No. 20-7883

In the Supreme Court of the United States

KATHLEEN M. O'DONNELL, PETITIONER

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

An attorney who successfully represents a social security claimant in federal court may potentially obtain attorney's fees under both the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, and the Social Security Act, 42 U.S.C. 406(b)(1). EAJA provides that an attorney who receives fees for the same work under both statutes must refund to the claimant the amount of the smaller fee award. This case concerns the mechanism for effectuating that refund. Here, petitioner's attorney received a fee award under EAJA. The district court subsequently awarded fees under Section 406(b)(1), payable by the agency from a pool of withheld, past-due benefits, and ordered the attorney to refund the EAJA award to petitioner. The court rejected counsel's request to "net" the two fees by subtracting the EAJA award from the Section 406(b)(1) award and ordering the agency to pay him only the difference between the two amounts. The question presented is whether a district court is required to net the two fees upon request by counsel.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ill.):

O'Donnell v. *Berryhill*, No. 17-cv-8931 (Apr. 18, 2019)

K.M.O. v. *Saul*, No. 17-cv-8931 (Jan. 28, 2020)

United States Court of Appeals (7th Cir.):

O'Donnell v. *Saul*, No. 20-1481 (Dec. 29, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 983 F.3d 950. The orders of the district court (Pet. App. B1 and C1-C2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2020. A petition for rehearing was denied on March 3, 2021 (Pet. App. D1). The petition for a writ of certiorari was filed on April 27, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the interaction of two statutes, each of which independently allows attorneys who successfully represent Social Security Administration (SSA) claimants to obtain attorney's fees.

a. The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes fees for the representation of Social Security claimants to be paid out of the claimant's past-due benefits. 42 U.S.C. 406. Section 406(a) authorizes the SSA Commissioner (Commissioner) to award fees for the representation of claimants before the agency. 42 U.S.C. 406(a). Subsection (b)(1), in contrast, authorizes courts to award fees for successful representation in federal court. 42 U.S.C. 406(b)(1). Subsection (b)(1) further specifies that any award for representation in court shall not be "in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled." *Ibid.* The statute imposes criminal consequences for exceeding the 25% cap, making it a misdemeanor for an attorney to "charge[ ], demand[ ], receive[ ], or collect[ ]" a fee for court representation in excess of the statutory limit. 42 U.S.C. 406(b)(2).

In *Culbertson* v. *Berryhill*, 139 S. Ct. 517 (2019), this Court considered whether the 25% cap applies only to fees for representation before a court under Section 406(b)(1), or whether it applies to aggregate fees for representation before a court and the agency under both Subsections (a) and (b)(1). The Court held that the "cap applies only to fees for representation before the court, not the agency." *Id.* at 522. *Culbertson* thus makes clear that an attorney may ultimately be awarded a fee of more than 25% of his client's past-due benefits under Section 406.

To facilitate the payment of potential fee awards, the Commissioner's longstanding policy is to withhold a pool of 25% of a claimant's past-due benefits until any fee applications are adjudicated. See *Culbertson*, 139 S. Ct. at 523 ("[T]he agency withholds a single pool of 25% of past-due benefits for direct payment of agency

and court fees."). Because the agency and a court may ultimately award fees that exceed 25% of the claimant's past-due benefits, that pool may be insufficient to cover the entirety of the eventual fee awards. In that situation, counsel must collect the difference from his client. The Court in *Culbertson* found nothing in the statute that might suggest the agency is required to withhold a greater percentage of past-due benefits, concluding that "[a]ny concerns about a shortage of withheld benefits for direct payment and the consequences of such a shortage are best addressed to the agency, Congress, or the attorney's good judgment." 139 S. Ct. at 523.

b. The Equal Access to Justice Act (EAJA) allows for an award of attorney's fees in a civil action against the United States to a prevailing plaintiff who satisfies certain requirements. 28 U.S.C. 2412 (2018 & Supp. I 2019). A Social Security claimant who successfully challenges an SSA decision in court may be awarded attorney's fees under EAJA in addition to any fees her attorney may be awarded under Section 406(b). See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 796 (2002). Unlike Section 406(b) fees, which are drawn from the claimant's past-due benefits, EAJA fees are paid out of agency funds. See 28 U.S.C. 2412(d)(4). EAJA awards belong to the claimant, though the agency may exercise its discretion to pay the award to counsel pursuant to an attorney-client agreement. See Pet. App. A5.

