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 April 11, 2023. That order directed court-appointed Amicus and the parties to file supplemental briefs to address whether, under the applicable authority, equitable tolling is merited in this case. ECF Doc. 37. It is not.

In May 2021, petitioners R.J. and A.J. filed a petition on behalf of their child, W.J., for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 *et seq.* (Vaccine Act), alleging that W.J. suffered various injuries as a result of receiving a measles, mumps, and rubella (MMR) vaccine in February 2005. The Special Master dismissed petitioners' claims as untimely because the petition was filed outside the Vaccine Act's 36-month statute of limitations, *id.* § 300aa-16(a)(2), and found that petitioners had not identified any extraordinary circumstances to merit equitable tolling. Appx37-43. The Court of Federal Claims affirmed. Appx17-21. Those decisions were correct.

In response to this Court's order, Amicus proposes a novel theory of equitable tolling that minority status, on its own, constitutes an extraordinary circumstance sufficient to toll the statute of limitations. This theory conflicts with the text of the Vaccine Act, and this Court has never endorsed such an understanding of the Act. The Supreme Court has long rejected the argument that statutes of limitations may be construed to include a "minority tolling" exception without a textual basis for one. *Vance v. Vance*, 108 U.S. 514, 521 (1883); *see also, e.g.*, *Booth v. United States*, 914 F.3d

1199, 1204-05 (9th Cir. 2019). To preserve Congress's aim that claims under the Vaccine Act be processed expediently and with certainty, *see Cloer v. Secretary of Health & Human Servs.*, 654 F.3d 1322, 1341 n.9 (Fed. Cir. 2011) (en banc), this Court should likewise reject Amicus's theory here.

Because petitioners did not demonstrate that they diligently pursued their claims or that some extraordinary circumstance prevented them from timely filing, they cannot demonstrate entitlement to equitable tolling. *Cf. K.G. v. Secretary of Health & Human Servs.*, 951 F.3d 1374 (Fed. Cir. 2020); 42 U.S.C. §§ 300aa-11(b)(1)(A), 300aa-33(2).

ARGUMENT

THE SPECIAL MASTER AND THE COURT OF FEDERAL CLAIMS PROPERLY CONCLUDED THAT THE PETITION WAS UNTIMELY AND EQUITABLE TOLLING WAS NOT WARRANTED

As relevant here, the Vaccine Act provides that a petitioner cannot file a claim for compensation "after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." 42 U.S.C. § 300aa-16(a)(2). Petitioners may include "any person who has sustained a vaccine-related injury," as well as "the legal representative of such person if such person is a minor or is disabled." *Id.* § 300aa-11(b)(1)(A); *see also id.* § 300aa-33(2) (defining "legal representative" as "a parent or an individual who qualifies as a legal guardian under State law"); Vaccine R. 2(c)(2)(C). And the limitations period applies equally to claims brought by parents on behalf of their children. *See, e.g.*, *Carson*

ex rel. Carson v. Secretary of Health & Human Servs., 727 F.3d 1365, 1370 (Fed. Cir. 2013) (affirming Special Master's dismissal of parents' petition on behalf of their child as untimely).

This Court has also held that "equitable tolling applies to the Vaccine Act," *Cloer v. Secretary of Health & Human Servs.*, 654 F.3d 1322, 1340 (Fed. Cir. 2011) (en banc), but that it should be applied "sparingly," *id.* at 1345 (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). A petitioner seeking to apply equitable tolling to his claims must establish that he "diligently" pursued his rights and that "an extraordinary circumstance" prevented him from timely filing. *K.G. v. Secretary of Health & Human Servs.*, 951 F.3d 1374, 1379 (Fed. Cir. 2020) (citing *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016)); *see also id.* at 1380 (listing "fraud," "duress," and a petitioner's "mental incapacity" as examples of extraordinary circumstances). A petitioner must also demonstrate that the extraordinary circumstance itself prevented timely filing. *See Aldridge v. McDonald*, 837 F.3d 1261, 1265 (Fed. Cir. 2016) (explaining that the requirement of extraordinary circumstance "necessarily carries with it an element of causation").

A. No Extraordinary Circumstance Prevented Petitioners From Timely Filing

The Special Master correctly found that no extraordinary circumstances prevented petitioners from timely filing, as petitioners provided no evidence that they were incapacitated during the relevant period. Appx38. And the Special Master rightly

found that equitable tolling would not be warranted based strictly on W.J.'s mental disabilities. Petitioners failed to demonstrate that those disabilities themselves prevented petitioners from timely filing. Amicus's novel theory that equitable tolling was warranted strictly based on W.J.'s minority status is unsupported by the text of the Vaccine Act; and courts—including the Supreme Court—have rejected this same theory of "minority tolling" in a number of other statutory contexts.

