No.

IN THE
SUPREME COURT OF THE UNITED STATES

JANET C. MANNING,

Petitioner,

v.

MICHAEL J. ASTRUE, COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit affirmed the district court's decision ordering the payment of an attorney fee awarded pursuant to the Equal Access to Justice Act ("*EAJA*"), 24 *USC* §2412(d)(1)(A), directly to the plaintiff, not plaintiff's counsel.

Two questions are presented:

1. Whether the attorney fee awarded pursuant to the EAJA is to be paid to the attorney who earned the fee by representing the plaintiff in federal court, or to the plaintiff where it can be attached by the government for outstanding debts.

2. Whether the Commissioner's current scheme of payment of the EAJA fee to the plaintiff undermines the principles behind the EAJA, which should be distinguished from and any other fee shifting statutes.

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to *Supreme Court Rule* 29.6, petitioner states she is a private citizen and no parent companies or non-wholly owned subsidiaries have any interest in this action.

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OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Manning v. Astrue*, 510 F.3d 1246 (10th Cir. 2007). The Tenth Circuit affirmed the decision of the United States District Court for the Eastern District of Oklahoma rendered on October 27, 2006, is unreported. *See* Appendices A, *infra*, 4a-27a, and B, *infra*, 28a-34a.

STATEMENT OF JURISDICTION

The Tenth Circuit's opinion was rendered on December 20, 2007. (App., *infra*, 4a-27a). A timely filed Petition for Rehearing *En Banc* was denied on February 22, 2008. *See* Appendix C, *infra*, 35a-36a. This Court's jurisdiction is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Equal Access to Justice Act.

Title 28 United States Code, Section 2412(d)(1)(A).

Sec. 2412. Costs and fees.

(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.

Pursuant to Supreme Court Rule 14.1(f), the provisions of the Social Security Act, Title 42 U.S.C. §§ 405(g) and 406(b)(1)(A) are lengthy and, therefore, set out in Appendices H, *infra*, 55a-57a, and I, *infra*, 58a-59a, respectively. In addition, the Appendix also includes the provisions of the following statutes: Civil Service Act, Title 5 U.S.C. § 7701(g)(1) (Appendix D, *infra*, 37a); Debt Collection Improvement Act of 1996, Title 31 U.S.C. §§ 3716 & 3728 (Appendices E, *infra*, 38a-44a, and F, *infra*, 46a-54a); and the Internal Revenue Code, Title 26, U.S.C. §7430(a)-(d) (Appendix G, *infra*, 46a-54a). Relevant provisions of EAJA's legislative history are set out in Appendix R, *infra*, 88a-103a, pursuant to Supreme Court Rule 14.1(h)(vi).

STATEMENT OF THE CASE

This case raises the important issue of to whom the EAJA attorney fee is to be paid. For almost 28 years, the Commissioner has paid the

EAJA attorney fee to the attorney who earned it by representing a poor Social Security claimant in federal court. This case is not the first case to determine that the attorney fee does not have to be paid to the attorney. *See FDL Techs., Inc. v. United States*, 967 F.2d 1578, 1580-1581 (Fed.Cir. 1992). In that case, the majority relied on the prevailing party language and found no fault with the defendant sending the attorney fee to the bankruptcy trustee rather than to the attorney. *Id.* at 1581. The minority dissent (Newman, J.) explained why they were incorrect to do so. *Id.* at 1582-1586. The Tenth Circuit's decision clearly splits the authority in the circuits. It has recently been joined by the Eleventh Circuit's decision in *Reeves v. Astrue*, ---F.3d---, 2008 WL 1930587 (11th Cir. May 5, 2008). Other circuits who have considered the payment of the attorney fee in EAJA cases, as well as other fee shifting statutes, have reached contrary conclusions.

Of these decisions, the most salient is *Marré v. United States*, 117 F.3d 297 (5th Cir. 1999). The authority of this decision has led the Commissioner to abandon payment of the EAJA attorney fee in the plaintiff's name, and instead pay it directly to the attorney. He has withdrawn his objections that the EAJA fee be payable to the plaintiff, and not to the attorney, because attorney's fees paid under Internal Revenue Code, 26 U.S.C. § 7430(a)-(d) (App., *infra*, 46a-54a), belong to the prevailing party's attorneys and not the prevailing party. *Stephens v. Astrue*, 539 F.Supp.2d 802, 819 (M.D.Md. 2008) citing the Commissioner's motion in *Bell v. Astrue*, Case No.

