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No. 08-1322

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CATHERINE G. RATLIFF

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The question presented in this case lies at the intersection of two distinct statutory regimes: the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, and the provisions of Title 31 (see Gov't Br. 2-3) that govern the administration by the Department of the Treasury (Treasury) of the Treasury Offset Program. EAJA directs that, when a prevailing litigant in a suit against the United States satisfies various statutory prerequisites, the court "shall award to a prevailing party * * * fees and other expenses." 28 U.S.C. 2412(d)(1)(A). Under the statutory provisions that govern the Treasury Offset Program, all "funds payable by the United States" (31 U.S.C. 3701(a)(1)) to an individual who owes a delinquent federal debt are subject to administrative offset except where the particular category of payments is exempt pursuant to statute. See 31 U.S.C. 3716(c); Gov't

Br. 33-34 & n.12. The attorney-fee award in this case was payable to respondent's client (Ruby Willow Kills Ree) under the plain terms of EAJA; it is undisputed that Kills Ree owed a delinquent debt to the United States; and no federal statute or regulation exempts EAJA awards from offset.[1] As our opening brief explains, those three propositions taken together establish that the Eighth Circuit erred in declining to allow an offset.

Respondent's efforts to avoid that conclusion are for the most part variations on a single theme: that attorneys rather than prevailing parties are the true beneficiaries of EAJA awards because Congress expected and intended that such awards would ultimately flow to the prevailing party's lawyer. It is true that prevailing parties who are awarded EAJA fees are often obligated by contract to pay over the fees to their lawyers. Nevertheless, EAJA fees are payable to the prevailing party

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[1] Respondent does not contend that any federal statutory provision exempts EAJA awards from offset. Respondent argues, for the first time in her merits brief to this Court, that such awards are exempt from offset under 31 C.F.R. 285.5(e)(5), which states that no offset is available for a payment made to a person "solely in that person's capacity as a representative payee for another person having the beneficial interest in a payment." See Resp. Br. 8, 46. Respondent's reliance on Section 285.5(e)(5) is misplaced. The term "representative payee" is defined by regulation to mean "a person named as payee on the payment voucher certified by the payment agency who is acting on behalf of a person entitled to receive the benefit of all or part of the payment." 31 C.F.R. 285.5(b). Representative payees include attorneys (for their clients) and parents (for their children). 67 Fed. Reg. 78,940 (2002) (discussing 31 C.F.R. 285.5(e)(5)); see 72 Fed. Reg. 1285 (2007). As we explain below, the prevailing party rather than her lawyer is the intended beneficiary of an EAJA award, and an outstanding obligation to pay for legal services does not convert the prevailing party into a "representative payee" for the attorney.

in the first instance, and the statute's underlying purpose is to enhance the party's ability to pursue meritorious claims, not to confer financial benefits on lawyers. In these circumstances, use of the offset mechanism is consistent with the text of the relevant statutes, and it directly furthers Congress's purposes in establishing the offset program—*i.e.*, to collect delinquent debts owed to the United States and, in particular, to prevent the payment of *additional* federal funds to persons who already owe such debts.

A. Fee Awards Under EAJA Are Payable In The First Instance To The Prevailing Party, Not To Her Attorney

1. EAJA directs that, when the statutory prerequisites to a fee award are satisfied, the court "shall award to a prevailing party * * * fees and other expenses * * * incurred by that party." 28 U.S.C. 2412(d)(1)(A). The statute thus unambiguously identifies the "prevailing party" as the person "to" whom fees are awarded. See Gov't Br. 15-17. EAJA further 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." 28 U.S.C. 2412(d)(1)(B). The text is clear: "EAJA authorizes the payment of fees to a prevailing party," *Scarborough* v. *Principi*, 541 U.S. 401, 405 (2004), not to her attorney.[2]

Respondent contends (Br. 16) that Section 2412(d)(1)(B) uses "the noun 'award'" to mean a "deci-

[2] Accord H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 21, 25 (1980) (explaining that EAJA "specifically allows for the *payment* of attorney fees (in addition to costs * * *) to the prevailing party" and embodies Congress's intent to "direct the United States to *pay* attorney fees and other expenses to a prevailing party") (emphasis added).

sion," and that Section 2412(d)(1)(A)'s use of "award" as a verb should similarly be understood to mean to "give a decision." She argues on that basis that, under Section 2412(d)(1)(A), the court must "'give a decision' to a prevailing party," but that "only the attorney who earned the fee * * * is entitled to receive" the actual payment. Pet. Br. 15-16 (emphasis omitted).

