NO. 11-129

In The
Supreme Court of the United States

Gabriel G. Rodriguez, as Administrator of the Estate of Giavanna Maria Rodriguez for the Benefit Of Gabriel Gene Rodriguez and Jennifer Ann Rodriguez,

Petitioner,

v.

Kathleen Sebelius, 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

BRIEF OF *AMICUS CURIAE* VACCINE INJURED PETITIONERS' BAR ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, Vaccine Injured Petitioners' Bar Association (hereinafter "Petitioners' Bar"), of which the undersigned is a member, is a voluntary bar association comprised of sixty-nine attorneys throughout the Country who represent Petitioners in the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 *et. seq.* Members of the Petitioners' Bar have assisted families of children and adults who have suffered adverse effects from vaccinations since the inception of the National Vaccine Injury Compensation Program in 1986. The organization an d its members have a professional responsibility to ensure that the vaccine injured receive justice as Congress intended – swiftly, with generosity and certainty. 42 U.S.C. § 300aa-10 (b). In furtherance of their obligation to injured recipients of vaccines, Congress intended that Petitioners' counsel would be appropriately compensated for carrying out their professional responsibilities. 42 U.S.C. § 300aa-15(e). Win or lose on the merits of the petition, a petitioner's counsel may be entitled to recover reasonable attorney fees and costs. *Id.* However, the recent Federal Circuit Court of Appeals decision in *Rodriguez v. Sec'y Health and Human Services*, 632 F.3d 1381 (Fed. Cir. 2011) has set adrift the Congressional mandate for reasonable attorney fees for

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[1]Pursuant to Supreme Court Rule 37.6, counsel for this *amicus* represents that she authored this brief and that no person or entity other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that all counsel for all parties have been provided notice of intent to file this brief in accord with Supreme Court Rule 37.2(a).

petitioner's counsel and has perpetuated uncertainty and unpredictability as to what reasonable attorney fees will be in the National Vaccine Injury Compensation Program. The uncertainty, lack of clarity and unpredictability in determining petitioners' attorney's reasonable fees in the Vaccine Program will most certainly result in increased litigation and will diminish the pool of qualified attorneys willing to represent vaccine injured persons. Inasmuch as the Federal Circuit's decision in *Rodriguez* is inapposite to this Court's precedent in other federal fee-shifting jurisprudence, this Court should grant Petitioner's Writ of Certiorari to conform this area of the law.

STATEMENT OF CONSENT

In accordance with Supreme Court Rule 37.2 (a), notice of intent to file this brief has been submitted to the counsel of record for both parties. Consent has been obtained from both petitioner and respondent.

SUMMARY OF ARGUMENT

The "guiding light" of federal fee-shifting jurisprudence - the lodestar figure - is widely accepted and applied in nearly all federal appellate courts. *Perdue v. Kenny A.*, 130 S.Ct. 1662(2010) reaffirms this well-established roadmap for determination of reasonable attorney fees under federal fee-shifting statutes because, while not perfect, the method produces an award that approximates the fee the attorney would receive in a comparable case from a paying client, is readily administrable and is objective.

These virtues "cabin the discretion of trial judges, permit meaningful judicial review and produce reasonably predictable results." *Perdue*, at 1672.

The Federal Circuit, in its *Rodriguez* opinion however, appears to disregard these principles and alternatively embraces a subjective approach to calculate what is a "reasonable" fee. The subjective approach, similar to that suggested by the Fifth Circuit Court of Appeals in *Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (CA5 1974),* relies upon non-objective factors, unlimited trial court discretion and undoubtedly leads to disparate results. The latter qualities being clearly less desirable as evidenced by this Court's statements in *Hensley v. Eckerhart*, 461 U.S. 424,437 (1983) – "A request for attorney's fees should not result in a second major litigation"; "Nor should it lead to years of protracted appellate review". *Id*, at 455-456.

The Vaccine Program fee-shifting provision, 42 U.S.C. § 300aa-15(e), should be treated no differently than other federal fee-shifting statutes. To conform the subjective approach advocated by the Federal Circuit to this Court's fee-shifting jurisprudence, this *Amicus* urges this Court to grant Petitioner's Writ of Certiorari.

ARGUMENT

I. VACCINE ACT LITIGATION IS SUFFICIENTLY COMPLEX SO AS TO WARRANT FEES PERMISSIBLE UNDER THE *LAFFEY MATRIX*.

The Federal Circuit, Court of Federal Claims and the special master here justify their subjective approach to determining reasonable attorney fees because they contend Vaccine Act Litigation is "not analogous to complex federal litigation." *Rodriguez* 632 F.3d at 1388. This contention is not shared by other of their colleagues.

