No. 15-24

In the Supreme Court of the United States

GARY L. FRANCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's brief confesses error, acknowledging *both* that the courts of appeals are split on the question presented *and* that the Seventh Circuit was wrong to permit garnishment of 100% of petitioner's disability insurance benefits. The parties therefore agree that the Court should grant the petition and correct the Seventh Circuit's mistaken decision below.

But the government says that the Court should abstain from reaching the merits and enter a GVR order, instead. The Court should decline that suggestion, for two reasons.

First, as the government acknowledges, the Seventh Circuit based its holding below on an interpretation of the Mandatory Victims Restitution Act, not the Consumer Credit Protection Act. Because the Department of Labor has no authority to enforce or interpret the MVRA, there is little reason to think that the Seventh Circuit would find its views relevant. And even with respect to the CCPA, DOL bases its views entirely on arguments that the Seventh Circuit has already considered and rejected as unpersuasive. The circuit conflict is therefore likely to survive a GVR.

Second, a GVR would introduce significant delay before final judgment. Such delay would be highly prejudicial to petitioner, who meanwhile must make ends meet in the absence of his primary source of income. A delay also would risk denying petitioner the practical benefit of a reversal and widen a loophole that may allow the government to collect the improperly garnished payments as an attachment of assets rather than a garnishment of earnings.

In circumstances like these, a GVR would not be appropriate. The Court often grants plenary review in response to the government's confession of error,[1] including in cases where the government requests a GVR.[2] Unless it is inclined to summarily reverse, it should grant plenary review here, as well.

A. The parties agree that the Seventh Circuit's decision should not stand

The government now agrees with petitioner on the merits, acknowledging that it may not garnish more than 25% of petitioner's disability insurance payments: "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." U.S. Br. 16.

Thus, the parties agree that the district court's garnishment order in this case violates the law. As matters now stand, petitioner's insurer is garnishing 100% of petitioner's monthly disability insurance payments, which are petitioner's primary source of income. See Pet. App. 34a. That is a state of affairs that the CCPA forbids. Neither the illegal garnishment order nor the Seventh Circuit's decision upholding it should be allowed to stand.

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[1] See, *e.g.*, *Setser* v. *United States*, 132 S. Ct. 1463 (2012); *Tapia* v. *United States*, 131 S. Ct. 2382 (2011); *Kucana* v. *Holder*, 558 U.S. 233 (2010).

[2] See, *e.g.*, *Pepper* v. *United States*, 562 U.S. 476 (2011); *Bond* v. *United States*, 131 S. Ct. 2355 (2011).

B. A GVR order would be inappropriate

The government agrees that the decision below is wrong (U.S. Br. 16) and acknowledges that the Seventh Circuit's holding "is inconsistent with * * * the Eighth Circuit's decision in *Ashcraft*" (*id.* at 19). But the government takes the position that "plenary review is not warranted" and that a GVR is in order because the Seventh Circuit "did not have the benefit" of the views of the Department of Labor, which is "the agency charged by Congress with enforcing the CCPA." *Id.* at 20.

Although we are heartened by the government's confession of error, we disagree with the government that the Court should enter a GVR order, for two reasons: *First*, there is little reason to think that that Seventh Circuit would be swayed by DOL's views, and *second* the delay entailed by a GVR would prejudice petitioner and hand the government an unfair litigation advantage.

1.a. Because DOL's views concerning the CCPA do not speak directly to the Seventh Circuit's reasoning under the MVRA, there is little reason to believe that the Seventh Circuit would consider the Solicitor General's brief relevant.

The government observes that the Seventh Circuit, in reaching its decision below, "did not have the benefit of DOL's views" concerning proper interpretation of the CCPA. U.S. Br. 16-17. That is true, but as the government acknowledges, the Seventh Circuit "ground[ed] * * * its opinion in the structure of the *MVRA* rather than in the text of the CCPA." U.S. Br. 20 (emphasis added). The Seventh Circuit was, indeed, quite clear about that: Its decision was based on "Section 3613(a)(1), which selectively incorporates

exemptions from the Internal Revenue Code" and "makes express exceptions for two specific types of disability payments * * * without mentioning private disability insurance." Pet. App. 9a. It was application of the *exprssio unius* canon to that provision of the MVRA (not the CCPA) that the Seventh Circuit found dispositive of the question presented. *Id*. at 9a-10a.

