No.

IN THE

Supreme Court of the United States

EVAN GREEBEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Consumer Credit Protection Act ("CCPA" or the "Act"), 15 U.S.C. § 1601 *et seq.*, establishes important protections for individuals against excessive garnishment orders. Specifically, the CCPA provides that no more than 25% of an individual's "earnings" may be garnished in most federal and state garnishment proceedings, *id.* § 1673(a), including proceedings involving restitution orders under the Mandatory Victims Restitution Act of 1996.

The CCPA defines the term "earnings" as "compensation paid or payable for personal services." 15 U.S.C. § 1672(a). But the circuits are openly and irreconcilably split over how to interpret and apply that definition. The Eighth Circuit, along with the Department of Labor—which is charged by Congress with enforcement of the CCPA—reads the definition according to its plain terms to hold that whether payments qualify as "earnings" depends on the compensatory character of the payment. The Second Circuit in the decision below, in contrast, follows the Fourth, Fifth, and Seventh Circuits in relying on stray statements in the CCPA's legislative history, cited in dicta by this Court in *Kokoszka* v. *Belford*, 417 U.S. 642 (1974), to exclude from the definition of "earnings" compensation for personal services paid in a lump-sum, as opposed to periodically.

The question presented is:

Whether lump-sum compensatory payments to an individual, such as those made pursuant to a retirement plan, qualify as "earnings" subject to the CCPA's garnishment limitations.

PARTIES TO THE PROCEEDING

Petitioner Evan Greebel was a defendant in the district court and an appellant before the court of appeals.

Martin Shkreli was a defendant in the district court, but he did not participate in the appeal.

Respondent United States of America prosecuted this case in the district court and was an appellee before the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *United States* v. *Shkreli, et al.*, No. 21-993 (2d Cir.) (judgment entered Aug. 24, 2022);
- *United States* v. *Shkreli, et al.*, No. 15-cr-637 (E.D.N.Y.) (order entered Apr. 16, 2021); and
- *United States* v. *Greebel*, No. 18-2667-cr (2d Cir.) (judgment entered Oct. 30, 2019).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Statutes

Rule

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Evan Greebel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 47 F.4th 65. Pet. App. 1a. The opinion of the district court is reported at 534 F. Supp. 3d 224. Pet. App. 23a.

JURISDICTION

The court of appeals entered judgment on August 24, 2022. On November 9, 2022, Justice Sotomayor extended the time to file a petition for a writ of certiorari to December 22, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in the appendix to this petition. Pet. App. 39a.

STATEMENT

The CCPA provides that no more than 25% of an individual's "earnings" may be seized in most garnishment proceedings. 15 U.S.C. § 1673(a). This is an exceptionally important statute with broad application. It applies to nearly every state and federal garnishment proceeding, and provides important protections for individuals by limiting the degree to which their earnings can be seized by the government or creditors. But despite the CCPA defining the term "earnings" in plain terms—"compensation paid or payable for personal services"—there is a mature split amongst the courts of appeals, as well as the Department of Labor, tasked

with enforcing the statute, as to whether lump-sum payments of compensation constitute "earnings."

The Second Circuit below followed multiple other federal courts of appeals in erroneously introducing a "periodicity" requirement into the definition of earnings. The notion that payments cannot qualify as "earnings" if made in a single installment is nowhere found in the CCPA's text. Instead, these courts rely on stray language from the CCPA's legislative history, as construed in dicta from this Court's decision in *Kokoszka* v. *Belford*, 417 U.S. 642, 651 (1974). This dicta is a relic from the bygone era when courts gave significant weight to legislative history to interpret even unambiguous statutes. *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 202 (1983). Of course, "this Court has long rejected" that method of statutory interpretation, and has adopted in its stead a textualist approach under which "legislative history can never defeat unambiguous statutory text." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1750 (2020); *see also, e.g.*, *Conroy* v. *Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."); Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:28 (Nov. 17, 2015), https://bit.ly/3FtLeLz ("We're all textualists now."). But the Second, Fourth, Fifth, and Seventh Circuits—and the Justice Department in this case—continue to rely on *Kokoszka*'s legislative history-based dicta.

The Eighth Circuit, in contrast, has interpreted "earnings" in a manner that is grounded in the plain meaning of the statutory text. As it has explained,

although "[s]ome courts interpret [*Kokoszka*] to mean that only periodic payments, as opposed to lump sums, can constitute 'earnings,'" "[t]he statute Congress passed does *not* restrict itself to periodic payments." *United States* v. *Ashcraft*, 732 F.3d 860, 863 n.4 (8th Cir. 2013) (emphasis added). This interpretation "prioritizes the character of the payment over its label" as periodic or non-periodic. *Id.* at 864. The Department of Labor had adopted this approach, opining that "the compensatory nature of the payment," not whether it is made in a "lump-sum," is the defining characteristic of "earnings." U.S. Dep't of Labor, *Lump-Sum Payments and "Earnings" Under the Garnishment Provisions of the Consumer Credit Protection Act*, CCP2018-1NA (Apr. 12, 2018), https://bit.ly/3PCmPs7 ("DOL Op. Ltr."). And the Office of the Solicitor General, speaking for the United States, endorsed "DOL's views" of a character-based interpretation of "earnings" in its most recent brief on this issue to this Court. U.S. Br. at 14, *France* v. *United States*, No. 15-24 (U.S. Nov. 6, 2015) ("U.S. *France* Br.").