1:06CV0036-D-A (N.D.Miss. May 30, 2007). (Appendix U, *infra*, 107a). Therefore, the circuits are split on the issue.

Since codification and re-enactment of the EAJA, the Commissioner has made the EAJA payment directly to the attorney. The Commissioner even offered to directly deposit the EAJA attorney fee in the bank chosen by the attorney. (Appendix V, *infra*, 111a). This method of payment was followed despite the so-called plain language of the EAJA statute, now held to be unambiguous and directing that the payment be made to the plaintiff. The Commissioner's past practices are a strong indication that his past practice is due deference, at least *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

The court found the statutory language determined that the EAJA attorney fee should be paid to the plaintiff. (App., *infra*, 12a-15a, 24a). Counsel argues that the court overlooks that

> It is fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provision of the whole law and to its object and policy." *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 592, 7 L.Ed.2d 492 (1962), *quoting Mastroplastics Corp. v. N.R.L.B.*, 350

U.S. 270, 285, 76 S.Ct. 349, 359, 100 L.Ed. 309 (1956).

The reason for the EAJA's passage was two-fold. It was to permit the access of poor plaintiffs to the federal court system by placing them on equal footing with the government. *Federal Trade Commission v. Kuykendall*, 466 F.3d 1149, 1156 (10th Cir. 2006). It also serves as a punishment to the government for litigating without substantial justification. *Orner v. Shalala*, 30 F.3d 1307, 1309 (10th Cir. 1994). If the attorney fee is directed to the plaintiff, the purposes behind the EAJA will be thwarted.

The court determined that when a statute is capable of being understood by reasonably well-informed persons in two or more different senses, then it is ambiguous. (App., *infra*, 11a). It is clear that even the Commissioner previously interpreted the EAJA statute differently because he paid the EAJA attorney fee directly to the attorney for years. *Garcia v. Sullivan*, 781 F.Supp. 969, 974 (S.D.N.Y 1991); *Price v. Sullivan*, 756 F.Supp. 400, 405 (E.D.Wisc 1991); *Barringer v. Bowen*, 673 F.Supp. 1167, 1170 (N.D.N.Y. 1987). (App. *infra*, 19a n. 6). One court held it would be "foolish, if not imprudent" to pay an EAJA attorney fee to inmates, just because they were prevailing parties. *Wedra v. Thomas*, 623 F.Supp. 272, 278 (S.D.N.Y. 1985). At the district court level in the case at bar, the Commissioner supported the plaintiff's position that the EAJA fee should be paid to the attorney and not the plaintiff.

(App. *infra*, 24a n. 8).

The court's interpretation of the EAJA statute overlooks that the Commissioner's own rules provide for the payment of the attorney fees to the attorney. HALLEX I-4-1-43 (Appendix Q, *infra*, 87a); HALLEX I-1-2-91 (Appendix P, *infra*, 84a); POMS GN 03930.040 (Appendix T, *infra*, 105a). *See also* SSA's *Policy Handbook* §2019.7. http://www.ssa.gov/ OP_home/handbook/handbook.20/handbook-2019.html.[1] (Appendix S, *infra*, 104a). As stated above, the Commissioner's past practices are a strong indication that his past practice is due deference, at least *Skidmore* deference. *Skidmore*, 323 U.S at 140, 65 S.Ct. at 164. *See also McGraw v. Barnhart*, 450 F.3d 493, 500-501 (10th Cir. 2006).

Interpreting the EAJA statute's language in a manner that nullifies its intent leads to a bizarre result. When a literal reading of a statute leads to an absurd result inconsistent with its legislative purpose, this result should be avoided. *Haggar Co. v. Helvering*, 308 U.S. 389, 394, 60 S.Ct. 337, 339, 84 L.Ed. 340 (1940). Payment of the EAJA fee to the plaintiff permits the attachment of the EAJA fee by the government, so the attorney representing the Social Security claimant in federal court may not

[1] SSA's *Policy Handbook* §2019.7 provides "If a Federal court rules in your favor, under the Equal Access to Justice Act (EAJA), your attorney may request reimbursement of the expenses he or she incurred in representing you. If the court allows a fee and the attorney is awarded a fee under EAJA, the attorney must refund to you the amount of the smaller fee."

receive the EAJA attorney fee. This leads to a result that "is so bizarre that Congress 'could not have intended it.'" *Demarest v. Manspeaker*, 498 U.S. 184, 191, 111 S.Ct. 599, 604, 112 L.Ed.2d 608 (1991), quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982).

