No. 15-24

In the Supreme Court of the United States

GARY L. FRANCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Consumer Credit Protection Act (CCPA), 15 U.S.C. 1601 *et seq.*, generally provides that no more than 25% of an individual's "disposable earnings" may be garnished for payment of a debt. 15 U.S.C. 1673(a). The CCPA's limitation on garnishment applies in proceedings brought by the United States to enforce a criminal restitution order. 18 U.S.C. 3613(a)(3) and (f). The question presented is whether monthly payments to an individual under a disability insurance policy obtained through the individual's employer qualify as "earnings" under the CCPA, thereby limiting the government's ability to garnish those payments to satisfy a restitution order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 782 F.3d 820. The opinion of the district court (Pet. App. 16a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2015. The petition for a writ of certiorari was filed on July 6, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341, and making a false declaration in a bankruptcy case, in violation of 18 U.S.C. 152(3). Pet. App. 2a. He was sentenced to 30 months of imprisonment and ordered to pay $800,000 in restitution. *Ibid.* The government later initiated proceedings to enforce the

restitution order, and the district court entered an order garnishing the monthly payments petitioner receives under a disability insurance policy. *Id.* at 16a-34a. The court of appeals affirmed. *Id.* at 1a-15a.

1. This case involves the application of the restriction on garnishment in the Consumer Credit Protection Act (CCPA), 15 U.S.C. 1601 *et seq.*, in a proceeding to enforce a restitution order under the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227.

a. As defined in the CCPA, "garnishment" is "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. 1672(c). Congress enacted the CCPA's restriction on garnishment in 1968, after finding that "[t]he unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit." 15 U.S.C. 1671(a)(1). Congress also concluded that excessive garnishment orders were driving debtors into bankruptcy and that "[t]he great disparities among the laws of the several States relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country." 15 U.S.C. 1671(a)(3); see *Kokoszka* v. *Belford*, 417 U.S. 642, 651-652 (1974).

To address those concerns, the CCPA generally prohibits garnishment of more than 25% of an individual's "disposable earnings":

> [T]he maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

> (1) 25 per centum of his disposable earnings for that week, or
>
> (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable,
>
> whichever is less.

15 U.S.C. 1673(a). The CCPA provides that "[t]he term 'earnings' means 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). An individual's "disposable earnings" are the earnings "remaining after the deduction * * * of any amounts required by law to be withheld." 15 U.S.C. 1672(b).

The CCPA generally applies to all garnishment proceedings in both federal and state courts. 15 U.S.C. 1672(c).[1] Congress authorized the Department of Labor (DOL) to enforce the CCPA's restriction on garnishment and to implement specific provisions of the statute by regulation. 15 U.S.C. 1676; see 15 U.S.C. 1673(a), 1675; 29 C.F.R. Pt. 870.

b. The MVRA requires sentencing courts to order restitution to victims when sentencing defendants convicted of specified crimes, including "any offense

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[1] The CCPA's restriction on garnishment is subject to narrow exceptions. See 15 U.S.C. 1673(b) (providing that a greater percentage of an individual's disposable earnings may be garnished to enforce a domestic support order and that the CCPA's restrictions do not apply to the collection of tax debt or to orders in Chapter 13 bankruptcy cases).

committed by fraud or deceit." 18 U.S.C. 3663A(c)(1)(A)(ii); see 18 U.S.C. 3663A(a)(1). The government may enforce a restitution order by, among other things, invoking "the practices and procedures for the enforcement of a civil judgment under Federal law or State law." 18 U.S.C. 3613(a); see 18 U.S.C. 3613(f), 3664(m)(1)(A). When the government does so, the MVRA generally provides that, "[n]otwithstanding any other Federal law," the order "may be enforced against all property or rights to property" of the defendant. 18 U.S.C. 3613(a).[2]

