No. 08-1322

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CATHERINE G. RATLIFF

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

PETITION FOR A WRIT OF CERTIORARI

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
WILLIAM KANTER
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations and rule:

In the Supreme Court of the United States

No. 08-1322

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CATHERINE G. RATLIFF

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2008. A petition for rehearing was denied on December 5, 2008 (App., *infra*, 17a). On February 23, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

April 6, 2009. On March 26, 2009, Justice Alito further extended the time to May 4, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

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

Before a court may "award [fees and other expenses] to a prevailing party," 28 U.S.C. 2412(d)(1)(A), the "party seeking [such] an award" must submit an application that, *inter alia*, "shows that the party is a prevailing party and is eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(B). The applicant for a fee award must therefore demonstrate that it falls within EAJA's definition of "party"—*i.e.*, that it is an individual or small business whose net worth when the action was filed did not exceed $2 million or $7 million, respectively, or a non-profit organization meeting specific criteria. 28 U.S.C. 2412(d)(2)(B). The applicant must also document "the amount sought" by providing in its application "an itemized statement from any attorney or expert witness representing or appearing on behalf of the party." 28 U.S.C. 2412(d)(1)(B).

In civil actions for review of final decisions rendered by the Social Security Administration, Congress has separately authorized awards of reasonable attorney fees in 42 U.S.C. 406(b). When a successful Social Security claimant "who was represented before the court by an attorney" obtains a favorable judgment, "the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. 406(b)(1)(A). If an attorney fee is awarded under that provision, the Commissioner of Social Security (Commissioner) may certify the amount of such fee "for payment to such attorney out of * * * the amount of" the past-due benefits owed to the claimant. *Ibid.* In cases in which awards are made under both EAJA and Section 406(b), "the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee.'" *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 796 (2002) (quoting Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186) (brackets in original).

b. The Department of the Treasury, through the Financial Management Service (FMS), operates a centralized delinquent debt collection program known as the Treasury Offset Program. When a federal agency requests that Treasury pay a government obligation, the offset program compares the payee's name and taxpayer identifying number to the names and taxpayer identifying numbers on delinquent debts that federal and state agencies have certified to Treasury as valid, delinquent, and legally enforceable. If the payee is matched to such a debt, the government's payment may be reduced to satisfy the debt pursuant to pertinent authority. See generally, *e.g.*, 5 U.S.C. 5514 (reductions from federal

salary); 26 U.S.C. 6331 (levy for federal tax debts), 6402(c)-(e) (reductions from tax refunds); 31 U.S.C. 3716 (administrative offset for non-tax debts), 3720A (reductions from tax refunds); 26 C.F.R. 301.6331-1 (tax levy); 31 C.F.R. 285.1-285.8 (offset regulations).[1] In January 2005, FMS extended its offset program to so-called "miscellaneous" payments, which include government payments for EAJA awards.

2. Respondent is an attorney who represented two Social Security claimants, Ruby Willow Kills Ree and Michael Randall, in separate civil actions challenging the denial of Social Security benefits. App., *infra*, 18a; C.A. App. 18, 21. Kills Ree and Randall both prevailed in their actions and obtained awards of fees and other expenses under EAJA. *Id.* at 27-28 (Randall); App., *infra*, 23a (Kills Ree).

As is pertinent here, the district court granted Kills Ree's unopposed motion for EAJA fees and ordered the Commissioner to "pay [Kills Ree's] claim for EAJA fees in the amount of $2,112.60 in attorney fees" and $126.75 in "other expense[s]." App., *infra*, 23a. The court directed that "[j]udgment shall be entered in favor of the Plaintiff [Kills Ree] and against the [Commissioner] accordingly." *Ibid.*

The Commissioner subsequently transmitted a request to FMS that Treasury pay the EAJA award to Kills Ree, and FMS matched Kills Ree to a delinquent

---

[1] The United States also may exercise a common-law right to reduce its payment by offset for a debt owed to it by a payee. See *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947) ("The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'") (citation omitted); 31 U.S.C. 3716(d); cf. *Citizens Bank* v. *Strumpf*, 516 U.S. 16, 18 (1995) (discussing offset).

non-tax federal debt that she owed to the government. See App., *infra*, 21a-22a. On January 31, 2006, FMS mailed Kills Ree a notice explaining that her creditor agency had previously mailed to her a separate notice explaining the amount and type of debt that she owed, her rights associated with that debt, and the agency's intent to collect the debt by intercepting future federal payments to her. *Ibid.*; see 31 U.S.C. 3716(a)(1); 31 C.F.R. 285.5(d)(6)(ii). The notice further explained that Kills Ree's $2239.35 EAJA award had been offset in its entirety to satisfy that pre-existing federal debt. App., *infra*, 22a.

3. a. On September 11, 2006, respondent initiated the present action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, challenging the offset as contrary to law. App., *infra*, 19a. Respondent's complaint alleged that respondent "was awarded attorney fees under [EAJA]" as counsel for Kills Ree, and that the Commissioner had unlawfully seized that award "to satisfy debts allegedly owed by [Kills Ree] to the government." *Id.* at 18a-19a.[2]

The district court granted the government's motion to dismiss. App., *infra.*, 10a-16a. The court held that, under the plain terms of the statute, EAJA awards are payable to the "prevailing party" rather than to that

---

[2] Respondent also challenged a $866.02 reduction taken from the $6160.37 EAJA award obtained by respondent's other client, Michael Randall. App., *infra*, 19a; see C.A. App. 27-28 (EAJA award); *id.* at 30 (notice of reduction). In the course of preparing this petition for a writ of certiorari, the government has identified an independent barrier to the use of the offset mechanism with respect to Randall's EAJA award. The government has determined that it will refund the money associated with that reduction and does not seek further review of that portion of this case.

party's attorney. *Id.* at 12a-13a. The court concluded that respondent "must seek the fees from her clients" directly and lacked standing to bring the present suit because she had not sustained an injury in fact from governmental action. *Id.* at 13a.

