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

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* ANGELA M. OLIVER IN RESPONSE TO SEPTEMBER 27, 2023 ORDER 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:

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Date: October 27, 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		

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INTEREST OF *AMICUS CURIAE*

Amicus presents this brief pursuant to this Court's Order of September 27, 2023, which requested supplemental briefing on certain issues. *See* ECF No. 60.[1]

ARGUMENT

I. Non-attorney parents generally may not represent their minor children *pro se* in asserting a Vaccine Act claim, though exceptions should exist.

When federal courts seek to ensure that the rights of a minor child are being adequately represented, two competing interests are at play. On one hand, because represented litigants fare better than *pro se* litigants, courts have traditionally required parents litigating on behalf of their children to hire counsel. On the other hand, if a family cannot afford to hire an attorney, the requirement to obtain counsel could result in a child's rights remaining entirely unaddressed. One scholar has referred to this as "a catch-22 for child litigants." Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22*, 71 Fla. L. Rev. 831, 833 (2019) ("Martin").

This catch-22, while significant, is less of a concern in Vaccine Act litigation due to the Act's generous attorney's fees provisions, which provide fees "not only

[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.

for successful cases, but even for unsuccessful claims that are not frivolous." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 229 (2011). Because this mitigates access-to-justice concerns, Amicus suggests that a child's interests are best served by requiring parents to obtain counsel to litigate the child's rights under the Act.

A. It is well-established that non-attorney parents cannot litigate on behalf of their children in federal court without obtaining counsel.

The "vast majority" of circuits hold that non-attorney parents cannot litigate claims on behalf of their minor child without obtaining counsel. *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395, 401 (4th Cir. 2005) (collecting cases from the Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh circuits). This prohibition derives from the "general common-law rule that nonattorneys cannot litigate the interests of another." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 526, 536 n.1 (2007) (Scalia, J., concurring in the judgment and dissenting in part); *accord Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 249 (1st Cir. 2003) (noting "the usual common law rule preventing non-attorney parents from proceeding pro se on behalf of their minor child").

This common law rule comports with 28 U.S.C. § 1654, which provides that, "[i]n all courts of the United States the parties may plead and conduct their own cases *personally or by counsel*." § 1654 (emphasis added). Though the Court of

Federal Claims is likely not a "court[] of the United States" within § 1654,[2] Congress crafted a similar provision for that court in 28 U.S.C. § 2503(a), which provides that "[p]arties to any suit in the United States Court of Federal Claims may appear before a judge of that court *in person or by attorney*, ..." § 2503(a) (emphasis added). Thus, the same logic applying § 1654 to require parents to obtain counsel should apply to cases before the Court of Federal Claims.

"It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys." *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990). In particular, "[c]ases involving pro se plaintiffs are associated with higher rates of termination by pretrial adjudication, higher rates of dismissals, and lower rates of settlement." Mark D. Gough & Emily S. Taylor Poppe, *(Un)changing Rates of Pro Se Litigation in Federal Court*, 45 Law & Soc. Inquiry 567, 582 (2020) ("Gough"). Further, "win rates in cases where plaintiffs are represented by counsel are approximately 300 percent greater than those for cases involving pro se plaintiffs." *Id.* This explains why courts have held that children "are entitled to trained legal assistance so their rights may be fully protected," as does the fact that minors do not have a "true

[2] In addressing 28 U.S.C. § 451, this Court has stated that the Court of Federal Claims is not a "court of the United States." *See, e.g.*, *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247, 250 n.1 (Fed. Cir. 1985).

choice" to "appear *pro se*." *Cheung*, 906 F.2d at 61.

B. Courts have crafted exceptions to this general rule when doing so is in the child's best interests.

In narrow circumstances, courts have permitted parents to proceed *pro se* on behalf of their children. *E.g.*, *Raskin v. Dallas Indep. Sch. Dist.*, 69 F.4th 280, 282 (5th Cir. 2023) (holding 28 U.S.C. § 1654 "allows a *pro se* parent to proceed on behalf of her child in federal court when the child's case is the parent's 'own'"); *Elustra v. Mineo*, 595 F.3d 699, 705–06 (7th Cir. 2010) (permitting a parent's *pro se* motion during a one-month lapse in counsel where the general rule would "harm[] the minors' interest in a way that subverts the purpose of the rule"); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 201 (2d Cir. 2002) (declining to vacate injunction that benefited minor).[3]

The most common exception involves parents litigating social security benefits for their children. *Adams v. Astrue*, 659 F.3d 1297, 1299–1300 (10th Cir. 2011); *Machadio v. Apfel*, 276 F.3d 103, 107 (2d Cir. 2002); *Harris v. Apfel*, 209 F.3d 413, 416–17 (5th Cir. 2000). Courts have cited multiple reasons for this exception.

