In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

E-Filed: August 7, 2012

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MARK and MELANIE WAX, as the Parents and Natural Guardians of ANDREW WAX, a minor,	*	TO BE PUBLISHED
	*	No. 03-2830V
Petitioners,	*	Autism; Dismissal of Claim as Untimely; Doctrine of Equitable Tolling Not Applicable on these Facts
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* * * * * * * * * * * * * * * * * *		

Michael London, Douglas & London, P.C., New York, NY, for petitioners.

Ryan Pyles, U.S. Dep't of Justice, Washington, DC, for respondent.

DECISION[1]

On December 17, 2003, petitioners filed a Short-Form Autism Petition for compensation under the National Vaccine Injury Compensation Program (the Program).[2]

[1] Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this ruling on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

In January 2009, more than five years after the filing of this claim and after the hearings in the six test cases in the Omnibus Autism Proceeding (OAP) were complete, petitioners filed medical records in this case.

The record makes clear that petitioners did not file their vaccine claim timely. Nor have petitioners established, on the facts of this case, that equitable tolling is warranted. For this reason, petitioners' claim must be dismissed.

I. PROCEDURAL HISTORY AND CURRENT POSTURE OF THE CASE

On March 4, 2009, respondent moved to dismiss this case as untimely. Resp't's Mot. to Dismiss. Respondent asserted that, in accordance with the Vaccine Act, petitioners must have filed their claim within 36 months of the first symptom or manifestation of Andrew's Autism Spectrum Disorder (ASD) for the petition to have been timely filed. Id. at 3. The filed medical records indicate that concern about Andrew's speech delay was documented in a record note dated November 9, 1995, Pet'rs' Ex. 5 at 3, and that Andrew received an ASD diagnosis on August 25, 1998, Pet'rs' Ex. 2 at 142-46. Petitioners filed their vaccine claim more than eight years after the record notation of Andrew's speech delay—a sign that is medically recognized to be among the earliest indications of an ASD[3]—and more than five years after Andrew received his ASD diagnosis.

Petitioners filed a response to the motion to dismiss as well as an expert affidavit and additional medical records on August, 20, 2009. Pet'rs' Resp., Pet'rs' Ex. 6-17. In response to the motion to dismiss, petitioners explained that they first filed a civil case

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[2] National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

By filing a Short-Form Autism Petition, petitioners elected to opt into the Omnibus Autism Proceeding (OAP), and consistent with the requirements set forth in § 11(c)(1) of the Act, alleged the following: (1) that the vaccinee suffered a vaccine-related injury, specifically a neurodevelopmental disorder caused by a received MMR vaccine and/or a thimerosal-containing vaccine; (2) petitioners have no pending civil action against a vaccine manufacturer or administrator; (3) the vaccinations in question were received in the United States; (4) the petition is being filed within three years after the first symptom of the disorder; and (5) the vaccine-related injury has persisted for more than six months.

3 See Cook v. Sec'y of Health & Human Servs., No. 03-2355V, 2012 WL 664766, at *7-8 (Fed. Cl. Spec. Mstr. Jan. 18, 2012) (discussing in detail the early symptoms of an ASD).

premised on a theory of thimerosal-related injury. Pet'rs' Resp. at 13. That civil action was dismissed on December 16, 2002. See Wax v. Aventis Pasteur, Inc., 240 F. Supp. 2d 191 (E.D.N.Y. 2002). Petitioners have filed into the record of this proceeding, as Exhibit 16, a copy of the dismissal decision. See Pet'rs' Ex. 16. Petitioners have not filed a copy of the complaint filed in that civil action, but they have filed a docket report from that civil action showing that the complaint was filed on April 3, 2002. Pet'rs' Ex. 22 at 1.

A status conference was held on September 27, 2011 to address petitioners' claim. The issue of untimely filing was drawn again to petitioners' attention. See Status Conf. Tr. 18-19, 24-26, Sept. 27, 2011.

After the status conference, petitioners filed a status report indicating that they intended to proceed with their claim and sought leave to file an amended petition by December 23, 2011. Pet'rs' Status Report, Nov. 8, 2011. Respondent objected to petitioners' request on the ground that the claim had not been filed timely. Resp't's Resp. and Supp. Mot. to Dismiss, Nov. 16, 2011. At the same time, respondent filed supplemental briefing for consideration with the then-pending motion to dismiss, again challenging the timeliness of petitioners' claim. Id. By NON-PDF order issued that same day, November 16, 2011, the undersigned afforded petitioners until December 27, 2011 to file their amended petition.

Petitioners filed additional medical records on December 23, 2011, Pet'rs' Ex. 18-21, but did not file their amended petition until January 13, 2012. In their amended petition, petitioners claimed that Andrew had a mitochondrial disorder,[4] and "suffered injuries under Categories I, II, III, IV, V, VI, VII, and/or IX of the Vaccine Injury Table.[5] Am. Pet. at ¶¶ 4, 5. Petitioners did not address the issue of timeliness in either their November 2011 status report or their January 2012 amended petition.

Nor did petitioners address the impact of the Cloer decision issued by the Federal Circuit in the fall of 2011. In Cloer, the Federal Circuit reiterated the Vaccine

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[4] To date, petitioners have not identified those medical records that establish Andrew's mitochondrial disorder.

[5] To receive compensation for a "Table Injury"—an injury listed on the Vaccine Injury Table—the petitioner must show that the injured person sustained the particular injury listed on the table and that the injury occurred within the specified time period. See § 11(c)(1)(C)(i). Petitioners have alleged eight different categories of injury on the vaccine table, one of which, namely category IX, does not exist. See 42 CFR § 100.3(a). Petitioners have not identified which exhibits in the record show that Andrew suffered the alleged injuries of encephalopathy, anaphylaxis, and polio . . . among others . . . within the time periods defined under the Vaccine Injury Table. Id.

Act's 36-month statute of limitations but, reversing its previous position, the Federal Circuit found that, in appropriate circumstances, equitable tolling is applicable in vaccine cases. Cloer v. Sec'y of Health & Human Servs., 654 F.3d 1322 (Fed. Cir. 2011) (en banc).

