Nos. 11-260 and 11-266

In the Supreme Court of the United States

ESTHER HALL, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

DONALD R. MASIAS, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The National Childhood Vaccine Injury Act of 1986 (Vaccine Act), 42 U.S.C. 300aa-1 *et seq.*, establishes a system of no-fault compensation for vaccine-related injuries and deaths, with petitions for compensation decided by a special master of the United States Court of Federal Claims, subject to deferential judicial review. A special master who awards a petitioner "compensation" on a vaccine-related claim "shall also award as part of such compensation an amount to cover * * * reasonable attorneys' fees." 42 U.S.C. 300aa-15(e)(1). The question presented is as follows:

Whether the hourly rates the special master found to be reasonable in these Vaccine Act cases were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 42 U.S.C. 300aa-12(e)(2)(B), because the special master based his fee award on market rates for attorneys in the locality where the attorneys performed their work, rather than the significantly higher market rate for attorneys in the District of Columbia.

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In the Supreme Court of the United States

No. 11-260

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OPINIONS BELOW

The opinion of the court of appeals in No. 11-260 (Pet. App. 1-18) is reported at 640 F.3d 1351. The opinions of the Court of Federal Claims (Pet. App. 19-70) are reported at 93 Fed. Cl. 239. The relevant decisions of the special master are unreported but are available at 2009 WL 3094881 and 2009 WL 3423036.

The opinion of the court of appeals in No. 11-266 (Pet. App. 1-23) is reported at 634 F.3d 1283. The opinion of the Court of Federal Claims (Pet. App. 24-35) is unreported. The relevant decisions of the special master are unreported but are available at 2009 WL 899703 and 2009 WL 1838979.

JURISDICTION

The judgment of the court of appeals in No. 11-260 was entered on April 1, 2011. On June 15, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 29, 2011. The petition for a writ of certiorari in No. 11-260 was filed on August 25, 2011.

The judgment of the court of appeals in No. 11-266 was entered on March 15, 2011. A petition for rehearing was denied on June 1, 2011 (Pet. App. 1). The petition for a writ of certiorari in No. 11-266 was filed on August 25, 2011.

The jurisdiction of this Court is invoked in both cases under 28 U.S.C. 1254(1).

STATEMENT

1. a. To stabilize the vaccine market and provide compensation for vaccine-related injuries and deaths, Congress enacted the National Childhood Vaccine Injury Act of 1986 (Vaccine Act), 42 U.S.C. 300aa-1 *et seq*. The Vaccine Act created the National Vaccine Injury Compensation Program, see 42 U.S.C. 300aa-10(a), which provides compensation for vaccine-related injuries and deaths through a no-fault system "designed to work faster and with greater ease than the civil tort system." *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1073 (2011) (quoting *Shalala* v. *Whitecotton*, 514 U.S. 268, 269 (1995)). A person injured by a vaccine (or the represen-

tative of such a person) may file a petition for compensation in the United States Court of Federal Claims (CFC), naming the Secretary of Health and Human Services (Secretary) as respondent. *Ibid.* A special master of the CFC then "makes an informal adjudication of the petition." *Ibid*.

If a party objects to the special master's decision, a judge of the CFC reviews the decision and may "set aside any findings of fact or conclusions of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. 300aa-12(e)(2)(B). The CFC's decision may in turn be appealed to the United States Court of Appeals for the Federal Circuit. 42 U.S.C. 300aa-12(f). A party may either "accept the court's judgment and forgo a traditional tort suit for damages" or "reject the judgment and seek tort relief." *Bruesewitz*, 131 S. Ct. at 1073.

A special master who has awarded a petitioner "compensation" on a vaccine-related claim "shall also award as part of such compensation an amount to cover * * * reasonable attorneys' fees." 42 U.S.C. 300aa-15(e)(1). Even when a petitioner is not awarded any other form of compensation, the special master "may award an amount of compensation to cover petitioner's reasonable attorneys' fees * * * if the special master * * * determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." *Ibid*. Thus, "[a]ttorney's fees are provided, not only for successful cases, but even for unsuccessful claims that are not frivolous." *Bruesewitz*, 131 S. Ct. at 1074.

b. "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of

hours reasonably expended on the litigation times a reasonable hourly rate." *Blum* v. *Stenson*, 465 U.S. 886, 888 (1984) (citing *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983)). "Adjustments to that fee then may be made as necessary in the particular case." *Ibid.* Under this "lodestar" method of calculating attorneys' fees, a reasonable hourly rate is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," and "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with [the prevailing market rate]." *Id.* at 896 n.11. A "reasonable" fee "is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious * * * case." *Perdue* v. *Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1672 (2010). See *Blum*, 465 U.S. at 897 ("[A] reasonable attorney's fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys.") (internal quotation marks, citation, and alterations omitted).