The MVRA makes two exceptions to that general rule. First, it provides that if the government relies on federal procedures for enforcing a civil judgment, some of the categories of property that are "exempt from levy for taxes" under 26 U.S.C. 6334(a) are also exempt from enforcement of the restitution order. 18 U.S.C. 3613(a)(1). The incorporated exemptions cover, among other things, unemployment benefits, 26 U.S.C. 6334(a)(4); workmen's compensation, 26 U.S.C. 6334(a)(7); amounts required to comply with judgments for the support of minor children, 26 U.S.C. 6334(a)(8); and certain disability payments connected to military service, 26 U.S.C. 6334(a)(10). See 18 U.S.C. 3613(a)(1).[3] Second, the MVRA preserves the CCPA's restriction on garnishment, specifying that "the provisions of section 303 of the Consumer Credit

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[2] Section 3613(a) governs the enforcement of a criminal fine, but its procedures also apply to "the enforcement of an order of restitution." 18 U.S.C. 3613(f); see 18 U.S.C. 3664(m)(1)(A).

[3] The MVRA expressly provides that other exemptions that ordinarily apply in proceedings under the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001 *et seq.*, are inapplicable to the enforcement of a restitution order. See 18 U.S.C. 3613(a)(2).

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).

2. In the mid-1990s, Petitioner owned and operated a solo dental practice in Chicago. During that time, he engaged in a fraudulent billing scheme that cost the City of Chicago, the Chicago Transit Authority, and their insurers at least $800,000. Pet. App. 2a, 16a-17a.

In 1996, petitioner closed his practice after injuries he sustained in a car accident rendered him unable to continue practicing dentistry. He then began collecting monthly payments under a disability insurance policy he had obtained through his incorporated dental business. Pet. App. 2a, 17a.

In 1999, petitioner arranged to receive a lump sum of approximately $300,000 from a different insurance company in exchange for the right to a portion of his disability payments for a limited period. Petitioner transferred that lump sum to accounts held in the names of other individuals and then filed a Chapter 7 bankruptcy petition. The petition failed to disclose the $300,000 payment or the transfers, and petitioner made affirmative statements concealing those facts from the bankruptcy court. Pet. App. 2a, 17a.

3. In 2002, petitioner pleaded guilty to mail fraud for his fraudulent billing scheme and to making a false declaration in a bankruptcy proceeding. The district court sentenced him to 30 months of imprisonment and ordered him to pay $800,000 in restitution for the fraud offense. Pet. App. 2a, 16a-17a.

4. As of 2013, more than ten years later, petitioner had paid less than $11,000 toward his restitution obligation. Pet. App. 1a, 17a. The government initiated proceedings to discover assets available to satisfy the

restitution order and learned that petitioner was receiving $16,296 per month under his disability insurance policy. *Id.* at 3a-4a. The government initiated proceedings to garnish those payments under the Federal Debt Collection Procedures Act of 1990 (FDCPA), 28 U.S.C. 3001 *et seq.*, which is the mechanism the government uses to enforce civil judgments and which is therefore available to enforce a restitution order under the MVRA. Pet. App. 4a, 20a; see 18 U.S.C. 3613(a) and (f); see also 28 U.S.C. 3205 (garnishment procedures under the FDCPA).

The district court entered a garnishment order requiring petitioner's insurance company to send the full amount of his monthly disability payments directly to the government to satisfy his obligation to pay restitution to the victims of his crime. Pet. App. 16a-34a. As relevant here, the court rejected petitioner's contention that only 25% of those payments are subject to garnishment because disability insurance payments qualify as "earnings" under the CCPA. *Id.* at 24a-27a. The court stated that petitioner had "arguably waived his right to claim the CCPA statutory exemption" by raising it too late. *Id.* at 26a. But "in an abundance of caution," the court considered petitioner's claim on the merits and concluded that his disability payments are not "earnings" under the CCPA because they "are not 'compensation paid or payable for personal services.'" *Id.* at 26a-27a (quoting 15 U.S.C. 1672(a)).

The district court acknowledged that the Eighth Circuit had held that "a criminal defendant's disability payments were 'earnings' within the meaning of the CCPA." Pet. App. 26a (citing *United States* v. *Ashcraft*, 732 F.3d 860 (8th Cir. 2013)). But the court distinguished *Ashcraft*, reasoning that the disability

insurance policy in that case had been provided by the defendant's employer, whereas petitioner "was self-employed, and privately purchased the disability insurance policy at issue here." *Id.* at 26a-27a. The court therefore held that petitioner's disability insurance payments do not qualify as "earnings" under the CCPA because they "are not a benefit of his employment." *Id.* at 27a.

