No. 08-1322

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CATHERINE G. RATLIFF

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

REPLY BRIEF FOR THE PETITIONER

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The court of appeals in this case held that attorney fees awarded under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), cannot be reduced to satisfy a debt owed to the United States by the prevailing party who obtained the fee because, in the court's view, EAJA fees "are awarded to the prevailing parties' attorneys, rather than to the parties themselves." Pet. App. 1a-2a, 4a. That holding is inconsistent with EAJA's clear directive that a court may "*award to a prevailing party* other than the United States fees and other expenses," 28 U.S.C. 2412(d)(1)(A) (emphasis added), and squarely conflicts with the holdings of at least three courts of appeals. See *Stephens* v. *Astrue*, 565 F.3d 131, 137 (4th Cir. 2009) (holding that "clear statutory text" specifies that EAJA fees "are payable to the claimant, not the

attorney," and therefore "are subject to administrative offset"); *Reeves* v. *Astrue*, 526 F.3d 732, 738 (11th Cir.) (same holding based on EAJA's "unambiguous text"), cert. denied, 129 S. Ct. 724 (2008); *Manning* v. *Astrue*, 510 F.3d 1246, 1249-1250, 1256 (10th Cir. 2007) (same), cert. denied, 129 S. Ct. 486 (2008); see also Pet. 13-14 & n.4; *FDL Techs., Inc.* v. *United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992) (holding that EAJA awards are payable to the prevailing party rather than her attorney in a case that did not involve a statutory offset).

The court of appeals recognized that its holding conflicted with decisions of "many courts" of appeals and ran contrary to a "literal interpretation" of EAJA's text. Pet. App. 2a-3a (citing, *e.g.*, *Reeves*, *Manning*, and *FDL Techs.*). That division of authority, on a question that is significant and recurring (Pet. 13-16), warrants resolution by this Court. Respondent's arguments against review are unavailing.

A. This Case Presents An Appropriate Vehicle To Resolve An Entrenched Circuit Split On The Question Presented

Respondent contends that this case is a poor vehicle to resolve the question presented and that review should wait until the division of authority has deepened. Br. in Opp. 12-20 (Opp.). Neither contention has merit.

1. Respondent argues (Opp. 12-15) that because the court of appeals issued its mandate reversing the district court and the district court subsequently entered judgment against the government, review by this Court is inappropriate. But this case neither became moot nor was terminated (Opp. 13-15) when the district court *sua sponte* concluded that it must "act in accordance with the Eighth Circuit's opinion" by entering judgment for respondent (Opp. App. 1a, 3a). The government timely

petitioned for a writ of certiorari from the appellate decision on which the district court's judgment rests, and nothing required the government to notice a separate appeal from that judgment to seek this Court's review.

It is well settled that "obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot [a] case" that is otherwise properly before this Court for review. *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972); see, *e.g.*, *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 126 n.2, 128 n.3 (1991) (an order on remand "predicated * * * on the correctness of the Court of Appeals' [decision]" reflects compliance with the appellate mandate that "does not moot the issue of the correctness of the [appellate] court's decision"); *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948); *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 467 (1947). A district-court judgment entered on remand therefore poses no barrier to certiorari review because "reversal of [the court of appeals'] decision would reinstate the judgment" initially entered by the district court and reversed on appeal. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983); see *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 674 (2003) (Breyer, J., dissenting from dismissal of a writ of certiorari) (reversal "would reinstate the judgment" reversed on appeal).

In *Villamonte-Marquez*, for instance, the court of appeals reversed judgments of conviction and remanded for further proceedings based on its conclusion that the government's key evidence was inadmissible. The appellate mandate issued, and the district court entered a final judgment on remand that granted the government's own motion to dismiss the indictments. This Court then granted the government's subsequent and

timely petition for a writ of certiorari. In addressing jurisdiction, the Court specifically rejected the contention that the district court's post-mandate dismissal rendered the case moot, holding instead that reversal of the court of appeals' judgment "would reinstate the judgment" that the district court originally had entered in the case. 462 U.S. at 581 n.2; cf. *id.* at 594-596 (Brennan, J., dissenting). The same principle governs here.

