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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Legislative Materials:

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

First, as petitioners recognize, the Vaccine Rules permit petitioners to proceed *pro se* on behalf of their child, *see* Vaccine Rule 14(a)(2). A panel of this Court previously expressly permitted such representation, *see* Nov. 15, 2022 Order (Doc. 18).

Second, equitable tolling is not warranted here simply because petitioners opted to proceed *pro se*, or because petitioners asserted claims on behalf of their child, who is mentally incapacitated. Neither of those circumstances is extraordinary, and the Special Master and Court of Federal Claims considered all relevant facts, appropriately concluding that nothing prevented petitioners from timely filing. Appx16-20, Appx38; *see Aldridge v. McDonald*, 837 F.3d 1261, 1265 (Fed. Cir. 2016).

Third, the statute of limitations and tolling provisions found in 28 U.S.C. § 2501 do not apply to claims brought under the Vaccine Act. Those provisions are irreconcilable with Congress's carefully reticulated compensation scheme. Additionally, reading § 2501 into the Vaccine Act would disrupt Congress's intent that claims be expeditiously resolved, *see* H.R. Rep. No. 99-908, at 3 (1986); *Cloer v. Secretary of Health & Human Servs.*, 654 F.3d 1322, 1325, 1341 (Fed. Cir. 2011) (en banc); would be inconsistent with this Court's precedent construing § 2501 in other contexts, *see, e.g.*, *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1580 (Fed. Cir. 1987); and would conflict with this Court's conclusion that the Vaccine Act permits equitable tolling.

ARGUMENT

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

As explained in the government's second supplemental brief (at 3-6), parents may represent their children *pro se* in Vaccine Act cases. Vaccine Rule 14(a)(2)); *see also* Pet'rs' Suppl. Br. 13 (similar). As petitioners rightly note (Suppl. Br. 14), a panel of this Court already determined that petitioners "meet a basic standard of competency" and permitted them to "continue to represent [W.J.] in this appeal." Doc. 18, at 6.

Taking a position contrary to petitioners, amicus contends that petitioners cannot represent their child *pro se*; but, in so arguing, amicus fails to grapple with Vaccine Rule 14(a)(2) or this Court's prior order. Whatever the validity of amicus's contention (at 6) that various policy reasons "weigh against allowing parents to represent their children *pro se* in Vaccine Act litigation," that argument is not based on the governing rules nor based in this Court's precedent.

Amicus's argument also cannot be squared with this Court's order approving petitioners' representation and explaining that "[t]he interests of parents alleging a vaccine-related injury are 'closely intertwined' with those of their minor or disabled children," recognizing that "Congress has specifically permitted … parents to petition on behalf of their minor or disabled child." Doc. 18, at 5 (citing 42 U.S.C. §§ 300aa-13(a)(1), 300aa-15(a)(1)(A)(ii)-(iii), (a)(1)(B)(ii)-(iii), (d)(2)). At minimum, the prior panel's determination should serve as law of the case. Amicus identifies no reason for

this panel to reconsider an issue that a prior panel "addressed, fully considered, and decided." *Toro Co. v. White Consol. Indus., Inc.*, 383 F.3d 1326, 1335 (Fed. Cir. 2004).

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.

Petitioners identified two bases for equitable tolling in this case: W.J.'s mental incapacity and the government's alleged fraudulent concealment. *See* Resp. 2d Suppl. Br. 7. The Special Master and the Court of Federal Claims correctly found that neither basis actually impeded petitioners from timely filing a claim. Appx16-20, Appx38.

Amicus reiterates two arguments in favor of equitable tolling: (1) petitioners proceeded *pro se*; and (2) W.J. was a minor and subject to a mental disability when the alleged vaccine-related injuries manifested, suggesting application of a "discovery rule." Neither succeeds.