5. The court of appeals affirmed. Pet. App. 1a-15a. As relevant here, the court first concluded, without dispute by the government, that petitioner had not waived his claim that his insurance payments are "earnings" under the CCPA. *Id.* at 6a-7a. On the merits, the court rejected the district court's attempt to distinguish *Ashcraft* based on the source of petitioner's disability insurance policy. *Id.* at 8a. The court explained that petitioner had "incorporated his dental business, and his insurance policy, like Ashcraft's, was purchased through a corporate entity." *Ibid.* The court therefore found no "principled basis" for distinguishing the insurance policy at issue here from the one at issue in *Ashcraft*. *Id.* at 8a-9a.

The court of appeals held, however, that *Ashcraft* was wrongly decided and that, when the government seeks to enforce a restitution order, payments from a disability insurance policy obtained through an individual's employer are not subject to the CCPA's limitations. Pet. App. 9a. The court reasoned that in the restitution context, the CCPA's restriction on garnishment of "earnings" must be viewed in the context of the relevant provisions of the MVRA, 18 U.S.C. 3613(a). The court noted that before referencing the relevant provision of the CCPA, Section 3613(a) "selectively incorporates" some of the exemptions in

Section 6334 of Internal Revenue Code, including exemptions for "two specific types of disability payments, workmen's compensation" and "military-related disability payments." Pet. App. 9a (citing 26 U.S.C. 6334(a)(7) and (10)). The court also emphasized that the MVRA "*does not* include" the Internal Revenue Code's neighboring exemption for "certain forms of public assistance, including Social Security disability payments." *Ibid.* (citing 26 U.S.C. 6334(a)(11)). The court concluded that because Congress elected in Section 3613(a)(1) "to incorporate the exemptions for certain forms of disability payments and not others," the *expressio unius* canon indicates that Congress did not intend the reference to the CCPA in Section 3613(a)(3) to encompass any additional categories of disability payments. *Id.* at 9a-10a.

The court of appeals also emphasized the breadth of the MVRA's general provision that "notwithstanding any other Federal law," all of a defendant's property is subject to the enforcement of a restitution order. Pet. App. 10a (quoting 18 U.S.C. 3613(a)). That "notwithstanding" clause, the court concluded, "underscores the importance of not adopting an expansive reading of the exemptions to [Section] 3613(a)." *Ibid.*

Finally, the court of appeals reasoned that *Ashcraft* had erroneously relied on this Court's decision in *Kokoszka*. Pet. App. 11a. That decision, the court stated, "adopt[ed] the view that earnings do not include 'every asset that is traceable in some way to * * * compensation.'" *Ibid.* (quoting *Kokoszka*, 417 U.S. at 651); see *Kokoszka*, 417 U.S. at 651-652 (holding that income tax refunds are not CCPA "earnings"). The court of appeals believed that "[a]t the

very least, this language cautions against stretching the definition of 'earnings' to include wage substitutes that are not explicitly mentioned in the statute." Pet. App. 11a.

Because its decision created a "split with the Eighth Circuit," the panel distributed its opinion to the full court, and no member "voted to hear the case en banc." Pet. App. 11a n.1.[4]

DISCUSSION

Petitioner contends (Pet. 8-22) that his disability insurance payments qualify as "earnings" under the CCPA and that, accordingly, the CCPA's limitations on garnishment restrict the collection of his restitution debt under the MVRA. Although the government took a different position in the courts below, it has reconsidered the issue based on consultations with the Department of Labor, the agency vested by Congress with authority to enforce the relevant provision of the CCPA. DOL has not previously issued formal guidance on the question presented, but it has now determined that payments under a disability insurance policy obtained through an individual's employer qualify as "earnings" under the CCPA. Consistent with that interpretation, and with the structure of the relevant provisions of the MVRA, the government now agrees with petitioner that his disability insurance payments are "earnings" subject to the CCPA's re-

[4] The court of appeals also rejected a challenge by petitioner's former wife to the district court's conclusion that the child support payments she received from petitioner's disability insurance disbursements were subject to garnishment. Pet. App. 12a-15a. This Court denied a petition for a writ of certiorari challenging that aspect of the court of appeals' decision. *Duperon* v. *United States*, No. 15-34, 2015 WL 4127292 (Oct. 5, 2015).

striction on garnishment in these proceedings. Because the government took a different position below, and because the court of appeals did not have the benefit of DOL's views, it would be appropriate for this Court to grant the petition, vacate the judgment of the court of appeals, and remand for further consideration in light of the position asserted in this brief.

