

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL
SECURITY, Petitioner, v. CATHERINE G. RATLIFF.
CASE NO: No. 08-1322
PLACE: Washington, D.C.
DATE: Monday, February 22, 2010
PAGES: 1-54

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL J. ASTRUE, COMMISSIONER :

4 OF SOCIAL SECURITY, :

5 Petitioner : No. 08-1322

6 v. :

7 CATHERINE G. RATLIFF. :

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9 Washington, D.C.

10 Monday, February 22, 2010

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:03 a.m.

15 APPEARANCES:

16 ANTHONY YANG, ESQ., Assistant to the Solicitor

17 General, Department of Justice, Washington, D.C.; on
18 behalf of Petitioner.

19 JAMES D. LEACH, ESQ., Rapid City, South Dakota; on

20 behalf of Respondent.

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C O N T E N T S	
	PAGE
1	
2	ORAL ARGUMENT OF
3	ANTHONY YANG, ESQ.
4	On behalf of the Petitioner
5	JAMES D. LEACH, ESQ.
6	On behalf of the Respondent
7	REBUTTAL ARGUMENT OF
8	ANTHONY YANG, ESQ.
9	On behalf of the Petitioner
10	
11	
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-1322, Astrue v. Ratliff.

Mr. Yang.

ORAL ARGUMENT OF ANTHONY YANG

ON BEHALF OF THE PETITIONER

MR. YANG: Mr. Chief Justice, and may it please the Court:

EAJA provides that in an appropriate case a court shall award to a prevailing party fees and other expenses incurred by that party. Every court of appeals to have addressed the question, including the court below, recognized that the plain meaning of EAJA's text directs payment of EAJA fees and other expenses to the prevailing party, and not her attorneys.

Moreover, EAJA's relationship to the fees approved under section 406(b) of the Social Security Act and this Court's decisions in Jeff D. and Venegas in the section 1988 fee context make clear that Congress designed EAJA, like other fee-shifting statutes, to work within traditional attorney-client fee relationships, under which the attorney looks to the client for payment.

1 Congress has also provided that, subject to
2 exceptions not relevant here, all funds payable to the
3 -- by the United States to an individual who owes a
4 valid delinquent debt, Federal debt, shall be reduced by
5 administrative offset.

6 There is no dispute in this case
7 that the prevailing party in this case, Ms. Kills Ree,
8 owed a valid delinquent debt to the United States,
9 received notice of that debt, had the opportunity to
10 repay that debt or enter into a repayment agreement that
11 would have avoided offset, failed to do so. Congress
12 directed in the Debt Collection Improvement Act of 1996
13 that agencies and the Department of Treasury here shall
14 offset such payments for delinquent debts.

15 JUSTICE ALITO: Isn't it true that the
16 Commissioner of Social Security in the past paid EAJA
17 awards directly to attorneys and that this is still
18 done in cases in which the client has assigned the
19 payment to an attorney?

20 MR. YANG: That is true in part. Prior to
21 2005, the Treasury Department did not yet implement,
22 fully implement, the Debt Collection Improvement Act
23 with respect to certain payments. Here, these are
24 miscellaneous payments. Treasury undertook the very
25 large undertaking of computerizing the system to provide

1 for offsets by tackling things like tax refunds, Federal
2 benefits, most contractor payments, large payment
3 systems that the government deals with on a day-to-day
4 basis, and only in 2005 was able to implement
5 miscellaneous offsets.

6 Since 2005, the government has been
7 offsetting EAJA payments. Now, in some circumstances
8 where a debt is owed -- where an EAJA payment is made
9 and a court, for instance, orders the government to pay
10 the attorney, the government's policy is to check
11 whether or not there is a delinquent debt a prevailing
12 party owes, and if not, then the government may accept
13 the assignment or comply with the --

14 JUSTICE ALITO: What gives the Federal
15 Government the right to override State law on that
16 issue? Suppose the situation was that another creditor
17 would have priority over the attorney if the money had
18 been paid directly to the claimant.

19 What gives the government the right, in
20 effect, to override that by paying the money directly to
21 the attorney, unless the government believes that this
22 is payable to the attorney under -- under EAJA?

23 MR. YANG: I don't believe so. There's two
24 circumstances where -- that we might be talking about.
25 The first circumstance might be where a court has

1 ordered the government to pay the attorney. That
2 happens in a number of cases.

3 When the government does not have a debt
4 which is receivable from the prevailing party, it
5 complies with the district court's order. It simply
6 does not have a dog in that fight. When we have an
7 assignment that the government recognizes, that's true
8 in any kind of context where you might have an
9 assignment. The government recognizes the assignment.
10 If there are third-party creditors who are able to come
11 in, they may come in and contest that. They likely
12 wouldn't have notice of it. But it's no different than
13 any other assignment that the government might accept,
14 from a party, of the debt, and that is not an infrequent
15 event.

16 JUSTICE SCALIA: What authority does a court
17 have to direct that the money be paid to the attorney?

18 MR. YANG: Well, it certainly doesn't lie in
19 EAJA. Courts have recognized that they retain equitable
20 authority to recognize a constructive trust or an
21 equitable lien to enforce an agreement between the
22 attorney and client that the client will pay over to an
23 attorney funds received pursuant to an award such as
24 EAJA. And in that context, although courts haven't been
25 particularly clear in their reasoning -- they have cited

1 to equity -- the courts have provided that when, for
2 instance, an attorney represents a client pro bono or
3 represents a prisoner pro bono, that the court will see
4 to it that the payment actually received doesn't
5 ultimately land in the hands of the client and enforces
6 the understanding, either expressed or implicit, between
7 the attorney and client that the funds that the client
8 receives will go to the attorney.

9 JUSTICE GINSBURG: What would happen in the
10 case -- in case it is a prisoner who is this
11 prevailing party? Would the -- would the attorney fee
12 be paid to the prisoner? And if not, to whom would it
13 be paid?

14 MR. YANG: The attorney fee under EAJA is
15 payable to the prevailing party, which would be the
16 prisoner. Now, attorneys would likely come in, the
17 attorneys for the prisoner, and ask the court to
18 exercise its equitable authority to recognize a
19 constructive trust over the fees that are actually paid
20 to the party and prevent the party from keeping that
21 money. But a prisoner is ultimately no different than
22 any other prevailing party under EAJA. It is the
23 prevailing party to whom Congress has directed the court
24 shall award fees and other expenses.

25 CHIEF JUSTICE ROBERTS: So how can the

1 court's broad equitable authority trump what you say is
2 what the statute says?

3 MR. YANG: They are not trumping it, Your
4 Honor. The -- there's two things going on when a court
5 recognizes an equitable trust. First, it has to
6 necessarily recognize the right of the prevailing party
7 to the payment. The prevailing party obtains the payment,
8 and only once the prevailing party actually has title to
9 the thing does equitable trust or a constructive trust
10 attach. So it's recognizing in the EAJA context that
11 the prevailing party is the one who is entitled to the
12 fee, but then --

13 CHIEF JUSTICE ROBERTS: Do you actually have
14 to transfer it or --

15 MR. YANG: Well --

16 CHIEF JUSTICE ROBERTS: I mean, the statute
17 says pay the prevailing party.

18 MR. YANG: Correct.

19 CHIEF JUSTICE ROBERTS: And you're saying
20 the court can say: No, pay the lawyer.

21 MR. YANG: Well --

22 CHIEF JUSTICE ROBERTS: In certain --

23 MR. YANG: In order to recognize the
24 agreement between the party and the attorney.

25 JUSTICE GINSBURG: Where is the agreement

1 between the party and the attorney? The Equal Access to
2 Justice Act provides that fees will be paid to the
3 prevailing party. Where does the prevailing party have
4 a contract with the attorney to turn the fees over?

5 MR. YANG: I'm sorry. I didn't --

6 JUSTICE GINSBURG: You said that pursuant --
7 maybe I misunderstood you, but I thought you said that
8 there is a contract between the prevailing party and the
9 attorney. And where is -- how does that contract come
10 about if it's simply a case that the lawyer is
11 representing pro bono a plaintiff?

12 MR. YANG: Well, as this Court recognized in
13 Venegas in the section 1988 context, it's commonplace
14 either for there to be an expressed or an implied
15 agreement to pay over any statutory award that the
16 prevailing party may receive to the attorney. And I
17 think, in the absence of any indication otherwise, courts
18 are well positioned to simply say, you know, if they
19 haven't agreed otherwise, the normal practice would be
20 for a prevailing party, if they were to receive
21 something under a statutory fee-shifting provision like
22 section 1988 or like EAJA, to agree to pay it to the
23 attorney.

24 JUSTICE SCALIA: Doesn't -- doesn't the
25 government setoff depend upon who owns the money under

1 State law? I mean, it's -- it's commonplace for the
2 Federal law to look to State law on issues of ownership.
3 And, in fact, if there is this doctrine of equitable
4 ownership on the part of the attorney, what right does
5 the government have to do the setoff?

6 MR. YANG: Well, that might be true if we
7 were relying on a common law offset. But in this
8 context, Congress has directed that all Federal
9 payments, unless there is an exception -- and there is
10 no exception in this case -- are to be offset before
11 payment, any payment, to the debtor. So in this case,
12 Congress has effectively established a priority scheme
13 whereby when a debtor owes a delinquent valid debt to
14 the United States and the United States owes an
15 offsetting obligation to that individual, Congress has
16 provided that no Federal funds shall be paid to the
17 individual and instead that the debt -- the government's
18 debt shall be offset against the debt that the --

19 CHIEF JUSTICE ROBERTS: What if the client
20 is bankrupt? What happens then?

21 MR. YANG: The same rule would apply. No
22 Federal payment would -- well -- I believe that the same
23 rule would apply. I've not carefully studied the
24 bankruptcy provisions, and I hate to venture into a very
25 complicated area to give you something definitive. But

1 my belief is that, based on the very clear text of
2 section 3716 of Title 31, which was amended by the Debt
3 Collection Improvement Act, that no payment shall be --
4 even in bankruptcy, the payment goes to the -- has
5 to go to the debtor first, and then it goes to the estate
6 -- that no payment shall be made from the Treasury and
7 instead an administrative offset shall be undertaken to
8 collect the government's debt.

9 JUSTICE BREYER: Is there a way for the
10 lawyer -- a lawyer sees that his client has a good case
11 against the government, and thinks he can get an EAGA
12 fee, so he says to the client: I'd like to represent
13 you and I can get paid for this. But the client says:
14 There are a lot of debts I owe the government.

15 Now, is there any way they can work it out
16 so he can get the representation?

17 MR. YANG: Well, sure. There's --

18 JUSTICE BREYER: What?

19 MR. YANG: As we indicated in our brief,
20 there's several things that can be done. First, the
21 attorney can determine whether there is in fact a debt
22 which is eligible for offset, and that can be done by
23 asking the Treasury with a valid Privacy Act waiver from
24 the client. If that is the case, the client retains the
25 right, which Congress expressly codified in section

1 3716, the right to enter into a repayment agreement. If
2 that is done, there will be no offset, and the repayment
3 agreement is largely governed by the Federal claims
4 collections standards, which are codified at 31 C.F.R. 900
5 to 904, and those -- those provisions provide in section
6 901.8, for instance, that installments shall -- should
7 bear a reasonable relation to the size of the debt and
8 the debtor's ability to pay. And in some instances, the
9 government agency is able to compromise that debt if the
10 debtor is unable to repay it within a reasonable amount of
11 time. The agency should consider the age, health,
12 present and potential income, as well as assets of the
13 debtor, in order to determine the --

14 JUSTICE BREYER: In other words, the lawyer
15 and the agency and the client sit down, and the lawyer
16 says: Here, I can get some money for this client and
17 that will help everybody, but I want to be paid. So I
18 want you, Agency, to agree that on the repayment
19 schedule if I get an EAGA fee, then I get to keep it and
20 I don't have to give it to my client, who will have to
21 give it to the government. And then they can sign a
22 piece of paper and then that's done and the lawyer gets
23 to keep the money.

24 MR. YANG: That -- that's correct.

25 JUSTICE BREYER: And has that ever happened?

1 MR. YANG: I don't know that that's happened
2 in this offset context.

3 JUSTICE BREYER: But it could now. Now
4 people would know about, and they could do it.

5 MR. YANG: It could well happen, and in
6 fact --

7 JUSTICE KENNEDY: Well, what's -- what's the
8 authority for the government to enter into the agreement?

9 MR. YANG: The authority --

10 JUSTICE KENNEDY: I mean, if the statute
11 says there has to be an offset, that's it.

12 MR. YANG: Well, the statute also provides,
13 under section 3711, for the Department of Justice and the
14 Department of Treasury to establish guidelines for
15 agencies. They have done so in Parts 901 to -- or 900
16 to 904 of Title 31 of the Code of Federal Regulations.

17 JUSTICE KENNEDY: But do the guidelines
18 reflect Justice Breyer's hypothetical?

19 MR. YANG: Well, the statute actually
20 reflects Justice Breyer's hypothetical, because at
21 section 3716 -- this is at page 9a of the government's
22 brief's appendix -- the head of the agency, prior to
23 implementing an administrative offset must advise --
24 this is on a4 -- the debtor of the opportunity to make a
25 written agreement with the head of the agency to repay

1 the amount of the claim. That reflects the practice in
2 the Federal claims collections standards of agreeing to
3 repayment of such claims.

