No. 22-583

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the Eighth Circuit has explicitly recognized, there is an open split of authority on Petitioner's question presented: "Some courts interpret [*Kokoszka* v. *Belford*, 417 U.S. 642 (1974)] to mean that only periodic payments, as opposed to lump sums, can constitute 'earnings'" under the CCPA, but "[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). This split—on an issue of nationwide importance—is mature, and runs through the courts of appeals and the Executive Branch itself. *Compare ibid.*, *and* DOL Op. Ltr. at 3, *with* Pet. App. 22a, *United States* v. *Sayyed*, 862 F.3d 615, 619 (7th Cir. 2017), *United States* v. *Frank*, 8 F.4th 320, 334 (4th Cir. 2021), *and* Opp. 10-11.

The government's only strategy for avoiding this clear divide is to ignore *Petitioner's* question presented and instead focus on its own, artificially narrowed framing that magically defines away the circuit split. But "it is the petitioner himself who controls the scope of the question presented." *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). The government does not dispute that there is a split on Petitioner's actual question presented.

The government's arguments on the merits, moreover, only serve to highlight that its position, and that of the court of appeals below, cannot be defended based on the CCPA's text. Indeed, the government completely ignores the vast majority of Petitioner's detailed textual analysis, Pet. 13-16, and fails to engage in any meaningful, independent discussion of the text. Instead, it simply follows the circuit court decisions

that have diverged from *Ashcraft* and the Department of Labor, relying on flimsy (and outdated) purposivist arguments to introduce an extratextual "periodicity" requirement into the definition of earnings. And while the government now runs from its prior reliance on the CCPA's legislative history, as misconstrued in dicta in *Kokoszka*, that is the source of the periodicity rule. In contrast, the authorities on Petitioner's side of the split, like the Department of Labor's official guidance, are grounded in the text of "[t]he statute Congress passed." *Ashcraft*, 732 F.3d at 863 n.4.

The government also does not dispute the importance of the question presented. Congress—through the CCPA—protected earnings, however paid, from being seized in full by the government or a creditor via garnishment. It did so to stave off destitution and to preserve private property rights, including retirement accounts that serve as myriad Americans' primary income. Yet the decision below thickens a troubling encrustment of case law on one side of the split blocking this critical statutory safeguard—and facilitating prosecutorial overreach—based on an atextual carveout: even income that is compensation for personal services cannot constitute earnings if paid in a lump sum.

The government's only argument against addressing the question is the supposed interlocutory posture of the case. To be sure, after making a final determination on the question presented, the court of appeals remanded for the district court to determine the tax effects of the garnishment. But this last, largely ministerial step should not prevent this Court's review. "[A]s this Court often has pointed out," finality is understood "practical[ly]," and a ruling can be final even

if it is not "the last order possible to be made in a case." *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152 (1964) (citation omitted). This is just such a case.

Accordingly, the Court should grant the petition.

ARGUMENT

I. COURTS AND THE EXECUTIVE BRANCH ARE DEEPLY DIVIDED ON THE CCPA'S APPLICATION TO LUMP-SUM COMPENSATORY PAYMENTS.

1. Rather than address the question presented as framed—"[w]hether lump-sum compensatory payments to an individual . . . qualify as 'earnings'" under the CCPA, Pet. i, 7-12—the government instead argues that there is no division among courts or within the Executive Branch on a different and far narrower question: whether the CCPA's protections apply to lump-sum distributions from an individual's 401(k) retirement account specifically. Opp. i, 13-17. That reframing is too clever by half. Absent "reasons of urgency or of economy"—and there are none here—it is the petitioner's "framing of the question presented," not the respondent's, that sets the terms of engagement in this Court. *Yee*, 503 U.S. at 535. This Court thus consistently addresses the issues as they have been "presented *by the petitioner*." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 169 (2009) (emphasis added). In any event, Petitioner's framing flows from the approach of the lower courts and the Department of Labor, which generally focus on the compensatory nature of the payment, on one side of the split, or lump-sum-versus-periodicity, on the other, without distinguishing between payments from retirement accounts and other sources.

