

No. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**

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JON LAWRENCE FRANK,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**APPLICATION FOR AN EXTENSION OF TIME IN WHICH  
TO FILE PETITION FOR A WRIT OF CERTIORARI**

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To the Honorable John Roberts, Chief Justice of the United States and  
Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

Under Supreme Court Rule 13.5 and 28 U.S.C. § 2101(c), petitioner Jon  
Lawrence Frank respectfully requests an extension of 30 days in which to file a  
petition for writ of certiorari in this case. The petition will challenge the decision of  
the Fourth Circuit in *United States v. Frank*, 2023 WL 1794153 (4th Cir. Feb. 7,  
2023) (per curiam), a copy of which is attached hereto as Appendix A. That decision  
followed a remand to the district court, and the post-remand decision adhered in  
relevant respects to the Fourth Circuit's prior, published opinion in this case,

*United States v. Frank*, 8 F.4th 320 (4th Cir. 2021), a copy of which is attached hereto as Appendix B.

In support of this application, petitioner states as follows:

1. The Fourth Circuit issued its opinion and entered judgment on February 7, 2023. Without an extension, the petition for a writ of certiorari would be due on May 8, 2023. With the requested extension, the petition would be due on June 7, 2023. The Court's jurisdiction will be invoked under 28 U.S.C. § 1254(1). In accordance with Supreme Court Rule 13.5, petitioner is filing this application at least ten days before the current due date.

2. This case involves important questions regarding whether and to what extent the federal government may garnish funds in a defendant's 401(k) retirement account to satisfy a criminal restitution order.

a. The Employee Retirement Income Security Act of 1974 ("ERISA") broadly aims to "protect ... the interests of participants in private pension plans and their beneficiaries." 29 U.S.C. § 1001(c). In furtherance of that goal, ERISA includes an "anti-alienation" provision, under which covered retirement plans must provide that plan benefits "may not be assigned or alienated." *Id.* § 1056(d)(1). The statute identifies only two situations in which this otherwise absolute anti-alienation rule "shall not apply": to payments pursuant to a "qualified domestic relations order," *id.* § 1056(d)(3)(A), and to an "offset of a participant's benefits ... against an amount that the participant is ordered or required to pay to the plan" in connection with certain plan-related wrongdoing, *id.* § 1056(d)(4).

As this Court has explained, ERISA’s anti-alienation rule “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 decision prevents others from securing relief for the wrongs done them.” *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365, 376 (1990). It is therefore up to Congress to craft any exceptions, and the Court has rejected arguments that vague, general statutory language suffices to do so. *See id.* at 374-76 (holding that statute authorizing suits for “other appropriate relief” did not create exception to ERISA’s anti-alienation rule). Instead, the Court has pointed to the exemption for qualified domestic relations orders in 29 U.S.C. § 1056(d)(3) as an example of what a legislative carve-out from the anti-alienation rule looks like. *See Guidry*, 493 U.S. at 376 n.18.

Consistent with *Guidry*, this Court has never recognized any exception to ERISA’s anti-alienation rule beyond those set forth in ERISA itself. *See id.*; *see also Boggs v. Boggs*, 520 U.S. 833, 846 (1997) (“ERISA’s pension plan anti-alienation provision is mandatory and contains only two explicit exceptions, which are not subject to judicial expansion.” (citations omitted)); *Patterson v. Shumate*, 504 U.S. 753, 760 (1992) (“[T]his Court ... vigorously has enforced ERISA’s prohibition on the assignment or alienation of pension benefits.”). The Fourth Circuit nonetheless held in this case that the government may garnish funds from ERISA-protected retirement accounts to satisfy a criminal restitution order under the Mandatory Victim Restitution Act of 1996 (“MVRA”). *See Exhibit B at 3.* The court of appeals

recognized that ERISA’s anti-alienation rule “includes only two express exceptions, for domestic relation orders and for offsets to recover for wrongs committed against the retirement plan.” *Id.* at 10. But the court held that the MVRA effectively creates an additional exception to the anti-alienation rule beyond those identified in ERISA, because the MVRA “instructs the government to enforce criminal restitution orders in the same manner as criminal fines,” and “a judgment imposing a fine may be enforced against all property or rights of the person fined” “[n]otwithstanding any other Federal law.” *Id.*

