

No. 08-1322

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

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

*Petitioner,*

v.

CATHERINE G. RATLIFF,

*Respondent.*

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

—◆—  
**RESPONDENT'S BRIEF**

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**QUESTION PRESENTED**

Who is entitled to receive an attorney's fee awarded under the Equal Access to Justice Act in a Social Security disability case: the attorney who earned it through knowledge, skill, and industry, or her indigent client, who has not paid her attorney, and for whom the money would be a windfall?

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## RELEVANT STATUTES

The relevant statutes are set out in the Appendix to this brief.



## STATEMENT OF THE CASE

### A. Facts and Proceedings Below

The Commissioner of Social Security found that Ruby Willow Kills Ree was entitled to Title XVI (Supplemental Security Income) disability benefits based on diabetes, arthritis, reactive airway disease, adjustment disorder with depressed mood, and borderline intellectual functioning.<sup>1</sup> Attorney Catherine Ratliff, a sole practitioner in Hot Springs, South Dakota, sued the Commissioner on Kills Ree's behalf, alleging that Kills Ree was entitled to additional benefits. The district court granted Kills Ree leave to proceed *in forma pauperis*.<sup>2</sup>

The district court ruled that Kills Ree was entitled to two months' additional benefits.<sup>3</sup> Under EAJA, Ratliff moved for an award of attorney's fees of \$2,112.60 and South Dakota sales tax of \$126.75, totaling \$2,239.35. The Commissioner did not oppose

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<sup>1</sup> *Kills Ree v. Barnhart*, Civ. No. 04-5119 (D.S.D. Sept. 28, 2005). Ratliff has asked the Clerk for permission to lodge this decision, which is also cited in the government's brief.

<sup>2</sup> Eighth Circuit Joint Appendix at 21.

<sup>3</sup> *Kills Ree v. Barnhart*, *supra*, at 8-9.

the motion, and the district court entered judgment accordingly.<sup>4</sup> Two weeks later, the Department of the Treasury wrote Kills Ree that it had taken the entire \$2,239.35 to apply to an unrelated debt that Kills Ree owed the federal government, leaving Ratliff with nothing.<sup>5</sup> Ratliff sued the Commissioner for her fee. The district court ruled against her.<sup>6</sup> The Eighth Circuit reversed.<sup>7</sup>

## **B. Social Security Cases and EAJA Fees**

In Social Security cases, an attorney may lawfully receive a fee in only two ways. One is from the government under EAJA. The other is from the government out of the client's past-due benefits, either awarded by the court (which happens in only five percent of such cases) or after a remand. If past-due benefits are awarded, the Commissioner pays the attorney a fee of up to 25% of the past-due benefits, based on the fee contract between the attorney and the client.<sup>8</sup> In 1985, Congress specified in EAJA that

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<sup>4</sup> Pet. App. 23a.

<sup>5</sup> *Id.* at 21a-22a.

<sup>6</sup> *Id.* at 10a-16a.

<sup>7</sup> *Id.* at 1a-9a, reported at 540 F.3d 800 (2008).

<sup>8</sup> The controlling statutes are EAJA (28 U.S.C. 2412), the Social Security Title II fee provisions (42 U.S.C. 406(b)(1)(A) and (b)(2)), and the Social Security Title XVI fee provisions (42 U.S.C. 1383(d)(2)(A)), all of which are reprinted in the Appendix to this brief. The Social Security Administration's data showing that only five percent of court cases resulted in an award of benefits during fiscal year 2007 are at <http://waysandmeans>.

(Continued on following page)

if “the claimant’s attorney receives fees” for the same work under EAJA and from the client’s past-due benefits, the attorney must refund the smaller fee to the claimant.<sup>9</sup> In 2005, Congress extended the direct payment system for Title II fees to Title XVI Social Security cases such as this one.<sup>10</sup>

Titles II and XVI use the same definition of “disability.”<sup>11</sup> Title II requires that the claimant have worked enough to become “insured”; Title XVI requires that the claimant be poor. As this Court has

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house.gov/media/pdf/111/ssgb.pdf (last visited January 4, 2010) at 1-80.

If a remand eventually results in an award of benefits by the agency, the attorney can return to federal court and request a fee award under the Social Security Act for services provided in federal court. *Bergen v. Commissioner*, 454 F.3d 1273, 1276-77 (11th Cir. 2006). (For cases handled before the agency, but not cases in federal court, under certain conditions, an attorney may obtain a deposit from a client into the attorney’s trust account, subject to later approval by the Social Security Administration. Social Security Ruling 82-39, available at [http://www.socialsecurity.gov/OP\\_Home/rulings/oasi/39/SSR82-39-oasi-39.html](http://www.socialsecurity.gov/OP_Home/rulings/oasi/39/SSR82-39-oasi-39.html) (last visited December 20, 2009)).

<sup>9</sup> Section 3 of the Act of August 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186, 28 U.S.C. 2412 note. *See also* *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002).

<sup>10</sup> Pub. L. No. 108-203, § 302(a)(1)(A), 118 Stat. 519 (2004). This law became effective on March 1, 2005, and sunsets on February 28, 2010. *Id.* § 302(c), 42 U.S.C. 1383 note; *see* 72 Fed. Reg. 44,766 (August 9, 2007). Until the enactment of this statute, courts had no authority to withhold past-due benefits to pay attorney’s fees in Title XVI cases. *Bowen v. Galbreath*, 485 U.S. 74 (1988).

<sup>11</sup> *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003).

noted, “Title II is an insurance program. . . . Title XVI is a welfare program.”<sup>12</sup> Title XVI benefits are “designed to help aged, blind, and disabled people, who have little or no income.” The program provides “cash to meet basic needs for food, clothing, and shelter.”<sup>13</sup> A person with more than minimal income or assets is not eligible for Title XVI benefits.<sup>14</sup>

This Court noted in 1990 that EAJA fee awards in Social Security cases averaged less than \$3,000.<sup>15</sup> EAJA fees remain modest. In fiscal year 2006, SSA paid 5,481 EAJA fee awards, in an average amount of \$3,573.47.<sup>16</sup> More than 91% of the federal district court cases reported in 2008 involving EAJA were Social Security cases.<sup>17</sup>

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<sup>12</sup> *Bowen v. Galbreath*, 485 U.S. 74, 76 (1988).

<sup>13</sup> <http://www.ssa.gov/ssi/index.htm> (last visited December 20, 2009).

<sup>14</sup> <http://www.ssa.gov/ssi/text-eligibility-ussi.htm> and <http://www.ssa.gov/ssi/text-resources-ussi.htm> (last visited December 20, 2009).

<sup>15</sup> *Commissioner, INS v. Jean*, 496 U.S. 154, 164 n.12 (1990).

<sup>16</sup> Declaration of Candace Wienckowski, Fiscal Management Analyst, Social Security Administration, *Williams v. Astrue*, No. 06-0427-SAC (D. Kan.) (document 28-2, filed December 4, 2007).

<sup>17</sup> A LEXIS search on November 14, 2009, showed 902 reported district court cases in 2008 that used the terms “EAJA” or “Equal Access to Justice Act.” Of these 902 cases, 19 were the same case reported more than once, so there were 883 different cases. Of these 883 cases, an EAJA motion was made in 646; of these 646, 593 (91.8%) were Social Security cases.

In addition, about 2,400 EAJA fee awards were made in the two most recent fiscal years by the United States Court of Appeals for Veterans Claims.<sup>18</sup> The law governing attorney's fees in veteran-benefit cases parallels the law governing attorney's fees in Social Security cases. Attorneys handling veterans' claims in administrative or court proceedings are limited to a contingent fee of 20% of past-due benefits, which is paid directly to the attorney.<sup>19</sup> And if an attorney in a veterans' case "receives fees" under both a contingent fee agreement and EAJA, the attorney must pay the claimant the amount of the smaller fee.<sup>20</sup>



### SUMMARY OF THE ARGUMENT

The plain meaning of "attorney's fee" is a fee for an attorney. But the Commissioner says that an "attorney's fee" awarded under EAJA should be paid to the attorney's *client*, even though the client has not paid the attorney. Here, the government took an attorney's fee awarded under EAJA in a Social Security disability case to pay a client's unrelated debt, leaving the attorney with no fee. The

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<sup>18</sup> [http://www.uscourts.cavc.gov/documents/Annual\\_Report\\_FY\\_2009\\_October\\_1\\_2008\\_to\\_September\\_30\\_2009.pdf](http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf) (last visited December 20, 2009).

<sup>19</sup> 38 U.S.C. 5904(d).

<sup>20</sup> Pub. L. No. 102-572, § 506(c), 106 Stat. 4513 (1992), 28 U.S.C. 2412 note ("Fee Agreements").

government received a windfall—an “economic gain[ ] independent of work, planning, or other productive activities that society wishes to reward”<sup>21</sup>—by not having to pay the attorney’s fee it owed. The client received a windfall because her unrelated debt was reduced. The Commissioner justifies these windfalls because, he argues, the client’s right to seek an “award” of fees means that the client also has the right to receive the attorney’s fee.

But the right to seek an “award” of fees and the right to receive the fees are different. This point is demonstrated by the language Congress used in enacting EAJA in 1980, which had a judicially settled meaning: attorney’s fees awarded by a court should be paid to an attorney if necessary to avoid offset of the attorney’s fee by the client’s creditor or a windfall to the client.

