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IN THE SUPREME COURT OF THE UNITED STATES

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KATHLEEN SEBELIUS, SECRETARY OF :
HEALTH AND HUMAN SERVICES, :

Petitioner : No. 12-236

v. :

MELISSA CLOER :

- - - - - x

Washington, D.C.

Tuesday, March 19, 2013

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:14 a.m.

APPEARANCES:

BENJAMIN J. HORWICH, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of Petitioner.

ROBERT T. FISHMAN, ESQ., Denver, Colorado; on behalf of
Respondent.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-236, Sebelius v. Cloer.

Mr. Horwich.

ORAL ARGUMENT OF BENJAMIN J. HORWICH

ON BEHALF OF THE PETITIONER

MR. HORWICH: Mr. Chief Justice, and may it please the Court:

The Vaccine Act does not provide for an award of attorneys' fees on a petition that is denied as untimely. That's the best reading of the Act's text, it fits best with the structure and purposes of the Act, and it's the result that's consistent with the canons of construction that would apply to an award of attorneys' fees out of the Federal Treasury.

Now, the -- the textual question here in some sense begins with the statute of limitations, which is in Section 16 of the Act, and which provides that no petition may be filed outside the applicable time period.

Now, that provision, like most limitations provisions, doesn't itself actually say what the consequences of the failure to comply with the provision are. And in some sense, just as in the -- the civil

1 context, it's not as if the Special Master, upon finding
2 the limitations provision hasn't been complied with, can
3 go back in time and prevent the petition from being
4 filed, just as a civil court can't prevent an action
5 from being commenced, or a suit from being brought, or
6 whatever the limitations provision proscribes.

7 So the question really is going forward,
8 what -- what consequences should there be once the
9 adjudicator decides -- once he or the Special Master
10 decides -- that the limitations period has not been
11 complied with. And textually speaking, it's the
12 correspondence between the limitations provision, which
13 says that no petition may be filed, and the attorneys'
14 fee provision, which depends on the existence of a
15 petition filed, that signals that Congress intended the
16 consequences of untimeliness to be visited through the
17 application of the attorneys' fees provision --

18 JUSTICE SOTOMAYOR: Mr. Horwich --

19 JUSTICE GINSBURG: There are other -- there
20 are other provisions that refer to a petition filed.
21 For example, reporting annually to Congress, publishing
22 a notice in the Federal Register, those both refer to
23 any petition filed. And so in those sections at least,
24 petition filed would include petition filed after the
25 running of the statute of limitations.

1 MR. HORWICH: Well, those provisions
2 would -- those provisions by their terms apply at points
3 in the proceedings where we would entirely
4 conventionally accept the -- the claimant's
5 representation that the petition has been filed in
6 accordance with the time limitation. That's generally
7 true, certainly in the civil context, that we accept the
8 plaintiff's allegation.

9 JUSTICE GINSBURG: But don't you -- don't
10 you put in the Federal Register and report to Congress
11 petitions that had been filed out of time?

12 MR. HORWICH: Well, with respect to -- with
13 respect to reporting to -- to Congress, that's actually
14 an obligation from the Court of Federal Claims, so I
15 can't necessarily speak on their behalf of what they --
16 what they've produced. From what I've seen, it's a
17 statistical report.

18 JUSTICE GINSBURG: Well, think about the
19 Federal Register.

20 MR. HORWICH: The Federal -- with respect to
21 the Federal Register provision, I should first say that
22 it has very recently come to my office's attention that
23 the Department of Health and Human Services has not been
24 complying with that provision for the last few years,
25 and they are taking steps to bring themselves in --

1 JUSTICE GINSBURG: So they don't file
2 anything in the Federal Register?

3 MR. HORWICH: Well, it -- they -- they have
4 historically, and let me -- up till about 2009 -- and
5 again, to be clear, they're taking steps to rectify that
6 situation. But with respect to the period up to 2009,
7 what they would do -- and this is understandable given
8 the -- the provision that says it's supposed to be
9 published within -- and I believe it's 30 days, that
10 they -- the petitions that are received or that were
11 received at the Department get logged into a computer
12 database, and then a report gets printed out, and they
13 would cross-check them for accuracy against the petition
14 title and forward them to the Office of the Federal
15 Register.

16 It's not -- it doesn't -- it wouldn't make
17 sense in a provision that's supposed to be applied
18 essentially upon the filing of the petition, to go into
19 an examination of the timeliness of that -- of that
20 petition.

21 And so we think that provision, just as you
22 would -- just as you would describe in a civil context,
23 you would certainly say that an action that ultimately
24 proves to be held untimely was nonetheless commenced
25 if -- for example, if you imagine a statute of

1 limitations that says no action may be commenced, you
2 wouldn't say the action hadn't been commenced at the
3 time it was pending. And -- and that's not the argument
4 we're relying on here.

5 What -- rather, what we're relying on is the
6 fact that when you get to the end of the case, which is
7 where the attorneys' fee provision is evidently supposed
8 to apply because --

9 JUSTICE KAGAN: Mr. Horwich, could you say a
10 little bit more about the reporting to Congress
11 provision because that presumably does not happen at the
12 very beginning, but happens more at the end or in the
13 middle. So do -- does the Department subtract the
14 number of untimely petitions from the number that it
15 reports?

16 MR. HORWICH: I believe the -- the reporting
17 provision is a -- there's a report that the Special
18 Master is to make to the Court of Federal Claims, and
19 there's a report that the Court of Federal Claims is to
20 deliver and -- and those, from what I have seen --
21 again, the Executive Branch doesn't prepare those
22 because it's the Special Masters and the court that do,
23 but the reports that I have seen, my understanding is
24 that the report of the Special Master is delivered
25 orally to the judges, and so I don't actually know what

1 the contents of that are. And the report that -- and
2 the report that the Court of Federal Claims sends to
3 Congress is a statistical report of all -- actually, of
4 all actions filed in the Court of Federal Claims, that it
5 sends a kind of an omnibus report in satisfaction of --

6 JUSTICE KAGAN: All actions filed, using
7 "filed" in the normal sense.

8 MR. HORWICH: No, no. I actually mean all
9 actions filed meaning Vaccine Act actions and otherwise.
10 So it -- it actually doesn't even differentiate the
11 Vaccine Act --

12 JUSTICE KENNEDY: But is -- is the upshot of
13 your argument then that filing means different things
14 under different provisions of the Act?

15 MR. HORWICH: Well, I think it means --

16 JUSTICE KENNEDY: And if that's so, it tends
17 to weaken the force of your reliance on -- on filing in
18 the statute -- on the word "filing" in the statute of
19 limitations section.

20 MR. HORWICH: Well, I don't think it
21 means -- I don't think it means different things in the
22 Act so much as it means it -- it is to be applied with
23 the understand -- it is to be applied as the -- as a
24 fair stand at the time the provision is applied.

25 JUSTICE KENNEDY: Well, I meant -- I meant

1 that just to supplement Justice Kagan's question. I
2 didn't mean to cut it off.

