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,

Respondent.

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

REPLY BRIEF

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I. Reply to the Respondent's Statement of the Case.

A. An Error in the Respondent's Statement of the Case Concerning A.R.D-C.'s Presence in the United States after his June 2016 Vaccinations.

In his statement of the case the Respondent acknowledges that A.R.D-C. traveled to Miami, Florida for treatment of his vaccine-related illness on July 13, 2016, but incorrectly states that A.R.D-C. ". . . remained in Florida until December 2016; and then returned to the Bahamas, but periodically visited the United States for future treatment." Brief in Opposition at page 3.

In fact, A.R.D-C. was transferred to Miami Children's Hospital (from Princess Margaret Hospital in Nassau, The Bahamas) by air ambulance on July 13, 2016. He lived in the United States for the remainder of his life with the exception of two visits to The Bahamas: from December 24, 2016 to January 24, 2017 and from January 29, 2017 to February 20, 2017. A.R. D-C. died as a result of acute myeloid leukemia (a complication of the treatment that he received for his vaccine-related illness) in Baltimore, Maryland on December 24, 2017.

The Respondent makes a similar error in his argument when he implies that A.R.D-C. had only "tangential connections" to the United States. Brief in Opposition, pages 9-10.[1] A.R.D-C.'s father was born in the

1. The Respondent incorrectly attributes the statement that it was "inconceivable" that Congress meant to compensate persons with "such tangential connections to the United States" to the court of appeals. That statement was made by the United States

United States; both of his parents were frequent visitors to the United States; and his mother learned that she was pregnant with A.R.D-C. at a doctor's appointment in Coral Gables, Florida. A.R.D-C. spent most of his post-vaccination life (fifteen of seventeen months) in the United States. His paternal grandmother owned a condominium in Coral Gables, where A.R.D-C. and his mother lived while A.R.D-C. received outpatient care for his vaccine-related illness while in Miami, Florida.

B. An Omission in the Respondent's Statement of the Case Concerning 42 USC § 300aa-11(c)(1)(B)(i)(II).

In his statement of the case the Respondent says that a person is eligible to file an NCVIA claim for compensation only if he or she satisfies one of the "territorial requirements" of 42 USC § 300aa-11(c)(1)(B). The Respondent's discussion of those requirements includes a meaningful omission: it fails to acknowledge that the second of the three subsections that he discusses, 42 USC § 300aa-11(c)(1)(B)(i)(II), explicitly requires that a person be "*a citizen of the United States*" or a dependent of *a citizen of the United States*. Section 11(c)(1)(B)(i)(II) makes a person eligible to file a claim if he or she received a covered vaccine and:

Court of Federal Claims judge. The Respondent also incorrectly implies that this statement was a characterization of A.R.D-C.'s connections to the United States. In fact, it characterized the connection to the United States of a hypothetical French citizen who vacationed in the U.S., returned to France where he was vaccinated, and then stopped in the U.S. to change planes on his way to Mexico. Pet. App. 45a.

> (II) received the vaccine outside of the United States or a trust territory and at the time of his vaccination such person *was a citizen of the United States* serving abroad as a member of the Armed Forces or otherwise as an employee of the United States *or a dependent of such citizen*.

42 USC § 300aa-11(c)(1)(B)(i)(II) (emphasis added).

The Respondent's omission is meaningful because the explicit citizenship requirement in section 11(c)(1)(B)(i)(II) demonstrates that when Congress intended to limit eligibility to pursue an NCVIA claim to a specific class of persons it did so explicitly.

II. Reply to the Respondent's Argument

A. A.R.D-C.'s Presence in the United States While In Utero was Sufficient to Make His Entry Into the United States after his June 2016 Vaccinations a "Return" to the United States.

The Petitioners agree that section 11(c)(1)(B)(i)(III)'s requirement that a person who receives a covered vaccine outside of the United States "return" to the United States no later than six months after receiving that vaccine requires "some presence in the United States before the time of vaccination". *See* Brief in Opposition at page 6. The Petitioners disagree with the Respondent's (and the court of appeals') assumption that a person who "received the vaccine outside of the United States" must have had a presence in the United States *as a person* before the time of vaccination.

