No. 22-622

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JONATHAN ROBERTS and CHARLES VAVRUSKA,
Plaintiffs-Appellants,
v.
MARY T. BASSETT, in her official capacity as Commissioner for New York State Department of Health, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York
Honorable Nicholas G. Garaufis, District Judge

APPELLANTS' REPLY BRIEF

WENCONG FA
CALEB R. TROTTER
ANASTASIA BODEN
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
WFa@pacificlegal.org
CTrotter@pacificlegal.org
ABoden@pacificlegal.org
Counsel for Plaintiffs-Appellants

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INTRODUCTION

Defendants' responses are case studies in contradictions. On one hand, they assert that the directives in this case were issued to "advise[] providers to allocate [COVID-19] treatments" based on risk factors including race and ethnicity, State Br. 1, when "demand for the treatments far exceeded supply." City Br. 6.[1] On the other, they claim that the directives "do[] not reference race or ethnicity to 'allocate' treatments." State Br. 43; City Br. 40 (denying that City's directive instructs providers to "allocate treatments to non-white individuals over identically situated white individuals"). The City now contends that its directive "merely reminds prescribers that they may consider race as one of many factors." City Br. 44. But that contradicts both the City's earlier assertion that employing a race-neutral system for allocating COVID-19 treatments would be "akin to intentionally maintaining a racially discriminatory policy for distributing live-saving drugs," No. 1:22-cv-00710, ECF No. 20, at 12–13 (E.D.N.Y. Feb. 25, 2022), and the State's current position that the directives serve a "compelling interest in protecting public health and preventing severe illness and death from COVID-19." State Br. 41.

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[1] Plaintiffs use the same shorthand as they did in the opening brief and refer to Defendant Bassett (Commissioner of the New York State Department of Health) as the State and the NYC Department of Health and Mental Hygiene as the City. Plaintiffs also use "race" to refer to both race and ethnicity.

The State all but concedes that its directive "authorize[s] providers" to treat race as a risk factor—and one that is on par with other risk factors like cancer and heart disease. *See id.* at 18 (noting that the directives do not "authorize providers to treat race and ethnicity as a determinative risk factor or a more significant factor than other markers for risk"). But it elsewhere suggests that its directive has no bearing on "the independent medical judgment of health care providers." *Id.* at 14. The State suggests that no one can challenge the "nonbinding guidance" in this case, *id.* at 23–26, but at the same time implies that a new challenge would be available to plaintiffs "if the guidance again takes effect and also causes them harm." *Id.* at 14. The City now distances itself from the State's directive. City Br. 8 (alleging that the City's directive "does not contain any risk matrix or assign points based on race"); *id.* at 39 n.10 (limiting discussion of the merits to the City's directive). But it stated earlier that departing from the State's directive would create "unnecessary confusion for prescribing physicians within New York City." No. 22-710, ECF No. 20, at 15–16 (E.D.N.Y.); *see also* App. 55 ¶ 20 ("The City Guidance closely mirrors the State Guidance . . . ."); App. 76 ¶ 14 ("Both the State and City of New York coordinated on the issuance of this Guidance, and the New York City Department of Health issued almost identical guidance . . . ."). The State asserts there is "no reasonable expectation that the supply shortages . . . are likely to recur," State Br. 14, but "COVID-19 remains an ongoing threat, given the periodic emergence and spread of

different variants of the virus," *id.* at 5, and "supply chain disruptions can happen at any time." App. 82–83. The City faults Plaintiffs for failing to "allege that a single person was denied the treatments," City Br. 44, but there were never any mechanisms "to track how clinicians used the advisory." *Id.* at 9.

These contradictions aside, the material facts are remarkably straightforward. The State's directive uses a matrix system for prioritizing COVID-19 treatments during times of scarcity. *See* App. 36–38; *see also* App. 278, Trans. at 21:13–20 (district court's observation that the guidelines resemble a matrix and "could be accused of promoting" bean counting). The directive plainly lists race as one of the risk factors, App. 38, and calls for providers to prioritize patients, in part, based on the "number of risk factors" they possess. App. 37; State Br. 9. The City's directive not only counsels providers to "[c]onsider race and ethnicity when assessing an individual's risk," App. 42, but also directs them to "adhere to" the State's directive. App. 40. Treatments were scarce for roughly two months. City Br. 43. Then, on February 1, 2022, the City distributed another directive. The City suggests that the updated directive indicates that there was "a surplus of the treatments," *id.* at 9, but the directive itself notes that "supplies remain[ed] limited" on February 1.[2]

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[2] NYC Health, 2022 Health Advisory #2 (Feb. 1, 2022), https://www1.nyc.gov/assets/doh/downloads/pdf/han/advisory/2022/covid-paxlovid-available.pdf.

