NO. 22-2119

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

W. J., BY HIS PARENTS AND LEGAL GUARDIANS, R.J. AND A.J.,
Petitioner-Appellant

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* ANGELA M. OLIVER IN SUPPORT OF PETITIONER-APPELLANT W. J., BY HIS PARENTS AND LEGAL GUARDIANS, R.J. AND A.J. IN SUPPORT OF REVERSAL

Appeal from the United States Court of Federal Claims in
No. 1:21-vv-01342-KCD, Judge Kathryn C. Davis.

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CERTIFICATE OF INTEREST

Case Number	22-2119
Short Case Caption	W.J. v. HHS
Filing Party/Entity	Angela M. Oliver, Amicus Curiae in support of W. J., by his parents and legal guardians, R.J. and A.J.

Instructions:

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Name: Angela M. Oliver

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Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. X None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. X None/Not Applicable
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INTEREST OF *AMICUS CURIAE*

Amicus presents this brief pursuant to this Court's Order of April 11, 2023, appointing amicus curiae counsel in support of W.J. on the issue of equitable tolling and, particularly, whether, under the applicable authority, equitable tolling is merited in this case. *See* ECF No. 37.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amicus states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

This case presents an important question regarding when to apply equitable tolling for claims based on vaccine-related injuries involving children. Both the Special Master and Court of Federal Claims denied W.J.'s request for equitable tolling in this case because W.J. was an infant at the time of his vaccine-related injury, and he had parents who purportedly could have filed a Vaccine Act petition on his behalf earlier than they did. Both tribunals reached this conclusion without considering any other critical factors, such as how W.J.'s status as a minor should impact the equitable tolling analysis. This lack of analysis regarding the import of W.J.'s status as a minor is particularly problematic in the Vaccine Act context, in

which Congress designed a program intended to generously and efficiently compensate children injured by vaccines. If anything, Congress's particular concern for protecting children in this context counsels in favor of a presumption that minority status should *permit* equitable tolling—not limit it as the Special Master and Court of Federal Claims did here.

SUMMARY OF THE ARGUMENT

The statute of limitations should be equitably tolled in this case because W.J. was injured as a minor[1] and has sustained serious mental incapacity ever since. Here, multiple reasons counsel in favor of applying equitable tolling to W.J.'s case.

First, the equities counsel in favor of equitable tolling because a finding that W.J.'s federal Vaccine Act petition is untimely would likely eliminate W.J.'s ability to bring a state law action, which is contrary to what Congress intended in designing the National Vaccine Injury Compensation Program ("Vaccine Compensation Program"). While Congress designed the Vaccine Compensation Program to serve as the primary—and most efficient—means for injured claimants to pursue compensation for vaccine-related injuries, Congress specifically preserved the bulk of a claimant's rights to pursue relief under state law. For instance, a claimant whose Vaccine Act petition is unsuccessful may simply reject

[1] W.J. was born February 8, 2004, which makes him 19 years old. *See* Appx45, ¶ 4.

that decision and instead pursue claims under state law. *See* 42 U.S.C. § 300aa–21(a)(2). Multiple courts have held, however, that when a Vaccine Act petition is dismissed as *untimely*, the claimant can no longer pursue state law remedies at all. *See, e.g.*, *McDonald v. Lederle Lab'ys*, 775 A.2d 528, 529 (N.J. Super. Ct. App. Div. 2001). This is particularly problematic for a minor claimant, such as W.J., who would typically receive the benefit of state law minority tolling statutes, which toll any statutes of limitations while the claimant is a minor. Similar to how this Court has treated mental incapacity as an "extraordinary circumstance" for purposes of equitable tolling, this Court should hold that minority status likewise constitutes an "extraordinary circumstance." And, particularly where (as here) a finding of untimeliness would have the effect of abrogating significant state law rights that Congress contemplated would otherwise be available—especially in the context of minority tolling provisions—the Court should weigh this as a significant factor favoring the application of equitable tolling. That abrogation of a child's rights is itself an "extraordinary circumstance" justifying equitable tolling.

Second, additional factors counsel in favor of finding equitable tolling appropriate in this particular case. W.J.'s legal guardians are his parents. They have no special training in law or medicine, nor do they have any ability to adequately communicate with W.J. due to W.J.'s mental incapacity and the fact that W.J. is

non-verbal. This, coupled with W.J.'s minority status throughout the relevant time period, demonstrates that merely having a legal guardian has been insufficient to preserve W.J.'s rights and alleviate the extraordinary circumstances of his mental incapacity and minority status. And these same factors counsel in favor of finding that W.J.'s parents were sufficiently diligent, particularly given that they could not effectively communicate with W.J. to understand his pain, symptoms, and—critically—his desire to pursue legal recourse for his injuries.

