

No. 08-1322

**In The
Supreme Court of the United States**

—◆—
MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

CATHERINE G. RATLIFF,

Respondent.

—◆—
**On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit**

—◆—
**BRIEF OF *AMICI CURIAE* NATIONAL
ORGANIZATION OF SOCIAL SECURITY
CLAIMANTS' REPRESENTATIVES, AARP,
NATIONAL SENIOR CITIZENS LAW CENTER,
NATIONAL DISABILITY RIGHTS NETWORK,
COMMUNITY LEGAL SERVICES, DISABILITY
LAW CLINIC OF THE PENNSYLVANIA STATE
UNIVERSITY DICKINSON SCHOOL OF LAW,
EMPIRE JUSTICE CENTER, CLINICAL PROGRAM
OF THE RUTGERS SCHOOL OF LAW – NEWARK,
AND PENNSYLVANIA LEGAL AID NETWORK, INC.,
IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

Once an attorneys-fee award is made under the Equal Access to Justice Act (28 U.S.C. § 2412(d)), may the fees be retained by the Government to recover a debt of the party, leaving the attorney's fee unpaid?

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THE INTEREST OF *AMICI CURIAE*¹

1. The **National Organization of Social Security Claimants' Representatives (NOSSCR)** is a national membership organization comprising approximately 4,000 individuals, mostly attorneys, who represent individuals applying for Social Security and SSI benefits. NOSSCR members include employees of legal services organizations, educational institutions, and other nonprofits; employees of for-profit law firms and other businesses; and individuals in private practice.

NOSSCR members represent Social Security and SSI claimants before the Social Security Administration and in the courts. Over five percent of all federal district court filings in the twelve-month period ending September 30, 2006, were Social Security cases, and about half of those cases likely will result in some relief entitling NOSSCR members' clients to seek attorneys-fee awards under the Equal Access to Justice Act.

NOSSCR has a great interest in ensuring that its members' clients get the benefits for which they qualify, and that their clients continue to have improved access to the courts through payment of their

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

attorney's fees under the EAJA, as Congress intended. EAJA fees provide our members' clients improved access to the courts by enabling them to obtain representation in the appeal of wrongly-denied Social Security claims, as well as defraying the client's legal expenses where fees are received under both the EAJA and the Social Security Act.

2. **AARP** is a national nonpartisan, nonprofit membership organization that helps people over the age of 50 to have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. AARP works to foster the health and economic security of individuals as they age, ensure access to high quality and economical health care, and ensure that older people have viable retirement options. Since many AARP members receive Social Security and SSI benefits to meet their basic needs, such as medicine, food, and rent, it is critical that they have access to attorneys when these benefits are denied. Without the payment to the attorney of awarded EAJA fees, many members will find it difficult to obtain needed representation.

The AARP Legal Counsel for the Elderly (LCE) provides free legal services for Washington, D.C. residents age 60 and older. LCE handles a variety of legal cases including Social Security and SSI cases. LCE has received EAJA attorneys' fees in the past and plans to seek them in the future.

3. The **National Senior Citizens Law Center (NSCLC)** is a nonprofit organization that advocates

before the courts, Congress and federal agencies to promote the independence and well-being of low income older Americans. In pursuit of this mission, NSCLC regularly litigates against federal agencies, including the Social Security Administration and relies on EAJA fees to offset the costs of litigation. While NSCLC does not provide representation in individual Social Security and SSI Disability appeals, these programs are an important part of NSCLC's advocacy effort because they are often the only means by which an individual may attain a modest degree of economic security in old age. It is essential that individuals have access to an attorney to represent them in federal court on disability appeals and that the incentive that EAJA provides for attorneys to take these cases not be diluted by offsetting government debts from attorneys-fee awards.

4. The **National Disability Rights Network (NDRN)** is the nonprofit membership association of protection and advocacy (P&A) agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and

works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. While most P&As do not represent Social Security and SSI entitlement cases, NDRN believes that it is critical that individuals with disability applying for Social Security and SSI have access to attorney representation when benefits are denied. Without the payment to the attorney of awarded EAJA fees, many individuals with disabilities will find it difficult to retain required attorney representation.

5. **Community Legal Services, Inc. (CLS)** is a non profit public interest law firm in Philadelphia that provides legal representation to low income Philadelphians. In addition to representing individuals in appeals of denials of Supplemental Security Income (SSI) cases, CLS has a long history of litigating class actions brought on behalf of SSI claimants and beneficiaries. CLS concentrates its representation on those who find it most difficult to find other representation, including the homeless, the mentally ill and those whose primary language is other than English. Most notably, in the realm of class actions, CLS was lead counsel in the case of *Sullivan v. Zebley*, where this Court upheld the claim that the Commissioner had misadjudicated the SSI claims of a class of 452,000 children. In both individual cases and in class actions, CLS pursues EAJA fees in order to defray the costs of its advocacy. All EAJA fees that are collected are used for the costs of representation

and are a significant part of CLS' yearly budget. Without such fees, the ability of CLS to represent low income clients alleging disability would be significantly affected.