Fortunately, COVID-19 treatments have apparently become more available since then. In March, the State announced there was no longer a shortage of COVID-19 treatments, but declined to retract its previous directive, which will continue to operate "during times of resource limitations." App. 248–49. Earlier this month, Governor Hochul again extended the emergency order for New York in light of "100 new [hospital] admissions a day."[3] The White House COVID-19 Response Coordinator similarly expressed concern that absent additional funding from Congress, "[w]e're going to run out of treatments" in the fall.[4]

This Court should reverse the district court's decision and remand with instructions to issue a preliminary injunction. The injury-in-fact in a case involving racial discrimination is not the ultimate denial of the benefit, but the erection of "a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993). Defendants' directives create exactly such a barrier, and, as a result, subjects Plaintiffs to "an enhanced risk"

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[3] New York State, Executive Order No. 11.7: Declaring a Disaster Emergency in the State of New York (June 14, 2022), https://www.governor.ny.gov/executive-order/no-117-declaring-disaster-emergency-state-new-york.

[4] The White House, Press Briefing by Press Secretary Karine Jean-Pierre and COVID-19 Response Coordinator Dr. Ashish Jha, June 2, 2022, https://www.whitehouse.gov/briefing-room/press-briefings/2022/06/02/press-briefing-by-press-secretary-karine-jean-pierre-and-covid-19-response-coordinator-dr-ashish-jha/.

of suffering severe illness as a result of COVID-19, which constitutes an injury-in-fact under this Court's precedent. *Baur v. Veneman*, 352 F.3d 625, 628 (2d Cir. 2003). This injury is fairly traceable to Defendants, who issued the race-based directives to over 70,000 individuals in communications "aimed at medical providers." App. 55. And it is redressable by a favorable court decision that would, in effect, inform providers not just that they may choose not to prioritize patients on the basis of race, but also that doing so would violate the equal protection guarantee embodied in the Fourteenth Amendment and in our nation's civil rights laws.

Defendants' mootness arguments fail. Despite the current supply of COVID-19 treatments, the State's race-based directive has not been superseded and threatens to return during the next shortage, which the State acknowledges could "happen at any time." App. 28, 82–83. Nor can the City use the current supply of treatments as a reason to shield itself from paying nominal damages, which are justified based on the fact that the City's race-based directive subjected Plaintiffs to a heightened risk of severe illness during the two months in which all agree that there was a shortage of potentially life-saving treatments.

On the merits, this is an easy case. There is no compelling interest that can sustain the race-based directives, and the directives fail narrow tailoring for several reasons—including that other states have figured out sensible bases for distributing the same treatments without resorting to racial classifications. It is always in the

public interest to ensure fealty to the Constitution and the government's departure from constitutional dictates always causes irreparable harm. As if that were not enough, this case involves an individual's right to access potentially lifesaving antivirals. Harm could hardly be more irreparable than this.

ARGUMENT

I.

Plaintiffs Have Article III Standing to Have Their Claim Heard in Federal Court

A. Plaintiffs Are Injured by Defendants' Directives

Defendants concede, as they must, that the injury-in-fact in an equal protection case involving racial discrimination is not the ultimate denial of the benefit, but the erection of "a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *City of Jacksonville*, 508 U.S. at 666; *Comer v. Cisneros*, 37 F.3d 775, 793 (2d Cir. 1994). *See* State Br. 17; City Br. 16. Defendants insist, however, that the race-based directives never imposed a barrier. They are wrong.

Defendants start off on the wrong track when they boldly assert that the directives "do[] not prevent any individual from receiving treatments should they contract COVID-19." City Br. 8–9, 22; *see* State Br. 38. Any system for prioritizing treatments when they are scarce will necessarily prevent some individuals from receiving them. To support Defendants' illogical assertion, the City submits a

declaration from its Chief Medical Officer. App. 57 ¶ 26. But the City omits the second sentence of the declaration, which clarifies that "[i]ndividuals who are qualified *based on risk factors* will not be turned away from necessary treatment based on race." *Id*. ¶ 26 (emphasis added). Because the directives make race a risk factor and because the number of risk factors determines how likely an individual will be able to obtain COVID-19 treatment pursuant to the directives at issue, *see* Appellants' Opening Br. 8–10, it is simply not the case that race will never be a factor in whether someone will be able to obtain COVID-19 treatment.[5]

None of Defendants' other arguments square with either precedent or principle. Defendants' chief argument—that Plaintiffs do not have standing to challenge the directives because third parties apply the directives without an express threat of penalty—would immunize their directives from judicial review. *See* City Br. 20 (arguing against standing because City's directive is "not binding" on providers and "[p]rescription decisions are decentralized and controlled by innumerable health care providers"); State Br. 19 (asserting that the "use of race in treatment decisions under the challenged guidance is a voluntary undertaking by

