No. 17-773

IN THE

Supreme Court of the United States

RICHARD ALLEN CULBERTSON,

Petitioner,

v.

NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY,

Respondent.

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

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* URGING AFFIRMANCE OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether the attorney's fees provisions of Title II of the Social Security Act, 42 U.S.C. § 406, cap the maximum amount of attorney's fees that may be paid under §§ 406(a) and 406(b) to 25% in the aggregate of a claimant's past-due benefits.

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STATEMENT OF THE CASE

A. Statutory Background

1. Attorney's Fees Under 42 U.S.C. § 406

The Social Security Act of 1935 ("Act") was enacted by Congress in the wake of the Great Depression "to provide for the general welfare." 79 Cong. Rec. 12793 (1935) (excerpt from Conference Report–Social Security H.R. 7260). The Act created a number of federal assistance programs for the elderly, infirm, and economically disadvantaged, and for certain of their dependents. Title II of the Act, 42 U.S.C. §§ 401 *et seq.*, established an insurance program providing old-age, survivor, and disability benefits for claimants and certain dependents. Title XVI of the Act, 42 U.S.C. §§ 1381 *et seq.*, established a separate welfare program that provides supplemental security income (SSI) benefits to financially needy individuals who are aged, blind, or disabled, and certain dependents, regardless of their insured status. Benefits provided under the Act are intended to serve as a "safety net," assuring minimum income and an adequate standard of living. *See Social Security Programs in the United States*, 50 Soc. Sec. Bull. No. 4, at 6 (Apr. 1987).

Amendments to the Act, codified at 42 U.S.C. § 406, govern the payment of attorney's fees for Title II and Title XVI.[1] The provisions of § 406 govern attorney's

1. Although the payment of attorney's fees for Title XVI claims is governed by 42 U.S.C. § 1383(d), Congress has extended the Title II attorney's fee payment system to claims brought under Title XVI and incorporated the provisions of § 406 into § 1383(d). *See* Social

fees for successful representation of claimants at the administrative level under § 406(a) and in court under § 406(b). There is no allowance for the payment of attorney's fees when representation is unsuccessful.

a. Fees for Representation Before the Agency Under § 406(a)

At the administrative level, an attorney who represents a claimant before the Social Security Administration (SSA) (referred to as an "agency attorney") may collect a fee for his[2] representation (referred to as an "(a) fee" or an "agency fee") if such representation results in a favorable determination by the agency. *See* 42 U.S.C. § 406(a)(1), (2). An attorney has two options for recovering a fee for successful representation before the agency: the attorney may file with the SSA either a fee petition under § 406(a)(1) ("petition process") or a fee agreement under § 406(a)(2) ("agreement process").

Under the petition process, if an attorney's representation before the agency results in a determination favorable to the claimant, the Commissioner of Social

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Security Protection Act of 2004, Pub. L. No. 108–203, § 302, 118 Stat. 493, 519–21, *as amended by* Social Security Disability Applicants' Access to Professional Representation Act of 2010, Pub. L. No. 111–142, 124 Stat. 38. While the Commissioner correctly notes that the amendment to Title XVI incorporating 42 U.S.C. § 406 contains "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)," (Respondent's brief 2-3 n.2), § 406's provisions remain applicable to SSI cases in all relevant respects.

2. For ease of reference, a generic attorney is referred to as "he" and a generic claimant as "she."

Security will upon request determine a reasonable fee for the attorney's services before the agency. *See* 42 U.S.C. § 406(a)(1). The maximum (a)(1) fee that may be charged is set by rules and regulations promulgated by the Commissioner. *Id.* An attorney may collect an (a)(1) fee even if no past-due benefits are awarded. *See* 20 C.F.R. 404.1725(b)(2). Cases in which a "favorable determination" is issued but no past-due benefits awarded typically involve overpayment or termination claims. *See Filing a petition when there is no past-due fund*, 2 Soc. Sec. Disab. Claims Prac. & Proc. § 21:83 (2nd ed.).

Alternatively, under the agreement process, if an attorney enters a fee agreement with his client setting a fee at the lesser of 25% of past-due benefits or $6,000[3] and files the agreement with the agency prior to the issuance of a favorable determination by the SSA, the Commissioner will automatically approve the fee at the time of the agency's decision. *See* 42 U.S.C. § 406(a)(2).

Under both the petition process and the agreement process, if the claimant is determined by the agency to be entitled to past-due benefits, the Commissioner will certify for payment out of those past-due benefits the attorney's fee in an amount up to 25% of the benefits. *See* 42 U.S.C. § 406(a)(4). The Commissioner is required to pay the agency attorney an (a) fee that she approves, but the payment of an (a) fee – under either (a)(1) or (a)(2) – may not exceed 25% of a claimant's past-due benefits. *Id.*

3. 42 U.S.C. 406(a)(2)(A), 74 Fed. Reg. 6080.

b. Fees for Representation Before the Court Under § 406(b)

An attorney who represents a claimant in court on appeal from an agency determination (referred to as a "court attorney") may collect a fee for his representation (referred to as a "(b) fee" or a "court fee") if he obtains a favorable court decision. Congress has provided that a federal court may include as part of its judgment favorable to a claimant a reasonable fee for representation by an attorney before the court not in excess of 25% of the claimant's past-due benefits. *See* 42 U.S.C. § 406(b)(1)(A). The Commissioner is authorized to certify a court fee for payment to the court attorney "out of, and not in addition to, the amount of such past-due benefits." *Id*. Because a (b) fee is limited to 25% of past-due benefits, "attorneys may not gain additional fees based on a claimant's continuing entitlement to benefits." *See Gisbrecht v. Barnhart*, 535 U.S. 789, 795 (2002).

The attorney's fee provisions of §§ 406(a) and (b) establish the exclusive regime for obtaining fees from Social Security claimants. *See Gisbrecht, supra,* 535 U.S. at 795–96. "Collecting or even demanding from the client anything more than the authorized allocation of past-due benefits is a criminal offense." *Id*. at 796 (citing 42 U.S.C. §§ 406(a)(5), (b)(2); 20 CFR §§ 404.1740–1799).

Although both § 406(a) and § 406(b) allow for an award of attorney's fees of up to 25% of a claimant's past-due benefits, and for certification of payment of those fees directly to the attorney, the Commissioner withholds only one 25% pool of past-due benefits from which to pay both agency fees and court fees. *See* 42 U.S.C. § 406(a)(4).

1. Attorney's Fees Under EAJA

In addition to the availability of attorney's fees under 42 U.S.C. § 406, a prevailing claimant for Title II and XVI benefits may seek an award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), in any case in which the Commissioner's position in the litigation was not "substantially justified." 28 U.S.C. § 2412(d)(1)(A). Once a claimant has established her prevailing party status, the burden shifts to the Government to prove that its position in the litigation was substantially justified. *Id.*; *Scarborough v. Principi*, 541 U.S. 401, 403 (2004). Unlike § 406 fees, which are paid by the claimant, EAJA fees are paid by the Government.

EAJA fees are available to a prevailing party for an attorney's successful representation in court as well as before the agency, but EAJA fees for representation at the administrative level are limited to cases in which the agency representation results from a remand pursuant to sentence six of 42 U.S.C. § 405(g). Under sentence six, the court retains jurisdiction pending the Commissioner's determination of claimant's entitlement to benefits.[4] *See Sullivan v. Hudson*, 490 U.S. 877, 892 (1989); *see also Shalala v. Schaefer*, 509 U.S. 292, 297-301 & 297 n.2 (1993).

4. In cases reviewing final agency decisions on Social Security benefits, the exclusive methods by which district courts may remand to the SSA are set forth in sentence four and sentence six of § 405(g). Under sentence four, a district court either affirms, modifies, or reverses the SSA's decision; under sentence six, the district court remands the case to the agency either with the Commissioner's consent or in light of additional evidence without any substantive ruling as to the correctness of the Secretary's decision, but only if the claimant shows good cause for failing to present the evidence earlier. *See Melkonyan v. Sullivan*, 501 U.S. 89, 98-99 (1991).