Section 11(c)(1)(B)(i)(III) requires that a "person" receive a covered vaccine outside of the United States. The word "person" applies only to the person *who received the vaccine*. Section 11(c)(1)(B)(i)(III) does not place any limits on the nature of prior presence that is sufficient to make a subsequent entry into the United States a "return." A.R.D-C. was seven months old when he received the vaccines that caused his injury and death. At that point he clearly satisfied the definition of a person.

A child who is in utero has legal status and legal rights and is entitled to legal protection before his or her birth. The maternal immunization provision of the NCVIA provides 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 USC § 300aa-11(f)(1). Decisions addressing surviving child benefits under the Social Security Act have consistently held that children in utero have a legally recognized existence and presence. *Wagner v. Finch*, 413 F.2d 267, 268-269 (5th Cir. 1969); *Adams v. Weinberger*, 521 F.2d 656, 659-661 (2nd Cir. 1975). Many state and federal criminal statutes are designed to protect children in utero from harm. *See, for example* 16 USC § 1841 (the Unborn Victims of Violence Act of 2004). These authorities demonstrate that a child who is in utero has a legal status and "a presence" while in utero.

The statutory definition of "person" and "child" in 1 USC § 8 specifically provides that nothing in that definition "shall be construed to . . . deny . . . or contract any legal status or legal right applicable" to children in utero before

their birth. 1 USC § 8(c). The court of appeals relied on 1 USC § 8's definition of "person" to deny A.R.D-C. access to the NCVIA. Pet. App. 14a-18a (the court of appeals' decision). That was contrary to the express prohibition in the statute.

B. Based on the Ordinary Meaning of "Returned", A.R.D-C. Returned to the United States when he Went Back to the United States after his June 2016 Vaccinations.

The Respondent argues that: "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." *See* Brief in Opposition page 6. The Respondent makes this bold assertion unsupported by anything more than his opinion. He does not cite any statutory or dictionary definition or legal authority in support of his opinion. And he provides no explanation for why he is of that opinion.

The Petitioners disagree with the Respondent's opinion. Many speakers of the English language say that an infant has "returned" to a place that his mother visited while pregnant. Parents often feel that their infant sons and daughters are with them during at least their last few months in the womb. They do say that their son "returned" to a park that they last visited when their son was in utero or that their daughter "returned" to the symphony when they first brought their daughter to a performance of a symphony that the parents had frequented while their daughter was in the womb. Many parents would say that their child "returned" to a country that his or her mother visited while pregnant.

The Oxford English Dictionary defines "return" as "to go back to a place or person." Oxford English Dictionary (2d Ed. 1981); *see also* Pet. App. at pages 6a, 21a, 42a, and 65a.

C. The Words of Section 11(c)(1)(B)(i)(III) Do Not Include a Residency Requirement.

The plain meaning of the words in section 11(c)(1)(B)(i)(III) cannot be reasonably understood to require that a person who receives a covered vaccine outside of the United States be a resident of the United States in order to pursue an NCVIA claim. The word 'returned" does not mean "returned to one's prior residence" and nothing in the context in which the NCVIA uses the word "returned" implies that only a "return" to one's prior residence satisfies the requirements of section 11(c)(1)(B)(i)(III).

If Congress had intended to limit eligibility to pursue an NCVIA claim under section 11(c)(1)(B)(i)(III) to "residents of the United States" it would have included that requirement in the plain language of the NCVIA. Section 11(c)(1)(B)(i)(II) makes that very clear. In that section of the NCVIA, Congress limited eligibility to pursue an NCVIA claim to *citizens of the United States* and their dependents. Section 11(c)(1)(B)(i)(II) makes a person eligible to pursue a claim if he or she:

> "(II) received the vaccine outside of the United States or a trust territory and at the time of his vaccination such person was a citizen of the United States serving abroad as a member of the Armed Forces or otherwise an employee of the United States or a dependent of such a citizen.