First, amicus fails to identify (at 9-10) any actual impediment to petitioners' ability to timely file a claim simply because they chose to proceed *pro se*. But an extraordinary circumstance warranting equitable tolling must have both "*caused* a litigant's delay … *and* [be] beyond its control." *Aldridge v. McDonald*, 837 F.3d 1261, 1265 (Fed. Cir. 2016); *see also 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."); Resp. 2d Suppl. Br. 8-10 (collecting authorities).

Second, amicus argues (at 10-13) that the Court should apply a de facto discovery rule to certain Vaccine Act claims brought by parents on behalf of their

children, based on when the parents "bec[a]me aware of the [alleged vaccine-related] injury or its cause." But this Court has rejected any kind of discovery rule for the Vaccine Act: "a discovery rule [is] fundamentally incompatible with the text Congress enacted." *Cloer v. Secretary of Health & Human Servs.*, 654 F.3d 1322, 1340 (Fed. Cir. 2011) (en banc). "Congress was presented the option of enacting a statute of limitations that would have run from the knowledge of the occurrence of a vaccine-related injury," but deliberately chose "to trigger the Vaccine Act statute of limitations from the date of occurrence of the first symptom or manifestation of the injury for which relief is sought." *Id.* at 1338 (citing S. 827, 99th Cong. § 2106(a) (1985)). Amicus's proposal (at 13) for "a more nuanced analysis" in only certain cases is exactly the sort of "inherently personal, plaintiff-specific" approach that this Court concluded is "antithetical to the simple, symptom-keyed test expressly required by the Vaccine Act's text," *Cloer*, 654 F.3d at 1340. Indeed, Congress specifically considered and rejected amicus's argument. *See id.* at 1339 n.8 (describing proposal from a parents' advocacy group). To the extent that amicus contends (*e.g.*, at 13) that tolling is necessary to "fully protect [a] child's rights," this merely repackages the argument that the Vaccine Act should provide for "minority tolling," which it does not, *see* p. 8.

Amicus's reliance (at 10, 13) on dicta from *Booth v. United States*, 914 F.3d 1199, 1207 (9th Cir. 2019), a case not involving the Vaccine Act, fails to advance petitioners' case. Even assuming its analysis is applicable, *Booth* explained that equitable tolling might be appropriate when "the cause of action is not reasonably knowable by the

plaintiff or her parents because of her minority." *Id.* But *Booth* cited *Wimberly v. Gatch*, 635 So.2d 206, 217 (La. 1994), which concluded that equitable tolling might be warranted in certain circumstances of sexual abuse of a minor, when the child "will not divulge the abuse, but will keep it secret." In those circumstances, a parent may well not know of the abuse (and, thus, not know of a possible cause of action). Amicus's reliance on the dicta in *Booth* is thus misplaced—W.J.'s parents have, at all points, actively advocated on W.J.'s behalf. *See, e.g.*, Resp. 1st Suppl. Br. 6.

III. Section 2501 Does Not Apply To Vaccine Act Claims.

A. As previously explained (Resp. 2d Suppl. Br. 11-12), the Vaccine Act provides the Court of Federal Claims jurisdiction to determine if a petitioner under the Act is entitled to compensation according to the terms of the National Vaccine Injury Compensation Program—as petitioners appropriately recognize (at 5). *See Cloer v. Secretary of Health & Human Servs.*, 675 F.3d 1358, 1361 (Fed. Cir. 2012). That statutory scheme comprehensively provides a cause of action and time limits, *see* 42 U.S.C. §§ 300aa-11, 300aa-16, in addition to its jurisdictional grant, *id.* § 300aa-12; *see also, e.g.*, *Gaiter ex rel. D.S.G. v. Secretary of Health & Human Servs.*, 784 F. App'x 759, 762 (Fed. Cir. 2019) (per curiam) (unpublished) (noting that the Vaccine Act "require[s] specific procedural milestones to occur within set timelines").

Because the Vaccine Act provides the relevant grant of jurisdiction and limitations period, 28 U.S.C. § 2501 has no application here. *See, e.g.*, *Terran ex rel. Terran v. Secretary of Health & Human Servs.*, 195 F.3d 1302, 1310 (Fed. Cir. 1999).

