No. 19-5657

IN THE

Supreme Court of the United States

W. R. III, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS HEATHER D. ROGERO AND WALTER A. ROGERO II,
Petitioner,

v.

ALEX AZAR II,
Secretary of Health and Human Services,
Respondent.

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

BRIEF OF NATIONAL AUTISM SOCIETY OF PITTSBURGH, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*

Amicus has strong interest in ensuring that the protections of the Rehabilitation Act of 1973, Section 504, are applied as intended by Congress and as previously interpreted by this Court. Section 504 protects Petitioner[1] and others with disabilities in federal programs, who have been denied statutorily guaranteed relief. This brief describes the intent of Congress, the legislative history of two applicable Congressional Acts, and the harm resulting to Petitioner from a misreading of the statutory provisions at issue, and why autism disability is irrelevant and impermissible evidence.

The Federal Circuit's decision in *Rogero v. Azar* pertains to the scope of §504's protection of citizens with autism disability in federal programs. This Court's decision whether to grant *certiorari* will directly impact the federal courts' application of §504 for 3.5 million U.S. citizens living with autism, a significant national issue.

The lower courts acknowledged Petitioner's preponderant evidence of vaccine injury, as detailed in the Petition, citing his medical records and expert medical opinion, but nonetheless denied him compensation. The preponderance standard evidence determined him eligible for compensation for his encephalopathy associated with the DTaP vaccine, but the merits of his claim were unequally treated to those of similarly situated children merely on the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* state that this brief was authored by counsel, and no person or entity other than the *amicus* or their counsel has made a monetary contribution to the preparation or submission of the brief. Respondent and Petitioner received a timely notice and have granted consent.

basis that he also had a subsequent autism disability that was not a claim. Since both the special master and Federal Circuit recognized this evidence, Petitioner should be awarded compensation for his life care and rehabilitation as defined by 42 USC §300aa–13(a)(1)(A).

Respectfully, the Federal Circuit's decision on its face constitutes a violation of §504's prohibition against discrimination, as interpreted by this Court. This type of discrimination, "*not of invidious animus, but rather of …benign neglect*" requires compensation. Thus the *amicus* urges that the judgment below be reversed.

Under Rule 37, *amicus* is focused on the legislative intent of Congress as interpreted by this Court for both the National Childhood Vaccine Injury Act and the Rehabilitation Act, highlighting the applicable Federal Rules of Evidence. These are "relevant matter[s] not already brought to the [the Court's] attention that may be of considerable help to the Court" regarding *Rogero v. Azar*, 19-5657 (S. Ct. 2019). Specifically, how 42 U.S.C. §300aa–13(a)(1)(A) [preponderance that was found by the courts determining compensation] for §300aa–11(c)(1)(C)(ii)(II) [vaccine-related encephalopathy injury associated with DTaP] is protected under §504 because the decision basis was on his irrelevant autism disability.

Description of *Amicus* is at Appendix 1a.

SUMMARY OF ARGUMENT

For over forty years, Congress has intentionally safeguarded the rights of children with disabilities to

equal access, equal opportunity, and freedom from discrimination in federal programs. Extending equal rights to those with disabilities reflects our national values. This case addresses the express intent of Congress for §504, prohibiting discrimination on the basis of disability in federal programs and protecting children with acquired disabilities from unequal treatment in our system of justice.

Petitioner W.R. III is now an 11-year-old, permanently disabled child, who acquired that disability after his May 2010 DTaP. He filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986 (NCVIA) at 42 U.S.C. §§300aa-1 to -34. He suffered encephalopathy, caused by diphtheria-tetanus-pertussis (DTaP) vaccinations received on May 4, 2010, before his second birthday. He continues to suffer from this medical injury. (*Pet. App. 2a, 3a, 5a, 9a*), He also has autism but did not claim this as an injury for compensation.