First, social security regulations expressly allow a non-attorney to proceed on behalf of a minor, but only if the parents meet substantive criteria to establish

[3] Parents may proceed *pro se* where an act provides *parents* with "independent, enforceable rights." *See Winkelman*, 550 U.S. at 533, 535 (declining to address "whether IDEA entitles parents to litigate their child's claims *pro se*").

competence. *Adams*, 659 F.3d at 1301; *Machadio*, 276 F.3d at 107. The Tenth Circuit explained that, if parents did not meet the criteria, "counsel would be required for the matter to proceed in federal court." *Id.*

Second, prohibiting non-attorney parents from pursuing social security benefits for their children *pro se* could prevent judicial review altogether, due to "the stringent family income limitations to which the award of [social security] benefits are subject." *Machadio*, 276 F.3d at 107; *see also Harris*, 209 F.3d at 417.

Third, social security proceedings are simple and "essentially involve the review of an administrative record." *Harris*, 209 F.3d at 417; *see also Machadio*, 276 F.3d at 107 ("such proceedings do not necessarily present the complexities present in other kinds of actions").

Fourth, parents have "a personal stake in the litigation" regarding social security benefits because they are "responsible for expenses associated with the minor's maintenance." *Harris*, 209 F.3d at 416; *see also Machadio*, 276 F.3d at 107.

While one Court of Federal Claims decision has held that parents may proceed *pro se* on behalf of their children in Vaccine Act cases, that was in the narrow context of determining whether a 20-year-old judgment was void under Claims Court Rule 60(b)(4) due to the parent's earlier *pro se* status. *Kennedy v. Sec'y of Health & Hum. Servs.*, 99 Fed. Cl. 535, 539–41, 547 (2011), *aff'd without*

opinion, 485 F. App'x 435 (Fed. Cir. 2012). In addition, the basis for the exception was simply that, in a Vaccine Act case, "the interests of parent and child here are 'closely intertwined.'" *Id.* at 546–47. That may be true, but it does not warrant an exception to the traditional common law rule. Merely having a shared financial interest in a claim is not enough. Qui tam relators under the False Claims Act share a financial interest with the government, but circuit courts have repeatedly banned relators from proceeding *pro se*. *See, e.g.*, *U.S. ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008) (collecting cases).

Besides general alignment of interests, all of the other considerations warranting an exception in the social security context weigh against allowing parents to represent their children *pro se* in Vaccine Act litigation.

First, there is no provision in the Vaccine Act expressly allowing parents to represent their children *pro se*, nor any requirement to ensure parents are competent to do so. The Act allows a parent to bring suit on a child's behalf, much like Federal Rule of Civil Procedure 17(c), but that does not address *pro se* representation or ensure competence. *See Raskin*, 69 F.4th at 285 n.5 (emphasizing "[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"); *id.* (noting Rule 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").

Second, the access-to-justice concerns in the social security context will rarely be present in the Vaccine Act context due to the Act's uniquely generous fee provisions. The Act provides attorney's fees "not only for successful cases, but even for unsuccessful claims that are not frivolous." *Bruesewitz*, 562 U.S. at 229; *see also* 42 U.S.C. § 300aa–15(e). Even an untimely Vaccine Act petition "may qualify for an award of attorney's fees if it is filed in good faith and there is a reasonable basis for its claim." *Sebelius v. Cloer*, 569 U.S. 369, 382 (2013).

Third, unlike social security proceedings, Vaccine Act cases are notoriously complex, often requiring extensive expert testimony and discovery akin to a products-liability lawsuit.

Accordingly, particularly given the complexity of Vaccine Act cases, coupled with the Act's generous compensation scheme for attorney's fees, this Court should not depart from the traditional rule requiring parents to obtain counsel when litigating on their child's behalf.

