court disagreed. If such a general provision could "override ERISA's prohibition on the alienation of pension benefits," the Court explained, ERISA's protections "would be inapplicable whenever a judgement creditor relied on the remedial provisions of a federal statute." *Id.* at 375-76. "Such an approach would eviscerate the protections of § 206(d)" and defy the "elementary tenet of statutory construction that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Id.* (quotations omitted). To illustrate what a clear, enforceable exception to the anti-alienation rule looked like, the Court pointed to the exemption for qualified domestic relations orders in 29 U.S.C. § 1056(d)(3), which directly states that ERISA's anti-alienation rule "shall not apply" when detailed statutory criteria are satisfied. *Guidry*, 493 U.S. at 376 n.18.

Since *Guidry*—and the passage of the MVRA—the Court has reaffirmed that ERISA's "anti-alienation provision is mandatory and contains only two explicit exceptions, which are not subject to judicial expansion." *Boggs*, 520 U.S. at 851 (citing 29 U.S.C. §§ 1056(d)(2), (d)(3)(A); *Guidry*, 493 U.S. at 376). The Court has never recognized any exception to ERISA's anti-alienation rule beyond those set forth in ERISA itself. The Court's restrained approach appropriately recognizes that ERISA is a "comprehensive and reticulated statute," *Nachman Corp. v. Pension Benefit*

Guar. Corp., 446 U.S. 359, 361 (1980), that is "enormously complex and detailed," *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262 (1993); *see Boggs*, 520 U.S. at 854 (cautioning against "upsetting the deliberate balance central to ERISA"). It also "gives full and appropriate effect to ERISA's goal of protecting pension benefits," *Patterson*, 504 U.S. at 764-65, even when doing so "prevents others from securing relief for the wrongs done them," *Guidry*, 493 U.S. at 376.

B. Contrary To *Guidry*, Three Courts Of Appeals Have Held That The MVRA's General Enforcement Provisions Override ERISA's Specific Anti-Alienation Rule

Despite *Guidry*'s guidance—which Congress had at its disposal when it enacted the MVRA—the Fourth Circuit below held that the MVRA creates an additional exception to ERISA's anti-alienation rule through general enforcement provisions that say nothing about ERISA. *See* Pet. App. 26a-27a. According to the Fourth Circuit, the MVRA's statement "that criminal restitution orders are to be enforced 'notwithstanding other Federal law'" is "all that is required to resolve the question," *id.* 37a, and the Fourth Circuit interpreted the MVRA's "statutory context" to point in the same direction, *id.* 31a.

The Fourth Circuit dismissed petitioner's reliance on *Guidry*, stating that *Guidry* had "no applicability," because "the MVRA, unlike the LMRDA at issue in *Guidry*, is not more 'general' than ERISA for these purposes." Pet. App. 35a. Rather, the court said, the two statutes "address the same issue at the same level of specificity from different points of view." *Id.* The Fourth Circuit then asserted that the MVRA would

govern in any event, because it "manifests the necessary 'clear intention' to bring ERISA-protected accounts within its scope." *Id.* 36a (quoting *Guidry*, 493 U.S. at 376).

Two other courts of appeals—the Second and Ninth Circuits—have reached the same conclusion as the Fourth Circuit based on the same core rationale. *See United States v. Shkreli*, 47 F.4th 65, 70-72 (2d Cir. 2022); *United States Novak*, 476 F.3d 1041, 1046-48 (9th Cir. 2007) (en banc).

C. This Issue Previously Divided The En Banc Ninth Circuit, And The Dissent Has The Better View

While the three courts of appeals that have ruled on this issue have agreed on the result, before that trend was established, six judges of the Ninth Circuit dissented from the now-prevailing view. *See United States v. Novak*, 476 F.3d 1041 (9th Circ. 2007) (en banc) (W. Fletcher, J., dissenting); *United States v. Novak*, 441 F.3d 819 (9th Cir. 2006) (B. Fletcher, J., dissenting). The majority approach, the dissenters explained, "gives short shrift to *Guidry* and its progeny" and therefore "misapprehends" the "interpretive task." *Novak*, 476 F.3d at 1067 (W. Fletcher, J., dissenting). For the reasons explained by the dissenters (among others), the Fourth, Second, and Ninth Circuits are wrong in reading the MVRA to displace ERISA's anti-alienation rule.