It is especially bizarre with respect to the Debt Collection Improvement Act, 31 U.S.C. §3716; 31 C.F.R. §285.5(a)(1). (Appendix O, *infra*, 75a). This case concerns an application for Supplemental Security Income disability benefits pursuant to under Title XVI of the Social Security Act, 42 U.S.C. § 1381a (App., *infra*, 60a). Ironically, the attachment of Supplemental Security Income benefits is expressly forbidden by 31 C.F.R. § 285.5(e)(3)(i)(A), but the EAJA fees are not. (App., *infra,* 83a). Since the EAJA is not expressly cited as unattachable, it may still be reached if the EAJA award is paid to the plaintiff. (App., *infra*, 10a).

There are other unintended consequences of paying the attorney fee to the plaintiff. Plaintiffs with outstanding governmental debts will not easily be able to find competent and capable counsel to appeal their cases in the federal court. The Tenth Circuit dismissed this argument as "purely speculative." (App., *infra*, 22a).

The court "easily conclude[d]" that the plaintiff would rightfully be taxed on the EAJA fees attached in her name. (App., *infra*, 23a). One court has taken

note of this consideration and found it to be unnecessary. *Porter v. U.S.A.I.D.*, 293 F.Supp.2d 152, 157 (D.D.C. 2003). Rather than saddle the plaintiff with a tax liability for the attorney fee award, the court directed the attorney fee award in a Title VII case be paid directly to the attorney. *Id.* The *Porter* court further explained that the prevailing party was the one who authorizes the fee, and

> that the *form* of an attorneys' fee award is that of an award made to the prevailing party, in *substance*, the award is to counsel. In practice, fee applications are invariably prepared by attorneys, supported by attorneys' billing materials and affidavits, calculated according to market data about prevailing attorneys' fees, and evaluated by judges using criteria having little to do with the prevailing parties in the cases before them or with the relationships between the prevailing parties and their attorneys. (Emphasis in original.) *Id.* at 158.

The Seventh Circuit also recognizes that

> whether the motion for fees is in the name of the party or his attorney truly is a "technicality." In such cases, it would "exalt[ ] form over substance" to deny the motion for fees "so that the ministerial function of substituting the plaintiff" for the attorney could be accomplished. *Lowrance v. Hacker*, 966 F.2d 1153, 1156 (7th Cir. 1992), citing *Ceglia*

v. Schweiker, 566 F.Supp. 118, 120 n. 1 (E.D.N.Y. 1983).

There is a potential loss of SSI benefits by a household member if another household member receives an EAJA fee and does pay the fee to the attorney. 20 C.F.R. § 416.1100. (Appendix K, *infra*, 61a). "Income is anything you receive in cash...." 20 C.F.R. § 416.1102. (Appendix L, *infra*, 62a). See App., *infra*, 63a-67a. "Deeming" rules attribute family members' income to Supplemental Security Income recipients. *Florez o/b/o Wallace v. Callahan*, 156 F.3d 438, 442 (2nd Cir. 1998). "[I]t does not matter whether the income of the other person is actually available to you." 20 C.F.R. § 416.1160(a). (Appendix N, *infra*, 68a). Because the income of the entire household is considered, a family member already receiving Supplemental Security Income benefits will lose them due to receipt of a large EAJA award by another family member. An offset appears neutral, but it results in invidious discrimination against a class of disabled debtors. *Maher v. Gagne*, 448 U.S. 122, 125 n. 5, 100 S.Ct. 2570, 2573 n. 5, 134 L.Ed.2d 855 (1980). The government must "remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Tenth Circuit's Decision Creates a Conflict Between the Circuits Regarding to Whom the EAJA Attorney Fee is

Payable.

