No. 2022-2119

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.

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

SUPPLEMENTAL BRIEF FOR RESPONDENT-APPELLEE SECRETARY OF HEALTH AND HUMAN SERVICES

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STATEMENT OF RELATED CASES

No appeal of this case has been before this or any other appellate court. To the knowledge of respondent-appellee, there is no same or similar case, filed pursuant to the National Childhood Vaccine Injury Act of 1986 (Vaccine Act), 42 U.S.C. §§ 300aa-1 to -34, pending before the Supreme Court, this Court, or any other Court of Appeals.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government respectfully submits this supplemental brief in response to this Court's order of September 27, 2023. That order directed court-appointed Amicus and the government to file supplemental briefs to address the following issues:

(1) Whether parents may lawfully represent their minor child *pro se* in asserting a claim under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 *et seq.* (the Vaccine Act);

(2) Whether, in this case, the Court of Federal Claims and the Special Master engaged in an equitable tolling analysis that was "based on a consideration of all relevant facts and circumstances," *K.G. v. Secretary of Health & Human Services*, 951 F.3d 1374, 1382 (Fed. Cir. 2020), including W.J.'s parents' *pro se* status; and

(3) Whether 28 U.S.C. § 2501, which provides "[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," applies to claims brought under the Vaccine Act.

First, the Vaccine Rules of the U.S. Court of Federal Claims, Rules of Ct. of Fed. Cl. (RCFC) app. B (Vaccine Rules), expressly permit parents to represent their minor children *pro se* to bring a claim under the Vaccine Act. Congress directed the Court of Federal Claims to issue special procedural rules for claims brought under the Vaccine Act, *see Simanski v. Secretary of Health & Human Servs.*, 671 F.3d 1368, 1371 (Fed. Cir. 2012) (citing 42 U.S.C. § 300aa-12(d)(2)); and Vaccine Rule 14(a)(2) provides that "[a]n individual who is not an attorney may represent oneself or a member of one's immediate family."

Second, the Special Master and the Court of Federal Claims considered "all relevant facts and circumstances" in determining that equitable tolling was not warranted here. *K.G.*, 951 F.3d at 1382. Petitioners argued that the statute of limitations should be tolled on account of W.J.'s communication difficulties and because the federal government allegedly concealed information linking vaccines and autism, *see, e.g.*, Appx17, Appx26. At no point did petitioners argue that those communication difficulties or that their *pro se* representation of W.J.'s interests actually interfered with their ability to bring a timely claim under the Vaccine Act. *Cf. Aldridge v. McDonald*, 837 F.3d 1261, 1265 (Fed. Cir. 2016). The Special Master and Court of Federal Claims thus appropriately concluded that equitable tolling was not warranted here. *See* Appx16-20, Appx38.

Third, the statute of limitations and tolling provision under 28 U.S.C. § 2501 do not apply to claims brought under the Vaccine Act. The Vaccine Act provides the Court of Federal Claims jurisdiction to determine whether a claimant is entitled to compensation under the National Vaccine Injury Compensation Program, *see Cloer v. Secretary of Health & Human Servs.*, 654 F.3d 1322, 1361 (Fed. Cir. 2011) (en banc), and claims invoking the Court of Federal Claims' jurisdiction under that scheme are subject to the scheme's specific statute of limitations, 42 U.S.C. § 300aa-16(a), including a 36-month statute of limitations applicable here, *id.* § 300aa-16(a)(2), with no tolling provision for any particular claimants. Section 2501, on the other hand,

provides a 6-year statute of limitations, with a tolling provision for all "claim[s] of a person under legal disability," 28 U.S.C. § 2501.

The Vaccine Act's specific 36-month statute of limitations thus conflicts with the general 6-year statute of limitations in 28 U.S.C. § 2501, and this Court and the Supreme Court have repeatedly held that, in the event of such a conflict, "the specific governs the general." *Biogen MA, Inc. v. Japanese Found. for Cancer Research*, 785 F.3d 648, 656 (Fed. Cir. 2015) (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)); *see also, e.g.*, *Martinez v. United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003) (en banc) (contrasting the statutes of limitations for claims under the Vaccine Act versus under 28 U.S.C. § 2501). The Vaccine Act's more specific limitations apply here, and 28 U.S.C. § 2501 does not apply to claims brought under the Vaccine Act.

