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

RESPONSE BRIEF OF COURT-APPOINTED *AMICUS CURIAE* ANGELA M. OLIVER IN RESPONSE TO SUPPLEMENTAL HHS BRIEF AND 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.

Angela M. Oliver
Haynes and Boone, LLP
800 17th Street NW
Suite 500
Washington, D.C. 20006
Phone: (202) 654-4552
Fax: (202) 654-4252

Court-Appointed Amicus Curiae in Support of Petitioner-Appellant W. J., by His Parents and Legal Guardians, R.J. and A.J.

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:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: November 13, 2023

Signature: */s/ Angela M. Oliver*

Name: Angela M. Oliver

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
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
Angela M. Oliver of Haynes and Boone, LLP (Court-appointed amicus curiae)		

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4). _X_ None/Not Applicable ___ Additional pages attached		

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

___Yes (file separate notice; see below) ___ No _X_ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). Please do not duplicate information. This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

_X_ None/Not Applicable ___ Additional pages attached

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

Amicus respectfully presents this response brief pursuant to this Court's Order of September 27, 2023 (ECF No. 60), and in response to the Government's Supplemental Brief of October 27, 2023 (ECF No. 64) ("Gov.'s Suppl. Br.").[1]

ARGUMENT IN RESPONSE

I. Rules of procedure cannot displace the traditional requirement—based in common law and statute—that parents obtain counsel before litigating their child's rights.

The Government relies on Vaccine Rule 14(a)(2) to argue that parents may, without question, represent their child's rights before the Court of Federal Claims and its Office of Special Masters without obtaining counsel. Yet the Government never grapples with the wealth of case law holding that parents cannot proceed *pro se* when asserting their child's rights in federal court. The overwhelming majority of circuits apply this rule, which stems from common law and comports with 28 U.S.C. § 1654 and, for the Court of Federal Claims, 28 U.S.C. § 2503(a). *See* Amicus' Suppl. Br. 2–4 (ECF No. 65). Neither the Vaccine Rules nor the Rules of the Court of Federal Claims ("RCFC") can displace this common law tradition of ensuring the rights of a child are adequately represented—nor override the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), 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.

statutory text limiting who may represent others in federal court.

At the outset, the Government's effort to distinguish RCFC 17(c) does nothing to further its position. *See* Gov.'s Suppl. Br. 5–6. First, like Federal Rule of Civil Procedure 17(c), RCFC 17(c) is a capacity-to-sue provision; it provides no clear guidance regarding whether parents can proceed *pro se* on their child's behalf. As the Fifth Circuit has emphasized, "[i]t is important not to confuse capacity to sue under Federal Rule of Civil Procedure 17 and the right to proceed *pro se* under § 1654." *See Raskin v. Dallas Indep. Sch. Dist.*, 69 F.4th 280, 285 n.5 (5th Cir. 2023); *see also id.* (noting FRCP 17(c)(1) "does not answer the question of whether the minor's case is the guardian's 'own' such that the guardian can proceed *pro se* under § 1654"). Further, the Government's attempt to disentangle the Vaccine Rules from the RCFC is puzzling, given RCFC 83.1(a)(3) would arguably support the Government's position. RCFC 83.1(a)(3) permits "[a]n individual who is not an attorney [to] represent oneself or a member of one's immediate family." Regardless, neither set of rules can override common law and statutory limits.

Congress required the Vaccine Rules to be subject to the usual strictures, including that they be consistent with statutes. The Vaccine Rules are promulgated "pursuant to section 2071 of Title 28." 42 U.S.C. § 300aa-12(d)(2)(A). Section 2071, in turn, requires such rules to be "consistent with Acts of Congress." 28

U.S.C. § 2071(a). Thus, the RCFC and the Vaccine Rules cannot conflict with any statutes—including 28 U.S.C. § 2503(a), which requires litigants in the Court of Federal Claims to proceed "in person or by attorney."