6. The **Empire Justice Center** is a statewide not-for-profit law firm. Its mission is to protect and strengthen the legal rights of people in New York who are poor, disabled or disenfranchised through: systems change advocacy, training and support to other advocates and organizations, and high quality direct civil representation to individuals and classes. As part of that mission, advocates at the Empire Justice Center frequently represent disability claimants in the federal courts who have been denied Social Security and/or SSI benefits by the Social Security Administration. The fees received under the EAJA in those appeals are used exclusively by the Empire Justice Center to provide representation to other indigent claimants who might otherwise not have access to the justice system.

7. The **Pennsylvania Legal Aid Network, Inc. (PLAN, Inc.)** is a statewide not-for-profit corporation responsible for funding and overseeing the work of civil legal aid programs across Pennsylvania. Through the funding, training and support of fourteen programs, PLAN, Inc. helps assure that legal aid programs are able to deliver civil legal services to low income residents. Together, these programs represent approximately 100,000 individuals every year. PLAN, Inc.'s mission is to help assure that low income Pennsylvanians have access to legal

services. Part of the array of legal services funded by PLAN, Inc. and undertaken by the legal aid programs, includes representation of disability claimants in the federal courts who have been denied Social Security and/or SSI benefits by the Social Security Administration. The fees received under the Equal Access to Justice Act are used by the PLAN, Inc. programs to provide representation to other indigent claimants who might otherwise not have access to the justice system. Together, the civil legal aid programs funded by PLAN, Inc. annually represent thousands of disabled clients regarding their claims to Disability Insurance and/or SSI.

8. The **Disability Law Clinic of the Pennsylvania State University Dickinson School of Law** is a professional law office dedicated to teaching law students the practice of law while providing pro bono legal representation to individuals with disabilities in various legal matters. The Clinic represents indigent disabled persons who, it deems, would find it difficult or impossible to obtain private counsel. It uses fees which it receives under the EAJA exclusively for the benefit of its clients, for such purposes as obtaining independent medical and psychological evaluations as needed in furtherance of their legal claims.

9. The **Clinical Program of the Rutgers School of Law – Newark** is a professional law office dedicated to teaching law students the practice of law while providing pro bono representation to unrepresented and underserved individuals and groups. The Rutgers Urban Legal Clinic and Rutgers Child

Advocacy Clinic are the constituent components of the program that provide representation and assistance, respectively, to adults with disabilities seeking Social Security and SSI benefits and children with disabilities seeking SSI benefits. The Rutgers clinical program represents disabled persons in these matters who, it deems, would find it difficult or impossible to secure other counsel. It uses the fees received under the EAJA for the benefit of its clients to expand the quality and availability of services for them.



SUMMARY OF THE ARGUMENT

A. (1). Congress enacted the Equal Access to Justice Act to improve access to the courts for certain persons by paying their attorney’s fees and costs.² The Government wishes to pay EAJA attorneys-fee awards to the party – after first offsetting the party’s government debts – instead of paying the attorney’s fee, arguing that the party would never receive the fee award if the party’s attorney’s fees were paid.³

The Commissioner’s argument overlooks that the EAJA provides “fees and costs.” By ignoring the subject of the award, the Commissioner attempts to convert an attorneys-fee award into monetary damages. There is no ambiguity in the EAJA to permit an

² 28 U.S.C. § 2412(d) (2006).

³ Commr.’s Br. 18.

interpretation that allows an award for the specific purpose of paying the party's attorney's fees to be converted into an award of general monetary damages, and if there were an ambiguity, sovereign immunity would forbid an interpretation that does not advance the purpose of the act.⁴ Recovery of government debts does not improve access to the courts. The "Savings Provision"⁵ shows Congress intended that the attorneys-fee award be paid to the attorney.

(2). This Court, in *Kay v. Ehrler*, explained that fee-shifting statutes are intended "to encourage potential claimants to seek legal advice before commencing litigation,"⁶ and many cases have recognized that fee-shifting statutes will not do that if the fees are not paid to the attorney once awarded.⁷

⁴ *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. ___, 128 S. Ct. 2007, 2019 (2008) (noting that the rule does not apply in the absence of ambiguity).

⁵ Social Security Act § 206(b) (1985) Pub.L. 96-481, as amended by Pub.L. 99-80, § 3, Aug. 5, 1985, 99 Stat. 186. This language is uncodified.

⁶ *Kay v. Ehrler*, 499 U.S. 432, 434 n.4 (1991) (quoting *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983)).

⁷ *E.g.*, *Miller v. Amusement Enter., Inc.*, 426 F.2d 534, 539 (5th Cir. 1970); *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974), *superseded by statute on other grounds*, see *Stanford Daily v. Zucher*, 550 F.2d 464, 465 (9th Cir. 1977); *Hairston v. R. & R. Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975).