In *Walmsley v. Sec'y of HHS*, No. 06-0270V, November 6, 2009, the special master addressed the complexity of the Vaccine Program and stated as follows:

> Aside from relaxed procedures in the absence of jury trials and substantially reduced discovery, the matters litigated in the Program are decidedly more complex than employment discrimination claims, and the statutes and substantive rules affecting both are of comparable complexity. The additional difference, when comparing the Program to medical malpractice, is medical duty of care and its breach; otherwise the two are substantially comparable. And aside from a few differences in procedure, there

> is little to differentiate Program cases from drug liability cases outside the program.

Walmsley at fn 11. Moreover, the then Chief Special Master, also addressing the complexity of the Program in relation to establishing reasonable attorney fees, stated in *Erickson v. Sec'y of HHS*,

> While the rules of procedure are relaxed, the complex legal and medical issues are encountered with relative frequency and many claims require as much preparation as traditional tort actions. Clearly, the straightforward nature of the Act, as originally contemplated by Congress, has proven a falsity in many instances. Not only do most claims take years to resolve, but the amount of damages awarded may reach in the millions over a vaccinee's lifetime. These scenarios are quite comparable with the traditional tort system. In addition, because of the 1995 administrative changes to the Vaccine Injury Table, most Petitioners are forced to pursue actual causation theories. Consequently, when the medical records fail to sufficiently support Petitioners' contentions, as they often do, Petitioners are obliged to present testimony from qualified medical experts who may have spent hours reviewing the records and preparing one or several expert reports.

> Furthermore, it is this court's experience that one expert is often inadequate to support Petitioners' claims; it is not unusual for one to four experts from various disciplines within the medical community to testify on petitioner's behalf. In addition, multiple hearings in any given case are not infrequent. And, of course, the court relies heavily on the experts' testimony to comprehend what are often truly difficult medical matters in causation-in-fact cases. The effective presentation of these cases requires knowledgeable, able, and experienced counsel. Such counsel command high hourly rates in the open market; the same market the lodestar is premised upon. Therefore, the argument that Program litigation is uncomplicated and requires less expertise or preparation than traditional tort litigation is no longer valid and will not be considered a factor in determining hourly rates.

Erickson v. Sec'y of HHS, 1999 WL 1268149, *4. The insightful observations of these two special masters, with more than 40 years of Vaccine Litigation experience between them, was apparently overlooked by the various jurists determining reasonable attorney fees in *Rodriguez*. The observations of these seasoned special masters poignantly underscore the need for clarity, predictability, and objectivity in Vaccine Act fee-shifting jurisprudence. Litigation under the

Vaccine Act is no less complicated than the litigation to which the *Laffey Matrix* is routinely applied.

Attorneys in the Vaccine Program are expected to digest and understand complex medical concepts and to work with highly specialized medical experts to break those concepts down into understandable pieces so as to be able to demonstrate to the triers of fact (special masters) who have no medical training, why compensation is justified. Causation hearings are often a battle of the experts as petitioners' and Department of Justice experts debate the significance of medical symptoms and observations in an area of medicine bereft of scientific certainty. Special masters are called upon to determine if conditions such as autoimmune, encephalitis, SCNIA gene mutation, Guillian Barré and infantile spasms are more likely than not causally related to the receipt of the specific vaccine. It is indisputable that it takes considerable legal skill to make the medical concepts clear and understandable and to put them into the requisite legal elements of proof. For this vaccine attorneys should be paid fairly and adequately. A bright-line standard, such as the *Laffey Matrix*, would accomplish this goal.

II. A FORUM RATE BASED ON THE *LAFFEY MATRIX* WOULD TREAT ALL PETITIONERS' COUNSEL EQUALLY.

It is undisputed that the lodestar method of determining attorney fees – number of reasonable hours multiplied by reasonable hourly rate – has been

embraced and employed by the Court of Federal Claims and the Federal Circuit in determining vaccine attorney fees and costs. *Avera v. Sec'y HHS*, 515 F.3d 1343, 1347 (Fed. Cir. 2008). *Avera* additionally held that the forum for Vaccine Act cases is the District of Columbia, where the Court of Federal Claims, which has exclusive jurisdiction over cases arising under the Vaccine Act, is located. *Avera* at 1348. It is the basis for the 'reasonable hourly rate' multiplier that remains adrift, unpredictable, and ever-subject to the court's unfettered discretion. A bright line rule is needed.