Finally, the decisions of the Special Master and Court of Federal Claims in this case should at least be vacated and remanded for a proper analysis under this Court's opinion in *K.G. See generally K.G. v. Sec'y of Health & Hum. Servs.*, 951 F.3d 1374 (Fed. Cir. 2020). In that case, this Court expressly rejected a *per se* rule that the existence of a legal guardian is enough to defeat a claim for equitable tolling. Yet that sort of *per se* rule is exactly what the Special Master and Court of Federal Claims applied here. Both tribunals relied on the fact that W.J. was a minor who had parents that purportedly could have filed a claim on his behalf as the primary (if not *only*) basis for rejecting W.J.'s request for equitable tolling. In other words, both tribunals effectively created a stricter standard for W.J. *because of his minority status*, which is directly contrary to what Congress intended in designing the Vaccine Compensation Program. Thus, the Court should at least remand for a

more thorough analysis that properly considers all relevant factors, including the impact of W.J.'s minority status on his ability to diligently pursue his claims.

ARGUMENT

I. Equitable tolling is warranted in this case.

To establish that equitable tolling is appropriate, a claimant must prove two elements: (1) that an extraordinary circumstance prevented him from filing his claim; and (2) that he diligently pursued his rights. *K.G.*, 951 F.3d at 1379 (citing *Menominee Indian Tribe v. United States*, 577 U.S. 250, 255 (2016)). "A claimant need only establish diligence during the period of extraordinary circumstances to meet this test." *Id.* (citing *Checo v. Shinseki*, 748 F.3d 1373, 1380 (Fed. Cir. 2014)). "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *See Holland v. Fla.*, 560 U.S. 631, 653 (2010) (cleaned up).

Here, neither the Special Master nor the Court of Federal Claims made any specific findings regarding diligence. Instead, both tribunals based the denial of W.J.'s equitable tolling claim on a purported lack of extraordinary circumstances in light of the fact that W.J. was a minor with parents who purportedly could have brought a claim on his behalf earlier than they did. *See* Appx37–38, Appx17–19. As explained below, however, this analysis contradicts the statutory purpose of the Vaccine Act and conflicts with this Court's decision in *K.G.* Accordingly, the

decisions of the Special Master and Court of Federal Claims should be reversed.

A. A child's status as a minor is an extraordinary circumstance that warrants equitable tolling, particularly where the child's remedies under state law would be eliminated without equitable tolling.

"The Vaccine Act is a pro-claimant regime meant to allow injured individuals a fair and fast path to compensation . . . ." *K.G.*, 951 F.3d at 1380; *see also* H.R. Rep. No. 99-908 at 3, *reprinted in* 1986 U.S.C.C.A.N. 6344, 6344 (contemplating a way for claims to be settled "quickly, easily, and with certainty and generosity"). In creating the Vaccine Act, Congress particularly focused on the need to protect and provide for children who have been injured by vaccines. *See* H.R. Rep. No. 99-908 at 4, *reprinted in* 1986 U.S.C.C.A.N. at 6345 ("While most of the Nation's children enjoy greater benefit from immunization programs, a small but significant number have been gravely injured. These children are often without a source of payment or compensation for their medical and rehabilitative needs, and they and their families have resorted in greater numbers to the tort system for some form of financial relief."). With this concern in mind, Congress created the Vaccine Compensation Program to balance two primary concerns: "that the tort system was failing to adequately compensate persons injured from vaccinations that were undergone for the public good and that excessive tort liability was unsustainably raising prices and discouraging vaccine manufacturers from

remaining in the market." *Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1325 (Fed. Cir. 2011) (en banc).

At least in the context of the statutory purposes underlying the Vaccine Act, a child's status as a minor should be considered an extraordinary circumstance that warrants equitable tolling. As is the case with mental incapacity, legal incapacity (e.g., through minority status) renders an individual incapable of handling his or her own affairs. *Cf. K.G.*, 951 F.3d a 1381 (requiring a claimant to show her "failure to file was the direct result of a mental illness or disability that rendered her incapable of rational thought, incapable of deliberate decision making, incapable of handling her own affairs, or unable to function in society"). Indeed, this is precisely why the law generally does not allow children to, for example, enter into legal contracts. Thus, applying the same reasoning as in *K.G.*, minority status should generally provide a basis for applying equitable tolling. And that minority status should similarly inform the diligence analysis, given a child cannot be expected to diligently pursue his or her legal rights. *See D.J.S.-W. by Stewart v. United States*, 962 F.3d 745, 751 (3d Cir. 2020) (noting the elements of equitable tolling are "distinct prongs" but that, "in practice, the two elements often go hand in hand").