The decision below creates a direct conflict with the Fifth Circuit Court of Appeals decision in *Marré* at 297. The *Marré* court would not permit the government to set off the attorney fee against the plaintiff's debt to the government and directed that the payment of the attorney fee, pursuant to 26 U.S.C. § 7430 (App., *infra*, 46a-54a), should be directly to the attorney. *Marré* at 303-305. The Marré decision is recognized by the Commissioner in the Fifth Circuit as controlling on the issue of to whom the attorney fee is to be paid. The Marré decision relied heavily on a fee shifting statute under the Truth-In-Lending Act where the attorney fee was directed to the attorney rather than be allowed to become an asset of the defendant, which would have occurred if not paid directly to the attorney. *See Plant v. Blazer Financial Services, Inc.*, 598 F.2d 1357, 1365 (5th Cir. 1979); *Carr v. Blazer Financial Services, Inc.*, 598 F.2d 1368, 1370 (5th Cir. 1979). In *Plant* and *Carr*, the court was interested in promoting the concept of multiple attorneys general to prevent abuse under the Act. This Court has noted role of a plaintiff being akin to a private "attorney general" in advancing the cause of righting government wrongs and punishing the government for assuming an unjustified legal position. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). The *Marré* decision is also in harmony with *Miller*, which determined the fee is to be paid directly to counsel so the award does not enrich litigants, but actually

compensates attorneys for the legal services performed. *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 (5th Cir. 1970).

This Court has affirmed lower courts' award of attorney fees to counsel for plaintiff in a civil rights case. *Maher v. Gagne*, 448 U.S. at 126-127, 100 S.Ct. at 2573. This case was decided before the EAJA became law, but it would seem that if the Court were dissatisfied with the results of an award of attorney fees made to the attorney, then it would have so stated at that time.

Other circuit courts have also determined that the proper recipient of the attorney fee in a fee-shifting statute, which permits the prevailing party to apply for an attorney fee, is the attorney and not the plaintiff.

The Third Circuit has awarded the attorney fee to the attorney in two pre-EAJA cases. Payment was made to the attorney in order to avoid a windfall to the plaintiff. *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978). Payment was also made to the attorney in order to avoid a windfall to the defendant, which would be against public policy. *Shadis v. Beal*, 692 F.2d 924, 928 (3rd Cir. 1982).

The Sixth Circuit has also determined that, although the EAJA fee is to be applied for in the name of the plaintiff, it is paid to the attorney. *King v. Commissioner of Social Sec.*, 230 Fed.Appx 476 (6th

Cir. 2007). The court did not address this case. "[A]ttorney fees awarded under the EAJA are *payable to the attorney*; they are awarded for the benefit of the party, but the money is not the party's to keep." (Emphasis added.). *King* at 481. *King* cites other Sixth Circuit cases that made the attorneys' fee payable to the attorney and not the plaintiff. *Martin v. Commissioner of Social Sec. Admin.*, 82 Fed.Appx. 453, 456 (6th Cir. 2003); *Willis v. Sullivan*, 931 F.2d 390, 394 (6th Cir. 1991); *Hull v. Bowen*, 748 F.Supp. 514, 526 (N.D. Ohio 1990); *Giarda v. Sec'y Health & Human Servs.*, 729 F.Supp. 572, 575 (N.D.Ohio 1989). The court also did not reference these decisions.

The Seventh Circuit is also in accord that the attorney fee is payable to the attorney. "Technically, the award of fees...is to the party, not his lawyer, but it is common to make the award directly to the lawyer where, as in this case, the lawyer's contractual entitlement is uncontested." *Richard v. Penfold*, 900 F.2d 116, 117 (7th Cir. 1990). While the court notes this case (App., *infra*, 21a-22a n. 7), it does not distinguish it or even note that the case is in direct opposition to its decision, which results in a split in the circuits.

Although *Davidson* was unpublished and is not of precedential value, the court ignored the rationale explaining why the fee should be paid to the attorney because it

> perceived a potential for unfairness if the

> client refused to endorse a check over to [the attorney]. To make an EAJA fee award payable to counsel is not inimical to the EAJA's purpose. Prosecution of a successful EAJA claim unquestionably benefits the client by reducing the cost of legal services. However, an attorney might lack the incentive to bring the EAJA motion if he knew that the award would be payable to a client who might then refuse to turn over any portion of that payment. Where, as here, the potential EAJA award is larger than the award of fees under SSA § 406(b)(1), the attorney would not have the incentive to bring the EAJA motion unless he was assured of receiving the excess of EAJA fees over SSA fees. If the client received the larger award, and refused to pay the attorney the difference between the two awards, the client would receive something of a windfall, while the attorney would be undercompensated for his work. *Davidson v. Sullivan*, 1992 WL 368014 *3 (N.D.Ill. 1992).

