No. 12-236

In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MELISSA CLOER

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

REPLY BRIEF FOR THE PETITIONER

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functioning of the Compensation Program. The petition for a writ of certiorari should be granted to correct the court of appeals' serious error.

A. Respondent's Sole Textual Argument In Support Of The Court Of Appeals' Ruling Is Unpersuasive

Respondent acknowledges that the relevant textual question in this case is whether "an untimely Vaccine Act petition is a petition filed under 42 U.S.C. 300aa-11." Br. in Opp. 5 (quoting Pet. 11) (internal quotation marks and brackets omitted). As the certiorari petition explains (at 11), an untimely Vaccine Act petition is not "a petition filed" under that section because the limitations provision says it is not: "*no petition may be filed* for compensation under the Program" after the expiration of the applicable time period. 42 U.S.C. 300aa-16(a)(2) (emphasis added).

In contesting this straightforward reading of the Vaccine Act, respondent relies solely (Br. in Opp. 6-8) on the fact that 42 U.S.C. 300aa-11(a)(2)(A) (which addresses the circumstances under which a civil action may be filed 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 infers from that distinction that Congress must have intended the first of those provisions, but not the second or third, to depend on compliance with the limitations provision. That inference is unfounded.

To begin with, respondent's argument proves too much. Section 300aa-11(a)(2)(A) is one of only a handful of provisions in the Vaccine Act with an express cross-reference to the limitations provision. If an express

cross-reference to the limitations provision were needed to trigger its application, the provision would be irrelevant 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, and the court of appeals' error becomes clear, when the limitations provision and other provisions of the Vaccine Act are read as the government urges. See Pet. 19-20.

Respondent is also mistaken in contending that, other than her reading, "there is no way to reconcile" (Br. in Opp. 7) the express cross-reference in Section 300aa-11(a)(2)(A) with the absence of a similar cross-reference in other provisions. The various provisions respondent points to are written differently because they serve different functions. Unlike the other provisions respondent cites, Section 300aa-11(a)(2)(A) establishes a prerequisite to specified suits "in a State or Federal court." The express cross-reference to the Vaccine Act's limitations provision demonstrates that preemption of any contrary state-law rule governing the same question was "the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In any event, 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 Sch.* v. *FLRA*, 495 U.S. 641, 646 (1990)). At a minimum, the court of appeals' interpretation of the Vaccine Act is not so "plain" (Br. in Opp. 9) that this Court should ignore the canons of construction (see pp. 4-5, *infra*) and structural features of

the statute (see pp. 6-11, *infra*) that cut so sharply against that interpretation and in favor of the government's reading.

B. Applicable Canons Of Statutory Construction Support The Government's Interpretation, And Respondent's Contrary Arguments Lack Merit

As the certiorari petition explains (at 16-19), three relevant canons of statutory construction confirm that the Vaccine Act does not permit an award of attorneys' fees and costs on an untimely petition. Respondent entirely fails to address one of those canons—that the Vaccine Act's fee-shifting provision departs so significantly from background principles that a court "should be cautious in interpreting the statutory mandate to extend beyond those cases in which fee-shifting was clearly intended," Pet. App. 19a (Bryson, J., dissenting). With respect to another canon, respondent states that she knows of "no authority * * * that supports the idea that the payment of attorneys' fees should be precluded * * * [to] avoid[] the complexity involved in determining * * * such awards." Br. in Opp. 18 (internal quotation marks omitted). But this Court has made clear that, as between an interpretation of a fee-shifting statute that will "result in a second major litigation" and one that will not, the latter is to be preferred. *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

Finally, in response to the government's invocation of the principle that the scope of a waiver of sovereign immunity should be strictly construed, respondent "question[s] whether the Vaccine Act involves a true waiver of sovereign immunity to be[gin] with." Br. in Opp. 15. Respondent relies on the fact that excise taxes paid on each dose of a covered vaccine (26 U.S.C. 4131) are deposited into the Vaccine Injury Compensation