4 JUSTICE SOTOMAYOR: Could you tell me what
5 would motivate the government to agree to give to a
6 lawyer a piece of a recovery that it, the government,
7 thinks it's entitled to? I mean, it's one thing to work
8 a repayment plan. That starts on the proposition that
9 the individual can only each week or month or whatever
10 give a certain amount of money over. But what --

11 MR. YANG: Well, I think the hypothetical was
12 premised at the beginning of the lawsuit rather than at
13 the end. If -- if the case were at the end and the
14 government were ordered to pay EAJA fees, the offset
15 would be automatic. We would not agree at that point to
16 split the -- the offset with -- with the attorney. But
17 in the beginning of the lawsuit, when the attorney is
18 undertaking representation of the client, the attorney
19 is able to do precisely what Congress intended, which
20 was to have debtors come to the United States and
21 take -- to avail themselves of the opportunity to repay
22 their debts to avoid an offset.

23 CHIEF JUSTICE ROBERTS: Well, but that's a
24 fanciful answer, because EAJA requires that the
25 government's position, to get fees, is substantially

1 unjustified. And so the government lawyer is going to
2 sit down and say, well, you know, if I take a position
3 that is substantially unjustified, I will at that point
4 pay the fees to you, not to the client.

5 MR. YANG: Well, not at all. The
6 government's interest in an installment plan is not
7 motivated by EAJA. The government's interest is --

8 CHIEF JUSTICE ROBERTS: Yes, but the
9 attorney's interest -- I thought in the hypothetical we
10 were talking about, the attorney's interest is. He
11 thinks the government is going to take a substantially
12 unjustified position, and he wants to make sure in that
13 case that he gets paid.

14 MR. YANG: This is a separate question,
15 which is whether there is really any deterrent or how
16 large the deterrent effect would be having the specter
17 of a fee offset. And as we explained in our brief, this
18 Court in Underwood explained that, because EAJA awards
19 are not given to every prevailing party and are only
20 given to parties where the government's position is not
21 substantially justified, it is -- one cannot reliably
22 determine in advance whether the government's position
23 is going to be so unreasonable that you're going to get
24 an award of fees.

25 And that -- that suggests that any deterrent

1 effect of having the possibility of an offsetting -- an
2 offset for the client's debt is small. And that --

3 CHIEF JUSTICE ROBERTS: Well, that's going
4 to look awful bad to a court that comes in and he's --
5 and the court is asked to award EAJA fees, and there is
6 an agreement already in effect. The government says,
7 well, if we're -- you know, if we're liable for EAJA
8 fees, this is how we are going to handle it.

9 MR. YANG: I may have misspoken --

10 CHIEF JUSTICE ROBERTS: That would be the
11 first piece of -- that would be the first piece of
12 evidence that I would want to put in saying I should get
13 EAJA fees. The government thought they might even take
14 a position that qualified.

15 MR. YANG: Let me back up. I may have
16 misspoken. What I intended to convey is that at the
17 beginning of the case when an attorney is deciding
18 whether to represent a client, the case has not been
19 litigated, we don't know whether the government's
20 position is going to be found to be substantially
21 unjustified or not, the attorney -- if the attorney
22 checks and wants to determine whether the client has
23 a -- a debt owed to the government that would be subject
24 to offset, the attorney can go to the government and say:
25 Let's enter into a repayment plan so that my debtor gets

1 on the government's good graces and no longer is subject to
2 have a tax -- a tax return, for instance, offset or any
3 other payment that the government may owe to that
4 debtor in the future, including EAJA. But it's not
5 because of the EAJA payment that you would enter into
6 the agreement. The government --

7 CHIEF JUSTICE ROBERTS: No, but say he goes
8 in to the government and says, look, I'm about to sue
9 you, and I'd like to sit down and negotiate a nice
10 agreement about the repayment.

11 MR. YANG: Well, I guess the attorney may
12 say, I'm about to sue you, but the government certainly
13 is not motivated because of the lawsuit. The
14 government -- whether an attorney is going to sue the
15 government or not, the question is --

16 CHIEF JUSTICE ROBERTS: Government lawyers
17 are always sympathetic to people who come in and say:
18 I'm going to sue you.

19 (Laughter.)

20 MR. YANG: Well, I guess that certainly gets
21 our attention. But the reason that the government would
22 enter into a repayment agreement is because that is an
23 opportunity for the government to collect a debt that is
24 delinquent, valid, and outstanding.

25 And what Congress intended to do in the Debt

1 Collection Improvement Act was not to have additional
2 Federal funds be paid to debtors who have been given
3 multiple warnings of the debt and are essentially, you
4 know --

5 JUSTICE SOTOMAYOR: The problem with your
6 argument is this pot of money is actually not going
7 to -- it's going to the debtor, according to your
8 argument, because in theory the debtor is the prevailing
9 party and is entitled to get the award. But the money
10 is not being paid to the debtor. It's for the benefit
11 of the lawyer who has done the work that Congress wanted
12 done.

13 MR. YANG: Well, actually, either --

14 JUSTICE SOTOMAYOR: I don't know what the --
15 I don't know what the motivation would be for a lawyer
16 to undertake to represent the meritorious claim when
17 they have to not only do the work in the case, but now
18 have to do the work for the government in getting their
19 client to negotiate an agreement with the government on
20 something that's completely unrelated to the claim.

21 MR. YANG: I guess a --

22 JUSTICE SOTOMAYOR: It's -- it's sort of --

23 MR. YANG: There's a few answers --

24 JUSTICE SOTOMAYOR: -- illogical.

25 MR. YANG: There's a few answers to that.

1 EAJA applies not only in the Social Security context; it
2 applies in all civil actions in which -- not sounding in
3 tort, in which there's not another specific fee
4 provision, brought -- brought by or against the United
5 States.

6 Congress intended -- and this is in the
7 statutory findings which precede EAJA in section -- I
8 believe it's 202 of the Act; it is -- to diminish the
9 financial deterrent on individuals, businesses, and
10 organizations caused by the expense of providing -- of
11 litigating a case. This is --

12 JUSTICE GINSBURG: That sounds like
13 you're -- you have -- the client has an agreement to pay
14 the lawyer or the client has paid the lawyer. It would
15 make sense if the client has paid the lawyer and then
16 there is reimbursement under EAJA that what -- what
17 you're describing would make sense in that situation.
18 But in most of these situations, the client doesn't have
19 the wherewithal to pay the attorney upfront, of course.

20 MR. YANG: That may be true in the Social
21 Security context, but there are many instances in
22 which -- this is the -- this is the normal way that,
23 you know, clients and -- and -- and their -- their
24 attorneys work out fee arrangements. Sometimes clients
25 will pay their attorney in advance; sometimes they will

1 pay as the litigation goes forward. And by the time you
2 have the EAJA award the client will have paid all or
3 part -- sometimes none -- but all or part of the -- of
4 the fee award.

5 JUSTICE GINSBURGH: Is it --

6 MR. YANG: Congress directed -- the language
7 is very clear: Courts shall award to the prevailing party
8 fees and expenses --

9 JUSTICE GINSBURG: And does that mean --

10 MR. YANG: -- incurred by the party.

11 JUSTICE GINSBURG: The award goes to the
12 prevailing party. So, therefore, the attorney's fee is
13 income to the client --

14 MR. YANG: I --

15 JUSTICE GINSBURG: -- is taxable income
16 to the client?

17 MR. YANG: This is -- the answer to that is
18 complicated and, generally, yes. The IRS is of the view
19 that attorney fee awards to prevailing parties, whether
20 it's EAJA or otherwise, are deemed to be taxable income
21 to the client.

22 Now, the clients, of course, will have an
23 offsetting deduction for expenses incurred by -- in --
24 in the course of producing or collecting income, and
25 that was recognized by this Court's opinion in Banks.

1 That deduction is, of course, subject to certain limits.
2 It has to be in excess of 2 percent of the adjusted
3 gross income and subject to the alternative minimum tax,
4 which wouldn't apply to Social Security claims.

5 But the general answer is yes, it is income
6 when the prevailing party receives a fee. There is an
7 offsetting deduction. However, there's a -- some
8 uncertainty with whether some fee awards when the
9 underlying benefit obtained is not taxable, whether
10 that -- the IRS will treat such payments to -- the fee
11 awards, as --

12 JUSTICE GINSBURG: Like pain and suffering,
13 but that's not --

14 MR. YANG: Yes, so, but also certain
15 Federal benefits, including Social Security benefits,
16 have a very complicated tax relationship. Social
17 Security benefits are taxable in part. It depends on
18 the size and the amount of other income.

19 So, the answer is actually quite complicated
20 whether fees are taxable under EAJA in the Social
21 Security context. But the general rule is, yes, fee
22 awards to a prevailing party are income and subject
23 to --

24 JUSTICE GINSBURG: And then, in turn, income
25 to the attorney when -- if the client --

1 MR. YANG: Correct. Just as, you know, when
2 I'm -- you know, I am paid my salary and taxed on it,
3 and then when I pay for services, the person to whom I
4 pay also has income, and they are taxed as well. This is
5 not an unusual situation.

6 JUSTICE KENNEDY: It seems to me the
7 underlying assumption -- and some of the question would
8 have been put to you by the court -- is that the
9 government has somehow benefited because the money is
10 created to offset the debt. It really isn't. It
11 would -- this would be true if an attorney were suing
12 a third party and creating a fund, and the government
13 said, ah, there's the money. In this case, it's just
14 being paid from one account to the other. The
15 government would be better off if there were no suit
16 at all.

17 MR. YANG: That's correct. If the
18 government never had an EAJA award, it at least would
19 be less of a debt that it could collect.

20 JUSTICE KENNEDY: It's just paying itself
21 from one account to the other.

22 MR. YANG: That's correct. The government
23 is -- ultimately zeroes out here. The person that gets
24 the benefit is the prevailing party, because the
25 prevailing party has eliminated a debt to the United

1 States by having that offset by the EAJA award. So the
2 prevailing party obtains the benefit, which is precisely
3 what Congress intended here.

4 CHIEF JUSTICE ROBERTS: The government
5 zeroes out, but in the course of it, it has taken a
6 legal position in court against a small business that
7 was substantially unjustified.

8 MR. YANG: And it has paid its EAJA award by
9 offsetting that award against the debt that the business
10 owed to the United States. The government is -- at the
11 end of the day, the balance sheets of the government
12 have not changed. And with -- from the perspective of --

13 CHIEF JUSTICE ROBERTS: But I think the
14 idea -- well --

15 MR. YANG: From the perspective of the
16 prevailing party as well. The prevailing party has an
17 obligation to the attorney. Those are the attorney's
18 fees incurred which have not yet been paid. The
19 prevailing party also has an obligation to the
20 government in the -- in the amount of a debt. It has
21 income that comes in through the -- through the fee
22 award, and whether that goes to offset the debt to the
23 government or offset the -- for use to pay the attorney,
24 the prevailing party ultimately gets the benefit of that
25 fee award. And the government has paid the EAJA award

1 as required by statute.

2 JUSTICE ALITO: Do you happen to know how
3 much the -- the Treasury typically collects in a year
4 under these EAJA offsets? Does it put a dent in the
5 Federal deficit?

6 MR. YANG: We don't, and the reason we don't
7 is because each agency that -- which is the subject of
8 an EAJA order submits to Treasury a payment request
9 based on that order, and they check "miscellaneous
10 payment." That agency doesn't know whether that payment
11 is offset. Treasury receives that -- that request of
12 payment and sees that it's a miscellaneous payment,
13 checks it against a debt, and may offset. But Treasury
14 doesn't know that the miscellaneous payment was an EAJA
15 award.

16 So we don't have any statistics that we can
17 point to, to say how often this -- this occurs. I can
18 say that the financial management service executes one
19 -- over one billion payments per year, and that offsets
20 of those payments account for \$4.8 billion. So about
21 two-tenths of 1 percent of payments from the Federal
22 Government result in offsets.

23 I'd like to reserve the balance of my
24 time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Leach.

2 ORAL ARGUMENT OF JAMES D. LEACH

3 ON BEHALF OF THE RESPONDENT

4 MR. LEACH: Mr. Chief Justice, may it
5 please the Court:

6 I'd like to discuss with you this
7 morning four reasons why Catherine Ratliff, and not the
8 government, is entitled to receive the fee for the legal
9 services she performed, that Congress invited her to
10 perform, to show that the government's position was
11 legally erroneous and was not even substantially
12 justified.

13 And my first point arises from your
14 question, Justice Scalia. You asked whether State law
15 determines who has the priorities here in terms of
16 offset, if I understood. And the answer is that
17 actually Federal law determines that, specifically the
18 Debt Collection Improvement Act and regulations. The
19 Act requires mutuality of a debt between the debtor and
20 the government before the government can offset. And the
21 regulations, which I'll quote in just an instant,
22 require that before offset can occur, the government must
23 look to who has the beneficial interest in the payment.
24 In other words, who is entitled to benefit from it.

25 Specifically, 31 C.F.R. 285.5(b), which is

1 quoted at page 45 of the red brief, defines, quote,
2 "offset," close quote, as withholding funds to satisfy
3 a debt owed by a payee. And "payee" -- and this is
4 critical -- is defined as the same -- in the same
5 regulation, also quoted at page 45 of our reply brief,
6 as "the person entitled" -- as the person entitled to
7 the benefit of all or part of a payment. In other
8 words, not the legal title holder if there is a
9 difference, but the person with the beneficial interest.

