

No. 08-1322

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

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MICHAEL J. ASTRUE,  
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

CATHERINE G. RATLIFF

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT*

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**BRIEF FOR THE PETITIONER**

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### **QUESTION PRESENTED**

Whether an “award of fees and other expenses” under the Equal Access to Justice Act, 28 U.S.C. 2412(d), is payable to the “prevailing party” rather than to the prevailing party’s attorney, and therefore is subject to an offset for a pre-existing debt owed by the prevailing party to the United States.

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**BRIEF FOR THE PETITIONER**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 540 F.3d 800. The order of the district court (Pet. App. 10a-16a) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on September 5, 2008. A petition for rehearing was denied on December 5, 2008 (Pet. App. 17a). On February 23, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 6, 2009. On March 26, 2009, Justice Alito further extended the time to May 4, 2009, and the petition was filed on April 28, 2009. The petition for a writ of certiorari was granted on September 30, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**STATUTORY PROVISIONS INVOLVED**

Pertinent provisions are set out in the appendix to this brief (App., *infra*, 1a-13a).

**STATEMENT**

1. a. Congress has directed that each federal agency “shall try to collect” monetary claims owed to the United States government when the claim arises out of the agency’s activities. 31 U.S.C. 3711(a); see 31 C.F.R. 901.1(a), 901.2. If an agency’s attempts to collect a claim are unsuccessful, the agency, subject to exceptions not relevant here, may “collect the claim by administrative offset.” 31 U.S.C. 3716(a). An agency may effect an administrative offset by “withholding funds payable by the United States” to the debtor, by cooperating with another agency to withhold such funds, or by notifying the Department of the Treasury (Treasury) of the debt for inclusion in Treasury’s centralized offset program. 31 U.S.C. 3701(a)(1); see 31 C.F.R. 285.5(d)(2), 901.3(b)(1) and (c). When a legally enforceable nontax debt becomes more than 180 days delinquent, the creditor agency must notify Treasury of the debt so that Treasury can attempt an administrative offset. 31 U.S.C. 3716(c)(6); see 31 C.F.R. 285.5(d)(1), 901.3(b)(1); cf. 31 C.F.R. 285.5(b), 900.2(b) (defining delinquent).<sup>1</sup>

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<sup>1</sup> Certain types of federal payments are not subject to administrative offset under 31 U.S.C. 3716. See 31 U.S.C. 3701(d), 3716(c)(1)(C), (3)(A)(ii), (B) and (e)(2); 31 C.F.R. 285.5(e)(2). Other statutory and regulatory provisions also govern the government’s collection of certain debts and reductions from certain federal payments. See, *e.g.*, 5 U.S.C. 5514 (reductions from federal salary); 26 U.S.C. 6331 (levy for federal tax debts), 6402(c)-(e) (reductions from tax refunds); 31 U.S.C. 3701(d) (tax, tariff, and certain Social Security debts); 31 U.S.C. 3720A (reductions from tax refunds); 26 C.F.R. 301.6331-1 (tax levy); 31 C.F.R.

Before attempting an offset, the creditor agency must mail to the debtor's most current known address a written notice of the type and amount of the claim, the agency's intention to collect the claim by administrative offset, and the debtor's rights under 31 U.S.C. 3716. See 31 U.S.C. 3716(a)(1); 31 C.F.R. 285.5(d)(6)(ii)(A). Those rights include the right to inspect and copy records related to the claim, the right to administrative review of the agency's determination of indebtedness, and the right to make a written agreement with the agency to repay the claim and thereby avoid an offset. 31 U.S.C. 3716(a)(2)-(4); 31 C.F.R. 285.5(d)(6)(ii)(B)-(D); cf. 31 C.F.R. 901.8 (repayment agreements). Before Treasury will implement an administrative offset, the creditor agency must certify in writing that, *inter alia*, the debt is past-due, legally enforceable, and properly subject to an administrative offset. 31 C.F.R. 285.5(d)(3)(i) and (ii). That certification must state that the agency has made a reasonable attempt to provide the debtor with the requisite notice and the opportunity to exercise her rights in connection with the debt, including her right to enter into a written repayment agreement. 31 C.F.R. 285.5(d)(3)(i), (ii) and (6).

Through the Financial Management Service (FMS), Treasury operates a centralized delinquent debt collection program known as the Treasury Offset Program. When a federal agency instructs Treasury to pay an obligation on the agency's behalf, the offset program compares the payee's name and taxpayer identifying number to the names and taxpayer identifying numbers on delinquent debts that creditor agencies have previously

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285.1-285.4, 285.5(e)(3), 285.6-285.8 (Treasury offset regulations). Those provisions are not implicated in this case.

certified to Treasury as valid, delinquent, and legally enforceable. 31 C.F.R. 285.5(b) (defining “match”). If the payee is matched to such a debt, the government’s payment to that person is reduced to satisfy the debt, and FMS provides the debtor with a written notice of the administrative offset. See 31 C.F.R. 285.5(c)(2), (f)(1) and (g)(3); see also 31 U.S.C. 3716(c)(1)(A) and (7)(A).

In January 2005, FMS extended its offset program to so-called “miscellaneous” payments. Miscellaneous payments include payments of attorney fees made by Treasury on behalf of federal agencies.

b. Congress enacted the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325 (1980), to enable “certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States” in appropriate cases. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6 (1980). EAJA authorizes the court in a civil action to “award to a prevailing party other than the United States fees and other expenses \* \* \* incurred by that party” if the position of the United States is not “substantially justified” and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A).

Before a court may “award [fees and other expenses] to a prevailing party,” 28 U.S.C. 2412(d)(1)(A), the “party seeking [such] an award” must submit an application that, *inter alia*, “shows that the party is a prevailing party and is eligible to receive an award under [EAJA].” 28 U.S.C. 2412(d)(1)(B). To establish eligibility for a fee award, the applicant must demonstrate that it falls within EAJA’s definition of “party”—*i.e.*, that it is an individual or small business whose net worth when the

action was filed did not exceed \$2 million or \$7 million, respectively, or a non-profit organization meeting specific criteria. 28 U.S.C. 2412(d)(2)(B). The applicant must also document “the amount sought” by providing in its application “an itemized statement from any attorney or expert witness representing or appearing on behalf of the party.” 28 U.S.C. 2412(d)(1)(B).

c. In civil actions for review of final decisions rendered by the Social Security Administration, Congress has separately authorized reasonable attorney fees in 42 U.S.C. 406(b). See *Gisbrecht v. Barnhart*, 535 U.S. 789, 795 (2002). When a successful Social Security claimant “who was represented before the court by an attorney” obtains a favorable judgment, “the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.” 42 U.S.C. 406(b)(1)(A). If a court allows an attorney fee under Section 406(b), the Commissioner of Social Security (Commissioner) may certify the amount of that fee “for payment to such attorney out of, and not in addition to, the amount of” the past-due Social Security benefits owed to the claimant. 42 U.S.C. 406(b)(1)(A); see 20 C.F.R. 404.1730(a), 416.1530(a) (requiring certification of an amount specified by regulation).

If the court has determined the amount of a reasonable attorney fee under Section 406(b), the attorney for a Social Security claimant ordinarily is prohibited from “charg[ing], demand[ing], receiv[ing], or collect[ing] \* \* \* any amount in excess of that allowed by the court” for representing the claimant in the civil action. 42 U.S.C. 406(b)(2). In 1985, however, Congress amend-

ed EAJA to relax that prohibition when certain criteria are satisfied. Specifically, Congress directed that the prohibition shall not apply with respect to “an award of fees and other expenses under [S]ection 2412(d)” of EAJA “if, where the claimant’s attorney receives fees for the same work under both” Section 406(b) and Section 2412(d), “the claimant’s attorney refunds to the claimant the amount of the smaller fee.” See Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (amending EAJA § 206(b)); see also *Gisbrecht*, 535 U.S. at 796.