Further, without the application of equitable tolling, W.J. risks losing not only his ability to seek compensation for his injuries through the federal Vaccine

Compensation Program, but also his ability to seek any recourse under state law—including the ability to have the limitations period for such recourse tolled during his time as a minor. This significant loss of rights contradicts what Congress intended and presents an extraordinary circumstance warranting equitable tolling.

Eliminating a Vaccine Act claimant's ability to pursue rights under state law would be contrary to the "pro-claimant regime" Congress envisioned when establishing the Vaccine Compensation Program. *See K.G.*, 951 F.3d at 1380. As this Court recognized in *Cloer*, "Congress created a system that provides for a petitioner to have *equal access to the Vaccine Program and to state remedies* once any filing occurs regardless of the forum." *Cloer*, 654 F.3d at 1343 (emphasis added). Thus, "while the Vaccine Act does not prohibit a petitioner from going to state court after completion or unfair delay of the compensation proceedings, the Vaccine Program was intended to 'lessen the number of lawsuits against manufacturers' and 'provide[] relative certainty and generosity' of compensation awards in order to satisfy petitioners in a fair, expeditious, and generous manner." *Cloer*, 654 F.3d at 1325–26 (quoting H.R. Rep. No. 99-908 at 12–13).

This design is borne out by multiple statutory provisions that expressly preserve a claimant's state law remedies. For instance, Congress provided that state law statutes of limitations would be stayed during the pendency of federal

Vaccine Act proceedings. *See* 42 U.S.C. § 300aa-16(c). Likewise, Congress expressly indicated that state law statutes of limitations would govern civil actions arising from vaccine-related injuries for which a petition was filed under the Vaccine Compensation Program. *See* 42 U.S.C. § 300aa-21(c). And while Congress limited the availability of certain state law relief (such as design defect claims),[2] the statutory provisions above demonstrate Congress's broader purpose of preserving rights available under state law while still shifting the primary focus of vaccine-related litigation to this specific federal program.

Key legislative history further confirms that Congress intended to preserve a Vaccine Act claimant's options to pursue state law remedies. *See* H.R. Rep. No. 99–908, at 23 (1986), 1986 U.S.C.C.A.N. at 6364 (explaining the stay of a state law statute of limitations). And, critically, the legislative history demonstrates that Congress had particular concerns in mind regarding the statute of limitations as applied to children. *See* H.R. Rep. No. 99–908, at 23 (1986), 1986 U.S.C.C.A.N. at 6364. These portions of the legislative history show that Congress had no intention of displacing state law minority tolling provisions. In fact, Congress contemplated that claims by minors in state court may be raised over a decade beyond the

[2] *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011) (holding that "the National Childhood Vaccine Injury Act pre-empts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects").

termination of federal proceedings under the Vaccine Act, based on those state law minority tolling provisions. *See* H.R. Rep. No. 99–908, at 23 (1986), 1986 U.S.C.C.A.N. at 6364. As the House Report explains:

> [i]f, however, the State statute of limitations makes special provisions for minors such that actions need not be brought before the age of 18 and if the petitioner files for compensation at age three and, at age four, elects to reject the compensation judgment and initiate a civil action, then *the State statute of limitations is unaffected and the civil action may be brought until the age of 18*.

See id. (emphasis added). Thus, while this Court has stated that "[t]he only purpose of the statute of limitations in the Vaccine Act is to protect the government from stale or unduly delayed claims," *Cloer*, 654 F.3d at 1341 n.9, Congress apparently had no concerns regarding "stale" claims when brought by children who had been injured before reaching the age of majority. Had Congress been concerned with ensuring a final expiration period on a claimant's ability to pursue a vaccine-related claim, Congress could have included a statute of repose, which "cuts off a cause of action at a certain time irrespective of the time of accrual of the cause of action," as Congress did in other Vaccine Act contexts. *See Weddel v. Sec'y of Health & Hum. Servs.*, 100 F.3d 929, 931–32 (Fed. Cir. 1996) (holding the time limitation in 42 U.S.C. § 300aa–16(a)(1) for *pre*-Act claims is a statute of repose); *see also* 42 U.S.C. § 300aa-16(b) (no compensation where a vaccine-related injury occurred over eight years before a revision to the Vaccine Injury Table).