1. The CCPA provides that "[t]he term 'earnings' means 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). Although the statute is not explicit on this point, that definition, fairly read, encompasses payments from employer-sponsored disability insurance policies.

a. Disability insurance provides income to individuals who lose the ability to work because of illness or injury. America's Health Insurance Plans, *Guide to Disability Income Insurance* 5 (2014) (*AHIP Guide*), http://www.ahip.org/DisabilityIncomeInsuranceGuide 2013. Many employers sponsor group disability insurance policies for their employees. *Ibid.* Short-term disability policies generally provide benefits for up to six months or a year. *Ibid.* Long-term disability policies typically provide benefits beginning three to six months after the onset of a disability and continuing for a period of years or until the individual reaches retirement age. *Id.* at 6. Both short- and long-term policies ordinarily provide periodic payments equal to a percentage of the employee's pre-disability wages, typically around 60%. Kristen Monaco, U.S. Bureau of Labor Statistics, DOL, *Disability Insurance Plans: Trends In Employee Access and Employer Costs* 5

(Feb. 2015), http://www.bls.gov/opub/btn/volume-4/pdf/disability-insurance-plans.pdf. Approximately half of all private-sector workers have access to employer-sponsored disability insurance. *Id.* at 3-4 & tbl. 2. "Most workers do not make contributions to their short- or long-term disability plans," which are instead typically paid for by employers. *Id.* at 4; see *AHIP Guide* 5-6.

Employer-sponsored disability insurance policies are made available to employees as one of the benefits of their employment. Accordingly, if an employee becomes disabled and begins receiving payments under such a policy, those payments are properly regarded as "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." *United States* v. *Ashcraft*, 732 F.3d 860, 864 (8th Cir. 2013). That conclusion is consistent with the ordinary understanding of "compensation" for personal services, which includes "wages, stock option plans, profit-sharing, commissions, bonuses, golden parachutes, vacation, sick pay, medical benefits, *disability*, leaves of absence, and expense reimbursement." *Black's Law Dictionary* 342-343 (10th ed. 2014) (quoting Kurt H. Decker & H. Thomas Felix II, *Drafting and Revising Employment Contracts* § 3.17, at 68 (1991)) (emphasis added).

Payments under a disability insurance policy do differ in some respects from some other forms of compensation. Employees may be required to contribute to the premiums for such policies, and payments are made only after an employee ceases work. In some other contexts, those features of disability insurance payments might justify treating them dif-

ferently from other forms of compensation, such as salary or wages. But the CCPA makes clear that its definition of "earnings" sweeps more broadly than salary and wages alone, specifying that the term includes "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, *or otherwise*." 15 U.S.C. 1672(a) (emphasis added). In addition, the CCPA expressly provides that its general definition of "earnings" "includes periodic payments pursuant to a pension or retirement program." *Ibid.* Pension payments, like disability payments, are typically made only after an employee ceases work, and employees may contribute to a retirement program in the same way that they may contribute to disability insurance premiums. See, *e.g.*, *United States* v. *Lee*, 659 F.3d 619, 621-622 (7th Cir. 2011) (holding that payments from an employer-sponsored 401(k) plan qualify as "earnings" under the CCPA). The CCPA's express statement that the statutory definition of "earnings" encompasses payments under pension and retirement plans thus confirms that the definition is broad enough to include analogous payments under employer-sponsored disability insurance policies. Like pension and retirement payments, such disability payments are properly seen as compensation "for personal services performed in the past." *Ashcraft*, 732 F.3d at 864 (citation omitted).[5]

