No. 13-902

In the Supreme Court of the United States

HARRY TEMBENIS, ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT 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, 42 U.S.C. 300aa-1 *et seq.*, provides compensation for vaccine-related injury and death. A person who suffers a vaccine-related injury before the age of 18, and whose "vaccine-related injury is of sufficient severity to permit reasonable anticipation that such person is likely to suffer impaired earning capacity at age 18 and beyond," is entitled to "compensation after attaining the age of 18 for loss of earnings." 42 U.S.C. 300aa-15(a)(3)(B). The Act also provides for an award of $250,000 to the estate of a person who has died as a result of receiving a vaccine. 42 U.S.C. 300aa-15(a)(2). The question presented is as follows:

Whether the estate of a child who dies of a vaccine-related injury before reaching the age of 18 is entitled to receive, in addition to the statutory death benefit, compensation for the child's hypothetical "loss of earnings."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-19a) is reported at 733 F.3d 1190. The opinion of the Court of Federal Claims (Pet. App. 22a-28a) is unreported but is available at 2012 WL 5395405. Decisions of the special master (Pet. App. 29a-34a, 35a-50a, 51a-88a) are unreported but are available at 2012 WL 3744722, 2011 WL 5825157, and 2010 WL 5164324.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2013. The petition for a writ of certiorari was filed on January 24, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 *et seq.* (Vaccine Act or Act), in order to stabilize the vaccine market and provide compensation for vaccine-related injuries and deaths. The Vaccine Act created the National Vaccine Injury Compensation Program, 42 U.S.C. 300aa-10(a), which was "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)). Under this program, a "person injured by a vaccine, or his legal guardian, 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 the respondent." *Ibid.* A special master of the CFC then "makes an informal adjudication of the petition." *Ibid.* This decision is subject to review by the CFC and then the United States Court of Appeals for the Federal Circuit. 42 U.S.C. 300aa-12(e)(2) and (f).

The Vaccine Act provides several forms of compensation to entitled claimants. See 42 U.S.C. 300aa-15(a)(1)-(4). Subsection (a)(1) allows compensation for an array of "[a]ctual unreimbursable expenses" that are reasonably necessary and result from the vaccine-related injury and have been or will be incurred for medical care and similar purposes. 42 U.S.C. 300aa-15(a)(1). In *Zatuchni* v. *Secretary of HHS*, 516 F.3d 1312 (Fed. Cir. 2008), the court of appeals interpreted the Act to allow the estate of a person who was injured by a vaccine, but who has died as a result of the vaccine by the time of the award, to recover under Subsection (a)(1) appropriate past expenses incurred from the time of injury to the time of

death. See Pet. App. 7a (citing *Zatuchni*, 516 F.3d at 1318-1319).

Subsection (a)(4) allows an award of up to $250,000 for actual and projected pain and suffering and emotional distress from a vaccine-related injury. 42 U.S.C. 300aa-15(a)(4). *Zatuchni* held that, like recovery under Subsection (a)(1), recovery under Subsection (a)(4) is available to the estate of a person who was injured by a vaccine, but who has died as a result of the vaccine by the time of the award. 516 F.3d at 1318-1319. Thus, an estate may obtain an award under Subsection (a)(4) for pain and suffering and emotional distress actually suffered by the deceased from the time of injury to the time of death. See Pet. App. 7a.

Under Subsection (a)(3)(A), a person who suffers a vaccine-related injury *after* reaching the age of 18, and whose earning capacity is impaired as a result, may receive compensation for "actual and anticipated loss of earnings." 42 U.S.C. 300aa-15(a)(3)(A). Subsection (a)(3)(B) addresses the case of a child who has suffered a vaccine-related injury *before* attaining the age of 18. If the child's vaccine-related injury "is of sufficient severity to permit reasonable anticipation that such person is likely to suffer impaired earning capacity at age 18 and beyond," then Subsection (a)(3)(B) provides for "compensation after attaining the age of 18 for loss of earnings determined on the basis of the average gross weekly earnings of workers in the private, non-farm sector, less appropriate taxes and the average cost of a health insurance policy, as determined by the Secretary." 42 U.S.C. 300aa-15(a)(3)(B). The parties agree in this case that the formula, discounted to present value, would add a lump sum award of approximately $660,000. Pet. App. 4a. As the court of appeals explained in this case, the purpose of

the recovery for past and future lost earnings is to furnish compensation for lost wages that "would have otherwise provided the income necessary to sustain the person." *Id.* at 8a (citing *Sarver* v. *Secretary of HHS*, No. 07-307V, 2009 WL 8589740, at *10 (Fed. Cl. Nov. 16, 2009)).

