
In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND
HUMAN SERVICES, PETITIONER

v.

MELISSA CLOER

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a person whose petition under the National Vaccine Injury Compensation Program is dismissed as untimely may recover from the United States an award of attorneys' fees and costs.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties in the court of appeals.

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ORDER AND OPINIONS BELOW

The order of the en banc court of appeals (Pet. App. 1a-21a) is reported at 675 F.3d 1358. A related opinion of the en banc court of appeals (Pet. App. 22a-83a) is reported at 654 F.3d 1322. A related opinion of a panel of the court of appeals (Pet. App. 88a-125a) is reported at 603 F.3d 1341. A related opinion of the United States Court of Federal Claims (Pet. App. 126a-154a) is reported at 85 Fed. Cl. 141. A related decision of the Chief Special Master of the United States Court of Federal Claims (Pet. App. 155a-176a) is not published in the *Federal Claims Reporter* but is available at 2008 WL 2275574.

JURISDICTION

The order of the en banc court of appeals was entered on April 11, 2012. On June 27, 2012, the Chief Justice

(1)

extended the time within which to file a petition for a writ of certiorari to and including August 9, 2012. On July 27, 2012, the Chief Justice further extended the time to August 23, 2012, and the petition was filed on August 22, 2012. The petition for a writ of certiorari was granted on November 20, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 *et seq.*, and the Internal Revenue Code are reprinted in an appendix to this brief. App., *infra*, 1a-40a.

STATEMENT

This case presents the question whether a person whose claim under the National Vaccine Injury Compensation Program is dismissed as untimely may recover from the United States an award of attorneys' fees and costs. Dividing 7-to-6, the en banc Federal Circuit held that such awards are available.

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 or Act), 42 U.S.C. 300aa-1 *et seq.* Congress determined that existing approaches to compensating people for injuries caused by vaccines—"through the civil tort system or through a settlement arrangement with the vaccine manufacturer"—were inadequate "from both the perspective of vaccine-injured persons as well as vaccine manufacturers." H.R. Rep. No. 908, 99th Cong., 2d Sess. 6-7 (1986) (*House Report*). Congress's study of the problem revealed in particular that "[l]awsuits and settlement negotiations can take months and even years to complete. Transaction costs—including attorneys' fees and

court payments—are high. And in the end, no recovery may be available.” *Id.* at 6.

To address those concerns, Congress created the National Vaccine Injury Compensation Program (Compensation Program or Program), see 42 U.S.C. 300aa-10(a), “a Federal ‘no-fault’ compensation program under which awards can be made to vaccine-injured persons quickly, easily, and with certainty and generosity,” *House Report* 3. Congress intended the Compensation Program to be “fair, simple, and easy to administer.” *Id.* at 7. Its procedures are designed to secure an “expeditious and fair” outcome for claimants in the Program. *Id.* at 12. The Act creates a Vaccine Injury Table that identifies covered vaccines and particular injuries associated with them, and a causal connection between vaccine and injury is rebuttably presumed when a claim is based on an injury specified in the Table. *Shalala v. Whitecotton*, 514 U.S. 268, 270 (1995); 42 U.S.C. 300aa-14; 42 C.F.R. Pt. 100. If an injury falls outside the parameters of the Table, a claimant must prove that the injury “was caused by” the covered vaccine, 42 U.S.C. 300aa-11(c)(1)(C)(ii)(I) and (II), but need not establish that the vaccine was defective or that any person was at fault.

A person who claims to be injured by a vaccine (or the representative 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 the respondent. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1073 (2011); 42 U.S.C. 300aa-11(c)(1)(C)(ii), 300aa-12(b)(1). A special master of the CFC then “makes an informal adjudication of the petition,” *Bruesewitz*, 131 S. Ct. at 1073, subject to further review by a judge of the CFC and by the United States Court of Appeals for the Federal

Circuit, see 42 U.S.C. 300aa-12(e)(2)(B) and (f). “After judgment has been entered by the [CFC] or * * * after the appellate court’s mandate is issued, the petitioner who filed the petition under section 300aa-11” must elect between accepting the CFC’s judgment and pursuing a civil tort action instead. 42 U.S.C. 300aa-21(a); see *Bruesewitz*, 131 S. Ct. at 1073 & n.16.

“[T]o expedite the proceedings” in the Compensation Program, Congress “replace[d] the usual rules of discovery in civil actions in Federal courts” with more limited discovery conducted under the auspices of the special master. *House Report* 16. Congress also provided that the “[c]ompensation awarded under the Program may not include * * * [p]unitive or exemplary damages,” 42 U.S.C. 300aa-15(d), thus limiting the issues before the special master to “whether the petitioner suffered a compensable injury and, if so, the extent of compensable damages.” *House Report* 16. That limitation obviates the “need for a wider inquiry, which might be appropriate in a civil action raising other issues.” *Ibid.* To ensure that “[t]he entire proceeding—from date of filing through Special Master proceedings and court review—is to take place as expeditiously as possible,” *id.* at 17, Congress directed the court to “render its judgment * * * as expeditiously as practicable but not later than 365 days after the date on which the petition was filed,” 42 U.S.C. 300aa-12(d)(3) (Supp. IV 1987).¹

¹ Congress later revised the Act to provide a series of time limits for the special master and reviewing court, and to permit the claimant to withdraw her petition if those deadlines pass without a decision. See 42 U.S.C. 300aa-12(d)(3)(C), (e)(2) and (g); *Bruesewitz*, 131 S. Ct. at 1073 & nn.13-14. In contemporary practice, petitions are typically resolved in two to three years. See Health Res. & Servs. Admin., U.S. Dep’t of Health & Human Servs., *National Vaccine*

In every respect, the Act’s no-fault compensation program thus is “designed to work faster and with greater ease than the civil tort system.” *Bruesewitz*, 131 S. Ct. at 1073 (quoting *Whitecotton*, 514 U.S. at 269). “[M]uch of the equity in limiting compensation and limiting other remedies arises from the speed and reliability with which the petitioner can expect judgment; without such quick and certain conclusion of proceedings, the compensation system would work an injustice upon the petitioner.” *House Report* 17.

b. This case concerns the award of attorneys’ fees and costs to a person whose claim under the Compensation Program was dismissed as untimely. The Vaccine Act’s limitations provision states that “no petition may be filed for compensation under the program * * * after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of” the alleged injury for which compensation is sought. 42 U.S.C. 300aa-16(a)(2).

With respect to awards of attorneys’ fees and costs, the Act provides:

In awarding compensation on a petition filed under [42 U.S.C. 300aa-11] the special master or court shall also award as part of such compensation an amount to cover—

- (A) reasonable attorneys’ fees, and
- (B) other costs,

incurred in any proceeding on such petition. If the judgment of the [CFC] on such a petition does not

Injury Compensation Program: Statistics Report n.1 (Dec. 3, 2012), <http://www.hrsa.gov/vaccinecompensation/statisticsreports.html>.

award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.

42 U.S.C. 300aa-15(e)(1).

Section 300aa-15(e)(1) differs from most fee-shifting provisions in that it does not make success on the underlying claim a prerequisite to an award of fees. Rather, so long as the special master or the court finds that a petition under Section 300aa-11 "was brought in good faith and there was a reasonable basis for the claim," the special master or the court may award reasonable attorneys' fees and costs even "[i]f the judgment * * * does not award compensation" to the claimant. 42 U.S.C. 300aa-15(e)(1). And because "[n]o attorney may charge any fee for services in connection with a petition filed under [42 U.S.C. 300aa-11] which is in addition to any amount awarded as compensation by the special master or court under [the fee shifting provision]," 42 U.S.C. 300aa-15(e)(3), the Vaccine Act's fee-shifting provision is the sole source of compensation for attorneys in those circumstances.

Awards of attorneys' fees and costs, like awards of compensation on the merits, are paid from the Vaccine Injury Compensation Trust Fund (Compensation Fund). 42 U.S.C. 300aa-15(f)(4)(A); see 26 U.S.C. 9510 (establishing Compensation Fund). The Compensation Fund is supported by a standing appropriation of "amounts equivalent to the net revenues received in the Treasury from the tax imposed by [26 U.S.C.] 4131" on each dose of vaccine covered by the Program. 26 U.S.C.

9510(b)(1); see 26 U.S.C. 4132(a)(1) (enumerating taxable vaccines). “Because of the straightforward nature of the petition and the proceedings,” Congress did “not anticipate that reasonable attorneys’ fees will be large.” *House Report 22*. Rather, it expected that “[w]ith most evidentiary requirements specified in the legislation, with prohibitions on traditional discovery and courtroom procedure, and with no obligations to demonstrate negligence or product defectiveness, the costs of legal services will * * * approximate those incurred in” other such “no-fault, non-adversarial system[s] * * * as the Black Lung benefits program or workers’ compensation programs.” *Id.* at 36.

2. After receiving three Hepatitis-B immunizations in 1996 and 1997, respondent experienced in mid-1997 what proved to be her first symptom of multiple sclerosis (MS). Pet. App. 29a. On September 16, 2005, eight years after her first symptoms of MS, respondent filed a claim for compensation under the Vaccine Act. *Id.* at 31a; J.A. 16 (docket entry). The parties participated in an initial status conference six weeks after the petition was filed. J.A. 18 (docket entry). Five weeks later, the Secretary moved to dismiss respondent’s claim as untimely, explaining that “[t]he record in this case establishes that [respondent] began experiencing neurologic symptoms of MS in 1997,” but “did not file her petition until September 16, 2005, at least four years beyond the statutory deadline.” Dkt. 7, at 6-7; J.A. 19 (docket entry).

The Chief Special Master ultimately agreed and dismissed respondent’s claim as time-barred. Pet. App. 155a-176a. He explained that “[i]t is clear from the medical records, [respondent’s] affidavits, as well as [respondent’s treating neurologist’s] affidavits and testi-

mony that the first symptom of the onset of [respondent's] MS was in 1997. Since the Petition was filed eight years later, the Petition was untimely." *Id.* at 168a. The CFC affirmed. *Id.* at 126a-154a.

3. a. A divided panel of the Federal Circuit reversed. Pet. App. 88a-125a. The panel held that the Vaccine Act's limitations period does not begin to run until there is objective medical recognition of a link between the claimed injury and the vaccine. *Id.* at 93a-102a. In respondent's case, the panel concluded, such recognition had occurred (if at all) no earlier than 2004. *Id.* at 102a.

b. The court of appeals granted the government's petition for rehearing en banc and affirmed the CFC's dismissal of respondent's claim as time-barred. Pet. App. 22a-83a. The en banc court rejected the panel's view that the Vaccine Act's statute of limitations is not triggered unless there is a medical recognition of a link between the claimed injury and the vaccine. The court held instead that, "[c]onsistent with the plain meaning of the statute, * * * the statute of limitations of the Vaccine Act begins to run on the calendar date of the occurrence of the first medically recognized symptom or manifestation of onset of the injury claimed by the petitioner." *Id.* at 23a-24a.