As painstakingly laid out in the Petition, with verifiable public findings under a *preponderance standard* under §300aa–11(c)(1) from medical records and medical testimony, Petitioner's encephalopathy is causally associated to his May 2010 DTaP vaccine as defined by 42 USC §300aa–13(a)(1)(A)-(B). (*See* Petition at 11-14, 19-23, 34-37).

Petitioner met all evidentiary requirements for compensation for vaccine-induced encephalopathy as defined by 42 USC §300aa–11(c)(1), §300aa–33(5)[2], and §300aa–14(b)(3)A).[3] Nonetheless, Petitioner was

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[2] "Vaccine-related injury or death" means an … injury… associated with … vaccines in the Vaccine Injury Table…"

[3] "Encephalopathy" means any significant acquired … ***injury*** to, … the brain… manifestations of encephalopathy are focal

denied due compensation. The Federal Circuit denied compensation and dismissed his case merely on the basis that he also had, subsequent to his encephalopathy, a *behavioral* autism disability. HHS experts ruled out autism as a cause of his encephalopathy but were silent about DTaP vaccine causation. Genetic causes of Petitioner's encephalopathy were ruled out in medical records, as explained by medical experts, resulting in unfair treatment and discrimination as defined by 45 C.F.R. 84 & 85, invoking the protections of the Rehabilitation Act, §504 in a federal program, 29 U.S.C. 794(d).

Petitioner timely raised discrimination objections in the VICP, which are protected on grounds under §504 and the 14th Amendment. In the Federal Court of Claims, the special master, contrary to law, elevated the burden of proof in such a way as to preclude an *entire class of petitioners* from claiming compensation*, i.e.* those who have vaccine-induced encephalopathy and subsequent autism. The special master and court must consider all *relevant* medical evidence and should have considered similar compensated cases of *Poling v. HHS*, No. 02-1466V, (Fed. Cl. Spec. Mstr. Jan. 28, 2011) and *Wright v. HHS*, No. 12-423 (Fed. Cl. Spec. Mstr. Sept. 21, 2015), which also featured encephalopathies that became chronic and had subsequent features of autism, like HRSA's statement and the government's opinion of W.R. III (See Petition at pp.16, 36).

In the Court of Appeals, Petitioner received unequal treatment when the Court focused on irrelevant autism, thus violating Vaccine Rules and

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and diffuse neurologic signs …. The neurological signs … may …result in various degrees of permanent impairment…"

the Federal Circuit's precedents *Althen*, *Contreras* and *Paluck*, which cases the Court remanded for misconstruing and not using relevant evidence. Petitioner's case resulted in autism disability discrimination, violating §504 and the 14th Amendment's protection.

The Federal Circuit's decision flagrantly misconstrued §300aa–13(a)(1) when sanctioning that Petitioner's evidence of his injury could be arbitrarily rejected (Petition at 18) by the special master. Then the Court capriciously denied the child his fundamental right to impartial due process regarding the causation factors, causing significant harm to Petitioner and his family (Petition at 5-6). After finding and rejecting medical encephalopathy injury evidence, the Court never analyzed causation, instead affirming a decision below on the basis of a subsequent behavioral diagnosis of an autism handicap.

The Federal Circuit panel sought to shore up its conclusion based on autism by erroneously asserting a legally unsupported and discriminatory reason conflicting with this Court's interpretation of §300aa–13(a)(1)(B), as described in the Petition. (Petition at 34-37).

Justice has been denied Petitioner for his encephalopathy injury. His fundamental rights in a federal program have been denied. This violates Congress' express intent, causing Petitioner to suffer wrongful civil rights violations.

In 1973, because Congress found that persons with disabilities had inadequate legal recourse to redress discrimination in federal programs, it passed §504 of the Rehabilitation Act. Congress expressly

sought to remedy discrimination against the handicapped that existed most often *not because of animus*, but because of thoughtlessness, indifference and benign neglect.