The common law rule prohibiting parents from litigating their child's claims *pro se* is reflected in 28 U.S.C. § 1654 and 28 U.S.C. § 2503(a). *See* Amicus' Suppl. Br. 2–4. Those statutory provisions, which "comprehensively list all the ways that a party may appear in federal court," *see Raskin*, 69 F.4th at 283 (addressing § 1654), allow a person to bring his or her own claim *pro se*, but do not permit a non-attorney to represent someone else's interests in court. *See* 28 U.S.C. § 1654 (parties may proceed "personally or by counsel"), 28 U.S.C. § 2503(a) (for cases in the Court of Federal Claims, parties may proceed "in person or by attorney"). By permitting non-attorney parents to represent their children *pro se*, Vaccine Rule 14(a)(2) and RCFC 83.1(a)(3) conflict with § 2503(a) and cannot be sustained. *See Nat'l Org. of Veterans' Advocs. v. Sec'y of Veterans Affs.*, 981 F.3d 1360, 1384–86 (Fed. Cir. 2020) (invalidating a rule as inconsistent with statute, based in part on the requirement in § 2071(a) that rules "be consistent with Acts of Congress").

Petitioners correctly note that this Court previously granted their motion to continue representing W.J. in this appeal. ECF No. 63 at 13–14 (citing Order of Nov. 15, 2022, ECF No. 18). The Court's non-precedential Order addressed, at

most, whether an *appeal* could be handled *pro se*, and, more particularly whether Petitioners could represent W.J.'s interest in this appeal. ECF No. 18 at 5–6. It did not address the broader question in the Order of Sept. 27, 2023 (ECF No. 60).

II. The Court of Federal Claims and Special Master did not consider all relevant facts in determining whether the presence of a parent could adequately protect W.J.'s legal rights.

The different approaches presented by Amicus and the Government reflect divergent views as to the core factual inquiry that should accompany the equitable tolling analysis for cases involving incapacitated individuals. Amicus' approach allows for a nuanced analysis focused on ensuring the incapacitated person's rights are sufficiently protected, particularly given the inherent difficulty a parent may have in realizing a cause of action under the Vaccine Act is accruing. Meanwhile, the Government's approach automatically substitutes the incapacitated individual for his or her guardian, without ensuring that such a substitution adequately protects the rights of the incapacitated individual. Equity favors Amicus' approach.

The Government first raises a forfeiture-type argument, faulting W.J.'s parents for not raising more detailed reasons why "W.J.'s inability to communicate caused them to be unable to file a timely suit." Gov.'s Suppl. Br. 7. Respectfully, that is precisely why W.J. should have access to counsel—an attorney would have presented a more detailed argument. But, regardless, W.J.'s parents did cite *K.G. v.*

Sec'y of Health & Hum. Servs., 951 F.3d 1374, 1381 (Fed. Cir. 2020). That case itself should have prompted a more searching analysis by the Special Master, particularly given this Court's admonition that "the Special Master erred in adopting a per se rule and considering only whether [the right-holder] had a legal guardian." *See id.*

The Government also relies on the Special Master's reasoning that W.J.'s parents were *themselves* not "incapacitated in any way during any time frame relevant to their petition." Appx38 (quoted at Gov.'s Suppl. Br. 7). That wrongly substitutes the parent for the child in the tolling analysis. The extraordinary circumstances preventing W.J. from asserting his rights are W.J.'s mental incapacity and his status as a minor. The pertinent question is thus whether W.J.'s inability to assert his own rights could be "alleviated" by the presence of a parent—not whether his parents had a separate basis for equitable tolling. *See K.G.*, 951 F.3d at 1381. The Special Master should have considered the specific allegations of injury and symptoms in the complaint, in light of W.J.'s age and inability to communicate, to determine whether W.J.'s parents had the information and ability to protect W.J.'s legal rights. *See* Amicus Br. 8–13.