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

Judge Gruender concurred in the court's judgment. App., *infra*, 4a-9a. He explained, however, that his concurrence was based solely on circuit precedent, and that the court's holding was "inconsistent with language in

two Supreme Court opinions, the EAJA's plain language, and the holdings of most other circuit courts." *Id.* at 5a; see *id.* at 5a-6a (discussing *Evans* v. *Jeff D.*, 475 U.S. 717, 731-732 (1986), and *Venegas* v. *Mitchell*, 495 U.S. 82, 87-89 (1990)); *id.* at 9a (explaining that "the majority of other circuit courts to consider the issue * * * hold that awards of attorney's fees belong to the client as the prevailing party, not to the attorney").

The court of appeals subsequently denied rehearing en banc, with five of the court's 11 active judges voting in favor of en banc review. App., *infra*, 17a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is incorrect and squarely conflicts with decisions of the Tenth and Eleventh Circuits. Those courts have held that because EAJA awards are payable to the prevailing party rather than to that party's attorney, such awards are subject to offset to collect pre-existing debts owed by the prevailing party. EAJA's text makes clear that attorney fees and other expenses may be awarded "to a prevailing party," and it specifically distinguishes between that party and an attorney who represents her. The decision below is also in substantial tension with the decisions of this Court, which have explained that Congress, by authorizing awards of attorney fees to prevailing parties under 42 U.S.C. 1988, bestowed fee-award eligibility on those parties (rather than their lawyers), who may waive, settle, or negotiate away a potential award in order to obtain other benefits from opposing litigants.

The question presented has arisen frequently since 2005, when changes in the Treasury Offset Program first allowed the government to identify EAJA award payments as subject to reduction for offsetting debts.

As a result of the division in the lower courts, the federal government currently is exposed to recurrent collateral litigation to determine the appropriate payee of an EAJA award and the permissibility of an offset for a pre-existing debt. A uniform national rule is necessary for the proper implementation of the Treasury Offset Program in this context. This Court's review is thus warranted.

1. The decision of the court of appeals is incorrect.

a. EAJA provides that, in circumstances in which an award is appropriate and "[e]xcept as otherwise specifically provided by statute, a court shall award *to* a *prevailing party* * * * fees and other expenses * * * *incurred by that party*." 28 U.S.C. 2412(d)(1)(A) (emphases added). This Court recently explained that the same language in EAJA's provision governing administrative proceedings emphasizes party status and "leaves no doubt" that Congress intended that EAJA awards be determined from "the perspective of the litigant" rather than from that of her attorney. *Richlin Sec. Serv. Co.* v. *Chertoff*, 128 S. Ct. 2007, 2013 (2008). The Tenth and Eleventh Circuits have likewise held that the equivalent language in Section 2412(d) "unambiguously directs the award of attorney's fees to the party who incurred those fees and not to the party's attorney." *Reeves* v. *Astrue*, 526 F.3d 732, 735 (11th Cir.), cert. denied, 129 S. Ct. 724 (2008); accord *Manning* v. *Astrue*, 510 F.3d 1246, 1249-1250 (10th Cir. 2007) (EAJA's "language clearly provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award of attorney's fees."), cert. denied, 129 S. Ct. 486 (2008).

EAJA's other provisions confirm that a litigant, rather than her attorney, is the proper recipient of a fee

award. For instance, Congress expressly conditioned a federal court's authority to direct the payment of an EAJA award on the prevailing party's net worth—not that of her attorney. See 28 U.S.C. 2412(d)(2)(B) (defining "party"); *Reeves*, 526 F.3d at 736; *Manning*, 510 F.3d at 1251. Indeed, EAJA specifically states that a fee application must show that "the party" (rather than the party's attorney) both is a "prevailing party" and "is eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(B). The Eighth Circuit's conclusion that "attorneys' fees awarded under the EAJA are awarded to the prevailing parties' attorneys, rather than to the parties themselves," App., *infra*, 1a-2a, cannot be reconciled with those provisions.

Moreover, Congress expressly distinguished between the "prevailing party" who is "eligible to receive" a fee award and the attorney who represents that party. EAJA directs that the party seeking fees must submit an application establishing "the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party" that, *inter alia*, details the attorney's hourly rate and time expended on the case. 28 U.S.C. 2412(d)(1)(B). That distinction between the "party" and her "attorney" was not inadvertent. Rather, EAJA treats attorneys in the same manner as it treats expert witnesses and other professional specialists who may be necessary for a party to litigate a case. See *Reeves*, 526 F.3d at 736 (citing *Panola Land Buying Ass'n* v. *Clark*, 844 F.2d 1506, 1511 (11th Cir. 1988) (*Panola*)); *Manning*, 510 F.3d at 1251.

The statute thus makes clear that a prevailing party may recover "fees and other expenses," which include "the reasonable expenses of expert witnesses, the rea-

sonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees." 28 U.S.C. 2412(d)(2)(A). Nothing in EAJA suggests that Congress intended that "all [such] persons performing services for the prevailing party in the litigation" might separately "assert their claims for compensation" against the government. *Panola*, 844 F.2d at 1511. Rather, those professionals—including attorneys—must obtain their compensation from the party who utilized their services. *Ibid.*; see *Oguachuba* v. *INS*, 706 F.2d 93, 97-98 (2d Cir. 1983).

Had Congress intended for EAJA awards to be payable directly to the attorneys who provide the relevant services, it presumably would have used language similar to that in 42 U.S.C. 406(b), which Congress enacted before EAJA and which authorizes the Commissioner to make direct "payment *to [the prevailing party's] attorney* out of * * * the amount of [the] past-due benefits" awarded to that party by a court. 42 U.S.C. 406(b)(1)(A) (emphasis added). Congress did not do so, and its decision reflects sound policy. In many EAJA contexts, a party may pay some or all of her attorney's bills during the course of litigation; an attorney may owe her client an unrelated debt; or the party and her attorney may dispute the appropriate amount of professional fees owed under their fee agreement. By making EAJA awards payable to the prevailing party, Congress avoided the need to provide for resolution of such issues under EAJA. Rather, disputes between EAJA award recipients and their attorneys concerning their obligations to each other are resolved under applicable non-EAJA law.