If an attorney is awarded both § 406 fees and EAJA fees for the same work, the attorney is required to refund the smaller fee to the client. *See* Act of Aug. 5, 1985, Pub. L. No. 99–80, § 3, 99 Stat. 186; *Gisbrecht*, 535 U.S. at 796. This savings provision "was intended to prevent attorneys from receiving double recovery under both the EAJA and § 406(b)." *Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1272 (11th Cir. 2010). To the extent an EAJA award offsets an award under § 406, the offset effectively increases the amount of past-due benefits the claimant will receive, up to 100% of the past-due benefits awarded. *Gisbrecht*, 535 U.S. at 796.

B. Factual Background

In 2008, Claimant Katrina F. Wood filed an application for disability benefits with the SSA under Title II, which the agency denied. *See* Administrative Record (A.R.) 10-21. After appointing Petitioner Richard Culbertson to act as her representative, A.R. 9, Ms. Wood appealed to the Appeals Council, A.R. 8, but the Appeals Council denied review, A.R. 4A-6.

In 2012, Ms. Wood retained Petitioner to file an appeal in the district court, and agreed to pay him a contingency fee of "25 percent of the total of the past due benefits to which [she] is entitled" in the event the court rendered judgment reversing or remanding and past-due benefits were awarded. J.A. 8-10. On appeal to the district court, the magistrate judge to whom the case was referred reversed the agency decision and entered judgment remanding the matter for further proceedings pursuant to sentence four of § 405(g).[5] J.A. 11; Pet. App. 4a. The

5. The parties consented to adjudication by a magistrate judge. *See* Pet. App. 3a, 4a n.2.

magistrate judge also granted Ms. Wood's unopposed motion for $4,107.27 in EAJA fees under § 2412(d) for Petitioner's representation in district court. J.A. 12-15.

On remand to the agency, Ms. Wood was awarded a total of $34,383 in past-due disability benefits ($30,871 for Ms. Wood plus $3,512[6] for her child as auxiliary beneficiary). J.A. 19; Pet. App. 4a. The agency withheld a total of 25% of Ms. Wood's past-due benefits ($8,595.75) to cover any payment of attorneys fees. J.A. 19, 30; Pet. App. 4a. Petitioner's request that he be authorized attorney's fees for his representation of Ms. Wood before the agency on remand was granted in part, and he was awarded an agency fee of $2,865. J.A. 19, 25-27; Pet. App. 4a-5a; Supp. C.A. App. 13.

Petitioner then moved the district court for additional attorney's fees under § 406(b) in the amount of $4,488.48 for his representation of Ms. Wood before the court. Supp. C.A. App. 4-10. The (b) fee that Petitioner requested equaled 25% of Ms. Wood's past-due benefits ($8,595.75) minus the EAJA award he had already been paid ($4,107.27). *Id.* at 5. Petitioner did not subtract from his request the $2,865 (a) fee he had been paid by the SSA for his agency work. Pet. App. 19a, 22a. Under Petitioner's calculation, Ms. Wood would receive a refund of attorney's fees in the amount of only $1,242.27 of her past-due benefits. Supp. C.A. App. 5.

The magistrate judge granted, in part, Petitioner's § 406(b) fee request. Pet. App. 18a-29a. Observing that

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6. Although the lower courts described the past-due auxiliary benefits as $4,340, Pet. App. 4a, 27a, the Commissioner explained that the correct amount is $3,512, D. Ct. Doc. 27 at 2.

binding precedent prevented a combined (a) and (b) fee in excess of 25% of a claimant's past-due benefits, the magistrate judge concluded that Petitioner's method of calculating his (b) fee request erroneously failed to deduct the $2,865 (a) fee he already had received. *Id*. at 20a, 22a-25. According to the magistrate judge, the proper method for calculating the (b) fee award was to subtract the $4,107.27 EAJA award that Petitioner had already received from the $8,595.75 in past-due benefits withheld by the Commissioner, and then subtract from that amount the $2,865 agency fee that Petitioner previously had been awarded under § 406(a), which would result in a net court fee award to Petitioner of $1,623.48. *Id*. at 26a. Under the magistrate judge's calculation, Ms. Wood would receive a refund of $4,107.27 of her past-due benefits – which reflects a reimbursement to Ms. Wood of the full EAJA award.

	Requested	Awarded
Past-Due Benefits Awarded	$ 34,383	$ 34,383
25% of Past-Due Benefits	$ 8,595	$ 8,595
§ 406(a) fees	$2,865	$2,865
§ 406(b) fees	$ 4,488	$ 1,623
EAJA Fees	$ 4,107	$ 4,107
Total Fees Paid to Petitioner:	$11,460 (33% of past-due benefits)	$ 8,595 (25% of past-due benefits)
Past-Due Benefits Refunded to Ms. Woods	$ 1,242	$ 4,107

Petitioner appealed the district court's attorney's fee award, and a panel of the Eleventh Circuit affirmed. Pet. App. 1a-17a. The panel explained that *Dawson v. Finch*, 425 F.2d 1192 (5th Cir. 1970), is binding precedent in the Eleventh Circuit that has interpreted § 406 as placing a 25% cap on combined § 406(a) and § 406(b) attorney's fees. Pet. App. 11a-12a & n.4, 14a. As the panel observed:

> The Dawson panel ruled that the language and legislative history of § 406(b) "clearly indicate[d]" that the 25% cap on fees paid out of past-due benefits was designed "to insure that the old age benefits for retirees and disability benefits for the disabled ... are not diluted by a deduction of an attorney's fee of one-third or one-half of the benefits received."

Id. at 11a (quoting *Dawson*, 425 F.2d at 1195) (omissions in original). According to the panel, in ruling on Petitioner's (b) fee request, the district court properly "looked to *Dawson*'s holding that the combined § 406(a) and (b) fees cannot be more than 25% of past-due benefits, and reduced [Petitioner's] fee request by the § 406(a) award he had received so as to limit his fee award to 25% of Ms. Wood's past-due benefits." *Id.* at 12a.

SUMMARY OF THE ARGUMENT

Congress intended when it enacted 42 U.S.C. § 406 and its amendments that attorney's fees for representation before the Social Security Administration under subsection (a) and attorney's fees for representation before the court under subsection (b) be limited in the aggregate to 25% of the past-due benefits awarded to the

claimant. Although § 406(a) and § 406(b) provide separate avenues for an award of attorney's fees for representation of a Social Security claimant, these fees are certified for payment out of a single source: the 25% of past-due benefits withheld by the Commissioner. *See* 42 U.S.C. § 406(a)(1), (a)(2), (a)(4), (b)(1)(A). When the statute is read as a whole, as it must be, it is evident that Congress placed a cumulative 25% cap on attorney's fees payable for successful representation of a Social Security claimant before both the agency and the court. This interpretation is reinforced by the Social Security rules and regulations that have been incorporated into the text of § 406, as well as from the series of amendments that laid out the framework allowing attorneys to collect fees for agency and court representation, all of which were designed by Congress to rein in the amount of fees Social Security attorneys could collect from their clients.

To the extent § 406 is ambiguous, the existence of an aggregate 25% cap is confirmed by the statute's legislative history. The legislative history reveals that Congress was deeply concerned that benefits awarded to Social Security claimants not be eroded by contingent fees sought by attorneys that could reach ⅓ to ½ of the claimant's accrued benefits, an amount Congress perceived to be "inordinately large." *See* Hearings on H.R. 6675 Before the Senate Committee on Finance, 89th Congress, 1st Sess., Part One, p. 513 (1965); Court-Appointed Amicus App. 1a-2a. By implementing a structure under § 406 for attorneys to collect fees, Congress did not intend to create a pathway for agency attorneys and court attorneys each to be awarded up to 25% of a disabled claimant's past-due benefits, fees that together could reach 50% – half – of the total past-due benefits awarded to the claimant. A 25%-aggregate rule furthers Congress's dual goals of

preventing benefits awarded to Social Security claimants from being consumed by unreasonably high attorney's fees, while at the same time providing an effective and efficient process for attorneys to collect reasonable fees for their services. *Id.*

The Social Security Act is a remedial statute that should be broadly construed and liberally applied in favor of the beneficiaries. *See, e.g., Cutler v. Weinberger*, 516 F.2d 1282, 1285 (2d Cir. 1975). Broadly construing and liberally applying the relevant provisions of § 406(a) and § 406(b) in favor of the disability claimant, both agency and court fees are capped at an aggregate 25% of past-due benefits.