The en banc court of appeals further held that the Vaccine Act's statute of limitations is subject to equitable tolling, rejecting its longstanding view to the contrary, see *Brice v. Secretary of HHS*, 240 F.3d 1367, 1370-1374 (Fed. Cir.), cert. denied, 534 U.S. 1040 (2001). Pet. App. 24a. But the court went on to conclude that respondent had failed to identify a sound basis for tolling in her case. Focusing on traditional circumstances warranting equitable tolling, the court explained that respondent "has put no argument before this court that,

for example, she has been the victim of a fraud, or of duress.” *Id.* at 65a. Respondent contended that applying the Act’s time limits “is *ipso facto* unfair because it threatens to deprive her of her claim.” *Ibid.* The court concluded that this was “not * * * the sort of circumstance that might merit equitable tolling.” *Ibid.*

c. This Court denied respondent’s petition for a writ of certiorari seeking review of the court of appeals’ holding that her claim was time-barred. 132 S. Ct. 1908 (No. 11-832). The government’s brief in opposition to that certiorari petition explained (at 17-19) that, although the government disagreed with the court of appeals’ decision to recognize equitable tolling of the Act’s limitations period, respondent’s case did not present a suitable vehicle for resolving that issue.

4. Respondent moved in the court of appeals for an award of \$118,792.95 in attorneys’ fees and costs for proceedings in the Federal Circuit. Pet. App. 4a; No. 2009-5052 Docket entry No. 74 (Sept. 6, 2011) (application for award of attorneys’ fees and costs); *id.* No. 75 (Sept. 12, 2011) (supplement to application). By a 7-6 vote, the court of appeals held that the dismissal of respondent’s complaint as untimely did not preclude the possibility of a fee award under the Act. The court remanded respondent’s fee motion for a determination whether respondent’s claim had been brought in good faith and with a reasonable basis. Pet. App. 1a-12a.

a. Overruling circuit precedent to the contrary, see *Brice v. Secretary of HHS*, 358 F.3d 865, 868-869 (Fed. Cir. 2004), the seven-member majority of the en banc court of appeals held that a person who files an untimely Vaccine Act petition, but who “assert[s] a reasonable limitations argument” in connection with that claim, is eligible for an award of attorneys’ fees and costs “absent

a determination that [the] petition was not brought in good faith or that the claim for which the petition was brought lacked a reasonable basis.” Pet. App. 5a. The majority held “that Congress did not intend to require compliance with [the Act’s limitations provision] as a prerequisite for the recovery of attorneys’ fees.” *Id.* at 6a. Rather, the majority concluded, “[t]he good faith and reasonable basis requirements apply to the claim for which the petition was brought; this applies to the entire claim, including timeliness issues.” *Id.* at 9a.

The en banc majority recognized that, under 42 U.S.C. 300aa-15(e), a Vaccine Act fee award is available only in a case involving “a petition filed under section 300aa-11.” Pet. App. 6a. It also acknowledged the directive in 42 U.S.C. 300aa-16(a) that “no petition may be filed for compensation under the Program” after the Act’s limitations period has expired. Pet. App. 10a. The majority concluded, however, that for purposes of the Vaccine Act’s attorneys’ fees provision, an untimely petition qualifies as a “petition filed under section 300aa-11.” *Id.* at 6a-7a.

In support of that conclusion, the en banc majority observed that Vaccine Act proceedings can be initiated only by the filing of a petition. Pet. App. 5a (citing 42 U.S.C. 300aa-11(a)(1)). The majority inferred from that fact that “[u]nless * * * [respondent’s] filing was a ‘petition filed,’ neither we nor the [CFC] had jurisdiction over her appeal.” *Id.* at 5a-6a. The majority also explained that another provision of the Vaccine Act (42 U.S.C. 300aa-11(a)(2)(A), relating to the conditions for filing a civil suit under state law) expressly cross-references the limitations provision. Pet. App. 6a. The majority stated that “[t]he absence of an analogous reference to [42 U.S.C.] 300aa-16 in the attorneys’ fees

provision suggests that Congress did not intend to require compliance with [42 U.S.C.] 300aa-16 as a prerequisite for the recovery of attorneys' fees." *Ibid.* The majority also noted that the term "petition filed" is used in other Vaccine Act provisions and, in context, appears to encompass untimely petitions. *Id.* at 6a-7a.

The en banc majority also stated that "[r]emedial legislation like the Vaccine Act should be construed in a manner that effectuates its underlying spirit and purpose." Pet. App. 8a. The majority expressed the view that its interpretation of the Act's fee provision would "fulfill[] congressional intent and the Act's legislative purpose" because "having to shoulder attorneys' fees could deter victims of vaccine-related injuries from seeking redress." *Ibid.* The court of appeals remanded to the CFC for a determination "whether [respondent's] petition was brought in good faith and whether the claim for which her petition was brought had a reasonable basis." *Id.* at 12a.

b. Judge Bryson, writing for six judges, dissented. Pet. App. 13a-21a. He explained that "[42 U.S.C. 300aa-16(a)] directs that 'no petition may be filed for compensation under the Program'—and thus under [42 U.S.C. 300aa-11]—after the expiration of the applicable time period." Pet. App. 14a. He further observed that "[42 U.S.C. 300aa-15(e)(1)] allows an attorneys' fee award only when a petition is filed under [42 U.S.C. 300aa-11]." Pet. App. 14a. The dissenting judges would have held on that basis that "an attorneys' fee award may be made only if the claimant files a timely petition, either by satisfying the applicable limitations period of [42 U.S.C. 300aa-16] or successfully invoking equitable tolling." Pet. App. 14a (citations omitted).

Judge Bryson noted as well that “it is almost unknown in American practice for a statute to provide that the prevailing party will pay the losing party’s attorneys’ fees.” Pet. App. 18a (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683-684 (1983)). He reasoned that, “because Congress departed from the governing principles applied in virtually every other federal fee-shifting statute, [the court] should be cautious in interpreting the statutory mandate to extend beyond those cases in which fee-shifting was clearly intended.” *Id.* at 19a (citing *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304-305 (1959)).

Judge Bryson also expressed concern about the practical difficulties that would arise in deciding a claim for attorneys’ fees in a case dismissed on threshold timeliness grounds. He explained that, because Vaccine Act fees are available only for petitions brought in good faith and with a reasonable basis, the special master in such a fee proceeding would be required to conduct “a sort of shadow trial to determine whether, if the claimant had made a timely filing, the petition would have had a reasonable chance of succeeding.” Pet. App. 20a. He observed that “[q]uite apart from the burden on the special masters and the court, the amount of attorney time (and thus the accumulating fees) that would be consumed by such a proceeding would likely exceed the fees expended on the typically much simpler question whether equitable tolling is available to the claimant.” *Id.* at 20a-21a. Judge Bryson reasoned that “it seems unlikely that Congress envisioned such a scheme, and in the absence of express congressional authorization, we should be cautious about engrafting one onto the statute.” *Id.* at 21a.

SUMMARY OF ARGUMENT

A. The text of the Vaccine Act does not authorize an award of attorneys' fees and costs when the underlying petition for compensation has been dismissed as untimely. One statutory prerequisite for a fee award is "a petition filed under section 300aa-11 of" Title 42. 42 U.S.C. 300aa-15(e)(1). Because the Act's limitations provision states that "no petition may be filed for compensation under the Program" after the applicable time limit expires, 42 U.S.C. 300aa-16(a)(2), a petition that has been dismissed as untimely is not a "petition filed under section 300aa-11." Respondent and the majority below rely heavily on the fact that, while some Vaccine Act provisions contain express cross-references to the Act's limitations provision, the Act's fee-shifting provision (Section 300aa-15(e)(1)) does not. A specific cross-reference to the limitations provision was unnecessary, however, because Section 300aa-15(e)(1) itself expressly requires "a petition filed under section 300aa-11," and an untimely petition does not fit that description.

B. Awarding attorneys' fees and costs on untimely petitions would be incompatible with the streamlined Compensation Program that the Vaccine Act establishes. Untimely Vaccine Act petitions will often be dismissed with little or no inquiry by the special master into the merits of the claimant's request for compensation. If fees and costs were available for untimely petitions, the determination whether particular claims were brought in "good faith" and with a "reasonable basis" on the merits, 42 U.S.C. 300aa-15(e)(1), would require "a sort of shadow trial to determine whether, if the claimant had made a timely filing, the petition would have had a reasonable chance of succeeding," Pet. App. 20a (Bryson, J., dissenting).

Such “shadow trials” would be substantially more arduous than the usual Vaccine Act fee proceeding, which is conducted by a special master who has already studied and resolved the pertinent merits issues, and they would divert substantial resources to proceedings that can be of no benefit to the claimants themselves. The availability of fees for untimely petitions would also likely cause more such petitions to be filed, further diverting Program resources to ancillary fee litigation and untimely claims, and away from the provision of compensation to injured claimants. Although the Vaccine Act’s fee-shifting provision was intended to create incentives for attorneys to represent claimants, limiting fee and cost awards to timely petitions would best respect both those incentives and Congress’s desire to establish a Compensation Program that functions simply and smoothly.

C. To the extent that the relevant Vaccine Act provisions are ambiguous, applicable canons of statutory construction reinforce the conclusion that attorneys’ fees and costs may not be awarded on untimely petitions. Vaccine Act fee awards directly implicate the principle that waivers of sovereign immunity are to be narrowly construed. Interpreting the Act to allow fee awards on untimely petitions would also substantially depart from the common law principles that have traditionally governed the question of who bears responsibility for legal expenses. And construing the Act to avoid lengthy and complex fee proceedings would respect this Court’s admonition that a “request for attorney’s fees should not result in a second major litigation.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

D. The en banc majority’s other rationales for its construction of the Vaccine Act’s fee provision are un-

persuasive. A recognition that a Vaccine Act petition must be timely in order to qualify as a “petition filed under section 300aa-11” would not create anomalous results or impede the resolution of Vaccine Act cases. And prior Federal Circuit decisions allowing “interim” fee awards in Vaccine Act cases do not support the result here, both because those decisions are themselves contrary to the text of the Act, and because those decisions did not involve untimely claims.

ARGUMENT

A VACCINE ACT CLAIMANT WHOSE PETITION FOR COMPENSATION IS DIMISSED AS UNTIMELY MAY NOT RECOVER FROM THE UNITED STATES AN AWARD OF ATTORNEYS’ FEES AND COSTS

Under the most straightforward reading of the Vaccine Act’s limitations and attorneys’ fees provisions, an award of attorneys’ fees and costs is unavailable when a petition is dismissed as time-barred. The cumbersome regime that respondent’s interpretation of the Act produces—under which a special master must conduct “a sort of shadow trial to determine whether, if the claimant had made a timely filing, the petition would have had a reasonable chance of succeeding,” Pet. App. 20a (Bryson, J., dissenting)—has no place in a compensation 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)). Applicable canons of statutory construction reinforce the conclusion that fee awards are unavailable in these circumstances. The court of appeals’ contrary decision should be reversed.