3 MR. HORWICH: Well, let me -- let me focus
4 for a moment then on the attorneys' fee provision,
5 though, in terms of why -- why that is particularly good
6 reason to think that petitions -- a petition filed is to
7 be considered, in terms of what ought to have been done.
8 And that's because the -- the attorneys' fee provision
9 speaks as of -- it speaks of awards of fees at the time
10 of judgment. And so that time, we know that any
11 limitations issue should have been resolved by that
12 point in the case.

13 And therefore, it is -- it is an entirely
14 natural -- it's entirely natural to expect that the
15 limitations provision might therefore have some
16 consequences at that stage.

17 In some ways, you can think of it as an
18 application of the old maxim that equity regards as done
19 what ought to have been done.

20 So we're saying to the Special Master, well,
21 if you've gotten to the point at the end of the case
22 where there's a judgment, and you've determined that
23 this petition was forbidden from being filed, in the
24 sense that the limitations provision forbids it, then
25 you should visit the consequences there.

1 JUSTICE SOTOMAYOR: That sounds like a
2 jurisdictional argument to me. But I understand the
3 government to be conceding that this statute of
4 limitations is not jurisdictional. It's just a claim
5 processing move.

6 MR. HORWICH: Well, if it sounds like a
7 jurisdictional argument, then I suppose the answer would
8 be for this Court to say that it's jurisdictional, and
9 of course, if that's true, then our position -- our
10 position would prevail.

11 We think on balance, given this Court's
12 precedence most recently in the -- the Auburn Regional
13 Medical Center case, that these -- that this Court did
14 not interpret Congress's time limit provisions to be
15 endowed with jurisdictional significance. It doesn't
16 mean that it doesn't have any significance. It has the
17 significance of an ordinary affirmative defense, just as
18 it has the significance of the -- the timeliness
19 provision here just has the significance of an ordinary
20 affirmative defense, just as --

21 CHIEF JUSTICE ROBERTS: I just want to make
22 sure I heard you right. You said if it sounds
23 jurisdictional, we should say it is, and you win.

24 MR. HORWICH: Well, what I was saying --
25 what I was saying in response to Justice Sotomayor's

1 question is that if -- if it seems that that argument
2 compels you to believe that it's jurisdictional, then
3 the Court should reach the conclusion that it's
4 jurisdictional rather than --

5 CHIEF JUSTICE ROBERTS: But your conclusion
6 is that it is not jurisdictional.

7 MR. HORWICH: We think -- we think that it
8 is not -- we think that it is not, even if the text of
9 it makes it sound like it could have jurisdictional
10 significance, we think on balance, this Court's
11 precedents teach that time -- that time limits are
12 typically claim processing rules, and we don't think
13 that the text overcomes that view.

14 JUSTICE SOTOMAYOR: Assume I accept --

15 JUSTICE GINSBURG: So using Federal rules as
16 your model, and Federal rules list statute of
17 limitations as an affirmative defense. Ordinarily,
18 that's what it is. But is it an affirmative -- well,
19 certainly it's an affirmative defense to any award of
20 compensation under the Vaccine Act.

21 But what makes it an affirmative defense to
22 the award of fees?

23 MR. HORWICH: Well, it seems to -- there is
24 not anything in the compensation provision that says
25 that it's an affirmative defense any more than -- in any

1 way that's more explicit than what we're relying on to
2 say that it's an affirmative defense to attorneys' fees.
3 It's not as if Congress said there -- in another section
4 there shall be no award of future medical expenses when
5 the statute of limitations is not complied with, and it
6 left that out of the attorneys' fees.

7 That's not how the statute is structured.
8 So we're in a situation where I think we ordinarily are
9 with statutes of limitation, in trying to decide what
10 the consequences of noncompliance are --

11 JUSTICE SCALIA: Yes, one of -- one of
12 your -- your argument you were making is that there --
13 since the attorneys' fees provision looks to the end of
14 the case, it should not be construed to apply to the --
15 the failure to meet the filing deadline.

16 Is -- is that true? I mean, the statute
17 says if the judgment does not award compensation, on a
18 petition filed under Section 300aa-11 -- if the judgment
19 does -- is there no judgment when a -- when a case is
20 dismissed for failure to meet the statute requirement?

21 MR. HORWICH: It -- it seems to us that the
22 appropriate disposition of a case that is held to be
23 untimely is that there is a judgment denying
24 compensation. And the reasons for that have to do with
25 something that's not really briefed, but the operation

1 of the appellate provisions of the Act --

2 JUSTICE SCALIA: Wait, so --

3 MR. HORWICH: -- become confusing if you
4 treat a dismissal as something different.

5 JUSTICE SCALIA: Other than the judgment.
6 Okay. So then -- then your argument that -- that this
7 fee provision looks to the end of the case simply
8 doesn't fly. It looks to the beginning as well, if
9 indeed dismissal for failure to comply with the time
10 limit is a judgment.

11 MR. HORWICH: Well, we think -- we agree
12 that it's a judgment, but it -- but it has to be a
13 judgment, I'm looking here at page 26A of the appendix
14 to the government's brief, refers to the judgment of the
15 Court of Federal Claims on such a petition. And then
16 such a petition refers back to a petition filed --

17 JUSTICE SCALIA: Well --

18 MR. HORWICH: -- and so that's --

19 JUSTICE SCALIA: Okay. That's just
20 repeating your -- your first argument.

21 MR. HORWICH: Well -- I -- but I do think
22 that --

23 JUSTICE SCALIA: That petition means --
24 means a petition properly filed, but I don't see that
25 the -- that the statutory scheme, the provision that's

1 at issue here, the provision for the award of attorneys'
2 fees looks to the end of the case and not to the
3 beginning. It looks to the judgment. And if it's a
4 judgment that dismisses because of a failure to comply
5 with the statute, it's still a judgment.

6 MR. HORWICH: It's still a judgment, but it
7 is -- it is not a judgment in connection with a petition
8 that should be regarded as having been filed timely --

9 JUSTICE SCALIA: That's your first argument.
10 I understand.

11 MR. HORWICH: -- that is our first argument.
12 But let me say, it is also -- the -- the situation here
13 is not one in which we think that it's incumbent on the
14 government to -- to demonstrate clearly how Congress
15 wanted to withhold attorneys' fees. The canons of
16 construction here all caution the Court to be -- to be
17 extremely reluctant to extend or -- or find that
18 Congress is willing to pay attorneys' fees in -- in
19 this context. And that's for -- and that's for several
20 reasons.

21 JUSTICE SCALIA: Well, wait. Congress has
22 waived sovereign immunity. It's absolutely clear that
23 there's a waiver of sovereign immunity here.

24 MR. HORWICH: It's clear that there's a
25 waiver, but it's --

1 JUSTICE SCALIA: And once we find that, I
2 don't think we nitpick the following language to
3 unrealistically narrow it as much as possible. I mean,
4 the initial question of whether Congress has agreed to
5 be sued is, yes, we -- we assume it hasn't and -- and --
6 but -- but once it's clear that it has agreed to be
7 sued, I think we just interpret the language reasonable.

