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

BRIEF *AMICUS CURIAE* OF ELIZABETH BIRT CENTER FOR AUTISM LAW AND ADVOCACY, *et al.* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the Vaccine Act[1] prohibit attorneys from being paid when they bring reasonable, good faith claims that a court ultimately finds to be untimely?

1. The Vaccine Act, which established the Vaccine Injury Compensation Program, is located at 42 U.S.C. §§ 300aa-1 *et seq.* For convenience, future references will be to the "Vaccine Act," the "Act" or the "Vaccine Program." Individual sections to the Act will include only the section number.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The *amici* respectfully submit this brief *amicus curiae* in support of Respondent Melissa Cloer[1] pursuant to Supreme Court Rule 37. The organizations that have signed this brief seek that the Court decides this case impartially and in keeping with Congressional intent. A full list of the *amici* is attached as Exhibit A. All the undersigned organizations understand that Congress intended to create a generous program to compensate the innocent victims of vaccine injury. This generosity included the right to have competent counsel.

Many of the organizations advocate for the ethical principle of informed consent to vaccination, as every vaccination potentially carries the risk of injury or death. Several organizations advocate for the rights of individuals with autism spectrum disorders, which have been associated with vaccine injury. Others highlight the risks of mercury in all medicines, including vaccines. The *amici* all interpret the Vaccine Act to require attorneys to be paid when they bring good faith, reasonable claims, even if a court ultimately finds them to be untimely. This interpretation best reflects Congress' generous intent.

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1. Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The plain language of the Vaccine Act provides that special masters pay attorneys' fees and costs to unsuccessful petitioners if the petitions were filed in good faith and on a reasonable basis. The statute does not limit attorneys' fees to timely petitions.[2]

Due to the often subtle and confusing nature of the onset of vaccine injury symptoms, the exact date of onset is often unknown and heatedly contested. *See Wilkerson v. Sec'y of HHS*, 593 F.3d 1343 (Fed. Cir. 2010). Congress intended that petitioners have competent counsel to address such complex issues at every step in the proceedings – even when making good faith, reasonable arguments at the outset as to whether petitions are timely filed.

Remedial legislation created the Vaccine Injury Compensation Program (Vaccine Program). *See Cloer v. Sec'y of HHS*, 654 F.3d 1322, 1350 (Fed. Cir, 2011) (noting the "remedial nature" of the Vaccine Program). Congress sought to promote the nation's public health by limiting civil lawsuits against vaccine manufacturers. A key part of the Congressional scheme was to provide generous compensation for those inadvertently injured by vaccines. *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1079 (2011) (describing the Vaccine Program as a "generous compensation scheme").

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2. *Amici* acknowledge that the reasons for an untimely filing may well be relevant to whether the filing was in good faith and had a reasonable basis.

There is nothing generous in requiring parents of vaccine-injured children to pay attorneys to argue legitimate timeliness claims. Certainly, Congress did not intend to limit access to the Vaccine Program to those who could afford to pay the "entry fee."

Congress did not intend that access to the Vaccine Program be limited only to those with the funds to compete with a formidable opponent. The Secretary of Health and Human Services and the Department of Justice vigorously defend against vaccine injury claims. They often hire many scientific and medical experts to testify as to when the onset of symptoms occurred for purposes of determining whether a claim was timely filed.[3] For example, in *Cedillo v. Sec'y of HHS*,[4] a petitioner claimed that she suffered brain damage and autism as a result of vaccination. To defeat her claims, the government provided twenty-two (22) different physicians and scientists to testify. *Id.* Clearly, Congress did not intend that access to the Vaccine Program be limited to those with sufficient financial resources to compete with a formidable opponent. Instead, as the Federal Circuit recently emphasized, "[O]ne of the underlying purposes of the Vaccine Act was to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims." *Avera v. Sec'y of HHS*, 515 F.3d 1343, 1352 (Fed. Cir. 2008).

Denial of payment for attorneys' fees and costs in good faith, reasonable cases would undoubtedly have a chilling

3. *See Wilkerson v. Sec'y of HHS*, 593 F.3d 1343 (Fed. Cir. 2010).