The Government further contends that a litigant's *pro se* status is not an extraordinary circumstance. Gov.'s Suppl. Br. 7–10. Amicus has not presented *pro se* status as a stand-alone basis for tolling, but rather as a factor in analyzing whether

a parent alleviates the extraordinary circumstances at issue. *See K.G.*, 951 F.3d at 1382 (the "significance of a legal guardian" may depend on "the nature and sophistication of the guardian (parent, lawyer, family member, or third-party)"). Similarly, the Government contends that tolling the limitations period because a litigant "opted to proceed *pro se*" would contradict the Vaccine Act's attorney's fees provisions. *See* Gov.'s Suppl. Br. 11. But for a child like W.J., "[t]he choice to appear *pro se* is not a true choice." *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990). If anything, his parents' choice to proceed *pro se* despite the Act's generous attorney's fees provisions reflects an incomplete understanding of this process, confirming the need for equitable tolling.

In sum, rather than carefully analyzing whether W.J.'s parents had adequate information and ability to protect W.J.'s rights under the Vaccine Act given the circumstances alleged in the complaint, the Special Master effectively substituted W.J.'s parents into the equitable tolling analysis, then expected the parents to establish their own basis for tolling. Respectfully, that approach skips the most critical step—ensuring the parent is sufficiently able to protect the child's rights.

III. The Vaccine Act did not impliedly repeal the background disability tolling provision of 28 U.S.C. § 2501, ¶ 3.

The Government's focus on the specific-governs-the-general canon does not resolve the question presented by this Court. *See* Gov.'s Suppl. Br. 12–13. To be

sure, the more specific 36-month limitations period in the Vaccine Act governs Vaccine Act claims, as opposed to the default six-year limitations period in § 2501, ¶ 1. 42 U.S.C. § 300aa-16(a)(2); 28 U.S.C. § 2501, ¶ 1. But that does not answer whether another default rule in § 2501, the disability tolling provision, applies to Vaccine Act claims. 28 U.S.C. § 2501, ¶ 3. Because the Vaccine Act does not address disability tolling, there is no reason to believe Congress intended to repeal the default tolling provision. No conflict exists between the Vaccine Act and the disability tolling provision of § 2501, ¶ 3, so this Court should give effect to both.

The disability tolling provision in § 2501 is a deeply embedded background principle of the Claims Court's jurisdiction, governing non-tort claims against the government since 1863. Amicus' Suppl. Br. 14–15. Congress left § 2501's predecessor tolling provision in place when passing the Tucker Act in 1887, and the Supreme Court held that the tolling provision continued to apply even though the Tucker Act arguably was intended to "cover the whole subject of the limitation of suits against the government, in whatever court instituted." *United States v. Greathouse*, 166 U.S. 601, 605 (1897); *see also Chance v. Zinke*, 898 F.3d 1025, 1032 (10th Cir. 2018) ("the two provisions coextensively governed lawsuits in the Court of Claims"). When Congress restructured the statutes of limitations in 1911, it made sure to include a disability tolling provision in *both* statutes, further

solidifying this as a background tolling principle governing non-tort[2] claims against the government, regardless of the forum. *See* Act of Mar. 3, 1911, ch. 231, § 156, 36 Stat. 1087, 1139 (predecessor to § 2501); *id.* § 24(20), 36 Stat. 1087, 1093 (predecessor to § 2401(a)). This background principle continues to exist across forums today. 28 U.S.C. § 2501, ¶ 3; *id.* § 2401(a).

Given that long history, the canon against implied repeals strongly points toward the conclusion that Congress intended to leave that background tolling principle in place for Vaccine Act claims because nothing in the Vaccine Act conflicts with that tolling provision. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("But where two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" (quoting *Regional Rail Reorg. Act Cases (Blanchette v. Connecticut Gen. Ins. Corps.)*, 419 U.S. 102, 133–34 (1974))).