ARGUMENT

I. Parents May Represent Their Child *Pro Se* In Asserting Claims Under The Vaccine Act.

The Vaccine Rules expressly permit parents to represent their minor children *pro se* in bringing a claim under the Vaccine Act. *See* Vaccine R. 14(a)(2).

Congress directed "the Court of Federal Claims, with input from the special masters, to promulgate rules of procedure for Vaccine Act cases." *Simanski v. Secretary of Health & Human Servs.*, 671 F.3d 1368, 1371 (Fed. Cir. 2012) (citing 42 U.S.C. § 300aa-12(d)(2)). These rules are known as the Vaccine Rules, *see* RCFC app. B,

which were "designed to ensure that claims for compensation under the Vaccine Act are resolved in a manner that is both speedy and fair," *Simanski*, 671 F.3d at 1371; *see also, e.g.*, *Caron ex rel. A.C. v. Secretary of Health & Human Servs.*, 136 Fed. Cl. 360, 386 (2018) (noting that the Vaccine Rules "contemplate fundamental due process rights that the Special Masters ought to observe in all proceedings") (quotations omitted).

Vaccine Rule 14(a)(2) provides that "[a]n individual who is not an attorney may represent oneself or a member of one's immediate family," *see also* Vaccine R. 2(c)(2)(C) (providing various filing requirements for a petition "filed by … the parent of an injured minor"); *O'Connell v. Secretary of Health & Human Servs.*, 63 Fed. Cl. 49, 57 n.7 (2004) ("[T]he Vaccine Act [does not] require petitioners to be represented by counsel."); *Kennedy v. Secretary of Health & Human Servs.*, No. 90-1009V, 2010 WL 4810233, at *5 (Fed. Cl. Oct. 29, 2010) ("In the 22-year history of the Vaccine Act, it has never been held … that parents who are not attorneys are therefore automatically legally disqualified from validly representing their minor child's interests."); *Riley v. Secretary of the Dep't of Health & Human Servs.*, No. 90-466V, 1992 WL 892300, at *3-4 (Cl. Ct. Mar. 26, 1992) (applying Vaccine Rule 14 in a case in which parents represented their son *pro se*). And this Court has adjudicated many cases in which parents proceeded *pro se* to assert claims under the Vaccine Act on behalf of their children, never calling into question those parents' ability to sue unrepresented. *See, e.g.*, *Miles v. Secretary of Health & Human Servs.*, 769 F. App'x 925 (Fed. Cir. 2019) (per

curiam) (unpublished); *Rogero v. Secretary of Health & Human Servs.*, 748 F. App'x 996, 997 (Fed. Cir. 2018) (per curiam) (unpublished).

During oral argument, the Court also inquired about the applicability of 28 U.S.C. § 1654, which provides that "parties may plead and conduct their own cases personally," as well as RCFC Rule 17 and the similarly worded Rule 17 of the Federal Rules of Civil Procedure, which provide that a "general guardian" "may sue or defend on behalf of a minor or an incompetent person." Construing those provisions, "most of the circuit courts have held 'that non-attorney parents generally may not litigate the claims of their minor children in federal court.'" *Adams ex rel. D.J.W. v. Astrue*, 659 F.3d 1297, 1300 (10th Cir. 2011) (collecting authorities).