On February 29, 2012, the undersigned issued a decision dismissing this case as untimely (Decision), finding that the statute of limitations was triggered in November of 1995, and that petitioners must have filed their petition by November of 1998. Decision at 7. The undersigned also found that that petitioners' equal protection and due process claims were unavailing, and that relief under the equitable tolling doctrine for fraud did not appear likely. Id. at 8-9.

On March 21, 2012, petitioners timely filed a motion for reconsideration under Vaccine Rule 10. Vaccine Rule 10 permits a party to file a motion for reconsideration of a special master's decision within 21 days of the issuance of the decision. Vaccine Rule 10(e)(1). The decision whether to grant reconsideration "lies largely within the discretion of the [trial judge]." Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir. 1990).

Petitioners did not dispute the undersigned's finding that the initial petition was untimely. Pet'rs' Mot. for Recon. at 15-16. Rather, petitioners argued for reconsideration of the dismissal decision on the ground that they had not been directed to address the Cloer decision. Id. at 8. Petitioners recognized that equitable tolling is a newly available remedy following the Cloer ruling and argued that the doctrine should apply in this case because petitioners had diligently pursued their rights before a change in the law occurred. Id. at 12-15.

The next day, March 22, 2012, the undersigned conducted an unscheduled status conference for the limited purpose of addressing petitioners' motion for reconsideration. That same day, the undersigned issued an order withdrawing the February 29, 2012 decision of dismissal. NON-PDF Order, Mar. 22, 2012. By separate order, also dated March 22, 2012, the undersigned afforded the parties additional time to fully brief the arguments concerning the applicability of the equitable tolling doctrine in this case.

Respondent responded to petitioners' motion for reconsideration on April 30, 2012, asserting that the facts of this case do not support an equitable tolling claim. Resp't's Resp. to Mot. for Recon. at 4. Respondent contends that petitioners could have brought a timely claim because no legal impediment prevented the earlier filing of their vaccine claim. Id. at 4-8.

On May 30, 2012, petitioners filed their reply, renewing their request to toll the statute of limitations. Petitioners argue that they were diligently pursuing their claim in

another jurisdiction until a legal change occurred that made clear that petitioners' claim belonged in the Vaccine Program. See Pet'rs' Reply at 2-4.

II. APPLICABLE LEGAL STANDARD

The Vaccine Act provides that in the case of:

> [A] vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury 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….

§ 16(a)(2).

In Cloer, the Court of Appeals for the Federal Circuit affirmed that the "statute of limitations begins to run on a specific statutory date: the date of occurrence of the first symptom or manifestation of onset of the vaccine-related injury recognized as such by the medical profession at large."[6] 654 F.3d at 1340. The date of the occurrence of the first symptom or manifestation of onset "does not depend on when a petitioner knew or reasonably should have known" about the injury. Id. at 1339. Nor does it "depend on the knowledge of a petitioner as to the cause of an injury." Id. at 1338.

In Cloer, the Federal Circuit also recognized that equitable tolling of the Vaccine Act's statute of limitations is available in exceptional circumstances. Id. at 1340. Citing the Supreme Court's decision in Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990), the Federal Circuit made clear that equitable tolling is to be used "sparingly," and the doctrine is not to be applied simply because the application of the statute of limitations would otherwise deprive a petitioner of the opportunity to bring a claim. See Cloer, 654 F.3d at 1344-45. Invoking the reasoning set forth in both Irwin, 498 U.S. at 96, and Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005), the Federal Circuit explained that equitable tolling should be applied only when a petitioner has "diligently pursued his rights, but . . . 'extraordinary circumstance[s]'" such as a procedurally defective pleading, fraud, or duress, [have] stood in the way. Cloer, 654 F.3d at 1344-45.

Determining whether petitioners timely filed their claim necessarily requires an examination of Andrew's medical history.

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[6] The opinions of the United States Court of Appeals for the Federal Circuit are binding on the Office of Special Masters. See Snyder v. Sec'y of Health & Human Servs., 88 Fed. Cl. 706, 719 n.23 (2009).

III. FACTUAL BACKGROUND

Andrew was born healthy on October 23, 1992. Pet'rs' Ex. 3 at 5. He received routine childhood vaccines between November 11, 1992, and March 18, 1997. Pet'rs' Ex. 1 at 1; Pet'rs' Ex. 4 at 1. Early on, Andrew experienced normal childhood illnesses such as ear infections and viral illnesses. See Pet'rs' Ex. 1 at 5-6; Pet'rs' Ex. 5 at 2-3.

Reports of Andrew's speech development vary slightly between the contemporaneous records and later provided histories. The contemporaneous records reflect that at his two-year well-child visit on October 12, 1994, Andrew was assessed as "well" and could say two words. Pet'rs' Ex. 5 at 2. However, by Andrew's three-year well-child visit on November 9, 1995, the pediatrician noted that Andrew tried to communicate but was not successful. The pediatrician diagnosed him with speech delay. Id. at 3.

According to a later provided parental history, related to a school psychologist on September 22, 1997, Andrew could say words that were understood at twelve months and used two-word phrases by twenty-four months. Pet'rs' Ex. 2 at 8. Subsequently, on August 25, 1998, an examining psychologist recorded that "[a]ccording to Mr. and Mrs. Wax, they first began to be concerned about Andrew's development at about age 3 when he appeared to be making less than expected progress in his communication skills." Id. at 142. The record further noted that Andrew "also began to be increasingly different from peers regarding his social skills, preferring to be off by himself and minimally searching out others." Id. Yet, a third parental history, provided afterward on August 17, 2001, indicates that Andrew did not talk at age two (about October 1994) and had only one word at age three (about October 1995). Pet'rs' Ex. 4 at 2. In his affidavit, Mr. Wax recalls that "[i]n hindsight, sometime in March or April 1994[, at about 17 months of age], Andrew appeared to slow down in making developmental progress in social and language areas. He had just a few words which he would continue to use." Pet'rs' Ex. 6 at ¶ 11.

