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

PETITION FOR REHEARING

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November 8, 2019

QUESTION PRESENTED

The judicial power of the United States is vested in this Court's supervisory power to enforce constitutional and statutory protections when a disabled child's fundamental and civil rights are violated in a federal program in federal courts by governement counsel if litigation occurred as to willfully misrepresent relevant material evidence filed by The Secretary or her Counsel, or engage in conduct in order to deprive a child the right of equal protection of the laws of 42 U.S.C. §300aa–14(b)(3)(A), 42 C.F.R. § 100.3(d)(3) and 42 U.S.C. § 300aa –13(a)(1)(A)-(B), in The National Childhood Vaccine Injury Act (NCVIA) in the National Vaccine Injury Program, (VICP) 42 U.S.C. §§ 300aa-10 *et seq.* rights protected by the 14th Amendment and § 504 of The Rehabilitation Act, and enforceable under Title 18 U.S.C. Section 242.

1. Whether the Secretary's Counsel's conduct caused the Federal Circuit not to perform in the usual manner its impartial task of adjudging *Rogero.*

PARTIES TO THE PROCEEDING

Petitioners (appellants) are W.R. III, a minor child, by and through his parents and next friends, Rev. Heather D. Rogero and Rev. Dr. Walter A. Rogero II.

Respondent (appellee) is Alex A. Azar II, in his official capacity as Secretary of Health and Human Services[1]

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[1] Attorney's whose names appear representing this case are Noel Francisco, Solicitor General, Voris Johnson, *Senior Trial Attorney*, Catherine Reeves, *Deputy Director*, C. Salvatore D'Alessio, *Acting Director,* Chad A. Readler, *Acting Assistant Attorney General*, Joseph H. Hunt, *Assistant Attorney General*, Benjamin Mizer, Principal Deputy Assistant Attorney General, Gordon Shemin, *Trial Attorney*

IN THE SUPREME COURT FOR THE UNITED STATES

No.19-5657

W.R. III, A MINOR,
BY AND THROUGH HIS PARENTS AND NEXT FRIENDS,
HEATHER ROGERO and WALTER ROGERO II,
Petitioner - Appellant,
vs.

ALEX AZAR II,
SECY. OF HEALTH & HUMAN SERVICES
Respondent- Appellee

CERTIFICATE OF INTEREST NOT APPLICABLE

NOW COMES BEFORE this Honorable Court, pursuant to Rule 29.6, attorney of record is Pro Se for appellant, HEATHER ROGERO and WALTER ROGERO II, Parents of W.R. III, a minor and certificate of interest is not required for Pro Se Appellants.

The represented party and real party are HEATHER ROGERO and WALTER ROGERO II, Parents of W.R. III, a minor.

The corporate disclosure statement required by Rule 26.1 does not apply as there are no corporations involved in this appeal.

The appellants are the attorney of record.

/s/ Heather D. Rogero
Heather D. Rogero
/s/ Walter A. Rogero II
Walter A. Rogero II

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PETITION FOR REHEARING

Pursuant to Rule 44.2 of this Court, W.R. III, a minor, by and through his parents, Heather D. and Walter A. Rogero II; Petitioners, respectfully and timely file the now disabled child's right to petition for rehearing.

GROUNDS FOR GRANTING CERTIORARI

Substantial matters on Constitutional and statutory grounds not previously presented demonstrate in clear fact-specific evidence why the Judgement below is premised on material misrepresentation of relevant fact and law that was knowingly filed to Federal Circuit by The Secretary's Counsel, involving more than solely defrauding the disabled child of this case of his statutorily determined significant monetary loss for eligible life care, rehabilitation, diminished earning capacity, pain and suffering... § 300aa-15(a) as this Court noted in *Bruesewitz v. Wyeth* (2011), but interfering with the judicial system's ability impartially to adjudicate, resulting in willing litigation that deprived a disabled child his right of equal justice under law of the 14th Amendment, not motivated by animus, but by *benign neglect* violating The Rehabilitation Act, § 504, 29 U.S.C. 794, and Title 18, U.S.C. § 242.

Intervening circumstances include The Secretary's concession of discrimination in treatment and her Counsels misconduct and public concession of correction of publishing a fraudulent claim of *Rogero* to 3rd parties and to the public while in *pending* litigation on Motion for Review and Federal Circuit, but publicly corrected days prior to Federal Circuit's Decision, demonstrating DOJ's litigation on Appeal was both fraudulent and discriminatory, contrary to law and relevant facts demonstrating substantial prejudicial effect and defrauding a disabled child "otherwise qualified" eligible for compensation as clearly defined by the master's relevant verifiable adjudicative facts of § 300aa–13(a)(1)(A), but was discriminated on a subsequent irrelevant handicap[1], defined as legally-irrelevant by The Secretary's opine as agreed subsequent sequelae. Moreover, The Secretary's concession of this case filing of every factor of the child's preponderance of his medical records and medical opine quoting verbatim his medical records on the merits of his claim, has never been reviewed due compensation. He was denied merely because he also had a subsequent autism.

[1] See previous Petition and Amicus demonstrating the violations as defined by The National Childhood Vaccine Injury Act, a civil case, *that became* a civil rights when the Decisions violated §504 of The Rehabilitation Act in a federal program, as defined by this Court's precedents and intent of Congress in H.R. that do not include DOJ's misconduct demonstrated, *infra*.