Respondent's position cannot be squared with either the words or the grammatical structure of Section 2412. Even the dictionary definitions that respondent cites confirm that the verb "award" means to "give *by* the decision of a law court" or to "grant * * * *by* judicial decree," not to "give a decision" itself. Resp. Br. 16 & n.39 (emphases added; citations omitted). In other words, a judicial decision is the *means* by which the court confers a right to payment upon the prevailing party; it is not itself the *thing* that the court gives (or orders the defendant to give) to the party. Cf. *Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987) (explaining that "[i]n all civil litigation, the judicial decree is not the end but the means," and that "[a]t the end of the rainbow lies not a judgment, but some action * * * by the defendant that the judgment produces"). The context in which EAJA uses the verb "award" reinforces that conclusion. In directing the court to "award to a prevailing party * * * fees and other expenses * * * incurred by that party," 28 U.S.C. 2412(d)(1)(A), Congress specified both to whom (the prevailing party) and what (fees and other expenses incurred by the party) the court must award.

Respondent's agreement (at 56) that EAJA treats the payment of "fees and other expenses" in Section 2412(d) as it treats the payment of "costs" in Section 2412(a), confirms that EAJA directs payment of both to the prevailing party. See Gov't Br. 16. Section 2412(a)

makes clear that the "judgment for costs" that may be awarded must "be limited to *reimbursing* in whole or in part the prevailing party for the costs incurred by such party in the litigation." 28 U.S.C. 2412(a)(1) (emphasis added). If the government owed and paid an award of "costs" to the prevailing party's attorney, that payment would not "reimburs[e]" the prevailing party for her incurred costs.

2. The separate provision governing attorney fees in Social Security cases, 42 U.S.C. 406(b), furnishes an instructive contrast. 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's judgment sets the amount of a reasonable fee under Section 406(b), the Commissioner of Social Security (Commissioner) may separately certify the full amount of the court-determined 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. *Ibid.*; see Gov't Br. 5. Section 406(b)'s authorization for fees to be paid directly to attorneys highlights the absence of any similar language in EAJA. See *Manning* v. *Astrue*, 510 F.3d 1246, 1252 (10th Cir. 2007) (citing Section 406(b) and explaining that "Congress knows what language to use to award attorney's fees to an attorney and what language to use when it chooses to award the fees to the prevailing party"), cert. denied, 129 S. Ct. 486 (2008); *Stephens* v. *Astrue*, 565 F.3d 131, 138 (4th Cir. 2009) ("Congress's continued use of different language is particularly telling because Con-

gress has specifically acted to harmonize the EAJA with the Social Security Act.").

3. Respondent also relies (Br. 12-14) on Section 206(b) of EAJA. Act of Aug. 5, 1985 (1985 Act), Pub. L. 99-80, § 3(2), 99 Stat. 186 (enacting Section 206(b)) (reproduced at 28 U.S.C. 2412 note); see Gov't Br. 25. That provision clarified that no violation of law occurs "if, 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)], the claimant's attorney refunds to the claimant the amount of the smaller fee." 1985 Act § 3(2), 99 Stat. 186. Because that language assumes that a Social Security claimant's attorney will sometimes "receive[] fees * * * under" EAJA, respondent infers (Br. 12-13) that EAJA fees are payable to the attorney in the first instance.

That inference is unsound. As our opening brief explains (at 25-26 n.8, 29), 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). Section 206(b)'s reference to the attorney's potential "recei[pt]" of a fee award simply reflects that practical reality. See *Reeves* v. *Astrue*, 526 F.3d 732, 737 (11th Cir. 2008) (explaining that Section 206(b) demonstrates only that "Congress anticipated attorneys will often be the ultimate beneficiaries of the attorney's fees awarded under the EAJA"); accord *Stephens*, 565 F.3d at 139.