The point is proven again by the language Congress used in amending EAJA in 1985 to specify that an EAJA fee award may be made in a Social Security case. There, Congress recognized that statutory fees are paid to attorneys by providing that where “the claimant’s attorney *receives fees*” for the same work under EAJA and the Social Security Act, the attorney must refund the amount of the smaller fee to the claimant (emphasis added). The legislative history of the 1985 amendments to EAJA reinforces the plain language of the statute by confirming that

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<sup>21</sup> Eric Kades, *Windfalls*, 108 Yale L.J. 1489, 1491 (1999).

the amendments “*permi[t] the attorney to seek recovery under both*” EAJA and the Social Security Act, and that the attorney may “*keep the larger fee. . .*”<sup>22</sup> Thus, “*an attorney collecting attorney fees under the EAJA* would have to use such fees to reduce” any fee withheld from the claimant’s benefits under § 406(b).<sup>23</sup>

Congress used “award” as a noun in its 1985 amendments extending EAJA to Social Security cases, where it specified that the Social Security Act “shall not prevent an award of fees” and “shall not apply with respect to any such award” if certain conditions are met. When used as a noun in the context of law, an “award” means a “decision.”<sup>24</sup> So the client receives the “award”—the decision awarding the fee—but the attorney receives the fee, the “payment asked or given for professional services.”<sup>25</sup>

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<sup>22</sup> H.R. Rep. No. 99-120 at 20 (1985) (emphasis added).

<sup>23</sup> *Id.* at 19 (emphasis added).

<sup>24</sup> *Webster’s New World Dictionary* 97 (2d College Edition 1978). Similar definitions abound. *American Heritage Dictionary* 92 (1981) (“[a] decision, as one made by a judge or arbitrator”); *West’s Legal Thesaurus/Dictionary* 77 (1986) (“[t]he decision of a body or entity”); *Black’s Law Dictionary* 157 (9th ed. 2009) (“[a] final judgment or decision.”).

<sup>25</sup> *Webster’s New World Dictionary* 512 (2d College Edition 1978). *West’s Legal Thesaurus/Dictionary* 318 (1986) defines “fee” as “payment for a service.” *Black’s Law Dictionary* 690 (9th ed. 2009) defines “fee” as “[a] charge for labor or services, esp. professional services.”

Alternatively, even if an EAJA fee award were nominally payable to a Social Security claimant, the attorney would have a beneficial interest in the payment that would exempt it from offset. The attorney's fee is for the benefit of the attorney, and, if paid to the client, should be impressed with a trust in favor of the attorney. Such treatment of EAJA fees is consistent with traditional equitable principles, under which an implied or constructive trust arises "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."<sup>26</sup> And the government's regulations do not allow offset if a payment to a person is made "solely in that person's capacity as a representative payee for another person having the beneficial interest in the payment."<sup>27</sup>

After EAJA was enacted the Commissioner had to decide to whom to pay awards of attorney's fees. Until 2006, the Commissioner paid them to attorneys, but then reversed field by adopting his present theory, which apparently applies only to cases in which the plaintiff owes a debt to the government. (In cases in which the plaintiff does not owe the government a debt, the Commissioner apparently still pays attorney's fees to attorneys, if the client has assigned to the attorney the right to receive the fee.)

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<sup>26</sup> *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).

<sup>27</sup> 31 C.F.R. 285.5(e)(5).

The Commissioner's present theory is based on an erroneous reading of *Evans v. Jeff D.*, 475 U.S. 717 (1986), and *Venegas v. Mitchell*, 495 U.S. 82 (1990). But contrary to the Commissioner's reading of those cases, they do not speak to the question of who ultimately receives attorney's fees awarded by a court, and this Court has repeatedly said that attorney's fees awarded under fee-shifting statutes are paid to attorneys. These decisions are consistent with the common understanding that attorney's fees are paid to attorneys, not to their clients.

The Commissioner conjures up a host of theoretical problems with paying attorney's fees, expenses, and costs to attorneys. But he does not cite even one case of such a problem actually occurring in the 30 years since EAJA was enacted. The absence of any such cases demonstrates that the Commissioner's concerns are groundless. Worse, the Commissioner's proposal—that fees, expenses, and costs awarded under EAJA should be paid to the client, where the client has not paid or advanced them—would create genuine practical problems. If paid to Social Security claimants, many attorney's fee and costs checks will not reach the attorney.

The Commissioner's approach is not, as the government argues, necessary to avoid disputes over who should receive payment of fees and costs. Existing attorney ethics rules in every state strictly regulate how attorneys handle funds, including payments of attorney's fees, expenses, and costs, if more than one person may have an interest in them. Attorneys who

violate these rules are subject to significant punishment, even disbarment. The rules work well. But the Commissioner's approach would displace these state rules, by paying awards of fees, expenses, and costs to clients (and thereby permitting the government to take them to pay the clients' debts to it), no matter who should receive them. There is no evidence that Congress intended the extraordinary result of federalizing this area traditionally reserved to state law.

Finally, the Commissioner's theory would subvert not only EAJA but most other fee-shifting statutes as well, because most such statutes use language similar to EAJA's "award to a prevailing party" standard. Most conspicuously, 42 U.S.C. 1988, which provides that a court may "allow the prevailing party" a fee in a civil rights case, would be sabotaged. Attorneys in those cases would no longer know whether any fees they might earn would be taken by their client's creditors or spent by their client. The purpose of fee-shifting statutes is to motivate attorneys to take appropriate cases by paying their fees and reimbursing any expenses and costs they have advanced if they win. Attorneys are much less likely to take such cases if when they win they are not paid and are not even reimbursed for the costs they advanced.



**ARGUMENT**

**I. The text of EAJA contemplates that attorney's fees in Social Security cases will be received by attorneys.**

**A. Section 3 of the 1985 amendments to EAJA distinguishes between an "award" of attorney's fees and the attorney's right to "receive" the fees.**

According to the Commissioner, an EAJA attorney's fee in a Social Security case, earned by the attorney, should be paid to the attorney's indigent client and may be taken to pay the client's debt to the government, even though the client has not paid the attorney. This strange result is supposedly required by EAJA's provision that "a court shall *award to a prevailing party* other than the United States *fees and other expenses . . . incurred by that party in any civil action. . .*"<sup>28</sup> To be sure, the "prevailing party" is the client, not the attorney. *Evans v. Jeff D.*, 475 U.S. 717, 730 (1986). But the text of § 3 of the 1985 amendments to EAJA expressly incorporates a critical distinction that courts have long recognized: the distinction between the right to an "award" of fees, and the right to "receive[]" the fees. This distinction is necessary to avoid a windfall to the client (who under the Commissioner's theory would have her debt to the government reduced) and to the government (which would retain the funds it otherwise

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<sup>28</sup> 28 U.S.C. 2412(d)(1)(A) (emphasis added).

would have paid to the attorney) at the expense of the attorney (who earned the fee but would not receive it).

Section 3 of the 1985 EAJA amendments 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 [EAJA], the claimant's attorney refunds to the claimant the amount of the smaller fee.<sup>29</sup>

The Commissioner's argument that Congress equated the right to an "award" of fees under EAJA with the right to "receive[] fees" is foreclosed by the language of the statute, which expressly distinguishes between the two. The only reading that gives meaning to all the words of the statute is that while the client may apply for an "award" of EAJA fees (that is, a decision that fees are due<sup>30</sup>), the attorney is entitled to

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<sup>29</sup> Act of August 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186, 28 U.S.C. 2412 note (emphasis added).

<sup>30</sup> See P. 7, *supra*, P. 15-16, *infra*.

“receive” the EAJA fees, and the attorney keeps the larger of the EAJA fee or the § 406(b) fee (if any).

According to the Commissioner, the purpose of § 3 is to avoid the prohibition on an attorney receiving a fee in a Social Security case other than under section § 406(b).<sup>31</sup> Although this is indeed *one* purpose of § 3, the other purpose is to be sure that the attorney does not *keep* both fees. This point had to be addressed because Congress understood that attorney’s fees are paid to attorneys.

The Commissioner argues that the refund provisions of § 3 apply only if the attorney, after not receiving the EAJA fee, happens to come into possession of it. This unlikely scenario has the client receiving the EAJA fee, then giving it to the attorney, who then shuffles it back to the client if it is less than the § 406(b) fee. There is no evidence that Congress contemplated EAJA fee checks being shuffled back and forth between attorneys and clients.

Had Congress intended that EAJA attorney’s fees be paid initially to Social Security claimants, Congress would have provided that if (and only if) the EAJA fee exceeds the § 406(b) fee, the *claimant* must pay the excess to the attorney, instead of providing that the *attorney* must pay the smaller fee to the claimant. That Congress instead intended both fees to be paid to the attorney in the first instance is

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<sup>31</sup> Pet. Br. at 26 n.8.

confirmed because the statute requires that the attorney *refund* the smaller fee to the client, rather than requiring that the attorney may *collect* only the amount by which the EAJA fee exceeds the § 406(b) fee. That § 3 uses the term “refund” in the general sense of “pay,” rather than in the sense of “[t]he return of money to a person who overpaid,”<sup>32</sup> is evident because the statute requires the attorney to “refund” the amount of whichever fee is smaller, the § 406(b) fee or the EAJA fee. Because the § 406(b) fee is *never* paid initially to the client, the amount of it could never be literally “returned” to the client.

Congress understandably chose the practical and reliable method of routing both fees through the attorney, who is bound by universal state bar ethics rules to distribute the money appropriately. The alternative method—attempting to route attorney’s fees through clients who often are destitute—would be highly unreliable. An EAJA fee is typically awarded when a case is remanded from federal court to the agency. *Shalala v. Schaefer*, 509 U.S. 292, 297-99 (1993) (court should enter judgment terminating case when it remands under sentence four of 42 U.S.C. 405(g), which applies in most cases). About 46% of Social Security cases result in a remand for further proceedings, but only 5% result in an award of benefits by the court.<sup>33</sup> On average the agency

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<sup>32</sup> *Black’s Law Dictionary* 1394 (9th ed. 2009).

<sup>33</sup> <http://waysandmeans.house.gov/media/pdf/111/ssgb.pdf> (last visited January 4, 2010) at 1-80.

takes 369 days to process a court remand.<sup>34</sup> So in the large majority of cases (46% to 5%), 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. Congress did not intend needy clients to safeguard an EAJA fee for a year while waiting to find out whether they will receive benefits—and if so, whether the EAJA fee will exceed the § 406(b) fee.