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[5] Petitioner is covered under an individual disability insurance policy rather than a typical employer-sponsored group policy. Pet. App. 8a. But because petitioner's policy was purchased through his employer (his incorporated dental business), the court of appeals correctly saw no basis for distinguishing his disability insurance payments from those provided under employer-sponsored group plans. *Id.* at 8a-9a. If, however, an individual purchased a

b. The purpose of the CCPA confirms that payments from an employer-sponsored disability insurance policy qualify as "earnings" protected from garnishment. Congress enacted the CCPA to prevent bankruptcies by restricting the garnishment of "periodic payments of compensation needed to support [a] wage earner and his family on a week-to-week, month-to-month basis." *Kokoszka* v. *Belford*, 417 U.S. 642, 651 (1974); see 15 U.S.C. 1671(a). Like payments from pension and retirement plans, disability insurance payments "provide income that substitutes for wages earned as salary or hourly compensation" after an individual ceases work. *Rousey* v. *Jacoway*, 544 U.S. 320, 331 (2005). Limiting garnishment of periodic disability insurance payments thus furthers the CCPA's purpose because individuals receiving those payments—like individuals receiving wages or periodic pension payments—typically rely on those payments to support themselves and their families. See Disability Rights Legal Ctr. Amicus Br. 7-8.

Including employer-sponsored disability insurance payments as earnings under the CCPA also avoids inconsistent treatment of materially identical payments. A tax-qualified pension plan may provide, in addition to pensions based on age or years of service, "the payment of a pension due to disability." 26 C.F.R. 1.401-1(b)(1)(i). Payments under such a disability pension qualify as "earnings" under the CCPA's express inclusion of "periodic payments pursuant to a pension or retirement program." 15 U.S.C. 1672(a);

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disability insurance policy without any involvement by his employer, payments under that policy would not qualify as "earnings" under the CCPA because they would not be compensation for employment.

see, *e.g.*, *United States* v. *Cunningham*, 866 F. Supp. 2d 1050, 1059-1061 (S.D. Iowa 2012). Those disability pension payments are essentially equivalent to payments under an employer-sponsored disability insurance policy, and no sound reason justifies treating them differently for purposes of the CCPA.

c. DOL's views on the question presented, as expressed in this brief, provide further reason to conclude that payments from an employer-sponsored disability insurance policy qualify as "earnings" under the CCPA. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). When it enacted the CCPA, Congress vested DOL with authority to "enforce the provisions of" the statute related to garnishment and to implement particular provisions by regulation. 15 U.S.C. 1676; see 15 U.S.C. 1673(a), 1675. In the decades since the CCPA was enacted, DOL has promulgated regulations and interpretive guidance, including opinion letters, fact sheets, and compliance guides for creditors, employers, and individuals. 29 C.F.R. Pt. 870; see DOL, Wage and Hour Div., *The Consumer Credit Protection Act*, http://www.dol.gov/compliance/laws/comp-ccpa.htm (last visited Nov. 5, 2015) (collecting guidance documents).

The question whether employer-sponsored disability insurance payments qualify as "earnings" under the CCPA has arisen only infrequently. See *Ashcraft*, 732 F.3d at 863 (noting that as of 2013, the question was "an issue of first impression" in the courts of appeals). DOL has not issued any formal guidance on that question and had not previously analyzed the issue in detail.[6] After examining the question pre-

[6] In June 2013, a regional office of DOL's Wage and Hour Division sent a letter responding to a Member of Congress's inquiry

sented in connection with this case, however, DOL has concluded that payments from employer-sponsored disability insurance policies qualify as "earnings" under the CCPA for the reasons set forth in this brief. DOL has informed this Office that it intends to memorialize that interpretation in forthcoming public guidance.

