No. 17-773

In The
Supreme Court of the United States

RICHARD A. CULBERTSON,

Petitioner,

v.

NANCY A. BERRYHILL,
Deputy Commissioner for Operations,
Social Security Administration,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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July 23, 2018

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INTEREST OF AMICUS CURIAE[1]

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a nonprofit, voluntary membership association. NOSSCR has more than 2,900 members, mostly attorneys, who represent claimants seeking disability and other benefits under the Social Security Act before the Social Security Administration (Agency). Any fee a claimant's attorney or non-attorney representative receives from a claimant for work before the Agency must be authorized under 42 U.S.C. § 406(a). In Fiscal Year 2019, the Agency expects to receive 2.4 million initial claims for disability benefits; dispose of 761,000 requests for hearings before administrative law judges; and complete 136,000 Appeals Council reviews.[2]

NOSSCR members who are attorneys represent claimants in civil actions for judicial review of the Agency's administrative denials of benefit claims. *See* 42 U.S.C. § 405(g). Any fee a claimant's attorney receives for work in court must be authorized under 42 U.S.C. § 406(b) or awarded pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The Agency anticipates that, in Fiscal Year 2019, claimants

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[1] Under Supreme Court Rule 37.6, NOSSCR states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than NOSSCR and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Petitioner filed a blanket consent to the filing of amicus briefs. Respondent has consented to NOSSCR filing an amicus brief.

[2] Soc. Sec. Admin., *Fiscal Yr. 2019 Budget Overview*, at 3, https://www.ssa.gov/budget/FY19Files/2019BO.pdf. All sites visited July 20, 2018.

will file 18,000 new civil actions under 42 U.S.C. § 405(g).[3]

NOSSCR has three significant interests in this case. First, the case concerns the exclusive way that representatives, including NOSSCR members, may be paid from claimants' past-due benefits for their work before the Agency. *See* 42 U.S.C. § 406(a). "[C]laimants who had a representative – either an attorney or a nonattorney representative – were allowed at a rate 2.9 times higher than a typical claimant with no representative."[4] Fees paid to claimants' attorney and non-attorney representatives enable the representatives to show the Agency that claimants are entitled to benefits.

Second, the case concerns the exclusive way that attorneys, including NOSSCR members who are attorneys, may be paid, for their work in court, from claimants' past-due benefits, in particular, the amount of the fee for that work. *See* 42 U.S.C. § 406(b). NOSSCR has an interest in its attorney members receiving reasonable § 406(b) fees that provide a sufficient incentive to challenge on judicial review the Agency's denials of benefits.

Third, the case involves the interplay between a fee under § 406(b) and an EAJA fee. The potential to

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[3] *Fiscal Yr. 2019 Budget Overview*, at 3.

[4] U.S. Gov't Accountability Office, *Soc. Sec. Disability: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearing Decisions* (Dec. 2017), at 24 (footnote omitted), https://www.gao.gov/assets/690/688824.pdf.

obtain EAJA fees provides an important incentive for attorneys to represent in court claimants challenging the Agency's denials of benefits. Indeed, EAJA fees may be as important an incentive as § 406(b) fees for attorneys to represent claimants in court.

SUMMARY OF THE ARGUMENT

Petitioner and Respondent have similar answers to the question presented. Brief for Petitioner at 6-30, *Culbertson v. Berryhill*, No. 17-773 (July 16, 2018) (Pet'r Br.); Brief for Respondent Supporting Reversal and Remand at 14-22, *Culbertson v. Berryhill*, No. 17-773 (July 16, 2018) (Resp't Br.). When a court determines a reasonable attorney fee to be paid from a Social Security claimant's past-due benefits for the attorney's work in court under 42 U.S.C. § 406(b), the 25% cap on such fees includes only fees authorized under § 406(b) and not also any Agency-authorized fee under 42 U.S.C. § 406(a) for that attorney's work (or another attorney's work) during the administrative proceedings. In other words, there is no cumulative cap on a § 406(b) fee including any § 406(a) fee and any § 406(b) fee.

While Respondent recognizes that the Social Security Act does not include a cumulative cap, Respondent argues that a court may impose a de facto cumulative cap through the exercise of discretion. Resp't Br. 22-26. To the contrary, except for a case remanded to the Agency under sentence six of 42 U.S.C. § 405(g), when determining a reasonable § 406(b) fee for an

attorney's work on judicial review, a court has no jurisdiction to set a lower or a higher fee based on the court's perceived value of that attorney's or another attorney's work during administrative proceedings. If a court concludes that the Agency's § 406(a) fee was unreasonably low, a court has no authority to increase the amount of the § 406(b) fee it authorizes to correct, in the court's view, the Agency's mistake. Similarly, if a court concludes that the Agency's § 406(a) fee was unreasonably high, a court has no authority to decrease the amount of the § 406(b) fee it authorizes to correct, in the court's view, the Agency's error. Just as a court has exclusive jurisdiction to determine a reasonable § 406(b) fee for an attorney's work on judicial review, the Agency has exclusive jurisdiction to determine a reasonable § 406(a) fee for an attorney's work during administrative proceedings.