In the context of Social Security cases, EAJA’s fee-shifting provisions are potentially more generous than is Section 406(b) in at least three respects. First, under EAJA, but not under Section 406(b), a court may award fees if the claimant has not obtained any past-due benefits. Under some circumstances a Social Security claimant may qualify as a “prevailing party” eligible for EAJA fees if the district court reverses the Commissioner’s denial of benefits and remands the matter to the agency for further administrative proceedings, even if the claimant does not ultimately obtain such benefits on remand. See *Shalala v. Schaefer*, 509 U.S. 292, 295-302 (1993). Fees under Section 406(b), by contrast, are limited to “25 percent of the total of the past-due benefits to which the claimant is entitled by reason of [the court’s] judgment,” 42 U.S.C. 406(b)(1)(A), and therefore are available only if the judgment leads to a benefits award. Second, EAJA fees are calculated not as a percentage of the claimant’s benefit award, but rather through use of the “lodestar” method, which takes into account attorney time reasonably expended and the attorney’s reasonable hourly rate. See *Gisbrecht*, 535 U.S. at 792, 796. Although fees allowed under Section 406(b) (in cases where past-due Social Security benefits are



awarded) are often greater than the EAJA fees for the same case, the “lodestar” method may sometimes produce a fee award in excess of the maximum (25% of such benefits) available under Section 406(b). Third, and perhaps most significantly, fees awarded under EAJA are payable *in addition to* any benefits that the claimant is owed. An attorney fee paid by the Commissioner under Section 406(b), by contrast, is paid “out of, and not in addition to, the amount of such past-due benefits.” 42 U.S.C. 406(b)(1)(A); see *Gisbrecht*, 535 U.S. at 802 (explaining that, unlike EAJA, Section 406(b) “does not authorize the prevailing party to recover fees from the losing party,” but rather “authorizes fees payable from the successful party’s recovery”).

2. Respondent is an attorney who represented Ruby Willow Kills Ree, a Social Security claimant, in a civil action challenging the denial of Social Security benefits. Pet. App. 18a. Kills Ree prevailed in her lawsuit. *Ibid.*<sup>2</sup> On January 17, 2006, the district court granted Kills Ree’s unopposed motion for EAJA fees, ordering the Commissioner to “pay [Kills Ree’s] claim for EAJA fees in the amount of \$2,112.60 in attorney fees” and \$126.75 in “other expense[s].” *Id.* at 23a. The court directed that “[j]udgment shall be entered in favor of the Plaintiff [Kills Ree] and against the [Commissioner] accordingly.” *Ibid.*

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<sup>2</sup> The district court ruled, consistent with the government’s concession in the case, that Kills Ree was entitled to benefits starting on January 28, 1999, rather than March 30, 1999, as the administrative law judge had determined. See *Kills Ree v. Barnhart*, Civ. No. 04-5119 (D.S.D. Sept. 28, 2005), slip op. 4, 8-9. The court “remand[ed] th[e] matter to the Social Security Administration for a determination that the Claimant’s disability commenced on January 28, 1999.” *Id.* at 9.

The Commissioner subsequently instructed FMS to pay the EAJA award to Kills Ree, and FMS matched Kills Ree to a delinquent non-tax federal debt that she owed to the government. See Pet. App. 21a-22a. On January 31, 2006, FMS mailed Kills Ree a notice explaining that a creditor agency had previously sent her a separate notice explaining the amount and type of debt that she owed, her rights associated with that debt, and the agency’s intent to collect the debt by intercepting future federal payments to her. *Ibid.* The notice further explained that Kills Ree’s \$2239.35 EAJA award had been offset in its entirety to satisfy that pre-existing federal debt. *Id.* at 22a.

3. On September 11, 2006, respondent initiated the present action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, challenging the offset as contrary to law. Pet. App. 19a. Respondent’s complaint alleged that respondent “was awarded attorney fees under [EAJA]” as counsel for Kills Ree, and that the Commissioner had unlawfully seized that award “to satisfy debts allegedly owed by [Kills Ree] to the government.” *Id.* at 18a-19a.<sup>3</sup>

The district court granted the government’s motion to dismiss. Pet. App. 10a-16a. The court held that, under the plain terms of the statute, EAJA awards are payable to the “prevailing party” rather than to that party’s attorney. *Id.* at 12a-13a. The court concluded

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<sup>3</sup> Respondent also challenged an \$866 offset for a federal tax debt that was deducted from an EAJA award of \$6160 obtained by a second client. See Pet. App. 19a; C.A. App. 27-28 (EAJA award); *id.* at 30 (offset notice). In the course of preparing its petition for a writ of certiorari, the government identified an independent barrier to the use of the offset mechanism with respect to that award, and subsequently refunded the money associated with that reduction.

that respondent “must seek the fees from her clients” directly and lacked standing to bring the present suit because she had not sustained an injury in fact from governmental action. *Id.* at 13a.

4. The court of appeals reversed. Pet. App. 1a-9a. The court held that “EAJA fee awards become the property of the prevailing party’s attorney when assessed and may not be used to offset the claimant’s debt.” *Id.* at 4a. The court acknowledged that its holding conflicted with decisions of other courts of appeals, including *Manning v. Astrue*, 510 F.3d 1246 (10th Cir. 2007), cert. denied, 129 S. Ct. 486 (2008), and *Reeves v. Astrue*, 526 F.3d 732 (11th Cir.), cert. denied, 129 S. Ct. 724 (2008). Pet. App. 2a-3a. The court also stated that, if it were not constrained by circuit precedent, it might “well agree with [its] sister circuits and be persuaded by a literal interpretation” of EAJA’s text awarding fees to the “prevailing party.” *Id.* at 3a. The court of appeals determined, however, that “controlling Eighth Circuit precedent” compelled the conclusion that “attorneys’ fees awarded under the EAJA are awarded to the prevailing parties’ attorneys, rather than to the parties themselves.” *Id.* at 1a-2a; see *id.* at 3a-4a (discussing prior Eighth Circuit decisions). The court therefore ruled that respondent had “standing to bring an independent action to collect the fees,” and, on the merits, that the government had violated the Fourth Amendment by unreasonably seizing respondent’s EAJA fee awards to satisfy the debts of her clients. *Id.* at 4a.

Judge Gruender concurred in the court’s judgment. Pet. App. 4a-9a. He explained, however, that his concurrence was based solely on circuit precedent, and that the court’s holding was “inconsistent with language in two Supreme Court opinions, the EAJA’s plain language,

and the holdings of most other circuit courts.” *Id.* at 5a. In Judge Gruender’s view, “other circuit courts” had correctly recognized that “awards of attorney’s fees belong to the client as the prevailing party, not to the attorney.” *Id.* at 9a; see *id.* at 6a-7a. Judge Gruender also relied on this Court’s conclusion that, under 42 U.S.C. 1988, “it is the party’s entitlement to receive [attorney] fees,” which do not “belong[] to the attorney.” Pet. App. 5a-6a (quoting *Venegas v. Mitchell*, 495 U.S. 82, 88 (1990)). In Judge Gruender’s view, this Court’s construction of Section 1988 further demonstrated that the court of appeals’ resolution of this case was incorrect. See *ibid.* (discussing *Venegas* and *Evans v. Jeff D.*, 475 U.S. 717 (1986)).

#### SUMMARY OF ARGUMENT

The court of appeals concluded that attorney fees under EAJA are “awarded to the prevailing parties’ attorneys, rather than the parties themselves,” and that EAJA awards “therefore cannot be used to offset the parties’ debts to the government.” Pet. App. 1a-2a. That holding cannot be squared with EAJA’s text, its drafting history, or the decisions of this Court in a parallel fee-shifting context. Because EAJA awards are payable to the prevailing party, they are subject to administrative offset under 31 U.S.C. 3716 to satisfy a debt owed by that party to the United States.