Instead of addressing this history, the Government cites various cases that do not address the issue. Gov.'s Suppl. Br. 14–16. The only case directly addressing this issue is *Doe v. Secretary of Department of Health & Human Services*, 2005 WL 6117660, at *1 (Fed. Cl. Oct. 7, 2005). *Doe*, of course, is not binding on this Court.

[2] The history of tort claims against the government proceeded separately. *See Booth v. United States*, 914 F.3d 1199, 1206 (9th Cir. 2019) (discussing the divergent history between § 2401(a) and § 2401(b)).

A more helpful case for this Court to follow is *United States v. Greathouse*, which analyzed whether the disability tolling provision in § 2501's predecessor statute would apply even after it was arguably displaced by the Tucker Act. 166 U.S. 601 (1897); Amicus' Suppl. Br. 17–18. Like § 2501, Revised Statutes (R.S.) § 1069 provided a six-year limitations period and a three-year disability tolling provision. *Id.* at 602. The government argued that the later-enacted Tucker Act, which included a six-year limitations period, displaced the tolling provision in R.S. 1069. *Id.* at 603. The Court disagreed, reasoning that the Tucker Act's limitations period did not "displace[] every part of section 1069 of the Revised Statutes." *Id.* at 605. Because "repeals by implication are not favored," and the two statutes were not "absolutely irreconcilable," the Court applied the tolling provision. *Id.* at 605–06. That same reasoning should apply here.

The Government suggests it is not possible to separate the tolling provision of § 2501, ¶ 3 from the limitations period in § 2501, ¶ 1. But Congress itself separated those provisions: instead of having one follow the other, Congress placed another limitations period in between them. *See* § 2501, ¶ 2. That textual structure confirms that each paragraph of § 2501 operates independently. *See also Greathouse*, 166 U.S. at 605 (noting the Tucker Act's limitations period did not "displace[] *every part* of section 1069 of the Revised Statutes" (emphasis added)).

The Government also relies on *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), and contends that § 2501 is "fundamentally incongruous" with the Vaccine Act because the Vaccine Act allows for equitable tolling, while § 2501, ¶ 1 is jurisdictional and subject only to disability tolling. *See* Gov.'s Suppl. Br. 16–17. But disability tolling provisions and equitable tolling can—and do—coexist. The Little Tucker Act includes a limitations period and disability tolling provision highly similar to § 2501, yet has been held *not* to be jurisdictional and, instead, to be subject to equitable tolling.[3] *See* 28 U.S.C. § 2401(a); *Chance*, 898 F.3d at 1033–35. Thus, the fact that the Vaccine Act's limitations period is subject to equitable tolling has no bearing on whether § 2501, ¶ 3 applies.[4]

In sum, the disability tolling provision has been deeply embedded in the history of non-tort claims against the government for over a century, and Congress legislated with that background principle in mind. While Congress provided a shorter limitations period for Vaccine Act claims, it left the disability tolling provision in place. Thus, this Court should give that tolling provision full effect.

---

[3] "[T]he only reason § 2501 is jurisdictional is because the Court had directly concluded as much in pre-*Irwin* precedent." *Chance*, 898 F.3d at 1032.

[4] The Government's suggestion that the *possibility* of equitable tolling is "more generous" than the *guaranteed* statutory tolling in § 2501, ¶ 3 is ironic given the case at hand and the fact that, in the example cited, equitable tolling was denied. Gov.'s Suppl. Br. 17 (citing *Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1344 (Fed. Cir. 2011) (en banc)).

Respectfully Submitted,

HAYNES AND BOONE, LLP

/s/ Angela M. Oliver

Angela M. Oliver
800 17th Street NW, Suite 500
Washington, D.C. 20006
Phone: (202) 654-4552
Fax: (202) 654-4252
Angela.Oliver@haynesboone.com

Court-Appointed *Amicus Curiae* in Support of Petitioner-Appellant W. J., by His Parents and Legal Guardians, R.J. and A.J.

CERTIFICATE OF COMPLIANCE

This brief complies with the ten-page limit set forth in the Court's order dated September 27, 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
Angela M. Oliver