The potential for an attorney to receive overlapping fees under EAJA and Section 406(b) for the same work raises the question whether Section 406(b)'s 25% cap applies to EAJA fees as well. Congress has addressed that potential conflict via a savings provision. The savings provision clarifies that an attorney does not violate the cap by accepting an EAJA fee in addition to a court

fee under Section 406(b)(1), "but only if, where the claimant's attorney receives fees for the same work under both [Section 406(b)(1)] and [EAJA], the claimant's attorney refunds to the claimant the amount of the smaller fee." Act of Aug. 5, 1985 (1985 Act), Pub. L. No. 99-80, § 3, 99 Stat. 186. In practice, the EAJA award typically represents the smaller sum. "Thus, an EAJA award offsets an award under Section 406(b), so that the amount of the total past-due benefits the claimant actually receives will be increased by the EAJA award up to the point the claimant receives 100 percent of the past-due benefits." *Gisbrecht*, 535 U.S. at 796 (brackets, citation, and ellipsis omitted).

c. The "refund[]" contemplated by EAJA's savings provision, 1985 Act § 3, 99 Stat. 186, may be accomplished in different ways. After receiving fee awards under both EAJA and Section 406(b)(1), an attorney may effectuate the refund simply by writing a check (or making a similar payment) to his or her client. See, *e.g.*, 17-cv-2783 D. Ct. Doc. 37, at 6 (S.D. Ind. Sept. 2, 2020); 18-cv-2245 D. Ct. Doc. 24, at 2 (C.D. Ill. Sept. 2, 2020); 18-cv-1841 D. Ct. Doc. 45, at 6 (N.D. Ill. Sept. 1, 2020). Alternatively, an attorney may ask the district court to account for a prior EAJA fee award in awarding fees under Section 406(b)(1). A district court that adopts that approach may authorize the attorney to retain the funds previously received under EAJA and authorize the Commissioner to pay the attorney the difference between the EAJA fee and the Section 406(b)(1) fee out of the pool of withheld, past-due benefits. See Pet. App. A5. This approach is referred to as "netting." *Ibid.*

Although netting typically has no effect on the substantive legal rights of either the attorney or the claimant, it has practical consequences in some cases due to

SSA's policy of withholding a maximum of 25% of a claimant's past-due benefits for payment of all fees that may be awarded under Section 406. As this Court clarified in *Culbertson*, the fees awarded under Subsections 406(a) and (b)(1) combined may exceed that pool of withheld benefits. 139 S. Ct. at 522. When the agency pays a Section 406(b)(1) award out of that pool, netting results in a greater share of the pool remaining available for the agency to pay the claimant's representative any fees awarded under Section 406(a). A district court's decision not to use netting makes it more likely that a representative will need to collect a portion of his fees directly from his client. See Pet. App. A6.

2. Petitioner in this case is a Social Security claimant. The real party in interest, however, is petitioner's attorney, who seeks review of the district court's denial of his request to use the netting methodology. See Pet. App. A6-A7.

a. In December 2017, petitioner filed a civil action in district court challenging the Commissioner's denial of her application for disability benefits. Pet. App. A5. In February 2019, a magistrate judge issued a final judgment favorable to petitioner and remanded the case to SSA for further administrative proceedings. *Ibid.* Shortly thereafter, the judge awarded petitioner a fee of $7,493.06 under EAJA. SSA paid the EAJA fee directly to counsel, as petitioner had agreed. *Ibid.*

On remand of the disability claim, an administrative law judge determined that petitioner was eligible for disability insurance benefits dating back to August 2016. Pet. App. A5. Consistent with its policy, SSA withheld $14,515.37 (*i.e.*, 25% of petitioner's total past-due benefits) for payment of potential fees to be awarded under Section 406. See *ibid.*

In January 2020, petitioner's counsel filed an unopposed motion with the magistrate judge for authorization to charge and collect a fee of $14,515.37 under Section 406(b)(1). Pet. App. A5. Because counsel had already been paid a fee award of $7,493.06 under EAJA, he proposed that the court issue a netting order allowing him to retain the EAJA award and be paid the remainder of the requested Section 406(b)(1) award (*i.e.*, $7,022.31) out of the pool of withheld benefits. A netting order would leave $7,493.06 in the pool for eventual payment of any Section 406(a) fee award. *Ibid.*

The magistrate judge initially granted the motion, but subsequently issued a new order *sua sponte* that rejected the netting method. Pet. App. A5-A6. The second order awarded counsel $14,515.37 in Section 406(b)(1) fees, payable by SSA from petitioner's past-due benefits. *Id.* at B1. The court directed that, "[f]rom this amount, counsel will refund to [petitioner] the amount of $7,493.06, equal to the EAJA attorney fees" counsel had already received. *Ibid.* The court explained that it did "not believe it has authority to order the Commissioner to retain funds for the potential payment of administrative fees, as sought" by counsel. *Id.* at B1 n.2. Petitioner's counsel filed a motion to alter or amend the judgment, which the court denied. *Id.* at C1.