Finally, in the event of a vaccine-related death, Subsection (a)(2) provides for a fixed award of $250,000 to the estate of the deceased. 42 U.S.C. 300aa-15(a)(2).

2. Elias Tembenis was born on August 23, 2000. On December 26, 2000, Elias received a Diphtheria-Tetanus-acellular-Pertussis (DTaP) vaccination. On December 27, 2000, he suffered the first of a series of seizures. Pet. App. 59a. On December 16, 2003—nearly three years later and just shy of the expiration of the Vaccine Act's statute of limitations, see 42 U.S.C. 300aa-16(a)(2)—Elias's father, petitioner Harry Tembenis, filed a petition for compensation on Elias's behalf, alleging that unidentified vaccines caused Elias to develop an autism spectrum disorder. Doc. 1; see Pet. App. 22a-23a. Along with the petition for compensation, he asked that proceedings in the case be deferred pending resolution of an omnibus proceeding in the CFC addressing whether the program should award compensation to children who develop autism around the time of their childhood vaccinations. Doc. 2. The government responded to the petition for compensation three months after it was filed, Doc. 6, but pursuant to petitioner's request, for five years no substantive activity occurred in the case. Meanwhile, in 2007, Elias died as a result of the seizure disorder. Pet. App. 23a. In August 2008, petitioners withdrew from the omnibus autism proceeding and asserted for the first time that the DTaP vaccination caused Elias to develop a seizure disorder and caused

Elias's death. Doc. 15. The caption of the case was amended to include both of Elias's parents, administrators of his estate, as petitioners. Pet. App. 23a.

In 2010, the special master determined that the DTaP vaccine caused Elias's seizure disorder and death. Pet. App. 4a. The parties agreed that the Secretary would pay Elias's estate the $250,000 death benefit under Section 300aa-15(a)(2) and, in keeping with *Zatuchni*, an additional $175,000 for actual pain and suffering and for past actual unreimbursable expenses under Sections 300aa-15(a)(1) and (4). See *ibid.* The parties disagreed, however, on whether the estate was entitled under Section 300aa-15(a)(3)(B) to the hypothetical lost future earnings that Elias would have received in his adult life if he had survived. The special master held that the estate was entitled to lost future earnings and entered judgment accordingly. See *ibid.* On the Secretary's motion for review, the CFC affirmed the special master's award. See *id.* at 5a.

3. a. The court of appeals reversed in relevant part. Pet. App. 2a-19a. It held that Section 300aa-15(a)(3)(B) makes an award for lost future earnings available only to persons who are alive at the time of the award. *Id.* at 10a. At the outset, the court noted that "[b]efore this case, no compensation award under the Vaccine Act had allowed future lost earnings for the estate of a deceased petitioner." *Id.* at 5a.

Starting with the text of the statute, the court noted that it refers to the "impairment" of a vaccine-injured person's future earnings capacity. Pet. App. 10a. "Impaired," the court explained, most naturally refers to the diminished earning capacity of a living person, not to the hypothetical future earning capacity of a deceased person. *Ibid.* The court elaborated that the statute "pre-

dicts future lost earnings to compensate for [the necessities of] life beyond the age of 18," but "[w]here a claimant is deceased, * * * the same prediction cannot rationally be made." *Ibid.*

The court of appeals found further support for its interpretation in a variety of related provisions of the Vaccine Act. See Pet. App. 11a-13a. Among other things, the court emphasized the unique status of the statutory $250,000 award for the estate of a person who dies as a result of a vaccine injury, identifying it as "the only type of compensation that is not designed to reimburse or replace an injured person's own losses arising from his or her vaccine-related injury." *Id.* at 12a.

The court of appeals further explained that its analysis of the different types of compensation available under Section 300aa-15(a) was consistent with tort law principles in wrongful death and survival actions. Pet. App. 13a-14a. The court explained that, generally speaking under tort law, wrongful death statutes are designed to compensate the survivors of the deceased for losses they have suffered. *Id.* at 13a. Survival statutes, by contrast, allow the estate to pursue compensation that the decedent could have recovered if he had lived. *Ibid.* Survival actions, the court explained, only encompass lost earnings until the time of death. *Ibid.* The court explained that those principles reconciled, on the one hand, *Zatuchni*'s holding that a decedent's estate may recover *past* damages in a way analogous to that allowed under survival statutes (*i.e.*, compensation for actual expenses, lost past wages, and pain and suffering under Subsections (a)(1), (3) and (4)) with, on the other hand, treating the award directly to the estate under (a)(2) as analogous to an award under a wrongful death statute. *Ibid.*