"[G]iven Congress' delegation of enforcement powers" to DOL, the agency's view on the proper interpretation of "earnings" is entitled to a measure of deference under the framework set forth in *Skidmore*. *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011). Under that framework, the "rulings, interpretations, and opinions" of the relevant agency "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. The weight to be given to an administrative interpretation under *Skidmore* depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later

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about the application of the CCPA to a constituent's disability insurance payments. The letter is not publicly available, but the text is included as an appendix to this brief. The letter did not analyze the legal question in detail, but it did state that "the most relevant court decision of which we are aware"—the district court decision later reversed in *Ashcraft*—"ruled that monthly long-term disability payments received from a former employer's insurance company are not 'earnings' under the CCPA." App., *infra*, 3a (citing *United States* v. *Ashcraft*, No. 04-cr-88, 2012 WL 2088934 (N.D. Iowa June 8, 2012)). The position set forth in this brief reflects DOL's considered analysis of the question presented and supersedes the June 2013 letter to the extent that letter is deemed inconsistent with the views expressed here.

pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Ibid.*

Here, as explained above, DOL had not previously analyzed the question presented in detail. But the conclusion and reasoning set forth in this brief represent the agency's considered analysis of the text and purpose of the CCPA. That conclusion is also consistent with DOL's past guidance on the interpretation of the CCPA's definition of "earnings." Most notably, DOL has long taken the view that "[s]ick pay is included in the 'disposable earnings' to which the Act's garnishment restrictions apply because such pay is a component of the compensation paid or payable for personal services." DOL, Wage & Hour Division, Opinion Letter WH-197, 1973 WL 36804, at *1 (Feb. 1, 1973). Disability insurance payments—particularly short-term disability payments—serve a function analogous to paid sick leave, and DOL's longstanding view that compensation for sick leave qualifies as "earnings" under the CCPA thus bolsters the conclusion that employer-sponsored disability insurance payments qualify as well.

2. The MVRA provides that "the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply" to the enforcement of a restitution order. 18 U.S.C. 3613(a)(3); see 18 U.S.C. 3613(f). Because payments under an employer-sponsored disability insurance policy are properly regarded as "earnings" under the CCPA, those payments are protected from garnishment where, as here, the relevant provision of the CCPA applies to the enforcement of a restitution order under the MVRA.

In reaching a contrary conclusion, the court of appeals did not analyze the CCPA (and did not have the

benefit of DOL's views). Instead, the court relied primarily on the surrounding provisions of the MVRA. Pet. App. 9a-10a. In particular, the court emphasized that before referencing the CCPA's restriction on garnishment, the MVRA incorporates some but not all of the exemptions in 26 U.S.C. 6334(a)—including exemptions for some types of "disability" payments (workmen's compensation and certain veterans benefits) but not others (Social Security disability benefits). Pet. App. 9a (citing 18 U.S.C. 3613(a)(1) and 26 U.S.C. 6334(a)(7), (10), and (11)). That feature of the MVRA, the court reasoned, indicates that Congress specifically chose "to incorporate the exemptions for certain forms of disability payments and not others." *Id.* at 10a. And the court therefore held that the subsequent reference to the CCPA's limitation on garnishment of "earnings" should not be construed to encompass any other form of disability payment. *Ibid.*

For several reasons, the court of appeals' approach is erroneous. The reference to the CCPA in the MVRA—an otherwise unrelated statute enacted in 1996—does not alter the proper interpretation of the CCPA's definition of "earnings," which has remained unchanged since its enactment in 1968 and which broadly applies to all garnishment proceedings in federal and state courts. 15 U.S.C. 1673(c). Nor does the MVRA justify any inference that Congress intended that the CCPA apply differently in the restitution context. In particular, as petitioner explains (Pet. 20-21), Congress's omission of employer-sponsored disability insurance payments from 18 U.S.C. 3613(a)(1) does not suggest that Congress intended to exclude such payments from the CCPA as referenced in Section 3613(a)(3) because the two provisions serve

different functions and have different effects. The exemptions in Section 3613(a)(1) provide covered property with *complete* protection from enforcement of a restitution order, whereas "earnings" under the CCPA receive only *partial* protection from garnishment. See 15 U.S.C. 1673(a) (permitting garnishment of up to 25% of disposable earnings). In addition, the Section 3613(a)(1) exemptions apply only to enforcement of a restitution order "under Federal law," 18 U.S.C. 3613(a)(1), whereas Section 3613(a)(3) preserves the application of the CCPA to proceedings "under Federal law *or* State law," 18 U.S.C. 3613(a)(3) (emphasis added).