Indeed, respondent acknowledges that the "ministerial entry of judgment in the district court" after an appellate judgment will not "defeat[] this Court's jurisdiction." Opp. 14 (citing *Carr* v. *Zaja*, 283 U.S. 52 (1931)). That rationale applies to this case. The parties here have never disputed the amount of fees to be awarded. Cf. Pet. App. 22a-23a. Rather, the contested issue on appeal was whether that award payment was subject to an offset to collect a pre-existing, delinquent debt owed to the government by respondent's client. Once the Eighth Circuit rendered its decision, the district court's entry of judgment merely effectuated the court of appeals' holding that the government could not lawfully offset respondent's "fee awards to cover the claimant's debts" because EAJA awards must be paid to a prevailing party's attorney. See *id.* at 4a; Opp. App. 3a.

Respondent's contention (Opp. 12-13) that a final judgment moots an interlocutory appeal mistakenly relies on decisions demonstrating that appeals from preliminary injunctions generally become moot once permanent relief issues. Appellate review of a preliminary injunction is normally pointless in such circumstances because any error will generally be harmless once a "final injunction establishes that the defendant should not have been engaging in the [enjoined] conduct." *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond*

Fund, Inc., 527 U.S. 308, 314-315 (1999) (emphasis omitted); cf. *Harper ex rel. Harper* v. *Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) (per curiam). But that injunction-specific principle does not apply to interlocutory rulings more generally. Rather, the jurisdictional inquiry here is governed by the established principle that a litigant's "obedience to the mandate of the Court of Appeals and the judgment of the District Court" poses no barrier to this Court's review of the dispositive court of appeals ruling. See *Mancusi*, 408 U.S. at 206-207; pp. 3-4, *supra*; see also *Villamonte-Marquez*, 462 U.S. at 581 n.2.

2. Respondent's contention (Opp. 18-20) that review should be deferred to allow further development of the law in the courts of appeals is unpersuasive. The Eighth Circuit's EAJA decision in this case is in square conflict with rulings of the Fourth, Tenth, and Eleventh Circuits, and contradicts as well the Federal Circuit's holding, in a case not involving an offset, that EAJA awards belong to the prevailing party, rather than her attorney. See pp. 1-2, *supra*. The Fifth Circuit in *Marré* reached the same conclusion as the Eighth Circuit in interpreting materially identical text in a fee-shifting statute modeled on EAJA—a holding the Eighth Circuit treated as directly applicable in the EAJA context. Pet. 15. And, while the Sixth and Ninth Circuits are not bound by their unpublished decisions, those courts have issued unpublished opinions on whether EAJA fees belong to the attorney or the prevailing party that reach results in conflict with each other. Compare Pet. 14 n.4 with Opp. 19 & n.9.

These decisions of eight courts of appeals have thoroughly ventilated the question presented here. Further litigation in the lower courts is unlikely to clarify the

competing arguments further, and it will not eliminate the current circuit conflict.[1] Respondent suggests (Opp. 20) that, if further litigation causes the conflict to grow more lopsided, the Eighth Circuit might reverse course and align itself with the prevailing view. But the mere possibility that the court of appeals might in the future decide that it erred in ruling for respondent is not a sound basis for denying review of that error here. The Eighth Circuit acknowledged in this case that its holding conflicts with the decisions of the majority of courts to have addressed the issue, and it has twice denied rehearing en banc to resolve that conflict. Pet. App. 2a-3a, 17a; see Pet. App. at 2a, 5a, *Astrue* v. *Wilson*, No. 08-1335 (filed Apr. 29, 2009).