Under Federal Circuit precedent, in performing lodestar calculations in Vaccine Act cases, special masters and judges sometimes use reasonable hourly rates for practitioners in the District of Columbia. See *Avera* v. *Secretary of HHS*, 515 F.3d 1343, 1348-1349 (Fed. Cir. 2008). Under the "*Davis County* exception," however, if the bulk of the work is performed outside the District of Columbia (as is typically the case in Vaccine Act proceedings, see note 4, *infra*) and there is a "*very significant* difference" between the local hourly rate and the forum hourly rate, fees are based on the local hourly rate. *Avera*, 515 F.3d at 1349 (quoting *Davis County*

Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. *EPA*, 169 F.3d 755, 758 (D.C. Cir. 1999)).

c. The *Laffey* matrix is a chart of hourly rates for attorneys, based on number of years of experience, that was originally developed in *Laffey* v. *Northwest Airlines, Inc.*, 572 F. Supp. 354, aff'd in part and rev'd in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985), for use in the United States District Court for the District of Columbia. The United States Attorney's Office for the District of Columbia updates the chart annually to reflect cost-of-living increases. As the special master in another Vaccine Act case described it, the *Laffey* matrix "is a court-created mechanism to streamline the issue of reimbursement of attorney fees in fee-shifting cases tried in the U.S. District Court for the District of Columbia."[1] *Rodriguez* v. *Secretary of HHS*, No. 06-559V, 2009 WL 2568468, at *11 (Fed. Cl. July 27, 2009).

Even within the D.C. Circuit, *Laffey* matrix rates are not binding on judges. See *Covington* v. *District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995), cert. denied, 516 U.S. 1115 (1996); *Agapito* v. *District of Columbia*, 525 F. Supp. 2d 150, 155 (D.D.C. 2007); *Muldrow* v. *Re-Direct, Inc.*, 397 F. Supp. 2d 1 (D.D.C. 2005), aff'd, 493 F.3d 160 (D.C. Cir. 2007). Thus, while the D.C. Cir-

[1] *Laffey* itself involved complex employment discrimination litigation that was "an extraordinary undertaking in many respects, consuming thirteen years and thousands of personnel hours and raising numerous issues under [two federal employment discrimination] statutes." 572 F. Supp. at 359. According to the attorney who conducted the *Laffey* fee litigation, the matrix sought "to establish the average billing rates * * * charged by the best lawyers within the District in their most complex cases" and "was never designed to set attorney rates in normal federal litigation by competent attorneys." *Rodriguez*, 2009 WL 2568468, at *6.

cuit has recognized that fee matrices, like the *Laffey* matrix, "provide a useful starting point" for determining a reasonable fee, that court also has recognized that the party opposing a fee request can present "contrary evidence tending to show that a lower rate would be appropriate." *Covington*, 57 F.3d at 1109-1110. Such evidence might include "[evidence of] fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases; and evidence of recent fees awarded by the courts or through settlement to attorneys with comparable qualifications handling similar cases." *Id.* at 1109.

2. Petitioner Hall received compensation under the Vaccine Act for an injury to her shoulder caused by a Hepatitis B vaccination. 11-260 Pet. App. 2.

a. Petitioner sought attorneys' fees for the work of her attorney, Richard Gage, who practices in Cheyenne, Wyoming. 11-260 Pet. App. 4. Between August 2002 and December 2005, Mr. Gage was associated with the law firm of Gage & Moxley, P.C. For legal work performed by Mr. Gage while he was at Gage & Moxley, petitioner requested, and the special master awarded, fees based on hourly rates of $175 to $200. *Id.* at 21, 23, 49 n.4. Neither party challenged this award, and it is not at issue in this petition. See *id.* at 23.