1. a. EAJA directs that courts “shall award to a prevailing party”—not to that party’s attorney—“fees and other expenses \* \* \* incurred by that party.” 28 U.S.C. 2412(d)(1)(A). The verb “award” is well understood in litigation contexts to mean “to give by judicial decree,” *Webster’s Third New International Dictionary* 152 (1986), and Congress’s use of the term in Sec-

tion 2412(d) unambiguously directs courts to give EAJA fees and expenses to the prevailing party. Congress has used the term “award” to confer a right to monetary payment upon litigants in various contexts, including in another provision of EAJA, which specifies that “costs” (which are defined to exclude “the fees and expenses of attorneys”) are to be “awarded to the prevailing party.” 28 U.S.C. 2412(a)(1).

Other EAJA provisions confirm that conclusion. Congress manifested its intent that prevailing parties “receive” EAJA payments under Section 2412(d) by requiring the party seeking the award to submit a fee application showing that she is a “prevailing party” and “is eligible to receive [the] award.” 28 U.S.C. 2412(d)(1)(B). Congress also distinguished between the prevailing party and her attorney by requiring the party’s fee application to “includ[e] an itemized statement from any attorney \* \* \* representing or appearing in behalf of the party” detailing the attorney’s hourly rate and time expended on the case. *Ibid.*

The prevailing party’s EAJA application must document the “amount sought” (28 U.S.C. 2412(d)(1)(B)) for the party’s attorney fees, expert witness expenses, and costs for “any study, analysis, engineering report, test, or project” needed for her case. 28 U.S.C. 2412(d)(2)(A). If attorney fees were separately payable to each attorney responsible for such fees, the same presumably would be true of other litigation specialists who provide services subject to EAJA reimbursement. Nothing in EAJA’s text or legislative history suggests that Congress intended for courts to partition EAJA awards in that manner. To the contrary, EAJA directs the “payment of attorney fees \* \* \* to the prevailing party.” H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 25 (1980).

That course properly avoids embroiling federal courts in collateral disputes over how to distribute the award between prevailing parties and their attorneys (and other hired specialists), who may disagree whether the prevailing party paid the agreed-to fees in full or in part before the court granted an EAJA award or dispute other matters concerning their relevant litigation-service contract. Such fee-collection disputes are properly resolved in the normal course outside the EAJA context.

b. When Congress drafted EAJA in 1980 and reenacted its provisions in 1985, it was aware of the attorney-fee provisions of 42 U.S.C. 406(b), which authorize the Commissioner to certify a court-determined attorney fee directly “for payment to such attorney.” 42 U.S.C. 406(b)(1)(A). Congress eschewed such language in Section 2412(d), however, and instead instructed the courts to “award [fees] to a prevailing party” after that party has shown her eligibility to “receive” the award.

c. This Court’s decisions construing 42 U.S.C. 1988, which authorizes courts to “allow the prevailing party \* \* \* a reasonable attorney’s fee,” further demonstrate that EAJA awards are payable to the prevailing party rather than to her attorney. Those decisions teach that the prevailing party is the person entitled to receive Section 1988 fees; reject the attorney’s claim of entitlement to such fees; and explain that the party may therefore waive, settle, or negotiate away such fees to obtain other benefits for herself. Those holdings are particularly significant here because this Court ordinarily construes prevailing-party fee-shifting provisions similarly and has specifically done so with respect to EAJA and Section 1988. Especially in light of EAJA’s much more detailed provisions manifesting Congress’s intent to give

fee awards to the prevailing party, the Court's decisions under Section 1988 directly apply to Section 2412(d).

d. The court of appeals' decision was based on Eighth Circuit precedents that contain no textual analysis or other reasoning that might provide a sound basis for the judgment below. Indeed, the court, in relying on those precedents, self-consciously departed from what it recognized was a "literal interpretation of the EAJA." Pet. App. 3a. That was error. EAJA says what it means and means what it says: Courts shall award fees and other expenses to the prevailing party, not to that party's attorneys.

2. Because EAJA awards properly are paid to the prevailing party, such an award may be reduced to satisfy a debt owed by that party to the United States. The administrative offset authority in 31 U.S.C. 3716 applies to all federal payments that are not exempted from offset, and no exemption is applicable to awards of attorney fees. The government therefore lawfully employed the administrative-offset mechanism when it used Kills Ree's EAJA award to satisfy a pre-existing debt that Kills Ree owed to the United States.

## ARGUMENT

### I. AWARDS OF ATTORNEY FEES AND OTHER EXPENSES UNDER EAJA ARE PAYABLE TO THE PREVAILING PARTY, NOT TO THAT PARTY'S ATTORNEY

The court of appeals held that "attorneys' fees awarded under the EAJA are awarded to the prevailing parties' attorneys, rather than to the parties themselves." Pet. App. 1a-2a. That conclusion cannot be reconciled with EAJA's clear directive that courts "shall award to a prevailing party" the fees and other expenses that are incurred by that party. 28 U.S.C. 2412(d)(1)(A).

The detailed provisions of Section 2412(d) unambiguously reflect Congress’s intent that the prevailing party—not her attorney—would receive EAJA’s statutory fee award. That conclusion is confirmed by EAJA’s drafting history, its relationship to the Social Security attorney-fee provisions of 42 U.S.C. 406(b), and the decisions of this Court construing the fee-shifting language of 42 U.S.C. 1988. Indeed, every other court of appeals that has addressed the question has concluded that the plain meaning of the pertinent statutory provisions is that EAJA fee awards are payable to the prevailing party. The Eighth Circuit erred by self-consciously departing from what it acknowledged was a “literal interpretation of the EAJA.” Pet. App. 3a.<sup>4</sup>

**A. EAJA Unambiguously Provides That Awards Of Fees And Other Expenses Are Payable To Prevailing Parties, Rather Than To Their Attorneys**

1. EAJA provides that, in circumstances where an award is appropriate and “[e]xcept as otherwise specifi-

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<sup>4</sup> Although the court of appeals stated that an unlawful Fourth Amendment seizure resulted from the offset of Kills Ree’s EAJA award, Pet. App. 4a, the court’s decision contains no constitutional analysis and rests exclusively on its construction of EAJA. *Id.* at 2a-4a. We therefore understand the court’s decision in this APA case (*id.* at 19a) to be grounded in its conclusion that the offset to collect Kills Ree’s debt to the United States was contrary to law, 5 U.S.C. 706(2)(A), because the EAJA award was payable not to Kills Ree but to respondent as her counsel. Pet. App. 1a-2a. Respondent had Article III standing (*id.* at 4a) to pursue that APA claim: her asserted monetary injury-in-fact is fairly traceable to the challenged agency action and would be redressable by a judicial order directing the government to pay the EAJA award to respondent. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 88-89 (1998). Thus, while the court of appeals erred in its merits ruling for the reasons discussed *infra*, the courts below had jurisdiction to resolve respondent’s claim.



cally provided by statute, a court shall *award to a prevailing party* \* \* \* fees and other expenses \* \* \* incurred by that party.” 28 U.S.C. 2412(d)(1)(A) (emphases added). That directive unambiguously reflects Congress’s intent to give EAJA fee awards to prevailing parties rather than directly to their attorneys.

The transitive verb “award” is well understood in litigation contexts to mean “to give by judicial decree.” *Webster’s Third New International Dictionary* 152 (1986) (first non-obsolete definition); accord *Black’s Law Dictionary* 125 (5th ed. 1979) (“To give or assign by sentence or judicial determination” as when a “court awards an injunction.”); see *Random House Dictionary of the English Language Unabridged* 144 (2d ed. 1987) (“to bestow by judicial decree” such as in “[t]he plaintiff was awarded damages”); *American Heritage Dictionary of the English Language* 92 (1976) (“To declare as legally due: *awarded damages to the plaintiff.*”). When joined with the prepositional phrase “to a prevailing party,” the term expresses Congress’s clear intent that a court’s decree shall give the fees and other expenses authorized by Section 2412(d) to the prevailing party.