The Eighth Circuit and the Department of Labor have it right. Their approach is faithful to the text of the CCPA. Conversely, the decision below and the cases it followed wreak havoc on the CCPA's text and, in the process, strip individuals across the country of an important protection against excessive garnishment orders, which Congress enacted to ensure continued means of support for debtors and to fend off the kind of prosecutorial overreach evident here. This Court should grant review to resolve this acknowledged circuit split and restore the original, plain meaning of the CCPA. *See, e.g.*, *United States* v. *France*, 782 F.3d 820, 826 n.1 (7th Cir. 2015) ("[T]his opinion creates a split with the Eighth Circuit.").

1. Congress enacted the CCPA in 1968 to, among other things, address the problem of "unrestricted garnishment of compensation due for personal services." 15 U.S.C. § 1671(a)(1). To that end, the Act caps the garnishment of an individual's "disposable earnings" at 25%. It defines the term "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).[1]

The CCPA's limit on the garnishment of earnings applies "broad[ly]" to most garnishment proceedings under federal and state law, *United States* v. *Clayton*, 613 F.3d 592, 596 (5th Cir. 2010), including restitution orders under the Mandatory Victims Restitution Act of 1996 ("MVRA"), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1214, 1227. Indeed, the MVRA specifically incorporates the CCPA's limit on garnishing earnings, providing that "the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply to enforcement of the [restitution order] under Federal law or State law." 18 U.S.C. § 3613(a)(3). The CCPA delegates "enforce[ment]" of "the provisions of th[e] subchapter" regarding limits on garnishment to "[t]he Secretary of Labor." 15 U.S.C. § 1676.

2. In 1978, Congress added subsection (k) to Section 401 of the Internal Revenue Code, thus allowing employees to avoid being taxed on deferred compensation. *See* Revenue Act of 1978, Pub. L. No. 95-600, 92. Stat. 2763. Soon after, retirement

[1] An individual's "disposable earnings" are simply the earnings that "remain[] after the deduction . . . of any amounts required by law to be withheld." 15 U.S.C. § 1672(b).

accounts established pursuant to this provision, commonly known as "401(k) accounts," exploded in popularity as a tax advantageous way to "provide a 'continued means of support' and subsistence" in retirement, "like wages" provided during one's working career. *United States* v. *DeCay*, 620 F.3d 534, 544 n.10 (5th Cir. 2010) (quoting H.R. Rep. No. 1040, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1979).

These accounts allow "[e]mployees [to] elect to defer receiving a portion of their salary which is instead contributed" to their retirement account. Dep't of Labor, Types of Retirement Plans (visited on Dec. 21, 2022), https://bit.ly/2DYKexz. Contributions to a 401(k) plan, called "deferred wages" or "elective deferrals," "are generally not subject to federal income tax withholding at the time of deferral." IRS, 401(k) Plan Overview (Nov. 1, 2022), https://bit.ly/3h5jx3G. Upon a participant's retirement, or other qualifying event, the participant may receive "[n]onperiodic" or "[p]eriodic" distributions, "[d]epending on the terms of the plan." IRS, 401(k) Resource Guide - Plan Participants - General Distribution Rules (Jan. 20, 2022), https://bit.ly/3P3h1Yh. Distributions from traditional 401(k) accounts are taxed as "income," regardless of whether they are paid periodically or in a lump-sum. IRS, Retirement Topics - Tax on Normal Distributions (Apr. 27, 2022), https://bit.ly/3hb77qV.

3. Petitioner Evan Greebel was a corporate attorney whose career included employment with the law firms Fried, Frank, Harris, Shriver & Jacobson LLP and Katten Muchin Rosenman LLP. While he was employed by these firms, Petitioner regularly deferred portions of his salary to contribute to 401(k) accounts sponsored by those firms. *See* C.A. App.

187–262 (the Fried Frank Plan); C.A. App. 263–420 (the Katten Plan).

4. On December 27, 2017, Petitioner was convicted of Conspiracy to Commit Wire Fraud and Conspiracy to Commit Securities Fraud. D. Ct. Dkt. 502. His sentence included a restitution order of $10,447,979.00 pursuant to the MVRA. C.A. App. 73. To enforce this restitution order, the government filed writs of garnishment against Petitioner's interest in both of his 401(k) accounts. C.A. App. 80, 95.

Petitioner objected to these writs, arguing, among other things, that the funds in his retirement accounts were subject to the CCPA's 25% cap on the garnishment of "earnings." After holding an evidentiary hearing and receiving briefs, the district court overruled Petitioner's objections. Pet. App. 38a. Petitioner appealed that order to the United States Court of Appeals for the Second Circuit.