A preschool evaluation conducted in September 1997, indicates that Andrew received a speech and language evaluation in March of 1997, qualified for services, and began language therapy in April and May of that year. See Pet'rs' Ex. 2 at 8. Mr. Wax states in his affidavit that Andrew received a pervasive developmental disorder – not otherwise specified (PDD-NOS) diagnosis from a school psychologist at age 4, Pet'rs' Aff. Ex.6 at ¶ 14, but the records from the referenced office visit do not reflect this diagnosis. See generally, Pet'rs' Ex. 2 at 1-26. The records do indicate that a psychologist diagnosed Andrew with autistic disorder on August 25, 1998. Id. at 142-46. At that time, Andrew was nearly six years old.

The filed medical records contain no report of an adverse reaction to any of Andrew's received vaccines. But, Mr. Wax states in his affidavit that after each

vaccination, Andrew exhibited "long sleep patterns" in the days immediately following vaccination, Pet'rs' Aff. Ex. 6 at ¶ 6, and that after receiving the vaccines on February 14, 1994 in particular, Andrew developed a 103 degree fever that resolved after a few days, id. at ¶ 10. The medical records contain no report of "long sleep patterns" after any of Andrew's vaccinations.

On February 14, 1994, Andrew received DTP, Hib, IPV, and MMR vaccines. Pet'rs' Ex. 4 at 1. The first reported fever after that date appears in a record dated March 24, 1994, more than a month after Andrew received the vaccines at issue. That record does note a 103 degree fever and an illness with which Andrew had presented 24 hours earlier. But it makes no mention of any vaccine reaction. No records of a reported fever closer in time to the February vaccinations have been filed. See Pet'rs' Ex. 5 at. 2.

Andrew is now almost 19 years old. He has an older brother, Alexander, who is approximately 21 years of age and has cerebral palsy. Pet'rs' Ex. 2 at 8. The medical records also suggest that Alexander has been diagnosed with Asperger's Syndrome, an autism spectrum disorder, but the records do not confirm this. See Pet'rs' Ex. 4 at 2.

IV. ANALYSIS AND DISCUSSION

It is well-documented that speech delay is commonly the first symptom of an ASD. See Resp't's Ex. A, Rhiannon J. Luyster, et al., Language Assessment and Development in Toddlers with Autism Spectrum Disorders, J. Autism Dev. Disord. 1426-28 (2008) (noting that language delay is an important diagnostic criterion for ASD). In this case, Andrew's earliest symptom of an ASD was his speech delay. The first contemporaneously documented impression of Andrew's speech delay occurred in November 1995 at Andrew's three-year well-child visit. Pet'rs' Ex. 5 at 3. Accordingly, this date triggered the running of the statute of limitations under the Vaccine Act. For petitioners' vaccine claim to be found timely, petitioners would have had to file their petition by November 1998. Petitioners did not file their claim until December 17, 2003.

A. Petitioners' Response to the Motion to Dismiss

Respondent has moved to dismiss petitioners' claim as untimely filed. Petitioners oppose dismissal on the grounds that: (1) they did not know of the alleged link between vaccines and ASDs until 2001; (2) the Vaccine Act's limitations period is unconstitutional; (3) the earlier filed civil action triggered the Vaccine Act's savings provision; and (4) equitable tolling is appropriate in this case. On motion for reconsideration, petitioners focused solely on the equitable tolling argument. For the sake of completeness, however, the undersigned addresses all of petitioners' arguments refuting the timeliness challenge to their petition.

The undersigned addresses each of petitioners' assertions in turn. For the reasons explained more fully below, petitioners' arguments are not persuasive.

1. Petitioners Did Not Know of the Alleged Link Between Vaccines and ASDs Until 2001

In August of 2009 (prior to the Federal Circuit's Cloer ruling), petitioners argued that the statute of limitations did not begin to run until 2001. Pet'rs' Resp. at 36. It was petitioners' position that their claim was filed timely because Mr. Wax, Andrew's father, did not become aware of the potential causal relationship between autism and vaccines until 2001.[7] Id. Thus, petitioners asserted, the 36-month time period should not begin to run until the time at which they discovered that they had a vaccine claim. Id. Petitioners effectively urged the undersigned to apply a discovery rule.

When incorporated into statutes of limitations, discovery rules "look to the knowledge of a [claimant] to determine the date upon which the Statute of Limitations begins to run." Cloer, 654 F.3d at 1338. The Federal Circuit considered and rejected the applicability of such a discovery rule in vaccine cases in the Cloer decision. 654 F.3d at 1337-40. The Circuit Court reasoned that "Congress made the deliberate choice to trigger the Vaccine Act statute of limitation from the date of occurrence of the first symptom or manifestation of the injury for which relief is sought, an event that does not depend on the knowledge of the petitioners as to the cause of an injury." Id. at 1338.

In their motion for reconsideration, petitioners accede that their argument for a discovery rule is unavailing following the Cloer ruling. Pet'rs' Mot. for Recon. at 16.

2. Petitioners Challenge the Constitutionality of the Vaccine Act's Limitations Period

Petitioners challenge the constitutionality of the Vaccine Act's statute of limitations, claiming that it violates Andrew's Fifth Amendment rights to due process and

[7] Petitioners characterized Andrew's injury as a latent one, and argued that the statute of limitations was improper as applied to latent injuries. Pet'rs' Resp. at 18-25. But, Andrew's injury was no longer latent at the time his speech delay became apparent in 1995. Noticeable speech delay is a patent indication of an emerging health condition. As an early symptom of Andrew's ASD, see, e.g., Resp't's Ex. A, Luyster, et al., supra, his documented speech delay triggered the running of the statute of limitations in 1995.

equal protection.[8] Pet'rs' Resp. at 18-35. For the reasons set forth below, this argument does not persuade. Although petitioners did not attempt to reassert this constitutional challenge on motion for reconsideration, the undersigned again addresses the earlier constitutional challenge in the interest of completeness.