In various contexts, Congress has used the term “award” to direct that the courts give monetary payments to specified classes of litigants. *E.g.*, 17 U.S.C. 1009(d)(1)(A)(i) (“the court shall award to the complaining party its actual damages”).<sup>5</sup> EAJA follows that

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<sup>5</sup> See also, *e.g.*, 17 U.S.C. 1203(c)(2) (“The court shall award to the complaining party the actual damages suffered by the party as a result of the violation.”); 29 U.S.C. 216(b) (court shall allow a reasonable attorney fee “in addition to any judgment awarded to the plaintiff”); 29 U.S.C. 431(c) (court may allow a reasonable attorney fee “in addition to any judgment awarded to the plaintiff”); 29 U.S.C. 2617(a)(3) (court shall allow a reasonable attorney fee “in addition to any judgment

trend. For instance, Congress specified in EAJA that “a judgment for costs, as enumerated in [28 U.S.C. 1920], but not including the fees and expenses of attorneys, may be awarded to the prevailing party.” 28 U.S.C. 2412(a)(1). No one has disputed that the phrase “award[] to the prevailing party” in Section 2412(a)(1) directs the payment of “costs” to the prevailing party, rather than her attorney. And if that is so, the self-same phrase in Section 2412(d) must be taken to direct the payment of legal fees and expenses to the party, and not her lawyer. Where, as here, Congress employs “identical words and phrases within the same statute,” they are presumptively understood to carry “the same meaning.” *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 1896, 1901 n.4 (2009) (quoting *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007)); see *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1027 (2008) (stating the Court’s “usual preference for construing the ‘same terms [to] have the same meaning in different sections of the same statute’”) (citation omitted; brackets in original); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (stating “the basic canon of statutory construction that identical terms within an Act bear the same meaning”). Nothing in Section 2412(d) suggests that Congress intended a departure from this “normal rule of statutory construction.” *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (citation omitted).

The courts of appeals that have analyzed EAJA’s relevant text have consistently recognized that the statutory language is “plain” and that “the prevailing party,

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awarded to the plaintiff”); 42 U.S.C. 3613(c)(1) (“court may award to the plaintiff actual and punitive damages”).

and not her attorney, is the proper recipient of attorney fees under EAJA.” *Bryant v. Commissioner of Soc. Sec.*, 578 F.3d 443, 447-448 (6th Cir. 2009) (discussing Section 2412(d)(1)(A)); accord *Stephens v. Astrue*, 565 F.3d 131, 137 (4th Cir. 2009) (same holding based on “the clear statutory text” of Section 2412(d)(1)(A)); *Reeves v. Astrue*, 526 F.3d 732, 735 (11th Cir.) (Section 2412(d)(1)(A) “unambiguously directs the award of attorney’s fees to the party \* \* \* and not to the party’s attorney.”), cert. denied, 129 S. Ct. 724 (2008); *Manning v. Astrue*, 510 F.3d 1246, 1249-1250 (10th Cir. 2007) (same holding based on Section 2412(d)(1)(A)’s “clear[]” statutory language), cert. denied, 129 S. Ct. 486 (2008); *FDL Techs., Inc. v. United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992) (expressing same holding based on materially identical text in EAJA’s provision for agency adjudications, 5 U.S.C. 504(a)(1), and explaining that the court’s analysis applies equally to Section 2412(d)(1)(A)). Even the court of appeals in this case did not dispute the import of this “literal interpretation of the EAJA,” concluding instead that it was bound by circuit precedent to depart from EAJA’s text. Pet. App. 3a.

2. Even if Section 2412(d)(1)(A)’s directive to “award [fees and other expenses] to a prevailing party” were ambiguous, EAJA’s other provisions confirm that the litigant, rather than her attorney, is the proper recipient of an EAJA fee award.

a. EAJA specifies that the “party seeking an award of fees and other expenses” must submit an application that “shows that the party is a prevailing party and is eligible to receive an award under [Section 2412(d)].” 28 U.S.C. 2412(d)(1)(B). That requirement that a prevailing party must prove her entitlement to “receive” EAJA fees before a court may “award [fees] to a prevailing

party” confirms Congress’s intent that courts shall direct the government’s payment of EAJA fees to the prevailing party. If, 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 after having established that it is she—not her attorney—who “is eligible to receive [the] award,” *ibid.*

Indeed, the content of the fee application itself, as specified in Section 2412(d), clearly distinguishes between the “prevailing party” and the “attorney” who represents her. Under that provision, the application of the “prevailing party” must establish “the amount sought, including an itemized statement from any attorney \* \* \* representing or appearing in behalf of the party.” 28 U.S.C. 2412(d)(1)(B). EAJA also requires that a prevailing party’s fee application show that the “party” is eligible to receive a fee award by establishing, *inter alia*, that the party’s net worth—not that of her lawyer—is less than the maximum amount allowed by statute. See 28 U.S.C. 2412(d)(2)(B) (defining “party”); see also 28 U.S.C. 2412(d)(1)(B); *Bryant*, 578 F.3d at 448; *Stephens*, 565 F.3d at 138; *Reeves*, 526 F.3d at 736; *Manning*, 510 F.3d at 1251. Congress’s consistent differentiation of the party and her attorney in Section 2412(d)—in assigning the task of submitting the fee application and in denoting the information that the application must include—further forecloses the court of appeals’ conclusion that the government must pay EAJA awards directly to the party’s “attorney.”

b. Moreover, EAJA’s inclusion of lawyers within a broader category of experts and professionals demonstrates that Congress did not grant lawyers a special entitlement to EAJA awards. EAJA requires that the

prevailing party's EAJA application submit details regarding attorney fees as just one part of the party's overall justification for an award of litigation expenses. 28 U.S.C. 2412(d)(1)(B). Such expenses expressly include not only "reasonable attorney fees" incurred by the party, but also "the reasonable expenses of expert witnesses" and "the reasonable cost of any study, analysis, engineering report, test, or project" needed to prepare "the party's case." 28 U.S.C. 2412(d)(2)(A) (defining "fees and other expenses"). EAJA thus treats attorneys in the same manner as it treats expert witnesses and other professional specialists who provide services needed to litigate the party's case. See *Bryant*, 578 F.3d at 448 (citing *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506, 1511 (11th Cir. 1988) (*Panola*)); *Reeves*, 526 F.3d at 736 (same); *Manning*, 510 F.3d at 1251 (same). Nothing suggests that any of those litigation specialists are entitled to direct payment of EAJA awards by the government. EAJA instead accounts for the fees of such specialists only when they have been "incurred by [the prevailing] party." 28 U.S.C. 2412(d)(1)(A). In this way too, EAJA's text shows Congress's intent that awards be determined from "the perspective of the litigant," not "from the perspective of the party's attorney." *Richlin Sec. Serv. Co. v. Chertoff*, 128 S. Ct. 2007, 2013 (2008) (construing materially identical text in EAJA's administrative adjudication provision, 5 U.S.C. 504(a)(1)).

3. The court of appeals' contrary conclusion would result in unusual and cumbersome outcomes, which there is no reason to believe Congress intended. Because the statute treats attorneys in the same way as other individuals and businesses providing litigation services—*e.g.*, expert witnesses, engineers, scientists, or other analysts, see 28 U.S.C. 2412(d)(2)(A)—the logic of

the court of appeals' holding would require direct payment from the government to any number of persons. Even if no non-attorney services were needed in a case, the court of appeals' decision would apparently require EAJA awards to be divided into multiple payments made directly to different counsel whenever a prevailing party is represented by multiple law firms.

If Congress had intended such a result, it presumably would have expressed its intent to mandate the partition of EAJA awards. But nothing in EAJA's text or legislative history suggests such an intent. To the contrary, Congress authorized "*an* award of fees and other expenses," 28 U.S.C. 2412(d)(1)(B) (emphasis added), and "specifically allow[ed] for the *payment* of attorney fees \* \* \* *to the prevailing party*," thus "direct[ing] the United States to pay attorney fees and other expenses to [that] party." H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 21, 25 (1980) (emphasis added).