If the Court holds that there is no cumulative cap, the impact of the Court's holding should be limited, for both claimants and their attorneys. Amicus explains that the prevailing market rate for a 42 U.S.C. § 406(b) fee approximates a cumulative cap today even where not required by Circuit precedent.

Amicus also addresses the Savings Provision of 42 U.S.C. § 406(b). *See* Pub. L. No. 99-80, § 3, Aug. 5, 1985, 99 Stat. 186. The Savings Provision provides that an attorney must refund to a claimant the smaller of an authorized § 406(b) fee and an EAJA fee that the attorney receives. While the precise operation of the Savings Provision is not included in the question presented, Amicus describes how the Savings Provision

operated in the courts below with a cumulative cap and how it might operate in this case without a cumulative cap.

ARGUMENT

I. Because There is No Cap on an Administrative Fee Under 42 U.S.C. § 406(a), the Cap on a Court Fee Under 42 U.S.C. § 406(b) to 25% of Past-Due Benefits Does Not Include Both § 406(a) and § 406(b) Fees.

Under 42 U.S.C. § 406(a), the Agency authorizes payment to an attorney (or non-attorney representative) a fee for the attorney's work before the Agency.[5] 42 U.S.C. § 406(a); *see, generally*, *Gisbrecht v. Barnhart*, 535 U.S. 789, 793-96 (2002).[6] Under 42 U.S.C. § 406(b), a court authorizes payment to an attorney a fee from a claimant's past-due benefits for the attorney's work in court. 42 U.S.C. § 406(b). Because there is no statutory cap on the amount of a § 406(a) fee that the Agency may authorize for work performed before the Agency, there is no statutory cumulative cap on § 406(a) and § 406(b) fees that a court may award under § 406(b) for work on judicial review. *See Program Operations Manual System* (*POMS*), GN § 03920.017(D)(5) ("The court

[5] For simplicity, Amicus refers below only to attorney representatives.

[6] *See also* Soc Sec. Admin., *SSA's Fee Authorization Process*, https://www.ssa.gov/representation/overview.htm.

fee is in addition to the fee, if any, SSA authorizes for proceedings at the administrative level.").

Section 406(b) is the only way that an attorney may receive a fee from a claimant's past-due benefits for the attorney's work in court. 42 U.S.C. § 406(b). Section 406(b) limits the fee that a court may determine for an attorney's work in court to a contingent fee of 25% of past-due benefits:

> Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment. . . .

42 U.S.C. § 406(b)(1)(A); *see, generally*, *Gisbrecht*, 535 U.S. at 799-809. Section 406(b) does not include a cumulative cap; it does not refer to § 406(a). *See* 42 U.S.C. § 406(b).

Section 406(a) of 42 U.S.C. provides two methods by which a claimant's attorney may obtain a fee for his or her work before the Agency. The first method is the "fee petition" process. Under this process, when the Agency favorably decides a claim, 42 U.S.C. § 406(a)(1) authorizes the Agency to "fix . . . a reasonable fee to compensate such attorney for the services performed by him [or her] in connection with such claim." 42 U.S.C. § 406(a)(1). Under the regulations governing the "fee petition" process, the attorney must submit a

"fee petition" showing the reasonableness of the fee according to the seven criteria detailed at 20 C.F.R. § 404.1725(a) (2018). The Agency officer authorizing the fee then evaluates the information provided in the "fee petition" and sets a reasonable fee to reflect the value of the legal services provided. A fee may be authorized even if the claimant received no past-due benefits as a result of the attorney's efforts. *See* 20 C.F.R. § 404.1725(b) (2018). Additionally, *HALLEX*, § I-1-2-57, provides that "there is not a maximum fee amount that can be requested or authorized under the fee petition process" other than reasonableness and contractual limitations. *HALLEX*, § I-1-2-57; *see also Gisbrecht*, 535 U.S. at 794-95 (discussing generally § 406(a) fees and citing *HALLEX*). A "fee petition" fee can be in any amount, including 25%, 50%, and 100% of past-due benefits, or even when the claimant receives no past-due benefits. *E.g.*, *Buchanan v. Apfel*, 249 F.3d 485, 492 (6th Cir. 2001). Because there is not a limit on the amount of fees that may be awarded under § 406(a), there is not a limit on the sum of § 406(a) and § 406(b) fees in the aggregate.