(3). This Court has not addressed the mechanics of paying fees once an attorneys-fee award has been made, under the EAJA or under Section 1988.⁸ But even if Section 1988 fees were paid to the party, there are distinctions between Section 1988 and the EAJA that require paying the attorney's fee under the EAJA to the attorney. The EAJA requires that fees be "incurred" through an attorney-client relationship, which would not occur if the attorneys-fee award were used to pay debts instead of the attorney's fee.

(4). In Social Security court cases, an attorney may not charge a fee that is not approved by a court, and may not obtain approval of a Social Security Act fee unless and until benefits are awarded.⁹ If benefits are awarded, it will generally be long after the EAJA attorneys-fee award, so the EAJA fees are the first – and sometimes the only – fees the attorney may receive. The risk that these fees will be lost to debt recovery would serve as a significant disincentive to representation in Social Security cases, especially for individuals with substantial debts, even when their claims have legal merit.

(5). The Commissioner says there will be increased problems with payment if the Court finds that EAJA attorneys-fee awards must be paid to the attorney, but this inaccurately implies that the

⁸ 42 U.S.C. § 1988 (2006).

⁹ *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002).

Commissioner now sends payment to the party. Any purported disputes over division of the EAJA fees would come, if at all, after the fee is entrusted to the attorney, regardless of the payee's identity. The Commissioner's predictions of problems arising from the identity of the payee of the EAJA award are unfounded.

B. Even if EAJA attorneys-fee awards were to be paid to the party instead the attorney, Debt Collection Improvement Act¹⁰ (DCIA) regulations¹¹ would permit offset of the payment only for the debt of the person with the beneficial interest. And because the payment of EAJA awards is made for a specific purpose – to pay the attorney's fee – the party would be a representative payee for the attorney, for whom the payment is intended. So payment of EAJA awards can only be offset for debts of the attorney.

◆

ARGUMENT

A. The EAJA provides for attorneys-fee awards to improve access to the courts, not monetary damages.

Congress enacted the EAJA to make it easier for individuals to seek redress for unjustified government

¹⁰ Debt Collection Improvement Act of 1996, Pub.L. 104-134, § 31001(b) (1996), 31 U.S.C. § 3701 (2006).

¹¹ 31 C.F.R. § 285.5(b), (e)(5) (2009).

actions, including unreasonable denial of Social Security benefits, by paying fees to lawyers and nonprofit advocacy organizations who successfully challenge those actions. The government's diversion of the court's attorneys-fee award leaves the attorney's fees unpaid in ordinary Social Security cases. Recovery of the plaintiff's debts while leaving the attorney's fee unpaid is not compatible with the EAJA's provision of attorneys-fee awards.

(1) Unless EAJA attorneys-fee awards pay the attorney's fees, the EAJA's purpose of improving access to the courts is frustrated.

The Equal Access to Justice Act is one of many cost-shifting statutes intended to “promote private enforcement of Congressional policies.”¹² The EAJA was enacted to improve access to the courts for small businesses and individuals by paying their attorney's fees when the Government has acted unreasonably.¹³ It allows private parties of modest means to recover their cost of litigation – including attorney's fees – against the United States where the private party prevails in the litigation, the position of the United

¹² DERFNER AND WOLF, COURT AWARDED ATTORNEY'S FEES, ¶ 5.02[1] (Matthew Bender 2004).

¹³ 28 U.S.C. § 2412(d) (2006).

States is not substantially justified, in the absence of special circumstances.¹⁴

Congress never intended the EAJA to provide a way for the Government to collect debts it is owed, but intended it to provide attorney's fees and costs to make it easier for individuals harmed by unjustified Government actions to challenge those actions. Undermining the purpose of the EAJA, the Commissioner turns logic on its head by stating "[i]f, as the court of appeals held, attorneys were entitled to a direct EAJA payment from the government, the prevailing party would never 'receive' the fee award."¹⁵ The Commissioner does not – cannot – explain how paying the attorney's fee prevents the party from receiving the benefit of the EAJA attorneys-fee award. The party has the right under the EAJA to the attorneys-fee award, but the award is distinct from its payment. The only purpose of the EAJA is to pay the attorney's fees and costs incurred by the prevailing party, so when the attorney's fee is paid, the party has received exactly what the EAJA provides. The Commissioner's contention to the contrary is illogical, and cannot be reconciled with the EAJA's language or purpose.

When interpreting a statute, "[i]t is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any

¹⁴ 28 U.S.C. § 2412(d)(1)(A) (2006).

¹⁵ Commr.'s Br. 18.

construction which implies that the legislature was ignorant of the meaning of the language it employed.”¹⁶ The Commissioner urges the Court to give effect to the verb and the object (“award” and “to the prevailing party”), but to ignore the subject (“fees and costs”) and the requirement that fees be “incurred.” But ignoring what is being awarded, and why, materially alters the EAJA, turning it from a statute providing a specific benefit – payment of attorney’s fees – into one providing monetary damages from which the Government may collect debts.