Between January 2006 and April 2009, when the litigation ended, Mr. Gage practiced with the law firm of Richard Gage, P.C. 11-260 Pet. App. 23. For Mr. Gage's work in that period, petitioner requested fees based on hourly rates of $360 to $410, which she derived from the *Laffey* matrix. *Id.* at 23-24. The Secretary objected to the proposed fees but stated that she had no objection to basing fees on an hourly rate of $200, the rate awarded for Mr. Gage's services in a 2004 Vaccine Act case. See

Hall v. *Secretary of HHS*, No. 02-1052V, 2009 WL 3094881, at *4 (Fed. Cl. July 28, 2009). The special master ultimately awarded fees based on hourly rates ranging from $219 to $239, which he obtained by adjusting the government's proposed hourly rate to account for inflation. 11-260 Pet. App. 24.

The special master's decision to award attorneys' fees based on Cheyenne rates was based on a three-stage analysis. First, the special master determined that an appropriate Cheyenne rate for Mr. Gage would be $200 per hour in 2004, rising with inflation. The special master reached this conclusion after considering petitioner's evidence and decisions awarding fees to practitioners in Wyoming. *Hall* v. *Secretary of HHS*, No. 02-1052V, 2009 WL 3423036, at *3-*8 (Fed. Cl. Oct. 6, 2009).

Second, the special master determined that an appropriate Washington, D.C., rate for Mr. Gage would be $350 per hour. He reached this conclusion after considering prior special master decisions (including his own) finding a reasonable rate for experienced Vaccine Act practitioners in Washington, D.C., to be $250-$375 per hour. *Hall*, 2009 WL 3423036, at *18-*19 (citations omitted). In addition, after extensive analysis, the special master rejected the *Laffey* matrix as an appropriate basis for Vaccine Act fee awards. *Id.* at *8-*18.

Third, the special master found that the *Davis County* exception applied because "[t]here is no evidence to indicate that Mr. Gage * * * performed any work within the District of Columbia," *Hall*, 2009 WL 3423036, at *20, and the 59% difference between the local and forum rates here was comparable to the 46% to 70% differences in rates found in prior decisions to be "very significant." *Id.* at *20-*21. The special master

added that compensating Mr. Gage at the forum rate would "constitute 'a form of economic relief to improve the financial lot of attorneys' or a 'windfall[] inconsistent with congressional intent.'" *Id.* at *21 (quoting *Avera*, 515 F.3d at 1349 (quoting *Davis County*, 169 F.3d at 759-760)) (brackets in original).

b. The CFC upheld the special master's refusal to award fees at the higher rates. 11-260 Pet. App. 19-70. It explained that "[t]he special master's determination of reasonable attorneys' fees and costs in a Vaccine Act case is a discretionary ruling that is entitled to deference." *Id.* at 30-31. Petitioner asserted that this Court in *Richlin Security Service Co.* v. *Chertoff*, 553 U.S. 571 (2008), had "repudiated one of the central premises of [the *Davis County*] exception." 11-260 Pet. App. 32.[2] The CFC disagreed, and it accordingly adhered to the *Davis County* exception recognized in *Avera*. *Id.* at 35-40. Petitioner also argued that the special master had "erred in finding that there is a very significant difference between local market rates in Cheyenne and forum rates in Washington, DC." *Id.* at 32. The CFC rejected that argument, "conclud[ing] that the special master's determination was reasonable." *Id.* at 40.

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[2] The Court in *Richlin* interpreted the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, which provides that an eligible prevailing party may recover "fees and other expenses incurred by that party in connection with" certain proceedings before an administrative agency. 5 U.S.C. 504(a)(1). (Under the EAJA, similar fee-shifting provisions apply to actions by or against the federal government in federal court. See 28 U.S.C. 2412(d).) The Court held that an EAJA award for paralegal services to a prevailing party, like an award for attorney services, should be based on "prevailing market rates" for those services, rather than the "reasonable cost" of the paralegal to the party's attorney. 553 U.S. at 576-580, 590.

c. The court of appeals affirmed. 11-260 Pet. App. 1-18. Petitioner argued that *Richlin* had "overruled the application of the *Davis County* exception." *Id.* at 8. The court rejected that argument, relying on its prior holding in *Masias* v. *Secretary of HHS*, 634 F.3d 1283, 1288 (Fed. Cir. 2011), "that *Richlin*[] * * * 'is not contrary to *Avera*.'" 11-260 Pet. App. 9.[3] It further noted that the statutory language applied in *Richlin*—that fees were to be calculated at "prevailing market rates," 5 U.S.C. 504(b)(1)(A)—does not appear in the Vaccine Act's fee provision, which calls for an award of "reasonable attorneys' fees," 42 U.S.C. 300aa-15(e)(1). 11-260 Pet. App. 9.