The Seventh Circuit's focus on the MVRA is, moreover, the crux of the circuit split. According to the Seventh Circuit, the Eighth Circuit went astray in *Ashcraft* primarily because its "decision did not address interpretation of the list of exemptions in § 3613(a) and, in fact, failed even to cite that provision." Pet. App. 9a.

We agree with the government that the Seventh Circuit's reasoning on that score is wrong, and that the text of the MVRA does not "justify any inference that Congress intended that the CCPA apply differently in the restitution context." U.S. Br. 17. See Pet. 20-22. But that is not a conclusion that follows from DOL's interpretation of the CCPA, and DOL is not similarly tasked with enforcing the MVRA. There is therefore little reason to think that the Seventh Circuit would find its take on the CCPA helpful.

b. Even with respect to interpretation of the CCPA, there is reason to doubt that DOL's newly taken position would move the Seventh Circuit. According to the government (Br. 15), DOL's interpretation of the CCPA is entitled to *Skidmore* deference. Unlike *Chevron* deference, which would bind the Seventh Circuit, *Skidmore* deference would apply only if the Seventh Circuit concluded that DOL's position has the "power to persuade." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

We agree wholeheartedly that DOL's interpretation of the CCPA *is* persuasive—but at bottom, the Department simply adopts the reasoning of the Eighth Circuit in *Ashcraft*. U.S. Br. 11-14. It has not developed any new arguments that the Seventh Circuit has not already fully considered and rejected. The Seventh Circuit found the arguments now advanced by DOL unpersuasive the first time around, and it is unclear why it would find the convincing now, simply by virtue of repetition.[3]

That is especially so because—insofar as the Seventh Circuit addressed the CCPA directly—it concluded that *Ashcraft* is out of step, not with the statutory language, but with this Court's decision in *Kokoszka* v. *Belford*, 417 U.S. 642 (1974). See Pet. App. 11a. Determining the correct interpretation of this Court's precedents is a task for the courts, not executive agencies. See *Negusie* v. *Holder*, 555 U.S. 511, 522 (2009) (an agency does not exercise "interpretive authority" when it construes precedents).

It is therefore likely that the split between the Seventh and Eighth Circuits would survive a GVR. The Seventh Circuit was aware of the Eighth Circuit's contrary ruling in *Ashcraft* when it issued the opinion below. Having created a conflict with the Eighth Circuit with open eyes, the panel circulated its opinion to the full court—and not one judge called for a vote to hear the case en banc. Pet. App. 11a n.1. Against that background, the division of authority is

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[3] Cf. *Nunez* v. *United States*, 546 F.3d 450, 452 (7th Cir. 2008) (after a GVR in light of a confession of error, expressing an "inclin[ation] to conclude a second time" that the plaintiff was not entitled to relief); *United States* v. *Frankel*, 589 F.3d 566, 568 (2d Cir. 2009) (per curiam) (similar);

likely to endure until this Court takes up the question presented itself.

2. In determining whether to GVR, the Court has additionally considered whether the "the delay and further cost entailed in a remand" would outweigh the benefits of a GVR, and whether the request for a GVR "is part of an unfair or manipulative litigation strategy." *Lawrence* v. *Chater*, 516 U.S. 163, 167-168 (1996). Here, both factors weigh against the government's proposal.

a. As the Court recognized in *Lawrence*, a GVR order introduces substantial delay in the final resolution of a case. 516 U.S. at 168. That is especially true of GVRs following confessions of error by the government; in such cases, the courts of appeals frequently take two years or longer to re-decide the appeal following a remand.[4]