ARGUMENT

Over our nearly 250-year history, we have progressively endeavored to ensure that *all* citizens secure liberty and equal access to justice [4] with "Equal Justice Under Law" engraved upon the entrance to this Court. This case is to safeguard that federal laws to protect the fundamental rights of Petitioner and 3.5 million other similarly situated individuals are upheld. Our Constitution ensures all citizens with disabilities the promise of equal justice under law.

As Dr. Martin Luther King observed, "the arc of the moral universe is long, but it bends toward justice."[5] The commitment to the rights of liberty, justice, and equality are the foundation of our judicial system to protect citizens against threats to those rights and to remedy deprivation of them.

Over the past 45 years, Congress has established that individuals with disabilities are prohibited from being "excluded from the participation in, [or] denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal

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[4] U.S. CONST. Preamble ("We the People…in Order to form a more perfect Union, establish Justice, … and secure the Blessings of Liberty to ourselves and our Posterity"); *id*... XIV, § 1 ("… nor deny to any person … the equal protection of the laws.").

[5] Martin Luther King, Jr., Speech given at the National Cathedral, March 31, 1968. https://www.si.edu/spotlight/mlk?page= 4&iframe=true (last viewed September 15, 2019).

financial assistance or under any program or activity conducted by any Executive agency" and are entitled to enforce equality of opportunity, full participation, and benefits, and the same rights in society as nondisabled individuals, §504, of The Rehabilitation Act of 1973, 29 U.S.C. §794.

In short, Congress understood that including individuals with disabilities among people who count in composing "We the People" was essential. See *Tennessee v. Lane*, 541 U.S. at 536. Many laws on disability, like §504, now guarantee children like Petitioner equal access, equal opportunity, and freedom from discrimination on the basis of disability.

I. Misreading the NCVIA Impedes Access to Justice, Contravening Congressional Intent and Decades of Precedent to Compensate Injured Children.

The Federal Circuit's holding in *Rogero* eviscerates the civil rights of children to be compensated and to receive rehabilitative services and life care from the excise tax on vaccines for vaccine-related harms. If Petitioner is deprived of compensation, the National Vaccine Injury Compensation Program (VICP) will have been a hollow formality. Petitioner's medically proven encephalopathy caused by his vaccines entitles him to compensation. His behavioral diagnosis is irrelevant and in any event, not inconsistent with previously compensated cases.

The inequity inherent in the lower courts' decisions is especially stark when considering Congressman Henry Waxman's statement when

introducing the National Childhood Vaccine Injury Act in 1986 (NCVIA) bill:

> … the bill I have introduced is probably not the first choice of most parties … Manufacturers would undoubtedly prefer greater insulation from liability. Parents of injured children would certainly prefer larger compensation and fewer restrictions on court activity…The administration would…prefer legislation that spends no money.[6]

This Court considered the context, legislative history, and intent of Congress for the NCVIA when "creat[ing] a no-fault compensation program" in *Bruesewitz v. Wyeth,* finding two purposes: "to stabilize the vaccine market and *facilitate compensation".* "A person injured by a vaccine … may file in the United States Court of Federal Claims, naming the Secretary of Health and Human Services as the respondent"[7] "A special master… makes an informal adjudication … within … 240 days.[8] The Court of Federal Claims must review objections to the … decision and enter final judgment under a similarly

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[6] *Vaccine Injury Compensation: Hearing on H.R. 1780, H.R. 4777, & H.R. 5184 Before the Subcommittee on Health and the Env't of the H. Comm. of Energy & Commerce*, 99th Cong. 2 (1986) (statement of Rep. Henry A. Waxman, Chairman, Subcommittee on Health & the Env't of the H. Comm. of Energy & Commerce) and 42 U.S.C. § 300aa-15(a)(1)(A)(iii)(II), (a)(1)(B)(iii).

[7] 42 U. S. C. §300aa–11(a)(1).