But that does not alter the result here. This Court has previously explained that "[t]he RCFC apply to special masters 'only to the extent referenced' in the Vaccine Rules." *Patton v. Secretary of the Dep't of Health & Human Servs.*, 25 F.3d 1021, 1026 (Fed. Cir. 1994) (quoting Vaccine R. 1(c)).[1] The Vaccine Rules do not reference RCFC Rule 17. *Cf. id.* at 1026 n.8 (listing a number of instances in which the Vaccine Rules

[1] The current version of Vaccine Rule 1(c) provides that "[t]he RCFC apply only to the extent they are consistent with the Vaccine Rules," but that does not affect the applicability of the Court's conclusion in *Patton*. This Court has not squarely held that RCFC 17 precludes a parent from representing his child *pro se*, as other courts of appeals have held with respect to Federal Rule of Civil Procedure 17, *cf. Kennedy v. Secretary of Health & Human Servs.*, 99 Fed. Cl. 535, 547 (2011) ("[I]t would appear that the Vaccine Act … authorize[s] a parent to proceed *pro se*" on behalf of a child.), *aff'd*, 485 F. App'x 435 (Fed. Cir. 2012). But even if this Court had so held, RCFC 17 would be inconsistent with Vaccine Rule 14 and would thus not apply here.

reference the RCFC). And this Court has repeatedly recognized that various RCFC do not apply in cases brought under the Vaccine Act. *See, e.g.*, *Cedillo v. Secretary of Health & Human Servs.*, 617 F.3d 1328, 1342 (Fed. Cir. 2010) (The RCFC "discovery rules do not apply to proceedings under the Vaccine Act."); *Turner v. Secretary of Health & Human Servs.*, 268 F.3d 1334, 1339 (Fed. Cir. 2001) (explaining that a particular Court of Federal Claims Rule "has limited application to the decisions of the Court of Federal Claims … in vaccine cases"); *Black v. Secretary of Health & Human Servs.*, 93 F.3d 781, 790 (Fed. Cir. 1996) (noting that a particular rule of the RCFC "does not apply by its terms to Vaccine Act proceedings before the special masters"); *Widdoss v. Secretary of the Dep't of Health & Human Servs.*, 989 F.2d 1170, 1178 (Fed. Cir. 1993) (holding that the Court of Federal Claims erred in applying a generally applicable procedural rule, contrary to "Congress' carefully circumscribed [procedures] under the Vaccine Act").

Because Vaccine Rule 14 expressly permits a parent to bring a claim under the Vaccine Act *pro se* on behalf of a child, petitioners may proceed *pro se* on behalf of their child here.

II. The Special Master And The Court Of Federal Claims Considered All Relevant Facts And Circumstances To Determine That Equitable Tolling Was Not Warranted Here.

A. The Special Master and the Court of Federal Claims considered "all relevant facts and circumstances" in determining that equitable tolling was not warranted in this case. *K.G. v. Secretary of Health & Human Servs.*, 951 F.3d 1374, 1382 (Fed. Cir.

2020). Petitioners argued that the statute of limitations should be tolled for two reasons: because W.J. is unable to communicate and because the federal government allegedly concealed information linking vaccines and autism. Appx17, Appx26 (summarizing petitioners' arguments); *see also* Appx56-61 (petition). But both the Special Master and the Court of Federal Claims rightly found that W.J.'s speech deficiencies did not themselves interfere with his parents' ability to bring a claim on his behalf or *cause* the parents any delay in filing suit. Appx18-19, Appx38; *see also Aldridge v. McDonald*, 837 F.3d 1261, 1265 (Fed. Cir. 2016) (Equitable tolling may only be warranted "where the circumstances that *caused* a litigant's delay are both extraordinary *and* beyond its control." (quoting *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 257 (2016))). Nor did petitioners explain how W.J.'s inability to communicate caused them to be unable to file a timely suit. The Special Master thus rightly found that "petitioners … were capable of filing a claim on [W.J.'s] behalf," and they did not "file[] evidence to suggest that they were incapacitated in any way during any time frame relevant to their petition." Appx38.

Moreover, petitioners' concealment arguments are baseless, and Amicus has not embraced them. Appx19-20, Appx40-42; *see also* Resp. Br. 21-23.