C. The Court should vacate and remand with instructions to allow W.J.'s parents time to obtain counsel.

Courts can—and should—raise a child's right to obtain counsel *sua sponte* to ensure the child's rights are fully protected. *See Adams*, 659 F.3d at 1299 (raising *sua sponte*); *Elustra*, 595 F.3d at 704 (same). Moreover, "[t]he right to counsel

belongs to the children" and, thus, "the parent cannot waive this right." *See Osei-Afriyie v. Medical College of Penn.*, 937 F.2d 876, 883 (3d Cir. 1991).

This Court should vacate the decisions of the Court of Federal Claims and Special Master and remand with instructions for the Special Master to allow an ample amount of time for W.J.'s parents to obtain counsel. *See Cheung*, 906 F.2d at 62 (remanding to provide "an opportunity to retain counsel or to request the appointment of counsel"); *see also Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005) (holding appeal in abeyance to allow minor to obtain counsel). If W.J.'s parents are unable to obtain counsel, the Special Master should analyze whether it may be appropriate to allow W.J.'s parents to proceed *pro se*, weighing the risks under the circumstances—particularly with respect to the statute of limitations. *See Elustra*, 595 F.3d at 705–06; Martin, *supra* at 864–65 & n.183.

II. In addressing equitable tolling, the Court of Federal Claims and Special Master did not analyze all relevant facts and circumstances.

The existence of a legal guardian is not, on its own, enough to reject an incapacity-based argument for equitable tolling. *K.G. v. Sec'y of Health & Hum. Servs.*, 951 F.3d 1374, 1381 (Fed. Cir. 2020). Instead, the Special Master must "analyze[] the facts to determine whether [the] legal guardianship *alleviated the extraordinary circumstance*." *Id.* (emphasis added). Put another way, the inquiry should focus on whether the presence of a legal guardian is sufficient to protect the

legal rights of someone who cannot assert his own rights due to some extraordinary circumstance, such as minority status or mental incapacity. If a parent is incapable of protecting a child's rights, the extraordinary circumstance preventing the child from pursuing his own rights remains, and equitable tolling would be warranted.

Here, W.J. has two extraordinary circumstances: mental incapacity and status as a minor, each of which prevented him from pursuing his own rights. The Special Master and Court of Federal Claims should have focused on whether the presence of W.J.'s parents was sufficient to "alleviate[]" these extraordinary circumstances that prevented W.J. from pursuing his own claims.

Nothing in the Special Master's decision adequately addresses the critical question of whether W.J.'s parents were, under the circumstances, capable of sufficiently protecting W.J.'s legal rights. First, they did not consider the impact of the parents' *pro se* status on the equitable tolling analysis. Second, they did not adequately address whether W.J.'s legal rights could be sufficiently protected by his parents in light of W.J.'s status as a minor and his mental incapacity.

A. The Special Master should have considered that W.J.'s parents were proceeding *pro se* and that W.J. had no access to counsel.

The Special Master and Court of Federal Claims should have analyzed the impact of W.J.'s parents' *pro se* status in considering equitable tolling. This goes directly to the question of whether the presence of a legal guardian alleviates the

extraordinary circumstances of minority status and mental incapacity. *See K.G.*, 951 F.3d at 1381–82 ("[t]he significance of a legal guardian may depend on a number of factors, including: the nature and sophistication of the guardian (parent, *lawyer*, family member, or third-party)" (emphasis added)). As highlighted above, the decision not to have counsel ultimately hurts the right-holder—here, W.J. *See* Gough, *supra* at 582. Accordingly, this Court should vacate and remand with instructions to reconsider the tolling analysis in light of W.J.'s lack of access to counsel, both now and throughout his childhood.

B. The Special Master failed to consider whether W.J.'s status as a minor and mental incapacity prevented his parents from protecting his legal rights.

The Ninth Circuit has recognized that "*[p]articular* circumstances connected to one's age could support equitable tolling," one of those circumstances being "where the cause of action is not reasonably knowable by the plaintiff or her parents because of her minority." *Booth v. United States*, 914 F.3d 1199, 1207 (9th Cir. 2019) (emphasis original). While the Vaccine Act does not provide for an automatic discovery rule, if a child's age or mental capacity adversely affects the parents' or doctors' ability to fully understand the child's symptoms (and thereby to protect the child's rights), those facts are highly relevant to an equitable tolling analysis.