14th Amendment protection of the child's constitutional right to "equal justice under the law" *Brown v. Board of Education*, 347 U.S. 483 (1954) and liberty to a decision based on the preponderance standard of proof for his medical theory, 42 U.S.C. §300aa–11(c)(1)(C)(II)(ii), in The National Vaccine Injury Compensation Program, ("VICP"), 42 U.S.C. §§ 300aa-10 *et seq.* F.R.C.P. Rules 11, 26(g) relied on for fraud outside Rule 60(b) that provides "*Grounds for Relief from a Final Judgment, Order, or Proceeding* for [substantive] reasons not previously presented of (2) newly discovered evidence ... (3) fraud misrepresentation, or misconduct by an opposing party: (4) the judgment is void; (6) any other reason that justifies relief. 60(d)(3) *Other Powers to Grant Relief.* ... a court's power to set aside a judgment for fraud on the court. "To constitute fraud on the court, the alleged misconduct must "harm the integrity of the judicial process" *Alexander v. Robertson*, 882 F. 2d 421, 424 (9th Cir. 1989). Defined in *Bulloch v. Pearson*, No. 84-1830, (10th Cir, 1985), defines a violation of due process is when the "government defendants' actions and *omissions* constituted fraud on the court;" by (1) "The defendants knew or should have known that their actions, omissions and manipulations constituted fraud upon the court" (2) "The defendants knew or should have known that the commission of fraud upon the court was wrongful and unlawful." And (3) "The defendants knew or should have known that the commission of fraud upon the court would harm the plaintiffs and prevent them from obtaining fair trials and due process of law." This Court stated, "Tampering with the administration of justice ... involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public ...". *Hazel-Atlas Glass Co. v. Hartford Empire Co.* 322 U.S. 238 (1944) at 246.

SUMMARY OF ARGUMENT

Rogero warrants rehearing because the judicial machinery has itself been tainted. A disabled child's civil and constitutional rights were violated in The National Childhood Vaccine Injury Compensation program, by officers of the court have made material misrepresentations of fact and law to the court, rending the Judgement void. The case has not been reviewed and has been in the program since 2011 awaiting justice.

Newly discovered, The Secretary of HHS conceded on December 21, 2018 the child was discriminated against on the basis of his subsequent to injury autism, when *Rogero* had no claim of autism, opined in agreement by The Secretary's expert and filed by DOJ post-hearing and masters facts, but "treated exactly the same as ... claimants alleging an ASD ... was caused by vaccination" (Doc. 57 at 13) and unlike 94 other similarly situated compensated cased of children with vaccine-related encephalopathy injury and also causally unrelated to vaccination autism or autism symptoms, meaning a Section 504 violation happened in federal court by her officers.

The Secretary revealed her "summarizing the [relevant] evidence" post-hearing, November 2016, filed to the Court the child's preponderance standard medical theory on the merits of his encephalopathy from DTaP, and every factor required to be eligible for

compensation. And designated that his encephalopathy injury caused his autism, as sequelae, defined by 42 CFR §100.3(d)(3). The master's also *found* the facts that also determined him for eligible for compensation for causation-in-fact encephalopathy injury with focal neurological motor injury from DTaP, as defined by law awaiting adjudication.

The Secretary revealed the fraudulent "evidence" defining why the child has been denied impartial due process; one of the Secretary's experts opined from the medical records of his encephalopathy being his motor injury and his autism being later, then under oath fraudulently declared autism as encephalopathy in a VICP proceeding, contrary to law, the Court, and NCVIA's definition of encephalopathy and claimed he was doing so. Fraudulently, the master made the illegitimate definition his basis, to deny the child, and denied the child his constitutional rights on the basis he also had autism disability, never claimed as injury, discriminating. On Appeal, DOJ Attorneys argued this fraud in harm.

Intervening Circumstances are the DOJ Civil Division fraudulently published to 3rd parties and the public the child had a claim of autism, contrary to the evidence and both parties during *pending* litigation. Just *before* the Federal Circuit Decision, DOJ publicly conceded correction, but not yet to the Federal Circuit.

The unreviewed Decision below has its basis in violating inalienable and civil rights and civil liberties of a disabled child which have caused irreparable harm not only to the child but to the integrity of the federal judiciary warranting this Court's oversight.

Fact-specific proof to the court and public show the child proved preponderance of his causation in fact encephalopathy from DTaP claim, but denied due process because he also had a subsequent autism he didn't claim, was discriminated, and both Section 504 of The Rehabilitation Act and Title 18, U.S.C., Section 242 were violated.

Due to the master and Secretary finding and filing every required fact from his preponderance, review for due compensation is appropriate and reparations for the extreme hardship of an extra years of litigating against fraud are warranted. The Federal Circuit's public Decision with unequivocal discrimination on the basis of autism due to misconduct in litigating on Appeal warrant this Court's review, because fundamental rights of a disabled child have been recklessly disregarded requiring the 14th Amendment's protection to resolve the case. W.R. III, and his family, respectfully pray this Court grants review so that "justice may roll on like a river" (Amos 5:24) to a very special boy who was vaccine-injured with motor injury to the point of never being able to function independently, distinguished from his

autism of no criterion of motor injury, as evidenced in the record, the toll of this case has been duly burdensome. Petitioners have willing Counsel contingent on granting review.

REASONS FOR GRANTING REHEARING

I. The Secretary's Response Conceded Petitioner was Discriminated in The National Childhood Vaccine Injury Program, Violating Section 504 of The Rehabilitation Act, Showing the Evidence

Applicable Rule is Anti-discrimination enforcement, due to disability discrimination defined by this Court in *Alexander v. Choate,* 469 U.S. 287, 105 S. Ct. 712 (1985) and *Southeastern Community College v. Davis,* 442 U.S. 397, 99 S. Ct. 2361, 60 L.Ed.2d 980 (1979), discrimination, "*not of invidious animus, but rather of ...benign neglect*", Implementing regulation for DOJ in National Childhood Vaccine Injury Program (VICP), is Subpart G of 28 C.F.R. Part 42.