10 CHIEF JUSTICE ROBERTS: The prevailing party
11 gets the benefit in the sense that she is relieved of
12 the debt she owed to the government. That's a real
13 benefit.

14 MR. LEACH: Well, Your Honor, I think that's
15 a benefit -- true, that's a benefit, I agree; but that's
16 not a benefit, I don't think, in the sense of who --
17 because the question is who has the beneficial interest
18 in the fee payment? And when we look to that question,
19 because that's what's at issue here, is the fee payment.

20 JUSTICE ALITO: Isn't this argument
21 circular? The -- the issue is who is -- to whom is this
22 payment to be made. And if it's to be made to the --
23 the claimant, then it's not for the beneficial interest
24 of the -- of the attorney.

25 MR. LEACH: Two responses, if I could,

1 Justice Alito: First, the word "payment" gets thrown
2 around a lot in the briefs. It can mean two separate
3 things. It can mean who receives the payment first; in
4 other words, who is the check mailed to; or it can mean
5 who the check is ultimately entitled to -- who is
6 entitled to benefit from it.

7 And the government's -- my second point is
8 the government's reply brief at page 10 to 12 concedes
9 that, but for the government's alleged right to offset,
10 the attorney does indeed have the beneficial interest in
11 the attorney's fee. And the government gives three
12 reasons, and only three reasons, why its alleged right
13 to offset trumps the attorney's beneficial interest.

14 The first reason the government gives is the
15 government says that the -- the constructive trust, which
16 the government acknowledges exists in the -- in -- in
17 favor of the attorney with respect to the fee payment,
18 does not arise until the instant the fee reaches the
19 client. And that's true, but that's not the point.

20 The point is the attorney had the
21 beneficial interest in the fee, which had to precede the
22 moment the fee reached the client, if it's payable to
23 the client in the sense of "sent to." The beneficial
24 interest had to precede that in order for a constructive
25 trust to arise.

1 The government's second argument --

2 JUSTICE BREYER: On the first one, imagine
3 that the -- a trust owes some money to the government.
4 Now, suppose a lawyer representing the trust recovers.
5 Now, they recover on a separate debt, okay? Separate
6 debt? One. That money goes to the trust. Right?

7 MR. LEACH: If -- I'm not --

8 JUSTICE BREYER: The trust first owes -- the
9 trust owes \$1,000 to the government. The trust then
10 independently recovers \$500 from the government on a
11 different matter.

12 MR. LEACH: Yes.

13 JUSTICE BREYER: The government couldn't
14 offset that?

15 MR. LEACH: Of course it could.

16 JUSTICE BREYER: Yes. Of course it could.

17 MR. LEACH: Yes.

18 JUSTICE BREYER: But the trust is not a
19 person entitled to the benefit of the payment.

20 MR. LEACH: Well --

21 JUSTICE BREYER: The beneficiaries of the
22 trust are entitled to the benefit of the payment.

23 MR. LEACH: If I understood your
24 hypothetical, if the trust is entitled to \$500, then the
25 trust I think would be entitled to the benefit of the

1 payment.

2 JUSTICE BREYER: It's not entitled to the
3 benefit of the \$500. The trust holds money for the
4 benefit of the beneficiaries of the trust. So --

5 MR. LEACH: I --

6 JUSTICE BREYER: -- it can't -- you agree
7 that that couldn't be?

8 MR. LEACH: Well --

9 JUSTICE BREYER: Yes, and once you agree
10 that that couldn't be, I think you are in trouble on
11 your first argument. I'm not sure.

12 MR. LEACH: Okay. I don't think so, because
13 if we are talking about payments to persons, you know,
14 if a person -- if a person owes a debt of \$10,000,
15 receives \$500 on the debt, the person receives the
16 benefit of that \$500.

17 JUSTICE GINSBURG: I --

18 JUSTICE BREYER: Well, similarly, the -- the
19 guy -- the client here receives the benefit of the money
20 that he has just gotten from the government, including
21 the attorney's fees. It happens that he can't keep
22 those attorney's fees, just as the trust can't keep the
23 \$500. He has to give the attorney's fees to the lawyer,
24 just as the trust eventually has to give the \$500 to the
25 beneficiary. So I'm simply saying -- drawing a

1 parallel, which -- go on to the next issue.

2 MR. LEACH: All right, Your Honor.

3 CHIEF JUSTICE ROBERTS: Well, let me -- can
4 trusts -- can trusts recover EAJA fees?

5 MR. LEACH: I don't know, Your Honor.

6 CHIEF JUSTICE ROBERTS: Yes, I don't either.
7 I'm looking at the definition. It doesn't say "trust."
8 It says a lot of other things, like corporation,
9 association, unit of government. I just don't --

10 JUSTICE KENNEDY: I'm having trouble with
11 this aspect, and it may -- may be that it varies from
12 State to State. But as a general matter, under State
13 law, let's say that the employee makes a contingency fee
14 arrangement with a lawyer to sue the employer and wins
15 \$50,000. It's a one-third contingent fee. The -- the
16 employee already owes the employer \$40,000. It would
17 seem to me under the general principle of offset that
18 the employer has to only pay \$10,000, and the attorney
19 is not going to get his full fee.

20 MR. LEACH: That's --

21 JUSTICE KENNEDY: And that's just -- that's
22 just the law of offsets.

23 MR. LEACH: That's true.

24 JUSTICE KENNEDY: Because again, it's the
25 same party. If they created money by suing some third

1 person, then that's different.

2 MR. LEACH: I think that's true.

3 JUSTICE KENNEDY: And -- and so I -- it
4 seems to me that what you're -- what you're asking for
5 is just contrary to the standard law of offsets.

6 MR. LEACH: Well, Your Honor, with what I --

7 JUSTICE KENNEDY: And it's even worse
8 because the Federal statute says that there shall be
9 this offset first as a matter of priority.

10 MR. LEACH: Actually, Your Honor, the
11 Federal statute provides for offset in accordance with
12 regulations to be issued by the Treasury Department.
13 And those Treasury Department regulations were what I
14 quoted right at the beginning of my argument. We have
15 to look at who is entitled to the benefit of the
16 payment, not the benefit in a generalized sense of the
17 lawsuit.

18 JUSTICE KENNEDY: Well, in the generalized
19 sense of -- of common law of offsets, as I've described
20 to it, sure, the attorney has a beneficial interest, but
21 he's not going to be able to collect it vis-à-vis the
22 employer who is entitled to an offset.

23 MR. LEACH: Yes. And the difference, Your
24 Honor, is that in your hypothetical we're talking about
25 one sum of money that's recovered in the name of the

1 claimant. In this situation, we're talking about a
2 statutory fee award, which is created only based on the
3 work of the attorney and which is labeled an attorney's
4 fee and separate from the benefit --

5 JUSTICE BREYER: Well, how is it different?
6 Look. This, what I was talking about, has nothing to do
7 With EAJA.

8 MR. LEACH: Yes.

9 JUSTICE BREYER: It has to do with when the
10 government's allowed to offset some money.

11 MR. LEACH: Yes.

12 JUSTICE BREYER: And it's allowed to offset
13 some money when the money is money that it would otherwise
14 give to a payee. All right?

15 MR. LEACH: Yes.

16 JUSTICE BREYER: And then you've defined
17 "payee" as a person who has some beneficial interest in
18 that money.

19 MR. LEACH: Yes. Yes.

20 JUSTICE BREYER: And I think that the client
21 here has no more and no less beneficial interest whether
22 he's a person or whether he's a trust. That was my
23 point.

24 MR. LEACH: I understand, Your Honor.

25 JUSTICE BREYER: Okay.

1 MR. LEACH: And my point about the statute
2 is simply that the statute is subject to the regulation
3 which looks to who's entitled to benefit.

4 JUSTICE SCALIA: Okay, let's take the
5 regulation: "A person who is entitled to the benefit of
6 all or part of the payment." Ultimately, isn't it the
7 plaintiff who has recovered that is entitled to the
8 benefit, because this money is given to him in order
9 that he can meet a financial obligation that he owes to
10 the lawyer?

11 I mean, if this didn't exist, he'd owe the
12 lawyer and have to pony it up out of his own pocket, no?

13 MR. LEACH: Not so, Your Honor, in Social
14 Security cases, which this is, and in Veterans cases,
15 which together account for more than 90 percent of all
16 EAJA awards. In Social Security cases, 42 U.S.C.
17 406(b)(2), set out in our appendix, makes it a Federal
18 crime for any lawyer to charge, receive, demand, or
19 collect a fee payment directly from a client, other than
20 under past -- the 46 U.S.C. 406 past-due benefits, 25
21 percent, or EAJA.

22 And this is a critical difference. In the
23 non-EAJA, in the non-Social Security, non-Veterans
24 contexts, you know, about 10 percent of cases, you've got
25 -- conceivably, you've got, often, clients paying lawyers

1 on a traditional pay-as-you-go basis. But in a Social
2 Security case or a Veterans case --

3 JUSTICE SCALIA: And in those cases, you
4 agree the offset can be made?

5 MR. LEACH: Absolutely. Absolutely.

6 The difference here in all these Social
7 Security and Veterans cases is that the attorney is
8 barred by law from receiving money on a
9 pay-as-you-go basis. So the attorney has never been
10 paid.

11 JUSTICE GINSBURG: In exchange for getting
12 25 percent of the recovery?

13 MR. LEACH: No. Actually, Your Honor, in
14 exchange for showing in Federal court, if I understand
15 your question. I hope I do.

16 JUSTICE GINSBURG: My understanding is that
17 the ordinary payment to the lawyer for Social Security
18 benefits gained for the client is 25 percent of the
19 recovery to the client paid directly to the lawyer.

20 MR. LEACH: That's true.

21 JUSTICE GINSBURG: So that, just as a
22 background in this case, did Ms. Ratliff get that
23 25 percent?

24 MR. LEACH: No, Your Honor. There was no
25 25 percent fee here.

1 JUSTICE GINSBURG: And that was because it
2 was too small to be bothered with? What was the reason?

3 MR. LEACH: She did not apply for a
4 25 percent fee. It would have been quite small, had she
5 received it. It would have been much smaller than the
6 EAJA fee.

7 JUSTICE GINSBURG: And she could keep only
8 one from the --

9 MR. LEACH: Yes.

10 JUSTICE GINSBURG: She could keep only the
11 larger of the two.

12 MR. LEACH: Had she received the EAJA fee,
13 she could have kept it.

14 JUSTICE GINSBURG: One of the difficulties
15 with your position is that Congress did exempt a number
16 of Federal payments from the offset, but it didn't
17 exempt Equal Access to Justice fees.

18 MR. LEACH: Yes. And the -- there are two
19 points there, Your Honor. I mean, EAJA fees -- I'm not
20 claiming all EAJA fees are exempt. As I just said --
21 spoke with you, Justice Scalia, if the -- in a non-Social
22 Security, non-Veterans case where the client has paid
23 the attorney and then an EAJA fee comes down, that's
24 clearly subject to offset. You have to look to that
25 regulation and who is entitled to the benefit of the fee

1 payment.

2 And the reason that the Debt Collection
3 Improvement Act doesn't address this in 1996 is that in
4 1996, the government had never taken the position that
5 attorney fees were subject to offset in Social Security
6 or Veterans cases. And in fact, in 1996, there were
7 three court of appeals decisions on the question of
8 whether a creditor could offset a statutory fee award:
9 Plant -- these are all of our briefs -- Plant, Fourth
10 Circuit, 1979; Duncan -- I'm sorry, Plant is Fifth
11 Circuit, 1979; Duncan, Fourth Circuit, 1989; Curtis,
12 Eighth Circuit, 1993.

13 All those cases said that the creditor may
14 not offset a statutory fee award against the creditor's
15 debt because the fee is for the attorney. That's why
16 Congress couldn't have conceivably thought to address it
17 in 1996.

18 And some of the questions take me toward the
19 point that you asked about before, Justice Roberts --
20 Chief Justice Roberts. And you suggested, or you said,
21 that EAJA says: Pay to the prevailing party. If I heard
22 you correctly. In fact, Your Honor, the language of the
23 statute is, quote, "award to the prevailing party...
24 fees and other expenses...incurred by that party."

25 And the two parts that we haven't really

1 addressed yet are that what is awarded is attorney's
2 fees. And this "incurred by" language -- with respect to
3 that attorney's fee language, "attorney's fees" has a
4 traditional meaning. It's a meaning this Court has
5 recognized in all those cases bullet-pointed at pages 19
6 to 21 of our briefs. It's a fee earned by and paid to
7 an attorney. And in *Gisbrecht v. Barnhart* in 2002, this
8 Court specifically described the real parties in
9 interest in attorney's fees litigation as the attorneys,
10 recognizing the reality that attorney fees go to
11 attorneys.

12 In addition, the language "incurred by that
13 party" -- what does it mean here? Well, outside of EAJA,
14 it could mean -- it does mean, I think -- money the
15 client takes out and pays to the attorney. We know in
16 Social Security cases and Veterans cases it can't mean
17 that, because that's illegal. That's a Federal crime if
18 the attorney does it.

19 So what does it mean? Well, the government
20 concedes at page 8 of its reply brief that that language
21 "incurred by" a prevailing party is supported by the
22 client's implied or express obligation to pay the
23 attorney the fee received. So this is where the
24 government's argument is circular, I think,
25 Justice Alito, in the sense that that "incurred by"

1 language only is satisfied and an EAJA award only may be
2 made where the client has the express or implied
3 obligation to pay the attorney.