1. As the en banc dissent in *Novak* explains, *Guidry* teaches that "ambiguous statutory language" is not "sufficient to override § 1056(d)(1)." *Novak*, 476 F.3d at 1066 (W. Fletcher, J., dissenting). Rather,

"the onus is on Congress to legislate clearly and precisely when it wishes to create exceptions to the anti-alienation provision." *Id.* When the Court in *Guidry* "sought to show how Congress should express its intention to override the anti-alienation provision, it cited a directive that explicitly, carefully, and unambiguously permitted alienation of ERISA-covered pension benefits"—the exception for qualified domestic relations orders in 29 U.S.C. § 1056(d)(3). *Id.* (citing *Guidry*, 493 U.S. at 376 n.18).

Under *Guidry*'s rigorous standard, the MVRA is not clear enough to overcome ERISA's anti-alienation rule. *Id.* at 1067. Just as the Court concluded in *Guidry* that the general entitlement to "appropriate relief" under the LMRDA did not displace ERISA's more specific anti-alienation rule, "the fact that the MVRA creates a general entitlement to restitution is not sufficient, standing alone, to override a statutory provision that specifically prohibits the alienation of ERISA-covered pension benefits." *Id.* (citing *Guidry*, 493 U.S. at 375-76). Beyond the general restitution mandate, the "relevant text of the MVRA is a relatively short 'notwithstanding any other federal law' clause" that "does not mention ERISA." *Id.* at 1065. The use of "notwithstanding" language, the *Novak* dissent explained, is not conclusive on its own, but rather "one of many factors that courts must consider when determining the proper relationship between two particular legislative enactments." *Id.* at 1068.[1]

[1] The courts of appeals broadly agree that a "notwithstanding any other law" clause "is a blunt tool prone to repeal too little or too much," and thus its "actual reach depends on an analysis

That inquiry focuses on whether the two statutes can reasonably be construed to coexist. *See id.* at 1069. And reading the MVRA to leave ERISA's anti-alienation provision undisturbed results in only "a 'minor exception' to the MVRA's general restitution requirement." *Id.* A defendant's other assets remain available to satisfy a restitution order, and even assets previously held in an ERISA plan may be garnished to pay restitution once those assets are distributed to the plan participant in the ordinary course. *Id.* In these circumstances, without an express statutory statement on the point, "the general restitution statute cannot trump ERISA's more specific anti-alienation provision." *Novak*, 441 F.3d at 827 (B. Fletcher, J., dissenting).

2. The "statutory context" referenced in support of the prevailing construction in the lower courts (Pet. App. 31a) does not supply the clarity missing from the MVRA's text.

The Fourth Circuit below first noted that the MVRA "expressly exempts from the reach of restitution orders" certain federal benefits that are also covered by anti-alienation provisions, and reasoned that "there would be no need to exempt those pensions from the MVRA if the anti-alienation provision …

---

of the statutory language relevant to it." *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng'rs*, 619 F.3d 1289, 1298-99 (11th Cir. 2010); *see also, e.g.*, *United States v. Holy Land Found. for Relief & Dev.*, 722 F.3d 677, 689 (5th Cir. 2013); *Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996); *Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1224 (3d Cir. 1992); *Liberty Mar. Corp. v. United States*, 928 F.2d 413, 417 (D.C. Cir. 1991).

already had the same effect." Pet. App. 31a. The exemption under the MVRA, however, is created through a reference to a tax code provision listing property exempt from tax levies. *See* 18 U.S.C. § 3613(a) (referencing 26 U.S.C. § 6334(a)). Significantly, through this reference, the MVRA does not shield from restitution *only* property already protected by an anti-alienation provision; it also exempts several other types of property, including apparel, school books, fuel, and furniture. 18 U.S.C. § 3613(a); 26 U.S.C. § 6334(a). Had Congress not included in § 3613(a)'s reference to § 6334(a) all property in § 6334(a) that Congress likewise did not intend the MVRA to touch—regardless of what other statutory protections might apply—it would have created uncertainty about Congress's intent with respect to property omitted from the express cross-reference. Congress's choice to avoid that ambiguity says nothing about whether it viewed ERISA's anti-alienation provision (or any other) as effective to shield property from restitution.