8 MR. HORWICH: Well, Your Honor, I -- I -- I
9 think this Court's decision certainly most recently in
10 the Cooper case, from a term or two ago, says that --
11 that this Court considers not only the existence but the
12 extent of the waiver of sovereign immunity to be
13 controlled by -- by canons that -- that counsel against
14 extending that -- extending that waiver.

15 But that's not the only issue here. Because
16 the consequences of -- of Respondent's rule are ones
17 that -- that are entirely out of place both with fee
18 proceedings in general and with this compensation
19 program in particular.

20 JUSTICE KAGAN: Mr. Horwich, before you go
21 to the consequences argument, just to keep on with the
22 text a little bit, is this understanding that you have
23 of what it means to be filed, does it have any
24 consequences other than with respect to attorneys' fees,
25 or is that the only thing that -- that depends on

1 viewing the word "filed" in this way?

2 MR. HORWICH: Well, I think viewing the word
3 "filed" in this way also explains mechanically why the
4 limitations issue becomes an affirmative defense on the
5 merits as well because Section 13 says compensation has
6 to be awarded on a record, and the record is defined as
7 the record on a petition filed. So similarly, if you
8 get to the end of the case or you get to the point of
9 limitations determination, the court says, well, there
10 shouldn't -- there shouldn't be -- there should not have
11 been a petition here, and so regarding -- regarding is
12 done what should have been done, we'll say there is
13 no -- there is no record available on that petition, so
14 we should deny compensation.

15 So I agree it's a little -- which I concede
16 is -- is not how we ordinarily think about statutes of
17 limitation, but it -- but it certainly is that -- it is
18 exactly the same textual logic in the --

19 JUSTICE SOTOMAYOR: I totally lost that
20 answer.

21 MR. HORWICH: Sure. I'm happy to step
22 through it in the statute itself.

23 JUSTICE SOTOMAYOR: Could you -- could you
24 go back and talk to me again about what you mean about
25 not having a record?

1 MR. HORWICH: Sure. So Section 13 of the
2 Act, which starts on page 19A of the government's brief
3 says that compensation is awarded "if the Special Master
4 report finds on the record" various matters.

5 But then it goes on, and this is on page 21A
6 in Section 13(c), to define the record as the -- as the
7 record established on a petition filed. And so in the
8 same sense that if the Special Master determines that
9 the limitations provision says, well, there shouldn't
10 have been a petition filed, the consequence is there is
11 not a basis for attorneys' fees. They're similarly in
12 this definitional provision not a basis for the record
13 on which compensation is to be awarded on the merits.
14 And that produces the result that we would expect, which
15 is that --

16 JUSTICE SOTOMAYOR: I'm totally confused.
17 Are you suggesting that the record shouldn't be filed in
18 that case or that the record supports the conclusion
19 that it was untimely? Or neither?

20 MR. HORWICH: What I'm -- what I'm
21 suggesting is -- what I'm suggesting is that when the
22 limitation -- when it's determined that the limitations
23 provision applies and should have prevented the filing
24 of the petition, and the Special Master has to decide,
25 well, what are the consequences of that. Because,

1 again, the Special Master can't go back and actually
2 prevent the whole thing from having happened, but the
3 Special Master can say, well, if this direct -- if this
4 directed that there shouldn't have been a petition
5 filed, then one of the consequences is there's no --
6 there's no record on which we should be able to decide
7 compensation.

8 JUSTICE ALITO: Well, as to the
9 consequences, let me give you these two cases. The
10 first is the case in which the petition is timely filed
11 and -- as you see it, but the claimant does not prevail
12 because the claimant is unable to prove that the injury
13 was caused by the vaccine, but there was a reasonable
14 basis for the argument and the argument was made in good
15 faith, so there would be eligibility for attorneys'
16 fees.

17 The second is a case in which there is a
18 question about when the statute of limitations begins to
19 run. And one of the points at which it can begin to run
20 is when there is the onset of significant aggravation of
21 an injury, which seems like a question about which there
22 could be a factual dispute. And in that situation as
23 well, the claimant does not prevail on the statute of
24 limitations argument, but there was a reasonable basis
25 for thinking that the petition was submitted within the

1 period after the -- the onset of this significant
2 aggravation.

3 Why would Congress want to draw a line
4 between -- a distinction between those two situations
5 for the purpose of attorneys' fees?

6 MR. HORWICH: Well, there's several reasons.
7 The first -- the first one is that in your -- in your
8 first example where there's been a determination on the
9 merits, the Special Master is in a perfect situation to
10 decide whether there was a reasonable basis on the
11 merits. And this is how -- this is how the program has
12 worked since its existence because to be clear, until
13 the decision below, there was no practice of awarding
14 attorneys' fees on untimely petitions in the -- in the
15 program.

16 And so what you would get would be
17 situations like your first example, Justice Alito, where
18 the Special Master would issue a -- a written decision
19 on entitlement and these are -- these are 10, 15, 20,
20 25 pages long in my experience, dealing in considerable
21 detail with the medical evidence, the scientific
22 evidence, the expert testimony, the review of
23 literature, the different theories of causation, and
24 getting to the end, and obviously, if the decision is that
25 compensation is to be awarded, then attorneys' fees

1 follow as a matter of right, but if compensation is
2 denied, the Special Master can and typically does add,
3 literally as an afterthought, that -- but having been
4 through all of this and having discussed all of this, I
5 think there was a reasonable basis for what was being
6 argued here.

7 Now, in your second example where the
8 Special Master has only determined this essentially
9 diagnostic question of when was the first symptom of
10 this particular claimant's particular injury, the
11 Special Master hasn't looked at any materials about
12 whether the vaccine can cause that injury. So let me
13 give as a -- as a paradigm example maybe the -- what we
14 give in our brief as the -- the Smith case, which had to
15 do with the claim of whether certain childhood vaccines
16 caused the claimant's Type 1 diabetes.

17 And the Special Master's decision focuses on
18 the question of whether the first symptom of the
19 diabetes was a blood glucose reading that sent the
20 claimant to the hospital, and then --

21 JUSTICE SOTOMAYOR: Excuse me. Could you --
22 could you -- there seems to be a confusion in this
23 consequence conversation. You seem to be assuming that
24 the attorneys' fee award on good faith basis has to do
25 with the ultimate merits, did the vaccine cause this

1 injury? I would have assumed that the award of
2 attorneys' fees has to do with whether the petition was
3 brought in good faith; i.e., was there a reasonable
4 basis to believe that the petition was timely? And on
5 that issue, before the Court can adjudicate the
6 timeliness question, it has to know all of the facts
7 that made the Petitioner believe it was timely.

8 And so I'm a little bit confused as to what
9 additional factfinding the Court has to do. It has to
10 be told by a lawyer, your cases say because reasonable
11 basis has to be in fact and law. The law says first
12 symptom. She experienced X, Y, and Z, and we thought
13 the latter was the starting point of the statute, not
14 the former. What more does the Special Master need to
15 know to adjudicate whether that's in good faith, that
16 belief is in good faith?