[5] Meanwhile, the State contends that its directive does not "authorize providers to treat race and ethnicity as a determinative risk factor or a more significant factor than other markers for risk, such as age and comorbidities"—all but acknowledging that its directive authorizes providers to prioritize patients on the basis of race. State Br. 18.

third parties," who are not subject "to any penalty for failing to consider race or ethnicity in treatment decisions"). Yet, as decades of precedent show, neither the fact that the directives instruct third parties to use race nor the fact that the directives do not expressly provide penalties for providers who fail to follow them undercuts Plaintiffs' standing to challenge them.

First, it is black letter law that just as the Equal Protection Clause prohibits government from itself discriminating on the basis of race, it prohibits government from "authoriz[ing]" third parties to discriminate on the basis of race. State Br. 18; *see also* City Br. 20 (attempting to shift blame on "innumerable health care providers—mostly private actors"). Standing posed no issue in *City of Richmond v. J.A. Croson Co.*, for example, where the Supreme Court invalidated a Minority Business Utilization plan that required third-party "prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises" or to request a waiver of the set-aside. 488 U.S. 469, 477 (1989); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205, 210–12 (1995) (subcontractor that was not certified as disadvantaged had standing to challenge program that coerced prime contractors to hire "subcontractors certified as small businesses controlled by 'socially and economically disadvantaged individuals'").

Second, that neither directive "contained a mechanism for enforcement of the terms," State Br. 8, does not shield the directives from judicial review. Defendants offer no response to the fact that, under their reasoning, "no one would have standing to challenge any sort of directive not backed by express penalties—even ones that instructed physicians not to treat individuals on the basis of race." Appellants' Opening Br. 26. The law does not dictate this troublesome result. Indeed, the very cases that the State cites do not support its argument that the policies were only subject to judicial review because "race was inevitably a component of the determinations" made by the state actor in those cases. State Br. 19. The admissions program at issue in *Grutter v. Bollinger*, for instance, sought "to guide admissions officers in 'producing classes both diverse and academically outstanding.'" 539 U.S. 306, 316 (2003) (citation omitted). The law school's dean testified that an applicant's race may be a determinative factor in some cases, but "play no role" in others. *Id.* at 319. Subsequent Supreme Court cases involving racial preferences in admissions similarly undermine Defendants' arguments. The admissions program examined in *Fisher v. University of Texas at Austin* provides only that "admissions officers *can* consider race," 579 U.S. 365, 375 (2016) (emphasis added), and the Supreme Court observed that "race consciousness played a role in only a small portion of admissions decisions." *Id.* at 384–85. And both the federal district and appellate courts have held that the plaintiff had standing to challenge the Harvard admissions policy in a case

before the Supreme Court this upcoming term, even though applicants were not even required to identify their race and admissions officers were not required to take race into account. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 397 F. Supp. 3d 126, 137 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).[6]

This Court's decision in *New York v. Dep't of Homeland Security*, 969 F.3d 42, 59 (2d Cir. 2020), lends still more support for Plaintiffs' standing. Agreeing with the Ninth Circuit, this Court observed that where "the [defendant] itself forecasts the injuries claimed by [plaintiffs], . . . it is 'disingenuous' for [the defendant] to claim that the injury is not sufficiently imminent." *Id.* at 60 (quoting *City & County of San Francisco v. USCIS*, 944 F.3d 773, 787 (9th Cir. 2019)). The City does not attempt to distinguish this case, and the State does so only with a conclusory assertion that "plaintiffs have pointed to no record evidence, much less a concession by the State, that the [State's directive] would result in predictable harms to plaintiffs or similarly situated individuals." State Br. 20. But the State itself asserts that its directive serves

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[6] There is more government coercion in the contracting cases, but even they do not support the assertion a plaintiff suffers an injury-in-fact only where "race was inevitably a component of the determinations" made by the government. State Br. 19. *See City of Jacksonville*, 508 U.S. at 659 (noting that ordinance provided for a "waiver or reduction of the 10% set-aside under certain circumstances"); *Adarand*, 515 U.S. at 207–08 (noting that "third parties may come forward with evidence in an effort to rebut the presumption of disadvantage for a particular [minority- or women-owned] business").

a "compelling interest in protecting public health and preventing severe illness and death from COVID-19," *id.* at 41. That assertion makes no sense if the document entitled "Prioritization of Anti-SARS-CoV-2 Monoclonal Antibodies and Oral Antivirals for the Treatment of COVID-19 During Times of Resource Limitations" failed to prioritize those treatments at all. App. 36.

