No. 20-1468

In the Supreme Court of the United States

ROBERT DAVID DUPUCH-CARRON AND
ELIZABETH JOANNA CARRON, PETITIONERS

v.

XAVIER BECERRA, SECRETARY OF
HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 *et seq.*, establishes a no-fault compensation scheme for certain persons who suffer injuries related to certain vaccines. A person who receives a vaccine outside the United States may file a claim for compensation, but only if, as relevant here, the person "returned to the United States not later than 6 months after the date of the vaccination." 42 U.S.C. 300aa-11(c)(1)(B)(i)(III). The question presented is as follows:

Whether petitioners' child—who received vaccines in a foreign country, resided in the foreign country before as well as after vaccination, and entered the United States for the first time after vaccination—should be deemed to have "returned to the United States" because his mother visited the United States during her pregnancy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 969 F.3d 1318. The opinion of the United States Court of Federal Claims (Pet. App. 31a-49a) is reported at 144 Fed. Cl. 659. The decision of the special master (Pet. App. 50a-77a) is not published in the Federal Claims Reporter but is available at 2019 WL 2263369.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2020. A petition for rehearing was denied on November 19, 2020 (Pet. App. 78a-79a). The petition for a writ of certiorari was filed on April 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Childhood Vaccine Injury Act of 1986 (Vaccine Act), 42 U.S.C. 300aa-1 *et seq.*, creates a no-fault scheme for compensating people who suffer injuries related to vaccines listed in the statute's vaccine injury table. A person alleging a vaccine injury may file a petition for compensation in the Court of Federal Claims, naming the Secretary of Health and Human Services as respondent. See 42 U.S.C. 300aa-11(c)(1)(C)(ii), 300aa-12(b)(1). A special master of the Court of Federal Claims then issues a decision on the petition, subject to review by the Court of Federal Claims and then by the Federal Circuit. See 42 U.S.C. 300aa-11, 300aa-12(d)-(f). Awards are paid from a fund created by an excise tax on vaccine doses. See 42 U.S.C. 300aa-15(e).

A person may file a claim for compensation under the Vaccine Act only if he satisfies its territorial requirements. See 42 U.S.C. 300aa-11(c)(1)(B). A person may satisfy those requirements in one of three ways. First, he can show that he "received the vaccine in the United States." 42 U.S.C. 300aa-11(c)(1)(B)(i)(I). Second, he can show that he received the vaccine outside the United States, but that, at the time of the vaccination, he was a member of the armed forces or other employee of the federal government, or a dependent of such a member or employee. 42 U.S.C. 300aa-11(c)(1)(B)(i)(II). Third, under the provision at issue in this case, he can show that he received the vaccine outside the United States, that the vaccine was made by a U.S. manufacturer, and that he "returned to the United States not later than 6 months after the date of the vaccination." 42 U.S.C. 300aa-11(c)(1)(B)(i)(III).

2. Petitioners Robert David Dupuch-Carron and Elizabeth Joanna Carron are domiciled in The Bahamas. Pet. App. 3a. Their minor son A.R. D-C., the subject of the Vaccine Act claim at issue in this case, was born in The Bahamas in 2015. *Ibid.* In June 2016, a pediatrician in The Bahamas administered eight childhood vaccines to A.R. D-C. *Id.* at 4a. All those vaccines were made by U.S. manufacturers. *Ibid.*

In July 2016, A.R. D-C. returned to the pediatrician with "complaints of a fever greater than 102 degrees Fahrenheit, crankiness, stuffy nose, rattling in his chest, occasional chesty coughs, reduced activity, vomiting, and diarrhea." Pet. App. 4a. Soon thereafter, he was admitted to the emergency room at a hospital in The Bahamas. *Ibid.* Local doctors concluded that he would receive better care in the United States, and he was transferred to a hospital in Miami, Florida. *Ibid.*

In Miami, A.R. D-C. was diagnosed with hemophagocytic lymphohistiocytosis. Pet. App. 4a-5a. He remained in the hospital until August 2016; remained in Florida for outpatient treatment until December 2016; and then returned to The Bahamas, but periodically visited the United States for further treatment. *Id.* at 5a, 56a-57a. In 2017, he was diagnosed with acute myeloid leukemia. *Id.* at 5a. He died from leukemia in December 2017. *Ibid.*

3. In October 2017, petitioners filed a claim under the Vaccine Act, contending that the vaccines A.R. D-C. had received in The Bahamas had caused his hemophagocytic lymphohistiocytosis. Pet. App. 5a. Then, after their son's death, petitioners amended their petition to allege that the vaccines had also caused his leukemia. *Ibid.*