17 MR. HORWICH: Well, the question under the
18 attorneys' fee provision, and this is on 26(a) of the
19 government's brief, is a determination that the petition
20 was brought in good faith and there was a reasonable
21 basis for the claim for which the petition was brought.
22 The question isn't was there a reasonable basis to
23 believe it was timely, the question is -- and -- and I
24 think my friend agrees with me on this --

25 JUSTICE SOTOMAYOR: Now, I understand.

1 JUSTICE BREYER: But now, look, still, the
2 worst thing, the obvious question -- I mean, as a
3 textual matter, but I don't know how you reconcile your
4 position with the -- with the first words in 3300aa-11,
5 which is talking about a petition starts this whole
6 proceeding and you want to interpret that word
7 "petition" meaning a timely petition. You mean an
8 untimely petition doesn't start the proceeding? I mean,
9 that's the technical linguistic thing, but if you get to
10 your -- to your basic worrying you, what is worrying you
11 is this proceeding, okay? That's what's worrying you, I
12 think, the shadow trial.

13 MR. HORWICH: Yes, it is.

14 JUSTICE BREYER: Now, on that, just what
15 Justice Sotomayor said, you only get into this problem
16 when the attorney has filed this timeliness matter with
17 a good reason to think his petition is timely, otherwise
18 forget it. Okay?

19 So you look at the complaint. You see a
20 complaint there. He had a good reason for thinking it's
21 timely. It looks, on the face of the complaint, as if
22 his client has a good claim, a plausible one. Now, if
23 the government wants to say, we want to present some
24 evidence, let them do it. And if they don't, the worst
25 that happens is this person who thought she had a good

1 claim, and who was reasonable in her timeliness will get
2 some attorneys' fees paid.

3 Why is that -- why is that so terrible? Why
4 is that putting such a burden on the government that
5 they have to go through hoops, I think, to try to get
6 these words in the statute, too?

7 MR. HORWICH: What -- what we're worried
8 about here is -- is not the fact that some fees may be
9 paid. What -- what we're worried about here, as you
10 said, are the shadow trials, and -- and to an extent
11 also the question of whether additional cases would be
12 attractive to the program.

13 JUSTICE BREYER: But that's in your control,
14 the shadow trials.

15 MR. HORWICH: Well --

16 JUSTICE BREYER: You don't have to have a
17 shadow trial if you don't want one.

18 MR. HORWICH: Well, but -- but -- but, Your
19 Honor, I think where we're coming -- where we're coming
20 at this from is -- is saying what did Congress envision
21 here. And as this Court said in Hensley and in Pierce,
22 Congress doesn't want attorneys' fees to be a second
23 major litigation. So it seems exceedingly odd to think
24 it would have set up a scheme in which the case would
25 end on the merits and yet, the question on which

1 attorneys' fees are to be decided -- the availability of
2 attorneys' fees is to be decided is going to require
3 some further proceedings that have not --

4 JUSTICE GINSBURG: Why not --

5 JUSTICE KENNEDY: The shadow trial brings up
6 the answer that you were giving to the second part of
7 Justice Alito's question, which you never got to finish.

8 MR. HORWICH: Yes.

9 JUSTICE KENNEDY: And you were saying -- you
10 were giving the example, suppose this were a question of
11 timeliness.

12 MR. HORWICH: Yes.

13 JUSTICE KENNEDY: And when did the fact of
14 the vaccine first -- or the symptoms first become
15 manifest, and you were -- and you said that this should
16 not be tried because -- and this is finishing off
17 Justice --

18 MR. HORWICH: Right.

19 JUSTICE KENNEDY: -- Justice Alito's
20 dichotomy.

21 MR. HORWICH: Yes. Maybe if I finish giving
22 the example I was giving in response to the -- the
23 second part of Justice Alito's dichotomy in that Smith
24 case. So the timeliness question the Special Master
25 resolved was, okay, was it the blood glucose reading

1 that was within the limitations period that was the
2 first symptom or was it the excessive thirst and
3 frequent urination that fell outside the limitations
4 period.

5 Now, the Special Master, having resolved
6 that, which is something that I think perhaps even some
7 of us in the room could recognize that one of those was
8 the symptom -- was likely the first symptom or not, the
9 Special Master then has to decide, was there a
10 reasonable basis for the claim that childhood vaccines
11 cause Type 1 diabetes? And that's simply not something
12 that that timeliness determination is going to be any
13 good for the Special Master in deciding.

14 JUSTICE GINSBURG: But there's a lot of
15 information just in 11 -- what is it -- (c), tells what
16 has to be put in the petition. And there's --
17 couldn't -- couldn't a Special Master make the
18 determination based on that?

19 MR. HORWICH: Well, I think part of the
20 problem is that we would be asking the Special Master to
21 spend the Special Master's time reviewing that material,
22 assuming that it's even in the petition, which is not
23 always the case. We'd be asking the Special Master to
24 spend -- spend her time evaluating that material in a
25 proceeding that can't result in compensation to any

1 injured person, which is, of course, the point of the
2 program, instead of spending her time on -- on other
3 petitions, and it's that diversion of resources that's
4 so concerning to us and we think would have been so
5 peculiar to Congress.

6 If I could reserve my --

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Fishman?

9 ORAL ARGUMENT OF ROBERT T. FISHMAN

10 ON BEHALF OF THE RESPONDENT

11 MR. FISHMAN: Mr. Chief Justice, and may it
12 please the Court:

13 My friend started with Section 16. I'd like
14 to start very briefly with our reading of the fee
15 provision itself. Section 15(e)(1), which says, "Any
16 petition filed under Section 11 is eligible for award of
17 attorneys' fees, even if it's denied, provided that two
18 conditions are satisfied. It has to be filed in good
19 faith and with a reasonable basis."

20 15(e) itself and by its terms says nothing
21 about compliance with the statute of limitations. The
22 filing provisions of Section 11, which are Section
23 11(a)(1) similarly say nothing about compliance with the
24 statute of limitations. Our position, therefore, is the
25 most direct and sensible reading of 15(e)(1), is you can

1 get an award of fees on a petition that has been denied
2 regardless of the reason why, and there is no textual
3 basis for saying that that provision carves out an
4 exception for one class of denied cases, those denied on
5 limitations grounds.

6 CHIEF JUSTICE ROBERTS: So if -- if you're
7 preparing one of these filings, and you're all set to
8 go, and on the day before your filing you say, oh, gosh,
9 it doesn't look like we're going to be on time. You
10 should still go ahead and file because you might be able
11 to apply for attorneys' fees. While if you file it the
12 day that it's due and you find out the day after, oh, my
13 gosh, we weren't on time, then there's no question that
14 you could apply for attorneys' fees.

15 MR. FISHMAN: Right. And if I understand
16 that comment correctly, I think that's right, and -- and
17 you see actually many Special Master decisions that
18 ultimately deny a petition for failure typically to
19 prove causation; and when they turn to the reasonable
20 basis standard, they will say literally, your contact --
21 your client contacted you two days before the statute of
22 limitations was going to run.