> "No otherwise qualified individual with a disability in the United States, as defined in [29 U.S.C. 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]"

Applicable Rule of Congresses intent and this Court's interpretation of Section 504 is laid out in the Amicus Brief, likewise, unequal treatment to 94 cases in Petitioner's Previous Petition at 15-17.

Substantially, and recently discovered, in the Secretary's Response on December 21, 2018, ordered from the Federal Circuit Panel and *En Banc* (Doc. No. 57 at 4) (1) revealed The Secretary's appropriate "*evidence*" for *Rogero,* filed "*post-hearing*" found at (ECF 177 at 21, 10), where the Secretary filed to Federal Court of Claims, from W.R.'s evidence that he had shown preponderance of proof of every factor as to be determined eligible for compensation for his DTaP causal to his encephalopathy injury, causation in fact, under 42 U.S.C. §300aa–11(c)(1)(C)(II)(ii) specifically indicating by law, his encephalopathy injury distinguished from his autism, and that his subsequent autism was legally caused by his encephalopathy, as sequelae, as both party's experts opined. (2) It also reveals (Doc. No. 57 at 12) that W.R. was discriminated on the basis of his legally irrelevant autism handicap in which he did not claim, because vaccines do not cause autism, found by the master in the Decision, and (3) that Federal Circuit's "basis" on autism is a basis of fraud and discrimination, showing "evidence" that Federal Circuit overlooked, when HHS/DOJ litigated the child be deprived his right to his preponderance standard medical theory. Thus, The Federal Circuit, has both a legal error as defined by *Althen* and The Vaccine Act

for requiring a heightened legal burden of scientific proof of an ingredient of aluminum *mechanism*[2] inside the DTaP, on scientific proof standard.

A. The Secretary's "Evidence" Revealed to Federal Circuit, Demonstrating Petitioner Showed a Preponderance of the Evidence, Eligible for Compensation as Defined by VICP Causation Standard of Proof under 42 U.S.C. § 300aa-11(c)(1)(C)(ii)(II).

Vaccine Rules of the United States Court of Federal Claims, RCFC, Appx. B, Vaccine Rules mandates special masters on evidence, "documents, affidavits, or oral testimony", VR 8(b)(2): VR 8(b)(1) "the special master must consider *all relevant* and *reliable* evidence governed by principles of fundamental *fairness* to both parties" and VR 3(b)(1) "the special master is responsible for ...including taking such evidence as may be *appropriate*".

This proof reveals it was the Special Master that discriminated W.R. III *on the basis of his autism*. The Secretary's relevant evidence of this case in November 2016, acknowledges by documenting proof that W.R. *showed* by *preponderance of the evidence*, that [he] received a [DTaP] by the Act and..." "suffered an [encephalopathy listed] on the Table with an *onset not occurring in the requisite time frame*," under authorizing statute 42 U.S.C. §300aa–11(c)(1)(C)(II)(ii) showing *every* required preponderance standard factor of factor 42 U.S.C. § 300aa-11(c)(1), The Secretary citing relevant medical records and *quoting verbatim* the *relevant contemporaneous* records *by* Expert Treating MD, *infra.*, warranting review in the interest of justice and in order for the DOJ to fulfill its mission to "ensure fair and impartial administration of justice for all Americans" in the Vaccine Injury Compensation Program that DOJ ensures "Eligible claimants can recover compensation for vaccine injury-related medical and rehabilitative expenses, for pain and suffering, and lost earnings."[3]

The Secretary files the appropriate causation standard for the evidence in that Response "to establish entitlement for compensation" footnotes are added where Dr.

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[2] *Althen* holds for a special master to require proof of a mechanism of aluminum as an ingredient in a DTaP is held as "inconsistent with purpose and nature of the Vaccine Program", quoting "*Knudsen v. HHS.*, 35 F.3d 543,549 (Fed.Cir.1994) (explaining that "to require identification and proof of specific biological mechanisms would be inconsistent with the purpose and nature of the vaccine compensation program")." And Supreme Court holds "[I]n a field bereft of complete and direct proof of how vaccines affect the human body," a paucity of medical literature supporting a particular theory of **causation cannot serve as a bar to recovery.** see Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593 (1993)" (citing *Andreu*).

[3] https://www.justice.gov/civil/vicp (last reviewed November 6, 2019)

Megson is quoting verbatim from the medical records, and The Secretary's Dr. Wizniter's concession of encephalophic regression from his report.

"[T]o establish entitlement to compensation under The Act, a claimant must show, by *preponderance of the evidence*, that the injured person received a vaccine covered by the Act and..." "suffered an injury listed on the Table with an *onset not occurring in the requisite time frame.*"[4] p. 2. "[P]reponderance of the evidence" is "(either through medical records *or* expert medical opinion)" showing "one or more vaccinations covered by the Act and administered to W.R. caused-in-fact his neurological [injury]" 42 U.S.C. §300aa–11(c)(1)(C)(II)(ii), 300aa–13(a)(1)(A), (Doc. No 57 at 3)

Evidence by medical opine *or* medical records, as defined by *Althen*, W.R. III had to "show by *preponderant evidence* that the vaccination[s] brought about [W.R.'s] injury by providing: (1) a medical theory causally connecting the *vaccination*[s] and the injury; (2) a logical sequence of cause and effect showing the vaccination[s] w[ere] the reason for the injury; and (3) a showing of a proximate temporal relationship between the vaccination[s] and the injury." (Doc. No 57 at 3-4)

The Secretary's relevant "evidence" includes every fact proven, that HHS/DOJ knowingly misrepresented and mischaracterized to Federal Circuit, even after arguing it again. Significantly, The Secretary also filed W.R.'s preponderance of the evidence that W.R.'s autism was *not* a claim in *Rogero* and *was caused* by his encephalopathy injury when DOJ filed it as *sequela*, as defined by the Act, like The Secretary's Expert Dr. Cetaruk, MD agreed in opine.