The special master granted the government's motion for summary judgment. Pet. App. 50a-77a. The special master concluded that A.R. D-C., who had received his vaccine outside the United States, was not eligible for compensation because he had not "returned to the United States not later than 6 months after the date of the vaccination." 42 U.S.C. 300aa-11(c)(1)(B)(i)(III). The special master first explained that A.R. D-C. had never been present in the United States between his birth and his vaccination, and thus could not have "returned" to the United States after the vaccination. Pet. App. 64a. In reaching that conclusion, the special master rejected petitioner's reliance on the fact that A.R. D-C.'s mother had visited the United States while pregnant with him. *Id.* at 62a-64a.

The special master then held, in the alternative, that "[e]ven if A.R.D-C. is recognized as a person who was present in the United States before vaccination," he still would not qualify as a person who had "returned" to the United States after the vaccination. Pet. App. 65a (citation and internal quotation marks omitted); see *id.* at 65a-70a. The special master explained that the term "'returned'" is "most reasonably * * * read to address persons who reside in the United States, who receive vaccinations while living or working abroad, and then return within six months." *Id.* at 66a, 74a. The special master concluded that the term could not properly be read to cover persons, such as A.R. D-C., who resided abroad and who entered the United States temporarily in order to obtain medical treatment. *Id.* at 75a.

4. The Court of Federal Claims affirmed. Pet. App. 31a-49a. The court concluded that "'return' means something more than a nonresident prior visitor's temporary entry for medical treatment." *Id.* at 45a. The

court explained that a broader reading of the term would violate the presumption against extraterritoriality and the presumption against waivers of sovereign immunity, would conflict with the structure of the statute, and would produce results that Congress could not have intended. *Id.* at 45a-49a.

5. The Federal Circuit affirmed. Pet. App. 1a-30a.

The court of appeals first concluded that A.R. D-C. had not been "present in the United States before his vaccinations" and that, as a result, his entry in July 2016 "cannot be construed as a 'return.'" Pet. App. 19a. In reaching that conclusion, the court rejected petitioners' argument that A.R. D-C.'s "prior presence in the United States *in utero*" would have provided the necessary predicate for a subsequent "return." *Id.* at 14a.

The court of appeals then concluded that, even if A.R. D-C. had in some sense been present in the United States before his vaccination, the word "return" requires "more * * * than a temporary visit for medical treatment." Pet. App. 27a. The court concluded that, instead, "some residence is required both before leaving and upon 'return to the United States.'" *Ibid.* (brackets and citation omitted). The court explained that Congress had intended to protect only persons who had "previously resided in the United States," had been "temporarily away from the United States" when receiving the vaccination, and had "'returned to the United States' within six months" of the vaccination "with the intention of resuming residence." *Id.* at 29a.

ARGUMENT

Petitioners contend (Pet. 7-29) that A.R. D-C. satisfies the Vaccine Act's requirement of having "returned" to the United States within six months after vaccina-

tion. The court of appeals correctly rejected petitioners' contention, and its decision does not conflict with any decision of this Court or any other court of appeals. In addition, the question presented does not arise often and lacks significance for litigants beyond the parties to this case. The petition for a writ of certiorari should be denied.

1. Petitioners' claim may proceed only if A.R. D-C. was a "person [who] returned to the United States" within six months after his vaccination. 42 U.S.C. 300aa-11(c)(1)(B)(i)(III). The court of appeals correctly held that, for two separate reasons, A.R. D-C. did not satisfy that requirement.

First, the court of appeals correctly recognized that the phrase "person [who] returned to the United States" requires, at a minimum, some presence in the United States before the time of the vaccination. See Pet. App. 13a; 42 U.S.C. 300aa-11(c)(1)(B)(i)(III). Congress has defined the word "person" to "include every infant member of the species homo sapiens who is born alive." 1 U.S.C. 8(a) (emphasis omitted); see 42 U.S.C. 300aa-11(f)(2). That definition indicates that A.R. D-C. did not qualify as a "person" for purposes of the Vaccine Act until his birth. Further, as this Court noted in another context, "one cannot return * * * to a place one has never been." *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 182 n.39 (1993). That is so even if one's mother had been to that place during her pregnancy. Few speakers of the English language would say that a person has "returned" to a place simply because the person's mother had visited that place while pregnant. In this case, it is undisputed that A.R. D-C. was never present in the United States between the time of his birth and the time of his vaccination. See Pet. App. 13a.