Petitioner also argued that the question whether local and forum hourly rates are "very significantly different" should be decided as a matter of law; he further contended that a court awarding fees should not adopt local rates but should instead merely reduce the forum hourly rate "so that the forum hourly rate falls below the threshold of what constitutes a very significant difference." 11-260 Pet. App. 9-10. The court of appeals rejected that approach as inconsistent with *Davis County*, and it emphasized that "the standard of review for the determination of reasonable attorneys' fees is abuse of discretion." *Id.* at 10 (citation omitted). Applying that deferential standard, the court explained that "the special master undertook a detailed analysis of reasonable local and forum hourly rates in Vaccine Act cases and other similar litigation," *id.* at 14, and concluded that the special master's fees decision "was

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[3] The Federal Circuit's decision in *Masias* is the subject of the petition for a writ of certiorari in No. 11-266 and is summarized at pp. 11-12, *infra*.

within the parameters of the cases on which he relied," *id.* at 16.

3. Petitioner Masias alleged that he had been injured as a result of the administration of Hepatitis B vaccines. 11-266 Pet. App. 2. The special master ultimately awarded compensation in an amount agreed upon in a settlement between the parties. *Ibid.*

a. Petitioner applied for an award of attorneys' fees, which the special master granted in part under an approach similar to the one he used in calculating fees for petitioner Hall's counsel. He awarded fees that were not reasonably in dispute using rates of $160 to $215 per hour, which prior decisions had found to be appropriate for petitioner's attorney, Robert Moxley, who practices in Cheyenne. *Masias* v. *Secretary of HHS*, No. 99-697V, 2009 WL 899703 (Fed. Cl. Mar. 12, 2009); see 11-266 Pet. App. 2 n.1. In a separate opinion, the special master declined to award additional fees based on Washington, D.C., rates (though he did award additional attorneys' fees for litigating the attorneys' fees issue). *Masias* v. *Secretary of HHS*, No. 99-697V, 2009 WL 1838979 (Fed. Cl. June 12, 2009).

In particular, the special master determined that a reasonable rate for Mr. Moxley's services was $160 per hour for services performed in 1999, increasing through 2008 to $220 per hour. *Masias*, 2009 WL 1838979, at *4-*13. Much as he had in ruling on petitioner Hall's fee request, the special master declined to rely on the *Laffey* matrix, *id.* at *13-*22; determined that the reasonable rate for an attorney in Washington, D.C., providing services under the Vaccine Act with experience similar to Mr. Moxley's would be $250 to $375 per hour, *id.* at *23-*25; and found that "the reasonable rate for Mr. Moxley, if he practiced in Washington, D.C., is $350

per hour," *id.* at *25. The special master noted that "[t]here is no evidence to indicate that Mr. Moxley * * * performed any work within the District of Columbia." *Ibid.*. The special master concluded, as he had with respect to petitioner Hall, that the 59% difference between the rates for similar legal services in Cheyenne, Wyoming, and in the forum, Washington, D.C., was "very significant" because it was similar to differences held in prior cases to be "very significant." *Id.* at *25-*26. Accordingly, the special master applied the *Davis County* exception and based his award of attorneys' fees for Mr. Moxley's services on the Cheyenne, Wyoming, rate of $160 to $220 per hour. *Id.* at *31.

b. The CFC upheld the special master's decision. 11-266 Pet. App. 24-35. The court explained that "[t]he special master explained all pertinent findings fully and persuasively. [The special master's] ruling reflects a conscientious and thoughtful record review in which relevant conclusions are fully justified by the evidence." *Id.* at 25.

c. The court of appeals affirmed. 11-266 Pet. App. 1-23. As relevant here, petitioner argued that the court should repudiate the *Davis County* exception because "the adoption of the *Davis County* exception in *Avera* was motivated to prevent 'windfalls' to petitioners, [but] this reasoning was undermined by *Richlin*." *Id.* at 8. The court rejected that argument, explaining that "[t]he Supreme Court's adoption of market rates for paralegal fees [in *Richlin*] is not contrary to *Avera*" because *Avera* addresses the question of which market rate (the "forum rate" or the "locality rate") should govern in a particular case. *Id.* at 9. Accordingly, the court adhered to *Avera* and held that "the special master did not err in

not applying a Laffey Matrix rate and in awarding attorneys' fees at the lower Cheyenne rate." *Id.* at 9-10.