B. Following this Court's first supplemental briefing order, Amicus argued (at 16) that the Court should consider petitioners' *pro se* status in determining whether equitable tolling is warranted here, and Amicus further invited petitioners (at 17) to "identify additional considerations pertinent to equitable tolling." Petitioners

identified none. *See* Pet'rs' Mem. in Lieu of Oral Arg., Doc. 58 (Sept. 6, 2023). And at no point have petitioners suggested that their *pro se* status has itself interfered with their ability to advocate on W.J.'s behalf. To the contrary—with the exception of timely bringing suit, petitioners have met every filing deadline in this case, *see* Appx176-179 (Court of Federal Claims docket), including timely seeking further review of the Special Master's decision in the Court of Federal Claims, Appx6, and timely seeking review in this Court, Appx179; *see also* Resp. Br. 20 (noting how W.J.'s parents have advocated for W.J.'s medical and educational needs, despite having no expertise in those areas); Resp. First Suppl. Br. 6 (similar).

In many different contexts, this Court has concluded that *pro se* litigants are equally subject to various statutes of limitations, and that a litigant's *pro se* status is not itself an "extraordinary circumstance" that would have interfered with a litigant's ability to bring a claim to warrant equitable tolling. *See, e.g.*, *G.L.G. ex rel. Graves v. Secretary of Health & Human Servs.*, 577 F. App'x 976, 977 (Fed. Cir. 2014) (unpublished) (affirming dismissal of *pro se* petitioner's Vaccine Act claims as untimely); *Barnes v. Merit Sys. Prot. Bd.*, 566 F. App'x 909, 912 (Fed. Cir. 2014) (per curiam) (unpublished) (finding that a *pro se* plaintiff failed to establish good cause for an untimely filing); *Moreno v. Shinseki*, 527 F. App'x 962, 962-63 (Fed. Cir. 2013) (per curiam) (unpublished) (concluding that *pro se* plaintiff "did not demonstrate any circumstance that would warrant [equitable] tolling"); *Hyde v. United States*, 336 F. App'x 996, 997 (Fed. Cir. 2009) (per curiam) (unpublished) (declining to conclude that

a *pro se* plaintiff had experienced "a legal disability that would warrant tolling the limitations period"); *see also, e.g.*, *Clubb v. Secretary of Health & Human Servs.*, 136 Fed. Cl. 255, 266-67 (2018) (affirming dismissal of *pro se* petitioner's Vaccine Act claims, even though the petitioner missed the statute of limitations deadline by "a matter of hours"); *Loutos v. Secretary of Health & Human Servs.*, No. 03-355V, 2015 WL 10986961, at *8 (Fed. Cl. Dec. 18, 2015) ("[B]eing a *pro se* litigant does not relieve the petitioner of his burden to fulfill the statutory requirements of the Vaccine Act." (quoting *Bass v. Secretary of the Dep't of Health & Human Servs.*, No. 05–901V, 2006 WL 5631321, at *2 (Fed. Cl. June 15, 2006))).

Other courts have likewise repeatedly rejected the argument that equitable tolling is appropriate for a *pro se* litigant simply because the litigant is proceeding *pro se*. *See, e.g.*, *Young v. SEC*, 956 F.3d 650, 656 (D.C. Cir. 2020) (concluding that "[n]o extraordinary circumstance beyond [the petitioner's] control stood in his way" of filing suit and rejecting argument for equitable tolling based exclusively on the petitioner's *pro se* status); *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012) ("[The petitioner's] *pro se* status and lack of knowledge of the law are not sufficient to constitute an extraordinary circumstance and to excuse his late filing."); *United States v. Petty*, 530 F.3d 361, 365 (5th Cir. 2008) (per curiam) ("Proceeding *pro se* is alone insufficient to equitably toll [a] statute of limitations."); *Walker v. Jastremski*, 430 F.3d 560, 564 (2d Cir. 2005) (holding that a *pro se* litigant's reasons for a "late filing" would not "support equitable tolling"); *Hedges v. United States*, 404 F.3d 744, 753

(3d Cir. 2005) (The plaintiff's "*pro se* status and depression do not justify equitable tolling.").

Those holdings are consistent with this Court's and the Supreme Court's precedents. The Supreme Court has explained that "procedural rules in ordinary civil litigation" should not be interpreted simply "to excuse mistakes by those who proceed without counsel," *McNeil v. United States*, 508 U.S. 106, 113 (1993), and this Court has rejected an interpretation of the Vaccine Act's statute of limitations that would "treat[] different plaintiffs differently based on their personal circumstances," *Cloer v. Secretary of Health & Human Servs.*, 654 F.3d 1322, 1340 (Fed. Cir. 2011) (en banc).