Congress is not indifferent to whether EAJA attorneys-fee awards pay the fees of the attorney. The EAJA was enacted to improve access to the courts by paying attorney’s fees where the Government’s position is unjustified, and its language contains no ambiguity which could allow it to accomplish an unrelated – and contradictory – purpose of collecting Government debts instead of paying the attorney’s fee. And even if there were ambiguity in the statute, the EAJA must be strictly construed to provide only fees and costs because the EAJA is a waiver of sovereign immunity, and the award may only be for the purpose specified in the law.¹⁷

¹⁶ *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883); see also *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001).

¹⁷ *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. ___, 128 S. Ct. 2007, 2019 (2008) (noting that the rule requiring strict
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The Commissioner does not – cannot – deny that Congress intended to reduce the financial disincentive to challenges of unreasonable government action by providing for payment of litigation costs. And the Commissioner has not explained how his resistance to paying the attorney fees to the attorney can be reconciled with the EAJA’s provision for attorneys-fee awards. Congress never intended that EAJA attorneys-fee awards be used to recover Government debts, or for any purpose other than helping eligible parties obtain representation, and thereby access to the courts.

The language of the EAJA shows that Congress expected EAJA attorneys-fee awards to be used to pay the attorney’s fee. Where an attorney receives the EAJA attorneys-fee award, and also receives fees awarded (usually months or years later) under the Social Security Act, the attorney must refund the smaller fee to the client.¹⁸ This requirement, known as the “Savings Provision,” says,

[W]here the claimant’s attorney receives fees for the same work under both section 206(b) of that Act [section 406(b) of Title 42] and section 2412(d) of title 28, United States Code [subsec. (d) of this section], the

construction due to sovereign immunity does not apply in the absence of ambiguity).

¹⁸ *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002).

claimant's attorney refunds to the claimant the amount of the smaller fee.¹⁹

The legislative history of the Savings Provision also shows that Congress expected EAJA attorneys-fee awards to be paid to the attorney, and knew that they were being paid to the attorney, when it adopted the Savings Provision to avoid the same services being compensated twice:

[T]he EAJA award should be used as a set off to reduce the payment which the claimant would otherwise owe the attorney. Thus, . . . an attorney for a Social Security or SSI claimant would be precluded from receiving both EAJA and Social Security Act fees. Without this amendment it was argued, "double dipping" was possible. Such double payments are inappropriate and deprive[] the plaintiff of the benefits intended by EAJA. . . . [T]he attorney [is permitted] to seek recovery under both authorizations. The attorney, however, may keep the larger fee, but must return the amount of the smaller fee to the claimant.²⁰

An attorney could only be paid twice for the same work if she received fees both under the EAJA and the Social Security Act. So Congress knew that EAJA

¹⁹ Social Security Act § 206(b) (1985), Pub.L. 96-481, as amended by Pub.L. 99-80, § 3, Aug. 5, 1985, 99 Stat. 186. This language is uncodified.

²⁰ H. Rep. No. 99-120, at 20, reprinted in 1985 U.S.C.C.A.N. 132, 148-49.

attorneys-fee awards were being paid to the attorney, expected payment to the attorney to continue, and never contemplated that the awards would be used for a purpose other than paying the attorney's fees and costs. The Commissioner's suggestion that Congress expected the EAJA attorneys-fee award to be paid to the party, who would then pay it to the attorney, who would then refund it to the party when it is the smaller fee, requires a process that is far too convoluted to be a natural and logical interpretation of the EAJA.

The experience of the *amici* is that the EAJA has historically accomplished its purpose of improving access to the courts. But the EAJA's purpose has been impaired by the Government's recent practice of attempting to recover debts from EAJA attorneys-fee awards instead of paying the attorney's fee. While we do not deny that recovery of Government debts is a legitimate activity, the purpose of the EAJA need not – and cannot – be perverted to accomplish an unrelated goal.

(2) The EAJA provides for attorneys-fee awards, not for monetary damages.

Courts have considered the question of whether litigants who receive attorneys-fee awards under fee-shifting statutes may receive payment personally instead of payment of their attorney's fees, and have concluded that fees must be paid to the attorney to avoid a windfall to the plaintiff, even though the

court awarded attorney's fees to the plaintiff. This Court explained in *Kay v. Ehrler* that the purpose of fee-shifting statutes is "to encourage potential claimants to seek legal advice before commencing litigation,"²¹ and therefore attorneys-fee awards should not be made except to pay for representation. In *Miller v. Amusement Enterprises, Inc.*, the Fifth Circuit cautioned that attorney fees awarded under fee-shifting statutes must go to the lawyers, and not to the litigants themselves.²² The Ninth Circuit reached the same conclusion in *Brandenburger v. Thompson*.²³ The Seventh Circuit has also ruled that fee awards to prevailing parties go directly to the attorneys to avoid the plaintiff receiving an unintended windfall.²⁴ The Third Circuit has reached the same conclusion.²⁵

This is the same rule applied under the "common fund" and "common benefit" exceptions to the American Rule regarding attorney's fees and costs.²⁶ This Court has explained when evaluating fees under the

²¹ *Kay v. Ehrler*, 499 U.S. 432, 434 n.4 (1991) (quoting *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983)).

