

No. 11-129

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IN THE  
SUPREME COURT OF THE UNITED STATES

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GABRIEL G. RODRIGUEZ, AS ADMINISTRATOR OF  
THE ESTATE OF GIAVANNA MARIA RODRIGUEZ FOR  
GABRIEL GENE RODRIGUEZ AND JENNIFER ANN  
RODRIGUEZ

*Petitioner,*

v.

SECRETARY OF HEALTH  
AND HUMAN SERVICES,

*Respondent.*

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On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Federal Circuit

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***AMICUS CURIAE* BRIEF OF  
THE NATIONAL VACCINE INFORMATION  
CENTER IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**

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**STATEMENT OF INTEREST OF  
*AMICUS CURIAE***

*Amicus curiae* the National Vaccine Information Center (NVIC), was founded in 1982 by parents whose children were injured or died following DPT vaccination; it is widely recognized as the oldest, largest and most effective non-profit national organization advocating for the institution of vaccine safety and informed consent protections in U.S. public health programs. NVIC has assisted thousands of individuals who have suffered serious health problems, hospitalizations, injuries and deaths following vaccination. It promotes scientific research to evaluate vaccine safety and defends the ethical principle of informed consent for medical interventions, including vaccination, which carry a risk of injury or death.<sup>1</sup>

The National Vaccine Information Center and a predecessor organization, Dissatisfied Parents Together, played an important role in the creation of the National Vaccine Injury Compensation Program. We maintain a web site which asks persons who have suffered vaccine-related injuries and the

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<sup>1</sup> Pursuant to Sup. Ct. R. 37.6, *amicus* notes that no part of this brief was authored by counsel for any party and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or entity other than the *amicus* or their members made such a monetary contribution. This brief is filed with the consent of all parties.

parents of children who have suffered vaccine-related injuries to report these injuries to us (as well as the Vaccine Event Reporting System). Our web site also informs the public about the availability of the National Vaccine Injury Compensation Program and changes in the Program. Through our members, correspondence sent to our web site, and attendance at meetings of the Advisory Commission on Childhood Vaccine (ACCV) we have closely monitored the National Vaccine Injury Compensation Program since its creation and are vitally interested in it.

### SUMMARY OF ARGUMENT

The special master deciding this National Vaccine Injury Compensation Program case did not award attorneys' fees based on the generally accepted measure of the relevant market's hourly rates, the *Laffey Matrix*. She calculated the attorneys' fees award based on hourly rates substantially less than those in the *Laffey Matrix* because: she felt that litigation in the National Vaccine Injury Compensation Program was not "complex" enough to merit market rates; and because the Vaccine Act authorizes the award of reasonable attorneys' fees to unsuccessful petitioners as well as to petitioners awarded compensation. The United States Court of Appeals for the Federal Circuit's decision affirming the special master's decision awarding fees, in effect, endorsed the special master's decision to pay below market rates to attorneys representing petitioners in the National Vaccine Injury Compensation Program.

We urge the Court to grant a writ of certiorari to review the Court of Appeals' decision because:

1. Inadequate attorneys' fees awards in the National Vaccine Injury Compensation Program make it very difficult for persons injured by vaccines to find an attorney to represent them in the Program.

2. Litigation in the National Vaccine Injury Compensation Program is as complex as the litigation under which parties are awarded reasonable attorneys' fees based on the *Laffey Matrix*; and

3. Congress chose to be generous in its provision for reasonable attorneys' fees in the National Vaccine Injury Compensation Program in order to encourage persons injured by vaccines to rely on the Program's remedy rather than tort litigation.

## **REASONS FOR GRANTING THE WRIT**

### **I. INADEQUATE ATTORNEYS' FEES AWARDS IN THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM MAKE IT VERY DIFFICULT FOR PERSONS INJURED BY VACCINES TO FIND AN ATTORNEY TO REPRESENT THEM IN THE PROGRAM**

Our members and similar situated persons

(persons who may have been injured by vaccines and the parents of children who may have been injured by vaccines) have always found it very difficult to find a qualified attorney to represent them in the National Vaccine Injury Compensation Program. Few attorneys regularly represent petitioners in the Program. Attorneys without expertise in the National Vaccine Injury Compensation Program frequently express interest in representing a vaccine injured person, but lose interest when they learn how complex the process is and how they will be compensated.

We believe that the most important reason for the difficulty finding an attorney to represent a petitioner in the National Vaccine Injury Compensation Program is that the attorneys' fees awards in the Program do not pay attorneys representing petitioners the market rate for their work.

## **II. LITIGATION IN THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM IS AS COMPLEX AS THE LITIGATION UNDER WHICH PARTIES ARE AWARDED ATTORNEYS' FEES BASED ON THE *LAFFEY MATRIX***

Litigation in the National Vaccine Injury Compensation Program is comparable to drug product liability or medical malpractice litigation in the civil courts. Although petitioners in the Program are not required to prove fault, in most cases they are required to prove causation (what we believe is

the most difficult aspect of civil litigation in the areas of drug product liability and medical malpractice). Successful petitioners are also required to demonstrate and quantify very significant damages.