By way of example, consider Guillain-Barré Syndrome—a Table injury associated with seasonal influenza vaccines. *See* Vaccine Injury Table at 4.[4] For children, symptoms of Guillain-Barré Syndrome include "difficulty walking," "refus[ing] to walk," and "tingling in the feet or hands."[5] It goes without saying that difficulty walking is normal early-childhood behavior, even for healthy children. For others, it might be a developmental delay that is expected to resolve over time. In short, normal stages of development in children may mask what might otherwise be flagged as symptoms of vaccine-related injuries. And for a child unable to communicate a symptom like "tingling in the feet or hands" due to age, mental incapacity, or both, he may suffer from Guillain-Barré Syndrome in silence, while still exhibiting symptoms sufficient to run the statute of limitations. In this scenario, it may be impossible for parents to protect the legal rights of their child.

For a child like W.J., who remained non-verbal throughout childhood, it may take a parent or doctor years to piece together clues before ever identifying that the child has experienced a vaccine-related injury. Rigidly enforcing a limitations

[4] The Vaccine Injury Table is available at https://www.hrsa.gov/sites/default/files/hrsa/vicp/vaccine-injury-table-01-03-2022.pdf.

[5] Guillain-Barré Syndrome, Nat. Inst. of Neurological Disorders and Stroke, https://www.ninds.nih.gov/health-information/disorders/guillain-barre-syndrome (last visited Oct. 27, 2023).

period in these circumstances produces a harsh result that Congress did not intend when designing a program to generously compensate children injured by vaccines.

Considering the impact of W.J.'s condition on his parents' ability to protect his rights does not create a discovery rule that would contradict this Court's decisions in *Cloer* or *Markovich*. *Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1337 (Fed. Cir. 2011) (en banc); *Markovich v. Sec'y of Health & Hum. Servs.*, 477 F.3d 1353, 1356–57, 1360 (Fed. Cir. 2007). Equitable tolling does not apply a discovery rule to all cases. Rather, it permits a degree of flexibility in applying the statute of limitations where equity favors a less rigid application of a limitations period. In the context of children who have been injured by vaccines, whose parents may not become aware of the injury or its cause until it is too late to preserve the child's legal rights, equity favors grace.

Here, in rejecting equitable tolling, the Special Master failed to conduct any analysis regarding whether W.J.'s parents had the information needed to fully protect W.J.'s legal rights. Instead, the Special Master primarily (if not entirely) focused on the fact that W.J. has parents who theoretically could have filed a petition earlier. *See* Appx37–38 (concluding "W.J.'s 'mental incapacity' does not serve as an 'extraordinary circumstance'" because W.J.'s parents "had the ability to file a petition"). The Special Master viewed all minors categorically, reasoning:

"The same is true for *all petitions* brought on behalf of *all minors*. Parents or other legal representatives must file the petition on behalf of a minor within the applicable statute of limitations." Appx38 (emphasis added). Similarly, the Court of Federal Claims merely pointed to the fact that a legal representative may file a petition on behalf of a minor, "as in any vaccine case involving a child." Appx18. Nowhere did the Special Master or Court of Federal Claims analyze whether the cause of action may not have been "reasonably knowable by the plaintiff or [his] parents because of [his] minority" or his mental incapacity, or how that impacts the question of whether having parents suffices to alleviate the extraordinary circumstances here. *See Booth*, 914 F.3d at 1207.

To be sure, the Special Master *did* discuss W.J.'s medical history in detail, including his parents' involvement in his medical care. *See* Appx27–30. But those findings do not answer the critical question of whether W.J.'s parents had sufficient information to fully protect W.J.'s legal rights, as discussed above.

In sum, given the nature of a Vaccine Act claim, which is based on symptoms that are often not outwardly apparent and that may align with typical childhood developmental stages, a more nuanced analysis is required to ensure the guardian can fully protect the child's rights.

III. 28 U.S.C. § 2501's statutory-tolling provision applies to every petition filed in the Court of Federal Claims, including Vaccine Act petitions.

A. The plain text of Section 2501 confirms that its tolling provision applies to every claim in the Court of Federal Claims.

The three-year (36-month) limitations period in the Vaccine Act does not bar W.J.'s petition because his claim accrued while he was under legal disability. The plain text of Section 2501 compels this conclusion, and nothing in the Vaccine Act prevents application of Section 2501's tolling provision.