The Commissioner cites 28 U.S.C. 2412(d)(1)(B), which requires a party seeking an EAJA award to show that the party is eligible “to receive an award.” But “award,” when used in legal contexts as a noun (as in “to receive an award”) means “decision.”<sup>35</sup> Only the prevailing party may receive the *award* (the decision granting fees), but only the attorney who earned the *fee* (the “payment asked or given for professional services”<sup>36</sup>) is entitled to receive it.

EAJA, as enacted in 1980, uses “award” or “awarded” 29 times: 14 times as a noun, 5 times as a past participle, 5 times as an intransitive verb, 3 times as a transitive verb, and twice as a gerund. The

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<sup>34</sup> Social Security Administration, Office of the Inspector General, Hearing Office Remand Processing Audit Report A-12-08-28036, September, 2008, at 5, available at <http://www.socialsecurity.gov/oig/ADOBEPDF/A-12-08-28036.pdf> (last visited December 20, 2009).

<sup>35</sup> P. 7, *supra*.

<sup>36</sup> *Id.*

Commissioner’s brief cites only the definition of the transitive verb.<sup>37</sup> But § 3 of the 1985 amendments uses “award” *only* as a noun (“an award of fees and other expenses” and “with respect to any such award”). So in § 3, as in § 2412(d)(1)(B), the meaning of “award” is “decision.” A prevailing party receives an “award”—a “decision”—granting attorney’s fees, but the attorney who earned the “fees”—“the payment asked or given for professional services”<sup>38</sup>—receives them. Consistent with EAJA’s use of the noun “award,” meaning “decision,” its use of “award” as a transitive verb (as in 28 U.S.C. 2412(d)(1)(A), “a court shall award to a prevailing party”) is most sensibly read to mean that the court shall “give a decision” to a prevailing party.<sup>39</sup>

Any reading of the statute that entitles a client to receive the attorney’s fee—and thereby allows the client to spend it, or the government to take the fee rather than pay it to the attorney—defies common sense that attorney’s fees are paid to attorneys, not their clients. And in a Social Security case, the

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<sup>37</sup> Pet. Br. at 10 and 15.

<sup>38</sup> P. 7, *supra*.

<sup>39</sup> *Webster’s New World Dictionary* 97 (2d College Edition 1978) (award used as transitive verb means “to give by the decision of a law court or arbitrator”). Other dictionaries agree. *American Heritage Dictionary* 92 (1981) (“to grant as merited or due” or “to declare as legally due”); *West’s Legal Thesaurus/Dictionary* 77 (1986) (“to grant; to adjudge”); *Black’s Law Dictionary* 157 (9th ed. 2009) (“to grant by formal process or by judicial decree.”).

attorney has *never* been paid by the client, because such payment is unlawful. As this Court has recognized, “[t]he prescriptions set out in §§ 406(a) and (b) establish the exclusive regime for obtaining fees for successful representation of Social Security benefits claimants. Collecting or even demanding from the client anything more than the authorized allocation of past-due benefits is a criminal offense.”<sup>40</sup> Thus, in no Social Security case will an EAJA fee award reimburse the client for fees the client previously paid the attorney, because all fees are paid by the government—both the EAJA fees that come from the government’s funds and the § 406 fees that come from the client’s past-due benefits.

Finally, the Commissioner points to EAJA’s language limiting an award to fees and expenses “incurred by that party” (28 U.S.C. 2412(d)(1)(A)) and argues that this demonstrates Congress’s intent that EAJA fee awards be received by prevailing parties, not their attorneys. But § 3 shows that an EAJA fee may exceed the contractual 25% fee allowed under the Social Security Act, so the fee “incurred by” the plaintiff is not limited to the contractual fee. Nor can “incurred by” mean that the client has already paid the attorney because, as explained above, an attorney may not demand such a payment in a Social Security case.

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<sup>40</sup> *Gisbrecht v. Barnhart*, 535 U.S. 789, 795-96 (2002).

At least in the Social Security setting, the only way to make sense of EAJA's "incurred by" language and give effect to all its terms is to read it as the Federal Circuit and Ninth Circuit have, construing "incurred by" to include an obligation for fees that is contingent on an award of fees.<sup>41</sup> In other words, the fees are incurred in the sense that the attorney has performed the work in the expectation of receiving a fee if a fee is awarded under EAJA. Under this reading of the statute, the language "incurred by" supports the attorney's entitlement to receive the EAJA fee, rather than allowing the government to take it to pay the client's unrelated debt or allowing the client to receive it and use it for other purposes.

The Commissioner, as of 2009, agreed with this reading of the statute. He advised a district court that had inquired about his reading of the "incurred by" language that "an award of attorney's fees under EAJA is not necessarily contingent upon an obligation to pay counsel and the presence of an attorney-client relationship is sufficient to entitle the prevailing party to receive a fee award."<sup>42</sup> The Commissioner described this as the "current policy of the Social Security Administration."<sup>43</sup> Later, when the

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<sup>41</sup> *Ed A. Wilson, Inc. v. General Services Admin.*, 126 F.3d 1406, 1408-10 (Fed. Cir. 1997); *Morrison v. Commissioner of Internal Revenue*, 565 F.3d 658, 662-63 (9th Cir. 2009).

<sup>42</sup> *Vinning v. Astrue*, No. 4:08-CV-059-A, 2009 U.S. Dist. Lexis 100896, at \*\*8 (N.D. Tex. October 29, 2009).

<sup>43</sup> *Id.*

same district court ordered him to provide more information, he told the court that his “litigation position” on this issue was “currently under review” by “high-ranking DOJ officials, possibly including the Solicitor General”<sup>44</sup> (possibly as a result of this case).

**B. “Attorney’s fees” means fees payable to attorneys.**

EAJA expressly provides for “attorney fees.”<sup>45</sup> This Court’s most recent EAJA case, *Richlin Security Service Co. v. Chertoff*, looks to “the traditional meaning of the term ‘attorney’s fees.’”<sup>46</sup> The traditional meaning of the term “attorney’s fees” is fees charged by or paid to an attorney for the attorney’s services. “[T]he term [a ‘reasonable attorney’s fee’] must refer to a reasonable fee for the work product of an attorney.” *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).

Consistent with the traditional meaning “attorney’s fees,” this Court has repeatedly recognized that attorney’s fees awarded pursuant to fee-shifting statutes are paid to attorneys:

- “Where a plaintiff has obtained excellent results, *his attorney should recover a fully*

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<sup>44</sup> *Id.* at \*\*12.

<sup>45</sup> 28 U.S.C. 2412(d)(2)(A)(ii).

<sup>46</sup> \_\_\_ U.S. \_\_\_, 128 S.Ct. 2007, 2015 (2008).

*compensatory fee.*” *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (emphasis added).

- “In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs’ counsel . . . are employed by . . . a privately funded non-profit public interest law firm. It is in the interest of the public that *such law firms be awarded reasonable attorneys’ fees* to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys’ fees.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974) (emphasis added) (ellipses in original)).
- “[A]ny award of costs or fees would inure to the benefit of Idaho Legal Aid.” *Evans v. Jeff D.*, 475 U.S. 717, 721 n.2 (1986).
- “[I]f plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that *he will be paid* a ‘reasonable fee,’ the purpose behind the fee-shifting statute has been satisfied.” *Pennsylvania v. Delaware Valley Citizens’ Council*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*) (emphasis added).
- “The issue before us is whether, when a plaintiff prevails, *its attorney should or may be awarded separate compensation* for assuming the risk of not being paid.” *Pennsylvania v. Delaware Valley Citizens’ Council*, 483 U.S. 711, 715 (1987) (*Delaware Valley II*) (emphasis added).

- “As we understand § 1988’s provision for allowing a ‘reasonable attorney’s fee,’ *it contemplates reasonable compensation*, in light of all the circumstances, *for the time and effort expended by the attorney* for the prevailing plaintiff, no more and no less.” *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) (emphasis added).
- “We . . . take as our starting point the self-evident proposition that the ‘reasonable attorney’s fee’ provided for by statute should compensate the work of . . . attorneys.” *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).
- “Although the claimants were named as the appellants below, and are named as petitioners here, *the real parties in interest are their attorneys, who seek to obtain higher fee awards. . . .*” *Gisbrecht v. Barnhart*, 535 U.S. 789, 798 n.6 (2002) (emphasis added).
- “Banks brought his claims under federal statutes that authorize *fee awards to prevailing plaintiffs’ attorneys.*” *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426, 438 (2005) (emphasis added).

Further, EAJA provides that “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.”<sup>47</sup> This provision makes sense only if attorney’s fees are paid to attorneys. Congress need not have made an exception to the \$125 per hour rate when “the limited availability of qualified attorneys . . . justifies a higher fee” unless the fee was for the attorney. A higher fee paid to the client, rather than to the attorney, would not achieve the purpose of attracting qualified attorneys.

As EAJA’s provision for higher fees if qualified attorneys are in short supply illustrates, EAJA seeks to achieve its aims through market mechanisms. Likewise, EAJA measures attorney’s fees based on the marketplace. 28 U.S.C. 2412(d)(2)(A) (“prevailing market rates” are used to determine fees). *See Richlin Security Service Co. v. Chertoff*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 2007, 2013 (2008) (under EAJA, paralegal fees, like all other fees, are measured by “prevailing market rates”). In the marketplace, clients pay fees to attorneys, not vice-versa. EAJA simply shifts to the government the responsibility for paying the attorney’s fee.

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<sup>47</sup> 28 U.S.C. 2412(d)(2)(A)(ii).

