No. 17-773

In the Supreme Court of the United States

RICHARD ALLEN CULBERTSON, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT SUPPORTING REVERSAL AND REMAND

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
CHARLES W. SCARBOROUGH
DENNIS FAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 42 U.S.C. 406(b)(1)(A) establishes that 25% of a claimant's past-due benefits under Title II of the Social Security Act is the maximum aggregate amount of attorney's fees that may be charged for representing the claimant in both administrative and court proceedings under Title II.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 861 F.3d 1197. The order of the district court (Pet. App. 18a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. On September 15, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 23, 2017, and the petition was filed on November 21, 2017. The petition for a writ of certiorari was granted on May 21, 2018. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are reproduced in the appendix to this brief. App., *infra*, 1a-17a.

STATEMENT

A. Statutory Background

The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide monetary benefits to certain individuals eligible for such benefits under Titles II and XVI of the Act. Title II, 42 U.S.C. 401 *et seq.*, establishes an "insurance program" that "provides old-age, survivor, and disability [OASDI] benefits to insured individuals irrespective of financial need." *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). Title XVI, 42 U.S.C. 1381 *et seq.*, establishes a separate social "welfare program" that provides supplemental security income (SSI) benefits "to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Galbreath*, 485 U.S. at 75. A claimant's application for benefits can result in payments of "[p]ast-due benefits"—*i.e.*, benefits that may accrue before a favorable determination or decision, 20 C.F.R. 404.1703, 416.1503—as well as ongoing monthly benefits. See 42 U.S.C. 423(a), 1382. A claimant may seek administrative review of SSA's initial determination, including any denial of benefits to which she may be entitled, 42 U.S.C. 405(b), 1383(c)(1) and (2), and may then seek judicial review of the resulting final agency decision, 42 U.S.C. 405(g), 1383(c)(3).

Title II of the Social Security Act separately regulates the amount of fees that an attorney may collect from an OASDI claimant for representing the claimant in agency proceedings, 42 U.S.C. 406(a), and on judicial review, 42 U.S.C. 406(b). See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 793-794 (2002).[1] "Collecting or even demanding from the

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[1] Title XVI of the Act incorporates most of the attorney's fee provisions for agency and court proceedings in Section 406(a) and (b),

client anything more than the authorized [fee for such representation] is a criminal offense." *Id.* at 796; see 42 U.S.C. 406(a)(5) and (b)(2). The question presented in this case is whether Section 406(b)(1)(A) establishes that 25% of the claimant's past-due benefits is the maximum aggregate amount of fees an attorney may charge for representing a claimant in both administrative and court proceedings under Title II.

1. Fees for Administrative Proceedings

Under Title II, an attorney may seek fees "[f]or representation of a benefits claimant at the administrative level" by either filing "a fee petition" with SSA under Section 406(a)(1) or seeking SSA's approval of a "fee agreement" with the claimant under Section 406(a)(2). *Gisbrecht*, 535 U.S. at 794.

a. Fee petitions under Section 406(a)(1)

Section 406(a)(1) provides that "[t]he Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any [Title II] claim before the Commissioner." 42 U.S.C. 406(a)(1). Section 406(a)(1) further provides that, except as provided in Section 406(a)(2) with respect to fee agreements, "whenever the Commissioner of Social Security * * * makes a determination favorable to the claimant" on "any claim before the Commissioner for benefits under [Title II]" in which the claimant was represented by an attorney, "the Commissioner shall * * * fix * * * a reasonable fee to compensate such attorney for the services performed by him in connection with such claim." *Ibid.*

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with modifications for SSI cases, 42 U.S.C. 1383(d)(2)(A), and separately addresses payment of such fees from past-due SSI benefits, 42 U.S.C. 1383(d)(2)(B). Title XVI fees are not at issue in this case.

SSA's implementing regulations require the claimant's representative to submit a "written request" for "approval of a fee for services * * * performed in dealings with [the agency]," which the representative should file with the agency "after the proceedings * * * are completed." 20 C.F.R. 404.1725(a). That fee petition must include, *inter alia*, a list of the services provided, the amount of time spent on each type of service, and the amount of the fee that the representative seeks to charge for those services. 20 C.F.R. 404.1725(a)(2)-(3). In fixing the amount of a reasonable fee, the agency will "consider the amount of benefits, if any, that are payable," but the agency will ultimately "base the amount of fee [it] authorize[s]" on multiple factors and "may authorize a fee even if no benefits are payable." 20 C.F.R. 404.1725(b)(2).

b. Fee agreements under Section 406(a)(2)

In 1990, Congress enacted Section 406(a)(2), which establishes an alternative, "streamlined process for a representative to obtain approval of [a] fee" for "representing a claimant before the agency" based on a written fee agreement. 74 Fed. Reg. 6080 (Feb. 4, 2009). A representative may invoke that process under Title II by "present[ing] in writing" to the agency "an agreement between the claimant" and the representative "prior to the time of the Commissioner's determination." 42 U.S.C. 406(a)(2)(A). If the Commissioner's determination is "favorable to the claimant" on a "claim of entitlement to past-due benefits" and "the fee specified in the agreement" does not exceed the lesser of "25 percent of the total amount of such past-due benefits" or a prescribed dollar amount (currently $6000), see 42 U.S.C. 406(a)(2)(A)(ii) and (iii), the Commissioner "shall approve" the agreement "at the time of the favorable determination" and "the fee specified in the agreement shall be the maximum fee."

42 U.S.C. 406(a)(2)(A). Cf. 42 U.S.C. 406(a)(3)(A)-(C) (addressing administrative review of a fee initially approved based on a fee agreement).[2]

In a case involving a fee "agreement described in [Section 406(a)(2)](A)" that relates to both a claim for past-due OASDI benefits (under Title II) and a claim for past-due SSI benefits (under Title XVI), Section 406(a)(2) imposes an additional requirement when the Commissioner makes "a favorable determination * * * with respect to both such claims." 42 U.S.C. 406(a)(2)(C). The Commissioner "may approve" such an agreement "only if the total fee or fees specified in [the] agreement" for representing the claimant before the agency on his Title II and Title XVI claims "does not exceed, in the aggregate, the [$6000] amount" noted above. *Ibid.*; see 42 U.S.C. 406(a)(2)(A)(ii)(II); p. 5 n.2, *supra*.

2. Fees for Court Proceedings

If a claimant seeks judicial review of a final SSA decision, see 42 U.S.C. 405(g) (providing for judicial review), two distinct provisions address attorney's fees for services performed on judicial review: Section 406(b) and a provision of the Equal Access to Justice Act (EAJA) that applies to "civil action[s]" for judicial review, 28 U.S.C. 2412(d). Section 406(b) regulates what the claimant's attorney may charge his own client, see 42 U.S.C. 406(b)(1)(A); see also 42 U.S.C. 406(b)(2), whereas EAJA authorizes a fee-shifting award against the government to reimburse a prevailing party for reasonable fees, see 28 U.S.C. 2412(d)(1)(A) and (2)(A).