Trust Fund (Compensation Fund) in the Treasury (26 U.S.C. 9510) that is used to pay awards under the Compensation Program (42 U.S.C. 300aa-15(f)(4)(A)). Respondent contends 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 to claimants to "provide for the * * * general Welfare of the United States," *ibid.* The status of the Compensation Program as a waiver of sovereign immunity is confirmed by the statutory requirement that any suit for compensation under the Program be filed against the Secretary of Health and Human Services in her official capacity. 42 U.S.C. 300aa-12(b)(1); see Pet. 3, 16. The Compensation Program's structure is thus thoroughly distinguishable from the "policies of insurance issued by the Government" at issue in *Standard Oil Co.* v. *United States*, 267 U.S. 76, 76 (1925), the case on which respondent relies (see Br. in Opp. 15-16).[1]

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[1] To the extent that respondent relies on the label "Trust Fund" (see Br. in Opp. 1 n.1, 16) to suggest that the Compensation Fund is different from most other federal funds, she is mistaken. 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

C. Respondent Offers No Sound Reason To Doubt That The Court Of Appeals' Decision Will Have Significant Adverse Consequences For The Compensation Program

As the six dissenting judges below explained, because Vaccine Act fees are available only for petitions brought in good faith and with a reasonable basis, a special master addressing a fee request for a petition dismissed as untimely 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. The petition for certiorari explains (at 12-16) how complex, wasteful, burdensome, and unpleasant such shadow trials could be. The profound mismatch between those shadow trials

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("Establishment of Trust Funds"), but such funds are generally an accounting and appropriations mechanism, and very few are actually held *in trust* for someone other than the United States. 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 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.

and the Vaccine Act's 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)), both signals that the decision below is incorrect and highlights a fundamental programmatic distortion that warrants correction by this Court.

1. Respondent acknowledges that a fee award on an untimely petition would necessitate the determinations that the dissent below foresaw being made in shadow trials. See Br. in Opp. 17 n.5 (citing Pet. App. 5a). Respondent contends, however, that such proceedings will not in practice be necessary or burdensome. Respondent's arguments are unpersuasive.

First, respondent contends that, "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 [that the claim was timely]." Br. in Opp. 10.[2] But that begs the central question whether the claimant had a reasonable basis for asserting that an injury falls within the parameters of the Table. That issue is often disputed in claims adjudicated on the merits, and it similarly would be the subject of a shadow trial when a putative Table claim is dismissed as untimely.

An apt example is the Vaccine Act proceeding that preceded the civil litigation that culminated in this

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[2] Under the Act, causation is rebuttably presumed when the claim is based on an injury specified in the Vaccine Injury Table, while the claimant must establish causation if the claim for injury falls outside the parameters of the Table. See Pet. 3. The former are often referred to as "Table claims" and the latter as "non-Table claims."

Court's decision in *Bruesewitz*. There, the vaccine recipient suffered seizures and claimed, *inter alia*, to have suffered an acute encephalopathy (a Table injury for the vaccine in question). After extensive testimony and analysis of her medical records revealed that the claimant was alert and active between seizures (behavior inconsistent with a diagnosis of acute encephalopathy), the special master rejected the Table claim. *Bruesewitz* v. *Secretary of HHS*, No. 95-266V, 2002 WL 31965744, at *12 (Fed. Cl. Dec. 20, 2002). If the Vaccine Act claim in *Bruesewitz* had been rejected as untimely, similar testimony and analysis would have been required to determine whether there was a reasonable basis for a Table claim.

Second, respondent posits that no further effort will be required to decide whether an award of attorneys' fees and costs is appropriate after a petition is dismissed as untimely because "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." Br. in Opp. 12. At least in the usual case, however, the very nature and purpose of a limitations defense is that it *avoids* inquiry 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). The threshold limitations decision therefore ordinarily will be uninformative on the question whether there was a reasonable basis for the claim on the merits.

