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

REPLY BRIEF FOR THE RESPONDENT

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The court of appeals held that 42 U.S.C. 406(b) caps at 25% of a Title II claimant's past-due benefits the aggregate amount of attorney's fees that an attorney may charge the claimant for representing her both in proceedings before the Social Security Administration (SSA) and in federal court. Pet. App. 11a-12a. That is incorrect. The government's opening brief explains that Section 406(b) imposes a 25% cap only on the fees that an attorney may charge for representing the claimant in court. Gov't Br. 15-22. Section 406(b)'s text plainly addresses only fees charged to the claimant "who was *represented before the court*" and imposes its 25% cap only on fees "for *such representation*." 42 U.S.C. 406(b)(1)(A) (emphasis added); see Gov't Br. 15-16. The statutory and regulatory framework governing fees under Section 406(a) for representing the claimant in SSA proceedings confirms that conclusion. Gov't

Br. 16-19. And although Congress did not impose an aggregate 25% cap, excessive aggregate fee awards should not result if SSA and the courts properly exercise their authority to approve "reasonable" fees in this context. *Id.* at 22-26.

The Court-appointed Amicus (Amicus) does not appear to contend that the text of Section 406(b) imposes a 25% aggregate cap. See Br. 11-19. The Amicus instead argues (Br. 13-19) that an aggregate 25% cap may be discerned if one reads Section 406(a) and Section 406(b) "together." But the Amicus does not identify anything in the text of Section 406(a) or Section 406(b), or the two read together, that purportedly imposes an aggregate 25% cap on the total amount of attorney's fees. See *ibid.* Nor does the Amicus's reliance on legislative history (Br. 19-22) and atextual policy considerations (Br. 23-31) advance the argument. Nothing warrants a departure from Section 406's text, which does not impose an aggregate 25% past-due-benefits cap on the total amount of attorney's fees for representing a claimant in agency proceedings and in court.

A. Nothing In The Text Of Section 406 Imposes A 25% Past-Due-Benefits Cap On The Aggregate Amount Of Attorney's Fees

1. Congress separately regulated the amount of fees that an attorney may collect from a Title II claimant in two subsections of 42 U.S.C. 406. "[Section] 406(a) governs fees for representation in administrative proceedings," and "[Section] 406(b) controls fees for representation in court." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 794 (2002). Only three provisions in Section 406(a) and (b) set limitations based on 25% of past-due benefits. See 42 U.S.C. 406(a)(2)(A)(ii), (4), and (b)(1)(A). None of those three provisions—even if read "together" as

the Amicus suggests (Br. 13)—imposes an aggregate 25% cap on the total amount of fees that an attorney may charge the claimant for representing the claimant in agency proceedings and in court.

First, Section 406(b) governs attorney's fees that a court may approve for "represent[ing] [the claimant] before the court." 42 U.S.C. 406(b)(1)(A). And as noted (see p. 1, *supra*), Section 406(b) provides that the court may allow "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 emphasized text makes clear that the 25% cap in Section 406(b) limits only the amount of fees for the attorney's work "before the court," *ibid.*, not the total amount of fees for work both before the agency and the court. Gov't Br. 15-16. The Amicus does not appear to argue otherwise. See Amicus Br. 13-19.

The second provision, Section 406(a)(2), provides that, if a fee agreement meets certain criteria, SSA must approve the agreement setting the amount of "contract-based fees * * * at the administrative level," *Gisbrecht*, 535 U.S. at 806, when the agency makes a decision favorable to the claimant. 42 U.S.C. 406(a)(2)(A); see Gov't Br. 4-5. Section 406(a)(2)(A)(ii) provides one of the relevant criteria: The "fee specified in the agreement" must 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 Gov't Br. 5 n.2. That provision plainly does not establish an aggregate 25% cap for work both in agency proceedings and in court, because it addresses only the maximum fee that may be specified in an agency-approved fee agreement for work at the *administrative level*. The Amicus

agrees that Section 406(a)(2) merely governs the "fee for successful representation before the agency." See Br. 2; see *id.* at 37 (stating that Section 406(a)(2) provides a method for "approving fees at the agency level").