Under that framework, the court of appeals explained, compensation for the hypothetical lost future earnings of a deceased person would only benefit the estate, which is the office of the death benefit; an award of hypothetical lost future earnings cannot, the court reasoned, compensate the deceased for losses he suffered while he or she was alive. Pet. App. 14a. In that light, the court concluded, allowing the estate to recover both the death benefit under Subsection (a)(2) and lost future earnings under Subsection (a)(3)(B) would be contrary to Congress's intent. *Ibid.* The court added that the result was consistent with this Court's interpretation of federal tort liability laws such as the Jones Act, 46 U.S.C. 30104. See Pet. App. 14a.

The court of appeals rejected petitioners' arguments that its decision conflicted with the court's earlier decisions in *Zatuchni*, *supra*, and *Edgar* v. *Secretary of HHS*, 989 F.2d 473 (Fed. Cir. 1993). The court pointed out that *Zatuchni*'s "analysis [had been] limited to whether an estate could recover past lost earnings [among other past damages], not future lost earnings." Pet. App. 16a. As for *Edgar*, the court observed that the claimant there was alive (albeit in a coma), so "[a]s the circumstances stood [at the time the award was made], [the *Edgar* claimant] had a foreseeable need for earnings to provide for her continued living, even if she may never actually recover from her coma and if she may not actually live to the age of 18." *Id.* at 17a. By contrast here, the court explained, "Elias, being deceased, has no similar foreseeable need." *Ibid.* Conversely, the court pointed out, the *Edgar* claimant could not recover a death benefit, while Elias's estate is entitled to a death benefit. *Ibid.* Overall, the court explained, this state of affairs

simply reflects "a number of compromises made by Congress in creating the program." *Ibid.*

b. Petitioners did not seek rehearing.

ARGUMENT

Petitioners ask this Court to resolve what they contend is an intra-circuit conflict over the precise roster of compensation available under the Vaccine Act to the estate of a child who is injured by a vaccine and then dies before he is awarded compensation. Despite the passage of decades since the Vaccine Act's enactment, the "interpretive question" arising from that highly particularized fact pattern was "one of first impression" in the court of appeals. Pet. App. 5a. The court of appeals soundly distinguished its precedent, and it correctly concluded that an estate should not receive compensation for the decedent's hypothetical lost future earnings. Instead, the Vaccine Act's death benefit provides a unique and counterbalancing form of compensation to an estate. As the court of appeals noted, that overall balance reflects "a number of compromises made by Congress in creating the program," *id.* at 17a, and Congress is in the best position to adjust the precise measures of compensation available under the program. This Court's review is not warranted.

1. As the court of appeals explained, a child claimant who is alive at the time compensation is awarded can receive an award for anticipated lost future earnings, but his estate is not entitled to a death benefit. Pet. App. 10a-12a. Conversely, the estate of such a claimant who dies before an award is made is entitled to the death benefit but not hypothetical lost future earnings. *Ibid.* That result flows naturally from the text and purpose of the Vaccine Act, and petitioners' arguments to the contrary are unpersuasive.

a. Under 42 U.S.C. 300aa-15(a)(3)(B), a child who suffers a vaccine-related injury can recover lost future earnings if the "*injury* is of sufficient severity to permit *reasonable anticipation* that such person is likely to suffer *impaired* earning capacity at age 18 and beyond" (emphasis added). As the court below explained, Pet. App. 10a, the term "impaired" connotes the diminished capacity of a living person and therefore indicates that Congress intended to compensate a living person for any loss of expected future earnings. It is, by contrast, unnatural to speak of a person's death as "impairing" his ability to work, and stranger still to say that such an "impairment" of earning capacity is caused "by reason of [the] vaccine-related *injury*." 42 U.S.C. 300aa-15(a)(3)(B) (emphasis added). Once a person has died, moreover, it is impossible to "anticipat[e]" that the person "is likely to *suffer* impaired earning capacity at age 18 and beyond." *Ibid.* (emphasis added). A deceased person no longer "suffers" an impairment.