Defendants' attempts to distinguish this Court's decision in *Baur v. Veneman* are also unavailing. In *Baur*, this Court explained that "an enhanced risk of disease transmission may constitute injury-in-fact." 352 F.3d at 633. Defendants strain to cabin *Baur* to "food and drug safety and environmental cases." City Br. 27; State Br. 22. They provide no basis for why that case would open courthouse doors to plaintiffs exposed "to drugs that had allegedly been approved without adequate FDA testing," *Baur*, 352 F.3d at 634 (citing *Cutler v. Kennedy*, 475 F. Supp. 838, 848–50 (D.D.C. 1979), *overruled on other grounds by Chaney v. Heckler*, 718 F.2d 1174, 1188 n.35 (D.C. Cir. 1983)), but slam them shut to plaintiffs exposed to the "largest wave of reported cases yet," App. 53, and a "severely limited supply" of COVID-19 treatments. State Br. 8.

This Court has extended the reasoning of *Baur* beyond the facts of that case. *See United States v. Evseroff*, 528 Fed. Appx. 75, 77 (2d Cir. 2013) (summary order). In *Evseroff*, this Court—relying upon *Baur*—noted that Evseroff's assertion that "the injury caused by the district court's judgment is the likelihood that the

Government will" deprive "him of his place of residence" was "sufficient to establish [his] Article III standing on appeal." More to the point, *Baur* itself rested its conclusion on precedent not involving food and drug safety or the environment. It cited favorably a Seventh Circuit decision holding that "'increased risk that a plan participant faces' as a result of an ERISA plan administrator's increase in discretionary authority satisfies Article III injury-in-fact requirements." *Baur*, 352 F.3d at 633 (citing *Johnson v. Allsteel, Inc.*, 259 F.3d 885, 888 (7th Cir. 2001)).

The City also attempts to distinguish *Baur* on the basis that "Plaintiffs do not sue under federal statutes that are crafted to eliminate small and probabilistic risks—which was a core element of *Baur*'s reasoning." City's Br. 26. But as this Court explained in *Baur* itself, the argument fails because Congress cannot expand standing beyond the requirements of Article III. *Baur*, 352 F.2d at 641 (citing *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).[7]

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[7] Plaintiffs have always asserted that the directives impose "a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." No. 1:22-cv-00710, ECF No. 19 at 8 (E.D.N.Y. Feb. 18, 2022) (quoting *City of Jacksonville*, 508 U.S. at 666). Because the increased risk of illness is a natural corollary to that argument, the City's contention that the argument is a new one is incorrect. City Br. 25. In any case, federal courts have an independent obligation to consider standing and may independently assure itself that standing exists. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719–20 (2007).

Baur also sinks Defendants' arguments that Plaintiffs' injury is not "actual or imminent" because (in Defendants' view) a series of contingencies must occur before Plaintiffs are injured. *See* City Br. 19–20; State Br. 22–23. Defendants insist that Plaintiffs must first contract COVID-19 before they *might* be able to sue in federal court. But this Court noted in *Baur* that "[a]lthough a chain of contingencies may need to occur for Baur to actually contract [the disease] as a result of his exposure to contaminated beef, to sustain standing, it is not the materialization of the feared risk itself that must be 'certainly impending.'" *Baur*, 352 F.3d at 641. As was the case in *Baur*, Defendants' "narrow rule would effectively bar standing in any case where the threatened medical injury has a complex etiology or delayed manifestation." *Id.* The treatments here must be taken within days of symptom onset, App. 28, and the district court agreed that the brief time frame makes it "impractical to wait until a person has tested positive for COVID-19 to file suit." App. 264. Defendants do not seriously dispute this fact, which they view as just one of many barriers to judicial review of their directives. Nor do Defendants explain how a plaintiff who has tested positive for COVID-19 would be able to maintain a lawsuit for prospective relief, given that Defendants may press mootness arguments within days of the filing of that suit. And Defendants offer no response to Plaintiffs' argument that given a person's "heightened immunity after contracting COVID-19, Plaintiffs have a *better* claim to prospective relief than an individual who sought

treatment since the directives were published in late December." Appellants' Opening Br. 22 n.19.

The City's argument that "innumerable health care providers" create additional barriers to this Court's review also finds no basis in precedent or principle. City Br. 20. As explained, the government violates the Equal Protection Clause just as much when it coerces others to discriminate as it does when it itself discriminates on the basis of race. *See Croson*, 488 U.S. at 477. And the City provides no basis in principle to force plaintiffs seeking COVID-19 treatment on a race-neutral basis to sue "innumerable health care providers—mostly private actors"—merely for doing what the government instructed them to do. City Br. 20.