ARGUMENT

THE ATTORNEY'S FEES PROVISIONS OF TITLE II OF THE SOCIAL SECURITY ACT, 42 U.S.C. § 406, CAP THE MAXIMUM AMOUNT OF ATTORNEY'S FEES THAT MAY BE PAID UNDER § 406(a) AND § 406(b) TO 25% IN THE AGGREGATE OF A CLAIMANT'S PAST-DUE BENEFITS.

The question presented by the Petitioner is whether attorney's fees subject to 42 U.S.C. § 406(b)'s 25% cap on past-due benefits include only fees for representation in court or also fees for representation before the SSA. Petitioner thus frames the issue as whether the court fee provision of § 406(b) controls the agency fee provision of § 406(a). But that is not how the issue was framed either by the Fifth Circuit in *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970), or by the courts below in applying *Dawson*. Instead, the holding in *Dawson*, applied below, was that "42 U.S.C.A. 406 precludes the aggregate allowance of

attorney's fees greater than twenty-five percent of the past due benefits received by the claimant." 425 F.2d at 1192; Pet. App. 12a (observing that district court below "looked to *Dawson*'s holding that the combined § 406(a) and (b) fees cannot be more than 25% of past-due benefits"). The correct question, subsumed within Petitioner's question, is whether combined agency fees under § 406(a) and court fees under § 406(b) may exceed 25% of a claimant's past-due benefits.

Petitioner and Respondent argue that the language of the statute is plain that there can be multiple awards of up to 25% of a claimant's past-due benefits paid to attorneys for successful representation, and that agency attorneys and court attorneys *each* can be awarded up to 25% of a disabled claimant's past-due benefits, fees that together could reach 50% – *half* – of the total past-due benefits awarded to the claimant. Petitioner and Respondent far overstate the clarity of this statute.

Since the statute itself does not specifically state whether combined agency and court fees may exceed 25% of a claimant's past-due benefits, the answer lies in the text of § 406; the rules and regulations promulgated pursuant to that statute; the order in which amendments to the Social Security Act that led to the 25% cap on attorney's fees were enacted; and the clear expression of Congress's intent behind these amendments as set forth in both the text of the amendments and their accompanying legislative history. The Fourth, Fifth and Eleventh Circuits[7] are correct that the 25% pool of past-due benefits

7. *See Morris v. Soc. Sec. Admin.*, 689 F.2d 495 (4th Cir. 1982); *Dawson v. Finch*, 425 F.2d 1192 (5th Cir. 1970). *See also Bonner v.*

withheld by the Commissioner for payment of attorney's fees must cover agency and court proceedings in order to effectuate Congress' goal of protecting disabled claimants from excessive attorney's fees awards.

A. The Text of § 406(a) & (b), Read Together, Supports a 25%-Aggregate Rule.

To understand the interplay between agency fees awarded under § 406(a) and court fees awarded under § 406(b), one must begin by reading the relevant text of both provisions together. A statute must be read in its entirety; it is not intended to be read piecemeal because the meaning of statutory language depends on context. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (following "the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context") (citing *Massachusetts v. Morash*, 490 U.S. 107 (1989) and *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 26, 109 (1988)). "[I]n expounding a statute, we [are] not ... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987).

Specific to this case, "the Social Security Act is remedial or beneficent in purpose, and, therefore, to be 'broadly construed and liberally applied'" in favor of beneficiaries. *Cutler, supra*, 516 F.2d at 1285 (quoting *Gold v. Secretary of Health, Education and Welfare*, 463

Prichard, 661 F.2d, 1206, 1209 (11th Cir. 1981) (en banc) (holding that all decisions of the former Fifth Circuit announced prior to October 1, 1981, are binding precedent in the Eleventh Circuit).

F.2d 38, 41 (2 Cir. 1972)); *McCuin v. Sec'y of Health & Human Servs.*, 817 F.2d 161, 174 (1st Cir. 1987) ("[T]he Social Security Act ... is a remedial statute, to be broadly construed and liberally applied in favor of beneficiaries."); *Eisenhauer v. Mathews*, 535 F.2d 681, 686 (2d Cir. 1976) ("[T]the Social Security Act is to be accorded a liberal application in consonance with its remedial and humanitarian aims."). *Cf. City Bank Farmers Tr. Co. v. Irving Tr. Co.*, 299 U.S. 433, 444 (1937) (recognizing that remedial purpose of statute "demand[s] a liberal construction in favor of the claimants for whom relief was intended"). "In practical terms, when a Social Security Act provision can be reasonably interpreted in favor of one seeking benefits, it should be so construed." *Cunningham v. Harris*, 658 F.2d 239, 243 (4th Cir. 1981).

The original version of the Social Security Act enacted in 1935 made no provision for attorney's fees. 49 Stat. 620 (1935). Within four years, Congress amended the Act to permit the Social Security Board to prescribe by regulation the maximum fees attorneys could charge for representation of claimants before the agency.[8] Social Security Act Amendments of 1939, 53 Stat. 1372, codified at 42 U.S.C § 406. It is telling that Congress's primary concern, as evidenced by its requirement that such fees be capped, was not to ensure that attorneys were being

8. The 1939 amendment provided:

> The Board may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Board under this title, and any agreement in violation of such rules and regulations shall be void.

53 Stat. 1372.

paid for their work before the agency; instead, it was to insure that they could not overbill their clients.

This same concern for protecting claimants from over-billing by attorneys was echoed 30 years later when Congress passed the Social Security Amendments of 1965, codified at § 406(b), for the first time regulating attorney's fees for representation before the court. *See* Pub. L. No. 89-97, Title III, § 332, 79 Stat. 403.[9] This amendment not only limited the availability of attorney's fees to only those cases in which the attorney's representation was successful, it also stipulated that a court fee be "reasonable" and imposed a maximum on the amount of an attorney's fee that could be collected, capping it at 25% of the claimant's past-due benefits. *See* 79 Stat. 403, as amended, 42 U.S.C. § 406(b); *Gisbrecht v. Barnhart*, 535 U.S. 789, 793 (2002). The passage of § 406(b) was yet another expression of Congress's intent that attorneys representing Social Security claimants be prevented from taking advantage of their clients by

9. The 1965 Amendment provided:

> 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 Secretary may, notwithstanding the provisions of section 405(i) of this title, 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.

Social Security Amendments of 1965, Pub. L. No. 89–97, § 332, 79 Stat. 403. Subsection (b)(1).

charging them excessive fees. Certainly nothing in either piece of legislation suggests that Congress envisioned that agency and court attorneys could collect up to 50% of a claimant's past-due benefits as a reasonable amount for attorney's fees.

To address the dual concern that Social Security claimants receive effective legal representation, the 1965 Amendment sought to assure attorneys that they would receive their fees by including a provision allowing the Secretary of Health and Human Services (HHS) to certify court fees for payment out of the claimant's past-due benefits.[10] Two years later, in the Social Security Amendments of 1967, Congress added two sentences to § 406(a) that gave the Secretary similar authority to certify agency fees for payment out of past-due benefits, this time *requiring* that the Secretary certify the fees.[11] In addition, Congress capped the amount of agency fees

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10. The court fee certification provision states:

> [T]he Secretary *may* . . . 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.

H.R. 6675 (emphasis added).