The same issue divided the en banc Ninth Circuit in *United States v. Novak*, 476 F.3d 1041 (9th Cir. 2007) (en banc), with five judges dissenting from a majority opinion that largely tracked the Fourth Circuit’s decision in this case. As the *Novak* dissent explained, *Guidry* makes clear that exceptions to ERISA’s anti-alienation rule should not be recognized absent “an unmistakable [legislative] intention” to achieve that result. *Id.* at 1064 (W. Fletcher, J., dissenting). And when the Court in *Guidry* “sought to show how Congress should express its intention to override the anti-alienation provision,” it cited the exception for qualified domestic relations orders—“a directive that explicitly, carefully, and unambiguously permitted alienation of ERISA-covered pension benefits.” *Id.* at 1066. The MVRA, by contrast, does not even mention ERISA. *Id.* at 1065. Nor does the MVRA amend the Internal Revenue Code to preserve tax-exempt status for ERISA plans in light of the possibility of alienation to satisfy a restitution order, as Congress has done when creating each of the express exemptions in ERISA. *Id.* As the *Novak* dissent

put it, the express exemptions in ERISA—one of which was enacted a year after the MVRA—show that “when congressional drafters intended to override ERISA’s anti-alienation provision, they knew how to do it.” *Id.*

Whether Congress can create exceptions to ERISA’s anti-alienation rule outside of ERISA itself, and without even referencing ERISA, is an exceptionally important question that merits this Court’s review. The ERISA anti-alienation rule’s requirements (and express exceptions) are mirrored in the Internal Revenue Code, and ERISA-governed retirement plans are required to comply with the anti-alienation provision to maintain their tax-qualified status. *See Patterson*, 504 U.S. at 759-60; 26 U.S.C. § 401(a)(13). Treating statutory provisions outside of the ERISA framework as effective exceptions to the anti-alienation rule creates significant uncertainty regarding the potential tax implications where plan administrators are ordered to turn over funds in a defendant’s retirement plan account to satisfy a criminal restitution order—a provision not contemplated under the relevant tax provisions. That uncertainty undercuts Congress’s goal of creating through ERISA a legislative regime that not only protects employees’ rights to the benefits they have earned, but also encourages employers to sponsor benefit plans in the first place. *See, e.g., Conkright v. Frommert*, 559 U.S. 506, 516-17 (2010).

b. The Fourth Circuit’s decision in this case also deepens an existing circuit split regarding whether lump-sum distributions of retirement funds qualify as “earnings” subject to the 25 percent cap on garnishment under the Consumer Credit Protection Act (“CCPA”). The Fourth Circuit said no, holding that only “periodic

payments” from retirement accounts qualify as “earnings” under the CCPA. Exhibit B at 25-27. Several other courts of appeals have taken the same view. *See United States v. Shkreli*, 47 F.4th 65 (2d Cir. 2022) (“[T]he CCPA’s garnishment cap does not apply to lump-sum distributions from contributory 401(k) accounts at issue here.”); *United States v. Sayyed*, 862 F.3d 615, 619 (7th Cir. 2017) (similar); *United States v. DeCay*, 620 F.3d 534, 544 (5th Cir. 2010) (similar). The Eighth Circuit, however, 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). This circuit conflict is already the subject of a petition currently pending before this Court in another case. *See Greebel v. United States*, No. 22-583.

3. There is good cause for the requested 30-day extension of time. The undersigned counsel is collaborating on this case with *pro bono* counsel Deanna M. Rice and Melissa C. Cassel of O’Melveny & Myers LLP. *Pro bono* counsel were not involved in the briefing or argument of the case below. The additional time sought is needed for *pro bono* counsel to fully familiarize themselves with the record and complex legal issues implicated by the decision below and for all counsel to communicate adequately with our client and prepare the petition. The attorneys responsible for preparing the petition have substantial conflicting work commitments between now and the current due date. The undersigned counsel has four briefs due between April 7, 2023 and May 8, 2023, and is also responsible for planning the Virginia statewide criminal defense conference for the Federal Public Defender and Criminal Justice Act Attorneys, scheduled for April 27-28, 2023. *Pro*

*bono* counsel's other deadlines and commitments include several depositions in April 2023; preparation for oral argument in the Fifth Circuit on May 2, 2023; another petition for certiorari due in this Court on May 4, 2023; and an opposition to class certification due on May 5, 2023.

For the foregoing reasons, petitioner respectfully requests a 30-day extension of time within which to file a petition for certiorari, to and including June 7, 2023.

Dated: April 4, 2023

Respectfully submitted,



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