23 You ran to the courthouse and filed. You
24 had a basis, we believe, for filing your claim. Further
25 investigation, examination of the medical -- medical

1 records made you question that judgment, and you
2 abandoned the case. And -- and there can be fee awards
3 in -- in that scenario.

4 CHIEF JUSTICE ROBERTS: My hypothetical was
5 not that you had two days and you made it in time, but
6 that before the -- the time -- after the time expired or
7 you were ready to file on time, but then you decided on
8 further research, oh, this isn't going to look like
9 we're going to comply. We thought we had the time, but
10 we don't. You should still go ahead and file, right, so
11 that you might be able to get the fees?

12 MR. FISHMAN: I think that would depend --
13 if -- if you're late, you're late. I think the -- the
14 judgment your hypothetical would call on the attorney to
15 make is, why did we miss it, and maybe does that provide
16 grounds for equitable tolling or do we have a reasonable
17 and good faith argument as to timeliness?

18 If the lawyer says, I blew it, whether by a
19 day or a month or a year, I think that attorney's going
20 to have a very difficult time showing a good faith
21 reasonable basis for filing a claim that I think in your
22 hypothetical would be by the attorney's own account,
23 clearly time barred without justification.

24 JUSTICE GINSBURG: So are you saying that
25 the good faith and the reasonableness go to two things:

1 One, the claim on the merits, and also the timeliness.

2 MR. FISHMAN: That is what we're saying.
3 That's also what the Federal circuit said. I think the
4 word "claim," as it's used in the statute, encompasses
5 the entire case. Causation, evidence that you actually
6 received a vaccine, the timeliness of your petition,
7 damages, the -- everything you would need to
8 establish --

9 JUSTICE SOTOMAYOR: So how do you answer the
10 argument about a shadow trial?

11 MR. FISHMAN: There's a number of arguments
12 about -- about that subject. And I think the starting
13 point because it may have been lost a little bit in the
14 briefs, is the government does not cite a single case
15 where there has ever even been a hearing held on a fee
16 petition, ever. And collectively are --

17 JUSTICE SOTOMAYOR: How were the records
18 accumulated and when?

19 MR. FISHMAN: I'm sorry?

20 JUSTICE SOTOMAYOR: How were the records
21 accumulated and when?

22 MR. FISHMAN: They are accumulated -- the
23 system that's established is one of front-loading.
24 You -- 11(c) requires an enormous amount of medical
25 documentation that is to be filed with the petition when

1 it's filed. If they are incomplete, you're required to
2 submit an affidavit explaining what's missing and why.

3 The very first thing substantively that
4 happens with these things, Vaccine Act Rule 4(a) says
5 within 30 days of filing a petition, the secretary must
6 review the medical records, and if she thinks they are
7 deficient, she has to immediately notify the Petitioner,
8 and that is the very first thing that is hashed out in
9 these cases, complete medical records.

10 Section -- Vaccine Act Rule 2(c)(2) says if
11 you're not going to rely solely on medical records in
12 support of your petition -- medical records will often
13 contain evidence of causation. If the records
14 themselves don't and you're going to go outside the
15 records, Vaccine Act Rule 2(c) -- 2(b)(2) is the actual
16 rule, says you're going to rely on observations or
17 testimony of every witness -- any witness, you have to
18 submit a detailed affidavit of the proposed testimony
19 that supports every allegation in the petition.

20 So the answer is, a lot of it's there right
21 at the front end, which is not to say that as these
22 cases get litigated and the areas of contention get
23 refined. Additional information can also be submitted,
24 but it is front loaded.

25 JUSTICE SOTOMAYOR: So is your bottom line

1 that the record is already there for the shadow
2 determination?

3 MR. FISHMAN: Sure. And that's the reason
4 why we point out in our brief, routinely these cases are
5 decided -- fee determinations are made based on the
6 written materials without a hearing, without any
7 additional evidence. And again there are no cases -- we
8 are not aware of a single instance going to the
9 inception of this program where there has ever been an
10 evidentiary hearing.

11 JUSTICE ALITO: And if there is a hearing,
12 would the claimant's attorney get -- potentially get
13 attorneys' fees for the representation at the hearing
14 about attorneys' fees?

15 MR. FISHMAN: Yes, the law is pretty clear
16 that fees are available for time incurred on seeking
17 fees.

18 JUSTICE KAGAN: Do you think it would be
19 within the discretion of the court or Special Master to
20 look at a case and say, for whatever strange reason,
21 this is a case where it's going to require some lengthy
22 mini-trial in order to figure out fees and that's a bad
23 use of everybody's time, so I'm not going to grant
24 attorneys' fees here? In other words -- you know, this
25 is a "may" provision; would it be a sufficient reason

1 that this is just going to take too long, it's too
2 involved, so I'm going to deny attorneys' fees in this
3 case?

4 MR. FISHMAN: I think that might well be
5 within a Special Master's discretion, if it really is
6 going -- if a fee determination really will require the
7 sort of parade of horrors that the government sees.
8 It's not our case, but I think it could be possible and
9 -- and within their discretion in a subsequent case.

10 JUSTICE GINSBURG: You say the Special
11 Master "may" award -- so it "may" award is
12 discretionary.

13 MR. FISHMAN: Correct.

14 CHIEF JUSTICE ROBERTS: Well, that's a tough
15 position, isn't it? I mean, if you have got a difficult
16 and tough and complicated case, well, you get no fees;
17 but if you've got an easy one, well, then you get fees.

18 MR. FISHMAN: I don't know -- the -- no
19 court and the parties have not briefed or addressed in
20 this case the -- the extent to which the "may"
21 discretion can be exercised in a procedural way that
22 Justice Kagan's hypothetical proposes. I'm just saying,
23 I can't stand here and give you a hard and fast rule
24 that says that will never be appropriate.

25 Maybe if that case comes before a court and

1 a Special Master has done that, the argument will be
2 it's an abuse of discretion.

3 CHIEF JUSTICE ROBERTS: I thought you
4 were -- I thought you were giving us that argument when
5 you said under the fees all you need is reasonable and
6 good faith.

7 MR. FISHMAN: Those are the requirements to
8 be eligible for an award of fees, the statutory
9 requirements for eligibility. But just because you meet
10 good faith and reasonable basis does not necessarily
11 mean you get fees for the -- for the reasons just
12 discussed. It is discretionary.

13 CHIEF JUSTICE ROBERTS: So is one reason
14 that should affect the exercise of discretion is that
15 you didn't comply with the statute of limitations?

16 MR. FISHMAN: I think it might be. There --
17 the law is not -- this is not the issue in our case, so
18 it's -- it's -- it's difficult to know the precise
19 contours of the exercise of discretion in a case where
20 nobody's contended that the discretion couldn't properly
21 be exercised.