11. The two sentences added by Congress in 1967 were:

> If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary *shall* ... certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of the past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services.

that could be certified at, once again, 25% of past-due benefits. *See* note 9 *supra*.

It is telling that, although § 406(a) and § 406(b) both permit the Commissioner to certify attorney's fees for payment out of the claimant's past-due benefits, the Commissioner withholds only one 25%-pool from which payment of attorney's fees can be certified.[12] If a single attorney could claim, and have certified, the entire 25% of withheld benefits, then the agency attorney and the court attorney would be racing against each other to be the first to have his fee certified for payment. It is difficult to believe that Congress intended to codify in a benefits statute a fee provision that has the practical effect of creating a race to the agency steps.

It also is significant that nearly 25 years later, in the Omnibus Budget Reconciliation Act of 1990, Congress amended § 406(a) to add subsection (a)(2) authorizing the "fee agreement" process.[13] This subsection, which directs the Commissioner to automatically approve certain agency fee agreements if the attorney's representation was successful, likewise includes a 25%-of-past-due-benefits cap. Once again, Congress is limiting fees in accordance with its stated goal of protecting claimants from

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Social Security Amendments of 1967, Pub. L. No. 90–248, Title I, § 173, 81 Stat. 877 (1968) (emphasis added).

12. *See* Hearings, Appeals, and Litigation Law Manual (HALLEX) I–1–2–9(B), I–1–2–71(A) n. 1; Program Operations Manual System (POMS) GN 03920.035(A) note, GN 03920.060(B)(3) note, *available at* http://www.ssa.gov.

13. *See* Pub. L. No. 101–508, § 5106(a), 104 Stat. 1388, 1388–266 (1990).

inordinately high attorney's fees, and, in accordance with its past legislation, defining excessive fees at anything over 25%.

What is of note is that, at the time this provision was enacted in 1990, the federal circuit courts of appeals were in unanimous agreement that there was an aggregate 25% cap on attorney's fees under § 406.[14] Congress presumptively was aware of this uniform application of the 25%-aggregate rule by the courts. *See*, *e.g.*, *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018), citing *Lorillard v. Pons*, 434 U. S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Consequently, in 1990, when Congress provided this additional avenue for a Social Security attorney to obtain a fee of up to 25% of past-due benefits, there was little reason for concern that an agency attorney and a court attorney *each* would seek *separate* fees of 25% of a claimant's past-due benefits. Instead, Congress was assured by the courts that an agency attorney and a court attorney would be required to share the 25% pool of accrued benefits.

Read in context and with a view toward implementing the purpose behind the amendments, Congress intended

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14. *See Davis v. Bowen*, 894 F.2d 271, 273 n. 3 (8th Cir. 1989) ("We note that those circuits which have addressed the issue agree that the aggregate of fees awarded at the judicial and administrative levels may not exceed twenty-five percent of past due benefits."); *Guido v. Schweiker*, 775 F.2d 107, 108 (3d Cir. 1985); *Morris, supra*, 689 F.2d at 497–98; *Webb v. Richardson*, 472 F.2d 529, 536 (6th Cir. 1972); *Dawson, supra*, 425 F.2d at 1195.

that attorney's fees be limited under § 406(a) and (b) to a total of 25% in the aggregate.

B. The Legislative History of § 406 Supports a 25%-Aggregate Rule.

While Congress's concern about overbilling is merely implicit in the text of the 1965 Amendment, it is explicit in the legislative history of the amendment. "[E]ven when, as here, a statute's meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783 (2018) (Sotomayor, J., concurring). To the extent that Congress's silence on the issue presented in this case creates an ambiguity, one must resort to the legislative history of the statute. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002) ("[S]ilence, after all, normally creates ambiguity. It does not resolve it.").

The 1965 Amendment was proposed by the Department of Health, Education and Welfare (HEW)[15] to address a dual concern of protecting Social Security claimants from inordinately large attorney's fees, while at the same time insuring that they receive effective legal representation. *See* Hearings on H.R. 6675 Before the Senate Committee on Finance, 89th Congress, 1st Sess., Part One, p. 513 (1965); Court-Appointed Amicus App. 1a-2a. According to HEW, Social Security attorneys occasionally charged "inordinately large" contingency fees for representing

15. In 1979, HEW was redesignated the Department of Health and Human Services ("HHS"). *See* 20 U.S.C. § 3508 (1982).

claimants in court, frequently reaching up ⅓ to ½ of a claimant's past-due benefits. When the bill came before the Senate Committee on Finance, the Committee adopted the concerns expressed by HEW in its report:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be *inordinately large fees* for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage *(frequently one-third to one-half) of the accrued benefits.*

S. Rep. No. 404, Pt. I, 89th Cong., 1st Sess., *reprinted in* 1965 U.S.C.C.A.N 1943, 2062 (emphasis added). *See Gisbrecht*, *supra*, 535 U.S. at 805 ("Congress thus sought to protect claimants against "inordinately large fees" and also to ensure that attorneys representing successful claimants would not risk 'nonpayment of [appropriate] fees.'" (quoting SSA Report 66).[16] Congress's desire to

16. As the Fifth Circuit in *Dawson* observed, the legislative history and text of § 406(b)

> clearly indicates that Congress sought, by amending the statute, to accomplish two goals. First, to encourage effective legal representation of claimants by insuring lawyers that they will receive reasonable fees directly through certification by the Secretary. And, second, to insure that the old age benefits for retirees and disability benefits for the disabled, which are usually the claimant's sole means of support, are not diluted by a deduction of an attorney's fee of one-third or one-half of the benefits received.

protect a Social Security claimant's past-due benefits from being cut by a third, or even in half, by attorney's fees could not have been more clear. As one scholarly article has discerned from the legislative history of the 1965 Amendment,

> Underlying Congress's concern with potential fee-gouging was Congress's implicit recognition of Social Security claimants as a unique, vulnerable class of litigants, who confront special difficulties in pursuing their claims and are in need of judicial oversight. Most claimants desperately need the past-due benefits they have gone without, and some--because of mental impairments, limited education, or the financial stress occasioned by the initial denial or cessation of benefits--may enter into fee agreements with their attorneys without a complete understanding of the nature of the arrangements or of their ability to negotiate the terms of such contracts.

Alison M. MacDonald & Victor, Williams, *In Whose Interests? Evaluating Attorneys' Fee Awards and Contingent-Fee Awards in Social Security Disability Benefits Cases*, 47 Admin. L. Rev. 115,145 (1995) (footnotes omitted).

It is difficult, if not impossible, to reconcile that after enacting a 25% cap on court fees in the 1965 Amendment designed to *prevent* "inordinately large" attorney's fees of up to 50% of past-due benefits, Congress would then turn around two years later and provide a mechanism to

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425 F.2d at 1195.

permit attorneys to do just that, i.e., to charge combined (a) and (b) fees of up to 50% of the past-due benefits that had been accruing while the disabled claimant was unable to work and earn a living.[17] On the contrary, by far the most reasonable interpretation of these amendments was that Congress imposed a 25% cap on (a) and (b) fees so that attorney's fees would be limited to 25% in the aggregate.

It was precisely this conundrum that drove the Fourth Circuit to adopt the 25%-aggregate rule in *See Morris v. Soc. Sec. Admin*., 689 F.2d 495 (4th Cir. 1982). As *Morris* observed, there is "no reason to believe that the same desire to eliminate 'inordinately large fees,' which were 'frequently one-third to one-half' of a claimant's past-due benefits, that prompted Congress to adopt the 1965 amendment did not also inspire the passage of the parallel 1968 amendment." *Id*. at 497–98. *Morris* refused to adopt a construction of § 406 that "would allow an attorney to recover fifty percent of his client's accrued benefits in direct contravention of congressional attempts to foreclose contingent fee arrangements of one-third to one-half." *Id*. at 498.

Liberally construing the statute with an eye toward implementing Congress's goal of protecting a claimant's Social Security benefits from being eroded by excessive attorney's fees, the statute should be read to limit fees under § 406(a) and (b) to a total of 25% in the aggregate.