[8] §300aa–12(d)(3).

tight statutory deadline."[9] "[A]wards are paid out of a fund created by an excise tax on each vaccine dose[10]. As a *quid pro quo*, manufacturers enjoy significant tort-liability protections. *Most importantly, the Act eliminates manufacturer liability for a vaccine's unavoidable, adverse side effects*."[11]

This Court found Congress's intent in *Shalala v. Whitecotton*, 514 U.S. 268, 270 (1995), that the VICP was designed to divert civil lawsuits against vaccine manufacturers into a less rigorous, less adversarial arena than the existing federal and state tort systems.[12] "The stated purpose of the [Vaccine Act] was to err on the side of compensating potential vaccine victims in order to offer an effective alternative to vaccine injury lawsuits."[13]

This Court recognized Congress's intent in *Bruesewitz v. Wyeth* to "*facilitate compensation"* for injuries "establish[ing] a *prima facie* entitlement to compensation by introducing proof of actual causation §300aa-11(c)(1)(C)(ii)". (*Shalala v. Whitecotton*).

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[9] §300aa–12(e), (g).

[10] Katherine Davenport, *Vaccines and the National Vaccine Injury Compensation Program* (Apr. 10, 2000 Notes 211-212, §300aa-15(i)(2), An "excise tax of 75 cents per dose is imposed on each vaccine covered under the VICP."

[11] §300aa-22(b)(1). Encephalopathy is as adverse side effect of DTaP.

[12] 42 U.S.C. §300aa-12(c)(1), §300aa-12(d)(2)(A).

[13] Advisory Comm'n on Childhood Vaccines, Dep't of Health & Human Servs., *see also* H.R. REP. 99–908, at 12–13 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6344, 6353–54.

A. Congressional Intent for Compensation and Causation based on a Preponderance of the Evidence

Congress did not expend time and effort to create a legislative scheme as a façade for unequal treatment of the injured. Nor did it intend to create an illusory eligibility framework as a hollow formality.

This Court stated Congress's clear purpose for the preponderance of evidence standard to ensure that children receive "compensation for medical, rehabilitation, counseling, special education, and vocational training expenses; diminished earning capacity; pain and suffering" as found by this Court under §300aa–15(a) in *Bruesewitz v. Wyeth.* This Court also acknowledged the intent of Congress to compensate encephalopathy by defining the injury as "significant acquired … *injury* to … the brain *with permanent focal neurological signs*", as *vaccine-related*, §300aa–33(5) and in *association* with the DTaP (Diphtheria-Tetanus-Pertussis vaccines) as "resulting from the administration of the vaccine" §300aa–14(a).

Congress's "causation" requirements then must be viewed through the lens of compensating the vaccine-injured to further specific statutory goals. As enacted in §11 (c)(1)(C)(ii)(II), §13 (a)(1)(A) and §13 (a)(1)(B), the NCVIA envisions a legal cause of injury, not "scientific proof". On the basis of the preponderance standard, the VICP must find every factor under Section §300aa-11(c)(1) for encephalopathy. In *Rogero*, the VICP found those facts. (Petition pp. 34-38). In short, the special master found and published Petitioner's

requirements for awarding compensation but discriminatorily denied participation, violating §504.

§300aa–13(a)(1)(A)[14]. Provides no authority for a special master to reject preponderant evidence. *Althen v. HHS*, 418 Fed. 3d 1274 (USCAFC 2005), *Knudsen*, 35 F.3d 543, 549 (Fed. Cir. 1994). The "statute's language is clear; §300aa-13(a)(1) instructs that a petitioner must prove causation in fact by a 'preponderance of the evidence,' substantiated by medical records or medical opinion, as to each factor contained in section §300aa-11(c)(1)." *Id.* at 1279.