In another Seventh Circuit case decided before EAJA was enacted, the attorney fee was paid to the legal services organization which "stands in the same position as a private attorney to whom a fee is owed," in order to avoid a windfall to the plaintiff." *Hairston v. R. R. Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975). *See also Grand Boulevard Improvement Ass'n v. City of Chicago*, 553 F.Supp. 1154, 1169 (N.D.Ill. 1982).

The Eighth Circuit found that a plaintiff represented by *pro bono* counsel had not incurred an attorney fee. The fee was directed to counsel rather than the prevailing party in order "to diminish the deterrent effect of the expense involved in seeking review of, or defending against, unreasonable government action." *Cornella v. Schweiker*, 728 F.2d 978, 981 (8th Cir. 1984).

The Ninth Circuit has also directed the attorney fee to the attorney to prevent a windfall to the plaintiff. *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974). It has also ruled the fee is payable to the attorney who is in the position of a private attorney. *Dennis v. Chang*, 611 F.2d 1302, 1309 (9th Cir. 1980). These cases were ignored while the court distinguished other rulings by the Ninth Circuit directing the payment to counsel rather than to plaintiff. *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc.*, 89 F.3d 574, 577 (9th Cir. 1996), *cert. denied sub nom U.S. ex rel. Virani v. Hall & Phillips*, 519 U.S. 1109, 117 S.Ct. 945, 136 L.Ed.2d 834 (1997) was distinguished by the court because of the difference between a qui tam case and a civil rights case. *See* App., *infra*, 18a, citing *Gilbrook v. City of Westminster*, 177 F.3d 839, 874 (9th Cir. 1999). Despite these differences, the attorney was awarded the attorney fee.

The Tenth Circuit has previously directed that the EAJA fee be paid to the attorney. "The government has been ordered to pay appellant's counsel fees and costs pursuant to the EAJA."

Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). *Weakley* unambiguously ordered "any additional [EAJA] fees be awarded directly to Appellant's attorney." *Weakley* at 580. "Thus, the Attorney will receive both the award under the EAJA and the award under the Social Security Act." *Kemp v. Bowen*, 822 F.2d 966, 968 (10th Cir. 1987), quoting *Weakley* at 580. *McGraw* also contemplates the attorney receiving the fee because it mandates payment of the smaller of the EAJA attorney fee and the 42 U.S.C. § 406(b) attorney fee be paid to the plaintiff. *McGraw* at 497 n. 2. However, the court distinguished *Weakley* as not addressing "whether the Social Security claimant or the claimant's attorney was entitled to recover the fees under the EAJA statute." (App., *infra*, 21a). Pursuant to *McGraw*, the court found that the EAJA award was to the claimant, whereas the § 406(b) award is to counsel. (App., *infra*, 21a).

The Eleventh Circuit has previously determined that it is proper to pay the attorney fee directly to the attorney because "any other method of payment would be impractical." *Turner v. Air Force*, 944 F.2d 804, 808 n. 4 (11th Cir. 1991). The attorney in *Turner* had been a salaried employee of one of the plaintiffs and had applied for all of the attorney fees even though he was no longer employed by them. *Turner* at 808. The Tenth Circuit ignored the fact that the attorney was awarded a portion of his fee for representation of one of the claimants. *Id.* at 806. The court selectively quoted *Turner*. (App., *infra*, 14a). It ignored that the attorney fees were paid to

the attorney, and that it was impractical to do otherwise. It noted only the cited passage that the fee belongs to the prevailing party. The recent Eleventh Circuit decision in *Reeves* does not cite this case. *Reeves* at *1.