a. Petitioner's due process claim

Petitioners earlier contended that Andrew's Fifth Amendment right to due process was violated by the Vaccine Act's statute of limitations. Pet'rs' Resp. at 25-29. The Fifth Amendment states in pertinent part that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Supreme Court has held that when an individual's fundamental right to either life, liberty, or property is threatened, the aggrieved person is entitled to due process, that is, an opportunity to address his or her claim through the justice system, unless a "countervailing state interest of overriding significance" is implicated. Boddie v. Connecticut, 401 U.S. 371, 377 (1971). Due process does not require, however, that every person receive a hearing on the merits of the filed claim. Id. at 378 (citing Windsor v. McVeigh, 93 U.S. 274, 278 (1876) (observing that a State can enter a default judgment if the defendant fails to appear after receiving adequate notice); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 351 (1909) (noting that a State can enter a default judgment if a party violates a procedural rule without justifiable excuse)). The Due Process Clause ensures only that parties receive notice of, and an opportunity to, attend any hearing on the aggrieved party's claim. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

The Federal Circuit has considered previously this particular challenge to the Vaccine Act's statute of limitations and has upheld the Court of Federal Claims' determination that due process is not violated by the Vaccine Act's statute of limitations

[8] Although petitioners refer to the "Equal Protection Clause of the Fifth Amendment," there is, in fact, no such clause. The Supreme Court repeatedly has pointed out that no clause explicitly addressing equal protection rights exists in the Fifth Amendment. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954) ("The Fifth Amendment, . . . does not contain an equal protection clause as does the Fourteenth Amendment . . . ."). The Court has observed, however, that the Fifth Amendment's Due Process Clause does contemplate "equal protection principles." Griswold v. Connecticut, 381 U.S. 479, 486 n.1 (1965); see also Bolling, 347 U.S. at 499 (observing that "discrimination may be so unjustifiable as to be violative of due process"). The undersigned understands petitioners to invoke the equal protection component of the Fifth Amendment. This argument is addressed in turn.

because petitioner has "no vested right in any claim for damages" until a final judgment has entered in the case. Cloer, 85 Fed. Cl. 141, 150-51 (2008).[9]

Accordingly, the undersigned finds that, in the instant case, the requirements of due process have been satisfied because petitioners were afforded a period of time within which to file their claim under the Vaccine Program. Andrew's parents, like all other petitioners seeking vaccine compensation, had 36 months from the appearance of the "first symptom or manifestation of onset" of Andrew's injury to file a vaccine claim. Notice of the limitations period for filing such a claim was provided in the Vaccine Act. See § 16(a)(2) (setting forth the applicable statute of limitations under the Vaccine Act). Petitioners failed to file a timely claim. Any complaint from petitioners that the 36-month statute of limitations period is too short is more properly addressed to Congress than to the undersigned. The undersigned must apply the law as it now stands, including the statutorily prescribed 36-month time limit for the filing of vaccine claims.

b. Petitioners' equal protection claim

Petitioners also contended earlier that Andrew's right to equal protection under the law was violated by the Vaccine Act's statute of limitations. Pet'rs' Resp. at 30-35. This second constitutional argument asserted by petitioners is similarly without merit.

According to the Supreme Court in Buckley v. Valeo, an equal protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment. 424 U.S. 1, 93 (1976). The Fourteenth Amendment forbids any State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. See also Plyler v. Doe, 457 U.S. 202, 210 (1982). The concept of equal protection is implicated where "classifications drawn by any statute constitute an arbitrary and invidious discrimination." Loving v. Virginia, 388 U.S. 1, 10 (1967).

Equal protection analysis first requires a determination of whether the statute creates a particular classification of person. If so, the next step is to determine the appropriate level of scrutiny to be applied when considering the statute.

Legislation generally is presumed to be valid and will be upheld under an equal protection analysis so long as the classification for which the statute provides is rationally

[9] The Court of Federal Claims' decision in Cloer was reversed and remanded on other grounds by a panel of the Federal Circuit. Cloer v. Sec'y of Health & Human Servs., 603 F.3d 1341 (Fed. Cir. 2010). The panel's decision was vacated and rehearing en banc was ordered. Cloer v. Sec'y of Health & Human Servs., 399 Fed. App'x. 577 (Fed. Cir. 2010). The en banc decision in Cloer, which has been discussed extensively in this decision, was issued on August 5, 2011. 654 F.3d 1322.

related to a legitimate state interest. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); Schweiker v. Wilson, 450 U.S. 221, 230 (1981); U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980). Certain classifications have been identified to require more rigorous levels of scrutiny.[10]

The Federal Circuit has held previously that although the application of the Vaccine Act may result in a disparate impact on persons, the application of heightened scrutiny is not automatically implicated. Black v. Sec'y of Health & Human Servs., 93 F.3d 781, 788 (Fed. Cir. 1996) (citations omitted). This is because, as the Supreme Court has observed, "the equal protection component of the Fifth Amendment prohibits only purposeful discrimination." Harris v. McRae, 448 U.S. 297, 323 n.26 (1980) (citing Washington v. Davis, 426 U.S. 229, 242 (1976)). The Vaccine Act's statute of limitations is not applied to purposefully discriminate. Nor do vaccine claimants fall into a protected class of persons. Accordingly, the Vaccine Act's statute of limitations is reviewed under a "rational basis" standard. See Black, 93 F.3d at 788.

Highlighting in Cloer that the "neutral" nature of the 36-month statute of limitations "treats all petitioners equally," the Federal Circuit appears to have affirmed, without overt discussion, the Court of Federal Claims' use of rational basis review to conclude that the statutorily prescribed limitations period is rationally related to the "legitimate legislative purposes undergirding the Vaccine Act." Cloer, 85 Fed. Cl. at

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[10] See, e.g., Cleburne, 473 U.S. at 440 (explaining that strict scrutiny is applied to classifications based on race, alienage, or national origin); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (applying strict scrutiny to a statute allowing the sterilization of criminals because of the potential for "invidious discrimination"). See also Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (holding that statutes which deny some residents the right to vote are not entitled to the general presumption of constitutionality). Classifications based on gender also require a higher standard of review. Cleburne, 473 U.S. at 440-41 (noting that a classification based on gender is unacceptable unless it is substantially related to a sufficiently important governmental interest). Classifications premised on a person's illegitimacy of birth must be substantially related to a legitimate state interest to withstand review. Mills v. Habluetzel, 456 U.S. 91, 98-99 (1982). Notably, the Supreme Court has rejected the attempt to apply a heightened standard of review to differential treatment under law based on age, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976), mental status – including disability, Cleburne, 473 U.S. at 446, and wealth classifications, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 38-39 (1973). Instead, regarding these classifications, the Equal Protection Clause requires only a rational means to serve a legitimate end.