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[2] Congress has authorized the Commissioner to "increase the dollar amount under [Section 406(a)(2)(A)](ii)(II)" to reflect "the rate of increase in primary insurance amounts" after January 1, 1991. 42 U.S.C. 406(a)(2)(A). In 2009, the Commissioner increased the prescribed amount to $6000. 74 Fed. Reg. at 6080.

a. Fees under Section 406(b)

Section 406(b) provides in pertinent part:

> Whenever a court renders a judgment favorable to a claimant under [Title II] 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). "[N]o other fee may be payable * * * for such representation except as provided in [Section 406(b)(1)]," *ibid.*, or EAJA. See pp. 7-8 & n.4, *infra*.

b. EAJA fees under Section 2412(d)

EAJA Section 2412(d) separately authorizes a court reviewing SSA's final decision to order the recovery of "reasonable attorney fees" from the government in certain circumstances in which such fees were "incurred by [the prevailing claimant] in [the] civil action" and the government's position was not "substantially justified." 28 U.S.C. 2412(d)(1)(A) and (2)(A).[3]

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[3] Although a separate EAJA provision authorizes an award of attorney's fees incurred in an adversary agency adjudication, 5 U.S.C. 504(a)(1), that provision does not apply to Social Security proceedings, which are not adversarial because the agency does not participate as a party to the proceedings. *Sullivan* v. *Hudson*, 490 U.S. 877, 891 (1989).

In circumstances not presented here, EAJA's fee provisions for "civil action[s]," 28 U.S.C. 2412(d)(1)(A), authorize a district court to order the government to pay attorney's fees incurred in certain remand proceedings before SSA. See *Hudson*, 490 U.S. at 890, 892. An EAJA fee award for work before the agency is available only if a district court remands the matter to SSA pursuant to sentence six of 42 U.S.C. 405(g), which applies "in only two situations: where the Secretary requests a remand before answering the complaint, or

In this case, as in most actions for judicial review of OASDI decisions in which the claimant is successful, the district court entered its judgment pursuant to sentence four of 42 U.S.C. 405(g). See J.A. 11. Under sentence four, a court reviews "'each final decision of the Secretary'" in "'a separate piece of litigation'" that "'terminates'" upon entry of a "judgment reversing the Secretary's denial of benefits." *Shalala* v. *Schaefer*, 509 U.S. 292, 299, 302 (1993) (citation, emphasis, and brackets omitted). A claimant who obtains a sentence-four judgment that orders a remand to SSA qualifies as a "prevailing party" under EAJA Section 2412(d) even before SSA makes a final benefits decision on remand, because a judgment of reversal under Section 405(g) reflects sufficient success in the claimant's civil action to confer "prevailing party" status under EAJA. *Id.* at 300-302.

If a court awards fees under EAJA and approves fees under Section 406(b), "the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee,'" which can "effectively increase[] the portion of past-due benefits the successful Social Security claimant may

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where new, material evidence is adduced that was for good cause not presented before the agency." *Shalala* v. *Schaefer*, 509 U.S. 292, 297 n.2 (1993); see *id.* at 300 n.4 ("limiting *Hudson*['s interpretation of Section 2412(d)] to sentence-six cases"). A sentence-six remand allows the district court to "'retain[] continuing jurisdiction over the case pending [the agency proceedings on remand]'" and then to enter its "judgment after [such] postremand agency proceedings have been completed." *Id.* at 297, 299 (citation and emphasis omitted). In that context, this Court has determined that "the [agency] proceedings on remand [can be deemed] an integral part of the 'civil action' for judicial review" for purposes of a fee award under Section 2412(d). *Hudson*, 490 U.S. at 892.

pocket." *Gisbrecht*, 535 U.S. at 796 (citation omitted; first set of brackets in original).[4]

3. Direct Payment to an Attorney for the Claimant's Fee Obligation Out of the Claimant's Past-Due Benefits

Section 406(a) and Section 406(b) include separate provisions granting SSA "withholding authority to pay attorney's fees" that have been approved for, respectively, "Title II administrative proceedings" and "judicial proceedings under Title II," out of the past-due benefits that are owed to the claimant. *Galbreath*, 485 U.S. at 76; see 42 U.S.C. 406(a)(4) and (b)(1)(A); cf. 42 U.S.C. 406(e)(1) (identifying such provisions as "fee withholding procedures").

a. If SSA has approved a maximum attorney's fee under either the fee-petition or fee-agreement process in Section 406(a) for work before the agency and the claimant is "entitled to past-due benefits under [Title II]," the claimant's attorney may obtain payment of some or all of the approved fee directly from the government out of the

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[4] An amendment to EAJA addresses Section 406(b)(1)'s prohibition against charging a Title II claimant any fee for representing the claimant in court "except as provided in [Section 406(b)(1)]," 42 U.S.C. 406(b)(1). That amendment provides that Section 406(b)(1) "shall not prevent an award of fees and other expenses under [EAJA] [S]ection 2412(d)." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (reproduced as the "Savings Provision" at 28 U.S.C. 2412 note). The amendment also provides that Section 406(b)(2)—which makes it a criminal offense to charge, demand, receive, or collect a fee for "proceedings before a court * * * in excess of that allowed" under Section 406(b)(1), see 42 U.S.C. 406(b)(2)—"shall not apply with respect to any such award" if, "where the claimant's attorney receives fees for the same work under both [Section 406(b) and EAJA], the claimant's attorney refunds to the claimant the amount of the smaller fee." § 3(2), 99 Stat. 186.

claimant's past-due benefits. 42 U.S.C. 406(a)(4). Section 406(a)(4) provides that, in such circumstances, the Commissioner "shall * * * certify for payment" to the attorney "out of [the] past-due benefits * * * an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits" (minus an assessment charged to the attorney for the direct payment). *Ibid.*; see 20 C.F.R. 404.1730(b)(1) and (d); cf. 42 U.S.C. 406(d) (assessment). SSA will therefore pay an attorney out of those past-due benefits "the smaller of" the "amount of the fee" set by the agency or "[25%] of the total of the past due benefits" (minus the assessment). 20 C.F.R. 404.1730(b)(1) and (d). SSA's Program Operations Manual System (POMS) explains that "[i]f the authorized fee exceeds the amount of withheld Title II benefits" that SSA can pay directly to the representative, "the representative must collect the balance from the claimant." POMS, GN 03920.017D.1 (Mar. 28, 2013), http://policy.ssa.gov/poms.nsf/lnx/0203920017.[5]

b. If the district court has allowed a reasonable fee as part of its judgment under Section 406(b)(1)(A), the Commissioner also "may * * * certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of [the claimant's] past-due benefits" (minus an assessment for the direct payment). 42 U.S.C. 406(b)(1)(A); see 20 C.F.R. 404.1728(b), 404.1730(a); cf. 42 U.S.C. 406(d) (assessment). That direct payment "is subject to the [same] limitations" that govern the direct payment of fees approved by SSA. 20 C.F.R. 404.1730(a). The POMS explain that although "[t]he court fee is in

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[5] The POMS are SSA's "publicly available operating instructions for processing Social Security claims." *Washington Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003).

addition to the fee, if any, SSA authorizes for proceedings at the administrative level," the agency will only "withhold[] a maximum of 25 percent of past-due benefits for direct payment of fees, whether authorized by SSA, a court, or both." POMS, GN 03920.017D.5 Note 1.