Finally, the third provision, Section 406(a)(4), provides that the agency "shall * * * certify for *payment* * * * to [the] attorney" "out of [the claimant's] past-due benefits * * * an amount equal to so much of the [agency-approved] maximum fee as does not exceed 25 percent of [the] past-due benefits." 42 U.S.C. 406(a)(4) (emphasis added); see Gov't Br. 8-9. That provision governs SSA's direct "payment" of (all or part of) the "maximum fee" to an attorney for representation in agency proceedings out of the claimant's own past-due benefits. It does not limit the amount of the "maximum fee" for those agency proceedings, much less establish a maximum aggregate fee cap for work both in agency proceedings and in court.

In fact, because Section 406(a)(4) provides that the agency shall certify for payment only "*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), Section 406(a)(4) itself demonstrates that the maximum fee sometimes *will exceed* 25% of past-due benefits. See Gov't Br. 18. If, as the Amicus contends, the aggregate amount of fees for both agency and court proceedings were capped at 25% of past-due benefits, the "maximum fee" specified in Section 406(a)(4) could never exceed 25% of past-due benefits. And if that were true, Section 406(a)(4)'s text limiting direct payment to "*so much of* the maximum fee *as does not exceed 25 percent of such past-due benefits*," 42 U.S.C. 406(a)(4), would be superfluous. The Amicus's position "thus runs afoul of the 'cardinal principle' of interpretation that courts 'must

give effect, if possible, to every clause and word of a statute.'" *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (citation omitted). The Amicus does not acknowledge Section 406(a)(4)'s significant text, which is sufficient in itself to demonstrate that the Amicus's position is incorrect.

2. The Amicus instead argues (Br. 13-19) that Section 406(a) and (b)—if read "together"—can be interpreted to support an aggregate 25% cap. But despite arguing that "the *text* of § 406(a) & (b), read together, supports a 25%-aggregate rule," Br. 13 (emphasis added; capitalization omitted), the Amicus pays scant attention to the actual text of either provision. That atextual approach to statutory interpretation is wrong.

a. Significantly, the Amicus does not identify any statutory text in Section 406(a) or (b)—or in any provision—that purportedly imposes a 25% aggregate cap. The Amicus notes (Br. 14-16) that Congress in Section 406(a) authorized SSA to regulate the maximum fees "for representation of claimants before the agency," Br. 14, and imposed in Section 406(b) a 25% past-due-benefits cap "for representation before the court," Br. 15. The Amicus then contends (Br. 16) that "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." But the relevant point is that nothing in the text of either Section 406(a) or (b) imposes a 25% aggregate cap on such overall fees.

By authorizing SSA to approve an uncapped "reasonable" fee for work before the agency, 42 U.S.C. 406(a)(1); see Gov't Br 17-18, and by separately authorizing a court to approve a "reasonable" attorney's fee for work "before the court" up to "25 percent of the

total of the past-due benefits to which the claimant is entitled by reason of [the court's] judgment," 42 U.S.C. 406(b)(1)(A), Congress necessarily provided—by virtue of simple addition—that the aggregate fee award may *exceed* 25% of the claimant's past-due benefits. Section 406's text thus is not "silent" on the question whether the total amount of both agency and court fees may exceed that 25% amount as the Amicus suggests (Br. 23). By separately authorizing fees that combined can exceed 25% of past-due benefits and by imposing no limitation on the "aggregate" amount of the fees (as Congress did elsewhere in Section 406, see 42 U.S.C. 406(a)(2)(C); Gov't Br. 17), the text of Section 406 authorizes the approval of agency and court fees that, in aggregate, can exceed 25% of past-due benefits.