THE SECRETARY'S MEDICAL THEORY OF ROGERO 42 U.S.C. §300aa–11(c)(1)(C)(II)(ii)

Post Hearing "Evidence", DOJ filed preponderance of *evidence* for all 3 *Althen* Prongs (1) medical opine of injury and vaccine, (2) medical opine quoting verbatim the medical records of onset proof from medical records, and (3) timing from his expert treating MD, Dr. Megson's report and testimony quoting the contemporaneous records, (ECF 177 at 21, 10).

> **The Secretary's filing: *"In this case, petitioner's overarching theory*** ... that W.R. **suffered an encephalopathy that was *caused-in-fact*** by the vaccines [Diphtheria, Tetanus, and Pertusis] he received." "Dr. Megson contended that W.R. suffered

[4] See 42 U.S.C. § §300aa–11(c)(1)(C)(II)(ii), 300aa–14; C.F.R. § 100.3 ("table of vaccines, the injuries, ... resulting from the administration of such vaccines").

[encephalophic] regression[5] and **encephalopathy** including, *inter alia*, loss[6] of eye contact, awareness of his surroundings, pointing, waving, and saying mama/dada[7] "ongoing" in the month after the **May 4, 2010 DTaP vaccine.** Pet. Ex. 104 at 10; see also Tr. at 22-23." And acute encephalopathy criteria, ECF 177 at 6, from medical record of "unresponsive episodes" after DTaP at hospital, knowingly conceding all 3 *Althen* Prongs of W.R. "... and that his neurodevelopmental[8] problems [autism] are *sequelae* [CFR 42 §100.3(d)(3)] meaning autism was later than encephalopathy, caused by an injury in the table] of that encephalopathy" ECF 177 at 21, 10).

HHS *Althen* Prong One Medical Theory (Injury and Vaccine in the Table): Dr. Megson contended W.R. suffered an encephalopathy that was caused-in-fact by May 4, 2010 DTaP, §300aa-11(c)(1)(C)(ii)(II)). (ECF 177 at 21, 10).

HHS *Althen* Prong Two – (DTaP Cause and Effect) Dr. Megson contended that W.R. suffered [encephalophic] regression and encephalopathy including, *inter alia*, loss of eye contact, awareness of his surroundings, pointing, waving, and saying mama/dada"

a. **The Secretary also filed preponderance of acute encephalopathy onset present on June 8 from his contemporaneous medical records, ECF 177,** as defined by §100.3(c)(2)(i)(B), #(2) clarified at §100.3(d)(4)(i) and (iii), criteria p. 6, from medical record as "Loss of awareness of his surroundings" Absent Responses to environment or external stimuli "On August 18, 2010 W.R" before his 2nd birthday, was seen at "Georgetown University Hospital" due to "unresponsive episodes" after 4th DTaP, at 6, Neurology record documents history of "regression after immunization" at 10 and 6, "had been pointing and waving" but "after receiving DPT vaccination in May 2010 that [W.R.] stopped making these gestures and that he had stopped using words" at 7, "in April of

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[5] W.R.'s neurologist contemporaneously documented on exam "lost pointing and waving after shot 5/10" [DTaP] "vaccine-injured" with focal neurological signs of encephalopathy found on exam "CN7 [cranial nerve 7] facial symmetry decreased NL fold on right", little stares", "regression" "pointing back" "low tone", "toe walks" "needs [labs: mitochondrial testing] also noted additionally psychiatric "autism" [ICD 299] box checked from behavior criterion (Pet. Ex. 9 at 153-157). Dr. Megson also cited, Tr. 38, his pediatrician documented in 2010, "Vaccines; did not have MMR, positive regression after DTaP" Ex. 6 at 53-54.

[6] Eye contact was listed as a strength on exam, smiley, giggling in response to activities, sustained attention and interaction *before* DTaP at 16.5 months, Ex. 34 at 4. And Ex. 34 at 4, 44, 68, Tr. 527-528 saying, mama, dada, and book, independently pointing and waving Pet. ECF 183 at 1-6, Ex. 34 at 45.

[7] Dr. Megson quoted contemporaneous medical records from *June 8, 2010* for her opine constitutes encephalopathy as defined by §100.3(c)(2)(i)(B), #(2) at §100.3(d)(4)(i) and (iii): On June 8, 15, 2010, first exam by Dr. Panitz, MD, Ex. 6 at 3-4 "it documents the loss of skills that were documented previously that he had" Tr. 73, on exam: "without eye contact", "not aware of environment" And Encephalopathy as defined by focal signs *§ 300aa–14(b)(3)(A):* "hypotonic gait?", "unusual guttural vocalizations", no specific words, word approximations, or signs, "does not point or use other gestures". W.R.'s *history* includes babbling but unable on exam, making guttural sounds, [A loss of babbling with inflection in record before DTaP in medical record in April saying, mama, dada, and book words, and independently pointing and waving in records Ex. 34 at 45 see Pleading ECF 183 at 1-6].

[8] *Precedent* Endrew F. v. Douglas County School Dist. RE-1, No. 15-827, 580 U.S.S.C. (2017), (798 F. 3d 1329, (----)) "Autism is a neurodevelopmental disorder"

2011, and since then he had no further regressions ...his only regressions in the past have been associated with vaccines" at 8.