B. Proceedings In This Case

1. a. In 2008, claimant Katrina Wood filed a Title II application for disability benefits, which SSA denied. See Administrative Record (A.R.) 13 (Aug. 30, 2012). Wood then entered into a fee agreement with an attorney who initially represented her in administrative proceedings. A.R. 44. In December 2010, after an administrative law judge (ALJ) determined that Wood was not disabled, A.R. 10-21, Wood designated petitioner as her attorney for further agency review proceedings before SSA's Appeals Council. A.R. 9. In April 2012, the Appeals Council denied review. A.R. 4A-6.

In June 2012, Wood entered into a contingency-fee agreement with petitioner for the upcoming district court action. J.A. 8-10. That agreement states that Wood "agrees to pay a fee of 25 percent of the total of the past-due benefits to which [she] is entitled" as payment for "[petitioner's] representation of [her] in Federal Court" if she succeeds in obtaining such benefits. J.A. 8-9. The fee agreement further states that its provisions do "not cover or include any representation before [SSA]." J.A. 9.

Petitioner subsequently represented Wood in district court, where the parties consented to adjudication by a magistrate judge. See Pet. App. 3a, 4a n.2. In September 2013, the magistrate judge reversed the agency decision and entered judgment remanding the matter for further proceedings pursuant to sentence four of 42 U.S.C. 405(g). Pet. App. 4a; J.A. 11. One month later, the magistrate judge granted Wood's unopposed motion for $4107.27 in

EAJA fees under Section 2412(d) for petitioner's work in district court. J.A. 12-15; see Pet. App. 4a.

b. On remand, SSA awarded Wood a total of $34,383 in past-due disability benefits: $30,871 for herself and $3512 for her child as an auxiliary beneficiary. Pet. App. 4a; J.A. 19; see D. Ct. Doc. 27, at 2 (Mar. 29, 2016) (explaining that $3512, not $4340, is the correct amount of past-due auxiliary benefits). The agency withheld a total of 25% of Wood's past-due benefits ($8595.75) from its immediate payment of benefits, to cover any direct payment of attorney's fees that might ultimately be warranted. J.A. 19, 30; see Pet. App. 4a. The agency separately granted petitioner's Section 406(a) fee petition in part, authorizing petitioner to charge Wood $2865 for representing her before the agency. See J.A. 25-26; Pet. App. 5a.

c. Petitioner then moved the district court for a separate $4488.48 fee award under Section 406(b) for representing Wood before the court. Pet. App. 5a. Petitioner calculated the amount of that Section 406(b) fee request ($4488.48) by subtracting the EAJA award ($4107.27) from the 25% contingency fee specified in petitioner's fee agreement for the district court litigation ($8595.75). Supp. C.A. App. 5. That $4488.48 fee request under Section 406(b) was therefore mathematically equivalent to requesting approval of the full 25% of past-due benefits specified in the fee agreement for the district court case ($8595.75) and refunding to Wood the smaller EAJA fee ($4107.27).

The magistrate judge awarded $1623.48 in Section 406(b) attorney's fees but otherwise denied petitioner's fee request. Pet. App. 18a-29a. The judge concluded that "the total fee under Sections 406(a) and (b) cannot exceed 25% of the [claimant's] past-due benefits." *Id.* at 21a. The judge also concluded that if a court grants a fee award

under EAJA, the claimant's attorney must refund to the claimant the amount of the EAJA fee or the Section 406(b) fee, whichever is smaller. *Ibid.* In this case, the judge continued, petitioner properly subtracted the $4107.27 EAJA award from the maximum $8595.75 amount reflecting "25% of [Wood's] past due benefits" but had "erroneously fail[ed] to deduct" the $2865 Section 406(a) fee that SSA had previously approved for petitioner's work before the agency. *Id.* at 22a. The judge therefore subtracted the Section 406(a) fee from petitioner's request and awarded him a $1623.48 fee under Section 406(b). *Id.* at 26a, 29a. That amount, the judge noted, was "far less than" amounts approved in other Section 406(b) contexts involving contingent-fee agreements. *Id.* at 28a.

SSA fees: Section 406(a)	$2865.00 (8.3%)[6]	$2865.00 (8.3%)
Court fees:	*Requested*	*Awarded*
EAJA	$4107.27	$4107.27
Section 406(b)	$4488.48	$1623.48
Subtotal:	$8595.75 (25.0%)	$5720.75 (16.7%)
Total fees:	$11,460.75 (33.3%)	$8595.75 (25.0%)

2. Petitioner perfected appeals from the attorney's-fee decisions in four Social Security benefits cases in which he represented the claimants, including Wood. See

[6] The percentage indicated is the percentage of total past-due benefits ($34,383) represented by each associated amount in the chart.

Pet. App. 1a-2a.[7] The court of appeals consolidated the appeals and affirmed. *Id.* at 1a-17a.

The court of appeals explained that *Dawson* v. *Finch*, 425 F.2d 1192 (5th Cir.), cert. denied, 400 U.S. 830 (1970), was "binding precedent" in the Eleventh Circuit and that *Dawson* held that "the 25% limit from [Section] 406(b) applies to total fees awarded under both [Section] 406(a) and (b)." Pet. App. 11a-12a & n.4. Under *Dawson*, the court determined, Section 406(b) "'preclud[es] the *aggregate* allowance of attorney's fees greater than 25 percent of the [claimant's] past due benefits.'" *Id.* at 12a (quoting *Dawson*, 425 F.2d at 1195).