The Fourth Circuit also found it significant that the MVRA expressly *includes* Social Security benefits as property subject to restitution, reasoning that because such benefits are generally afforded even greater protection than ERISA benefits, "it stands to reason that the MVRA would override ERISA's lesser protections, as well." Pet. App. 32a. But Congress's decision to explicitly displace the Social Security Act's anti-alienation provision makes sense precisely because of the differences between that provision and ERISA's anti-alienation bar. The Social Security Act protects benefits from garnishment even after they

have been paid, *see* 42 U.S.C. § 407(a), while courts have interpreted ERISA's anti-alienation provision to apply only while funds remain in an ERISA plan.[2] Congress thus may well have understood that ERISA's anti-alienation provision presented a less significant obstacle to achieving the MVRA's aims than did the Social Security Act's protections and therefore seen no need to displace it.

Finally, the MVRA's statement that a restitution order operates as "a lien in favor of the United States … as if the liability of the person fined were a liability for a tax," 18 U.S.C. § 3613(c), does not mean that tax levies and restitution orders reach all of the same property. To the contrary, § 3613(a)(1) makes clear that the types of property available to satisfy tax levies and restitution orders are not fully coextensive. *Compare* 18 U.S.C. § 3613(a)(1) *with* 26 U.S.C. § 6334(a). In the context of § 3613 as a whole, § 3613(c) is more plausibly understood to merely incorporate certain procedural rules from the tax context. *See Novak*, 476 F.3d at 1076 (W. Fletcher, J., dissenting) (Section 3613(c) "provides only that tax lien *procedures* are applicable to enforce restitution orders.").

---

[2] *See N.L.R.B. v. HH3 Trucking, Inc.*, 755 F.3d 468, 470 (7th Cir. 2014) ("ERISA differs from statutes that *do* cover who can access funds after payment."); *see also Hoult v. Hoult,* 373 F.3d 47, 53-55 (1st Cir. 2004); *Robbins v. DeBuono,* 218 F.3d 197, 203 (2d Cir. 2000); *Cent. States, Se. & Sw. Areas Pension Fund v. Howell,* 227 F.3d 672, 678-79 (6th Cir. 2000); *Wright v. Riveland,* 219 F.3d 905, 921 (9th Cir. 2000); *Trucking Emps. of N. Jersey Welfare Fund, Inc. v. Colville,* 16 F.3d 52, 54-56 (3d Cir. 1994); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1081-83 (10th Cir. 1994) (en banc).

3. While the MVRA's statutory "context" is at best ambiguous, the legislative history and Congress's adoption of a distinct, express exception to the anti-alienation rule just a year after passing the MVRA confirm that Congress knows how to craft unambiguous exceptions when it wants to—and uses means far more direct than a general "notwithstanding" clause to do so. *See id.* at 1069.

Before the MVRA was passed, Senator McCain "proposed a bill that would have … expressly amended ERISA's anti-alienation clause to allow attachment of ERISA-covered pension benefits" for restitution, stating that the prohibition on alienation "shall not apply to a qualified criminal restitution order" and that "each pension plan shall provide for payments in accordance with the applicable requirements of a qualified criminal restitution order." *Id.* at 1065, 1070 (quoting S. 1570, 104th Cong. § 1(a)(1) (1996)). The bill also would have amended the tax code "to permit pension plans to alienate funds pursuant to qualified criminal restitution orders without losing their tax-favored status." *Id.* at 1070 (citing S. 1570, 104th Cong. § 1(b) (1996)). Senator McCain's bill, however, was never incorporated into the MVRA. *Id.*

As the *Novak* dissent put it, if the Conference Committee had wanted to displace ERISA's protections when it enacted the MVRA, the Committee "easily could have included the clear, direct, and detailed language of Senator McCain's bill instead of a short and cryptic 'notwithstanding' clause." *Id.* at 1071. "At the very least, the Committee could have explained the function of the 'notwithstanding' clause in

the Conference Report." *Id.* But the Committee did neither of those things.