Petitioners in the case at bar advocate that the *Laffey Matrix*[2], utilized by the U.S. Attorney's Office for the District of Columbia is *prima facie* evidence of the forum rate for Vaccine Act cases. This was rejected by the special master who instead used a six-prong analysis which included subjective data such as the negotiated hourly rates for the one Vaccine Act attorney practicing within the District of Columbia[3], a previous order in another Vaccine case awarding a lower hourly rate to Petitioner's counsel, and

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[2]The matrix may be found in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983). An updated *Laffey Matrix* has been approved by the District of Columbia as well. See, *Salazar v. Dist. of Col.*, 123 F.Supp.2d 8 (D.D.C.2000).

[3]This sole D.C. attorney was a senior partner in his law firm with 35 years of experience handling medical malpractice and product liability cases. He requested an hourly rate of $300, which was reduced to $210/hour by the lower court. He never took on another Vaccine Program case. See *Flannery v. Sec'y HHS*, No. 99-963V (Oct. 12, 2004).

negotiated rates of Vaccine Act attorneys practicing in Boston, Massachusetts and Vienna, Virginia. See, *Rodriguez v. Sec'y HHS*, No. 06-559V, Order Regarding Fees and Cost Application, July 17, 2008. None of these factors reflected a true forum rate for attorney fees in complex litigation in the District of Columbia.

The special master's subjective-based approach was affirmed by both the Court of Federal Claims and the Federal Circuit. See, *Rodriguez v. Sec'y of HHS*, 91 Fed.Cl. 453 (2010); *Rodriguez v. Sec'y of HHS*, 632 F.3d 1381 (Fed. Cir. 2011) and is now the "preferred" approach to fee setting in the Vaccine Program. This approach is akin to the approach advocated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (Fifth Cir. 1974)[4], which was rejected by this Court in *Perdue v. Kenny A* because it is not an "objective" approach to calculating reasonable attorney fees, does not produce reasonably predictable

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[4] *Johnson v. Georgia Highway Express, Inc.* involved the reasonableness of the attorney fee award in a Title VII class action matter. The Fifth Circuit advocated that the trial court utilize a 12-point analysis in reaching a determination of reasonable attorney fees that included consideration of (1) the time and labor required, (2) the novelty and difficulty of the issues, (3) the skill requisite to perform the legal services, (4) whether taking the case precluded the attorney from accepting other work, (5) the customary fee for similar work in the community, (6) whether the fee was fixed or contingent, (7) any time limitations imposed on the attorney by the client or circumstances, (8) the amount involved and results obtained, (9) the experience, reputation and ability of the attorney, (10) the undesireability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

results, and hampers meaningful judicial review. *Perdue* at 1672.

The Federal Circuit's decision in *Rodriguez* creates the same pitfalls for fee determinations as did the Fifth Circuit's in *Johnson*. Instead of establishing an objective, predictable means of determining reasonable hourly rates for vaccine petitioners' attorneys, the Federal Circuit has embraced a method which allows the lower courts to make fees determinations on an impressionistic basis, entirely undermining the major purpose of the lodestar method – providing an objective and reviewable basis for fees. If the Federal Circuit's decision stands, this *Amicus* is concerned that highly qualified attorneys will be discouraged from taking on Vaccine Act cases because they can at best be paid sub-market rates for months and years of work. Establishing the *Laffey Matrix* as the appropriate data set for the reasonable hourly rate multiplier would eliminate this vexation and put all petitioners' counsel on an equal playing field.

III. CERTAINTY AND PREDICTABILITY IN DETERMINING VACCINE PETITIONERS' COUNSEL'S HOURLY RATES IS NEEDED.

42 U.S.C. § 300aa-15 (e)(1) of the Vaccine Act[5]

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[5]The statutory provisions governing the Vaccine Act are found in 42 U.S.C. § 300aa-10 *et. seq.* Hereinafter, reference will be to the relevant subsection of 42 U.S.C. § 300aa. The "Vaccine Act" is also sometimes referred to as the "Vaccine Program." Both terms will be used interchangeably in this brief.

provides for compensation of reasonable attorney's fees and costs incurred in the proceedings appurtenant to a petition brought in the Vaccine Program. Section 15 (e)(1) states in relevant part,

> In awarding compensation . . . [the] court shall also award as part of such compensation an amount to cover reasonable attorneys' fees, and other costs incurred in any proceeding on [the] petition.