After the district court entered its order, SSA awarded counsel $4,925.21 under Section 406(a) for his representation before the agency. Pet. App. A6. Counsel is therefore entitled to total fees of $19,440.58 under Subsections 406(a) and (b)(1). If the agency were to pay $14,515.37 of that amount from the pool of withheld benefits to satisfy the district court's Section 406(b)(1) award, counsel would need to seek the remainder—

namely, the amount of fees due under Section 406(a)—directly from petitioner. *Ibid.*

b. Counsel appealed in petitioner's name, Pet. App. A6, and the court of appeals affirmed, *id.* at A1-A9. The court first concluded that it had jurisdiction over the appeal. *Id.* at A6. The court reasoned that, although petitioner's counsel had no real dispute with SSA—ostensibly, the opposing party—with respect to the mechanism for awarding fees, the court had "jurisdiction over this appeal because it concerns matters ancillary to the underlying dispute." *Ibid.*

The court of appeals next concluded that the magistrate judge did not abuse her discretion in refusing to apply netting. The court noted that EAJA's saving provision states that an attorney may accept fee awards under Section 406(b)(1) and EAJA for the same work, "but only if . . . the claimant's attorney refunds to the claimant the amount of the smaller fee." Pet. App. A8 (quoting 1985 Act § 3, 99 Stat. 186). The court explained that a "'refund'" is a "'return of money to a person who overpaid,'" and that it is "the claimant, not the Commissioner, who has 'overpaid'" in this context. *Ibid.* (quoting *Black's Law Dictionary* 1534 (11th ed. 2019) (*Black's*)). The court further noted that the statute expressly imposes the obligation to pay the refund on the attorney, not the courts or the agency. *Ibid.*

Nevertheless, the court of appeals declined to hold that a direct refund is the *only* acceptable method, noting that nothing in the savings provision requires courts "to order a specific refund procedure." Pet. App. A8 (citation omitted). It further observed that "the other statute in play, § 406(b)(1)," states that a district court "'may determine and allow as part of its judgment a reasonable fee.'" *Ibid.* (quoting 42 U.S.C. 406(b)(1)(A))

(emphases omitted). In the court's view, that language "vests the court with discretion" to determine both the amount and the "form" of the fee. *Ibid.* Ultimately, the court held that "the netting method is permissible," but found "no statutory requirement that the court order netting in any or all circumstances." *Id.* at A8-A9 & n.3.

The court of appeals acknowledged that the district court's order meant that counsel would need to seek a portion of his fees from petitioner. Pet. App. A7. But the court viewed counsel's policy arguments as "beside the point," noting that " '[a]ny concerns about a shortage of withheld benefits for direct payment and the consequences of such a shortage are best addressed to the agency, Congress, or the attorney's good judgment'—not to this court." *Id.* at A9 (quoting *Burrage* v. *United States*, 571 U.S. 204, 218 (2014), and *Culbertson*, 139 S. Ct. at 523) (brackets in original).

ARGUMENT

Petitioner renews his contention (Pet. 8-13, 15-19) that the magistrate judge was required to use a netting methodology in awarding attorney's fees under 42 U.S.C. 406(b)(1). Further review is unwarranted. The decision below is correct and does not squarely conflict with the decision of any other court of appeals. In addition, the question presented lacks practical significance given that the answer will likely have no effect on the substantive rights of either counsel or claimant.

1. The court of appeals correctly held that the relevant statutes do not categorically require the netting methodology, and that the district court in this case did not abuse its discretion by ordering a direct refund.

a. EAJA's savings provision states that an attorney may accept fee awards under both EAJA and Section 406(b)(1) for the same work "if * * * the claimant's

attorney refunds to the claimant the amount of the smaller fee." 1985 Act § 3, 99 Stat. 186. On its face, that language imposes an obligation on "the claimant's attorney" to refund the smaller fee amount to the claimant. It does not impose an obligation on courts or SSA to assist in effectuating the refund, much less to assist in any particular way. Thus, even if netting is permissible, see Pet. App. A9, nothing in the statute compels a district court to order netting in any individual case.

