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

PETITIONER'S MEMORANDUM OF LAW IN RESPONSE TO RESPONDENT'S MEMORANDUM OF LAW DATED OCTOBER 27, 2023 (ECF NO. 64) IN COMPLIANCE WITH THIS COURT'S ORDERS DATED SEPTEMBER 27, 2023 (ECF NO. 60) AND OCTOBER 3, 2023 (ECF NO. 62)

November 12, 2023

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INTRODUCTION

R.J. and A.J. (hereinafter "Petitioners"), appearing pro se on behalf of Petitioner-Appellant W.J., respectfully submit this Memorandum of Law in Response to Respondent-Appellee's Brief dated October 27, 2023, ECF No. 64, in compliance with this Court's Orders dated September 27, 2023, ECF No. 60, and October 3, 2023, ECF No. 62, 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, 21-1342-V C.F.C. | ECF Nos. 40 and 43.

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

STATEMENT OF FACTS / PROCEDURAL HISTORY

For a complete recitation of the relevant facts and procedural history in this matter, Petitioners respectfully refer this Court to our previous brief dated October 25, 2023, ECF No. 63 pp. 5-8.[1]

ARGUMENT

I. The Government Has Provided This Court with No Supreme Court Guidance Whatsoever in Regard to Whether 28 U.S.C. § 2501 Applies to the Vaccine Act

[1] All citations herein to previously filed documents are to the ECF docket number and pages as numbered by the ECF system.

The Government has provided this Court with no clear Supreme Court guidance in regard to whether 28 U.S.C. § 2501 (hereinafter "§ 2501") applies to the Vaccine Act. In response to the Government's brief dated October 27, 2023, ECF No. 64, Petitioners respectfully refer this Court back to our brief dated October 25, 2023, ECF No. 63, wherein ample authoritative Supreme Court guidance is provided.

II. The General/Specific Canon of Statutory Construction Has No Bearing on Whether 28 U.S.C. § 2501 Applies to the Vaccine Act

A. The General/Specific Canon Has Been Applied by the Courts Almost Exclusively to Resolve Apparent Conflicts Between General and Specific Provisions Within the Same Statute, Not to Apparent Conflicts Between Two Different Statutes

In support of its contention that § 2501 does not apply to the Vaccine Act, the Government refers this Court to "the canon of statutory construction that the specific governs the general" (hereinafter "the general/specific canon"). ECF No. 64 p. 22. However, the general/specific canon has been applied by the courts almost exclusively to resolve apparent conflicts between general and specific provisions within the *same* statute, *not* to apparent conflicts between two *different* statutes. *RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S.Ct. 2065, 2070-2071 (2012) (The Court used the canon to resolve an apparent conflict between two provisions within 11 U.S.C. § 1129[b][2][A].); *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 386 (1992) (The Court used the canon to resolve an apparent conflict between two provisions within 49 U.S.C. App. § 1305.);

Crawford Fitting Co., v. J.T. Gibbons, Inc., 482 U.S. 437, 439 (1987) (The Court used the canon to resolve an apparent conflict between two provisions—a specific provision in 28 U.S.C. § 1821(b), and a general provision in Rule 54(d) of the Federal Rules of Civil Procedure. This, however, is *not* a conflict between two statutes.). Similarly, in *Parkinson v. Department of Justice*, this Court used the canon to resolve an apparent conflict between two provisions within 5 U.S.C. § 7701(c)(2). 874 F.3d 710, 716 (Fed Cir. 2017). In, *Biogen MA v. Japanese Foundation for Cancer Research*, this Court used the canon to resolve an apparent conflict between two provisions within the Leahy-Smith America Invents Act, Pub.L. No. 112-29, 125 Stat. 284 (2011). 785 F.3d 648, 656 (Fed Cir. 2015).

In *Radzanower v. Touche Ross & Co*., the Supreme Court *did* apply the canon to an apparent conflict between two separate statutes. The *Radzanower* Court dealt with the apparent conflict between the narrow venue provision of the National Bank Act of 1878 versus the broad venue provision of the Securities Exchange Act of 1934. 426 U.S. 148, 149-150 (1976). The Court observed that

> [i]t is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by *a later enacted statute* covering a more generalized spectrum.

426 U.S. at 153 (emphasis added). The instant matter concerns a situation which is the reverse of that in *Radzanower*. The enactment of § 2501 precedes that of the

Vaccine Act by some three decades. The Vaccine Act is not the "later enacted statute covering a more generalized spectrum" in the matter at hand. 426 U.S. at 153. As such, *Radzanower* may not be particularly on point here.

B. The General/Specific Canon Notwithstanding, This Court Must Still Determine the Intent of Congress in Its Inquiry into Whether § 2501 Applies to the Vaccine Act

The *Radzanower* Decision is not a simple holding which states that the specific provision always trumps the general provision or that the later enacted statute always trumps the prior enacted one. The *Radzanower* Decision was based on the specific set of facts in that case. 426 U.S. at 158 ("For *these* reasons ... ") (emphasis added). The Court arrived at its conclusions after a thorough study of the statutory history of both laws in question. 426 U.S. at 153-158. In *Radzanower*, the Court held that a determination regarding the general/specific canon necessitates a court's inquiry into "the mind of the legislator." 426 U.S. at 153. Neither did *Radzanower* hold that the later enacted statute always trumps the prior one. 426 U.S. at 153 (" 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, *regardless of the priority of enactment*.' *Morton* v. *Mancari,* 417 U.S. 535, 550-551.") (emphasis added).