A delay of that length (or even half that length[5]) would be highly prejudicial to petitioner. As the government recognizes, individuals receiving disability payments "typically rely on those payments to support themselves and their families." U.S. Br. 13 (citing DRLC Amicus Br. 7-8). The government says

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[4] See, *e.g.*, *United States* v. *Bennett*, 427 F. App'x 228, 230 (3d Cir. 2011), on remand from 553 U.S. 1029 (2008) (Mem.) (three years from GVR to decision); *United States* v. *Williamson*, 706 F.3d 405 (4th Cir. 2013), on remand from 561 U.S. 1003 (2010) (Mem.) (two and a half years); *United States* v. *Watts*, No. 07-14422 (11th Cir. Dec. 21, 2011), on remand from 558 U.S. 1143 (2010) (Mem.) (nearly two years).

[5] In *Snipes* v. *United States*, No. 12-5552 (6th Cir. Mar. 10, 2015), on remand from 134 S. Ct. 1278 (2014) (Mem.), the plaintiff requested expedited consideration; it still took the Sixth Circuit one year from the GVR to issue a decision.

that "petitioner does not resemble the type of individual whom the CCPA sought principally to protect" (U.S. Br. 20), but that is wrong.[6]

Petitioner's disability insurance payments are necessary to support not only his own living, but also that of his daughter, who is presently a student in college. See Decl. of Theresa M. Duperon ¶¶ 4, 9 (Dist. Ct. Dkt. 109-2). Petitioner's daughter's college tuition and expenses, net of scholarships, amount to over $60,000 per year. *Id.* ¶ 18. Yet as a result of his disability, petitioner is not regularly employed. Mot. to Quash ¶ 7 (Dist. Ct. Dkt. 86). Without his private disability insurance payments, petitioner's remaining income (comprising primarily his modest Social Security disability payments (*id.* ¶ 8)) is insufficient to meet his financial obligations. Cf. DRLC Amicus Br. 8 (explaining that Social Security disability benefits "often are not enough to maintain an average lifestyle"). Thus, as a consequence of the crushing garnishment order entered by the district court, petitioner—who has already emerged from Chapter 7 bankruptcy once and has no personal savings to

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[6] The government's assertion that petitioner "avoided making any significant payments toward his restitution obligation for more than a decade" (U.S. Br. 20 n.7) is misleading. In fact, petitioner satisfied $300,000 of his restitution obligation between 2004 and 2007, as part of a settlement with his bankruptcy trustee. Motion 2-3 (Dist. Ct. Dkt. 112-2). Yet the district court refused to credit those payments. Dist. Ct. Dkt. 114.

The government also describes petitioner's disability payments as "lucrative." U.S. Br. 20 n.3. But the payments are commensurate with what he would be making if he were still presently working as an dentist. And the payments are annually adjusted; when petitioner first began receiving payments under the policy in 1996, they were around $8,000; by 2002, they were $9,000. See Plea Agreement 5 (Dist Ct. Dkt. 50).

speak of—has had to assume substantial new debts. The situation is certain grow worse without relief in the near term.

Allowing the continued garnishment of 100% of petitioner's disability benefits while the parties rebrief and reargue this appeal before the Seventh Circuit (and perhaps also before the district court) for many additional months or years—followed by the very real possibility of another petition for a writ of certiorari before this Court—thus threatens to bring about just the kind of the financial ruin that the CCPA was meant to forestall.

b. Not only would a GVR prejudice petitioner directly, but it would hand the government an unfair litigation advantage. As we noted in the petition (at 7 & n.3), petitioner's monthly disability payments are currently being paid into a fund held by the clerk of the district court. Due to the unlimited garnishment of those payments, more than half of petitioner's restitution obligation has been paid into the account, and unless the garnishment order is vacated in the interim, the remainder will be deposited over the next 22 months. It should go without saying that a modification of the garnishment order after that point would be meaningless.

Of course, if the garnishment order were ultimately modified, the district court might (*might*) release to petitioner the amount that was wrongfully withheld from his monthly disability payments over the prior several years. But if the government's brief is any indication, that is cold comfort.