That legislative judgment reflects sound policy. "Except as otherwise specifically provided by statute," EAJA applies to every "civil action (other than cases sounding in tort) \* \* \* brought by or against the United States." 28 U.S.C. 2412(d)(1)(A). In many such cases, the prevailing party may have paid some or all of the bills submitted to her by her attorneys, expert witnesses, or other specialists during the course of litigation; any one of those professionals may owe the prevailing party a separate debt; or the prevailing party and her attorney or specialists may dispute other matters concerning their relevant litigation-service contract.<sup>6</sup>

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<sup>6</sup> The Commissioner construes 42 U.S.C. 406(b) generally to prohibit attorneys from charging a Social Security claimant for their legal services in federal court litigation unless and until the claimant receives past-due Social Security benefits by reason of a court judgment. See

By making EAJA awards payable directly to the prevailing party, Congress avoided the need to have federal courts resolve such collateral issues under EAJA. Cf. *Pierce v. Underwood*, 487 U.S. 552, 563 (1988) (A “request for attorney’s fees [under EAJA] should not result in a second major litigation.”) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). Rather, such disputes between EAJA award recipients and their attorneys or other hired professionals concerning their financial obligations to each other are appropriately resolved under applicable non-EAJA law.

In short, nothing in EAJA suggests that “all [such] persons performing services for the prevailing party in the litigation” may separately “assert their claims for compensation” against the government. *Panola*, 844 F.2d at 1511. Those professionals—including attorneys—must follow the usual course and obtain their compensation from the party who utilized their services, *ibid.*; see *Bryant*, 578 F.3d at 448; *Reeves*, 526 F.3d at 736; *Oguachuba v. INS*, 706 F.2d 93, 97-98 (2d Cir. 1983), because EAJA entitles only the prevailing party (and not those who provided her with litigation assistance) to receive payment of attorney fees and other expenses.

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*Gisbrecht v. Barnhart*, 535 U.S. 789, 795 (2002) (noting Commissioner’s interpretation); pp. 5-6, *supra*. That prohibition does not apply to an attorney’s collection of fees awarded to the claimant under EAJA Section 2412(d), see pp. 24-26, *infra*, and does not extend beyond the specific context of Social Security civil actions.

**B. EAJA's Relationship To 42 U.S.C. 406(b), And The Drafting History Of EAJA's Enactment And Subsequent Amendment, Show That Congress Intended EAJA Awards To Be Paid To Prevailing Parties Rather Than To Their Attorneys**

EAJA's relationship to 42 U.S.C. 406(b), and the history of Congress's efforts to harmonize the two provisions, reinforce the conclusion that EAJA awards are payable to the prevailing party.

1. Section 406 generally governs the amount of a reasonable attorney fee that an attorney may charge for representing Social Security claimants in administrative and judicial proceedings. Section 406(a) governs the fee that may be charged for representing a claimant in administrative proceedings before the Commissioner. See 42 U.S.C. 406(a); *Gisbrecht v. Barnhart*, 535 U.S. 789, 794-795 (2002). Section 406(b), in turn, authorizes a district court to "determine and allow as part of its judgment a reasonable fee" for an attorney who successfully represents a Social Security claimant in federal court. 42 U.S.C. 406(b)(1)(A). The fee that a court may allow under that provision is capped at "25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." *Ibid.*

Section 406(b) also authorizes the Commissioner of Social Security to "certify the amount of such fee for payment to such attorney" out of the past-due benefits that the government has been found to owe. 42 U.S.C. 406(b)(1)(A). That language authorizing "attorneys [to] be paid directly" by the government was added by Congress "to ensure that attorneys representing successful claimants would not risk 'nonpayment of [appropriate] fees'" when such fees are allowed by a court under Section 406(b). See *Gisbrecht*, 535 U.S. at 804 n.13, 805



(brackets in original); see also S. Rep. No. 404, 89th Cong., 1st Sess. 122 (1965) (explaining that the provision is intended “to assure the payment of the fee \* \* \* to the attorney”); *id.* at 19, 349; H.R. Conf. Rep. No. 682, 89th Cong., 1st Sess. 62-63 (1965).<sup>7</sup> EAJA, by contrast, does not contain language similar to Section 406(b)’s authorization to make direct “payment to [an] attorney” of a court-ordered fee. Section 406(b) illustrates that “Congress knows what language to use to award attorney’s fees to an attorney,” and Congress’s failure to employ similar language in Section 2412(d) reflects its intent to make fee awards under EAJA payable to the prevailing party rather than to her attorneys. See *Manning*, 510 F.3d at 1252; accord *Bryant*, 578 F.3d at 448-449; *Stephens*, 565 F.3d at 138; *Reeves*, 526 F.3d at 736.

2. Congress was aware of the Section 406 fee provisions when it enacted EAJA in 1980 and amended it in 1985. In 1980, the Secretary of Health and Human Services advised Congress of his objection to EAJA’s proposed application to Social Security proceedings. The Secretary expressed the view that the “fee-paying system” established by Section 406, which “prescribes the means by which attorneys can be paid out of benefits otherwise due their clients” for legal services in administrative and judicial proceedings, already “work[ed] well” in the Social Security context and that applying EAJA to agency proceedings could “change the very character of the SSA appeals process.” See *Award of Attorneys’ Fees Against the Federal Government: Hearings Before the Subcomm. on Courts, Civil Liber-*

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<sup>7</sup> Congress later added a parallel provision providing “for payment, out of [the claimant’s] past-due benefits \* \* \* to [the] attorney” for legal representation in administrative proceedings. See 42 U.S.C. 406(a)(4) (added 1968).

*ties and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 542 (1980) (letter from Secretary dated Aug. 28, 1980); cf. *id.* at 605 (letter from Chairman of the House Ways and Means Committee explaining that legislation concerning attorney fees in Social Security cases fell within his committee’s jurisdiction and discussing attorney fees under Section 406). Congress amended EAJA’s proposed text one month later to exclude SSA administrative proceedings from the scope of the bill. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12, 20 (1980). After “much discussion,” however, Congress “decided that civil actions [under the Social Security Act, 42 U.S.C. 301 *et seq.*] should be covered.” *Id.* at 12.

In October 1984, Section 2412(d) and EAJA’s other primary fee-shifting provision (5 U.S.C. 504) were automatically repealed pursuant to sunset provisions that Congress had enacted with EAJA in 1980. See EAJA, Pub. L. No. 96-481, §§ 203(c), 204(c), 94 Stat. 2327, 2329. In 1985, Congress reenacted the repealed provisions while making clarifying and other amendments to them. See Act of Aug. 5, 1985, Pub. L. No. 99-80 §§ 1, 2, 6(a), 99 Stat. 183-186.

As noted above (see pp. 23-24, *supra*), the legislative history of EAJA’s enactment in 1980 reflected Congress’s understanding that the statute would apply in civil actions under the Social Security Act. Some language in both EAJA and 42 U.S.C. 406, however, cast doubt on the correctness of that view. EAJA authorizes fee awards under Section 2412(d) only when not “otherwise specifically provided by statute,” 28 U.S.C. 2412(d)(1)(A), and Section 406(b) contains two provisions suggesting that its attorney-fee provisions might be exclusive in the Social Security context. Then, as now,

Section 406(b)(1) specified that, when a court’s judgment allows a reasonable fee for an attorney’s representation of a Social Security claimant in court proceedings under Section 406(b), “no other fee may be payable \* \* \* for such representation except as provided in [Section 406(b)(1)].” 42 U.S.C. 406(b)(1)(A). Section 406(b)(2) similarly made it unlawful for an attorney to “charge[], demand[], receive[], or collect[] for services rendered in connection with [such] proceedings \* \* \* any amount in excess of that allowed by the court [under Section 406(b)(1)].” 42 U.S.C. 406(b)(2).