Finally, the State claims that Plaintiffs' injury is not imminent because "concerns about future supply shortages are speculative." State Br. 12. But the State's own actions indicate that it anticipates future shortages. In response to a direct inquiry from the district court, the State admitted that the subsequently issued guidance does not supersede the directive challenged in this case, App. 248, which operates in times of scarcity. The State's declarant stressed that "[e]ven though there is not currently a shortage of oral antiviral treatments, the pandemic has taught us that supply chain disruptions can happen at any time." App. 82–83.[8] And the City's

[8] Contrary to the State's argument, the district court's prediction that "a future shortage appears increasingly speculative" is not a factual finding that is "owed

declarant observed that "community transmission remains an ongoing public health concern." App. 53; *see also* State Br. 5. Defendants do not explain how these sworn statements from their own declarants at the district court have transformed into "speculation" now that the procedural posture has changed.

B. Plaintiffs' Injury Is Fairly Traceable to Defendants' Directives

Defendants reiterate many of their injury arguments in the traceability section.[9] As explained above, neither the fact that the directives lack express penalties nor that they rely on third-party providers to follow them undermine Plaintiffs' standing. And Defendants do not dispute that the City distributed its directive to "75,000 email addresses aimed at medical providers and other registered individuals," App. 55, nor that Defendants are "regulators of the third-party medical professionals and suppliers of the COVID-19 treatments at issue in this case." Appellants' Opening Br. 26; *see* State Br. 4 (noting that the New York State Department of Health is a state agency endowed by the legislature with "broad power

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deference by this Court." State Br. 21; *see Kaplun v. Attorney General of United States*, 602 F.3d 260, 264 (3d Cir. 2010) ("Although predictions of future events may in part be derived from facts, they are not the sort of facts determined by the Immigration Judge that can only be reviewed for clear error.") (internal brackets and quotation marks omitted).

[9] In *Baur*, this Court noted that the government defendant did not contest causation and redressability, and observed that "it seems clear that if the alleged risk of disease transmission from downed livestock qualifies as a cognizable injury-in-fact then Baur's injury is fairly traceable to the USDA's decision to permit the use of such livestock for human consumption and could be redressed if the court granted Baur's request for equitable relief." 352 F.3d at 632 & n.6.

to regulate in the public interest") (quoting *Agencies for Child. Therapy Servs., Inc. v. New York State Dep't of Health*, 136 A.D.3d 122, 129 (N.Y. App. Div. 2015)).

The City acknowledges that even "an advisory opinion that produces a coercive effect on a third-party actor can give rise to traceability." City Br. 23. But it suggests that such an opinion could produce an effect only where it is "rarely ignored due to risk of 'substantial civil and criminal penalties, including imprisonment.'" *Id.* (citing *Bennett*, 520 U.S. at 169–70). Yet the penalties that the City mentions were not penalties for disregarding the advisory opinion, but for the knowing "take" of an endangered or threatened species. *See Bennett*, 520 U.S. at 170. And although compliance with the advisory opinion provided immunity for actions that would have otherwise been a taking, *id.*, the crux of the traceability analysis in *Bennett* is the fact that the "statutory scheme . . . presuppose[d] that the biological opinion will play a central role in the action agency's decisionmaking process." *Id.* at 169 (citation omitted). So too here. The State does not even attempt to rebut Plaintiffs' argument that the "purpose of the guidance was to cause providers to discriminate based on race or ethnicity when administering COVID-19 treatments." State Br. 25. It instead argues only (and incorrectly) that "purpose or intent has never been the test for traceability." *Id.*

This Court's non-precedential decision in *Nat'l Council of La Raza v. Mukasey*, 283 Fed. Appx. 848, 851 (2d Cir. 2008) (summary order), is similarly

unhelpful to Defendants. The plaintiffs in that case pleaded that a number of third parties chose not to comply with the federal government's requests for "policy reasons." *Id.* at 852. The state and local authorities' disregard of the federal government's requests in that case was hardly surprising given that the entities operated as independent sovereigns. Defendants here, however, supply the COVID-19 treatments, regulate the medical providers, and in some cases, directly employ those third-party providers. In all, Plaintiffs have satisfied their "relatively modest" burden of alleging that their injury is traceable to the challenged directives. *Bennett*, 520 U.S. at 171.

C. Plaintiffs' Injury Is Redressable by a Favorable Court Decision

Defendants contend that Plaintiffs' injury is not redressable because another party might also discriminate on the basis of race. But they fail to distinguish Supreme Court precedent holding that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). At a minimum, a favorable decision will remove State's and City's seal of approval over a provider's decision to allocate scarce COVID-19 treatments on the basis of race.

The State is also mistaken in concluding that the directives flow from a parallel document from the Centers for Disease Control and Prevention. State Br.