The court of appeals stated that, in each of the cases before it, the magistrate judge had "relied on *Dawson*," which remained binding on the court of appeals under the "prior panel precedent rule." Pet. App. 12a, 14a. Although the court acknowledged that petitioner had identified decisions from other courts of appeals that "do not apply the 25% limit in [Section] 406(b) to the aggregate fee award under [Section] 406," the court noted that those out-of-circuit decisions "either explicitly or implicitly recognize that *Dawson* limited the combined [Section] 406(a) and (b) attorney's fee awards to 25% of past-due benefits" and did "not empower [the panel here] to ignore [*Dawson*'s]" precedential effect. *Id.* at 13a-14a.

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[7] Although the claimants were named as appellants in each of those appeals, Pet. App. 1a-2a, petitioner was the real party in interest in the appeals because, as their attorney, he sought "to obtain higher fee awards under [Section] 406(b)." *Gisbrecht*, 535 U.S. at 798 n.6; see Pet. App. 3a n.1.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that Section 406(b) imposes a 25% cap on the aggregate amount of attorney's fees that may be approved for work before SSA and before the court. Section 406(b)'s text plainly imposes that 25% limitation only upon the amount of fees allowed for the claimant's "represent[ation] *before the court*." 42 U.S.C. 406(b)(1)(A) (emphasis added). That text fully resolves this case. The surrounding statutory context confirms that conclusion. Whereas Section 406(b) governs the amount of fees that may be charged for representing a plaintiff in court, Section 406(a) imposes distinct limits on the amount of fees that may be charged for work before the agency. Among other things, Section 406(a) authorizes SSA to approve fees for work before the agency that by themselves *exceed* 25% of a claimant's past-due benefits. Section 406(b)'s 25% cap thus logically could apply only to fees for court proceedings, not the aggregate total of fees for agency and court proceedings.

The absence of a 25% cap on the aggregate amount of attorney's fees for agency and court proceedings does not mean that attorney's fees should normally total 50% or more of a claimant's past-due benefits. SSA may properly consider the total amount of agency and court fees requested when determining the proper amount of fees for work before the agency. The district court likewise should serve as an "independent check" against excessive fees, *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 807 (2002), when it determines a reasonable fee for work on judicial review. Congress itself established those distinct limitations on the amount of fees that may be charged to an SSA claimant, which should allow sufficient fees to attract the

attorneys needed by SSA claimants while ensuring that such fees are not themselves excessive.

ARGUMENT

THE COURT OF APPEALS ERRED BY IMPOSING A 25% CAP ON THE AGGREGATE AMOUNT OF ATTORNEY'S FEES FOR AGENCY AND COURT PROCEEDINGS

The court of appeals held that "the 25% limit from [42 U.S.C.] 406(b) applies to total fees awarded under both [42 U.S.C.] 406(a) and (b)" and, for that reason, Section 406(b) prohibits "'the *aggregate* allowance of attorney's fees greater than 25 percent of the [claimant's] past due benefits.'" Pet. App. 11a-12a (citation omitted). That is incorrect. The text of Section 406(b) unambiguously applies its 25% cap only to the amount of attorney's fees for a claimant's "represent[ation] before the court." 42 U.S.C. 406(b)(1)(A). Section 406(b) thus does not restrict fees that may be awarded under Section 406(a) for representing the claimant before the agency or limit the aggregate amount of fees for such representation before the agency and in court. That conclusion is confirmed by the broader statutory context, which demonstrates that attorney's fees for agency proceedings under Section 406(a) can alone exceed 25% of the claimant's past-due benefits so long as such fees are reasonable.

A. Section 406(b) Caps The Amount Of Attorney's Fees Only For Work In Court Proceedings

1. The text of Section 406(b) applies only to attorney's fees for representation in court

Section 406(b) imposes a 25% cap on attorney's fees only with respect to fees awarded for representing the claimant in court. The relevant portion of Section 406(b) provides:

> Whenever a court renders a judgment favorable to a claimant under [Title II] 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) (emphasis added). The 25% cap in that passage limits the amount of a "reasonable fee for such representation." "[S]uch representation," in turn, refers directly back to the claimant's "represent[ation] before the court." See *ibid.* Nothing in Section 406(b) addresses attorney's fees for representing a claimant in agency proceedings.

No other plausible construction exists. The adjective "such" is "used to avoid repetition," and it means "of the sort or degree previously indicated." *Webster's Third New International Dictionary* 2283 (1981). The phrase "such representation" in Section 406(b) thus necessarily refers to the provision's only antecedent reference to representation, namely, the claimant's "represent[ation] before the court" by an attorney. 42 U.S.C. 406(b)(1)(A).

If Congress had intended to apply the limitations in Section 406(b) to fees for representation before SSA, it would have done so expressly. Elsewhere in Section 406, Congress made it quite clear when it intended to address fees for work before the agency. See, *e.g.*, 42 U.S.C. 406(a)(1) (discussing "any claim before the Commissioner" and requiring a "reasonable fee to compensate [an] attorney for the services performed by him in connection with such claim"); *ibid.* (addressing "the maximum fees which may be charged for services per-

formed in connection with any claim before the Commissioner"). Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Moreover, when Congress intended to impose a cap on the aggregate amount of total fees under Section 406, it enacted clear text to set such a limit. Section 406(a) specifically addresses fee agreements for work performed before the agency for a claimant with both an OASDI claim under Title II and a separate SSI claim under Title XVI. 42 U.S.C. 406(a)(2)(C). If the claimant prevails on both such claims, Congress directed that the agency approve the fee agreement only if "the *total fee or fees* specified in such agreement does not exceed, in the *aggregate*," $6000. *Ibid.* (emphasis added); see p. 5 n.2, *supra*. Had Congress intended to impose a 25% cap on the "aggregate" amount of fees awarded under Section 406(a) and (b), it would have enacted analogous text.

2. The surrounding statutory context confirms that Section 406(b) does not restrict attorney's fees for agency proceedings

An aggregate 25% past-due-benefits cap would also be inconsistent with the broader structure of Section 406.

Congress has required that SSA determine the amount of a "reasonable fee" under Section 406(a)(1)'s fee petition process without imposing any fixed limit on the amount of that fee. 42 U.S.C. 406(a)(1). The only statutory criterion for fixing such a fee is that the fee must be "reasonable." *Ibid.* As a result, so long as a fee

for an attorney's work before the agency is "reasonable" under Section 406(a), that fee can exceed 25% of the claimant's past-due benefits.