**C. In EAJA, Congress used language with a judicially settled meaning: that an attorney’s fee should be paid directly to an attorney if necessary to avoid a windfall to a client or offset by the client’s creditor.**

When Congress uses terms defined in existing law, it is presumed to intend the same meaning for those terms: “[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.” *Rowe v. N. H. Motor Transp. Ass’n*, 552 U.S. 364, \_\_\_, 128 S.Ct. 989, 994 (2008), quoting *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006). This Court has applied this principle to fee-shifting statutes by construing 42 U.S.C. 1988 in light of the statutes and case law preceding the statute’s enactment. *Blum v. Stenson*, 465 U.S. 886, 894 n.10 (1984) (“Congress was legislating in light of experience when it enacted the 1976 fee statute”); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (Congress patterned § 1988 on the attorney’s fee provisions of the Civil Rights Act of 1964). The language Congress used in EAJA in 1980 and 1985—“award to a prevailing party”—had a settled judicial meaning, established in a series of cases predating EAJA: it authorized payment of an attorney’s fee directly to the attorney if necessary to pay the attorney and avoid a windfall to the client, or, as in this case, to prevent the client’s creditor from offsetting the attorney’s fee.

The Fifth Circuit in 1970, in a case in which the fee-shifting statute provided that the court “may allow the prevailing party . . . a reasonable attorney’s fee,” ruled that “the fees allowed are to reimburse and compensate for legal services rendered and will not go to the litigants, named or class.”<sup>48</sup> Similarly, the Seventh Circuit in 1975, in a case in which the fee-shifting statute provided that the court “may grant as relief . . . reasonable attorney fees in the case of a prevailing plaintiff,” ruled that “[t]o avoid any windfall, . . . the grant of fees should go directly to the organization providing the services,” not to the plaintiff.<sup>49</sup> And the Third Circuit in 1977, in a case in which the fee-shifting statute provided that the court “shall . . . allow a reasonable attorney’s fee to be paid by the defendant,” ruled that “since the object of fee awards is not to provide a windfall to individual plaintiffs, fee awards must accrue to counsel.”<sup>50</sup>

The Fifth Circuit in 1979, in a Truth in Lending Act case in which the fee-shifting statute provided that a creditor who violated a debtor’s rights “is liable to that person” in an amount including “a reasonable attorney’s fee,” rejected a creditor’s attempt to offset the attorney’s-fee award against the plaintiff’s debt. The court reasoned that “[t]o allow a setoff would in effect relieve the creditors in violation of the Act of

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<sup>48</sup> *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539.

<sup>49</sup> *Hairston v. R & R Apartments*, 510 F.2d 1090, 1093.

<sup>50</sup> *Rodriguez v. Taylor*, 569 F.2d 1231, 1245.

the attorney's fee expense in the case of an insolvent debtor. Such a result would thwart the statute's individual enforcement scheme and its remedial objectives."<sup>51</sup> The court ruled that "the fee once awarded becomes in effect an asset of the attorney, not the client."<sup>52</sup> The court rejected the creditor's argument that the statute, by making the creditor liable "to that person [the debtor]" for "a reasonable attorney's fee," meant that the debtor must "be paid directly, and therefore that this payment is subject to setoff." The court ruled that "[s]uch an approach misstates the issue before the Court, places greater emphasis upon form than substance, and attaches to this phrase an unintended significance."<sup>53</sup>

Even in the absence of a fee-shifting statute, the Ninth Circuit in 1974 in a § 1983 case directed that court-awarded attorney's fees be paid to the attorney, not to a litigant who had not paid them: "Of course, the award should be made directly to the organization providing the services to ensure against a windfall to the litigant."<sup>54</sup>

Congress's understanding that attorney's fees should be paid to the attorney who earned them was also demonstrated in the legislative history of § 1988, which was enacted four years before EAJA and uses

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<sup>51</sup> *Plant v. Blazer Financial Services*, 598 F.2d 1357, 1366.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Brandenburger v. Thompson*, 494 F.2d 885, 889.

similar language. (Section 1988 says a court may “allow the prevailing party” a reasonable attorney’s fee; EAJA says a court may “award to a prevailing party” a reasonable attorney’s fee.) “In computing the fee, *counsel for prevailing parties should be paid*, as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter.” S. Rep. No. 94-1011, at 6 (1976) (emphasis added) (internal quotation omitted). This Court has relied on this passage several times in construing § 1988.<sup>55</sup>

Ratliff has found no case before EAJA’s enactment in 1980, or before EAJA’s amendment and re-enactment in 1985, holding that an attorney’s fee awarded under a fee-shifting statute may be taken by a client’s creditor or paid to a client who has not paid a fee. The Commissioner’s argument—that the “award to a prevailing party” language of EAJA requires that an attorney’s fee be paid to a client, or allows it to be taken by a client’s creditor—contradicts the judicially settled meaning of that language at the time EAJA was enacted. The slight differences between the fee-shifting statutes in the pre-EAJA cases and EAJA do not justify a different result. Fee-shifting statutes that use similar language are interpreted similarly. *Independent Federation of*

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<sup>55</sup> *Blanchard v. Bergeron*, 489 U.S. 87, 91 (1989); *Riverside v. Rivera*, 477 U.S. 561, 575 (1986); and *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983).

*Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989).

The Commissioner’s argument assumes that Congress intended a result at odds with existing law, but cites no evidence that Congress intended any such change. “In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.” *INS v. St. Cyr*, 533 U.S. 289, 320 n.44 (2001) (quoting *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)).

In re-enacting EAJA in 1985, Congress used the same “award to a prevailing party” language it used in originally enacting EAJA in 1980, and in § 3 amended the statute to integrate fee awards under EAJA and the Social Security Act, specifying that if the attorney “receives” fees under both statutes, the attorney refunds the amount of the smaller fee to the client. This is the *only* circumstance under EAJA in which the amount of a fee award in a Social Security case ultimately goes to a client. Indeed, § 3, and the later-added provision involving veterans’ cases, are the only two provisions of EAJA that refer to clients receiving the amount of an attorney’s fee under any circumstances. Section 3 demonstrates Congress’s knowledge and approval that attorneys were receiving fees under EAJA, in accordance with the pre-EAJA cases construing language similar to the “award to a prevailing party” language that Congress

used in EAJA. The same understanding is reflected in Congress's later enactment of the parallel provision concerning EAJA fees in veterans' cases.<sup>56</sup>

**D. The Commissioner paid EAJA attorney's fees to attorneys until 2006, and apparently continues to do so today if the plaintiff does not owe a debt to the government and assigns the right to receive the fees to the attorney.**

As the Fourth Circuit noted in 2009, "Since the enactment of the EAJA in 1980, the Commissioner has consistently paid attorney's fees directly to the attorneys, not the claimants. In fact, the Commissioner created a direct deposit system for attorneys and issued I.R.S. 1099 forms directly to the attorneys who received awards, noting the awards as taxable attorney income."<sup>57</sup> As recently as 2006, the Commissioner argued that an EAJA fee was payable to the attorney.<sup>58</sup>

EAJA fee awards against the Commissioner are paid by the Commissioner. 28 U.S.C. 2412(d)(4). To effectuate the statute, the Commissioner had to

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<sup>56</sup> P. 5, *supra*.

<sup>57</sup> *Stephens v. Astrue*, 565 F.3d 131, 135 (4th Cir. 2009). The same observation is made in *Bryant v. Commissioner*, 578 F.3d 443, 446 (6th Cir. 2009).

<sup>58</sup> *Manning v. Astrue*, 510 F.3d 1246, 1255 (10th Cir. 2007), referencing *Manning v. Barnhart*, No. Civ-04-021-SPS (E.D. Okla.) (document 27, filed October 19, 2006).

decide who should receive the fees. The Commissioner decided that the attorney should receive them. The Commissioner's original understanding of EAJA is persuasive evidence of the proper interpretation of the statute. This Court gives "great weight to the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement." *Bank of America Corp. v. United States*, 462 U.S. 122, 130 (1983). An agency charged with enforcing a law is unlikely to have ignored or overlooked "pervasive and open" practices that it believed violated the law. *Id.* It is even less likely to have violated the law itself.

The Commissioner tries to downplay the significance of his prior practice by observing that the offset program was not extended to attorney's-fee payments until January 2005,<sup>59</sup> but this is beside the point. The Commissioner paid EAJA fees to attorneys because the Commissioner believed that paying EAJA fees to attorneys was proper.

Even today, the Commissioner apparently continues to pay EAJA fees to attorneys if the client does not owe the government a debt and assigns to the attorney the right to receive the fees. The Commissioner will "waive strict compliance with the Anti-Assignment Act, 31 U.S.C. 3727 (which governs any transfer of an interest in monies owed by the United States and specifies the procedures necessary for creating a valid assignment), and forego arguing that

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<sup>59</sup> Pet. Br. at 4.

any EAJA fee awarded should be made payable to Plaintiff, rather than his attorney. . . .”<sup>60</sup> The Commissioner’s practice of waiving the Anti-Assignment Act to allow payment of attorney’s fees to attorneys reflects a sound recognition that the purpose of awarding attorney’s fees is to compensate attorneys. That same recognition counsels against treating attorney’s fees as property of the client available to pay the client’s unrelated debts.

**E. The direct payment provision of § 406(b) does not contradict EAJA.**

The Commissioner argues that the direct payment provision of 42 U.S.C. 406(b) for contractual attorney’s fees paid by the government out of a client’s past-due benefits shows that Congress “knows what language to use to award attorney’s fees to an attorney”<sup>61</sup> and that Congress’s failure to use similar language in EAJA implies that Congress wanted attorney’s fees to be paid to clients.<sup>62</sup>

There are four answers to the Commissioner’s argument. First, as Eighth Circuit Judge Michael J.

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<sup>60</sup> *Patino v. Astrue*, No. S-05-1736 DAD, 2009 U.S. Dist. Lexis 45256, at \*2-3 (E.D. Cal. May 18, 2009). The Commissioner took the same position in *Hilliard v. Astrue*, No. Civ. S-07-1759 KJM, 2009 U.S. Dist. Lexis 95019, at \*7 (E.D. Cal. September 25, 2009).

<sup>61</sup> Pet. Br. at 23.

<sup>62</sup> *Id.* at 27.