The "fee agreement" process is the second method by which an attorney may obtain a § 406(a) fee for representing a claimant before the Agency. *See* 42 U.S.C. § 406(a)(2). Under this process, if the attorney and the claimant enter into a written fee agreement and submit the fee agreement to the Agency before the Agency issues a determination, and if the determination is favorable to the claimant, the Agency will approve that agreement at the time of the favorable determination,

provided the specified fee does not exceed the statutory limit. *See* 42 U.S.C. § 406(a)(2)(A). The statutory limit for a "fee agreement" fee is the lesser of 25% of past-due benefits *or* a specific amount, whichever is less. *See* 42 U.S.C. § 406(a)(2)(A). The current maximum "fee agreement" amount is $6,000. 74 Fed. Reg. 6,080 (Feb. 4, 2009). (Most attorneys use the "fee agreement" process at least for representation of a claimant through the claimant's first hearing before an administrative law judge.)

The "fee agreement" process for a § 406(a)(2) fee does not limit the amount that a court may authorize under § 406(b). *See* 42 U.S.C. § 406(a)(2). That process does not contain a cumulative cap on a § 406(b) fee to 25% of past-due benefits, i.e., a cap on the sum of any § 406(a) fee and any § 406(b) fee.

Such a cumulative cap would also be illogical. It is quite common for a claimant to have different attorneys at the administrative and court levels. Consider a case in which Attorney A contracted to represent a claimant during the administrative proceedings for a "fee agreement" fee and Attorney B contracted to represent that same claimant in court for a § 406(b) fee of 25% of past-due benefits. Assume that before Attorney B filed a motion with the court for a § 406(b) fee, the Agency determined that Attorney A should receive the full withheld 25% of the claimant's past-due benefits under the "fee agreement" process for his or her work before the Agency. *See* 42 U.S.C. § 406(a)(2). If there were a cumulative cap on a § 406(b) fee of 25% of past-due benefits of the sum of any § 406(a) fee and any

§ 406(b) fee, then a court could not award Attorney B *any* § 406(b) fee from the claimant's past-due benefits for Attorney B's successful work on the claimant's behalf in court. The full withheld 25% of the claimant's past-due benefits would have been authorized as a § 406(a)(2) fee for Attorney A. To the contrary, the Agency's determination of Attorney A's "fee agreement" fee under § 406(a)(2) for work before the Agency does not make more or less reasonable Attorney B's request that a court authorize a § 406(b) fee for his or her work performed in court.

The same rationale also applies if the same attorney represents the claimant during both the administrative proceedings and on judicial review. The Agency's determination of a reasonable § 406(b) fee for the attorney's work before the Agency has no logical connection to a reasonable § 406(b) fee for the attorney's work on judicial review.

In sum, the Court should hold that the Social Security Act does not include a cumulative cap on a § 406(b) fee to 25% of past-due benefits, including any § 406(a) fee and any § 406(b) fee.

II. In the Absence of a Statutory Cumulative Cap, a Court Has No Discretion to Impose a Cumulative Cap on a 42 U.S.C. § 406(b) Fee, i.e., the Sum of Any § 406(a) and Any § 406(b) Fees.

Respondent correctly acknowledges the Social Security Act does not include a cumulative cap on a

reasonable fee under 42 U.S.C. § 406(b) to 25% of past-due benefits, i.e., the sum of any § 406(b) fee and any fee under 42 U.S.C. § 406(a). Resp't Br. 14-22. Respondent incorrectly argues that a court may impose such a cumulative cap as a matter of discretion. *Id.* 24-26. According to Respondent, when determining a reasonable § 406(b) fee for an attorney's work on judicial review, a court has the discretion to take into account any fee that the Agency has authorized or might authorize to that attorney (or another attorney) for that attorney's work (or another attorney's work) before the Agency. Respondent is incorrect.[7]

Respondent maintains that the Agency has the discretion to impose a cumulative cap on a reasonable "fee petition" fee under 42 U.S.C. § 406(a) or even a "fee agreement" fee to 25% of past-due benefits, i.e., the sum of any § 406(a) fee and any § 406(b) fee, so a district court has similar discretion to impose a cumulative cap on a reasonable fee under § 406(b) fee. Resp't Br. 24-26. Respondent cites no authority that, as a discretionary matter, the Agency imposes a cumulative cap on a § 406(a) fee of 25% of past-due benefits, including any § 406(a) fee and any § 406(b) fee. Indeed, the Respondent concedes that a § 406(a) fee may be in any amount and that neither § 406(a) nor § 406(b) includes a cumulative cap. Resp't Br. 15-18. Cf. *Buchanan*, 249 F.3d at 492 (holding that the

[7] As Amicus explains below, attorneys and claimants may agree that any § 406(b) fee should be capped at the sum of any § 406(a) fee and any § 406(b) fee. When an attorney and a claimant agree to a cumulative cap, a court enforces the agreement.