That understanding fits the Vaccine Act's purpose. As a no-fault system, the Act is designed not to deter wrongful conduct through monetary liability, but rather to provide compensation for people who sustain vaccine-related injuries and for those who depend on them. Thus, for example, the compensation program pays for a range of otherwise unreimbursable expenses that have been or will be incurred as a result of a vaccine-related injury. 42 U.S.C. 300aa-15(a)(1). Similarly, the court of appeals correctly recognized that the future-lost-wages provision is intended to help the living claimant support himself, by replacing the income that he would have received absent his injury. See, *e.g.*, Pet. App. 17a. Someone who dies before reaching a normal age of employment (age 18, as provided in 42 U.S.C. 300aa-

15(a)(3)) has no standard of living to maintain for himself. Accordingly, the purposes of the Act do not suggest an intent to compensate him—or his estate—for a loss of earnings. Nor would someone who dies in childhood ordinarily have dependent survivors who might be affected by the loss of his earnings. An award of that sort would, in short, be inconsistent with the strictly compensatory purpose of Section 300aa-15(a)(3)(B).

Petitioners' interpretation, by contrast, would unmoor Section 300aa-15(a)(3)(B) from its purpose. Their theory regards a vaccine-injured child's projected future earnings not as the child's means of support upon reaching adulthood, but instead as an expectation interest held by beneficiaries of the child's estate (ordinarily, the child's parents). That is inconsistent with the program's purpose of providing no-fault compensation to those who bear the consequences of extremely rare episodes of vaccine-related injury. Under Congress's approach, the death benefit reflects a judgment that a substantial fixed sum—not a stream of future earnings discounted to net present value—is the fitting and proper way of acknowledging the immeasurable anguish a parent feels at the loss of a child.

In effect, petitioners' approach would transform the award for loss of future earnings into an automatic increase in the death benefit without Congressional warrant. As a practical matter, a vaccine-related death can nearly always be described as preceded by a vaccine-related injury.[1] That injury, on petitioners' view, would

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[1] The arguable exception would be immediate death from an anaphylactic reaction at the time the vaccine was administered. See 42 C.F.R. 100.3 (vaccine injury table recognizing the possibility of anaphylaxis occurring within four hours of administration of certain vaccines).

be a sufficient basis for recovering lost future earnings in virtually every case involving a vaccine-related death. No other conditions need be met under petitioners' approach: Although petitioners allude to the lengthy pendency of some petitions for compensation, see Pet. 3, 24; but see p. 15, *infra*, their theory of statutory construction does not depend on whether a case proceeds swiftly or slowly—or even, perhaps, on whether the vaccine recipient is alive at the time the petition for compensation is filed. Whatever the policy merits of an increase in the award to an estate in the case of a vaccine-related death, recalibration of that sort would be a task for Congress.

The court of appeals also explained convincingly why its decision is consistent with traditional tort principles (though in the government's view those principles may have limited relevance in interpreting the finely drawn terms of a statute designed to replace a tort regime). Recoveries by an estate or survivors generally come in the form of a wrongful death action or a survival action. A wrongful death action compensates survivors for their *own* losses, not for the decedent's losses as such, and statutes vary in the types of recovery allowed. See 1 Stuart M. Speiser & James E. Rooks, Jr., *Recovery for Wrongful Death* §§ 6:3, 6:12 (4th ed. 2005 & Supp. 2011) (*Wrongful Death*); Restatement (Second) of Torts § 925 cmt.b (1979) (Restatement). Although a survival statute, by contrast, does allow an estate to recover for the decedent's losses, in such an action "a claim for lost earnings embraces only the earnings lost up to the time of death." *Wrongful Death* § 1:14 (citing *Jones* v. *Flood*, 716 A.2d 285 (Md. 1998)); accord *Sacco* v. *Allred*, 845 So. 2d 528, 538 (La. Ct. App. 2003); see also Restatement § 926(a) ("[T]he death of the injured person limits recovery for

damages for loss or impairment of earning capacity, emotional distress and all other harms, to harms suffered before the death."). In other words, survival actions encompass those losses that the deceased actually suffered while he was alive. As the court of appeals recognized, the right of a decedent's estate to recover lost earnings can only be analogized to a survival action. And even if some state wrongful death actions might permit recovery for some portion of the decedent's lost future earnings (see Restatement § 925 cmt.b.2), the Vaccine Act's statutory death benefit is simply a fixed sum.