Melloy said at the oral argument of this case: “Isn’t the short answer . . . that Congress probably never thought of it. . . . They didn’t think about it, because as I understand it, it was only up until about a year ago that even the Justice Department was not—had never taken the position [that] they were subject to setoff.”<sup>63</sup> Judge Melloy is correct. Congress did not foresee an argument that no one even thought of for another 20 years.

Second, Congress had no reason in the 1985 EAJA amendments to use language similar to the direct payment provisions of § 406(b). Section 406(b) fees come out of the claimant’s own Social Security benefits, which *must* be paid to the claimant in the absence of statutory authorization to pay part of them to someone else, because assignment of those benefits is prohibited by statute.<sup>64</sup> By contrast, an EAJA attorney’s-fee award would naturally be paid to the attorney because the attorney earned it. And it is not subject to the anti-assignment law, so no special authorization was needed.

Third, EAJA’s language unmistakably contemplates that attorneys receive EAJA fees: “where the *claimant’s attorney receives fees* for the same work under both section 206(b) of [the Social Security] Act

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<sup>63</sup> *Ratliff v. Astrue*, oral argument at 15:33 to 15:47 (available at <http://www.ca8.uscourts.gov/oralargs/oaFrame.html>) (last visited December 20, 2009).

<sup>64</sup> 42 U.S.C. 407(a).

and [EAJA], the claimant's attorney refunds to the claimant the amount of the smaller fee."<sup>65</sup>

Fourth, as discussed above, the legal background against which Congress enacted EAJA confirms that Congress indeed did use language that authorizes direct payment of attorney's fees to attorneys in appropriate circumstances, such as to avoid offset by a client's creditor.

**F. Well-reasoned fee-shifting cases after EAJA's enactment hold that an attorney's-fee award may not be paid to a client as a windfall or offset by a creditor, even when the creditor is the federal government.**

The distinction between the client's right to seek an award of attorney's fees under a fee-shifting statute, and the attorney's right to receive the fees if the attorney has not already been paid, remained well-recognized in the years after EAJA was enacted in 1980 and re-enacted in 1985. In several cases, as here, a prevailing party's creditor sought to take an attorney's-fee award, arguing that it belonged to the prevailing party. But courts consistently rejected such claims, even where the creditor was the federal government, reasoning that allowing this offset would undermine the aims of fee-shifting statutes, and concluding that while the right to seek a fee award

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<sup>65</sup> Section 3 of the 1985 amendments (emphasis added).

belongs to the client, the right to receive the fee once awarded belongs to the attorney who earned it.

The Fourth Circuit in 1989 held that the federal government could not offset an attorney's-fee award against the plaintiff's debt to the government. The government had statutory and common-law offset rights, but neither allowed the government to take the attorney's fee. The court saw the issue as whether Congress's "desire to have private enforcement of invasions of financial privacy by the government will be undermined if the very offender of the statute is let off the hook from paying attorney's fees which in effect provide the mechanism by which the enforcement is brought to bear."<sup>66</sup> The court concluded that the purpose of the award would be frustrated if the government were allowed to offset the attorney's fee against the client's debt.<sup>67</sup>

In an Eighth Circuit case in 1993, the plaintiff had recovered a judgment under 42 U.S.C. 1983 and received an award of attorney's fees under § 1988. The plaintiff's creditors sought to execute on the award of attorney's fees, arguing that it belonged to the plaintiff. The court held that the attorney's fees belonged to the attorneys: "The clear Congressional intent and purpose of § 1988 was to encourage

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<sup>66</sup> *Duncan v. U.S. Dept. of the Army*, 887 F.2d 1078, 1989 WL 117742, at \*3, No. 88-2143 (October 4, 1989) (unpublished table decision).

<sup>67</sup> *Id.*

attorneys to prosecute constitutional violations. . . . Whatever priority the [creditors] have with respect to their lien on the judgment in this case has no effect on the award of § 1988 fees.”<sup>68</sup>

The Fifth Circuit in 1997 reached the same result. The plaintiff sued the federal government for wrongful disclosure of federal tax information. Along with damages, he recovered attorney’s fees under 26 U.S.C. 7430, which closely parallels EAJA but applies to federal tax claims.<sup>69</sup> The government sought to offset the attorney’s-fee award against his tax debts, under its common-law and statutory right of offset. But the court refused to allow the offset, reasoning that a court-awarded attorney’s fee is to go to the attorney, not to the plaintiff, and thus may not be offset against the plaintiff’s debts: “That the statute provides that attorneys’ fees are to be awarded to the prevailing party is not controlling. The issue ‘is not whether plaintiff is nominally to receive the money but whether ultimately it is to go to her attorney or to be credited toward defendant in repayment of plaintiff’s debt.’ . . . [T]he prevailing party is only nominally the person who receives the award; the

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<sup>68</sup> *Curtis v. City of Des Moines*, 995 F.2d 125, 129.

<sup>69</sup> *Miskovitch v. Commissioner*, 200 F.3d 351, 353 (5th Cir. 2000); *Pate v. United States*, 982 F.2d 457, 459 (10th Cir. 1993).

real party in interest vis-a-vis attorneys' fees awarded under the statute are the attorneys themselves."<sup>70</sup>

Courts also recognized the need to avoid the windfall that would occur if the attorney's fee were paid to an indigent client who had not paid the attorney. In 1982, a federal district court ordered that attorney's fees awarded under EAJA to plaintiffs represented by a Legal Assistance Foundation be paid directly to plaintiffs' counsel.<sup>71</sup> In 1985, a federal district court ordered that attorney's fees awarded under EAJA to prisoners, while made in the names of the prisoners, must be paid to their attorney, because it would be "foolish, if not imprudent, to direct that counsel's fees be paid directly to an inmate or inmates."<sup>72</sup>

The Federal Circuit in 1992, in a case where the attorney *had* been paid by his client in the ordinary pay-as-you-go manner, declined to order that a statutory fee be paid directly to the attorney, but expressly distinguished cases that "involve *pro bono* counsel where the award was paid directly to counsel in order to avoid giving the prevailing parties, usually prisoners or indigents, a windfall."<sup>73</sup> Social Security cases

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<sup>70</sup> *Marré v. United States*, 117 F.3d 297, 304 (internal citation and footnote omitted).

<sup>71</sup> *Grand Boulevard Improvement Assoc. v. City of Chicago*, 553 F. Supp. 1154, 1169 (N.D. Ill. 1982).

<sup>72</sup> *Wedra v. Thomas*, 623 F. Supp. 272, 278 (S.D.N.Y. 1985).

<sup>73</sup> *FDL Technologies, Inc. v. Nathan*, 967 F.2d 1578, 1580 n.1.

are similar to *pro bono* cases in that attorneys *always* work without payment, except for the possibility of an EAJA fee or a § 406 fee at the end of the case, because the law forbids them from charging fees on a pay-as-you-go basis.

Thus, until the Commissioner began taking EAJA fees in Social Security cases to pay plaintiffs' unrelated debts, courts reasoned persuasively that in cases in which the attorney had not already been paid, the right to apply for a fee belongs to the party, but the attorney's fee is paid to the attorney—and is not available to the client's creditor, even if the creditor is the federal government. Likewise, in cases involving indigent clients, courts ruled that the attorney's fee is paid to the attorney.

Nothing has changed to make the reasoning of these courts less persuasive. In fact, Congress amended EAJA again in 1992,<sup>74</sup> 1995,<sup>75</sup> 1996,<sup>76</sup> and 1998<sup>77</sup> without changing direct fee payments to attorneys. That Congress never changed the fee provisions in effect since 1980, or § 3 of the 1985 amendments integrating fees under EAJA with fees awarded under the Social Security Act, suggests no congressional dissatisfaction with the federal case

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<sup>74</sup> Pub. L. No. 102-572, 106 Stat. 4506.

<sup>75</sup> Pub. L. No. 104-66, 109 Stat. 722.

<sup>76</sup> Pub. L. No. 104-121, 110 Stat. 863.

<sup>77</sup> Pub. L. No. 105-368, 112 Stat. 3342.

law reaching this result.<sup>78</sup> And when Congress in 1992 amended EAJA to address fees in veterans' benefits cases—and used the same language it used in the 1985 amendments regarding fees in Social Security cases—it affirmatively expressed satisfaction with the status quo under which attorneys in Social Security cases, not their indigent clients or their clients' creditors, received EAJA fees.

## **II. EAJA's purpose and legislative history show that attorney's-fee awards should be paid to attorneys.**

### **A. EAJA's purpose is to encourage attorneys to represent people who have meritorious claims by providing fees in appropriate cases.**

A statute should be read “faithful to its apparent purpose.” *Blanchard v. Bergeron*, 489 U.S. 87, 100 (1989) (Scalia, J., concurring). “[S]tatutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, L.), *aff'd*, 326 U.S. 404 (1945).

The “specific purpose” of a fee-shifting statute is “to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.” *Kay*

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<sup>78</sup> *Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 845-46 (1986).

*v. Ehrler*, 499 U.S. 432, 436 (1991). Attorneys are more likely to provide legal services if they may be paid for them. “[L]awyers are in the business of practicing law, and . . . like other business people, they are and must be concerned with earning a living.” *Evans v. Jeff D.*, 475 U.S. 717, 758 (1986) (Brennan, J., dissenting) (footnote omitted). Encouraging attorneys to provide their services by offering to pay their fees works only if lawyers, not their clients, are paid attorney’s fees if the case is won. “[I]f plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that *he will be paid* a ‘reasonable fee,’ the purpose behind the fee-shifting statute has been satisfied.” *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*) (emphasis added).

Without an attorney, Kills Ree could not have sued the Commissioner. EAJA made it possible for her to find an attorney and enforce the law. Fee-shifting statutes, to be sure, were not designed to improve the financial lot of attorneys. *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992). But neither were they designed to improve the short-term financial lot of a few plaintiffs or their creditors, at the expense of the broader public interest in encouraging attorneys to take similar meritorious cases in the future.

