No. 12-236

In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

MELISSA CLOER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Vaccine Act, which provides for the payment of attorneys' fees and costs incurred in connection with an unsuccessful claim for compensation brought pursuant to the Act, should be construed to permit the payment of such fees and costs in all circumstances except when a claim is unsuccessful because the statute of limitations has run.

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INTRODUCTION

The National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§300aa-1 to 300aa-34 ("Vaccine Act" or "Act") provides the primary remedy for individuals who are injured by vaccines covered under the Act. All tort remedies based upon claims of defective design are barred. *Bruesewitz v. Wyeth LLC,* 131 S. Ct. 1068 (2011). The Act was designed to compensate victims of vaccine-related injuries "quickly, easily, and with certainty and generosity." H.R.Rep. No. 99–908, at 3 (1986), reprinted 1986 U.S.C.C.A.N. 6344, 6363. Attorneys who represent individuals suffering a suspected vaccine injury are prohibited from collecting fees apart from the fees paid to them from the Trust Fund established under the Act. 42 U.S.C. 300aa-15 (e) (3)[1].

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[1]In her Petition For Writ of Certiorari (the "Petition"), the Secretary of Health and Human Services (the "Secretary") refers to the Act's fee provision as a "fee-shifting" provision, but this is not accurate. A true "fee-shifting" provision requires one party to pay the fees that traditionally would be borne by an opposing party. Here, by contrast, the United States does not pay the fees incurred by claimants under the Act. Those fees are paid out of the Vaccine Injury Compensation Trust Fund, administered by the United States, but funded by a consumer-paid surcharge on vaccines. *See* 26 U.S.C. § 9510 (establishing the Trust Fund) and 26 U.S.C. § 4131 (imposing tax on the sale of vaccines). Currently, the Trust Fund has a balance of more than 2.4 billion (with a "b") dollars. *See* ftp://ftp.publicdebt.treas.gov/dfi/tfmb/dfivi0912.pdf. Moreover, because the Act provides that attorneys can only be paid fees from the Trust Fund, prohibiting private fee arrangements and payments, the fee provision is more accurately characterized not as a "fee shifting" provision, but as an attorney compensation provision or, more simply, a "fees and costs provision," which is how we refer to it.

The Vaccine Act provision for the payment of attorneys' fees and costs is broader than the typical "prevailing party" provision found in other federal statutes: the Vaccine Act not only mandates the recovery of fees by prevailing parties, it also permits the payment of fees and costs when a claim for compensation is denied, provided that the claim was brought in good faith and with a reasonable basis in fact. The Act's fee provision makes perfect sense: Congress provided that the Trust Fund would fully subsidize Vaccine Act litigation and accordingly, Congress provided the necessary incentive for attorneys to represent petitioners even when the validity of their claims is less than certain. Thus, the Act provides a mechanism for reimbursement of all costs, including attorneys' fees, in the event that claims, brought in good faith, prove unsuccessful for whatever reason.

Consistent with that purpose, Congress provided for an award of fees and costs in connection with "any proceedings" relating to a petition filed under section 300aa-11 of the Act, and the only statutory condition created by Congress on the payment of such fees incurred is that the claims, even if unsuccessful, were brought in good faith and with a reasonable basis. Congress drew no other distinctions about the types of unsuccessful claims filed pursuant to section 300aa-11 that could result in the payment of fees and costs including claims that are denied due to the running of the Act's statute of limitations.

And yet, the Secretary's Petition is devoted entirely to drawing exactly such a distinction, despite the fact that Congress itself did not do so. As we explain below, the Secretary's attempt to create a statutory

exception for the award of fees (that Congress itself did not create) should be rejected because it cannot be reconciled with the plain language of the Act. It similarly cannot be reconciled with the purpose of the fees and costs provision itself.