²² *Miller v. Amusement Enter., Inc.*, 426 F.2d 534, 539 (5th Cir. 1970).

²³ *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974), *superseded by statute on other grounds*, see *Stanford Daily v. Zurcher*, 550 F.2d 464, 465 (9th Cir. 1977).

²⁴ *Hairston v. R. & R. Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975).

²⁵ *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977).

²⁶ See e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980).

common fund doctrine that awarding fees only if the party has an attorney “rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant’s expense.”²⁷ The courts have reached the same conclusion where litigants are entitled to seek attorney’s fees under Section 1988²⁸ – they are not entitled to receive the attorney’s fees, even when the *pro se* litigant is an attorney.²⁹ These cases underscore that attorneys-fee awards must pay the attorney’s fee, and may not be diverted to other purposes. There is nothing in this Court’s decisions indicating an intent to overrule the cases requiring that attorneys-fee awards be used to pay the attorney’s fee to avoid creation of a windfall, and at least one lower court has interpreted language in *Missouri v. Jenkins*³⁰ as authorizing direct payment of attorneys-fee awards to the attorney.³¹

²⁷ *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980).

²⁸ 42 U.S.C. § 1988 (2006).

²⁹ *Kay v. Ehrler*, 499 U.S. 432 (1991); *Gonzalez v. Kangas*, 814 F.2d 1411 (9th Cir. 1987); *Smith v. DeBartoli*, 769 F.2d 451, 453 (7th Cir. 1985); *Turman v. Tuttle*, 711 F.2d 148 (10th Cir. 1983) (per curiam); *Owens-El v. Robinson*, 694 F.2d 941 (3d Cir. 1982); *Wright v. Crowell*, 674 F.2d 521 (6th Cir. 1982) (per curiam); *Cofield v. Atlanta*, 648 F.2d 986, 987-88 (5th Cir. 1981); *Lovell v. Snow*, 637 F.2d 170 (1st Cir. 1981); *Davis v. Parratt*, 608 F.2d 717 (8th Cir. 1979) (per curiam).

³⁰ *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).

³¹ *Gonzalez v. Comm’r of Soc. Sec. Admin.*, 564 F. Supp. 2d 317, 321-22 (D.N.J. 2008).

(3) This Court’s Section 1988 decisions do not support the Commissioner’s intent to use EAJA attorneys-fee awards to recover the party’s government debts.

The Commissioner asserts that this Court’s interpretations of Section 1988 fee awards establish that attorneys-fee awards should be paid to the party instead of the attorney, and that the EAJA requires the same result.³² But these assertions are overstated. While there is no doubt that the “prevailing party” interpretation of both statutes provides that attorneys-fee awards are made to the prevailing party, this Court has not decided under either statute whether the attorneys-fee award, once made, must pay the attorney’s fee. And the text of the EAJA requires that attorneys-fee awards pay the attorney’s fee and does not provide monetary damage awards to pay an unrelated government debt. It does not require complex analysis to conclude that an attorneys-fee award pays the attorney.

An important distinction between Section 1988 fees and EAJA fees which the Commissioner neglects is that Section 1988 does not require that fees be “incurred.” In a Section 1988 action, “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part

³² Commr.’s Br. 28.

of the costs,” without a requirement that the plaintiff incur fees.³³ The EAJA is in stark contrast, providing:

a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action.³⁴

So the EAJA does not allow a party to request an attorneys-fee award unless there is an expressed or implied obligation to pay, or to reimburse previously paid attorney’s fees, because the EAJA makes attorneys-fee awards conditional on fees being “incurred.” As discussed below on page 23, prepayment of attorney’s fees is unlikely, if even possible, in Social Security cases because non-EAJA fees may only be awarded after the party is awarded benefits, and nonprofit, *pro bono amici* attorneys do not charge non-EAJA fees. As the Federal Circuit has explained,

[T]o be “incurred” within the meaning of a fee shifting statute, there must also be an express or implied agreement that *the fee award will be paid over to the legal representative*. The statute does not contemplate that a fee award may be made to a party to be retained. Thus, we have held in an

³³ *Gilbrook v. City of Westminster*, 177 F.3d 839, 844 (9th Cir. 1999)

³⁴ 28 U.S.C. § 2412(d)(1)(A) (2006).

analogous situation that a party acting pro se is not entitled to an attorney fee award.³⁵

As one court has analyzed it, the attorney's fees are incurred by the lawyer on behalf of the client where the EAJA fees, if awarded, are always paid to the attorney.³⁶ So fees are "incurred" where they will be paid to the attorney, through either an express or an implied agreement. But if they are paid to the party as monetary damages, and potentially used to recover Government debts before the attorney's fee is paid, the fee is never incurred. This defeats the purpose of the EAJA attorneys-fee award.³⁷

Contrary to the Commissioner's assertions, nothing in the decisions of this Court requires payment of Section 1988 attorneys-fee awards, once made, to the plaintiff where the attorney's fee remains unpaid. And even if this were required under Section 1988, there are important differences between that statute and the EAJA which require that the EAJA attorneys-fee award be used to pay the attorney's fee.