b. That conclusion is reinforced by this Court's attorney fee decisions under 42 U.S.C. 1988. The Court has explained that Section 1988, by authorizing courts to "allow the prevailing party * * * a reasonable attorney's fee as part of the costs," 42 U.S.C. 1988(b), makes "the party, rather than the lawyer," eligible for fee awards. *Venegas* v. *Mitchell*, 495 U.S. 82, 87 (1990); accord *Evans* v. *Jeff D.*, 475 U.S. 717, 730-732 (1986) (Section 1988 does not "bestow[] fee awards upon attorneys."). The Court therefore has "rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff," *Venegas*, 495 U.S. at 89 (citing *Jeff D.*, 475 U.S. at 731-732), holding instead that a plaintiff may use a potential fee award as a "bargaining chip" that she may waive, settle, or negotiate away to obtain other benefits for herself. *Jeff D.*, 475 U.S. at 731 & n.20; see *Venegas*, 495 U.S. at 88. That conclusion is in significant tension with the court of appeals' holding that EAJA awards are payable directly to the attorney. App., *infra*, 5a-6a, 9a (Gruender, J., concurring) (concluding that "today's holding is in conflict with the repeated statements of the Supreme Court" in *Jeff D.* and *Venegas*, which "undermine[]" the conclusion that "EAJA attorney's fees are awarded to a prevailing party's attorney").

The Court's reasoning in *Venegas* and *Jeff D.* is significant in the EAJA context because this Court normally construes "prevailing party" fee-shifting provisions similarly, see *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001); *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 n.2 (1989); *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983), and has done so

with respect to EAJA and Section 1988. See *Richlin*, 128 S. Ct. at 2014-2015 (construing EAJA to have the same meaning as similar text in Section 1988). It would be anomalous to do otherwise here, particularly given the additional textual indications in EAJA (see pp. 8-10, *supra*) that Congress intended EAJA fees and expenses to be paid to the prevailing party.

c. Because the EAJA award in this case was payable to Kills Ree rather than to her attorney, that award, like most federal payments, was subject to an administrative offset to collect the pre-existing debt that Kills Ree owed to the United States. As the Tenth Circuit has explained, "[a]ll federal payments, including 'fees,' are subject to administrative offset," except for payments that are specifically listed as exceptions to that general rule. *Manning*, 510 F.3d at 1255 (citing 31 C.F.R. 285.5(e)(1) and (2)); see 31 U.S.C. 3701(b) and (d); 31 U.S.C. 3716(c)(1), (3)(A)-(B) and (6); 31 C.F.R. 285.5(d)(1), (2), (6), (e)(1) and (2). Neither EAJA nor the statutory and regulatory provisions governing the administrative-offset process exempt from the offset mechanism the EAJA award at issue here. See *Manning*, 510 F.3d at 1255; App., *infra*, 8a-9a (Gruender, J., concurring).

d. The court of appeals made no attempt to reconcile its decision with EAJA's language. In fact, the court appeared to recognize that a "literal interpretation of the EAJA" supported the government's position in this case. App., *infra*, 3a. The court declined to adopt that interpretation only because it viewed itself as bound by Eighth Circuit precedent. *Ibid*.

Both cases cited by the court—*Curtis* v. *City of Des Moines*, 995 F.2d 125 (8th Cir. 1993), and *United States* v. *McPeck*, 910 F.2d 509 (8th Cir. 1990)—involved fee-

shifting provisions other than EAJA, and those decisions provide no textual analysis that might extend by analogy to the present case. Cf. App., *infra*, 3a-4a; *id.* at 5a & n.1 (Gruender, J., concurring). The decision in *Curtis* contains two paragraphs of analysis to support its conclusion that Section 1988 fees belong to the attorney because the purpose of the statute is to "encourage attorneys to prosecute constitutional violations." 995 F.2d at 128-129. That atextual analysis is problematic even in the Section 1988 context, where the Court indicated in *Venegas* and *Jeff D.* that fee awards belong to the prevailing party rather than her attorney. See pp. 10-11, *supra*. Indeed, the Court in *Jeff D.* confronted an argument similar to that adopted in *Curtis* and rejected the view that permitting "clients to bargain away fee awards" would significantly undermine Section 1988's purpose by deterring lawyers from representing civil rights plaintiffs. *Jeff D.*, 475 U.S. at 741 n.34.[3] The analysis in *McPeck* provides even less support for the court of appeals' ruling here. The court in *McPeck* addressed a fee award imposed as a sanction in bankruptcy proceedings; concluded that "EAJA [is] inapplicable to th[e] case"; and adopted the government's position that, "[w]hen a statute awards attorneys' fees to a party, the award belongs to the party, not to the attorney representing the party." 910 F.2d at 513.

2. The Eighth Circuit's ruling in this case squarely conflicts with decisions of the Tenth and Eleventh Circuits. App., *infra*, 2a-3a. As noted, the courts in *Reeves* and *Manning* held that EAJA fees are payable to the prevailing party rather than to her attorney. See

[3] Although *Curtis* cites *Jeff D.* and *Venegas*, it does not explain how its holding is consistent with the reasoning in those decisions. See 995 F.2d at 128-129.

Reeves, 526 F.3d at 734-738; *Manning*, 510 F.3d at 1249-1255. Those courts further held that because an EAJA award is payable to the prevailing party, it is subject to an offset to collect a pre-existing debt owed by that party to the United States or another eligible creditor. See *Reeves*, 526 F.3d at 738; *Manning*, 510 F.3d at 1255-1256.[4]

The court of appeals' disallowance of the offset in this case is consistent with the decision of the Fifth Circuit in *Marré* v. *United States*, 117 F.3d 297 (1997). The court in *Marré* held that, although a fee award under 26 U.S.C. 7430 is made to a "prevailing party," that statutory directive "is not controlling" because "the real part[ies] in interest vis-a-vis attorneys' fees awarded under the statute are the attorneys themselves," such that "the prevailing party is only nominally the person who receives the award." 117 F.3d at 304. Concluding that "the fee once awarded becomes in effect an asset of the attorney," the court held that the government could not offset a federal debt owed by the prevailing party from fees awarded under Section 7430. *Id.* at 304-305 & n.11 (citation omitted).