26. It is Defendants, not the CDC, that directly regulate medical professionals and distribute the COVID-19 treatments in New York. And the CDC's prioritization guideline does not direct providers to use race in the same manner as Defendants' directives. *See* App. 155.

The State compounds this mistake when it alleges that "[t]his Court's decision in *Town of Babylon v. Federal Housing Finance Agency*, 699 F.3d 221 (2d Cir. 2012), is directly on point." State Br. 28. In that case, the plaintiffs challenged a federal agency directive instructing Fannie Mae and Freddie Mac to take "prudential actions" to protect themselves from risks imposed by programs that impose priority or first-liens on certain properties and an Office of the Comptroller of the Currency ("OCC") bulletin "stating that national banks need to be aware of the FHFA's directives and should take steps to mitigate exposures and protect collateral positions." *Town of Babylon*, 699 F.3d at 225–26 (internal quotation marks omitted). After both the federal agency directive and the OCC bulletin were issued, Fannie and Freddie "each issued statements declaring that they would no longer purchase mortgages secured by properties subject to first-lien [ ] obligations." *Id.* at 226. This is what caused the plaintiffs' injury, *see id.*, but neither plaintiff named Fannie or Freddie as a defendant. Plaintiffs' claim against the federal agency was precluded by statute, *id.* at 224, and the Court held that plaintiffs' injury was not redressable because "if the OCC Bulletin were vacated, Fannie Mae's and Freddie Mac's refusal

to purchase mortgages of properties subject to first-lien PACE programs would remain in force." *Id.* at 230. By stark contrast, Defendants here point to no provider that has expressed an interest in prioritizing patients for COVID-19 treatments on the basis of race—with or without Defendants' directives. *Town of Babylon* is inapposite here.[10]

D. Defendants' Arguments on Mootness and Ripeness Fail

Defendants are wrong to contend that the case is moot. As explained above, the record does not support any contention that "there is no reasonable expectation that the alleged violation will recur." *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 647 (2d Cir. 1998). Indeed, both defendants' briefs and the declarations of their health officers confirm what should be obvious to anyone who has paid attention to the news for the past two years. Both supply chain issues and another significant outbreak can occur "at any time." App. 82–83.

Given that the State's race-based directives have not been superseded, this Court can reject Defendants' mootness arguments without proceeding to the

[10] The State's argument that Plaintiff Jonathan Roberts's injury is not redressable because his requested "relief would not make [him] eligible to receive the underlying treatments" is also misguided. State Br. 28–29. Not only does this argument appear to acknowledge that Mr. Roberts's race is the reason he is ineligible for COVID-19 treatments, but it is also wrong as a matter of law. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (noting that a court, in curing an equal protection violation, may "order that [a statute's] benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion").

"capable of repetition, yet evading review" exception to mootness. But Plaintiffs would win under that exception. By the City's account, the previous COVID-19 treatment "shortage [] lasted only about two months." City Br. 43. But this Court has held that a controversy can evade review where it could not be fully litigated in 120 days. *See Martin v. Yellow Freight Sys., Inc.*, 983 F.2d 1201, 1202 (2d Cir. 1993).

At the very least, the City is liable for nominal damages. The City resists such damages on grounds that Plaintiffs can establish "no past violation of their rights because neither had COVID-19." City Br. 17. As mentioned above, this argument rests on the false premise that individuals must first contract COVID-19 before they are (perhaps) permitted to seek review of the race-based directives. But Plaintiffs are injured by Defendants' erection of a race-based barrier that increased Plaintiffs' risk of suffering adverse effects from COVID-19 for at least the two months during which the City concedes that there was a shortage of COVID-19 treatments. *Baur*, 352 F.3d at 633.[11]

Finally, the City advances a new argument that the case is not ripe. City Br. 33–34. But the City does not point to additional facts that must be developed to ripen

[11] As mentioned above, the City's updated February 1, 2022, directive, which states that "supplies remain limited," does not support the City's contention that the shortage ended before Plaintiffs filed their complaint. *See* City's Br. 18. But the precise date that the shortage ended is irrelevant to Plaintiffs' entitlement of nominal damages, which rests upon the fact that Defendants injured them by issuing the race-based directives and subjecting Plaintiffs to a heightened risk of suffering severe illness from COVID-19.

the case. *See Artway v. Attorney General of State of NJ*, 81 F.3d 1235, 1249 (3d Cir. 1996) ("The more that the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa."). At any rate, a controversy can be ripe for adjudication even where "the factual record is not yet fully developed." *National Organization for Marriage, Inc. v. Walsh*, 714 F.3d 682, 691 (2d Cir. 2013). That is the case here, where the question presented is primarily a question of law and whatever future contingencies remain are not determinative. *See id.*

II.