³⁵ *Phillips v. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991) (emphasis supplied).

³⁶ See *Jemas v. Comm'r of Soc. Sec. Admin.*, No. 08-4446 (FSH), slip op. at 5 and n.2 (D.N.J. Dec. 17, 2009); see also *Phillips v. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991) ("lawyer's fees are 'incurred by an employee' if they are incurred in his behalf, even though he does not pay them") (internal citations omitted).

³⁷ *Morrison v. C.I.R.*, 565 F.3d 658, 667 (9th Cir. 2009).

- (4) Unlike other cases where EAJA fees may reimburse previously paid fees, ordinarily EAJA fees in Social Security cases must be payable to the attorney to assure that the attorney's fees are paid.**

The language and purpose of the EAJA are inconsistent with an offset of EAJA attorneys-fee awards to recover the party's government debts. But even if the Court were to find this permissible where the award reimburses previously paid fees, in Social Security cases EAJA attorneys-fee awards must be paid to the attorney to assure the attorney's fee is paid. Fee restrictions in the Social Security Act make EAJA attorneys-fee awards very important in Social Security cases. And improving access to representation in Social Security cases is crucial because of the great importance to the *amici's* clients of Social Security benefits, which are intended to provide "income required for ordinary and necessary living expenses."³⁸

In recent years, over 12,000 civil actions have been filed annually to challenge administrative denials of Social Security claims, representing 5% of all civil claims filed in federal court.³⁹ Over half of

³⁸ 20 C.F.R. § 404.508 (2009).

³⁹ James C. Duff, *Judicial Business of the U.S. Courts: 2007 Annual Report of the Director*, at 150, <http://www.uscourts.gov/judbus2007/appendices/C02ASep07.pdf> (last visited Jan. 13, 2010).

awards of fees under the EAJA are in Social Security cases.⁴⁰ While this Court has recently considered the EAJA in cases where it reimburses the party's expense,⁴¹ in Social Security cases the EAJA fees typically will be the first fees available, and sometimes the only fees. As this Court noted in *Gisbrecht*, attorneys can only charge fees for their court work on behalf of Social Security claimants after there has been an award of past-due benefits.⁴² It is a criminal offense to collect any Social Security Act fees before past-due benefits have been awarded,⁴³ and they generally have not been awarded at the time when EAJA attorneys-fee awards are made. So the EAJA attorneys-fee award does not typically reimburse the party for fees previously paid in typical Social Security cases. If there is a refund of EAJA fees to the client due to the Savings Provision, it will normally come long after entry of judgment. And there is significant risk there will be no other fees.

According to the Social Security Advisory Board,⁴⁴ the federal courts enter judgment for the

⁴⁰ *Comm'r of INS v. Jean*, 496 U.S. 154, 165 (1990).

⁴¹ See e.g., *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. ___, 128 S. Ct. 2007, 2013 (2008).

⁴² *Gisbrecht v. Barnhart*, 535 U.S. 789, 795 (2002).

⁴³ *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002).

⁴⁴ Disability Decision Making: Data and Materials, Chart 69 (Social Security Advisory Board, May 2006), <http://www.ssab.gov/documents/chartbook.pdf> (last visited Jan. 12, 2010).

plaintiff and award benefits in only 5% of the Social Security claims appealed to district court, and enter judgment for plaintiff with a remand for further proceedings in 45%. The courts either dismiss or affirm in 50% of their Social Security cases. Of the cases remanded for further proceedings, 33% will never result in past-due benefits (including cases becoming moot due to death of an SSI claimant, withdrawal, dismissal, overpayment cases, or denial on the merits), so no Social Security Act fees will be awarded.⁴⁵ If EAJA attorneys-fee awards do not pay the attorney's fee, then the improved access to the courts Congress intended will be eroded, and it will be more difficult for the *amici* and other attorneys to assist Social Security claimants, even where unjustified Government actions have wrongly denied their claims.

The Court should rule that EAJA attorneys-fee awards must be used – as in other fee-shifting statutes – to pay or reimburse attorney's fees incurred by the prevailing party, and are not available for other purposes. This position gives meaning and import to the careful use of the word “incurred” in the statutory language.⁴⁶ And it respects the realities faced by Social Security claimants seeking representation in court.