22 JUSTICE GINSBURG: Well, let's take -- let's
23 take this case. What would you put in to show that you
24 have been reasonable, in good faith and reasonable, one,
25 as to the claim; and two, as to the attorneys' fees?

1 What -- what would the Special Master have to look at to
2 make those determinations in this case?

3 MR. FISHMAN: I will take the second part
4 first, reasonableness of statute of limitations. The
5 Federal Circuit has already ruled that we were
6 reasonable to bring this case in terms of timeliness
7 because of the case law as it existed at the time the
8 petition was filed, the fact that we actually prevailed
9 on the timeliness question before the three-judge panel.
10 So the Federal -- I think on that question the Federal
11 Circuit has resolved it.

12 But if you want to go beyond that, I think
13 you would look at our briefs and the laws that existed
14 and the analysis of the various courts that have looked
15 at this and said -- and say, that was a close call, you
16 actually prevailed for a couple years on this question.
17 That's reasonable, and that's good faith.

18 As to the merits, it is all the material
19 that accompanied our petition, which is principally
20 medical records, also some medical studies linking the
21 Hepatitis B vaccine to MS, and then a number of
22 affidavits that were filed subsequently. And I think
23 that is all you would need to look at, and -- that is
24 the only thing in the record. Because the government
25 has introduced no evidence in this case at any stage

1 contesting the merits of our underlying claim.

2 JUSTICE SOTOMAYOR: They are arguing that
3 they don't need to, and why should be -- why should they
4 be put to the burden of doing that?

5 MR. FISHMAN: The reason is you have to
6 remember this is not ordinary civil litigation; it's a
7 streamlined front-loaded process. So the way the
8 Vaccine Act works is you file a petition with medical
9 records, as I mentioned before. You have 30 days for
10 the government to object to the completeness of the
11 record. The very next thing that happens under the
12 rules, and it's Rule 4(c), is the Secretary has 90 days
13 to set out all of her objections to the case.

14 JUSTICE KENNEDY: But the very fact that
15 it's streamlined indicates to me that we should be very
16 careful to enforce the policy of the rule which is to
17 deter the filing of stale claims. And your -- your rule
18 certainly undermines that.

19 MR. FISHMAN: I think that you have to back
20 up and -- and acknowledge, as a starting point, that
21 there's no question that Congress intended this program
22 to award fees on petitions that have been denied. And
23 as we point out in our brief, petitions are routinely
24 denied on procedural grounds where there has been no
25 examination of the underlying merits, just as the

1 government contends is the case with statute of
2 limitations.

3 We disagree with that. We think actually to
4 resolve a statute of limitations question, a Special
5 Master is going to have a more complete understanding of
6 the underlying merits of a case than in many other
7 procedural settings. So we know that Congress has
8 already said, sure, it's a streamlined process, but
9 we're not going to pursue that objective at the expense
10 of compensating attorneys who bring good faith claims,
11 but lose.

12 CHIEF JUSTICE ROBERTS: Is the -- what's the
13 relationship between your position and equitable
14 tolling? I mean, your case, I think, is unusual in that
15 there was a fair amount of confusion about when the
16 statute of limitations might run or that's your
17 position. I would think a lot of the cases where the
18 attorney doesn't meet the limitations deadline will
19 involve things like -- you know, I was delayed by
20 Hurricane Sandy or -- or whatever, or we tried to file,
21 and it got lost in the mail.

22 Are those things that -- I mean, should that
23 be considered under the rubric of equitable tolling, or
24 under -- under your idea that you don't have to file on
25 time anyway?

1 MR. FISHMAN: The -- the -- I think that the
2 best answer to that question is to look at the Federal
3 Circuit -- Circuit's en banc ruling in Cloer I. We
4 actually argued -- we didn't argue snowstorm. What our
5 argument was is there was an extraordinary circumstance
6 that prevented us from filing within 36 months of the
7 first symptom. And that circumstance was there was no
8 scientific evidence of a link between the vaccine --

9 CHIEF JUSTICE ROBERTS: I understand that,
10 but I would assume the more typical case is when you
11 miss a filing deadline is because the lawyer, whether
12 for good reasons or bad, missed the filing deadline.
13 And I'm just curious if you would -- if it's not
14 sufficient to support equitable tolling, whether it is,
15 therefore, unreasonable when it comes to attorneys'
16 fees?

17 MR. FISHMAN: I think that would be a
18 case-by-case determination as to whether the particular
19 facts relied upon supported good faith and a reasonable
20 basis. I think in Your Honor's hypothetical, you would
21 be -- a lawyer would be skating on thin ice there, too,
22 because the Federal Circuit made clear in Cloer I that
23 fraud and duress are the grounds for equitable tolling.
24 So I think if you are going to bring a claim that you
25 know is late and your only excuse is a snowstorm, you

1 have to look at Cloer I and think, I don't have a very
2 strong or maybe any equitable tolling argument.

3 JUSTICE KENNEDY: It does seem to me, I did
4 not have the opportunity to ask the government this
5 question, that the equitable tolling argument undercuts
6 the government's position that no petition may be filed,
7 as being an absolute. Because we all know, I take it
8 the government concedes, that there is equitable
9 tolling.

10 MR. FISHMAN: They -- well, they fought the
11 issue.

12 JUSTICE KENNEDY: Or there can be equitable
13 tolling in some cases.

14 MR. FISHMAN: Sure. That's the law. They
15 fought the issue below and lost, and in fairness, in
16 their briefs to this Court, they say, we don't agree
17 with the ruling just because we didn't seek this Court's
18 review for reasons that are not identified.

19 That is the law. That's correct. And it
20 is, frankly, one in a long list of inconsistencies with
21 their conception of what it means to file under the Act.

22 JUSTICE KAGAN: Mr. Fishman, this may be a
23 hard question for you to answer, but is your sense of
24 why it is that petitions are untimely filed that they
25 usually have to do with things like -- you know,

1 snowstorms and lawyer error, or that they usually have
2 to do with questions about the manifestation of
3 symptoms?

4 Or something else, if something else is --
5 just the range of cases out there, what are we talking
6 about? Why are these cases untimely filed?

7 MR. FISHMAN: My understanding from reading
8 the case law is it's the latter. It's not snowstorms.
9 It is here is a disease. I have a child that has been
10 sick her whole life. When is the first symptom of this
11 disease? She coughed 40 months ago. She had a -- some
12 other symptom 42, and the experts often battle that out,
13 and -- and oftentimes the Special Master say, sorry, it
14 was the cough at 40 months that is the first symptom of
15 the disease, not the symptom you've pointed to.

16 JUSTICE ALITO: This may be a question that
17 the government is in a better position to answer, but
18 do -- do you have any sense of how often claims are
19 rejected on the ground of timeliness, what we're dealing
20 with?

21 I mean, you mentioned in a footnote that the
22 fund out of which the -- the claims and the attorneys'
23 fees are paid has a positive balance of \$3.5 billion.
24 Maybe the only government fund that has a positive
25 balance, but --

1 (Laughter.)