A. The Text Of The Vaccine Act Does Not Permit An Award Of Attorneys’ Fees And Costs On An Untimely Petition

1. The Vaccine Act requires the special master to award attorneys’ fees and costs when “awarding compensation on a petition filed under section 300aa-11 of this title.” 42 U.S.C. 300aa-15(e)(1). The Act permits (but does not require) an award of fees and costs “[i]f the judgment * * * on *such a petition* does not award compensation.” *Ibid.* (emphasis added). Because the phrase “such a petition” refers back to “a petition filed under section 300aa-11 of this title,” the propriety of awarding attorneys’ fees and costs on an untimely Vaccine Act petition depends on whether an untimely petition is a “petition filed under section 300aa-11.” Respondent concedes that is the relevant textual question in this case. See Br. in Opp. 5 (quoting Pet. 11).

The Vaccine Act’s limitations provision states that, “if a vaccine-related injury occurred as a result of the administration of [a covered] vaccine, *no petition may be filed* for compensation under the Program for such injury” after the expiration of the applicable time period. 42 U.S.C. 300aa-16(a)(2) (emphasis added). Because compliance with the limitations provision is a statutory prerequisite to the filing of a petition “for compensation under the Program,” a petition that has been dismissed for failure to comply with the Act’s time limits is not a “petition filed under section 300aa-11.” And in the absence of a petition filed under Section 300aa-11, there is no statutory basis for awarding attorneys’ fees and costs. See Pet. App. 14a (Bryson, J., dissenting).

2. In contesting this straightforward reading of the Vaccine Act, respondent (Br. in Opp. 6-8) and the majority below (Pet. App. 6a) rely heavily on the fact that 42 U.S.C. 300aa-11(a)(2)(A) (which addresses the circum-

stances under which a civil action may be filed against private parties after proceedings under the Compensation Program have concluded) expressly cross-references the limitations provision, while 42 U.S.C. 300aa-11(a)(1) (the provision for initiating a compensation proceeding) and 42 U.S.C. 300aa-15(e)(1) (the attorneys' fees and costs provision) do not. Respondent and the majority below would infer from that difference that Congress must have intended only the first of those provisions, and not the second or third, to depend on compliance with the limitations provision. That inference is unfounded for several reasons.

To begin with, as explained above, the Vaccine Act *does* link an award of attorneys' fees and costs to timeliness through cross-references—just not the particular one respondent would insist upon. By its terms, the fee-shifting provision requires “a petition filed under section 300aa-11,” see 42 U.S.C. 300aa-15(e)(1), and the limitations provision states that “no petition may be filed” after the expiration of prescribed time periods, 42 U.S.C. 300aa-16(a)(2). The fee-shifting provision's requirement of “a petition filed under section 300aa-11” thus obviates the need for other cross-references to the limitations provision.

That statutory arrangement is analogous to the one this Court recently confronted in *Astrue v. Capato*, 132 S. Ct. 2021 (2012). Respondent's insistence on a particular form of cross-reference here is likewise analogous to the respondent's argument in *Capato*, which the Court rejected. See *id.* at 2031 (“Respondent notes the absence of any cross-reference in § 416(e) to § 416(h). She overlooks, however, that § 416(h) provides the crucial link * * * [by making] reference to ‘this subchapter’ [which] includes * * * [§] 416(e). Having explicitly

complemented § 416(e) by the * * * provisions contained in § 416(h), Congress had no need to place a redundant cross-reference in § 416(e).”) (citation omitted).

More broadly, the negative inference respondent would draw from the absence of a particular form of cross-reference in Section 300aa-11(a)(1) proves too much. Section 300aa-11(a)(2)(A) is one of only a handful of provisions in the Vaccine Act that expressly reference the limitations provision. If an express cross-reference to the limitations provision were needed to trigger its application, the limitations provision would not apply in a broad array of circumstances. On respondent’s logic, for example, a failure to comply with the limitations provision would not even bar recovery under the Compensation Program itself because 42 U.S.C. 300aa-13 (“Determination of eligibility and compensation”) does not expressly cross-reference the limitations provision. No such problems arise on the government’s reading.

Congress had sound reasons, moreover, to include the express cross-reference in Section 300aa-11(a)(2)(A). That section is a key part of Congress’s “design[] to stabilize the vaccine market” through “significant tort-liability protections for vaccine manufacturers.” *Bruesewitz*, 131 S. Ct. at 1074 & n.24 (citing 42 U.S.C. 300aa-11(a)(2)). In particular, Section 300aa-11(a)(2)(A) requires that a vaccine-injured person exhaust her remedies under the Compensation Program—and do so in a timely manner—before pursuing certain civil damage claims “in a State or Federal court” against the vaccine’s administrator or manufacturer. Congress anticipated that the Program would thereby “divert a significant number of potential plaintiffs from litigation” against vaccine manufacturers. *House Report* 13.

In at least two ways, the express cross-reference in Section 300aa-11(a)(2)(A) is uniquely suited to the purpose of that provision. First, Section 300aa-11(a)(2)(A) has preemptive effect: It is a federal law that bars an otherwise permissible state-law suit from proceeding. Section 300aa-11(a)(2)(A)'s specific reference to the limitations provision confirms that preemption of any contrary state-law rule governing the prerequisites to filing a civil action under state law was “the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Second, unlike most of the Vaccine Act—which is addressed to expert special masters and to expert agencies within the federal government—Section 300aa-11(a)(2) is addressed to “a State or Federal court” with general jurisdiction over civil claims. The convenience and clarity of the express cross-reference in that provision makes it unnecessary for such generalist courts to familiarize themselves with the intricacies of the Vaccine Act, when they are called upon only to apply a straightforward rule about timely exhaustion of remedies under the Act.

Even if there were an unexplained discrepancy between Section 300aa-11(a)(1) and Section 300aa-11(a)(2)(A), that discrepancy would be an insufficient reason to adopt respondent's position. Congress often employs language “out of an abundance of caution” and “to remove any doubt” on an issue. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008) (quoting *Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 646 (1990)). At a minimum, respondent's interpretation of the Vaccine Act is not so “plain” (Br. in Opp. 9) that this Court should ignore the structural features of the statute (see pp. 20-27, *infra*) and the canons of construction (see pp.

28-34, *infra*) that cut so sharply against her interpretation and in favor of the government's reading.

B. Awarding Attorneys' Fees And Costs On An Untimely Petition Is Incompatible With The Structure And Purpose Of The Vaccine Act

Respondent's position is also incompatible with the structure and overall purpose of the Vaccine Act. Congress sought to establish a simple and efficient procedural mechanism for providing compensation to persons injured by vaccines. See pp. 2-5, *supra*. Accepting respondent's position, by contrast, would necessitate complex proceedings that cannot possibly result in compensation for injured persons.

1. a. In a case in which the judgment does not award compensation, a fee award is authorized only for a claim "brought in good faith" and with a "reasonable basis." 42 U.S.C. 300aa-15(e)(1). As Judge Bryson explained in dissent below, "[i]n a case that has gone to judgment on the merits and the [Vaccine Act] petitioner has lost, it is fairly easy for the special master and the court to determine whether the petitioner's position on the merits was reasonable," because "the special master and the court will have the entire record of the case before them to enable them to make that determination." Pet. App. 20a. The special master who has studied and resolved the pertinent merits issues can apply the knowledge acquired during that endeavor in deciding whether an award of attorneys' fees and costs is warranted. The special master is thus in a position similar to that of a district judge who has decided a case on the merits adversely to the government, and is therefore well-situated to determine whether the government's position was "substantially justified" under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). See

Pierce v. Underwood, 487 U.S. 552, 560 (1988) (noting that a district judge deciding a request for EAJA fees has “full knowledge of the factual setting” and, by dint of experience with the case, “may have insights not conveyed by the record”).

By contrast, a Vaccine Act petition submitted after the Act’s limitations period has expired may be dismissed on threshold grounds without any meaningful analysis of the merits. Indeed, the very nature and purpose of a limitations defense is that it ordinarily eliminates any need to inquire into the substance of a plaintiff’s claim. See, e.g., *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319 (9th Cir.), cert. denied, 525 U.S. 963 (1998). Under the Vaccine Act in particular, a special master conducting a limitations analysis typically needs only to determine “the date of the occurrence of the first symptom or manifestation of onset” of the claimed injury. 42 U.S.C. 300aa-16(a)(2). Thus, in respondent’s case, “[t]he sole issue presented” to the special master concerned the date of respondent’s first symptom of MS. Pet. App. 157a; see *id.* at 168a. The parties did not litigate, and the special master was not called upon to decide, whether respondent could establish her case on the merits—either as an injury within the parameters of the Table (which respondent did not assert) or as an injury caused in fact by a covered vaccine. Those issues will ordinarily go unaddressed when a Vaccine Act petition is dismissed as untimely.

Under those circumstances, the special master will have amassed no record, and will have acquired no case-specific expertise, that can be used to determine whether the claim was brought in “good faith” and had a “reasonable basis” on the merits. 42 U.S.C. 300aa-15(e)(1). To decide whether the claimant could satisfy those stat-

utory prerequisites for a fee award, the special master therefore would be required to “conduct a sort of shadow trial to determine whether, if the claimant had made a timely filing, the petition would have had a reasonable chance of succeeding.” Pet. App. 20a (Bryson, J., dissenting). The special master would also need to decide whether the claimant had offered a reasonable (albeit insufficient) basis for arguing either that the petition had been timely under the statutory deadline, or that the deadline should have been equitably tolled. See *id.* at 12a (majority opinion) (establishing threshold requirement of “an unsuccessful but non-frivolous limitations claim”).

b. Such a collateral proceeding would be wasteful, painful, and complex—the antithesis of the system that Congress “designed to work faster and with greater ease than the civil tort system.” *Bruesewitz*, 131 S. Ct. at 1073 (quoting *Whitecotton*, 514 U.S. at 269). Proceedings to decide whether there was a reasonable basis for a claim (had it been timely) would consume much of the effort that actually deciding the claim would have entailed, undermining the resource-conserving purpose of the limitations provision. Such proceedings would typically include review of the claimant’s medical records, development of expert testimony, and briefing to the special master. Cf., e.g., *Perreira v. Secretary of HHS*, 33 F.3d 1375, 1377 (Fed. Cir. 1994) (applying the “reasonable basis” requirement in an objective fashion taking into account the evidence offered in support of the Vaccine Act petitioner’s merits claim). In cases where the special master held that a fee award was appropriate, the award could include attorneys’ fees and costs for the fee proceedings themselves. See Pet. App. 20a-21a (Bryson, J., dissenting) (predicting that the amount of

attorney time and consequent fees attributable to fee proceedings in this situation typically will be greater than the fees incurred while litigating the original timeliness question). That effort and those expenses, moreover, would be incurred *after* it had been definitively determined that the claimant was not entitled to compensation.

This shadow trial would be thoroughly unappealing to the claimant herself. Vaccine Act claimants often suffer from debilitating diseases or conditions that require lifelong intensive medical care and are sometimes terminal. Yet the attorneys' fee inquiry would call on the claimant to further expose her medical records (and perhaps herself) to examination by a new round of experts, and face a trial of sorts. Similarly, the claimant's family members (who not uncommonly testify in proceedings on the merits) could be called upon to participate in fee proceedings. To be sure, a claimant who seeks Vaccine Act compensation must accept similar burdens in connection with the resolution of her claim on the merits. But while such merits proceedings may culminate in an actual award of compensation, the shadow trials that respondent's position would require can produce no tangible benefit for claimants themselves, only for their lawyers.