B. Petitioners and amicus argue that the Vaccine Act and 28 U.S.C. § 2501 are "easily reconcilable" and work "in tandem." *E.g.*, Pet'rs' Suppl. Br. 5, 7, 10; Amicus 2d Suppl. Br. 17-20. But as explained (Resp. 2d Suppl. Br. 16-17), the timing scheme in § 2501 is fundamentally incompatible with the Vaccine Act.

Amicus recognizes (at 18) that "the Vaccine Act's later-enacted three-year limitations period supplants the six-year limitations period in Section 2501"; and amicus cites (at 16, 18) *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357 (Fed. Cir. 2002), in support of the argument that 28 U.S.C. § 2501 does not conflict with the Vaccine Act. But *Inter-Coastal Xpress* does not support amicus's logical leap. There, this Court endorsed the principle that the Vaccine Act's limitations period "'unequivocally … supersedes the six-year limitations period in 28 U.S.C. § 2501 in cases' involving claims" under the Vaccine Act, *id.* at 1368 (quoting *Scott v. United States*, 27 Fed. Cl. 829, 831 (1993)). The Court did not say anything to suggest that it would be proper to borrow tolling from a statute whose limitation periods do not apply here. Nor have amicus or petitioners identified any other case from this Court in the last 35 years suggesting that § 2501's tolling provision applies.

Amicus's argument also fails to grapple with its implications: reading the tolling provision in § 2501 into the Vaccine Act would upend Congress's carefully designed statutory scheme to ensure timely and expeditiously resolved claims, and it would conflict with this Court's precedent construing § 2501 in other contexts.

Congress intended for claims under the Vaccine Act to be resolved "quickly,

easily, and with certainty and generosity." H.R. Rep. No. 99-908, at 3; *see also id.* at 13 (anticipating the "speed of the compensation program"). But applying the tolling provisions of 28 U.S.C. § 2501 to the Vaccine Act would permit children allegedly injured by a vaccine to wait until adulthood to file a claim and, indeed, permit a mentally incapacitated person to challenge the alleged effects of a vaccine at any time while under a disability, which could potentially last for a person's entire life. This would conflict with Congress's intent to empower legal guardians to timely act on behalf of their wards, *see* 42 U.S.C. §§ 300aa-11(b)(1)(A), 300aa-33(2), within 36 months of a symptomatic injury or significant aggravation of such injury, *id.* § 300aa-16(a)(2). It would further conflict with this Court's recognition that the Vaccine Act was carefully designed "to protect the government from stale or unduly delayed claims." *Cloer*, 654 F.3d at 1341 n.9. But tolling claims stemming from vaccines administered in childhood to adulthood, or indefinitely tolling claims stemming from vaccines that allegedly resulted in mental incapacity—as with petitioners here—would create significant record-preservation issues and would additionally undermine Congress's intention that the Vaccine Program be "simple, and easy to administer," *id.* at 1325 (quoting H.R. Rep. No. 99-908, at 7).

Nor is there any evidence that Congress intended § 2501 to apply to Vaccine Act claims. To the contrary, Congress initially provided that claims for compensation be filed in the district court where the petitioner "resides or [where] the injury or death occurred" (not the Court of Federal Claims). National Childhood Vaccine

Injury Act of 1986, Pub. L. No. 99-660, § 2111, 100 Stat. 3755, 3758. Congress later transferred that jurisdiction to the Court of Federal Claims, *see* Vaccine Compensation Amendments of 1987, Pub. L. No. 100-203, § 4307, 101 Stat. 1330-221, 1330-224, but never indicated that Vaccine Act claims should be newly subject to § 2501—nor did Congress amend the applicable limitations period, *see* Pub. L. No. 99-660, § 2116, 100 Stat. at 3769-70. *See* Amicus 2d Suppl. Br. 17 n.6. Although amicus recognizes (at 19) that applying § 2501 to claims brought under the Vaccine Act would "ensure[]" that statutory scheme "includes a minority tolling provision," the Vaccine Act contained no minority tolling provision when enacted, and amicus provides no evidence that Congress intended to silently add one in 1987. This Court should not read such a provision into the Act by implication. *See* Resp. 1st Suppl. Br. 8-9 (collecting authorities).