That conclusion finds additional support in the language of Section 406(b)(1), which states that a "court may determine and allow as part of its judgment a reasonable fee." 42 U.S.C. 406(b)(1)(A). That language confers on district courts the authority both to determine the amount of a reasonable fee and award that fee to counsel. Critically, it does not specify netting or any other particular procedure for paying fees. The statute thus can reasonably be read to allow the district court a measure of discretion over how to structure the fee award.

b. In contending that the district court was required to use netting, petitioner cites a definition of the term "refund" as a "balancing of accounts," and argues that his preferred definition better accords with the netting methodology than with a direct refund. Pet. 9 (citation omitted). But even if that definition were applied—as opposed to the more contextually appropriate definition, "return of money to a person who overpaid," Pet. App. A8 (quoting *Black's* 1534)—the savings provision still contemplates that "the claimant's attorney," not the agency or the court, will effectuate the refund. 1985 Act § 3, 99 Stat. 186. The text of the savings provision thus does not mandate the use of netting.

Petitioner also suggests (Pet. 9) that this Court approved netting in *Gisbrecht* v. *Barnhart*, 535 U.S. 789 (2002). Petitioner notes that the district court in *Gisbrecht* employed a netting approach, and that this Court "did not indicate that there were any problems with this procedure." Pet. 9. But the propriety of netting was not at issue in *Gisbrecht*, and this Court therefore had no reason to comment on it. See 535 U.S. at 792. Even assuming *Gisbrecht* implicitly sanctioned netting, however, the decision below does not conflict with that holding. The court of appeals simply held that none of the applicable statutory provisions *requires* a district court to employ netting, and that the district court in this case did not abuse its discretion by ordering a direct refund. Nothing in *Gisbrecht* undermines that conclusion.

Petitioner further contends that SSA's regulations require the agency to make "direct" payments to the claimant of any EAJA refund and to the attorney of any fee awards under Section 406. Pet. 11 (citation omitted); see Pet. 10-11 (citing various regulations and guidance documents). He relies principally on 20 C.F.R. 404.1720(b)(4), which provides that, when a claimant is "entitled to past-due benefits, [SSA] will pay the authorized fee, or a part of the authorized fee, directly to the attorney or eligible non-attorney out of the past-due benefits, subject to the limitations described in § 404.1730(b)(1)." Section 404.1730, in turn, governs the direct payment of fees for both judicial and administrative proceedings, and subsection (b)(1) of that regulation provides, as relevant here, that the agency "will pay the representative out of the past-due benefits" up to a maximum of "[t]wenty-five percent of the total of the past-due benefits." 20 C.F.R. 404.1730(b)(1)(i). That

aggregate limitation reflects the agency's policy of withholding a single pool of 25% of past-due benefits for payment of fees under both Subsections 406(a) and (b)(1). See SSA, *Program Operations Manual System (POMS)*, GN 03920.035(A), https://policy.ssa.gov/poms.nsf/lnx/0203920035 (June 22, 2009). Because the regulations require direct payment up to 25% of past-due benefits, paying withheld benefits directly to counsel out of that pool to satisfy a Section 406(b)(1) award complies with those regulations as long as the 25% cap is not exceeded.

Moreover, many of petitioner's arguments depend on "SSA's Program Operations Manual System ('POMS'), which Counsel erroneously refers to as 'regulations.'" Pet. App. A9. Although the POMS provisions that petitioner cites (Pet. 10-11) contemplate direct payment of fees to counsel in certain circumstances, they do not require the Commissioner to use a netting methodology and are not otherwise inconsistent with the district court's order, which *did* contemplate a direct payment to counsel of attorney's fees under Section 406(b)(1). Furthermore, "[t]he POMS is a policy and procedure manual that employees of the [agency] use in evaluating Social Security claims," and "does not have the force and effect of law." Pet. App. A9 (second set of brackets in original) (quoting *Davis* v. *Secretary of HHS*, 867 F.2d 336, 340 (6th Cir. 1989)); see *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981) (per curiam). Accordingly, the POMS could not constrain the district court's exercise of discretion here.