Pro se petitioners might be entitled to equitable tolling if they make "diligent but technically defective efforts" to file a claim during the limitations period. *Bonneville Assocs., Ltd. P'ship v. Barram*, 165 F.3d 1360, 1365 (Fed. Cir. 1999) (quoting *Bowden v. United States*, 106 F.3d 433, 438 (D.C. Cir. 1997)); *see also, e.g.*, *Askew v. Secretary of Health & Human Servs.*, No. 10-767V, 2012 WL 2061804, at *10 (Fed. Cl. May 17, 2012) (finding that equitable tolling was warranted "where a *pro se* Petitioner made a reasonable effort to comply with the provisions of the statute in a timely manner, and timely placed Respondent on notice of the claim and its particulars, but failed to perfect the filing and … filed eight days late"). But that doctrine does not assist petitioners, who made no effort to comply with the relevant deadlines, and instead "waited years, without any valid justification" to assert claims on behalf of their child. *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005).

Perhaps recognizing the difficulties that *pro se* litigants could face in litigating Vaccine Act claims, Congress provided a generous scheme for those claimants to obtain attorneys' fees and costs to facilitate claimants' ability to seek counsel, *see* 42 U.S.C. § 300aa-15(e)(1). Tolling the statute of limitations simply because a litigant opted to proceed *pro se* would run counter to Congress's carefully designed scheme that otherwise encourages Vaccine Act litigants to obtain representation. *See Parrott v. Shulkin*, 851 F.3d 1242, 1250 (Fed. Cir. 2017) (construing a statute that confers attorneys' fees to encourage "the representation" that Congress had "[sought] to secure").

III. The Statute of Limitations And Tolling Provision For Claims Brought Under 28 U.S.C. § 2501 Does Not Apply To Claims Brought Under The Vaccine Act.

A. This Court has explained that the Vaccine Act affords "[t]he Court of Federal Claims and its special masters … 'jurisdiction over proceedings to determine if a petitioner … is entitled to compensation under the [Vaccine] Program.'" *Cloer v. Secretary of Health & Human Servs.*, 675 F.3d 1358, 1361 (Fed. Cir. 2012) (fourth alteration in original) (emphasis omitted) (quoting 42 U.S.C. § 300aa-12(a)); *see also Milik v. Secretary of Health & Human Servs.*, 822 F.3d 1367, 1375 (Fed. Cir. 2016) (describing the history of the Vaccine Act's jurisdiction provision); H.R. Rep. No. 99-908, at 16 (1986) (describing the Vaccine Act's jurisdictional provision). And when invoking federal jurisdiction for a cause of action, a party must comply with the statute of limitations for that particular cause of action. *See, e.g.*, *In re Franklin Sav.*

Corp., 385 F.3d 1279, 1289 (10th Cir. 2004) (explaining that for claims brought under a certain statutory scheme, a "court's subject matter jurisdiction … is determined and defined by the provisions" of that scheme, "including the [scheme's] statute of limitations provision").

Claims brought under the Vaccine Act are subject to a specific statute of limitations for claims brought under that statutory scheme, which afforded petitioners 36 months to file a claim for compensation based on alleged injuries from a vaccine administered in 2005, 42 U.S.C. § 300aa-16(a)(2). Accordingly, in asserting their claims under the Vaccine Act, petitioners appropriately invoked the Court of Federal Claims' jurisdiction under 42 U.S.C. § 300aa-12(a), *see* Appx44, ¶ 1 (petition); *see also* Appx6-7; Petrs' Opening Br. 1-2 (jurisdictional statement).