2 JUSTICE ALITO: Is this going to bankrupt
3 the -- the system?

4 MR. FISHMAN: I -- I can't imagine how it
5 would even really put much of a dent in that government
6 obligation.

7 JUSTICE ALITO: Do you know how many cases
8 we might be dealing with?

9 MR. FISHMAN: I -- I don't. I know that
10 there are not a huge number of published cases by
11 Special -- unpublished decisions by Special Masters on
12 the statute of limitations question. I tend to think
13 that those numbers will actually go down moving forward,
14 even under the rule we're proposing because of the law
15 on when the statute of limitations runs is so much
16 clearer now than it was in 2005 when we brought this
17 case.

18 The other point, of course, is you're always
19 going to have to show good faith and a reasonable basis.
20 So the government seems to suggest that the rule we're
21 advocating and the one that the Federal Circuit adopted
22 is going to result in a flood of frivolous litigation.
23 I think that's just not supported because of the
24 requirements you'd have to establish.

25 I think there's also no reason to think that

1 that will be the case empirically, and I say that for
2 this reason: The -- the program for 25 years has
3 authorized the payment of fees to losers. It has paid
4 out \$2.4 billion in compensation to individuals injured
5 by vaccines in that 25 years and just about \$160 million
6 in fees for winners and losers. It is just over
7 6 percent. And one would think that if this unusual
8 system of paying losers really encouraged the filing of
9 frivolous lawsuits so lawyers could be paid, you'd think
10 the number would be substantially higher than 6 percent.

11 JUSTICE ALITO: Who pays for the Special
12 Masters? Is that paid out of the fund?

13 MR. FISHMAN: It is.

14 I do want to answer a couple of the
15 questions that were presented during my friend's
16 presentation. The -- I was not aware of the fact that
17 the Secretary no longer discharges her obligation to
18 publish in the Federal Register, but as we noted in our
19 brief, our petition was published. And her obligation
20 to publish it was triggered by the statute's requirement
21 that a petition has, quote, "been filed under Section
22 11." Ours -- ours, in fact, was published.

23 The question that -- that you raised,
24 Justice Kagan, is there any other situation where this
25 reading results in a petition that has been filed. The

1 answer is yes, the government argues that a petition
2 filed under Section 11, even if it's untimely, is
3 sufficient to commence proceedings and confer
4 jurisdiction, which if that's true, it goes to your
5 question, Justice Sotomayor. How do you get here if the
6 statute -- if the statute of limitations is not
7 jurisdictional? How do you get from one place to the
8 next? I -- I think there's not a good answer for that.

9 Another question that has arisen, I think,
10 Justice Scalia, your comments are correct, that -- that
11 a filing, a judgment can occur at any time in a case. I
12 think it's also important to remember that the Secretary
13 is not bound to defend a case on the merits and then
14 contest a fee award for the same reason. So there are
15 cases pending before the Special Masters right now that
16 for reasons I suspect are that the Secretary wanted to
17 establish a precedent, that there is no causation
18 between vaccine A and injury X, we want to litigate that
19 on the merits, and they have won. But it wasn't a slam
20 dunk. There was a lot of evidence and a lot of science
21 to contradict that, which was rejected.

22 Those lawyers now come before the Special
23 Master and seek fees in those cases, and the Secretary
24 is arguing no fees because these are time-barred. And
25 in that case, you are going to have a judgment, by the

1 government's account, entered on the merits and then
2 they're going to come back and defend a fee award
3 saying, there is no judgment because there's never been
4 a case filed, and you can't get fees. And it is just a
5 fundamental and glaring inconsistency with their
6 position.

7 I want to address a couple additional points
8 on the shadow trial argument because these were raised
9 in the government's reply brief.

10 JUSTICE SCALIA: Could I -- I have been
11 thinking about your last point. Couldn't that last
12 point easily be remedied by -- by simply our holding
13 that -- you know, you -- you can't ride both horses;
14 that if, in fact, you've litigated it through to a -- to
15 a merits judgment in your favor, which presumably has
16 stare decisis effect, you then cannot come back and say
17 the suit never occurred because the filing was too late.
18 I mean, we -- I think we're able to hold that, don't you
19 think?

20 MR. FISHMAN: I --

21 JUSTICE SCALIA: I mean, I agree with you
22 it's a terrible -- it's a terrible, outrageous thing for
23 the government to do, to win the case and get -- get
24 stare decisis effect, and then to say you can't get
25 lawyers' fees because there's never been a case, right?

1 MR. FISHMAN: Right. I mean, I think
2 that -- yes, and I think that, in terms of authority,
3 power, I think that --

4 JUSTICE SCALIA: We could make that up,
5 couldn't we?

6 MR. FISHMAN: I think that you probably
7 could.

8 (Laughter.)

9 JUSTICE SCALIA: Sure.

10 MR. FISHMAN: I think you probably could,
11 but I think that the problem is you would then be, in
12 essence, adopting a procedural rule though that endorses
13 the inconsistency in the position. A petition is filed
14 for some purposes but not for others, even though
15 Congress only referred to petitions filed in -- in the
16 generic sense. It didn't distinguish between the time
17 at which it's entered or the basis on which it's
18 entered. And it could have easily done these things.

19 The -- the government is proposing this
20 legal fiction. Well, they say, sure, I mean, it can be
21 tendered and accepted and you can litigate it for years
22 and there can be all sorts of rulings, but as soon as
23 the Special Master enters a ruling on timeliness, the
24 phrase is they're bound to, quote, "refuse to recognize"
25 that it has ever been filed.

1 They could have established that -- Congress
2 could have established that legal fiction. It could
3 have said no petition shall be deemed to be filed if it
4 is brought after the statute of limitations has run.

5 Or Congress could have achieved this same
6 consequence that the government is attributing to
7 Section 16 by enacting a rule like this Court's Rule
8 13-2; the court will not -- will not file a cert
9 petition that is untimely.

10 JUSTICE KENNEDY: You were going to address
11 the shadow trial?

12 MR. FISHMAN: Yeah, a couple -- a couple
13 quick points. We cited 11 cases in the discussion of
14 our -- in our discussion of shadow trials for the point
15 that these petition -- petitions are denied on
16 procedural grounds all the time, and Special Masters
17 resolve subsequent fee requests routinely and without a
18 hearing.

19 The government --

20 JUSTICE KENNEDY: Procedural grounds because
21 the affidavits aren't sufficient or --

22 MR. FISHMAN: Inadequate records is one
23 reason. Sometimes, a petitioner dies, and their family
24 or estate does not want to pursue this, so it's
25 abandoned. There's cases where there's just a failure

1 to prosecute, it's not clear why; the lawyers lost touch
2 with a client or I don't know the reason why, it's just
3 a failure to prosecute.

4 There are also cases where somebody is
5 arguing for causation, but as their case is going
6 through the system, other cases are being decided that
7 reject their view, particularly paradigm cases. And the
8 petitioners fold, they give up, but the lawyers, having
9 fought the cases for years, come in and argue. So those
10 are all, incidentally, examples of procedural denials
11 that are reflected in the 11 cases we cited.