HHS *Althen* Prong Three – Timing "ongoing" in the month after the May 4, 2010 DTaP vaccine

a. The Secretary filed requisite timing preponderance of medical opine, ECF 177 at 21, 10 "Dr. Megson contended that W.R. suffered a ... regression *and* encephalopathy [**diagnosed in contemporaneous medical records *and* attributed to his May 2010 DTaP by 2 MD's in 2010]...["ongoing"'] *in the month after the May 4, 2010 DTaP* vaccine. Pet. Ex. 104 at 10; see also Tr. at 22-23."

b. **The Secretary's expert, Dr. Wiznitzer[9], also concedes W.R.'s preponderance proof of W.R.'s *encephalophic regression* from his own contemporaneous medical records, *2 years before* hearing,** documenting from medical records, W.R. stopped pointing after May 4, 2010 DTaP by June 8, 2010 when filing report of by in documenting 12 months of loss of skills and loss of pointing by July 8, 2010: (at 16.5 months before DTaP, W.R.'s "social emotional skills" were up to "IS-month level" and on July 8, 20I0, at 21 months, "social/emotional development had a six-month equivalent"; Resp. Ex. A, at 10, last paragraph top. 12 first paragraph), **See* ECF 183 at 4-6, after 4th DTaP in his report. HHS conceded that W.R. lost ability to pointing by June 8, 2010 as documented by his 2 MD's, (Res. Ex. *A* at 10, last paragraph "was pointing" on March 17 [also spontaneously pointing on March 17, April 9 & 14 Records before May DTaP] top. 4, last sentence after DTaP exam on June 8 after May DTaP, "did not point or use other gestures" and neurologist documented "He stopped pointing after DTaP vaccination in May 2010" Resp. Ex. A, at 6, second paragraph).

This means, DOJ Attorney on Appeal knowingly filed misrepresentation to the Court absent fact and law, a frivolous argument proven in the Secretary's own "evidence" "The Secretary's position in this case has always been that W.R. suffers from and ASD, not an "encephalopathy" (Doc. 29 at 21).

Model Rules of Professional Conduct (ABA) Rule 3.3 "[a] **lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement** of material fact or law previously made to the tribunal by the lawyer."

ADDITIONAL REQUIRED FACTORS REQUIRED FROM PREPONDERANCE

Materially, The Secretary's Counsel knew *and* also filed conceding the remainder of the factors quoting his own preponderance of the evidence under § 300aa–11(c)(1) for compensation of his DTaP causing his encephalopathy, conceding him eligible for §300aa-

[9] Dr. Wiznitzer was silent on W.R.'s neurology exam diagnosed in 2010; "Cranial Nerve 7 facial asymmetry/strength mild NL fold on right" Ex. 9 at 156 explained by Dr. Megson, with pictures before and after are in Affidavit with dates on pictures, Ex. 276 to compare before and after, but opined his motor issue "is linked to his encephalopathy" Tr. 820, did not deny his oromotor speech articulation disorder was not his encephalopathy, Tr. 821-822.

11(c)(1)(C)(ii)(II) compensation. Conceeds §300aa–11(c)(1)(B)(I), that W.R. *received the alleged DTaP from medical records and opine.*

> DOJ FILED ECF 177 at 21 "Dr. Megson contended that W.R. suffered ... encephalopathy ... after the May 4, 2010 DTaP vaccine. Pet. Ex. 104 at 10; see also Tr. at 22-23." And documented W.R. "had a physical on May 4, 2010 Pet. Ex. 5 at 5" ECF 177 at 6 [Ex. 5 at 5 is Dr. Steven's in Arlington, VA receiving the DTaP].

Conceeds §300aa-11(c)(1)(D)(i), when filing medical record evidence W.R. suffered permanent encephalopathy injury more than 6 months.

a. DOJ filed from neurology records at ECF 177 at 9, 3 years after the 2010 injury, that "in 2013" "W.R. had a diagnosis of chronic encephalopathy manifested by [motor] speech [articulation] disorder; oral motor dyspraxia, hypotonia, and motor delay" [focal neurological deficit signs of encephalopathy injury as defined by NCVIA and NIH[10], differentiated from autism diagnostic criterion, like defined by both parties experts in hearing]
b. The Secretary's expert, Dr. Cetaruk, MD conceeds the child continued to suffer encephalopathy beyond 6 months, required for compensation, agreeing with his neurologists diagnoses of focal neurological signs of chronic encephalopathy manifests, none of which are autism diagnostic criterion nor his autism, of "severe oromotor dyspraxia" ICD 784.69, "motor planning deficits", and "hypotonia" ICD 781.34, were his encephalopathy, and opining his autism ICD 299.0 was "subsequent", and opined agreement as a "sequela" §100.3(d)(3), of encephalopathy injury, Tr. 768-769, meaning causally unrelated to vaccines, and why it was not claimed an injury.

The Secretary of HHS conceded *Rogero* merits and preponderance, of May 4, 2010 DTaP causal to his vaccine-related encephalopathy as diagnosed, documented by treating MD's, and as defined by[11] §300aa-33(5), §300aa-l4(b)(3)(A), §100.3(c)(2)(i)(B),(2) at §100.3(d)(4)(i) and (iii), under §300aa-l l(c)(1)(C)(ii)(II). And the Secretary's expert conceded encephalophic regression onset had occurred in contemporaneous medical records *by* June 8, 2010, like the child's expert treating Dr. Megson, MD opined "ongoing in the month after the DTaP" under §300aa-11(c)(1)(C)(ii)(II) timing in November 2016. Likewise, the special master on the *true* merits and preponderance standard in VICP as defined by §300aa–13(a)(1)(A), but denied impartial due process on the basis of subsequent autism, treatment unlike 94 other similar situated cases, *See*, previous Petition at 15-17, 18-23.

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[10] NIH, U.S. National Library of Medicine: https://medlineplus.gov/ency/article/002267.htm and https://medlineplus.gov/ency/article/003191.htm

[11] See Appendix on Docket.