Commissioner is not allowed to cap a "fee petition" fee at 25% of past-due benefits "because such a cap cannot be reconciled with the full consideration of the factors specified in 20 C.F.R. §§ 404.1725(b) and 416.1525(b)").

Contrary to Respondent, with exceptions not relevant here, a court has no jurisdiction to determine the reasonableness of a § 406(a) fee.[8] *See Buchanan*, 249 F.3d at 492. Because the Agency has sole jurisdiction to determine the reasonableness of a § 406(a) fee, a court has no jurisdiction to determine a § 406(b) fee based on the value of an attorney's work before the Agency. Under *Gisbrecht*, a "reasonable" § 406(b) fee is not determined, even in part, by considering the amount the Agency authorized or might authorize

[8] There is a prudential exception to the rule that the amount of a § 406(b) fee is legally unrelated to the amount of a § 406(a) fee. When a court enters judgment for a claimant after making a substantive ruling on the correctness of the Agency's decision, it does so pursuant to the fourth sentence of 42 U.S.C. § 405(g). *See Melkonyan v. Sullivan*, 501 U.S. 89, 97-99 (1991). The judgment terminates the civil action. *See Shalala v. Schaefer*, 509 U.S. 292, 296-303 (1993). By contrast, when a court remands a case to the Agency under the sixth sentence of § 405(g), the civil action is not terminated and the remand proceedings before the Agency are part of the civil action itself. *See Schaefer*, 509 U.S. at 299-300 (*citing Melkonyan*, 501 U.S. at 97; *Sullivan v. Hudson*, 490 U.S. 877, 880-81, 892 (1989)). The amount of a § 406(a) fee for proceedings before the Agency on sentence-six remand is likely relevant to the reasonableness of an attorney's request for a § 406(b) fee from a court to the extent that the § 406(a) fee and § 406(b) fee are for the same work before the Agency. Petitioner's case involved sentence four, not sentence six, of § 405(g). *See Wood v. Comm'r of Soc. Sec.*, 861 F.3d 1197, 1201 (11th Cir. 2017).

under § 406(a). *See Gisbrecht*, 535 U.S. at 799-809. In *Gisbrecht*, this Court held that when a court determines the amount of a § 406(b) fee, a court

> may require the claimant's attorney to submit, not as a basis for satellite litigation, but as an aid to the court's assessment of the reasonableness of the fee yielded by the fee agreement, a record of the hours spent representing the claimant and a statement of the lawyer's normal hourly billing charge for noncontingent-fee cases.

Gisbrecht, 535 U.S. at 808. The "record of the hours spent representing the claimant and a statement of the lawyer's normal hourly billing charge for noncontingent-fee cases" refer to the attorney's time record for work *in court* and non-contingent billing rate *for litigation*. If at issue for a § 406(b) fee were the hours expended at the administrative level, a court could or even would be drawn into satellite litigation over the time spent during administrative proceedings. But a court has no jurisdiction over such proceedings (except when a case is remanded to the Agency under sentence six of 42 U.S.C. § 405(g)). *See supra* n.8.

III. In Circuits *Without* a Cumulative Cap, the Prevailing Market Rate Includes a Cumulative Cap Either By Contract or in Practice.

The Court should decide this case considering the actual market for legal services. Even though the Social Security Act does not include a cumulative cap on a 42 U.S.C. § 406(b) fee to 25% of past-due benefits, i.e.,

a cap including any § 406(a) fee and any § 406(b) fee, the prevailing market rate for representation of a claimant in court includes such a cumulative cap either by contract or in practice.