1. The Special Master Properly Concluded That No Extraordinary Circumstances Were Applicable Here

a. As W.J.'s legal guardians, petitioners filed a petition on W.J.'s behalf based on W.J.'s alleged vaccine-related injuries. *See* 42 U.S.C. §§ 300aa-11(b)(1)(A), 300aa-33(2); *see also K.G.*, 951 F.3d at 1381 ("Parents and legal guardians can ordinarily bring claims on behalf of their wards."); Vaccine R. 2(c)(2)(C). The Special Master rightly found that petitioners did not provide "any evidence to suggest that they were incapacitated in any way during any time frame relevant to their petition" that would provide grounds to equitably toll the limitations period based on extraordinary circumstances. Appx38; *see also* Appx17-18.

As the Special Master explained, as "is true for all petitions brought on behalf of all minors," petitioners were required to "file a petition 36 months from the onset of the earliest symptom or manifestation of W.J.'s injury." Appx38; *see also* Appx38 ("Parents or other legal representatives must file the petition on behalf of a minor within the applicable statute of limitations."). And "[g]iven the 'great deference'

afforded to the Special Master in applying the law to the facts of the case," the Special Master's conclusion that equitable tolling was not warranted for petitioners' untimely petition was not "arbitrary and capricious." Appx18-19 (quoting *Munn v. Secretary of Dep't of Health & Human Servs.*, 970 F.2d 863, 870 (Fed. Cir. 1992)).

Because W.J.'s parents could file on W.J.'s behalf, the Special Master rightly concluded that W.J.'s mental incapacity would not amount to an "extraordinary circumstance" to merit equitable tolling because petitioners did not provide any evidence that W.J.'s mental incapacity itself caused petitioners' untimely filing. *See* Appx42 ("[W.J.'s parents] have not asserted that they have any disability or mental incapacity."). An extraordinary circumstance that might serve as a basis for equitable tolling "necessarily carries with it an element of causation." *Aldridge*, 837 F.3d at 1265. That is, that circumstance must have "'prevent[ed]' another thing from happening"—here, preventing petitioners from timely filing a petition. *Id.* (citing *Menominee Indian Tribe*, 577 U.S. at 257); *see also K.G.*, 951 F.3d at 1381 ("[A] Vaccine Act claimant must show that her failure to file was the *direct result* of a mental illness or disability that rendered her incapable of rational thought." (emphasis added)). But petitioners provided no evidence that they could not timely file. *Cf. Hazlehurst v. Secretary of Health & Human Servs.*, 604 F.3d 1343, 1345 (Fed. Cir. 2010) (discussing the "large number of cases involving claims for compensation on behalf of autistic children").

In *K.G.*, this Court explained that a Special Master must "analyze[] the facts" to determine whether a legal guardianship actually "alleviated the extraordinary

circumstance of [a petitioner's] mental illness." 951 F.3d at 1381. In that case, the petitioner's relationship with her sister—who had been appointed petitioner's guardian—had badly "deteriorated," such that the sister "eventually stopped acting as [petitioner's] guardian." *Id.* at 1377 (quotations omitted).

The Special Master appropriately distinguished *K.G.* from the facts here: unlike in *K.G.*, petitioners here "were capable of filing a claim on [W.J.'s] behalf." Appx38. And nothing in the record suggests that the relationship between petitioners and W.J. had "deteriorated" at any point. To the contrary, petitioners regularly made medical and legal decisions on W.J.'s behalf, including choosing W.J.'s medication regimen, Appx190; and advocating for W.J.'s educational needs, Appx200-201, Appx220.

b. Amicus misreads the Special Master's and Court of Federal Claims' decisions in arguing (at 17-20) that they adopted a "*per se* rule" that the mere presence of a legal guardian or parent "should bar a minor's claim of equitable tolling." The Court of Federal Claims carefully noted that "the Special Master must 'analyze[] the facts to determine whether [the] legal guardianship alleviated the extraordinary circumstance' of the petitioner's mental incapacity." Appx18 (alterations in original); *see K.G.*, 951 F.3d at 1381. And here, the Special Master "considered all facts in the record." Appx18; *see also* Appx38. The record contains no evidence calling into question the quality of petitioners' guardianship or petitioners' ability to advocate on W.J.'s behalf during the relevant time period. *See* Appx38, Appx42.