The Federal Circuit has ordered the attorney fee paid to counsel or the service organizations employing them in order to prevent a windfall to the plaintiff. *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1037 (Fed.Cir. 1974), rev'd on other grounds *sub nom Aleyska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In *Willis*, the Federal Circuit also agreed with the Ninth Circuit's reasoning in *Virani* at 577 and *Pony v. County of LA*, 433 F.3d 1138, 1142-1143 (9th Cir. 2006), that the attorney has the right to collect the fees awarded because the right to the fee vests in the attorney when the plaintiff requests the attorney fee award provided for by the statute. *Willis v. Government Accountability Office*, 448 F.3d 1341, 1347 n. 4 (Fed.Cir. 2006), *rehearing en banc denied, cert denied*, ---U.S.---, 127 S.Ct. 1356, 167 L.Ed.2d 76 (2007). The *Willis* court found nothing inharmonious with their decision that the attorney was to be awarded the full statutory fee award even though the plaintiff had already paid him a part of the attorney fees. *Id.*, *citing Jensen v. Department of Transportation*, 858 F.2d 721, 724 (Fed.Cir. 1988).

II. The Issue Presented by the Conflict is Recurring and of Great Practical Importance.

Allowing plaintiff as the prevailing party to apply for the EAJA attorney fee, but paying the fee directly to the attorney is practical and logical. This is especially true in the context of a Social Security case, when the plaintiffs are usually impoverished, in debt, and judgment proof. While the EAJA statute, as well as other fee shifting statutes, uses the term "prevailing party," the reason for the statute is to allow impoverished plaintiffs to have access to the federal courts. The current scheme devised by the Commissioner undermines the entire reasoning and purpose of the statute when it permits the attachment of the EAJA attorney fee to satisfy outstanding debts owed by the plaintiff. Now, a whole class of individuals, those with outstanding debts owed to the government, will be segregated from those without debts and unable to obtain counsel to represent them in federal court. At least one justice of this Court has voiced concern that the pool of competent lawyers could shrink, *infra*. *City of Burlington v. Dague*, 505 U.S. 557, 574-575, 112 S.Ct. 2638, 2648, 120 L.Ed.2d 449 (1992) (Blackmun, J., dissenting). Overlooked is that Justice Blackmun discussed the fee awards as though the prevailing party and attorney were one.

> Preventing attorneys who bring actions under fee-shifting statutes from receiving fully compensatory fees will harm far more than the legal profession. Congress intended the fee-shifting statutes to serve as an integral enforcement mechanism in a variety of federal

> statutes-most notably, civil rights and environmental statutes. The *amicus* briefs filed in this case make clear that we can expect many meritorious actions will not be filed, or, if filed, will be prosecuted by less experienced and able counsel. Today's decision weakens the protections we afford important federal rights. (Footnote deleted.). *Id.*, 505 U.S. at 574-575, 112 S.Ct. at 2648.

III. The Decision Below is Based on "Prevailing Party" Language Applied in Unique Circumstances where the Attorney has no Standing to Receive the Attorney Fee or in Fee Shifting Statutes where the Attorney Fee Is a Part of the Remedy.

There are cases in which a plaintiff's attorney has withdrawn, been fired, or been removed from the case by the court for disciplinary reasons. After resolution of the case, the attorney then applied for an attorneys' fee and was denied because he did not have standing to request the fee. A small sampling includes *Panola Land Buying Association v. Clark*, 844 F.2d 1504, 1506 (11th Cir. 1988); *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227 (10th Cir. 1998), *cert. denied*, 525 U.S. 1019, 119 S.Ct. 546, 142 L.Ed.2d 454 (1998), *rehearing denied*, 525 U.S. 1117, 119 S.Ct. 894, 142 L.Ed.2d 792 (1999); *Weeks v. Independent School District No. I-89*, 230 F.3d 1201 (10th Cir. 2000), *cert. denied*, 532 U.S. 1020, 121 S.Ct. 1959, 149 L.Ed.2d 755 (2001). In these cases, the

attorney-client bond had been severed. The cases rely heavily on the fee being for the prevailing party rather than having the fee paid to an attorney who no longer represents the plaintiff. The cases are readily distinguishable from the case at bar because the facts are so different. Counsel has not been fired or removed from the case. Counsel does not argue that an attorney who no longer represents the prevailing party has any standing to seek an attorney fee. The is a fact pattern similar to that of *Willis* at 1347. Plaintiff attorneys have no independent right to seek EAJA fees. *Oguachuba v. I.N.S.*, 706 F.2d 93, 97-98 (2nd Cir. 1983).