Section 406(a)'s text governing SSA's payment of an attorney's agency-approved maximum fee directly out of the claimant's past-due benefits confirms that Section 406(a) fees for work before the agency can exceed 25% of the claimant's past-due benefits. Section 406(a)(4) directs that the agency "shall * * * certify for payment out of such past-due benefits * * * *so much of* the maximum fee *as* does not exceed 25 percent of such past-due benefits. 42 U.S.C. 406(a)(4) (emphasis added). That provision thus reflects that the "reasonable fee" approved by the agency may sometimes exceed 25% of a claimant's past-due benefits, because it limits the extent to which the agency may pay an attorney out of those benefits, permitting the agency to pay only "so much of" the approved fee as does not exceed 25% of the past-due benefits. SSA's regulations likewise state that SSA may pay out of past-due benefits only "the smaller of" the fee approved by the agency or 25% of such benefits. 20 C.F.R. 404.1730(b)(1). SSA's publicly available guidance accordingly explains that when the "authorized fee exceeds the amount of withheld Title II benefits" for the payment of fees from those benefits, "the representative must collect the balance from the claimant." POMS, GN 03920.017D.1 (Mar. 28, 2013).

SSA's longstanding interpretation of Section 406 further reflects that the "reasonable fee" that may be sought by filing an agency fee petition under Section 406(a)(1) is not capped at 25% of past-due benefits. The agency's regulations make clear that the agency may authorize a reasonable fee "even if no benefits are payable." 20 C.F.R. 404.1725(b)(2).

Those provisions permitting a fee award under Section 406(a) that *exceeds* 25% of a claimant's past-due benefits confirm that Section 406(b)'s limitation capping fees at 25% of past-due benefits does not apply beyond fees awarded under Section 406(b) for an attorney's work in court and does not limit the aggregate amount of fees under both Section 406(a) and (b). It would be anomalous to conclude that Congress permitted a "reasonable fee" exceeding 25% of a claimant's past-due benefits under Section 406(a)(1) for work before the agency but, by virtue of Section 406(b), imposed a cap on the *aggregate* amount of fees for both the agency and court proceedings equal to *only* 25% of such benefits.

3. No sound basis exists for disregarding Section 406(b)'s unambiguous text

The court of appeals in this case did not independently analyze whether Section 406(b)'s text caps the aggregate amount of fees for both agency and court proceedings. The court instead concluded that it was bound by the Fifth Circuit's precedent in *Dawson* v. *Finch*, 425 F.2d 1192, cert. denied, 400 U.S. 830 (1970), even if "*Dawson* was wrongly decided." Pet. App. 14a; see *id.* at 11a-12a & n.4, 13a-14a. Neither *Dawson* nor the Fourth Circuit's similar decision in *Morris* v. *SSA*, 689 F.2d 495 (1982) (per curiam), provides a sound basis for disregarding Section 406(b)'s unambiguous text.

In *Dawson*, the Fifth Circuit affirmed a district court's decision to award an attorney no fees under Section 406(b) for successfully representing a claimant in court, because SSA had already approved an attorney's fee for administrative proceedings that equaled 25% of the claimant's past-due benefits, which the court understood to constitute the "total fee allowance" in this context. 425 F.2d at 1192. The court of appeals stated that it had considered

"[t]he statutory language and legislative history of Section [4]06(b)," *id.* at 1195, and it block-quoted the relevant statutory text, which applies when a court enters a judgment favorable to a claimant "'who was represented before the court by an attorney'" and which caps the amount of a reasonable fee "'for such representation'" at 25% of the past-due benefits, *id.* at 1193 (quoting 42 U.S.C. 406(b)). But *Dawson* did not set forth any analysis of the block-quoted text that might have arguably supported its holding. See *id.* at 1193-1195. *Dawson* merely noted that the attorney seeking fees had not "discussed the statutory language" in arguing for his contrary position. *Id.* at 1195.

Rather than analyzing the statutory text, *Dawson* relied heavily on congressional testimony preceding Section 406(b)'s enactment in 1965, in which an official of the Department of Health, Education, and Welfare (which was then responsible for administering the Social Security Act) noted an "occasion[al]" problem of "what appeared to be inordinately large fees for representing claimants *in Federal district court actions* arising under the social security program." 425 F.2d at 1194 (emphasis added; citation omitted). But that testimony does not reflect that Section 406(b) imposes a cap on the *aggregate* amount of fees for both administrative and court proceedings. The text of Section 406(b), like that testimony, targets only attorney's fees for representation in court proceedings.[8]

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[8] The government opposed certiorari in *Dawson* by filing a three-page memorandum in opposition, which included a single, four-sentence paragraph asserting that the court of appeals had correctly interpreted Section 406(b). Gov't Mem. in Opp. at 2-3, *Dawson*, *supra* (No. 70-427) (Aug. 17, 1970). The government's memorandum neither reproduced the relevant portion of Section 406(b)'s text limiting its attorney's fee provisions to fees for "represent[ation] before the court," 42 U.S.C. 406(b)(1)(A), nor discussed or analyzed that limitation. Gov't Mem. in Opp. at 2-3, *Dawson*,

The Fourth Circuit's per curiam decision in *Morris* likewise offered no sound basis for concluding that Section 406 "limits the aggregate attorney's fees recoverable to twenty-five percent of the claimant's past-due benefits." 689 F.2d at 496. *Morris* rested its decision on an inference it derived from Section 406(a) and (b). First, *Morris* determined that Section 406(b) imposes a 25% cap on the amount of attorney's fees that "courts [may] authorize[]." *Id.* at 497. Second, *Morris* determined that Section 406(a) also prohibits SSA from "approv[ing] an attorney's fee in excess of twenty-five percent," apparently (and erroneously) based on statutory text—now amended and relocated to Section 406(a)(4)—stating that the agency "'shall . . . certify for payment (out of [the claimant's] past-due benefits)'" up to "'25 per centum of the total amount of such past-due benefits.'" *Id.* at 497 & n.1 (quoting 42 U.S.C. 406(a) (1976)); see *id.* at 496. *Morris* then concluded that "the most reasonable inference to be drawn" from the purported 25% caps in both Section 406(a) and (b) was that Congress intended an aggregate 25% cap "to establish a ceiling for attorney's fees that was independent of the course of the proceedings." *Id.* at 497-498.