A. The Secretary Correctly Filed There was No Claim of Autism, for it is Sequelae of his Encephalopathy in Fact and Law as Opined by Both Parties' Experts and Found by the Master's Decision

"***Sequela*** means a condition or event which was actually caused by a condition listed in the Vaccine Injury Table", 42 CFR §100.3(d)(3).

The master found quoting a former Chief Special Master in context, App. 100a, that "[T]his case is about encephalopathy that was caused by the vaccinations (*combined DTaP: Diphtheria, Tetanus, and Pertusis*) *** [in which] the ***sequelae*** [of the encephalopathy] may include autism or autistic- like symptoms." (*E.g.*, Pet. Post-Hearing Brief, filed 8-19-16, pp. 1-2.)". 42 CFR §100.3(d)(3) legally defines sequelae as caused by an injury in the table.

All three HHS experts signified W.R.'s encephalopathy was not his autism. Dr. Cetaruk, MD opined *from preponderance medical evidence* "in this case," "in terms of *differentiating between W.R.'s autism and encephalopathy*" that W.R.'s "symptoms were encompassed by the diagnosis of encephalopathy with a *subsequent* autism" opining affirmatively "autism can be *sequelae* of encephalopathy" Tr. 768-769. as did Dr. Johnson, of encephalopathy leading to an outcome of autism. Significantly, HHS's Dr. Wiznitzer opined from *preponderance evidence, the medical records* that W.R.'s motor injury (i.e. motor diagnoses of cranial nerve 7 injury in his face and tongue impacting articulation, walking) ***is*** encephalopathy with later autism, Tr. 820. and omitted any opine on his causal DTaP, differentiating both diagnoses from the medical record. (See Opening FC Brief at 21)

Petitioner's experts Dr. Mikovits, "ASD is not an infrequent sequela of encephalopathy" Ex. 236 at 5, and Dr. Ratajczak, that W.R.'s autism in terms of his encephalopathy is one of the sequelae, Tr 628.

DOJ Attorneys also filed The Secretary preponderance found post-hearing, demonstrating there is no legal basis for autism in *Rogero,* as sequela, from preponderance "evidence", *supra.* and that encephalopathy injury caused his neurodevelopmental autism as *sequelae.* DOJ filing: "that W.R. suffered an encephalopathy ... caused-in-fact by the vaccines [Diphtheria, Tetanus, and Pertusis] he received **and** that his neurodevelopmental[12] problems [autism] are **sequelae** [CFR 42 §100.3(d)(3)] meaning autism was later than encephalopathy, caused by an injury in the table] of that encephalopathy" ECF 177 at 21, 10).

B. Overlooked by Federal Circuit is there Was no Legal Basis for Autism, proof that DOJ Mischaracterized the Secretary's "Evidence" that DOJ pointed out in the Response by The Secretary.

Overlooked on Petition for Rehearing, (Doc. No. 54), Petitioner's raised

"The Panel misapprehended there is no legal support for autism "basis" resulting in unintentional disability discrimination[13] in VICP, violating the 14th Amendment, violating due process of encephalopathy "because he was definitely diagnosed with an autism", a legally irrelevant diagnoses defined "sequelae" and "subsequent" by the government, violating the Rehabilitation Act of 1973, Section 504 ...

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[12] *Precedent* Endrew F. v. Douglas County School Dist. RE-1, No. 15-827, 580 U.S.S.C. (2017), (798 F. 3d 1329, (----)) "Autism is a neurodevelopmental disorder"

[13] §300.8 (a)(1) Child with a disability ..."autism", 42 U.S. Code § 15009 - Rights of individuals with developmental disabilities (a)(4)(b) CLARIFICATION The rights of individuals with developmental disabilities ... shall be considered to be in addition to any constitutional or other rights otherwise afforded to all individuals. (Pub. L. 106–402, title I, § 109, Oct. 30, 2000, 114 Stat. 1692.).

"No otherwise qualified individual with a disability in the United States ... shall, **solely by reason of her or his disability**, be **excluded from** the participation in, **be denied** the benefits of, or be **subjected to discrimination** under *any program*[14] or activity receiving Federal financial assistance..." The failure to apply §300aa-11(c)(1)(C), to the claim, the Act's and *Althen's* mandate is abuse of discretion under *Koon* v. U.S.A. 518 U.S. 81 (1996).

In other VICP cases, encephalopathy/encephalitis claims with [unclaimed] autism were compensated, 83 are in *Pace Environmental Law Review, where* VICP states, "We have compensated cases in which children exhibited an encephalopathy. Encephalopathy may be accompanied by ... symptoms including autistic behavior, autism" – David Bowman (HRSA)".

C. The Secretary Conceeds Petitioner was Discriminated in The National Childhood Vaccine Injury Program, Violating Section 504 of The Rehabilitation Act

The Secretary Conceded, to the Panel and En Banc, he had no autism claim and was treated as if he did, not by mistake given the evidence, a civil rights violation and crime punishable under Title 18 U.S.C. Section 242.

"The Rogeros were **treated exactly the same** as ... claimants **alleging an ASD** ... was **caused by vaccination**" (Doc. 57 at 13).