The prevailing party language has also been applied in Civil Rights cases where attorney fees may be awarded. *Venegas* used the phrase "prevailing party." *Venegas v. Mitchell*, 495 U.S. 82, 87, 110 S.Ct. 1679, 1682, 109 L.Ed.2d 74 (1990). The attorney, Mitchell, had been replaced as the attorney in the case, and brought his action as an intervenor. *Id.*, 495 U.S. at 85, 110 S.Ct. at 1681. He had no standing to obtain a fee. This result is similar to that of *Willis*, which interprets the fee shifting statute in the Civil Service Reform Act, 5 U.S.C. § 7701(g). (App., *infra*, 37a). *Willis* at 1344-1346. *Venegas* was a civil rights case, considering a fee shifting statute pursuant to 42 U.S.C. § 1988. In a Civil rights case, the relationship of the attorney to the client is entirely different from the case at bar. The holding in *Venegas* would indicate that all fee shifting statutes cannot be interpreted exactly alike, because the EAJA does not permit the attorney to

contract for more than the statutory amount of the EAJA fee permitted. *Venegas*, 495 U.S. at 82, 110 S.Ct. at 1679. Petitioner notes that this result would be anomalous with Social Security regulations that carefully regulate the amount of fees to be requested and paid. 42 U.S.C § 406(b)(1)(A). (App., *infra*, 58a).

Jeff D. is another civil rights case utilizing the prevailing party language. *Evans v. Jeff D*, 475 U.S. 717, 730, 106 S.Ct. 1531, 1539, 89 L.Ed.2d 747 (1986). This case stands for the proposition that the plaintiff can waive attorney fees in order to settle the case. *Id.*, 475 U.S. at 731, 106 S.Ct. at 1529-1530. In civil rights cases, the attorney fee is a part of the remedy a plaintiff can seek. Under the EAJA, there is no provision permitting a claimant to waive an attorney fee as a part of the remedy in the case. There is not even authority for the plaintiff to assign the attorney fee to his attorney. *Winslow v. Astrue*, 2008 WL 724374 *1 (10th Cir. 2008).

IV. The Court is Uniquely Positioned to Clarify the Uncertainty in the Interpretation of the EAJA Statute.

Although there is considerable confusion over the meaning of the EAJA statute, there is no confusion regarding its purpose. "The purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable government actions. *Sullivan v. Hudson*, 490 U.S. 877, 883, 109 S.Ct. 2248, 2253, 104 L.Ed.2d 941 (1989). The Court further stated that

> [t]he EAJA applies to a wide range of awards in which the cost of litigating fee disputes would equal or exceed the cost of litigating the merits of the claim. If the Government could impose the cost of fee litigation on prevailing parties by asserting a "substantially justified" defense to fee applications, the financial deterrent that the EAJA aims to eliminate would be resurrected. The Government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights and "curbing excessive regulation and the unreasonable exercise of Government authority." *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 163-165, 110 S.Ct. 2316, 2322, 110 L.Ed.2d 134 (1990).

The Commissioner's scheme, currently, is to pass the costs of §405(g) litigation onto the plaintiff under the rubric of making EAJA attorney fee attachable through application of the Treasury Department's regulations, which implement the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3716. (App., *infra*, 38a-44a). Treasury Department regulations do not allow the government to offset attorney fees to collect Plaintiff's debts. Although fee payments under fee-shifting statutes are not excluded from offset, 31 C.F.R. §§ 285.5(e)(1) & (e)(2) make it clear plaintiffs would, at best, be treated as a representative payee. (App., *infra*, 81a-82a). This is why the Commissioner now insists that the EAJA fee

be paid to the plaintiff, so the funds are attachable. The Treasury Offset Program defines a "Representative Payee" as "a person named as payee on the payment voucher certified by the payment agency who is acting on behalf of a person entitled to receive the benefit of all or part of the payment." 31 C.F.R. §285.5(b)(5). (App., *infra*, 80a). Payments to representative payees may not be offset to repay the representatives payee's debts. 31 C.F.R. § 285.5(e)(5). (App., *infra*, 83a). The government can offset only the attorney's federal debts, not the clients.

No reasoned analysis has been supplied for the Government's change in policy and practice on EAJA fee payments, which did not commence until this case reached the Tenth Circuit.[2] (App., *infra*, 24a). The historical interpretation of the EAJA statute is now suddenly passé because it has been replaced with an interpretation that no longer permits the award be made to the attorney. When statutes are ambiguous, other tools must be used to divine their interpretation. *McGraw* at 498; *Schusterman v. U.S.*, 63 F.3d 986, 989 (10th Cir. 1995).