That inference-based analysis does not purport to ground an aggregate 25% fee cap in any statutory text directly establishing such a limit and, for the reasons previ-

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supra. The memorandum instead relied only on the portion of Section 406(b)'s text imposing a 25% cap and, like the *Dawson* court, invoked an inapposite passage from legislative history. *Ibid.* The government has now fully analyzed the text and concludes that its abbreviated 1970 analysis of Section 406(b) was both incomplete and incorrect. See Gov't Cert-Stage Br. 22 (discussing the government's change in position).

ously discussed, that atextual reading is incorrect. Moreover, *Morris* is flawed even on its own terms. *Morris* erroneously conflated SSA's determination of a reasonable fee for agency proceedings under Section 406(a) with the agency's separate certification under Section 406(a) of a direct "payment" to the attorney of (some or all of) the approved fee out of past-due benefits, deeming the latter to impose a cap on the former. See *Clark* v. *Astrue*, 529 F.3d 1211, 1217-1218 (9th Cir. 2008) (noting this error). The Fourth Circuit's inferential logic is accordingly flawed because it rests on a mistaken understanding of Section 406(a). See *ibid.*

B. Section 406 Provides Alternative Means To Regulate The Total Amount Of Attorney's Fees In OASDI Cases

The absence of a statutory cap on the aggregate amount of attorney's fees for agency proceedings (under Section 406(a)) and court proceedings (under Section 406(b)) does not mean that the agency and courts should approve fees that in aggregate total 50% or more of the client's past-due benefits. Although it is mathematically possible to produce an aggregate fee of such magnitude without a 25% aggregate cap, Section 406(a) and (b) confer upon SSA and a reviewing court sufficient discretion to prevent unduly large fees. Their approval of Title II fee awards of such magnitude should therefore be "unlikely" if the agency and the courts properly discharge their responsibility to "ensur[e] the attorney fee is reasonable." *Wrenn ex rel. Wrenn* v. *Astrue*, 525 F.3d 931, 938 (10th Cir. 2008).

Section 406(a)(1) directs SSA to approve only a "reasonable fee" for work in agency proceedings through SSA's fee-petition process. 42 U.S.C. 406(a)(1). Thus, although the fee that the agency can approve will not provide compensation for "any service the representative

gave [the claimant] in any proceeding before a * * * court," 20 C.F.R. 404.1728(a), SSA nevertheless requires that the representative's fee petition disclose the amount of any additional fee the representative "wants to request or charge for his or her services in the same matter before any * * * court." 20 C.F.R. 404.1725(a)(4). The agency then evaluates the appropriate fee by considering several factors, 20 C.F.R. 404.1725(b)(1), including "[t]he amount of fee the representative requests for his or her services, including any amount authorized or requested before," 20 C.F.R. 404.1725(b)(1)(vii). The agency ultimately approves a reasonable fee by considering those factors in the context of the Social Security program's "purpose" of "provid[ing] a measure of economic security for the beneficiaries." 20 C.F.R. 404.1725(b)(1). That administrative process for evaluating the reasonableness of a fee properly accounts for the aggregate amount of fees that may be charged to the claimant for work before the agency and in court.

The agency's authority in the fee-agreement context under Section 406(a)(2) and (3) is also sufficient to prevent excessive fees in Title II cases. When other statutory criteria are satisfied, Section 406(a)(2) provides that the agency "shall approve" a fee agreement "at the time of the [agency's] favorable [benefits] determination"—thereby making "the fee specified in the agreement the maximum fee"—if the "the fee specified in the agreement" does not exceed the lesser of "25 percent of the total amount of [the claimant's] past-due benefits" or $6000. 42 U.S.C. 406(a)(2)(A)(ii); see pp. 4-5 & n.2, *supra*. But the claimant—and in certain contexts, the ALJ or other agency adjudicator who made the favorable benefits determination—may then request that SSA "reduce the maximum fee" on administrative review. 42 U.S.C.

406(a)(3)(A)(i); see 42 U.S.C. 406(a)(3)(A) (authorizing agency adjudicator to request that the Commissioner reduce the maximum fee if, for instance, "the fee is clearly excessive for services rendered"). Consistent with Congress's determination that SSA must approve a "reasonable fee" for administrative proceedings in the absence of an appropriate fee agreement, 42 U.S.C. 406(a)(1), and Congress's unqualified grant of authority to an SSA adjudicator to "affirm or modify" a maximum fee authorized by a fee agreement on administrative review (a decision that is itself "not * * * subject to further review"), 42 U.S.C. 406(a)(3)(C), SSA determines on review "whether the fee authorized under the fee agreement process is reasonable" and, if it is not, will reduce the approved fee in order to "set a reasonable fee" for agency proceedings. POMS, GN 03960.050B and C.1-C.3 (Jan. 15, 2010), http://policy.ssa.gov/poms.nsf/lnx/0203960050; see SSA, Office of Hearings and Appeals, *Litigation Law Manual* (HALLEX) I-1-2-47.A.4 and C (Jan. 28, 2003), https://www.ssa.gov/OP_Home/hallex/I-01/I-1-2-47.html.

Section 406(b) similarly grants a reviewing court discretion in reviewing a fee application for an attorney's representation of the prevailing claimant before the court, by providing that "the court *may* determine and allow * * * a reasonable fee for such representation." 42 U.S.C. 406(b)(1)(A) (emphasis added); see *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994) ("The word 'may' clearly connotes discretion" in an attorney's fee provision.). Just as the agency may consider the total amount of fees awarded or sought in determining a "reasonable fee" under Section 406(a)(1), so too may a court consider the overall fee burden on the claimant when exercising its sound discretion

under Section 406(b) to determine the amount of a "reasonable fee" for court proceedings. Given the parallel text of both provisions, it would be "anomalous" to treat a court's authority to approve a reasonable fee any differently in this regard. Cf. *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 806 (2002) (concluding that it would be "anomalous" if contract-based fees that the agency may approve under Section 406(a)(2) were not also available under Section 406(b)'s fee provisions for court proceedings).

Even when an attorney seeks a reviewing court's approval of a "reasonable fee" under Section 406(b) based on a fee agreement with the claimant, "[Section] 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases." *Gisbrecht*, 535 U.S. at 807. While "Congress has provided one boundary line" by prohibiting fees for court proceedings "exceeding 25 percent of the past-due benefits," the attorney seeking court approval of his requested fee still "must show that the fee sought is reasonable." *Ibid.* "If the benefits are large in comparison to the amount of time counsel spent on the case," for instance, "a downward adjustment is * * * in order." *Id.* at 808. Similarly, if the total amount of fees sought from the claimant is not reasonable in comparison to the benefits ultimately awarded, a downward adjustment would be in order to ensure that approved fees are, at the end of the day, "reasonable." "Judges of [the Nation's] district courts are accustomed to making reasonableness determinations in a wide variety of contexts, and their assessments in such matters * * * ordinarily qualify for highly respectful review." *Ibid.* Thus, while Congress has not imposed a 25% cap on the aggregate amount of attorney's fees that may be approved under Section 406(a) and (b) for work before the agency and in court, Congress has

vested the agency and the courts with adequate authority to ensure that such fees are not excessive in particular cases.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
CHARLES W. SCARBOROUGH
DENNIS FAN
Attorneys

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APPENDIX

1. 28 U.S.C. 2412 provides in pertinent part:

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.

* * * * *

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor,

such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) * * * *

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

* * * * *

2. Section 206(b) of the Equal Access to Justice Act, as added by the Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (28 U.S.C. 2412 note), provides:

(b) 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.