There are Circuits with a cumulative cap on a § 406(b) fee of 25% of past-due benefits, i.e., including any § 406(a) fee and any § 406(b) fee. *See Wood*, 861 F.3d at 1204-05; *Morris v. Social Sec. Admin.*, 689 F.2d 495, 496-98 (4th Cir. 1982); *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970). There are Circuits without such a cumulative cap. *See Clark v. Astrue*, 529 F.3d 1211, 1218 (9th Cir. 2008); *Wrenn ex rel. Wrenn v. Astrue*, 525 F.3d 931, 937 (10th Cir. 2008); *Horenstein v. Sec'y of Health and Human Servs.*, 35 F.3d 261, 262 (6th Cir. 1994) (en banc). By contract or in practice, the prevailing market rate for representing a claimant in court is the same in both kinds of Circuits. An attorney in a Circuit without a cumulative cap ordinarily requests that a court authorize a § 406(b) fee that reflects a cumulative cap. *E.g.*, *Edkins v. Comm'r of Soc. Sec.*, No. 1:15-cv-01322-PJG, 2018 WL 3207600, at *2 (W.D. Mich. June 29, 2018) (plaintiff's attorney sought a § 406(b) fee consistent with a cumulative cap); *De Gowin v. Berryhill*, No. 2:14-cv-02463-KJM-DB, 2018 WL 734459, at *1 n.3 (E.D. Cal. Feb. 6, 2018) (Report and Recommendation) (same); *Upton v. Colvin*, No. 6:12-cv-00168-JHP-SPS, 2016 WL 8465594, at *2 (E.D. Okla. June 1, 2016) (same). Even if the attorney requests that a court authorize a § 406(b) fee exceeding a cumulative cap and even if the court authorizes that fee, the attorney ordinarily will never receive from the

claimant's past-due benefits aggregate § 406(a) and § 406(b) fees exceeding 25% of past-due benefits.

In a Circuit without a cumulative cap, the contract between an attorney and a claimant for representation in court may include a cumulative cap. An attorney may attract a claimant by proposing to represent him or her in court for a § 406(b) fee of 25% of past-due benefits with a cumulative cap, instead of without a cumulative cap. The clear majority of claimants who seek representation in federal court were previously represented at the administrative level. At the administrative level, the prevailing market rate for representation is a § 406(a) fee of no more than 25% of past-due benefits using the "fee agreement" process or the "fee petition" process. *See* 42 U.S.C. § 406(a). It is obviously easier for an attorney to contract with a claimant to retain him or her for a fee that includes a cumulative cap than for a fee that does not. In addition, many attorneys contract with claimants at the administrative level, i.e., before any civil action is necessary to obtain benefits, to provide representation at both the administrative and court levels for a fee including a cumulative cap.

In a Circuit without a cumulative cap, the contract between an attorney and a claimant for representation in court sometimes does not include a cumulative cap. Nonetheless, as a practical matter, the attorney will ordinarily receive at most a § 406(b) fee consistent with a cumulative cap. This is due to (1) the statutory 25% cap on past-due benefits that the Agency withholds for both § 406(a) and § 406(b) fees for direct payment to an

attorney; (2) the limited means of the claimants; and (3) the difficulty of obtaining a fee from a claimant that is more than 25% of past-due benefits.

A. The Agency Withholds at Most 25% of Past-Due Benefits to Pay Any § 406(a) Fee *and* Any § 406(b) Fee; There is a Single Fund of 25% of Past-Due Benefits From Which the Agency Pays All Attorneys Directly.

When a claimant is found entitled to benefits, the Agency withholds 25% of past-due benefits for payment of a fee(s) directly to the attorney(s) from the withheld benefits. 42 U.S.C. § 406(a)(4).[9] There is thus a single fund of 25% of past-due benefits from which the Agency pays all attorneys directly any § 406(a) and/or any § 406(b) fee. After the Agency authorizes a § 406(a) fee or after a federal court awards a § 406(b) fee, the Agency pays the fee directly to the attorney from the withheld 25% of past-due benefits.[10] The

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[9] *See also POMS*, GN § 03920.017(B)(1) ("A direct payment is an authorized fee paid directly to an eligible appointed representative for services rendered at the administrative or federal court level. SSA makes this payment by withholding up to 25% of a claimant's past-due benefits."); *id.*, GN § 03920.017(D)(5) ("SSA withholds a maximum of 25 percent of past-due benefits for direct payment of fees, whether authorized by SSA, a court, or both.").

[10] An attorney pays an "assessment" for direct payment. *See* 42 U.S.C. § 406(d)(1) ("Whenever a fee for services is required to be certified for payment to an attorney from a claimant's past-due benefits pursuant to subsection (a)(4) or (b)(1), the Commissioner shall impose on the attorney an assessment").

Agency does not pay directly to an attorney a § 406(a) fee greater than 25% of past-due benefits; a § 406(b) fee greater than 25% of past-due benefits; or combined § 406(a) and § 406(b) fees greater than 25% of past-due benefits. The prevailing market rate in Circuits without a cumulative cap corresponds to 25% of past-due benefits that the Agency withholds for direct payment to an attorney.

B. 42 U.S.C. § 407(a) Prevents an Attorney From Using Legal Process to Obtain From a Claimant Him- or Herself an Attorney Fee From the Claimant's Social Security Benefits.