Moreover, the determination whether a claimant had reasonable arguments as to both timeliness and the merits can be particularly delicate and complex in Vaccine Act cases because there will sometimes be tension between a claimant's merits and timeliness theories. To establish that a particular medical condition resulted from administration of a covered vaccine, it is typically helpful to show that the first manifestations of the condition were perceived soon after the vaccine was admin-

istered. See, e.g., *Althen v. Secretary of HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005) (explaining that a “showing of a proximate temporal relationship between vaccination and injury” tends to support a claim under the Vaccine Act). But because the Vaccine Act’s limitations period begins to run on “the date of the occurrence of the first symptom or manifestation of onset” of the pertinent condition, 42 U.S.C. 300aa-16(a)(2), a claimant’s effort to establish that her petition was timely filed will often involve an attempt to dispute the relevance of any early-occurring symptom (as respondent did here, see Pet. App. 173a-174a). Thus, in considering a fee request after dismissal of an untimely Vaccine Act petition, a special master would need to determine not only whether the claimant had reasonable arguments on both timeliness and the merits, but also whether those arguments were internally consistent.

The facts of *Smith v. Secretary of HHS*, No. 02-93V, 2006 WL 5610517 (Fed. Cl. July 21, 2006), sustained, 2006 WL 5624674 (Fed. Cl. Nov. 16, 2006), aptly illustrate the problems that would arise during shadow trials. There, the Vaccine Act petitioner alleged that her son had developed diabetes as a result of a series of vaccinations ending in late 1998. *Id.* at *1-*2. In January 1999, the boy experienced symptoms including excessive thirst and frequent urination. *Id.* at *2, *6. In February 1999, the boy was hospitalized with dangerously high blood sugar and diagnosed with diabetes. *Id.* at *2. The Vaccine Act petition was filed in late January 2002, within the 36-month limitations period as measured from the hospitalization and diagnosis of diabetes, but outside the period as measured from the earlier symptoms. *Id.* at *2-*3. The claim was held to be time-barred, based on the special master’s finding that the

earlier symptoms were “the first symptom or manifestation of onset,” 42 U.S.C. 300aa-16(a)(2), of the boy’s diabetes. 2006 WL 5610517, at *7.

Under the government’s approach, no fee award would be available in *Smith*. And indeed, no attorneys’ fees or costs were awarded in *Smith* because, until the decision below, the Federal Circuit had held that an award of attorneys’ fees and costs was unavailable when a Vaccine Act petition was dismissed as untimely. *Brice v. Secretary of HHS*, 358 F.3d 865, 868-869 (2004) (*Brice II*); cf. *Martin v. Secretary of HHS*, 62 F.3d 1403, 1405-1407 (Fed. Cir. 1995) (holding that Vaccine Act attorneys’ fees were unavailable because the claimants’ prior civil suit had foreclosed the special master from asserting jurisdiction over their underlying Vaccine Act petitions).

By contrast, under respondent’s approach, resolving whether the claimant in *Smith* was entitled to an award of attorneys’ fees and costs would entail a collateral proceeding to determine whether there was a reasonable basis for believing that the boy’s vaccinations in 1998 caused diabetes that was first manifested in February 1999, with coincidental and unrelated symptoms of excessive thirst and frequent urination in January 1999. That inquiry is substantially more complex than the inquiry the special master would have conducted if the claim had been timely (*viz.*, simply whether there was a reasonable basis for a claim that the boy’s vaccinations caused his diabetes). “[I]t seems unlikely that Congress envisioned such a scheme, and in the absence of express congressional authorization,” the court of appeals should not have “engraft[ed] one onto the statute.” Pet. App. 21a (Bryson, J., dissenting).

c. Because “challenges brought on limitations grounds will frequently arise in vaccine injury cases,” Pet. App. 11a, accepting respondent’s position would likely have two broad and adverse effects on the Compensation Program.

First, the “shadow trials” described above, pp. 21-25, *supra*, can be expected to consume substantial resources of the special masters, reviewing courts, and others involved in the Compensation Program. As outlined above, fee proceedings on untimely petitions are likely to be more elaborate and time-consuming than on petitions where judgment has been entered on the merits. That is a particularly unwarranted and wasteful allocation of the Compensation Program’s resources because the cases affected by the question presented are by definition cases in which the claimant will not receive compensation. “A request for attorney’s fees should not result in a second major litigation.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). But the decision below promises exactly that.

Second, the inducement of a fee award to claimants’ counsel is likely to increase the number of untimely Vaccine Act petitions. To be sure, the extent of that increase cannot reliably be predicted in advance. The basic purpose of fee-shifting provisions, however, is to increase the incentives for attorneys to provide services in particular categories of cases, thereby enhancing the ability of potential litigants to obtain representation. See, e.g., *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 559-560 (1986). Because awards of attorneys’ fees and costs on untimely Vaccine Act petitions had not been available prior to the decision below, see *Brice II*, *supra*, an increase in the number of untimely Vaccine Act petitions would be the

natural and expected result of affirming the court of appeals' new position that attorneys who file such petitions are eligible for an award of fees.

Because the Program's resources are limited—there is, for example, a statutory cap on the number of special masters, 42 U.S.C. 300aa-12(c)(1)—effort devoted to collateral matters can be expected to impede the prompt resolution of meritorious claims for much-needed compensation. The Act reflects Congress's effort to establish a compensation system “designed to work faster and with greater ease than the civil tort system.” *Bruesewitz*, 131 S. Ct. at 1073; see *House Report 3* (explaining that the Act establishes a “compensation program under which awards can be made to vaccine-injured persons quickly, easily, and with certainty and generosity”); *id.* at 17 (“[M]uch of the equity in limiting compensation and limiting other remedies arises from the speed and reliability with which the [Vaccine Act] petitioner can expect judgment,” and “without such quick and certain conclusion of proceedings, the compensation system would work an injustice upon the petitioner”). A rule that forces special masters, reviewing courts, and others to devote extensive resources to fee litigation and untimely claims, rather than to the merits of timely filed petitions, would subvert the Act's basic design.

2. The majority below took a different view of the Act's structure and purposes. The en banc court stated that “[r]emedial legislation like the Vaccine Act should be construed in a manner that effectuates its underlying spirit and purpose.” Pet. App. 8a. The court concluded that awards of attorneys' fees and costs for untimely petitions were appropriate because withholding such

awards “could deter victims of vaccine-related injuries from seeking redress.” *Ibid.*

The general proposition underlying that reasoning is unhelpful in deciding this case because “[n]o legislation pursues its purposes at all costs, and [e]very statute pursues, not only to achieve certain ends, but also to achieve them by particular means.” *Freeman v. Quick-en Loans, Inc.*, 132 S. Ct. 2034, 2044 (2012) (second pair of brackets in original) (internal quotation marks and citations omitted). Here, the relevant provisions of the Vaccine Act obviously limit the availability of a claimant’s remedies, including by barring untimely claims irrespective of merit. And while the incentives created by the Vaccine Act’s fee-shifting provisions are undoubtedly part of Congress’s remedial design, Congress had other values in mind as well—such as ensuring the simplicity and smooth functioning of the Compensation Program—which is why an award of attorneys’ fees and costs is available only in specified circumstances, *i.e.*, on a successful petition or an unsuccessful petition filed in good faith with a reasonable basis. See 42 U.S.C. 300aa-15(e)(1). This case simply calls for recognition that, in the service of those other values, see pp. 20-27, *supra*, timely filing is among the conditions Congress placed on the availability of an award of attorneys’ fees and costs.

C. Applicable Canons Of Statutory Construction Reinforce The Conclusion That Attorneys’ Fees And Costs Are Not Available When A Vaccine Act Petition Is Dismissed As Untimely

For the reasons stated above, respondent’s position is inconsistent with the text and structure of the Vaccine Act. To the extent that the Vaccine Act is ambiguous on this point, established canons of statutory construction should inform this Court’s understanding of the Act’s

fee-shifting provision. Three such canons reinforce the conclusion that fees are not available when a Vaccine Act petition is dismissed as untimely.

1. Principles of sovereign immunity disfavor the recovery of attorneys’ fees and costs from the United States on an untimely Vaccine Act petition

a. The Vaccine Act authorizes monetary claims against the United States by way of a suit against the Secretary in her official capacity. See 42 U.S.C. 300aa-12(b)(1) (“[T]he Secretary shall be named as the respondent.”); 42 U.S.C. 201(c) (defining “Secretary” as “the Secretary of Health and Human Services”). In Compensation Program proceedings, the Secretary is “represented in accordance with section 518(a) of title 28,” 42 U.S.C. 300aa-12(b)(1), which provides for the Attorney General to “conduct and argue * * * suits in the [CFC] * * * in which the United States is interested,” 28 U.S.C. 518(a). A Vaccine Act claim therefore is a suit against the United States.

“Caution is especially warranted in a case authorizing a monetary award against the government in light of well-settled principles of sovereign immunity.” Pet. App. 21a (Bryson, J., dissenting). That principle applies even when (as in the Vaccine Act) Congress has unambiguously waived sovereign immunity from *some* monetary claims. See, e.g., *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (“For the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign.”). Accordingly, the scope of the Vaccine Act’s waiver of sovereign immunity—including the United States’ liability to pay respondent’s attorneys’ fees and costs—should be strictly construed. *E.g.*, *United States v. Nordic Vill. Inc.*,

503 U.S. 30, 34 (1992) (“[T]he Government’s consent to be sued must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires.”) (alterations, citations, and internal quotation marks omitted).

b. Respondent has “question[ed] whether the Vaccine Act involves a true waiver of sovereign immunity.” Br. in Opp. 15. She relies on the fact that excise taxes paid on each dose of a covered vaccine (26 U.S.C. 4131, 4132) are effectively deposited into the Compensation Fund in the Treasury (26 U.S.C. 9510), which is used to pay awards under the Compensation Program (42 U.S.C. 300aa-15(f)(4)(A)). Respondent has contended that, because this framework could be analogized to commercial insurance premiums paid into a fund used by the insurer to pay claims, sovereign immunity principles do not apply to the Compensation Fund.

That argument is misconceived because the Compensation Program is not commercial insurance. Rather—as with many federal programs that involve federal funds and are subject to principles of sovereign immunity—the Compensation Program raises money through Congress’s “Power To lay and collect * * * Excises,” U.S. Const. Art. I, § 8, Cl. 1; the Treasury holds that money for the benefit of the United States; and funds are disbursed “in Consequence of Appropriations made by Law,” *id.* § 9, Cl. 7, to claimants to “provide for the * * * general Welfare of the United States,” *id.* § 8, Cl. 1.

In particular, 26 U.S.C. 4131 imposes an excise tax on each dose of covered vaccine. Those taxes are received by the Treasury as revenue. To avoid the need for periodic appropriations of lump sums to pay awards under the Compensation Program, Congress has “appropriat-

ed to the Vaccine Injury Compensation Trust Fund amounts equivalent to the net revenues received in the Treasury from the tax imposed by [S]ection 4131.” 26 U.S.C. 9510(b)(1). Confirming the limited nature of the Vaccine Act’s waiver of sovereign immunity, the United States’ liability under the Compensation Program is limited to amounts so appropriated to the Compensation Fund. See 26 U.S.C. 9510(d).

