No. 08-1322

IN THE

Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

CATHERINE G. RATLIFF,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an attorney fee awarded under the Equal Access to Justice Act in an *in forma pauperis* Social Security case is invariably and as a matter of law property of the plaintiff subject to offset based on the plaintiff's debts to the federal government, without regard to any property rights of the attorney in the fee.

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INTRODUCTION

This case was a dispute over whether respondent Catherine Ratliff, an attorney who successfully represented a Social Security claimant in an earlier *in forma pauperis* action seeking review of the Social Security Administration's wrongful denial of benefits, should be permitted to recover fees and expenses amounting to $2,239.35, which were awarded under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), for her work in the prior action. The Solicitor General has asked this Court to review the case to decide whether EAJA fees in Social Security cases are properly paid to attorneys or instead belong to their clients and are thus subject to offsets for unrelated debts owed by the clients to the government.

This case is an especially poor vehicle for resolving the question. At best, it is unclear whether this is still a live case. The Eighth Circuit held that Ms. Ratliff had Article III standing to bring a stand-alone action asserting constitutional claims for the recovery of EAJA fees that the government had offset on account of a debt owed by her client and that the offset violated the Fourth Amendment, and it remanded the case for further proceedings. After the court of appeals denied rehearing, the government did not seek a stay of the mandate or otherwise attempt to forestall further action in the district court, and the district court entered final judgment in Ms. Ratliff's favor on January 15, 2009. The government did not appeal that final judgment, and its time for appealing expired six weeks before it filed its petition for certiorari. Thus, the government now seeks review of an interlocutory ruling in a case that has been finally terminated. Absent an ongoing case in

which it could be applied, a decision on the question presented would be an advisory opinion.

Even leaving aside the unappealed final judgment, this case presents the issue in a very unusual posture. Other cases that have addressed the issue have done so in the same action in which the EAJA fees were awarded and have considered whether the judgment should require that fees be paid directly to the attorney to avoid the possibility of offset. This case is the only one in which the issue has arisen as a result of a separate action raising constitutional claims on behalf of the attorney, and the court of appeals' decision addresses the issue primarily as a threshold matter of the attorney's Article III standing. The unusual procedural setting, which presents a number of issues that are potentially different from those that have arisen in other cases on which the Solicitor General relies, together with the Eighth Circuit's focus on standing, make this unique case a poor choice for resolving the issue presented in the petition.

In any event, only a few months ago, the Solicitor General informed the Court that the developing split of authority over the EAJA offset issue was not yet important enough to warrant this Court's review until more circuits had established their position on the question. *See* Brief for the Respondent in Opposition, *Reeves v. Astrue*, No. 08-5605 (filed Nov. 5, 2008); *see also* Brief for the Respondent in Opposition, *Manning v. Astrue*, No. 07-1468 (filed Sept. 26, 2008). Consistent with this advice, this Court not only denied both petitions, but did so in *Reeves* even after being advised that the Eighth Circuit had denied the government's petition for rehearing in this case.

Manning v. Astrue, 129 S. Ct. 486 (2008); *Reeves v. Astrue*, 129 S.Ct. 724 (2008); *see* Pet. 15 n.5.

Review by this Court remains premature. Although other circuits continue to weigh in on the issue, many have not yet spoken, and appeals are pending in at least the Second, Sixth, and Ninth Circuits. The outcomes of those cases are likely to determine whether a significant conflict will develop over the issue, in which event review by this Court may be called for. If one or more of those circuits rules against the government's position, the government will have ample additional opportunities to seek review by this Court. If, on the other hand, the decision below is ultimately the only one that sustains an attorney's entitlement to receive EAJA fees in a Social Security case (an unlikely prospect given the merits of the issue), it is probable that the Circuit's own en banc review process will ultimately address the matter.

Finally, the decision below is correct. Contrary to the government's contention, the plain language of the statute does not address the dispositive issue, which is not who, formally, is the party entitled to move for an award of fees, but who is the real party in interest that should receive payment once the fees are awarded. The government's position fails to account for statutory language directly applicable to Social Security cases, which provides that in such cases EAJA fees are received by *attorneys*. Moreover, the government's argument ignores that in an *in forma pauperis* case such as this one, EAJA fees are not recompense for fees paid by the client, but are intended to and do provide attorneys with compensation that they will not otherwise receive. Indeed, in

many Social Security cases, attorneys are forbidden by law to collect any fee directly from their clients. The government's position threatens dire consequences for Social Security claimants, who have difficulty enough obtaining good legal representation for the very modest amounts of fees available under EAJA (or, where applicable, the Social Security Act's own 25% fee provision) and will find it even more difficult to obtain assistance if they owe even small amounts of money to the government for reasons having nothing to with their Social Security cases.