Section 206(b)'s use of the verb "refunds" reinforces that conclusion, because it indicates that any fees the attorney "receives" came from the claimant in the first instance. That holds true whether the attorney "re-

funds" fees that were reimbursed under EAJA or fees that were allowed under Section 406(b). Respondent's assertion (at 14) that a Section 406(b) fee payment can never be "refund[ed]" (*i.e.*, "returned") because it "is *never* paid initially to the client" is incorrect. Social Security claimants and attorneys normally enter into contingent-fee agreements, which are subject to court "review for reasonableness" under Section 406(b). See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 800, 803-805, 808-809 (2002). In cases where a court determines and allows a reasonable fee for the attorney's representation before the court, Section 406(b) permits the Commissioner to collect the approved fee on behalf of the attorney and certify it for "payment to such attorney out of" her client's past-due benefits (minus an assessment for that service). See 42 U.S.C. 406(b)(1)(A) (Commissioner "may" take such collection activity); 42 U.S.C. 406(d)(1) and (2)(B)(ii) (assessment should normally "achieve full recovery of the [government's] costs" of collection); 20 C.F.R. 404.1730(a), 416.1530(a) (Commissioner "will" pay court-approved fees "out of [the claimant's] past-due benefits"). Although the Commissioner in such cases acts as the attorney's collection agent, the attorney ultimately "receives" the fee payment from her client because the payment comes out of the client's funds.[3]

[3] Respondent is also wrong in suggesting (Br. 15) that, under the government's reading of Section 206(b), an attorney must wait to collect any fees from her client until both Social Security and EAJA payments are available. EAJA fees may be awarded by the district court well before the claimant receives any past-due benefits on remand to the agency. See Gov't Br. 6 (citing *Shalala* v. *Schaefer*, 509 U.S. 292, 295-302 (1993)); Resp. Br. 15 ("[I]n the large majority of cases * * * , an EAJA fee awarded when the case is remanded precedes, by about a year, the agency's decision whether it will award benefits, which determines whether there will be a § 406(b) fee."). Section 206(b)

B. A Prevailing Party's Contractual Obligation To Pay Her Attorney Any EAJA Fees She Receives Does Not Make Those Fees Payable To The Attorney In The First Instance, And It Does Not Prevent Use Of The Offset Mechanism To Collect The Prevailing Party's Pre-Existing Debt To The United States

The litigant who receives an EAJA award is frequently required by contract to pay the funds over to her attorney (see p. 6, *supra*), and several of this Court's decisions reflect the expectation that attorneys will be the ultimate recipients of any EAJA fees awarded (see Resp. Br. 19-21).[4] That practical reality, however, does

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permits attorneys to collect and "receive" from the client the relevant amount under EAJA before the determination of past-due benefits would allow the attorney to collect Social Security fees under 42 U.S.C. 406(b)(1)(A).

[4] EAJA awards under 28 U.S.C. 2412(d)(1)(A) are limited to "fees and other expenses * * * incurred by [the prevailing] party." EAJA awards may sometimes serve to compensate the party for money she has already paid to her attorney. A party may also "incur" attorney fees by making a contractual commitment to pay her attorney any EAJA award she receives.

For instance, a party will "incur" attorney fees if she accepts an obligation to pay counsel for legal services contingent upon either success on the merits or an award of EAJA fees, see Resp. Br. 18, and both attorneys and clients generally contemplate that, if counsel has not yet been paid, any statutory fee award will be used to compensate counsel. Several courts of appeals have thus recognized correctly that the party can "incur" fees even though the party was nominally represented by counsel *pro bono publico*. See, *e.g.*, *Morrison* v. *Commissioner*, 565 F.3d 658, 662-666 (9th Cir. 2009) (explaining *pro bono* cases and holding that a party "incurs" fees "when [its] obligation to repay fees is contingent upon the party's successful recovery of fees under the statute"); *Ed A. Wilson, Inc.* v. *GSA*, 126 F.3d 1406, 1409-1410 (Fed. Cir. 1997) (discussing, *inter alia*, *Phillips* v. *GSA*, 924 F.2d 1577 (Fed. Cir. 1991)); cf. *Blanchard* v. *Bergeron*, 489 U.S. 87, 93-94, 96 (1989)

not alter the fact that EAJA fees are payable in the first instance to the prevailing party. And because that is so, the government may offset those fees to collect the party's delinquent debt.