Amicus correctly observes (at 19) that the proper standard "consider[s] all relevant factors to determine how the presence of a legal guardian impacted the extraordinary circumstances and diligence inquiries in this particular case." But Amicus confuses the inquiry by suggesting (at 19-20), for example, that W.J.'s mental incapacity and the fact that W.J. is "non-speaking" bear on this standard. This Court has instead explained that "[t]he significance of a legal guardian[ship]" may depend on, among other things: "the timing of the institution of the guardianship," "the nature of the guardian's rights and obligations under state law," "the extent to which the claimant's mental incapacity interferes with her relationship and communication with her guardian," "the quality and nature of the guardian's relationship with the claimant," and "any conflicts of interest that would inhibit the guardian from bringing a Vaccine Act claim on the claimant's behalf." *K.G.*, 951 F.3d at 1382. As noted, W.J.'s parents, who have been W.J.'s guardians the past 19 years, *see* Appx45, have not identified any conflicts of interest that would have inhibited them from bringing a claim on W.J.'s behalf. Nor have petitioners suggested that W.J.'s mental incapacity interfered with their guardianship over W.J., *cf. K.G.*, 951 F.3d at 1377, 1382 (noting that the guardian's relationship to the claimant "deteriorated" and became "strained" during the relevant period); or that there was any reason to question "the quality and nature" of petitioners' relationship with W.J. *See* Appx17-18, Appx38. And as explained below, pp. 14-15, any difficulty petitioners experienced in communicating with W.J. would not be pertinent to whether equitable tolling is merited. *Cf. Carson*,

727 F.3d at 1367, 1369 (holding that petitioners-parents' Vaccine Act petition was untimely, even though the parents had difficulty communicating with their child).[1]

2. Minority Status Is Not A Basis For Equitable Tolling

Rather than demonstrating that anything particular to this case warrants equitable tolling, Amicus principally argues (at 6-15) that minority status, on its own, "should be considered an extraordinary circumstance that warrants equitable tolling." But amicus provides no doctrinal or textual support for this novel understanding of the Vaccine Act. Indeed, the government is unaware of this Court ever endorsing an atextual theory of "minority tolling" in any other statutory context.

a. The plain text of the Vaccine Act does not provide for "minority tolling." *See* 42 U.S.C. § 300aa-16(a)(2). As explained, the Vaccine Act provides that a petitioner must file a claim within 36 months, *id.*, and expressly provides that a claim may be brought by "the legal representative of such person if such person is a minor," *id.* § 300aa-11(b)(1)(A); *see also id.* § 300aa-33(2) (defining "legal representative" as "a parent or an individual who qualifies as a legal guardian under State law"). It is impossible to square this scheme with Amicus's theory that Congress intended to permit equitable tolling until an injured person turns 18.

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[1] The Special Master also rightly found that fraudulent concealment was not a basis for equitable tolling. *See* Appx39; *see also* Appx19-20 (Court of Federal Claims affirming those findings). Because Amicus does not address that issue, the government respectfully directs the Court to its primary response brief, pp. 21-23.

When Congress intends to suspend the statute of limitations for claims brought by minors, it does so explicitly. *See, e.g.*, 18 U.S.C. § 1595(c)(2); 28 U.S.C. §§ 2401(a), 2501; 33 U.S.C. § 2712(f)(3)(A); 42 U.S.C. § 9612(d)(3)(A); 46 U.S.C. § 30526(d). The Supreme Court has long held that "exemptions from the operation of statutes of limitations" for minors must rest "upon express language in those statutes giving them time, after majority …, to assert their rights." *Vance v. Vance*, 108 U.S. 514, 521 (1883); *see also Traer v. Clews*, 6 S. Ct. 155, 173 (1885) ("Courts cannot ingraft on statutes of limitations exceptions not clearly expressed."). And the courts of appeals have accordingly "consistently rejected requests to create tolling exceptions for minors." *United States v. Alvarez*, 710 F.3d 565, 567 n.10 (5th Cir. 2013); *see also Vogel v. Linde*, 23 F.3d 78, 80 (4th Cir. 1994) ("The blackletter rule[] … is that a statute of limitations runs against all persons, … unless the statute expressly provides otherwise." (footnote omitted)); *Booth v. United States*, 914 F.3d 1199, 1204-05 (9th Cir. 2019) (collecting authorities); *Murray v. City of Milford*, 380 F.2d 468, 473 (2d Cir. 1967) (holding that state statute of limitations "makes no exception for minors"). This is so, as the Fifth Circuit has explained, because "parents and guardians are assumed to be adequate surrogates" for minors, *Alvarez*, 710 F.3d at 567 n.10—just as the Vaccine Act specifically permits parents to file claims on their children's behalf, as petitioners did here, *see, e.g.*, *Paluck v. Secretary of Health & Human Servs.*, 786 F.3d 1373 (Fed. Cir. 2015) (affirming compensation award for a claim brought by parents on their child's behalf).