151-52 (citing Brice, 240 F.3d at 1368, rev'd on other grounds, Cloer, 654 F.3d 1322).[11] See id. ("[T]here can be no question that applying the Vaccine Act's limitation period is rationally related to the dual legitimate legislative purposes undergirding the Vaccine Act: (1) the settling of claims quickly and easily, and (2) the protecting of manufacturers from uncertain liability [that makes the] 'production of vaccines economically unattractive, [and] potentially discourag[es] vaccine manufacturers from remaining in the market.'") (internal footnote omitted). The Court of Federal Claims further stated in Cloer that "Congress is not obligated to extend the coverage of the Vaccine Act . . . to all person[s] suffering a vaccine-related injury." Id. at 150 (citing Leuz v. Sec'y of Health & Human Servs., 63 Fed. Cl. 602, 608 (2005)).

Andrew's ASD diagnosis does not place him within a protected class of persons. Nor does his diagnosis compel different treatment under the Vaccine Act. Contrary to petitioners' earlier allegations, the statute does not provide for different treatment of petitioners based on whether or not they allege an autism injury. The claims of all petitioners, regardless of the alleged injury, must be evaluated consistent with the terms of the Vaccine Act, provided the claimants have met the threshold requirement of filing the petition within the time limit prescribed by the statute.

Although the limitations period has a disparate impact on some petitioners who fail to meet the requirement, the law is clear that equal protection concerns only arise in circumstances involving "legislation whose purpose or effect is to create discrete and objectively identifiable classes," Rodriguez, 411 U.S. at 60 (Stewart, J., concurring); such concerns simply are not implicated when the legislation at issue, such as the Vaccine Act, does not classify persons. Because the Vaccine Act withstands a rational basis review, petitioners' argument that Andrew's right to equal protection has been violated by the Vaccine Act's statute of limitations is unavailing, and petitioners' constitutional challenge must fail.

3. The Savings Provision of the Vaccine Act

The Vaccine Act provides for the tolling of the statute of limitations in the circumstance in which a petitioner has filed a civil action before filing a vaccine-related

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[11] The Federal Circuit has observed that "a decision is the law of the case not only with respect to 'questions in terms discussed and decided' but also questions decided by necessary implication." Smith Int'l, Inc. v. Hughes Tool Co., 759 F.2d 1572, 1577 (Fed. Cir. 1985). See also Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc., 761 F.2d 649, 657 (Fed. Cir. 1985) ("Issues decided at an earlier stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case."). Although recognized in the non-vaccine context, this principle is nonetheless applicable to vaccine claims.

injury claim with the Office of Special Masters, as the statute requires. § 11(a)(2)(A).[12] Petitioners here did file an earlier civil action, and under the savings provision of the Vaccine Act, the filing date of their civil action is the Vaccine Program filing date for statute of limitations purposes. In their motion for reconsideration, petitioners acknowledge that the savings provision does not apply, Pet'rs' Mot. for Recon. at 16, but the undersigned addresses the applicability of the provision in this case for decision completeness.[13]

When petitioners file a civil action before filing a vaccine claim as required by the Program, the date of filing the civil action may serve as the effective date of filing the vaccine claim for statute of limitations purposes. § 11(a)(2)(B). The filed civil action must have been a claim that could have been filed under the Vaccine Program for petitioners to avail themselves of this savings provision, and petitioners must satisfy the requirement—set forth in section 11(a)(2)(B)—that they file their vaccine claim "within one year of the date of the dismissal of the civil action." Id. If more than one year passes between the dismissal of the civil claim and the filing of the Vaccine Act claim, however, petitioners cannot invoke the section 11(a)(2)(B) savings provision.[14]

Petitioners here filed their civil action on April 3, 2002, against the vaccine manufacturer, premised on the theory that the thimerosal content in the vaccines

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[12] The Vaccine Act states:

> No person may bring a civil action for damages in an amount greater than $1,000 . . . against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, . . . unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program . . . .

§ 11(a)(2)(A).

[13] Petitioners' previous motions did not argue that that the savings provision would render their claim timely. On motion for reconsideration, petitioners indicated that, without a discovery rule, they always knew the filing of their civil action was outside of the Vaccine Act's 36-month statute of limitations, and thus the savings provision could not have cured their timing problem. Pet'rs' Mot. for Recon. at 15-16.

[14] See Flowers v. Sec'y of Health & Human Servs., 49 F.3d 1558, 1562 (Fed. Cir. 1995) (holding the savings clause inapplicable because the petition was not filed within a year of the date of dismissal of the earlier civil action); see also Cook, 2012 WL 664766, at *14 (dismissing a vaccine claim because the savings clause of § 11(a)(2)(B) was inapplicable, and it was not otherwise filed timely).

administered to Andrew injured him. Pet'rs' Ex. 22 at 1; Pet'rs' Resp. at 13. That claim against the vaccine manufacturer for damages arising from a vaccine-related injury was stayed on October 30, 2002 to allow petitioners to proceed under the Vaccine Program. Pet'rs' Ex. 13 at 8, Wax v. Aventis Pasteur, Inc., 240 F. Supp. 2d 191, 195 (E.D.N.Y. 2002). Notably, that order analyzed the Vaccine Act's savings provision and explained that, if petitioners filed a vaccine claim within a year of dismissal, then the date the civil action was filed in district court would be "deemed the date that the Vaccine [Program] petition was filed." Id. After the parties jointly moved to clarify the October 30, 2002 order, the civil action was dismissed on December 16, 2002. Pet'rs' Ex. 16, Wax v. Aventis Pasteur, Inc., 240 F. Supp. 2d at 195-96.