---

[4] The Federal Circuit, while not addressing the question whether an award of attorney fees may be offset to collect a pre-existing debt owed by the prevailing party, likewise has held that fee awards under EAJA and comparable statutes are payable to the prevailing party rather than to her attorney. See *FDL Techs., Inc.* v. *United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992); App., *infra*, 3a. The Ninth Circuit also recently followed *Reeves* in denying a request that EAJA "fees be directly awarded to counsel." *Lozano* v. *Astrue*, No. 06-15935, 2008 WL 5875572, at *1 (9th Cir. July 18, 2008) (unpublished panel order; citing *Reeves*); see *Lozano* v. *Astrue*, No. 06-15935, 2008 WL 5875573, at *1 (9th Cir. Sept. 4, 2008) (EAJA award by appellate commissioner). That unpublished decision does not constitute binding precedent and need not be followed by future panels. See 9th Cir. R. 36-3(a).

Although *Marré* (unlike the decision below) involved a different fee-shifting statute and therefore does not squarely conflict with *Manning* and *Reeves*, Section 7430 was largely modeled on EAJA and expressly incorporates EAJA's definitions of "party" and "prevailing party." See 26 U.S.C. 7430(a); see also 26 U.S.C. 7430(c)(4) (defining the term "prevailing party" by referencing 28 U.S.C. 2412(d)(1)(B) and (2)(B)). In its administration of the Treasury Offset Program, the government therefore has treated *Marré* as precluding (within the Fifth Circuit) use of the offset mechanism to offset debts owed by the prevailing party against EAJA awards. The Eighth Circuit itself appears to have interpreted *Marré* as resolving the question presented here, describing *Marré* as ruling that "the government cannot offset attorneys' fees in an EAJA case because 'the prevailing party is only nominally the person who receives the award.'" See App., *infra*, 4a (quoting *Marré*, 117 F.3d at 304). In any event, the Eighth Circuit's decision in this case, in part based on the Fifth Circuit's ruling in *Marré*, creates a clear circuit split that warrants resolution by this Court.[5]

---

[5] The government previously acknowledged in its briefs in opposition to the petitions for writs of certiorari in *Manning* and *Reeves* that the Eighth Circuit's decision in *Ratliff* had created a conflict with the Tenth and Eleventh Circuits' decisions. The government explained, however, that review was premature at that time because, if the Eighth Circuit granted rehearing en banc in *Ratliff*, the division of authority might be eliminated. The Court denied certiorari in *Manning* on November 3, 2008. 129 S. Ct. 486 (No. 07-1468). The court of appeals denied rehearing en banc in this case on Friday, December 5, 2008 (App., *infra*, 17a), and the government advised this Court of that denial by letter filed the same day. The Court denied certiorari in *Reeves* on Monday, December 8, 2008. 129 S. Ct. 724 (No. 08-5605).

3. The question presented in this case is significant and recurring. The government is frequently ordered to pay EAJA awards in civil actions and, since the Treasury Offset Program was extended to EAJA awards in 2005, litigants commonly seek to have payment of such awards made directly to counsel. In addition to producing a circuit split, see pp. 13-15, *supra*, the issue is the subject of several pending appeals[6] and has spawned multiple internal conflicts within district courts.[7] As a result, even after EAJA fee applications have been adjudicated, the United States is exposed to recurring satellite litigation to identify the proper payee for the fee award and to determine whether an offset may be taken to collect a pre-existing debt owed by the prevailing party. Review by this Court is warranted to resolve the circuit conflict and to alleviate the practical burdens associated with those disputes.

---

[6] See, *e.g.*, *Stephens* v. *Astrue*, 539 F. Supp. 2d 802, 805 (D. Md. 2008), appeal pending, No. 08-1527 (4th Cir.) (argued Mar. 26, 2009); *Bryant* v. *Astrue*, No. 07-CV-209, 2008 WL 4186892, at *1-*2 (E.D. Ky. Sept. 10, 2008), appeal pending, No. 08-6375 (6th Cir.); *Thompson* v. *Astrue*, No. 06-CV-237A, 2009 WL 537512, at *2-7 (W.D.N.Y. Mar. 3, 2009), notice of appeal filed (Apr. 21, 2009); *Abeytia* v. *Astrue*, No. 06-CV-2185 (D. Ariz. Mar. 23, 2009), notice of appeal filed (Apr. 21, 2009).

[7] See, *e.g.*, *Thompson*, 2009 WL 537512, at *2 (noting intra-district conflict in W.D.N.Y.); compare, *e.g.*, *Walker* v. *Astrue*, No. 04-CV-891, 2008 WL 4693354, at *7 (N.D.N.Y. Oct. 23, 2008) (EAJA awards are paid to prevailing party); *Riggins* v. *Commissioner of Soc. Sec.*, No. 07-CV-2116, 2008 WL 4822225, at *2 (D.N.J. Nov. 3, 2008) (same), with *Spencer* v. *Commissioner of Soc. Sec.*, No. 03-CV-733, 2009 WL 1011629, at *1-*4 (N.D.N.Y. Apr. 15, 2009) (EAJA awards are paid to attorney for prevailing party); and *Williams* v. *Commissioner of Soc. Sec.*, 549 F. Supp. 2d 613, 615-621 (D.N.J. 2008) (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
WILLIAM KANTER
MICHAEL E. ROBINSON
Attorneys

APRIL 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-2317

CATHERINE G. RATLIFF, PLAINTIFF-APPELLANT

v.

MICHAEL J. ASTRUE, COMMISSIONER
OF SOCIAL SECURITY, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of South Dakota

Filed: September 5, 2008

Before MELLOY, GRUENDER, and SHEPHERD, Circuit Judges.

MELLOY, Circuit Judge.

Plaintiff Catherine G. Ratliff, an attorney, appeals from a district court judgment allowing the government to offset an award of attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(b), against debts her clients owe the federal government. Based on controlling Eighth Circuit precedent, we conclude that attorneys' fees awarded under the EAJA are awarded to the prevailing parties' attorneys, rather than

to the parties themselves, and therefore cannot be used to offset the parties' debts to the government. Thus, we reverse the judgment of the district court.