Nor should the Act's fee provision be rewritten in the manner urged by the Secretary (and the dissenting Judges in this case) based upon the parade of horrors that purportedly will result from the Federal Circuit's decision in this case. The primary vice that may result from the majority's decision is, the Secretary speculates, the necessity of conducting "shadow trials" when making fee decisions that will overwhelm the court system. These "shadow trials" would arise in cases that are denied on statute of limitations grounds, and where no judgment about the merits of a claim have been made. The Secretary asserts, then, that the merits nevertheless might have to be adjudicated in the context of a claim for fees and costs, because such an award can be made only on claims brought in good faith and with a reasonable basis in fact.

The argument rests upon a fundamental misconception about how the Vaccine Act works, and it fails to take into account the fact that statute of limitations issues are themselves inextricably intertwined with the merits of a vaccine petition — as this case amply demonstrates. This may help explain why, while the Secretary raises the specter of "shadow trials" repeatedly in her Petition, the dissent below (which is the origin of the phrase) mentions it only once, and even then only in passing.

ARGUMENT

1. The Court of Appeals' Decision Is Based Upon, And Fully Consistent With, The Plain Language Of The Vaccine Act.

The Vaccine Act's attorneys' fees and costs provision provides as follows:

> (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, 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.

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

On its face, the Act provides for the payment of

attorneys' fees and costs "incurred in any proceeding" related to "a petition filed under section 300aa-11", including in cases where no compensation is awarded to the petitioner. Thus, the Secretary correctly observes that "the court of appeals' decision in this case depends on the court's determination that an untimely Vaccine Act petition is a 'petition filed under [42 U.S.C. 300aa-11]." Petition at 11 (bracketed text in original).

Section 300aa-11 provides, in relevant part, that "[a] proceeding for compensation under the [Vaccine] 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." 42 U.S.C. §300aa-11 (a) (1) (emphasis added). Section (a) (1) says nothing about compliance with the Act's statute of limitations in section 300aa-16 being a prerequisite for initiating "a proceeding" under the Act.

Thus, and by its plain terms, if a petition is filed and served upon the Secretary, and if it contains the matters required by subsection (c), then "a proceeding for compensation" has been initiated under the Act. And, accordingly, attorneys' fees incurred in connection with that proceeding may be paid pursuant to section 300aa-15 (e) (1).

In contrast to section 300aa-11 (a) (1), section 300aa-11 (a) (2) (A) prohibits a petitioner from bringing a civil action in State or Federal court arising from a vaccine-related injury "unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program . . ." Section 300aa-11

(a) (2) (A) makes clear that Congress knew how to condition the provisions of section 300aa-11 upon compliance with the Act's statute of limitations provision contained in section 300aa-16.

Congress required compliance with the statute of limitations before a plaintiff could file a civil suit pursuant to section 300aa-11 (a) (2) (A), but Congress did not require such compliance as a precondition to initiating a proceeding for compensation pursuant to 300aa-11 (a) (1). Thus, while Congress specifically conditioned the right to file a civil suit on the filing of a timely petition under section 300aa-16, Congress did not condition the availability of attorneys' fees upon the filing of a timely petition under that same section 300aa-16.

Thus, the Circuit en banc majority correctly concluded that because section 300aa-15 (e) (1) permits an award of attorneys' fees incurred in connection with "any proceedings" brought pursuant to 300aa-11, and because neither section 300aa-15 (e) (1) nor section 300aa-11 (a) (1) requires compliance with the Act's statute of limitations provision as a precondition to initiating proceedings under the Act, compliance with section 300aa-16 is not a prerequisite to reimbursement for attorneys' fees and costs under the Act. App. at 5a-9a[2].