To compute time for savings provision purposes, Vaccine Rule 19[15] applies. Accordingly, the undersigned must "exclude the day of the event that triggers" the one year time frame to invoke the savings clause. Vaccine Rule 19(a)(1)(A). Here, because petitioners' civil action was dismissed on December 16, 2002, petitioners had from within one year of the next day, December 17, 2002, to file within the Vaccine Program. Petitioners filed in the Vaccine Program on December 17, 2003, precisely one year after the day the savings provision calculation began, satisfying the requirements of section 11(a)(2)(B). Thus, for statute of limitations purposes, the effective filing date of the vaccine claim is April 3, 2002. Notably, this earlier filing date still does not render petitioners' claim a timely filing under the Vaccine Act due to the more than six year gap between the pediatrician's observation of Andrew's noticeable speech delay and petitioners' filing in civil court.

4. The Doctrine of Equitable Tolling

In the decision issued on February 29, 2012, the undersigned noted that petitioners had not addressed the issue of equitable tolling in their earlier filed briefing and observed "that any effort by petitioners to invoke equitable tolling would be highly unlikely to succeed on the facts of this case." Decision at 13. On motion for reconsideration, petitioners requested an opportunity to address this issue. Pet'rs' Mot. for Recon. at 1. The undersigned granted petitioners' request to allow briefing on the issue of equitable

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[15] Vaccine Rule 19 states:

> When the period is stated in days or a longer unit of time: (A) exclude the day of the event that triggers the period; (B) count every day, including intermediate Saturdays, Sundays, and legal holidays (for legal holidays, see RCFC 6(a)(6)); and (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Vaccine Rule 19(a)(1).

tolling and withdrew the February 29, 2012 decision. NON-PDF Order, Mar. 22, 2012; Order, Mar. 22, 2012.

While acknowledging the applicability of the doctrine in vaccine cases, the Federal Circuit advised in Cloer that equitable tolling should be used "sparingly." Cloer, 654 F.3d at 1344-45 (citing Irwin, 498 U.S. at 96). However, when a petitioner overcomes "the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way," then the doctrine of equitable tolling may apply. Pace, 544 U.S. at 418; see also Cloer, 654 F. 3d at 1344 (citing Pace, 544 U.S. at 418).

Petitioners argue that equitable tolling should apply because they diligently pursued their claim, but due to an extraordinary circumstance, they were prevented from timely filing their claim in the Vaccine Program. Pet'rs' Mot. for Recon. at 12, Pet'rs' Reply at 1. Petitioners point to their filing of a civil action in April 2002 as evidence of their diligent pursuit of their rights. Petitioners explain that they first filed in federal court because they believed that vaccine-injury claims relating to thimerosal could not be filed in the Vaccine Program. Pet'rs' Reply at 2. Moreover, based on the typically generous limitations periods for the filing of personal injury actions on behalf of minor prescribed by state law, petitioners erroneously believed that the statute of limitations would not begin to run until Andrew's 18th birthday. Pet'rs' Mot. for Recon. at 12-13. Petitioners add that before the Vaccine Act was amended in November of 2002, there was "ambiguity in the law" about where to file vaccine claims based on the thimerosal content in the vaccine.[16] Pet'rs' Reply at 3 n.1. Petitioners assert that the November 2002 change in the law modifying the definition of a vaccine and subsequent dismissal of their civil action in December 2002, constitute the type of extraordinary circumstances that merit application of equitable tolling. Pet'rs' Mot. for Recon. at 13.

On November 25, 2002, the definitions section of the Vaccine Act was amended to make clear that a vaccine includes "all components and ingredients" and that an adulterant does not "include any component or ingredient" of a vaccine. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1715-17, 116 Stat. 2135, 2320-21 (2002). Referencing this change in the law, the federal district court, considering petitioners' earlier filed civil action, dismissed their case without prejudice to allow the Office of Special Masters to decide whether or not it had jurisdiction over the matter. Pet'rs' Ex. 16 at 3-4, Wax, 240 F. Supp. 2d at 196. The district court noted that the definitions section of the Vaccine Act had been amended to include "'all components and ingredients [of a vaccine],'" but the district court did "not consider whether the

[16] Thimerosal is a preservative added to multi-dose vials of vaccines. See Hazlehurst v. Sec'y of Health & Human Servs., No. 03-654V, 2009 WL 332306, at *41 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

amendment applie[d] to the pending proceeding." Id. (citing Homeland Security Act of 2002, Pub. L. No. 107-296, § 1716, 116 Stat. 2135, 2321 (2002)).

The amendments to the definitions section of the Vaccine Act were repealed within three months. See Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 102, 117 Stat. 11, 528-29 (2003).

a. Diligently pursuing their rights

Petitioners have not shown that they have diligently pursued their rights. Petitioners insist that they have done so even though they did not file a civil action until 2002, several years after the Vaccine Act's statute of limitations expired. Petitioners explain that they believed that the federal district court had jurisdiction over their claim and that a much longer statute of limitations applied.[17] Pet'rs' Mot. for Recon. at 12-13. Petitioners contend that their choice of federal district court, and not the Vaccine Program, was based on "a good faith reading of prevailing law and science." Pet'rs' Reply at 2.

Petitioners' argument for equitable tolling, based on the factual circumstances related in their motion for reconsideration, is unavailing. Petitioners cannot invoke application of the doctrine based on their own misunderstanding of the jurisdiction of the Office of Special Masters.[18] As the case law demonstrates, courts have consistently

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[17] Petitioners reasoned that their personal injury claim, brought in federal court on diversity jurisdiction grounds, was governed by state law. Petitioners noted that the relevant states—New York (where they brought suit), Ohio (where Andrew resided), North Carolina (where Andrew received a vaccination), and Mississippi (where Andrew also received a vaccination)—all toll the statutes of limitations in favor of minors. See Pet'rs' Resp. at 14, Pet'rs' Mot. for Recon. at 4.