I.

Ratliff successfully represented two claimants in their efforts to receive benefits from the Social Security Administration. She then moved for the award of fees and costs under the EAJA. The court granted the fees. The government reduced the fee award because of debts the claimants owed the United States government. Ratliff alleged this was an illegal seizure prohibited by the Fourth Amendment. The district court determined that because the fees were awarded to the parties, not their attorney, Ratliff lacked standing to challenge the government's offset.

II.

We review the district court's judgment de novo. *Emergency Med. Servs., Inc. v. St. Paul Mercury Ins. Co.,* 495 F.3d 999, 1009 (8th Cir. 2007) (reviewing de novo the district court's interpretation of a fee-shifting statute); *Jones v. Gale,* 470 F.3d 1261, 1265 (8th Cir. 2006) ("We review the district court's conclusion that the plaintiffs had standing *de novo.*").

Based on controlling Eighth Circuit precedent, we conclude that the attorney's fees in this case are awarded to the parties' attorney. We recognize that many courts have reached the opposite conclusion. *See Reeves v. Astrue,* 526 F.3d 732, 733 (11th Cir. 2008) (concluding in a social security EAJA case that "the statute unambiguously grants an award to the 'prevailing party'" and thus "hold[ing] the award belongs, in the first instance,

to the party and not the party's attorney"); *Manning v. Astrue,* 510 F.3d 1246, 1249-50 (10th Cir. 2007) (holding that under the plain language of the EAJA, the government can offset attorney's fees by the social-security claimant's debt); *FDL Techs., Inc. v. United States,* 967 F.2d 1578, 1580 (Fed. Cir. 1992) (noting the EAJA provides fees [*sic*] are awarded "*to a prevailing party*, not the prevailing party's attorney," and "[t]hus, under the language of the statute, the prevailing party, and not its attorney, is entitled to receive the fee award"); *Panola Land Buying Ass'n v. Clark,* 844 F.2d 1506, 1510 (11th Cir. 1988) (noting in an EAJA case that "[i]n employing the 'prevailing party' language, Congress recognized that throughout our history litigation costs generally have been awarded to the prevailing party"). Were we deciding this case in the first instance, we may well agree with our sister circuits and be persuaded by a literal interpretation of the EAJA, providing that "a court may award reasonable fees and expenses of attorneys . . . *to the prevailing party.*" 28 U.S.C. § 2412(b) (emphasis added).

However, case law from this circuit compels a contrary conclusion. In *Curtis v. City of Des Moines,* 995 F.2d 125, 129 (8th Cir. 1993), we held that EAJA attorneys are entitled to fees awards; thus, the fees could not be recovered by a third-party judgment creditor of the plaintiff. This also holds true if the judgment creditor is the government. *United States v. McPeck,* 910 F.2d 509, 514 (8th Cir. 1990). In *McPeck,* we remanded and directed the bankruptcy court to "determine whether attorneys' fees can be awarded" under the Internal Revenue Code and, if so, specifically directed that "the award of attorneys' fees should be assessed affirmatively against the [government], and not as an offset against its

tax claim." *Id*. Applying *Curtis* and *McPeck,* we hold EAJA fee awards become the property of the prevailing party's attorney when assessed and may not be used to offset the claimant's debt. *See also Marre v. United States,* 117 F.3d 297, 304 (5th Cir. 1997) (holding the government cannot offset attorneys' fees in an EAJA case because "the prevailing party is only nominally the person who receives the award; the real party in interest vis-á-vis attorneys' fees awarded under the statute are the attorneys themselves").

III.

Because we hold EAJA attorneys' fees are awarded to prevailing parties' attorneys, we find that Ratliff has standing to bring an independent action to collect the fees and that the government's withholding of the fee awards to cover the claimants' debts was in violation of the Fourth Amendment. We reverse the judgment of the district court and remand for proceedings consistent with this opinion.

GRUENDER, Circuit Judge, concurring.

I concur in the Court's judgment because I agree that we are bound by our prior decision in *Curtis* and that *Curtis* compels the conclusion that EAJA attorney's fees are awarded to the party's attorney. While *Curtis* involved the award of attorney's fees under 42 U.S.C. § 1988 and not the EAJA, *see* 995 F.2d at 128-29, *Curtis*'s holding applies to this EAJA case because these "fee-shifting statutes' similar language is a strong indication that they are to be interpreted alike," *Independent Federation of Flight Attendants v. Zipes,* 491 U.S. 754, 758 n.2 (1989). *See also Northcross v. Bd. of Educ.*

of Memphis City Sch., 412 U.S. 427, 428 (1973) ("[S]imilarity of language . . . is, of course, a strong indication that . . . two [attorney's fee] statutes should be interpreted *pari passu.*"). Furthermore, the *Curtis* court's conclusion that the attorneys were entitled to the fees without regard to the priority of the judgment creditor's claim necessarily means that the attorneys' fees were awarded to and belonged to the attorneys and not the party they represented. Had the fee award ever belonged to the party, the court would have been required to analyze the priority of the competing claims. Accordingly, I agree with the Court that *Curtis* compels the conclusion that the attorney's fees awarded pursuant to the EAJA are awarded to the attorney, not her clients.[1]

I write separately to emphasize that our holding today, as compelled by *Curtis*, is inconsistent with language in two Supreme Court opinions, the EAJA's plain language, and the holdings of most other circuit courts. In *Evans v. Jeff D.*, the Supreme Court stated that "the language of [§ 1988], as well as its legislative history,

---

[1] On the other hand, I am not convinced that our *McPeck* decision compels the conclusion reached today. *McPeck* recognizes that "[w]hen a statute awards attorneys' fees to a party, the award belongs to the party, not to the attorney representing the party." 910 F.2d at 513. In remanding the case for the district court to determine whether the attorney's fees could be awarded pursuant to the Internal Revenue Code, rather than the Bankruptcy Code, the court stated that, "[i]f so, the award of attorneys' fees should be assessed affirmatively against the IRS, and not as an offset against its tax claim." 910 F.2d at 514. However, in the context of that bankruptcy case, it is not at all clear to me that the court's statement implied that the fees are to be awarded directly to the attorneys and not to the party or the bankruptcy estate. In addition, *McPeck* did not involve attorney's fees awarded under either the EAJA or § 1988. Moreover, because this statement is not necessary to the outcome, I respectfully suggest that it is dicta.