Nevertheless, the Secretary insists that the failure of Congress to mention the Act's statute of limitations in

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[2]Citations to the opinions below are to the appendix accompanying the Secretary's Petition.

either section 300aa-15 (e) (1) or 300aa-11 (a) (1) is of no consequence because the statute of limitations itself provides that "no petition may be filed for compensation under the Program" after its expiration. Petition at 11 (discussing §300aa-16 (a) (2)). Thus, the Secretary's argument goes:

> The fee-shifting provision requires "a petition filed under section [42 U.S.C.] 300aa-11 of this title," . . . and the limitations provision states that "no petition may be filed for compensation under the Program" after the expiration of prescribed time periods. . . . The fee-shifting provision's requirement of "a petition filed under [42 U.S.C.] 300aa-11" thus obviates the need for any direct cross-reference to the limitations provision itself.

Petition at 19 (internal citations omitted; bracketed language in original).

The problem with the Secretary's argument, and the reason it must be rejected, is that some provisions of section 300aa-11 do explicitly require compliance with the statute of limitations, whereas others do not. Compare §300aa-11 (a) (1) with §300aa-11 (a) (2) (A). Consequently, there is no way to reconcile the Secretary's reading of section 300aa-11 (a) (1) with the language used in section 300aa-11 (a) (2) (A), which requires that a "petition has been filed, in accordance with section 300aa-16 of this title." According to the Secretary, the first clause ("a petition has been filed") necessarily means a petition that has been filed in accordance with section 300aa-16. Thus, to accept the

Secretary's interpretation of the Act would render Congress's use of the second clause ("in accordance with section 300aa-16 of this title") utterly superfluous, in violation of firmly-established canons of statutory construction. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotations omitted); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("[i]t is our duty 'to give effect, if possible, to every clause and word of a statute'") (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

Similarly, to accept the Secretary's statutory interpretation would render use of the phrase "in accordance with section 300aa-16" in section 300aa-11 (a) (2) (A), and the decision of Congress to omit that clause in section 300aa-11 (a) (1), a drafting choice of no significance and of no consequence, also in violation of well-settled canons of statutory construction. *See, e.g., Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

2. The Secretary's Concerns About Collateral "Shadow Trials" Are Irrelevant And Wrong.

The majority of the Secretary's Petition is devoted to a discussion about the purported, and utterly

speculative, practical difficulties that might result from the Federal Circuit's decision in this case. Petition at 12-16, 23-25. The Secretary warns that a vaccine injury petition filed after the statute of limitations has run "may be dismissed on threshold grounds without any meaningful analysis of the merits," requiring special masters "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." Petition at 13 (internal quotations omitted). The problem, according to the Secretary, is that "[s]uch proceedings would typically include review of the claimant's medical records, development of expert testimony, and briefing to the special master." Ibid. The Secretary despairs: "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." Ibid. (internal quotations omitted).

The Secretary's concerns are irrelevant for two reasons. First, the sort of policy considerations identified by the Secretary furnish no basis for ignoring the plain language of the Vaccine Act. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) ("when the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd — is to enforce it according to its terms") (internal quotations omitted); *Tyler v. Cain*, 533 U.S. 656, 663, n.5 (2001) ("even if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds").

Second, whatever practical concerns there might be with determining whether a time-barred claim was brought in good faith or with a reasonable factual basis, those are not concerns that arise in this case. As the Federal Circuit correctly observed, "the government does not dispute the reasonableness of Dr. Cloer's underlying claim or allege that it was not brought in good faith". App. 9a. Indeed, as the Chief Special Master noted in his May 15, 2008 decision, the evidence furnished in support of Dr. Cloer's petition were not disputed by the Secretary. App. 157a ("[t]he facts presented in this matter are uncontested").