STATEMENT OF THE CASE

1. The Government's EAJA Offset Policy

This case has its origin in the federal government's very recent policy of attempting to recoup debts owed to it by offsetting them against attorney fee awards under EAJA, under the purported authority of the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, Tit. III, ch. 10, § 31001, 110 Stat. 1321-358, and the government's claimed "common law" right to offset. *See* Pet. 4 & n.1. Although the Debt Collection Improvement Act was enacted in 1996 and the asserted common-law right has presumably existed at all times (assuming it exists at all), the government did not begin implementing its policy of attempting to invoke offsets against EAJA fee awards until 2005, a quarter century after EAJA's enactment. *See* Pet. 4. At that time, apparently as a result of improved systems for matching the identities of payees and debtors, the government changed its longstanding policy of making checks for EAJA awards payable to the attorneys for whose work fees had been awarded. It began instead to treat clients who owe the government money as the

payees, enabling it to offset the EAJA payments to collect its asserted debts.

2. The *Kills Ree* Case and the EAJA Award

The events giving rise to this particular controversy over the application of the government's new policy began in December 2004, when Catherine Ratliff, a Hot Springs, South Dakota attorney and the respondent here, filed a Social Security benefits case in the United States District Court for the District of South Dakota on behalf of her client, Ruby Willow Kills Ree. Ms. Kills Ree, a Lakota Indian living on the Pine Ridge Reservation, had made repeated unsuccessful efforts to obtain Supplemental Security Income (SSI) benefits on account of multiple disabilities.[1] In 2003, after a remand in an earlier court proceeding, an administrative law judge ruled that Ms. Kills Ree was eligible for benefits because she suffered from disabilities including diabetes, arthritis, reactive airway disease, adjustment disorder with depressed mood, and borderline intellectual functioning. Nonetheless, the ALJ unaccountably failed to order that she be awarded benefits for the full period beginning on the date she filed the application for benefits that was ultimately granted. The Social Security Administration's Appeals Council declined to hear her appeal on this and other issues, and she was forced to obtain Ms. Ratliff's assistance to file

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[1] The SSI program, created by Title XVI of the Social Security Act, 42 U.S.C. subchapter XVI, is "designed to help aged, blind, and disabled people, who have little or no income" by "provid[ing] cash to meet basic needs for food, clothing, and shelter." Social Security Administration, Supplemental Security Income Home Page, http://www.ssa.gov/ssi/index.htm.

suit in federal court to seek the full benefits to which she was entitled.

Before her complaint was served, Ms. Kills Ree applied for and was granted *in forma pauperis* status under 28 U.S.C. § 1915, which required the district court to determine, based upon an affidavit listing all of Ms. Kills Ree's assets, that she was financially unable to pay filing fees and other costs of maintaining the suit. *See id.* § 1915(a)(1). Once the complaint was served, the government did not defend the ALJ's refusal to award all benefits due her from the date of her application. In September 2005, the district court remanded Ms. Kills Ree's benefits claim to the agency. In January 2006, the court granted an unopposed motion for attorney fees under EAJA in the amount of $2,112.60 for Ms. Ratliff's work, as well as expenses in the amount of $126.75 (reflecting the amount of South Dakota sales tax required to be paid on the fee award).

Rather than paying the fees, the Treasury Department sent Ms. Kills Ree a notice stating that it had "applied all or part of your Federal payment to a debt you owe." The notice went on to recite that the amount of the payment before reduction to offset the debt was $2,239.35 and that the amount of the reduction was $2,239.35, leaving nothing to pay Ms. Ratliff for the services she had rendered. Because her client was, as the district court had determined, indigent, the effect of the government's offset was to deprive Ms. Ratliff of any possibility of payment for her successful work on behalf of Ms. Kills Ree.

3. Ms. Ratliff's Lawsuit

In September 2006, Ms. Ratliff filed this action seeking to recover the attorney fees and expenses

awarded in the *Kills Ree* case.[2] Ms. Ratliff's complaint named only the then-Commissioner of Social Security, Jo Anne Barnhart, as defendant, and it alleged jurisdiction under 28 U.S.C. § 1331. The complaint also invoked the Administrative Procedure Act, and it claimed that the offset of the EAJA awards unconstitutionally deprived Ms. Ratliff of property without due process of law and was an unreasonable seizure of property in violation of the Fourth Amendment; more generally, it averred that "[d]efendant is not entitled to seize plaintiff's EAJA fees to satisfy debts that plaintiff's clients allegedly owe defendant." Pet. App. 19a. Based on these claims, the complaint sought monetary relief (referred to in the complaint as disgorgement) in the amount of the EAJA fees offset by the government.

The government seemingly treated the claim as one against the Social Security Administration. Foregoing defenses that it would usually be expected to invoke against such claims (such as challenges to jurisdiction, the existence of rights of action in these circumstances under the constitutional provisions cited, sovereign immunity, etc.), the government filed a motion for summary judgment addressing the merits of the question whether EAJA fee awards are the

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[2] Ms. Ratliff's suit also sought to recover $866.02 that the government had deducted from a $6,160.37 award of fees and costs in another Social Security case she had brought on behalf of Michael Randall. The petition for certiorari, however, represents that the government now agrees that the fee award in the *Randall* case was not properly subject to offset for reasons unrelated to the issue in this case, and the government thus no longer contests Ms. Ratliff's entitlement to receive this amount. *See* Pet. 5 n.2.

property of and payable to the prevailing party or her attorney. The government argued that such fees belong exclusively to the party and thus are subject to offset for debts the party owes to the federal government. The government further argued that Ms. Ratliff did not even have Article III standing to assert her claims because the EAJA fees were not her property and therefore she had suffered no "injury in fact" when the government took an action that deprived her of any possibility of payment for her work.

