No. 08-1335

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

BRANDY WILSON

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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The court of appeals in this case held that attorney fees awarded under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), cannot be reduced to satisfy a debt owed by the prevailing party because, in the court's view, EAJA fees "are owned by * * * the attorneys who represented [that party]." Pet. App. 2a. The court explained that its decision in *Ratliff* v. *Astrue*, 540 F.3d 800 (8th Cir. 2008), petition for cert. pending, No. 08-1322 (filed Apr. 28, 2009), resolved "the same issue" as is presented in this case. Pet. App. 1a. The court concluded that, "[f]or the reasons stated in [the] opinion" in *Ratliff*, the EAJA award in this case should not have been reduced to satisfy respondent's debt. *Id.* at 2a. Because this petition raises the same issue as the

pending petition in *Ratliff*, it should be held pending the Court's disposition of the *Ratliff* petition.

Respondent does not appear to dispute that, if the petition in *Ratliff* is granted, the petition here should be held pending the Court's disposition of that case. See Br. in Opp. 1, 7 (Opp.). Respondent contends, however, that the Court should deny certiorari in *Ratliff*, and that there is no basis for granting review here if the petition in *Ratliff* is denied.

1. In arguing that the petition in *Ratliff* should be denied, respondent embraces (Opp. 9-10) Ratliff's argument that this Court's review should await further developments in the court of appeals. As explained in the government's reply brief in *Ratliff* (at 5-7), eight courts of appeals have addressed the relevant issues, and an entrenched circuit split has resulted. This Court's review is warranted in this context. Respondent likewise invokes (Opp. 11-19 & n.3) the arguments advanced in the *Ratliff* brief in opposition that the court of appeals' decision is correct. For the reasons stated in the government's reply brief in *Ratliff* (at 9-11), those arguments are without merit.

Unlike Ratliff, respondent attempts (Opp. 15 n.4) to reconcile the Eighth Circuit's rulings here and in *Ratliff* with this Court's decisions in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), and *Venegas* v. *Mitchell*, 495 U.S. 82 (1990). Respondent correctly observes (Opp. 15 n.4) that neither *Jeff D.* nor *Venegas* presented the question whether an attorney fee award could be offset to collect a pre-existing debt owed by the prevailing party. Those cases establish, however, that the entitlement to a fee award, at least under 42 U.S.C. 1988, belongs to the prevailing party rather than to her attorney. See Pet. at 11-12, *Ratliff*, *supra* (No. 08-1322). That holding casts serious

doubt on the Eighth Circuit's determination that "EAJA attorneys' fees are awarded to prevailing parties' attorneys," Pet. App. at 4a, *Ratliff*, *supra* (No. 08-1322)—a determination that was central to the court's ultimate conclusion that the fee awards in *Ratliff* and in this case were not subject to offset to collect the claimants' pre-existing debts.

Respondent argues (Opp. 15-17) that attorneys will refuse to represent Social Security disability claimants if EAJA award payments are subject to offset to collect the claimants' pre-existing, delinquent debts. That argument lacks merit. As an initial matter, it is not clear to what extent attorneys make representation decisions based on the potential for an EAJA recovery. See *Pierce* v. *Underwood*, 487 U.S. 552, 573-574 (1988) (explaining that "it is quite impossible to base [an economically viable law] practice upon the acceptance of non-monetary cases in which there is fair prospect that the Government's position will not be 'substantially justified'" because a "lawyer will rarely be able to assess with any degree of certainty the likelihood that the Government's position will be deemed so unreasonable as to produce an EAJA award"). But even assuming attorneys make representation decisions based on the prospect of collecting EAJA awards, there is no reason to think that the current majority rule will create a general deterrent to attorneys' representation of disability claimants—and no evidence to suggest it has in fact done so. Lawyers can readily determine whether potential clients owe debts subject to offset. Potential clients receive advance written notice of any debt subject to collection by offset, see 31 U.S.C. 3716(a)(1); 31 C.F.R. 285.1(h)(1), 285.5(d)(6)(ii)(A), and the Department of the Treasury will disclose such information to an attorney if

the potential client provides a signed Privacy Act waiver. And if the client owes a debt subject to offset, the client has the opportunity to seek administrative review of the debt obligation and to agree to a written repayment plan that will prevent an offset from occurring, thus protecting any EAJA recovery from reduction. See 31 U.S.C. 3716(a) (requiring notice of those opportunities); 31 C.F.R. 285.1(h), 285.5(d)(6)(ii)(A).

In any event, the statute is clear and presumably reflects Congress's best judgment about how to accommodate the interests at stake. Congress has directed that federal officials "shall offset" federal payments to collect specified delinquent debts, including "any amount" owed to the United States and past-due child-support obligations enforced by a State, unless those payments are specifically exempted pursuant to statutory authority. 31 U.S.C. 3701(b)(1) and (2), 3716(c)(1)(A); see, *e.g.*, 31 U.S.C. 3701(d), 3716(c)(1)(C) and (3)(B) (exemptions). Congress has not exempted EAJA award payments from offset. Accordingly, because EAJA fees and other expenses are "award[ed] to a prevailing party," 28 U.S.C. 2412(d)(1)(A), they are subject to offset to collect a pre-existing debt owed by that party. The court of appeals erred in holding otherwise.

2. Respondent contends (Opp. 1-2) that, if the Court denies the government's petition for a writ of certiorari in *Ratliff*, it should deny certiorari here as well. If the Court denies the petition in *Ratliff* because it concludes that the question presented is not of sufficient importance to warrant this Court's review, or that the Court's consideration of the relevant issues would benefit from further development of the law in the courts of appeals,

those reasons would apply equally to the petition in this case.

The respondent in *Ratliff* has also argued that several features distinct to that case make it an unsuitable vehicle for resolution of the question presented. See Br. in Opp. at 12-18, *Ratliff*, *supra* (No. 08-1322). For the reasons stated in the government's reply brief in *Ratliff* (at 2-5, 7-9), those arguments lack merit. Nevertheless, if the Court concludes that the question whether EAJA awards are subject to offset to collect prevailing parties' debts warrants review by this Court, but that *Ratliff* is not an appropriate case in which to resolve that issue, the Court should grant plenary review in this case.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending the Court's disposition of *Astrue* v. *Ratliff*, No. 08-1322 (filed Apr. 28, 2009), and then disposed of as appropriate. In the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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