Further underscoring the point, the year after it passed the MVRA, "Congress expressly amended ERISA to permit restitution orders to reach ERISA-covered pension benefits for crimes committed against the plan itself." *Id.* at 1065; *see* 29 U.S.C. § 1056(d)(4). "Again, unlike the MVRA's 'notwithstanding' clause (and like the unsuccessful McCain bill), the 1997 amendment expressly amended ERISA's anti-alienation clause, and expressly amended the Internal Revenue Code to allow the preservation of ERISA plans' tax-exempt status." *Novak*, 476 F.3d at 1065 (W. Fletcher, J., dissenting) (emphasis omitted).

The 1997 amendment illustrates that "Congress knew that abrogating ERISA's anti-alienation provision would have unwanted tax consequences unless an exception was added to § 401(a)(13)." *Id.* at 1074. But unlike the 1997 amendment, "the MVRA did not amend § 401(a)(13), and nothing in the text of that section expressly authorizes plan administrators to attach benefits pursuant to a restitution order without disqualifying the plan for tax purposes." *Id.* Given Congress's evident awareness of the potential tax consequences associated with alienation of ERISA-governed retirement benefits, had "Congress intended to abrogate ERISA's anti-alienation provision when it enacted the MVRA, it is difficult to imagine why it would not also have amended § 401(a)(13)." *Id.*

* * *

In sum, the "nationwide judicial consensus" (Pet. App. 27a) cited by the Fourth Circuit obscures meaningful disagreement about what *Guidry* requires and how the MVRA measures up against that standard. *See also* Alan K. Ragan, *Balancing ERISA's Anti-Alienation Provisions against Garnishment of a Convicted Criminal's Retirement Funds*, 39 U. Balt. L. Rev. 63, 95, 101 (2009) (arguing that although "courts have treated the MVRA as an exception to ERISA's prohibition against alienation of plan benefits, the legal support for such treatment is questionable at best" under this Court's precedent). The Court should grant certiorari to correct the misapprehension of *Guidry* that has taken root in the lower courts and reaffirm that ERISA's anti-alienation rule can be displaced only when Congress expresses its intent to do so in unmistakable terms.

II. The Fourth Circuit's Ruling That The CCPA's Garnishment Cap Does Not Apply To Lump-Sum Distributions Of Retirement Plan Benefits Also Warrants Review

The Fourth Circuit compounded its error by holding that not only could the government step into petitioner's shoes to initiate a lump-sum distribution of his 401(k) plan account, but such a distribution is not subject to the CCPA's cap on garnishment. That was so, the Fourth Circuit concluded, even though the garnishment cap undisputedly *would* apply if petitioner's benefits were distributed as a series of periodic payments. This Court's review is warranted because the Fourth Circuit's ruling deepens a split of authority regarding the CCPA's definition of "earnings"—and whether the periodic nature of payments matters

under that definition—and the Fourth Circuit's answer to that question is contrary to the plain statutory text.

A. The Decision Below Implicates A Split Of Authority Regarding The CCPA's Definition Of "Earnings"

The CCPA broadly defines "earnings" as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a). The courts of appeals disagree about whether the distinction between periodic and lump-sum payments matters in determining whether a particular payment is subject to the 25 percent cap on garnishment under the CCPA.