The MVRA's treatment of pension and retirement payments further confirms that the omission of a type of payment from Section 3613(a)(1) does not imply an intent to exclude the payment from the CCPA's limit on garnishment preserved in Section 3613(a)(3). Section 3613(a)(1) incorporates exemptions for some pension payments, including "pension payments under the Railroad Retirement Act" and certain military pensions. 26 U.S.C. 6334(a)(6). Under the court of appeals' reasoning, that exception would suggest that Congress did not mean to provide any protection for other pension or retirement payments through the reference to the CCPA in Section 3613(a)(3). But the CCPA's definition of "earnings" expressly includes "periodic payments pursuant to a pension or retirement program." 15 U.S.C. 1672(a). Section 3613(a)(1)'s exemption for some forms of disability payments thus provides no sound reason to conclude that the CCPA, as referenced by Section 3613(a)(3), excludes all other payments in the same general category.

Apart from its analysis of the MVRA, discussed above, the court of appeals suggested that this Court's decision in *Kokoszka* provides reason not to "stretch[] the definition of 'earnings' to include wage substitutes that are not explicitly mentioned in the statute." Pet. App. 11a. That suggestion, however, overlooks the features of the definition of "earnings" that support interpreting it to cover employer-sponsored disability insurance payments. See pp. 10-16, *supra*. *Kokoszka*'s treatment of income tax refunds—which are not "compensation paid or payable for personal services" in any form, 15 U.S.C. 1672(a)—casts no doubt on the conclusion that employer-sponsored disability insurance payments qualify as "earnings."

The court of appeals also relied on the MVRA's provision that "[n]otwithstanding any other Federal law," a restitution order "may be enforced against all property or rights to property" of the defendant. 18 U.S.C. 3613(a); see Pet. App. 10a. But as petitioner explains (Pet. 22), that provision sheds no light on the proper interpretation of the CCPA because the MVRA preserves the application of the CCPA to restitution proceedings in an express "except[ion]" to the broad "[n]otwithstanding" clause on which the court of appeals relied. 18 U.S.C. 3613(a).

3. Petitioner is therefore correct that the court of appeals erred in holding that his disability insurance payments do not qualify as "earnings" subject to the CCPA's restriction on garnishment in this MVRA proceeding. That holding, moreover, is inconsistent with the only other decision by a court of appeals to address the question, the Eighth Circuit's decision in *Ashcraft*. But that shallow conflict does not warrant plenary review by this Court. The Seventh Circuit's

grounding of its opinion in the structure of the MVRA rather than in the text of the CCPA means that its holding may not extend beyond the restitution context. Cf. Pet. 21-22. In view of the government's current position, moreover, the question whether employer-sponsored disability payments are protected from garnishment in MVRA proceedings is of limited prospective importance. And the general issue of the proper application of the CCPA's definition of "earnings" to such payments has rarely been litigated: Although the CCPA was enacted more than 45 years ago, that question has been addressed in only a handful of decisions. See Pet. 11 n.4.

Although plenary review is not warranted, and although petitioner does not resemble the type of individual whom the CCPA sought principally to protect,[7] it would be appropriate to vacate the decision below and remand for further proceedings. The government now agrees with petitioner that his disability insurance payments are subject to the CCPA's limitations on garnishment. When it issued its original decision, the court of appeals did not have the benefit of the government's current views, which reflect the interpretation adopted by the agency charged by Congress with enforcing the CCPA. This Court should therefore grant the petition, vacate the judgment of the court of appeals, and remand for further consideration in light of the position asserted in this brief. See *Lawrence* v. *Chater*, 516 U.S. 163, 165-175 (1996) (per

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[7] Petitioner successfully avoided making any significant payments toward his restitution obligation for more than a decade even though he was receiving highly lucrative disability insurance payments that now total more than $16,000 each month. Pet. App. 1a-4a.

curiam); see also, *e.g.*, *Tax-Garcia* v. *United States*, 134 S. Ct. 2291 (2014); *Ajoku* v. *United States*, 134 S. Ct. 1872 (2014).[8]