Contrary to respondent’s suggestion (see Br. in Opp. 1 n.1, 16), the label “Trust Fund” does not evidence any substantive difference between the Compensation Fund and most other federal funds. Like the Compensation Fund, many dedicated funds in the Treasury bear the formal label of “Trust Fund.” See, *e.g.*, 26 U.S.C. Ch. 98, Subch. A (“Establishment of Trust Funds”). Like the Compensation Fund, such funds are generally an accounting and appropriations mechanism, and very few are actually held *in trust* for someone other than the United States.² Ordinary principles of sovereign im-

² See, *e.g.*, *Flemming v. Nestor*, 363 U.S. 603, 608-611 (1960) (holding that an individual did not have a vested right to receive certain Social Security benefits from the Federal Old-Age and Survivors Insurance Trust Fund, 42 U.S.C. 401(a)); GAO, *Federal Trust and Other Earmarked Funds: Answers to Frequently Asked Questions* 7 (Jan. 2001) (“In the federal budget the meaning of the term ‘trust’ differs significantly from its private sector usage. * * * [I]n contrast to a private trust fund, the federal government does not have a fiduciary responsibility to the trust beneficiaries, and it can raise or lower future trust fund collections and payments or change the purposes for which the collections are used by changing existing laws. Moreover, the federal government has custody and control of the funds.”), <http://gao.gov/assets/210/200562.pdf>; Off. of Mgmt. & Budget, *Analytical Perspectives: Budget of the U.S. Government* 133 (FY 2013) (“*Trust funds* account for the receipt and expenditure of monies by the Government for carrying out specific purposes and programs in accordance with the terms of a statute that

munity, including the canon that waivers of immunity are to be construed narrowly, therefore are fully applicable to the Vaccine Act.

2. *An interpretation of the Vaccine Act that authorizes an award of attorneys' fees and costs on an untimely petition is disfavored because it would substantially depart from the common law*

The extremely generous interpretation of the Vaccine Act's fee-shifting provision that respondent advances departs so far from background principles about who pays a litigant's attorneys' fees that it cannot be justified without a clearer statement than the Act can supply. "[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (citations omitted) (brackets in original).

In certain respects, the Vaccine Act's remedial provisions do unambiguously deviate from prevailing legal practices. The very existence of a fee-shifting provision reflects a departure from the "American Rule," under which each party pays its own fees, *e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), and the Vaccine Act is especially unusual because it permits an award of fees when a claimant does not succeed on the merits. See Pet. App. 18a (Bryson, J., dissenting) ("[I]t is almost unknown in American practice for a statute to provide that the prevailing party will pay the losing party's attorneys' fees."). Thus, even as

designates the fund as a trust fund (such as the Highway Trust Fund)."), <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/spec.pdf>.

construed by the government and by the dissenting members of the en banc court of appeals, Section 300aa-15(e)(1) exposes the United States to much more expansive potential fee liability than does the typical federal fee-shifting statute. That fact counsels particular hesitation before reading Section 300aa-15(e)(1) to authorize fee awards in additional situations that the provision does not clearly cover. See *id.* at 19a (“[B]ecause Congress departed from the governing principles applied in virtually every other federal fee-shifting statute, [the courts] should be cautious in interpreting the statutory mandate to extend beyond those cases in which fee-shifting was clearly intended.”) (citing, *inter alia*, *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304-305 (1959)).

3. Consistent with this Court’s approach to the interpretation of other fee-shifting provisions, the Vaccine Act’s provision for attorneys’ fees and costs should be read to avoid lengthy and complex fee litigation

This Court has cautioned that ambiguous language in federal fee-shifting provisions should be construed, when the text of the statute permits, to limit the length and complexity of fee litigation. In *Pierce*, the Court concluded that “the text of the statute permits, and sound judicial administration counsels, deferential review of a district court’s decision regarding attorney’s fees under the EAJA.” 487 U.S. at 563. The Court based that conclusion in part on the assessment that a deferential approach “will implement [the Court’s] view that a ‘request for attorney’s fees should not result in a second major litigation.’” *Ibid.* (quoting *Hensley*, 461 U.S. at 437).

That principle is directly applicable here. In a case where the special master has already conducted the

inquiry needed to reject a Vaccine Act claim on the merits, the further determination whether the petition was brought in good faith and with a reasonable basis can typically be made in an expeditious manner. By contrast, when a Vaccine Act petition has been dismissed as untimely, the determination required by 42 U.S.C. 300aa-15(e)(1) will often require fee litigation of a length and complexity that outstrips the underlying proceedings. See Pet. App. 20a-21a (Bryson, J., dissenting); pp. 20-25, *supra*. Construing Section 300aa-15(e)(1) in a manner that avoids such “shadow trial[s]” (Pet. App. 20a) is thus consistent with this Court’s usual approach to the interpretation of federal fee-shifting provisions.

D. Other Reasons Given For The En Banc Majority’s Holding Are Unpersuasive

The majority below gave several other reasons in support of its conclusion that attorneys’ fees and costs may be awarded on an untimely Vaccine Act petition. None of those reasons withstands scrutiny.

1. The court of appeals believed that “[u]nless * * * [respondent’s] filing was a ‘petition filed’” for purposes of the fee-shifting provision, then “neither [the court of appeals] nor the [CFC] had jurisdiction over her appeal.” Pet. App. 5a-6a. For two reasons, holding that a time-barred claim is not a “petition filed under section 300aa-11” would create no such “jurisdictional impasse.” *Id.* at 14a & n.1 (Bryson, J., dissenting).

First, any court involved would have “jurisdiction to determine its jurisdiction.” *Harmon v. Brucker*, 355 U.S. 579, 582 (1958) (per curiam). Second, 42 U.S.C. 300aa-12(a) alleviates the majority’s specific concern by giving special masters broad jurisdiction “over proceedings to determine if a petitioner under [42 U.S.C. 300aa-

11] is entitled to compensation under the Program.” That authority literally and logically includes the power to decide whether the claimant “is eligible under [42 U.S.C. 300aa-16] to file a petition for compensation.” Pet. App. 14a-15a n.1 (Bryson, J., dissenting).

2. The court of appeals also expressed concern that, if the phrase “petition filed under section 300aa-11” is understood to exclude time-barred petitions, then the Secretary and special masters will be unable to perform various statutory obligations with respect to “petitions filed” under the Act “until a determination is made as to the timeliness of the petition.” Pet. App. 6a-7a. That concern is unfounded because the obligations to which the court referred apply at the commencement of the action, when the claimant’s allegations are taken as true and treated as sufficient to warrant further proceedings. For purposes of those requirements, a Vaccine Act petition can appropriately be treated as timely until the special master has definitively made a contrary determination. That is no different from ordinary litigation, in which “[a]t the pleading stage, general factual allegations * * * may suffice,” even though “at the final stage, those facts (if controverted) must be supported adequately by the evidence.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks and citations omitted).

3. Finally, the en banc majority believed its decision to be supported by prior Federal Circuit decisions (see, e.g., *Shaw v. Secretary of HHS*, 609 F.3d 1372 (2010)) holding that “interim” fees may be awarded in Vaccine Act cases before the entry of judgment on the merits. The court stated: “Holding that attorneys’ fees are only available where a petition has been subjected to a final adjudication on the merits is also inconsistent with the

recognized practice of awarding interim attorneys' fees, which by definition does not require a final adjudication on the merits." Pet. App. 10a-11a. For two reasons, prior Federal Circuit decisions allowing interim fees in Vaccine Act cases provide no sound basis for the decision below.

First, the Federal Circuit precedents allowing interim fees cannot be reconciled with the statutory text. The Vaccine Act authorizes the special master or court to award attorneys' fees either "[i]n awarding compensation on a petition filed under section 300aa-11" or, under certain circumstances, "[i]f the judgment of the [CFC] on such a petition does not award compensation." 42 U.S.C. 300aa-15(e)(1). Neither of those statutory conditions for a fee award—*i.e.*, an award of compensation, or a judgment that does not award compensation—can be satisfied until the claimant's entitlement to compensation for the underlying injury has been finally adjudicated. In light of the principles of sovereign immunity that inform the Vaccine Act's interpretation, see pp. 29-30, *supra*, there is no warrant for disbursing money from the Compensation Fund on an interim basis.

Second, even if interim fee awards were proper, that would be no reason to conclude that attorneys' fees can be awarded on untimely petitions. The Federal Circuit's initial opinion recognizing the possibility of "interim fees" in a Vaccine Act case rested in part on the court's perception that "[a] special master can often determine at an early stage of the proceedings whether a claim was brought in good faith and with a reasonable basis." *Avera v. Secretary of HHS*, 515 F.3d 1343, 1352 (2008). Thus, while the Federal Circuit has held that the Vaccine Act permits some fee awards before the entry of

judgment, see *Shaw*, 609 F.3d at 1374-1375, the special master must still acquire sufficient familiarity with the underlying facts to determine whether the “good faith” and “reasonable basis” requirements are satisfied. By the same token, the attorneys’ fees provision’s requirement of “a petition filed under section 300aa-11,” 42 U.S.C. 300aa-15(e)(1), makes the availability of a Vaccine Act fee award—interim or otherwise—contingent on the timely submission of a claim. See p. 16, *supra*. Even if interim fee awards under the Vaccine Act were permissible in some circumstances, they could not properly be made without a finding that the petition was timely filed. The Federal Circuit’s “interim fee” decisions accordingly provide no support for the proposition that fees may be awarded even after a petition has been dismissed as untimely.

CONCLUSION

The order of the court of appeals should be vacated, and the case remanded with instructions to deny respondent's motion for an award of attorneys' fees and costs.

Respectfully submitted.

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JANUARY 2013

APPENDIX

1. 42 U.S.C. 300aa-10 provides:

Establishment of program

(a) Program established

There is established the National Vaccine Injury Compensation Program to be administered by the Secretary under which compensation may be paid for a vaccine-related injury or death.

(b) Attorney's obligation

It shall be the ethical obligation of any attorney who is consulted by an individual with respect to a vaccine-related injury or death to advise such individual that compensation may be available under the program¹ for such injury or death.

(c) Publicity

The Secretary shall undertake reasonable efforts to inform the public of the availability of the Program.

¹ So in original. Probably should be capitalized.

2. 42 U.S.C. 300aa-11 provides:

Petitions for compensation

(a) General rule

(1) A proceeding for compensation under the Program for a vaccine-related injury or death shall be initiated by service upon the Secretary and the filing of a petition containing the matter prescribed by subsection (c) of this section with the United States Court of Federal Claims. The clerk of the United States Court of Federal Claims shall immediately forward the filed petition to the chief special master for assignment to a special master under section 300aa-12(d)(1) of this title.