Reasonable attorney fees and costs may be awarded in those petitions in which the Petitioner does not receive compensation upon a determination "that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." *Id.* Because the term "reasonable attorney fees" is not defined in the statutory text of the Vaccine Act, it has spawned ongoing disagreement, much litigation, and continued unpredictability in Vaccine Act fee-shifting decisions.

Congress intended that the Vaccine Act would be "simple and easy to administer" while being "expeditious and fair." *Id.* at 7,12, reprinted in 1986 U.S.C.C.A.N. at 6348, 6353. The Federal Circuit affirmed the use of the lodestar approach to determine what constitutes "reasonable attorneys' fees" under the Vaccine Act in *Avera v. Sec'y of HHS*, 515 F.3d 1343 (Fed. Cir. 2008). In *Avera*, the Federal Circuit held that "in general [vaccine attorneys' fees] should be determined using the forum rate for the District of

Columbia." *Id.* at 1349. The Federal Circuit's apparent reticence to endorse the *Laffey Matrix* as the benchmark data set of D.C. forum rates flies in the face of Congress' stated intent for the Vaccine Program. The Federal Circuit's decision will not stem the growing tide of litigation regarding reasonable attorney rates in the Vaccine Program. Rather, it will serve to foster ongoing uncertainty and unfettered discretion by the lower courts in setting reasonable fees and vaccine petitioners and their counsel will be left to wonder when and if the legal bills will be paid.

Even the Special Master who initially opined as to Petitioner's attorneys fees in this [the *Rodriguez]* matter recognized the need for clarity, uniformity and predictability in determining Petitioner's counsel's fees. "Our fee-setting jurisprudence has become needlessly confused – it has become untethered from the free market it is meant to approximate." See, *Rodriguez v. Sec'y HHS*, No. 06-559V, Order Regarding Fees and Cost Application, July 17, 2008, p. 7; citing *Arbor Hill Concerned Citizens Neighborhood Association, et al. v. County of Albany,* 522 F.3d 182, 184 (2d Cir. 2008). Indeed, the Special Master is correct – decisions regarding fee setting in the Vaccine Program are untethered from the free market. Rather than establish attorney fees by using a predictable, objective, data set such as the *Laffey Matrix*, vaccine special masters make these determinations mostly on their own impression of what is appropriate. For example, the special master in *Rodriguez* relied on prior negotiated rates for other vaccine attorneys not their market rates, a prior fees decision as to

petitioners' counsel - none of which reflected the forum rate for the District of Columbia, the forum in which vaccine litigation occurs.

As this Court stated in *Hensley v. Eckerhart*, "a request for attorney fees should not result in a second [or third or fourth] major litigation." 461 U.S. 424, 437 (1983). So far in 2011, twenty-four out of sixty-two published Vaccine Act opinions addressed attorney fees and cost applications. In 2010, forty-two of one hundred three published opinions addressed this very same issue. Nearly forty percent of the published Vaccine Act opinions in the past two years have been devoted to solely what petitioners' counsel should be paid. Many of these decisions come months and years after a decision on the merits of a claim. This protracted litigation cannot be what Congress intended when it said that the Vaccine Act would provide "swift, certain and generous" compensation to Vaccine Act petitioners, including an award of reasonable fees and costs to their attorney. See, H.R. REP 99-908, printed in 1986 U.S.C.C.A.N. **6344, *3 and **6363, *22.[6]

The special master below recognized that a "bright-line rule would go a long way toward reducing unnecessary litigation over attorneys' hourly rates in Vaccine Act cases." See *Rodriguez* Order Regarding

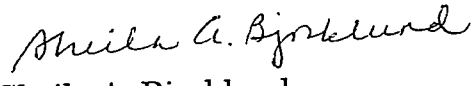
[6]Congress specifically stated, ". . . the Committee does not intend that the limitation of fees [] act to limit Petitioners' ability to obtain qualified assistance and intends that the court make adequate provision for attorneys' time and that the court exercise its discretion to award fees in non-prevailing, good faith claims." *Id.* at **6363 *22.

Fees at 18. She went on to opine, "were the court to adopt such an approach [the *Laffey Matrix*], the question of what hourly rate is reasonable" could be established very easily . . ." Id. Review by this Court is necessary to give the guidance sought but left adrift by the Federal Circuit's decision.

CONCLUSION

The Vaccine Program fee-shifting provision, 42 U.S.C. § 300aa-15(e), should be treated no differently than other federal fee-shifting statutes. To conform the differing approach advocated by the Federal Circuit in *Rodriguez v. Sec'y of HHS*, this *Amicus* urges this Court to grant Petitioner's Writ of Certiorari.

Respectfully Submitted,



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