The Social Security Act prevents a claimant's attorney from using legal process to obtain from the claimant him- or herself an authorized attorney fee (under either § 406(a) or § 406(b)) from the claimant's benefits, including past-due benefits:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a). Because the Agency withholds at most 25% of past-due benefits, *see* 42 U.S.C. § 406(a)(4), the Agency pays an attorney directly a § 406(a) fee and/or a § 406(b) fee only to the extent that 25%

of past-due benefits have not been depleted by the prior direct payment of an authorized fee. *See POMS*, GN § 03920.017(D)(5). If there is an authorized fee that exceeds 25% of past-due benefits, the attorney must collect that fee from the claimant him- or herself. *See Wrenn ex rel. Wrenn*, 525 F.3d at 933 ("If the amount withheld by the Commissioner is insufficient to satisfy the amount of fees determined reasonable by the court, the attorney must look to the claimant, not the past-due benefits, to recover the difference.").

For example, if the Agency authorized a § 406(a) fee of 20% of past-due benefits; if the Agency paid that § 406(a) fee directly to the attorney; and if a court later authorized a § 406(b) fee of 25% of past-due benefits, the Agency would pay the attorney directly a § 406(b) fee of 5% of past-due benefits, i.e., the amount remaining from 25% of past-due benefits withheld. The attorney would have to collect from the claimant him- or herself the 20% of past-due benefits that the Agency did not pay the attorney directly. Importantly, the clear majority of claimants who have been found entitled to disability benefits have limited economic resources. After all, they are unable to work. Many disabled claimants also have significant debts, including for medical treatment. Thus, as a matter of fact, a typical claimant would be unable to pay his or her attorney the 20% of past-due benefits owed to the attorney. Further, even if the attorney desired to collect the 20% of past-due benefits owed to him or her as a § 406(b) fee, the attorney cannot use a legal process to obtain the 20% of past-due benefits owed to him or her out of the past-due

benefits (to the extent that the claimant's money is identifiable as Social Security benefits). *See* 42 U.S.C. § 407(a).

In sum, if the Court reverses the judgment below and holds that the Social Security Act does not include a cumulative cap on a § 406(b) fee, the impact of the Court's holding will be limited, given the actual legal marketplace.

IV. The Savings Provision States That an Attorney Shall Refund to a Claimant the Smaller of a 42 U.S.C. § 406(b) Fee and an EAJA Fee That the Attorney Receives; Petitioner Obtained a Net § 406(b) Fee to Avoid (1) Refunding to Ms. Wood the Smaller EAJA Fee He Received and (2) Collecting From Ms. Wood the Portion of the § 406(b) Fee That the Agency Did Not Pay Him Directly From Ms. Wood's Past-Due Benefits.

Petitioner's request for a 42 U.S.C. § 406(b) fee exceeding the Eleventh Circuit's cumulative cap concerns only Ms. Wood. Pet'r Br. II. Amicus describes how Petitioner used an Eleventh Circuit case that allows a court to authorize the Agency to pay an attorney directly from the claimant's past-due benefits only a portion of a § 406(b) fee, namely, the portion of the § 406(b) fee remaining after a smaller EAJA fee is deducted. *See Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1272-74 (11th Cir. 2010). Petitioner used *Jackson*'s allowance of a net § 406(b) fee to avoid (1) refunding to Ms. Wood the smaller EAJA fee consistent with the

§ 406(b)'s Savings Provision and (2) collecting from Ms. Wood the portion of the § 406(b) fee that the Agency did not pay him directly from Ms. Wood's past-due benefits.

A. The Savings Provision Includes a Refund Provision.

A court shall award attorney fees and expenses under the EAJA to a prevailing party in a civil action under 42 U.S.C. § 405(g) if the prevailing party satisfies the requirements of the EAJA. *See* 28 U.S.C. § 2412(d); *Astrue v. Ratliff*, 560 U.S. 586, 588-89 (2010); *Schaefer*, 509 U.S. at 296-97. An EAJA award is paid from an agency's general fund. Under the Treasury Offset Program, the United States may seize an EAJA fee in whole or in part to pay a prevailing party's debt. *See Ratliff*, 560 U.S. at 588-89. The Savings Provision for 42 U.S.C. § 406(b) allows an attorney to receive any (post-offset) EAJA award notwithstanding § 406(b), so long as the attorney refunds to the claimant the smaller of the § 406(b) fee and the EAJA fee that the attorney receives:

> 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. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title

> 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

Pub. L. No. 99-80, § 3, Aug. 5, 1985, 99 Stat. 186; *see also Ratliff*, 560 U.S. at 595-96 (describing Savings Provision); *Gisbrecht*, 535 U.S. at 796 (same). The purpose of the Savings Provision is to benefit the claimant, not the attorney. *See Gisbrecht*, 535 U.S. at 796.