indicates that Congress bestowed on the 'prevailing party' . . . eligibility for a discretionary award of attorney's fees in specified civil rights actions. 475 U.S. 717, 730 (1986). Several years later, in *Venegas v. Mitchell*, the Supreme Court reiterated its earlier statement, saying that it "[had] recognized that it is the party's entitlement to receive the fees in the appropriate case," 495 U.S. 82, 88 (1990) (citing *Evans,* 475 U.S. at 730-31), and "[had] already rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff," *id*. at 89 (citing *Evans,* 475 U.S. at 731-32). This language undermines *Curtis*'s implicit holding that attorney's fees awarded under § 1988 are awarded to a prevailing party's attorney, as well as our conclusion today that EAJA attorney's fees are awarded to a prevailing party's attorney. *See Manning,* 510 F.3d at 1249-50 (citing *Venegas* and *Evans,* among other cases, in support of the proposition that the EAJA's language "clearly provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award of attorney's fees").

Further, our conclusion that EAJA attorney's fees are awarded to a prevailing party's attorney also contradicts the plain language of the EAJA. In interpreting a statute we first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997). If so, we apply the plain language of the statute. *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450 (2002). The EAJA provides that "a court may award reasonable fees and expenses of attorneys . . . *to the prevailing party* . . . ." 28 U.S.C. § 2412(b) (emphasis added). The EAJA clearly states that the attorney's reasonable fees and expenses

are awarded directly to the prevailing party and does not authorize a court to award fees and expenses to the attorney. I recognize the policy argument that Congress created the EAJA to encourage attorneys to provide representation in certain cases where they might otherwise be unwilling and that to hold that the attorney's fees belong to the client might frustrate this purpose. *See Evans,* 475 U.S. at 731 ("[W]hile 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."); *Curtis,* 995 F.2d at 129. Nonetheless, the plain language of the EAJA awards the attorney's fees to a prevailing party, not the prevailing party's attorney. Congress has elsewhere demonstrated that it is capable of explicitly directing the awarding of attorney's fees to attorneys. *See* 42 U.S.C. § 406(b)(1) ("Whenever a court renders a judgment favorable to a claimant . . . who was represented before the court by an attorney, the court may determine and allow . . . a reasonable fee for such representation, . . . and the Commissioner of Social Security may . . . certify the amount of such fee for payment *to such attorney* . . . .") (emphasis added). Congress knows how to ensure that attorney's fees be awarded directly to the attorney and plainly chose to award the fees to the party when it enacted the EAJA. *See Manning,* 510 F.3d at 1251-52.

In addition, as discussed by the Tenth Circuit in its thorough and well-reasoned opinion holding that attorney's fees awarded under the EAJA belong to the party and not the party's attorney, "in defining fees and other expenses, the EAJA treats attorneys in the same manner as it treats expert witnesses, engineers, scientists,

analysts, or other persons found by the court to be needed to prepare the case." *Id.* at 1251 (internal quotations omitted). In support of this proposition, the court cited *Panola Land Buying Association,* in which the Eleventh Circuit stated, "Congress did not intend that all persons performing services to the prevailing party in the litigation be allowed to become parties in the case to assert their claims for compensation. Those persons look to the party that obtained their service—just as does the attorney for the party." 844 F.2d at 1511. The EAJA also requires the prevailing party, not the attorney, to submit an itemized list of expenses from the attorney including the time expended and the fee rate, supporting the proposition that it is "settled law that the attorney does not have standing to apply for the EAJA fees; that right belongs to the prevailing party." *Manning,* 510 F.3d at 1252 (citing *Oguachuba v. INS,* 706 F.2d 93, 97-98 (2d Cir. 1983)). Finally, the EAJA conditions eligibility for an award of attorney's fees on the prevailing parties' having a net worth of less than two million dollars. 28 U.S.C. § 2412(d)(2)(B); *see Manning,* 510 F.3d at 1251. "The EAJA therefore permits attorney's fees reimbursement to financially eligible prevailing parties, who make a proper application, and not to their attorneys." *Manning,* 510 F.3d at 1251.

Here, Ratliff successfully represented two social security claimants. Both clients owed outstanding debts to the United States government, and before paying the EAJA fees, the government offset the awards based on the claimants' outstanding debts pursuant to the Debt Collection Improvement Act ("DCIA"). 31 U.S.C. § 3716. Ratliff filed suit to obtain the attorney's fees awarded to her clients, and the district court determined that the government could offset the attorney's fees ob-

tained under the EAJA against each client's debt to the government. The DCIA subjects all federal payments, including fees, to administrative offset by the head of an executive, judicial or legislative agency. 31 C.F.R. § 285.5(e)(1). "[T]he primary purpose of the [DCIA] is to increase the collection of nontax debts owed to the Federal Government. . . ." Exec. Order No. 13,019, 61 Fed. Reg. 51,763 (Sept. 28, 1996). However, Congress recognized specific exceptions to the administrative offsets allowed under the DCIA. 31 U.S.C. § 3716(c)(3)(A). EAJA awards are not listed as exceptions to the administrative offset provision, and there is no indication that Congress intended to exclude EAJA awards from DCIA offsets. Thus, the failure of the DCIA to exempt EAJA awards from offset leads me to believe that Congress intended to allow EAJA awards to be offset against any debts the party owes to the government. *See Manning,* 510 F.3d at 1255.