Petitioner also argued that the appropriate rate in a Vaccine Act case was a "federal specialty" rate of between $375 and $405 per hour because (in his view) the complexity of Vaccine Act practice, and its concomitant financial demands, exceed that of a typical "local" legal practice. 11-266 Pet. App. 11. The court of appeals rejected that argument as "an attempt to circumvent *Avera*'s application of the *Davis County* exception." *Id.* at 12-13. The court also found the argument inconsistent with *Blum*'s definition of the "prevailing market rate" as the rate "'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Id.* at 13 (quoting *Blum*, 465 U.S. at 896 n.11). Because the special master "considered the relevant evidence, drew plausible inferences, and articulated a rational basis for his decision," the court of appeals concluded that "his determination that a reasonable locality rate for Mr. Moxley's services was $220 per hour was not arbitrary, capricious, or an abuse of discretion." *Id.* at 18.

ARGUMENT

The decisions below are correct and do not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners argue (11-260 Pet. 8-17; 11-266 Pet. 8-17) that this Court's review is warranted because the Federal Circuit's adoption of the *Davis County* exception—which petitioners acknowledge is intended to prevent "windfalls" under fee-shifting statutes, 11-260 Pet. 8; 11-266 Pet. 11-12—is contrary to *Blum* v. *Stenson*, 465 U.S. 886 (1984), *Richlin Security Services Co.* v.

Chertoff, 553 U.S. 571 (2008), and *Perdue* v. *Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010). Petitioners' reliance on those decisions is misplaced.

a. Federal courts have recognized that "forum rates" are often the best measure of prevailing market rates in the relevant community, as petitioners suggest.[4] See 11-260 Pet. 10; 11-266 Pet. 8-9 (citing cases). But use of a forum rate has never been categorically required. As the D.C. Circuit noted in recognizing the

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[4] Petitioners assume, and the Federal Circuit has held, that the District of Columbia is the "forum" for Vaccine Act litigation because that is "where the Court of Federal Claims * * * is located." *Avera* v. *Secretary of HHS*, 515 F.3d 1343, 1348 (Fed. Cir. 2008). But that premise is in tension with 28 U.S.C. 173, which provides:

> The principal office of the United States Court of Federal Claims shall be in the District of Columbia, but the Court of Federal Claims may hold court at such times and in such places as it may fix by rule of court. The times and places of the sessions of the Court of Federal Claims shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the Court of Federal Claims with as little inconvenience and expense to citizens as is practicable.

In keeping with those principles, Vaccine Act status conferences routinely are conducted by telephone, see *Masias* v. *Secretary of HHS*, No. 99-697V, 2009 WL 1838979, at *25 (Fed. Cl. June 12, 2009), and the special master and government counsel typically travel to a locale specified by the petitioner's counsel to conduct hearings.

Status conferences in petitioner Hall's case were held by telephone, and the only in-person hearing took place in Denver, Colorado, apparently at petitioner's counsel's request. *Hall* v. *Secretary of HHS*, No. 02-1052V, 2009 WL 3423036, at *20 (Fed. Cl. Oct. 6, 2009). The remainder of counsel's work took place in Cheyenne, Wyoming. *Id*. at *5, *20, *26. Status conferences in petitioner Masias's case were likewise held by telephone, and mediation was conducted in Denver, apparently at petitioner's counsel's request. *Masias*, 2009 WL 1838979, at *25. The remainder of counsel's work took place in Cheyenne. *Id*. at *6, *25, *31.