Ms. Ratliff cross-moved for summary judgment. In opposing her motion, the government restated its merits and standing arguments and offered one further defense: It invoked 31 U.S.C. § 3716(c)(2), which provides that in cases of administrative offset, "[n]either the disbursing official nor the payment certifying agency shall be liable—(A) for the amount of the administrative offset on the basis that the underlying obligation, represented by the payment before the administrative offset was taken, was not satisfied ...." Because the Social Security Administration was the "payment certifying agency," the government argued, this provision shielded the defendant (the head of that agency) from any liability for failure to satisfy the obligation against which the offset was taken.

4. The District Court's Decision

On May 10, 2007, the district court issued its decision dismissing Ms. Ratliff's lawsuit for lack of standing. According to the court, the "plain meaning" of EAJA was that the client, rather than the attorney was the "prevailing party" and thus "the EAJA fee was awarded to Ratliff's clients and not to her directly." Pet. App. 12a-13a. Ignoring that it had previ-

ously found in granting *in forma pauperis* status that Ms. Kills Ree could not even afford to pay the fee to file her complaint and thus obviously lacked resources to pay her attorney, the district court held: "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." Pet. App. 13a.

5. The Eighth Circuit's Decision

Ms. Ratliff appealed, and, on September 5, 2008, the Eighth Circuit reversed. In a short opinion, the panel concluded that "controlling Eighth Circuit precedent" (Pet. App. 2a)—principally *Curtis v. City of Des Moines*, 995 F.2d 125 (8th Cir. 1993)—compelled the conclusion that EAJA fee awards become the property of the prevailing parties' attorneys once they are assessed. Based on this conclusion, the court found "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." The court had no occasion to discuss the government's purported defense under 31 U.S.C. § 3716(c)(2), which the district court had not addressed in view of its disposition of the case.

The government sought rehearing en banc, urging the same conflict among the circuits that it relies on in its petition for certiorari, and noting that two of the judges on the panel had expressed doubts about, and the third outright disagreement with, the Eighth Circuit precedent that all three agreed compelled the result. On December 5, 2008, the court denied rehearing en banc.

6. The *Manning* and *Reeves* Petitions

Meanwhile, petitions for certiorari had been filed seeking review of two other recent appellate decisions considering whether EAJA fees in Social Security cases are subject to offset based on debts owed to the government by the prevailing Social Security claimants: *Manning v. Astrue*, 510 F.3d 1246 (10th Cir. 2007), and *Reeves v. Astrue*, 526 F.3d 732 (11th Cir. 2008), both of which rejected arguments that district courts should order payment of EAJA fees directly to attorneys to avoid offsets. In the briefs in opposition in both *Manning* (No. 07-1468) and *Reeves* (No. 08-5605), the Solicitor General argued that the decisions conflicted with the Eighth Circuit's decision in this case but that review by this Court was "premature" because the conflicts alleged by the petitioners were "exaggerated" and a "consensus" might yet develop among the courts of appeals, particularly if the Eighth Circuit were to grant rehearing en banc in this case. Brief for the Respondent in Opposition, *Manning*, at 6, 11, 15; Brief for the Respondent in Opposition, *Reeves*, 8, 15, 19.

This Court denied certiorari in *Manning* on November 3, 2008. 129 S. Ct. 486. On December 5, 2008, the Solicitor General advised this Court in the *Reeves* case that the Eighth Circuit had denied the government's rehearing petition in this case. The Court nonetheless denied certiorari in *Reeves* on December 8, 2008. 129 S. Ct. 724.

7. The Unappealed Final Judgment

The Eighth Circuit issued its mandate in due course on December 12, 2008, one week after its denial of rehearing. The government did not seek to stay the mandate or otherwise defer proceedings in

the district court pending further review. And although the Eighth Circuit had held only that Ms. Ratliff had standing and that a Fourth Amendment violation had occurred, the government made no further attempt to invoke the Social Security Administration's previously asserted defense to liability under 31 U.S.C. § 3716(c)(2). Nor did the government assert any other potential defenses to the monetary remedy Ms. Ratliff sought.

Accordingly, on January 15, 2009, without objection by the government, the district court entered judgment in Ms. Ratliff's favor in the amount of $3,105.57.[3] That judgment, which is reproduced in the appendix to this brief, was in all respects final and was set forth in a separate document as required by Federal Rule of Civil Procedure 58. The government filed no post-judgment motions under Federal Rules of Civil Procedure 59 or 60, nor did it appeal. The time for appeal from the district court's final judgment expired on March 16, 2009.