In addition to being irrelevant, the Secretary's policy concerns are wrong in that they simply cannot be reconciled with the way the Vaccine Act works in practice. First, one has to bear in mind the distinction between "Table" and "non-Table" injuries. If a claimant has suffered a Table injury within a specified time frame after receiving a vaccine, the claimant is presumed to be entitled to relief under the Vaccine Act. *See, e.g.,* §§300aa-11 (c) (1) (C) (ii); 300aa-14; *Grant v. Secretary of HHS*, 956 F.2d 1144, 1147 (Fed.Cir.1992). Thus, in the case of a petition involving a Table injury where the claim is denied on statute of limitations grounds, virtually the only question to be answered on a compensation claim for attorneys' fees will be whether there was a good faith basis for arguing either that the statute of limitations had been complied with or that noncompliance should have been excused on the basis of equitable tolling. In all such cases, the special master will necessarily have to consider the facts underpinning the Secretary's statute of limitations argument in order to determine that the claim is time barred. Thus, no additional or burdensome "shadow trial" will be required

to determine whether the claimant nevertheless had a good faith or reasonable factual basis for bringing her petition outside of the limitations period: The facts and law that will have to be considered in ruling that a claim is time-barred will be identical to the facts and law that will have to be considered in determining whether the petition nevertheless was brought in good faith or with a reasonable basis in fact.

Second, and in the case of non-Table injuries, the dichotomy that underlies the Secretary's "shadow trial" argument — where statute of limitations determinations are portrayed as being entirely separate and distinct from an analysis of the merits of a claim — simply does not exist. In order to recover for a non-Table injury, a claimant is required to prove "cause in fact", to wit, that her injury was caused by a previously-administered vaccine. *See, e.g.*, § 300aa-11 (c) (1) (C) (ii); *Grant,* 956 F.2d at pp. 1147-48. In order to evaluate whether a petition has been filed within the applicable statute of limitations, the special master must determine whether a petition has been filed, "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 [a vaccine-related] injury. § 300aa-16 (a) (2).

In order to determine when the "first symptom" or "manifestation of onset" or "significant aggravation" of a vaccine-related injury occurred, the special master must necessarily determine what that injury is, whether it was caused by a vaccine, and what its symptoms, manifestations and/or aggravations are. The special master must then determine what the facts of a particular case say about each of those things. All of

which is to say: In order to determine when the statute of limitations on a particular claim has expired, one must consider in detail the facts underlying the merits of that claim, as Dr. Cloer's case itself amply demonstrates.

The chief special master's decision dismissing Dr. Cloer's petition correctly noted that "the sole issue presented at this stage of the proceedings is whether Dr. Cloer's Petition . . . was filed within '36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.' § 300-aa-16 (a) (2)." App. at 157a. And yet, the Decision went into minute detail about the nature of Dr. Cloer's injury, her medical history and diagnosis, the expert testimony submitted in support of her petition and host of other matters. See App. 157a-164a, 168a-173a. It was only "[a]fter considering the entire record and the parties' respective arguments", that the chief special master was in a position to conclude that "this case must be dismissed as untimely." App. 168a. Why? Because, as the special master explained, "the medical records, petitioner's affidavits, as well as Dr. Meyer's affidavits and testimony [established] that the first symptom of the onset of Dr. Cloer's [injury] was in 1997." *Ibid.*

The Secretary fears that "[p]roceedings 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 provisions [because s]uch proceedings would typically include review of the claimants medical records, development of expert testimony, and briefing to

the special master." Petition at 13.

As this case demonstrates, that fear is unfounded: "[M]uch of the effort that actually deciding the claim would have entailed" was in fact required in order to rule upon the Secretary's own claim that Dr. Cloer's petition was barred by the statute of limitations, including "review of the claimant's medical records, development of expert testimony, and briefing to the special master[3]." Even more examination of the merits will take place in the examination of equitable tolling, as required by the new doctrine announced below.

Third, and for similar reasons, there is no merit to the Secretary's claim (Petition at 14) that these "shadow trial[s] would be thoroughly unappealing to the claimant herself" because they will require "the claimant to further expose her medical records (and perhaps herself) to expert examination . . . [while] produc[ing] no tangible benefit for the claimant herself, only for her lawyer." As the Secretary well knows, the Vaccine Act provides that all petitions "shall contain," among other things, "maternal prenatal and delivery records, newborn

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[3]Curiously, the Secretary cites *Smith v. Secretary of HHS,* 2006 WL 5610517 (Fed. Cl. July 21, 2006), as a case that "aptly illustrates the problem the court of appeals' decisions creates." Petition at 15. But the Secretary's own discussion of the case illustrates the fact that, in order to conclude that Smith's petition was barred by the statute of limitations, the special master was required to carefully evaluate the facts underlying Smith's petition. Thus, just as occurred in this case below, the special master's statute of limitations rulings in *Smith* required an intimate familiarity with the facts of the case. Asking the special master to determine whether those facts furnished a reasonable basis for filing Smith's petition is not too much to ask.