4 JUSTICE SCALIA: Well, you say that in
5 Social Security the attorney is forbidden to accept
6 pay-as-you-go? Is --

7 MR. LEACH: Yes, Your Honor.

8 JUSTICE SCALIA: But that doesn't mean that
9 there is not either an express or an implied contract
10 between the attorney and the Social Security recipient.

11 MR. LEACH: I agree. That's what I was
12 trying to say.

13 JUSTICE SCALIA: Well, but if there is that
14 implied contract, then it is an obligation of the
15 recipient.

16 MR. LEACH: Yes, that's what I was trying to
17 say, Your Honor.

18 JUSTICE SCALIA: Well, I don't see how that
19 leads you where you want to go. Then the payment given
20 to the recipient does indeed benefit the recipient by --
21 by paying off an obligation that the Social Security
22 recipient has.

23 MR. LEACH: Yes, but that obligation exists
24 only to the extent of the EAJA fee. It's not a separate
25 obligation. The attorney can't turn around and go

1 against the client. I mean, 406(b)(2) prohibits the
2 attorney going against the client for any fee other than
3 the 406(b) fee, which is separate, if there is a 406(b)
4 fee, or the EAJA fee. And when --

5 JUSTICE SOTOMAYOR: Is it --

6 MR. LEACH: We have been talking
7 -- I'm sorry.

8 JUSTICE SOTOMAYOR: Just so I'm clarifying,
9 is it your position -- and this is something I want to
10 ask the government as well -- that once the EAJA fee is
11 awarded, the attorney couldn't sue the client later even
12 in an offset situation for repayment, because by statute
13 you view them as blocked from --

14 MR. LEACH: Yes.

15 JUSTICE SOTOMAYOR: -- from seeking anything
16 other than the EAJA fee or the 406 fee?

17 MR. LEACH: Yes, that's what 406(b)(2) says,
18 Your Honor.

19 JUSTICE SOTOMAYOR: So that once the offset
20 happens, the attorney, under -- even if the client had
21 other money, the attorney would be blocked from going
22 after it?

23 MR. LEACH: Yes, Your Honor.

24 JUSTICE SOTOMAYOR: Because by the terms of
25 the statute they can only seek the EAJA fee?

1 MR. LEACH: They can only seek what?

2 JUSTICE SOTOMAYOR: Either the EAJA fee or
3 the 406 fee.

4 MR. LEACH: Yes, and we have been talking as
5 if EAJA fees and 406(b) fees are sort of contemporaneous
6 in every case. In fact, the data cited at page 14 of the
7 red brief is that 46 percent of Federal court Social
8 Security cases result in a remand. Only 5 percent result
9 in an award of benefits. So there are going to be far more
10 EAJA fees in Federal court than there ever are 406(b) fees.

11 JUSTICE KENNEDY: Do you calculate the fee
12 under either the Social Security Act or EAJA, depending
13 on the case? Do you ever calculate it under both so that
14 you get some under each?

15 MR. LEACH: Yes, Your Honor. And that's --

16 JUSTICE KENNEDY: The -- the -- you calculate
17 it under both so you get some under each?

18 MR. LEACH: No, section 3 says how this
19 works, of the -- of EAJA 1985. It says if there are two
20 fees, the attorney keeps the larger fee --

21 JUSTICE KENNEDY: Right.

22 MR. LEACH: -- and sends the smaller
23 to the client and vice versa.

24 And that's the situation, for example,
25 where you could have an offset of an EAJA fee in a

1 Social Security case. Let's say there is a 406(b) fee
2 that's \$6,000. Let's say there is an EAJA fee that is
3 \$4,000. Under section 3, that -- the attorney doesn't
4 keep that \$4,000. That \$4,000 winds up in the client's
5 pocket. The government can offset that. That's --
6 that's what integrates all this discussion we've been
7 having about EAJA fees not being exempt. We have to
8 look to the beneficial interest.

9 JUSTICE GINSBURG: In what percent of the
10 Social Security cases where the claimant prevails is
11 there an EAJA fee?

12 MR. LEACH: Forty-six percent. No, that's not
13 right. It's about 42 percent. And I get that from
14 combining two numbers. There are 5,481 EAJA awards per
15 year. That's red brief page 4. And there are about
16 13,000 Social Security civil cases per year. That's
17 green brief page 22. Fifty-four -- 13,000 divided by
18 5,481 is 42 percent.

19 And this bring me to the point the
20 government was making in suggesting that an attorney at
21 the beginning of a case could never know whether or
22 not there -- there is going to be an EAJA fee, because,
23 you know, you can't know at the beginning, they argue,
24 what position the government will take, whether or not
25 the government's position is substantially justified or

1 not.

2 Well -- and the government cites
3 Pierce/Underwood from 1988 from this Court, in which
4 this Court said exactly that -- Pierce v. Underwood.

5 Pierce v. Underwood is outside the Social
6 Security context, outside the Veterans context, so
7 Pierce v. Underwood is in this less than 10 percent
8 category of cases under EAJA which are not Social
9 Security or Veterans.

10 In a Social Security case or a Veterans
11 case, the attorney has the record before proceeding into
12 court, before deciding whether to proceed into court.
13 And the attorney can look at that record, read it, and
14 have a pretty good idea of whether or not the government
15 position might be substantially justified or not.

16 I don't ask you to take my word for any of
17 this. Let me tell you what the data shows.

18 The data, Justice Ginsburg -- this is where
19 the 42 percent of Federal Social Security cases result
20 in an EAJA award. If it's 42 percent, that's quite a
21 high number of cases in which the government's position
22 is found substantially -- not substantially justified as
23 well as legally erroneous.

24 In Veterans cases, it's even worse. The
25 Court of Veterans Appeal Web site -- this the number of

1 cases -- all together -- number of dispositions per year
2 and the number of EAJA awards. And for 2008 and 2009, if
3 you add up the numbers, out of all the Veterans
4 disability cases filed, 70 percent, 7-0, result in an
5 EAJA award. So there's quite a large number of cases
6 in which -- in -- in a Veterans context or Social
7 Security context where the government's position is
8 found not to be --

9 JUSTICE BREYER: I don't understand your
10 earlier point.

11 MR. LEACH: I'm sorry.

12 JUSTICE BREYER: Imagine that if Joe Smith
13 is in a lot of financial trouble.

14 MR. LEACH: Yes.

15 JUSTICE BREYER: His house is being
16 foreclosed on --

17 MR. LEACH: Yes.

18 JUSTICE BREYER: -- all his bank accounts
19 are attached. Then he gets some money from the
20 government and -- including an EAJA fee.

21 MR. LEACH: Yes.

22 JUSTICE BREYER: And it's \$5,000 of money and
23 1,000 for the fee. They put it in his bank account. It
24 was attached, good-bye, nobody sees the money, because
25 it's whoever attached it got the money. Is that

1 possible?

2 MR. LEACH: Are we talking about the
3 government?

4 JUSTICE BREYER: I'm making this up. I'm
5 not talking about the government. I'm saying the
6 government paid him 5,000 plus 1,000 in an EAJA fee, and
7 the bank got all the money because it had attached his
8 bank account. Is that possible?

9 MR. LEACH: Is this in a Social Security --

10 JUSTICE BREYER: I'm making it up. No. It
11 has nothing to do with -- I'm just making up --

12 MR. LEACH: Yes.

13 JUSTICE BREYER: -- a hypothetical.

14 MR. LEACH: Yes, it is. Sorry.

15 JUSTICE BREYER: All right?

16 MR. LEACH: Yes.

17 JUSTICE BREYER: You follow that. Those are
18 the facts.

19 MR. LEACH: I think so.

20 JUSTICE BREYER: Okay. So a year later, Joe
21 Smith is doing much better. Couldn't the attorney now
22 sue him for the \$1,000, say I'd like it? It went to
23 the bank because they had attached the bank account.

24 MR. LEACH: Outside the Social Security
25 context, yes, I think so.

1 JUSTICE BREYER: All right. Now, suppose it
2 happened to be that that 6,000, 5 for the one and 1 for
3 the other, came from Social Security. Then how does
4 that make a difference?

5 MR. LEACH: The bank could not take it
6 because of the anti-assignment provision --

7 JUSTICE BREYER: It couldn't take 1,000?

8 MR. LEACH: Couldn't take any of it under --

9 JUSTICE BREYER: Couldn't take any of it.
10 Because of?

11 MR. LEACH: -- 42 U.S.C. 407.

12 JUSTICE BREYER: Is that in here?

13 MR. LEACH: Yes, 42 U.S.C. 407 -- it's cited,
14 if it's not quoted -- prohibits assignment of Social
15 Security benefits. But, Justice Breyer, if I --

16 JUSTICE BREYER: And the EAJA fee counts as a
17 Social Security benefit?

18 MR. LEACH: Oh, I'm sorry. I thought we were
19 outside the Social Security context.

20 JUSTICE BREYER: I changed it and said, now,
21 how does it matter if it's Social Security?

22 (Laughter.)

23 MR. LEACH: If it's an EAJA fee in a Social
24 Security context, the bank cannot take that because of
25 the Federal -- well, because the attorney -- the

1 government admits the constructive trust exists in favor
2 of the attorney with respect to those funds.

3 JUSTICE BREYER: If you win this case?

4 MR. LEACH: No. The government says -- has
5 said that in its reply brief.

6 JUSTICE BREYER: In other words -- in other
7 words, no one can attach? No one can -- no one get the
8 EAJA fee by attaching the bank account of the client?

9 MR. LEACH: Yes.

10 JUSTICE BREYER: Okay.

11 MR. LEACH: And I wanted to get back to the
12 point you asked, Justice Breyer --

13 JUSTICE BREYER: Well, skip my points.
14 They're too complicated.

15 (Laughter.)

16 MR. LEACH: Well -- but during -- during
17 Mr. Yang's argument, you asked about this -- this
18 repayment agreement. The concept of a repayment
19 agreement being any use to a lawyer who is thinking
20 about taking one of these cases is fanciful for two
21 reasons: Number one, SSI benefits by statute are
22 limited to, quote, "aged, blind, and disabled people who
23 have little or no money."

24 So, I don't know where the disabled or blind
25 or aged person is going to get the money to enter into

1 any repayment agreement.

2 But the second reason it's fanciful is that
3 the attorney only has 60 days from final agency action
4 to file the case in Federal court. And, so, there is
5 60 days to, you know, meet with the client and try to
6 get an answer out of the government. I've never tried
7 to do this -- I don't know anyone who has -- but I don't
8 think you're going to get much of an answer at 60 days
9 asking the government to do this so the attorney can
10 then recover a fee.

11 Finally, there's -- there's a critical
12 point here that I need to get to, which is that I think
13 Congress has told us exactly what this language means.
14 Here's why.

15 In 1985, Congress enacts EAJA and uses this
16 section 3 language which talks about who gets the fee,
17 large or smaller fee. Okay. In 1992, Congress extends
18 EAJA to Veterans claims. And when it does that, in 38
19 U.S.C. 5904, Congress uses the same language, down to
20 the exact commas in the same place, that it has done in
21 1985.

22 During this entire period -- and here's why
23 that's important -- during that entire period from 1985
24 to 1992, and indeed continuing many years after that,
25 but for purposes here, 1992, the administration is every

1 time paying the attorney's fee to the attorney under
2 EAJA. And so when Congress in 1992 uses the same
3 language for Veterans EAJA claims that it used for
4 Social Security EAJA claims 7 years earlier,
5 Congress, as a matter of law, is incorporating the
6 settled administrative construction --

7 JUSTICE SCALIA: I thought the -- I
8 thought the government said they only did that when --
9 when the court directed that it be paid to the attorney.

10 MR. LEACH: Mr. Yang was talking about from
11 2006 on. From 1990 -- from 1985 to 2006, every EAJA fee
12 went to the attorney.

13 JUSTICE GINSBURG: Because there was no
14 offset in the picture because the government wasn't
15 offsetting.

16 MR. LEACH: Two responses, Your Honor: The
17 offset came into the picture in 1996, but the government
18 says it wasn't practical to 2005. Even if you grant them
19 that point, the agency had to make -- totally apart from
20 offset, the agency had to decide who these fees should
21 be paid to under section 3 -- I mean under EAJA.

22 The government had to say, who does this
23 statute say fees should be paid to? Now, had the
24 government said, well, fees go to the client, says, you
25 know, award to the prevailing party, fees and other

1 expenses, we are going to pay attorney's fees to
2 clients, which had never happened. But had the
3 government said that -- that's not what they said.

4 They look at the statute. They look at the
5 fact that the attorney earned the fees, and they say we
6 are going to pay these fees to the attorney. So that's
7 what's going on at the time Congress in 1992 copies its
8 1985 language --

9 JUSTICE GINSBURG: But Congress has provided
10 in some statutes, the Social Security Act itself, 406,
11 that you quoted, for the fee to be paid directly to the
12 attorney. Here it used different language; it said pay
13 the prevailing party.

14 MR. LEACH: Just two points,
15 Justice Ginsburg: Number one, we get back to this
16 question about does payment mean who receives the check
17 or who is entitled to benefit from it? Number two, EAJA
18 doesn't say pay to the party. EAJA doesn't use the
19 phrase "payment"; 406 says payment to the attorney. EAJA
20 doesn't say that, "payment," at all. The only place you
21 find "pay" in EAJA is where it says the government
22 cannot be required to pay a filing fee.