Another aspect of the House Report confirms that Congress intended to preserve state law minority tolling provisions. *See* H.R. Rep. No. 99–908, at 25 (1986), 1986 U.S.C.C.A.N. at 6366. There, the Report recognized that "[a] number of States have statutes of limitations that are stayed during the period in which one is a minor." *Id.* The Report then explained:

> Except for the requirement (where applicable) that one file a petition for compensation within the proper time period as a prerequisite to filing a civil action for damages and the provision in Section 2116(c) (discussed above) that stays the statute of limitations during the pendency of a petition for compensation, *nothing in this legislation is intended to affect these statutes of limitations—or any other provisions of State statutes of limitations*—with respect to the filing of civil actions for damages for a vaccine-related injury or death.

Id. (emphasis added). Thus, these passages from the House Report confirm that Congress recognized a need to protect the rights of injured children by preserving the ability for those children to pursue remedies according to the rights afforded to them under state law minority tolling provisions.

Here, under New York law,[3] W.J. would be entitled to tolling of the statute of limitations based on his status as a minor during the relevant time period. *See* N.Y. C.P.L.R. § 208.[4] Despite that, however, a finding that W.J.'s Vaccine Act

[3] Based on this record, it appears New York law would govern W.J.'s state law remedies. *See* Appx44 (MMR vaccine administered in New York in 2005), Appx64 (Petition signed in New York in 2021).

[4] N.Y. C.P.L.R. § 208 provides:

Petition was filed untimely risks eliminating his rights to pursue his state law remedies altogether. Multiple courts[5] have held that state suits *are* barred where a Vaccine Act petition is dismissed as untimely. *See, e.g.*, *Goetz v. N.C. Dep't of Health & Hum. Servs.*, 692 S.E.2d 395, 400 (N.C. Ct. App. 2010) (holding "a claimant must file a timely petition and exhaust all of the Federal Vaccine Act's requirements as a precondition to the maintenance of a valid state action"); *McDonald v. Lederle Lab'ys*, 775 A.2d 528, 529 (N.J. Super. Ct. App. Div. 2001) (holding "the Act bars an individual, who files an untimely petition, from later seeking recovery for injuries resulting from an adverse reaction to vaccination in a subsequently filed State civil action"). The dissent in *Cloer* similarly believed such

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> If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues, except, in any action other than for medical, dental or podiatric malpractice, where the person was under a disability due to infancy.

[5] This Court reserved that question in *Brice*. *See Brice v. Sec'y of Health & Hum. Servs.*, 240 F.3d 1367, 1368 (Fed. Cir. 2001) ("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."), *overruled on other grounds by Cloer*, 654 F.3d 1322.

an absurd result would ensue: "The apparent result [of holding that the Vaccine Act has no discovery rule] is that the state remedy will be barred for failure to file a petition under the Vaccine Act. It is incredible to think that the Vaccine Act was intended to foreclose the very state law remedies that it was designed to preserve and augment." *Cloer*, 654 F.3d at 1352 (Dyk, J., dissenting).

While serious statutory questions exist as to whether the Vaccine Act should be read as permanently barring state law claims where a claimant fails to file a timely Vaccine Act petition, that analysis is beyond the scope of this brief. Further, many cases addressing that question stem from state court proceedings, and those state courts would not be bound by this Court's interpretation of this aspect of the Vaccine Act. If anything, the potential for varying resolutions of this question among state courts (and federal district courts sitting in diversity) confirms that, as a matter of equity, the potential for a claimant to lose his or her rights in this way should bear directly on the equitable tolling analysis.

The Vaccine Act's preservation of access to state law minority tolling provisions should be of utmost importance when considering limitations questions affecting federal Vaccine Act proceedings. Indeed, these arguments could extend to the question of whether the Vaccine Act should be construed, as a matter of statutory interpretation, to allow state law minority tolling provisions to apply to

Vaccine Act petitions themselves.[6] But, at the very least, the analysis applies equally—indeed, more so—when considering the equities underlying the doctrine of equitable tolling. The presence of a state law minority tolling statute should counsel in favor of finding that equitable tolling should apply in a given case. And while that factor may not be dispositive in every case, that, coupled with additional factors present here, warrants the application of equitable tolling in this case.