The *Radzanower* Court stated that

> [t]he reason and philosophy of the [general/specific canon] rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.

426 U.S. at 153 (internal citation omitted). While *Radzanower* discussed two separate statutes that chronologically went from a specific to a general provision, it stands to reason that the same reason and philosophy should apply for two statutes that go from a general to a specific provision, as in the instant case. The Court must attempt to search "the mind of the legislator," i.e., the intent of Congress. When the intent of Congress "turned to the details" of the Vaccine Act, did Congress expressly contradict or repeal § 2501? Is it "absolutely necessary" to give the Vaccine Act "such a construction, in order that its words shall have any meaning at all?" 426 U.S. at 153. Petitioners assert that the answer to both of these questions is no.

C. The General/Specific Canon Notwithstanding, this Court's Main Key to Correctly Determining Whether § 2501 Applies to the Vaccine Act Is to Reject the Government's Implied Repeal Argument

Radzanower provides important guidance regarding implied repeals. The Court held that

> [t]he statutory provisions at issue here cannot be said to be in "irreconcilable conflict" in the sense that there is a positive

> repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. ... Repeal is to be regarded as implied only if necessary to make the later enacted law work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.

426 U.S. at 155 (internal citations omitted). Moreover, the Court held that, when considering applying the general/specific canon to two different statutes, "[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." 426 U.S. at 154 (internal citation omitted).

Nothing in the Vaccine Act shows that Congress gave any consideration to the repeal of § 2501, consciously abandoned its tolling policy for those with legal disabilities, or clearly and manifestly intended to do either. *Radzanower*, 426 U.S. at 158 ("And there is nothing in the legislative history of the Securities Exchange Act to support the view that Congress in enacting it gave the slightest consideration to the *pro tanto* repeal of § 94, let alone to indicate 'that Congress consciously abandoned its [prior] policy,' *Morton* v. *Mancari,* 417 U. S., at 551, or that its intent to repeal § 94 *pro tanto* was 'clear and manifest,' *United States* v. *Borden Co.,* 308 U. S. 188, 198, quoting *Red Rock* v. *Henry,* 106 U.S. 596, 602.").

Resolving an apparent conflict between a general and a specific provision in two separate statutes is no different than resolving an apparent conflict between those two statutes for any reason. "The issue boils down to whether a

clear intention otherwise can be discovered." *Radzanower*, 426 U.S. at 154 (internal quotation marks omitted). The *Radzanower* Court held that there are

> "two well-settled categories of repeals by implication — (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest..." *Posadas* v. *National City Bank,* 296 U. S. 497, 503.

426 U.S. at 154. As Petitioners discussed in our previous brief, the Government is trying to get this Court to adopt its unfavored implied repeal argument with respect to the Vaccine Act's purported setting aside of § 2501. ECF No. 63 p. 10. It is still necessary—even in light of the general/specific canon—that any purported repeal of § 2501 in the Vaccine Act be clear and manifest, or that the two statutes be irreconcilable.

This brings us right back to Petitioners' previous brief, ECF No. 63 p. 8, wherein in Petitioners respectfully referred this Court to "the most significant guiding principle from the Supreme Court" regarding this matter, which is that when "[p]resented with two statutes, the Court will regard each as effective unless Congress' intention to repeal is clear and manifest, or the two laws are irreconcilable." *Maine Community Health Options v. U.S.*, 140 S.Ct. 1308, 1323 (2020) (internal citations and quotation marks omitted). Petitioners respectfully

reiterate that, as we previously argued, the Vaccine Act contains no clear and manifest repealing of § 2501, nor is it irreconcilable with § 2501 or the Tucker Act. ECF No. 63.

Moreover, as Petitioners pointed out in our previous brief, the Vaccine Act's 36-month limitations deadline, 42 U.S.C. § 300aa-16(a)(1), is a nonjurisdictional procedural requirement whereas § 2501 goes to the Court's subject-matter jurisdiction. ECF No. 63 pp. 11-12. In light of this, this Court needs to determine whether Congress intended, in the Vaccine Act, to alter the Court of Claims' subject-matter jurisdiction over "every claim" as provided for in § 2501.

Did Congress clearly and manifestly, specifically and substantively, in the Vaccine Act, intend to modify the Court's § 2501 subject-matter jurisdiction over every claim? Does the Vaccine Act's nonjurisdictional procedural requirement repeal the Court's jurisdictional power to hear W.J.'s vaccine injury claim, as provided for in § 2501? Petitioners assert that the answer to both of these questions is no. *U.S. v. Cotton*, 535 U.S. 625, 630 (2002) (Subject-matter jurisdiction means "the court's statutory or constitutional power to adjudicate the case." Because it "involves a court's power to hear a case," it "can never be forfeited or waived.") (internal citations omitted). The Vaccine Act's nonjurisdictional limitations provision does not affect the Court's subject-matter jurisdiction in any way. *Arbaugh v. Y & H Corp*., 546 U.S. 500, 502 (2006) ("[W]hen Congress does not

rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."). Congress did not clearly and manifestly repeal the Court's § 2501 subject-matter jurisdiction over the Vaccine Act. Therefore, § 2501 indeed applies to the Act. The general/specific canon of statutory construction has no bearing here.

CONCLUSION AND RELIEF SOUGHT

For the reasons cited herein, and those in our previous briefs, Petitioners respectfully ask this Honorable Court to reverse Judge Davis's Decision, 21-1342-V C.F.C. | ECF Nos. 40 and 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.

Dated: Staten Island, New York
November 12, 2023

/ s / R.J.

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