42 USC § 300aa-11(c)(1)(B)(i)(II).

Congress did not include a requirement that "such person was *a resident of the United States*" in section 11(c)(1)(B)(i)(III). The absence of such an express requirement should be fatal to the court of appeals' interpretation of section 11(c)(1)(B)(i)(III) (and Respondent's defense of it.)

This Court's decision in *Sebelius v. Cloer,* 569 U.S. 369 (2013) interpreted the attorney's fees provision of the NCVIA. That decision says:

> "If Congress had intended to limit fee awards to timely petitions, it could have easily done so."
>
> . . . .
>
> "When the [NCVIA] does require compliance with the limitation period, it provides so expressly. For example, 300aa-11(a)(2)(A) prevents claimants from bringing suit against vaccine manufacturers "unless a petition has been filed, in accordance with Section 300aa-16 of this title [the limitation period], for compensation under the Program for such injury or death. (Emphasis added). We have long held that "[w]here Congress includes particular language in one section of the statue but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Sebelius v. Cloer, 569 U.S. 369, at 376-378 (2013)

Congress expressly limited eligibility under section 11(c)(1)(B)(i)(II) to citizens. It did not expressly limit eligibility under section 11(c)(1)(B)(i)(III) to residents. Under *Cloer*, the court of appeals' decision to limit section 11(c)(1)(B)(i)(III) to residents of the United States was clearly inappropriate. The Respondent's argument that "context" can impose a requirement not in the ordinary meaning of the words in the NCVIA is contrary to this Court's decision in *Bostock v. Clayton County,* ___ U.S. ___, 140 S.Ct. 1731, 1737-1739 (June 15, 2020) and should not be persuasive.

The Respondent's suggestion that "[t]he verb "return" when used in connection with a country usually implies residence in that country", Brief in Opposition at page 7, is unsupported by any dictionary definition, reference to law, or explanation. The word "returned" is often used in reference to a country without any suggestion of residency. For example, many speakers of the English language would say that the President "returned" to Europe for a summit or that a tourist "returned" to Costa Rica on a subsequent visit there.

Nothing in the ordinary meaning of the words "returned to the United States" can be reasonably understood to require that a person who received a vaccination outside of the United States " (1) previously resided in the United States, where they were subject to United States vaccination programs, (2) were temporarily away from the United States when they received the vaccination, and (3) 'returned to the United States' within six months with the intention of resuming residence therein." *See* Pet. App., pg. 29a (the court of appeals' decision).

The court of appeals' decision does not reflect an analysis of the objective meaning of the words "returned to the United States." Instead, it reflects the panel's own opinion of who should be eligible for compensation under the NCVIA. As such, the court of appeals' decision is contrary to this Court's decision in *Bostock v. Clayton County,* ___ U.S. ___, 140 S. Ct. 1731, 1737-1739 (June 15, 2020). The court of appeals' decision is an egregious exercise in judicial legislation.

D. Neither the Presumption Against Waivers of Sovereign Immunity Nor the Presumption Against Extraterritoriality Provide Meaningful Support for the Court of Appeals' Interpretation of Section 11(c)(1)(B)(i)(III).

The presumption against waivers of sovereign immunity does not apply to the interpretation of section 11(c)(1)(B)(i)(III) because it is an unequivocal waiver of sovereign immunity. *Thacker v. TVA*, ___U.S. ___, 139 S. Ct 1435, 1438-1439 (2019); *Loeffler v. Frank*, 486 U.S. 549, 554-557 (1988); *Federal Housing Admin. v. Burr*, 309 U.S. 242, 244-245 (1940). The presumption against waivers of sovereign immunity is a cannon of statutory construction that would be relevant only if section 11(c)(1)(B)(i)(III) were ambiguous. *Sebelius v. Cloer*, *supra*, 569 U.S. at 380-381. Section 11(c)(1)(B)(i)(III) is not ambiguous, so the presumption against sovereign immunity does not apply.