Finally, if there were any ambiguity in the availability of the award petitioners seek, it should be resolved against them. The Vaccine Act is a waiver of the federal government's sovereign immunity, and courts "must construe waivers strictly in favor of the sovereign, and not enlarge the waiver beyond what the language requires." *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (internal quotation marks and citations omitted). Here, petitioners' interpretation of "compensation * * * for loss of earnings," 42 U.S.C. 300aa-15(a)(3)(B), would expand the scope of Congress's waiver of sovereign immunity beyond what the statutory text provides.

b. Petitioners' arguments to the contrary are unpersuasive. First, petitioners contend (Pet. 21-24) that the decision below fails to accord similar treatment to similarly-situated vaccine-injured persons, pointing out that a vaccine-injured child alive at the time an award is made is treated differently from one who dies before an award. But the reason for treating those two cases differently is obvious: One involves an injured living person and the other does not. A living claimant would receive an award for impaired future earnings but no death benefit, while

the estate of a claimant who died before an award would receive a death benefit but no compensation for lost future earnings. Although the dollar amounts of those two awards may be different, the awards themselves are analogous. Petitioners' view, by contrast, creates an asymmetry: Both claimants would receive an award of lost future earnings, but only the claimant who died sooner would endow his estate with a death benefit. That would be a far more "ghoulish race" (Pet. 3) than the one petitioners posit.[2]

Second, petitioners argue (Pet. 29-31) that the court of appeals erred in measuring lost future earnings based on the child's condition on the date of the award rather than on the date of the child's injury. That objection is answered (1) by the fact that the court of appeals' decision reflects conventional tort principles, to the extent they are relevant here (see pp. 11-12, *supra*), and (2) by 42 U.S.C. 300aa-13(b)(1). That statute contemplates that the CFC—in determining what decision to render, including the amount of compensation to be awarded—will consider "the entire record and the course of the injury, disability, illness, or condition *until the date of the judgment of the special master or court*." 42 U.S.C. 300aa-13(b)(1) (emphasis added). As the Federal Circuit has previously explained, that text "make[s] clear that if there is a change in the victim's condition or expenses

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[2] Petitioners' reliance on an identical-twin hypothetical (Pet. 21) rests on the premise that the claimant alive at the time of the award will die the next day. That foreknowledge is unavailable, however, at the time an award is actually made on the necessary assumption that the claimant will live much longer. There is, by contrast, no doubt about the status of the predeceased twin at the time his award is made, and the court of appeals correctly recognized (Pet. App. 10a) that it is unnatural to speak of a deceased person's "impaired earning capacity" (42 U.S.C. 300aa-15(a)(3)(B)).

prior to the date of the final calculation of the award, the compensation decision should take that matter into account." *McAllister* v. *Secretary of HHS*, 70 F.3d 1240, 1243 (1995). Compensation under the Vaccine Act, therefore, "is ordinarily calculated as of the time of the special master's decision that leads to the final judgment in the case." *Ibid.* At the time of the special master's determination here, Elias could no longer be regarded as having an impaired earning capacity, but his death meant that his estate could recover a death benefit, which could not have been awarded if Elias had been alive at the time of the award.

Third, petitioners seek support (Pet. 32-33) in the text of 42 U.S.C. 300aa-15(b), which allows certain claimants who were injured or died before the operative date of the Vaccine Act to recover, *inter alia*, actual unreimbursable expenses as provided in Subsection (a)(1)(A), the death benefit as provided in Subsection (a)(2), and an amount, capped at a combined total of $30,000, for lost earnings, pain and suffering, and attorney's fees, as provided in Subsections (a)(3), (4) and (e). 42 U.S.C. 300aa-15(b). Petitioners argue that Section 300aa-15(b) allows compensation for lost future earnings as well as the statutory death benefit, and that Congress would not have intended to award both types of compensation to those with pre-Vaccine Act injuries while denying it to those with post-Vaccine Act injuries. Petitioners err, however, in assuming that Section 300aa-15(b) guarantees recovery of every item in every case. Plainly, no living vaccine-injured person is entitled to recover a death benefit, a result that flows from the text and structure of Subsection (a)(2). Likewise, for the reasons given above, the text and structure of Subsection (a)(3) do not permit

awards of lost future earnings to claimants who are deceased at the time of the award.

Finally, petitioners suggest (*e.g.*, Pet. 3, 5, 24) that the sometimes-lengthy proceedings in the compensation program are a reason to award lost future earnings to the estate of a deceased claimant. That argument is seriously flawed. As an initial matter, petitioners' reasoning is unsound. There is no evidence that Congress intended the types of awards provided by the statute to vary with the average processing time of petitions for compensation. In any event, petitioners' claim that the compensation program is a "glacial bureaucracy" (Pet. 3) is unfounded. The average time from filing to judgment in the program has, in recent years, been slightly more or less than three years. See Health Res. & Servs. Admin., Dep't of HHS, *Justification of Estimates for Appropriations Committees* 477 (Fiscal Year 2015). And, tragic as their son's death was, petitioners are in no position to complain about delays: They waited nearly three years to petition for compensation, and when they did file, they immediately asked to put their case on hold for five years. Elias died before petitioners first asserted that the DTaP vaccination caused his seizure disorder and death. See pp. 4-5, *supra*.