After two extensions of time, the government filed its petition for certiorari seeking review of the Eighth Circuit's decision on April 28, 2009—42 days after the expiration of its time to appeal the judgment that finally terminated this case.

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[3] The amount of the judgment includes Ms. Ratliff's requested recovery of the *Kills Ree* EAJA award ($2,239.35) and the withheld portion of the *Randall* EAJA award ($866.02), which the government no longer contests.

REASONS FOR DENYING THE WRIT

I. This Case Is Not a Suitable One in Which to Resolve the Question Presented.

A. The Case Has Ended in an Unappealed Final Judgment.

Under ordinary circumstances, an appealable final judgment moots an interlocutory appeal because the issues in the interlocutory appeal merge in the final judgment. *See, e.g.*, *Harper v. Poway Unified School Dist.*, 549 U.S. 1262 (2007). The Eighth Circuit's decision here was interlocutory, not final: It held that Ms. Ratliff had standing to sue because she had a property interest in the EAJA fee and that, as a matter of law, the government's seizure of the fee violated the Fourth Amendment, and it remanded for further proceedings. It neither explicitly addressed nor implicitly foreclosed the defense that the government had asserted under 31 U.S.C. § 3716(c)(2), nor did it foreclose other defenses that the government might have chosen to raise. And it did not direct the district court to award Ms. Ratliff a sum certain. Nonetheless, the government on remand did not object to the entry of a final judgment against it, and it did not appeal that judgment.

The government's petition for certiorari thus comes before the Court in an unusual posture: It is an attempt to obtain review of an interlocutory ruling in a case that has terminated in an unappealed final judgment. The district court's final judgment marked the end of the case. *See Catlin v. United States*, 324 U.S. 229, 233 (1945) (final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). Ordi-

narily, interlocutory appellate rulings merge into a final judgment and are reviewable by this Court after appeal from the final judgment (even though the court of appeals in such cases may be bound by its prior rulings under the doctrine of law of the case). *See, e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-59 (1916); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365-66 n.1 (1973). Absent special circumstances, an interlocutory ruling that is issued as a way station to an *unappealed* final judgment no longer presents a live issue, as the case at that point is over. *Cf. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 315 (1999) ("Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter.")[4]; *Harper*, 549 U.S. at 1262 (holding interlocutory appeal was "moot" following entry of final judgment against the appellant).

Here, the government made no effort to prevent the case from becoming final on remand to the district court. It neither sought to stay the Eighth Circuit's mandate nor to forestall further action by the district court; it simply abandoned any and all remaining defenses and let the case end in Ms. Ratliff's favor. There is no remaining case between the par-

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[4] In *Grupo Mexicano*, the Court found that the interlocutory appeal was not mooted by the unappealed final judgment, because the appeal still had consequences for the parties that were independent of the district court's ultimate disposition of the case on the merits—namely, possible recovery on the preliminary injunction bond. *See* 527 U.S. at 313-18. No such ongoing collateral consequences are present here.

ties in which this Court may review the Eighth Circuit's interlocutory ruling.

Of course, where a court of appeals issues a *final* ruling in a case and its mandate issues, resulting in a ministerial entry of judgment in the district court, this Court has the power to review the final decision of the court of appeals without a new appeal from the final judgment. In such a case, neither the court of appeals' issuance of its mandate nor the subsequent action of the district court defeats this Court's jurisdiction. *See Carr v. Zaja*, 283 U.S. 52 (1931).

But where the court of appeals' decision is, as in this case, not final and leaves open the possibility of further proceedings in which either party might prevail, the matter is quite different. To begin with, it is the general policy of this Court not to exercise its certiorari jurisdiction in such cases, but to await a final disposition in the district court and an ensuing appeal, in part because of the possibility that the case might be resolved below on other grounds that would avoid the claimed need for this Court's intervention. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari). To permit a litigant that has bypassed the possibility of prevailing on an alternative ground on remand, and has not even appealed the resulting adverse judgment against it, to obtain certiorari review of the interlocutory appellate decision would, at a minimum, undermine that policy. Moreover, because of the doctrine that interlocutory rulings merge in a final judgment, the unappealed final judgment, by definitively terminating the litigation between the parties, would appear to deprive

this Court of jurisdiction because there is no longer any live case or controversy between the parties.[5]

Regardless of whether the government's failure to appeal the final judgment on remand is a jurisdictional bar to the Court's consideration of the petition, this highly unusual circumstance is, at least, a powerful reason for this Court not to exercise its certiorari jurisdiction and reward a party that has both abandoned alternative lines of defense and failed to challenge in any way the district court's ultimate entry of final judgment against it.