Finally, the majority of other circuit courts to consider the issue disagree with our conclusion and hold that awards of attorney's fees belong to the client as the prevailing party, not to the attorney. *See Reeves,* 526 F.3d 732; *Manning,* 510 F.3d 1246; *FDL Techs., Inc.,* 967 F.2d 1578; *cf. King v. Comm'r,* 230 Fed. Appx. 476, 482 (6th Cir. 2007) (unpublished) (stating that "attorney's fee awards are necessarily payable to the attorney, either directly or through the hands of the prevailing party" while concluding that the motion for attorney's fees was actually brought on behalf of the attorney's client). *But see Marre,* 117 F.3d at 304. Accordingly, I concur because I am compelled to do so by *Curtis,* but I believe today's holding is in conflict with the repeated statements of the Supreme Court, the EAJA's plain language, and the decisions of several other circuit courts.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ. No. 06-5070-RHB

CATHERINE G. RATLIFF, PLAINTIFF

v.

MICHAEL ASTRUE[1], COMMISSIONER
OF SOCIAL SECURITY, DEFENDANT

[Filed: May 10, 2007]

ORDER

NATURE AND PROCEDURE OF THE CASE

Plaintiff, Catherine Ratliff (Ratliff), an attorney, represented two different claimants in their efforts to receive benefits from the Social Security Administration. Upon successful judicial review in both actions, Ratliff, on behalf of her clients, moved for the award of fees and costs pursuant to the Equal Access to Justice Act (EAJA). *See Randall v. Barnhart,* CIV. 05-5080; *Kills Ree v. Barnhart*, CIV. 04-5119. The Court granted

[1] Jo Anne B. Barnhart was the named party when the suit was commenced. Michael Astrue is the current Commissioner of Social Security and as such, has replaced Jo Anne B. Barnhart as a party in this action.

the request and awarded the fees and costs. Subsequently, Ratliff's clients were informed that the court-ordered EAJA award had been reduced due to debts they owed to the United States government. Ratliff then commenced this action alleging that the reduction, or offset, of the EAJA award was an illegal seizure prohibited by the Fourth Amendment. Defendant moves the Court to dismiss this action. Ratliff moves for summary judgment.

DISCUSSION

Defendant alleges that plaintiff does not have the requisite standing to bring this action. "To establish standing, a plaintiff is required to show that he or she had '"suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.' Second, the injury must be traceable to the defendant's challenged action. Third, it must be 'likely' rather than 'speculative' that a favorable decision will redress the injury." *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006) (quoting *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003) (citations omitted)).

In the instant case, plaintiff has not suffered an injury in fact. Title 28 of the United States Code, Section 2412, also referred to as EAJA, allows the award of costs and fees to a prevailing party who has commenced an action where the United States is a party. It states in pertinent part,

> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses

> . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall . . . submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from *any* attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

28 U.S.C. § 2412(d)(1)(A) & (B) (emphasis added).

"'If statutory language is plain and unambiguous, the court must look only to the plain meaning of the statutory language.' . . . 'Words and phrases are to be given their ordinary meaning.'" *Marvin Lumber and Cedar Co. v. PPG Industries, Inc.*, 401 F.3d 901, 921 (8th Cir. 2005) (citations omitted). To receive an award under this statute, the party requesting the award must show that he is a "prevailing party" and submit the statement of "any" attorney that represented him. Reading the provisions of the statute together, it becomes apparent that it is the client, not the attorney that is the prevailing party. *See FDL Technologies, Inc. v. United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992). If it were not so, Congress would not have required "any" attorney's

statement to be submitted with the request for an award. As such, the EAJA fee was awarded to Ratliff's clients and not to her directly. Therefore, Ratliff cannot seek her fees from the United States; rather, she must seek the fees from her clients. Not having suffered an injury in fact, Ratliff does not have the requisite standing to pursue this action.

Even if Ratliff qualified as a prevailing party, the laws and regulations of the United States allow for an offset of EAJA fees. Title 31 of the United States Code, section 3716 allows for administrative offsets of federal payments.

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

31 U.S.C. § 3716(c)(1)(A).

31 C.F.R. § 285.5(e)(1), which was promulgated pursuant to 31 U.S.C. § 3716, discusses what types of payments are subject to an administrative offset and which are exempt. It states:

> (1) Payments eligible for offset. Except as set forth in paragraph (e)(2) of this section, all Federal

payments are eligible for offset under this section. Eligible payments include, but are not limited to, Federal wage, salary, and retirement payments, vendor and expense reimbursement payments, certain benefit payments, travel advances and reimbursements, grants, *fees*, refunds, judgments . . . , tax refunds, and other payments made by Federal agencies.

(2) Payments excluded from offset under this section. This section does not apply to the following payments:

(i) Black Lung Part C benefit payments, or Railroad Retirement tier 2 payments;

(ii) Payments made under the tariff laws of the United States;

(iii) Veterans Affairs benefit payments to the extent such payments are exempt from offset pursuant to 38 U.S.C. 5301;

(iv) Payments made under any program administered by the Secretary of Education under title IV of the Higher Education Act . . . ;

(v) Payments made under any other Federal law if offset is expressly prohibited by Federal statute;

(vi) Payments made under any program which the Secretary has granted an exemption in accordance with the provisions of

> 31 U.S.C. 3716(c)(3)(B) and paragraph (e)(7) of this section; and
>
> (vii) Federal loan payments other than travel advances.

31 C.F.R. § 285.5 (emphasis added). Under this regulation, fees, which would include attorney's fees, are expressly included as subject to administrative offsets. Such fees would only be exempt from offsets if expressly excluded by this regulation or within the EAJA statute.

In reviewing the relevant portion of the EAJA statute, the Court finds that an award pursuant to the statute is not exempt from administrative offsets. Title 42 of the United States Code, section 2412(d)(l)(A) states in pertinent part,

> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . 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.

As neither the regulation, nor the statute, expressly preclude the offset of attorney's fees, the offset in this matter was appropriate. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss (Docket #8) is granted.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (Docket #10) is denied.

Dated this 10th day of May, 2007.

BY THE COURT:

/s/ RICHARD H. BATTEY
RICHARD H. BATTEY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-2317

CATHERINE G. RATLIFF, APPELLANT

v.