Meaning as defined by this Court, he was discriminated *on the basis of his autism*, as he was *otherwise qualified* to be in VICP with his vaccine-related encephalopathy injury from DTaP. (See Amicus Brief for The Rehabilitation Act Section 504 Violation and Previous Petition p. 15-17 for unequal treatment)

Materially, The Secretary also conceeds W.R. was indeed deprived his rights under Color of Law, a crime, by a federal official, for discrimination on the basis of his irrelevant autism to the Court

In this regard, DOJ, the special master, and The Secretary of HHS violated W.R.'s civil rights in a federal program, moreover, it was willingly, making it a crime punishable by law under Title 18 U.S.C. Section 242. Here, on December 21, 2018, DOJ conceeds W.R. *was* treated unlike 94 other similarly situated cases with vaccine-related encephalopathy injury that also had "subsequent" causally unrelated to vaccination autism (*See* previous Petition at 15-17), as defined by The Secretary's expert's opine on W.R.'s records. Congress specifically authorized 42 U.S.C. § 300aa-11(c)(1)(C)(ii)(II) for W.R. III. It reveals the master intentionally did this when the Previous Petition (pp. 10-14

[14] The NVICP program exists due to statute of NVICA and HHS, DOJ, and Federal Court of claims receive appropriate Trust Fund amount annually 26 U.S. Code §9510.

shows what the parties agreed on and 18-23 revealing the master intentionally denied impartial due process on the basis of his autism handicap).

This proof signifies HHS/DOJ litigation on Appeal misrepresented the Secretary's position and placed fraud to the court, harming the child and litigating in such a way as to deny him his medical theory on Appeal, litigating an illegal heightened scientific proof burden, contrary to the National Childhood Vaccine Injury Act.

II. The Secretary's Counsel knowingly engaged in litigating in such a way as to willfully deprive an injured child his legal right to equal justice under the law, 42 U.S.C. § 300aa-11(c)(1)(C)(ii)(II) denying his right to his medical theory on preponderance standard of his proof § 300aa–13(a)(1)(B), protected by § 300aa-14(b)(3)(B) and the 14th Amendment; defrauding the child and Federal Circuit in VICP.

DOJ's material misrepresentation of fact and law as fraudulent "evidence" and depriving a child equal justice under law on the basis of a handicap, evokes anti-discrimination law protections of Section 504 and Title 18, U.S.C. Section 242.

"When an attorney ***misrepresents or omits material facts to the court*, or *acts on a client's perjury* or *distortion of evidence***, his conduct may constitute a fraud on the court." *Trehan v. Von Tarkanyi*, 63 B.R. 1001, 1007 (Bankr. S.D.N.Y. 1986). When an officer of the court **fails to correct a misrepresentation or retract false evidence submitted to the court, it can constitute fraud on the court.** In re *McCarthy*, 623 N.E.2d 473, 477 (Mass. 1993) "[S]ince attorneys are officers of the court, their conduct**, if dishonest, would constitute fraud on the court.**" *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976). Rules of Professional Conduct, (ABA) Rule 3.3 "[a] **lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement** of material fact or law previously made to the tribunal by the lawyer." "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or "discrimination on the basis disability" R. 8.4(c), (g), FRCP Rule 26(g) Rule 26 obligates "each attorney to stop and think about the legitimacy ... a response thereto, or an objection"[15] to make a reasonable inquiry into the **factual and legal basis** of his response. The signature certifies that "to the best of the person's knowledge, information, and belief formed after a reasonable inquiry" the response, is "consistent with these rules and warranted by existing law." And "not interposed for any **improper purpose, such as to harass, ..., or needlessly increase the cost of litigation.**" If a lawyer or party makes the certification required by Rule 26(g) that violates the rule, **the court "must" impose an appropriate sanction,** which may include an order to pay reasonable expenses and attorney's fees caused by the violation. And to set aside **fraudulently begotten judgments,** RCFC 60(d)(3).

A. The Secretary Counsel, Officers of the Court (Docs. 57 and 29), Omitted Fact to The Court That They were Filing Misrepresentation of Law and Material Fact to both Panel and *En Banc* in order to

[15] FED. R. CIV. P. 60 advisory committee's note to 1983 amendment

Defraud the Child and the Court, knowing there Was *no legal basis* for Federal Circuit's Decision's illegitimate basis on autism.

Intentionally filing misrepresentation of this material fact and law, the fraud on the court made the judgment *void,* FRCP 60(b)(4) and grounds for relief of judgement for fraud on the court 60(d)(3). FRCP Rule 26(g) Rule 26 obligates a response to make a reasonable inquiry into the **factual and legal basis** of his response" Model Rules of Professional Conduct 1.0(d), "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

1. **The Secretary's Counsel filed fraud to the Federal Circuit when filing misrepresentation of fact and encephalopathy to determine if a child is compensated, necessitating correction to Federal Circuit for the fraud on the court, under FRCP R. 11, 26(g), and 60(d)(3)**

> DOJ filed: *"Specifically,* the special master *relied* on the opinion of the Secretary's expert neurologist, Dr. Max Wizniter" and "Dr. Wiznitzer testified that while **autism is ... encephalopathy** in the sense that "the brain isn't working right ...Given *this evidence [of Dr. Wiznitzer is mischaracterizing encephalopathy as autism and told the Court he is not in accordance with NCVIA Court law or how it applies to this case]* the special master had solid support *[fraud of testimony of Dr. Wiznitzer]* for his determination that **W.R.'s neurological** condition was correctly ***characterized*** as an ASD" (HHS Doc. 29 at 18).

Congress did not authorize this definition for encephalopathy cases, and for the sake of the VICP Program should have been stricken rather than asserted. *If autism is encephalopathy in VICP Proceedings,* then The Secretary is proclaiming vaccines cause autism, because they cause encephalopathy in VICP by law.

Congress enacted 42 U.S.C. §300aa–14(b)(3)(A), that distinguishes encephalopathy from autism with focal neurological signs of motor injury, and if not resolved, means every Autism Omnibus that did make a claim of autism, unlike *Rogero,* were wrongly decided, due to DOJ's recklessness in offering illegitimate arguments to the Court in order to deprive a child who demonstrated preponderance, proved in the Secretary's own filing.