1. The Second, Fourth, and Seventh Circuits have held that "the CCPA's garnishment cap does not apply to lump-sum distributions from contributory 401(k) accounts." *Shkreli*, 47 F.4th at 77; *see* Pet. App. 46a ("[W]e agree with the ... Seventh Circuit that a lump-sum distribution of retirement funds does not qualify as 'earnings' subject to the CCPA's garnishment cap."); *United States v. Sayyed*, 862 F.3d 615, 619 (7th Cir. 2017) ("[W]e find that a lump-sum distribution of retirement funds does not qualify as 'earnings' under the CCPA."). The Fifth Circuit has grafted a more general periodicity requirement onto the statutory definition of "earnings," stating that "the terms 'earnings' and 'disposable earnings' under the CCPA are 'limited to "periodic payments of compensation."' *United States v. DeCay*, 620 F.3d 534,

543 (5th Cir. 2010) (quoting *Kokoszka v. Belford,* 417 U.S. 642, 651 (1974)).

2. The Eighth Circuit, by contrast, has explained that the CCPA "does not restrict itself to periodic payments." *United States v. Ashcraft*, 732 F.3d 860, 863 n.4 (8th Cir. 2013). Rather, "Congress defines the only test as whether the payment is 'compensation paid or payable for personal services.'" *Id.* (quoting 15 U.S.C. § 1672(a)). The Department of Labor, which is charged with enforcing the CCPA, *see* 15 U.S.C. § 1676, has similarly advised that "the compensatory nature of the payment, *i.e.*, whether the payment is for services provided by the employee, rather than the frequency of the payment, is determinative under" the CCPA's definition of "earnings." U.S. Dep't of Labor, *Lump-Sum Payments and "Earnings" Under the Garnishment Provisions of the Consumer Credit Protection Act*, Op. Letter CCP2018-1NA (Apr. 12, 2018), bit.ly/3MITMmT. Several state-court decisions have also held that "[t]he sole criteria … is that the funds ('earnings') subject to the garnishment, in fact and in a strict sense, represent 'compensation' for 'personal services.'" *BancOhio Nat'l Bank v. Box*, 580 N.E.2d 23, 25 (Ohio Ct. App. 1989) (quoting *Gerry Elson Agency, Inc. v. Muck*, 509 S.W.2d 750, 753 (Mo. Ct. App. 1974)).

3. The same split of authority was presented for this Court's review in the recent petition in *Greebel v. United States*, No. 22-583, *cert. denied*, 2023 WL 396133 (May 30, 2023). In that case, in addition to raising vehicle problems not present here, *see infra* at 34-35, the government attempted to minimize the conflict, arguing that the Court can ignore it because

no circuit has squarely "held that a lump-sum distribution from a contributory retirement account qualifies as 'earnings' under the CCPA." *Greebel* U.S. Br. at 14. But that does not change the fact that the courts of appeals disagree about the test for determining whether a payment constitutes "earnings" under the CCPA. As discussed, the Eighth Circuit (and DOL) have stated that the statutory text permits an inquiry only into whether the payments at issue are "compensatory," while several other courts of appeals (including the Fourth Circuit below) have held that the frequency of the payments is determinative when it comes to retirement benefits.

Lest there be any doubt that the division among the courts of appeals makes a difference, the government itself previously (and correctly) argued in *France v. United States* that "pension and retirement payments … are properly seen as compensation 'for personal services performed in the past.'" U.S. Br. at 12, *France v. United States*, No. 15-24 (U.S. Nov. 6, 2015) (quoting *Ashcraft*, 732 F.3d at 864); *see also Lockheed Corp. v. Spink*, 517 U.S. 882, 895 n.7 (1996) (recognizing that "retirement benefits themselves may be defined as deferred wages" that "compensate the employee … for services rendered").[3] Such payments therefore would clearly qualify as "earnings" under the Eighth Circuit's test, which properly

[3] The IRS likewise describes 401(k) plan contributions as "deferred wages," Internal Revenue Service, 401(k) Resource Guide, 401(k) Plan Overview, bit.ly/3N8ODEW, and distributions from traditional 401(k) plan accounts are taxed as "income" regardless of whether the distributions are made as series of periodic payments or a lump sum, Internal Revenue Service, Retirement Topics – Tax on Normal Distributions, bit.ly/3WZqIet.