1. This Court in *Venegas* noted the prevalence, in the context of civil-rights litigation, of contracts between lawyer and client under which the client agrees to pay over to her attorney any fees awarded under 42 U.S.C. 1988. See 495 U.S. at 86. Social Security claimants and their lawyers commonly enter into similar agreements. See p. 6, *supra*. The existence of such agreements, however, does not support respondent's contention that EAJA awards are payable to attorneys in the first instance. To the contrary, if awards under federal fee-shifting statutes were payable to attorneys in the first instance, such contractual commitments would be superfluous because the attorney would automatically receive payment of any such award. While recognizing the prevalence of such agreements, the Court in *Venegas* emphasized that "the party, rather than the lawyer," is "entitle[d] to receive the fees" awarded under Section

(holding that an express "contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees" under Section 1988; explaining that "Congress * * * broadly requir[ed] all defendants to pay a reasonable fee to all prevailing plaintiffs" and that attorneys who ultimately receive a "reasonable" fee will not obtain a "windfall"). But cf. *United States* v. *Claro*, 579 F.3d 452, 464-466, 468 (5th Cir. 2009) (explaining the "general rule" that "fees are 'incurred' when the litigant has a legal obligation to pay them" but stating that *pro bono* representation is an "exceptional situation[] for which an award of attorney's fees is not contingent upon an obligation to pay counsel"). That approach to "incurred" fees, which respondent appears to embrace (at 18), ultimately reflects that the attorney's right to payment derives from the prevailing party's (implied or express) agreement to incur the obligation to pay counsel.

1988, and that Section 1988 "controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer." 495 U.S. at 87-88, 90.

Similarly in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), this Court explained that "the language of [Section 1988] * * * bestow[s] on the 'prevailing *party*' (generally plaintiffs) a statutory eligibility for a discretionary award of attorney's fees" and does not "bestow[] fee awards upon attorneys" themselves. *Id.* at 730-732 & n.19 (footnote omitted). Although the Court noted that an "award of costs or fees [in the case] would inure to the benefit of Idaho Legal Aid," that observation reflected that the plaintiffs "effectively" had "assign[ed] [their] right" to payment of any court-ordered award to the organization. *Id.* at 721 n.2, 731. As in *Venegas*, the Court's discussion of the plaintiffs' "assignment of this right to an attorney," *id.* at 731, is inconsistent with respondent's contention that attorneys are entitled by statute to payment of such awards.

2. Respondent contends (Br. 23-27) that when EAJA was enacted in 1980, the phrase "award to a prevailing party" had a "settled judicial meaning" that authorized payment of fee awards directly to attorneys. That argument lacks merit.

The decisions on which respondent relies do not interpret the phrase "award to a prevailing party" and appear to be grounded on more general equitable principles. And although the decisions provide little analysis to support their conclusions, they are consistent with the principle that a client's implied agreement to provide her attorney with any statutory fee award she may receive will give rise to a constructive trust that the attorney may enforce once the client receives payment of the

award.[5] When a client agrees to "convey a specific object" like a statutory fee award to an attorney before he has acquired it, that promise "will make the [client] a trustee as soon as he gets a title to the thing." *Barnes* v. *Alexander*, 232 U.S. 117, 121 (1914). Such an agreement to pay a contingent attorney fee "out of [a] fund" obtained in litigation will therefore give rise to a constructive trust and "create[] a lien" benefitting the attorney "the moment the fund [is] received" by the client-trustee. *Ibid.*; see *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 363-365 (2006) (explaining that "a constructive trust or equitable lien" is imposed once the agreed-to fund comes "into the [trustee's] hands") (citation omitted); cf. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213-214 (2002) (concluding that restitution in the form of "a constructive trust or an equitable lien" is unavailable when the pertinent funds or