2. As to Petitioner's question presented, the government has no answer to the fact that the courts of appeals have firmly divided on whether lump-sum compensatory payments count as "earnings" under the CCPA. *See* Pet. 7 (noting disagreement between the Eighth Circuit and the Second, Fourth, Fifth, and Seventh Circuits).

The government tries to distinguish *United States* v. *Ashcraft* on the basis that it involved *disability*, rather than *retirement*, payments. Opp. 14-15. But that factual difference is immaterial. *Ashcraft*'s core reasoning was that "[t]he statute Congress passed does not restrict itself to periodic payments," because the "label[]" of the payment "is not the central issue; the central issue is whether the . . . payments are 'compensation paid or payable for personal services.'" 732 F.3d at 863 n.4. Other courts of appeals diverge from *Ashcraft* (and the Department of Labor) by categorically deeming any type of lump-sum payments not "earnings" within the scope of the CCPA. That the Eighth Circuit did not involve, and therefore did not address, the CCPA's application to lump-sum retirement payments specifically does not change the stark disagreement among the courts of appeals on the appropriate benchmark for earnings—the compensatory nature of the funds, or the timing of their payment. *Compare ibid.*, *with, e.g.*, Pet. App. 20a (rejecting Petitioner's argument that "the definition of earnings is not based on the timing of the payment").

3. Even flimsier is the government's discussion of *United States* v. *France*, 782 F.3d 820 (7th Cir. 2015). The government points (Opp. 15) to this Court's subsequent vacatur of the Seventh Circuit's judgment "in light of the [government's] confession of error."

France v. *United States*, 577 U.S. 1026 (2015). But *Ashcraft* diverges from another Seventh Circuit case, *United States* v. *Sayyed*, that post-dates *France*, as well as decisions of the Second, Fourth, and Fifth Circuits; the split is equally deep regardless of *France*. *See* Pet. 8-9.

4. The government's discussion of *France* also highlights the conflicting views within the Executive Branch, which the government tries (and fails) to paper over. In *France*, the government sought—and secured—summary vacatur on the view that *Ashcraft* correctly interpreted the CCPA by focusing on whether payments are a "component of the compensation [the employer] provided [the employee] in return for [the employee's] personal services." U.S. Br. at 10-12, *France* v. *United States*, No. 15-24 (U.S. Nov. 6, 2015) (quoting *Ashcraft*, 732 F.3d at 864); *see also France*, 577 U.S. 1026. Under that view, which was based on consultations with the Department of Labor, Pet. 12, the government argued that "pension and retirement payments" "are properly seen as compensation 'for personal services performed in the past,'" U.S. *France* Br. at 12 (quoting *Ashcraft*, 732 F.3d at 864). The Department of Labor in its 2018 opinion letter similarly relied on *Ashcraft* to reject the notion that the CCPA's reference to "earnings" only encompasses periodic payments, and instead concluded that *the compensatory nature of a payment is determinative*. Pet. 11-12.

Yet here, the government defends the Department of Justice's view that retirement payments are *not* compensation for personal services when paid in a lump sum. Opp. 11. Tellingly, unlike in *France*, the

Solicitor General's just-filed brief to this Court is silent on the Department of Labor's view.

The government's only response is to claim that neither its brief to this Court in *France* nor the Department of Labor's subsequent official guidance addressed "the specific question presented," Opp. 15-17—but, again, the question Petitioner has presented is whether the CCPA covers "lump-sum *compensatory* payments to an individual," Pet. i (emphasis added). Both statements conveying the Department of Labor's position squarely answered that question in the affirmative; here, the Department of Justice has taken the opposite view.

5. The clear split of authority extends well beyond the federal courts of appeals and the federal government. The decision below (and those it follows) is also in conflict with the Michigan Supreme Court and other state courts that have held that limiting the CCPA's coverage to periodic payments "is inconsistent with the plain language of 15 U.S.C. [§] 1672(a)." *Genesee Cnty. Friend of Ct.* v. *Gen. Motors Corp.*, 626 N.W.2d 395, 400 (Mich. 2001); Pet. 23-24. And lower courts "around the country" have diverged on the issue. *United States* v. *DeCay*, 620 F.3d 534, 543 (5th Cir. 2010); *see also In re Radez,* 2009 WL 1404326 (Bankr. S.D. Ind. May 15, 2009). The divide is deep and well developed; this Court should weigh in now.