b. The Amicus finds (Br. 17) it "telling" that SSA "withholds only one 25%-pool [of past-due benefits] from which payment of attorney's fees can be certified," even though Section 406(a) and (b) both permit the agency "to certify attorney's fees for payment" out of past-due benefits. The Amicus also argues (Br. 35-37) that fees approved by SSA in the fee-petition process are "tethered" to the 25% pool of past-due benefits out of which SSA will pay fees directly to an attorney. Br. 35. The Amicus is incorrect. Provisions governing the *approval* of attorney's fees by SSA and the courts are distinct and separate from those granting SSA authority to *withhold and directly pay* some or all of the fees that the agency or court has approved. And the 25% limit on the amount that SSA will directly pay to an attorney out of past-due benefits does not limit the amount that an attorney may charge the claimant. Indeed, as explained below, the 25% aggregate cap on the agency's direct payment is a creature of regulation, and

it reflects the agency's understanding that the aggregate amount of attorney's fees can and sometimes will exceed 25% of past-due benefits.

Two statutory provisions govern SSA's direct payment of agency- and court-approved fees out of past-due benefits: Section 406(a)(4) and Section 406(b)(1)(A). Section 406(a)(4) is mandatory: It provides that the agency "shall" certify for payment to an attorney "so much of the maximum fee as does not exceed 25 percent of [the claimant's] past-due benefits." 42 U.S.C. 406(a)(4). The "maximum fee," in turn, is defined elsewhere in Section 406(a) as the fee for work *before the agency*, which is set either by agency regulations governing the fee-petition process, 42 U.S.C. 406(a)(1), or by an agency-approved fee agreement, 42 U.S.C. 406(a)(2)(A).[1] Section 406(a)(4) thus requires that the agency pay directly to an attorney the approved fees for work in agency proceedings, up to 25% of the claimant's past-due benefits.

Section 406(b)(1)(A), however, is permissive: It provides that that the agency "may" certify the amount of the fee for "represent[ation] before the court." 42 U.S.C. 406(b)(1)(A); see *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001) (concluding that "Congress' use of the permissive 'may' in [a statutory provision] contrasts with

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[1] Congress authorized SSA to adopt rules to "prescribe the maximum fees" for work before the agency, which governs the attorney's fee determined in the fee-petition process. 42 U.S.C. 406(a)(1). And when the agency approves a fee-agreement under Section 406(a)(2), "the fee specified in the agreement shall be the maximum fee," 42 U.S.C. 406(a)(2)(A), unless the "maximum fee" is modified on administrative review, 42 U.S.C. 406(a)(3)(C). See Gov't Br. 23-24 (discussing modification of maximum fee on agency review).

[its] use of a mandatory 'shall' in the very same section"). SSA has accordingly exercised its discretion in this context to withhold a total of 25% of past-due benefits for direct payment of the approved agency and court fees. 20 C.F.R. 404.1730(a) and (b)(i); see Gov't Br. 9-10. But that discretionary determination about the maximum total amount the agency will withhold for direct payment to an attorney does not dictate the aggregate amount of fees that may be authorized by SSA and the courts. Quite the contrary, "[i]f the authorized fee exceeds the amount of withheld Title II benefits" that SSA will pay to the representative, "the representative must collect the balance from the claimant." SSA, Program Operations Manual System (POMS), GN 03920.017D.1 (July 25, 2012) (emphasis omitted), https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920017.

c. Finally, the Amicus notes (Br. 17-18) that Section 406(a)(2) was enacted in 1990 to impose a 25% past-due-benefits cap on the amount of fees that an agency-approved fee agreement may specify for representing the claimant in agency proceedings. The Amicus suggests (Br. 18) that this 1990 enactment somehow ratified prior court of appeals decisions that had concluded that *other* provisions of Section 406 imposed a 25% aggregate cap. That contention is incorrect. Section 406(a)(2) itself does not establish any aggregate fee cap, and Congress's addition of a new means of setting an agency fee through agency-approved fee agreements under Section 406(a)(2) did not alter other statutory provisions to codify such an aggregate cap. Indeed, as we explain below, the legislative history of Section 406(a) and (b) makes clear that Congress understood that it did *not* impose an aggregate 25% cap on the total amount of fees for agency and court proceedings.