The presumption against extraterritoriality does not apply to the interpretation of section 11(c)(1)(B)(i)(III) because that section expressly and unequivocally extends the compensation provisions of the NCVIA to persons who received a covered vaccine "outside of the United

States". 42 U.S.C. § 11(c)(1)(B)(i)(III). The cases that the Respondent references for the presumption against extraterritoriality are not relevant to the interpretation of section 11(c)(1)(B)(i)(III). The relevant statutes in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 250-252 (2010) (the Federal Securities and Exchanges Act of 1934) and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 441-442 (2003) (patent law) have no provision extending their coverage outside of the United States. The statute in *Smith v. United States*, 507 U.S. 197, 198-202 (1993) has been interpreted to extend the coverage of the Federal Tort Claims Act to the "high seas" but expressly prohibits its extension to a "foreign country."

Section 11(c)(1)(B)(i)(II) and section 11(c)(1)(B)(i)(III) of the NCVIA expressly extend the coverage of the NCVIA's compensation provisions to persons who received covered vaccines outside of the United States. Congress clearly defined the extent and limits of the extraterritorial coverage provided by these provisions. The presumption against extraterritoriality clearly does not apply to the interpretation of those provisions of the NCVIA.

E. The Court of Appeals' Decision Merits Review by this Court.

This case merits review by this Court because the court of appeals' decision is an egregious example of judicial legislation. The panel's decision ignores the ordinary meaning of the words of section 11(c)(1)(B)(i)(III) and substitutes the panel's own opinion of who should be eligible to seek compensation through the NCVIA. The court of appeals' decision added a specific, detailed residency requirement to section 11(c)(1)(B)(i)(III) of the

NCVIA. That residency requirement significantly reduces the number of persons who have access to compensation through the NCVIA.

Childhood vaccines are a vital element of the United States' effort to prevent infectious disease. *See*, *Bruesewitz v. Wyeth, LLC*, 562 U. S. 223, 226-229 (2011); H.R. Rep. 99-908, 99th Cong. 2d Sess. Pt. 1, pgs. 4-7 (Sept. 26, 1986) *reprinted in* 1986 U.S. Code, Cong. and Admin. News 6345-6348. The NCVIA was enacted to advance the United States' childhood vaccination programs by encouraging parents to have their children vaccinated (by compensating persons injured by vaccines) and encouraging vaccine manufactures located in the United States to continue to manufacture childhood vaccines (by limiting their liability for vaccine-related injuries). *See*, *Bruesewitz*, *supra,* 562 U.S. at pgs. 226-229; H. R. Rep. 99-908 at pages 4-7, 13, 1986 U.S. Code, Cong and Admin. News at 6345-6348, 6354. Section 11(c)(1)(B)(i)(III) of the NCVIA makes some persons who receive covered vaccines outside of the United States eligible to seek compensation through the NCVIA if the vaccines were manufactured by a vaccine manufacturer located in the United States. 42 USC § 300aa-11(c)(1)(B)(i)(III).

Congress felt that section 11(c)(1)(B)(i)(III) was important enough to include it in the NCVIA, which suggests that Congress felt that section 11(c)(1)(B)(i)(III) was important to the United States' childhood vaccination programs. The Petitioners believe that makes the interpretation of section 11(c)(1)(B)(i)(III) important enough to merit this Court's attention.

The Respondent's argument that the questions presented by this petition for writ of certiorari "warrants further percolation," ignores the fact that only the United States Court of Appeals for the Federal Circuit hears NCVIA appeals and that the court of appeals' decision in this case does not leave any room for further consideration of the issues raised by this case or any other case with a similar fact pattern. For those reasons, if any court is to consider the questions presented by this petition, it will be this Court, now.

CONCLUSION

You should grant the petition for writ of certiorari.

Respectfully submitted.

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