It follows that his first visit to the United States, for medical treatment following vaccination, did not qualify as a "return" to the United States.

Second, the word "return[ed]," as used in this context, requires "some residence" in the United States "both before leaving and upon return." Pet. App. 27a (citation and internal quotation marks omitted). The verb "return," when used in connection with a country, usually implies residence in that country. For example, the statement "the soldier returned to France after the war" suggests that the soldier lived in France before the war and resumed living in France after the war. So too, the phrase "returned to the United States" in the Vaccine Act suggests that the person resided in the United States before the vaccination and then resumed residence in the United States after the vaccination. *Id.* at 29a. A.R. D-C. neither resided in the United States before his vaccination nor did so after his purported return. *Ibid.*

The court of appeals' interpretation draws support from the presumption against waivers of sovereign immunity. Under that presumption, "the Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (alterations, citations, ellipses, and internal quotation marks omitted). Congress consented in the Vaccine Act to claims against the government seeking compensation for injuries relating to certain vaccines, but it limited that consent to cases that satisfy the statute's eligibility criteria, including its territorial requirements. See 42 U.S.C. 300aa-12(b)(1). The presumption against waivers of sovereign immunity counsels against a lax reading of those requirements.

The court of appeals' interpretation also draws support from the presumption against extraterritoriality—that is, the principle that United States law applies only within the United States in the absence of "clearly expressed congressional intent to the contrary." *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090, 2100 (2016). The presumption rests on the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Ibid.* (citation omitted). "The applicability of the presumption is not defeated * * * just because the [statute at issue] specifically addresses the issue of extraterritorial application." *Smith* v. *United States*, 507 U.S. 197, 204 (1993). Rather, in such a case, the presumption requires courts to resolve "any lingering doubt regarding the reach of the [statute]" against extraterritorial application. *Id.* at 203; see *Morrison* v. *National Australia Bank*, 561 U.S. 247, 265 (2010) ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms."); *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 456 (2007) (The presumption against extraterritoriality "remains instructive in determining the *extent* of the statutory exception."). Here, Congress has extended the Vaccine Act's compensation program to vaccinations that occurred outside the United States, but only when (among other requirements) the vaccinated person "return[ed] to the United States" within six months. 42 U.S.C. 300aa-11(c)(1)(B)(i)(III). The presumption against extraterritoriality requires courts to resolve any lingering doubt about that provision's meaning against petitioners.

The court of appeals' interpretation, in addition, makes sense given the structure and design of the Vaccine Act as a whole. The Act's compensation program

is funded through an excise tax on vaccines manufactured or produced in the United States and on vaccines that enter the United States for consumption or storage. 26 U.S.C. 4131(b), 4132. The Internal Revenue Service has clarified that the excise tax does not apply to vaccines exported for use outside the United States. See Internal Revenue Service, Dep't of the Treasury, *Publication 510: Excise Taxes* (rev. Feb. 2020). Separately, as petitioners admit (Pet. 23), the Vaccine Act's compensation program is designed to replace "product liability and medical malpractice litigation" with respect to vaccine injuries. To that end, the statute provides that "[n]o person may bring a civil action for damages in an amount greater than $1,000 or in an unspecified amount against a vaccine administrator or manufacturer *in a State or Federal court* for damages arising from a vaccine-related injury or death." 42 U.S.C. 300aa-11(a)(2)(A) (emphasis added). As the italicized language shows, that provision does not limit the right of foreign residents such as petitioners to sue vaccine manufacturers or administrators in foreign courts. The fact that the Vaccine Act's tax and liability provisions focus on domestic concerns suggests that the accompanying compensation program likewise focuses on domestic concerns.

Petitioners' contrary interpretation of the Vaccine Act would lead to results that Congress is unlikely to have intended. In this very case, for example, petitioners' reading could require the United States to pay compensation with respect to a child who lived in The Bahamas, was vaccinated in The Bahamas, and suffered his injuries in The Bahamas, simply because his mother happened to have visited the United States during her pregnancy. Similarly, "if a French citizen, resident in

France, vacationed in the United States, then returned to France and received a vaccination there, the fact that one week later, the French citizen stopped in New York to change planes on his way to Mexico would permit him to submit a Vaccine Act claim under the petitioners' broad reading." Pet. App. 45a. As the court of appeals observed, it is "inconceivable" that Congress meant to compensate people with such tangential connections to the United States. *Ibid.*