[18] Petitioners earlier implied that they first filed their claim in federal district court because they knew their claim was untimely under the Vaccine Act's statute of limitations. See Pet'rs' Resp. at 15-16. Before the district court, petitioners argued against dismissal because their vaccine claim was time-barred by the "clear statutory language" of the Vaccine Act, and federal district court provided the only remaining forum for the case. See Pet'rs' Ex. 14 at 2-3 (Nov. 13, 2002 letter from petitioners' counsel to the federal district court). Petitioners indicated that they had previously filed approximately ten cases with the Vaccine Program, were aware of the statute of limitations, knew how seriously the Vaccine Program undertook the establishment of the first symptom for statute of limitations purposes, and did not want Andrew to be denied justice because his claim was untimely. See Pet'rs' Ex. 15 at 7-8,10 (transcript of Dec. 16, 2002 hearing before the federal district court).

declined to recognize a plaintiff's lack of knowledge or awareness as a ground for equitably tolling a limitations period. See Esso Standard Oil Co. v. United States, 559 F.3d 1297, 1305 (Fed. Cir. 2009) (holding that "ignorance of the governing statute" reflects a lack of diligence and does not warrant the application of the doctrine of equitable tolling); Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000) (stating that "ignorance of the law . . . does not excuse prompt filing") (internal citations omitted); Wakefield v. R.R. Ret. Bd., 131 F.3d 967, 970 (11th Cir. 1997) (holding that "[i]gnorance of the law usually is not a factor that can warrant equitable tolling") (internal citations omitted); Jarrett v. U.S. Sprint Commc'ns Co., 22 F.3d 256, 262 (10th Cir. 1994) (stating that "[w]e have found no case in which the actions or inactions of the plaintiff alone have provided a basis for the application of equitable tolling to a limitations period"); Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473, 478 (5th Cir. 1991) (finding that "ignorance of legal rights does not toll the statute of limitations" and that the cause of the ignorance is irrelevant) (internal citations omitted); Sch. Dist. of the City of Allentown v. Marshall, 657 F.2d 16, 21 (3rd Cir. 1981) (stating that "ignorance of the law is not enough to invoke equitable tolling").

Citing the Supreme Court's decision in Pace, 544 U.S. at 419, respondent noted in her briefing on the motion for reconsideration that a petitioner seeking habeas corpus relief was denied the relief of equitable tolling because he failed to diligently pursue his rights, waiting instead several years to file his claim. Resp't's Resp. to Mot. for Recon. at 7. Respondent argues that because petitioners here similarly waited to file their claim, the relief of equitable tolling should also be denied. Id. Petitioners did not file their civil claim until April of 2002, more than six years after Andrew first began manifesting symptoms of his ASD, in November of 1995. Although petitioners offer that they did not understand the extent of this court's jurisdiction, they have not shown that they were diligently pursuing their rights before the 36-month statute of limitations expired in November of 1998.

Petitioners concede that they were aware of the Vaccine Program, but chose to file in federal district court due to an ambiguity in the law. See Pet'rs' Reply at 3 n.1. The legal ambiguity to which petitioners refer is the question concerning whether thimerosal was a vaccine adulterant and thus could not be the subject of a Vaccine Program claim. Id. The ambiguity about this issue provoked discussion in the case law in the years 2001 and 2002, more than six years after Andrew began manifesting symptoms of ASD, and three years after the statute of limitations had expired. But petitioners have not pointed to any ambiguity in the law during the relevant limitations period that expired in November of 1998.

According to the Vaccine Act, all vaccine-related claims over $1,000 were to be brought as Program actions, § 11(a)(2)(A), but by definition, a vaccine-related claim could "not include an illness, injury, condition, or death associated with an adulterant or contaminant intentionally added to such a vaccine." § 33(5). The question regarding

whether thimerosal was an adulterant was addressed in the Vaccine Program in 2002 in the Leroy decision. Leroy v. Sec'y of Health & Human Servs., No. 02-392V, 2002 WL 31730680 (Fed. Cl. Spec. Mstr. Oct. 11, 2002). In the year preceding the issuance of the Leroy decision, several federal courts addressed the issue. One district court found that thimerosal-based claims must be heard in the Vaccine Program. See Leroy, 2002 WL 31730680 at *5-8 (primarily discussing Owens v. Am. Home Products Corp., 203 F. Supp. 2d 748 (S.D. Tex. 2002). Two other federal courts remanded the thimerosal-based claims before them back to state court, believing that the state court might have jurisdiction over such claims. See Leroy, 2002 WL 31730680 at *11 (discussing King ex rel. King v. Aventis Pasteur, Inc., 210 F. Supp. 2d 1201 (D. Or. 2002); Pet'rs' Ex. 26, Garcia v. Aventis Pasteur, Inc., No C02-0168C (W.D. Wash., April 22, 2002). Even the Office of Special Masters had expressed some uncertainty about whether such claims were to be addressed in the Vaccine Program. See Leroy, 2002 WL 31730680 at *10 (discussing the order in Geppert v. Sec'y of Health & Human Servs., No. 00-286V (Fed. Cl. Spec. May 21, 2001), filed here as Petitioners' Exhibit 23, and finding some "tentative analysis" from the special master about his authority to hear a thimerosal claim, but noting that the special master had only ordered further briefing).

But, the case law instructs that legal ambiguity is inadequate to trigger the application of the equitable tolling doctrine. See Reed v. Mokena School District No. 159, 41 F.3d 1153, 1155 (7th Cir. 1994) ("The unsettled state of the law, standing alone, is not sufficient to trigger the invocation of equitable principles."). Petitioners must diligently pursue their rights amidst any legal ambiguity.