B. The Case's Unique Procedural Characteristics Make It a Poor Choice for Review.

Among opinions of the lower federal courts addressing the question of an attorney's entitlement to receive an EAJA award in a Social Security case, the decision below is the only one to be issued in an independent action for damages against the government brought by the attorney. In other cases, both past and pending, the issue has been litigated in the underlying case in which fees were awarded and has generally arisen from a motion that the check for the fees be made payable to the attorney rather than the

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[5] It is unclear what action the Eighth Circuit could take if, at this point, this Court were to remand to that Court for further proceedings consistent with this Court's opinion, because the case in the Eighth Circuit was an appeal from an order in a case that no longer exists. No relief would appear to be available to the government at this point, as a final remedy—payment of the fee by the government to Ms. Ratliff—has already been awarded and is no longer subject to review. *See* App 1a.

client. Even leaving aside the matter of the unappealed final judgment against the government, this significant procedural difference provides a strong reason why this case would not be the right one in which to address the issue even should the Court be inclined to do so.

In particular, none of the other decisions cited by the government decides whether an attorney may bring a separate action against the government to recover fees that were awarded for her efforts but that the government has offset to repay a debt owed it by the client. Indeed, one of the government's favored decisions, the Tenth Circuit's opinion in *Manning v. Astrue*, acknowledges the argument that an attorney may have a property interest (in the nature of a lien) in an EAJA fee, and expressly declines to decide whether any such property interest exists or takes priority over the government's offset right, or how the attorney may assert such an interest. *See* 510 F.3d at 1249. Thus, *Manning* explicitly leaves open the possibility that an attorney might bring an action, such as this one, to assert her own property rights. *Reeves*, the other appellate decision on which the government principally relies, does not mention the possibility of an action by the attorney at all, nor does the Fourth Circuit's recent decision in *Stephens v. Astrue*, 565 F.3d 131 (4th Cir. 2009).[6]

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[6] The other court of appeals opinion principally relied on by the government, *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506 (11th Cir. 1988), did not involve fees in a Social Security case. As the government itself has acknowledged (and as explained further below), "[f]ee relationships in Social-Security-benefit cases are different than in other EAJA contexts because

(*Footnote continued*)

Moreover, an action such as this one raises a host of issues not present where the question whether an EAJA fee is payable in the first instance to the attorney or the client is raised in the action in which the fee has been awarded. Those questions, none of which was explored in the courts below (principally because of the government's failure to raise them), include the jurisdictional basis of the suit;[7] the existence and nature of the cause of action; the proper defendant (*i.e.*, the United States, the agency to whom the client's debt was owed, or, as here, the official or agency that was the defendant in the action where the EAJA fee was awarded); and the possibility of sovereign or official immunity (depending on who was the proper defendant). Also potentially implicated in a lawsuit of this kind is 31 U.S.C. § 3716(c)(2), which appears to provide a defense to liability in certain circumstances to the "disbursing official" and the "payment certifying agency." Although the government at one point raised that defense, its scope and possible application were never decided by the lower courts because of the govern-

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of statutory provisions prohibiting attorneys from collecting or demanding from their clients anything more than the authorized allocation of past-due benefits awarded by a court." *Manning* Br. in Opp. 9, n.2. Moreover, *Panola* involved the distinct question whether an attorney can intervene in an action to apply for a fee waived by the client, not whether the attorney has an interest in the fee once awarded.

[7] The principal jurisdictional question would be whether the district court had jurisdiction under 28 U.S.C. § 1331, the basis claimed in the complaint, or whether Tucker Act jurisdiction would have to be invoked, and whether its requisites were satisfied, which would in turn depend on the nature of the right of action, if any. *See* 28 U.S.C. § 1346.

ment's failure to press the issue on remand. Finally, the Eighth Circuit's focus on standing and its reliance on the Fourth Amendment differentiate this case from others in which the EAJA offset issue has arisen and present other complicating factors not present in those cases.

In short, this case is unique among those posing the EAJA offset question. Even if the Court were inclined to address that issue, a more representative case would provide a better setting in which to resolve it.

II. Review of the Issue Is Best Deferred Pending Further Development of the Law in the Courts of Appeals.

This Court has only recently taken the Solicitor General's advice to *decline* review of the question presented as premature despite the exact conflict discussed in the government's petition in this case. In both *Reeves* and *Manning*, the government specifically informed the court of the Eighth Circuit's decision in this case but argued that the conflict between those decisions and this one did not then merit review. Similarly, the government advised in *Reeves* and *Manning* that the Fifth Circuit's decision on a similar issue in *Marré v. United States*, 117 F.3d 297 (5th Cir. 1997), which its current petition for certiorari describes as conflicting in principle with the decision below, was not in such direct conflict as to justify a grant of certiorari. This Court denied certiorari in both cases, and in *Reeves* it did so even *after* being advised by the government of the Eighth Circuit's denial of rehearing en banc in this case.