As part of the 1985 amendments, Congress added Section 206(b) to EAJA in order to address the circumstances in which a court may allow attorney fees under both 28 U.S.C. 2412(d) and 42 U.S.C. 406(b). See Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (EAJA § 206 is reproduced as the “Savings Provision” at 28 U.S.C. 2412 note). Section 206(b) clarified that the exclusivity provision of 42 U.S.C. 406(b)(1) “shall not prevent an award of fees and other expenses under [EAJA] [S]ection 2412(d),” and that the prohibitions in Section 406(b)(2) “shall not apply with respect to any such award” if, “where the claimant’s attorney receives fees for the same work under both [Section 406(b) and Section 2412(d)], the claimant’s attorney refunds to the claimant the amount of the smaller fee.” EAJA § 206(b), 99 Stat. 186 (28 U.S.C. 2412 note); see *Gisbrecht*, 535 U.S. at 796; pp. 5-6, *supra*.<sup>8</sup> Congress thus resolved the prior uncer-

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<sup>8</sup> By defining the attorney’s obligation in a Social Security case “where the claimant’s attorney receives fees for the same work under both [42 U.S.C. 406(b) and 28 U.S.C. 2412(d)],” EAJA § 206(b), 99 Stat. 186 (28 U.S.C. 2412 note), the 1985 EAJA amendments reflect Congress’s understanding that EAJA awards may ultimately be “received” by the attorneys who perform the relevant services. That language

tainty regarding EAJA’s application to Social Security cases by specifying that the attorney-fee provisions of Section 406(b) and Section 2412(d) are both applicable, and by requiring that, when an attorney who represents a Social Security claimant in court actually receives fees that have been ordered under both provisions, the attorney must “reduc[e] the liability of the claimant so that the claimant is the primary beneficiary of the EAJA award.” H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 19 (1985); see *Stephens*, 565 F.3d at 139; *Reeves*, 526 F.3d at 737.<sup>9</sup>

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simply acknowledges that lawyers who represent Social Security claimants will generally do so “on the express or implied promise of the plaintiff to pay the lawyer the statutory award, *i.e.*, a reasonable fee, if the case is won” and EAJA fees are awarded. *Venegas v. Mitchell*, 495 U.S. 82, 86 (1990). Congress’s recognition of that practical reality does not alter EAJA’s clear directive that the prevailing claimant “receive” the award in the first instance. 28 U.S.C. 2412(d)(1); see pp. 14-18, *supra*. This understanding of the term “receives” in the 1985 EAJA amendments is supported by the larger statutory context. The 1985 amendments established an exception to the general prohibition contained in 42 U.S.C. 406(b)(2), which imposes criminal penalties on “[a]ny attorney who charges, demands, *receives*, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder.” 42 U.S.C. 406(b)(2) (emphasis added). Within that prohibition, the term “receives” clearly covers receipt either from the client or from an outside source. The 1985 EAJA amendments, which relax that bar by permitting an attorney to “receive[]” fees under both Section 406(b)(1) and EAJA (so long as the attorney refunds the smaller amount to the claimant), should be understood to use the term in the same manner.

<sup>9</sup> EAJA Section 206(b) was adopted in the face of a “great deal of litigation” regarding the availability of EAJA awards in Social Security civil actions where courts had “com[e] down on both sides” of the issue. S. Rep. No. 586, 98th Cong., 2d Sess. 20-21 (1984). By 1985, several courts of appeals had concluded based on EAJA’s pre-amendment

The 1985 amendments thus revised 28 U.S.C. 2412(d) while expressly referencing 42 U.S.C. 406(b). Although Congress specifically focused on EAJA's application to Social Security cases, and amended EAJA to make clear that the statute authorizes fee awards in such cases, it did not authorize or require a direct government "payment to [an] attorney" who represents a Social Security claimant. Had Congress intended for EAJA awards in Social Security cases to be payable directly to the attorneys who provide the relevant services, it presumably would have used language similar to that in Section 406(b). Congress instead chose to leave Social Security cases subject to the general rule that a court may "award [EAJA fees] to a prevailing party" when that party has demonstrated its eligibility to "receive" an EAJA award. 28 U.S.C. 2412(d)(1). The court of appeals erred in declining to give effect to that congressional judgment.

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legislative history (and without significant textual analysis) that EAJA fees could be awarded in civil actions under the Social Security Act. See, e.g., *Cornella v. Schweiker*, 728 F.2d 978, 987 (8th Cir. 1984); *Wolverton v. Heckler*, 726 F.2d 580, 582 (9th Cir. 1984); *Berman v. Schweiker*, 713 F.2d 1290, 1293, 1296 (7th Cir. 1983). Some of those courts also had stated in dicta that, if attorney fees are ordered under both Section 406(b) and EAJA, "[a]ny award received by [the claimant's] counsel under the EAJA \* \* \* must be used to reimburse [the claimant] up to the amount awarded under [Section 406(b)]." *Guthrie v. Schweiker*, 718 F.2d 104, 107-108 & n.11 (4th Cir. 1983); see *Watford v. Heckler*, 765 F.2d 1562, 1566 & n.5 (11th Cir. 1985). The 1985 EAJA amendments effectively codified that result. See H.R. Rep. No. 120, at 20 (amendments prevent possibility of "double dipping" by attorneys).

**C. The Decisions Of This Court Interpreting 42 U.S.C. 1988(b) Reinforce The Conclusion That EAJA Awards Are Paid To Prevailing Parties Rather Than To Their Attorneys**

Unlike the more detailed provisions governing EAJA awards under Section 2412(d), the pertinent fee-shifting language of 42 U.S.C. 1988(b) simply authorizes federal courts in certain civil-rights actions to “allow the prevailing party \* \* \* a reasonable attorney’s fee as part of the costs.” 42 U.S.C. 1988(b). In *Evans v. Jeff D.*, 475 U.S. 717 (1986), and *Venegas v. Mitchell*, 495 U.S. 82 (1990), the Court made clear that attorney fees awarded under Section 1988 belong to the prevailing party rather than to her attorneys. Those holdings support the most natural understanding of EAJA’s text and history.

In *Jeff D.*, the Court explained that a “straightforward reading” of Section 1988’s authorization to “allow the prevailing party . . . a reasonable attorney’s fee” reflects that “Congress bestowed upon the ‘prevailing party’ (generally plaintiffs) a statutory eligibility for a discretionary award of attorney’s fees” and did not “bestow[] fee awards upon attorneys” themselves. 475 U.S. at 730-732 & nn.17, 19 (footnote omitted); *id.* at 719 (quoting 42 U.S.C. 1988). The Court accordingly held that a civil-rights plaintiff may use a potential attorney-fee award as a “bargaining chip” that she may waive, settle, or negotiate away to obtain other benefits for herself. *Id.* at 731-732 & n.20. The Court concluded that the plaintiff class in *Jeff D.* therefore could properly agree to forgo an attorney-fee award under Section 1988 as part of a settlement that provided for injunctive relief broader than the plaintiffs could reasonably have expected to obtain at trial. See *id.* at 722 & n.5, 729-730.

The Court in *Venegas* considered the application of Section 1988 to a fee dispute between a civil-rights plaintiff (Venegas) and his trial counsel (Mitchell). As in *Jeff D.*, the Court in *Venegas* explained that Section 1988 “by its terms” authorized the district court “to order the defendants to pay to Venegas, the prevailing party, a reasonable attorney’s fee.” 495 U.S. at 86. The Court also emphasized that, under Section 1988, “the party, rather than the lawyer,” is “entitle[d] to receive the fees” awarded by a court. *Id.* at 87-88.

The Court in *Venegas* recognized that many if not most lawyers likely undertake civil-rights litigation “on the express or implied promise of the plaintiff to pay the lawyer the statutory award, *i.e.*, a reasonable fee, if the case is won.” 495 U.S. at 86. The Court reiterated, however, that the plaintiff in such a case retains the “right to waive, settle, or negotiate” away a Section 1988 fee claim, explaining that the decision in *Jeff D.* had “rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff.” *Id.* at 88-89. The Court elaborated that Section 1988 simply “controls what the losing defendant must pay” to the prevailing plaintiff—“not what the prevailing plaintiff must pay his lawyer.” *Id.* at 90. The Court accordingly concluded that Section 1988 imposes no barrier to a plaintiff’s agreement to pay his attorneys a fee greater than that which would be awarded under Section 1988. *Ibid.*; see *id.* at 86-87 (“[T]here is nothing in the section to regulate what plaintiffs may or may not promise to pay their attorneys if they lose or if they win.”).