2. Petitioners' contrary arguments lack merit.

Petitioners err in arguing (Pet. 11, 13) that the court of appeals "add[ed] a requirement that is not set out in the words" of the statute based on its "subjective belief [about] who should be * * * eligible to seek compensation." The court simply interpreted the statutory term "returned" in light of its ordinary meaning, the structure of the Vaccine Act as a whole, and established interpretive principles. Petitioners prefer a broader interpretation of the term "returned," but this Court has explained that a word in a statute does not always "extend to the outer limits of its definitional possibilities." *Dolan* v. *United States Postal Service*, 546 U.S. 481, 486 (2006). Petitioners are therefore wrong to contend (Pet. 13-17) that the court of appeals' holding conflicts with the Court's precedents on statutory interpretation, such as *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020), and *Sebelius* v. *Cloer*, 569 U.S. 369 (2013).

Petitioners also err in invoking (Pet. 24-29) the 21st Century Cures Act (Cures Act), Pub. L. No. 114-255, 130 Stat. 1033. The Cures Act amended the Vaccine Act to provide that "both a woman who received a covered vaccine while pregnant and any child who was *in utero* at the time such woman received the vaccine shall be considered persons to whom the covered vaccine was

administered and persons who received the covered vaccine." 42 U.S.C. 300aa-11(f)(1) (emphasis omitted). Petitioners suggest (Pet. 29) that this statutory language shows that Congress meant to permit Vaccine Act claims on behalf of "children whose pre-vaccination presence in the United States was while in utero." That is incorrect. The amendment made by the Cures Act simply clarifies that a child may file a claim for compensation for injuries that the child suffered from a vaccine administered to the child's mother during her pregnancy—a result that some courts had previously questioned. See, *e.g.*, *Rooks* v. *Secretary of the Dep't of Health & Human Servs.*, 35 Fed. Cl. 1, 4 (1996); see also Pet. App. 14a-15a (collecting cases). The Cures Act did not, however, amend the Vaccine Act's separate territoriality requirements. As relevant here, the Cures Act left untouched the provision of the Vaccine Act that requires claimants who received their vaccines outside the United States to have "returned" to the United States within six months. And as shown above, the term "returned" is not naturally read to encompass "children whose pre-vaccination presence in the United States was while in utero." Pet. 29.

Finally, petitioners err in relying (Pet. 21) on the "primary purposes" of the Vaccine Act, "protecting vaccine manufacturers and administrators * * * from civil liability" and "compensa[ting] persons injured as a result of rare vaccine related injuries." The Vaccine Act does indeed serve those purposes, but only with respect to vaccinations connected with the United States, not with respect to all vaccinations throughout the world. See pp. 8-9, *supra*.

3. For the reasons discussed above, the court of appeals' decision is correct. And the court's decision in any event does not warrant review by this Court.

As far as the government is aware, this is the first case since the enactment of the Vaccine Act 35 years ago in which the Federal Circuit has ruled on the scope the Vaccine Act's "return" requirement, and only the second case in which the Court of Federal Claims has done so. See Pet. App. 39a (identifying the Court of Federal Claims' decision in *McGowan* v. *Secretary of the Department of Health & Human Services*, 31 Fed. Cl. 734 (1994) as "the only relevant judicial precedent"). That is presumably so because the facts of this case are extraordinary and are unlikely to recur. Because the case's significance is limited to the parties, it does not warrant the Court's review. See *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 78 n.2 (1955) (explaining that the Court usually grants certiorari only to consider issues of "public significance," as opposed to issues "of importance merely to the litigants"); William Howard Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 Yale L.J. 1, 2 (1925) ("The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest.").

At a minimum, the question presented warrants further percolation. Whether an individual has "returned" to the United States depends on the individual's factual circumstances before and after vaccination. In reviewing the question presented, the Court could benefit from the Federal Circuit's efforts to address a variety

of fact patterns involving persons who have been vaccinated outside the United States.

Finally, this case would be a poor vehicle for considering the question presented. The court of appeals rested its decision on two alternative holdings: its determination that A.R. D-C.'s presence in the United States while *in utero* could not provide a predicate for a subsequent "return," see Pet. App. 13a-19a, and its determination that the word "returned" required some residence in the United States both before and after the vaccination, see *id.* at 20a-29a. Petitioners would therefore need to establish that the court erred on both grounds in order to obtain reversal. See *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924). Petitioners have not done so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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