This Court's holding in *Carson* also cannot be squared with Amicus's contention that the Vaccine Act permits "minority tolling." *Carson*, 727 F.3d at 1370. In that case, the petitioners had filed a claim on their son's behalf—including for similar injuries as petitioners alleged here—but the Special Master dismissed their claim as untimely. *Id.* at 1367. Affirming that dismissal, this Court recognized that "equitable tolling is available under the Vaccine Act in certain circumstances," but it found "'no basis in equity for doing so'"—which would have required rejecting "minority status" as an extraordinary circumstance. *Id.* at 1368 n.2 (quoting *Cloer*, 654 F.3d at 1344-45); *see also, e.g.*, *Spohn v. Secretary of Health & Human Servs.*, 132 F.3d 52 (Fed. Cir. 1997) (unpublished) (affirming dismissal of parents' claims filed on their child's behalf that were filed only a single day after the statute of limitations had run).

Carson thus forecloses Amicus's argument (at 7), relying on *K.G.*, that "minority status should generally provide a basis for applying equitable tolling." Although the Court held in *K.G.* that "equitable tolling on the basis of mental incompetence is available in Vaccine Act cases," 951 F.3d at 1381, this Court has not held that minority status, on its own, is a basis for equitable tolling. Unlike mental incapacity—which could impede a claimant's own ability to timely file—minority status imposes no such barrier, especially since the statute specifically permits a minor's parent or guardian to file a claim on his behalf. *See, e.g.*, *Andreu ex rel. Andreu v. Secretary of Health & Human Servs.*, 569 F.3d 1367, 1375 (Fed. Cir. 2009) (holding that petitioners-parents were entitled to compensation for claim brought on their child's behalf). Amicus's

proposed interpretation of the Vaccine Act's statute of limitations, 42 U.S.C. § 300aa-16(a)(2), would effectively make the provisions entitling parents to sue on their children's behalf superfluous, *id.* §§ 300aa-11(b)(1)(A), 300aa-33(2); *cf. Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1336 (Fed. Cir. 2020) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." (alteration in original) (quoting *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013))).

b. Amicus fails to advance petitioners' case by asserting (at 7-11) that, absent equitable tolling, petitioners may lose their "ability to seek any recourse under state law." As an initial matter, state law rights do not bear on the equitable tolling inquiry under a federal statute.

In any event, this contention rests on a misunderstanding of the Vaccine Act and its legislative history. An interpretation of the Vaccine Act that does not provide for "minority tolling" would not necessarily prevent minors from bringing viable claims under state law. Legal guardians could either timely file under the Vaccine Act or demonstrate the extraordinary circumstances necessary for equitable tolling.

The Vaccine Act expressly provides that "the period prescribed by limitations of actions under State law" would apply to state law civil actions for damages arising from a vaccine-related injury for which a petition had been filed under the Vaccine Compensation Program. *See* 42 U.S.C. § 300aa-21(c); *see also id.* § 300aa-16(c) (staying certain state law limitations periods). The Act's legislative history also confirms that if

a State's statute of limitations "makes special provisions for minors such that actions need not be brought before the age of 18," and if a minor files a claim for compensation under the Program that he subsequently rejects in favor of filing a state law civil action, "then the State statute of limitations is unaffected and the civil action may be brought until the age of 18." H.R. Rep. No. 99-908, at 23 (1986). Subject to the Vaccine Act's filing requirements, Congress explained that "nothing in this legislation is intended to affect [State law] statutes of limitations—or any other provisions of State statutes of limitations—with respect to the filing of civil actions for damages for a vaccine-related injury or death." *Id.* at 25; *see also* 42 U.S.C. § 300aa-16(c); *cf.* Amicus Br. 11-12 & nn.3-4 (citing N.Y. C.P.L.R. § 208 (McKinney), the text of which provides for minority tolling).