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17. *See Tamara B. v. Berryhill*, ___ F. Supp. ___, 2018 WL 3085200, at *3 (D. Vt. 2018) ("It would be strange indeed to believe that Congress would in 1965 denounce 50% contingency fees as excessive and enact a statute to stop them, and then, in 1968, pass a law with the effect of permitting 50% contingency fees.").

C. The Arguments in Favor of a 25%-Aggregate Rule Are Compelling.

i. Because (a) and (b) fees are paid from a single pool of past-due benefits, permitting such fees to exceed 25% in the aggregate creates a race to the agency.

Inarguably, § 406 does not expressly state whether an agency attorney and a court attorney may be paid combined fees of over 25% of the past-due benefits that a claimant is awarded. To the contrary, the statute is silent on this point. Yet one thing is clear: there is only one pool of past-due benefits from which agency fees and court fees may be paid by the Commissioner, and it is this same pool that is referenced in both § 406(a) and § 406(b). *See* 42 U.S.C. § 406(a)(4); 20 C.F.R. § 404.1720(b)(4), § 404.1730(a) & (b). The Commissioner withholds only *one* pool of 25% of past-due benefits from which to certify for payment all of the attorney's fees awarded under both § 406(a) for agency representation and § 406(b) for court representation. *See* HALLEX I-1-2-71(A) n. 1, *available at* https://www.ssa.gov/OP_Home/hallex/I-01/I-1-2-71.html ("SSA only withholds a maximum of 25 percent of past-due benefits for direct payment of fees, whether authorized by SSA, a court, or both."). *See also* HALLEX I-1-2-9(B), *available at* https://www.ssa.gov/OP_Home/hallex/I-01/I-1-2-9.html. There is no additional pool of benefits from which attorney's fees may be paid.

Because the Commissioner withholds only one pool of 25% of past-due benefits from which to pay attorney's fees for both agency and court representation, for an attorney to collect a fee that exceeds the 25% pool of withheld

disability benefits the attorney either would need to file a lawsuit against his disabled client, or seek to have his fees deducted from his client's future disability benefits under the agency's regulations governing overpayments.[18] The prospect of attorneys suing their aged, blind or disabled clients to collect fees out of their present or future benefits is directly at odds with the stated purpose of the Social Security Act to ensure beneficiaries a protected source of income. The chance this could occur suggests that Congress intended that agency attorneys and court attorneys share in the pool of past-due benefits withheld under §406(a) and § 406(b) for payment of attorney's fees.

ii. Rejecting the 25%-aggregate rule would lead to absurd results.

A reading of § 406 that would permit multiple, "stackable" attorney's fees awards of up to 25% of past-due benefits would lead to absurd results. Consider the text of § 406(b)(1) governing the award of court fees, which provides in relevant part:

> 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

18. In the Sixth Circuit, which has rejected the 25%-aggregate approach, it is assumed that attorney's fees exceeding 25% of past-due benefits are recoverable from the claimant "either directly or by utilizing the SSA's administrative overpayment mechanism, whereby fees would be taken from [the claimant's future] monthly disability payments." *Hayes v. Comm'r of Soc. Sec.*, 895 F.3d 449, 452 (6th Cir. 2018).

> 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 . . . 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.

42 U.S.C. § 406(b)(1)(A) (emphasis added). The word "court" is not defined; it could refer to the district court, the court of appeals, or both. It appears to be universally accepted, however, that it refers to both the district court and the court of appeals: an attorney can obtain a favorable judgment from the district court[19], followed by a favorable judgment by the court of appeals. Court fees then may be sought from the district court, or the court of appeals, or both. *See, e.g., Lavender v. Califano*, 683 F.2d 133, 135 (6th Cir. 1892) (recognizing that § 406(b) fees may be awarded "where a claimant has been successful either in the district court, or upon appeal to this court"); *Brown v. Gardner*, 387 F.2d 345, 346 (4th Cir. 1967) (affirming § 406(b) fee for services rendered in the district court and on appeal); *Bailey v. Heckler*, 621 F. Supp. 521, 523 (W.D. Pa. 1985) (recognizing that a district court can approve attorney's fees for services performed in the trial or appellate courts).

Under the parties' non-aggregate view of § 406, because the award of district court attorney's fees and

19. On appeal to the district court of an SSA decision, a judgment may be rendered either by a district judge or by a magistrate judge by reference pursuant to 28 U.S.C. § 636.

appellate court attorney's fees are "distinct,"[20] each court attorney would be eligible to receive up to 25% of the claimant's past-due benefits. In other words, the attorney who represented the claimant before the district court is entitled to fees of up to 25% of the claimant's past-due benefits for obtaining the favorable district court judgment, *and* the attorney who represented the claimant before the court of appeals *also* is entitled to fees of up to 25% of the claimant's past-due benefits for obtaining a favorable court of appeals judgment. Consequently, under § 406(b)(1)(A), up to 50% of a claimant's past-due benefits could be awarded to court attorneys for successful representation before the district court and the court of appeals. Adding to that the up-to-25% "distinct" award of attorney's fees recoverable by the agency attorney, both the SSA and the court – acting independently in awarding fees – together would be authorized to award fees of up to 75% of a claimant's past-due disability benefits. No doubt this absurd result is not an outcome intended by Congress – nor should it be sanctioned by this Court. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (recognizing that when the plain text of a statute leads to absurd results, or to unreasonable results at variance with the policy of the legislation as a whole, this Court follows the law's purpose rather than its literal words).

iii. Logic supports the 25%-aggregate rule.

It also makes logical sense to read all of the relevant provisions of the statute as requiring that agency and court attorneys share the 25% pool of past-due benefits. If a claimant is successful before the SSA and need not

20. Brief of Petitioner 14, 19, 23; Brief of Respondent 14.

either pursue or defend an appeal, agency fees can be awarded in an amount of up to 25% of the entire pool of past-due benefits that has accrued while the case was pending before the agency. On the other hand, when court proceedings are necessary to obtain a favorable outcome, and then court fees are sought in addition to agency fees, the claimant's past-due benefits continue to accrue while the court proceedings are pending – thereby increasing the past-due-benefits pool. In formulating the Social Security Amendments of 1965, "Congress was mindful . . . that the longer the litigation persisted, the greater the buildup of past-due benefits and, correspondingly, of legal fees awardable from those benefits if the claimant prevailed." *Gisbrecht*, 535 U.S. at 804. This passive accrual of benefits is not the result of the performance of either the agency attorney or the court attorney; it is simply a byproduct of the passage of time. Because agency fees are payable to an agency attorney for successful representation before the agency, and court fees are payable to a court attorney for successful representation before the court, it makes sense to divvy up the agency fees and court fees from the 25% pool of accrued benefit in a manner that recognizes that a portion of the accrued benefits is attributable to time the case was pending before the agency, while the other portion is attributable to time the case was pending before the court. The 25%-aggregate rule does just that.

iv. Respondent for decades agreed with *Dawson*'s 25%-aggregate rule.

Respondent acknowledges that it interpreted § 406 to limit agency fees and court fees to a combined 25% of a claimant's past-due benefits when it opposed this Court granting certiorari in *Dawson*, arguing in its brief in

opposition that *Dawson* had been correctly decided. Brief of Respondent 20 n. 8. The Secretary of HHS continued to side with *Dawson* and the 25%-aggregate rule over 35 years later, when the circuit courts first began to question the aggregate 25% cap. For example, in *Clark v. Astrue*, 529 F.3d 1211 (9th Cir. 2008), the Commissioner advised the Ninth Circuit that capping § 406(a) fees and § 406(b) fees at a combined 25% of past-due benefits "honors the congressional intent to limit the erosion of past-due benefits by attorney fees." Brief for Appellee at 15, *Clark, supra,* (No. 07-35056) (filed June 25, 2007). The Commissioner concluded:

> The statute is ambiguous, but repeatedly mentions a 25% cap on withheld past-due benefits for attorney fees. Given this language and congressional displeasure with attorney fees above 25% of a claimant's past-due benefits, this Court should affirm the district court's holding that combined attorney fees under §§ 406(a) and 406(b) must not exceed this amount.