Finally, petitioner argues that the decision below undermines the general purposes of Section 406(b)(1) by "mak[ing] it harder, not easier, for attorneys to collect their fees in Social Security cases." Pet. 16. But the

district court in this case ordered that all Section 406(b)(1) fees would be payable directly to counsel by the agency. And to the extent counsel is concerned about potential difficulty in collecting Section 406(a) fees in these circumstances, this Court has observed that "[a]ny concerns about a shortage of withheld benefits for direct payment and the consequences of such a shortage are best addressed to the agency, Congress, or the attorney's good judgment." *Culbertson* v. *Berryhill*, 139 S. Ct. 517, 523 (2019).

2. Even setting aside the merits, the question presented does not warrant this Court's review. No square conflict exists in the circuits, and resolution of the question presented will likely have no effect on the substantive legal entitlements of either counsel or claimant.

a. The court of appeals' decision does not squarely conflict with any decision of another court of appeals. Petitioner asserts that the circuits "have split over whether netting is permissible." Pet. 13-14. But the decision below expressly held that "[c]ounsel is correct that the netting method is permissible." Pet. App. A9. It concluded only that the magistrate judge had not "abused her discretion in rejecting that method here." *Ibid.* And none of the other circuits that petitioner identifies (Pet. 14-15) have found the netting method impermissible either. See *Crawford* v. *Astrue*, 586 F.3d 1142, 1144 n.3 (9th Cir. 2009) (characterizing netting as "proper[]" in dicta); *McGraw* v. *Barnhart,* 450 F.3d 493, 497 n.2 (10th Cir. 2006) (noting that it is "more appropriate for counsel to make the required refund to his client, rather than to delegate that duty to the Commissioner," but without definitively resolving the issue); *Martinez* v. *Berryhill*, 699 Fed. Appx. 775, 776 (10th Cir. 2017) (explaining that, while the Tenth Circuit

"disfavor[s]" netting, it has not "ruled it out"); *Jackson* v. *Commissioner of Soc. Sec.*, 601 F.3d 1268, 1272 (11th Cir. 2010) (stating that EAJA's savings provision does not require a district court "to order a specific refund procedure"); see also *Rice* v. *Astrue*, 609 F.3d 831, 836 (5th Cir. 2010) (discussing refund process without commenting on netting).

Conversely, no court of appeals has held that the relevant statutes require netting. Petitioner cites the Eleventh Circuit's decision in *Jackson*, in which the district court had concluded that "EAJA's Savings Provision required it" to order a direct refund. 601 F.3d at 1271. The court of appeals reversed, reasoning that "[t]here is no language in the Savings Provision that requires courts to take any action with respect to the refund," and that "nothing in the Savings Provision commands courts to order a specific refund procedure." *Id.* at 1272. That reasoning is consistent with the decision below, which similarly found that the relevant statutes do not require a direct refund. The Eleventh Circuit did not resolve the question presented here of whether district courts retain discretion to order a direct refund. Although the court's comment that an "attorney may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) fee request," *id.* at 1274, could be read to suggest that district courts do not retain that discretion, at least where the attorney requests netting, the court did not definitively resolve that issue or discuss the scope of discretion at all. Any tension between *Jackson* and the decision below would accordingly be too shallow and tenuous to merit this Court's review.

In any event, additional percolation would be warranted prior to this Court's intervention. Netting may

have a meaningful effect when the combined awards under Subsections 406(a) and (b)(1) exceed 25% of past-due benefits; otherwise, the agency's withheld pool of benefits will cover the entire Section 406 award regardless of the refund mechanism. *Culbertson* only recently clarified that the 25% cap in Section 406(b)(1) is limited to court fees, not agency fees, thereby resolving a circuit conflict on that issue. 139 S. Ct. at 521-522 (2019). Thus far, only a relatively small number of circuits have addressed issues related to netting, but additional circuits can be expected to weigh in as they sort out the implications of *Culbertson*.

b. The question presented also lacks practical significance because it typically does not affect the amount of fees to which attorneys are entitled or the amount of benefits to which claimants are entitled. See Gov't C.A. Br. 19-21 (addressing marginal situations in which the choice whether to use netting could potentially have a substantive effect). There is no dispute that counsel is required to refund the smaller award when he or she receives overlapping awards under EAJA and Section 406(b)(1) for the same work. See Pet. 15-16. The only dispute in this case is whether the agency or the claimant's attorney is responsible for refunding the EAJA fee to the claimant. Petitioner has not shown that his narrow disagreement with the lower courts' resolution of that procedural question in this case—but not the district court's substantive fee award—merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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