Moreover, while 42 USC §300aa–11(c)(1)(C)(ii)(II) requires a petitioner to demonstrate the injury "was caused by a vaccine", the standard is "proof by a simple preponderance, of 'more probable than not' causation," "explaining that 'to require identification and proof of specific biological mechanisms would be inconsistent with the purpose and nature of the vaccine compensation program'…. the purpose of the Vaccine Act's preponderance standard is to allow the finding of causation in a field bereft of complete and direct proof of how vaccines affect the human body." *Althen*, at 1280.

Althen observed that Congress "envisioned" that petitioners could freely use "circumstantial evidence" for the "preponderance standard"; that medical literature is not required, *Id.* at 1281, and that "close calls regarding causation are resolved in favor of

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[14] "Compensation shall be awarded under the Program to a petitioner if the special master or court *finds* on the record as a whole- that the petitioner has demonstrated by a *preponderance* (medical records or testimony) of the *evidence* the matters required 42U.S.C. §300aa-11(c)(1)".

injured claimants." *Id*. at 1280. A "medical theory causally connecting the vaccination and the injury" is also meets the preponderance standard.

The Federal Circuit failed to follow precedent in *Capizzano v. HHS*, 440 F. 3d 1317 (2006), because it sanctioned a special master to overlook the value of the unsworn, recorded statements of treating physicians contained in Petitioner's medical records, where the court stated, such opinions are "quite probative." *Capizzano,* at 1326. In fact, the court held, citing *Althen*, "medical records and medical opinion testimony are favored in vaccine cases. *Althen*, 418 F.3d at 1280." *Capizzano*, at 1326.

The Petition painstakingly cites Congress's causation standard as upheld by the Federal Court of Claims and Federal Circuit's precedents.

In short, Petitioner was not compensated, yet the VICP gave no statutory provision as to why it rejected preponderant evidence from medical records and experts.[15] The Federal Circuit denied petitioner equal access to the VICP's preponderant evidence standard on the stated basis of a behavioral handicap. (See Petition pp. 29-31, App. 13a), This is grounds for reversal because §300aa–13(a)(1)(A) was incorrectly applied. This conflicts with this Court's precedent in *Shalala v. Whitecotton*, where it interpreted §300aa–13(a)(1)(B).

[15] Encephalopathy was the only vaccine-related injury claimed. The special master found autism was not a claim and cited no evidence for a claim.

B. Federal Rules of Evidence Determine Errors Affect Substantial Rights

Under Rule 103, errors may "affect a substantial right of the party", denying procedural due process and equal access to rights under §300aa–13(a)(1)(A)-(B). Petitioner timely objected and stated the grounds to both lower courts regarding the special master's error under *Althen* that precluded Petitioner from receiving due compensation. These lower courts discriminated against Petitioner on the basis of autism. Petitioner is protected against such discrimination by §504 of the Rehabilitation Act and the 14th Amendment. The Federal Circuit overlooked these errors affecting Petitioner's substantial rights.

II. Preventing a Child with a Disability from Accessing Justice Causes Significant Harm, Contravening §504 of the Rehabilitation Act.

A. Congressional Intent and Legislative History of §504 as Determined by This Court

"The Rehabilitation Act of 1973 is a civil liberties law that forbids discrimination on the basis of disability by federally funded programs," [16] thus protecting disabled children from unfair treatment. Even after 1973, Congress's goals focused on

[16] Autism-Society Legal Resources: https://www.autism-society.org/living-with-autism/legal-resources/ (last viewed September 10, 2019).

improving the quality of life and outcomes for individuals with disabilities. In 1990, Congress passed the Americans with Disabilities Act (ADA) and reauthorized the All Handicapped Children Act (EHA) and the Individuals with Disabilities in Education Act (IDEA). Congress enacted the NCVIA in 1986 against this backdrop, to compensation infants and children in the rare instances when some would become disabled after receiving vaccinations. §300aa–13(a)(1)(A).