Typically, a special master conducting a limitations analysis need only 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). In respondent's case, "[t]he sole issue presented" to the special master concerned the date of respondent's first

symptom of multiple sclerosis (MS). Pet. App. 157a; see *id.* at 168a. The parties did not litigate, and the special master was not called upon to decide, whether there was a reasonable basis for believing that a Hepatitis-B immunization caused respondent's MS. The same will be true of any other non-Table claim dismissed as untimely; the question whether the claimant's injury was caused by a vaccine will call for evidence and expertise quite different from that required to decide when the injury first manifested.[3]

Third, respondent contends (Br. in Opp. 13-14) that, because 42 U.S.C. 300aa-11(c)(2) already requires a petition for compensation to include the claimant's medical records, a shadow trial will not be an additional burden on the claimant. But the potential burden on a claimant and her family often goes beyond the mere submission of records. See, *e.g.*, *Bruesewitz*, 2002 WL 31965744, at *8 (discussing testimony by vaccine recipient's parents). And even as to medical records, when a petition for compensation is dismissed as untimely, subsequent fee proceedings will require *further* scrutiny of those records by causation experts on both sides of the case, for an opinion on whether the claimant's injury was caused by a vaccine, all with no possibility of producing a tangible benefit for the claimant. See Pet. 14. And in any event, respondent's contention fails to address the

[3] Respondent's assertion that the timeliness inquiry will turn on "whether [a claimant's injury] was caused by a vaccine," Br. in Opp. 11, is particularly unfounded. The panel below held that limitations and causation issues were intertwined such that medical recognition of a causal link was a prerequisite to the running of the limitations period. Pet. App. 95a-102a. The en banc court overruled the panel on precisely that point, however, see *id.* at 51a-57a, and this Court denied respondent's petition for a writ of certiorari seeking further review of that issue, 132 S. Ct. 1908 (2012) (No. 11-832).

larger problem that, under the decision below, the Compensation Program's resources must be diverted away from adjudicating claims for compensation on the merits, and toward conducting shadow trials to decide attorneys' fee applications in untimely cases.

2. Respondent asserts that the prospect of shadow trials is "utterly speculative," Br. in Opp. 8-9, but she fails to identify anything conjectural about the government's concerns. All agree that some Vaccine Act petitions are dismissed as untimely. The decision below holds that an award of attorneys' fees and costs is nonetheless available for such petitions. The availability of such an award in a particular case is contingent on particular findings about the hypothetical merits of the underlying claim, but those findings will not be evident from a proceeding that has considered only when the claimant's injury first manifested. Some collateral proceeding for making those findings will therefore be required, and that proceeding will entail the same type of inquiry that actually deciding the claim would have involved. The practical consequences of the decision below are so apparent that not even the en banc majority disputed them; the only point of disagreement below was whether Congress intended those consequences.

Moreover, as the petition for certiorari explains (Pet. 24-25), the inducement of a fee award to claimants' counsel is likely to increase the number of untimely Vaccine Act petitions, further distorting the Compensation Program. Respondent contends (Br. in Opp. 17 n.5) that the limitation of fee awards to petitions that had a reasonable basis on the merits will keep this unproductive incentive in check. But an untimely petition that advances a reasonable position on the merits is still untimely, and it fails to advance the Vaccine Act's goal

of delivering compensation to those entitled to it. Respondent also notes that "the availability of equitable tolling is * * * exceptionally limited." *Ibid.* If anything, that fact underscores the government's concerns because it increases the likelihood that claimants will advance reasonable but unsuccessful tolling arguments, leading to swiftly denied claims for compensation, followed by extended fee proceedings to assess the reasonableness of the claimant's (hitherto unadjudicated) arguments for relief on the merits. Diversion of the Compensation Program's resources to those collateral proceedings is inconsistent with the Vaccine Act's text and would disserve Congress's objectives.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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