The decisions in *Jeff D.* and *Venegas* bear directly on the question presented here because this Court ordinarily construes “prevailing party” fee-shifting provisions in the same way, see *Buckhannon Bd. & Care*

*Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001); *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989); *Hensley*, 461 U.S. at 433 n.7, and has done so with respect to EAJA and Section 1988. See *Richlin*, 128 S. Ct. at 2014-2015 (construing EAJA to have the same meaning as similar text in Section 1988). Indeed, compared with Section 1988's general authorization to "allow the prevailing party \* \* \* a reasonable attorney's fee as part of the costs," 42 U.S.C. 1988(b), EAJA contains much stronger textual indications that any statutory fee award belongs to the prevailing party rather than to her attorney. As previously discussed, EAJA requires that courts "shall award to a prevailing party \* \* \* fees and other expenses" only after that party has shown that she "is eligible to receive [the] award," and EAJA specifically distinguishes between the prevailing "party" and her "attorney" by requiring the party's EAJA application to detail the hourly rate and time expended by "any attorney \* \* \* representing or appearing in behalf of the party." 28 U.S.C. 2412(d)(1)(A) and (B) (emphases added); see pp. 14-19, *supra*. The Court's analysis in *Jeff D.* and *Venegas* therefore applies *a fortiori* to the statute at issue here.

**D. The Court Of Appeals Failed To Identify A Sound Basis For Concluding That EAJA Fees Are Payable To The Prevailing Party's Attorney**

In holding that "EAJA fee awards become the property of the prevailing party's attorney when assessed," Pet. App. 4a, the court of appeals made no attempt to reconcile its construction with EAJA's text. In fact, the court recognized that its decision did not comport with



a “literal interpretation” of the statute. *Id.* at 3a. The court declined to engage in such textual analysis because it viewed itself as bound by Eighth Circuit precedent. *Ibid.*

Neither of the Eighth Circuit decisions cited by the court below—*Curtis v. City of Des Moines*, 995 F.2d 125 (8th Cir. 1993), and *United States v. McPeck*, 910 F.2d 509 (8th Cir. 1990)—provides a sound basis for the court’s interpretation of Section 2412(d). Cf. Pet. App. 3a-4a; *id.* at 5a & n.1 (Gruender, J., concurring). The opinion in *Curtis* contains two brief paragraphs to support its conclusion that Section 1988 fees belong to the attorney because the purpose of the statute is to “encourage attorneys to prosecute constitutional violations.” 995 F.2d at 128-129. That atextual analysis is misconceived in light of this Court’s earlier explanation in *Jeff D.* and *Venegas* that fee awards under Section 1988 belong to the prevailing party rather than to her attorney. See pp. 27-29, *supra*. Indeed, this Court in *Jeff D.* considered and rejected an argument similar to that adopted in *Curtis*, concluding that allowing “clients to bargain away fee awards” would not undermine Section 1988’s purpose by significantly deterring lawyers from representing civil rights plaintiffs. *Jeff D.*, 475 U.S. at 741 n.34.<sup>10</sup>

The analysis in *McPeck* provides even less support for the court of appeals’ judgment. The court in *McPeck* addressed a fee award imposed as a sanction in bankruptcy proceedings; concluded that “EAJA [was] inapplicable to th[e] case”; and adopted the government’s position that, “[w]hen a statute awards attorneys’ fees to

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<sup>10</sup> The Eighth Circuit in *Curtis* cited both *Jeff D.* and *Venegas*, but did not attempt to reconcile its holding with the reasoning in those decisions. See 995 F.2d at 128-129.

a party, the award belongs to the party, not to the attorney representing the party.” 910 F.2d at 513.

Every other court of appeals to have analyzed the language of Section 2412(d) in this context has concluded that EAJA awards are paid and belong to the prevailing party, not to that party’s attorney. See pp. 16-17, *supra*. That conclusion is sound. EAJA says what it means and means what it says: Courts “shall award to a prevailing party” fees and other expenses under EAJA after that party shows, *inter alia*, that it is “eligible to receive an award under [EAJA].” 28 U.S.C. 2412(d)(1)(A) and (B). The court of appeals erred in self-consciously departing from that “literal interpretation of the EAJA.” Pet. App. 3a.

**II. EAJA AWARDS ARE SUBJECT TO ADMINISTRATIVE OFFSET UNDER 31 U.S.C. 3716 TO SATISFY DEBTS OWED TO THE UNITED STATES BY THE PREVAILING PARTY**

Because the EAJA award in this case was payable to Kills Ree rather than to her attorney, that award, like most types of federal payments, was properly subject to an administrative offset under 31 U.S.C. 3716 to collect a pre-existing debt that Kills Ree owed to the United States.

Congress revised and expanded Section 3716’s offset authority when it enacted the Debt Collection Improvement Act of 1996 (1996 Act), Pub. L. No. 104-134, § 31001, 110 Stat. 1321-358. The 1996 Act reflects Congress’s effort “[t]o 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.” *Id.* § 31001(b)(1), 110 Stat. 1321-358. The 1996 Act requires all federal agencies to use

the administrative offset authority in Section 3716 when debts to the United States are more than 180 days delinquent, see 31 U.S.C. 3716(c)(1)(A) and (6), and it broadly defines the class of “debts” that are subject to offset to include “any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States,” 31 U.S.C. 3701(b)(1). See 1996 Act § 31001(d)(2)(D) and (z)(1)(B), 110 Stat. 1321-359 to 1321-361, 1321-378.<sup>11</sup>

All “funds payable by the United States” to an individual who owes a delinquent federal debt thus are subject to administrative offset, 31 U.S.C. 3701(a)(1), unless the payment is exempted by statute. See 31 C.F.R. 285.5(e)(1); *Bryant*, 578 F.3d at 449; *Stephens*, 565 F.3d at 136, 140; *Reeves*, 526 F.3d at 738 n.3; *Manning*, 510 F.3d at 1255. Congress has exempted from mandatory offset several categories of payments, including Department of Education payments under Title IV of the Higher Education Act of 1965, see 31 U.S.C. 3716(c)(1)(C); certain federal benefit payments (including Social Security benefits) to the extent the payments total less than \$9000 annually, 31 U.S.C. 3716(c)(3)(A); and other payments when a statute “explicitly prohibits using administrative offset or setoff,” 31 U.S.C.

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<sup>11</sup> The United States also retains a non-statutory, common-law right to reduce payments by offset for debts owed to it by payees. See *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947) (“The government has the same right ‘which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.’”) (citation omitted); 31 U.S.C. 3716(d) (“Nothing in this section is intended to prohibit the use of any other administrative offset authority existing under statute or common law.”); cf. *Citizens Bank v. Strumpf*, 516 U.S. 16, 18 (1995) (discussing offset). That common-law authority is not at issue in this case.

3716(e)(2). See 31 C.F.R. 285.5(e)(2).<sup>12</sup> No such exemption applies to attorney fees awarded under EAJA. 31 C.F.R. 285.5(e)(1) (Except as specifically provided, “all federal payments” including “fees” paid by federal agencies “are eligible for offset.”); see also *Bryant*, 578 F.3d at 449; *Stephens*, 565 F.3d at 136; *Manning*, 510 F.3d at 1255.

Indeed, the court of appeals did not dispute that EAJA awards are subject to administrative offset to satisfy debts owed to the government by the proper payees. The court’s disapproval of the offset in this case was based on its view that EAJA fees “cannot be used to offset the parties’ debts to the government” because such fees “are awarded to the prevailing parties’ attorneys, rather than to the parties themselves.” Pet. App. 1a-2a. For the reasons set forth above (pp. 13-30, *supra*), that analysis cannot be reconciled with the text and history of EAJA, or with this Court’s decisions construing similar fee-shifting statutes. Because the award of fees and other expenses in this case was payable to Kills Ree herself under the plain terms of EAJA, the government properly utilized the administrative-offset mechanism to apply that award to Kills Ree’s pre-existing debt to the United States.