The court of appeals vacated and remanded the judgment of the district court for further proceedings on certain issues, but it affirmed the judgment as it relates to the CCPA's garnishment cap. The court reasoned that although the CCPA "plainly covers *periodic* payments pursuant to a retirement program," it does not cover "lump-sum distributions" pursuant to retirement programs. Pet. App. 20a. The court grounded its holding in two primary factors. First, it reasoned that its holding "is consistent with Congress's intent" to primarily "protect 'periodic payment[s],'" citing this Court's decision in *Kokoszka* v. *Belford*, 417 U.S. 642 (1974). Pet. App. 22a. And second, it reasoned that by defining "earnings" to "include[] periodic payments pursuant to a pension or retirement program," the CCPA necessarily *excludes*

lump-sum payments pursuant to a retirement program. Pet. App. 20a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT BY MISINTERPRETING THE CCPA AND MISAPPLYING THIS COURT'S PRECEDENT.

A. Courts and the Executive Branch are Split as to How to Interpret the Definition of "Earnings" in the CCPA.

This Court should grant review to resolve an open and acknowledged circuit split about whether lump-sum (as opposed to periodic) compensatory payments fall within the definition of "earnings" under the CCPA. *Compare United States* v. *Ashcraft*, 732 F.3d 860, 863 n.4 (8th Cir. 2013) ("The statute Congress passed does not restrict itself to periodic payments."), *with United States* v. *France*, 782 F.3d 820, 826 & n.1 (7th Cir. 2015) ("[T]his opinion creates a split with the Eighth Circuit" about how to interpret "the definition of 'earnings'" under the CCPA.); *see also United States* v. *Frank*, 8 F.4th 320, 334 (4th Cir. 2021) ("[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 Sates* v. *DeCay*, 620 F.3d 534, 543 (5th Cir. 2010) (quoting *Kokoszka* for the proposition that "earnings" under the CCPA are "limited to periodic payments of compensation"); Pet. App. 21a ("Congress limited the type of retirement payments that qualified as earnings to periodic payments," as opposed to "lump-sum distributions."). These competing interpretations are irreconcilable, and can only be brought into uniformity by this Court. *See* Sup. Ct. R. 10(a).

1. Under the test adopted by multiple federal courts of appeals, including the decision below, the definition of "earnings" depends on the periodic nature of the payments.

In the decision below, the court of appeals acknowledged that the CCPA "plainly covers *periodic* payments pursuant to a retirement program." Pet. App. 20a; *see also DeCay*, 620 F.3d at 544 ("We find the statutory language unambiguous and hold that the United States may garnish only twenty-five percent of Barre's monthly pension benefits."); *United States* v. *Lee,* 659 F.3d 619, 621–22 (7th Cir. 2011) (same). But in its view, payments lose their status as "earnings" if they are made in a lump-sum instead of in multiple installments.

Admitting that the text of the CCPA is "silent" on this specific question, Pet. App. 20a (quoting *United States* v. *Sayyed*, 862 F.3d 615, 619 (7th Cir. 2017)), the court of appeals supported its conclusion with extra-textual sources. Citing dicta from *Kokoszka*, it held that "[i]n enacting the CCPA, Congress intended to protect 'periodic payment of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis.'" Pet. App. 22a (quoting *Kokoszka*, 417 U.S. at 651); *see also id.* at 20a ("'The Supreme Court has cautioned that the terms 'earnings' and 'disposable earnings' under the CCPA are 'limited to periodic payments of compensation and do not pertain to every asset that is traceable in some way to such compensation.'" (quoting *Kokoszka*, 417 U.S. at 651)).

Accordingly, under this test, it matters not that Petitioner's 401(k) payments form part of his compensation and will serve as replacement income during retirement. Rather, the fact that the payment

is not made periodically trumps all other considerations. *See* Pet. App. 20a (rejecting the argument that earnings are "not based on the timing of the payment but rather the compensatory nature of the payment" (quotation marks omitted)). Numerous other courts of appeals have made the same error. *See, e.g.*, *Frank*, 8 F.4th at 334 (4th Cir.); *Sayyed*, 862 F.3d at 619 (7th Cir.); *DeCay*, 620 F.3d at 543 (5th Cir.).[2]

2. The Eighth Circuit takes a different approach that relies on the statutory text instead of legislative history. In its view, "the only test as [to] whether the payment" is considered "earnings" under the CCPA is found in the text of the CCPA itself: whether the payment "is 'compensation paid or payable for personal services.'" *Ashcraft*, 732 F.3d at 863 n.4 (quoting 15 U.S.C. § 1672(a)). Thus, whether a payment is considered "earnings" depends on the compensatory *character* of the payment, not whether it is paid *periodically*.

In *Ashcraft*, like the decision below here, the Eighth Circuit considered whether payments that are not explicitly listed in the statute—in that case, post-employment payments of disability insurance—are "earnings" under the CCPA. The Eighth Circuit held that those payments were "designed to function as

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[2] Although *Decay* principally involved the question of whether monthly pension benefits are considered "earnings" under the CCPA, it cited *Kokoszka*'s periodic payments dicta, and other Fifth Circuit cases have understood it as establishing a periodicity requirement. *See United States* v. *Charpia*, 2022 WL 1831141 at *4 (5th Cir. June 3, 2022). Further muddying the waters, *Charpia* held that disability payments still qualify as "earnings" if they were intended to be made periodically but were actually paid in a lump-sum due to government error. *Ibid*.

wage substitutes," and were "themselves a direct component of the compensation [the employer] provided to [the employee] in return for the personal services [the employee] rendered to [the employer]." 732 F.3d at 864. Accordingly, they were "compensation" that was paid in the form of "disability payments rather than as wages or salary," and were thus "earnings" under the CCPA. *Ibid*.