In sum, both the fact of W.J.'s minority status and the significant possibility that W.J. will lose his ability to pursue *any* state law remedies contemplated by the Vaccine Act constitute extraordinary circumstances sufficient to justify equitable tolling in this case. *See Albright v. Keystone Rural Health Ctr.*, 320 F. Supp. 2d 286, 289 (M.D. Pa. 2004) (holding the existence of a state law minority tolling statute coupled with general difficulty in learning facts necessary to properly evaluate a federal statute of limitations "gave rise to an extraordinary circumstance" justifying equitable tolling); *cf. Santos ex rel. Beato v. United States*, 559 F.3d 189, 204 (3d Cir. 2009) (holding equitable tolling appropriate in a Federal Tort Claims Act action where a plaintiff erroneously relied on a state law minority tolling

[6] The Court of Federal Claims rejected an argument that the Vaccine Act's provision for timely filing of federal petitions incorporates minority tolling statutes. *Hebert v. Sec'y of Health & Hum. Servs.*, 66 Fed. Cl. 43, 44 (2005). This Court, however, did not address that important issue because the appeal in that case was dismissed for failure to pay the docketing fee. *See Hebert v. Sec'y of Health & Hum. Servs.*, 140 F. App'x 266 (Fed. Cir. 2005) (non-precedential).

statute, noting that a contrary holding would bring about "a result likely to prejudice the weakest and most vulnerable members of our society who surely are compelled to rely on others for the assertion of their rights").

B. Additional factors counsel in favor of equitable tolling in this case.

Regardless of whether a child's status as a minor and/or the existence of a state minority tolling provision for state law remedies should routinely operate to justify a claim of equitable tolling, those are at least factors that justify equitable tolling in this case when coupled with other factors present here.

As this Court explained in *K.G.*, "[t]hat a mentally incapacitated individual has a legal representative is just one of many factors that may further inform the diligence inquiry." *K.G.*, 951 F.3d at 1382. "The significance of a legal guardian may depend on a number of factors, including: the nature and sophistication of the guardian (parent, lawyer, family member, or third-party), the timing of the institution of the guardianship (before or after the vaccination, for example), the nature of the guardian's rights and obligations under state law, the extent to which the claimant's mental incapacity interferes with her relationship and communication with her guardian, the quality and nature of the guardian's relationship with the claimant, and any conflicts of interest that would inhibit the guardian from bringing a Vaccine Act claim on the claimant's behalf." *Id.* Here,

multiple additional factors counsel in favor of applying equitable tolling.

First, W.J.'s parents—who are pursuing this action *pro se*—have no particularized training in law or medicine that would alleviate W.J.'s inability to pursue his claims. They have no experience or knowledge that would warrant placing a burden on them to sift through complicated questions of statutory interpretation and nuanced differences in federal versus state law to reach a correct conclusion about the proper timeline for pursuing relief for a vaccine-related injury. Nor do they have any medical training that would have helped them understand the implications of the myriad diagnoses and treatments assigned to W.J. over the course of his young life. Thus, even though they may serve as his guardians due to the parent-child relationship, that does not alleviate W.J.'s inability to adequately present his Vaccine Act petition.

Second, W.J.'s parents do not have any ability to adequately communicate with W.J. due to W.J.'s mental incapacity and the fact that W.J. is non-verbal. This, coupled with W.J.'s minority status (i.e., a legal incapacity) throughout the relevant time period, demonstrates that merely having a legal guardian has been insufficient to preserve W.J.'s rights or alleviate the extraordinary circumstances of his mental capacity and minority status.

All of these same factors counsel in favor of finding that W.J.'s parents were

sufficiently diligent to warrant equitable tolling. Particularly so, given that they could not effectively communicate with W.J. to understand his pain, symptoms, and—critically—his desire to pursue legal recourse for his injuries based on his mental incapacity and his legal incapacity as a minor child.

In sum, Amicus contends that these additional factors, coupled with the significant factor of W.J.'s status as a minor child (and the attendant loss of rights for him as a minor when compared to state law minority tolling provisions), are sufficient to establish that equitable tolling should be applied in this case. To the extent W.J.'s parents identify additional considerations pertinent to equitable tolling, which they may be better positioned to identify, those may further support this same conclusion.

II. The Special Master and Court of Federal Claims improperly applied a *per se* rule that limits an injured child's ability to pursue relief for a vaccine-related injury simply because the child has a legal guardian, such as a parent.