23 There is this, shall award to a prevailing
24 party fees and other expenses, and (d)(2)(A) defines
25 "fees" to include quote, "attorney fees," close quote.

1 I'm finishing my sentence, Your Honor.

2 CHIEF JUSTICE ROBERTS: Go ahead.

3 MR. LEACH: Thank you. And -- and so
4 "payment" isn't even in EAJA.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. LEACH: Thank you very much, Your Honor.

7 CHIEF JUSTICE ROBERTS: Mr. Yang, you have
8 4 minutes remaining.

9 REBUTTAL ARGUMENT OF ANTHONY YANG

10 ON BEHALF OF THE PETITIONER

11 MR. YANG: I believe I heard counsel concede
12 that EAJA fees outside of the Social Security context
13 are payable to the prevailing party and therefore
14 subject to offset. That's true. EAJA does not draw a
15 distinction between Social Security fees and other types
16 of fees. Section 2412 uses the same language, court
17 shall award to the prevailing party fees and other
18 expenses. I believe that disposes of this case.

19 Second, counsel relies on a definition of
20 "representative payee" in the offset regulations. That's
21 addressed at reply -- our reply, page 2, footnote 1. A
22 representative payee -- as the Federal Register provisions
23 that relate to this make clear, it refers to things like
24 attorneys, it refers to things like parents, where the
25 beneficial interest is not that of the attorney or the

1 parent but the client and the child.

2 It would be entirely unworkable if any time
3 that a payee owes some debt that a third party might
4 claim an interest to, that the government would have to
5 find out the payee's finances and obligations in order
6 to execute an offset. It's simply not the way the
7 offset program was designed, and it's not reflected in
8 the regulation.

9 JUSTICE SOTOMAYOR: Counsel, is your
10 adversary correct that under 406(b) --

11 MR. YANG: (2).

12 JUSTICE SOTOMAYOR: -- (b)(2), that if these
13 attorneys -- if any attorney attempts to collect from
14 a Social Security or Veterans client any fees outside
15 of those granted --

16 MR. YANG: No. Section 206(b) of the EAJA,
17 which is reproduced on 4a of our appendix, states that
18 section 206(b)(2), the provision you were talking about,
19 shall not apply with respect to any such award, meaning
20 any award under EAJA, so long as where the attorney
21 receives fees, the smaller fee is returned. So --

22 CHIEF JUSTICE ROBERTS: Counsel, do you -- do
23 you dispute your friend's statement that 42 percent of
24 the time in Social Security cases the government's
25 position is unjustified, and 70 percent of the time in

1 Veterans cases?

2 MR. YANG: Well, I think that reflects the
3 stakes often, Your Honor. Oftentimes the government
4 does not contest, for instance, a \$2,000 EAJA award
5 and because it's the government, it has to --

6 CHIEF JUSTICE ROBERTS: So whenever it
7 really makes a difference --

8 MR. YANG: No --

9 CHIEF JUSTICE ROBERTS: -- 70 percent of the time
10 the government's position is substantially unjustified?

11 MR. YANG: In cases -- in the VA context, the
12 number is not quite that large, but there's a substantial
13 number of cases at the court of appeals --

14 CHIEF JUSTICE ROBERTS: What number would
15 you accept?

16 MR. YANG: It was, I believe, in the order of
17 either 50 or maybe slightly more than 50 percent. It
18 might be 60. But the number is substantial that you get
19 a reversal, and in almost all of those cases, EAJA --

20 CHIEF JUSTICE ROBERTS: Well, that's really
21 startling, isn't it? In litigating with veterans, the
22 government more often than not takes a position that is
23 substantially unjustified?

24 MR. YANG: It is an unfortunate number, Your
25 Honor. And it is -- it's accurate.

1 With respect to the question of in the
2 Social Security context, EAJA awards occur not only --
3 excuse me, 406(b) awards under the Social Security
4 Administration do not apply in only the 5 percent of the
5 cases that get judgment entered. 406(b) provides that
6 any time a judgment that leads to an award of benefits
7 is made, then 406(b) fees are awarded.

8 So even if in cases that were remanded to
9 the Social Security Administration, as in this case, you
10 could get 406(b) fees. It's just a question of the
11 timing. You have to do so after a remand determines the
12 amount of the fee. So in all cases in which a claimant
13 ends up recovering back benefits -- prevailing and
14 recovering back benefits as a result of a successful court
15 case, that attorney is entitled to payment under 406(b)
16 pursuant to the fee agreement with the client.

17 JUSTICE GINSBURG: What would that be in
18 this case? What was the -- the amount?

19 MR. YANG: That is not in the record, but
20 what is in the record -- actually, no, this is not in
21 the record, either. But the court's -- I can tell you that
22 the district court's opinion at the underlying case,
23 pursuant to the government's concession, awarded --
24 determined that 2 additional months of benefits would
25 be paid.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 The case is submitted.

3 (Whereupon, at 11:03 a.m., the case in the
4 above-entitled matter was submitted.)

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A	<p>age 12:11</p> <p>aged 46:22,25</p> <p>agencies 4:13 13:15</p> <p>agency 12:9,11 12:15,18 13:22 13:25 24:7,10 47:3 48:19,20</p> <p>agree 9:22 12:18 14:5,15 26:15 29:6,9 34:4 38:11</p> <p>agreed 9:19</p> <p>agreeing 14:2</p> <p>agreement 4:10 6:21 8:24,25 9:15 12:1,3 13:8,25 16:6 17:6,10,22 18:19 19:13 46:18,19 47:1 53:16</p> <p>ah 22:13</p> <p>ahead 50:2</p> <p>Alito 4:15 5:14 24:2 26:20 27:1 37:25</p> <p>alleged 27:9,12</p> <p>allowed 32:10 32:12</p> <p>alternative 21:3</p> <p>amended 11:2</p> <p>amount 12:10 14:1,10 21:18 23:20 53:12,18</p> <p>answer 14:24 20:17 21:5,19 25:16 47:6,8</p> <p>answers 18:23 18:25</p> <p>ANTHONY 1:16 2:3,8 3:7 50:9</p> <p>anti-assignment 45:6</p> <p>apart 48:19</p>	<p>Appeal 42:25</p> <p>appeals 3:13 36:7 52:13</p> <p>APPEARAN... 1:15</p> <p>appendix 13:22 33:17 51:17</p> <p>applies 19:1,2</p> <p>apply 10:21,23 21:4 35:3 51:19 53:4</p> <p>appropriate 3:11</p> <p>approved 3:19</p> <p>area 10:25</p> <p>argue 41:23</p> <p>argument 1:13 2:2,7 3:4,7 18:6,8 25:2 26:20 28:1 29:11 31:14 37:24 46:17 50:9</p> <p>arises 25:13</p> <p>arrangement 30:14</p> <p>arrangements 19:24</p> <p>asked 16:5 25:14 36:19 46:12,17</p> <p>asking 11:23 31:4 47:9</p> <p>aspect 30:11</p> <p>assets 12:12</p> <p>assigned 4:18</p> <p>assignment 5:13 6:7,9,9,13 45:14</p> <p>Assistant 1:16</p> <p>association 30:9</p> <p>assumption 22:7</p> <p>Astrue 1:3 3:4</p> <p>attach 8:10 46:7</p> <p>attached 43:19 43:24,25 44:7</p>	<p>44:23</p> <p>attaching 46:8</p> <p>attempts 51:13</p> <p>attention 17:21</p> <p>attorney 3:24 4:19 5:10,17 5:21,22 6:1,17 6:22,23 7:2,7,8 7:11,14 8:24 9:1,4,9,16,23 10:4 11:21 14:16,17,18 16:17,21,21,24 17:11,14 19:19 19:25 20:19 21:25 22:11 23:17,23 26:24 27:10,17,20 30:18 31:20 32:3 34:7,9 35:23 36:5,15 37:7,10,15,18 37:23 38:3,5 38:10,25 39:2 39:11,20,21 40:20 41:3,20 42:11,13 44:21 45:25 46:2 47:3,9 48:1,9 48:12 49:5,6 49:12,19,25 50:25 51:13,20 53:15</p> <p>attorneys 3:17 4:17 7:16,17 19:24 37:9,11 50:24 51:13</p> <p>attorney's 15:9 15:10 20:12 23:17 27:11,13 29:21,22,23 32:3 37:1,3,3,9 49:1</p> <p>attorney-client 3:23</p> <p>attorney's 48:1</p>	<p>authority 6:16 6:20 7:18 8:1 13:8,9</p> <p>automatic 14:15</p> <p>avail 14:21</p> <p>avoid 14:22</p> <p>avoided 4:11</p> <p>award 3:12 6:23 7:24 9:15 15:24 16:5 18:9 20:2,4,7 20:11 22:18 23:1,8,9,22,25 23:25 24:15 32:2 36:8,14 36:23 38:1 40:9 42:20 43:5 48:25 49:23 50:17 51:19,20 52:4 53:6</p> <p>awarded 37:1 39:11 53:7,23</p> <p>awards 4:17 15:18 20:19 21:8,11,22 33:16 41:14 43:2 53:2,3</p> <p>awful 16:4</p> <p>a.m 1:14 3:2 54:3</p> <p>a4 13:24</p>
			B	
			<p>b 51:12</p> <p>back 16:15 46:11 49:15 53:13,14</p> <p>background 34:22</p> <p>bad 16:4</p> <p>balance 23:11 24:23</p> <p>bank 43:18,23 44:7,8,23,23 45:5,24 46:8</p> <p>bankrupt 10:20</p>	

bankruptcy 10:24 11:4	53:14,24	7:10,10 9:10	30:3,6 36:20	37:15 38:2
Banks 20:25	better 22:15	10:10,11 11:10	50:2,5,7 51:22	39:1,2,11,20
Barnhart 37:7	44:21	11:24 14:13	52:6,9,14,20	40:23 46:8
barred 34:8	billion 24:19,20	15:13 16:17,18	54:1	47:5 48:24
based 11:1 24:9	blind 46:22,24	18:17 19:11	child 51:1	51:1,14 53:16
32:2	blocked 39:13	22:13 34:2,2	Circuit 36:10,11	clients 19:23,24
basis 5:4 34:1,9	39:21	34:22 35:22	36:11,12	20:22 33:25
bear 12:7	bono 7:2,3 9:11	40:6,13 41:1	circular 26:21	49:2
beginning 14:12	bothered 35:2	41:21 42:10,11	37:24	client's 16:2
14:17 16:17	Breyer 11:9,18	46:3 47:4	circumstance	37:22 41:4
31:14 41:21,23	12:14,25 13:3	50:18 53:9,15	5:25	close 26:2 49:25
behalf 1:18,20	28:2,8,13,16	53:18,22 54:2	circumstances	Code 13:16
2:4,6,9 3:8	28:18,21 29:2	54:3	5:7,24	codified 11:25
25:3 50:10	29:6,9,18 32:5	cases 4:18 6:2	cited 6:25 40:6	12:4
belief 11:1	32:9,12,16,20	33:14,14,16,24	45:13	collect 11:8
believe 5:23	32:25 43:9,12	34:3,7 36:6,13	cites 42:2	17:23 22:19
10:22 19:8	43:15,18,22	37:5,16,16	City 1:19	31:21 33:19
50:11,18 52:16	44:4,10,13,15	40:8 41:10,16	civil 19:2 41:16	51:13
believes 5:21	44:17,20 45:1	42:8,19,21,24	claim 14:1 18:16	collecting 20:24
beneficial 25:23	45:7,9,12,15	43:1,4,5 46:20	18:20 51:4	Collection 4:12
26:9,17,23	45:16,20 46:3	51:24 52:1,11	claimant 5:18	4:22 11:3 18:1
27:10,13,21,23	46:6,10,12,13	52:13,19 53:5	26:23 32:1	25:18 36:2
31:20 32:17,21	Breyer's 13:18	53:8,12	41:10 53:12	collections 12:4
41:8 50:25	13:20	category 42:8	claiming 35:20	14:2
beneficiaries	brief 11:19	Catherine 1:7	claims 12:3 14:2	collects 24:3
28:21 29:4	15:17 26:1,5	25:7	14:3 21:4	combining
beneficiary	27:8 37:20	caused 19:10	47:18 48:3,4	41:14
29:25	40:7 41:15,17	certain 4:23	clarifying 39:8	come 6:10,11
benefit 18:10	46:5	8:22 14:10	clear 3:21 6:25	7:16 9:9 14:20
21:9 22:24	briefs 27:2 36:9	21:1,14	11:1 20:7	17:17
23:2,24 25:24	37:6	certainly 6:18	50:23	comes 16:4
26:7,11,13,15	brief's 13:22	17:12,20	clearly 35:24	23:21 35:23
26:15,16 27:6	bring 41:19	changed 23:12	client 3:25 4:18	commas 47:20
28:19,22,25	broad 8:1	45:20	6:22,22 7:2,5,7	Commissioner
29:3,4,16,19	brought 19:4,4	charge 33:18	7:7 10:19	1:3 4:16
31:15,16 32:4	bullet-pointed	check 5:10 24:9	11:10,12,13,24	common 10:7
33:3,5,8 35:25	37:5	27:4,5 49:16	11:24 12:15,16	31:19
38:20 45:17	business 23:6,9	checks 16:22	12:20 14:18	commonplace
49:17	businesses 19:9	24:13	15:4 16:18,22	9:13 10:1
benefited 22:9		Chief 3:3,9 7:25	18:19 19:13,14	completely
benefits 5:2	C	8:13,16,19,22	19:15,18 20:2	18:20
21:15,15,17	C 2:1 3:1	10:19 14:23	20:13,16,21	complicated
33:20 34:18	calculate 40:11	15:8 16:3,10	21:25 27:19,22	10:25 20:18
40:9 45:15	40:13,16	17:7,16 23:4	27:23 29:19	21:16,19 46:14
46:21 53:6,13	can't 29:6	23:13 24:25	32:20 33:19	complies 6:5
	carefully 10:23	25:4 26:10	34:18,19 35:22	comply 5:13
	case 3:4,11 4:6,7			