(2)(A) No person may bring a civil action for damages in an amount greater than \$1,000 or in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, and no such court may award damages in an amount greater than \$1,000 in a civil action for damages for such a vaccine-related injury or death, unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury or death and—

(i)(I) the United States Court of Federal Claims has issued a judgment under section 300aa-12 of this title on such petition, and

(II) such person elects under section 300aa-21(a) of this title to file such an action, or

(ii) such person elects to withdraw such petition under section 300aa-21(b) of this title or such petition is considered withdrawn under such section.

(B) If a civil action which is barred under subparagraph (A) is filed in a State or Federal court, the court shall dismiss the action. If a petition is filed under this section with respect to the injury or death for which such civil action was brought, the date such dismissed action was filed shall, for purposes of the limitations of actions prescribed by section 300aa-16 of this title, be considered the date the petition was filed if the petition was filed within one year of the date of the dismissal of the civil action.

(3) No vaccine administrator or manufacturer may be made a party to a civil action (other than a civil action which may be brought under paragraph (2)) for damages for a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988.

(4) If in a civil action brought against a vaccine administrator or manufacturer before October 1, 1988, damages were denied for a vaccine-related injury or death or if such civil action was dismissed with prejudice, the person who brought such action may file a petition under subsection (b) of this section for such injury or death.

(5)(A) A plaintiff who on October 1, 1988, has pending a civil action for damages for a vaccine-related in-

jury or death may, at any time within 2 years after October 1, 1988, or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) of this section for such injury or death.

(B) If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition under subsection (b) of this section for such injury or death.

(6) If a person brings a civil action after November 15, 1988¹ for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) of this section for such injury or death.

(7) If in a civil action brought against a vaccine administrator or manufacturer for a vaccine-related injury or death damages are awarded under a judgment of a court or a settlement of such action, the person who brought such action may not file a petition under subsection (b) of this section for such injury or death.

(8) If on October 1, 1988, there was pending an appeal or rehearing with respect to a civil action brought against a vaccine administrator or manufacturer and if the outcome of the last appellate review of such action or the last rehearing of such action is the denial of damages for a vaccine-related injury or death, the person who brought such action may file a petition un-

¹ So in original. Probably should be followed by a comma.

der subsection (b) of this section for such injury or death.

(9) This subsection applies only to a person who has sustained a vaccine-related injury or death and who is qualified to file a petition for compensation under the Program.

(10) The Clerk of the United States Claims Court² is authorized to continue to receive, and forward, petitions for compensation for a vaccine-related injury or death associated with the administration of a vaccine on or after October 1, 1992.

(b) Petitioners

(1)(A) Except as provided in subparagraph (B), any person who has sustained a vaccine-related injury, the legal representative of such person if such person is a minor or is disabled, or the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table may, if the person meets the requirements of subsection (c)(1) of this section, file a petition for compensation under the Program.

(B) No person may file a petition for a vaccine-related injury or death associated with a vaccine administered before October 1, 1988, if compensation has been paid under this part for 3500 petitions for such injuries or deaths.

² See Change of Name note below.

(2) Only one petition may be filed with respect to each administration of a vaccine.

(c) Petition content

A petition for compensation under the Program for a vaccine-related injury or death shall contain—

(1) except as provided in paragraph (3), an affidavit, and supporting documentation, demonstrating that the person who suffered such injury or who died—

(A) received a vaccine set forth in the Vaccine Injury Table or, if such person did not receive such a vaccine, contracted polio, directly or indirectly, from another person who received an oral polio vaccine,

(B)(i) if such person received a vaccine set forth in the Vaccine Injury Table—

(I) received the vaccine in the United States or in its trust territories,

(II) received the vaccine outside the United States or a trust territory and at the time of the vaccination such person was a citizen of the United States serving abroad as a member of the Armed Forces or otherwise as an employee of the United States or a dependent of such a citizen, or

(III) received the vaccine outside the United States or a trust territory and the vaccine was manufactured by a vaccine man-

ufacturer located in the United States and such person returned to the United States not later than 6 months after the date of the vaccination,

(ii) if such person did not receive such a vaccine but contracted polio from another person who received an oral polio vaccine, was a citizen of the United States or a dependent of such a citizen,

(C)(i) sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table in association with the vaccine referred to in subparagraph (A) or died from the administration of such vaccine, and the first symptom or manifestation of the onset or of the significant aggravation of any such illness, disability, injury, or condition or the death occurred within the time period after vaccine administration set forth in the Vaccine Injury Table, or

(ii)(I) sustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by a vaccine referred to in subparagraph (A), or

(II) sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was

caused by a vaccine referred to in subparagraph (A),

(D)(i) suffered the residual effects or complications of such illness, disability, injury, or condition for more than 6 months after the administration of the vaccine, or (ii) died from the administration of the vaccine, or (iii) suffered such illness, disability, injury, or condition from the vaccine which resulted in inpatient hospitalization and surgical intervention, and

(E) has not previously collected an award or settlement of a civil action for damages for such vaccine-related injury or death,

(2) except as provided in paragraph (3), maternal prenatal and delivery records, newborn hospital records (including all physicians' and nurses' notes and test results), vaccination records associated with the vaccine allegedly causing the injury, pre- and post-injury physician or clinic records (including all relevant growth charts and test results), all post-injury inpatient and outpatient records (including all provider notes, test results, and medication records), if applicable, a death certificate, and if applicable, autopsy results, and

(3) an identification of any records of the type described in paragraph (1) or (2) which are unavailable to the petitioner and the reasons for their unavailability.

(d) Additional information

A petition may also include other available relevant medical records relating to the person who suffered such injury or who died from the administration of the vaccine.

(e) Schedule

The petitioner shall submit in accordance with a schedule set by the special master assigned to the petition assessments, evaluations, and prognoses and such other records and documents as are reasonably necessary for the determination of the amount of compensation to be paid to, or on behalf of, the person who suffered such injury or who died from the administration of the vaccine.

3. 42 U.S.C. 300aa-12 provides:**Court jurisdiction****(a) General rule**

The United States Court of Federal Claims and the United States Court of Federal Claims special masters shall, in accordance with this section, have jurisdiction over proceedings to determine if a petitioner under section 300aa-11 of this title is entitled to compensation under the Program and the amount of such compensation. The United States Court of Federal Claims may issue and enforce such orders as the court deems necessary to assure the prompt payment of any compensation awarded.

(b) Parties

(1) In all proceedings brought by the filing of a petition under section 300aa-11(b) of this title, the Secretary shall be named as the respondent, shall participate, and shall be represented in accordance with section 518(a) of title 28.

(2) Within 30 days after the Secretary receives service of any petition filed under section 300aa-11 of this title the Secretary shall publish notice of such petition in the Federal Register. The special master designated with respect to such petition under subsection (c) of this section shall afford all interested persons an opportunity to submit relevant, written information—

(A) relating to the existence of the evidence described in section 300aa-13(a)(1)(B) of this title, or

(B) relating to any allegation in a petition with respect to the matters described in section 300aa-11(c)(1)(C)(ii) of this title.

(c) United States Court of Federal Claims special masters

(1) There is established within the United States Court of Federal Claims an office of special masters which shall consist of not more than 8 special masters. The judges of the United States Court of Federal Claims shall appoint the special masters, 1 of whom, by designation of the judges of the United States Court of Federal Claims, shall serve as chief special master. The appointment and reappointment of the special masters shall be by the concurrence of a majority of the judges of the court.

(2) The chief special master and other special masters shall be subject to removal by the judges of the United States Court of Federal Claims for incompetency, misconduct, or neglect of duty or for physical or mental disability or for other good cause shown.

(3) A special master's office shall be terminated if the judges of the United States Court of Federal Claims determine, upon advice of the chief special master, that the services performed by that office are no longer needed.

(4) The appointment of any individual as a special master shall be for a term of 4 years, subject to termination under paragraphs (2) and (3). Individuals serving as special masters on December 19, 1989, shall serve for 4 years from the date of their original appointment, subject to termination under paragraphs (2) and (3). The chief special master in office on December 19, 1989, shall continue to serve as chief special master for the balance of the master's term, subject to termination under paragraphs (2) and (3).

(5) The compensation of the special masters shall be determined by the judges of the United States Court of Federal Claims, upon advice of the chief special master. The salary of the chief special master shall be the annual rate of basic pay for level IV of the Executive Schedule, as prescribed by section 5315, title 5. The salaries of the other special masters shall not exceed the annual rate of basic pay of level V of the Executive Schedule, as prescribed by section 5316, title 5.

(6) The chief special master shall be responsible for the following:

(A) Administering the office of special masters and their staff, providing for the efficient, expeditious, and effective handling of petitions, and performing such other duties related to the Program as may be assigned to the chief special master by a concurrence of a majority of the United States Claims Courts¹ judges.

(B) Appointing and fixing the salary and duties of such administrative staff as are necessary. Such staff shall be subject to removal for good cause by the chief special master.

(C) Managing and executing all aspects of budgetary and administrative affairs affecting the special masters and their staff, subject to the rules and regulations of the Judicial Conference of the United States. The Conference rules and regulations pertaining to United States magistrate judges shall be applied to the special masters.

(D) Coordinating with the United States Court of Federal Claims the use of services, equipment, personnel, information, and facilities of the United States Court of Federal Claims without reimbursement.

(E) Reporting annually to the Congress and the judges of the United States Court of Federal Claims

¹ So in original. Probably should be a reference to the United States Court of Federal Claims.

on the number of petitions filed under section 300aa-11 of this title and their disposition, the dates on which the vaccine-related injuries and deaths for which the petitions were filed occurred, the types and amounts of awards, the length of time for the disposition of petitions, the cost of administering the Program, and recommendations for changes in the Program.

(d) Special masters

(1) Following the receipt and filing of a petition under section 300aa-11 of this title, the clerk of the United States Court of Federal Claims shall forward the petition to the chief special master who shall designate a special master to carry out the functions authorized by paragraph (3).

(2) The special masters shall recommend rules to the Court of Federal Claims and, taking into account such recommended rules, the Court of Federal Claims shall promulgate rules pursuant to section 2071 of title 28. Such rules shall—

(A) provide for a less-adversarial, expeditious, and informal proceeding for the resolution of petitions,

(B) include flexible and informal standards of admissibility of evidence,

(C) include the opportunity for summary judgment,

(D) include the opportunity for parties to submit arguments and evidence on the record without requiring routine use of oral presentations, cross examinations, or hearings, and

(E) provide for limitations on discovery and allow the special masters to replace the usual rules of discovery in civil actions in the United States Court of Federal Claims.

(3)(A) A special master to whom a petition has been assigned shall issue a decision on such petition with respect to whether compensation is to be provided under the Program and the amount of such compensation. The decision of the special master shall—

(i) include findings of fact and conclusions of law, and

(ii) be issued as expeditiously as practicable but not later than 240 days, exclusive of suspended time under subparagraph (C), after the date the petition was filed.

The decision of the special master may be reviewed by the United States Court of Federal Claims in accordance with subsection (e) of this section.

(B) In conducting a proceeding on a petition a special master—

(i) may require such evidence as may be reasonable and necessary,

(ii) may require the submission of such information as may be reasonable and necessary,

(iii) may require the testimony of any person and the production of any documents as may be reasonable and necessary,

(iv) shall afford all interested persons an opportunity to submit relevant written information—

(I) relating to the existence of the evidence described in section 300aa-13(a)(1)(B) of this title, or

(II) relating to any allegation in a petition with respect to the matters described in section 300aa-11(c)(1)(C)(ii) of this title, and

(v) may conduct such hearings as may be reasonable and necessary.