The court chided the government for ignoring "the character of the payments," explaining that the key consideration is that "'[d]isability payments serve the same purpose [as earnings] and, *like retirement or pension payments*, are replacement income.'" *Ashcraft*, 732 F.3d at 864 (quoting *In re Conway*, 2003 Bankr. LEXIS 1988, at *20–22 (Bankr. S.D. Ala. Sept. 9, 2003)) (emphasis added); *see also id.* at 864–65 ("The disability payments constitute other compensation to employees paid to [her] as a part of [her] earnings for personal services performed in the past." (brackets in original; quotation marks omitted)).[3]

3. The Executive Branch, speaking through both the Department of Labor and the Solicitor General, has also endorsed the *Ashcraft* test. The Department of Labor's position is particularly compelling as it is

[3] The court of appeals' attempt to distinguish *Ashcraft*, and thus downplay the circuit split, was unavailing. The court of appeals relied on the fact that *Ashcraft* involved disability payments, rather than retirement payments, and stated that the CCPA "treats retirement payments differently" from disability payments. Pet. App. 21a n.12. But the Second Circuit indisputably followed the Fourth, Fifth, and Seventh Circuit in interpreting the CCPA's text to exclude lump-sum payments from the definition of "earnings," directly contrary to the Eighth Circuit. *See* Pet. App. 20a–21a (citing *Frank*, 8 F.4th 320, *Sayyed*, 862 F.3d 615, and *DeCay*, 620 F.3d 534).

the cabinet department expressly charged by Congress with enforcing the CCPA. 15 U.S.C. § 1676 ("The Secretary of Labor, acting through the Wage and Hour Division of the Department of Labor, shall enforce the provisions of this subchapter."). "[G]iven Congress' delegation of enforcement powers" to the Department of Labor, this Court "give[s] a degree of weight to [its] views about the meaning of" the statute. *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14–15 (2011) (discussing Department of Labor's "view" of the meaning of statutory term at issue) (citing *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944)).

In 2018, the Department of Labor issued an opinion letter responding to a request for guidance about "whether certain lump-sum payments from employers to employees are earnings" under the CCPA. DOL Op. Ltr. Citing *Ashcraft*, the Department firmly rejected the interpretation of "earnings" that is "restrict[ed]" "to periodic payments." *Id.* at 3 (citing *Ashcraft*, 732 F.3d at 863 n.4). Instead, it concluded 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. *Ibid*.[4]

[4] The requester asked for the Department's opinion as to whether "eighteen specific examples" of lump-sum payments are considered earnings under the CCPA. DOL Op. Ltr. at 1. But because the requester did not ask specifically about lump-sum retirement payments, the Department did not provide an opinion as to whether that specific category of payment is considered earnings under the CCPA. The Department did, however, conclude that several other forms of lump-sum, post-employment payments qualify as earnings, including termination pay and severance pay. *Id.* at 1–3.

The United States similarly endorsed the *Ashcraft* test in its most recent brief to this Court discussing the definition of "earnings" under the CCPA. *See* U.S. *France* Br. at 11. The government explained that the text of "the CCPA makes clear that its definition of 'earnings' sweeps more broadly than salary and wages alone." *Id*. at 12 (citing 15 U.S.C. 1672(a)); *see also id*. at 13 (stating that the definition of "earnings" covers "payments" that "'provide income that substitutes for wages,'" such as "payments from pension and retirement plans" (quoting *Rousey* v. *Jacoway*, 544 U.S. 320, 331 (2005)). And citing *Ashcraft*, it argued that disability insurance payments are "earnings" under the CCPA "because they are a 'component of the compensation [the employer] provided [the employee] in return for [the employee's] personal services.'" *Id.* at 11 (quoting *Ashcraft*, 732 F.3d at 864). This brief, while filed before the Department of Labor issued its 2018 guidance letter, was "based on consultations with the Department of Labor." *Id.* at 9; *see also id.* at 16 ("[T]he conclusion and reasoning set forth in this brief represent the agency's considered analysis of the text and purpose of the CCPA.").

Yet in this case, the Department of Justice has inexplicably departed from the considered analysis and position of the Department of Labor. It has thus created an intra-Branch split—to go along with the acknowledged circuit split—in a dogged and troubling effort to effectively override the protections that Congress has put in place to protect earnings from garnishment. This Court should grant review to resolve this split as to whether lump-sum payments constitute "earnings" under the CCPA.

B. The Decision Below Contravenes the Plain Text of the CCPA Based on a Misapplication of this Court's Dicta.

The decision below not only deepens a well-established circuit split, but does so in a way that furthers a worrying trend of lower courts misapplying this Court's decision in *Kokoszka* to privilege legislative history over the text of the CCPA—resulting in an artificial narrowing of the statute's protections on garnishment of "earnings." Certiorari is warranted on this independent basis. *See Ross* v. *Blake*, 578 U.S. 632, 635 (2016) (granting review where the court of appeals' approach was "inconsistent with" a federal statute). The *Ashcraft* approach, on the other hand, is faithful to the text and purpose of the CCPA, and does not rely on a misreading of this Court's precedent.