Dr. Wiznitzer's misconduct was also displayed in *Wright* v. HHS, where the master called him in the Decision for opining contrary to The Secretary in a VICP Proceeding, unlike Special Master Hastings who fraud an illegitimate basis, as did Federal Circuit, harming the child.

2. The Opening Brief on Appeal to Federal Circuit Reveals "the opinion" "relied upon" (instead of applying the law to preponderance), is Expert Dr. Wiznitzer's fraud to the court, grounds for relief of Judgment under RCFC 60(b)(3).

> The Secretary's expert Dr. Wiznitzer admits he is mischaracterizing encephalopathy to the court, stating he's "**not using it [encephalopathy] in terms of what the Court says ... or what The Table defines encephalopathy**." (opening Brief at 39 pointing to transcript, 819; Appx 427).

The Secretary's expert, Dr. Wiznitzer, conceeds he is *intentionally mischaracterizing encephalopathy to the Court after taking an oath,* harming the child, making light of the child's motor injuries, mischaracterizing after he opined in accordance to the medical records, misrepresenting HHS's definition of encephalopathy 42 U.S.C. §300aa–14(b)(3)(A), and This Court's Precedent Shalalah v. Whitecotton – *514 U.S. 268 (1995)*: *"The Act defines encephalopathy as "any significant acquired abnormality of, or injury to, or impairment of function of the brain," 42 U.S.C. §300aa–14(b)(3)(A), and lists the condition [encephalopathy] on the Vaccine Injury Table*[16] *in association with the [DTaP] vaccine"* The Vaccine Act *§300aa–14(b)(3)(A)*: "The term "encephalopathy" means any significant acquired abnormality of, or injury to, or impairment of function of the brain... manifestations of encephalopathy **are focal**[17]*** ... neurologic signs**,...The neurological signs and symptoms of encephalopathy ... may result in various degrees of **permanent** impairment..." Precedent *Whitecotton v. HHS*, Nos. 92-5083, 93-5101., (Fed. Cir. 1996) Quoting §300aa–14(b)(3)(A). Distinguishing from this Court's Precedent *Endrew F. v. Douglas County School* Dist. RE-1, No. 15-827, 580 U.S.S.C. (2017), (798 F. 3d 1329, (----)) "Autism is a neurodevelopmental disorder."

The only "**record evidence**" is Dr. Wizniter's mischaracterization, fraud FRCP 60(b)(3), which under the Act was immaterial because it didn't beat a prima facie case that never had due process on the merits that makes the Judgment void, FRCP 60(b)(4).

> DOJ filed to En Banc: "The Rogeros sought compensation under the Vaccine Act on behalf of their minor son, W.R. who suffers from a neurological condition that the Rogeros *characterize* simply as an "*encephalopathy*," but which the **record evidence** ["Dr. Wizniter's testifying fraud in VICP] establishes is, *in fact*, an autism spectrum disorder ("ASD") (Doc. No. 57 at 2, 29 at 17).

DOJ is litigating *even against The Secretary's medical experts* cited in the Opening Brief who distinguished his encephalopathy *from* his subsequent sequelae of autism before the Court, it is unequivocally clear he has both diagnoses, conduct not in keeping with the intent of VICP, undeniable in the special master's findings, by board certified physicians.

> DOJ: "[T]he Rogeros; "argument [that W.R.'s injury is an encephalopathy rather than an ASD] is unvailing". (Doc. No. 29 at17)

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[16] 42 U.S.C. Code §100.3(b)(2)

[17] Autism has no medical focal neurological signs of injury; autism diagnostic basis is on behavior only.

Federal Circuit's Decision determined W.R. III through his parents timely filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986 (NCVIA) at 42 U.S.C. §§300aa-1 to -34. And found he claimed and suffered encephalopathy, diagnosed by treating neurologist, caused by diphtheria-tetanus-pertussis (DTaP) vaccinations received on May 4, 2010 [and documented encephalophic regression in 2010 contemporaneous medical records of pediatrician and neurologist], before his second birthday, and continues to suffer from this medical injury of encephalopathy (*Pet. App. 2a, 3a, 5a, 9a*) and also a ["subsequent to his encephalopathy" injury, and "later"] autism *12a* [as defined by The Secretary and agreed with W.R.'s experts from the contemporaneous medical records, acknowledged by the Panel, determining DOJ's assertions are illegitimate]. Nonetheless, the Federal Circuit's Decision denied on a legally unsupported "basis" of "autism" *App. 12a*

III. Intervening Circumstances of substantial effect are that DOJ Attorneys fraudulently misrepresented *Rogero* to 3rd parties and the public during pending litigation, then publicly conceded by correction, the impropriety of publishing a false claim of autism just prior to Federal Circuit Decision meaning DOJ's publicly conceded discrimination on the basis of autism, as it wasn't a claim, as defined by *benign neglect* by this Court.

The photos of proof with dates are demonstrated in Appendix I at 116-118

This Court granted certiorari in Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991), recognizing the inherent power to vacate judgements and punish conduct which abuses the judicial process, with appropriate sanctions, a judgement must appropriately reflect the *true merits* and *legal standard* of the findings, *to uphold the justice-function of federal courts*, when the party practices a fraud upon the court resulting in a fraudulent judgement, Also see *Universal Oil Products Co. v. Root Refining Co.*, 328 U. S. 575, 328 U. S. 580 (1946).

CONCLUSION

For the foregoing reasons and those stated in Petitioner's brief, substantiated in the Amicus on docket, the judgment below should be reversed or void, eligible compensation reviewed, and additional sanctions considered for the excessive burden on the child's family for fraud on the court.

Respectfully submitted.

November 9, 2019.

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