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 . . ." 42 U.S.C. §300aa-11 (c) (2).

Thus, it is not a request for payment of fees that "expose[s a claimant's] medical records," as the Secretary claims, it is the very fact of filing a petition that does so. As far as the Secretary's assertion that a claim for fees sought in connection with a petition that denies compensation provides no "tangible benefit to the claimant herself, only her lawyers," it is enough to say that all potential claimants benefit from the existence of a qualified bar willing to bring claims under the Vaccine Act even when the success of those claims is not guaranteed. The fees and costs scheme of the Act is designed "to ensure that vaccine-injury claimants will have readily available a competent bar to prosecute their claims under the Act." *Saunders v. Secretary of HHS*, 25 F.3d 1031, 1035 (Fed.Cir.1994). *See also Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1672 (2010) (fees must be "sufficient to induce a capable attorney" to undertake a case).

Fourth, the Secretary warns that the Federal Circuit's decision "is likely to increase the number of untimely Vaccine Act petitions" which will "impede the prompt resolution of meritorious claims for much-needed compensation." Petition at 24-5. The Secretary acknowledges that this fear is entirely speculative (id. at

24), and this hardly furnishes the sort of "consequences [that] are sufficiently serious to warrant this Court's intervention," as the Secretary asserts. *Id.* at 23.

3. The Canons Of Statutory Construction Cited By The Secretary Furnish No Support For Her Interpretation Of The Act.

The Secretary argues that her interpretation of the Vaccine Act finds additional support in the notion that, "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." Petition at 7. However, this rule of "strict construction" is but one canon of statutory construction, and it is not implicated where, as here, traditional canons of statutory construction (like those discussed in Part 1 above) resolve any purported statutory ambiguity. *Richlin Sec. Service Co. v. Chertoff,* 553 U.S. 671, 590 (2008) ("[T]raditional tools of statutory construction and considerations of stare decisis compel the conclusion that paralegal fees are recoverable as attorney's fees at their prevailing market rates. There is no need for us to resort to the sovereign immunity canon because there is no ambiguity left for us to construe.") (internal citations and quotations omitted).

Moreover, it is questionable whether the Vaccine Act involves a true waiver of sovereign immunity to being with. This Court has long recognized that traditional rules involving sovereign immunity are "inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986) (citing *Standard Oil Co. v.*

United States, 267 U.S. 76, 79 (1925)). The Vaccine Act establishes a consumer-funded insurance system that replaces traditional civil tort actions against manufacturers of covered vaccines. *See* Joint Committee on Taxation, Issues Arising in the Determination of an Appropriate Funding Source for The National Childhood Vaccine Injury Program (JCS-4-87), March 4, 1987 at 2 (explaining that the Vaccine Act program was created "as an alternative source of compensation to civil tort actions against manufacturers of the prescribed vaccines .... [and] substitutes a Federal insurance system for the existing State-law tort and private insurance system") (emphasis added).

Moreover, such compensation funds are "treated as a trust fund" and have "the same characteristics as any insurance carrier." Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* §10:12 (3d ed.1995). As such, "[i]t is common that pursuant to such statutes the fund . . . will not be entitled to sovereign immunities that would not be afforded to private insurance carriers." *Ibid. See Standard Oil Co.*, 267 U.S. at 79 ("[w]hen the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business"). *Compare Sandia Oil. Co. v. Beckton*, 889 F.2d 258, 263-64 (10th Cir.1989) (holding that FEMA's flood insurance program was not a "commercial enterprise" defeating claims of sovereign immunity because, "[t]he flood insurance program was intended from the beginning to be, not a commercial enterprise, but rather a subsidized insurance program . . . designed to accomplish important national goals at some cost to the national treasury") (emphasis added).