1. Under the plain terms of the CCPA, lump-sum payments pursuant to a retirement account qualify as earnings.

The CCPA's definition of "earnings" consists of three clauses: *first*, the core definition, which defines earnings as "compensation paid or payable for personal services"; *second*, a qualifying statement that is expansive in scope, specifying that all forms of compensation are covered, "whether denominated as wages, salary, commission, bonus, or otherwise"; and *third*, an illustrative example, noting that the definition "*includes* periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a) (emphasis added).

Starting with the first clause, as discussed above, *supra* at 5, an individual's 401(k) account is made up of contributions of one's deferred *wages*. Payments made pursuant to these accounts thus fit squarely

within the core definition of "compensation." *See Black's Law Dictionary* (11th ed. 2019) (defining "compensation" as "[r]emuneration and other benefits received in return for services rendered; esp[ecially], salary or wages"); *see also The American Heritage Dictionary of the English Language* (6th ed. 2016) (defining "compensation" as "[s]omething, such as money, given or received as payment or reparation, as for a service or loss"). Indeed, in *Rousey*, this Court recognized that individual retirement accounts "provide a substitute for wages," by which the Court "mean[t] *compensation* earned as hourly or salary income." 544 U.S. at 329 (emphasis added).

Citing the same Black's Law definition cited above, the government has previously acknowledged that earnings under the CCPA include "stock option plans, profit-sharing, commissions, bonuses, golden parachutes, vacation, sick pay, medical benefits, disability, leaves of absence, and expense reimbursement." U.S. *France* Br. at 11 (quotation marks and citation omitted; emphasis removed). Lump-sum payments of deferred wages are just as much earnings as are "golden parachutes," "bonuses," and "expense reimbursement[s]"—all of which are generally paid in a lump-sum.

The second clause, moreover, illustrates the expansive nature of the definition of earnings. Congress's use of expansive terms—"whether denominated as" and "or otherwise"—precludes the government's view that Congress was trying to *limit* the definition of "earnings" to the examples provided in the statute. *Cf. Helsinn Healthcare S.A.* v. *Teva Pharm. USA, Inc.,* 139 S. Ct. 628, 634 (2019) ("[A] broad catchall phrase" such as "'otherwise available to the public' captures material that does not fit neatly

into the statute's enumerated categories but is nevertheless meant to be covered.").

Lastly, the statute specifies that the definition of earnings "includes periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a). It is a black letter rule of statutory interpretation that "including" or "includes" indicates enlargement rather than limitation. Thus, as this Court has repeatedly explained, Congress uses "including" to indicate the "'illustrative and not limitative' function of the examples given." *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citation omitted); *see also*, *e.g.*, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001) ("including" "emphasizes the fact that that which is within is meant simply to be illustrative").

The court of appeals, however, flipped this rule on its head, holding that the word "includes" serves to limit, rather than expand, the definition of "earnings." Pet. App. 20a–21a. True, the interpretive canon *expressio unius*—when it is applicable—provides that "expressing one item of [an] associated group or series excludes another left unmentioned." *United States* v. *Vonn,* 535 U.S. 55, 65 (2002). But that canon "depends on identifying a series of *two or more* terms or things that should be understood to go hand in hand." *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 81 (2002) (emphasis added). This Court "do[es] not read the enumeration of *one* case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (emphasis added). Since there is no evidence that Congress sought to *exclude* lump-sum payments pursuant to retirement accounts, the CCPA's express

inclusion of periodic payments pursuant to retirement accounts does not have any exclusive effect. That would be the case even if the statute did not expressly characterize the periodic payment example as illustrative and not limitative; here it did just that. *See* 15 U.S.C. § 1672(a) ("includes").

The court of appeals also suggested that Petitioner's reading of the CCPA would make some provisions superfluous. Pet. App. 21a. Not so. The third clause of the definition of "earnings" serves an important purpose: making absolutely clear that periodic payments pursuant to retirement programs are covered by the CCPA. The fact that these payments would also be covered by the core definition is no reason to adopt a contorted reading of the core definition simple to avoid a redundancy in the statute. *Conn. Nat'l Bank* v. *Germain,* 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting."). In any event, this Court's "preference for avoiding surplusage constructions is not absolute." *Lamie* v. *U.S. Tr.*, 540 U.S. 526, 536 (2004). Even when faced with an interpretation that *possibly* introduces surplusage, this Court's precedents teach that "[w]e should prefer the plain meaning since that approach respects the words of Congress." *Ibid*.

2. The court of appeals' decision also continues a concerning trend of lower federal courts misapplying this Court's decision in *Kokoszka*, and as a result giving greater weight to a snippet from the CCPA's legislative history than to its plain text.

This Court's holding in *Kokoszka* was narrow: tax refunds are not earnings under the CCPA. This Court rejected the petitioner's argument that a tax refund,

"having its source in wages," qualifies as "earnings." 417 U.S. at 649. Instead, it reasoned that the CCPA does not cover "every asset that is *traceable in some way* to . . . compensation." *Id.* at 651 (emphasis added). Tax refunds, being payments made *by the government* to an individual, simply had too attenuated a connection to compensation *from an employer* to be considered "earnings" under the CCPA.