The government is clear that its "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." U.S. Br. 21 n.8. And, in the government's view, while "[t]he CCPA restricts the extent to which petitioner's insurer may be required to withhold his disability payments," it "does not protect those payments once they pass into petitioner's hands." *Ibid*.

There is no mistaking what the government means by that: If the decision below is reversed and the district court returns petitioner's improperly garnished payments, the government will attempt to seize 100% of the released funds as an "attachment of assets" rather than a "garnishment of earnings," effectively obtaining an end run around its confession of error. That gives the government a perverse incentive to maximize (through delay) the number of disability payments diverted into the account before the garnishment order is modified.

All of this weighs decisively against a GVR. "[T]he potential benefits of further consideration by the lower court" (*Lawrence*, 516 U.S. at 168) are slim at best. And because the delay entailed by a GVR would impose a hardship and unfairly advantage the government, "a GVR order is inappropriate." *Ibid*.

C. The Court should summarily reverse or grant plenary review

Rather than entering a GVR order, the Court should either summarily reverse the Seventh Circuit or grant plenary review and appoint an amicus to defend the Seventh Circuit's judgment.

The government's only real objection to plenary review is its assertion that the question presented is unimportant. It speculates that, because the Seventh

Circuit's decision below is grounded in the text of the MVRA, its holding "may not extend beyond the restitution context." U.S. Br. 20. It also suggests that its own change of position means that the question presented "is of limited prospective importance." *Ibid.* And it notes that the question of whether the CCPA applies to disability payments "has rarely been litigated." *Ibid.* Those assertions do not hold up to scrutiny.

As an initial matter, there is no serious dispute that the Seventh Circuit's decision here will have far-reaching consequences outside of the MVRA context. True, the Seventh Circuit understood itself to be interpreting principally the MVRA, which incorporates the CCPA's limitations on garnishment by reference. But as both we (Pet. 20-22) and the government (Br. 17) have demonstrated, the CCPA does not take on different meanings depending upon whether it has been incorporated into other code sections. Creditors will thus doubtless seek 100% garnishments of disability benefits in collections actions of all kinds under the Seventh Circuit's decision in this case. And because the government will not be a party to such garnishment proceedings (many of which will take place in state court), its confession of error here cannot forestall that outcome.

For three reasons, the government also misses the point when it asserts that the question presented is infrequently litigated.

First, the court's answer to the question here will impact many individuals. As the Disability Rights Legal Center and Equip for Equality explain in their amicus brief supporting certiorari (at 5), nearly 40 percent of private-sector workers have disability insurance coverage, usually as a benefit of employ-

ment; and nearly one in four Americans will someday face a disability. As we explained in the petition (at 13), moreover, earnings garnishment has become, in the wake of the Great Recession, the method of choice for debt collectors; thus, nearly 10% of all American workers between the ages of 35 and 44 are having their earnings garnished.

Second, apart from the fact that the issue here is likely to affect many individuals, it is a matter of incalculable importance to those individuals it does affect. Disability insurance benefits are typically the principal source of income for families with heads of household who are no longer able to work; by sanctioning unlimited garnishments of such benefits, the Seventh Circuit's decision threatens to leave many such families destitute, driving them into bankruptcy. See DRLC Amicus Br. 5, 9-11.

Finally, the frequency with which the question arises is not accurately reflected in the appellate decisions resolving it. That is both because debtors facing unlawful garnishments typically lack the resources and know-how to protect their rights in court, and because many debt collectors are able to avoid litigation even when a debtor does attempt to challenge a garnishment. It is hardly a reason to deny review that the beneficiaries of the Seventh Circuit's mistaken holding are often able to avoid judicial scrutiny of their unlawful collection tactics.

We made each of those points in the petition (at 12-15), and the government does not refute a single one of them. In short, the government is wrong that the question presented is unimportant.

CONCLUSION

The Court should grant the petition and either summarily reverse or set the case for argument.

Respectfully submitted,

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