Davis County exception, there are "few cases applying the [forum rate] rule * * * where out-of-jurisdiction lawyers would receive substantially higher rates than they ordinarily command for work done almost exclusively in their home territory." *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.* v. *EPA*, 169 F.3d 755, 758 (D.C. Cir. 1999). The Federal Circuit has followed the D.C. Circuit by adopting a reasoned exception to the use of forum rates in Vaccine Act lodestar calculations. Under the Federal Circuit's approach, local rates are appropriate if (1) the bulk of an attorney's work is performed outside the District of Columbia, and (2) there is a very significant difference between forum and local rates, such that the local rates "are substantially lower."[5] *Avera* v. *Secretary of HHS*, 515 F.3d 1343, 1349 (Fed. Cir. 2008).

That narrow exception is consistent with this Court's precedents and indeed flows naturally from them. If using the forum rate in the lodestar calculation creates a "windfall"—because rigid application of that rate would award compensation at an hourly rate substantially higher than the attorney in question would otherwise command—then the resulting attorney's fee is not reasonable. See *Blum*, 465 U.S. at 897 (discussing legislative history of 42 U.S.C. 1988, which explains that "a

[5] Petitioner Hall argues (11-260 Pet. 14-15) that the question whether a "very significant" difference between local and forum rates exists in a particular case is a question of law. The court of appeals held that, under *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988), the special master's application of the *Davis County* exception is reviewable only for abuse of discretion. See 11-260 Pet. App. 10-14. That holding is correct, since the relevant inquiry is "multifaceted" and requires both the general experience of the special master and the special master's "superior understanding of the litigation." *Id.* at 13-14 (citing *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)).

reasonable attorney's fee" is one that does "not produce windfalls to attorneys." (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976)). The Federal Circuit adopted the *Davis County* exception to prevent an attorney working on Vaccine Act litigation from collecting Washington, D.C., market rates if (like petitioners' attorneys) he performs little or no work in Washington and the Washington rate is substantially higher than the prevailing market rate where the work is performed. Thus, *Avera* is tailored to address a particular situation in which Vaccine Act attorneys would otherwise collect the "'windfall profits' [Congress] expressly intended to prohibit." *Blum*, 465 U.S. at 895.

b. Petitioner Masias asserts that the special master awarded fees in his case "on an impressionistic basis condemned by *Perdue*"; "d[id] not adequately measure [his] attorney's true market value"; and "repudiate[d]" the evidence that supported a higher fee. 11-266 Pet. 14 (citation omitted). Those criticisms do not warrant review because they merely reflect disagreement with the special master's factbound decision, which was upheld on deferential review by both courts below. See, *e.g.*, 11-266 Pet. App. 18 ("[T]he special master considered the relevant evidence, drew plausible inferences, and articulated a rational basis for his decision.").

To the extent petitioner's criticisms address any larger issue, they do not implicate *Perdue*. In *Perdue*, this Court acknowledged that an attorney's fee may be enhanced above the lodestar calculation in "rare" and "exceptional" circumstances. 130 S. Ct. at 1674. The Court made clear, however, that such an enhancement is appropriate only if the fee applicant presents "specific evidence that the lodestar fee would not have been 'ade-

quate to attract competent counsel.'" *Ibid.* (quoting *Blum*, 465 U.S. at 897).

For two reasons, *Perdue* is not relevant here. First, the Court in *Perdue* condoned the enhancement of market hourly rates only in the "rare" and "exceptional" circumstance where those rates would be insufficient to attract competent counsel. Petitioner Masias, however, advocates an across-the-board rule that would assign his attorney a higher hourly rate in *all* cases. Second, there is no evidence that petitioners (or any other Vaccine Act claimants) have had difficulty finding lawyers to represent them. Indeed, petitioners' attorneys' well-established Vaccine Act practices confirm that higher rates are not needed to "attract competent counsel." *Blum*, 465 U.S. at 897; see *Hall* v. *Secretary of HHS*, No. 02-1052V, 2009 WL 3423036, at *4 (Fed. Cl. Oct. 6, 2009) (noting that Mr. Gage has litigated Vaccine Act cases for 15 years at Cheyenne, Wyoming, rates); *Masias* v. *Secretary of HHS*, No. 99-697V, 2009 WL 1838979, at *5 (Fed. Cl. June 12, 2009) (noting that Mr. Moxley has litigated Vaccine Act cases for 18 years at Cheyenne, Wyoming, rates).

c. Petitioners also contend (11-260 Pet. 13-14; 11-266 Pet. 12-13) that *Richlin* undermines the D.C. Circuit's "windfall" analysis in *Davis County*. That argument is mistaken. In *Richlin*, this Court held that a prevailing party under the EAJA should be reimbursed for paralegal work at "prevailing market rates" rather than at its "reasonable cost." 553 U.S. at 590. The Court explained that under the EAJA, paralegal expenses are better characterized as "fees" (which are paid at prevailing market rates) than as "other expenses" (which are paid at reasonable cost). *Id.* at 576-578.