12 The point I wanted to make is the government
13 doesn't say which of those cases it's referring to when
14 it makes the claim that our cases reflect circumstances
15 where the Secretary has determined the program's
16 resources would be best conserved by, I think the phrase
17 is "acquiescing" to a modest request for fees.

18 They don't identify what cases they're
19 talking about, but in 10 of the 11 cases we cited, on
20 their face, fee awards were contested. And they're
21 litigated. And you read the opinions, and the Special
22 Masters are resolving the challenges that the Secretary
23 made, and they are doing it without a hearing.

24 There also is this argument about -- I think
25 we've already gone over the fact that a statute of

1 limitations determination is not identical to a
2 causation determination. The additional argument that
3 the Secretary made in their brief is that, unlike many
4 other matters that must be supported at the outset --
5 the key question in most of these cases, causation, you
6 don't have to furnish evidence or make allegations of
7 causation -- is not correct.

8 Under Section 11(c), if you're bringing a
9 non-table case, you have to allege cause and fact.
10 And if the medical records don't support causation, you
11 need an affidavit from an expert. So that is
12 front-loaded as well.

13 JUSTICE KENNEDY: Are there regulations or
14 rules establishing hourly rates?

15 MR. FISHMAN: There are not.

16 JUSTICE SOTOMAYOR: Do you have any idea
17 from the cases what the ranges are?

18 MR. FISHMAN: For rates?

19 JUSTICE SOTOMAYOR: For rates.

20 MR. FISHMAN: It varies region by region. I
21 think the Special Masters look to see what the rates in
22 Denver are as opposed to the rates in New York or Los
23 Angeles --

24 JUSTICE SOTOMAYOR: I know that civil rights
25 rates, for example, are far below market rates for most

1 law firms. Is that the same for this, or is it market
2 rates generally?

3 MR. FISHMAN: Right. I think it's less.
4 And it's not --

5 JUSTICE SOTOMAYOR: Market rates for general
6 litigation.

7 MR. FISHMAN: Right. And it's not CJA
8 rates --

9 JUSTICE SOTOMAYOR: Right.

10 MR. FISHMAN: -- but very often, it's not
11 the rates that attorneys are actually paid. It ends up
12 being a problem -- as an aside -- with expert witnesses
13 sometimes because the Special Masters don't pay what
14 experts in these cases want.

15 If there are no further questions, I will
16 relinquish the remainder of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Horwich, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF BENJAMIN J. HORWICH

20 ON BEHALF OF THE PETITIONER

21 MR. HORWICH: Thank you. I think it's
22 important --

23 JUSTICE SOTOMAYOR: Do you have some
24 evidence -- numbers -- to tell us how complicated the
25 fee award disputes are generally -- putting aside

1 because it hasn't until recently been an issue for cases
2 dismissed -- but for other cases, particularly those
3 dismissed on -- other procedural grounds.

4 MR. HORWICH: Well, no, we don't. And
5 actually, that's the point I wanted to start with
6 is that -- is that the Federal Circuit's decision below
7 puts the program into this unchartered territory, where
8 we don't really know what this is going to look like.

9 The cases that -- that my friend cites in
10 his brief are ones that either the petition is so
11 facially defective that, of course, fees can't be
12 awarded on it, but there's no reason to think that's
13 going to be the typical case.

14 And then there's other cases where the
15 application of the reasonable basis standard is so lax
16 as to essentially just turn on -- on the claimant's
17 personal say-so, that, oh, I think the vaccine caused my
18 injury. That's like -- that's the Hamrick case, for
19 example; it's cited in there.

20 And that -- that can't be the standard for
21 reasonable basis.

22 And -- and so I think the Court needs to
23 keep in mind that, for example, when my friend says
24 there's -- the government doesn't cite a case where
25 there's been any shadow trial, the reason is because

1 there haven't been fees available on untimely petitions,
2 which is exactly the set-up that would cause you to have
3 a shadow trial.

4 JUSTICE SOTOMAYOR: But there have been
5 dismissals on other procedural grounds.

6 MR. HORWICH: Well, there aren't -- there
7 are not really other procedural grounds. There may be
8 situations where a petition is voluntarily withdrawn,
9 and I think there is a problem there about there not
10 actually being a judgment when somebody voluntarily
11 withdraws.

12 But even in those, the Special Masters
13 should have, in our view, examined whether there was a
14 reasonable basis. I don't think it's right to say that
15 an attorney can come in, file the petition and then the
16 claimant decides, well, I would like to withdraw, and
17 then the attorney essentially gets paid as of right.

18 So our -- it's unsurprising that there's no
19 examples of these hearings. It's also unsurprising that
20 my friend says, well, there -- for the petitions, when
21 it comes time to determine fees, the record is complete.
22 Of course the record is complete because the case has
23 been decided on the merits. And that's the paradigm
24 situation under which the program has been operated.

25 What we are talking about here is entering

1 this unchartered territory, where -- where the program
2 has not been before, and where you wouldn't think
3 Congress would want to send it. And this is our central
4 concern with this case. The government's concern
5 here -- and the reason we've petitioned for certiorari
6 is not because of the dollar amount involved in paying
7 these claims. The concern is about where the program's
8 resources are being directed.

9 The question is -- the question is about
10 where the finite number of Special Masters, the finite
11 number of government attorneys, can put their time in
12 responding to these petitions for -- to deliver the
13 compensation to the very few, but very deserving people
14 who Congress wanted to award compensation to.

15 And our concern here is --

16 JUSTICE BREYER: So your view here it's the
17 same. No attorneys' fees when the client dies, or they
18 decide to withdraw the petition when it's dismissed
19 early on for a procedural ground, when the record is
20 inadequate, et cetera.

21 You think that in none of those cases
22 Congress would have wanted attorneys' fees.

23 Or is it --

24 MR. HORWICH: Well, in the case of --

25 JUSTICE BREYER: -- do you think in some but

1 not others?

2 MR. HORWICH: Well, no. In the case where
3 the claimant dies, the statute has provisions for that,
4 and you can obtain compensation in that situation. So
5 there's no reason an attorney can't go on there --

6 JUSTICE BREYER: No, no, no, no, the family
7 gives up.

8 MR. HORWICH: -- if they want to -- if they
9 want to withdraw the petition, I guess it depends on
10 exactly the circumstances under which --

11 JUSTICE BREYER: No, but my question is what
12 is your view? It's the same problem. He's listed, you
13 heard, he listed six or seven different instances --
14 four or five anyway; he's found 11 cases, apparently.
15 And so what is your view?

16 MR. HORWICH: Well, my view -- my view is
17 the view that I think we would take under any other fee
18 shifting provision, which is that if a claimant wants to
19 withdraw his or her case, I don't think that he can then
20 claim the benefit of the attorneys' fee provision,
21 absent some circumstances that -- that would warrant the
22 finding of reasonable basis. I think that is an
23 unexceptional result.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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The case is submitted.

(Whereupon, at 11:12 a.m., the case in the
above-entitled matter was submitted.)

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