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[5] See *Miller* v. *Amusement Enters., Inc.*, 426 F.2d 534, 539 (5th Cir. 1970) (relying on "equitable powers" to "assure that the [statutory] fees allowed" under Title II of the Civil Rights Act of 1964 will pay for "legal services rendered and will not go to the litigants"; explaining that a "formal agreement" by the prevailing litigants to pay the statutory award to counsel is not necessary); *Brandenburger* v. *Thompson*, 494 F.2d 885, 888-889 (9th Cir. 1974) (following *Miller* and directing non-statutory fee to party's counsel under the court's "equitable power"), overruled by *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975) (holding that, in the absence of statutory authorization, attorney fee awards are generally prohibited under "American Rule" governing attorney fees); *Hairston* v. *R&R Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975) (following *Miller* and *Brandenburger* to direct statutory fees to counsel under the Fair Housing Act); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977) (explaining that "prevailing litigants" are entitled to "receive fee awards" under the Age Discrimination in Employment Act and following *Miller*, *Brandenburger*, and *Hairston* in concluding that the "fee awards must accrue to counsel"), cert. denied, 436 U.S. 913 (1978).

property "are not in [the trustee's] possession"); *Sereboff*, 547 U.S. at 362 (discussing *Great-West*).

Recognition of a constructive lien in this circumstance is fully consistent with the understanding that an award under EAJA (or under other federal fee-shifting statutes) is payable in the first instance to the prevailing party. Indeed, no such lien would be necessary if EAJA itself directed that the award be paid to the attorney under EAJA's own terms. Imposition of a constructive lien simply reflects an awareness that, when the prevailing party is contractually obligated to pay the award to his attorney, a court may legitimately act to ensure that the party complies with that obligation rather than diverting the funds to other uses.

Where, as here, a federal statute mandates a different disposition of the relevant funds, the constructive-trust principles described above are inapplicable. Once it is understood that an EAJA award is payable to the prevailing party, the statutory provisions governing the offset program unambiguously direct that the award be offset to collect any delinquent debt that the party owes to the United States. Although Congress has exempted certain categories of federal payments from the offset program, it has not exempted attorney-fee awards under EAJA or other fee-shifting statutes. Neither the prevailing party's contractual promise to pay the funds to her attorney, nor the equitable mechanism that might otherwise be used to enforce that promise, can super-

sede Congress's directive that the funds instead be used to repay the party's federal debt.[6]

3. As respondent explains (Br. 28-30), the government has frequently paid EAJA fees in Social Security cases directly to attorneys, either in compliance with a court order specifying the attorney as the proper payee, or pursuant to the claimant's assignment to the attorney of the claimant's right to payment. Contrary to respondent's contention, the government's invocation of the offset mechanism here is consistent with that practice. In most Social Security cases where EAJA fees are awarded, the claimant does not owe a delinquent debt to the government and is contractually obligated to trans-

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[6] Respondents discuss (Br. 24-25) one pre-EAJA court of appeals decision, *Plant* v. *Blazer Financial Services, Inc.*, 598 F.2d 1357, 1365-1366 (5th Cir. 1979), in which the court held that the creditor-defendant could not offset a court-ordered award of attorney fees against a debt owed to it by the plaintiff. *Plant* involved the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, whose fee-shifting provision makes a creditor who violates a debtor's rights "liable to that person" in an amount including "a reasonable attorney's fee." *Plant*, 598 F.2d at 1365 (quoting 15 U.S.C. 1640). The court of appeals held that the creditor could not offset the attorney-fee award against the debt owed to the creditor by the plaintiff, because "[t]o allow a setoff would in effect relieve the creditors in violation of the act of the attorney's fee expense in the case of an insolvent debtor * * * [and so] thwart the statute's individual enforcement scheme and its remedial objectives." *Id.* at 1366. The fee-shifting provision at issue in *Plant* did not contain the "prevailing party" language that Congress subsequently adopted in EAJA, and it predated this Court's decisions in *Jeff D.* and *Venegas*. In addition, the court in *Plant* arguably had greater latitude to consider the policies underlying the relevant fee-shifting statute than did the court below, since the creditor in *Plant* did not argue that another federal statute expressly authorized the offset that it sought to take. Here, by contrast, the government had express statutory authority to offset respondent's fee award against her delinquent debt to the United States. See Gov't Br. 2-4.