Section 2501 establishes background limitations rules for "[*e*]*very claim* of which the United States Court of Federal Claims has jurisdiction." 28 U.S.C. § 2501, ¶ 1 (emphasis added). Those rules include a statutory-tolling provision that "[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." *Id.* § 2501, ¶ 3. The Court of Federal Claims has jurisdiction here, so Section 2501 applies.

The history of Section 2501 and the Vaccine Act confirm that Congress intended the Vaccine Act to give effect to the tolling provision in Section 2501. That tolling provision is deeply embedded in the Claims Court's history, even pre-dating the Tucker Act. *See* Act of Mar. 3, 1863, Pub. L. 37-92, ch. 92, § 10, 12 Stat. 765, 767 (1863). Section 2501 began as a Civil-War-era statute that provided a six-year limitations period for money claims against the Government. *See Chance v. Zinke*, 898 F.3d 1025, 1032 (10th Cir. 2018). Congress later expanded the

jurisdiction of the Court of Claims through the Tucker Act, but "it didn't repeal the 1863 statute of limitations, so the two provisions coextensively governed lawsuits in the Court of Claims." *See Chance*, 898 F.3d at 1032 (explaining also that the "Little" Tucker Act separately provided for claims of smaller amounts); *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 815–17 (6th Cir. 2015) (discussing Tucker Act's statutory history). Congress recodified many of the relevant provisions in 1948, and the language providing tolling for the period of legal disability has remained nearly identical since the 1948 recodification. *See* Act of June 25, 1948, Pub. L. 80-773, ch. 646, § 2501, 62 Stat. 869, 976 (1948). This backdrop confirms this Court's explanation that "in the absence of a specific statutory provision, a suit in the [Court of Federal Claims] is limited by the general statute of limitations applicable to *all cases* in" that court. *Cf. Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1572 (Fed. Cir. 1994) (citing 28 U.S.C. § 2501) (emphasis added).

The Vaccine Act merely provides another type of claim that is heard by the Court of Federal Claims. Indeed, the Vaccine Act prevents federal district courts from hearing cases worth more than $1,000 unless a petition is first filed with the Court of Federal Claims, a structure in alignment with the historic Big-Little Tucker Act dichotomy. *See* 42 U.S.C. § 300aa-11(a)(2)(A). The general provisions applicable to all claims in the Court of Federal Claims, including the tolling

provision in Section 2501, are thus applicable to the Vaccine Act "unless the later statute 'expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that the words of the later statute shall have any meaning at all.'" *See Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1366 (Fed. Cir. 2002) (quoting *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014, 1018 (Fed. Cir. 1995)) (determining which statute of limitations applied in a suit under the Interstate Commerce Act) (alterations in original)).

Ontario Power Generation, Inc. v. United States, cited by the Government at oral argument, is not to the contrary. *See* 369 F.3d 1298 (Fed. Cir. 2004). *Ontario Power* merely explained that the Tucker Act provides the Court of Federal Claims jurisdiction to hear certain monetary claims against the United States but does not provide the substantive right. *See id.* at 1301. Instead, "a plaintiff must also rely on a right to money damages found in the Constitution, a statute or a government regulation, or a contract." *Id.* That truism is of no import here, as W.J. indisputably has a right to petition for relief under the Vaccine Act.

B. The Vaccine Act's three-year limitations period does not repeal the tolling provision in Section 2501.

As discussed above, the plain text of Section 2501 shows that "[e]very claim" over which the Court of Federal Claims has jurisdiction is subject to the general provisions in Section 2501. And there is no indication that Congress

intended to repeal Section 2501's existing tolling provision when Congress placed jurisdiction over Vaccine Act petitions in the Court of Federal Claims.[6] "The cardinal rule is that repeals by implication are not favored." *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). This rule is an application of the principle that, when two statutes govern the same subject, "effect should be given to both if possible." *See id.*; *see also 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))); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."). Because it is possible—indeed, simple—to give effect to both the Vaccine Act and Section 2501's tolling provision, this Court should apply both.

Applying that canon, the Court in *United States v. Greathouse* explained that "effect should be given" to the tolling provision found in Section 2501's predecessor statute unless the purportedly conflicting limitations provision was

[6] Jurisdiction over Vaccine Act claims was originally in the district courts, *see* National Childhood Vaccine Injury Act of 1986, Pub. L. 99-660, § 2111, 100 Stat. 3743, but was transferred to the Court of Federal Claims a year later, *see* Vaccine Compensation Amendments of 1987, Pub. L. 100–203, § 4307, 101 Stat. 1330.