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<sup>12</sup> In addition, the Secretary of the Treasury must exempt from offset payments made under means-tested programs for which the head of the responsible agency has requested an exemption, 31 U.S.C. 3716(c)(3)(B); 31 C.F.R. 285.5(e)(7)(i), and the Secretary has discretion to exempt from offset certain other payments for which the relevant agency head has made a request, 31 U.S.C. 3716(c)(3)(B); 31 C.F.R. 285.5(e)(7)(ii). No agency head has requested that EAJA awards be exempted from offset, and the Secretary of the Treasury has not exempted them.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

1. 28 U.S.C. 2412 provides in pertinent part:

### **Costs and fees**

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

\* \* \* \* \*

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

\* \* \* \* \*

(1a)

(d)(1)(A) Except as otherwise specifically provided by statute, 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 (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

\* \* \* \* \*

(2) For the purposes of this subsection—

(A) “fees and other expenses” includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party’s case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) “party” means (i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organiza-



tion or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

\* \* \* \* \*

(H) “prevailing party”, in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

\* \* \* \* \*

2. Section 206(b) of the Equal Access to Justice Act, as added by the Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186, provides:

Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant’s attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant’s attorney refunds to the claimant the amount of the smaller fee.

3. Section 206 of the Social Security Act, as codified at 42 U.S.C. 406, provides in pertinent part:

**Representation of claimants before Commissioner**

\* \* \* \* \*

**(b) Fees for representation before court**

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

\* \* \* \* \*

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than \$500, or imprisonment for not more than one year, or both.

\* \* \* \* \*

**(d) Assessment on attorneys**

**(1) In general**

Whenever a fee for services is required to be certified for payment to an attorney from a claimant's past-due benefits pursuant to subsection (a)(4) or (b)(1) of this section, the Commissioner shall impose on the attorney an assessment calculated in accordance with paragraph (2).

**(2) Amount**

(A) The amount of an assessment under paragraph (1) shall be equal to the product obtained by multiplying the amount of the representative's fee that would be required to be so certified by subsection (a)(4) or (b)(1) of this section before the application of this subsection, by the percentage specified in subparagraph (B), except that the maximum amount of the assessment may not exceed the greater of \$75 or the adjusted amount as provided pursuant to the following two sentences. \* \* \* \*

(B) The percentage specified in this subparagraph is—

\* \* \* \* \*

(ii) for calendar years after 2000, such percentage rate as the Commissioner determines is necessary in order to achieve full recovery of the costs of determining and certifying fees to attorneys from the past-due benefits of claimants, but not in excess of 6.3 percent.

\* \* \* \* \*

4. 31 U.S.C. 3701 provides in pertinent part:

**Definitions and application**

(a) In this chapter—

(1) “administrative offset” means withholding funds payable by the United States (including funds payable by the United States on behalf of a State government) to, or held by the United States for, a person to satisfy a claim.

\* \* \* \* \*

(b)(1) In subchapter II of this chapter and subsection (a)(8) of this section, the term “claim” or “debt” means any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency. A claim includes, without limitation—

(A) funds owed on account of loans made, insured, or guaranteed by the Government, including any deficiency or any difference between the price obtained by the Government in the sale of a property and the amount owed to the Government on a mortgage on the property,

(B) expenditures of nonappropriated funds, including actual and administrative costs related to shoplifting, theft detection, and theft prevention,

(C) over-payments, including payments disallowed by audits performed by the Inspector General of the agency administering the program,

(D) any amount the United States is authorized by statute to collect for the benefit of any person,

(E) the unpaid share of any non-Federal partner in a program involving a Federal payment and a matching, or cost-sharing, payment by the non-Federal partner,

(F) any fines or penalties assessed by an agency; and

(G) other amounts of money or property owed to the Government.

\* \* \* \* \*

(d) Sections 3711(e) and 3716–3719 of this title do not apply to a claim or debt under, or to an amount payable under—

(1) the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.),

(2) the Social Security Act (42 U.S.C. 301 et seq.), except to the extent provided under sections 204(f) and 1631(b)(4) of such Act and section 3716(c) of this title, or

(3) the tariff laws of the United States.

(e) In section 3716 of this title—

(1) “creditor agency” means any agency owed a claim that seeks to collect that claim through administrative offset; and

(2) “payment certifying agency” means any agency that has transmitted a voucher to a disbursing official for disbursement.

\* \* \* \* \*

5. 31 U.S.C. 3716 provides in pertinent part:

**Administrative offset**

(a) After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive, judicial, or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor—

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

(b) Before collecting a claim by administrative offset, the head of an executive, judicial, or legislative agency must either—

(1) adopt, without change, regulations on collecting by administrative offset promulgated by the Department of Justice, the Government Accountability Office, or the Department of the Treasury; or

(2) prescribe regulations on collecting by administrative offset consistent with the regulations referred to in paragraph (1).

(c)(1)(A) Except as otherwise provided in this subsection, a disbursing official of the Department of the Treasury, the Department of Defense, the United States Postal Service, or any other government corporation, or any disbursing official of the United States designated by the Secretary of the Treasury, shall offset at least annually the amount of a payment which a payment certifying agency has certified to the disbursing official for disbursement, by an amount equal to the amount of a claim which a creditor agency has certified to the Secretary of the Treasury pursuant to this subsection.

\* \* \* \* \*

(C) Payments certified by the Department of Education under a program administered by the Secretary of Education under title IV of the Higher Education Act of 1965 shall not be subject to administrative offset under this subsection.

\* \* \* \* \*

(3)(A)(i) Notwithstanding any other provision of law (including sections 207 and 1631(d)(1) of the Social Security Act (42 U.S.C. 407 and 1383(d)(1)), section 413(b) of Public Law 91-173 (30 U.S.C. 923(b)), and section 14 of the Act of August 29, 1935 (45 U.S.C. 231m)), except as provided in clause (ii), all payments due to an individual under—

- (I) the Social Security Act,
- (II) part B of the Black Lung Benefits Act, or
- (III) any law administered by the Railroad Retirement Board (other than payments

that such Board determines to be tier 2 benefits),

shall be subject to offset under this section.

(ii) An amount of \$9,000 which a debtor may receive under Federal benefit programs cited under clause (i) within a 12-month period shall be exempt from offset under this subsection.

\* \* \* \*

(B) The Secretary of the Treasury shall exempt from administrative offset under this subsection payments under means-tested programs when requested by the head of the respective agency. The Secretary may exempt other payments from administrative offset under this subsection upon the written request of the head of a payment certifying agency. A written request for exemption of other payments must provide justification for the exemption under standards prescribed by the Secretary. Such standards shall give due consideration to whether administrative offset would tend to interfere substantially with or defeat the purposes of the payment certifying agency's program. The Secretary shall report to the Congress annually on exemptions granted under this section.

\* \* \* \* \*

(6) Any Federal agency that is owed by a person a past due, legally enforceable nontax debt that is over 180 days delinquent, including nontax debt administered by a third party acting as an agent for the Federal Government, shall notify the Secretary of



the Treasury of all such nontax debts for purposes of administrative offset under this subsection.

(7)(A) The disbursing official conducting an administrative offset with respect to a payment to a payee shall notify the payee in writing of—

(i) the occurrence of the administrative offset to satisfy a past due legally enforceable debt, including a description of the type and amount of the payment otherwise payable to the payee against which the offset was executed;

(ii) the identity of the creditor agency requesting the offset; and

(iii) a contact point within the creditor agency that will handle concerns regarding the offset.

\* \* \* \* \*

(d) Nothing in this section is intended to prohibit the use of any other administrative offset authority existing under statute or common law.

(e) This section does not apply—

\* \* \* \* \*

(2) when a statute explicitly prohibits using administrative offset or setoff to collect the claim or type of claim involved.

\* \* \* \* \*

6. 42 U.S.C. 1988 provides in pertinent part:

**Proceedings in vindication of civil rights**

\* \* \* \* \*

**(b) Attorney's fees**

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

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