The only change in the landscape of appellate decisions since the Court's denial of certiorari in *Reeves* (and, indeed, since the filing of the petition for certiorari in this case) has been the Fourth Circuit's decision in *Stephens v. Astrue*, 565 F.3d 131, which adopts the government's view of the issue. Meanwhile, however, appeals raising the question are pending in at least three other circuits—the Second, Sixth, and Ninth.[8] Two of those cases (in the Second and Ninth Circuits) are appeals by the government from strong district court opinions in favor of the right of attorneys to receive EAJA fee awards in Social Security cases, and one (in the Sixth Circuit) is in a court that previously ruled in favor of an attorney on the issue in an unpublished opinion.[9]

The Court would benefit from the views of those courts before deciding whether it needs to address this issue. Strong opinions from those courts sustaining an attorney's right to receive EAJA fees in Social Security cases free from the government's offsets to recover debts owed by the clients could yet lead to an appellate consensus in favor of that view and would at a minimum provide the Court the benefit of a more thoughtful discussion of the issue (in contrast to the Eighth Circuit's mere reliance on prior circuit precedents) should it choose to review the question.

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[8] *Thompson v. Astrue*, 2009 WL 537512 (W.D.N.Y. Mar. 3, 2009), *notice of appeal filed* (Apr. 21, 2009); *Bryant v. Astrue*, 2008 WL 4186892 (E.D. Ky. Sept. 10, 2008), *appeal pending*, No. 08-6375 (6th Cir.); *McMahon v. Astrue*, 2008 WL 4183018 (D. Ariz. Sept. 8, 2008), *appeal pending*, No. 09-15873 (9th Cir.).

[9] *See King v. Commissioner of Soc. Sec.*, 230 Fed. Appx. 476, 481 (6th Cir. 2007).

Moreover, the Court would have a further opportunity to consider the issue should one of the circuits in which appeals are pending decide for the attorney, because the government could petition for certiorari from any such ruling.

In the less likely event that all the pending appeals are resolved in favor of the government, the Eighth Circuit would be left in isolation and, particularly given the doubts expressed by a number of its judges about the issue, might well resolve the conflict itself through the en banc process. Alternatively, if the court stuck to its guns, the government would have other opportunities to seek review by this Court given the government's recent national policy decision to collect debt by offsetting EAJA awards.

Nor would allowing the issue to develop further in the courts of appeals have significant adverse consequences for the government. The government already advised the Court, in its briefs in opposition in *Reeves* and *Manning* that its (self-imposed) inability to offset EAJA fees in the Fifth Circuit in light of the *Marré* decision was not so serious a problem for the government as to justify review of the question. *See Manning* Brief in Opp. 14-15. The government's inability to offset EAJA awards in Social Security cases in the much less populous Eighth Circuit should pose even less of a concern, particularly given that the government will have ample opportunities to seek review by this Court should disagreement among the circuits grow.[10]

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[10] The government does not argue that its ability to offset the small fee awards typical in Social Security EAJA cases to recover debts owed by usually impecunious Social Security

(*Footnote continued*)

III. The Decision Below Is Correct.

Finally, the Eighth Circuit was correct in holding that attorneys are entitled to receive EAJA awards in Social Security cases notwithstanding the government's purported offset rights to collect debts owed by the clients. The government's contrary argument is based on a misreading of the statutory language and would turn the purpose of fee awards in such cases on its head.[11]

To begin with, the government's facile contention that the plain language of EAJA resolves the issue is wrong. The government relies on 28 U.S.C. § 2412(d)(2)(A), which provides for the "award" of attorneys' fees "to a prevailing party." But although there is universal agreement that under the statute, only a "party" may seek an award of fees by submitting a fee application to the court (*see id.* § 2412(d)(2)), the statutory language does not specifically address whose *property* the fees become once awarded, or to whom the fees thus awarded *are payable*. As the district court observed in *Thompson v. Astrue* (the case currently on appeal to the Second Circuit), there is an "absence of explicit language in the EAJA directing the method by which the Commissioner should pay attorney fees to [the prevailing

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claimants is particularly significant as a fiscal matter. The only "practical" concern it identifies to justify a grant of certiorari is its desire to avoid what it calls "satellite litigation" over the proper payee. Pet. 16.

[11] The arguments opposing the government's position on the merits are more fully set forth in the district court opinions in *Thompson v. Astrue*, 2009 WL 537512, and *Quade v. Barnhart*, 570 F. Supp. 2d 1164 (D. Ariz. 2008).

party]." 2009 WL 537512, at *5; *see also King v. Commissioner*, 230 Fed.Appx. at 481-82 (noting that EAJA's language prevents an attorney from *applying* for fees, but that fees nonetheless are *payable* to the attorney).

The Eighth Circuit's recognition that an attorney has a protectible property interest in an EAJA fee once it is awarded finds strong support in the long-established rule that an attorney's interest in a fee for her efforts creates a lien allowing equitable tracing of funds that have been transferred to other creditors of the client. *See Barnes v. Alexander*, 232 U.S. 117, 121-23 (1914).[12] That *Barnes* remains sound law is confirmed by this Court's extensive reliance on it in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). Regardless of who has the right to apply for an attorney fee under EAJA, or even to receive it in the first instance, the attorney's equitable lien is itself a property interest subject to constitutional protection against government confiscation. *Cf. Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) ("a mortgagee clearly has a legally protected property interest" subject to due process protections).