Nor do this Court's denials of certiorari in *Reeves* and *Manning* suggest that review is presently unwarranted. Cf. Opp. 18-20. The government advised the Court in those cases that certiorari was premature because it hoped the circuit split could be eliminated through a then-pending petition for en banc review of the Eighth Circuit decision now at issue. See Br. in Opp. at 18-19, *Reeves*, *supra* (No. 08-5605); Br. in Opp. at 14-15, *Manning*, *supra* (No. 07-1468). The Eighth Circuit denied rehearing on December 5, 2009 (Pet. App. 17a), after the Court denied certiorari in *Manning*. The government promptly informed this Court of that denial by letter on the afternoon of December 5. Although the

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[1] After the government filed its petition in this case, it determined that the prevailing parties in *Thompson* v. *Astrue*, No. 09-1724 (2d Cir.), *Abeytia* v. *Astrue*, No. 09-15832 (9th Cir.), and *McMahon* v. *Astrue*, No. 09-15873 (9th Cir.), did not owe debts that could be offset against their EAJA awards. The government accordingly has moved to dismiss its appeals in those cases because the appeals would have no impact on the public fisc. Cf. Pet. 16 n.6; Opp. 19 n.8.

Court did not deny certiorari in *Reeves* until December 8, the case was scheduled for conference on December 5, and it is unclear whether the Court took the letter into account in denying certiorari. Cf. 08-5605 Docket entry (Nov. 20, 2008). Given the Eighth Circuit's denial of the government's petition for rehearing, review of the circuit split on the question presented in this case is no longer premature.

3. Respondent correctly notes (Opp. 15-16) that, in most cases presenting the question here, the offset issue has arisen within the same proceeding in which the underlying EAJA award was made. In this case, by contrast, respondent is an attorney who commenced a separate action in her own name after the government offset the fee award to collect the client's pre-existing, delinquent debt. It is undisputed, however, that the court of appeals' interpretation of EAJA in this lawsuit squarely conflicts with the interpretation that has been rendered in EAJA cases by other courts of appeals, and the Eighth Circuit itself has deemed its ruling in this case dispositive in resolving EAJA disputes. Pet. App. at 2a, *Wilson*, *supra* (No. 08-1335). The court's conclusion that no offset was available rested squarely on its determination that "EAJA attorneys' fees are awarded to prevailing parties' attorneys" rather than to the prevailing parties themselves. Pet. App. 4a. Although the attorney's appearance as a party is atypical of the cases in which this issue has been litigated, that peculiarity—which accurately reflects that the attorney, rather than the claimant, is the beneficiary of the Eighth Circuit's approach—will not affect the Court's consideration of the disputed question.

Rather than identify alternative grounds for affirming the judgment in her favor, respondent takes the un-

conventional approach of suggesting (Opp. 15-18) various grounds on which the government might have prevailed. But the undeveloped jurisdictional theories that respondent proffers present no barrier to this Court's review. Respondent had Article III standing to assert her APA claim that the EAJA award at issue should have been paid to her as the attorney whose fees were at stake. When the court of appeals ruled in respondent's favor on the proper interpretation of EAJA, her asserted monetary injury-in-fact was redressable by an order directing the government to pay the award to respondent. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998); cf. *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 798 n.6 (2002) (explaining that prevailing parties may nominally pursue fee awards under 42 U.S.C. 406(b) that are paid directly out of their recoveries to their attorneys even though "the real parties in interest are their attorneys"). Similarly, the APA's waiver of sovereign immunity, 5 U.S.C. 702, and Congress's grant of general federal-question jurisdiction under 28 U.S.C. 1331, provided statutory jurisdiction for this APA challenge to agency action. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 891-901 (1988); *Califano* v. *Sanders*, 430 U.S. 99, 105-107 (1977).

Respondent's suggestion of possible non-jurisdictional defects in her own case also provide no reason to deny review. Although respondent correctly notes (Opp. 18) that the court of appeals here, unlike other courts, stated that an unlawful Fourth Amendment seizure resulted from the reduction of the EAJA award by offset, the court's decision contains no constitutional analysis and rests exclusively on its construction of EAJA. Pet. App. 2a-4a. And, to the extent respondent suggests that non-jurisdictional bases might justify reversal (rather

than affirmance) of the judgment below, any such arguments have been abandoned, were neither pressed nor passed upon by the court of appeals, and could not be properly raised before this Court. All that remains to support the court of appeals' judgment is an interpretation of EAJA that is the subject of an entrenched circuit split. This petition should be granted to review that judgment.