Id. at 23. Likewise, the Commissioner's brief in *Wrenn ex rel. Wrenn v. Astrue*, 525 F.3d 931 (10th Cir. 2008), described the inequity that would result if the Tenth Circuit were to permit both an agency attorney and a court attorney to collect up to 25% of a disability claimant's past-due benefits:

> [T]he Commissioner believes that it is in the claimants's interest that this court does not establish a rule where there is a potential for 50% of a claimant's past due benefits to be used

> for attorney fees. Social Security "benefits are provided for the support and maintenance of claimants and their dependents, and not for the enrichment of members of the bar." *Rodriquez v. Bowen*, 865 F.2d 739, 745 (6th Cir. 1989).

(Brief for Appellee at 13, *Wrenn, supra (*No. 06-7088) (filed Nov. 3, 2006).

Although no change in the law or relevant circumstances appears to have prompted it, the Commissioner has now reversed her position and is siding in this case with Petitioner *against* the 25%-aggregate rule. By doing so, the Commissioner has placed herself in a curious position. As this Court has recognized, in Social Security fee disputes, the Commissioner serves in the role as a sort of trustee, charged with representing the interests of the claimant whose benefits pay for the attorney's fees. *See Gisbrecht* 535 U.S. at 798 n. 6 (observing that the Commissioner "plays a part in the fee determination resembling that of a trustee for the claimants") (citing *Lewis v. Sec'y of Health & Human Servs.*, 707 F.2d 246, 248 (6th Cir. 1983) ("In view of the humanitarian policy of the Social Security program to benefit the disabled, we agree that the Secretary retains an interest in the fair distribution of monies withheld for attorney's fees.") (internal quotation marks and citation omitted). The role of a trustee includes a duty to preserve the assets of the beneficiary. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 572 (1985) ("One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets . . .."); Restatement (Second) of Trusts § 176 (1957) ("The trustee is under a duty to the beneficiary to use

reasonable care and skill to preserve the trust property"). By withdrawing her support for the 25%-aggregate rule, the Commissioner appears to have abandoned her role as trustee for the claimant in this case as her new position has the potential of reducing the amount of past-due benefits the claimant may retain – a result that would neither be in the claimant's best interests nor maximize the preservation of the claimant's assets.

The attorney for the claimant is in an equally awkward position. An attorney's argument in favor of overturning a limitation on fees that may be awarded from a client's past-due benefits at some point collides with the attorney's ethical duty to advance the interests of his client. *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) ("[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct . . .."). Opposing a 25% aggregate rule seemingly creates an irreconcilable conflict between an attorney's personal financial interest and his ethical obligation of zealous advocacy on behalf of the client.

Yet in Social Security fee disputes, claimants' attorneys have been characterized as the "real parties in interest." *Gisbrecht*, 535 U.S. at 798, n. 6; *Astrue v. Ratliff,* 560 U.S. 586, 600 (2010). It would seem that the *most* interested party, i.e., the party with the most at stake, would be the attorney's client. While attorneys no doubt have an interest in the amount of fees they are able to secure for their representation, a Social Security attorney's interest in maximizing his fees surely is not greater than his disabled client's interest in preserving her past-due benefits. After all, while it is doubtful that any one case is a lawyer's sole source of income, it is often

likely that a disability claimant's past-due benefits are the *claimant's* single source of income for the time-period during which the past-due benefits were accumulating.[21]

The upshot of this is that at no point in the process of resolving the question of what the attorney's fees should be in this case have Ms. Wood's interests been represented in the courts. Indeed, in all similar fee disputes, it is the attorney and the Commissioner who appear in court; it is never the claimant. This makes application of the rule calling for a broad and liberal construction of § 406 in favor of beneficiaries of special importance in this and like cases. *See, e.g., Cutler*, *supra*, 516 F.2d at 1285. Given the favored construction of the amendments to § 406, the order in which these amendments were enacted, and the goal of Congress in passing them, § 406 should be read to limit the payment of attorney's fees out of past-due benefits to 25% in the aggregate.

D. The Arguments Against a 25%-Aggregate Rule Are Unpersuasive.

1. Petitioner expresses concern that, "[s]hould the Eleventh Circuit's interpretation of § 406(b) be endorsed, fewer attorneys will be willing to represent Social Security claimants" because they "will lack the financial incentive." (Brief for Petitioner 20, 23). His dire prediction does not appear to be borne out by the data. In the past three years, the filings of Social Security

21. Indeed, the past-due benefits awarded to Ms. Wood appeared to have been her sole source of income, as the administrate law judge noted in his initial denial of benefits that she has not worked since the onset of her disability. A.R. 15.

cases in the district courts within the three circuits that have adopted the 25%-aggregate rule has steadily *increased*: Fourth Circuit (from 1,470 in 2015; to 1,616 in 2016; to 2,067 in 2017); Fifth Circuit (from 758 in 2015; to 795 in 2016; to 861 in 2017) and Eleventh Circuit (from 1,896 in 2015; from 1,966 in 2016; to 2,083 in 2017). *See* Admin. Office of the U.S. Courts, Statistical Tables for the Federal Judiciary, Table C-3 (2015-17), *available at* http://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_1231.2015.pdf;http://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_1231.2016.pdf; http://www.uscourts.gov/report-names/statistical-tables tables-federal-judiciary.[22] This trend likely is due to the fact that, even in circuits operating under the 25%-aggregate rule, Social Security attorneys are able to obtain court fees computed at an hourly rate of over $1,000 per hour. *See, e.g.*, *Claypool v. Barnhart*, 294 F. Supp. 2d 829, 833 (S.D.W. Va. 2003) (approving § 406(b) fee with hourly rate of $1,433.12); *Sabourin v. Colvin*, 2014 WL 3949506 (N.D.Tex. 2014) (unpublished) ("de facto hourly rate of $1,245.55 per hour" was not an unearned windfall); *Melvin v. Colvin*, 2013 WL 3340490 *2 (E.D.N.C. 2013) (unpublished) (approving § 406(b) fee with hourly rate of $1,043.70); *Vilkas v. Comm'r of Soc. Sec.*, 2007 WL 1498115 (M.D. Fla. 2007) (unpublished) approving fees

22. Petitioner's argument also is undercut by his own experience, as he has maintained a Social Security practice for four decades yet "has never required a client to pay more than twenty-five percent of his past-due benefits for attorney fees for work done in Federal Court and at the administrative level." Supp. C.A. App. 28; *see also* https://www.richard culbertsonlaw.com/our-attorneys/ ("Since 1975, Mr. Culbertson has handled thousands of Social Security and Supplemental Security Income cases from pre application through the Federal Courts.").

translating to an hourly rate of $1,121.86). While Petitioner suggests that Social Security attorneys earn "modest compensation" from which they will not "get rich," Brief of Petitioner at 24, the data on which Petitioner relies shows that in 2013, at least one claimant representatives received $38.6 million in fees that year – $35 million of which he attributed to his law firm and the remaining $3.8 million he kept. *See* Office of the Inspector Gen., Soc. Sec. Admin., No. A-05-15-15017, *Informational Report: Agency Payments to Claimant Representatives* App. C-1 & n. 2 (2015), *available at* https://oig.ssa.gov/ sites/ default/files/audit/full/pdf/A-05-15-15017.pdf. This level of income should provide an adequate financial incentive for attorneys to represent Social Security claimants.