Although *Kokoszka*'s holding was grounded in these above-mentioned considerations, in dicta the Court opined on the legislative history of the CCPA, remarking that "Congress . . . sought to regulate garnishment in its usual sense as a levy on periodic payments of compensation." 417 U.S. at 651. There is no question that "the Supreme Court's broad pronouncements about the CCPA's relationship to the Bankruptcy Code were at minimum dicta." *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259, 278 (3d Cir. 2013). The notion that a payment must be made periodically to be considered earnings is nowhere to be found in the statutory text. Indeed, numerous lower and state courts have recognized that the "discussion about periodic payments [in *Kokoszka*] is not an analysis of the language of the statute, but rather of the general legislative purposes behind the CCPA." *Genesee Cnty. Friend of Ct.* v. *Gen. Motors Corp.*, 464 Mich. 44, 56 n.7 (2001); *see also In re Radez*, 2009 WL 1404326, at *2 (Bankr. S.D. Ind. May 15, 2009) ("This 'periodic payment' requirement is grounded in the CCPA's legislative history as discussed in *Kokoszka*.").

Moreover, this dicta is unsupported by the legislative history. *Kokoszka* did not cite any legislative materials specifically stating that the CCPA was intended to protect only periodic

payments. Rather, it merely asserted, *ipse dixit*, that "[t]here is every indication that Congress" held this view. 417 U.S. at 651.

In any event, to the extent it relied on a House Report or the floor statement of a legislator at the expense of the CCPA's text, *Kokoszka*'s dicta is a holdover from an outdated mode of statutory interpretation. *See Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1750 (2020); *see also id.* at 1754 ("Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."); *United States* v. *Wells*, 519 U.S. 482, 497 (1997) (holding that the actions of the "'staff of experts' who prepared the legislation" "does nothing to muddy the ostensibly unambiguous provision of the statute as enacted by Congress"). It is important that this Court now make clear that this dicta is not to be treated as controlling law or otherwise followed any longer.

Furthermore, *Kokoszka*'s dicta—to the extent it has any application—is relevant only as to how the "Bankruptcy Act of 1898" interacts with the CCPA. *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004) (also noting that *Kokoszka*'s discussion of legislative history "was not expressed as a holding"). Indeed, the Court's analysis of the legislative history was specifically tethered to this interaction. *Kokoszka*, 417 U.S. at 651 ("There is no indication . . . that Congress intended drastically to alter the delicate balance of a debtor's protections and obligations during the bankruptcy procedure."); *see also id.* at 650 ("Congress' concern was not the administration of a bankrupt's estate but the prevention of bankruptcy in the first place by

eliminating an 'essential element in the predatory extension of credit'" (quoting H.R. Rep. No. 1040, 90th Cong., 1st Sess., 21 (1967))).

Nevertheless, numerous courts of appeals, including the Second Circuit below, have relied on this Court's dicta in *Kokoszka* to hold that "earnings" under the CCPA are limited to "periodic payments of compensation." *See, e.g.*, *Frank*, 8 F.4th at 334 (4th Cir.) (citing *Kokoszka* for the proposition that "[l]ump-sum payouts" from retirement accounts do not qualify as "earnings" under the CCPA); *Sayyed*, 862 F.3d at 619 (7th Cir.) (similar); *DeCay*, 620 F.3d at 543 (5th Cir.) (similar); Pet. App. 21a (similar). This pattern of lower courts misapplying this Court's precedent is satisfactory grounds for review. *Cf. Pearson* v. *Callahan*, 555 U.S. 223 (2009) (where "a decision . . . defie[s] consistent application by the lower courts," reconsideration is appropriate (quotation marks and citation omitted)); *see also Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 179 (2009) ("[E]ven if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework.").

The court of appeals' decision below is also inconsistent with this Court's more recent precedent. *See* Sup. Ct. R. 10(c). As noted above, *supra* at 14, this Court held in *Rousey* that IRAs—which, as relevant here, are essentially identical to 401(k) accounts—"provide a substitute for wages (by wages, for present purposes, we mean *compensation* earned as hourly or salary income), and are not mere savings accounts." 544 U.S. at 329 (emphasis added). The government has previously argued before this Court that *Rousey*'s discussion of "payments from pension and retirement

plans" is relevant for the purposes of interpreting the definition of "earnings" under the CCPA. U.S. *France* Br. at 13. This intervening decision—which conflicts with the way some lower courts have interpreted *Kokoszka*—is further reason to grant review and clarify that *Kokoszka*'s dicta is not controlling. *Cf. Neal* v. *United States*, 516 U.S. 284, 295 (1996) ("We have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision'" (citation omitted)); *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct. 12, 15 (2011) (Mem.) (Thomas, J., dissenting) ("Since *Van Orden* and *McCreary*, lower courts have understandably expressed confusion.").

3. The court of appeals' approach also undermines the purpose of the CCPA. "Congress intended for courts to broadly construe [the CCPA's] provisions in accordance with its remedial purpose" to ensure a continued means of support for debtors and their families. *Stout* v. *FreeScore, LLC*, 743 F.3d 680, 684 (9th Cir. 2014); *accord 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 and citation omitted)). Applied to this context, that means construing the definition of "earnings" broadly so as to provide individuals with greater protection against excessive garnishments. The decision below, however, does the opposite.