mit to her attorney any award that she receives. When the government is able to verify that those two conditions are satisfied, direct payment from the government to the attorney expeditiously satisfies both the government's obligation to the claimant and the claimant's obligation to her lawyer. The government's willingness to utilize that payment method (or to decline to appeal district court orders that direct payment to the attorney) does not cast doubt either on the proposition that EAJA fees are payable to the prevailing party in the first instance, or on the susceptibility of the fees to offset in a case where the claimant *does* owe a delinquent debt.[7]

Respondent's reliance (Br. 29-30) on the government's willingness in some cases to waive statutory restrictions on assignment is particularly misplaced. A claimant's assignment to her attorney of the right to EAJA fees presupposes that the right belongs to the claimant in the first instance. No assignment would be necessary if EAJA mandated payment of such fees to the attorney.

4. Respondents contend (Br. 34-35, 43-45) that, even if EAJA by its terms authorizes an award of fees to the prevailing party, the fees are only "nominally" paid to the party and are actually "for the benefit of the attor-

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[7] In one respect, the government's practice in this area has changed significantly in recent years. The Treasury Offset Program was extended in January 2005 to "miscellaneous" payments like attorney fees. See Gov't Br. 4. Until that time, the government did not typically seek to ascertain whether a prevailing Social Security claimant owed a delinquent debt to the United States, and identification of the proper payee of an EAJA award had less practical significance. In cases where a prevailing claimant does owe a delinquent debt, extension of the offset program to attorney fees has resulted in increased litigation over the question whether EAJA awards are payable in the first instance to claimants or to their attorneys.

ney." That argument reflects a fundamental misunderstanding of EAJA's purpose.

Congress recognized that "certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved," and it enacted EAJA "to diminish the deterrent effect." EAJA, Pub. L. No. 96-481, Tit. II, § 202(a) and (c)(1), 94 Stat. 2325; see *Commissioner, INS* v. *Jean*, 496 U.S. 154, 163 (1990) (explaining that "the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions"). Congress sought to achieve that objective "by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6 (1980); see *id.* at 7-9, 15. As respondent elsewhere acknowledges (see Br. 38), EAJA and other fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys," but rather were enacted "to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U.S. 546, 565 (1986). The prevailing party is not simply a conduit through which EAJA fees may pass between the government and her attorney; she is the intended beneficiary of the statute.

This Court's decision in *Jeff D.* reinforces that conclusion. In *Jeff D.* the Court held that, *because* the relevant fee-shifting statute (in that case, Section 1988) conferred eligibility for fee awards on prevailing parties rather than on their attorneys, those parties could nego-

tiate away their entitlement to fees in order to extract other benefits from the defendant. See 475 U.S. at 730-732. The Court analogized such a settlement to one in which the plaintiff offers "a concession on damages to secure broader injunctive relief." *Id.* at 731. The Court's analysis confirms that the prevailing party has more than "nominal" status as the payee of an EAJA award.[8]

C. Allowing An Offset In These Circumstances Does Not Impermissibly Subvert The Purposes Of EAJA

Respondent contends (Br. 10, 37-39, 40, 50, 61-62) that allowing an offset in these circumstances would subvert the purposes of EAJA, in Social Security cases and more generally, by creating a disincentive for lawyers to represent impecunious clients. Respondent substantially overstates the seriousness of any deterrent effect on the provision of attorney services, and she ignores entirely the countervailing interests served by the statutory offset mechanism.