4. 617 F.3d 1328 (Fed. Cir. 2010).

effect on the Vaccine Program. It would drive lawyers away from representing clients in the Program; it would push legitimate vaccine injury cases into the civil courts; it would increase the number of *pro se* claimants; and in direct conflict with congressional intent, would likely undermine public confidence in federal vaccine policy. Finally, the Court of Federal Claims has clear jurisdiction to award, or deny fees in untimely filed cases, in contrast to Petitioner's contention.

ARGUMENT/REASONS TO DENY THE WRIT

1. Statutory Interpretation Supports Payment of Attorneys' Fees In Cases Where a Petition is Filed in Good Faith and With Reasonable Basis

A. Plain Meaning of § 15(e)(1)

The Vaccine Act's plain language permits the payment of attorney's fees "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." § 15(e)(1). Good faith and reasonable basis are the ***only*** limitations for attorneys' fees. No language in the statute prohibits payment of attorneys' fees if a court ultimately finds a claim to be untimely. The statute prohibits only petitions filed in bad faith or without a reasonable basis.

The exact timing of the onset of vaccine injury symptoms may be extremely difficult to ascertain.[5]

5. Unlike § 16(a)(3), which establishes a clear filing deadline of two years in vaccine-related death cases, § 16(a)(2) provides an unclear deadline. It is 3 years after the "occurrence of the first symptom or manifestation of onset . . .of such injury. . . ."

Indeed, many autistic children currently processing claims in the Vaccine Program face precisely this issue. Many require substantial legal proceedings simply to determine whether their petitions were timely filed. As Judge Futey noted:

> [T]he beginning stage of autism cannot be reduced to a single, identifiable symptom. . . .Many of the initial 'symptoms' are subtle and can easily be confused with typical childhood behavior. . . .Where there is no clear start to the injury, such as in cases involving autism, prudence mandates that a court addressing the statute of limitations not hinge its decision on 'the occurrence of the first symptom.'

Setnes v. Sec'y of HHS, 57 Fed.Cl. 175, 179 (USCFC 2003).

Congress sought to give such petitioners the financial resources to argue timeliness issues and to keep these claims out of state and federal civil courts.[6]

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6. In *Brice v. Sec'y of HHS,* 240 F.3d 1367 (Fed. Cir. 2001) ("*Brice I*"), Judge Dyk perspicaciously observed, "We need not decide in this case whether a petitioner who fails to file a timely petition under the Program may still pursue traditional tort remedies." *Brice*, 240 F.3d at 1368. The answer to this question is both relevant and important. Certainly, vaccine manufacturers will argue that untimely filings by autistic children in the Program will cut off traditional state tort remedies. Indeed, the number one purpose of the Vaccine Act is to shield vaccine manufacturers from lawsuits. However, *amici* point out, all fifty (50) states toll statutes of limitations for minors and for brain-damaged individuals. It is inconceivable that congress would have intended such a sweeping preemption of the rights of children and mentally handicapped persons without a single word in the statute. What does the statute

B. Congress Intended to Pay Attorneys' Fees for Petitions Filed In Good Faith and With Reasonable Basis

Prior to the existence of the Vaccine Program, civil lawsuits against vaccine manufacturers abounded. When vaccine manufacturers threatened to stop making vaccines due to the crippling costs of litigation, the nation's health programs were also threatened and a crisis ensued. Congress responded by establishing the Vaccine Program in 1988 to ensure the availability of existing vaccines and to encourage the development of new ones. Congress accomplished this by prohibiting lawsuits against vaccine manufacturers and by requiring that people claiming vaccine injuries first present their claims in the Vaccine Program. While Congress preserved the rights of claimants to file civil actions if the Vaccine Program failed to resolve their claims, Congress painstakingly designed the Program to minimize this likelihood. It designed a "no fault," generous Program. §§ 15(a)(1-4). The Vaccine Program was designed to be "less adversarial, expeditious, and informal [with]. . .flexible and informal standards of [the] admissibility of evidence." §§ 12(d)(2)(A) & (B). While permitting post-Program civil actions,

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say? The Vaccine Act expressly states that, except as otherwise provided, "State law shall apply to a civil action brought for a vaccine-related injury or death." § 22(a). The Vaccine Act does not provide that untimely petitioners in the Program forfeit all rights to civil litigation. Indeed, such an interpretation is incongruous with congressional intent and will be firmly rejected by state courts.