3. Section 206 of the Social Security Act, 42 U.S.C. 406, provides in pertinent part:

Representation of claimants before Commissioner

(a) Recognition of representatives; fees for representation before Commissioner

(1) * * * * The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void. Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this subchapter, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

(2)(A) In the case of a claim of entitlement to past-due benefits under this subchapter, if—

(i) an agreement between the claimant and another person regarding any fee to be recovered by such person to compensate such person for services with respect to the claim is presented in writing to the Commissioner of Social Security prior to the time of the Commissioner's determination regarding the claim,

(ii) the fee specified in the agreement does not exceed the lesser of—

(I) 25 percent of the total amount of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title), or

(II) $4,000, and

(iii) the determination is favorable to the claimant,

then the Commissioner of Social Security shall approve that agreement at the time of the favorable determination, and (subject to paragraph (3)) the fee specified in the agreement shall be the maximum fee. The Commissioner of Social Security may from time to time increase the dollar amount under clause (ii)(II) to the extent that the rate of increase in such amount, as determined over the period since January 1, 1991, does not at any time exceed the rate of increase in primary insurance amounts under section 415(i) of this title since such date. The Commissioner of Social Security shall publish any such increased amount in the Federal Register.

(B) For purposes of this subsection, the term "past-due benefits" excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title.

(C) In any case involving—

(i) an agreement described in subparagraph (A) with any person relating to both a claim of entitlement to past-due benefits under this subchapter and a claim of entitlement to past-due benefits under subchapter XVI of this chapter, and

(ii) a favorable determination made by the Commissioner of Social Security with respect to both such claims,

the Commissioner of Social Security may approve such agreement only if the total fee or fees specified in such agreement does not exceed, in the aggregate, the dollar amount in effect under subparagraph (A)(ii)(II).

(D) In the case of a claim with respect to which the Commissioner of Social Security has approved an agreement pursuant to subparagraph (A), the Commissioner of Social Security shall provide the claimant and the person representing the claimant a written notice of—

(i) the dollar amount of the past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) and the dollar amount of the past-due benefits payable to the claimant,

(ii) the dollar amount of the maximum fee which may be charged or recovered as determined under this paragraph, and

(iii) a description of the procedures for review under paragraph (3).

(3)(A) The Commissioner of Social Security shall provide by regulation for review of the amount which would otherwise be the maximum fee as determined under paragraph (2) if, within 15 days after receipt of the notice provided pursuant to paragraph (2)(D)—

(i) the claimant, or the administrative law judge or other adjudicator who made the favorable determination, submits a written request to the Commissioner of Social Security to reduce the maximum fee, or

(ii) the person representing the claimant submits a written request to the Commissioner of Social Security to increase the maximum fee.

Any such review shall be conducted after providing the claimant, the person representing the claimant, and the adjudicator with reasonable notice of such request and an opportunity to submit written information in favor of or in opposition to such request. The adjudicator may request the Commissioner of Social Security to reduce the maximum fee only on the basis of evidence of the failure of the person representing the claimant to represent adequately the claimant's interest or on the basis of evidence that the fee is clearly excessive for services rendered.

(B)(i) In the case of a request for review under subparagraph (A) by the claimant or by the person representing the claimant, such review shall be conducted by the administrative law judge who made the favorable determination or, if the Commissioner of Social Security determines that such administrative law judge is unavailable or if the determination was not made by an administrative law judge, such review shall be conducted by another person designated by the Commissioner of Social Security for such purpose.

(ii) In the case of a request by the adjudicator for review under subparagraph (A), the review shall be conducted by the Commissioner of Social Security or by an administrative law judge or other person (other than such adjudicator) who is designated by the Commissioner of Social Security.

(C) Upon completion of the review, the administrative law judge or other person conducting the review

shall affirm or modify the amount which would otherwise be the maximum fee. Any such amount so affirmed or modified shall be considered the amount of the maximum fee which may be recovered under paragraph (2). The decision of the administrative law judge or other person conducting the review shall not be subject to further review.

(4) Subject to subsection (d) of this section, if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Commissioner of Social Security shall, notwithstanding section 405(i) of this title, certify for payment out of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title).

(5) Any person who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant or beneficiary under this subchapter by word, circular, letter or advertisement, or who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Commissioner of Social Security shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both. The Commissioner of Social Security shall maintain in the electronic information retrieval system used by the Social Security Administration a

current record, with respect to any claimant before the Commissioner of Social Security, of the identity of any person representing such claimant in accordance with this subsection.

(b) Fees for representation before court

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter 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, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(B) For purposes of this paragraph—

(i) the term "past-due benefits" excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title, and

(ii) amounts of past-due benefits shall be determined before any applicable reduction under section 1320a-6(a) of this title.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that

allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

(c) Notification of options for obtaining attorneys

* * * * *

(d) Assessment on attorneys

(1) In general

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) of this section, the Commissioner shall impose on the attorney an assessment calculated in accordance with paragraph (2).

(2) Amount

(A) The amount of an assessment under paragraph (1) shall be equal to the product obtained by multiplying the amount of the representative's fee that would be required to be so certified by subsection (a)(4) or (b)(1) of this section before the application of this subsection, by the percentage specified in subparagraph (B), except that the maximum amount of the assessment may not exceed the greater of $75 or the adjusted amount as provided pursuant to the following two sentences. In the case of any calendar year beginning after the amendments made by section 301 of the Social Security Protection Act of 2003[9] take effect, the dollar amount specified in the preceding sentence (including a previously adjusted

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[9] See References in Text note below.

amount) shall be adjusted annually under the procedures used to adjust benefit amounts under section 415(i)(2)(A)(ii) of this title, except such adjustment shall be based on the higher of $75 or the previously adjusted amount that would have been in effect for December of the preceding year, but for the rounding of such amount pursuant to the following sentence. Any amount so adjusted that is not a multiple of $1 shall be rounded to the next lowest multiple of $1, but in no case less than $75.

(B) The percentage specified in this subparagraph is—

(i) for calendar years before 2001, 6.3 percent, and

(ii) for calendar years after 2000, such percentage rate as the Commissioner determines is necessary in order to achieve full recovery of the costs of determining and certifying fees to attorneys from the past-due benefits of claimants, but not in excess of 6.3 percent.

(3) Collection

The Commissioner may collect the assessment imposed on an attorney under paragraph (1) by offset from the amount of the fee otherwise required by subsection (a)(4) or (b)(1) of this section to be certified for payment to the attorney from a claimant's past-due benefits.

(4) Prohibition on claimant reimbursement

An attorney subject to an assessment under paragraph (1) may not, directly or indirectly, request or otherwise obtain reimbursement for such assessment

from the claimant whose claim gave rise to the assessment.