B. Section 2501 of Title 28 does not alter the applicable statute of limitations or provide any additional tolling period here. The text of § 2501 applies generally to "[e]very claim of which the United States Court of Federal Claims has jurisdiction," and those claims are subject to a 6-year statute of limitations, with a tolling provision for all "claim[s] of a person under legal disability," 28 U.S.C. § 2501. The Vaccine Act, however, provides a specific statute of limitations for claims for compensation brought under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-16(a)—including a 36-month limitations period applicable here, *id.* § 300aa-16(a)(2), and potential equitable tolling, as this Court held in *Cloer*. The Vaccine Act includes no tolling provision for minors or other claimants under a legal disability. *Cf.*

id. §§ 300aa-11(b)(1)(A), 300aa-33(2) (permitting legal representatives, including parents, to sue on a claimant's behalf).

The specific statute of limitations for petitioners' claims brought under the Vaccine Act therefore conflicts with the general statute of limitations period and applicable tolling periods for claims brought in the Court of Federal Claims, 28 U.S.C. § 2501. Because only one limitations period can govern a claim, *see, e.g.*, *Federal Hous. Fin. Agency v. UBS Americas Inc.*, 712 F.3d 136, 143 (2d Cir. 2013) ("Congress intended one statute of limitations … to apply to *all* claims" brought under a particular statutory scheme.); *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1505 n.7 (11th Cir. 1986) ("For each statutory right of action provided in the securities laws, there is only one express statute of limitations which applies to all claims asserted under th[at] statutory section."), the specific must govern the general. *See, e.g.*, *Biogen MA, Inc. v. Japanese Found. for Cancer Research*, 785 F.3d 648, 656 (Fed. Cir. 2015) (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)). Section 2501 therefore applies to "[e]very claim of which the United States Court of Federal Claims has jurisdiction," *except* those claims that are subject to a specific limitations period—including claims brought under the Vaccine Act.

Confirming this conclusion, the Court has applied this principle to claims brought under the Contract Disputes Act,[2] as well as the Fair Labor Standards Act.[3]

Moreover, the canon of statutory construction that the specific governs the general is particularly apt where—as here—Congress "has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Biogen MA*, 785 F.3d at 656 (quotations omitted); *see Gilbert ex rel. Gilbert v. Secretary of Health & Human Servs.*, 51 F.3d 254, 257 (Fed. Cir. 1995) (describing "the carefully constructed and detailed statutory scheme Congress provided for the litigation of damage claims for vaccine-related injuries" under the Vaccine Act); *see also Gaiter ex rel. D.S.G. v. Secretary of Health & Human Servs.*, 784 F. App'x 759, 762 (Fed. Cir. 2019) (per curiam) (unpublished) ("When Congress passed the Vaccine Act, it established a

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[2] *See* 41 U.S.C. §§ 7103(a)(4), 7104(b)(1) (providing a 6-year statute of limitations for claims under the Contract Disputes Act, which must be brought in the Court of Federal Claims and including no tolling provision for claims of a person under a legal disability); *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 525 (D.C. Cir. 2010) ("Section 2501 does not even apply to claims arising under the [Contract Disputes Act]." (citing *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1580 (Fed. Cir. 1987))).

[3] *See* 29 U.S.C. § 255(a) (providing statutes of limitations for claims brought under the Fair Labor Standards Act); *Adams v. United States*, 350 F.3d 1216, 1229 (Fed. Cir. 2003) (applying the statute of limitations provided in 29 U.S.C. § 255 for claims brought in the Court of Federal Claims); *Ewer v. United States*, 63 Fed. Cl. 396, 399 (2005) (holding, in a case brought under the Fair Labor Standards Act, that 28 U.S.C. § 2501 "does not apply when the statute under which the action is brought provides" a separate limitations period, and citing *Adams*).

statutory scheme to govern the procedure for cases brought under the Act. These statutes require specific procedural milestones to occur within set timelines.").