This Court observed in *Sullivan v. Hudson* in 1989 that “we find it difficult to ascribe to Congress an intent [in EAJA] to throw the Social Security

claimant a lifeline that it knew was a foot short.”<sup>79</sup> In *Sullivan*, the Court found that the purposes of EAJA would not be served by interpreting it so as to provide an “incentive . . . for attorneys to abandon claimants.”<sup>80</sup> Here, the Court should reject an interpretation that would discourage attorneys from taking Social Security cases in the first place, which would be directly contrary to Congress’s purposes in enacting EAJA.

Attorneys are the engine that makes the adversary system run, and the adversary system, as the Chief Justice observed this Term, is “central to maintaining the rule of law.” *Mohawk Industries, Inc. v. Carpenter*, No. 08-678, Tr. of Oral Arg. 25. EAJA’s purpose—to encourage attorneys to take meritorious cases challenging government action and thereby to allow even the indigent to enforce the rule of law—is satisfied only if an attorney who earns a fee receives it.

**B. EAJA’s legislative history confirms that attorney’s fees should be paid to attorneys.**

The legislative history of Congress’s 1985 reauthorization of EAJA confirms that Congress specifically understood and intended that at least in Social Security cases—where attorneys are otherwise

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<sup>79</sup> 490 U.S. 877, 890.

<sup>80</sup> *Id.*

forbidden from collecting fees from their clients—EAJA fees are payable directly to attorneys. The House Report on the reauthorization bill, in explaining the provisions added to authorize EAJA fees in Social Security cases while preventing double-dipping by attorneys, states directly that the amended provisions of EAJA would “*permi[t] the attorney to seek recovery* under both” EAJA and the Social Security Act, and that the attorney may only “*keep the larger fee. . .*”<sup>81</sup> Thus, “*an attorney collecting attorney fees under the EAJA* would have to use such fees to reduce” any fee withheld from the claimant’s benefits under § 406(b).<sup>82</sup> The report, like the statutory language itself, shows that Congress understood that the attorney collects any fees awarded both under EAJA and the Social Security Act, and incorporated that understanding into the statute.

More broadly, EAJA’s legislative history confirms that allowing the government to divert attorney’s fees away from attorneys would contradict the statute’s goal: enabling people who lack substantial financial security to hire lawyers to challenge unjustified government actions. “[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.” *Commissioner, INS v. Jean*, 496

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<sup>81</sup> H.R. Rep. No. 99-120 at 20 (1985) (emphasis added).

<sup>82</sup> *Id.* at 19 (emphasis added).

U.S. 154, 163 (1990). The statute itself states that Congress intended EAJA “to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States.”<sup>83</sup> EAJA’s history leaves no doubt that Congress enacted it “to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government.”<sup>84</sup> Congress recognized that, “[f]or many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process.”<sup>85</sup>

In short, as Senator Grassley observed in floor discussions of the reauthorization of EAJA, “the Act was designed to provide those of modest means with access to the judicial process, hence the title—Equal Access to Justice Act.”<sup>86</sup> EAJA, Senator Grassley stated, “allowed the little guy to fight city hall and to actually come out ahead if he prevailed in

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<sup>83</sup> Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325 (1980), 5 U.S.C. 504 note.

<sup>84</sup> H.R. Rep. No. 96-1005 at 9 (1980), quoted in *Scarborough v. Principi*, 541 U.S. 401, 406 (2004).

<sup>85</sup> S. Rep. No. 96-253 at 5 (1979), quoted in *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989).

<sup>86</sup> 129 Cong. Rec. S3916 (Mar. 24, 1983).

litigation.”<sup>87</sup> As Senator Domenici put it, the Act reflected Congress’s recognition that “[e]qual justice is not available when one cannot afford to fight.”<sup>88</sup>

The legislative history further demonstrates that the means Congress chose to achieve these ends was to ensure *reasonable compensation to counsel* in cases where a financially eligible litigant successfully challenged unreasonable government action. The 1980 House Report emphasized that

the computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client. The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act. In short, the award of fees is to be determined according to general professional standards.<sup>89</sup>

The Report reflected a purpose to provide an adequate incentive for lawyers to take meritorious cases for needy litigants by *compensating* them for their efforts at rates consistent with those they normally would receive for similar work for paying clients.

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<sup>87</sup> 130 Cong. Rec. S13296 (Oct. 3, 1984).

<sup>88</sup> 131 Cong. Rec. S9998 (July 24, 1985).

<sup>89</sup> H.R. Rep. No. 96-1418 at 15, 1980 U.S.C.C.A.N. 4984, 4994.

Similarly, in discussing the statutory cap on fees, the Report made clear that an award of fees was to pay attorneys: “no attorney . . . may be *compensated* at a rate in excess of \$75 per hour unless special factors justify a higher fee.”<sup>90</sup> Using attorney’s fee awards to pay clients’ unrelated debts contravenes Congress’s goal of compensating attorneys.

**III. Alternatively, even if an EAJA fee award is nominally payable to a Social Security claimant, the attorney has a beneficial interest in the payment and it is therefore not subject to offset.**

Even if EAJA’s language providing that a court “shall award to a prevailing party . . . fees and other expenses” were read as requiring that the party nominally receive the attorney’s fee, that reading would still have to be reconciled with the language and purpose of the statute as a whole, which establish that in a Social Security case in which no fees have been or will be paid directly by the client, the fees awarded are to be used to pay the attorney. Even under the government’s interpretation of “award to a prevailing party,” the construction that would best give effect to all the words of the statute, including the requirement that the fees must have been “incurred” by the party and the statute’s express contemplation that the attorney will “receive[.]”

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<sup>90</sup> *Id.* (emphasis added).

EAJA fees in Social Security cases, would be that the payment, although made in name to the party, would be for the benefit of the attorney whose fees were not otherwise paid, and would thus be impressed with a trust in the attorney's favor. *Cf. Sprint Commun. Co. v. APCC Servs., Inc.*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 2531, 2538-43 (2008) (recognizing distinction between legal and beneficial interest in a recovery); *id.* at 2552 n.2 (Roberts, C.J., dissenting) (same).

This construction would serve EAJA's purpose of fostering representation of litigants whose cases have merit. It would also reflect the common sense understanding that a Social Security plaintiff who has paid her attorney nothing is not entitled to retain the benefit of an attorney's-fee award at the expense of the attorney. Under traditional equitable principles, an implied or constructive trust arises "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."<sup>91</sup> Put another way, where a recipient of identifiable property or funds would be unjustly enriched at the expense of another if he retained the funds, "the recipient may be declared a constructive trustee, for the benefit of the claimant."<sup>92</sup> A common situation where a trust is implied to avoid unjust

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<sup>91</sup> *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).

<sup>92</sup> Restatement (3d) of Restitution, Tentative Draft No. 6, § 55 (2008).

enrichment is where a person has received a payment “to which [another] has a superior legal or equitable entitlement,” as “[w]here the claimant has furnished the value for which the defendant is compensated or reimbursed.”<sup>93</sup> That is true here: the fees result from and are intended as payment for the attorney’s successful efforts, the party’s entitlement to an award assumes there is an obligation to pay the fees to the attorney (otherwise they were not “incurred”), and the statute contemplates that the attorney will “receive[]” the fees.<sup>94</sup> Thus, even under the Government’s interpretation of EAJA’s language, the attorney’s fees, even if nominally payable to the client, would belong to the attorney and thus not be subject to offset.

Treasury regulations foreclose offset of payments made for the benefit of a person who does not owe a debt to the government. The regulations define “offset” as “withholding funds payable by the United States . . . to satisfy a debt owed by the payee,” and define a “payee” as “a person who is entitled to the *benefit* of all or part of a payment” from the government.<sup>95</sup> Because a Social Security claimant who

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<sup>93</sup> *Id.*, Tentative Draft No. 5, § 48 & comment d(1) (2007); see, e.g., *Barnes v. Alexander*, 232 U.S. 117 (1914) (recognizing constructive trust in favor of attorneys to secure entitlement to fees generated through their efforts).

<sup>94</sup> *Cf. Curtis v. City of Des Moines*, 995 F.2d 125 (8th Cir. 1993) (recognizing attorneys’ interest in fee award under 42 U.S.C. 1988).

<sup>95</sup> 31 C.F.R. 285.5(b) (emphasis added).

receives an EAJA award, even if nominally the recipient of the fee, is not entitled to retain the benefit of the fee, the regulations do not allow offset because the claimant is not the beneficiary of the fee. Indeed, to underscore the point, the regulations go on to forbid offset against a person who receives “a payment . . . solely in that person’s capacity as a representative payee for another person having the beneficial interest in the payment.”<sup>96</sup>

**IV. Neither *Evans v. Jeff D.* nor *Venegas v. Mitchell* answers the question presented here.**

In *Evans v. Jeff D.*, this Court held that a district court may refuse to award attorney’s fees under a fee-shifting statute if the plaintiffs have waived them in settling their case: “we consider the question whether attorney’s fees *must* be assessed when the case has been settled by a consent decree granting prospective relief to the plaintiff class but providing that the defendants shall not pay any part of the prevailing party’s fees or costs. We hold that the District Court has the power, in its sound discretion, to refuse to award fees.”<sup>97</sup> The Court reasoned that “Congress bestowed on the ‘prevailing *party*’ (generally plaintiffs) a statutory eligibility for a discretionary award

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<sup>96</sup> *Id.* 285.5(e)(5).

<sup>97</sup> 475 U.S. 717, 720 (1986).

of attorney's fees in specified civil rights actions."<sup>98</sup> Congress did not forbid a party from waiving the right to seek a fee award.<sup>99</sup>

But the right to seek a fee award is different from the right to receive the fee. *Evans* could not have decided who is entitled to receive fees when an award is made to an indigent client because there was no fee award in *Evans*, and hence no such issue. As the Federal Circuit recognized in 2006: "Under fee-shifting statutes in general, there is a distinction between the party's entitlement to claim an award of fees and the attorney's right to receipt of fees that are awarded."<sup>100</sup> The same year, the Ninth Circuit noted: "Once the prevailing party exercises her right to receive fees, the attorney's right to collect them vests, and he may then pursue them on his own."<sup>101</sup>

In 1996, the Ninth Circuit explained the reasons for distinguishing the right to seek an award from the right to receive the resulting fees: "Once the power [to seek a fee award] is exercised . . . the attorneys' right vests, and the defendant's duty becomes fixed. . . . The work was done by and the fees are for the plaintiff's attorney. They must be directed to the

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<sup>98</sup> *Id.* at 730 (footnotes omitted).