⁴⁵ *Id.* at Chart 67.

⁴⁶ 28 U.S.C. § 2412(d)(1)(A) (2006).

While NOSSCR cannot know the scope of the disincentive to representation of individuals wrongly denied Social Security benefits that would result from debt collection from EAJA attorneys-fee awards, it has some experience in those circuits which currently have debt collection. The Commissioner's brief does not provide data regarding the extent of debt collection in Social Security cases, or in other cases. NOSSCR has been unable to find any non-Social Security cases in which EAJA attorneys-fee awards were offset to recover government debts. However, NOSSCR has evidence that the impact is significant in Social Security cases. Two NOSSCR members who practice in the Tenth Circuit, and one who practices in the Fourth Circuit, have reported that over 20% of their recent EAJA attorneys-fee awards were offset to pay debts. Other members report that 10% or less of EAJA attorneys-fee awards are offset to pay debts when offset is permitted.

The nonpayment of EAJA attorneys-fee awards would be a significant disincentive to representation. NOSSCR has received reports that some members are no longer representing individuals in court who have, or may have, Government debts. And nonprofits which do not charge fees to their clients will be hampered in their ability to represent clients who wish to challenge unreasonable Government actions if they do not receive the EAJA attorneys-fee awards.

- (5) The Commissioner correctly sends EAJA attorneys-fee and costs awards which are not seized to recover debts to the prevailing party’s attorney now, whether the party or the attorney is the payee, contrary to implications of his brief.**

While the Commissioner’s brief deftly demonstrates that attorneys-fee awards under EAJA are *awarded to* the prevailing party, he confuses the pre-award question of who may receive *the award* with the post-award question of whether, once the attorney’s fees are awarded, the attorney’s fee must be paid. The Commissioner’s brief relies heavily on portraying the EAJA as having specified to whom the attorneys-fee award is payable, using the word “payable” thirty-five times in his brief. But the word “payable” does not appear in the EAJA, and the payment of fees has not been analyzed in this Court’s cases interpreting the EAJA or other fee-shifting statutes.

The Commissioner’s brief dissects the language of the EAJA, separating “award” and “to the prevailing party” from “fees and costs,” as if the subject of the award were unrelated, and then leaps to the conclusion that because the “award” is made to the prevailing party, the EAJA requires “payment” to the prevailing party.⁴⁷ The Commissioner’s brief then

⁴⁷ Commr.’s Br. 15-16.

argues that if EAJA awards of attorney's fees and costs must be used to pay the fees and costs the court awarded, he would be required to make direct payment to each person whose services or costs are included in the EAJA award, and even to resolve disputes among professionals over payment.⁴⁸ But this argument is undermined by the Commissioner's actual practice.

The Commissioner asserts that a decision by the Court that requires him to assure that the EAJA attorneys-fee award pays the attorney's fee, instead of paying government debts, would cause him a great administrative burden.⁴⁹ But paying the prevailing class members in class actions would be a greater burden. An EAJA attorneys-fee award in a single class action case would potentially generate more EAJA payments than many years of EAJA checks in all other Social Security cases. For example, *amici* CLS successfully represented a class comprised of 452,000 members, as noted above on page 4; the Commissioner's assertion that sending payment to the attorney instead of the party would cause problems could not have considered the administrative burden of paying fees to all class members. But the Commissioner's assertion that sending attorneys-fee awards to the attorney would cause problems is

⁴⁸ Commr.'s Br. 19-20.

⁴⁹ Commr.'s Br. 19-20.

neither realistic nor consistent with his current practice.

The experience of the *amici* is that the Commissioner correctly pays EAJA awards the same way judgments are satisfied routinely in most civil litigation: the payment – if any is left after taking offsets – is sent to the party’s attorney, whether the party or the attorney is the payee. The party’s attorney then is responsible for paying the appropriate people. The Commissioner has acknowledged this practice, saying “the EAJA fee check, although payable to Plaintiff, will be sent to his counsel.”⁵⁰ And in this case he has not suggested or implied that he will stop sending the EAJA-fee check to the attorney, even if it is reduced to recover government debts.

The Commissioner’s argument also conflicts with his public statements on the agency’s web site, which acknowledge that the Commissioner pays EAJA attorneys-fee awards to the attorney: “[the EAJA] [a]uthorizes an attorney to obtain reimbursement of expenses incurred (*e.g.*, legal fees, expert witness fees, etc.).”⁵¹

⁵⁰ Commissioner’s Surreply opposing EAJA fees, Doc. 24-2, at 4-5, *Braxton v. Astrue*, No. 8:06-cv-02603-SKG (D. Md. Aug. 13, 2007).

⁵¹ Fees For Representation In Proceedings Before A Court, http://www.ssa.gov/representation/rep_fees_before_a_court.htm (last visited Jan. 12, 2010); *see also* HALLEX, § I-1-2-91, http://www.socialsecurity.gov/OP_Home/hallex/I-01/I-1-2-91.html (last visited Jan. 12, 2010).