In *Alexander v. Choate*, this Court found that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act" was "[d]iscrimination against the handicapped…*perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect*."[17] Thus, Representative Vanik, introducing the predecessor to §504 in the House,[18] described the

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[17] *See Alexander,* Well-cataloged instances of invidious discrimination against the handicapped exist, *e.g.,* United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, Ch. 2 (1983); Wegner, The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under §504 of the Rehabilitation Act of 1973, 69 Cornell L.Rev. 401, 403, n. 2 (1984).

[18] Ibid., §504 ultimately passed as part of the Rehabilitation Act of 1973, the nondiscrimination principle codified in §504, was initially proposed as an amendment to Title VI. This proposal was first introduced by Representative Vanik in the House. See H.R. 14033, 92d Cong., 2d Sess., 118 Cong.Rec. 9712 (1972); H.R. 12154, 92d Cong., 1st Sess., 117 Cong.Rec. 45945 (1971). A companion measure was introduced in the Senate by Senators Humphrey and Percy, S. 3044, 92d Cong., 2d Sess., 118 Cong.Rec. 525-526 (1972). The principle underlying these bills was reshaped in the next Congress and inserted as §504. Senator Humphrey and Representative Vanik indicated that the intent of the original bill had been

treatment of the handicapped as one of the country's "shameful oversights." 117 Cong. Rec. 45974 (1971). Similarly, Senator Humphrey, who introduced a companion measure in the Senate, asserted "we can no longer tolerate the invisibility of the handicapped in America . . .." 118 Cong. Rec. 525-526 (1972). Senator Cranston, the Acting Chairman of the Subcommittee that drafted §504,[19] described the Act as a response to "previous societal neglect." 119 Cong. Rec. 5880, 5883 (1973). Senator. Percy, cosponsor, in describing the legislation leading to the 1973 Act stated that it was a national commitment to eliminate the "*glaring neglect*" of the handicapped. 118 Cong. Rec. 526 (1972).[20] Federal agencies have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus[21] and that "much of the conduct that Congress sought to alter in passing the

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carried forward into §504. See 119 Cong.Rec. 6145 (1973) (statement of Sen. Humphrey); 118 Cong.Rec. 32310 (1972); 119 Cong.Rec. 7114 (1973) (statement of Rep. Vanik). Given the lack of debate devoted to §504 in either the House or Senate when the Rehabilitation Act was passed in 1973, see R. Cappalli, Federal Grants and Cooperative Agencies § 20:03 (1982), the intent with which Congressman Vanik and Senator Humphrey crafted the predecessor to §504 is a primary signpost on the road toward interpreting the legislative history of §504.

[19] 118 Cong.Rec. 30680 (1972) (Sen. Randolph describing origins of §504).

[20] Senator Percy was both a cosponsor of the predecessor to §504 and Senate version of the Rehabilitation Act of 1973.

[21] United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 17 (1983); Accommodating the Handicapped: The Meaning of Discrimination Under §504 of the Rehabilitation Act, 55 N.Y.U.L.Rev. 881, 883 (1980).

Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." There, this court found that "Section 504 seeks to assure *evenhanded treatment* and the opportunity for handicapped individuals to participate in and *benefit from* programs receiving federal assistance. *Southeastern Community College v. Davis,* 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979)."

Now, because of §504, handicapped persons with autism are guaranteed an equal opportunity to participate in federal programs [22], ensured the opportunity for the merits of their claims to be impartially adjudicated, and to receive the same benefits as every citizen. Thus, irrelevant consideration of an autism handicap in the VICP is unlawful and discriminates against Petitioner, whose evidence of vaccine-induced encephalopathy was acknowledged, but who received unequal treatment compared to similarly situated individuals.