At the very least, the Court should vacate and remand this case for a proper analysis of whether the presence of a legal guardian alleviated the extraordinary circumstances of W.J.'s inability to pursue his own rights.

In *K.G.*, this Court held that "the appointment of a legal guardian is only one factor a court should consider when deciding whether equitable tolling is appropriate in a particular case," and, thus, that "the Special Master erred in

adopting a per se rule and considering only whether K.G. had a legal guardian." *K.G.*, 951 F.3d at 1376, 1381. The Court explained that the Special Master "should have instead analyzed the facts to determine whether K.G.'s legal guardianship alleviated the extraordinary circumstance of her mental illness." *Id.* Similarly, *K.G.* stated that the presence of a legal guardian "is just one of many factors that may further inform the diligence inquiry." *Id.* at 1382. *K.G.* then identified myriad other factors that should be considered in the equitable tolling analysis. *Id.*

The Special Master did not consider any of those factors here. Instead, despite the holding in *K.G.*, the Special Master appeared to resort to a *per se* rule based on the fact that W.J. has parents who purportedly could have filed a claim on his behalf earlier than they did. *See* Appx37–38. That is directly contrary to *K.G.*

Specifically, in attempting to distinguish *K.G.*, the Special Master reasoned that "[u]nlike K.G., W.J. was an infant at the time of his vaccination, and the petitioners, W.J.'s parents, were capable of filing a claim on his behalf." Appx38. The Special Master further reasoned that "nothing in the [*K.G.*] decision negated a legal representative's rights and responsibilities under the Vaccine Act," and that W.J.'s parents therefore "had the right and responsibility to bring a timely claim on W.J.'s behalf." Appx38 (citing the definition of "legal representative" at 42 U.S. Code § 300aa–33(2) and the provision permitting a legal representative to bring a

claim, 42 U.S. Code § 300aa–11(b)(1)(A)). The Court of Federal Claims' Decision fared no better. *See* Appx17–19. The court reiterated the same reasoning, i.e., that a legal representative may file a petition for compensation on behalf of a minor—"as in any vaccine case involving a child." Appx18.

The logic employed by the Special Master and Court of Federal Claims entirely fails to address the holding in *K.G.*, which makes clear that the mere presence of a legal representative—and that representative's statutory ability to file a claim on behalf of a claimant—is insufficient to reject a request for equitable tolling. *See K.G.*, 951 F.3d at 1376, 1381–82. Instead, the Special Master and Court of Federal Claims should have considered all relevant factors to determine how the presence of a legal guardian impacted the extraordinary circumstances and diligence inquiries in this particular case.

W.J.'s Petition included specific allegations relevant to this inquiry that the Special Master failed to adequately address. For example, the Petition pleaded that "because [W.J.] is non-speaking and cerebrally incapacitated, [he] was unable to convey any experience of pain, discomfort, or other symptoms to anyone in the years following his MMR vaccine shot." Appx56, ¶ 87. This is even more striking than in *K.G.*, where the claimant merely *refused* to speak with her guardian. *See K.G.*, 951 F.3d at 1377. Here, the Special Master should have considered W.J.'s

mental incapacity (Appx56, ¶ 87), his legal incapacity as a minor throughout the relevant period (Appx44–45, ¶ 4), and the fact that he is "non-speaking" (Appx56, ¶ 87) in analyzing equitable tolling. At most, the Special Master and Court of Federal Claims used W.J.'s status as a minor *against* him, without properly analyzing how that would have affected his ability to communicate his needs and wishes to his legal guardians. *See* Appx38 (distinguishing *K.G.* because W.J. "was an infant at the time of his vaccination, and the petitioners, W.J.'s parents, were capable of filing a claim on his behalf"); Appx18 (reasoning that, "as in any vaccine case involving a child," a legal guardian could file a petition).

As in *K.G.*, this Court should decline to create a *per se* rule that a having a legal guardian—here, simply a parent—should bar a minor's claim of equitable tolling. Accordingly, the Court should vacate the Special Master's and Court of Federal Claims' decisions and remand for a more expansive consideration of how W.J.'s complete inability to communicate, coupled with his minority status throughout the relevant period, impacts the equitable tolling analysis.

CONCLUSION

For the reasons above, the Court should reverse the decisions of the Special Master and Court of Federal Claims and hold that equitable tolling is warranted in this case, rendering W.J.'s Vaccine Act Petition timely.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the twenty-page limit set forth in the Court's order dated April 11, 2023. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word for Microsoft 365 in 14-point Equity A font.

/s/ Angela M. Oliver
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