In order to adequately represent a petitioner in the National Vaccine Injury Compensation Program an attorney needs expertise and skill comparable to that of a lawyer who successfully represents plaintiffs in the areas of drug product liability and medical malpractice. An attorney needs knowledge of the complex and rapidly evolving law which governs the Program. An attorney needs a working knowledge of the medicine and science relevant to his client's illness or injury, most often vaccine injury, pediatric neurology (of the alleged vaccine injury and proposed alternatives) and immunology but often also developmental pediatrics, rheumatology, hematology or genetics. In order to adequately represent a petitioner in the Program an attorney needs expertise in locating, recruiting, and working with highly qualified and persuasive expert witnesses and the financial ability to hire and pay them.

An attorney who represents petitioners in the National Vaccine Injury Compensation Program needs to be an experienced, capable, and persuasive trial advocate because most serious claims are decided after trial. The informality and absence of discovery in Program claims can add complexity to Program proceedings. Attorneys for petitioners must prepare their client's case without the benefit of

discovery and effectively cross-examine the Secretary of Health and Human Services' expert witness without the benefit of depositions or other discovery.

An attorney who successfully represents petitioners in the Program must also have expertise in developing damages evidence in cases involving catastrophic injuries, including recognizing potential needs (and services which will address these needs) and familiarity with the experts needed to evaluate and prove future needs, primarily life care planners. He or she may also need to be an accomplished appellate lawyer. The law governing the Program is both complex and relatively unsettled, requiring relatively frequent appeals.

The National Vaccine Injury Compensation Program was created as an alternative to product liability and medical malpractice claims available under state tort laws. This was highly complex litigation. The Vaccine Act did not eliminate all the complexity inherent in vaccine injury cases.

Moreover, much of the simplicity that Congress envisioned when it created the National Vaccine Injury Compensation Program has been eliminated by changes in the Program over the last 23 years. Administrative revisions in the Programs' Vaccine Injury Table have converted most Program claims from "Table" cases, in which petitioners relied on the legal presumption of causation provided by the original Vaccine Injury Table, to "off-Table" cases, in which petitioners must prove that a

vaccination caused their illnesses or injuries. Eight new vaccines have been added to the Program – most with no “Table injuries” (requiring all petitioners alleging injuries caused by these vaccines to prove causation). The Secretary of Health and Human Services’ defense of Program claims has become much more complex.

The United States Court of Federal Claims and special masters deciding National Vaccine Injury Compensation Program cases have repeatedly recognized that litigation in the Program is “complex” litigation.

The most recent decision recognizing the complex nature of Program litigation was decided after the special master’s attorneys’ fees decision in this case, and decided the precise issue presented in that decision differently (it awards John McHugh attorney’s fees based on *Laffey Matrix* rates). Special Master Richard Abell’s attorneys’ fees decision in *Walmsey vs. Sec’y of Health and Human Services*, 2009 U.S. Claims LEXIS 690 at \* 21, footnote 11 (Fed. Cl. Spec. Master, Abell June 23, 2008) reads:

“The *Rodriguez* decision makes repeated reference (2009 U.S. Claims LEXIS 438, [WL] at \*6-7) to other areas of law (e.g., employment discrimination, medical malpractice, and drug liability) that were perspected as more complex than vaccine injury litigation within this Program, to which the Undersigned

merely notes his dissent. 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 of the Program.”

In *Erickson vs. Sec’y of Health and Human Services*, 1999 U.S. Claims LEXIS 292 at \*17, 1999 WL 1268149 (Fed. Cl. Spec. Master, Golkiewicz, Dec. 10, 1999) then Chief Special Master Gary Golkiewicz explained:

The court has historically viewed vaccine cases as fairly straightforward and involving less difficult issues of causation than are seen in traditional tort litigation. However, the viewpoint has changed over the past several years and the undersigned can no longer agree with the supposition that the Act is not a complex piece of federal

legislation . . . . While the rules of procedure are relaxed, 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.

. . . .

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.”

Judge Gibson of the United States Claims Court explained that litigation in the National Vaccine Injury Compensation Program was “complex” even before the changes in the Program described by Special Master Golkiewicz.

“This court notes that the level of complexity involved in Vaccine Act cases is not a reason to reduce the lodestar rate in this instance. Although Congress chose to provide petitioners with an alternative to the traditional civil forum, relax standards of causation, and ease rigid procedural rules, issues under the Act are nonetheless complex. Vaccine litigation requires counsel’s extensive knowledge of biology, microbiology, immunology, neurology, pediatrics and infant and child development, and a variety of complex damage issues. It does not follow that simply because the legal issues have changed, and perhaps been simplified, that significant skill is not required to competently represent a petitioner. The substantive issues of vaccine litigation remain complex, both factually and legally – it is merely the procedural framework with has simplified.”