In an effort to underscore the asserted concern that minors who fail to file timely claims under the Vaccine Act may not have viable state law remedies, Amicus cites (at 12) a pair of state court decisions. But those decisions explain precisely why this is the result Congress intended. One North Carolina court has explained that "a claimant must file a timely petition and exhaust all of the Federal Vaccine Act's requirements as a precondition to the maintenance of a valid state action," and "allowing claimants to file a petition under the federal program outside the required time period would have the effect of converting [a] state program into the primary source of recovery." *Goetz v. North Carolina Dep't of Health & Human Servs.*, 692 S.E.2d 395, 400 (N.C. Ct. App. 2010); *see also* 42 U.S.C. § 300aa-21(c). Claimants "could

intentionally avoid pursuing his or her federal remedies and instead litigate a claim solely under [a state] statute"; but because "most states provide very lengthy statutes of limitations for minors," that understanding of the Vaccine Act "would actually exacerbate one of the very problems Congress sought to address—insulating vaccine manufacturers from stale claims and giving them predictability regarding exposure to litigation." *Goetz*, 692 S.E.2d at 400 (citing H.R. Rep. No. 99-908, at 12-13). A New Jersey court similarly explained: that "a dismissal of a petition on procedural grounds as filed untimely bars a subsequent State action[] is consistent with Congress's goal." *McDonald v. Lederle Labs.*, 775 A.2d 528, 533 (N.J. Super. Ct. App. Div. 2001); *see also id.* at 534 ("[A] victim's traditional tort claim will not be saved by a state statute of limitations that extends beyond the limitation period proscribed by the [Vaccine] Act, if a claim is not filed with the Program within its time restrictions.").

Amicus's proposed theory of equitable tolling on account of "minority status" would instead upend the timely disposition of Vaccine Act petitions. This Court has explained that the Vaccine Act's statute of limitations was intended "to protect the government from stale or unduly delayed claims." *Cloer*, 654 F.3d at 1341 n.9; *see also* H.R. Rep. No. 99-908, at 3 (indicating that claims under the Vaccine Act should be resolved "quickly, easily, and with certainty and generosity"); *id.* at 13 (anticipating the "speed of the compensation program"). But Amicus's theory of minority tolling could create substantial record problems by tolling the statute of limitations for up to 18

years—further undermining Congress's intention that the Program be "simple, and easy to administer." *Cloer*, 654 F.3d at 1325 (quoting H.R. Rep. No. 99-908, at 7).

3. Amicus's Additional Arguments For Equitable Tolling Are Unavailing

Amicus additionally argues (at 16) equitable tolling is appropriate here because petitioners are *pro se*, without any "particularized training in law or medicine," and because petitioners "do not have any ability to adequately communicate with W.J. due to W.J.'s mental incapacity." Neither argument is persuasive.

First, panels of this Court have concluded that *pro se* petitioners bringing claims on behalf of their children are equally subject to the Vaccine Act's statute of limitations. *See, e.g.*, *G.L.G. ex rel. Graves v. Secretary of Health & Human Servs.*, 577 F. App'x 976, 982 (Fed. Cir. 2014) (unpublished) (affirming the dismissal of a *pro se* Vaccine Act petition as untimely); *Price v. Secretary of Health & Human Servs.*, 565 F. App'x 891, 894 (Fed. Cir. 2014) (per curiam) (unpublished) (similar). Moreover, the Vaccine Act provides a generous scheme to cover reasonable attorneys' fees and costs for all cases "brought in good faith" and for which "there was a reasonable basis for the claim [to be] brought," 42 U.S.C. § 300aa-15(e)(1), which would have facilitated petitioners' ability to seek counsel. *See, e.g.*, *James-Cornelius ex rel. E. J. v. Secretary of Health & Human Servs.*, 984 F.3d 1374, 1381 (Fed. Cir. 2021) (citing "the Vaccine Act's remedial objective of maintaining petitioners' access to willing and qualified legal assistance" and citing H.R. Rep. No. 99-908, at 22).

Second, petitioners' ability to adequately communicate with W.J. and W.J.'s inability to speak would not bear on whether equitable tolling is warranted. *See, e.g.*, *Carson*, 727 F.3d at 1367, 1369 (affirming dismissal of parents' Vaccine Act petition as untimely, even though child had "difficulty with speech" and "speech delay"). Indeed, parents have previously submitted timely petitions on behalf of their children with limited "communicative speech." *See, e.g.*, *Cedillo v. Secretary of Health & Human Servs.*, 89 Fed. Cl. 158, 165 (2009) (quotations omitted), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010).