B. Section 406's Legislative History Reflects Congress's Intent Not To Impose A 25% Aggregate Cap

The Amicus argues (Br. 19-22) that Section 406's legislative history supports a 25% aggregate cap. The Amicus bases her conclusion (Br. 20) on a passage from a committee report concerning the 1965 enactment of Section 406(b)'s 25% cap on fees for "represent[ing] [the claimant] before the court," 42 U.S.C. 406(b)(1)(A), which noted the "occasion[al]" problem of inordinately large fees "in Federal district court actions," S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, at 122 (1965) (1965 Senate Report). Amicus then argues (Br. 21-22) that "[i]t is difficult, if not impossible," to conclude that a different Congress would later enact a statutory mechanism that allowed "combined" fees for work in agency proceedings and in court to exceed a 25% cap. Not only does Section 406's text show that Congress did precisely that, Section 406's legislative history does so as well.

Before 1965, Section 406 authorized SSA to set the maximum fees that could be charged for representing a claimant before the agency, but it included no provision governing fees for court proceedings. See 42 U.S.C. 406 (1964). In the absence of legislation, some courts concluded that Congress's grant of jurisdiction to review SSA decisions, 42 U.S.C. 405(g), allowed a reviewing court "to provide for the payment of counsel fees for conducting the litigation from any recovery obtained therein." *Folsom* v. *McDonald*, 237 F.2d 380, 382 (4th Cir. 1956) (per curiam); accord *Gonzalez* v. *Hobby*, 213 F.2d 68, 69 (1st Cir. 1954). In 1965, the Fifth Circuit, in *Celebrezze* v. *Sparks*, 342 F.2d 286, stated that it was "in full accord" with that reasoning. *Id.* at 288. Shortly thereafter, "Congress effectively codified *Sparks* by adding

a new subsection (b)(1) to [Section] 406 that allows withholding of past-due benefits to pay attorney's fees incurred in judicial proceedings," subject, of course, to Section 406(b)(1)'s 25% past-due-benefits cap. *Bowen* v. *Galbreath*, 485 U.S. 74, 76 (1988). But because Section 406(a) already had separately authorized attorney's fees for work in agency proceedings, Congress would have understood that its new 25% cap for fees for work in court would mean that the total amount of agency and court fees could exceed that 25% court-fee cap. Cf. *Hall* v. *United States*, 566 U.S. 506, 516 (2012) ("We assume that Congress is aware of existing law when it passes legislation.") (citation omitted).

Indeed, in 1990, when Congress added Section 406(a)(2)'s fee-agreement provisions to create a "streamlined process" as an alternative to Section 406(a)'s fee-petition process for setting the maximum fee for agency proceedings, see H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 933-934 (1990) (1990 Conf. Rep.), the legislative history makes clear that Congress understood that the total amount of attorney's fees would not be capped at—and thus could exceed—25% of past-due benefits. The 1990 legislation reorganized Section 406(a) by moving to Section 406(a)(4) the provisions governing SSA's certification and direct payment of the "maximum fee" from past-due benefits. Compare 42 U.S.C. 406(a)(4) (Supp. II 1990), with 42 U.S.C. 406(a) (Supp. I 1989). The accompanying Conference Report accordingly explained that, under the revision, once SSA has approved an attorney's fee for work in agency proceedings, the "attorney would be paid the approved fee out of the claimant's past-due social security benefits." 1990 Conf. Rep. 934. But the report then made clear that "if the attorney were *awarded a fee in excess of 25 percent* of

the claimant's past-due social security benefits, the amount payable to the attorney out of the past-due social security benefits [under Section 406(a)(4)] could not exceed 25 percent of those benefits." *Ibid.* (emphasis added). That explanation underscores that Section 406 means what it says, and that nothing in Section 406(a) or (b) imposes an aggregate 25% cap on attorney's fees.

