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No. OFFICE OF THE CLERK

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*

PETITION FOR A WRIT OF CERTIORARI

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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 child-support debt owed by the prevailing party.

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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 orders of the court of appeals (App., *infra*, 1a-2a, 3a-4a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2008. A petition for rehearing was denied on December 15, 2008 (App., *infra*, 5a). 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).

b. The Department of the Treasury, through the Financial Management Service (FMS), operates a cen-

tralized 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).^{*} In January 2005, FMS extended its offset program to so-called "miscellaneous" payments, which include government payments for EAJA awards.

2. Respondent sought judicial review of the denial of her application for Social Security benefits. After losing in the district court, respondent prevailed on appeal. *Wilson v. Astrue*, 493 F.3d 965 (8th Cir. 2007). The court of appeals directed that her case be remanded to the Commissioner for further proceedings. *Id.* at 968. Respondent subsequently filed a motion in the court of appeals under EAJA for an award of \$4599 in appellate

^{*} 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).

attorney fees and other expenses. On October 1, 2007, the court of appeals granted her unopposed motion and directed that the EAJA fee award be included as part of the court's mandate. See App., *infra*, 3a-4a.

The Commissioner requested Treasury to pay the EAJA award to respondent, and FMS thereupon matched respondent to a certified delinquent child-support debt. Cf. Resp. Mot. to Enforce Mandate, Exh. 1 (filed Nov. 15, 2007). On October 29, 2007, FMS mailed respondent 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.* The notice from FMS further explained that respondent's \$4599 EAJA award had been offset in its entirety to satisfy that pre-existing debt. *Ibid.*; see 31 U.S.C. 3701(b)(2), 3716(c); 31 C.F.R. 285.1.

3. Respondent subsequently requested that the court of appeals enforce its mandate by directing the Commissioner to pay the EAJA award directly to respondent's counsel. The motion argued that fee awards under EAJA are payable to counsel for the prevailing party, rather than to the prevailing party herself. Because respondent's motion presented the same question as in *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008), petition for cert. pending, No. 08-1322 (filed Apr. 28, 2009), the court consolidated the cases for oral argument. See App., *infra*, 1a.

On September 5, 2009, the court of appeals held in *Ratliff* 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." 540 F.3d at 802. Ten days later, the court of appeals issued an un-

published order granting respondent's motion to enforce the mandate. App., *infra*, 1a-2a. The order explained that the court had "issued its decision in the companion case" of *Ratliff v. Astrue*, and, "[f]or the reasons stated in that opinion, th[e] court has determined [that] the [EAJA] fees are property of the attorneys and should not be offset against debts owed by the successful claimant." *Id.* at 2a. The order further directed that the EAJA award "should be paid directly to [respondent's counsel]." *Ibid.*

On December 5, 2009, the court of appeals denied rehearing en banc in *Ratliff* with five of the court's 11 active judges voting in favor of en banc review. Ten days later, the court of appeals denied rehearing en banc in the present case with five judges again voting in favor of en banc review. App., *infra*, 5a.

4. On April 28, 2009, the Solicitor General, on behalf of the Commissioner, petitioned this Court for a writ of certiorari to review the judgment of the court of appeals in *Ratliff*.

REASONS FOR GRANTING THE PETITION

In this case, the court of appeals held that awards of EAJA fees and other expenses are the property of, and are payable directly to, the attorneys for a prevailing party. App., *infra*, 2a. The court further held that because the fee award in this case was payable to respondent's attorneys rather than to respondent herself, the award was not subject to offset to collect a pre-existing child-support debt owed by respondent. See *ibid.* The court relied on its decision in *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008), from which the government has petitioned this Court for a writ of certiorari (No. 08-1322). See App., *infra*, 2a. Because this case presents the same

question as *Ratliff*, and because the court of appeals concluded that its prior decision in *Ratliff* resolved the present case, the petition for a writ of certiorari in this case should be held pending the Court's disposition of the petition in *Ratliff* and, if the court grants that petition, pending the Court's decision in that case.

CONCLUSION

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.

Respectfully submitted.

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