This Court has, furthermore, recognized the distinction between the two limitations periods in the Vaccine Act and 28 U.S.C. § 2501 (which applies to claims brought under the Tucker Act). *See Martinez v. United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003) (en banc) (contrasting statutes of limitations for "particular limitation statute[s]," including the Vaccine Act, versus "the general statute of limitations for Tucker Act claims"); *Frazer v. United States*, 288 F.3d 1347, 1352-53 (Fed. Cir. 2002) (similar); *see also, e.g.*, *Terran ex rel. Terran v. Secretary of Health & Human Servs.*, 195 F.3d 1302, 1310 (Fed. Cir. 1999) (explaining that the Vaccine Act's jurisdictional provision is "independent of the Tucker Act" (citing 42 U.S.C. § 300aa-12(a))); *id.* at 1318 (Plager, J., dissenting) ("[T]he Vaccine Act itself provides the Court of Federal Claims with jurisdiction to determine whether [a petitioner] is entitled to compensation and the amount of such compensation. … This grant of jurisdiction is independent of any jurisdictional grant under the Tucker Act." (citations omitted)); *see also Kay v. Secretary of Health & Human Servs.*, 80 Fed. Cl. 601, 605 (2008) (contrasting a claim filed under the Vaccine Act versus one invoking jurisdiction under 28 U.S.C. § 2501 and noting that "the Vaccine Act … allow[s] jurisdiction only over cases filed within its expressed thirty-six month statute of limitations"), *aff'd*, 298 F. App'x 985 (Fed. Cir. 2008); *Red Cloud v. United States*, 158 Fed. Cl. 500, 510 (2022) (contrasting a claim's accrual under 28 U.S.C. § 2501 versus under the Vaccine Act); *Doe v. Secretary of the Dep't of Health &*

Human Servs., No. 04-273V, 2005 WL 6117660, at *2 (Fed. Cl. Oct. 7, 2005) ("Tolling provisions arising under the non-tort suits against the United States (28 U.S.C. §§ 2401(a), 2501) … do not apply to petitions filed under the Vaccine Act."); *Lombardo v. Secretary of Health & Human Servs.*, 34 Fed. Cl. 21, 27 (1995) (distinguishing the 28-month statute of repose in the Vaccine Act for claims based on vaccines administered before October 1, 1988, 42 U.S.C. § 300aa-16(a)(1), versus the Tucker Act's 6-year statute of limitations, 28 U.S.C. § 2501).

To the government's knowledge, at no point has this Court suggested that the statute of limitations or tolling provisions of 28 U.S.C. § 2501 apply to claims brought under the Vaccine Act.

C. It is also not possible to separate the statute of limitations in 28 U.S.C. § 2501 from the section's tolling provision. The two provisions work in tandem, as one provides the relevant limitations period and the other provides a limited exception to that period. The Supreme Court's holding in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), underscores this connection. As the Supreme Court explained, 28 U.S.C. § 2501 is jurisdictional and suits subject to that statute of limitations are "not susceptible to equitable tolling," *John R. Sand & Gravel*, 552 U.S. at 136. The only tolling available for claims subject to that provision is therefore the statutory tolling provision for claims "of a person under legal disability or beyond the seas at the time the claim accrues." 28 U.S.C. § 2501.

In contrast, this Court has held that claims brought under the Vaccine Act may be subject to equitable tolling, *Cloer*, 654 F.3d at 1340, and that limitations period is not jurisdictional, *see id.* at 1341 (distinguishing *John R. Sand & Gravel*); *see also Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1321-22 (Fed. Cir. 2014) (similarly distinguishing the § 2501 holding of *John R. Sand & Gravel* with respect to the Contract Disputes Act). The timing scheme under § 2501 is thus fundamentally incongruous with the scheme applicable to Vaccine Act claims. And the Vaccine Act's tolling provisions are in fact potentially more generous: claims governed by § 2501 are limited to a tolling period of only 3 years and only for those under a legal disability or "beyond the seas." *Contrast, e.g.*, *Cloer*, 654 F.3d at 1344 (petitioner arguing that limitations period should be equitably tolled to 2004, based on alleged injuries from vaccines administered in 1996 and 1997).

The statute of limitations and tolling provision for claims subject to 28 U.S.C. § 2501 thus does not apply to claims brought under the Vaccine Act.

CONCLUSION

For the foregoing reasons, in addition to the reasons presented in the government's original response brief and the government's first supplemental brief, the judgment of the Special Master should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Court's September 27, 2023 order because it contains 18 pages. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Casen B. Ross
Casen B. Ross