focuses on "whether the payment is 'compensation paid or payable for personal services.'" *Ashcraft*, 732 F.3d at 863 n.4 (quotation omitted). There is no logical basis to argue that "pension and retirement payments" are "compensation for personal services performed in the past" when they are distributed periodically but somehow are *not* "compensation for personal services performed in the past" if distributed as a lump sum. *France* U.S. Br. at 12 (internal quotation marks omitted). The character of the funds in a retirement plan does not change based on how they are paid out.

B. The Fourth Circuit's Holding That The CCPA's Definition Of "Earnings" Excludes Lump-Sum Retirement Plan Distributions Misconstrues The Statutory Text

The Fourth Circuit's ruling rested principally on the premise that "retirement accounts are different" under the CCPA "because the statute treats them differently, singling out for inclusion 'periodic payments' and only periodic payments from such accounts." Pet. App. 45a. That is, according to the Fourth Circuit, because the CCPA expressly states that its definition of "earnings" "includes periodic payments pursuant to a pension or retirement program," the CCPA "clearly excludes from the definition of 'earnings' a one-time-lump-sum distribution from a retirement fund." *Id.* at 44a

The Fourth Circuit's view is incompatible with fundamental principles of statutory interpretation. It is well established that use of the terms "including" or "includes" serves as an indication of the "'illustrative and not limitative' function of the examples given."

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012) ("The verb *to include* introduces examples, not an exhaustive list."). There is no textual basis to read the CCPA's inclusion of "periodic payments pursuant to a pension or retirement program" to exclude any other "compensation paid or payable for personal services" not explicitly mentioned in the statute. Nor, as explained above, is there any logical basis to conclude that funds in a retirement account represent "compensation for personal services"—i.e., "earnings"—when distributed as periodic payments but not when distributed as a lump sum.

The Fourth Circuit's construction was driven by concern that reading the definition of "earnings" to embrace lump-sum retirement distributions would make the reference to "periodic payments pursuant to a pension or retirement program" "entirely superfluous." Pet. App. 44a. But it is not surprising that Congress would have envisioned retirement benefits being paid on a "periodic" basis in 1968 when it enacted the CCPA. At that time, defined benefit plans were far more common than defined contribution plans, *see LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008), and defined benefit plan benefits are distributed as a series of periodic payments, *see Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020).[4]

[4] Depending on the terms of the plan, distributions of 401(k) plan benefits may be made as a lump sum or through a series of periodic payments. *See* Internal Revenue Service, 401(k) Resource Guide – Plan Participants – General Distribution Rules, bit.ly/41U7GXy.

However, the statutory "enumeration of one case" does not mean that Congress "considered the unnamed possibility and meant to say no to it." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). This Court, moreover, has cautioned that the general "preference for avoiding surplusage constructions is not absolute." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004). And placing excess weight on Congress's use of the word "periodic" in describing one example of what "earnings" "includes" produces an arbitrary distinction between periodic and lump-sum payments that has nothing to do with the core statutory "compensation paid or payable for personal services" test.

The Fourth Circuit's reading is all the more untenable in light of the fact that "Congress intended for courts to broadly construe [the CCPA's] provisions in accordance with its remedial purpose." *Stout v. FreeScore, LLC*, 743 F.3d 680, 684 (9th Cir. 2014); *see also, e.g.*, *Clemmer v. Key Bank Nat'l Ass'n*, 539 F.3d 349, 353 (6th Cir. 2008) (the CCPA is a "remedial statute accorded a broad, liberal construction in favor of the consumer" (quotation marks omitted)).

III. The Questions Presented Are Important, And This Case Is An Ideal Vehicle For Resolving Them

A. Ensuring That Statutory Protections For Retirement Plan Assets Are Respected Is Critically Important

1. This Court has long recognized "the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force." *Boggs*, 520 U.S. at 839.