"absolutely irreconcilable." 166 U.S. 601, 604–06 (1897). The Court held that the disability tolling provision in Revised Statutes 1069 still applied after passage of the limitations period in the Tucker Act in 1887, even though that act did not make "any exception in favor of persons under disability." *Id.*

This Court has often applied the rule against implied repeal when determining whether a specific statute of limitations was displaced by a later-enacted general statute of limitations, *see Inter-Coastal Xpress*, 296 F.3d at 1366, and it should do so in this context, too. Indeed, there is even more reason to apply that rule here, where the specific statutory scheme (the Vaccine Act, as amended) was enacted against the existing background of the disability tolling provision applicable to all petitions before the Court of Federal Claims. Under the rule against implied repeal, the Vaccine Act displaced Section 2501 if the later act is irreconcilable with the prior, or if the later act would be devoid of meaning if effect were given to Section 2501. *See Inter-Coastal Xpress*, 296 F.3d at 1366 (citing *Dalton*, 50 F.3d at 1018); *see also Traynor v. Turnage*, 485 U.S. 535, 548 (1988). Neither exception is met here.

First, the tolling for legal disability in Section 2501 is easily reconcilable with the Vaccine Act. Although the Vaccine Act's later-enacted three-year limitations period supplants the six-year limitations period in Section 2501, the Vaccine Act is

silent as to the question of tolling for a period of legal disability. The tolling provision in Section 2501, if anything, complements the Vaccine Act: Section 2501 provides that a claim must be filed "within three years after the disability ceases," 28 U.S.C. § 2501, which coincides with the three-year limitations period in the Act.

The ease with which these provisions fit together is highlighted by *Booth v. United States*, 914 F.3d 1199, 1206 (9th Cir. 2019). There, the court explained that a tolling provision did not apply to a separate limitations scheme in part because the tolling provision provided a *three*-year filing period after a disability was removed, but the limitations provision at issue required claims to be brought within *two* years, creating "an anomaly." *Id.* Here there is no such anomaly. Both the tolling provision in Section 2501 and the Vaccine Act provide a three-year period.

Second, the Vaccine Act would not be devoid of meaning if effect is given to Section 2501's tolling provision. To the contrary, giving that tolling provision effect furthers the "pro-claimant" purpose of the Act, *see K.G.*, 951 F.3d at 1380, including its focus on providing for children injured by vaccines. *See* H.R. Rep. No. 99-908 at 4, *reprinted in* 1986 U.S.C.C.A.N. at 6345. Applying Section 2501's tolling provision here ensures the federal compensation system includes a minority tolling provision, similar to what Congress contemplated would be available in state systems based on state-law minority tolling provisions. *See* H.R. Rep. No. 99–908,

at 23 (1986), 1986 U.S.C.C.A.N. at 6364; *see also* Amicus Br. 9–10 (ECF No. 46).

Further, reading Section 2501 in tandem with the Vaccine Act minimizes the absurd results brought about by the fact that the Act has been held to lack a discovery rule. *See Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1337 (Fed. Cir. 2011) (en banc). Not only does the lack of a discovery rule mean state-law remedies may be barred, *see Cloer*, 654 F.3d at 1352 (Dyk, J., dissenting), it often renders it impossible for young children who are injured by vaccines to obtain the relief Congress promised—particularly where symptoms may be overlooked due to the child's developmental stage or inability to adequately communicate. *See supra* Section II; Amicus Br. 11–12. In sum, the tolling provision in Section 2501 enhances—rather than distracts from—the purpose of the Vaccine Act.

In short, effect can easily be given to both the Vaccine Act and Section 2501's tolling provision for legal disability, so, under Supreme Court and this Court's precedent, effect should be given to both. *See Ruckelshaus*, 467 U.S. at 1017–1018; *Syngenta Crop Protection, LLC v. Willowood, LLC*, 944 F.3d 1344, 1355–59 (Fed. Cir. 2019) (explaining that "[i]f two statutory provisions 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 *Ruckelshaus*, 467 U.S. at 1018)). W.J.'s claim is therefore not barred.

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 twenty-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