1. EAJA does not authorize an award of attorney fees to every litigant who prevails in a suit against the United States. Rather, Section 2412(d)(1)(A) authorizes fee awards to prevailing parties only when the government's position is not "substantially justified." 28 U.S.C.

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[8] In *Gisbrecht*, the Court stated that attorneys are "the real parties in interest" when they seek court approval of the fee that they may charge to a Social Security claimant under 42 U.S.C. 406(b). *Gisbrecht*, 535 U.S. at 798 n.6. In that context, the fee comes out of the monetary recovery that the client has already obtained in a court judgment. *Id.* at 795, 798 n.6. An EAJA fee, by contrast, is payable in addition to any recovery the plaintiff obtains in the suit. The Court in *Gisbrecht* explained that, because EAJA and Section 1988 permit "the prevailing party to recover fees from the losing party," those statutes are "of another genre" from Section 406(b). *Id.* at 802; see Gov't Br. 5-7.

2412(d)(1)(A). The "EAJA subsidy" thus "is not directed to a category of litigation that can be identified in advance," and a "lawyer will rarely be able to assess with any degree of certainty the likelihood that the Government's position will be deemed *so* unreasonable" as to justify an award. *Pierce* v. *Underwood*, 487 U.S. 552, 573-574 (1988). Given the substantial uncertainty regarding the prospects of ultimately obtaining an EAJA award that exists at the outset of every case, the possibility that any such award might be subject to offset is unlikely to have a meaningful incremental effect on a lawyer's decision whether to undertake the representation. See *ibid.* (concluding that, unlike cases involving Section 1988 awards, it is "impossible" to base an "economically viable contingent-fee practice" upon the acceptance of cases in which there is a fair prospect of securing an EAJA award).[9]

2. Any such disincentive is particularly attenuated in the Social Security context, where 42 U.S.C. 406(b) provides an alternative source of attorney fees. See Gov't Br. 6-7, 25-26; p. 5, *supra*. In Social Security civil actions, Congress has authorized reasonable attorney fees to be paid out of the claimant's past-due benefits in all cases where a court judgment results in such benefits (not just those in which the government's position is not

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[9] In late 2007, the Tenth Circuit held that EAJA requires payment to the prevailing party and that EAJA awards may be offset under 31 U.S.C. 3716 for delinquent debts owed by a successful Social Security claimant. *Manning* v. *Astrue*, 510 F.3d 1246, 1249-1251, 1255 (10th Cir. 2007), cert. denied, 129 S. Ct. 486 (2008). Three other courts of appeals have since reached the same conclusion. See Pet. 17. Respondent has identified no evidence that those holdings have affected the ability either of Social Security claimants or of litigants more generally to secure legal representation.

substantially justified). 42 U.S.C. 406(b)(1)(A). The attorney is required to refund the smaller of the two awards if he receives fees under both Section 406(b) and EAJA. An offset against the EAJA award will therefore disadvantage the attorney only if the claimant prevails in her suit, the government's position is held not to have been substantially justified, *and* the EAJA award is larger than any fee under Section 406(b). The prospect that any particular suit will have that outcome is unlikely to be so great as to have any marked effect on lawyers' decisions whether to accept a case.[10]

3. Lawyers can readily determine whether potential clients owe debts that are subject to offset. Potential clients receive advance written notice of any debt subject to collection by offset, see 31 U.S.C. 3716(a)(1); 31 C.F.R. 285.1(h)(1), 285.5(d)(6)(ii)(A), and the Department of the Treasury will disclose such information to an attorney if the potential client provides a signed Privacy Act waiver. And if the client owes a debt subject to offset, the client has the opportunity to seek administrative review of the debt obligation and to agree to a written repayment plan that will prevent an offset from occurring, thus protecting any EAJA recovery from reduction. See 31 U.S.C. 3716(a) (requiring notice of those opportunities); 31 C.F.R. 285.1(h), 285.5(d)(6)(ii)(A).