Moreover, where Social Security cases are concerned, EAJA must be read in light of other statutory language both in the Social Security Act and in the uncodified 1985 reauthorization and amendment of EAJA itself, which is the basis for the award of

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[12] *See also Gisbrecht v. Barnhart*, 535 U.S. 789, 798 n.6 (2002) (recognizing that attorneys are "real parties in interest" in dispute over entitlement to fee award); *Hopkins v. Cohen*, 390 U.S. 530, 531 n.2 (1968) (same).

EAJA fees in some Social Security cases. Section 206(b) of the Social Security Act provides that it is a crime for an attorney in certain Social Security cases to "charg[e], deman[d], receiv[e], or collec[t]" any fee for services in court other than a court-awarded fee, payable directly to the attorney from an award of benefits and not exceeding 25% of the benefits awarded. 42 U.S.C. § 406(b)(1).[13] The 1985 EAJA amendments, however, also expressly authorize an award of EAJA fees in such cases: "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." Pub. L. No. 99-80, § 3, 99 Stat. 183 (1985) (28 U.S.C. § 2412 note). The permission for EAJA awards in Social Security cases, however, is subject to the qualification that "where *the claimant's attorney receives fees* for the same work under both section 206(b) of [the Social Security] Act and [EAJA], *the claimant's attorney [must] refun[d]* to the claimant the amount of the smaller fee." *Id.* (emphasis added)

The statutory language saying that EAJA fees in Social Security Act cases, like fees under 206(b), are "receive[d]" by the attorney, and the provision for "refunds" to claimants in cases where both an EAJA and a § 206(b) fee are awarded, are most naturally read as indications that EAJA fees are payable to attorneys in Social Security cases, and that the only right the client has to receive them is as a refund

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[13] This provision is applicable to cases involving claims for Social Security benefits "under this subchapter," 42 U.S.C. § 406(b)(1)(A), which encompasses old age, survivors, and disability insurance benefits (but not SSI benefits).

from the attorney in the event that they are smaller than a fee awarded under § 206(b), where that section applies. Indeed, the government concedes that § 206(b) fees are payable directly to attorneys and not subject to offset, *see* Pet. 10, so it is highly significant that the 1985 EAJA amendments refer to EAJA fees and § 206(b) fees alike as being "receive[d]" by attorneys. As the district court concluded in *Thompson*, the statutory language reflects Congress's "implicit understanding that compensation to plaintiffs for EAJA legal costs would be directed to plaintiffs' attorneys," because the "amendment's direction to refund EAJA attorney fees would make no sense if the attorneys involved had not received EAJA payments from the government and had nothing to refund." 2009 WL 537512, at *4.[14]

More broadly, the model of EAJA that underlies the government's merits arguments is incompatible with the reality of fee relationships in Social Security Act cases. The government posits that EAJA is designed to compensate parties for amounts they have paid or otherwise owe their attorneys. *See* Pet. 8-11. That view may be accurate with respect to some other types of EAJA cases, but not to Social Security Act cases.

In a Social Security case such as this one, involving SSI benefits, the claimant by definition has "little

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[14] Even if this reading of the statute is not conclusive, it at least indicates that EAJA cannot be read as an unambiguous direction that EAJA fees be payable directly to Social Security claimants. Thus, resolving the issue requires consideration of the statute's context, purposes and history. *See Quade v. Barnhart*, 570 F. Supp. 2d at 1171.

or no income," http://www.ssa.gov/ssi/index.htm, and requires cash assistance to meet her basic needs for food, clothing, and shelter. Such a claimant obviously cannot and does not pay attorneys' fees as her case proceeds. That fact is even more apparent when the claimant, like Ms. Kills Ree, has been granted *in forma pauperis* status, reflecting a judicial determination that she cannot even afford the filing fee for her action. As this Court long ago recognized, "if a person is too poor to pay the costs of a suit, sometimes very small in amount, how can it be imagined that he could possibly pay a fair [attorney] fee except from the recovery he obtains?" *Adkins v. E. I. du Pont de Nemours & Co.*, 335 U.S. 331, 343 (1948).

Moreover, as noted earlier, in Social Security cases that are subject to § 206(b) of the Social Security Act the client could *never* have any obligation independent of an EAJA award to pay the attorney any fees directly, and it would be a crime for the attorney even to attempt to impose such an obligation. 42 U.S.C. § 406(b)(1).

Thus, the government's assertion that "a party may pay some or all of her attorney's bills during the course of litigation," Pet. 10, is inapplicable to Social Security Act cases for two reasons: SSI claimants are by definition indigent and unable to pay fees, and in old age, survivor's and disability insurance benefit cases that are subject to § 206(b), such payments are expressly forbidden by statute on pain of criminal penalties for the attorney. An EAJA award in such cases is thus necessarily an award of fees that the client has not already paid to the attorney. Put differently, an EAJA award is not compensation to the client for a debt owed or previously paid, but rather

payment for an attorney who, in a Social Security case, has not received and will not otherwise receive a fee from the client.