[8] The government's agreement with petitioner that his disability insurance payments qualify as "earnings" subject to the CCPA's restriction on garnishment does not limit the government's ability to enforce the restitution order through other legal means consistent with the CCPA. The CCPA restricts the extent to which petitioner's insurer may be required to withhold his disability payments, but it does not protect those payments once they pass into petitioner's hands. 15 U.S.C. 1672(c), 1673(a); see *Usery* v. *First Nat'l Bank of Ariz.*, 586 F.2d 107, 111 (9th Cir. 1978) (the CCPA "protects the funds concerned only from garnishment" and does not "provide for protection from attachment of such monies while in the hands of the employee"). The government may also seek to enforce petitioner's restitution obligation through other legal mechanisms that do not involve garnishment of his earnings. See, *e.g.*, 18 U.S.C. 3664(k) (permitting a court to adjust a defendant's payment schedule in light of a "material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution").

CONCLUSION

This Court should grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of the position asserted in this brief.

Respectfully submitted.

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NOVEMBER 2015

APPENDIX

U.S. Department of Labor [SEAL OMITTED]

Employment Standards Administration
Wage and Hour Division
61 Forsyth St. SW
Atlanta, Georgia 30303

June 5, 2013

The Honorable John Lewis
House of Representatives
The Equitable Building
100 Peachtree Street N.W.
Suite 1920
Atlanta, Georgia 30303

Dear Representative Lewis:

Thank you for your letter to Brian Kennedy, Assistant Secretary for Congressional and Intergovernmental Affairs of the U.S. Department of Labor, on behalf of your constituent, Dr. Joseph Martino. Your letter was forwarded to the Wage and Hour Division for response as it administers Title III of the Consumer Credit Protection Act (CCPA). Dr. Martino seeks assistance regarding the garnishment, pursuant to an order by a Georgia court, of

the monthly long-term disability benefit payments payable to him by Cigna Group Insurance Company.

The CCPA limits the amount of earnings that may be garnished and protects an employee from being fired if pay is garnished for only one debt. See Fact Sheet 30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title 3 (CCPA) (enclosed). For example, the CCPA limits the amount of earnings that may be garnished per week to the lesser of 25 per cent of "disposable earnings" (defined as "earnings" less deductions "required by law," 15 U.S.C. 1672(b)) or the amount of disposable earnings which exceeds 30 times the Fair Labor Standards Act's minimum wage. 15 U.S.C. 1673(a). Garnishments that seek to collect certain types of debts are not subject to the limitations and different limitations allowing a higher percentage of disposable earnings to be garnished apply if the garnishment is "to enforce any order for the support of any person." 15 U.S.C. 1673(b).

The CCPA's limitations on garnishment apply only to "earnings," which the CCPA defines as "compensation paid or payable for personal services." 15 U.S.C. 1672(a). The CCPA provides the following non-exhaustive list of the types of compensation that are "earnings": "wages, salary, commission, bonus, . . . includ[ing] periodic payments pursuant to a pension or retirement program." 15 U.S.C. 1672(a). Because of 15 U.S.C. 1672(a)'s definition, "earnings" reach payments by employers to their workers in exchange for the work they perform. There must be a personal services relationship between the

payor and the payee for the compensation paid to be "earnings" under the CCPA. Wage and Hour has previously stated that Social Security Disability payments are not subject to the CCPA's protections because they are not compensation paid or payable by an employer for personal services. Additionally, the most relevant court decision of which we are aware, U.S. v. Ashcraft, 2012 WL 2088934 (N.D. Iowa Jun. 8, 2012), ruled that monthly long-term disability payments received from a former employer's insurance company are not "earnings" under the CCPA and are not protected by the limitation on garnishment in 15 U.S.C. 1673(a).

We hope that this information is helpful to Dr. Martino in understanding the scope of the CCPA's protection. Thank you again for your correspondence. If we can be of further assistance to you, please have a member of your staff contact Ms. Nikki McKinney in the Office of Congressional and Intergovernmental Affairs at (202) 693-4600.

Sincerely,

/s/ JOHN M. BATES
JOHN M. BATES
Director of Enforcement
Southeast Regional Office