B. The Savings Provision Does Not Apply to a 42 U.S.C. § 406(a) Fee for Work Before the Agency in a Sentence-Four Case.

The Savings Provision applies to a court-authorized fee under 42 U.S.C. § 406(b) and not to an Agency-authorized fee under 42 U.S.C. § 406(a). *See* Pub. L. No. 99-80, § 3. The Savings Provision applies when there are two fees for the "same work." *Id.* With the exception of administrative proceedings on court remand under sentence six of 42 U.S.C. § 405(g), *see Melkonyan*, 501 U.S. at 96-97; *supra* n.8, work representing a claimant during administrative proceedings is not the "same work" as representing the claimant in court. Thus, if an attorney does not receive a § 406(b) fee, but receives a § 406(a) fee for work before the Agency and a separate EAJA fee for work in court, the attorney keeps the entire § 406(a) fee and the entire EAJA fee. *See Rice v. Astrue*, 609 F.3d 831, 838 (5th Cir. 2010). The claimant him- or herself pays only the § 406(a) fee.

C. In Most Civil Actions in Which a Claimant Obtains Judicial Relief, a Court Rules on an Application for EAJA Fees Before a Motion for a 42 U.S.C. § 406(b) Fee is Filed.

Courts seldom hold that a claimant is disabled and entitled to benefits, making further administrative proceedings unnecessary. *See* 42 U.S.C. § 405(g) (sentence four) ("The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."). In Fiscal Year 2017, courts held that claimants were entitled to benefits in 2% of civil actions and remanded for further administrative proceedings 48% of civil actions.[11] Because a judgment under sentence four reversing the Commissioner's final decision with a remand for a rehearing makes a claimant a prevailing party, a prevailing party may apply for EAJA fees after a sentence-four remand. *See Schaefer*, 509 U.S. at 296-97 & n.2. When a court reverses the Commissioner's final decision with a remand for a rehearing, i.e., for further administrative proceedings, the claimant has not yet been found entitled to benefits and thus there are no past-due benefits from which a § 406(b) fee could be authorized. In Fiscal Year 2017, administrative law judges allowed 47% of claims, including those on court

[11] Soc. Sec. Admin., *FY 2019 Congressional Justification*, at 206, https://www.ssa.gov/budget/FY19Files/2019CJ.pdf.

remand.[12] If a claimant is found disabled on remand, the claimant's attorney may ask the court to award a § 406(b) fee from the claimant's past-due benefits. *See Jackson v. Astrue*, 705 F.3d 527 (5th Cir. 2013).

D. Petitioner Used Eleventh Circuit Net-Fee Law to Avoid the Savings Provision's Refund Provision.

Amicus describes how Petitioner used Eleventh Circuit net-fee law to avoid (1) refunding to Ms. Wood the smaller of the court-awarded EAJA fee and § 406(b) fee under the Savings Provision and (2) collecting from Ms. Wood herself a fee in excess of the 25% of past-due benefits withheld.

In June 2012, Ms. Wood hired Petitioner to represent her in court for a contingent fee of 25% of past-due benefits. Joint App. 8-10. At that time, Eleventh Circuit precedent included a cumulative cap.[13] *See*

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[12] *FY 2019 Congressional Justification*, at 206.

[13] When Ms. Wood hired Petitioner in June 2012, Petitioner was aware that Eleventh Circuit precedent imposed a cumulative cap. *E.g.*, *Jackson v. Comm'r of Soc. Sec.*, No. 6:07-cv-1432-Orl-KRS, 2010 WL 11595279, at *3 (M.D. Fla. Nov. 18, 2010) (district court reminding Petitioner that controlling Circuit law included a cumulative cap), *rev'd on other grounds Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268 (11th Cir. 2010). Petitioner's and Ms. Wood's contract did not mention the cumulative cap. Joint App. 8-10. However, the contract may be construed as including that cap. *See Arabia v. Siedlecki*, 789 So.2d 380, 383 (Fla. 4th DCA 2001) ("An attorney must be clear and precise in explaining the terms of a fee agreement. To the extent the contract is unclear, the agreement should be construed against the attorney."). The contract