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[10] To be sure, in cases where fees are awarded under both EAJA and Section 406(b), an offset against the EAJA award will affect the *claimant's* interests by requiring her to pay her attorney out of her past-due benefits rather than from a separate source of federal funds. Use of the offset mechanism in that circumstance, however, directly serves the government's substantial interest in collecting valid and delinquent debts owed to the United States, and in avoiding additional federal outlays to persons who owe such debts. See p. 19, *infra*.

4. Despite the foregoing, the Court may assume, *arguendo*, that the availability of an offset in these circumstances will have some marginal deterrent effect on the willingness of counsel to litigate Social Security cases, at least those that involve claimants who are known to owe delinquent debts to the United States and who have not entered into a repayment plan. The prospect of such effects, however, provides no basis for declining to enforce according to its terms the statutory regime that governs use of the offset mechanism. Respondent does not even cite the statutory provisions that establish the offset program, and she ignores the important policy interests they serve. Those provisions reflect Congress's commitment to collecting delinquent federal debts and, in particular, to avoiding *additional* federal outlays to persons who owe such obligations.

Although EAJA serves important policy objectives, every federal statute that authorizes funds to be paid out of the Treasury reflects Congress's determination that the authorized expenditures will further some public purpose. The effect of the offset mechanism is always to prevent the payment of federal funds that Congress has otherwise authorized to be paid, and many uses of that mechanism could plausibly be claimed to disserve, at least to some degree, the purposes of the underlying funding statute. A court cannot decline on that basis to enforce the offset provisions, nor can it appropriately undertake to balance the goal of the relevant funding statute against the goal of collecting delinquent federal debts. Rather, Congress has struck that balance itself by exempting some payments but not others from the coverage of the offset program. EAJA awards are not among the federal payments for which Congress has enacted an exemption. Thus, even if it could be shown

that application of the offset program to such awards will make it more difficult for Social Security claimants or other litigants to find attorneys, the Title 31 provisions that govern the offset program indicate that Congress is willing to bear that cost.

Finally, it bears emphasis that EAJA applies far beyond Social Security cases and applies to *every* "civil action (other than cases sounding in tort) * * * brought by or against the United States" except as otherwise specifically provided by statute. 28 U.S.C. 2412(d)(1)(A). Many individual, corporate, and organizational clients in such cases will pay all or part of the litigation bills of their attorneys, expert witnesses, or other legal specialists during the course of litigation pursuant to their agreements with those professionals. EAJA works within the confines of those traditional fee relationships by compensating the prevailing party for the litigation expenses and costs incurred by that party. See Gov't Br. 20-21. Nothing suggests that Congress intended to disrupt the traditional arrangement under which attorneys recover fees for services from their clients, and it would make little sense to direct EAJA awards to attorneys in all cases when attorneys often will have already been paid under fee agreements with their clients. EAJA's text in Section 2412(d) draws no distinction between Social Security and other cases, and, in all instances, has directed that EAJA fees and other expenses be awarded "to the prevailing party."

D. Use Of The Offset Mechanism In This Case Did Not Confer Any "Windfall" Upon The Government

Respondent asserts that, by applying an administrative offset to the EAJA award in this case, "the government received a windfall" and secured an "economic gain

independent of work, planning, or other productive activities that society wishes to reward." Resp. Br. 6 (citation and brackets omitted); see *id*. at 11-12. That argument is misconceived.

Contrary to respondent's contention, application of the offset mechanism in this case did not produce any "economic gain" for the government. The offset did not bring additional funds into the Treasury, but simply allowed the government to keep the money it had. To be sure, the offset allowed the government to avoid the outlay that the district court's EAJA award would otherwise have required. But because the offset reduced respondent's delinquent debt by the amount of the award, the government suffered a commensurate reduction in its "accounts receivable," and it therefore realized no economic gain.

In short, the offset functioned in this case precisely as Congress intended. The offset did not allow the government to avoid the adverse financial impact that the EAJA award would otherwise have caused, since the offset reduced the amount of money that the government is entitled to collect from respondent. The offset simply relieved the government of the burden of paying additional sums to a person who already owes a delinquent debt to the United States. If that outcome constituted a "windfall," a similar windfall would result from every use of the offset mechanism.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

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