Unclear to the undersigned is why—even as presented with a legal ambiguity about which petitioners now complain—petitioners elected to delay filing their claim altogether and thereby risk filing a time-barred action instead of filing promptly in each of the courts having potential jurisdiction and thereby risk only a dismissal for lack of jurisdiction. Petitioners' erroneous election to file only in federal court does not reflect a diligent effort to pursue a legal claim. Nor does such ignorance or error merit the application of the equitable tolling doctrine. See Esso Standard Oil Co., 559 F.3d at 305 (denying equitable tolling because the timing "error could havse been avoided if [the litigant] had simply consulted the statute"). Equitable tolling does not extend to petitioners acknowledging their own misunderstanding of the jurisdiction of the Vaccine Program and failing to act promptly to preserve their claim.

b. Extraordinary circumstances

To have filed this claim timely, petitioners must have filed their claim by November of 1998. Petitioners, however, seek to invoke the doctrine of equitable tolling based on the extraordinary circumstance in which they found themselves several years after the limitations period under the Vaccine Act had expired. The "extraordinary" circumstance that petitioners cite was the district court's dismissal of their civil action

based on the possibility that jurisdiction might be appropriate under the Vaccine Program. Pet'rs' Mot. for Recon. at 13.

The dismissal from federal court, however, does not constitute an extraordinary circumstance for equitable tolling purposes. The Vaccine Act expressly provides for the circumstance involving the filing of a civil action before filing a vaccine claim. As discussed earlier, the savings provision of the Vaccine Act operates to protect certain petitioners who file a civil action before filing in the Vaccine Program. §11(a)(2)(B). If a petitioner files a vaccine claim within one year of the dismissal of a filed civil action, then the filing date of the civil action is deemed the filing date of the vaccine claim for statute of limitations purposes, provided the claim could have been filed initially as a Program action Id.

In this case, although petitioners filed their vaccine claim within the one year period required by the Act's savings provision, the date of filing the civil action was well beyond the Vaccine Act's statute of limitations. Thus, as petitioners have recognized, their claim cannot be "saved" under the Vaccine Act by the filing of the earlier civil action.

What petitioners appear to argue now is that the dismissal of their claim from district court—based on the 2002 amendments to the Vaccine Act's definitions' section—provides an "extraordinary circumstance" that warrants equitable tolling of the Vaccine Act's limitations period to allow petitioners' vaccine claim to proceed. Petitioners' election to file suit in federal district court after the running of the statute of limitations was an election entirely within the control of the petitioners. Absent evidence that petitioners were prevented from bringing their vaccine claim, they cannot point to their own misunderstanding about what tribunal had jurisdiction over their claim—which led to the filing in federal district court several years too late—as constituting an extraordinary circumstance allowing the application of the doctrine of equitable tolling. See Holland v. Florida, 130 S. Ct. 2549, 2567 (2010) (citations omitted) ("disallowing equitable tolling based on ordinary attorney miscalculation [because it] . . . is not a circumstance beyond the litigant's control").

Petitioners' assertion that the subsequent change in the law created an extraordinary circumstance is insufficient to trigger the application of the equitable tolling doctrine. On November 25, 2002, the Vaccine Act was amended to expand the definition of "vaccine" to include "all components and ingredients listed in the vaccines's product license application and product label." Homeland Security Act of 2002, Pub. L. No. 107-296, § 1716, 116 Stat. 2135, 2321 (2002). Consistent with this amendment, the definition of vaccine "manufacturer," at section 33(3), also was amended to reflect the change in definition of vaccine. Id. at § 1714. Additionally, the definition of "vaccine-related injury or death," at section 33(5), was amended to clarify that "an adulterant or contaminant shall not include any component or ingredient listed in the vaccines's

product license application and product label." Id. at § 1715. The federal district court's dismissal decision informed petitioner of these definitions section amendments. Pet'rs' Ex. 16 at 4, Wax, 240 F. Supp. 2d at 196.

On motion for reconsideration of the dismissal of their vaccine claim for untimeliness, petitioners assert that these amended definitions created an intervening change in the law and presented an extraordinary circumstance that prevented them from timely filing in the Vaccine Program. Pet'rs' Reply at 3; Pet'rs' Mot. for Recon. at 14. Although not mentioned by petitioners in their motion for reconsideration, the amendments were repealed with prejudice within a few months after their enactment. On February 20, 2003, Congress repealed the amended definition sections, stating that the Vaccine Act "shall be applied and administered as if the sections repealed . . . had never been enacted." Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 102, 117 Stat. 11, 528 (2003). The repeal provision further directed that "no inference shall be drawn from the enactment of [these] sections." Id. How the amendments enacted in November of 2002 and repealed in February of 2003 could have prevented petitioners from filing their vaccine claim before the limitations period expired in November of 1998 is unclear to the undersigned.

Petitioners cite several cases as support for their position that an intervening change in the law constitutes an extraordinary circumstance. Pet'rs' Mot. for Recon. at 14. But, all of petitioners' cited authority pertains to the change in the law prescribed by the Supreme Court's decision in Wallace v. Kato, 549 U.S. 384 (2007), which altered the time when the statute of limitations begins to run for illegal arrest claims. This change led to an "understandable confusion about the state of the law as to when the claim accrued" and was the type of "unusual case that fits neatly into the doctrine of equitable tolling." Kucharski v. Leveille, 526 F. Supp. 2d 768, 775 (E.D. Mich. 2007). In contradistinction, because petitioners' vaccine claim accrued seven years before the brief change in Vaccine Act definitions upon which petitioners now seek to rely, the four-month temporary change in the definitions section of the Vaccine Act cannot be understood to have caused confusion about when a vaccine claim accrues, and thus, cannot be considered an extraordinary circumstance that triggers the doctrine of equitable tolling.

Petitioners in this case have not shown either that they diligently pursued their rights or that an extraordinary circumstance prevented them from making a timely filing. Therefore, the doctrine of equitable tolling cannot be applied.

V. CONCLUSION

The Vaccine Act clearly states that claims must be filed within 36 months of the "occurrence of the first symptom or manifestation of onset." § 16(a)(2). Petitioners have failed to do so. Nor have petitioners made the requisite showing for equitable tolling to apply. For the reasons set forth above, this case is **DISMISSED. The Clerk of the Court is directed to enter judgment accordingly.**

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Chief Special Master