Employer-sponsored retirement accounts enable millions of Americans to accumulate funds to support themselves and their dependents in retirement. In 2020, there were approximately 600,000 401(k) plans, with 60 million active participants and millions more former employees and retirees. Investment Company Institute, 401(k) Plan Research: FAQs, *Frequently Asked Questions About 401(k) Plan Research* (Oct. 11, 2021), bit.ly/3WoSYXA. As of year-end 2022, 401(k) plans collectively held approximately $6.6 trillion in assets. Investment Company Institute, Release: Quarterly Retirement Market Data, *Retirement Assets Total $33.6 Trillion in Fourth Quarter 2022* (Mar. 16, 2023), bit.ly/3OwknF7. The contours of the rules governing third-party access to those funds are thus exceptionally important—particularly in light of Congress's repeated emphasis on protecting retirement benefits.

2. Recognizing exceptions to ERISA's anti-alienation rule based on general statutory provisions that do not reference ERISA creates substantial uncertainty for plan sponsors, administrators, and service providers.

Under ERISA, plan sponsors are required to state in plan documents that benefits cannot be assigned or alienated, except in narrow circumstances inapplicable here. 29 U.S.C. § 1056(d). Plan fiduciaries, in turn, must follow the documents governing the plan and act solely in the interests of participants and beneficiaries. *Id.* § 1104(a)(1). ERISA also provides that directed trustees are required to follow directions from plan fiduciaries so long as those directions are not contrary to ERISA or plan terms. *Id.* § 1103(a)(1).

That system works only if the boundaries of the anti-alienation rule align with the text of ERISA itself. Nothing in ERISA suggests that plan sponsors are required to write into their plan documents exceptions that do not appear in 29 U.S.C. § 1056(d), and understandably so, as ERISA provides no guidance as to how plan sponsors would be expected to go about identifying any such exceptions. Thus, if courts continue to recognize exceptions outside of ERISA, plan documents that properly track ERISA's requirements will not fully capture the range of circumstances in which alienation of plan benefits may occur. That result is at odds with the design of "ERISA's statutory scheme," which "is built around reliance on the face of written plan documents." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300-01 (2009) (quoting *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 83 (1995)).

Holding that a general provision like the MVRA's "notwithstanding" clause creates an exception to ERISA's anti-alienation rule also raises significant questions about the tax-qualification consequences when a court orders disbursement of retirement funds in circumstances not contemplated under ERISA or the tax code. Tax-qualification is of critical importance to 401(k) plans, *see supra* at 5-6, and a ruling that creates uncertainty about what is required to maintain tax-qualified status merits this Court's attention.

Indeed, Schwab raised the potential uncertainty surrounding these issues in this case, seeking the plan sponsor's assurance that compliance with the court's garnishment order would not run afoul of "the

terms of the Plan and applicable law including the IRC and ERISA." D. Ct. Dkt. 124-1 at 1-2. Without itself taking any position on those questions, the government argued in response that "the Court should not require [the plan sponsor] to take the actions and give the assurances" sought by Schwab, because in the government's view, it was entitled to access the funds in petitioner's 401(k) account regardless. D. Ct. Dkt. 127 at 2-3. And the district court neither required the plan sponsor to weigh in on these issues nor addressed them itself, simply entering an order directing Schwab to distribute the funds in petitioner's account. *See* D. Ct. Dkt. 132; Pet. App. 4a.