In sum, the decision below misapplies dicta from *Kokoszka* to support the creation of a legislative history-based periodicity requirement that cannot be reconciled with the CCPA's plain terms. The Eighth Circuit's approach, in contrast, rightly eschews the

legislative history and is faithful to the text of the CCPA. This Court should grant the petition and adopt that approach.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

This Court should grant review for the additional reason that the petition involves an exceptionally important issue of federal law—namely, the scope of protections afforded to citizens by an Act of Congress against prosecutorial overreach in the form of excessive garnishment. *See* Sup. Ct. R. 10(c).

1. It is a deeply rooted principle of our constitutional order that the seizure of private property is a serious power that should be exercised only in carefully circumscribed ways. As Joseph Story explained in *Commentaries on the Constitution of the United States* § 1784, at 661 (1833): "[I]n a free government," "almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen." This Court has affirmed this principle in a wide variety of contexts, ensuring that private citizens are protected from unwarranted or excessive seizures of personal property. *See, e.g.*, *Austin* v. *United States*, 509 U.S. 602, 622 (1993) (holding that civil *in rem* forfeitures following criminal conviction are "subject to the limitations of the Eighth Amendment's Excessive Fines Clause"); *see also Timbs* v. *Indiana*, 139 S. Ct. 682, 688 (2019) (noting that the Magna Carta required that "economic sanctions . . . not be so large as to deprive an offender of his livelihood") (brackets and quotation marks omitted); *Horne* v. *Dep't of Agriculture*, 576 U.S. 350, 359 (2015) (noting that "early Americans bridled at

appropriations of their personal property during the Revolutionary War").

This Court's concern about the deprivation of private property extends to the garnishment context specifically. *See, e.g.*, *N. Ga. Finishing, Inc.* v. *Di-Chem, Inc*., 419 U.S. 601, 608 (1975) (invalidating prejudgment garnishment statute as violative of the Due Process Clause); *Sniadach* v. *Fam. Fin. Corp. of Bay View*, 395 U.S. 337, 341–42 (1969) (finding inadequate constitutional protection in case challenging garnishment law). Granting this petition would further this Court's long-standing tradition of protecting private property from unwarranted seizure by creditors or the government.

2. This Court should also grant review because the decision below is inconsistent with the CCPA's explicit design to protect against overreach by creditors so that individuals and their families can continue to "meet basic needs." *Gehrig* v. *Shreves*, 491 F.2d 668, 674 (8th Cir. 1974) (citing H. Rep. No. 1040, 90th Cong., 2d Sess., U.S. Code Cong. & Ad. News, at 1962, 1977–79 (1968)). Indeed, in enacting the CCPA, Congress acted "not to protect the rights of creditors, but to limit the ills that flowed from the unrestricted garnishment of wages." *Long Island Tr. Co.* v. *U.S. Postal Serv.*, 647 F.2d 336, 339 (2d Cir. 1981). Moreover, "Congress intended for courts to broadly construe [the CCPA's] provisions in accordance with its remedial purpose." *Stout*, 743 F.3d at 684; *see also Clemmer*, 539 F.3d at 353 (CCPA is a "remedial statute accorded a broad, liberal construction in favor of the consumer" (citation and quotation marks omitted)). The ruling below, and the trend it represents, guts the protections afforded by the CCPA

and is irreconcilable with its purpose of protecting private property.

3. The breadth of the CCPA's applicability is further reason to grant review. A variety of common categories of earnings that are paid in lump-sum—including bonuses, severance pay, and relocation payments—are covered by the CCPA's garnishment cap. DOL Op. Ltr. at 4. The CCPA governs nearly all garnishment actions under both state and federal law, not just those under the MVRA. *See* 15 U.S.C. § 1672(c) (applying the 25% cap to "*any* legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt" (emphasis added)). And it applies to garnishment actions by private creditors, as well as the government. As such, the confusion over the definition of "earnings," and the failure of many courts to limit garnishment of lump-sum earnings to the statutory maximum, has wreaked havoc in other areas of law beyond restitution orders under the MVRA and outside of the court of appeals cases directly implicated in the circuit split discussed above.

For example, one federal bankruptcy court, citing *Kokoszka*'s dicta, held that a bonus is not earnings despite the CCPA specifically listing bonuses *as an example of earnings*. *In re Radez*, 2009 WL 1404326, at *2 ("[C]ase law indicates that lump sum bonuses paid at the end of the year would not be subject to garnishment even though the definition of 'earnings' includes 'bonus.'"). On the other hand, some state courts, recognizing the atextual nature of the periodicity requirement, have properly rejected it. *See Genesee Cnty. Friend of Ct.*, 464 Mich. at 55 (holding that the periodicity requirement "is inconsistent with the plain language of 15 U.S.C. 1672(a)"); *Lizardo* v.