Plaintiffs Are Entitled to Preliminary Relief

This Court may order a preliminary injunction on appeal even if the merits of the motion were not decided by the district court. The State argues that the Court should not reach the merits because it is not "typical appellate practice." State Br. 33. But this Court's typical practice need not dictate the result in every case. For instance, this Court pushed forward to the merits of a preliminary injunction motion in *Cacchillo v. Insmed, Inc.*, even though the "district court denied Cacchillo's motion for lack of standing." 638 F.3d 401, 405 (2d Cir. 2011). Thus, although this Court noted that its consideration of the merits was based on the rule that it "may affirm [the district court's decision] on any ground supported by the record," *id.* (citation omitted), its decision contradicts the State's assertion that "[w]ithout a

district court ruling as to the preliminary injunction factors, a reviewing court is unable to determine whether the district court properly carried out [its] function." State Br. 32 (citation and quotation marks omitted).

Of course, *Cacchillo* does not stand for the proposition that an appellate court may reach the merits of a preliminary injunction motion not ruled upon by the district court only when it affirms a ruling for the defendant. In *Carson v. Simon*, for instance, the Eighth Circuit remanded to the district court "with instructions to immediately enter the following order granting a preliminary injunction," 978 F.3d 1051, 1062 (8th Cir. 2020); *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 19–20 (1st Cir. 1996) (same). Although the district court in *Carson*, like the district court in this case, did not pass upon the merits, that did not prevent the appellate court from considering the merits given that "resolution on the merits depends primarily on the purely legal issue" and "timing of this appeal makes it impractical to remand to the district court to decide the merits in the first instance." *Carson*, 978 F.3d at 1059. Here, too, the issues presented are legal and the fact that Plaintiffs must take the necessary treatments within days of contracting a rapidly evolving disease counsel toward this Court's consideration of the merits in this appeal.

A. Plaintiffs Are Likely to Prevail on the Merits

i. Defendants' race-based directives are subject to strict scrutiny

All racial classifications are subject to strict scrutiny. *Parents Involved*, 551 U.S. at 720. The Court need look no further than the plain text of the directives to repudiate the Defendants' claims that their directives "do[] not make any such classification." City Br. 39; *see* State Br. 38 (arguing that the "challenged guidance does not confer a benefit or impose a burden based on a racial classification"). The City's directive instructs providers to "[a]dhere to" to the State's directive, App. 40, which prioritizes non-white or Hispanic individuals over white and non-Hispanic individuals. *See* App. 37 (prioritizing treatments based, in part, on number of risk factors); App. 38 ("Non-white race or Hispanic/Latino ethnicity should be considered a risk factor . . . .").

The State's authorities do not support its call for rational basis review. The student assignment plan in *Lewis v. Ascension Parish Sch. Bd.*, unlike the directives in this case, was "race neutral on its face." 662 F.3d 343, 348–49 (5th Cir. 2011). Even then, the Fifth Circuit remanded the case so the district court could determine the standard of review following fact-finding on whether the plan was motivated by a discriminatory purpose. *Id.* at 352; *see also Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 545 (3d Cir. 2011) (school assignment plan at issue was "facially race neutral, assigning students to schools based only on the geographical areas in

which they live”). The State’s invocation of *Honadle v. Univ. of Vermont & State Agric. Coll.*, 56 F. Supp. 2d 419, 428 (D. Vt. 1999), is even more inapposite. That case involved a program that appeared to “enhance equal opportunity through expanded recruitment” rather than using race as a factor in allocating COVID-19 treatment. *Id.* Strict scrutiny applies here.

ii. The directives do not further a compelling interest

The directives do not further a compelling interest. The City attempts to expand the list of compelling interests sufficient to justify racial preferences beyond remedying the effects of past intentional discrimination and diversity in higher education. City Br. 42. But it admits that the cases it cites have mentioned other possible compelling interests only in dicta. *Id.* In any event, the City never explains *how* its directive furthers a compelling interest in “tackling th[e] alarming trend” that “[c]ertain minority groups are at dramatically higher risk of hospitalization or death when they contract COVID-19,” *id.* at 41, when it elsewhere stresses that the directive is “not binding” on “innumerable health care providers” that make prescription decisions. *Id.* at 20. And the factual predicate for the City’s contention is, at best, overbroad. *See* Appellants’ Opening Br. 33–34 (pointing out flaws and omissions in studies submitted by Defendants in the district court).

iii. The directives are not narrowly tailored

The directives also fail narrow tailoring for several reasons. *First*, even by Defendants' account, the directives are not narrowly tailored because of the "random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination." *Croson*, 488 U.S. at 506. The directives employ race as a risk factor for all individuals of a "[n]on-white race or Hispanic/Latino ethnicity." App. 38. Yet Defendants do not dispute that, according to a CDC document that the State considers "[p]erhaps the most convincing data point," App. 79 ¶ 21, Asians fare better on every measure—cases, hospitalizations, and deaths. *Id.* The City's response betrays a similar flaw. It repeatedly pronounces that "*certain* racial and ethnic groups are at greater risk of severe illness and death from COVID-19." City Br. 2, 24, 41 (emphasis added). But pursuant to the directives, race is a risk factor for individuals of all "non-white" racial groups. App. 38.