Whether or not the Commissioner may offset EAJA attorneys-fee awards to recover debts instead of paying the fees, there is no reason to change the Commissioner's current practice of sending a single payment to the party's attorney regardless of whether the party or the attorney is the payee.

B. Even if EAJA attorneys-fee awards were paid to the prevailing party initially, federal regulations treat the prevailing party as a representative payee for the attorney, and do not authorize the offset that occurred here.

The Commissioner's brief makes an unwarranted assumption when it argues that EAJA attorneys-fee awards may be offset for the debts of the prevailing party. While the Commissioner is correct in saying that payments under the EAJA are not exempted from the Debt Collection Improvement Act (DCIA), the Commissioner's brief did not consider that the EAJA doesn't award the party monetary damages, but attorney's fees. If the party were to receive the awarded attorney's fees, it would only be for purposes of paying the attorney. While the payment would not be exempt from offset, it would be subject to offset only for the debts of the attorney.

An attorneys-fee award under the EAJA awards the party the right to have his attorney paid. A party's right to have his attorney's fee paid is not a general asset which can be tapped for discretionary purposes, but is made for a specific purpose vital to

the mission of the courts. But once that award is converted into money by being paid (or made payable) to the attorney, it ceases to be “an award” of attorney’s fees, and becomes a payment subject to the DCIA. And even if the EAJA attorneys-fee award were paid to the party, it would be only for the purpose of paying the attorney’s fee, so the party would serve only as a representative payee for the attorney, who has the beneficial interest in the payment.

This interpretation of the DCIA is supported by the regulations published by the Secretary of the Treasury. The DCIA regulations provide,

If a payment is made to a person solely in that person’s capacity as a representative payee for another person having the beneficial interest in a payment, the disbursing official shall offset that payment only to collect debts owed by the person having the beneficial interest in the payment. Payment agencies are responsible for identifying representative payees.⁵²

Here, if the party were to receive the attorneys-fee award, it would be only as a representative payee for the person the payment was intended for – here, the attorney. So any offset taken must be for debts of the attorney, not the party. This gives effect to both the EAJA and the DCIA, by considering the party

⁵² 31 C.F.R. § 285.5(b), (e)(5) (2009).

whose fees are awarded to be the representative payee for the attorney, and permitting offset only for debts of the attorney. Under the Commissioner's interpretation, the Government would not be able to offset an EAJA fee where the attorney has a large debt to the Government, but the party has none.

If an EAJA attorneys-fee award were paid to the party, it would be a payment to a representative payee such as described in the Secretary of the Treasury's interpretation of the DCIA's exemptions from the Treasury Offset Program.⁵³ The Secretary's Standards for Exemption of payments recognize payments "to alternative payees to accomplish the program purpose" and payments "earmarked by statute or regulations for a specific purpose"⁵⁴ as the type of payments which should be exempted.

The Secretary's Standards for Exemption reflect that agencies should attempt to avoid offsets which would interfere with the purpose of a payment by directing payment to alternative payees. This supports finding that the district courts have the discretion to direct that attorneys-fee awards be paid to the attorney to assure that the purpose of the payment is effectuated. It also implies that the lack of

⁵³ 31 U.S.C. § 3716(c)(3)(B) (2006).

⁵⁴ Standards and Procedures for Exemption of Classes of Payments from Centralized Administrative Offset under the Debt Collection Improvement Act of 1996, <http://fms.treas.gov/debt/top.html> (last visited Jan. 12, 2010).

a statutory exemption for EAJA attorneys-fee award payments is immaterial, because attorneys-fee awards are paid for the explicit statutory purpose of paying attorney's fees. As the Secretary's standards suggest, the purpose of the EAJA could be met by the district court directing payment to the attorney. The best way to effectuate the purposes of both statutes is to direct payment of EAJA attorneys-fee awards to the attorney, or to the prevailing party as the representative payee of the attorney.

The application of the DCIA so as to permit recovery of debts by offsetting EAJA attorneys-fee awards impedes the purposes of both the DCIA and the EAJA. The DCIA was amended in 1996 "To maximize collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools."⁵⁵ It will not maximize collection of delinquent debts to erode the ability of individuals wrongly denied Social Security benefits to get attorneys to represent them, as without representation they will not be awarded the ongoing benefits, and there could be no recovery from those ongoing benefits. It will preserve the purposes of both laws to require that EAJA attorneys-fee awards be used to pay the attorney's fee, as that will improve access to the courts and also assist wrongly-denied individuals

⁵⁵ Debt Collection Improvement Act of 1996, Pub.L. 104-134, § 31001(b) (1996), 31 U.S.C. § 3701 (2006).

to obtain ongoing benefits from which debts may be collected.



CONCLUSION

Amici curiae recommend that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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