Congress made such actions more difficult by limiting theories of liability[7] and by requiring phased trials. § 23.

Congress' "principal findings" that led to the Vaccine Program are still relevant today. They are:

> 1. [t]he availability and use of vaccines to prevent childhood diseases is among the Nation's top public health priorities;
>
> 2. [t]he Federal government has the responsibility to ensure that all children in need of immunization have access to them and to ensure that all children who are injured by vaccines have access to sufficient compensation for their injuries; and
>
> 3. [p]rivate or non-governmental activities have proven inadequate in achieving either of these goals. . . .

H.R. Rep. No. 99-908, 99th Cong., 2d. Sess. page 5 (1986).

Thus, Congress stated, "two overriding concerns have led to the development of this legislation:

> (a) the inadequacy--from both the perspective of vaccine-injured persons as well as vaccine manufacturers--of the current approach to compensating those who have been damaged by a vaccine; and

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7. *See* § 22; *see also Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1079 (2011).

> (b) the instability and unpredictability of the childhood vaccine market. . . ."

Id. at 7.

To remedy these concerns, Congress created the Vaccine Program. Congress hoped the Vaccine Program would lessen the number of lawsuits against manufacturers. In so doing, it hoped the Vaccine Program would promote the "development of both new and improved vaccines. . . ." *Id.* at 4. It also hoped it would help to create, "a new system for compensating individuals who have been injured by vaccines routinely administered." *Id.* at 3. Congress intended awards to petitioners to "be made… quickly, easily, and with certainty and generosity." H.R. Rep. No. 99-908 at 18; U.S. Code Cong. & Admin. News 1986, page 18.

Congress also intended that the Program itself pay attorneys' fees and costs, not petitioners. For this reason, § 15(e)(3) prohibits attorneys from receiving compensation "in addition to" that provided by the Program. However, Congress said, "The Committee. . . .intends that the court make adequate provision for attorneys' time and that the court exercise its discretion to award fees in non-prevailing, good faith claims." H.R. Rep. No. 99-908 at 22. There is no mention of timeliness.

Congress sought to make the Program attractive by relieving petitioners of the onerous burden of contingent attorney fees and extraordinary case expenses. The Program pays reasonable attorney fees for petitions filed in good faith with a reasonable basis. §§ 15(e)(1) & (3).

This brief, however, is not about attorneys' fees. It is about an interpretation of the Court's jurisdiction in a way that promotes, not undermines, congressional intent. It is about minimizing lawsuits against vaccine manufacturers. As Justice Souter noted:

> For injuries and deaths traceable to vaccinations, the Act establishes a scheme of recovery designed to work faster and with greater ease than the civil tort system. H. R. Rep. No. 99-908, pp. 3-7 (1986). Special masters in the Court of Federal Claims hear vaccine-related complaints, 42 U.S.C. § 300aa-12(c) (1988 ed., Supp. V), which they adjudicate informally, §300aa-12(d)(2), within strict time limits, §300aa-12(d)(3)(A), subject to similarly expeditious review, §300aa-12(e)(2). A claimant. . .must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any *de novo* civil action in state or federal court. 42 U.S.C. § 300aa-11(a) (1988 ed. and Supp. V).

Shalala v. Whitecotton, 514 U.S. 268, 269-270 (1995) (emphasis added).

Simply put, Congress' primary purpose in establishing the Vaccine Program was to promote the nation's health by protecting its current supply of vaccines and by encouraging the development of new vaccines.[8] *See* H.R.

8. Since the Vaccine Program was established, the following vaccines have been developed and added to the Vaccine Table: Diphtheria-Tetanus-acellular-Pertussis ("DTaP") vaccine;

Rep. No. 99-908, 99th Cong., 2nd. Sess. (1986). Due to the "no fault," informal and generous nature of the Program, Congress intended that most, if not all, claims for vaccine-related injuries would be resolved in the Program without resort to civil litigation.

C. Congress Intended that Petitioners Have the Resources to Compete Against a Formidable Opponent

Few would argue that there is already a significant tilt in the Vaccine Program in favor of the Secretary of Health and Human Services and the Department of Justice. They prevail in the overwhelming majority of cases. They have greater funds, experience, access to experts and access to science scientific data from the government than petitioners have. To threaten petitioners' counsel with non-payment of fees in good faith, reasonable cases will only further skew this already uneven playing field and further undermine public confidence in federal vaccine recommendations.