C. The Amicus's Policy Arguments Are Misplaced And, In Any Event, Cannot Overcome The Statutory Text

The Amicus contends (Br. 23-31) that various policy considerations support a 25% aggregate cap. Those arguments are misplaced and, in any event, cannot overcome the text of Section 406, which imposes no such cap.

1. The Amicus argues (Br. 23-24) that if attorney's fees could be approved in an amount greater than the 25% of past-due benefits that SSA will pay directly to an attorney, then attorneys will need to collect the unpaid fees from their claimant-clients by either bringing suit or seeking to collect such fees out of the claimant's future social security benefits. That result, the Amicus argues (Br. 24), is "at odds with" the Social Security Act's goal of "ensur[ing] beneficiaries a protected source of income." That is incorrect.

As an initial matter, the Amicus misunderstands (Br. 24 & n.18) the possibility of collecting attorney's fees from a claimant's ongoing social security benefits, which can occur only in certain contexts to recover the amount of *past-due* benefits that the agency should have, but did not, pay directly to the attorney.[2] More importantly, however, the collection of properly approved

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[2] That possibility arises only when SSA "fail[s] to pay an authorized fee" directly to an eligible attorney out of the claimant's past-due benefits and instead releases to the claimant some or all of

"reasonable" fees by attorneys from the claimants who owe them is fully consistent with the Social Security Act. Attorneys must routinely collect reasonable bills from clients. Cf. *Astrue* v. *Ratliff*, 560 U.S. 586, 598 (2010) (noting in social-security context that attorneys can collect their fees from their clients by using "non-statutory (contractual and other assignment-based) rights"). And Congress specifically contemplated that attorneys would collect their fees from claimants by prohibiting the attorneys from "collect[ing]" such a fee only when the fee is "in excess of the maximum fee" approved by the agency, 42 U.S.C. 406(a)(5), or "in excess of that allowed by the court," 42 U.S.C. 406(b)(2).

As the Amicus correctly acknowledges (Br. 19, 20 n.16), two competing policy concerns are implicated in this context: (a) protecting claimants from excessive fees, and (b) providing adequate monetary incentives to attract "effective legal representation." Congress has itself drawn the policy line by imposing a cap on certain

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the past-due benefits that should have been withheld for the attorney. See POMS, GN 03920.055A (May 19, 2014), https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920055; cf. *Hayes* v. *Commissioner of Soc. Sec.*, 895 F.3d 449, 452 (6th Cir. 2018) (noting that an attorney would need to collect fees from the claimant "either directly or by utilizing the SSA's administrative overpayment mechanism," because "SSA had released the 25% of past-due benefits normally reserved to pay attorney's fees" before the attorney had moved for Section 406(b) fees). In that limited circumstance, if the attorney reports that he or she is unable to collect the fee from the claimant, SSA will "[p]ay the representative the maximum amount [it] should have paid from the claimant's [T]itle II past-due benefits" and will then "[i]nitiate overpayment recovery procedures from the claimant." POMS, GN 03920.055C. That process merely recovers the amount of past-due benefits (up to 25%) that should have been paid directly to the attorney in the first place and thus does not improperly reduce a claimant's ongoing benefits.

types of fees under Section 406 and by separately authorizing SSA and the courts to approve reasonable fees. The fact that Congress might have arguably struck that balance differently by adding an aggregate fee cap does not justify overriding the balance Congress struck here.[3]

2. The Amicus argues (Br. 24-26) that unless this Court imposes a 25% aggregate cap on attorney's fees, Section 406 will allow excessive fees. But Congress has provided ample safeguards for ensuring that fees under both Section 406(a) and Section 406(b) are not excessive.