<sup>99</sup> *Id.*

<sup>100</sup> *Willis v. Govt. Accountability Office*, 448 F.3d 1341, 1347 (footnote omitted).

<sup>101</sup> *Pony v. County of Los Angeles*, 433 F.3d 1138, 1142.

attorney.”<sup>102</sup> Otherwise, plaintiffs would receive fee awards, and attorneys often would not be paid: “[l]eft to the normal vicissitudes of life, substantial sums would be diverted from their intended purpose. Actions of the client or of the client’s creditors (or heirs) would often intervene.”<sup>103</sup> This would “thwart the Congressional purpose” and “would also make no sense at all and would lead to unconscionable results.”<sup>104</sup> This distinction between the right to apply for a fee and the right to receive it is implicit in this Court’s recognition that the “real parties in interest,” when attorneys seek higher fee awards, are attorneys. *Gisbrecht v. Barnhart*, 535 U.S. 789, 798 n.6 (2002).

The reasoning of *Evans*, moreover, does not extend to the issue presented here. *Evans* explained that its holding furthers the purpose of the civil rights laws because allowing a plaintiff to waive the right to seek a fee encourages settlement: “a general proscription against negotiated waiver of attorney’s fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement.”<sup>105</sup> But if (as here) a fee award has been made, the claimant’s rights have already been vindicated.

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<sup>102</sup> *Virani v. Jerry M. Lewis Truck Parts & Equip.*, 89 F.3d 574, 578-79 (footnote omitted).

<sup>103</sup> *Id.* at 579.

<sup>104</sup> *Id.*

<sup>105</sup> *Evans*, 475 U.S. at 732.

Letting the government take an attorney's fee awarded after a Social Security case has been won impairs the purpose of both the Social Security laws and EAJA: an attorney whose fee is taken is less likely to take such cases in the future, so meritorious Social Security claims will go unpaid and unreasonable government action will go unchallenged.

The Commissioner points to this Court's statement in *Evans* that "while it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, *it neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable. . . .*"<sup>106</sup> Read in context, this says that Congress did not bestow the *right to seek fee awards*—the only issue in *Evans*—upon attorneys.

*Evans* recognized that attorney's fees, if awarded, would be paid to the attorney: "any award of costs or fees would inure to the benefit of Idaho Legal Aid."<sup>107</sup> Otherwise, the attorneys would not have had standing to dispute their clients' right to waive the fees. In addition, this Court's statement in *Evans* that allowing a party to waive an attorney's fee "may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases"<sup>108</sup>

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<sup>106</sup> 475 U.S. at 731-32 (emphasis added).

<sup>107</sup> 475 U.S. at 721 n.2.

<sup>108</sup> 475 U.S. at 741 n.34.

recognizes that an attorney's fee, if awarded, goes to the attorney.

In *Evans*, this Court dismissed as "remote" the likelihood that allowing a client to bargain away an attorney's-fee award would reduce the pool of lawyers who would take such cases.<sup>109</sup> But the consequences of the lawyer not being paid are different here, for three reasons. First, *Evans* involved a fee waiver to settle a case, whereas here the attorney's fee was taken after the attorney had litigated and won. The disincentive to future representation is greater where a lawyer has seen a case through to victory, successfully obtained a fee award, then sees the fee vanish.

Second, a lawyer may be able to protect against a client bargaining away the lawyer's fee by requiring the client, at the outset of the case, to forgo this option. *Evans*, 475 U.S. at 766 (Brennan, J., dissenting). As the Ninth Circuit noted in 1999, "civil rights lawyers can protect their interest in a fee award simply by executing contracts."<sup>110</sup> But in a Social Security case, a contract between an attorney and client will not protect a fee from offset by the government. 31 U.S.C. 3727(b) ("An assignment [of a claim against the United States] may be made only after a claim is allowed, the amount of the claim is

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<sup>109</sup> *Id.*

<sup>110</sup> *Gilbrook v. City of Westminster*, 177 F.3d 839, 874.

decided, and a warrant for payment of the claim has been issued.”).

Third, the economic circumstances facing civil rights plaintiffs and social security claimants are different, and make the theoretical problem in *Evans* a concrete reality here:

While the likelihood of a chilling effect may be remote in civil rights cases, it is a real result in social security disability cases. As evidenced from the numerous cases in which awards of attorney’s fees have already been used to pay the debts of clients, attorneys are losing their earned fees. This is predictable in the social security benefits context. Plaintiffs are disabled people, unable to pursue gainful employment and frequently in distressed financial circumstances. This is exacerbated by the years it takes to pursue a claim through both the administrative process as well as the court process.<sup>111</sup>

The government’s reliance on *Venegas v. Mitchell*, 495 U.S. 82 (1990), is as unpersuasive as its reliance on *Evans*. *Venegas* holds only that 42 U.S.C. 1988 does not invalidate attorney’s-fee contracts that require the plaintiff to pay an attorney *more* than a statutory fee award. In the course of resolving that issue, *Venegas* reiterates the rule of *Evans* that “it is the party, rather than the lawyer,” who is eligible for

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<sup>111</sup> *Quade v. Barnhart*, 570 F. Supp. 2d 1164, 1173 (D. Ariz. 2008).

an award of fees, and states that *Evans* “rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff.”<sup>112</sup> More precisely, *Evans* rejected the argument that the entitlement to *seek* a § 1988 award belongs to the attorney rather than the plaintiff.

In short, the issue in *Venegas* was whether the attorney was entitled to receive the statutory fee *and* the additional amount by which the contractual fee exceeded the statutory fee. To the extent that *Venegas* bears on the issue here, the opinion, like *Evans*, implicitly recognizes that the attorney ultimately is the proper recipient of a statutory attorney’s fee. In fact, *Venegas* approvingly cites *Blanchard v. Bergeron*, in which this Court held that a fee award must provide “reasonable compensation . . . for the time and effort expended by the attorney,” and so is not limited by a fee agreement that provides for a smaller fee.<sup>113</sup>

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<sup>112</sup> *Venegas*, 495 U.S. at 87, 89.

<sup>113</sup> *Blanchard*, 489 U.S. at 93.

**V. The Commissioner imagines problems that do not exist, ignores the problems that his position creates, unnecessarily imposes federal regulation of matters that traditionally are regulated by state bar rules, and subverts most fee-shifting statutes.**

**A. The Commissioner does not identify a single instance of a practical problem that has actually arisen.**

The Commissioner theorizes that paying EAJA attorney’s fees and costs directly to attorneys—as the Commissioner did until 2006—will create practical problems. He claims that courts will need to “partition” EAJA awards between attorneys and other experts. He speculates that federal courts will become “embroil[ed]” in “collateral disputes” over how to distribute EAJA awards. He hypothesizes that “unusual and cumbersome outcomes” will bedevil the courts. And he says that federal courts will face multiple fee requests from multiple counsel and experts.<sup>114</sup>

These assertions are groundless. The Commissioner does not cite a single such dispute in a Social Security case in the 20 years that the Commissioner regularly paid EAJA fees to attorneys. Nor does he cite such a dispute in any other EAJA case in the 30 years that EAJA has been in effect, or for that matter in *any* case under *any* fee-shifting statute. Likewise,

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<sup>114</sup> Pet. Br. at 11-12 and 19-21.

the Commissioner does not describe a single problem he has had from 2006 to the present in effectuating district court decisions holding that EAJA fees should be received by the attorneys who earned them, or a single problem in the Eighth Circuit (where fees cannot be offset because of this case) or in the Fifth Circuit (where the Commissioner does not offset fees because of circuit precedent).<sup>115</sup> And the Commissioner does not suggest why problems that have not arisen in the past will arise in the future.

The Commissioner says that fees should be paid to prevailing parties because the parties and their attorneys may “disagree whether the prevailing party paid the agreed-to fees in full or in part before the court granted an EAJA award,” and that “the prevailing party may have paid some or all of the bills submitted to her by her attorneys.”<sup>116</sup> But the large majority of EAJA applications are made in Social Security or veterans’ cases, where attorneys are barred by law from charging clients directly, and may be paid only by the government.<sup>117</sup> And in the relatively few EAJA applications made in other types of cases, the billing records and cost itemizations submitted by attorneys in support of their applications would ordinarily make clear whether fees, costs, or expenses have already been paid. In any

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<sup>115</sup> Petition for a Writ of Certiorari at 14-15.

<sup>116</sup> Pet. Br. at 12, 20.

<sup>117</sup> P. 2-5, 17, *supra*.

event, the Commissioner cites no instance of such a dispute ever actually occurring.

The Commissioner’s solution to an imaginary problem itself would cause significant problems. The Commissioner argues that any obligation of clients to pass along court-awarded fees and costs to their attorneys is a matter for state-court litigation: “[D]isputes 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.”<sup>118</sup> But the money will already have been spent before the state court lawsuit is even drafted; the client is often judgment-proof; the transaction costs of a lawsuit are significant compared with the modest size of the average EAJA fee; and a lawsuit by an attorney against a client will destroy the attorney-client relationship, thus frustrating the purpose of EAJA. *See Sullivan v. Hudson*, 490 U.S. 877, 890 (1989) (disruption of attorney-client relationship would “frustrat[e] . . . the very purposes behind the EAJA itself, [so] Congress cannot lightly be assumed to have intended it.”). So the Commissioner’s solution—“Go sue your client”—is no solution at all.

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<sup>118</sup> Pet. Br. at 21.