Amicus's position is also inconsistent with a large body of case law in this Court concerning other statutory schemes. In cases brought under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7103(a)(4), 7104(b)(1), "the six-year statute of limitations in 28 U.S.C. § 2501 is not applicable," *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1580 (Fed. Cir. 1987); and in cases brought under the Fair Labor Standards Act, 29 U.S.C. § 255, 28 U.S.C. § 2501 "does not apply," *Ewer v. United States*, 63 Fed. Cl. 396, 399 (2004) (citing *Adams v. United States*, 350 F.3d 1216, 1229 (Fed. Cir. 2003)). This Court has explained that a suit brought in the Court of Federal Claims is "limited by the … statute of limitations applicable to all cases" brought in

that court, but that applies only "in the absence of a specific statutory provision." *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1572 (Fed. Cir. 1994). The government is aware of no case in which this Court suggested that suits brought under the Contract Disputes Act or Fair Labor Standards Act are subject to the § 2501 tolling provision.

Courts' treatment of the tolling provision in 28 U.S.C. § 2401(a) and the limitations period for claims brough under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2401(b), confirms that this Court should not shoehorn 28 U.S.C. § 2501 into the Vaccine Act. Section 2401(a) provides a tolling provision similar to § 2501:

> [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years … s. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

28 U.S.C. § 2401(a). And § 2401(b) provides that "[a] tort claim against the United States shall be forever barred" unless properly presented "within two years after such claim accrues." Courts have long rejected arguments that the FTCA includes "minority tolling"—holding, for example, that "Congress did not intend 'that the sentence in [§ 2401(a)] qualified the limitation on tort claims set forth in [§ 2401(b)],'" even if the "generic" language of § 2401(a) would seem to apply to claims brought under § 2401(b). *Booth*, 914 F.3d at 1206 (quoting *United States v. Glenn*, 231 F.2d 884, 886 (9th Cir. 1956)); *MacMillan v. United States*, 46 F.3d 377, 381 (5th Cir. 1995) (no minority tolling under the FTCA); *cf. Khan v. United States*, 808 F.3d 1169, 1173 (7th

Cir. 2015) (collecting authorities for the proposition that § 2401(b) supersedes the longer period in § 2401(a)). The same logic applies to the Vaccine Act and 28 U.S.C. § 2501. Amicus's reliance on *Booth* (at 19) to argue that the Vaccine Act and § 2501 "fit together" is thus mistaken.

As noted in the government's second supplemental brief (at 16-17), this Court's holding in *Cloer*, 654 F.3d at 1340-41, further underscores that the tolling provision of 28 U.S.C. § 2501 cannot be transplanted into the Vaccine Act. There, this Court held that the Vaccine Act's limitations period is not jurisdictional but is susceptible to equitable tolling. In contrast, the Supreme Court held in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008), that § 2501 is jurisdictional and thus "not susceptible to equitable tolling." And no more successful is amicus's contention (at 19) that the Vaccine Act and § 2501 ostensibly "fit together" because "[b]oth the tolling provision in Section 2501 and the Vaccine Act provide a three-year period"; this conflates the *limitations* period in the Vaccine Act with a *tolling* provision in another statute. Amicus also fails to recognize that equitable tolling under the Vaccine Act alone would provide a more generous and flexible limitations period. *Cf. Cloer*, 654 F.3d at 1344 (petitioner arguing for at least four years of equitable tolling).

CONCLUSION

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

Respectfully submitted,

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November 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Court's September 27, 2023 order because it contains 10 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
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