*Monteverdi vs. Sec’y of Health and Human Services*,  
19 Cl Ct. 409, 433-434 (1990).

Litigation in the National Vaccine Injury Compensation Program is complex federal litigation. An award of “reasonable attorneys’ fees” under the National Vaccine Injury Compensation Program should compensate the petitioner’s attorney at the market rate for an attorney representing a client in complex federal litigation in a federal court sitting in the District of Columbia.

The generally accepted measure of that market rate is the *Laffey Matrix*.

The special master’s decision awarding attorneys’ fees awarded fees based on an hourly rate at least \$100 to \$130 an hour less than the hourly rate in the *Laffey Matrix*. The Court of Appeals for the Federal Circuit affirmed that decision.

We view these decisions as awarding petitioners in the National Vaccine Injury Compensation Program attorneys’ fees at an hourly rate significantly below the generally accepted market rate for attorneys representing a client in a federal court in the District of Columbia.

We ask you to grant Rodriguez’s petition for a writ of certiorari to determine whether this was appropriate.

**III. CONGRESS CHOSE TO BE GENEROUS  
IN ITS PROVISION FOR REASONABLE  
ATTORNEYS’ FEES IN THE NATIONAL  
VACCINE INJURY COMPENSATION  
PROGRAM IN ORDER TO ENCOURAGE**

**PERSONS INJURED BY VACCINES TO  
RELY ON THE PROGRAM'S REMEDY  
RATHER THAN TORT LITIGATION**

The language and legislative history of the Vaccine Act make it clear that Congress intended the fee shifting provision of the Vaccine Act to be more generous than those in most other fee-shifting statutes.

The law creating the National Vaccine Injury Compensation Program specifies that

“in awarding compensation on a petition filed under [the Program] the special master or court shall also award as part of such compensation an amount to cover - (A) reasonable attorneys’ fees, and (B) other costs incurred in any proceeding on such petition.”

42 USC § 300aa-15(e)(1). The law also provides that:

“If the judgment of the United States Court of Federal Claims on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner’s reasonable attorneys’ fees and other costs incurred in any proceeding on such a petition if the special master or court determines that the petition was brought in good faith

and there was a reasonable basis for the claim for which the petition was brought.”

*Id.* The Vaccine Act unequivocally requires the special master to award reasonable attorneys’ fees if the compensation is awarded and unequivocally allows the special master to award reasonable attorneys’ fees if she denies compensation.

The legislative history of the Vaccine Act explains that Congress intended to provide a compensation system with “generous” remedies in order to persuade persons who may have been injured by vaccines to rely on the Program’s remedy rather than civil litigation. The House Committed Report describing the National Vaccine Injury Compensation Program explains:

“The Committee anticipates that the speed of the compensation program, the low transaction costs of the system, the no-fault nature of the required findings, and the relative certainty and generosity of the system’s awards will divert a significant number of potential plaintiffs from litigation.”

H.R. Report 99-908, 99<sup>th</sup> Cong. Sess. pt. 1, p. 13 (Sept 26, 1986) *reprinted in* 1986 U.S. Code Cong. & Admin. News 6344, 6354.

The legislative history further indicates that Congress’ decision to provide potential petitioners a

generous remedy included the Vaccine Acts' provision for an award of reasonable attorneys' fees to unsuccessful petitioners. The Committee Report states:

"Attorneys Fees – If the court awards compensation on a petition, the compensation is to include an amount to provide for reasonable attorneys' fees and other costs incurred in proceedings on the petition. If the court does not award compensation on a petition, it may, in its discretion, nonetheless make such an award for attorneys' fees and costs if it determines that the action was brought in good faith and there was a reasonable basis for the claim for which the action was brought.

....

No attorney may charge a fee for services in connection with a petition other than the amount authorized by this section.

....

Conversely, however, the Committee does not intend that the limitation of fees to those included in the award 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."

H.R. Report 99-908, 99<sup>th</sup> Cong. 2d Sess. pt. 1, pp. 21-22 (Sept. 26, 1986) *reprinted in* 1986 U.S. Code Cong. & Admin. News 6344, 6362-6363.

Congress chose to make the fee-shifting provisions in the Vaccine Act more generous than in most other fee-shifting statutes. It did this as part of its intent to create a generous compensation system and to assure that potential petitioners had the ability to obtain qualified attorneys to represent them in the National Vaccine Injury Compensation Program.

The special master's decision and that of the Court of Appeals frustrate Congress' intent by allowing an award of attorneys' fees at an hourly rate well below that awarded in other fee-shifting statutes and making it very difficult for persons who may have been injured by vaccines to find a qualified attorney to represent them in the Program.

We ask you to grant Rodriguez's petition for writ of certiorari to determine if this was appropriate.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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