2. Petitioners contend (Pet. 24-29) that the decision below conflicts—albeit not squarely on the question presented—with other decisions of the Federal Circuit. But that contention counsels *against* this Court's review at this time. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties," *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), yet petitioners did not petition the court of appeals to rehear this case en banc. In any event, no conflict exists, and as explained above, the court of appeals' decisions establish

an overall result that assures meaningful compensation to living claimants and to decedents' estates, while not providing for awards that do not serve the compensation program's purpose.

a. Petitioners argue (Pet. 21) that by distinguishing between living and deceased claimants, the decision below conflicts with the court of appeals' pronouncement in *Figueroa* v. *Secretary of HHS*, 715 F.3d 1314 (Fed. Cir. 2013), that "similarly situated individuals who receive the same vaccine on the same day, and who experience the same medically-recognized symptom of a vaccine-related injury shortly afterwards, * * * and who then suffer similar harm as a result, should be treated equally," no matter when they file their petition for compensation. *Id.* at 1318 (citation omitted); see Pet. 23-24. As explained above, pp. 12-13, *supra*, the two claimants petitioners hypothesize are not similarly situated in that one is living at the time the compensation award is made, while the other is deceased.

b. Petitioners also contend that the decision below is inconsistent with the Federal Circuit's prior decisions regarding awards of compensation in other factual permutations. Pet. 24-29 (discussing *Zatuchni* v. *Secretary of HHS*, 516 F.3d 1312 (Fed. Cir. 2008), and *Edgar* v. *Secretary of HHS*, 989 F.2d 473 (Fed. Cir. 1993)). No intra-circuit conflict exists.

In *Zatuchni*, the court of appeals addressed whether the claimant's estate could receive compensation for medical expenses, lost wages prior to death, and pain and suffering under Subsections (a)(1), (3) and (4), in addition to the death benefit under Subsection (a)(2). 516 F.3d at 1315. The court concluded such an award was proper because "the fact that a vaccine-related death followed a vaccine-related injury in a particular

case does not alter the fact that certain expenses were incurred, wages lost, or pain and suffering endured *in the interim*." *Id.* at 1318 (emphasis added). *Zatuchni* did not address the issue presented by this case—whether a claimant's estate may recover lost *future* earnings in addition to the death benefit. And *Zatuchni*'s use of the past tense—"expenses were incurred, wages lost, or pain and suffering endured," *ibid.*—suggests the very distinction between retrospective relief that makes an estate whole and an award of future lost earnings that does not serve the compensation program's purpose.

Edgar is similarly consistent with the decision below. There, the court held that the payment of an annuity for lost earnings could not be "contingent upon the actual, post-injury life of the injured child." *Edgar*, 989 F.2d at 477. The court concluded that Subsection (a)(3) "requires consideration of only whether the injured child is 'likely to suffer impaired earning capacity at age 18 and beyond,'" and that "[i]mplicit in this consideration is a determination of the expected, not the actual, work-life of the child." *Ibid.* (quoting 42 U.S.C. 300aa-15(a)(3)(B)). If, as in *Edgar*, the vaccine-injured child is alive at the date of the award, she may recover lost future earnings, without qualification; the award is based on her expected work-life and not contingent upon her actually reaching the age of 18.[3] Here, there is also no contingency to

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[3] Nothing in the court of appeals' decision supports petitioners' suggestion that "where the child [is] in a coma, her future earnings, assessed on the date of judgment, would effectively [be] zero as well." Pet. 23. As the court of appeals made clear, when awarding lost future earnings to a living minor, whatever her precise condition, "the special master [should] calculate[] 'the present value of the

consider, but the projection of future impairment is different: As the court of appeals explained, "Elias, being deceased, has no * * * foreseeable need" "for earnings to provide for [his] continued living." Pet. App. 17a. Under those circumstances, the $250,000 death benefit is provided for Elias's estate instead.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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expected future stream of earnings that has been lost.'" Pet. App. 11a (quoting *Edgar*, 989 F.2d at 476).