There may be no discovery in a proceeding on a petition other than the discovery required by the special master.

(C) In conducting a proceeding on a petition a special master shall suspend the proceedings one time for 30 days on the motion of either party. After a motion for suspension is granted, further motions for suspension by either party may be granted by the special master, if the special master determines the suspension is reasonable and necessary, for an aggregate period not to exceed 150 days.

(D) If, in reviewing proceedings on petitions for vaccine-related injuries or deaths associated with the administration of vaccines before October 1, 1988, the chief special master determines that the number of filings and resultant workload place an undue burden

on the parties or the special master involved in such proceedings, the chief special master may, in the interest of justice, suspend proceedings on any petition for up to 30 months (but for not more than 6 months at a time) in addition to the suspension time under subparagraph (C).

(4)(A) Except as provided in subparagraph (B), information submitted to a special master or the court in a proceeding on a petition may not be disclosed to a person who is not a party to the proceeding without the express written consent of the person who submitted the information.

(B) A decision of a special master or the court in a proceeding shall be disclosed, except that if the decision is to include information—

(i) which is trade secret or commercial or financial information which is privileged and confidential, or

(ii) which are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy,

and if the person who submitted such information objects to the inclusion of such information in the decision, the decision shall be disclosed without such information.

(e) Action by United States Court of Federal Claims

(1) Upon issuance of the special master's decision, the parties shall have 30 days to file with the clerk of the United States Court of Federal Claims a motion to

have the court review the decision. If such a motion is filed, the other party shall file a response with the clerk of the United States Court of Federal Claims no later than 30 days after the filing of such motion.

(2) Upon the filing of a motion under paragraph (1) with respect to a petition, the United States Court of Federal Claims shall have jurisdiction to undertake a review of the record of the proceedings and may thereafter—

(A) uphold the findings of fact and conclusions of law of the special master and sustain the special master’s decision,

(B) set aside any findings of fact or conclusion of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or

(C) remand the petition to the special master for further action in accordance with the court’s direction.

The court shall complete its action on a petition within 120 days of the filing of a response under paragraph (1) excluding any days the petition is before a special master as a result of a remand under subparagraph (C). The court may allow not more than 90 days for remands under subparagraph (C).

(3) In the absence of a motion under paragraph (1) respecting the special master’s decision or if the United States Court of Federal Claims takes the action de-

scribed in paragraph (2)(A) with respect to the special master's decision, the clerk of the United States Court of Federal Claims shall immediately enter judgment in accordance with the special master's decision.

(f) Appeals

The findings of fact and conclusions of law of the United States Court of Federal Claims on a petition shall be final determinations of the matters involved, except that the Secretary or any petitioner aggrieved by the findings or conclusions of the court may obtain review of the judgment of the court in the United States court of appeals for the Federal Circuit upon petition filed within 60 days of the date of the judgment with such court of appeals within 60 days of the date of entry of the United States Claims Court's² judgment with such court of appeals.

(g) Notice

If—

(1) a special master fails to make a decision on a petition within the 240 days prescribed by subsection (d)(3)(A)(ii) of this section (excluding (A) any period of suspension under subsection (d)(3)(C) or (d)(3)(D) of this section, and (B) any days the petition is before a special master as a result of a remand under subsection (e)(2)(C) of this section), or

(2) the United States Court of Federal Claims fails to enter a judgment under this section on a pe-

² So in original. Probably should be a reference to the United States Court of Federal Claims.

tition within 420 days (excluding (A) any period of suspension under subsection (d)(3)(C) or (d)(3)(D) of this section, and (B) any days the petition is before a special master as a result of a remand under subsection (e)(2)(C) of this section) after the date on which the petition was filed,

the special master or court shall notify the petitioner under such petition that the petitioner may withdraw the petition under section 300aa-21(b) of this title or the petitioner may choose under section 300aa-21(b) of this title to have the petition remain before the special master or court, as the case may be.

4. 42 U.S.C. 300aa-13 provides:

Determination of eligibility and compensation

(a) General rule

(1) Compensation shall be awarded under the Program to a petitioner if the special master or court finds on the record as a whole—

(A) that the petitioner has demonstrated by a preponderance of the evidence the matters required in the petition by section 300aa-11(c)(1) of this title, and

(B) that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition. The special master or court

may not make such a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.

(2) For purposes of paragraph (1), the term “factors unrelated to the administration of the vaccine”—

(A) does not include any idiopathic, unexplained, unknown, hypothetical, or undocumentable cause, factor, injury, illness, or condition, and

(B) may, as documented by the petitioner’s evidence or other material in the record, include infection, toxins, trauma (including birth trauma and related anoxia), or metabolic disturbances which have no known relation to the vaccine involved, but which in the particular case are shown to have been the agent or agents principally responsible for causing the petitioner’s illness, disability, injury, condition, or death.

(b) Matters to be considered

(1) In determining whether to award compensation to a petitioner under the Program, the special master or court shall consider, in addition to all other relevant medical and scientific evidence contained in the record—

(A) any diagnosis, conclusion, medical judgment, or autopsy or coroner’s report which is contained in the record regarding the nature, causation, and aggravation of the petitioner’s illness, disability, injury, condition, or death, and

(B) the results of any diagnostic or evaluative test which are contained in the record and the summaries and conclusions.

Any such diagnosis, conclusion, judgment, test result, report, or summary shall not be binding on the special master or court. In evaluating the weight to be afforded to any such diagnosis, conclusion, judgment, test result, report, or summary, the special master or court shall 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.

(2) The special master or court may find the first symptom or manifestation of onset or significant aggravation of an injury, disability, illness, condition, or death described in a petition occurred within the time period described in the Vaccine Injury Table even though the occurrence of such symptom or manifestation was not recorded or was incorrectly recorded as having occurred outside such period. Such a finding may be made only upon demonstration by a preponderance of the evidence that the onset or significant aggravation of the injury, disability, illness, condition, or death described in the petition did in fact occur within the time period described in the Vaccine Injury Table.

(c) “Record” defined

For purposes of this section, the term “record” means the record established by the special masters of the United States Court of Federal Claims in a proceeding on a petition filed under section 300aa-11 of this title.

5. 42 U.S.C. 300aa-15 provides:

Compensation

(a) General rule

Compensation awarded under the Program to a petitioner under section 300aa-11 of this title for a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, shall include the following:

(1)(A) Actual unreimbursable expenses incurred from the date of the judgment awarding such expenses and reasonable projected unreimbursable expenses which—

(i) result from the vaccine-related injury for which the petitioner seeks compensation,

(ii) have been or will be incurred by or on behalf of the person who suffered such injury, and

(iii)(I) have been or will be for diagnosis and medical or other remedial care determined to be reasonably necessary, or

(II) have been or will be for rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related

(1a)

travel expenses, and facilities determined to be reasonably necessary.

(B) Subject to section 300aa-16(a)(2) of this title, actual unreimbursable expenses incurred before the date of the judgment awarding such expenses which—

(i) resulted from the vaccine-related injury for which the petitioner seeks compensation,

(ii) were incurred by or on behalf of the person who suffered such injury, and

(iii) were for diagnosis, medical or other remedial care, rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary.

(2) In the event of a vaccine-related death, an award of \$250,000 for the estate of the deceased.

(3)(A) In the case of any person who has sustained a vaccine-related injury after attaining the age of 18 and whose earning capacity is or has been impaired by reason of such person's vaccine-related injury for which compensation is to be awarded, compensation for actual and anticipated loss of earnings determined in accordance with generally recognized actuarial principles and projections.

(B) In the case of any person who has sustained a vaccine-related injury before attaining the age of 18 and whose earning capacity is or has been impaired by reason of such person's vaccine-related injury for which compensation is to be awarded 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, 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.

(4) For actual and projected pain and suffering and emotional distress from the vaccine-related injury, an award not to exceed \$250,000.

(b) Vaccines administered before effective date

Compensation awarded under the Program to a petitioner under section 300aa-11 of this title for a vaccine-related injury or death associated with the administration of a vaccine before October 1, 1988, may include the compensation described in paragraphs (1)(A) and (2) of subsection (a) of this section and may also include an amount, not to exceed a combined total of \$30,000, for—

(1) lost earnings (as provided in paragraph (3) of subsection (a) of this section),

(2) pain and suffering (as provided in paragraph (4) of subsection (a) of this section), and

(3) reasonable attorneys' fees and costs (as provided in subsection (e) of this section.¹

(c) Residential and custodial care and service

The amount of any compensation for residential and custodial care and service expenses under subsection (a)(1) of this section shall be sufficient to enable the compensated person to remain living at home.

(d) Types of compensation prohibited

Compensation awarded under the Program may not include the following:

(1) Punitive or exemplary damages.

(2) Except with respect to compensation payments under paragraphs (2) and (3) of subsection (a) of this section, compensation for other than the health, education, or welfare of the person who suffered the vaccine-related injury with respect to which the compensation is paid.

(e) Attorneys' fees

(1) In awarding compensation on a petition filed under section 300aa-11 of this title the special master or court shall also award as part of such compensation an amount to cover—

(A) reasonable attorneys' fees, and

(B) other costs,

¹ So in original. Probably should be preceded by a closing parenthesis.

incurred in any proceeding on such petition. If the judgment of the United States Court of Federal Claims on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.

(2) If the petitioner, before October 1, 1988, filed a civil action for damages for any vaccine-related injury or death for which compensation may be awarded under the Program, and petitioned under section 300aa-11(a)(5) of this title to have such action dismissed and to file a petition for compensation under the Program, in awarding compensation on such petition the special master or court may include an amount of compensation limited to the costs and expenses incurred by the petitioner and the attorney of the petitioner before October 1, 1988, in preparing, filing, and prosecuting such civil action (including the reasonable value of the attorney's time if the civil action was filed under contingent fee arrangements).

(3) No attorney may charge any fee for services in connection with a petition filed under section 300aa-11 of this title which is in addition to any amount awarded as compensation by the special master or court under paragraph (1).

(f) Payment of compensation

(1) Except as provided in paragraph (2), no compensation may be paid until an election has been

made, or has been deemed to have been made, under section 300aa-21(a) of this title to receive compensation.

(2) Compensation described in subsection (a)(1)(A)(iii) of this section shall be paid from the date of the judgment of the United States Court of Federal Claims under section 300aa-12 of this title awarding the compensation. Such compensation may not be paid after an election under section 300aa-21(a) of this title to file a civil action for damages for the vaccine-related injury or death for which such compensation was awarded.

(3) Payments of compensation under the Program and the costs of carrying out the Program shall be exempt from reduction under any order issued under part C of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 900 et seq.].

(4)(A) Except as provided in subparagraph (B), payment of compensation under the Program shall be determined on the basis of the net present value of the elements of the compensation and shall be paid from the Vaccine Injury Compensation Trust Fund established under section 9510 of title 26 in a lump sum of which all or a portion may be used as ordered by the special master to purchase an annuity or otherwise be used, with the consent of the petitioner, in a manner determined by the special master to be in the best interests of the petitioner.