a. As explained in the government's opening brief, when SSA sets a "reasonable" attorney's fee for proceedings before SSA under Section 406(a)(1), its regulations take into account the amount of fees sought for court proceedings as well as the Social Security Act's "purpose" of providing "a measure of economic security for the beneficiaries." Gov't Br. 22-23 (citation omitted). SSA may similarly adjust the fee established in a fee agreement under Section 406(a)(2) on administrative review, where SSA sets a "reasonable" fee for agency proceedings using the same criteria for reasonableness. *Id.* at 23-24 (discussing agency review under Section 406(a)(3)).

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[3] For similar reasons, the Amicus's repeated suggestion (Br. 11, 13-14, 22, 31, 42) that the Social Security Act should be "broadly" or "liberally" construed to favor the claimant is misplaced. This Court has not held that the Social Security Act should be construed in that manner. But even if it had, that interpretive proposition would not apply here, where the two countervailing goals of avoiding excessive fees and attracting counsel both advance claimants' interests. The appropriate course is therefore to honor the balance that Congress itself has struck in the text of Section 406(a) and (b), by interpreting the statute according to its terms.

b. With respect to fees for representation in court, the Amicus contends (Br. 24-26) that the absence of a 25% cap could produce "absurd results." Br. 24. In the Amicus's view (Br. 25-26), Section 406(b)'s authorization for a "court" to award reasonable fees up to 25% of past-due benefits authorizes both a district court and a court of appeals separately to award fees up to Section 406(b)'s 25% cap, which could potentially lead to awards of 50% of past-due benefits just for court proceedings. The Amicus further suggests (Br. 26) that, when added to agency fees, the total amount of allowed fees could account for "up to 75% of a claimant's past-due disability benefits." Those concerns are misplaced.

In many SSA cases in which an appeal is filed, the claimant will succeed in only one of the two courts involved.[4] Moreover, even if a claimant were to prevail in both district court and a court of appeals, Section 406(b) can be construed to allow only one fee award for all proceedings in court. In any event, Section 406(b)(1)(A) is itself properly construed to authorize the approval of

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[4] A court may award a reasonable fee as part of its "judgment favorable to a claimant" in an amount up to "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). As a result, Section 406(b) authorizes court fees only when the claimant obtains a "favorable" judgment. Moreover, in a case in which the relevant judgment is favorable to the claimant but is not responsible for the full amount of the claimant's past-due benefits (*e.g.*, when it leads to an earlier disability-onset date that merely increases the amount of past-due benefits), the court-approved fee will be limited to 25% of the additional past-due benefits that a claimant obtains because of the favorable judgment.

court fees that in total do not exceed 25% of past-due benefits.[5]

But even if those limitations in Section 406(b) were to be ignored, the fees approved for judicial proceedings would still be subject to the overriding standard of "reasonable[ness]." 42 U.S.C. 406(b)(1)(A). And like SSA, courts may account for the total amount awarded for agency and court proceedings when determining a "reasonable fee" under Section 406(b). Gov't Br. 24-25. Indeed, the Amicus does not appear to dispute that Section 406 vests SSA and the courts with sufficient authority to determine "reasonable" amounts of fees that are not excessive in the aggregate. It is hardly absurd for Congress to have vested SSA and the courts with the

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[5] The Dictionary Act, 1 U.S.C. 1 *et seq.*, provides that, unless the statutory context requires otherwise, "words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. 1. As a result, Section 406(b) is properly read to authorize the "court[s]" that render "judgment[s] favorable to a claimant" to "determine and allow as part of [their] judgment[s]" reasonable fees for "represent[ation] before the court[s]," "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[s]." See 42 U.S.C. 406(b)(1)(A). Under that reading, Section 406(b) authorizes fees for work in district and appellate courts totaling no more than 25% of the claimant's past-due benefits. That reading of Section 406(b) comports with the concern, reflected when Congress enacted Section 406(b)'s 25% court-fee cap in 1965, that "attorneys * * * representing claimants in Federal district court actions"—which can include appeals in such actions—had "occasion[ally] charged what appear to be inordinately large fees" for such representation totaling "one-third to one-half[] of the accrued benefits." 1965 Senate Report 122. This Court need not resolve that question, however, because the authority of SSA and the courts to approve "reasonable" fees is sufficient to reject the Amicus's contention that an atextual 25% cap on aggregate agency and court fees is necessary to prevent excessive attorney's fees.