B. The Decision Of The Court Of Appeals Is Incorrect

Respondent's defense of the court of appeals' judgment on the merits (Opp. 21-30) provides no basis for denying certiorari. Respondent's brief discussion of EAJA's language (Opp. 21) largely ignores the textual bases for concluding that EAJA awards belong to the prevailing party, not her attorney. See Pet. 8-9. Thus, respondent does not address EAJA provisions directing that fees and other expenses "shall [be] award-[ed] to a prevailing party," and requiring the "prevailing party"—not her attorney—to show that she "is eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(A) and (B).

The understanding that EAJA awards are payable to the prevailing party is consistent with the rule that an EAJA award may be ordered in addition to a fee award under 42 U.S.C. 406(b) "if, where the claimant's attorney receives fees for the same work under both [provisions], the claimant's attorney refunds the claimant the amount of the smaller fee." 28 U.S.C. 2412 note; compare Pet. 3 with Opp. 23. Contrary to respondent's contention (Opp. 23), that provision does not suggest that EAJA fees are payable directly to the attorney. Rather, it simply recognizes that the attorney may ultimately receive the fees and addresses the proper approach when that

event occurs. See *Stephens*, 565 F.3d at 139 (explaining that this provision "does not presuppose that attorney's fees under the EAJA are directly payable to the attorney, but merely rests on the 'uncontroversial proposition that Congress anticipated attorneys will often be the ultimate beneficiaries of the attorney's fees awarded under the EAJA'") (quoting *Reeves*, 526 F.3d at 737). In that respect, the provision contrasts with 42 U.S.C. 406(b), which authorizes the Commissioner in a Social Security case in which the claimant was represented by counsel to certify a "fee for payment to such attorney." See Pet. 3, 10.

Respondent's reliance (Opp. 22) on the common-law principle of an attorney's equitable lien is also misplaced. First, a common-law equitable doctrine can neither overcome the statutory offset authority enacted by Congress in 31 U.S.C. 3716, nor add to the limited statutory exemptions that Congress enacted in that provision. Second, this Court has held that, because plaintiffs rather than their attorneys are entitled to fee awards under 42 U.S.C. 1988, plaintiffs may waive, settle, or negotiate away those awards to obtain benefits for themselves. See Pet. 11 (discussing *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), and *Venegas* v. *Mitchell*, 495 U.S. 82 (1990)). Respondent makes no effort to reconcile that ruling concerning an analogous fee-shifting statute with her contention that a common-law equitable lien attaches to a client's fee recovery before the client receives that award. Third, respondent's reliance (Opp. 22) on *Barnes* v. *Alexander*, 232 U.S. 117 (1914), is misplaced. *Barnes* merely concluded that a lien attaches "as soon as [the trustee] gets title to the thing." *Id.* at 121-122 (declining to decide "whether the lien attached * * * before the fund was received"). When an EAJA award payment is

subject to an administrative offset, title to the award never transfers to the prevailing party because the fee award is reduced to collect the offsetting debt before any payment is made.

Finally, respondent relies heavily (Opp. 24-29) on policy-based arguments specific to the Social Security context. Those arguments, however, cannot govern the construction of EAJA, which applies broadly to "any civil action" (other than those sounding in tort) brought by or against the United States. 28 U.S.C. 2412(d)(1)(A). The proper determination whether EAJA awards are subject to offset to collect debts owed by prevailing parties to the United States must therefore take account of the full spectrum of cases to which EAJA applies. Indeed, Congress has already addressed any special circumstances pertinent to Social Security cases by authorizing special fee compensation to be paid directly to attorneys under 42 U.S.C. 406(b). See Pet. 3; pp. 9-10, *supra*.

In short, EAJA says what it means and means what it says. Courts "shall award to a prevailing party" fees and other expenses under EAJA after that party shows, *inter alia*, that it is "eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(A) and (B). The meaning of the pertinent statutory provisions is plain, and the court of appeals erred in self-consciously departing from "a literal interpretation of the EAJA." Pet. App. 3a.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2009