<p>compromise 12:9 computerizing 4:25 concede 50:11 concedes 27:8 37:20 conceivably 33:25 36:16 concept 46:18 concession 53:23 Congress 3:21 4:1,11 7:23 10:8,12,15 11:25 14:19 17:25 18:11 19:6 20:6 23:3 25:9 35:15 36:16 47:13,15 47:17,19 48:2 48:5 49:7,9 consider 12:11 construction 48:6 constructive 6:20 7:19 8:9 27:15,24 46:1 contemporane... 40:5 contest 6:11 52:4 context 3:21 6:8 6:24 8:10 9:13 10:8 13:2 19:1 19:21 21:21 42:6,6 43:6,7 44:25 45:19,24 50:12 52:11 53:2 contexts 33:24 contingency 30:13 contingent 30:15 continuing</p>	<p>47:24 contract 9:4,8,9 38:9,14 contractor 5:2 contrary 31:5 convey 16:16 copies 49:7 corporation 30:8 correct 8:18 12:24 22:1,17 22:22 51:10 correctly 36:22 counsel 24:25 50:5,11,19 51:9,22 54:1 counts 45:16 course 19:19 20:22,24 21:1 23:5 28:15,16 court 1:1,13 3:10,12,13,14 5:9,25 6:16 7:3 7:17,23 8:4,20 9:12 15:18 16:4,5 22:8 23:6 25:5 34:14 36:7 37:4,8 40:7,10 42:3,4,12,12 42:25 47:4 48:9 50:16 52:13 53:14 courts 6:19,24 7:1 9:17 20:7 court's 3:20 6:5 8:1 20:25 53:21,22 created 22:10 30:25 32:2 creating 22:12 creditor 5:16 36:8,13 creditors 6:10 creditor's 36:14 crime 33:18</p>	<p>37:17 critical 26:4 33:22 47:11 Curtis 36:11 C.F.R 12:4 25:25 <hr/>D<hr/>d 1:19 2:5 3:1,20 25:2 49:24 Dakota 1:19 data 40:6 42:17 42:18 day 23:11 days 47:3,5,8 day-to-day 5:3 deals 5:3 debt 4:4,4,8,9,10 4:12,22 5:8,11 6:3,14 10:13 10:17,18,18 11:2,8,21 12:7 12:9 16:2,23 17:23,25 18:3 22:10,19,25 23:9,20,22 24:13 25:18,19 26:3,12 28:5,6 29:14,15 36:2 36:15 51:3 debtor 10:11,13 11:5 12:10,13 13:24 16:25 17:4 18:7,8,10 25:19 debtors 14:20 18:2 debtor's 12:8 debts 4:14 11:14 14:22 decide 48:20 deciding 16:17 42:12 decisions 3:20 36:7 deduction 20:23 21:1,7</p>	<p>deemed 20:20 deficit 24:5 defined 26:4 32:16 defines 26:1 49:24 definition 30:7 50:19 definitive 10:25 delinquent 4:4,8 4:14 5:11 10:13 17:24 demand 33:18 dent 24:4 Department 1:17 4:13,21 13:13,14 31:12 31:13 depend 9:25 depending 40:12 depends 21:17 described 31:19 37:8 describing 19:17 designed 3:22 51:7 determine 11:21 12:13 15:22 16:22 determined 53:24 determines 25:15,17 53:11 deterrent 15:15 15:16,25 19:9 didn't 9:5 difference 26:9 31:23 33:22 34:6 45:4 52:7 different 6:12 7:21 28:11 31:1 32:5 49:12 difficulties 35:14</p>	<p>diminish 19:8 direct 6:17 directed 4:12 7:23 10:8 20:6 48:9 directly 4:17 5:18,20 33:19 34:19 49:11 directs 3:16 disability 43:4 disabled 46:22 46:24 discuss 25:6 discussion 41:6 disposes 50:18 dispositions 43:1 dispute 4:6 51:23 distinction 50:15 district 6:5 53:22 divided 41:17 doctrine 10:3 dog 6:6 doing 44:21 draw 50:14 drawing 29:25 Duncan 36:10 36:11 D.C 1:9,17 <hr/>E<hr/>E 2:1 3:1,1 EAGA 11:11 12:19 EAJA 3:11,16 3:22 4:16 5:7,8 5:22 6:19,24 7:14,22 8:10 9:22 14:14,24 15:7,18 16:5,7 16:13 17:4,5 19:1,7,16 20:2 20:20 21:20 22:18 23:1,8</p>
---	--	---	---	---

23:25 24:4,8 24:14 30:4 32:7 33:16,21 35:6,12,19,20 35:23 36:21 37:13 38:1,24 39:4,10,16,25 40:2,5,10,12 40:19,25 41:2 41:7,11,14,22 42:8,20 43:2,5 43:20 44:6 45:16,23 46:8 47:15,18 48:2 48:3,4,11,21 49:17,18,19,21 50:4,12,14 51:16,20 52:4 52:19 53:2 EAJA's 3:15,18 earlier 43:10 48:4 earned 37:6 49:5 effect 5:20 15:16 16:1,6 effectively 10:12 Eighth 36:12 either 7:6 9:14 18:13 30:6 38:9 40:2,12 52:17 53:21 eligible 11:22 eliminated 22:25 employee 30:13 30:16 employer 30:14 30:16,18 31:22 enacts 47:15 ends 53:13 enforce 6:21 enforces 7:5 enter 4:10 12:1 13:8 16:25 17:5,22 46:25	entered 53:5 entire 47:22,23 entirely 51:2 entitled 8:11 14:7 18:9 25:8 25:24 26:6,6 27:5,6 28:19 28:22,24,25 29:2 31:15,22 33:3,5,7 35:25 49:17 53:15 Equal 9:1 35:17 equitable 6:19 6:21 7:18 8:1,5 8:9 10:3 equity 7:1 erroneous 25:11 42:23 ESQ 1:16,19 2:3 2:5,8 essentially 18:3 establish 13:14 established 10:12 estate 11:5 event 6:15 eventually 29:24 everybody 12:17 evidence 16:12 exact 47:20 exactly 42:4 47:13 example 40:24 exception 10:9 10:10 exceptions 4:2 excess 21:2 exchange 34:11 34:14 excuse 53:3 execute 51:6 executes 24:18 exempt 35:15,17 35:20 41:7 exercise 7:18 exist 33:11	exists 27:16 38:23 46:1 expense 19:10 expenses 3:13 3:16 7:24 20:8 20:23 36:24 49:1,24 50:18 explained 15:17 15:18 express 37:22 38:2,9 expressed 7:6 9:14 expressly 11:25 extends 47:17 extent 38:24 <hr/> F <hr/> fact 10:3 11:21 13:6 36:6,22 40:6 49:5 facts 44:18 failed 4:11 fanciful 14:24 46:20 47:2 far 40:9 favor 27:17 46:1 February 1:10 Federal 4:4 5:1 5:14 10:2,8,16 10:22 12:3 13:16 14:2 18:2 21:15 24:5,21 25:17 31:8,11 33:17 34:14 35:16 37:17 40:7,10 42:19 45:25 47:4 50:22 fee 3:21,23 7:11 7:14 8:12 11:12 12:19 15:17 19:3,24 20:4,12,19 21:6,8,10,21 23:21,25 25:8 26:18,19 27:11	27:17,18,21,22 30:13,15,19 32:2,4 33:19 34:25 35:4,6 35:12,23,25 36:8,14,15 37:3,6,23 38:24 39:2,3,4 39:4,10,16,16 39:25 40:2,3 40:11,20,25 41:1,2,11,22 43:20,23 44:6 45:16,23 46:8 47:10,16,17 48:1,11 49:11 49:22 51:21 53:12,16 fees 3:12,16,18 7:19,24 9:2,4 14:14,25 15:4 15:24 16:5,8 16:13 20:8 21:20 23:18 29:21,22,23 30:4 35:17,19 35:20 36:5,24 37:2,3,9,10 40:5,5,10,10 40:20 41:7 48:20,23,24,25 49:1,5,6,24,25 49:25 50:12,15 50:16,17 51:14 51:21 53:7,10 fee-shifting 3:22 9:21 Fifth 36:10 Fifty-four 41:17 fight 6:6 file 47:4 filed 43:4 filing 49:22 final 47:3 Finally 47:11 finances 51:5	financial 19:9 24:18 33:9 43:13 find 49:21 51:5 findings 19:7 finishing 50:1 first 3:4 5:25 8:5 11:5,20 16:11 16:11 25:13 27:1,3,14 28:2 28:8 29:11 31:9 follow 44:17 footnote 50:21 forbidden 38:5 foreclosed 43:16 Forty-six 41:12 forward 20:1 found 16:20 42:22 43:8 four 25:7 Fourth 36:9,11 friend's 51:23 full 30:19 fully 4:22 fund 22:12 funds 4:2 6:23 7:7 10:16 18:2 26:2 46:2 future 17:4 <hr/> G <hr/> G 1:7 3:1 gained 34:18 general 1:17 21:5,21 30:12 30:17 generalized 31:16,18 generally 20:18 getting 18:18 34:11 Ginsburg 7:9 8:25 9:6 19:12 20:9,11,15 21:12,24 29:17 34:11,16,21
--	---	--	--	--

<p>35:1,7,10,14 41:9 42:18 48:13 49:9,15 53:17 GINSBURGH 20:5 Gisbrecht 37:7 give 10:25 12:20 12:21 14:5,10 29:23,24 32:14 given 15:19,20 18:2 33:8 38:19 gives 5:14,19 27:11,14 go 7:8 11:5 16:24 30:1 37:10 38:19,25 48:24 50:2 goes 11:4,5 17:7 20:1,11 23:22 28:6 going 8:4 15:1 15:11,23,23 16:3,8,20 17:14,18 18:6 18:7 30:19 31:21 39:2,21 40:9 41:22 46:25 47:8 49:1,6,7 good 11:10 17:1 42:14 good-bye 43:24 gotten 29:20 governed 12:3 government 5:3 5:6,9,12,15,19 5:21 6:1,3,7,9 6:13 9:25 10:5 11:11,14 12:9 12:21 13:8 14:5,6,14 15:1 15:11 16:6,13 16:23,24 17:3 17:6,8,12,14</p>	<p>17:15,16,21,23 18:18,19 22:9 22:12,15,18,22 23:4,10,11,20 23:23,25 24:22 25:8,20,20,22 26:12 27:11,14 27:15,16 28:3 28:9,10,13 29:20 30:9 36:4 37:19 39:10 41:5,20 41:24 42:2,14 43:20 44:3,5,6 46:1,4 47:6,9 48:8,14,17,22 48:24 49:3,21 51:4 52:3,5,22 government's 5:10 10:17 11:8 13:21 14:25 15:6,20 15:22 16:19 17:1 25:10 27:7,8,9 28:1 32:10 37:24 41:25 42:21 43:7 51:24 52:10 53:23 government's 15:7 graces 17:1 grant 48:18 granted 51:15 green 41:17 gross 21:3 guess 17:11,20 18:21 guidelines 13:14 13:17 guy 29:19</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>handle 16:8 hands 7:5 happen 7:9 13:5 24:2</p>	<p>happened 12:25 13:1 45:2 49:2 happens 6:2 10:20 29:21 39:20 hate 10:24 head 13:22,25 health 12:11 hear 3:3 heard 36:21 50:11 help 12:17 high 42:21 holder 26:8 holds 29:3 Honor 8:4 26:14 30:2,5 31:6,10 31:24 32:24 33:13 34:13,24 35:19 36:22 38:7,17 39:18 39:23 40:15 48:16 50:1,6 52:3,25 hope 34:15 house 43:15 hypothetical 13:18,20 14:11 15:9 28:24 31:24 44:13</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 23:14 42:14 illegal 37:17 illogical 18:24 imagine 28:2 43:12 implement 4:21 4:22 5:4 implementing 13:23 implicit 7:6 implied 9:14 37:22 38:2,9 38:14 important 47:23 Improvement</p>	<p>4:12,22 11:3 18:1 25:18 36:3 include 49:25 including 3:14 17:4 21:15 29:20 43:20 income 12:12 20:13,15,20,24 21:3,5,18,22 21:24 22:4 23:21 incorporating 48:5 incurred 3:13 20:10,23 23:18 36:24 37:2,12 37:21,25 independently 28:10 indicated 11:19 indication 9:17 individual 4:3 10:15,17 14:9 individuals 19:9 infrequent 6:14 installment 15:6 installments 12:6 instance 5:9 7:2 12:6 17:2 52:4 instances 12:8 19:21 instant 25:21 27:18 integrates 41:6 intended 14:19 16:16 17:25 19:6 23:3 interest 15:6,7,9 15:10 25:23 26:9,17,23 27:10,13,21,24 31:20 32:17,21 37:9 41:8 50:25 51:4</p>	<p>invited 25:9 IRS 20:18 21:10 issue 5:16 26:19 26:21 30:1 issued 31:12 issues 10:2 it's 45:14,21 53:10 I'd 17:9 24:23 25:6 44:22 I'll 25:21 I'm 17:8 30:7,10</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J 1:3 JAMES 1:19 2:5 25:2 Jeff 3:20 Joe 43:12 44:20 judgment 53:5,6 Justice 1:17 3:3 3:9 4:15 5:14 6:16 7:9,25 8:13,16,19,22 8:25 9:2,6,24 10:19 11:9,18 12:14,25 13:3 13:7,10,13,17 13:18,20 14:4 14:23 15:8 16:3,10 17:7 17:16 18:5,14 18:22,24 19:12 20:5,9,11,15 21:12,24 22:6 22:20 23:4,13 24:2,25 25:4 25:14 26:10,20 27:1 28:2,8,13 28:16,18,21 29:2,6,9,17,18 30:3,6,10,21 30:24 31:3,7 31:18 32:5,9 32:12,16,20,25 33:4 34:3,11 34:16,21 35:1</p>
--	--	---	--	--