Given that practical and legal framework, a holding that the client in a Social Security Act case has some personal entitlement to an EAJA fee (outside of the circumstance where she is statutorily entitled to a refund of the fee because the attorney has received a larger fee under § 206(b) of the Social Security Act), or that such a fee may be drawn on to repay the client's personal debts, would result in an "unintended windfall" both to the client and to the client's creditors (here, the government). *Quade*, 570 F. Supp. 2d at 1174. It would also run directly counter to the evident purpose of the legislation allowing EAJA fees in Social Security Act cases, which was not to compensate clients for amounts they already paid their attorneys, but to provide an incentive for attorneys to represent Social Security Act claimants by allowing them to receive fees that they otherwise would not collect from their clients.

Moreover, although payment of the EAJA fee to the client might provide a "windfall" benefit to a needy client in any one case, overall, *potential* clients will suffer severely if EAJA fees are subject to offset—and in precisely the way that EAJA was intended to avoid. As this Court has recognized, EAJA's "specific purpose" is to help people who are not wealthy overcome financial barriers that prevent them from "challeng[ing] unreasonable governmental actions." *Commissioner, INS v. Jean*, 496 U.S. 154, 163 (1990). Providing EAJA fees to attorneys who, without other means of payment, have taken on liti-

gation on behalf of indigent Social Security claimants directly advances this manifest statutory purpose:

> [A]llowing fee awards to pro bono counsel under the EAJA "serves to insure that legal services groups, and other pro bono counsel, have a strong incentive to represent indigent social security claimants." *Ceglia v. Schweiker*, 566 F. Supp. 118, 123 (E.D.N.Y. 1983). If attorneys' fees to pro bono organizations are not allowed in litigation against the federal government, it would more than likely discourage involvement by these organizations in such cases, effectively reducing access to the judiciary for indigent individuals. Such a result surely does not further the goals of the EAJA.

Cornella v. Schweiker, 728 F.2d 978, 986-87 (8th Cir. 1984).

This Court held many years ago that construing the *in forma pauperis* statute to require attorneys to bear the relatively modest burden of paying court costs on behalf of indigent clients out of statutory fee awards would frustrate the statute's purpose by "restricting the opportunities of the poor litigant in getting a lawyer." *Adkins*, 335 U.S. at 343. Construing EAJA to make lawyers, in effect, pay their clients' debts to the federal government out of the lawyers' modest compensation would have a still more devastating effect on the ability of Social Security claimants who owe even small sums to the government to obtain counsel. EAJA fees themselves, which are subject to a below-market statutory rate cap, *see Richlin Sec. Serv. v. Chertoff*, 128 S. Ct. 2007 (2008), are already often insufficient to attract competent attorneys to represent Social Security claimants in

federal court actions. As the district court explained in *Quade*, subjecting fees to offset would only make matters worse:

> [T]he likelihood of a chilling effect ... 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. Moreover, as here, the fee award is usually quite modest as compared to an award under 42 U.S.C. § 1988, which is usually in the tens or hundreds of thousands of dollars. The potential for an entire fee award to be offset in the Social Security context is great given both the modest means of many claimants and the relatively small fee awards in the typical cases.

570 F. Supp. 2d at 1173.

This case provides a telling illustration of the *Quade* court's point. The claimant, Ms. Kills Ree, is impoverished and has multiple disabilities. The Social Security Administration mistakenly determined the commencement date of her benefits in a decision that the government ultimately could not defend in court. Because the agency had denied her administrative appeal, however, she had no way of obtaining the wrongfully withheld benefits other than filing suit with the assistance of Ms. Ratliff, who agreed to

represent her. Ms. Ratliff had to file an action in federal court and engage in motions practice to obtain the remand to which her client was entitled. Because her client was indigent and could not afford to pay her, Ms. Ratliff's sole source of compensation for her efforts on Ms. Kills Ree's behalf was EAJA. For those efforts, the court awarded the very modest sum of $2,112.60 (plus the small amount for sales tax payable to the state), the reasonableness of which the government did not contest.

The government's offset, however, left Ms. Ratliff with *no* compensation for her successful work in Ms. Kills Ree's case. It takes little imagination to conclude that few attorneys will consider it worth their while to assist Social Security claimants if they stand to receive no compensation at all, even in those cases where they not only succeed, but where the government's position was not even substantially justified.

As the many Social Security cases in which EAJA fee awards are issued demonstrate, the result of impeding claimants' access to counsel would be to leave standing a great many decisions in which benefits were wrongly denied to needy claimants, very often without substantial justification. The importance of EAJA in fostering judicial review of unjustifiable Social Security benefits denials is illustrated by the statistics cited by this Court in *Commissioner v. Jean*, demonstrating that "[n]inety percent of EAJA fee awards are made in cases involving the Department of Health and Human Services." 496 U.S. at 164 n.12. This Court should decline the government's invitation to take this case for the purpose of depriving practitioners such as Ms. Ratliff of the very modest

fees (averaging less than $3000 per case at the time of the *Jean* decision, *id.*) that they earn for assisting Social Security claimants with meritorious cases and erecting new barriers between such claimants and the legal assistance they so desperately need.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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