B. Through §504, Congress has clearly protected Petitioner from unfair

[22] See id. §§ 701, 794. Equal opportunity can be analyzed under (1) equal treatment - requires evaluation by objective rules and neutral standards, or (2) equal impact, which treats as presumptively discriminatory behavior or policy that has an adverse impact on the protected group. This Court has described §504 as mandating "evenhanded treatment," *Southeastern Community College v. Davis, Supra,* but also indicated a willingness to entertain claims arising under the section when an agency's or program's behavior has disparate effects on handicapped persons, see *Alexander v. Choate*, *Supra.*

treatment and discrimination on the basis of his autism in federal programs

The Federal Circuit's decision based on a handicap rather than injury invokes protection that provides benefits of compensation under §504., See, S.Rep. No. 93-1297, pp. 40-41, 56 (1974)[23].

The Health Resources and Services Administration (HRSA) [within Health and Human Services (HHS)], the Healthcare Systems Bureau, Division of Injury Compensation Programs in conjunction with the federal courts and DOJ administer the VICP with specific regulations prohibiting discrimination and enforcing §504.

In reaching its erroneous decision in *Rogero*, the Federal Circuit relied not upon §300aa–13(a)(1)(B), as interpreted by this court in *Shalala v. Whitecotton*, but arbitrarily on an irrelevant handicap. This basis contravenes §504 and the Federal Rules of Evidence.

C. The Federal Rules of Evidence Determine that Autism is Irrelevant in *Rogero*

Federal Rules of Evidence 401-403 indicate that Petitioner's autism disability that he sustained after his vaccine-induced injury is *irrelevant evidence* because autism has no "consequence in determining the action" of the claim of encephalopathy from DTaP for causation analysis under § 300aa–13(a)(1)(A)-(B), nor does it make the fact of his diagnosed encephalopathy "less probable." HHS even conceded that Petitioner's autism was *later* and

[23] §504 is similar to the antidiscrimination language of the Civil Rights Act of 1964, §601

subsequent to his encephalopathy and affirmed that autism was a sequela of encephalopathy, meaning it was not the injury in *Rogero* nor the cause of his encephalopathy. See Petition p. 36 at (2).

Therefore, Petitioner's autism is *"irrelevant evidence* [and] *is not admissible*" under Rule 402. For the sake of argument, *if* it were relevant, under Rule 403, an autism disability may be excluded for "unfair prejudice, confusing the issues" because the Federal Court of Claims found that there was no claim of autism (Petition p. 36 at (1)).

In short, the Federal Circuit's "basis" to affirm the decision below was because Petitioner was "definitely diagnosed with autism." App. 12a. This was a legally unsupported decision based on irrelevant evidence under Rule 401 and at odds with this Court's interpretation of §300aa–13(a)(1)(B) in *Shalala*. Thus the Federal Circuit's decision on its face violates §504 of the Rehabilitation Act prohibiting discrimination and should be reversed.

> **SEC. 504** "No *otherwise qualified handicapped individual* [i.e. with irrelevant behavioral autism] in the United States, as defined in §7(20)[24], of this title, shall, solely by reason of his handicap,[25] be excluded from the

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[24] "[I]ndividual with a disability" means any individual who—(i)has a physical or mental impairment". 45 C.F.R. **§§** 84.3, 85.3, *Individual with Handicaps* This Court stated autism is a disability by statute in *Endrew F. v. Douglas County School Dist. RE- 1*, No. 15-827, 580 U.S.S.C. (2017).

[25] 29 U.S.C. §794 (1982). This Court interpreted this as "mere possession of a handicap". *Southeastern Community College v. Davis*, *Supra.*

> participation in, be denied the benefits of [i.e. compensation for medical encephalopathy], or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program [VICP] or activity conducted by any Executive agency[26] …". 29 U.S.C. §794 (1982). & 45 CFR §85.21[27]

This Court interpreted "*otherwise qualified [handicapped] person*" as "one who is able to meet all of a program's requirements *in spite of* his handicap," *Southeastern Community College v. Davis, supra*, coupled with implicit "evenhanded treatment," see *id.* at 410-12. The decision below demonstrates that Petitioner proved the "requirements in spite of his handicap." (Petition pp. 19-23, 34-37).