Second, the plain text of the directives calls for the use of race as a mechanical plus factor. The State's directive calls on providers to prioritize patients based, in part, on the number of risk factors they possess, App. 37, and the City's directive instructs providers to adhere to the State's directive. App. 40. The City responds by arguing that providers are "not bound to follow it in circumstances where it does not align with their sound medical judgment." City Br. 44. But they cite no authority for the proposition that the directives are more narrowly tailored because some may

choose to disregard the directives' command to mechanically treat individuals on the basis of their membership in a racial group.

The City's contention that its directive is narrowly tailored because "[b]y design, the advisory was in effect only during a shortage that lasted only about two months" is also misplaced. City Br. 43. Just as an admissions program is not narrowly tailored just because it "only" applies when there are many students for a limited number of seats, the directives are not narrowly tailored because they only apply when there are many patients vying for a limited number of COVID-19 treatments. *See Gratz v. Bollinger*, 539 U.S. 244, 251 (2003) (noting that plaintiff was denied admission to the university despite being "well qualified").

Third, the government must engage in "serious, good faith consideration of workable race-neutral alternatives" that would allow it to achieve a compelling interest—and may only use race as a last resort. *Grutter*, 539 U.S. at 339. But Defendants here do not—and cannot—contest the fact that they have not tried any race-neutral alternatives before resorting to race-based classifications.[12] That is particularly concerning because several other states, when confronted with the same

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[12] The City raises a valid point that these COVID-19 treatments cannot be given to people who are not sick. City Br. 45–46. But that fact undercuts the underpinning of race-based allocation of COVID-19 treatments. The City's declarant asserts that "marginalized racial and ethnic groups" are "disproportionately affected by COVID-19" in part because they are more likely to get COVID-19 due to "neighborhood and physical environment" and "occupation and job conditions." App. 56, ¶ 24.

shortage of COVID-19 treatments, used factors other than race in distributing them. *See* Appellants' Opening Br. 37 (citing Washington and Utah). The State contends that this fact "does not preclude New York from making an independent judgment on the issue." State Br. 43. Federalism allows states to experiment on many issues, but the Fourteenth Amendment prohibits states from doing so with regards to race.

B. The Remaining Factors for Preliminary Relief Are Satisfied

Plaintiffs also satisfy the other factors for obtaining a preliminary injunction. That the directives violate Plaintiffs' right to equal protection is itself sufficient for irreparable harm. *See* Appellants' Opening Br. 38. In opposition, the City cites a case in which this Court found no irreparable harm because plaintiffs "*failed* to demonstrate a likelihood of success on their . . . constitutional claims." *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 294 (2d Cir. 2021) (emphasis added). And the case that the State cites did not involve a preliminary injunction at all. *See Levin v. Harleston*, 966 F.2d 85, 87 (2d Cir. 1992). Neither does the current supply of COVID-19 treatments change the fact that a preliminary injunction is warranted here. The potentially life-saving treatments must be taken within days of contracting COVID-19, and supply shortages could happen at any time. App. 28, 82–83.

The balance of hardships therefore counsel strongly in favor of granting the preliminary injunction and "obedience to the Constitution" is always in the public's interest. *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980). The injunction that

Plaintiffs seek would not "block" the City from providing "information merely because it involves race," City Br. 39. It would not prohibit Defendants from directing providers to prioritize patients on the basis of facially race-neutral risk factors such as cancer, heart disease, and chronic kidney disease. It would only prohibit Defendants from directing providers to prioritize patients on the basis of race.

CONCLUSION

The decision of the district court should be reversed.

Dated: June 30, 2022.

Respectfully submitted,

/s/ Wencong Fa

WENCONG FA
CALEB R. TROTTER
ANASTASIA BODEN
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
WFa@pacificlegal.org
CTrotter@pacificlegal.org
ABoden@pacificlegal.org

Attorney for Plaintiffs-Appellants

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Dated: June 30, 2022.

/s/ Wencong Fa
WENCONG FA
Attorney for Plaintiffs-Appellants

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/s/ Wencong Fa
WENCONG FA
Attorney for Plaintiffs-Appellants