The Tenth Circuit opined that "Congress knows what language to use to award attorney's fees

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[2] The fact that the Commissioner has only recently commenced its new fee accrual policy herein more than 2 decades after *Jeff D.* demonstrates that he does not believe that *Jeff D.* controls the policy. Indeed, despite *Jeff D.*, he has chosen an inconsistent approach, supporting fee awards to counsel in all cases in the 5th Circuit because of *Marré* at 304. Thus, if *Jeff D.* controlled, the Commissioner would be required to follow it.

to an attorney and what language to use when it chooses to award the fees to the prevailing party." (App., *infra*, 17a). Ignored is that the government has only recently had the ability to match EAJA recipients to past governmental debts. *Stephens* at 809-810. When Congress passed the Debt Collection Improvement Act, no matching capacity existed under the Treasury Offset Program to compare taxpayer numbers with debt records. 31 C.F.R. §§ 285.5(b) & (c)(2). (App., *infra*, 76a-81a). Congress knew that the EAJA fee was paid to the attorney rather than the plaintiff, pursuant to the Commissioner's policies cited, *supra*. There was no reason for Congress to anticipate that the policy would change.

V. The Decision Below Is Incorrect.

Paying the EAJA fee to Plaintiff directly subverts EAJA's entire legislative purpose because poor claimants with an outstanding school loan are unlikely to find representation. The decision sequesters this class of individuals from access to the courts. The court cites *Evans v. Jeff D.*, 475 U.S. at 741 n. 34, 106 S.Ct. at 1531 n. 34, that the possibility was "remote." (App., *infra*, 22a-23a). EAJA insures "a strong incentive to represent indigent social security claimants.... [R]educing access to the judiciary for indigent individuals...does not further the goals of the EAJA." *Cornella* at 986-987. The court has specifically noted if unrewarded for their labors, it "might tend to discourage attorneys from undertaking to represent claimants in such cases."

McGraw at 502.

When Congress re-enacted the EAJA in 1985, the uncodified *Savings Provision*[3] demonstrated Congressional intent that counsel receives the EAJA fee, so a broader reading of the legislative history is appropriate. (App., *infra*, 88a-103a). *See McGraw* at 500. EAJA's legislative history cautions against an "overly technical construction" of its terms. *Brewer v. American Battle Monuments Comm.*, 814 F.2d 1564, 1566-1567 (Fed.Cir. 1987), citing H.R.Rep. No. 120, 99th Cong., 1st Sess., 18 n. 26, *reprinted* 1985 U.S.C.C.A.N. 132, 146 n.26. (App., *infra*, 88a, 99a). *Weakley* embodies the dictates of the *Savings Provision*, which states the attorney will receive the EAJA because the directive to refund implies the fee be paid to the attorney. *Weakley* at 580. One section of the EAJA cannot be interpreted in isolation so it renders another section meaningless. The court's decision renders EAJA's *Savings Provision* surplusage, contrary to *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115, 11 Otto 112, 25 L.Ed. 782 (1879) ("no clause, sentence or word shall be superfluous, void, or insignificant.").

Even the Tenth Circuit court did not appear to have faith in its own determination.

> [W]e recognize that perhaps the answer is not as clear as it would appear from the statutory language, legislative history and case law.

[3] Pub.L. 99-80, 99 Stat. 183.

> Admittedly, it seems counter intuitive to hold that an award of attorney fee does not go to the attorney, especially since the EAJA fees are calculated based on the time spent by the attorney and based on the attorney's hourly rate, *see* 28 U.S.C. § 2412(d)(1)(B), (2)(A). Indeed, the answer to the question "who do the fees go to" was not clear to the government, because it switched positions during the course of this investigation. But on appeal, it took the position that the award belonged to Ms. Manning. Despite the government's confusion, we are bound by the statutory language, legislative history, and case law, which has been set forth in detail above. (Footnote omitted.) (App., *infra* 23a-24a).

The Tenth Circuit's decision clearly splits the authority in the other circuits. It results in a bizarre outcome that thwarts the purpose of the EAJA by chilling the poor Social Security debtor's access to the courts to appeal their disability cases.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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