The Court in *Richlin* interpreted a statute that "specifically requires that attorneys' fees be calculated at 'prevailing market rates.'" 11-260 Pet. App. 9 (quoting 5 U.S.C. 504(b)(1)(A)). Although the Vaccine Act's fee-shifting provision does not contain comparably specific language, the Act's authorization of a "reasonable" fee award (42 U.S.C. 300aa-15(e)(1)) likewise is properly understood to mandate consideration of market rates. Cf. *Missouri* v. *Jenkins*, 491 U.S. 274, 284-289 (1989) (reaching conclusion similar to *Richlin* about paralegal expenses under 42 U.S.C. 1988, which speaks of "a reasonable attorney's fee"). That understanding, however, says nothing about the manner in which the applicable market rate should be determined, or (in particular) about the way in which the relevant market should be identified. In discussing the circumstances under which the site of the attorney's practice (rather than the location of the forum) should be regarded as the relevant market, the courts in *Davis County* and *Avera* appropriately took their cue from this Court's holding in *Blum*, 465 U.S. at 897, that a reasonable attorney's fee is one that is adequate to attract competent counsel without providing a "windfall" to the attorney. Nothing in *Richlin* (which does not cite *Blum*) casts doubt on that analysis.

2. Petitioner Masias further contends that the fee awards in his case and in other Vaccine Act cases reflect an unjustified "refusal of the [National Vaccine Injury Compensation] Program to acknowledge that vaccine practice is 'complex federal litigation.'" 11-266 Pet. 17. That argument lacks merit, particularly in light of the special master's extensive analysis of why Vaccine Act litigation is typically less complex than litigation that commands hourly rates on par with those in the *Laffey*

matrix. See *Masias*, 2009 WL 1838979, at *16-*25. Petitioner offers no sound basis for concluding that the special master's determination—on a subject with which the special master was thoroughly familiar—was arbitrary and capricious.

The Vaccine Act "establishes a no-fault compensation program 'designed to work faster and with greater ease than the civil tort system.'" *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1073 (2011) (quoting *Shalala* v. *Whitecotton*, 514 U.S. 268, 269 (1995)). A special master, not a jury, makes a "[f]ast, informal adjudication." *Ibid.* A claimant who demonstrates that his injury is listed in the Act's Vaccine Injury Table and appeared at the time specified in the statute is prima facie entitled to compensation; no showing of causation is necessary. *Id.* at 1073-74. "Unlike in tort suits, claimants under the Act are not required to show that the administered vaccine was defectively manufactured, labeled, or designed." *Id.* at 1074. Those features strongly support the view (endorsed here by the court of appeals) that Vaccine Act litigation is typically "less complex [than typical tort litigation], [does] not present any novel issues of law, and [does] not require appellate review on the merits." 11-266 Pet. App. 13. And when particular Vaccine Act cases pose special challenges, those difficulties can be reflected and compensated through an increase in the reasonable number of hours expended, without the adoption of an elevated hourly rate.

Petitioner Masias acknowledges (11-266 Pet. 19 n.25, 24 n.34) that other special masters and prior decisions of the court of appeals have reached the same conclusion. See *Rodriguez* v. *Secretary of HHS*, 632 F.3d 1381, 1385 (Fed. Cir. 2011) (concluding that Vaccine Act proceedings "are different from the complex type of litigation

the Laffey Matrix is designed to compensate" because the proceedings "involve no discovery disputes, do not apply the rules of evidence, and are tried in informal, streamlined proceedings"), petition for cert. pending, No. 11-129 (filed July 27, 2011). As the government's brief in opposition to the certiorari petition in *Rodriguez* explains (at 14-16), there are ample differences between Vaccine Act cases and the complex litigation for which the *Laffey* Matrix was designed. A special master does not act arbitrarily and capriciously by taking account of those differences in recognizing that different hourly rates are appropriate for different types of litigation.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2011