authority to make individualized determinations of reasonableness on a case-by-case basis.

c. The Amicus notes (Br. 27) that past-due benefits can continue to accrue through agency and court proceedings, such that the amount of past-due benefits that may be used to satisfy a claimant's attorney's fees will normally increase with time. But as this Court has already explained, "Congress was mindful" that "legal fees awardable from those benefits" could continue to increase "the longer the litigation persisted." *Gisbrecht*, 535 U.S. at 804. Not only does the 25% cap for Section 406(b) fees address that reality, *id.* at 804-805, so too does SSA's and the courts' more general authority to determine reasonable fees. See Gov't Br. 22-26. "If the benefits are large in comparison to the amount of time counsel spent on the case," both SSA and the courts may properly approve a reduced amount of fees relative to the total amount of past-due benefits. *Id.* at 808. Such a "downward adjustment" can be warranted to ensure the "reasonableness" of fees, even if the claimant and her counsel had previously agreed to a larger amount in a written fee agreement. *Ibid.* Similarly, if there is unwarranted delay in the proceedings, "a reduction [would be] in order so that the attorney will not profit from the accumulation of benefits during the pendency of the case." *Ibid.*

More generally, the authority of SSA and the courts to approve reasonable fees in this context, Gov't Br. 22-26, provides both tribunals with ample power to "assure that they yield reasonable results in particular cases." *Gisbrecht*, 535 U.S. at 807. In short, if the attorney's fee provisions of Section 406 are properly applied, they should avoid the type of excessive attorney compensation with which the Amicus is concerned.

3. Finally, the Amicus notes (Br. 27-31) that the government previously advocated a 25% aggregate cap on attorney's fees. The government explained to this Court in this case that it had previously filed briefs supporting a 25% aggregate cap; that the government's prior position had also been inconsistent; and that, in any event, its prior briefs supporting an aggregate cap simply failed to account for the salient statutory text. See Gov't Br. 20 n.8; Gov't Cert. Br. 22. The government has therefore corrected its position to account properly for that text. And as the briefing in this case reflects, no statutory basis exists for imposing an aggregate 25% past-due-benefits cap on the total amount of attorney's fees for agency proceedings and judicial review.[6]

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[6] The Amicus also criticizes (Br. 29-30) the government's position in this Court as inconsistent with what the Amicus states is the government's "duty to preserve the assets" of claimants as a "trustee" for social security claimants. That criticism is based on a misreading of this Court's observation that SSA has played a role in litigation concerning Section 406 fees "*resembling* that of a trustee for the claimants," because SSA had "no direct financial stake" in the quantum of fees an attorney may charge a claimant, *Gisbrecht*, 535 U.S. at 798 n.6 (emphasis added). That observation simply reflects that SSA has a legitimate policy-based interest in the proper interpretation of the governing fee provisions, and it therefore participates in fee proceedings to advocate for what it views as the proper result. SSA may therefore "resembl[e]" (*ibid.*) something like a trustee for a claimant when (as in *Gisbrecht*) its position in litigation aligns with the claimant's financial interest to minimize her attorney's fees. But the government is not actually a trustee and owes no trustee-based duties to a claimant in this context. Such "trust obligations" are "established and governed by statute," *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011); see *id.* at 174, and no statutory provision imposes any such trust obligations on the government here.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

OCTOBER 2018