Few qualified attorneys are now willing to accept vaccine injury cases because they are exceedingly difficult to litigate. If the government prevails in this case, the Court of Federal Claims will undoubtedly have even more *pro se* litigants because counsel will be unwilling to take any but the most clear-cut cases.

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hepatitis B vaccine, *haemophilus influenzae* type B vaccine, varicella vaccine, rotavirus vaccine, pneumococcal conjugate vaccines, hepatitis A vaccine, trivalent influenza vaccine, and human pappillomavirus vaccine.

2. The Onset of Symptoms Is Often Subtle and Confusing

Scientists often do not know how vaccines cause injury. This lack of knowledge, combined with the introduction of new vaccines and evolving science, profoundly impacts any understanding of when an "onset" of symptoms occurs. Because of this lack of knowledge, the "preponderance" standard invites good faith debate between the parties. Petitioners with good faith, reasonable arguments have a statutory right to have their lawyers paid. As the Federal Circuit has noted, "[T]he purpose of the Vaccine Act's preponderance standard is to allow the finding of causation in a field bereft of complete and direct proof of how vaccines affect the human body." *Althen v. Sec'y of HHS*, 418 F.3d 1274, 1280 (Fed. Cir. 2005).

3. The Court has Jurisdiction to Award Fees in Untimely Cases

In *Brice I* and *Brice v. Sec'y of HHS*, 358 F.3d 865 (Fed. Cir. 2004)("*Brice II*"), the Federal Circuit ruled that the Vaccine Act is a waiver of sovereign immunity, and that courts have no subject matter jurisdiction to award fees in untimely cases. However, several decisions after *Brice II* by both the Federal Circuit and this Court indicate that "waivers of sovereign immunity" and "jurisdiction" are slippery concepts that are not well-defined. In the end, they are simply two of many tools courts use to interpret federal statutes. The primary tools, however, are plain language of the statute and Congressional intent.

For example, after *Brice II* was decided, the Federal Circuit ruled that a plaintiff's failure to timely file a claim

does *not* affect the subject matter jurisdiction of the Court of Federal Claims. *Venture Coal Sales Co. v. U.S.*, 370 F.3d 1102, 1105, n.2 (Fed. Cir. 2004). Thereafter, the Federal Circuit ruled "the Supreme Court has 'clarified that time prescriptions, however emphatic, are not properly jurisdictional.'" *Kirkendall v. Dept. of the Army*, 479 F.3d 830, 842 (Fed. Cir. 2007).[9]

Regarding the slippery concept of jurisdiction, this Court has indicated that "Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). This Court made a further distinction regarding how time limitations should be construed in terms of jurisdiction in *Eberhart v. U.S.*, 546 U.S. 12, 16 (2005). In *Eberhart*, this Court stated, "Our repetition of the phrase 'mandatory and jurisdictional' has understandably led the lower courts to err on the side of caution by giving [time] limitations. . .the force of subject-matter jurisdiction. *Id.* at 19.[10]

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9. In his dissent, Judge Dyk, who wrote the decision in *Brice II*, admittedly recognized that recent precedential "cases have admittedly clouded the 'jurisdictional nature' of time bars." *Id.* at 872.

10. This Court termed time limitations as "claim-processing rules, despite the confusion generated by the 'less than meticulous' uses of the term 'jurisdiction' in our earlier cases (citing *Kontrick*, 540 U.S. at 454)." *Id.* at 16.

The following year, this Court further clarified, "[I]n recent decisions we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional."'" *Arbaugh v. Y & H Corporation*, 546 U.S. 500, 510 (2006).[11] To rule out any question, this Court again addressed this issue, in *Day v. McDonough*, stating, "A statute of limitations defense is ***not*** jurisdictional. . . ." 547 U.S. 198, 199 (2006) (emphasis added).