Moreover, Petitioner's argument that a combined 25% cap is a disincentive to representing Social Security claimants is even less persuasive when the availability of EAJA fees is factored into the equation. As this Court has recognized, EAJA awards, which are paid by the Government, "provide an important additional incentive for attorneys to undertake Social Security cases." *Astrue v. Ratliff, supra*, 560 U.S. at 602. Whereas § 406 fees are limited to a percentage of back-due benefits awarded, EAJA fees are calculated under the lodestar method by multiplying the attorney's reasonable hours expended by hourly rate, and are payable regardless of whether back-due benefits are awarded. *Id*. To the extent an EAJA fee exceeds a § 406 fee awarded for the same work, the attorney may pocket the excess. The data, although scant, at least suggest a good possibility that EAJA fees will be available for successful court representation. In fiscal year 2010, EAJA fee were awarded in approximately 42% of Social Security cases in which the claimant prevailed, *see*

Astrue v. Ratliff, supra, 560 U.S. at 601 n. 2, amounting to $19,743,189.12 in payments, *see* https://www.ssa.gov/open/data/EAJA.html. By fiscal year 2017, that amount had more than doubled, to $41,952,601.90 in EAJA payments. *Id.; see also Shalala v. Schaefer*, 509 U.S. 292, 302 (1993) (recognizing that a sentence four remand under § 405(g) generally confers "prevailing party" status for EAJA purposes); *Marshall v. Comm'r of Soc. Sec.*, 444 F.3d 837, 842 (6th Cir. 2006) (a sentence six remand followed by successful administrative proceedings is sufficient to confer prevailing party status).[23] The likelihood of obtaining EAJA fees for successful representation, payable over and above § 406 fees and regardless of whether past-due benefits are awarded, provides an attractive inducement to Social Security attorneys.

2. Petitioner and Respondent both argue that agency fees and court fees cannot be limited to an aggregate 25% of past-due benefits because an agency attorney may obtain an agency fee under § 406(a)(1)'s fee petition process in

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23. Although more recent data is not readily available, in 1998 GAO reported to Congress:

> From its inception in fiscal year 1982 through fiscal year 1994 (the last year central reporting of governmentwide data was required), more than 6,200 applicants were awarded about $34 million under EAJA's administrative and judicial processes for reimbursement of attorneys' fees and related expenses. Of the $34 million, applications involving the Social Security Administration (SSA) accounted for at least 83 percent of the claims granted and 48 percent of the amounts awarded.

Equal Access to Justice Act: Its Use in Selected Agencies, HEHS-98-58R, pp. 2-3 (Jan. 14, 1998), *available at* https://www.gao.gov/products/HEHS-98-58R.

excess of 25% of past-due benefits. (Brief for Petitioner 15; Brief for Respondent 17-19). To the contrary, finer analysis indicates that this blanket statement is overbroad. To be sure, where past-due benefits are not available yet the outcome of the representation was nevertheless successful – such as in termination or overpayment cases – there is no monetary cap on fees. In these cases, there are no past-due benefits to cap. But in cases where past-due benefits *are* awarded, an examination of the statute and its implementing regulations reveals that agency fees sought under (a)(1)'s petition process are tethered to a limitation of 25% of past-due benefits.[24]

This 25% limitation is derived from two sentences (six and seven) of § 406(a)(1), which provide:

> ***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

24. It is irrelevant that the regulations permit an award of attorney's fees "even if no benefits are payable." (Brief of the United States at pp. 17-19) (quoting 20 C.F.R. § 404.1725(b)(2)). The issue presented in this case does not arise when no past-due benefits are awarded.

> 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.

42 U.S.C. § 406(a)(1) (emphasis added). As the highlighted phrases explain, the statute delegates to the Commissioner the authority to determine by rules and regulations the maximum § 406(a)(1) fee that may be authorized when an agency attorney petitions to be paid a fee under the fee petition process. Further, the Commissioner is required to fix the maximum fee "in accordance" with the regulations that prescribe the maximum fee, meaning, the § 406(a)(1) fee must be set "in a way that agrees with or follows" the rules and regulations. Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/in%20accordance%20with.

The Commissioner has done exactly that. The regulations that fix the maximum § 406(a)(1) fee are 20 C.F.R. § 1720 and § 1730. Section 1720(a), which governs agency fees, directs that an attorney "may charge and receive a fee for his or her services as a representative ***only*** as provided in paragraph (b) of this section." 20 C.F.R. § 404.1720(a) (emphasis added). Section 404.1720(b), in turn, limits an agency attorney's receipt of a § 406(a)(1) fee to the amount authorized by the Commissioner.[25]

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25. "The representative must file a written request with us before he or she may charge or receive a fee for his or her services." 20 C.F.R. § 1720(b)(1). "We decide the amount of the fee, if any, a representative may charge or receive." 20 C.F.R. § 1720(b)(2).

Section 404.1720(b)(3) specifically provides that an agency attorney "must not charge or receive any fee unless [the Commissioner has] authorized it," and, further, that the agency attorney "must not charge or receive any fee that is more than the amount [the Commissioner] authorize[s]." 20 C.F.R. § 404.1720(b)(3). If agency representation includes an award of past-due benefits,[26] the Commissioner "will pay the authorized fee, or a part of the authorized fee, directly to the attorney . . . out of the past-due benefits, *subject to the limitations described in [42 C.F.R.] § 404.1730(b)(1)*." 20 C.F.R. § 404.1720(b)(4) (emphasis added). The "limitations described in § 404.1730(b)(1)" are that, if the Commissioner renders a favorable decision, the Commissioner "will pay the [agency attorney] out of the past-due benefits, the *smaller* of the amounts [of 25% of the total past-due benefits] or [the amount of fee the Commissioner sets]."

What all of this means is that the Commissioner has, by regulation, set the maximum fee under § 406(a)(1) when past-due benefits are awarded to the claimant as 25% of those past-due benefits.

Even if these provisions cannot be read to place a 25% cap on agency fees awarded under § 406(a)(1), it is apparent from the legislative history that Congress intended to replace the (a)(1) petition process – an ungainly method for approving fees at the agency level – with the (a)(2) agreement process – a more efficient, "streamlined" procedure. *See* H.R. Conf. Rep. 101-964,

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26. Not every successful agency representation includes an award of past-due benefits, for example, if the favorable decision is in a termination or overpayment case. *See supra* p. 35.

reprinted in 1990 U.S.C.C.A.N. 2374, 2638-39 ("The provision would generally replace the fee petition process with a streamlined process in which SSA would approve any fee agreement jointly submitted in writing and signed by the representative and the claimant if the Secretary's determination with respect to a claim for past-due benefits was favorable and if the agreed-upon fee did not exceed a limit of 25 percent of the claimant's past-due benefits up to $4,000."). Today, the fee agreement process is by far the preferred method used for obtaining agency fees. *See, e.g.*, Thomas E. Bush, *Social Security Disability Practice: The Fee Agreement Process for Approval of Attorney Fees, excerpted at* http://jameseducationcenter.com/articles/disability-attorney-fees/#Two_Fee_App (observing that "the fee agreement process, which provides for streamlined approval and payment of attorney fees, works better in the vast majority of cases").[27] A Social Security attorney generally will rely on the petition process when past-due benefits have been awarded only when (1) there is no written fee agreement; (2) the SSA did not approve a fee agreement; or (3) the attorney's representation terminated before the SSA favorably decided the claim. *See Disability Secrets: When Can a Disability Lawyer Use a Fee Petition to Get Paid? available at* https://www.disability secrets.com/resources/when-can-a-disability-lawyer-use-a-fee-petition-get-paid.

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27. According to the SSA's Single Payment System (SPS) used to make fee payments to claimant representatives, only 4% of fee payments were coded as having been obtained pursuant to the petition process in fiscal year 2012. *See* Office of the Inspector Gen., Soc. Sec. Admin., No. A-05-13-13061, *Audit Report: Controls over Claimant Representative Fee Petition Payments* 3 n. 4 (2015), *available at* https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-13-13061.pdf.