II. THE DECISION BELOW LACKS A TEXTUAL BASIS.

1. The government's opposition makes clear that the decision below cannot be defended on textual grounds. Completely missing from the government's opposition is any serious engagement with the text of

the CCPA. Pet. 13-16. Instead, the government's purported "text[ual]" analysis (Opp. 11-12) consists of regurgitating the holdings of circuit court decisions on the wrong side of the split, which—to the extent they engage with the text at all—erroneously rely on the statute's reference to *examples* of earnings "includ[ing] periodic payments pursuant to a pension or retirement program" to hold that lump-sum payments do not qualify. *Ibid.* (citing Pet. App. 36a; *Frank*, 8 F.4th at 334; *Sayyed*, 862 F.3d at 619).

Critically, the government has no answer to this Court's precedents holding that Congress' use of the word "including" indicates 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* Pet. 15. As a result, Congress' "enumeration of one case" introduced by the term "including"—here, periodic payments pursuant to retirement plans—does *not* mean that Congress "considered the unnamed possibility," *i.e.*, lump-sum payments pursuant to a retirement plan, "and meant to say no to it." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Nor does the government provide any principled basis for why Congress would have included the one and not the other in the definition of earnings, when retirement plans serve as "compensation paid or payable for personal services," 15 U.S.C. § 1672(a), whether payable periodically or in a lump sum. Indeed, the statute expressly directs that it is the "compensat[ory]" nature of the payment that determines its status as earnings, however "denominated." *Ibid.*

2. The government also now seeks to distance itself from this Court's decision in *Kokoszka* v. *Belford*.

Opp. 13-14. It does not dispute that *Kokoszka*'s discussion of a periodicity requirement is dicta. *Ibid*. Instead, it argues that the decision below "rested principally on the plain text of Section 1672(a), not on *Kokoszka*." Opp. 14. But the court of appeals expressly relied on *Kokoszka* for its core holding—limiting the definition of earnings to "periodic payments." Pet. App. 20a (quoting *Kokoszka*, 417 U.S. at 651). And the other cases cited by the government also rely expressly on *Kokoszka* when analyzing the statute. *See* Pet. 8-9.

The government's newfound willingness not to treat *Kokoszka* as controlling precedent does not change the fact that numerous courts of appeals, including the decision below here, wrongly view it as such. This Court alone can correct that misapprehension and ensure that lower courts do not continue to rely on *Kokoszka*'s purportedly legislative history-based dicta about periodic payments to override the plain text of the CCPA.

3. Having effectively disavowed the CCPA's plain text and run from *Kokoszka* as binding precedent, the government inexplicably turns back to *Kokoszka* to support its core, purposivist argument. Introducing a requirement nowhere found in the statute's text, the government claims Congress enacted the CCPA to "restrict[] the garnishment of 'periodic payments of compensation needed to support [a] wage earner and his family.'" Opp. 12 (quoting *Kokoszka*, 417 U.S. at 651). But neither *Kokoszka* nor the government's opposition actually cites *any* legislative materials that support limiting the definition of earnings to periodic payments. *See* Pet. 17-18. Indeed, the single House Report cited in *Kokoszka* does not so much as mention a

periodicity requirement for the definition of earnings. H.R. Rep. No. 90-1040 (Dec. 13, 1967). In any event, this dicta from *Kokoszka* is an example of a bygone reliance on legislative history over statutory text; this Court should step in to correct it. Pet. 2. Moreover, to the extent legislative purpose has any relevance, the government does not even attempt to grapple with the authority directing that courts should "broadly construe [the CCPA's] provisions in accordance with its remedial purpose." Pet. 20 (quoting *Stout* v. *Free-Score, LLC*, 743 F.3d 680, 684 (9th Cir. 2014)).