(5) Disposition of assessments

Assessments on attorneys collected under this subsection shall be credited to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, as appropriate.

(6) Authorization of appropriations

The assessments authorized under this section shall be collected and available for obligation only to the extent and in the amount provided in advance in appropriations Acts. Amounts so appropriated are authorized to remain available until expended, for administrative expenses in carrying out this subchapter and related laws.

(e) Extension of fee withholding and assessment procedures to qualified non-attorney representatives

(1) The Commissioner shall provide for the extension of the fee withholding procedures and assessment procedures that apply under the preceding provisions of this section to agents and other persons, other than attorneys, who represent claimants under this subchapter before the Commissioner.

* * * * *

4. 20 C.F.R. 404.1703 provides in pertinent part:

Definitions.

As used in this subpart—

* * * * *

Eligible non-attorney means a non-attorney representative who we determine is qualified to receive direct payment of his or her fee under § 404.1717(a).

* * * * *

Past-due benefits means the total amount of benefits under title II of the Act that has accumulated to all beneficiaries because of a favorable administrative or judicial determination or decision, up to but not including the month the determination or decision is made. For purposes of calculating fees for representation, we determine past-due benefits before any applicable reduction under section 1127 of the Act (for receipt of benefits for the same period under title XVI). Past-due benefits do not include:

(1) Continued benefits paid pursuant to § 404.1597a of this part; or

(2) Interim benefits paid pursuant to section 223(h) of the Act.

* * * * *

Representative means an attorney who meets all of the requirements of § 404.1705(a), or a person other than an attorney who meets all of the requirements of § 404.1705(b), and whom you appoint to represent you in dealings with us.

* * * * *

5. 20 C.F.R. 404.1725 provides:

Request for approval of a fee.

(a) *Filing a request.* In order for your representative to obtain approval of a fee for services he or she performed in dealings with us, he or she shall file a written request with one of our offices. This should be done after the proceedings in which he or she was a representative are completed. The request must contain—

(1) The dates the representative's services began and ended;

(2) A list of the services he or she gave and the amount of time he or she spent on each type of service;

(3) The amount of the fee he or she wants to charge for the services;

(4) The amount of fee the representative wants to request or charge for his or her services in the same matter before any State or Federal court;

(5) The amount of and a list of any expenses the representative incurred for which he or she has been paid or expects to be paid;

(6) A description of the special qualifications which enabled the representative, if he or she is not an attorney, to give valuable help in connection with your claim; and

(7) A statement showing that the representative sent a copy of the request for approval of a fee to you.

(b) *Evaluating a request for approval of a fee.* (1) When we evaluate a representative's request for approval of a fee, we consider the purpose of the social security program, which is to provide a measure of

economic security for the beneficiaries of the program, together with—

(i) The extent and type of services the representative performed;

(ii) The complexity of the case;

(iii) The level of skill and competence required of the representative in giving the services;

(iv) The amount of time the representative spent on the case;

(v) The results the representative achieved;

(vi) The level of review to which the claim was taken and the level of the review at which the representative became your representative; and

(vii) The amount of fee the representative requests for his or her services, including any amount authorized or requested before, but not including the amount of any expenses he or she incurred.

(2) Although we consider the amount of benefits, if any, that are payable, we do not base the amount of fee we authorize on the amount of the benefit alone, but on a consideration of all the factors listed in this section. The benefits payable in any claim are determined by specific provisions of law and are unrelated to the efforts of the representative. We may authorize a fee even if no benefits are payable.

6. 20 C.F.R. 404.1728 provides:

Proceedings before a State or Federal court.

(a) *Representation of a party in court proceedings.* We shall not consider any service the representative gave you in any proceeding before a State or Federal court to be services as a representative in dealings with us. However, if the representative also has given service to you in the same connection in any dealings with us, he or she must specify what, if any, portion of the fee he or she wants to charge is for services performed in dealings with us. If the representative charges any fee for those services, he or she must file the request and furnish all of the information required by § 404.1725.

(b) *Attorney fee allowed by a Federal court.* If a Federal court in any proceeding under title II of the Act makes a judgment in favor of a claimant who was represented before the court by an attorney, and the court, under section 206(b) of the Act, allows to the attorney as part of its judgment a fee not in excess of 25 percent of the total of past-due benefits to which the claimant is entitled by reason of the judgment, we may pay the attorney the amount of the fee out of, but not in addition to, the amount of the past-due benefits payable. We will not certify for direct payment any other fee your representative may request.

7. 20 C.F.R. 404.1730 provides in pertinent part:

Payment of fees.

(a) *Fees allowed by a Federal court.* We will pay an attorney representative out of your past-due benefits the amount of the fee allowed by a Federal court in a

proceeding under title II of the Act. The payment we make to the attorney is subject to the limitations described in paragraph (b)(1) of this section.

(b) *Fees we may authorize*—(1) *Attorneys and eligible non-attorneys.* Except as provided in paragraph (c) of this section, if we make a determination or decision in your favor and you were represented by an attorney or an eligible non-attorney, and as a result of the determination or decision you have past-due benefits, we will pay the representative out of the past-due benefits, the smaller of the amounts in paragraph (b)(1)(i) or (ii) of this section, less the amount of the assessment described in paragraph (d) of this section.

(i) Twenty-five percent of the total of the past-due benefits; or

(ii) The amount of the fee that we set.

(2) *Non-attorneys ineligible for direct payment.* If the representative is a non-attorney who is ineligible to receive direct payment of his or her fee, we assume no responsibility for the payment of any fee that we authorized. We will not deduct the fee from your past-due benefits.

(c) *Time limit for filing request for approval of fee to obtain direct payment.* (1) To receive direct fee payment from your past-due benefits, a representative who is an attorney or an eligible non-attorney should file a request for approval of a fee, or written notice of the intent to file a request, at one of our offices, or electronically at the times and in the manner that we prescribe if we give notice that such a method is available, within 60 days of the date we mail the notice of the favorable determination or decision.

(2)(i) If no request is filed within 60 days of the date the notice of the favorable determination is mailed, we will mail a written notice to you and your representative at your last known addresses. The notice will inform you and the representative that unless the representative files, within 20 days from the date of the notice, a written request for approval of a fee under § 404.1725, or a written request for an extension of time, we will pay all the past-due benefits to you.

(ii) The representative must send you a copy of any request made to us for an extension of time. If the request is not filed within 20 days of the date of the notice, or by the last day of any extension we approved, we will pay all past-due benefits to you. We must approve any fee the representative charges after that time, but the collection of any approved fee is a matter between you and the representative.

(d) *Assessment when we pay a fee directly to a representative.* (1) Whenever we pay a fee directly to a representative from past-due benefits, we impose an assessment on the representative.

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