3. Petitioner points to a Social Security instruction manual explaining that attorney's fees could be awarded in excess of 25% of past-due benefits as evidence that "closes the door on any suggestion that administrative and court representation fees share a single fee cap." Brief for Petitioner 17. Although Petitioner is correct that SSA's Program Operations Manual System (POMS) advises that "the court fee and the administrative fee combined may exceed 25 percent of the [past-due benefits," POMS GN 03920.050(C), the POMS is merely a guidance manual directed at Social Security claims processors intended to instruct them on how to perform their jobs. *See* https://secure.ssa.gov/poms.nsf/home!readform (describing POMS as a "source of information used by Social Security employees to process claims for Social Security benefits."). The portion of the instruction manual to which Petitioner refers merely provides guidance to SSA employees on how to handle a situation where combined agency fees and court fees exceed 25% of past-due benefits, presumably in jurisdictions where this is permitted. In other words, this manual does not purport to offer a legal opinion on whether § 406 provides a 25% cap on combined (a) and (b) fees; it simply attempts to advise employees on how to process claims consistent with the various divergent circuit court rules. However, to the extent this Court agrees with Petitioner regarding the weight to be given to the SSA's opinion, this Court should affirm the judgment of the Eleventh Circuit because it has been the consistent position of the SSA for the past 48 years – at least since *Dawson* was decided in 1970 – that § 406 caps combined (a) fees and (b) fees at 25%. *See infra* pp. 27-29.

4. Petitioner suggests that there is no need to worry that attorneys will seek excessive fees in the absence of

a 25%-aggregate cap because § 406(a)'s "reasonableness inquiry" has "real teeth and "effectively check[s] excessive fees for representation before the agency." Brief for Petitioner 14 n. 2 & 15. Respondent offers that is "unlikely" that combined fees will reach 50% of past-due benefits "if the agency and the courts property discharge their responsibility" to award reasonable fees. Brief of Respondent 22. Yet these safeguards have not prevented Social Security attorneys in circuits that have rejected the 25%-aggregate rule from walking away with combined (a) and (b) fees approaching 40% and even 50% of past-due benefits. *See Booth v. Comm'r of Soc. Sec.*, 645 F. App'x 455, 457 (6th Cir. 2016) (after agency awarded attorney a $6,000 (a) fee, court awarded a (b) fee of 25% of past-due benefits, resulting in combined fees totaling over 47% of past-due benefits); *Campbell v. Astrue*, 2009 WL 2342739 (E.D. Ky. 2009) (unpublished) (after claimant's attorney was awarded a $5,300 (a) fee, the court awarded a $9,362 (b) fee, amounting to 39% of claimant's past-due benefits). *See, e.g., Ellick v. Barnhart*, 445 F. Supp. 2d 1166, 1168–69 (C.D. Cal. 2006) (reporting that survey of 43 cases revealed that "[s]lightly more than half" of the §406(b) requests yielded court fees alone of 25% of past-due benefits).[28]

5. Amicus NOSSCR seems to suggest that the ramifications of rejecting a 25%-aggregate rule are insignificant, because attorneys who have been able to secure exorbitant fees will not be able to collect them from their disabled clients. Brief of Amicus NOSSCR 17018.

28. These cases appear to contradict Amicus NOSSCR's suggestion that "[a]n attorney in a Circuit without a cumulative cap ordinarily requests that a court authorize a § 406(b) fee that reflects a cumulative cap" and its discussion regarding the "prevailing market rate" for (b) fees. Brief of Amicus NOSSCR 13.

Putting aside the dubious suggestion that this type of consideration should influence the decision in this case, it is by no means clear that disabled claimants would not be hounded by their lawyers in perpetuity over their future disability or SSI benefits, or any other potential sources of income, including inheritances, they might have the good fortune to acquire. As mentioned above, the Sixth Circuit has suggested that attorney's fees in excess of the amount withheld by SSA might be treated as an overpayment and withheld from a claimant's future benefits. *See supra* note 18 (quoting *Hayes,* 895 F.3d at 452). As for Amicus NOSSCR's fear that 42 U.S.C. § 407(a) would prevent collection of attorney's fees from claimants, this does not appear to be the case since such fees stem from past-due benefits, not future benefits. *Cf. Celebrezze v. Sparks*, 342 F.2d 286, 288 (5th Cir. 1965) (concluding that § 407(a) applies only to a '"future payment" whereas an attorney's fee deals solely with past due benefits).

6. Petitioner and Amicus NOSSCR hypothesize that under a 25%-aggregate rule, an attorney might obtain a favorable result in court and then discover that an agency attorney has already "used up" the withheld past-due benefits. Brief for Petitioner 20; Brief for Amicus NOSSCR 10-11. In practice, there are safeguards to prevent this from happening. First, in circuits operating under the 25%-aggregate rule, such as the Eleventh Circuit, it is standard practice for an attorney who accepts representation of a claimant in court to enter an agreement ahead of time delineating how any withheld benefits will be split between counsel. Second, since the agency when ruling on an (a) fee request is required to consider the amount of any (b) fee the attorney plans to request from the court, *see* 20 C.F.R. § 404.1725(a)(4); 20

C.F.R. § 404.1728(a), and since the court when ruling on a (b) fee request is likewise authorized to consider the amount of any (a) fee the attorney plans to request from the agency, *see* Brief of Respondent 24-25, there would be no opportunity for the agency attorney to use up the pot of past-due benefits. Moreover, it is important to weigh the risks. While the risk to an attorney of not receiving a fee is minimal, the impact on a claimant's well-being of having her income eroded by attorney's fees can be significant. In any event, because the perceived problem in the hypothetical is at best illusory, it should not drive the Court's decision in this case.

7. Finally, Petitioner and Respondent both argue that had Congress intended to limit agency and court fees to 25% in the aggregate, it would have said so. (Brief for Petitioner 13; Brief for Respondent 16). But the converse is equally true: had Congress intended that separate 25%-fees could be awarded under both § 406(a) and § 406(b), it could have said that as well. At best, the statute is ambiguous on this point. This ambiguity must be resolved in favor of Ms. Wood, because a broad construction and liberal application of the attorney's fees provisions of § 406 would further the remedial and beneficent purposes of the Social Security Act, rather than defeat it. *See Cutler, supra*, 516 F.2d at 1285 (quoting *Gold, supra*, 463 F.2d at 41).

In sum, Congress intended when it drafted 42 U.S.C. § 406 and its amendments to limit combined agency fees under subsection (a) and court fees under subsection (b) to no more than 25% of a claimant's past-due benefits. This is evident from the text of the amendments to § 406 as well as their legislative history, and effectuates

Congress's goal of protecting Social Security claimants from a disproportionately large reduction of their benefits while at the same time ensuring their ability to secure legal representation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Hearings on H.R. 6675 Before the Senate Committee on Finance, 89th Congress, 1st Sess., Part One, p. 513 (1965):

Explanation of amendment

This amendment is designed to alleviate two problems that have arisen with respect to representation of claimants by attorneys. The first relates to the need to encourage effective legal representation of claimants. Under the provisions of section 205(i) of the Social Security Act, accrued amounts of benefits that are due to a claimant as a result of a court decision are to be paid directly to him. Under section 207, assignment of benefits is prohibited. Attorneys have complained that such awards are sometimes made to the claimant without the attorney's knowledge and that some claimants on occasion have not notified the attorney of the receipt of the money, nor have they paid his fee.

Another problem that has arisen is that attorneys have on occasion charged what appeared to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these inordinately large fees result from a contingent fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half of the accrued benefits). Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, may be payable if the claimant wins his case.

Appendix

The amendment would provide that whenever a court renders a judgment favorable to a claimant, it would have express authority to allow as part of its judgment a reasonable fee (not in excess of 25 percent of accrued benefits) for services rendered in connection with the claim. Any violation would be made subject to the same penalties as are provided in section 206 of the law for charging more than the maximum fees prescribed in regulations (20 CFR 404.975) for services rendered in proceedings before the Secretary. In addition, as a specific exception to section 205(i), the Secretary would be permitted to certify the amount of the court-approved fee to the attorney out of the amount of accrued benefits. As a result, claimants would be insured more effective legal representation and also would be protected from being charged exorbitant fees.