The Secretary also argues that courts should show "particular hesitation" before concluding that the Vaccine Act permits the payment of fees incurred in connection with time-barred claims because the Vaccine Act's "remedial provisions" will "expose[] the United States to much more expansive potential fee liability". Petition at 18-19. This claim is doubly wrong.

The Act's remedial nature does not counsel hesitation and strict construction, it mandates a liberal construction. *See, e.g., United States v. An Article of Drug*, 394 U.S. 784, 798 (1969) (recognizing "the well-accepted principle that remedial legislation . . . is to be given a liberal construction consistent with the Act's overriding purpose to protect the public health")[4]. Second, and as noted above, no payments made under the Vaccine Act — whether payments for compensation to an injured petitioner or the payments of attorneys' fees and costs — create any true "liability" to the United States. See, infra, footnote 1. The United States merely administers a Trust Fund that is privately funded in its entirety. And to any extent the Secretary is suggesting that the payment of attorneys' fees incurred in connection with time-barred petitions brought in good faith might jeopardize the solvency of the fund, the claim is absurd[5].

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[4]The majority below noted this same important doctrine, that remedial legislation should be "construed in a manner that effectuates its underlying reason and purpose. App at 8a (citing *Atchison, Topeka and Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 561-62 (1987)).

[5] As noted, the Trust Fund established under the Act is well funded. *See, infra,* footnote 1. In addition, while the Secretary seems to fear a flood of litigation involving time-barred claims brought by lawyers enticed by the promise of recovering their fees and costs, that fear is not well founded. The

(continued...)

Third, and finally, the Secretary argues "that ambiguous language in federal fee-shifting provisions should be construed . . . to limit the length and complexity of fee litigation," and in support, the Secretary cites a case in which this Court adopted a deferential standard of review of a district courts' fee determinations in order to purse that objective. Petition at 18 (citing *Pierce v. Underwood*, 487 U.S. 552, 563 (1988)). Although the Secretary hazards no opinion about the standard of review that should be applied to fee determinations under the Vaccine Act, the Secretary asserts that the principle of *Pierce* "is directly applicable here." Petition at 18. But, the Secretary cites no authority, and Dr. Cloer is aware of none, that supports the idea that the payment of attorneys' fees should be precluded as a matter of law because doing so has the virtue avoiding the "complexity" involved in determining what the amount of such awards should be.

CONCLUSION

The Federal Circuit's ruling that the Vaccine Act permits the payment of attorneys' fees incurred in any proceedings brought under the Act, including

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(...continued)

Federal Circuit's decision makes clear that both a claim for compensation and arguments about the timeliness of a claim must be brought in good faith and with a reasonable basis in fact. App. at 5a. And, to the extent the Secretary's fear is premised upon the opportunities created by the Federal Circuit's earlier recognition that equitable tolling is available under the Act, we note simply that the availability of equitable tolling is, according to the Circuit, exceptionally limited. App. at 65a-66a (concluding that Dr. Cloer's petition was not subject to equitable tolling because she had made no showing that, "she has been the victim of a fraud, or of duress" and noting that its holding "sharply limits" the ability to bring time-barred claims under the Act).

proceedings where no award of compensation is made because a petition is deemed to be time barred, is correct and consistent with the plain language of the Act. There is no reason for this Court to review that decision.

Moreover, even if the Federal Circuit's decision could create the practical difficulties envisioned by the Secretary, this Court has no reason to review this case, which presents none of them. The merits of Dr. Cloer's petition were not contested below by the Secretary.

The Secretary's Petition should be denied.

Respectfully submitted, October, 2012

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