D. The Decisions Below Constitute Discrimination Under §504

This Court, in *Alexander v. Choate, supra.* stated that a §504 violation "reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped", and "[o]n that assumption, we must then determine whether the disparate effect" of the Petition "is the sort of disparate impact that federal law might recognize" and "to determine which disparate impacts §504 might make actionable, the proper starting point is *Southeastern*

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[26] Agency means the Department of Health and Human Services or any component part that conducts a program, 45 CFR §85.3, i.e. HRSA conducting VICP.

[27] Or agency receives federal assistance, under 45 CFR §84.4

Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979)" [in defining the scope of §504 in altering a program]. We point out in *Rogero*, unlike *Davis*, alteration is unnecessary. Petitioner seeks only the even-handed application of the preponderant evidence standard.

> **45 CFR §85.21(b)(1)(i) was violated**. This regulation means that a federal program may not deny a *qualified individual with handicaps* the opportunity to participate in or *benefit from* the aid, *benefit*, or *service* available to others.
>
> **Also** CFR §**85.21(b)(1)(ii),(iii),(iv)** indicates that a federal program may not "afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, … that is not equal to that afforded others" nor "Provide … benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others" or "(iv) Provide different … benefits, … to individuals with handicaps *or to any class or individuals with handicaps* than is provided to others …"

Petitioner has shown 94 other similarly situated cases of compensated brain injury where the petitioner also had autism or autism symptoms. Petition at pp. 15-16. The Federal Circuit's affirmance, contrary to law, may elevate the burden of proof to future Petitioners in such a way as to deny legal compensation to many deserving children. Petition at 29-34.

> **CFR "§85.21(b)(1)(vi)** This regulation means that a federal program may not "Otherwise limit a qualified individual with handicaps in the enjoyment of any *right*, privilege … opportunity enjoyed by others receiving the … benefit, or service" and that "**(3)** The agency may not, directly or through … other arrangements, *utilize criteria or methods of administration* the purpose or effect of which would …**§85.21(b)(3)(vi)] (i)**Subject qualified individuals with handicaps to discrimination on the basis of handicap; or **(ii)** Defeat or substantially *impair accomplishment of the objectives of a program*."

In conclusion, Congress's intent in §504 of the Rehabilitation Act means that Petitioner is a *qualified individual with handicaps* as defined by CFR §§85.3, 84.21(a). [28] The Federal Circuit's decision disparately affects him based on his handicap, costing him his rehabilitation and care for vaccine-induced encephalopathy, merely because he also has autism. *Animus is* not *required to establish a violation of* §504 *and its implementing regulations.* Petitioner, a handicapped individual, has been discriminated against in the federal VICP on basis of an irrelevant, behavior handicap. Thus, the Federal Circuit's denial of compensation is erroneous and unlawful under §504, constituting a *prima facie* case of disability discrimination.

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[28] Having a "physical or mental impairment that substantially limits one or more major life activities" qualifies one protection against "prohibition against discrimination" on the basis of handicap in VICP.

III. The Federal Circuit's Decision Contravenes Congress's Intent

In *Rogero v. Azar*, we respectfully request that the Court grant review under the plain language of §504 of the Rehabilitation Act and the Court's precedents.

The Federal Circuit's unconstitutional decision on the basis of disability discrimination, even if "*not of invidious animus, but rather of …benign neglect*", will continue to affect children and adults with autism in all federal programs if *Rogero* is not reversed. This Court has the opportunity to safeguard the constitutional rights of millions of individuals with autism to equal access in federal programs consistent with Section 504 of the Rehabilitation Act.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Autism Society of Pittsburg, Since its founding in 1966, this Society has made a difference in the lives of families with autism. Many of the programs and initiatives started in Pittsburgh have inspired the establishment of similar endeavors. Autism Society prepares and delivers testimony on all autism-related topics, including issues that are being litigated or considered for legislative action. We advocate for the rights of those with autism and the rights of parents and families to obtain appropriate services for their family member with autism.