Rousey v. *Jacoway*, 544 U.S. 320 (2005), does not support the government's invocation of legislative purpose. *See* Opp. 12. *Rousey* 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). So *Rousey* only bolsters Petitioner's textual argument that any distribution from a retirement account—whether it is in lump sum or made periodically—is "compensation paid or payable for personal services." 15 U.S.C. § 1672(a).

4. The government also suggests—without a text-based rationale—that "[l]ump sum payouts" pursuant to retirement plans are not earnings because they involve "funds that often have been invested for decades." Opp. 11 (citation omitted). But periodic payments pursuant to retirement plans also often involve funds that have been "invested for decades," yet there is no dispute that those payments are considered "earnings" under the CCPA. Although *Usery* v. *First National Bank*, 586 F.2d 107 (9th Cir. 1978), held that compensation does not retain its character as "earn-

ings" when deposited into an employee's *bank account*, this holding cannot be extended to retirement accounts because, as the government concedes, the CCPA covers at least some payments from retirement accounts.

5. The government's view also leads to absurd results, and this case is a prime example. Petitioner's 401(k) plans, like many retirement accounts, permit either a lump-sum distribution or periodic distributions: Petitioner had the *option* to receive a lump-sum distribution or a periodic distribution, or a combination of both. Had he left his 401(k)s untouched until he was 75, federal law would have *mandated* that he begin taking periodic distributions. *See* 26 C.F.R. §§ 1.401(a)(9)-1, 1.401(a)(9)-5. The government cannot dispute that under the latter scenario the payments would be considered earnings under the CCPA. But Petitioner never had the opportunity to make that choice because the government elected to withdraw the funds in a lump sum through the garnishment proceedings.

Thus, under the government's theory, the funds in any citizen's retirement account may ping-pong between earnings and non-earnings for CCPA purposes. The funds are earnings when the account is created, and possibly still earnings when first invested. But at some undefined point—after they have been "invested for decades," Opp. 11—the funds are no longer earnings. They may regain their status as earnings, however, if they are later paid out periodically—but they will remain non-earnings if paid out in a lump sum. What's more, their status may ultimately turn on the conduct of the government (or a creditor), as here,

when the *government* chose to garnish Petitioner's retirement accounts in a lump sum. The distinction between periodic and lump-sum payments posited by the government thus introduces an element that makes no practical sense and is also ripe for abuse.

III. This Is an Excellent Vehicle to Address an Indisputably Important Question.

1. The government does not dispute the importance of the question presented. It implicates individuals' freedom from governmental interference with private property, Pet. 21-22; if unaddressed, it threatens to gut the CCPA's core purpose of preventing unrestricted garnishment of earnings, Pet. 22-23, would endanger continued access to retirement funds, with particular impacts on vulnerable populations, Pet. 24-26, and would have repercussions in nearly all federal and state garnishment actions, Pet. 23-24; and it is recurring yet often evades review on appeal, Pet. 25-27.

2. The government's sole rebuttal is to assert that this case's purportedly interlocutory posture makes review unwarranted. Opp. 18-19. But finality is understood "practical[ly]," and a ruling can be final even if it is not "the last order possible to be made in a case." *Gillespie*, 379 U.S. at 152 (citation omitted). Here, as to the question presented, the Second Circuit's decision is final; nothing in the future, largely ministerial proceedings concerning the tax effects of garnishment will alter its conclusion that the CCPA does not shield Petitioner's retirement plan.

Regardless, this Court often reviews interlocutory decisions that are "fundamental to the further conduct of the case." *Gillespie*, 379 U.S. at 153 (citation

omitted); *accord Randolph Cent. Sch. Dist.* v. *Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting from denial of certiorari) (collecting cases). Deciding the meaning of "earnings" under the CCPA is necessary for the future computation of taxes, since any tax implications hinge on the amount of Petitioner's retirement plan garnished. The question presented is, moreover, "an important and clear-cut issue of law" that "otherwise would qualify as a basis for certiorari." *Randolph*, 506 U.S. at 965 (citation omitted); *accord Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 192-93 (1974) (granting certiorari "despite the interlocutory character" because of "importance of the issues" and circuit "conflicts"). Review is warranted at this time.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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