The Federal Circuit's decision in *John R. Sand & Gravel Company v. U.S.*[12] demonstrated a clear difference of opinion among Federal Circuit judges with respect to subject matter jurisdiction and untimely filings. The Federal Circuit solely reviewed whether failure to meet the Tucker Act's six-year statute of limitations[13] deprived the Court of Federal Claims of subject matter jurisdiction. The majority opinion recognized that recent Supreme Court decisions have described time limitations as non-jurisdictional claim processing rules. *Id.* at 1354. However, the Court insisted, a plaintiff's failure to meet the Tucker Act's time limitation is jurisdictional and did deprive the Court of Federal Claims of jurisdiction to enforce the claim. *Id.* at 1346. In her dissent, Judge Newman cited a litany of decisions, many cited here, that explicitly state that the Court of Federal Claims' subject matter

11. Further explaining this Court's position, the majority stated, "We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Id.* at 511.

12. 457 F.3d 1345 (Fed. Cir. 2006).

13. Located at 28 U.S.C. § 2501.

jurisdiction is *not* affected by statutory bars to remedies, such as time limits.[14] *Id.* at 1362.

This Court agreed with the Federal Circuit's majority. It found the Tucker Act's statute of limitations to be jurisdictional. The Tucker Act, however, is not the Vaccine Act. The Tucker Act provides compensation for damages from government-mandated environmental remedial action. The Supreme Court's characterization of the Act's statute of limitations as jurisdictional was *consistent* with congressional intent. Nothing in the *John R. Sand & Gravel Company* ruling undermines the Congress' purpose of establishing the Tucker Act. The primary purpose of the Vaccine Act, on the other hand, is to resolve vaccine injury cases in the Vaccine Program, not in civil court. To deprive the Court of Federal Claims its power to implement provisions, such as § 15(e), designed by Congress to promote its goal of resolving vaccine injury cases in the Vaccine Program, is in direct conflict with congressional intent.

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14. Judge Newman cited, *inter alia*, "*Ariadne Fin. Servs. Pty. Ltd. v. U.S.*, 133 F.3d 874, 878 (Fed. Cir. 1998), ('the question of a time bar on [plaintiff's] claim does not affect the subject matter jurisdiction of the Court of Federal Claims'); *Henke v. U.S.*, 60 F.3d 795,798 n.3 (Fed. Cir. 1995) ('The raising of the statutory bar to a remedy does not, as such, deprive the court of jurisdiction to hear the cause in the first instance. Indeed, the court could not adjudicate the question of the proper application of the statute if it did not have subject matter jurisdiction over the claim'); [and] *Borough of Alpine v. U.S.*, 923 F.2d 170, 171 n.1 (Fed. Cir. 1991) (despite an untimely filing the 'Claims Court has and will continue to have jurisdiction over the subject matter of Contract Disputes Act cases')." 457 F.3d 1363.

This Court has recently confirmed this common sense approach. The Supreme Court stated, "The sovereign immunity canon is just that – a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." *Richlin Security Service Company v. Michael Chertoff, Sec'y of Homeland Security*, 128 S.Ct. 2007, 2019 (2008).

In this case, the doctrine of sovereign immunity should play no role. The plain language of § 15(e) of the Vaccine Act and Congress' intent remove all ambiguity. The Court of Federal Claims has jurisdiction to award fees and should do so.

CONCLUSION

The *en banc* decision of the U.S. Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — LIST OF *AMICI*

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Age of Autism (www.ageofautism.com)

Alan D. Clark, M.D. Memorial Research Foundation

Alliance for Human Research Protection (www.ahrp.org)

Autism Action Network (www.a-champ.org)

AutismOne (www.autismone.org)

The Canary Party (www.canaryparty.org)

The Center for Personal Rights (www.centerforpersonalrights.org)

Citizens for Health (www.citizens.org)

The Coalition for Safe Minds (www.safeminds.org)

Generation Rescue (www.generationrescue.org)

Maryland Coalition for Vaccine Choice (mdvaccinechoice.wordpress.com)

National Autism Association (NAA) (www.nationalautismassociation.org)

Appendix A

National Autism Association New York Metro Chapter (www.naanyc.org)

The Office of Medical & Scientific Justice (www.omsj.org)

Schafer Autism Report (www.sarnet.org)

Truth About Gardasil (www.truthaboutgardasil.org)

Unlocking Autism (www.unlockingautism.org)

Vermont Coalition for Vaccine Choice (www.vaxchoicevt.org)

We the Parents (www.wetheparents.info)