MICHAEL J. ASTRUE, COMMISSIONER
OF SOCIAL SECURITY, APPELLEE

Appeal from U.S. District Court
for the District of South Dakota
(5:06-cv-05070-RHB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge LOKEN, Judge RILEY, Judge COLLOTON, Judge GRUENDER and Judge BENTON would grant the petition for rehearing en banc.

December 05, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ MICHAEL E. GANS

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DISTRICT

Civ. No. 06-5070

CATHERINE G. RATLIFF, PLAINTIFF

v.

JO ANNE B. BARNHART, COMMISSIONER
OF SOCIAL SECURITY, DEFENDANT

[Filed: Sept. 11, 2006]

COMPLAINT

---

1. Plaintiff is an attorney who successfully represented two social security claimants, Michael B. Randall and Ruby Willow Kills Ree, in social security cases in this court. *Randall* is Civ. 05-5080; *Kills Ree* is Civ. 04-5119.

2. Defendant is Commissioner of Social Security and is sued in her official capacity.

3. Plaintiff was awarded attorney fees under the Equal Access to Justice Act in both cases.

4. In both cases, defendant unreasonably and unlawfully seized plaintiff's EAJA fee, without due pro-

cess, to satisfy debts allegedly owed by the client to the government.

5. In *Randall,* defendant unreasonably and unlawfully seized $866.02; in *Kills Ree*, defendant unreasonably and unlawfully seized $2,239.35.

Jurisdiction

6. This is an action to redress deprivation of plaintiff's right to due process of law as guaranteed by the Fifth Amendment to the United States Constitution, and plaintiff's right to be free from unreasonable seizures as guaranteed by the Fourth Amendment to the United States Constitution. This court has jurisdiction under 28 U.S.C. § 1331, the Administrative Procedures Act, and 28 U.S.C. § 1361 (mandamus).

Cause of Action

7. Defendant is not entitled to seize plaintiff's EAJA fees to satisfy debts that plaintiff's clients allegedly owe defendant.

8. Defendant seized plaintiff's fees unreasonably, in violation of the Fourth Amendment.

9. Defendant seized plaintiff's fees without due process of law, in violation of the Fifth Amendment.

10. Defendant's position is not substantially justified within the meaning of the Equal Access to Justice Act.

WHEREFORE plaintiff requests relief as follows:

1. An order compelling defendant to disgorge to plaintiff her fees it unlawfully seized.

2. Reasonable attorney's fees and costs of this action; and

3. Such other and further relief as the Court deems just.

Dated: September 8, 2006

Respectfully submitted,

/s/ JAMES D. LEACH

JAMES D. LEACH
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
Tel 605 341 4400
Attorney for Plaintiff

APPENDIX E

DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE
P.O. BOX 1686
BIRMINGHAM, ALABAMA 35201-1686

THIS IS NOT A BILL – PLEASE RETAIN FOR YOUR RECORDS

01/31/06

RUBY WILLOW
C/O CATHERINE RATLIFF
PO BOX 844
HOT SPRINGS, SD 47747

Dear RUBY WILLOW:

As authorized by Federal law, we applied all or part of your Federal payment to a debt you owe. The government agency (or agencies) collecting your debt is listed below.

DFS PRICE UNIT
FEDERAL OFFSET PROGRAM
PO BOX 967
CHEYENNE WY 82002
800-264-1293 1-800-264-1293
PURPOSE: Non-Tax Federal Debt

TIN Num: [REDACTED]
TOP Trace Num: P30022477
Acct Num: 00016544FS00000001
Amount This Creditor: $2239.35
Creditor: 28 Site: WY

The Agency has previously sent notice to you at the last address known to the Agency. That notice explained the amount and type of debt you owe, the rights available to you, and that the Agency intended to collect the debt by intercepting any Federal payments made to you, including tax refunds. **If you believe your payment was reduced in error or if you have questions about this debt, you must contact the Agency at the address and telephone number shown above.** The U.S. Department of the Treasury's Financial Management Service cannot resolve issues regarding debts with other agencies.

We will forward the money taken from your Federal payment to the Agency to be applied to your debt balance: however, the Agency may not receive the funds for several weeks after the payment date. If you intend to contact the Agency, please have this notice available.

/s/ JEFFREY SCHRAMEK
JEFFREY SCHRAMEK
Department of the Treasury, Financial Management Service
(800) 304-3107
Telecommunications Device for the Deaf (TDD)
(866) 297-0517

PAYMENT SUMMARY
PAYEE NAME: RUBY WILLOW
PAYMENT BEFORE REDUCTION: $2239.35
TOTAL AMOUNT OF THIS REDUCTION: $2239.35
PAYING FEDERAL AGENCY: Social Security Administration

PAYMENT DATE: 01/31/06
PAYMENT TYPE: Check

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ. No. 04-5119

RUBY WILLOW KILLS REE, PLAINTIFF

v.

JO ANNE B. BARNHART, COMMISSIONER
OF SOCIAL SECURITY, DEFENDANT

[Filed Jan. 17, 2006]

ORDER

Pending before the Court is Plaintiff's Motion for EAJA Fee [doc. #22]. The Defendant, by her attorney, the United States Attorney for the District of South Dakota, has notified the Court of her intent not oppose the Plaintiff's Motion. Accordingly it is hereby

ORDERED that the Defendant shall pay Plaintiff's claim for EAJA fees in the amount of $2,112.60 in attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and the amount of $126.75 in sales tax as an "other expense" under 28 U.S.C. § 2412(d)(1)(A). Judgment shall be entered in favor of the Plaintiff and against the Defendant accordingly.

Dated this 17th day of January, 2006.

BY THE COURT:

/s/ ANDREW W. BOGUE
ANDREW W. BOGUE
Senior District Judge

APPENDIX G

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

Costs and fees

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

* * * * *

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

* * * * *

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

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

* * * * *

(2) For the purposes of this subsection—

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

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

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

* * * * *

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

* * * * *

2. 42 U.S.C. 406 provides in pertinent part:

Representation of claimants before Commissioner

* * * * *

(b) Fees for representation before court

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such

fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

* * * * *

3. 42 U.S.C. 1988 provides in pertinent part:

Proceedings in vindication of civil rights

* * * * *

(b) Attorney's fees

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

* * * * *