Petitioners did not need to communicate with W.J. to understand his injuries, which had "objectively manifested" before the statute of limitations expired. Appx17-18. They first received medical diagnoses of W.J.'s conditions in March 2006, when W.J. was two years old. Appx28. And petitioners recognize that "[e]ven today, W.J. still falls into the category of non-speaking," Appx120; so Amicus's argument would effectively permit indefinite tolling of the statute of limitations for individuals with permanent disabilities who cannot communicate, even if they have able guardians who knew about the individual's injury well before the end of the thirty-six month limitations period. This Court has made clear, however, that the statute of limitations is triggered "on the date of the first symptom or manifestation of onset of the injury." *Cloer*, 654 F.3d at 1336.

B. Petitioners Failed To Demonstrate That They Diligently Pursued Their Claims

The Special Master and Court of Federal Claims found that equitable tolling is not warranted because petitioners failed to demonstrate extraordinary circumstances, but this Court may also affirm the Special Master's dismissal because petitioners did not diligently pursue their petition on W.J.'s behalf and are thus not entitled to equitable tolling on that basis, either. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) ("Even if we were to accept petitioner's theory [of extraordinary circumstance], he would not be entitled to relief because he has not established the requisite diligence."); *see also, e.g.*, *Banner v. United States*, 238 F.3d 1348, 1355 (Fed. Cir. 2001) (the Court may affirm on any ground fairly supported by the record).

To have been sufficiently diligent, petitioners must have sought appropriate recourse before the statute of limitations had run, including during the period of asserted extraordinary circumstances. *See Sneed v. McDonald*, 819 F.3d 1347, 1354 (Fed. Cir. 2016) (citing *Checo v. Shinseki*, 748 F.3d 1373, 1380 (Fed. Cir. 2014)); *see also, e.g.*, *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (per curiam) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.").

Petitioners did not file their petition until May 2021, Appx23, alleging injuries from a vaccine that was administered in 2005, Appx45, and after W.J. had been diagnosed with a "speech delay" and autism in 2006 and 2007, respectively, Appx28.

Petitioners did not demonstrate that they made any attempt to pursue claims under the Vaccine Act before the statute of limitations expired. *See* Appx57-61, Appx121-122. Indeed, petitioners seemingly do not dispute the Special Master's findings that they were required to file earlier petitions for W.J.'s alleged vaccine-related injuries of chronic encephalopathy (filing deadline of January 2010) and immunodeficiency (filing deadline of April 2017). *See* Appx35-37.

Instead, petitioners "waited years, without any valid justification" to assert their claims on behalf of their child. *Pace*, 544 U.S. at 419 (affirming denial of equitable tolling for lack of diligence). And although petitioners assert that they "didn't seriously consider any connection between W.J.'s autism and any vaccine for a long time" but "connected the dots" only after 2019, Appx60-61, this Court has held that a claimant must file a Vaccine Act petition within 36 months of the first *manifestation* of autism symptoms, not the *discovery* of the injuries' claimed cause. *Cloer*, 654 F.3d at 1340; *see also* Appx28 (noting that W.J. was diagnosed with autism in 2007). Nor have petitioners explained why their "failure to connect the dots" persisted for 16 years with respect to a non-speaking child.

Amicus suggests (at 5) that "neither the Special Master nor the Court of Federal Claims made any specific findings regarding diligence"; but in rejecting petitioners' argument that the government had fraudulently concealed an alleged link between the MMR vaccine and autism, the Special Master found that petitioners failed to show how the government's "alleged concealment prevented them from filing a

petition." Appx39. "Petitioners could have filed a petition … but did not do so." *Id.* And while Amicus argues (at 7) that "a child cannot be expected to diligently pursue his or her legal rights," petitioners, as W.J.'s parents and legal guardians, retained the ability to file a claim on W.J.'s behalf. Appx17, Appx20, Appx38; *see also* 42 U.S.C. §§ 300aa-11(b)(1)(A), 300aa-33(2). They made no effort to do so while the limitations period was running. *See Adams v. United States*, 59 F.4th 1349, 1355 (Fed. Cir. 2023) (holding that the Court may affirm on any basis supported by the record).

CONCLUSION

For the foregoing reasons, 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 April 11, 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