35:7,10,14,17 35:21 36:19,20 37:25 38:4,8 38:13,18 39:5 39:8,15,19,24 40:2,11,16,21 41:9 42:18 43:9,12,15,18 43:22 44:4,10 44:13,15,17,20 45:1,7,9,12,15 45:16,20 46:3 46:6,10,12,13 48:7,13 49:9 49:15 50:2,5,7 51:9,12,22 52:6,9,14,20 53:17 54:1 justified 15:21 25:12 41:25 42:15,22	L	38:7,11,16,23 39:6,14,17,23 40:1,4,15,18 40:22 41:12 43:11,14,17,21 44:2,9,12,14 44:16,19,24 45:5,8,11,13 45:18,23 46:4 46:9,11,16 48:10,16 49:14 50:3,6 leads 38:19 53:6 legal 23:6 25:8 26:8 legally 25:11 42:23 let's 16:25 30:13 33:4 41:1,2 liable 16:7 lie 6:18 lien 6:21 limited 46:22 limits 21:1 litigated 16:19 litigating 19:11 52:21 litigation 20:1 37:9 little 46:23 long 51:20 longer 17:1 look 10:2 16:4 17:8 25:23 26:18 31:15 32:6 35:24 41:8 42:13 49:4,4 looking 30:7 looks 3:24 33:3 lot 11:14 27:2 30:8 43:13	management 24:18 matter 1:12 28:11 30:12 31:9 45:21 48:5 54:4 mean 8:16 10:1 13:10 14:7 20:9 27:2,3,4 33:11 35:19 37:13,14,14,16 37:19 38:8 39:1 48:21 49:16 meaning 3:15 37:4,4 51:19 means 47:13 meet 33:9 47:5 meritorious 18:16 MICHAEL 1:3 minimum 21:3 minutes 50:8 miscellaneous 4:24 5:5 24:9 24:12,14 misspoken 16:9 16:16 misunderstood 9:7 moment 27:22 Monday 1:10 money 5:17,20 6:17 7:21 9:25 12:16,23 14:10 18:6,9 22:9,13 28:3,6 29:3,19 30:25 31:25 32:10,13,13,13 32:18 33:8 34:8 37:14 39:21 43:19,22 43:24,25 44:7 46:23,25 month 14:9 months 53:24	morning 3:4 25:7 motivate 14:5 motivated 15:7 17:13 motivation 18:15 multiple 18:3 mutuality 25:19
keep 12:19,23 29:21,22 35:7 35:10 41:4 keeping 7:20 keeps 40:20 KENNEDY 13:7,10,17 22:6,20 30:10 30:21,24 31:3 31:7,18 40:11 40:16,21 kept 35:13 Kills 4:7 kind 6:8 know 9:18 13:1 13:4 15:2 16:7 16:19 18:4,14 18:15 19:23 22:1,2 24:2,10 24:14 29:13 30:5 33:24 37:15 41:21,23 41:23 46:24 47:5,7 48:25	K	mailed 27:4 making 41:20 44:4,10,11	N	
			N 2:1,1 3:1 name 31:25 necessarily 8:6 need 47:12 negotiate 17:9 18:19 never 22:18 34:9 36:4 41:21 47:6 49:2 nice 17:9 non-EAJA 33:23 non-Social 33:23 35:21 non-Veterans 33:23 35:22 normal 9:19 19:22 notice 4:9 6:12 number 6:2 35:15 42:21,25 43:1,2,5 46:21 49:15,17 52:12 52:13,14,18,24 numbers 41:14 43:3	
			O	
			O 2:1 3:1 obligation 10:15 23:17,19 33:9 37:22 38:3,14 38:21,23,25 obligations 51:5 obtained 21:9 obtains 8:7 23:2	

<p>occur 25:22 53:2 occurs 24:17 offset 4:5,11,14 10:7,10,18 11:7,22 12:2 13:2,11,23 14:14,16,22 15:17 16:2,24 17:2 22:10 23:1,22,23 24:11,13 25:16 25:20,22 26:2 27:9,13 28:14 30:17 31:9,11 31:22 32:10,12 34:4 35:16,24 36:5,8,14 39:12,19 40:25 41:5 48:14,17 48:20 50:14,20 51:6,7 offsets 5:1,5 24:4,19,22 30:22 31:5,19 offsetting 5:7 10:15 16:1 20:23 21:7 23:9 48:15 Ofentimes 52:3 Oh 45:18 okay 28:5 29:12 32:25 33:4 44:20 46:10 47:17 once 8:8 29:9 39:10,19 one-third 30:15 opinion 20:25 53:22 opportunity 4:9 13:24 14:21 17:23 oral 1:12 2:2 3:7 25:2 order 6:5 8:23 12:13 24:8,9</p>	<p>27:24 33:8 51:5 52:16 ordered 6:1 14:14 orders 5:9 ordinary 34:17 organizations 19:10 outside 37:13 42:5,6 44:24 45:19 50:12 51:14 outstanding 17:24 override 5:15,20 owe 11:14 17:3 33:11 owed 4:8 5:8 16:23 23:10 26:3,12 owes 4:3 5:12 10:13,14 28:3 28:8,9 29:14 30:16 33:9 51:3 ownership 10:2 10:4 owns 9:25</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 13:21 26:1,5 27:8 37:20 40:6 41:15,17 50:21 pages 37:5 paid 4:16 5:18 6:17 7:12,13 7:19 9:2 10:16 11:13 12:17 15:13 18:2,10 19:14,15 20:2 22:2,14 23:8 23:18,25 34:10 34:19 35:22 37:6 44:6 48:9 48:21,23 49:11</p>	<p>53:25 pain 21:12 paper 12:22 parallel 30:1 parent 51:1 parents 50:24 part 4:20 10:4 20:3,3 21:17 26:7 33:6 particularly 6:25 parties 15:20 20:19 37:8 parts 13:15 36:25 party 3:12,13,17 4:7 5:12 6:4,14 7:11,15,20,20 7:22,23 8:6,7,8 8:11,17,24 9:1 9:3,3,8,16,20 15:19 18:9 20:7,10,12 21:6,22 22:12 22:24,25 23:2 23:16,16,19,24 26:10 30:25 36:21,23,24 37:13,21 48:25 49:13,18,24 50:13,17 51:3 past-due 33:20 pay 5:9 6:1,22 8:17,20 9:15 9:22 12:8 14:14 15:4 19:13,19,25 20:1 22:3,4 23:23 30:18 36:21 37:22 38:3 49:1,6,12 49:18,21,22 payable 4:2 5:22 7:15 27:22 50:13 payee 26:3,3</p>	<p>32:14,17 50:20 50:22 51:3 payee's 51:5 paying 5:20 22:20 33:25 38:21 48:1 payment 3:16 3:25 4:19 5:2,8 7:4 8:7,7 10:11 10:11,22 11:3 11:4,6 17:3,5 24:8,10,10,12 24:12,14 25:23 26:7,18,19,22 27:1,3,17 28:19,22 29:1 31:16 33:6,19 34:17 36:1 38:19 49:16,19 49:19,20 50:4 53:15 payments 4:14 4:23,24 5:2,7 10:9 21:10 24:19,20,21 29:13 35:16 pays 37:15 pay-as-you-go 34:1,9 38:6 people 13:4 17:17 46:22 percent 21:2 24:21 33:15,21 33:24 34:12,18 34:23,25 35:4 40:7,8 41:9,12 41:13,18 42:7 42:19,20 43:4 51:23,25 52:9 52:17 53:4 perform 25:10 performed 25:9 period 47:22,23 person 22:3,23 26:6,6,9 28:19 29:14,14,15</p>	<p>31:1 32:17,22 33:5 46:25 persons 29:13 perspective 23:12,15 Petitioner 1:5,18 2:4,9 3:8 50:10 phrase 49:19 picture 48:14,17 piece 12:22 14:6 16:11,11 Pierce 42:4,5,7 Pierce/Under... 42:3 place 47:20 49:20 plain 3:15 plaintiff 9:11 33:7 plan 14:8 15:6 16:25 Plant 36:9,9,10 please 3:10 25:5 plus 44:6 pocket 33:12 41:5 point 14:15 15:3 24:17 25:13 27:7,19,20 32:23 33:1 36:19 41:19 43:10 46:12 47:12 48:19 points 35:19 46:13 49:14 policy 5:10 pony 33:12 position 14:25 15:2,12,20,22 16:14,20 23:6 25:10 35:15 36:4 39:9 41:24,25 42:15 42:21 43:7 51:25 52:10,22 positioned 9:18</p>
--	--	---	---	--

