

2022-2119

**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

Appeal from the United States Court of Federal Claims
in 21-1342-V
Judge Kathryn C. Davis

**MEMORANDUM IN LIEU OF ORAL ARGUMENT OF APPELLANT W.J.,
by his parents and legal guardians, R.J. and A.J.**

R.J.
Family Representative – Vaccine Rule 14(a)(2)
P.O. Box 100073
Staten Island NY 10310
Cell: (929) 352-4433 [call or text]
Email: LitigantRJ@yahoo.com

September 6, 2023

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INTRODUCTION

R.J. and A.J., appearing pro se on behalf of Petitioner-Appellant W.J., respectfully submit this Memorandum in Lieu of Oral Argument in compliance with this Court’s Order dated August 18, 2023, ECF No. 56, in support of our appeal from U.S. Court of Federal Claims Judge Kathryn C. Davis’s Memorandum & Order, dated June 21, 2022, and then reissued on July 7, 2022, ECF No. 43.

Respondent-Appellee in this matter is the Secretary of Health and Human Services (hereinafter “the Government”).

We reassert our arguments in support of equitable tolling in our previous briefs and filings, expressly concur with the brief filed by amicus counsel, and submit the following in further support of the tolling of the statute of limitations in this matter.

ARGUMENT

I. Congress Has Explicitly Provided That W.J.’s Legal Disabilities Toll the Statute of Limitations in This Matter

Congress has explicitly provided that W.J. has a statutory right to bring his Vaccine Act claim at this time because in

[e]very claim of which the United States Court of Federal Claims has jurisdiction ... [a] petition on the claim of a person under legal disability ... at the time the claim accrues may be filed within three years after the disability ceases.

28 U.S.C. § 2501. In the Vaccine Act, Congress does not provide a “notwithstanding” clause in reference to 28 U.S.C. § 2501. Congress has statutorily tolled the statute of limitations in *every claim* before the U.S. Court of Federal Claims for petitioners with legal disabilities at the time their claims accrue. Congress has defined the term “legal disability” to include both mental incapacity and being underage. 28 U.S.C. § 376(j). W.J. had both of these legal disabilities from the time his claim accrued until the time his vaccine injury petition was filed. Therefore, this Court should find that the Vaccine Act’s 36-month limitation is tolled by 28 U.S.C. § 2501 in W.J.’s case.

CONCLUSION AND RELIEF SOUGHT

For the reason cited herein, and those in our previous briefs, we respectfully ask this Honorable Court to reverse Judge Davis’s Decision, ECF No. 43, and order that this matter be remanded to the U.S. Court of Federal Claims for further proceedings under correct instructions and grant such other and further relief as this Court may deem just, equitable, and proper.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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Date: 09/06/2023

Signature: /s/ R.J.

Name: R.J.