**B. EAJA treats “fees,” “other expenses,” and “costs” alike—all are payable to the attorney, to be distributed by the attorney as appropriate.**

EAJA provides for awards, under appropriate circumstances, of “fees and other expenses”<sup>119</sup> and “costs.”<sup>120</sup> As the Commissioner notes, EAJA treats “fees and other expenses” and “costs” alike. The Commissioner claims that “[n]o 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.”<sup>121</sup> Actually, no one has addressed the point, but examining it shows that the Commissioner is wrong, both as to whom “fees and other expenses” are payable and as to whom “costs” are payable.

In Social Security cases, the prohibition on charging a client a fee as the case progresses means that attorneys always advance the value of their services. Likewise, attorneys typically advance the costs required to litigate the case. The Commissioner recognizes this—he publicly advises claimants that “if a Federal court rules in your favor, under the Equal Access to Justice Act (EAJA), your attorney may request reimbursement of the expenses he or she

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<sup>119</sup> 28 U.S.C. 2412(d)(1)(A); “fees and other expenses” are defined at 28 U.S.C. 2412(d)(2)(A).

<sup>120</sup> 28 U.S.C. 2412(a)(1).

<sup>121</sup> Pet. Br. at 16.

incurred in representing you.”<sup>122</sup> The government should not be able to take an award for costs, advanced by the attorney, to pay the client’s unrelated debt. Nor should an attorney who advanced costs be required to negotiate to get a client to endorse the government’s check for costs over to the attorney. The same principles apply to an award of fees.

Indeed, this case illustrates the anomalies created by the Commissioner’s theory that the government is entitled to take awards of expenses and costs, as well as fees. The district court awarded attorney’s fees of \$2,112.60 and, as an expense, South Dakota sales tax of \$126.75.<sup>123</sup> (South Dakota is one of the few states that imposes sales taxes on attorney’s fees.) The Commissioner took the attorney’s fee *and* the sales tax that Ratliff would have paid to the State of South Dakota had she received her fee, but that never became due because the government took the fee.

Although EAJA awards in most states will not include sales tax, they ordinarily will include costs such as service of process, and, in *non-in forma pauperis* cases, the \$350 filing fee. The traditional approach, and the only reasonable one, is to pay the award of expenses and costs to the attorney and let

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<sup>122</sup> *Social Security Handbook*, § 2019.7, available at [http://www.socialsecurity.gov/OP\\_Home/handbook/handbook.20/handbook-2019.html](http://www.socialsecurity.gov/OP_Home/handbook/handbook.20/handbook-2019.html) (last visited December 20, 2009).

<sup>123</sup> Pet. App. 23a.

the attorney reimburse the client for any expenses or costs the client advanced.

The Commissioner claims that the plaintiff may have paid expert witnesses during the course of the litigation. But in a Social Security case, review ordinarily is conducted on the record made below, so expert witnesses are rarely involved.<sup>124</sup> In non-Social Security cases, experts typically are retained by attorneys, and the expense of hiring them is often advanced by attorneys, so paying an award of those expenses to an indigent client is irrational. As with other expenses, reimbursement of expert witness expenses logically should be made to the attorney to distribute appropriately.

**C. Existing state bar rules regulate this area effectively, so there is no need for federal regulation of how attorneys distribute fees, expenses, and costs.**

In non-Social Security cases, a party may have paid attorney's fees before the EAJA award, or may have paid expert witness expenses and costs. The Commissioner's failure to cite a single dispute between an attorney and a client about who is entitled to receive EAJA attorney's fees, expert witness

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<sup>124</sup> 42 U.S.C. 405(g) (Title II) and 42 U.S.C. 1383(c)(3) (Title XVI) (review is conducted on the record, except if there is material new evidence, and good cause for failing to incorporate it into the record in a prior proceeding).

expenses, or costs shows that existing legal rules work exceedingly well. An attorney who receives money in which a third party has an interest is required to put the money in the attorney's trust account; to promptly pay the money to the person to whom it belongs; and, if there is a dispute, to keep the money separate until the dispute is resolved.<sup>125</sup> Mishandling client trust funds is punishable by sanctions up to and including disbarment.<sup>126</sup>

Hypothetical problems that have never occurred are a poor justification for requiring, as a matter of federal law, that all payments for fees, expenses, and costs go to the client. State bar ethics rules regulate this area appropriately and efficiently. The potential penalties for violating those rules give them serrated teeth. The Commissioner's federal one-size-fits-all rule for attorney's fees, expenses, and costs—under which the government takes them all or the client receives them all, no matter who advanced them—

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<sup>125</sup> American Bar Association, *Annotated Model Rules of Professional Conduct*, Rule 1.15 (6th ed. 2007). All states except California have adopted some form of Rule 1.15. [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html) (last visited December 20, 2009). California has a similar rule, and requires attorneys to use “extraordinary care and fidelity in dealing with money and property belonging to their clients.” *Howard v. State Bar*, 793 P.2d 62, 65 (Cal. 1990).

<sup>126</sup> *Standards for Imposing Lawyer Sanctions* (American Bar Association 1992) 16-17, available at [http://www.abanet.org/cpr/regulation/standards\\_sanctions.pdf](http://www.abanet.org/cpr/regulation/standards_sanctions.pdf) (last visited December 20, 2009).

needlessly displaces the state bar rules that require attorneys to distribute those funds appropriately.

“Absent a clear indication of Congressional intent,” this Court is “reluctant to federalize” state law, “particularly where established state policies . . . would be overridden.” *Santa Fe Indus. v. Green*, 430 U.S. 462, 479 (1977). Regulation of lawyers historically is a core state function. *Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984). EAJA should not be read to create federal regulation of this area, invading a subject traditionally and effectively regulated by the states, and thereby creating problems where none now exist.

**D. The Commissioner’s theory subverts most fee-shifting statutes, including 42 U.S.C. 1988.**

Congress has enacted more than a hundred fee-shifting statutes.<sup>127</sup> Perhaps most important among them is 42 U.S.C. 1988, which has played a major role in the enforcement of civil rights laws by making it financially possible for private counsel and *pro bono* organizations to represent the often impecunious plaintiffs who serve the public’s interest in enforcing civil rights legislation.<sup>128</sup> Many fee-shifting statutes

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<sup>127</sup> *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting).

<sup>128</sup> S. Rep. No. 94-1011, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910 (“In many cases arising under our civil  
(Continued on following page)

use language similar to the “award to a prevailing party” language found in EAJA.<sup>129</sup> Section 1988 uses “allow the prevailing party,” which in substance is the same as “award to a prevailing party.” The two cases on which the Commissioner primarily relies, *Evans v. Jeff D.* and *Venegas v. Mitchell*, both involve § 1988.

Where fee-shifting statutes use similar language, this Court interprets them alike. *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973). Thus, a decision in this case that EAJA’s “award to a prevailing party” language requires that an attorney’s fee in a Social Security case be paid to a client, and that the client’s creditor can take the attorney’s fee, would apply to many fee-shifting statutes including § 1988.

“[T]he overriding statutory concern [of § 1988] is the interest in obtaining independent counsel for victims of civil rights violations.” *Kay v. Ehrler*, 499 U.S. 432, 437 (1991). Fee-shifting statutes accomplish this purpose by providing attorney’s fees to attorneys who successfully prosecute such cases—by ensuring, as this Court has put it, that “[w]here a plaintiff has obtained excellent results, his attorney should recover a *fully compensatory fee*.” *Hensley v. Eckerhart*,

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rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer.”).

<sup>129</sup> *Buckhannon Board and Care Home, Inc., v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 600 (2001) (“Numerous federal statutes allow courts to award attorney’s fees and costs to the ‘prevailing party.’”).

461 U.S. 424, 435 (1983) (emphasis added). Fee awards intercepted by creditors do not compensate attorneys. Even if no creditors intervene, some clients who receive attorney's fee checks will spend them. Either result defeats the statute's purpose to "enable civil rights plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail." *Venegas v. Mitchell*, 495 U.S. 82, 86 (1990).

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## CONCLUSION

In § 3 of the 1985 amendments to EAJA, Congress provided fees to encourage attorneys to represent Social Security claimants in meritorious cases. The statute expressly distinguishes between the client's right to an "award" of fees and the attorney's right to "receive[]" the fees, and provides that where "the claimant's attorney receives fees" under both § 3 and the Social Security Act, the attorney refunds the amount of the smaller fee to the client. These provisions unmistakably denote the distinction between the right to an "award" of fees and the right to "receive[]" them.

Where the government takes the attorney's fee to pay the client's unrelated debt, the client and the government receive a windfall—the client by having a debt paid, and the government by not having to pay the attorney. In the short run, the windfall is at the expense of the attorney. In the long run, the windfall is at the expense of disabled people who have

wrongfully been denied Social Security benefits, because they will be less likely to find attorneys willing to represent them. And the windfall is at the expense of the rule of law, which a lawyer's services are ordinarily necessary to vindicate.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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*Appendix*

Section 3 of the Act of August 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186, 28 U.S.C. 2412 note 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.

Title 28 U.S.C. 2412(d)(1)(A) provides:

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.

Title 42 U.S.C. 406(b)(1)(A) and (b)(2) provide:

(b) Fees for representation before court.

(1)(A) Whenever a court renders a judgment favorable to a claimant under this title [42 U.S.C. 401 *et seq.*] 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 205(i) [42 U.S.C. 405(i)], 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) 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.

Title 42 U.S.C. 1383(d)(2)(A) provides:

The provisions of section 206 [42 U.S.C. 406] . . . shall apply to this part [42 U.S.C. 1383 *et seq.*] to the same extent as they apply in the case of title II [42 U.S.C. 401 *et seq.*]. . . .<sup>1</sup>

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<sup>1</sup> Pub. L. No. 108-203, § 302(a)(1)(A), 118 Stat. 519 (2004). This law became effective on March 1, 2005, and sunsets on February 28, 2010. *Id.* § 302(c), 42 U.S.C. 1383 note; *see* 72 Fed. Reg. 44,766 (August 9, 2007).

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