3. The tension between the MVRA and ERISA is a recurring issue that presents a substantial problem on its own. *See* Pet. App. 27a, 50a (discussing court of appeals and district court decisions on this issue). But the MVRA is not the only statute that risks multiplying exceptions to ERISA's anti-alienation rule outside the ERISA framework. For instance, a district court in the First Circuit applied decisions interpreting the MVRA (including the Fourth Circuit's decision in this case) to hold that the Terrorism Risk Insurance Act likewise functions as an indirect exception to ERISA's anti-alienation rule based on a general "notwithstanding" clause. *See Caballero v. Fuerzas Armadas Revolucionarias de Colombia*, 565 F. Supp. 3d 110, 112 (D. Mass. 2021). The same logic would seemingly apply to any statute that creates a payment obligation and purports to apply "notwithstanding any other provision of law." Indeed, a court focused narrowly on the presence of a "notwithstanding" clause—language that appears in well over 1,000

provisions in the U.S. Code—might well conclude that even statutes that do not directly create a payment obligation override ERISA's anti-alienation rule.[5]

4. The adverse consequences of the Fourth Circuit's dilution of ERISA's anti-alienation rule are only further amplified by the court's simultaneous misreading of the CCPA. Taken together, the Fourth Circuit's holdings create a scenario where the government can elect a lump-sum distribution of an individual's 401(k) retirement account over the participant's objections and then, because the account was distributed as a lump sum, garnish 100 percent of the funds and avoid the cap that would apply if the funds were distributed on a periodic basis. That leaves individuals who deferred substantial sums to save for retirement (not to mention their beneficiaries) with nothing—contrary to Congress's clearly expressed intent to protect retirement funds.

5. The Fourth Circuit unfortunately is not an outlier on either issue, and there is no indication that the lower courts will correct course on their own absent this Court's intervention. If anything, this case and *United States v. Shkreli*, 47 F.4th 65 (2d Cir. 2022), reflect a recent trend of more courts of appeals lining up on the wrong side of these contested issues. The

---

[5] *See, e.g.*, 42 U.S.C. § 3537a (authorizing Secretary of HUD to "impose a civil money penalty" on an employee for violating a prohibition on advance disclosure of funding decisions and empowering courts to "order payment of the penalty imposed by the Secretary" "[n]otwithstanding any other provision of law"); 42 U.S.C. § 1395mm(e)(4) ("Notwithstanding any other provision of law, the eligible [health insurance] organization may . . . charge" a member for expenses paid to them.).

Court has previously granted certiorari to correct wide-spread misreadings of important federal statutes, and it should do the same here. *See, e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (granting review and rejecting unanimous lower-court construction of federal statute); *Honeycutt v. United States*, 581 U.S. 443 (2017) (granting review on 4-1 circuit split and adopting minority position); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (granting review and rejecting rule adopted by all eleven courts of appeals to have considered the issue).

B. This Case Is An Ideal Vehicle For Review

This case provides the right opportunity for the Court to address these important and recurring issues. Both questions presented were litigated and decided on the merits in the district court and the Fourth Circuit. Had the court of appeals answered either question differently, it would have made a substantial difference for petitioner. If the Fourth Circuit had ruled that the MVRA does not overcome ERISA's anti-alienation protections, petitioner's 401(k) plan account would have been shielded from garnishment. And even if the government had been permitted to reach petitioner's plan benefits, it could have garnished only 25 percent of the funds if, as the Eighth Circuit and DOL have explained, the only question for determining whether the CCPA's garnishment cap applies was whether the funds represent "compensation paid or payable for personal services."

The Court recently denied the petition in *Greebel* that sought review on the same CCPA issue also

presented here, but the obstacles cited by the government in opposing review in *Greebel* are not present in this case. In *Greebel*, the government argued that "the interlocutory posture of th[at] case ma[de] it an inappropriate vehicle for review," as there were still issues to be addressed on remand in the district court. *Greebel* U.S. Br. at 10; *see id.* at 18-19. Here, by contrast, remand proceedings have been completed, and there is nothing left for the lower courts to decide. *Greebel*, moreover, did not raise the important threshold question of whether ERISA's anti-alienation provision flatly bars garnishment of retirement benefits while they are still held in an ERISA plan account—an issue this case squarely and cleanly presents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Deanna M. Rice
Nathan T. Tschepik
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

Melissa C. Cassel
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111

Patrick L. Bryant
Counsel of Record
Cadence Mertz
FEDERAL PUBLIC
DEFENDER'S OFFICE
Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0885
Patrick_Bryant@fd.org

June 7, 2023