<p>possibility 16:1 possible 44:1,8 pot 18:6 potential 12:12 practical 48:18 practice 9:19 14:1 precede 19:7 27:21,24 precisely 14:19 23:2 premised 14:12 present 12:12 pretty 42:14 prevailing 3:12 3:17 4:7 5:11 6:4 7:11,15,22 7:23 8:6,7,8,11 8:17 9:3,3,8,16 9:20 15:19 18:8 20:7,12 20:19 21:6,22 22:24,25 23:2 23:16,16,19,24 26:10 36:21,23 37:21 48:25 49:13,23 50:13 50:17 53:13 prevails 41:10 prevent 7:20 principle 30:17 prior 4:20 13:22 priorities 25:15 priority 5:17 10:12 31:9 prisoner 7:3,10 7:12,16,17,21 Privacy 11:23 pro 7:2,3 9:11 problem 18:5 proceed 42:12 proceeding 42:11 producing 20:24 program 51:7 prohibits 39:1</p>	<p>45:14 proposition 14:8 provide 4:25 12:5 provided 4:1 7:1 10:16 49:9 provides 3:11 9:2 13:12 31:11 53:5 providing 19:10 provision 9:21 19:4 45:6 51:18 provisions 10:24 12:5 50:22 purposes 47:25 pursuant 6:23 9:6 53:16,23 put 16:12 22:8 24:4 43:23</p> <hr/> <p style="text-align: center;">Q</p> <p>qualified 16:14 question 3:14 15:14 17:15 22:7 25:14 26:17,18 34:15 36:7 49:16 53:1,10 questions 36:18 quite 21:19 35:4 42:20 43:5 52:12 quote 25:21 26:1 26:2 36:23 46:22 49:25,25 quoted 26:1,5 31:14 45:14 49:11</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 Rapid 1:19 Ratliff 1:7 3:5 25:7 34:22 reached 27:22 reaches 27:18</p>	<p>read 42:13 real 26:12 37:8 reality 37:10 really 15:15 22:10 36:25 52:7,20 reason 17:21 24:6 27:14 35:2 36:2 47:2 reasonable 12:7 12:10 reasoning 6:25 reasons 25:7 27:12,12 46:21 REBUTTAL 2:7 50:9 receivable 6:4 receive 9:16,20 25:8 33:18 received 4:9 6:23 7:4 35:5 35:12 37:23 receives 7:8 21:6 24:11 27:3 29:15,15,19 49:16 51:21 receiving 34:8 recipient 38:10 38:15,20,20,22 recognize 6:20 7:18 8:6,23 recognized 3:15 6:19 9:12 20:25 37:5 recognizes 6:7,9 8:5 recognizing 8:10 37:10 record 42:11,13 53:19,20,21 recover 28:5 30:4 47:10 recovered 31:25 33:7 recovering 53:13,14</p>	<p>recovers 28:4,10 recovery 14:6 34:12,19 red 26:1 40:7 41:15 reduced 4:4 Ree 4:7 refers 50:23,24 reflect 13:18 reflected 51:7 reflects 13:20 14:1 52:2 refunds 5:1 Register 50:22 regulation 26:5 33:2,5 35:25 51:8 regulations 13:16 25:18,21 31:12,13 50:20 reimbursement 19:16 relate 50:23 relation 12:7 relationship 3:18 21:16 relationships 3:24 relevant 4:2 reliably 15:21 relies 50:19 relieved 26:11 relying 10:7 remaining 50:8 remand 40:8 53:11 remanded 53:8 repay 4:10 12:10 13:25 14:21 repayment 4:10 12:1,2,18 14:3 14:8 16:25 17:10,22 39:12 46:18,18 47:1 reply 26:5 27:8</p>	<p>37:20 46:5 50:21,21 represent 11:12 16:18 18:16 representation 11:16 14:18 representative 50:20,22 representing 9:11 28:4 represents 7:2,3 reproduced 51:17 request 24:8,11 require 25:22 required 24:1 49:22 requires 14:24 25:19 reserve 24:23 respect 4:23 27:17 37:2 46:2 51:19 53:1 Respondent 1:20 2:6 25:3 responses 26:25 48:16 result 24:22 40:8,8 42:19 43:4 53:14 retain 6:19 retains 11:24 return 17:2 returned 51:21 reversal 52:19 right 5:15,19 8:6 10:4 11:25 12:1 27:9,12 28:6 30:2 31:14 32:14 40:21 41:13 44:15 45:1 Roberts 3:3 7:25 8:13,16,19,22 10:19 14:23</p>
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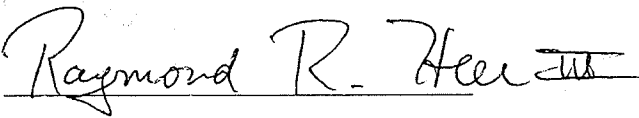
15:8 16:3,10 17:7,16 23:4 23:13 24:25 26:10 30:3,6 36:19,20 50:2 50:5,7 51:22 52:6,9,14,20 54:1 rule 10:21,23 21:21	21:17,21 33:14 33:16,23 34:2 34:7,17 35:22 36:5 37:16 38:5,10,21 40:8,12 41:1 41:10,16 42:6 42:9,10,19 43:7 44:9,24 45:3,15,17,19 45:21,24 48:4 49:10 50:12,15 51:14,24 53:2 53:3,9 see 7:3 38:18 seek 39:25 40:1 seeking 39:15 sees 11:10 24:12 43:24 sends 40:22 sense 19:15,17 26:11,16 27:23 31:16,19 37:25 sent 27:23 sentence 50:1 separate 15:14 27:2 28:5,5 32:4 38:24 39:3 service 24:18 services 22:3 25:9 set 33:17 setoff 9:25 10:5 settled 48:6 sheets 23:11 show 25:10 showing 34:14 shows 42:17 sign 12:21 similarly 29:18 simply 6:5 9:10 9:18 29:25 33:2 51:6 sit 12:15 15:2 17:9	site 42:25 situation 5:16 19:17 22:5 32:1 39:12 40:24 situations 19:18 size 12:7 21:18 skip 46:13 slightly 52:17 small 16:2 23:6 35:2,4 smaller 35:5 40:22 47:17 51:21 Smith 43:12 44:21 Social 1:4 3:19 4:16 19:1,20 21:4,15,16,20 33:13,16 34:1 34:6,17 36:5 37:16 38:5,10 38:21 40:7,12 41:1,10,16 42:5,8,10,19 43:6 44:9,24 45:3,14,17,19 45:21,23 48:4 49:10 50:12,15 51:14,24 53:2 53:3,9 Solicitor 1:16 sorry 9:5 36:10 39:7 43:11 44:14 45:18 sort 18:22 40:5 SOTOMAYOR 14:4 18:5,14 18:22,24 39:5 39:8,15,19,24 40:2 51:9,12 sounding 19:2 sounds 19:12 South 1:19 specific 19:3 specifically	25:17,25 37:8 specter 15:16 split 14:16 spoke 35:21 SSI 46:21 stakes 52:3 standard 31:5 standards 12:4 14:2 startling 52:21 starts 14:8 State 5:15 10:1,2 25:14 30:12,12 30:12 statement 51:23 states 1:1,13 4:3 4:8 10:14,14 14:20 19:5 23:1,10 51:17 statistics 24:16 statute 8:2,16 13:10,12,19 24:1 31:8,11 33:1,2 36:23 39:12,25 46:21 48:23 49:4 statutes 3:22 49:10 statutory 9:15 9:21 19:7 32:2 36:8,14 studied 10:23 subject 4:1 16:23 17:1 21:1,3,22 24:7 33:2 35:24 36:5 50:14 submits 24:8 submitted 54:2 54:4 substantial 52:12,18 substantially 14:25 15:3,11 15:21 16:20 23:7 25:11	41:25 42:15,22 42:22 52:10,23 successful 53:14 sue 17:8,12,14 17:18 30:14 39:11 44:22 suffering 21:12 suggested 36:20 suggesting 41:20 suggests 15:25 suing 22:11 30:25 suit 22:15 sum 31:25 supported 37:21 suppose 5:16 28:4 45:1 Supreme 1:1,13 sure 11:17 15:12 29:11 31:20 sympathetic 17:17 system 4:25 systems 5:3
S				
S 2:1 3:1 salary 22:2 satisfied 38:1 satisfy 26:2 saying 8:19 16:12 29:25 44:5 says 8:2,17 11:12,13 12:16 13:11 16:6 17:8 27:15 30:8 31:8 36:21 39:17 40:18,19 46:4 48:18,24 49:19 49:21 Scalia 6:16 9:24 25:14 33:4 34:3 35:21 38:4,8,13,18 48:7 schedule 12:19 scheme 10:12 second 27:7 28:1 47:2 50:19 section 3:19,21 9:13,22 11:2 11:25 12:5 13:13,21 19:7 40:18 41:3 47:16 48:21 50:16 51:16,18 Security 1:4 3:19 4:16 19:1 19:21 21:4,15				
			T	
			T 2:1,1 tackling 5:1 take 14:21 15:2 15:11 16:13 33:4 36:18 41:24 42:16 45:5,7,8,9,24 taken 23:5 36:4 takes 37:15 52:22 talking 5:24 15:10 29:13 31:24 32:1,6 39:6 40:4 44:2 44:5 48:10 51:18 talks 47:16 tax 5:1 17:2,2 21:3,16 taxable 20:15,20 21:9,17,20	

taxed 22:2,4	title 8:8 11:2	24:21	uses 47:15,19	we're 16:7,7
tell 14:4 42:17	13:16 26:8	types 50:15	48:2 50:16	31:24 32:1
53:21	told 47:13	typically 24:3	U.S.C 33:16,20	we've 41:6
terms 25:15	tort 19:3		45:11,13 47:19	what's 13:7,7
39:24	totally 48:19	U		49:7
text 3:15 11:1	traditional 3:23	ultimately 7:5	V	wherewithal
Thank 24:25	34:1 37:4	7:21 22:23	v 1:6 3:4 37:7	19:19
50:3,5,6 54:1	transfer 8:14	23:24 27:5	42:4,5,7	win 46:3
that's 30:20	Treasury 4:13	33:6	VA 52:11	winds 41:4
31:25 35:23	4:21,24 11:6	unable 12:10	valid 4:4,8 10:13	wins 30:14
36:15 40:24	11:23 13:14	uncertainty 21:8	11:23 17:24	withholding
theory 18:8	24:3,8,11,13	underlying 21:9	varies 30:11	26:2
there's 11:17	31:12,13	22:7 53:22	Venegas 3:20	word 27:1 42:16
18:23,25 19:3	treat 21:10	understand	9:13	words 12:14
43:5 47:11,11	tried 47:6	32:24 34:14	venture 10:24	25:24 26:8
52:12	trouble 29:10	43:9	versa 40:23	27:4 46:6,7
They're 46:14	30:10 43:13	understanding	veterans 33:14	work 3:23 11:15
thing 8:9 14:7	true 4:15,20 6:7	7:6 34:16	34:2,7 36:6	14:7 18:11,17
things 5:1 8:4	10:6 19:20	understood	37:16 42:6,9	18:18 19:24
11:20 27:3	22:11 26:15	25:16 28:23	42:10,24,25	32:3
30:8 50:23,24	27:19 30:23	undertake 18:16	43:3,6 47:18	works 40:19
think 9:17 14:11	31:2 34:20	undertaken 11:7	48:3 51:14	worse 31:7
23:13 26:14,16	50:14	undertaking	52:1,21	42:24
28:25 29:10,12	trump 8:1	4:25 14:18	vice 40:23	wouldn't 6:12
31:2 32:20	trumping 8:3	undertook 4:24	view 20:18	21:4
37:14,24 44:19	trumps 27:13	Underwood	39:13	written 13:25
44:25 47:8,12	trust 6:20 7:19	15:18 42:4,5,7	vis-à-vis 31:21	
52:2	8:5,9,9 27:15	unfortunate		X
thinking 46:19	27:25 28:3,4,6	52:24	W	x 1:2,8
thinks 11:11	28:8,9,9,18,22	unit 30:9	waiver 11:23	
14:7 15:11	28:24,25 29:3	United 1:1,13	want 12:17,18	Y
third 22:12	29:4,22,24	4:3,8 10:14,14	16:12 38:19	Yang 1:16 2:3,8
30:25 51:3	30:7 32:22	14:20 19:4	39:9	3:6,7,9 4:20
third-party 6:10	46:1	22:25 23:10	wanted 18:11	5:23 6:18 7:14
thought 9:7 15:9	trusts 30:4,4	unjustified 15:1	46:11	8:3,15,18,21
16:13 36:16	try 47:5	15:3,12 16:21	wants 15:12	8:23 9:5,12
45:18 48:7,8	trying 38:12,16	23:7 51:25	16:22	10:6,21 11:17
three 27:11,12	turn 9:4 21:24	52:10,23	warnings 18:3	11:19 12:24
36:7	38:25	unreasonable	Washington 1:9	13:1,5,9,12,19
thrown 27:1	two 5:23 8:4	15:23	1:17	14:11 15:5,14
time 12:11 20:1	26:25 27:2	unrelated 18:20	wasn't 48:14,18	16:9,15 17:11
24:24 48:1	35:11,18 36:25	unusual 22:5	way 11:9,15	17:20 18:13,21
49:7 51:2,24	40:19 41:14	unworkable	19:22 51:6	18:23,25 19:20
51:25 52:9	46:20 48:16	51:2	Web 42:25	20:6,10,14,17
53:6	49:14,17	upfront 19:19	week 14:9	21:14 22:1,17
timing 53:11	two-tenths	use 23:23 46:19	went 44:22	22:22 23:8,15
		49:18	48:12	24:6 48:10

50:7,9,11 51:11,16 52:2 52:8,11,16,24 53:19 Yang's 46:17 year 24:3,19 41:15,16 43:1 44:20 years 47:24 48:4 you're 8:19 15:23 47:8	19 37:5 1979 36:10,11 1985 40:19 47:15,21,23 48:11 49:8 1988 3:21 9:13 9:22 42:3 1989 36:11 1990 48:11 1992 47:17,24 47:25 48:2 49:7 1993 36:12 1996 4:12 36:3,4 36:6,17 48:17	<hr/> 4 <hr/> 4 41:15 50:8 4a 51:17 406 33:20 39:16 40:3 49:10,19 406(b) 3:19 39:3 39:3 40:5,10 41:1 51:10 53:3,5,7,10,15 406(b)(2) 33:17 39:1,17 407 45:11,13 42 33:16 41:13 41:18 42:19,20 45:11,13 51:23 45 26:1,5 46 33:20 40:7		
<hr/> Z <hr/> zeroes 22:23 23:5	<hr/> 2 <hr/> 2 21:2 49:24 50:21 51:11,12 53:24 2002 37:7 2005 4:21 5:4,6 48:18 2006 48:11,11 2008 43:2 2009 43:2 2010 1:10 202 19:8 206(b) 51:16 206(b)(2) 51:18 21 37:6 22 1:10 41:17 2412 50:16 25 2:6 33:20 34:12,18,23,25 35:4 285.5(b) 25:25	<hr/> 5 <hr/> 5 40:8 45:2 53:4 5,000 44:6 5,481 41:14,18 50 2:9 52:17,17 5904 47:19		
<hr/> \$ <hr/> \$1,000 28:9 44:22 \$10,000 29:14 30:18 \$2,000 52:4 \$4,000 41:3,4,4 \$4.8 24:20 \$40,000 30:16 \$5,000 43:22 \$50,000 30:15 \$500 28:10,24 29:3,15,16,23 29:24 \$6,000 41:2	<hr/> 3 <hr/> 3 2:4 40:18 41:3 47:16 48:21 31 11:2 12:4 13:16 25:25 3711 13:13 3716 11:2 12:1 13:21 38 47:18	<hr/> 6 <hr/> 6,000 45:2 60 47:3,5,8 52:18		
<hr/> 0 <hr/> 08-1322 1:5 3:4	<hr/> 1 <hr/> 1 24:21 45:2 50:21 1,000 43:23 44:6 45:7 10 27:8 33:24 42:7 10:03 1:14 3:2 11:03 54:3 12 27:8 13,000 41:16,17 14 40:6	<hr/> 7 <hr/> 7 48:4 7-0 43:4 70 43:4 51:25 52:9		
		<hr/> 8 <hr/> 8 37:20		
		<hr/> 9 <hr/> 9a 13:21 90 33:15 900 12:4 13:15 901 13:15 901.8 12:6 904 12:5 13:16		

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY, Petitioner, v. CATHERINE G. RATLIFF., Petitioners, v. CITY OF CHICAGO, ILLINOIS.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Handwritten signature of Raymond R. Heer in cursive script, written over a horizontal line.

REPORTER