Wood, 861 F.3d at 1204-05 (*citing Dawson*, 425 F.2d 1192). In September 2013, the district court reversed Ms. Wood's case with a remand for a rehearing pursuant to sentence four 42 U.S.C. § 405(g). In November 2013, the district court awarded an EAJA fee of $4,107.27. Petitioner eventually received that amount. On remand, the Agency awarded Ms. Wood past-due benefits and withheld for payment of an attorney fee(s) $8,595.75. The Agency also authorized a § 406(a) fee of $2,865, which Petitioner received. In March 2016, Petitioner asked the district court to authorize a § 406(b) fee of $8,595.75, i.e., the entire amount withheld from Ms. Wood's past-due benefits, and order payment to him of a net fee of $4,488.48, i.e., the 25% of past-due benefits of $8,595.75 minus the $4,107.27 EAJA fee Petitioner received earlier. *See Jackson*, 601 F.3d at 1272-74 (allowing a court to order the Agency to pay an attorney not the entire § 406(b) fee but the § 406(b) fee reduced by the smaller EAJA fee that the attorney previously received). This would relieve Petitioner of his Savings Provision duty to refund to Ms. Wood the smaller EAJA fee.[14] The district court applied the Eleventh Circuit's cumulative cap and found that $5,730.79 remained from the withheld 25% of past-due benefits ($8,595.75 (25% of past-due benefits) – $2,865.00

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does not provide evidence Ms. Wood understood that Petitioner would seek a larger fee than Circuit law allowed.

[14] In Petitioner's contract with Ms. Wood, Petitioner did not promise to refund the smaller of the § 406(b) fee or the EAJA fee he received, but to use an EAJA fee he received "to reduce the amount of attorney fees that would otherwise be due from claimant's past-due benefits." Joint App. 9.

(§ 406(a) fee Petitioner received)). The district court then applied the Eleventh Circuit's net-fee method from *Jackson* and authorized a § 406(b) fee of $1,623.48 ($5,730.79 (amount of 25% of past-due benefits remaining after subtraction of $2,865.00 § 406(a) fee) – $4,107.27 (EAJA fee Petitioner received)).

Without a cumulative cap *and* without the Eleventh Circuit's net § 406(b) fee method in *Jackson* and assuming that Petitioner is authorized a § 406(b) fee of 25% of Ms. Wood's past-due benefits, Petitioner would need to refund to Ms. Wood the smaller EAJA fee and collect from Ms. Wood herself a portion of the § 406(b) fee. Amicus provides a step-by-step description of that scenario. First, the district court awarded and Petitioner received an EAJA fee of $4,107.27. Second, the Agency awarded Ms. Wood past-due benefits; withheld for payment of an attorney fee(s) $8,595.75; and authorized a § 406(a) fee of $2,865.00. Third, Petitioner asked the district court to authorize a § 406(b) fee of $8,595.75, i.e., the entire amount withheld from Ms. Wood's past-due benefits. Fourth, the district court ruled that $8,595.75 is a reasonable § 406(b) fee. Fifth, the Agency would pay Petitioner directly not $8,595.75 as a § 406(b) fee, but $5,730.75. Because the Agency withholds only 25% of past-due benefits and because the Agency already paid Petitioner $2,865.00 as a § 406(a) fee, only $5,730.75 remains to pay Petitioner a § 406(b) fee directly from Ms. Wood's past-due benefits. Sixth, because Petitioner received a § 406(b) fee of $5,730.75 and an EAJA fee of $4,107.27, Petitioner must refund to Ms. Wood the smaller fee, i.e., $4,107.27. Lastly,

Petitioner would need to use self-help to collect from Ms. Wood the $2,865.00 remaining of the $8,595.75 § 406(b) fee authorized.

In theory, Petitioner could receive the same total fees if the Savings Provision's refund provision were followed that he would receive if he received a net § 406(b) fee under *Jackson*. But following the Savings Provision's refund provision would require Petitioner to spend resources (1) administering that provision and (2) collecting from Ms. Wood a portion of the § 406(b) fee. Further, as shown above, there is a risk that an attorney will be unable to collect from a claimant him- or herself an authorized § 406(a) fee or § 406(b) fee that the Agency did not pay the attorney directly. Consequently, an attorney may decide not to attempt to collect from the claimant the remaining authorized fee.

CONCLUSION

The Court should decide the question presented taking into account the language and structure of 42 U.S.C. § 406(a) and (b). With respect to Respondent's position that a court has discretion to impose a cumulative cap of 25% of past-due benefits when determining a reasonable § 406(b) fee, the Court should recognize that a court has no jurisdiction over the determination of a reasonable fee under § 406(a). Further, the Court may also consider the actual marketplace for legal services for Social Security claimants. The

prevailing market rate in that marketplace includes a cumulative cap even though not required by the Social Security Act.

Respectfully submitted,

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July 23, 2018