Ortega, 91 Mass. App. Ct. 687, 693 (2017) ("The father's retroactive lump-sum distribution of SSDI benefits constituted earnings."); *Shah* v. *City of Farmington Hills*, 278 Mich. App. 95, 101 (2008) (holding that "a lump-sum severance payment constitutes 'earnings' under the CCPA"); *BancOhio Nat'l Bank* v. *Box*, 580 N.E.2d 23, 25 (Ohio Ct. App. 1989) ("[N]either the [CCPA] nor case law . . . supports th[e] position" "that in order to qualify as 'earnings,' the payment needs to be 'periodic.'"). These cases highlight that the confusion caused by *Kokoszka* extends beyond the cases that have resulted in precedential rulings in the federal courts of appeals.

4. Moreover, this case touches on a feature of the human experience that nearly every single American must plan for: retirement. Every year, millions of individuals depend on employer retirement accounts, like 401(k)s, to survive. Individuals with 401(k) accounts nearly always make contributions, which demonstrates a clear intention to rely on the accounts' future benefits and returns during retirement. Maria G. Hoffman et al., *New Data Reveal Inequality in Retirement Account Ownership*, Census.gov (Aug. 31, 2022), https://bit.ly/3V48yWl ("In 2020, 92.1% of 401(k)-style account owners and 81.1% of IRA or Keogh account owners contributed to their employer-sponsored retirement accounts, regardless of the frequency of their contributions."). The significance of this petition is further underscored by the reality that a majority of Americans live paycheck to paycheck, leaving little room to save money and creating an increased dependency on employer retirement accounts, like 401(k)s. *See generally* Jessica Dickler, *63% of Americans Are Living Paycheck to Paycheck — Including Nearly Half of Six-Figure Earners*, CNBC (Oct. 24, 2022), https://cnb.cx/3FKtQn6. And many

individuals retire because of circumstances beyond their control, including because of unexpected health problems or to take care of a family member in need. *See* Federal Reserve, *Economic Well-Being of U.S. Households in 2020* (May 2021), https://bit.ly/3W6Dmqf. For these individuals, employer-funded retirement funds can be especially critical for their survival.

5. While the question presented is important to citizens of all backgrounds, it will uniquely affect vulnerable populations, who especially depend on the CCPA's wage garnishment protections. For example, members of the disabled community are likely to be especially reliant on the protections of the CCPA. Disability and retirement policies are created to protect vulnerable populations "against the contingency of" being "prevented . . . from earning a living for [themselves]." *United States* v. *Crume*, 54 F.2d 556, 557 (5th Cir. 1931). An individual's disability might prevent them from working entirely or significantly diminish the amount of hours they can work, thereby creating an increased reliance on retirement accounts, like the 401(k)s at issue here.

The CCPA's protections are also especially important to low-income individuals. Without a cap on garnishment, individuals and families who are already struggling could be thrust deeper into poverty. Further, people of color are "more likely . . . to be impacted by lawsuits resulting in wage garnishment." Press Release, *Adams Introduces Bill to Protect Essential Workers from Wage Garnishment* (Dec. 5, 2022), https://bit.ly/3uIUpTG.

6. The question presented is also recurring. In the United States, garnishment actions have become increasingly common. *See* Chris Arnold, *Millions of*

Americans' Wages Seized over Credit Card and Medical Debt, NPR (Sept. 15, 2014), https://n.pr/3hKRgjg ("One in 10 working Americans between the ages of 35 and 44 are getting their wages garnished."). And the rates of employee garnishments are especially high for workers at large companies, *i.e.*, the kinds of companies that are more likely to provide employees with 401(k) benefits. *See* ADP Research Institute, *Garnishment: The Untold Story* 12 (2014), https://bit.ly/3G9MN2O.

Despite the volume and pervasiveness of wage garnishment, a variety of factors often prevent garnishment cases from being litigated through appeal, making it all the more important that the Court take *this* opportunity to resolve the important question presented. Debt collectors employ a number of tactics to avoid even the prospect of litigation. *See generally* John Collins Rudolf, *Pay Garnishments Rise as Debtors Fall Behind*, N.Y. Times (Apr. 1, 2010), https://nyti.ms/3joc1l5. Many individuals facing writs of garnishment, moreover, may not have the financial means to challenge them. *See generally* Nat'l Consumer Law Center, *No Fresh Start 2021: Will States Let Debt Collectors Push Families Into Poverty as Pandemic Protections Expire?* (Nov. 2021), https://bit.ly/3HMfEM2.

This Court has recognized that the dynamic between creditor and debtor hinders legal challenges:

> The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often

> sign a new contract of 'payment schedule' which incorporates these additional charges.

Sniadach, 395 U.S. at 341 (citation omitted).

In light of these considerations, it is important for the Court to grant review now, since similar cases may not reach this stage of litigation with frequency, despite the recurring nature of the issue presented. Meanwhile, the real world consequences of the decisions on the wrong side of the circuit split are felt by our nation's most vulnerable each and every day.

7. Finally, this case is an excellent vehicle to address this important question because the question was squarely presented below and there are no factual issues precluding review.

In sum, this case cleanly presents an issue of significant importance—prosecutorial overreach via the seizure of private property beyond the limits set by Congress—on which the courts of appeals, and the Executive Branch, are split. This Court should grant review and adopt an interpretation of the term "earnings" in the CCPA that is grounded not in a misreading of legislative history, but in the plain text of the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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