(B) In the case of a payment of compensation under the Program to a petitioner for a vaccine-related injury or death associated with the administration of a

vaccine before October 1, 1988, the compensation shall be determined on the basis of the net present value of the elements of compensation and shall be paid from appropriations made available under subsection (j) of this section in a lump sum of which all or a portion may be used as ordered by the special master to purchase an annuity or otherwise be used, with the consent of the petitioner, in a manner determined by the special master to be in the best interests of the petitioner. Any reasonable attorneys' fees and costs shall be paid in a lump sum. If the appropriations under subsection (j) of this section are insufficient to make a payment of an annual installment, the limitation on civil actions prescribed by section 300aa-21(a) of this title shall not apply to a civil action for damages brought by the petitioner entitled to the payment.

(C) In purchasing an annuity under subparagraph (A) or (B), the Secretary may purchase a guarantee for the annuity, may enter into agreements regarding the purchase price for and rate of return of the annuity, and may take such other actions as may be necessary to safeguard the financial interests of the United States regarding the annuity. Any payment received by the Secretary pursuant to the preceding sentence shall be paid to the Vaccine Injury Compensation Trust Fund established under section 9510 of title 26, or to the appropriations account from which the funds were derived to purchase the annuity, whichever is appropriate.

(g) Program not primarily liable

Payment of compensation under the Program shall not be made for any item or service to the extent that payment has been made, or can reasonably be expected to be made, with respect to such item or service (1) under any State compensation program, under an insurance policy, or under any Federal or State health benefits program (other than under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.]), or (2) by an entity which provides health services on a prepaid basis.

(h) Liability of health insurance carriers, prepaid health plans, and benefit providers

No policy of health insurance may make payment of benefits under the policy secondary to the payment of compensation under the Program and—

(1) no State, and

(2) no entity which provides health services on a prepaid basis or provides health benefits,

may make the provision of health services or health benefits secondary to the payment of compensation under the Program, except that this subsection shall not apply to the provision of services or benefits under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.].

(i) Source of compensation

(1) Payment of compensation under the Program to a petitioner for a vaccine-related injury or death asso-

ciated with the administration of a vaccine before October 1, 1988, shall be made by the Secretary from appropriations under subsection (j) of this section.

(2) Payment of compensation under the Program to a petitioner for a vaccine-related injury or death associated with the administration of a vaccine on or after October 1, 1988, shall be made from the Vaccine Injury Compensation Trust Fund established under section 9510 of title 26.

(j) Authorization

For the payment of compensation under the Program to a petitioner for a vaccine-related injury or death associated with the administration of a vaccine before October 1, 1988, there are authorized to be appropriated to the Department of Health and Human Services \$80,000,000 for fiscal year 1989, \$80,000,000 for fiscal year 1990, \$80,000,000 for fiscal year 1991, \$80,000,000 for fiscal year 1992, \$110,000,000 for fiscal year 1993, and \$110,000,000 for each succeeding fiscal year in which a payment of compensation is required under subsection (f)(4)(B) of this section. Amounts appropriated under this subsection shall remain available until expended.

6. 42 U.S.C. 300aa-16 provides:

Limitations of actions

(a) General rule

In the case of—

(1) a vaccine set forth in the Vaccine Injury Table which is administered before October 1, 1988, if a vaccine-related injury or death occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury or death after the expiration of 28 months after October 1, 1988, and no such petition may be filed if the first symptom or manifestation of onset or of the significant aggravation of such injury occurred more than 36 months after the date of administration of the vaccine,

(2) a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury, and

(3) a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a death occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such death after the expiration of 24 months from the date of the death and no such petition

may be filed more than 48 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of the injury from which the death resulted.

(b) Effect of revised table

If at any time the Vaccine Injury Table is revised and the effect of such revision is to permit an individual who was not, before such revision, eligible to seek compensation under the Program, or to significantly increase the likelihood of obtaining compensation, such person may, notwithstanding section 300aa-11(b)(2) of this title, file a petition for such compensation not later than 2 years after the effective date of the revision, except that no compensation may be provided under the Program with respect to a vaccine-related injury or death covered under the revision of the table if—

(1) the vaccine-related death occurred more than 8 years before the date of the revision of the table, or

(2) the vaccine-related injury occurred more than 8 years before the date of the revision of the table.

(c) State limitations of actions

If a petition is filed under section 300aa-11 of this title for a vaccine-related injury or death, limitations of actions under State law shall be stayed with respect to a civil action brought for such injury or death for the period beginning on the date the petition is filed

and ending on the date (1) an election is made under section 300aa-21(a) of this title to file the civil action or (2) an election is made under section 300aa-21(b) of this title to withdraw the petition.

7. 42 U.S.C. 300aa-21 provides:

Authority to bring actions

(a) Election

After judgment has been entered by the United States Court of Federal Claims or, if an appeal is taken under section 300aa-12(f) of this title, after the appellate court's mandate is issued, the petitioner who filed the petition under section 300aa-11 of this title shall file with the clerk of the United States Court of Federal Claims—

(1) if the judgment awarded compensation, an election in writing to receive the compensation or to file a civil action for damages for such injury or death, or

(2) if the judgment did not award compensation, an election in writing to accept the judgment or to file a civil action for damages for such injury or death.

An election shall be filed under this subsection not later than 90 days after the date of the court's final judgment with respect to which the election is to be made. If a person required to file an election with the court under this subsection does not file the election

within the time prescribed for filing the election, such person shall be deemed to have filed an election to accept the judgment of the court. If a person elects to receive compensation under a judgment of the court in an action for a vaccine-related injury or death associated with the administration of a vaccine before October 1, 1988, or is deemed to have accepted the judgment of the court in such an action, such person may not bring or maintain a civil action for damages against a vaccine administrator or manufacturer for the vaccine-related injury or death for which the judgment was entered. For limitations on the bringing of civil actions for vaccine-related injuries or deaths associated with the administration of a vaccine after October 1, 1988, see section 300aa-11(a)(2) of this title.

(b) Continuance or withdrawal of petition

A petitioner under a petition filed under section 300aa-11 of this title may submit to the United States Court of Federal Claims a notice in writing choosing to continue or to withdraw the petition if—

(1) a special master fails to make a decision on such petition within the 240 days prescribed by section 300aa-12(d)(3)(A)(ii) of this title (excluding (i) any period of suspension under section 300aa-12(d)(3)(C) or 300aa-12(d)(3)(D) of this title, and (ii) any days the petition is before a special master as a result of a remand under section 300aa-12(e)(2)(C) of this title), or

(2) the court fails to enter a judgment under section 300aa-12 of this title on the petition within 420

days (excluding (i) any period of suspension under section 300aa-12(d)(3)(C) or 300aa-12(d)(3)(D) of this title, and (ii) any days the petition is before a special master as a result of a remand under section 300aa-12(e)(2)(C) of this title) after the date on which the petition was filed.

Such a notice shall be filed within 30 days of the provision of the notice required by section 300aa-12(g) of this title.

(c) Limitations of actions

A civil action for damages arising from a vaccine-related injury or death for which a petition was filed under section 300aa-11 of this title shall, except as provided in section 300aa-16(c) of this title, be brought within the period prescribed by limitations of actions under State law applicable to such civil action.

8. 26 U.S.C. 4131 provides:

Imposition of tax

(a) General rule

There is hereby imposed a tax on any taxable vaccine sold by the manufacturer, producer, or importer thereof.

(b) Amount of tax

(1) In general

The amount of the tax imposed by subsection (a) shall be 75 cents per dose of any taxable vaccine.

(2) Combinations of vaccines

If any taxable vaccine is described in more than 1 subparagraph of section 4132(a)(1), the amount of the tax imposed by subsection (a) on such vaccine shall be the sum of the amounts for the vaccines which are so included.

(c) Application of section

The tax imposed by this section shall apply—

(1) after December 31, 1987, and before January 1, 1993, and

(2) during periods after the date of the enactment of the Revenue Reconciliation Act of 1993.

9. 26 U.S.C. 9510 provides:

Vaccine Injury Compensation Trust Fund

(a) Creation of Trust Fund

There is established in the Treasury of the United States a trust fund to be known as the “Vaccine Injury Compensation Trust Fund”, consisting of such amounts as may be appropriated or credited to such

Trust Fund as provided in this section or section 9602(b).

(b) Transfers to Trust Fund

(1) In general

There are hereby appropriated to the Vaccine Injury Compensation Trust Fund amounts equivalent to the net revenues received in the Treasury from the tax imposed by section 4131 (relating to tax on certain vaccines).

(2) Net revenues

For purposes of paragraph (1), the term “net revenues” means the amount estimated by the Secretary based on the excess of—

(A) the taxes received in the Treasury under section 4131 (relating to tax on certain vaccines), over

(B) the decrease in the tax imposed by chapter 1 resulting from the tax imposed by section 4131.

(3) Limitation on transfers to Vaccine Injury Compensation Trust Fund

No amount may be appropriated to the Vaccine Injury Compensation Trust Fund on and after the date of any expenditure from the Trust Fund which is not permitted by this section. The determination of whether an expenditure is so permitted shall be made without regard to—

(A) any provision of law which is not contained or referenced in this title or in a revenue Act, and

(B) whether such provision of law is a subsequently enacted provision or directly or indirectly seeks to waive the application of this paragraph.

(c) Expenditures from Trust Fund

(1) In general

Amounts in the Vaccine Injury Compensation Trust Fund shall be available, as provided in appropriation Acts, only for—

(A) the payment of compensation under subtitle 2 of title XXI of the Public Health Service Act (as in effect on October 18, 2000) for vaccine related injury or death with respect to any vaccine—

(i) which is administered after September 30, 1988, and

(ii) which is a taxable vaccine (as defined in section 4132(a)(1)) at the time compensation is paid under such subtitle 2, or

(B) the payment of all expenses of administration (but not in excess of \$9,500,000 for any fiscal year) incurred by the Federal Government in administering such subtitle.

(2) Transfers for certain repayments

(A) In general

The Secretary shall pay from time to time from the Vaccine Injury Compensation Trust Fund into the general fund of the Treasury amounts equivalent to amounts paid under section 4132(b) and section 6416 with respect to the taxes imposed by section 4131.

(B) Transfers based on estimates

Transfers under subparagraph (A) shall be made on the basis of estimates by the Secretary, and proper adjustments shall be made in the amounts subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred.

(d) Liability of United States limited to amount in Trust Fund

(1) General rule

Any claim filed against the Vaccine Injury Compensation Trust Fund may be paid only out of such Trust Fund.

(2) Coordination with other provisions

Nothing in the National Childhood Vaccine Injury Act of 1986 (or in any amendment made by such Act) shall authorize the payment by the United States Government of any amount with respect

to any such claim out of any source other than the Vaccine Injury Compensation Trust Fund.

(3) Order in which unpaid claims to be paid

If at any time the Vaccine Injury Compensation Trust Fund has insufficient funds to pay all of the claims out of such Trust Fund at such time, such claims shall, to the extent permitted under paragraph (1) be paid in full in the order in which they are finally determined.